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EMPLOYMENT LAW ARTICLES

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The attached articles are for informational purposes only and should not be considered "legal advice." If you have particular issues and/or concerns, please contact our office at your convenience.

EMPLOYERS SHOULD CONSIDER IMPLEMENTING A CELLULAR PHONE USAGE POLICY

Cellular phones have increasingly become an indispensable tool for employees, who need to conduct business, while on the road. As a result, several states have proposed legislation to address the hazzards created by cellular phone use, while driving. Although New York is the only state that prohibits the use of cellular phones while driving, employers need to be aware of the possibility that they may be held liable, by plaintiffs, for car accidents that occur while their employees are using cellular phones in the course and scope of their employment.

In order to limit the possibility of such liability, employers should consider implementing a cellular phone usage policy that addresses the risks posed by cellular phone use, while on the road. Among the policies that employers may wish to consider are: (1) the prohibition of cellular phone use while employees are driving; or (2) allowing employees to use cellular phones while driving, but requiring that each employee use a hands-free device.

Since it may not be practical, from a business standpoint, for some employers to prohibit their employees from using cellular phones while driving, it would behoove those employers who permit cellular phone usage on the road, to educate their employees in safe cellular phone usage. In fact, those employers who permit their employees to use cellular phones while driving, should consider allocating hands-free devices to their employees and require their use, when their employees are on the road.

By establishing a cellular phone usage policy, employers will encourage safe driving habits among their employees, and reduce the risk and potential liability of automobile accidents caused by distracting phone calls.

Written by Larry C. Baron, Esq.

INDIVIDUAL LIABILITY FOR UNPAID WAGES AND PENALTIES AGAINST CORPORATE OFFICER

All earned and unpaid wages must be paid promptly upon an employee's separation from employment, either immediately upon discharge (Labor Code section 201) or within 72 hours of a voluntary quit without prior notice (Labor Code section 202.) The obligation to pay rests with the employer. But, who is the "employer?" With the decreased economy, this is an important question, as many employers are faced with the inability to pay wages to their employees. Since both state and federal authorities define "employer" very broadly, it is crucial for employers and their officers to know that the latter can be held personally liable for employees' unpaid wages and penalties.

The definition of "employer" is found in the orders of the Industrial Welfare Commission, which governs the payment of wages, hours of work, and working conditions of employees in every industry and occupation in California. The IWC orders expressly define an "employer" as "any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or other person, employs or exercises control over the wages, hours or working conditions of any person."

In the only published decision in California which construes the second prong of the above definition, the court held that the definition of employer allows for the imposition of liability of unpaid wages against officers of a corporation who exercise the requisite control over employees' wages, or hours, or working conditions. (Bureerong. v. Uvawas (C.D. Cal. 1996) 922 F.Supp. 1450, 1469-70.) The court further held that the wage statutes are to be given liberal effect and not be construed within narrow limits of the law. (Id.)

Further, in an opinion letter dated June 18, 2002 by the Department of Labor Standards Enforcement ("DLSE"), the state government agency responsible for handling wage claims, it is stated that California courts would likely adopt the federal FLSA's broad definition of "employment" and the "economic realities" of the relationship. Under the "economic reality test," the relevant factors include: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." (Herman v. RSR Security Services, Ltd. (2nd Cir. 1999) 172 F.3d 132, 139.) No one of the four factors is dispositive. Rather, the factors are viewed under the totality of the circumstances.

Based on the above definitions, together with the opinion letter, which will be given binding effect by the DLSE, there is an increased likelihood that if an employee files a claim for unpaid wages with the Labor Commissioner, a judgment could be entered against an individual officer under California law.

Written by Rebecca L. Gombos,Esq.

SB1661: FAMILY TEMPORARY DISABILITY INSURANCE

Existing law provides for payment of disability compensation for wage losses sustained by an employee who can't work because of sickness or injury. The compensation is financed by employee contributions at specified rates. This system is commonly referred to as State Disability Insurance, or SDI.

