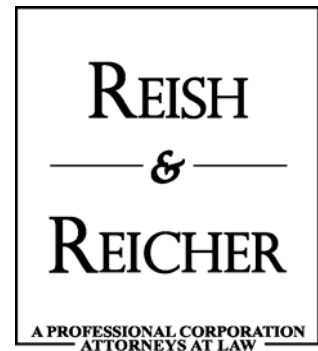


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**Selected New Employment Laws
That Employers and Their Advisors
Need to Know for 2010**

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Mr. Terman served as a Superior Court appointed arbitrator in some 25 cases. For each of 2004 through and including 2010, his peers selected him as a California "Super Lawyer" in which some 65,000 California lawyers were polled for each year. Mr. Terman speaks to and writes for client and industry groups on litigation avoidance and management, wage and hour issues, trade secret protection, and avoiding sexual harassment, among other employment law topics. He chaired the California CPA Education Foundation's Annual Employment Practices Conference for 5 years and has served on that Conference's Planning Committee for 10 years.

Mr. Terman earned his Juris Doctorate in 1983 from Loyola Law School, where he served on the Law Review. In August 1986, he attended Hasting College of Law as an attorney for jury trial training. He earned his bachelor's degree in 1979 from University of California at Los Angeles. Please see www.reish.com.

I. Recent Legislative and Regulatory Developments

- **Legislative Interest in Employers.** While the state budget and the economy dominated much of the California Legislature's attention in 2009, employers continue to draw legislative scrutiny, 331 of the bills introduced in the 2008-2009 California Legislative Session mention "employer." This is about half as many bills as the prior year and about the same as the 2006-2007 Session. Even fewer made it past the Governor's desk this year.
- **H1N1 Guidance.** The H1N1 virus threat raises questions for employers who need to provide a safe workplace without violating employee rights under the disability discrimination, privacy and other laws. The Equal Employment Opportunity Commission's recent interpretive memorandum, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, provides guidance.

For example, an employer may, during a pandemic, without violating the ADA: require infection control practices, such as regular hand washing, coughing and sneezing etiquette, proper tissue usage and disposal, and working at other employer facilities or telework; send employees home if they display flu-like symptoms, such as fever or chills and a cough or sore throat; ask employees who report feeling ill at work or who call in sick if they are experiencing flu-like symptoms, though information about employee illness must be kept as a confidential medical record; encourage such employees to stay

away from work and consider telecommuting as a short-term reasonable accommodation; make further inquiries, even if disability-related, if justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat; ask an employee why the employee has been absent from work even if the employer suspects it is for a medical reason; and require medical certification as a condition of return to work.

Employers may not, for example, require medical examinations of employees, such as measurement of employee body temperatures, unless the pandemic becomes wide spread in the community as assessed by state or local health authorities or the Centers for Disease Control and Prevention; ask whether employees have any medical condition that could make them more vulnerable to infection and, if information volunteered by employees must be kept as a confidential medical record; and require employees to receive vaccines.

Find the EEOC guidance at http://www.eeoc.gov/facts/pandemic_flu.html. CDC and California Department of Public Health resources are at <http://www.cdc.gov/H1N1FLU/> and <http://www.cdph.ca.gov>.

➤ ***COBRA Subsidy Extension Embedded in Defense Appropriations Bill***

The American Recovery and Reinvestment Act of 2009 (ARRA), commonly known as the federal economic stimulus bill passed earlier this year, requires companies to provide a COBRA subsidy for up to 9 months. The ARRA required employers to pay 65% of the group health care insurance plan premiums for COBRA assistance eligible employees who were involuntarily terminated for cause from employment between September 1, 2008 and December 31, 2009. Eligible individuals pay only 35% of their COBRA premiums. The employer may recover the 65% premium subsidy by taking a credit on its quarterly federal employment tax return. Certain high-income individuals may have to repay all or part of the premium subsidy through an increase in their income tax liability for the year. Subsidy eligibility ends when the individuals are eligible for coverage under another group medical insurance plan or Medicare, or the normal period for COBRA eligibility ends. Employees terminated for cause may not be assistance eligible. By now, employers or their COBRA administrators have amended their COBRA notices and practices to be ARRA compliant.

Federal COBRA covers employers with 20 or more employees. Employers of 19 or fewer employees and their group medical insurers are covered by “Cal-COBRA” and the ARRA’s subsidy provisions did not directly apply. California AB 23 filled the gap and provides similar benefits and obligations for employees subject to Cal-COBRA.

