

# 2009 California Employer Update

*Presented by*  
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# Statutory and Legislative Changes

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- Expansion of Computer Programmer Professional Exemption from overtime (AB 10)
  - Alternative definitions of who is exempt
  - Lower Earnings Threshold
- New W-4 forms available on IRS website
- Federal minimum wage increasing to \$7.25 per hour effective 7/24/09 (CA remains at \$8 per hour)
- SB 101 prohibits employer from including more than last four digits of employee's social security number or other identification number on itemized statement given at time of payment of wages.

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# AB 650: Earned Income Tax Credit Notice

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- Applies to all companies with California employees
- Notify employees they may be eligible for EITC within one week of providing annual wage summaries
- Hand to employee or mail to last known address
- Notice must contain instructions on obtaining forms from IRS to file for EITC
- Notice must clarify that employees do not risk losing governmental benefits

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# Americans with Disabilities Amendments Act of 2008 (“ADAAA”)

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- Definition of “disability” should be construed in favor of broad coverage of individuals
- Tasks EEOC with promulgating new regulations
- Sets forth a non-exhaustive list of “major life activities,” and an impairment need only substantially limit one major life activity
- “Major Life Activities” include: seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, thinking, working, communicating, etc.

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# Americans with Disabilities Amendments Act of 2008 (“ADAAA”) *(continued)*

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- Drastically expands definition of “regarded as”
  - Individual is “regarded as” disabled if the individual has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.
  - “Regarded as” definition does not apply to impairments that are “transitory and minor” (an actual or expected duration of six months or less).

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# Americans with Disabilities Amendments Act of 2008 (“ADAAA”) *(continued)*

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- Provides safe haven for employers
  - Employer not required to provide a reasonable accommodation to an individual who is covered only under the “regarded as” prong of the Act
- More employees will be deemed “disabled” and qualified for reasonable accommodations and protections from alleged discrimination
- Review current policies
- Train managers about expanded “regarded as” prong

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# Additional Leave under Military & Veterans Code §395.10

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- Requires employers with 25 or more employees to provide 10 days of unpaid leave to eligible spouses of deployed military personnel who are on qualified leave from military duty; integrate with Qualified Exigency Leave under Federal law
- Only employees working an average of 20 or more hours per week are eligible
- Spouse must be deployed to area designated combat zone by President
- Employee must submit written documentation of spouse's official leave

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# Genetic Information Nondiscrimination Act of 2008 (GINA)

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- Forbids insurance companies and employers from discriminating against an individual based on his or her genetic information
  - Genetic information: tests that determine variations in a person's DNA, information regarding family history of a particular disease
- Prohibits employers from collecting genetic information on their employees
- Requires strict confidentiality of genetic information obtained by employers

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# Statutory and Legislative Changes

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- **Labor Code §201.3**

- Temporary employees should be paid at least weekly. If assignment ends during the week, final wages may be paid at next regularly scheduled payday if it falls during the following calendar week.

- **Labor Code §206.5**

- It is unlawful for a company to require, as a condition of receiving a paycheck, an employee to state that the hours recorded on a time card are accurate, if the employer knows the hours are falsely recorded.

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# Statutory and Legislative Changes

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- **E-Verify**
  - Effective 1/15/09, federal contractors with prime contracts for more than 120 days and with a value above \$100,000, and subcontractors who have contracts above \$3,000, are required to use E-Verify program to verify the employment eligibility of applicants.
- **New EEOC guidelines** on religious discrimination and harassment, reasonable accommodations available online at [www.eeoc.gov](http://www.eeoc.gov).

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# Cal-OSHA Heat Illness Regulations

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- Citations and fines issued against employer
- Company fails to provide:
  - Heat illness prevention training
  - Access to shaded areas for recovery periods of no less than five minutes
  - Single-use disposable cups at water station
  - Enough cool, accessible water for each employee to have at least four cups per hour

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# Payroll Debit Cards

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- California Labor Commissioner issued letter 7/7/2008
- Companies may use payroll debit cards if:
  - Participation is optional
  - Employees can still receive pay in form of live check or direct deposit
  - Payroll debit card backed by bank with place of business in California
  - Total amount of funds is accessible to employee on regularly scheduled payday
  - Wage statement is still provided to employee

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# Changes to FMLA/CFRA Regulations

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- Effective January 16, 2009
- Expanded definitions of “serious health condition”
- Clarification on determining eligibility
- Employer now has five days to designate leave as FMLA
- CFRA regulations currently incorporate 1995 FMLA regulations, not 2009 regulations
- Same-sex marriages impact definition of “spouse” under CFRA but not FMLA

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# Protections for Military Families

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- Qualified Exigency Leave available for:
  - Short-notice deployment
  - Military events
  - Deployment related family, school and financial arrangements
  - Counseling
  - Post-deployment activities and recovery
- Military Caregiver Leave
  - Available to provide or participate in care for serious health condition related to military service
  - Expanded coverage of 26 weeks
  - Applies to designated “Next of Kin”

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# Disability: What is a “Disability”

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- *Lonicki v. Sutter*: employer did not need to obtain third medical opinion before asserting employee did not have serious medical condition
- *Gambini v. Total Renal Care*: firing employee for use of profanity caused by bipolar disorder was termination because of a disability in violation of the law

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# Disability: Reasonable Accommodation

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- *Ross v. RagingWire*: employer has no duty under FEHA to accommodate medical marijuana use
- *Wilson v. County of Orange*: employer cannot be held liable for failure to engage in the interactive process where a reasonable accommodation is provided; the interactive process is informal
- *Nadaf-Rahrov v. Neiman Marcus*: Cannot refuse to discuss accommodations with employee unless she presented doctor's release to work ; employee was entitled to a reasonable accommodation if there were other vacant positions, including other stores, had to extend leave if future openings were anticipated

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# *Edwards v. Arthur Andersen*

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- A provision in an employment agreement that even “partially” or “narrowly” restricts an employee from serving customers or competing with former employer is invalid and violates California law
- Release whose waiver does not expressly exclude right to indemnity acceptable because such rights are unwaivable under Labor Code §2804
- Non-competition agreements invalid unless they fall under statutory exceptions (protect trade secrets, or in connection with sale or dissolution of corporations or limited liability companies)
- Valid release must contain “magic language” in California

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## *Mitri v. Arnel Management Co.*

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- Where Employee Handbook stated that signing an arbitration agreement was a condition of employment, but the employer could not produce a signed arbitration agreement, the employer's motion to compel arbitration was denied.
- A handbook's reference to arbitration, without an actual signed agreement, is insufficient to force employees to arbitrate their claims.