On September 23, 2002, California became the first state to enact paid leave for employees. SB1661 provides up to six (6) weeks of paid family leave annually in the form of Family Temporary Disability Insurance ("FTDI"). Under FTDI, disability compensation benefits are expanded to cover employees who can't work because of the sickness or injury of a family member or who choose to take time off to bond with a new child. These benefits will be financed entirely by additional employee contributions beginning January 1, 2004, and will be payable beginning July 1, 2004. Employers will not be responsible for funding any portion of FTDI benefits.

While the legislation identifies the new leave as a benefit, as a practical matter, employers should think of SB1661 as a separate leave running concurrently with state and federal family leave laws.

1. Covered employees:

The statute suggests that all employees in California are entitled to FTDI benefits. Therefore, unlike the California Family Rights Act (CFRA) or the Family and Medical Leave Act (FMLA), the worker need not be employed by an employer with more than fifty (50) employees or work for 1,250 hours during the last year to be eligible for benefits. However, some contend that SB1661 was designed specifically to address workers who were entitled to take leave under the CFRA and/or FMLA but couldn't do so because of the loss of income. Thus, the argument goes, only those protected under these statutes are entitled to the benefit. This is an issue that may ultimately have to be resolved by the courts.

2. Available benefits:

Under FTDI, employees are entitled to the same categories of leave available under the FMLA and CFRA. However, FTDI provides broader benefits because domestic partners are also entitled to its benefits.

Eligible employees will be paid a benefit amount established by law for up to six (6) weeks over a twelve (12) month period. During the leave, the employee will receive fifty-five percent (55%) of his or her weekly salary up to a maximum of $728. That amount will increase to $840 in 2005 and will be indexed to the state's average weekly wage increase thereafter. The only limitation is that an employee may not receive more in paid leave than he or she earned in the prior quarter.

No benefits will be paid during the first seven (7) days of a covered leave. An employer can require employees to use up to two (2) weeks of accrued vacation before using FTDI benefits. However, one of those two weeks, must run concurrently with the one-week waiting period. It is unclear whether the employee is entitled to six (6) full weeks of compensation *following* the waiting or vacation period.

Employers must perform a delicate balancing test when making a choice about the vacation requirement. Most employees do not want to use vacation for purposes other than vacation. If they use vacation for family care, very little true vacation time may remain. Accordingly, requiring use of two weeks of vacation may reduce the use of SB1661 leave and resulting workplace disruptions. On the other hand, an employer that requires use of two (2) weeks vacation before qualifying for FTDI may create issues of employee satisfaction and productivity and a push for union organization.

A compromise would require one week of vacation to cover the seven-day waiting period. This protects against abuse of FTDI benefits by requiring the use of some vacation time while keeping paid leave accessible to employees who need it.

3. Funding of benefits:

Currently, workers pay up to $417 a year to fund SDI benefits. This maximum will increase by $70 to fund FTDI benefits. The average employee is expected to pay an additional $27 (.08% of wages) per year. Employers will be responsible for processing these employee contributions.

The deductions to fund FTDI will begin on January 1, 2004. However, benefits will not be available until July 1, 2004, to allow the account to build up the necessary funds to provide the compensation. Workers receiving other unemployment or disability benefits are not eligible for FTDI.

4. Notification requirement:

According to the statute, employees hired after January 1, 2004, or separated from their employment after July 1, 2004, must be notified of their right to FTDI benefits. Interestingly, there doesn't appear to be an obligation to notify existing employees.

5. No reinstatement requirement:

Unlike either CFRA or FMLA, SB1661 does not contain a guarantee of reinstatement. Whether an employee denied reinstatement has a public-policy termination claim is a matter the courts will have to determine.