On December 19, 2009, President Obama signed into law HR 3326, the Department of Defense Appropriations Act, 2010 (Act). The Act immediately amended the ARRA by extending the COBRA subsidy period from 9 to 15 months and extending the cut-off for commencement of the subsidy period from December 31, 2009 to February 28, 2010.

Employers or their COBRA administrators must now update their COBRA eligibility and election notices to include the extended subsidy information. Model notices are available now on the U.S. Department of Labor's (DOL) website. In addition, within 60 days of enactment of the Act, special notice must be given to any COBRA assistance eligible individual who was either already on COBRA on or after October 31, 2009 or was involuntarily terminated on or after of October 31, 2009 who already received a COBRA rights notice that did not include the subsidy extension information.

According to the DOL, individuals who had reached the end of the reduced premium period before the legislation extended it to 15 months will have additional time to pay the reduced premiums related to the extension. To continue their coverage they must pay the 35% of premium costs by "60 days after date of enactment" or, if later, 30 days after notice of the extension is provided by their plan administrator.

Employers should sign up for email notice of updates to the DOL website to stay current on these developments. See, <http://www.dol.gov/ebsa/cobra.html>

➤ ***Employers Injured by Lack of Worker's Comp Insurance.***

Effective January 1, SB 313 mandates and increases penalty assessments against employers caught without required workers compensation insurance and issued an Order by the Labor Commissioner to stop all operations until insurance is obtained. The Labor Commissioner must now assess the uninsured employer \$1,500 per employee or, alternatively, require the employer to deposit to the state Uninsured Employers Benefit Trust Fund the greater of twice the amount that should have been paid for workers comp insurance for the uninsured period or \$1,000 per employee. Problems triggered by lack of workers comp insurance seem to occur most when an employer either intentionally or by mistake fails to pay premiums or place coverage, or misclassifies its workers as independent contractors rather than employees. As if the risks of a stop order, assessments, and lack of insurance were not bad enough, the "no-fault" nature of the workers comp system is lost and courts presume the employer was negligent.

➤ ***No Raise Needed for Exempt Computer Software Employees.***

California Labor Code Section 515.5 contains an overtime pay exemption for certain highly skilled computer professionals who spend more than 50% of their working time in top-level intellectual or creative work that requires the exercise of discretion and independent judgment, such as software engineers and programmers, and systems designers and analysts. To qualify for exemption, the employee also be paid at least a certain amount per hour or, alternatively, a salary equal to that hourly rate. These rates are reset each October 1 by the Department of Industrial Relations (DIR) based on the "percentage increase" in California Consumer Price Index for Urban Wage Earners and Clerical Workers. Even though the CCPI declined 1.4% from the previous year, the DIR has determined that the rates will stay the same as last year because there was no "increase." Unless the Labor Commissioner reconsiders this determination due to court challenge or otherwise, the following rates remain in effect as of January 1: \$37.94 per hour or a \$79,950.00 annual salary (i.e., \$6,587.50 monthly).

- ***No Real Change in Minimum Wage.*** The federal Minimum Wage increased to \$7.25 per hour in the last of three steps put into effect in 2007 legislation. This change meant little to California employers since the California law mandates an \$8.00 Minimum Wage and, when federal and state employment laws overlap, the employee retains the benefit of the law most favorable to the employee. Likewise, the City of San Francisco, which has a Wage Ordinance governing all employers in the city, will retain a \$9.79 per hour Minimum Wage in 2010. The Ordinance requires an increase each year based upon CPI increase. Given that there was no CPI increase, this Minimum Wage will not change from the 2009 rate. This is one of three San Francisco labor laws that apply to all employers with employees performing work in the city. The other two are the Health Care Security Ordinance and Paid Sick Leave Ordinance. Find more information on these labor laws at http://www.sfgov.org/site/olse_index.asp?id=81787.
- ***Military Families Get a Break.*** In 2008, the Family Medical Leave Act (FMLA) was amended to permit up to 26 weeks of unpaid leave to FMLA eligible employees to care for a spouse, son, daughter, parent, or next of kin who is injured while serving on active military duty. Also added was up to 12 weeks of leave for urgent needs related to reservist or National Guard member's spouse, son, daughter, or parent's call to active service. A maximum of 26 weeks was set for employees who take military related FMLA leaves and non-military release FMLA leaves in a year. Signed into law October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (HR 2647) expands exigency and caregiver leave provisions for military families under the FMLA. HR 2647 expands the caregiver leave provision to include veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time during the five years preceding the date of treatment. HR 2647 also expands the exigency leave benefits to include family members of active duty service members.
- ***No Genes at Work.*** On November 21, 2009, the Genetic Information Nondiscrimination Act of 2008 (GINA) became effective November 21, 2009. This Act prohibits employers from discriminating against individuals based on genetic tests and information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members. GINA requires that employers immediately post a new EEOC poster which downloaded from <http://www1.eeoc.gov/employers/poster.cfm>.
- ***Is an I-9 Enough?*** Employers risk substantial fines and criminal action if they knowingly employ workers who do not have the legal right to work in the United States.