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## *Sprint v. Mendelsohn*

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- In age discrimination suit, Court of Appeals held that “me too” evidence admissible on case-by-case basis but should be excluded where different supervisors and events were not in “temporal proximity” with the facts giving rise to the plaintiff’s claims.
- U.S. Supreme Court vacated the Court of Appeals’ opinion and remanded the case.
- Question of admissibility of “me too” evidence is still unresolved.

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## *Lukovsky & Zoloratev v. San Francisco*

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- Job applicants sued claiming defendants gave preferential treatment to Asian and Filipino workers
- Claims accrued at time they received notice that they would not be hired, rather than when they suspected there was a discriminatory motive
- In absence of active concealment of discrimination by employer, one-year statute of limitations applies from date of adverse employment action, even if unaware of racial preferences in hiring until years later

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# Individual Liability of Managers

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- *Jones v. Lodge at Torrey-Pines*: non-employer individuals cannot be personally liable for retaliation under the FEHA.
- *Bradstreet v. Wong*: owners, officers, and managers were not employers and had no personal liability for earned wages and accrued vacation pay owed to employees when company went out of business.

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## *Harvey v. Sybase*

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- Employer argued it was entitled to judgment because the same person who terminated the plaintiff employee had previously hired and promoted her.
- Court disagreed – although there was “same-actor evidence,” there was also substantial evidence that the supervisor had formed the intent to make race- and gender-based personnel decision.
- “Same-actor” evidence is not a rule or presumption.

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# Employees' Expectation of Privacy

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- *Quon v. Arch Wireless*: under the Stored Communications Act, employee text messages are protected from unreasonable search and seizure by employer even though two-way pager and account were paid for by the public employer.

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# Record Keeping

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- *Alch v. Superior Court*: television writers in class action issued third party subpoenas to get information to support age discrimination claim; relevance of the requested information outweighed the third party's privacy interests
- *EEOC v. FedEx*: EEOC retains authority to issue an administrative subpoena against an employer even after the charging party receives a right-to-sue notice and after he initiates a private lawsuit
- Best practice: maintain payroll records for 3 years

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# Wage and Hour Issues

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- *City of Oakland v. Hassey*: City permitted to seek reimbursement for training from police officers who did not stay with the force long enough for the city to benefit from the officer's training; but withholding final paycheck to recover debt violated the FLSA
- *Schachter v. Citigroup*: incentive compensation plan where employee used portion of annual earnings to purchase stock, but lost stock and funds used to purchase it if quit or was terminated before vesting did not violate Labor Code

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## Wage and Hour Issues *(continued)*

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- *Gonzalez v. Beck*: when employer does not appear at labor commissioner hearing and judgment is entered, employer cannot seek relief in Superior Court
- *Brewer v. Premier Golf Properties*: employee cannot recover punitive damages in an action for violation of Labor Code provisions on meal and rest breaks, pay stubs and minimum wages
- *Sullivan v. Oracle*: non-California residents who work for a California employer entitled to receive overtime for work performed in the state

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## Wage and Hour Issues *(continued)*

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- *Advanced Tech Security Services v. Roman*: under Labor Code §510 an employer who pays time-and-a-half for work performed on holidays need not pay additional overtime payments based upon the holiday time worked
- *Brinkley v. Public Storage*: employer cannot be liable for misstatements on pay stubs unless knowingly and intentionally made and employee suffers injury as a result

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# Meal Periods and Rest Breaks

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- *Brinker Restaurant Corp. v. Superior Court*: Labor Code only requires employer to provide employees with meal periods and rest breaks in which they perform no work and not to dissuade or deter employees from taking them; but employer is not responsible for ensuring that the employees actually take those breaks.
- CA Supreme Court has granted review. DLSE is complying with *Brinker* in the meantime and has asked court to resolve this issue.

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# Workers' Compensation

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- *Chin v. Namvar*: Chin, who had let his contractor's license expire, was injured on the job. Court rejected his claim that the lack of such license was evidence that he was an employee rather than an independent contractor.
- *Tomlin v. WCAB*: SWAT team officer was permitted to make claim for injury sustained while running on vacation, because he was training for upcoming mandatory departmental physical fitness test.

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# Preventing Workplace Violence

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- *Franklin v. Manadnock*: Labor Code §6310 protects employee from termination after he makes good faith complaints of co-worker's threat to have him killed.
- *deVillers v. County of San Diego*: County employer was not directly or vicariously liable when employee murdered her husband. Employer had no duty to protect against criminal attacks even though access to the “weapon” (drugs) was provided by the workplace.

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# No-Match Letters

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- *Aramark v. SEIU*: Ninth Circuit upheld arbitrator's decision to overturn termination based on no-match letters and employee's failure to correct them within a reasonable time.
- *Status of No-Match Letters*: Department of Homeland Security has submitted revised regulations to the court for review; Department of Justice has asked that the injunction be dissolved.

