

New Labor Laws

the election of Barack Obama and a Democratic majority in Congress in many states may mean more regulation and changes for employers in areas such as unionizing workplaces, the Family and Medical Leave Act and anti-discrimination laws. However, California is habitually in the lead when it comes to expanding employee rights and employer regulation, so expanded federal regulation often brings requirements of employers in other states up to or near levels that exist in California.

In turn, California employers will have less reason to move operations and jobs out of state, which may help recruit employers here.

For example, Congress recently amended the federal Americans with Disabilities Act to make more people eligible for its protections. While this new law made headlines in the California press, the reality is that starting Jan. 1, the ADA will be closer to disabled employee rights that already exist under the California Fair Employment and Housing Act.

Employers continue to draw scrutiny from the California Legislature, however. Of the bills introduced during the 2007–08 California legislative session, 626 mention “employer.” Even though this is about twice as many bills as last year, few made it past the governor’s desk.

Here’s a sample of what’s in store for 2009.

No Text or E-mail While Driving

Effective Jan. 1, SB 28 makes it illegal to drive a motor vehicle while using an electronic wireless communications device to write, send or read a text-based communication. The statute defines “write, send or read a text-based communication” as using an electronic wireless communications device to manually communicate with any person using a text-based communication, including, but not limited to, communications referred to as a text



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message, instant message or electronic mail. This plugged the gap left by SB 1613 which, effective July 1, 2008, required people to use hands-free listening and speaking devices while driving. Employers should update employee handbooks.

Employer Compelled False Statements Are Illegal

Effective Jan. 1, 2009, AB 2075 makes it illegal

What Employers and Their Advisers Need to Know for 2009

to require an employee, as a condition of being paid, to sign a statement of the hours worked during the pay period if the employer knows the statement to be false. Any such “release” would be void and subject the employer to misdemeanor enforcement.

This adds to existing law that prohibits an employer from requiring the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned unless payment of those wages has been made.

It is still lawful for an employer to require non-exempt employees to sign a statement on their time card that they have taken all non-working meal periods and rest breaks required by law, and accurately recorded their hours worked on the time card. An employer cannot compel these statements when the employer knows them to be false.

OT Exemption for Computer Professionals

California Labor Code Sec. 515.5 contains an overtime pay exemption for certain highly skilled computer professionals who spend more than 50 percent of their working time in top-level intellectual or creative work that requires the exercise of discretion and independent judgment.

Workers at this level typically 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. Outside of certain high-tech and engineering employers, this duties test is hard to meet.

To qualify for this overtime exemption, the employee also must be paid at least a certain amount per hour or, alternatively, effective Oct. 1, 2008, per AB 10, a salary equal to that

hourly rate. Those amounts are \$36 per hour or a \$75,000 annual salary. Effective Jan. 1, the hourly rate will be \$37.94 per hour or a \$79,950 annual salary.

Proposition 8 Passes

The passage of Prop. 8, which bans same-sex marriage in California, will not affect employers much.

In 2005, AB 205 gave California Registered Domestic Partners (RDPs) essentially all of the rights of married persons under California law. Employers already should have afforded any workplace benefit or policy benefiting employees and their spouses, which is provided by employer policy/practice or California law, to employees and their RDPs.

For example, employers who provide health insurance to spouses must offer insurance to RDPs of their employees. The employer also must pay the RDP's premiums to the extent it pays for spousal premiums.

Bad Advice on Independent Contractor Designation Vetoes

Sometimes bills that do not become law tell us what may become law in the future.

SB 1583 was one of the last bills vetoed this year and would have provided that a person, who, for money or other valuable

consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual, shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor.

Exempt from this bill would be an employee who provides advice to his or her employer, or an attorney who provides legal advice in the course of practicing law. CPAs would not be exempt.

A plethora of government agencies and laws are already primed to challenge and reject independent contractor classification (e.g., EDD, Labor Commissioner, workers comp, Department of Fair Employment and Housing, OSHA, DOL, Department of Homeland Security and tax agencies), and CPAs could soon be in the line of fire for advising employers to classify workers as contractors.

The EDD Employment Determination Guide (Form DE38) is a helpful classification tool, as the EDD tends to be one of the toughest agencies on contractor classification issues. More information can be found at www.edd.ca.gov/taxrep/de38.pdf.

Employer-Paid Transportation Costs in San Francisco

The city of San Francisco enacted a new

ordinance requiring employers with at least 20 employees to offer their workers at least one of three transportation benefit options by Jan. 19, 2009:

- A pre-tax election of a maximum of \$115 per month (consistent with the allowable election per federal law);
- An employer-provided (or reimbursed) transportation pass equal in value to at least \$45 per month; or
- Employer-provided transportation at no cost to employees.

Civil penalties for non-compliance include a first violation fine not to exceed \$100, a fine of \$200 for a second violation within the same year, and a \$500 fine for each additional violation within the same year. Administrative fines may be assessed instead. San Francisco's enforcement costs also may be recovered.

Minimum Wage in San Francisco

Effective Jan. 1, the San Francisco minimum wage increases from \$9.36 to \$9.79 per hour.

This is one of three San Francisco labor laws that apply to all employers with employees in the city. The other two are the Health Care Security Ordinance and Paid Sick Leave Ordinance. For more information on each of these labor laws, visit www.sfgov.org/site/olse_index.asp?id=81787.

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For updated information on local labor laws governing employers with contracts or leases with the city of San Francisco, visit www.sfgov.org/site/olse_index.asp?id=81788.

New EDD Form

Employers must report new employees to the EDD within 20 days of the first work date. The EDD has released a new DE 34 Form [Rev 6 (7-08)]: www.edd.ca.gov/pdf_pub_ctr/de34.pdf.

New Employment Eligibility Verification (I-9) Form Required

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 (OMB Form 1615-0047; expires June 15, 2009) can be downloaded from www.uscis.gov.

New Passport Card for Employment Eligibility Verification

The U.S. Citizenship and Immigration Services announced a new acceptable document under List A on the I-9: a “U.S. Passport Card.”

The new card is a simplified, U.S. government issued document permitting U.S. citizens to travel by land and sea between the U.S., Canada, Mexico, Bermuda and the Caribbean.

E-Verify

The E-Verify system is a new online employment verification service that quickly reports back to you a new hire’s eligibility to work in the United States.

E-Verify can be used for current employees and once an offer of employment has been accepted.


All information regarding E-Verify is available on the Department of Homeland Security’s website: www.dhs.gov/xprexprot/programs/gc_1185221678150.shtm.

In addition, employers using the E-Verify system must post or provide copies of two notices: “You Should Know Your Rights and Responsibilities Under E-Verify” and the “Employee Rights Poster.” Scroll down to the bottom of the aforementioned web page to download copies of these posters in multiple languages.

Update Workplace Notices and Pamphlets

Workplace posters, notices and pamphlet requirements tend to change at least once a year, usually Jan. 1. The California Chamber of Commerce and other vendors usually can provide a complete set of required posters and notices at a cost more reasonable than researching all the requirements and obtaining them piecemeal.

The California Chamber of Commerce can be reached at www.calchamber.com.

In addition to understanding the new laws, employers should review personnel policies, update employee handbooks and train supervisors. Confer with experienced employment lawyers or human resources professionals to help you make lawful and effective personnel decisions, minimize the incidence of employee claims and maximize employee productivity and morale. 

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