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EMPLOYMENT LAW ARTICLES

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TABLE OF CONTENTS

COMPLIANCE WITH CALIFORNIA WAGE ORDER 5-2001

Effective January 1, 2001, the California Industrial Welfare Commission adopted a new Wage Order that applies to the Public Housekeeping Industry. This includes "hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care."

The new Wage Order continues to create controversy and confusion. The purpose of this article is to outline the important portions of the Wage Order as it applies to profit and non-profit organizations in the Public Housekeeping Industry. Of course, this article should not be considered legal advice and each corporation should seek individual legal advice concerning compliance. This article cannot cover all aspects of the new California law and specifically does not address the major concern that employees are properly classified as exempt employees.

Minimum Wage

Effective January 1, 2001, the minimum wage is $6.25 per hour. Effective January 1, 2002, the minimum wage will increase to $6.75 per hour.

The Basic Overtime Rule

Effective January 1, 2000, all overtime was to be paid at the rate of one and one half times the regular hourly wage rate for all time over eight hours in a workday or forty hours in a workweek or on the seventh day of work. All overtime after twelve hours in a day or after eight hours on the seventh day shall be paid at twice the hourly wage rate.

The End of the 54 Hour Rule and the Adoption of the 40 Hour Rule

Significantly, the Industrial Welfare Commission no longer recognizes the fifty-four hour rule which allowed "personal attendants" to be paid overtime only after fifty-four hours in a workweek. In our opinion, the fifty-four hour rule continued until October 1, 2000 when the Industrial Welfare Commission adopted a new Wage Order for the industry.

Effective January 1, 2001, the Industrial Welfare Commission adopted a special rule for "personal attendants" which are defined as "any person employed by a non-profit organization...to supervise, feed or dress a child or person who by reason of advanced age, physical disability or mental deficiency needs supervision." For these non-profit organizations overtime does not have to be paid if (1) the employee is a "personal attendant," (2) the employee has direct responsibility for children under eighteen years of age receiving twenty-four hour care or resident managers of homes for the aged having less than eight beds and (3) the employee is not employed more than forty hours nor more than six days in any workweek. In our opinion, if an organization schedules such employees for forty hours, and not one minute more than forty hours, there is no daily overtime liability if the employee works more than eight hours in a day. As an example, if an employee regularly works forty-one hours, it could be argued that this special forty hour (40) rule does not apply and that daily overtime has to be paid.

The only exception to working more than forty hours is in the case of an emergency and then the employer must pay time and a half. There is no definition of emergency and we do not believe that the California Labor Commissioner will interpret this section in favor of the employer. Emergency should be limited to matters that refer to the resident or client and not cause scheduling problems or other organizational problems. Abuse of the emergency excuse will result in liability. This rule does not require an election.

The New 40 Hour Rule Effective January 1, 2001 for Employees with Responsibility for Children

Effective January 1, 2001 the following overtime rule applies for employees with responsibility for children:

Employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24 hour residential care, may, without violating any provision of this section, be compensated as follows:

(a) An employee who works in excess of 40 hours in a workweek shall be compensated at one and one-half (1½) times the employee's regular rate of pay for all hours over 40 hours in the workweek.

(b) An employee shall be compensated at two (2) times the employee's regular rate of pay for all hours in excess of 48 hours in the workweek.

(c) An employee shall be compensated at two (2) times the employee's regular rate of pay for all hours in excess of 16 in a workday.

(d) No employees shall work more than 24 consecutive hours until said employee receives not less than eight (8) consecutive hours off-duty immediately following the 24 consecutive hours of work. The time spent sleeping shall not be included as hours worked.

The 14\80 Rule

For employers who operate "a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises," there is special rule whereby the employee can be scheduled for eighty hours in fourteen days without incurring any overtime liability. All time after eighty hours must be paid at one and one half times the regular rate of pay. This rule does not require an election.

The Alternative Work Schedule Election Process

There is also the opportunity for an employer to adopt an Alternative Work Schedule by holding meetings, disclosing the impact of the Alternative Work Schedule in writing and conducting an election. An Alternative Work Schedule would allow the employer to pay overtime only after forty hours in a work

week and allow for ten hour or twelve hour days without incurring overtime liability in a workday or workweek. However, the rules are technical and require reporting the results to the Division of Labor Standards Enforcement and, thus, if an organization is considering such an option, legal advice should be sought.

