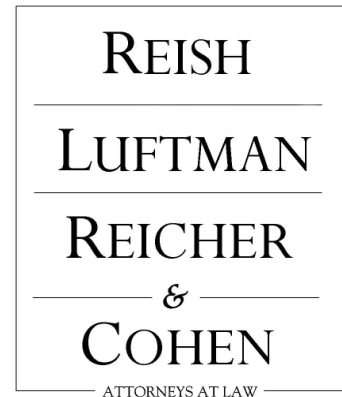


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**Selected New Employment Law That
Employers and Their Advisors
Need to Know for 2008**

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Mr. Terman served as a Superior Court appointed arbitrator in some 25 cases. His peers selected him as a 2004, 2005, 2006, 2007 and 2008 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 four years and has served on that Conference's Planning Committee for 8 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.

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I. Recent Legislative and Regulatory Developments

- ***Legislative Interest in Employers.*** 337 of the Bills introduced in the 2006-2007 California Legislative Session mention "employer."
- ***Increased CA Minimum Wage – Effect on Non-Exempt Employees.*** AB 1835 raised California's hourly Minimum Wage for non-exempt employees from \$6.75 to \$7.50 effective January 1, 2007, and to \$8.00 per hour effective January 1, 2008.

Effect on Exempt Employees. In addition to satisfying the "duties" exemption test, executive, administrative and professional employee overtime exemption requires payment of a salary that is twice the Minimum Wage. To satisfy the "salary basis test," the required annual salary increased from \$31,200 to \$33,280 (\$2,773 per month) effective January 1, 2008. To remain exempt, ***commission employees*** must be paid 1.5 times Minimum Wage and more than half of their pay must be commission.

Employers may still require employees to supply and maintain their own ***hand tools*** as long as the employee makes at least twice the Minimum Wage.

Federal Minimum Wage changed to \$5.85 per hour and will phase up to \$7.25 per hour by July 2009. A new poster is required. California employees must still be paid the higher California Minimum Wage.

- ***Update Workplace Notices and Pamphlets Annually.*** Workplace posters, notices and pamphlet requirements tend to change at least once a year, usually January 1. The

California Chamber of Commerce and other vendors can usually provide a complete set of required posters and notices at a cost more reasonable than researching all the requirements and obtaining them piecemeal. Consider vendors such as the California Chamber of Commerce (e.g., “Required Notices Kit;” See, www.calchamberstore.com).

- ***Overtime Exemption for Computer Professionals.*** 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. Workers at this level often include software engineers, programmers, and systems designers and analysts who are highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming and software engineering.

To qualify for overtime exemption, the employee be paid at least a certain amount per hour. Effective January 1, 2008, SB 929 reduces the threshold hourly wage to sustain the computer professional exemption from \$49.77 to **\$36.00 per hour**. Given that this lowers the annual full time compensation of those eligible for exemption from over \$100,000 to nearly \$75,000, the apparent intent of this bill is to help California’s computer programming industry compete internationally and in the United States.

- ***Military Spouse Leave.*** AB 392 enacts California Military and Veterans Code Section 395.10 which requires employers of 25 or more employees to permit an employee who is the spouse of a member of the federal or state Military to take up to 10 days of unpaid leave while the Military member is on leave from deployment. To qualify for leave, the employee must work an average of 20 or more hours per week and be married to a member of the United States Armed Forces deployed during a period of military conflict to a combat zone or to member of the National Guard or Reserves deployed during a period of military conflict.

The employee seeking leave must provide the employer with notice within at least two business days of receiving official notice that their spouse will be on leave from deployment that he or she wishes to take leave and also provide the employer with written documentation certifying the spouse will be on leave from deployment. An employer may not retaliate against any employee for requesting or taking this AB 392 leave. Registered Domestic Partners are also eligible for these leave rights.

- ***Social Security Numbers on Pay Stubs.*** California Labor Code Section 226 has for many years required employers to give employees an itemized statement along with each paycheck that contains the basis for wage earnings and all deductions. With an eye toward curbing identity theft opportunities, SB 1618 amended the statute to require that full social security numbers may no longer be used after January 1, 2008. Employers must now use only the last four digits of social security numbers or use alternate employee identification numbers on pay stubs. SB 1618, enacted in 2004 with a several year implementation deadline, may have been forgotten by some.

➤ ***Final Regulations Issues for Mandatory Anti-Harassment Training for Supervisors.***

California Government Code Section 12950.1, requires employers with 50 or more workers to provide a minimum of two hours of anti-harassment training and education to all supervisors by January 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.

Regulations under this law bogged down through multiple drafts and promised final implementation deadlines; but, the California Fair Employment and Housing Commission issued final interpretive regulations effective August 17, 2007 (See www.fehc.ca.gov/act/harass.asp). Some employers have experienced in-house Human Resources personnel who are capable of understanding the regulations, delivering the training, writing compliant curriculum and keeping appropriate records. Many employers rely on professional human resources trainers or counsel.