Employers must also obtain and keep a completed U.S. Citizenship and Immigration Services Form I-9 forms, with copies of required papers, to verify employment eligibility of all new hires. A recently issued I-9 (OMB Form 1615-0047; Expires August 31, 2012) should be used. It can be downloaded at <http://www.uscis.gov>.

In 2007 and 2008, the Department of Homeland Security (DHS) issued proposed rules that would have deemed an employer to have actual knowledge of workers' lack of legal right to work in the United States if the employer did not comply with verification procedures after it received a "no-match" letter from the DHS or Social Security Administration (SSA). No-match letters state that the social security number provided with payroll filings does not match with the SSA database. A federal court in San Francisco enjoined implementation of the proposed rule citing "serious questions" as to whether the DHS and SSA exceeded their authority in making the rules. On November 6, 2009, the DHS rescinded the proposed rule stating that it would focus on I-9 compliance, E-Verify (see below), and other measures to increase immigration law compliance. Recently, the DHS issued Notices of Inspection to some 1,000 employers associated with critical infrastructure.

It remains to be seen if no-match letters will continue to issue. If they do, Employers who receive them should not hastily fire the affected workers. There may be honest mistakes in the employee's or the government's information which can be rectified with the advice of experienced counsel or human resources professional.

- ***Expanded E-Verify.*** E-Verify is an online employment verification system operated jointly by the DHS and SSA. Participating employers can quickly check the employment eligibility of new hires online by comparing information from an employee's Form I-9 against SSA and DHS. Beginning September 8, 2009, employers with federal contracts or subcontracts that contain the FAR E-Verify clause are required to use E-Verify to determine the employment eligibility of employees performing direct, substantial work under those federal contracts and new hires organization wide - regardless of whether they are working on a federal contract. The new rules require insertion of the E-Verify clause in all prime federal contracts with a period of performance longer than 120 days and a value above \$100,000. The rule also covers subcontractors if a prime contract includes the clause. Other employers may voluntarily use E-Verify as well after an offer of employment has been accepted or with current employees. Find E-Verify information on the DHS website: <http://www.uscis.gov/portal/site/uscis>. As with no-match letters, use caution before rejecting an employee or taking further steps to verify if E-Verify returns a negative report.

- ***Proposed Employee Free Choice Act of 2009.*** The EFCA (H.R. 1409) would, if passed: (1) eliminate the secret ballot process that has been a cornerstone of worker determination of whether to recognize a union as its bargaining representative. Instead, the EFCA would require the government to certify a union if more than half of the workers at a facility sign a card authorizing the Union. Some employer groups believe that the public card signing process invites coercion and intimidation of workers to sign. (2) require an employer to initiate collective bargaining process with the new union within 10 days after certification. If a collective bargaining agreement is not entered into within 90 days, either side can refer negotiations to the Federal Mediation and Conciliation Service. If a deal is not struck in 30 days, either side can commence an action before a federal arbitration panel who will decide upon contract terms that will be binding for 2 years. (3) add additional penalties on employers for labor law violations.

- **Update Workplace Notices.** Workplace posters, notices and pamphlet requirements usually change at least once a year. For example, the EEOC mandated a new poster under GINA. Most government agencies will look for poster compliance if on site to inspect or investigate for another reason and there are monetary penalties for failure to display some posters. The California Chamber of Commerce and other vendors can annually provide a complete set of the 16 or so required federal and state posters and notices at a relatively nominal cost.
- **IRS Standard Mileage Rate for 2010.** Effective January 1, 2010, the standard employee business mileage reimbursement rate to \$0.50 per mile.
- **Independent Contractors; EDD Employment Determination Guide (Form DE38).**
http://www.edd.ca.gov/pdf_pub_ctr/de38.pdf;
- **Independent Contractor or Common Law Employee for Use by State Agencies.**
http://www.edd.ca.gov/pdf_pub_ctr/ee-ic.pdf
- **Wage and Hour Orders:** <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>
- **What is the Status of Pending California Legislation?**
Find out at: <http://www.leginfo.ca.gov/>