Under CFRA, an employer can refuse to reinstate a key employee only if doing so would create an undue hardship on the employer. While FTDI does not contain a comparable "undue hardship" defense, because the right to reinstatement comes from the federal, state or other applicable statutes or public policy, if the courts imply a reinstatement right following FTDI leave, an undue hardship defense should be available to

the employer. In any event, employers must recognize that the mere absence of a rehire provision does not give the employer a veto right over the taking of FTDI leave.

6. Conclusion:

Studies show that a large percentage of workers nationwide cannot afford to take unpaid leave or do not have paid vacation or sick days to use in the case of a family emergency. The new paid leave available in California will likely be used often by employees, and may result in increased absenteeism, decreased productivity and increased training costs for temporary replacement employees. Furthermore, SB1661 is replete with ambiguity and uncertainty. Experience, administrative regulation and courts will undoubtedly be called upon to answer many of the questions suggested above.

Written by Laura S. Withrow, Esq.

STATE DISABILITY LAWS AND THE INTERACTIVE PROCESS
- WHAT EMPLOYERS SHOULD KNOW -

In 2001, significant changes were made to the state's disability laws. The significance of those changes and their interpretation are still being resolved in the courts. Prior to these changes, the federal Americans with Disabilities Act (ADA) was generally followed to guide California employers in interpreting state disability laws. Some of the more significant changes to California disability laws include the following:

1. The definition of "disability" was amended to prevent discrimination based on a person's record or history of certain impairments. Thus, the employee does not have to be presently disabled to be protected.

2. The legislature clarified that the definitions of "physical and mental disability" only require a "limitation" upon major life activity, not a "substantial limitation" as required by the ADA. In addition, employers cannot rely on mitigating measures used by the employee (such as eye glasses or prescription drugs) unless the mitigation itself limits a major life activity.

3. Working is a "major life activity" regardless of whether actual or perceived working limitations implicate a specific position or broad class of employment. Under the ADA, a disability must affect a person's ability to obtain a broad class of employment rather than a specific job.

4. It is illegal to ask current employees about a mental or physical disability unless the inquiry is related to the employee's job.

The California Department of Fair Employment & Housing (DFEH) has recently issued a publication that discusses the changes in the state's disability laws and summarizes what is required by California employers. They have listed two (2) general requirements that employers with five (5) or more employees should take note of.

a. Reasonable accommodation is required for those applicants and employees who because of their disability are unable to perform the essential functions of their job.

b. Employers must engage in a timely, good faith "interactive process" with applicants or employees in need of reasonable accommodation.

Most employers are familiar with the first requirement. Employer obligations to reasonably accommodate extend to making facilities accessible to individuals with disabilities, restructuring jobs, modifying work schedules, buying or modifying equipment, modifying examinations and policies or other accommodations. Whether or not an accommodation is reasonable is decided on a case-by-case basis. It

has recently been held, for example, that employees who are discharged for testing positive for drugs must be considered for rehire if they have been rehabilitated regardless of a company policy that forbids such rehiring.

It has also been held that employers are not required to hire additional personnel to assist an employee in lifting if lifting is an essential part of the employee's job duties.

However, the most misunderstood requirement is the “interactive process.” This interactive process is designed to lead the employer and employee to a reasonable accommodation. Generally, an employer must engage in the interactive process with an employee who has a known disability. The guidelines for the interactive process include consulting with the individual to ascertain the precise job related limitations and how they can be overcome with a reasonable accommodation, identifying potential accommodations and selecting an accommodation.

In deciding what accommodation is reasonable, one is not obligated to simply select the preference of the individual employee. The accommodation implemented should be one that is most appropriate for both the employee and the employer.

The interactive process must also be conducted in “good faith.” This means that the employer and the employee must communicate directly with each other and neither party can delay nor interfere with the process. For example, recent cases have held that employees who refuse an employer's offer to engage in the interactive process waive their right to complain later that a reasonable accommodation was not made. Thus, the interactive process has become a significant part of the process and should be used by employers when faced with accommodation issues.