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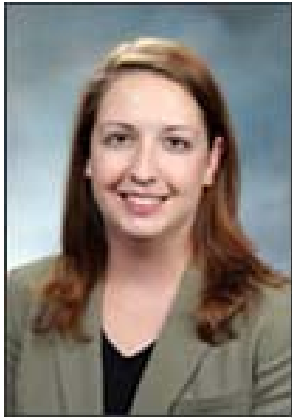
Ms. Hayashi has over twenty-five years experience representing and advising Silicon Valley employers in employment and business litigation. She has trial experience in wrongful termination, discrimination, and misappropriation of trade secrets and proprietary information actions in both state and federal court. In June 2003, she was named one of the "Top 50 Women Litigators" in California by The Daily Journal.

She is a frequent speaker on employment law and legal ethics. She is a faculty member at Lincoln Law School on employment law, past president of the Santa Clara County Bar Association and the Law Foundation of Silicon Valley, and a member of the Santa Clara County Superior Court, Alternative Dispute Resolution Committee and Bench/Bar/Media/Police Committee.

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# Kara L. Erdodi

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Ms. Erdodi represents individuals and businesses in employment and general litigation, including wrongful termination, unfair competition, misappropriation of trade secrets, and discrimination. Ms. Erdodi has experience litigating and representing employers before the Labor Commissioner on issues including unpaid overtime and vacation. She advises and counsels on employee classification, leaves of absence, wage and hour law, and reduction in force.

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**2009 California  
Employer Update**

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## 2009 California Employer Update

### STATUTORY/LEGISLATIVE UPDATES<sup>1</sup>

#### AB 10 Revisions to Computer Programmer Professional Exemption

Prior to the enactment of AB 10, all of the following were required for the computer professional exemption in that the employee had to be: (1) engaged in work that was intellectual, creative and required discretion and independent judgment; (2) primarily engaged in duties consisting of one or more of the following: (a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications, (b) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications, or (c) the documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems; (3) highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering; (4) receives \$36.00 per hour or “the annualized full-time salary equivalent of that rate, provided that all other requirements of this section are met, and that in each workweek the employee receives not less than thirty-six dollars (\$36.00) per hour worked.”

Each of the former provisions remains in effect, with minor yet important modifications. First, the duties have been modified under Labor Code §515.5(1)-(3). Item number 3 has been changed from a conjunctive requirement (...systems analysis, programming and software engineering) to a disjunctive requirement (...systems analysis, programming **or** software engineering), thereby increasing the number of computer professionals eligible for overtime exemption than allowed under the prior interpretation. Second, compensation has been modified under Labor Code §515.5(4). Item number 4 is now clarified to exempt computer professionals paid an annual salary of \$75,000 or greater, or at a rate of at least \$6,350 per month rather than the more restrictive prior interpretation, which resulted in elimination of exemption status based upon overtime pay, which resulted in a rate of less than \$36 per hour. This dramatically streamlines the recordkeeping process and reduces the risk of potential lawsuits arising from employees who worked more than 40 hours in one week causing the hourly compensation rate to drop below the \$36 per hour level. Effective immediately, computer professionals may be exempt from overtime if they earn \$36 per hour or an annual salary of \$75,000 (or greater) for full-time employment paid in monthly amounts of not less than 1/12<sup>th</sup> their annual salary.

In addition to expanding the current definition of overtime exempt computer professionals and providing much-needed clarification to wage guidelines, AB 10 reduces administrative burdens since employers are no longer required to maintain hourly time records for salaried computer professionals.

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<sup>1</sup> The materials presented here provide a selective, informational summary only and do not cover all aspects of all legislation or cases that affect the employment relationship. They do not include all information necessary to evaluate any specific case. They are not intended as legal advice or as legal treatises and should not be relied on as such.

### **AB 1825 Final Regulations**

The Fair Employment and Housing Commission Regulations (CCR, Title 2, section 7288.0) have clarified AB 1825 (Gov. Code §12950.1). Employers with 50 or more employees are required to have its supervisors participate in two hours of interactive training on the prevention of sexual harassment in the workplace once every two years, or within six months of the hiring of a new supervisor.

### **AB 632 Health Care Whistleblower**

AB 632 amends Health & Safety Code 1278.5, a whistleblower protection originally intended for patients and healthcare facility employees. The legislation will make it easier for physicians who are subject to medical staff discipline to challenge that process without first exhausting administrative remedies. Among other consequences, it appears that in certain circumstances, physicians will be able to pursue a retaliation lawsuit while a peer review hearing is pending, something that until now was extraordinarily difficult for them to do.

AB 632 prohibits health facilities from discriminating or retaliating against a medical staff member because he or she has: (1) “presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity;” or (2) “initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.”

### **AB 650 EITC Notice**

AB 650 requires employers to notify employees that they may be eligible for the federal EITC within one week of providing the employees their annual wage summaries. The notice must either be handed directly to the employee or mailed to the employee’s last known address. AB 650 provides recommended language for the notice and requires that the notice contain instructions on how to obtain any notices made available from the Internal Revenue Service for the purpose of obtaining the necessary forms to file for the EITC; the notice must clarify that those who received the EITC do not necessarily jeopardize governmental benefits, such as Medicare and Temporary Assistance for Needy Families (“TANF”) payments. Finally, the bill requires that every employer process, at the request of the employee and in accordance with federal law, the Form W-5 for the advance payment of the EITC. The requirements of AB 650 apply to all companies that have employees in California.

### **SB 101 Social Security Number Protections**

This law prohibits an employer from including more than the last four digits of an employee’s social security number or other identification number on the employee’s itemized statement furnished at the time of payment of wages to the employee.

## **AB 1298 Expansion of Breach Notification Law**

AB 1298 will add “health information” and “medical insurance information” to the categories of “personal information” protected by the California Confidentiality of Medical Information Act. “Health information” includes “any information regarding an individual’s medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional.” “Medical insurance information” includes “an individual’s health insurance policy number or subscriber information number, any unique identifier used by a health insurer to identify the individual, or any information in the individual’s application and claims history, including any appeals.” These provisions do not apply just to medical providers, but to any business which maintains computerized employee benefits or other health data.