A blind spot for some employers is ensuring that training is conducted every two years. The new regulations give employers some flexibility with two methods of compliance. “Individual tracking” requires training for that supervisor within 2 years of their last training. “Training year tracking” permits an employer to designate a “training year” in which it trains some or all supervisors and then must retrain the supervisors by the end of the next training year, two years later. If the prior training occurred in 2005 (in advance of the original January 1, 2006 deadline), the later tracking method permits all supervisors to be trained by the end of 2007. Note, however, the tracking year method also requires a supervisor who was trained within 6 months of becoming employed, to be retrained in the next training year that occurs less than or equal to two years after the initial training.

- ***Handsfree Drivers.*** Effective July 1, 2008, SB1613, enacted as California Vehicle Code Section 12810.3, makes driving a motor vehicle while using a wireless telephone illegal unless the driver is using a hands free listening and speaking device. Emergency calls to, for example, law enforcement, public safety services, and healthcare providers are exempted. While the statute does not specify use of wireless email and document retrieval devices, it would not be surprising for these distracting devices to be added to the statute at some point.
- ***Workplace Violence Protection Expansion.*** Effective January 1, 2008, AB 2695 expands an employer’s right to seek workplace violence restraining orders on behalf of employees to protect multiple worksites and multiple employees. In addition, even if the threatened employee does not want to pursue a restraining order, the employer may seek the order if it reasonably believes there is a credible threat of violence against others in the workplace.
- ***Child Support.*** Effective January 1, 2008, AB 2440 imposes heavy penalties upon employers who assist employees or contractors in avoiding child support obligations where (a) the employer knew or should have known that the individual has a child support obligation and (b) fails to report the individual’s hire date, employment, and/or wages to the California Employment Development Department. The penalty can be up to

three times the amount of the unpaid support, subject to a maximum of the entire support obligation.

- ***New Employment Eligibility Verification (I-9) Form Required.*** Effective December 26, 2007, employers must use a new U.S. Citizenship and Immigration Services Form I-9 form to verify employment eligibility of all new hires or re-verifications or be subject to penalties. The new Form I-9 can be found at www.uscis.gov/files/form/i-9.pdf.
- ***California Requires Notice of Earned Income Tax Credit Rights Along with W-2 and 1099s NOW.*** Effective January 1, 2008, AB 650 adds California Revenue and Taxation Code Sections 19850 which requires employers to give notice to all employees that they may be eligible for the EITC within one week before or after, or at the same time, that the employer provides an annual wage summary such as Form W-2 or a Form 1099. Notice must be given to all employees, either personally delivered to the employee or mailed to the employee's last known address, even though EITC applies only to lower income taxpayers and working poor. The notice must either contain the language specified in the statute, or provide instructions on how to obtain the information from the IRS. Employee is defined as anyone who is eligible for Unemployment Insurance. The required text can be found at: <http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=95421121400+0+0+0&WAIAction=retrieve>
- ***IRS Business Mileage Reimbursement.*** 50.5 cents per mile for 2008. See, <http://www.irs.gov/pub/irs-drop/rp-06-49.pdf>
- ***Independent Contractors; EDD Employment Determination Guide (Form DE38).*** <http://www.edd.ca.gov/taxrep/de38.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. Recent Court Decisions

- ***Law Firm Partners Brought Within Protection of Federal Employment Law Against Age Discrimination.*** Pursuant to a consent decree approved by a federal judge on October 4, 2007, the international law firm of Sidley Austin LLP agreed to pay \$27.5 million to 32 former partners who the U.S. Equal Employment Opportunity Commission alleged were forced out of the partnership because of their age under age based retirement policy. The EEOC brought the suit in 2005 under the federal Age Discrimination in Employment Act (ADEA).

A major issue in the case was whether partners in the law firm were protected as employees under the ADEA. The decree provides that “Sidley agrees that each person for whom EEOC has sought relief in this matter was an employee with the meaning of the ADEA.” The consent decree also includes an injunction that bars the law firm from “terminating, expelling, retiring, reducing the compensation of or otherwise adversely changing the partnership status of a partner because of age” or “maintaining any formal

or informal policy or practice requiring retirement as a partner or requiring permission to continue as a partner once the partner has reached a certain age.”

- ***Federal No-Match Letter Rules on Hold.*** Many employers are receiving letters from the Social Security Administration (SSA) indicating a discrepancy between an employee’s Social Security Number (SSN) and SSA records. The Department of Homeland Security (DHS) issued regulations last year by which DHS: (a) intended to use the SSA database to issue its own “no-match” letters; (b) could claim that employers had constructive knowledge of an employee’s unauthorized work status; and (c) unless the discrepancy was resolved within three months, the employer would have had to fire the employee or be exposed to monetary fines of up to \$10,000 per violation and criminal proceedings from the government.

On October 15, 2007, a federal court issued a preliminary injunction suspending the effectiveness of the new rules indefinitely. The basis of the injunction was that “serious questions” were raised as to whether the DHS and SSA exceeded their authority in making the rules.

While the safe harbor rules are currently of no effect, some employers who may have workers who are undocumented or otherwise ineligible to work in the United States may worry that government enforcement will reduce their available labor pool and expose employers to prosecution. For now, employers who receive no-match letters 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.

