



On Tap

Wage, Training Issues Among Employment Laws Ringing in 2008

BY MARK TERMAN, ESQ.

Perhaps employers are becoming slightly less of a focus in the California Legislature as only 337 of the bills introduced in the 2006-07 legislative session mentioned “employer”—about 10 percent of all bills introduced and half as many as those introduced in the prior session.

Still, here’s what you should know and plan for in 2008.

INCREASED MINIMUM WAGE

California’s minimum wage for non-exempt employees will increase from \$7.50 to \$8 per hour effective Jan. 1, 2008. Download the required workplace poster at www.dir.ca.gov/IWC/Minwage2007.pdf.

The increase will affect other wage and hour compliance issues.

For example, of the two tests used to determine whether an employee is exempt from overtime pay, the “salary basis test” requires payment of a salary that is twice minimum wage. To satisfy this test, the required annual salary will increase from \$31,200 to \$33,280 as of Jan. 1, 2008. The Legislature has not changed the law regarding the “duties test” for executive, administrative and professional employees.

Commissioned employees, to maintain overtime pay exempt status, must be paid 1.5 times minimum wage and more than half of their pay must be commission.

In addition, employers that require employees to supply and maintain their own hand tools must pay the employee at least twice minimum wage.

Where federal and state law both apply, the employee is generally entitled to the benefit of the law that most favors the employee. Federal minimum wage, which changed July 24, 2007, to \$5.85 per hour and will phase up to \$7.25 per hour by July

2009, is basically irrelevant in California because it lags behind the state’s law. A new federal workplace poster, however, is required. Visit www.dol.gov/esa/regs/compliance/posters/flsa.htm.

OT EXEMPTION FOR COMPUTER PROFESSIONALS

California Labor Code Sec. 515.5 contains an overtime pay exemption for certain highly skilled computer professionals, those 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 often include software engineers, programmers, systems designers and analysts.

Effective Jan. 1, 2008, these employees must be paid at least \$36 per hour to sustain the computer professional exemption, down from \$49.77 per hour. Given that this lowers the annual full-time compensation of those eligible for exemption from more than \$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 Sec. 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 at least 20 hours per week and be married to a member of the U.S. Armed Forces deployed during a period of military conflict to a combat zone or a member of the National Guard or Army 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 and also provide the employer with written documentation certifying the spouse will be on leave from deployment.

Many California employment laws have provisions disallowing employers to retaliate against an employee for requesting or taking AB 392 leave.

SOCIAL SECURITY NUMBERS ON PAY STUBS

For many years California Labor Code Sec. 226 has 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, SB 1618 amended the statute and requires employers to use only the last four digits of Social Security numbers, or an alternate employee identification numbers, on pay stubs rather than full Social Security numbers.

ANTI-HARASSMENT TRAINING

California Government Code Sec. 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 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.

The California Fair Employment and Housing Commission issued final interpretive regulations (www.fehc.ca.gov/act/harass.asp) effective Aug. 17, 2007.

Employers need to keep in mind that training is required every two years. The new regulations give employers some flexibility with two methods of compliance.

“Individual tracking” requires training for supervisors within two years of their last training.

“Training year tracking” permits an employer to designate a “training year” in which it trains 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 Jan. 1, 2006, deadline), the latter tracking method permits all supervisors to be trained by the end of 2007. However, the tracking year method also requires a supervisor who was trained within six 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.

FEDERAL NO-MATCH LETTER RULES ENJOINED

Many employers are receiving letters from the Department of Homeland Security or the Social Security Administration indicating a discrepancy between an employee’s Social Security number or immigration and employment right-to-work documentation.

These letters arguably give employers knowledge of an employee’s unauthorized work status and, in turn, can expose the

employer to monetary fines of up to \$10,000 per violation and criminal proceedings from the government.

The DHS issued rules that provided a “safe harbor” from those exposures if certain procedures were followed to verify or resolve the discrepancy. These rules made national headlines because employers would have been required to fire employees if the SSN mismatch could not be resolved within three months.

The new rules made headlines again Oct. 15, 2007, when a preliminary injunction was issued that suspended the new rules indefinitely because “serious questions” were raised as to whether the DHS and SSA exceeded their authority in making the rules.


Still, 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 them to prosecution. For now, employers that receive no-match letters generally should not hastily fire the affected workers. Rather, seek the advice of experienced counsel to rectify the situation. Also,

employers should make sure that valid I-9s are filled out, required documentation exists for all employees, and that the newest form (March 2007 revision: www.uscis.gov/files/form/i-9.pdf) is being used for new hires.

MAKE ANNUAL UPDATES

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 can usually provide a complete set of required posters for a reasonable cost.

WHAT NOW?

Compared to prior years, new employment laws are coming at a more manageable pace. Employers should use this time to confer with employment lawyers or human resources professionals to assess and improve their employment practices, review personnel policies, update employee handbooks and train supervisors to maintain compliance. 

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