

In the Know

New Laws Cover Everything from Minimum Wage to Trade Secrets. Here's a Primer.

BY MARK E. TERMAN, ESQ.

Some 636 of the bills introduced in the 2005–06 California legislative session mentioned “employer.” Yet, with all that interest in employers, not too many of them made it through the Legislature. Even fewer made it past the governor’s desk and into law. Still, there are some new laws that you and your clients or employers should know about.

INCREASED MINIMUM WAGE

AB 1835 raises California’s hourly minimum wage for non-exempt employees from \$6.75 to \$7.50 effective Jan. 1, 2007, and to \$8 per hour effective Jan. 1, 2008.

These new rates will affect other wage and hour law compliance issues.

For example, there are two tests to be met to determine whether an employee is properly classified as exempt from overtime pay. The “duties” test typically draws the most attention for determining executive, administrative and professional exemptions.

The “salary basis” test requires payment of a salary that is twice the minimum wage. To satisfy this test, the required annual salary will increase from \$28,080 to \$31,200 effective Jan. 1, 2007, and to \$33,280 effective Jan. 1, 2008.

The increased minimum wage also will affect the overtime pay exemption for commissioned employees who must be paid 1.5 times minimum wage and more than half of their pay must be commissions to remain exempt.

In addition, employers still may require employees to supply and maintain their own hand tools as long as the employee makes at least twice the minimum wage.

UPDATE WORKPLACE NOTICES AND PAMPHLETS ANNUALLY

Workplace notices and pamphlet requirements tend to change at least once a year, usually Jan. 1.

For example, a new required minimum wage notice must be posted in the workplace effective Jan. 1, 2007. Also, the U.S.

Department of Labor has published a new required poster relating to leave and return to work rights of those in military service (See USERRA discussion below). The California Chamber of Commerce and other vendors can provide a complete set of required posters and notices.

TRADE SECRET CLAIMS: BAD FAITH IS STILL A BAD IDEA

SB 1636 amends the Trade Secrets Act (California Civil Code Sec. 3426 et. seq., the “Act”) to permit an award of costs (such as expert witnesses), in addition to reasonable attorney fees, to the prevailing party if a claim of misappropriation is made in bad faith, or a motion to terminate an injunction is made or resisted in bad faith.

This law seems intended to put the brakes on employers who sue former employees for alleged trade secret theft when there is no basis to claim the trade secret exists.

The definition of “trade secret,” unchanged under the Act, is “... information, including a formula, pattern, compilation, program, device, method, technique or process that: (a) Derives actual or potential economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

Examples of confidential and proprietary information that may be a trade secret include research and development of new products, marketing and manufacturing processes, and customer lists/data.

THE LEGISLATURE LEFT IT ALONE

AB 2371 died early. The bill would have invalidated arbitration agreements between employers and employees, if required by the employer as a condition of hiring, that

relate to employment practices covered by the Fair Employment and Housing Act.

MANDATORY ANTI-HARASSMENT TRAINING FOR SUPERVISORS

The California Department of Fair Employment and Housing (DFEH) issued *proposed* interpretive regulations Oct. 2, 2006, relating to California Government Code Sec. 12950.1, which required employers with 50 or more workers to provide a minimum of two hours of anti-harassment training and education to all supervisors by Jan. 1, 2006.

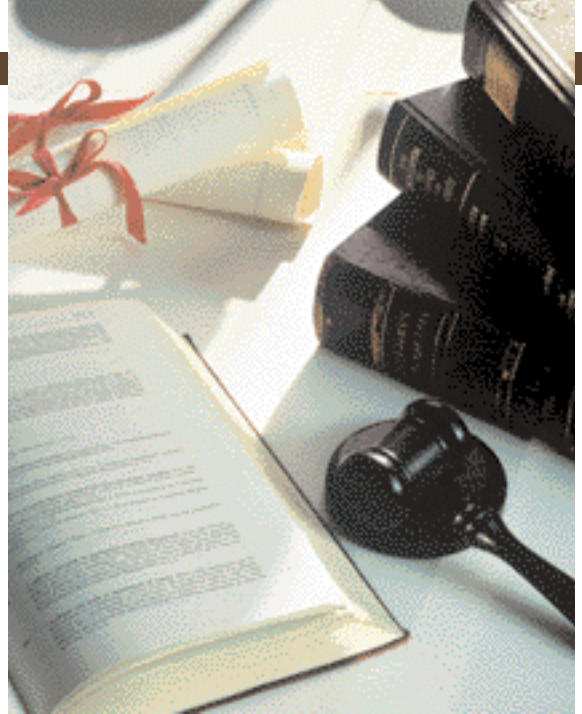
The training must be repeated every two years and new supervisors must complete the training within six months of attaining a supervisory position.

Among the key areas of the proposed regulations are: (1) Independent contractors must be counted as part of the workforce and trained; (2) Training with a prior employer within the two-year window may qualify; (3) Retraining generally would be permissible sometime during a “training year,” instead of exactly two years for each person; (4) Training would be required only of supervisors located in California; and (5) “Subject matter expert” and other qualifications for trainers are listed.