Employers can refuse to accommodate individuals based on undue hardship, but do so at their peril. Undue hardship can be shown where the accommodation would require significant difficulty or expense when considered in light of the following factors:

1. The nature and cost of the accommodation needed;

2. The overall financial resources of the facilities involved in providing the reasonable accommodation, the number of employees employed at the facility and the effect on expenses or resources or the impact otherwise of these accommodations upon the operation of the facility;

3. The overall financial resources of the employer, the size of its business and the number of locations and facilities;

4. The type of operations, including composition, structure and functions of the workforce; and

5. Geographic separateness, administrative or fiscal relationships of the facility or facilities.

"Undue hardship" is a defense. As such, it can only be considered if the employer has engaged in the interactive process.

Frequently, employers are unaware of their obligations to engage in the interactive process. It should be emphasized that the interactive process requirement is present even if the employer does not receive a specific request from an employee for an accommodation. If an employer is aware that an employee has a disability that impairs their ability to perform the essential functions of their position, the employer may be obligated to reasonably accommodate an employee even if the employee makes no request for accommodation. For example, employers that are covered by the requirements of state disability laws may not be covered by the FMLA. In that case, many employers wrongfully assume that if they do not have fifty (50) employees, they do not have to worry about leaves of absence for employees with injuries and other medical conditions that are disabilities under state law. In such cases, where an employee may need time off for an operation or recovery, it is a reasonable accommodation to provide a leave of absence or a reduced work schedule even if not required by FMLA and even if not specifically requested by the employee. In such cases, an appropriate accommodation can only be arrived at through the interactive process.

With the requirement of the interactive process coupled with the changes in state disability laws, employers will be tested more frequently. Employers should be vigilant in complying with the laws requirements as the penalties for failure to comply are severe.

Written by Michael S. Lavenant, Esq.

DISCIPLINARY DEDUCTIONS FROM EXEMPT SALARY

On May 7, 2002, the Labor Commissioner's office issued an opinion letter, which concerned deductions from an exempt employee's pay for disciplinary reasons. The issue was whether a suspension without pay of an exempt salaried employee voided the exemption.

The Labor Commissioner noted that an employee cannot be fined or penalized for disciplinary infractions in a monetary sense. Therefore, if work is actually performed, the employee must be paid.

However, it is permissible to suspend an exempt employee without pay as long as the following conditions are met:

1. The suspension must be for a complete workweek. Suspending an exempt employee for a partial workweek without pay would violate the salary test. An employer can suspend an exempt employee with pay for less than a full workweek, but that is more like a vacation and would certainly not have the requisite impact.

2. The exempt employee must still receive two (2) times the minimum wage for the month in which the suspension occurs. This salary amount is currently $2340.00 to maintain exempt status. Therefore, employees that make close to double the minimum wage cannot be suspended for complete weeks because they would not receive the monthly salary set forth in the wage orders.

Written by Michael S. Lavenant, Esq.

EMPLOYEES CAN SEEK 203 PENALTIES FOR FAILING TO PAY EXTRA COMPENSATION FOR MISSED MEAL OR REST PERIODS

Labor Code, Section 226.7, which took effect on January 1, 2001, provides extra compensation for employees who do not receive a meal or rest period in accordance with the IWC orders.

Section 226.7 does not specifically designate this extra compensation as a penalty. In a written request, the Labor Commissioner was asked to decide whether or not the extra compensation provided by Labor Code, 226.7 constitutes "wages," and, thus, is subject to Labor Code, Sections 201 and 203. Labor Code, Section 201 requires employers to pay all wages owed at the time of termination if an employee is discharged or within seventy-two (72) hours if an employee resigns without notice. Labor Code, Section 203 provides for a penalty if an employer willfully does pay employees all wages owed at the time of termination. Thus, employers who do not pay the extra compensation for meal periods missed at the time of termination are subject to 203 penalties.