AB 1298 also expands the CMIA to provide that any business maintaining medical information for use by individuals or health care providers in managing that information or receiving or providing medical diagnoses or treatments is subject to the general requirements imposed on “providers or health care” by the CMIA. This amendment subjects such businesses to the civil and criminal penalties prescribed by the CMIA for improper uses and disclosures of medical information.

## **Amendments to FMLA**

On November 17, 2008, the U.S. Department of Labor issued its long-awaited final revisions to the regulations that implement the Family Medical Leave Act (FMLA). The final regulations take effect January 16, 2009. Some of the changes include:

*Serious Health Conditions.* The final regulations maintain the six definitions of “serious health condition” and elaborate. For leave involving incapacity of more than three consecutive, full calendar days, the employee must receive two treatments by a health care provider within 30 days of the first day of incapacity or one treatment that results in a regimen of continuing treatment, with the first treatment in either case occurring in the first seven days. In the case of chronic serious health conditions, at least two visits to a health care provider per year are required.

*Eligibility.* The final regulations clarify how to count employees’ past service toward the requirement that they be employed by the covered employer for at least 12 months, since the 12 months of service are not required to be consecutive. Under the final regulations, any employment before a break in service of seven years or more is not counted. There are exceptions for military service and certain rehire agreements.

*Intermittent Leave.* The final regulations allow employers to limit leave to the shortest increment of time used to account for absences or leaves, provided that increment is one hour or less.

*Designation Notice.* Employers now have five days within which to obtain enough information to determine whether leave is being taken for an FMLA-qualifying reason and use this notice to tell the employee whether the leave will count as FMLA leave, rather than two days.

## **Additional Protections for Members of the Military and Their Families**

In 2008, Congress passed the National Defense Authorization Act, which provides for two new types of workplace leave to protect members of the military and their families: Qualified Exigency Leave and Military Caregiver Leave. The new FMLA regulations address both types of leave.

Qualified Exigency L provides that FMLA leave is available if a spouse, son, daughter or parent is called to active duty or deployed and time away from work is needed due to:

- Deployment on seven days (or less) notice; leave for this purpose can be used for up to seven calendar days;
- Military events (e.g. deployment or returning soldier events)
- Childcare or school arrangements
- Financial and legal arrangements
- Counseling for the military member, or his/her child, or for the employee
- To spend time with a recuperating soldier
- Post-Deployment activities including funeral and burial arrangements.

Military Caregiver Leave of up to 26 weeks in 12 month period is now available to designated next of kin, as well as spouses, children and parents, of members of the military who are injured in the line of duty. This leave is coordinated with FMLA leave (not given in addition to FMLA leave). “Next of Kin” may be a blood relative beyond just a parent or child. A servicemember can designate only one next of kin.

## **CFRA Regulations**

The new FMLA regulations also affect the California Family Rights Act (CFRA). The California Fair Employment and Housing Commission is responsible for promulgating CRFA regulations, and with a few exceptions, has incorporated by reference the FMLA regulations to the extent the federal regulations are not consistent with California law. The CFRA regulations currently in effect require compliance with the FMLA regulations issued in 1995. As of January 16, 2009, California employers attempting to administer leaves running concurrently between the FMLA and CFRA may have to decide whether to continue to follow the 1995 regulations as specified in the CFRA regulations, or to follow the 2009 regulations and ignore the FEHC’s reference to the 1995 regulations.

## **ADAAA Changes**

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (the “ADAAA”), which expands the scope of The Americans with Disabilities Act (the “ADA”) coverage for cases arising on or after January 1, 2009. In enacting the ADAAA, Congress

expressly overturned several U.S. Supreme Court cases that limited the physical and mental problems that rise to the level of a “disability” under the ADA. In passing the ADAAA, Congress also had a primary objective of changing the focus of ADA claims from whether or not a person’s impairment rises to the level of a disability, to the employment actions at issue and whether or not the employer complied with its obligations.

The ADA defines a “disability” as a physical or mental impairment that substantially limits a major life activity of an individual. Several U.S. Supreme Court cases have narrowly construed this definition and have interpreted “substantially limits” to mean “prevents or severely restricts.” While the ADAAA does not alter the statutory definition of disability, the ADAAA rejects the Supreme Court’s interpretation of “substantially limits.” The ADAAA states that the definition of disability should be construed in favor of broad coverage of individuals. The ADAAA also makes clear that Congress intended to apply a less demanding standard than that applied in the courts. Finally, the ADAAA tasks the Equal Employment Opportunity Commissions (the “EEOC”) with promulgating new regulations regarding the definition of a “disability,” consistent with the ADAAA.

The U.S. Supreme Court narrowed the group of people covered by the ADA by ruling that mitigating measures, such as medication or devices, are to be taken into account in determining whether or not a person is substantially limited in a major life activity. The ADAAA provides that the ameliorative effects of mitigating measures are not to be considered in determining whether an individual has an impairment that substantially limits a major life activity. However, the ADAAA carves out an exception for “ordinary eyeglasses or contact lenses” that are “intended to fully correct visual acuity or eliminate refractive error,” which shall be considered in determining whether an impairment substantially limits a major life activity.

The U.S. Supreme Court had held that a “major life activity” under the ADA, is an activity that is “of central importance to most people’s daily lives.” The ADAAA sets forth a non-exhaustive list of major life activities. The lists of major life activities includes: caring for one’s self; performing manual tasks; seeing; hearing; eating; sleeping; walking; standing; lifting; bending; speaking; breathing; learning; reading; concentrating; thinking; communicating; working; and major bodily functions including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The ADAAA also clarifies that an impairment need only substantially limit one major life activity. Further, under the ADAAA an impairment that is episodic or in remission is a disability if the impairment would substantially limit a major life activity when the impairment is active.