Find more information at www.fehc.ca.gov/pub/harassment_training.asp.

FEDERAL GUIDANCE ON MILITARY LEAVE/RETURN TO WORK

New DOL regulations (www.dol.gov/vets/regs/fedreg/final/USERRA_Final_Rule.pdf) implementing the Uniformed Services Employment and Re-employment Rights Act of 1994 went into effect Jan. 18, 2006.



The DOL also published a newly required workplace poster to inform employees of their USERRA rights, benefits and obligations to return to their job at the same pay, benefits and status following military service (www.dol.gov/vets/programs/userra/USERRA_Private.pdf#Non-Federal).

The new regulations include: (1) A definition of “employer” that is broader than that found in other federal statutes in that individual supervisors and managers who have control over employment opportunities, and to whom the employer has delegated the performance of such responsibilities, may be personally liable; (2) Requirements that a service member who returns from a qualified leave be re-employed in an “escalator position” that permits an employee to step back into the position the employee would have occupied had the employee been employed continuously during the military leave; and (3) Application of the escalator principle (e.g., employers who use a seniority or bidding systems for job assignment; promotions where there is no seniority system; and reductions in force, layoffs and disciplinary procedures).

COURT CASES

While this has been a comparatively light year for new regulations, the California courts have been active. Here are just two examples:

Attempt at Creating a New Exception to Non-Compete Agreements Was Denied
In *Raymond Edwards II v. Arthur Andersen LLP*, (2006) 142 Cal. App.4th 603, the California Court of Appeal held that: (1) The noncompetition agreement between parties was invalid and not within any exception recognized by law; (2) There was no “narrow restraint” exception to general rule voiding non-competition agreements, even though the restriction was narrowly drawn to leave open for the employee a substantial portion of the market; (3) Employers demanding execution of the agreement violated public policy; (4) The agreement’s release of employee’s right to indemnity violated public policy; and (5) The non-disparagement provision did not violate the whistle-blower statute. A Petition for Review with the California Supreme Court was filed Oct. 10, 2006.

In particular, the voided noncompetition agreement sought to prohibit the employee, for an 18-month period, from performing professional services for any client on whose account he had worked during 18 months prior to his termination, and prohibit him for a year after termination from providing professional services to any client of a certain office.

“At-Will” Meant At-Will

In *Dore v. Arnold Worldwide, Inc.*, (2006) 39 Cal.4th 384, the California Supreme Court rejected an employee’s lawsuit for breach of contract, breach of the covenant of good faith and fair dealing, and fraud in connection with his termination, ruling that: (1) At-will language in the employee’s job offer confirmation letter unambiguously meant that he could be fired without cause; and (2) A clear and unambiguous at-will provision in a written employment contract, signed by the employee, cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination. The facts of the case remind us of the value of a well-drafted offer letter.

According to Plaintiff, he was told during the interview process that AWI needed someone to handle a new account on a “long-term basis”; that if hired, he would “play a critical role in growing the agency”; that AWI was looking for “a long-term fix, not a Band-Aid”; and that AWI employees were treated like family.

Plaintiff claimed he was not told that his employment could be terminated without cause or “at will” during interviews or when he received a verbal job offer, which he accepted.

Plaintiff soon thereafter received a letter from a senior vice president of AWI to “confirm our offer to join us as Management Supervisor” and to state “[t]he terms of this offer.” Along with a start date, compensation details and various benefits, and even language about annual review process and the potential for advancement, the letter shut down the Plaintiff’s later claims with this paragraph:

“Brook, please know that as with all of our company employees, your employment with Arnold Communications, Inc. is at will. This simply means that Arnold Communications has the right to termi-

nate your employment at any time just as you have the right to terminate your employment with Arnold Communications, Inc. at any time.”

GOVERNOR VETOES

The governor blocked many employment-related laws that passed the Legislature. These examples give us a window into legislation that may surface again:


SB 1414 would have imposed a tax on some of the state’s largest employers to spend the equivalent of 8 percent of their total payroll on health care or pay the equivalent amount to the state.

AB 879, in effect, would have destroyed the right of an employer who did not appear at a Labor Commissioner Hearing to seek a “de novo appeal” to the Superior Court (i.e., a new trial in this context) as the employer would not have been able to put any evidence at the new trial that was not in the record at the hearing.

AB 1884 would have essentially required California employers to subsidize a strike against their company by providing unemployment insurance benefits to workers unemployed due to a strike.

AB 2555 would have imposed civil penalties for gender-based discrimination of twice the balance of the wages due to the aggrieved employee, or four times the balance of the wages due if the employer’s violation is willful. The bill also would have required an employer of 50 or more employees to provide each employee with a written statement setting forth the employees’ job title, wage rate and explanation as to how their wages are calculated.

THAT WASN’T SO BAD, WAS IT?

In past years, employers struggled just to keep up with laws that seemed to constantly change. Savvy employers will sit down with their employment lawyers or human resources professionals to review personnel policies, update employee handbooks and train supervisors so smart personnel decisions can be made. 

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