The On Duty Meal

All employees must be given a thirty minute meal period if they work more than five hours. If an employee can finish their shift in six hours, the meal period may be waived by mutual consent. Unless the employee is relieved of all duty during the thirty minute meal period, the time is compensable. An employer that fails to give such a meal period must pay a penalty of one additional hour of pay for each day the meal period was not provided. An on duty meal period shall only be permitted when "the nature of the work prevents an employee from being relieved of all duty and there is written agreement between the employer and the employee." The written agreement must advise the employee of their right to revoke the agreement at any time.

Sleep Time and Personal Time

Employees who reside on the premises need not be paid for sleep time or personal time. However, this is an area of controversy and potential liability and, thus, legal advice should be sought. The basic rule is that employee's sleep time can be deducted for a maximum of eight hours as long as the employee receives at least five hours of uninterrupted sleep and is paid for actual interruptions. Personal time need not be compensated and we believe that the Labor Commissioner will support an agreement between the employer and the employee that bears a reasonable relationship to the duties required and establishes how many hours are considered personal and non compensable. Legal advice concerning such an agreement should be sought.

Record Keeping

Every employer must keep "time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded."

Make up Time

If an employee has a personal obligation that requires them to take time off but wishes to make up that time without being paid overtime, the employee must make the request in writing and make up that time during the same workweek. The employee can work up to eleven hours in any workday to make up that time.

Amendment of Wage Order

There is a significant change in the California Wage Order for those employees with direct responsibilities for children under the age of eighteen (18) in twenty-four (24) hour residential care facilities. The Industrial Welfare Commission will meet on August 24, 2001 to approve the overtime

amendment effective ninety (90) days thereafter. This change is significant and will benefit all residential treatment programs. There are also changes concerning meal and rest periods for twenty-four (24) residential care facilities for children, the elderly, blind or developmentally disabled individuals. Further information will be provided when the amendment is official.

Written by Alfred J. Landegger, Esq.

A WORKERS' COMPENSATION ACTION CAN BE A BLESSING IN DISGUISE

Former employees who file a civil action alleging discrimination or sexual harassment, often commence their lawsuits contemporaneously with a workers' compensation claim. Although it may seem like injury on top of insult for a former employee to file two separate actions in two different venues to recover for the same injuries, it may turn out to be a blessing in disguise. This can occur when the workers' compensation action is resolved through a Compromise and Release, prior to the resolution of the civil action. Under these circumstances, our firm has been successful in having the civil action dismissed by asserting several defenses pertaining to the resolution of the former employee's claims in the workers' compensation action.

The defenses we have used to obtain dismissal of a civil action, where a related workers' compensation action has been settled are Res Judicata, Compromise and Release, and Judicial Estoppel. The defense of Res Judicata prevents a former employee from relitigating in a civil action the same damage claim that was adjudicated in the workers' compensation action. The defense of Compromise and Release bars a former employee from pursuing a civil action against the employer, where the former employee released all claims against the employer in settling the workers' compensation action. Finally, the defense of judicial estoppel prevents a former employee from taking inconsistent positions in two separate lawsuits. As such, a former employee cannot claim that an injury arose in the course and scope of employment for the purposes of recovering in a workers' compensation action, and then claim that the same injury arose outside the course and scope of employment for the purpose of recovering in a subsequent civil action.

Therefore, if a former employee files a civil action against your company for discrimination or harassment, find out if the employee has filed a workers' compensation claim based on the same occurrence and damages. If so, a quick resolution of the workers' compensation claim could result in dismissal of the civil action, thereby saving your company thousands of dollars in attorneys fees.

Written by Larry C. Baron, Esq.

DOCKING THE PAY OF EXEMPT EMPLOYEES

A common question with employers is when, if ever, they can dock an exempt employee's pay for time off of work. The answer is not as clear as employers would hope. However, there is sufficient authority upon which to base a well-thought-out decision on the issues that often arise.

The first step is to evaluate whether or not the employee has been properly classified as an "exempt" employee. The guidelines for this analysis can be found in the particular wage order that is applicable to the employer's industry and the employee's type of work. If the employee should be properly classified as "non-exempt", the employer need only pay the employee for hours actually worked. For exempt employees, the analysis is a little trickier.