Under the ADA and previous case law, an individual was “regarded as” disabled if the individual could show that the employer perceived the individual as having a substantially limiting impairment. The ADAAA drastically expands the definition of “regarded as.” The ADAAA states that an individual is “regarded as” disabled if the individual “has been subjected to an action that is prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” The ADAAA does note, however, the “regarded as” definition does not apply to impairments

that are transitory and minor. The ADAAA defines transitory as an actual or expected duration of six months or less.

In addition, the ADAAA provides a safe haven for employers by further stating that an employer is not required to provide a reasonable accommodation to an individual who is covered only under the “regarded as” prong of the Act. Therefore, the newly expanded “regarded as” definition will likely be of most significance in cases where an adverse employment action has actually occurred.

The overall effect of the ADAAA will be that, under federal law, more employees will be deemed to be “disabled” and will qualify for reasonable accommodations and protections from alleged discrimination. This will likely give rise to an increase in the number of disability discrimination lawsuits under federal law. In addition, it is likely that the focus of ADA litigation will move from whether or not an individual meets the definition of “disabled” toward the questions surrounding the employer’s actions and the motivation for such actions.

Employers in California with five or more employees are subject to the California Fair Employment and Housing Act (the “FEHA”), which has historically provided broader protections to California workers than the ADA. Under the FEHA, disability is defined as an impairment that limits a major life activity. Unlike the ADA and ADAAA, no *substantial* limitation is required. According to California Government Code § 12926, a mental or psychological disorder or condition or physical disability limits a major life activity if it makes the achievement of the major life activity difficult and “limits” are to be determined without regard to mitigating measures. Further, major life activities are to be construed broadly and include physical, mental and social activities and working. Therefore, the passage of the ADAAA with the expanded definitions of disability and major life activity, and the admonition that mitigating factors shall not be considered in whether or not an impairment rises to a disability should not change California employers’ obligations. California employers should, however, monitor the promulgation of regulations and court decisions under the new ADAAA. Should such regulations and decisions further expand the protections afforded to individuals, employers should explore whether those regulations and decisions have broadened the protections beyond those required by the FEHA.

It appears likely that the ADAAA may provide broader protections for individuals than the FEHA in “regarded as” cases. As discussed above, under the “regarded as” prong of the ADAAA an individual is “regarded as” disabled if the individual “has been subjected to an action that is prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” Under the FEHA, an individual is “regarded as” disabled if that individual is perceived to be limited in a major life activity. Thus, the ADAAA could prove to require greater protections for individuals because the impairment does not have to limit a major life activity. However, as noted above, under the ADAAA employers need not provide reasonable accommodations to employees who are only covered under the “regarded as” prong making the expanded “regarded as” coverage most significant in cases where an adverse job action has occurred.

Assuming that the ADAAA provides more protection for individuals under the “regarded as” prong than the FEHA, California employers will be required to follow the ADAAA on that

issue. To avoid an increase in the number of “regarded as” claims, to the extent possible, employers should attempt to shield employment decision makers from medical, health, workers’ compensation, family and medical leave, and other similar personal information about employees to avoid the implication that an employee was subjected to a prohibited action because of a perceived physical or mental impairment. Decision makers should also be trained about their responsibility to base employment decisions on legitimate factors other than a perception of mental or physical impairment.

Employers should review their current policies and practices to ensure that they are in compliance with the ADAAA by January 1, 2009. California employers already in compliance with the FEHA should train managers and employment action decision makers about the expanded coverage for individuals under the “regarded as” prong in adverse employment action cases.

Employers should expect that regulations and case law interpreting the ADAAA will be promulgated. Employers should also monitor the regulations and case law that will be forthcoming under the ADAAA. If the regulations and case law further expand the protections afforded to impaired individuals, employers will need to ensure that their policies and practices remain in compliance with the current interpretations of the new ADAAA.

### **New W-4 Forms**

The Internal Revenue Service has new W-4 forms for use beginning January 1, 2009. These forms are available for download at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>.

### **Federal Minimum Wage Increase July 2009**

Effective July 24, 2009, the federal minimum wage will increase from \$6.55 per hour to \$7.25 per hour. California’s minimum wage remains at \$8.00 per hour.

### **Additional Leave under Military & Veterans Code §395.10**

On October 9, 2007, Governor Schwarzenegger signed into law a bill which creates an additional leave of absence right for spouses of military personnel. The new law, California Military & Veterans Code §395.10, was designated as emergency legislation and went into effect immediately upon signing. It requires covered employers (those with 25 or more employees) to provide up to 10 days of unpaid leave to eligible spouses of deployed military personnel who are on qualified leave from military duty.

Only those employees who work an average of 20 or more hours per week are eligible for the leave. Spouses must be qualified members of the United States Armed Forces, National Guard or Reserves who are deployed during a period of military conflict to an area designated as a combat theater or combat zone by the President. Eligible employees must notify employers of their intention to take leave within two business days of receiving official notice that the military spouse will be on leave from deployment. The employee also must submit written documentation certifying that the spouse will be on official leave from deployment during the time the employee is requesting leave. The unpaid leave may only be taken during a period of military conflict, defined as a period of war declared by Congress, or a period of deployment for

which a member of a reserve component is ordered to active duty. Taking leave under Section 395.10 does not affect an employee's right to other leave or benefits to which the employee is otherwise entitled.

### **Lily Ledbetter Equal Pay Act of 2007**

This bill, which was introduced after the decision in *Ledbetter v. Goodyear Tire & Rubber*, was intended to amend Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time such compensation is paid pursuant to the discriminatory compensation decision or other practice, rather than only the first time. The bill passed the House of Representatives on July 31, 2007, but had not been voted upon by the U.S. Senate at the close of the last two sessions, and so was cleared from the books. Hearings on this subject took place in September 2008, and it is possible that it could be reintroduced or that similar legislation will be passed later.