- ***Meal and Rest Period “Penalties” Are Not Penalties.*** The California Supreme Court in *Murphy v. Kenneth Cole Productions* 40 Cal.4th 1094 (2007) held that California Labor Code Section 226.7 required payment of “one additional hour of pay at the employee’s regular rate of compensation” for each day that an employer fails to provide mandatory meal or rest periods to an employee is a “wage” and not a “penalty.” The effect is that a three (or four) year statute of limitations will apply for recovery of wages rather than a one-year statute for recovery of a penalty.
- ***Stop Using Employer’s Email Systems for Union Solicitation.*** The National Labor Relations Board in *Guard Publishing Company*, NLRB Case No. 36-CA-08743-1 (December 16, 2007) held that employers may restrict the use of company e-mail, even if such restriction includes a ban on the use of e-mail for “union business,” as long as the employer prohibits solicitations on behalf of all third-party organizations (e.g., unions, political groups, churches, insurance sales). Although the employer in this case allowed personal e-mails, the NLRB upheld discipline of employees for using company e-mail to announce union rallies and other related union activities.
- ***A Military Victory.*** A California Court of Appeal in *Perez v. Uline*, 157 Cal.App. 4th 953 (2007) held that an employee’s waiver and release of claims as part of a severance agreement is unenforceable to block the employee’s rights under the Uniformed Services Employment and Reemployment Rights Act. USERRA specifies that rights under that law cannot be eliminated by contract.

- ***If You Want to Arbitrate, You Need a Contract.*** The California Court of Appeal in *Mitri v. Arnel Management Co.*, 157 Cal.App.4th 1164 (2007) held that an arbitration agreement signed by the employee is required for a court to compel arbitration and that a policy “requiring” arbitration in an employee handbook is insufficient. In this case, an acknowledgement of receipt of an employee handbook, particularly a handbook that refers to a nonexistent, separate arbitration agreement, will not withstand judicial scrutiny. .
- ***If You Want to Arbitrate, You Will Probably Not Avoid a Class Action.*** The California Supreme Court in *Gentry v. Circuit City Stores, Inc.*, 42 Cal.4th 443 (2007), held that an agreement that required all employment related disputes to be arbitrated which also precluded the arbitrator from hearing class action claims was disfavored and may not be enforceable. While the case was sent back to the lower court for further proceedings, well established California law requires in order for a pre-dispute arbitration agreement to be enforceable, the employee’s monetary recovery and remedies cannot be less than those available in court.
- ***Why Reimburse Itemized Expenses When I’d Rather Just Pay More Compensation?*** The California Supreme Court in *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554 (2007) held an employer can pay employees increased compensation instead of reimbursing employee business expenses as long as the employer can prove that the pay increase reimburses employees fully for the expenses they incur on the employer’s behalf. As a practical matter, if the employer must have records to justify an alleged failure to reimburse business expenses, it may as well require regular expense reimbursement forms to be submitted and pay for actual expenses.
- ***Bonus May be Based on Company Net Profits.*** The California Supreme Court in *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal.4th 217 (2007) held that an employer may offer employee bonus compensation based on a net profit calculation that takes into account merchandise shortages, worker’s compensation costs, tort claims by non-employees and other business expenses beyond the employees’ control.
- ***Attempt at Creating a New Exception to Non-Compete Agreements Was Denied.*** In *Raymond Edwards II v. Arthur Andersen LLP*, 142 Cal.App.4th 603 (2006), 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 noncompetition agreements, even though the restriction was narrowly drawn to leave open for employee a substantial portion of the market; (3) employer's 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 nondisparagement provision did not violate the whistle-blower statute. A Petition for Review with the California Supreme Court was granted on November 29, 2006.

In particular, the 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.*, 39 Cal.4th 384 (2006), the California Supreme Court rejected a terminated employee's lawsuit for breach of contract, breach of the covenant of good faith and fair dealing, and fraud, 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.

According to Plaintiff, he was never told during the interview process that his employment would be terminable without cause or “at will,” he was told that the employer had landed a new account and needed someone to handle it on a long-term basis, he was told that, if hired, he would “play a critical role in growing the agency,” that employer was looking for “a long-term fix, not a Band-Aid,” and that the company’s employees were treated like family. Plaintiff claimed that employer offered him the management supervisor position by telephone, and he orally accepted.

Later that month, Plaintiff received a three-page letter from a senior vice-president of the employer to “confirm our offer to join us as Management Supervisor in our Los Angeles office” and to state “[t]he terms of this offer.” The letter then listed a commencement date, compensation details, and various benefits (including reimbursement of relocation expenses, parking, various types of insurance, expense reimbursement, and vacation”).

The letter also stated: “You will have a 90 day assessment with your supervisor at which time you will receive initial performance feedback. This assessment will also be the time that you will work with your supervisor to set objectives against which you will be evaluated at the time of your annual review. After your assessment is complete, you and your supervisor will have the opportunity to discuss consideration for being named an officer of Arnold Communications.”

In a separate paragraph, the letter stated: “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 terminate your employment at any time just as you have the right to terminate your employment with Arnold Communications, Inc. at any time.”

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