Most exempt employees are paid on a salary basis, either weekly, bi-weekly or monthly. Both California law and federal provide that, in general, employees must receive their full salary for any week in which they perform any work without regard to the number of days or hours worked. In other words, an employee who works for one hour on Monday and is absent the rest of the week, for example, should receive his or her full salary. There are exceptions.

Both California law and federal provide that if an exempt employee is out of work for a full day or more for "personal reasons," other than sickness or accident, that employee's salary may be docked. In other words, if an employee needs a full day or more off to take care of car maintenance, for example, that employee's salary may be docked the equivalent of the daily rate for the number of days taken off. "Personal reasons" does not include time off for jury duty, attendance as a witness, or temporary military leave. So, if an exempt employee misses a full day or more of work for jury duty, attendance as a witness, or temporary military leave, but does perform some work during that week, the employer should not dock the employee's salary.

This still leaves the question, though, of whether an employee who is out sick most, but not all, of the week can be docked for the time missed. The answer comes from a review of the California state laws, the federal law, case decisions interpreting those laws, and the California Labor Commissioner's interpretive manual. By reviewing those authorities, it would appear that the dispositive issue is whether the employer has a "bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability." In other words, whether the employer has a sick pay policy. If the employer does have such a policy in place, the employer must pay the exempt employee for the time off until that employee has exhausted his or her accrued sick time. Once the employee has used up all of the "sick pay" or "sick time" allowed to him or her under the employer's policy, the employer may dock that employee's pay for time missed of a full day or more.

If the employer has no sick pay policy, the exempt employee's salary cannot be docked for time missed due to sickness or disability. This application of the law, alone, should inspire employers to have some type of sick pay policy applicable to both exempt and non-exempt employees. Note that exempt employees' salaries should not be docked for time missed of less than one full day of work for any reason.

Written by Heather Appleton, Esq.

NON-COMPETE AGREEMENTS UNDER CALIFORNIA LAW

When it comes to the competing interests of employers and employees, the policy makers in California have generally sided with employees in a number of different contexts, whether in the area of discrimination, wrongful termination, wage-and-hour issues, and so on. Another area in which California law greatly favors the interests of employees over employers is the area of non-compete agreements. Often, employers are concerned that when key employees leave their employment with the company, particularly employees involved in sales and marketing, they may seek to work for a competitor where they may use to their advantage information or contacts that they obtained during the course of their prior employment.

It has been a longstanding policy in California that, except under very limited circumstances, an employer cannot preclude an employee from competing against it. This policy is set forth in Business and Professions Code Section 16600, which states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Increasingly, California courts have been interpreting this statute ever more strictly as time goes by. Lately, there have been two California appellate court decisions which place further limitations on an employer's ability to restrict a former employee from competing against it.

The more recent decision is Advanced Bionics Corp. v. Medtronic, Inc., 2001 Cal.App. LEXIS 218 (March 22, 2001). In that case, the employee had signed a covenant not to compete with his Minnesota employer, Medtronic. The covenant contained a choice of law provision, which stated that the agreement would be governed by the law of Minnesota, which does not prohibit non-compete covenants. The employee eventually quit his job with Medtronic and moved to California where he obtained employment with a competitor of Medtronic. Suit was initiated by the former employer in Minnesota, and by the latter employer in California. Eventually, the matter ended up with the California court, which held that because California's policy prohibiting restraints against competition was such a fundamental public policy of the state, the courts will not enforce out-of-state non-compete covenants.

The other important recent decision in this area is D'Sa v. Playhut (2000) 174 Cal.App.3d 268. In D'Sa, the employer demanded that its employee sign a non-compete agreement that would have precluded the employee from working for a competitor within one year of leaving the company. D'Sa shrewdly refused to sign the agreement, whereupon he was terminated. D'Sa then filed suit against the company for wrongful termination in violation of public policy. The court agreed with D'Sa, finding that terminating an employee for refusing to sign a non-compete agreement violates the public policy of the state, and will give rise to liability for wrongful termination.

Employers should not despair of these decisions because there are measures that employers can take to protect themselves against unfair competition by a former employee. Primarily, California law prohibits the misappropriation of trade secrets. Trade secrets can certainly include customer lists and customer account information so long as the information has economic value because it is not generally known, and the information is the subject of reasonable efforts to maintain its secrecy. If the employer can demonstrate that its information satisfies this criteria, and that the employee has in some way misappropriated this information and used or disclosed it to the disadvantage of the employer, the employer will then have recourse against the employee.