### **Genetic Information Nondiscrimination Act of 2008**

On May 21, 2008, President Bush signed into law a bill forbidding insurance companies and employers from discriminating against an individual based on his or her genetic information. Advocates of the Genetic Information Nondiscrimination Act (the "GINA"), contend that it is "the first major civil rights act of the 21st century." The provisions of GINA applicable to employers will take effect on November 21, 2009; however, the provisions governing insurance companies take effect in May 2009.

GINA expands Title VII, which already bans discrimination by race and gender, to prohibit employers from discriminating against employees on the basis of "genetic information" in hiring, firing, and other activities. "Genetic information," for the law's purposes, not only includes tests that determine variations in a person's DNA, but also information regarding family history of a particular disease. GINA also prohibits employers from collecting genetic information from their employees, except for rare circumstances such as testing for adverse effects to hazardous workplace exposures, and requires strict confidentiality of genetic information obtained by employers. GINA grants employees and individuals remedies similar to those provided under Title VII and other nondiscrimination laws, i.e., compensatory and punitive damages. It also provides that no person shall retaliate against an individual for opposing an act or practice made unlawful by GINA. Currently, GINA does not prohibit discrimination once someone already has a disease.

### **Labor Code §201.3: Weekly Payments to Temporary Workers**

Effective January 1, 2009, Labor Code §201.3 clarifies the payment of wages to temporary employees. Temporary employees should be paid at least weekly. If the assignment ends during the week, final wages are not due to the temporary employee on the last day of work, but may be made at the next regularly scheduled payday provided that it occurs during the following calendar week. Any employee who is hired for the day (whether directly or through an agency) must be paid at the end of each workday.

## **Labor Code §206.5: No certification by employee required as a condition to receiving paycheck if employer knows hours are falsely recorded**

Effective January 1, 2009, Labor Code §206.5 will be amended to make it unlawful for a company to require, as a condition to receive a paycheck, an employee to state that the hours recorded on a time sheet or time card are accurate, if in fact the employer knows that the hours are falsely recorded.

## **ADMINISTRATIVE DEVELOPMENTS**

### **E-Verify**

Effective January 15, 2009, federal contractors with prime contracts for more than 120 days and which have a value above \$100,000, and their subcontractors who have contracts for more than \$3,000, are required to use the federal government's E-Verify program, created by Executive Order 12989. E-Verify is a program to verify the employment eligibility of applicants. The U.S. Citizenship and Immigration Services reported that 92,000 employers are currently using the program and approximately 6.6 million employment queries were run during FY 2008.

### **New EEOC Guidelines on Religious Discrimination and Harassment under Title VII**

The new EEOC guidelines do not alter an employer's responsibility to provide a workplace free of discrimination and harassment on the basis of religion under Title VII, but clarifies the EEOC's position on religious discrimination and harassment. The following points were confirmed: (1) The definition of "religion" is broad and covers traditional, theistic concepts as well as non-theistic – but sincerely held – moral and ethical beliefs about right and wrong; (2) The prohibition on religious discrimination applies to all aspects of the workplace, including recruitment, hiring, promotion, discipline, scheduling, compensation and termination; and (3) Unlike other Title VII categories, employers must reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so imposes an "undue hardship."

Further, the EEOC simultaneously set forth a number of "best practices" for employers on the topic of religious discrimination and harassment. The list includes (1) making sure the employer's anti-harassment policy covers religion; (2) training managers to recognize and deal with religious harassment or discrimination; (3) exploring various options to reasonably accommodate religious beliefs or practices; and (4) consider offering flexible schedules or a system of voluntary substitutes or swaps to reduce conflicts between religious practices and work schedules. To view the complete text of the EEOC's guidelines and recommendations, go to [http://eeoc.gov/docs/best\\_practices\\_religion.html](http://eeoc.gov/docs/best_practices_religion.html).

### **New EEOC Guidelines on Reasonable Accommodations, Job Performance and Accommodations to Meet a Performance or Production Standard**

The EEOC explains that an employer can hold disabled and nondisabled employees to the same quantitative and qualitative requirements for performing a job's essential functions. The same goes for production standards. However, a reasonable accommodation might be required to assist a disabled employee in meeting a performance or production standard. Ideally, employees

will request a reasonable accommodation before performance problems arise, but often the first time an employee requests a reasonable accommodation is after a problem has occurred. In such a situation, the ADA doesn't require an employer to tolerate or excuse the poor performance, withhold or rescind disciplinary action, or raise a performance rating. However, once the employer knows that a reasonable accommodation is required, it should engage in the interactive process with the employee to determine which type of accommodation will help him or her meet the performance or production standards going forward. Regarding conduct issues, the EEOC says that an employer can discipline an employee with a disability for violating a conduct standard. This is true even if the disability caused the violation (such as if a bipolar disability causes the person to yell at a coworker) as long as the conduct rule being enforced is job-related and consistent with business necessity, and other employees are held to the same standard. Read more about these guidelines at [www.eeoc.gov/facts/performance-conduct/html](http://www.eeoc.gov/facts/performance-conduct/html).

### **Governor Schwarzenegger's Joint Task Force Auditing Automotive Repair Industry**

In the summer of 2008, Governor Schwarzenegger put together a coalition consisting of representatives from the Department of Labor Standards Enforcement (DLSE), Cal-OSHA, and the Bureau of Automotive Repair (BAR). The joint task force immediately began arriving unannounced at automotive repair operations in California to conduct inspections of the site, interview employees, and inspect payroll records, licenses, workers' compensation and other employment documentation.

### **Cal-OSHA's Heat Illness Regulations & Increased Enforcement/Fines under 8 CCR 3395**

Following the death of an employee of Merced Farm Labor Contractor ("Merced FLC") who had been working in a San Joaquin County vineyard for nine hours with little water and no access to shade, Cal/OSHA began investigating agricultural companies to ensure that they are providing a safe and healthful workplace for their employees.