II. Selected Recent Court Decisions

- **Managers May be Liable for Wage and Hour Violations.** In *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009), the Ninth Circuit Court of Appeals held that former employees of a bankrupt hotel could pursue wage and hour class action claims under federal law against the CEO, CFO and a labor relations manager of the corporation. Under the Fair Labor Standards Act (“FLSA”), an “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee” (Title 29 U.S.C. § 203(d)). The *Boucher* court stated that the “economic reality” of the manager’s relationship is the touchstone of an analysis of whether an individual exercises “control over the nature and structure of the employment relationship,” or “economic control” over the relationship, such that the individual may be an “employer” with FLSA liability.
- **Labor Commissioner Authorizes Reduction of Work Schedules and Salaries for Exempt Employees.** On August 19, 2009 the California Labor Commissioner issued an opinion letter permitting employers to reduce the work schedules of exempt employees, with a corresponding reduction in salary. The specific change approved was a 4-day, 20% reduced pay structure and the new salary cannot adjust from week to week depending on hours worked. (See, <http://www.dir.ca.gov/dlse/opinions/2009-08-19.pdf>). To retain the exemption, however, the salary must still be twice Minimum Wage (\$2,774 monthly or \$33,280 annually). In the past, the Labor Commissioner viewed hours and pay reduction as destroying the overtime exemption. This change in enforcement policy now parallels California law with the federal FLSA, at least during current economic conditions.

- ***Punitive Damages Outlawed in Wage and Hour Lawsuits.*** In *Brewer v. Premier Golf Properties*, 168 Cal. App. 4th 1243 (2009), the California Court of Appeal held that punitive damages cannot be awarded for an employer's malicious conduct in violating statutes regulating unpaid wages, meal and rest breaks, and wage statement detail.
- ***General Contractor Liability for Subcontractor's Wage and Hour Violations.*** In *Sanders Construction Company, Inc. v. Cerda*, 175 Cal. App. 4th 430 (2009), the California Court of Appeal held that a general contractor may be held liable for unpaid wages, interest and penalties claimed by an employee of its unlicensed subcontractor, regardless of whether the general contractor has paid its subcontractor for the labor provided by the employee. The basis of the Court's decision was California Labor Code Section 2750.5, which provides that general contractors may be liable as statutory employers for unemployment insurance and workers' compensation contributions for the employees of unlicensed subcontractors. The Court concluded, "Labor Code Section 2750.5 operates to conclusively determine that a general contractor is the employer of not only its unlicensed subcontractors but also those employed by the unlicensed subcontractors."
- ***Conflict Over Meal and Rest Periods is Still Not Resolved.*** On July 22, 2008, the California Court of Appeal in *Brinker v Superior Court* (2008 WL 2806613 (Cal. App. 4th Dist., July 22, 2008)), held, among other things, that: (1) California employers are only required to "provide" or "make available" meal and rest periods to its non-exempt employees and are not required to ensure that such breaks are taken; (2) an employer need only authorize and permit a rest period every four hours (or major fraction thereof); where impracticable, the rest period need not be in the middle of each work period; (3) an employer may only be liable for "off-the-clock" work if it knew or should have known that its employees were working off-the-clock; and (4) class action certification will be denied in most meal period cases. On October 22, 2008, a Petition for Review was granted by the California Supreme Court. This stays the decision until the Court decides it. The Court is likely to decide the case in 2010.
- ***A Manager's Ignorance of Disability Accommodation Provided Agreed to Is No Excuse.*** In *A.M. v. Albertsons, LLC*, 178 Cal. App. 4th 455 (2009), the California Court of Appeal affirmed a six-figure jury verdict holding the employer liable for failure to accommodate an employee's disability on a single occasion even though the manager on duty was unaware of the accommodation agreed to. The Court of Appeal, held that: (1) any failure on the employee's part to continue interactive process after accommodation had been agreed upon did not preclude employer's liability for failure to accommodate, and (2) the employer's success in accommodating employee's disability for over a year did not preclude employer's liability based on a single incident. This appears to be a "bad facts make bad law" case.
- ***Non-Compete Agreements Hammered Further.*** In *Dowell v. Biosense Webster, Inc.*, the California Court of Appeal struck down as a void non-compete agreement provisions that that for 18 months after termination of employment the employee would (1) "not render services, directly or indirectly, to any conflicting organization" in which such services "could enhance the use or marketability of a conflicting product by application of confidential information" to which the employee "shall have had access" during

employment; and (2) “not solicit any business from, sell to, or render any service to, or, directly or indirectly, help others to solicit business from or render service or sell to any of the accounts, customers or clients” with whom the employee had contact during the last 12 months of employment.