In order to bolster any such claim of trade secrets misappropriation or unfair competition, employers should require their employees to sign agreements in which the employee acknowledges that certain information is proprietary to the employer, and that the employee will maintain the confidentiality of such information. Employers should also secure agreements from their employees wherein the employees agree not to solicit its employees or customers after leaving the employ of the company. Although California law prohibits non-compete agreements, a non-solicitation agreement will likely be upheld if it is narrowly tailored and does not purport to restrain the employee from competing against the employer altogether.

Written by Dean Weinreich, Esq.

HOW TO SUCCESSFULLY NAVIGATE THE DISABILITY MINEFIELD

The recent changes to the disability laws in California have created a seemingly impassable minefield for employers in dealing with "disabled" employees. Not only have the recent amendments opened the proverbial flood gates as to what constitutes a disability in California, but employers face substantial penalties for failing to even meet with employees claiming to be disabled to discuss their limitations and possible accommodations, even when faced with the most questionable of claims. Although the amendments impose numerous duties upon the employer, they are by no means left without a course of action to avoid potential liability in this area.

In addressing a claim of disability by an employee, the employer's natural first reaction is to question the "disability" itself. However, this is not the proper starting place for such claims. First, in such circumstances the employer is usually not given sufficient information by the employee to properly determine whether the employee is truly "disabled" under the statute. Second, with the recent amendments, it is highly doubtful an employer will ever be able to determine whether an employee is "disabled" under the statute. And finally, even if an employer were to make such a determination, the employee's response would most likely be a costly lawsuit claiming disability discrimination, failure to engage in the interactive process and failure to accommodate.

So what is the proper starting point for the employer faced with such a claim? Communication. Like most other relationships we encounter in our lives, open and frank communication is the key. If nothing else, the recent amendments to the disability laws make clear that the focus is on dialogue between the employer and employee. When an employer is faced with an employee claiming to be "disabled," the employer should immediately schedule a meeting with employee. Ask the employee to provide documentation of the disability from a health care provider at the meeting. During the meeting, review the documents provided by the employee and discuss the contents with the employee. Ask the employee what accommodations he believes are needed for him to perform the duties of his job. If you believe the accommodations are not reasonable, raise your concerns with the employee and ask the employee how your concerns might be addressed. Give your suggestions for accommodation to the employee and again discuss them openly with the employee. The employer should conclude the meeting by thanking the employee for coming forward and by assuring the employee his concerns will be considered by the Company and appropriately addressed. After the meeting, the employer should consult with legal counsel and issue a confirming letter or memorandum recounting what was discussed at the meeting, offering possible accommodations for the employee's limitations, and asking the employee for feedback on the suggested accommodations.

Although time-consuming, such steps will reduce the risk of being entangled in a costly disability discrimination suit. Often times, frank and open dialogue will result in a cost-effective accommodation which meets both the needs of the employer and employee.

Written by Frank A. Magnanimo, Esq.

STEPS EVERY EMPLOYER SHOULD TAKE TO PREVENT LIABILITY IN A SEXUAL HARASSMENT LAWSUIT

In today's litigious society, sexual harassment lawsuits continue to flood the court system. Therefore, it is important for employers to be proactive and take the necessary steps to either deter an employee from filing a lawsuit in the first place, or reduce the amount of potential exposure, should an employer be forced to defend a sexual harassment lawsuit.

First and foremost, it is crucial that employers have an anti-harassment policy which (1) provides a definition of sexual harassment, (2) identifies whom employees should contact if they are subjected to sexual harassment, (3) ensures that harassing supervisors can be bypassed in filing complaints, (4) describes the disciplinary measures that the company may use in a harassment case, and (5) provides a statement that retaliation will not be tolerated. Such policy should be distributed to employees upon their first day of work. In addition, employees should be required to acknowledge that they have read and received a copy of the policy and the employee handbook, which should contain a separate statement summarizing the policy.

It is also important for every employer to have an effective complaint procedure policy which advises employees of the proper steps to take in filing a complaint/grievance with the company. Employers should also consider sexual harassment training for all levels of employees, from upper-level management to the lowest-level employee.