Cal/OSHA issued citations and fines of \$262,700 against Merced FLC – the largest assessed to an agricultural firm since the permanent heat illness prevention regulations were implemented in 2006 – and ordered Merced FLC not to operate until it can prove it is in compliance with the heat regulations. Citations were issued for failure to provide heat illness prevention training to employees and supervisors, failure to provide access to a shaded area for recovery periods of no less than five minutes, and failure to have procedures in place to respond to medical emergencies. Citations were further issued for failure to provide single-use disposable cups at water stations, failure to fully implement an illness and injury prevention program, failure to have written procedures for complying with heat illness prevention requirements, and failure to maintain a properly equipped first aid kit at the worksite. Under California law, employers are required to have a written heat illness prevention program, train all employees and supervisors about the dangers of heat illness, and provide adequate and access to shade and enough cool, accessible water for each employee to drink at least four cups per hour.

In 2008, Cal-OSHA:

- Conducted 611 heat illness seminars compared to 284 for all of 2007.

- Exceeded the number of heat illness prevention inspections, with 1105 heat-related inspections to date in 2008 compared to 1,018 for all of 2007.
- Issued 459 citations since the summer began, primarily for failing to have written heat illness prevention plans. During heat waves, special compliance teams are dispatched to outdoor work sites to ensure workers are being properly protected.
- Partnered with California growers to jointly conduct supplemental heat illness training sessions for farm labor contractors, and partnered with the California Department of Education's Migrant Education Program statewide to educate students and their families about heat stress and their rights.

### **Payroll Debit Card Program**

On July 7, 2008, the California Labor Commissioner's office issued an opinion letter which allows companies to utilize payroll debit cards as one alternative manner with which to pay their employees. There are some requirements that must be met with a payroll debit card policy:

- Participation in the payroll debit card program must be optional. Employees must still be able to receive their pay in the form of a live check or through direct deposit;
- The payroll debit card must be backed by a bank which has a place of business in California;
- The total amount of the funds must be accessible to the employee on the regularly scheduled payday and must have access to one transaction per pay period without being charged any fees to access the funds. The employer must allow employees access to the funds for a minimum of 30 days following the payday; and
- A wage statement, either printed or electronic, must still be provided to the employee.

### **CASE LAW**

#### **Discrimination**

##### **Age**

*Meacham v. Knolls Atomic Power Labs* (2<sup>nd</sup> DCA 2004) 381 F.3d 56.

When the federal government ordered its contractor, Knolls, to reduce its work force, Knolls had its managers score their subordinates on "performance, flexibility, and critical skills." These scores, along with points for years of service, were used to determine who was laid off. Of the 31 employees let go, 30 were at least 40 years old. Meacham and others filed a disparate impact claim under the Age Discrimination in Employment Act of 1967 (ADEA). To show such an impact, Meacham relied on a statistical expert's testimony that results so skewed according to age could rarely occur by chance, and that scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. The court held that an employer defending a disparate-impact claim under the ADEA bears both

the burden of production and the burden of persuasion for the “reasonable factors other than age” affirmative defense.

## **Retaliation**

*CBOCS West v. Humphries* (06-1431, decided May 27, 2008).

Claiming that CBOCS West dismissed him because he is African-American and because he complained to managers that an African-American co-employee was also dismissed for race-based reasons, Humphries filed suit charging that CBOCS’ actions violated both Title VII and 42 USC §1981. The District Court dismissed the Title VII claims for failure to timely pay filing fees and granted CBOCS summary judgment on the §1981 claims. The Seventh Circuit affirmed on the direct discrimination claims, but remanded for a trial on Humphries’ §1981 retaliation claim, rejecting CBOCS’ argument that §1981 did not encompass a retaliation claim. The U.S. Supreme Court held that §1981 encompasses retaliation claims.

*Gomez v. Potter* (06-1321, decided May 27, 2008).

Gomez-Perez, a 45-year-old postal worker, filed suit claiming her employer had violated the federal-sector provision of the ADEA (29 USC 633a) by subjecting her to various forms of retaliation after she filed an administrative ADEA complaint. The district court granted Potter summary judgment and the First Circuit affirmed on the basis that 29 USC 633a’s prohibition of “discrimination based on age” does not cover retaliation. The U.S. Supreme Court held that Section 633(a) prohibits retaliation against a federal employee who complains of age discrimination.

## **Disability**

*Avila v. Continental Airlines* (2008) 165 Cal.App.4<sup>th</sup> 1237.

Avila made claims that he was discharged from his employment in violation of FEHA, CFRA and public policy. Avila was hospitalized for acute pancreatitis and missed four days of work. When he returned to work, he produced two medical forms from Kaiser establishing that he had been hospitalized. He told his friends that he had been sick, but did not talk to his supervisors. He was charged two recordable absences for his illness and recuperation, bringing his total number of recorded absences to six for the relevant 12-month period. The following month, plaintiff incurred another recordable absence. He was then terminated for being absent seven times in the preceding 12 months. The Court of Appeal held that there were triable issues of fact as to whether plaintiff submitted material to Continental that constituted a request for CFRA-qualifying leave. Although the forms plaintiff submitted to Continental documenting his hospitalization were insufficient to put Continental on notice that he was disabled for purposes of FEHA, they could suggest that plaintiff had suffered a “serious medical condition” as defined in CFRA and could be viewed as a request for leave under CFRA. If, as plaintiff’s evidence shows, he was terminated because of absences for a period that was subject to a request for CFRA leave, plaintiff has a CFRA claim.

*Lonicki v. Sutter* (2008) 43 Cal.4<sup>th</sup> 201.