The agreement broadly defined “confidential information” as “information disclosed to me or known by me as a result of my employment by the company, not generally known to the trade or industry in which the company is engaged, about products, processes, technologies, machines, customers, clients, employees, services and strategies of the company, including, but not limited to ... marketing, merchandising, selling, sales volumes or strategies, number or location of sales representatives, names or significance of the company’s customers or clients or their employees or representatives, preferences, needs or requirements, purchasing histories, or other customer or client-specific information.”

The Court not only voided the provisions, but it also held that their use constituted unfair competition in violation of Business and Professions Code §17200. The Court stated that it doubted the continued viability of a “trade secret exception” to the prohibition on employee non-compete agreements. (This was a door left open for non-solicitation agreements by the California Supreme Court in *Raymond Edwards II v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008)). The *Dowell* court stated that a trade secret exception would not apply in this case in any event because the agreement’s definition of confidential information was much broader than “trade secret” information as defined under California law, the contract effectively precluded the employee from competing altogether.

- ***Reasonable Expectation of Privacy in Text Messages.*** In *Quon v. Arch Wireless Operating Co., Inc.*, No. 07-55282 (9th Cir., June 18, 2008), the Ninth Circuit Court of Appeals held that employees of the Ontario, California police department could sue in federal court for invasion of privacy and other claims because they had a reasonable expectation of privacy in text messages in this particular case. Here, the employer’s contract with the alphanumeric pager service provider allotted 25,000 characters per month, after which the City was required to pay overage charges. The employees were told that if they paid the monthly overage charges, the police department would not review their text messages to determine if they were personal or work related. Months later, during a City audit of personal text message use, the City found that many of the messages sent during normal work hours were personal in nature and sexually explicit. The Court noted that, had the City had simply followed its general policy on computer, internet and e-mail use, the employees would probably be unable to claim any reasonable expectation of privacy in the content of their text messages. That policy prohibited personal use of City-owned computers, e-mail, Internet and other systems, and permitted the City to search these resources. The United States Supreme Court recently granted certiorari on this case which effectively stays the decision until the High Court rules.

III. Sample Damage and Penalty Exposure in a Civil Wage & Hour Case Brought in California by Employee(s)

- **Time Frames:** Four years prior to the date the Complaint was filed
Time from Complaint filing to settlement or judgment
- **Regular Rate of Pay:** Salary (and possibly guaranteed bonuses) divided by 2080 for a full time employee
- **Attorneys Fees:** Recoverable by a successful Plaintiff
- **Interest on Damages**
- **Single Plaintiff or Class Action**

FAILURE TO PAY OVERTIME

Damages: All unpaid overtime at applicable OT rate of 1.5 or 2 times regular rate of pay.
(Note: employer obligation to maintain time records).

FAILURE TO PAY MINIMUM WAGE

Damages: Difference between amount paid and minimum wage in effect. Liquidated damages equal to wage not paid and interest subject to court discretion.
Civil penalties: \$100 per employee for first intentional violation or \$250 per employee for each subsequent intentional violation.

FAILURE TO PROVIDE MEAL PERIODS

Damages: One additional hour of pay at Employee's regular rate of compensation for each work date that the meal is not provided. Possible that hours worked may trigger unpaid overtime obligation.

FAILURE TO PROVIDE REST PERIODS

Damages: One additional hour of pay at Employee's regular rate of compensation for each work date that the rest period is not provided. Possible that hours worked may trigger unpaid overtime obligation.

FAILURE TO PROVIDE ITEMIZED STATEMENTS

Civil Penalties: \$50 per employee for first violation and \$100 per employee for subsequent violations, up to \$4,000 in the aggregate per employee.

FAILURE TO PAY EMPLOYEES ALL WAGES DUE UPON END OF EMPLOYMENT

Civil Penalty: Daily rate of pay for up to 30 days of waiting.

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