Should an employer receive a complaint (either verbally or in writing) from an employee who is alleging that he/she was sexually harassed, it is the employer's responsibility to conduct a prompt, thorough and neutral investigation of the complaint. In order to gather all of the facts, the following individuals should be interviewed: (1) the complaining employee; (2) the alleged harasser; and (3) all other witnesses to the alleged harassment. Detailed notes of the interviews should be taken and every step of the investigation should be thoroughly documented.

An employer also has the legal obligation to take appropriate corrective action to ensure that further harassing conduct does not occur. If it is determined that the alleged harasser violated the employer's sexual harassment policy, remedial action must be taken that is commensurate with the gravity of the behavior, and depending on whether there have been prior sexual harassment complaints against the alleged harasser. Remedial action may include, but is not limited to, the following: verbal warning, written warning, suspension without pay, transfer, demotion, or termination.

Even though an employer cannot prevent an employee from filing a sexual harassment lawsuit, adherence to the above guidelines will put an employer in a more favorable legal position.

Written by Rebecca L. Gombos, Esq.

LABOR CODE SECTION 132a

The California Supreme Court's recent pro-employee decision in *Currie v. Workers' Comp. Appeals Bd.* grants employees the right to collect prejudgment interest on an award of backpay under Labor Code Section 132a. Currie suffered an industrial injury and took a year's leave. At the end of that time his employer ("Employer") terminated him because Currie's leave exceeded the time allowed under his union contract. Currie's doctor thereafter pronounced him fit for work. The Workers' Compensation Appeals Board ("Board") found that the termination was proper, but that Employer discriminated against Currie, in violation of Labor Code Section 132a, by not reinstating him when he recovered and was ready to return to work. Currie was awarded $200,000, plus post judgment interest. The Board found that prejudgment interest was not proper and declined to award it. The court of appeal agreed with the Board, but the California Supreme Court reversed.

The Court found that Section 132a is not subject to any limitation on interest implicit in Labor Code Section 5800 (as Employer had argued,) because awards under 132a are not "compensation" as are awards referred to in Section 5800, but instead are a different remedy—for lost wages—under a different division of the Labor Code. The Court concluded that although Section 132a does not expressly authorize prejudgment interest, Civil Code Section 3287(a) requires such interest on damages due on a particular date, including awards of backpay, when they are certain or capable of being made certain by calculation.

Written by Roxana E. Verano, Esq.

AT-WILL EMPLOYMENT

In California there is a presumption that employment is at-will. The at-will rule is set forth in Labor Code Section 2922 which states, in pertinent part, that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." Because of this rule, an at-will employment relationship can be terminated by the employer or employee at any time, for any reason or no reason, with or without cause, and with or without notice.

The at-will rule, however, is not without exceptions. In fact, Congress, the California Legislature and the courts have imposed limitations on an employer's prerogative to discharge or discipline employees at-will. Accordingly there are exceptions and limitations to the at-will rule, and they are statutory or judicial.

In the area of statutory exceptions, the limited applicability of the at-will rule is apparent in state and federal legislation which prohibits an employer's right to terminate, discipline or discriminate against employees. There is substantial legislation in this areas, including the Fair Employment and Housing Act, Title VII and the Age Discrimination in Employment Act.

In the area of judicial limitations on the application of the at-will rule, there are three main exceptions: (1) wrongful termination in violation of public policy; (2) breach of an express or implied contract; and (3) breach of the covenant of good faith and fair dealing.

Typically, a wrongful termination in violation of public policy is where an adverse employment action occurs which violates a public policy because it was retaliatory, or because an employee refused to participate in an illegal act.

A breach of an express or implied contract is also a limitation to the applicability of the at-will rule. This limitation is due to the existence of a written or oral agreement which states that an employee will be terminated only for cause.

Finally, breach of the covenant of good faith and fair dealing, provides that where there is an employment contract, there is an implied covenant therein to act with good faith and fair dealing.

The at-will employment relationship is a theory of employment law that is widely debated and scrutinized in the context of the above mentioned exceptions and limitations. As such, the issue of whether or not there is an at-will employment relationship in a particular situation, gives rise to a substantial part of wrongful termination law in California.

Written by Heather A. Hinkson, Esq.