This ruling is significant because it really steps up the amount that an employer could be liable for if they have a number of employees who do not receive meal and rest periods as required by law. Employees can file claims under the Business and Professions Code on behalf of all employees similarly situated and recover such wages and penalties.

In deciding that the extra compensation constitutes wages, the Labor Commissioner compared it with the obligation to pay overtime and found that it was similar. The right to payment for extra compensation is tied to the performance of labor during a particular period of time based on the number of hours already worked in a given workday. In any case, employers should make sure that all employees are provided meal and rest periods as required by the IWC orders.

When paying the one (1) hour additional compensation, it is not counted as "hours worked" for the purposes of calculating overtime pay. For example, if an employee works eight (8) hours and does not receive a meal period, they are entitled to an additional hour of compensation at their regular rate of pay. They are not however considered to have worked nine (9) hours during that day, and, thus, they are not entitled to one (1) hours of overtime compensation. They only receive an hour of straight time.

In this opinion letter, the Labor Commissioner also decided that the statute of limitations for bringing a claim to recover such additional compensation is three (3) years instead of the usual one (1) year statute for penalties.

Written by Michael S. Lavenant, Esq.

ERISA PREEMPTS LABOR CODE SECTION 132A ALLOWING EMPLOYER TO HALT EMPLOYEE'S ERISA REGULATED BENEFITS WITHOUT RISKING A DISCRIMINATION ACTION

California Labor Code section 132a prohibits employers from retaliating or discriminating against employees who have suffered an industrial injury. A series of poorly reasoned Workers' Compensation Appeals Board ("WCAB") decisions in the late 1990s created a standard under which an employer could be held liable under Labor Code section 132a for any detriment suffered by an occupationally injured employee as a result of said injury. In 1997 the WCAB, in *Maraviov v. Tenet Health Systems Hospitals, Inc.*, found that a violation of Labor Code section 132a occurred where the employer stopped paying health benefits on behalf of the employee after twelve weeks of leave taken as a result of the Applicant suffering an occupational injury. The WCAB made this finding despite the fact that all parties conceded such action was in compliance with the employer's benefits policies, and that, pursuant to said policy, the employer stopped paying for health benefits for both industrial and non-industrial leaves after twelve weeks. Further, the WCAB ignored the defendant's position that Labor Code section 132a was preempted by the federal Employee Retirement Income Security Act of 1974 ("ERISA"), whose terms would allow such a termination of benefits.

California employers have been forced to work within this difficult standard established by the WCAB requiring the continuation of ERISA regulated benefits for employees out on leave necessitated by occupational injury. However, in the recently decided *Navarro v. Workers' Compensation Appeals Board*, the WCAB reversed course. In *Navarro*, the WCAB ruled that ERISA does preempt Labor Code section 132a, and thus if an employer discontinues paying for an ERISA regulated benefit pursuant to the terms of an ERISA benefit plan, then no violation of Labor Code section 132a can be found to have occurred.

The *Navarro* decision was silent as to those benefits not regulated by ERISA. As such, those benefits which are not regulated by ERISA may remain subject to the earlier ruling in *Maraviov*. Such benefits most notably include paid vacation and paid sick leave benefits which are paid directly by the employer, and not through a separately funded ERISA benefit plan. However, while the WCAB's position as to these benefits is unclear, an argument can be made that such benefits represent compensation (not unlike wages) and like said earned benefits can be discontinued while the employee is on occupational leave. There is likely to be additional litigation in the upcoming year in this area.

The *Navarro* decision is a huge coup for employers whose welfare and retirement benefit plans are regulated by ERISA. California employers can now take comfort in knowing that the non-discriminatory termination of ERISA regulated benefits pursuant to the employer's benefits policy cannot provide an Applicant the basis for a Labor Code section 132a claim.

Written by Geoffrey D. Taylor, Esq.