The employee requested medical leave from a full-time job because of major depression and work-related stress. She obtained medical authorization for her absence. An occupational health physician chosen by the employer reported that the employee could return to work without

restrictions. The employer then instructed the employee to return to work and terminated her when she did not do so. The employer moved for summary judgment, arguing that the employee had found a part-time job elsewhere, which involved similar duties, during the period for which she sought medical leave. The court held that the employer's failure to obtain a third medical opinion as required by Government Code §12945.2(k)(3)(C) did not stop it from asserting that the employee did not have a serious medical condition. The employee's ability to work a similar part-time job did not conclusively establish her ability to do the job for the original employer because the phrase "functions of the position of that employee" in Government Code §12945.2(k)(3)(C), referred to the specific job assigned to the employee by the employer, not to the job functions generally.

*Ross v. RagingWire Telcomm, Inc.* (2008) 49 Cal.4<sup>th</sup> 920.

In a 5-2 decision, the California Supreme Court held that the employer has no duty under the FEHA to make a reasonable accommodation for medicinal marijuana use, but may terminate an employee who fails a pre-employment drug screening test for marijuana.

*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (1<sup>st</sup> DCA 2008) 166 Cal.App.4<sup>th</sup> 952.

This is an important reasonable accommodations case which demonstrates that employers have a very high hurdle to clear to fulfill the legal obligation to engage in an interactive process to explore reasonable accommodations for a disabled employee. The plaintiff, who worked as a clothes-fitter at Neiman Marcus, was granted a one-month family and medical leave because of a back and joint disability. She submitted a medical certification which indicated that she was unable to perform all essential functions of her job. She asked the HR manager to be assigned to another job that did not involve bending, standing or kneeling. The HR manager told plaintiff that, according to the medical certification, she was completely prohibited from performing any type of work, and without a release, there was no point in discussing available positions because she was not qualified for anything. Leave was extended several times, and eventually the HR manager told plaintiff that her FMLA leave was exhausted and the company could no longer hold her job open. The court held that plaintiff was qualified for FEHA protection and was entitled to a reasonable accommodation if there was a vacant or soon-to-be vacant position she could perform with or without a reasonable accommodation. The court said Neiman Marcus had to consider whether there were other vacant positions, including at other stores, that she could have performed at the time of her termination or in the foreseeable future. Even if no other jobs were currently available, the employer had to extend the leave for a limited time if future openings were anticipated. The court also ruled that the HR manager's refusal to discuss accommodations unless she presented a doctor's release, and terminating her without advance notice, caused a breakdown in the interactive process.

*Arteaga v. Brink's Incorporated* (2008) 163 Cal.App.4<sup>th</sup> 327.

The employee was the subject of an internal investigation into missing cash, and he knew he could be terminated depending on the outcome. During the investigation, the employee notified the company for the first time that he was suffering from pain and numbness in his arms, fingers, shoulders and feet. The employee filed claims for workers' compensation. Days later, he was terminated based on the results of the investigation. The court concluded that the employee's FEHA claim and wrongful termination claim failed as a matter of law. The employee's symptoms did not constitute a "physical disability" under the FEHA. The employee's pain and

numbness did not make it difficult for him to achieve the major life activity of working. The company also had a legitimate, nondiscriminatory reason for the termination – loss of confidence in the employee – as confirmed by the investigation. Although the employee argued that he was terminated within days of disclosing his symptoms and filing his workers’ compensation claims, this temporal proximity, by itself, did not create a triable fact as to pretext once the company offered evidence of a legitimate, nonprohibited reason for its action.

*Wilson v. County of Orange* (4<sup>th</sup> DCA January 6, 2009), No. G039733.

The court held that the County employer provided reasonable accommodations for an emergency dispatcher with an autoimmune disorder that placed her at risk of blood clots, requiring avoidance of stress. County provided one year of temporary restrictions before reaching agreement on permanent restrictions for a dispatcher. Although the interactive process for the permanent restrictions did not commence until nine months after the temporary restrictions had been implemented the court found that as a matter of law, there was no claim for failure to provide an “interactive process”, stating that it is an “informal process” and “ritualized discussions are not necessarily required.” Further, the court relied upon prior cases holding that an employer cannot be held liable for failing to engage in an interactive process where the employee is in fact offered a reasonable accommodation.

## **ADA**

*National Federation of the Blind v. Target.*

The National Federation of the Blind (“NFB”) sued Target in a nationwide class action lawsuit alleging that Target’s website violates the Americans with Disabilities Act (“ADA”) and California’s Unruh Act because it is inaccessible to individuals with vision impairments. The NFB complained that blind individuals could not access certain features of Target’s website such as accessing information about store locations and hours, ordering prescription refills and photo prints, and printing coupons. The NFB argued that Target’s website is a service and benefit of the actual stores. In denying a motion to dismiss the case, the court held that federal and California disability laws require websites to be accessible regardless of whether they have any nexus to the brick-and-mortar store. Target is paying \$6 million to settle this case as well as revamping its website to eliminate Flash, altering PDFs, ensuring that links are specific, that titles and headers are descriptive, and that images have embedded text explanations.

*Gambini v. Total Renal Care, Inc.* (9<sup>th</sup> Cir. 2007) 486 F.3d 1087 (WA law).

Gambini notified her supervisor that she was seeking treatment for bipolar disorder. She told her fellow co-workers that she was having severe mood swings and trying to address that problem through medications, and asked them not to be offended if she was irritable or short with them. In a meeting with her current and former supervisors, Gambini was presented with a performance improvement plan. As she read it, she began to cry, and threw it across the desk, expressing her opinion (along with a string of profanities) that it was unfair and unwarranted. She went to the hospital the next day because of suicidal thoughts. She was given FMLA forms to fill out and her request for FMLA leave was approved. Thereafter, an investigation was done into the meeting between Gambini and her supervisors, and several employees sent emails stating concerns about Gambini’s outbursts. The following business day, her supervisors terminated her employment by telephone because of her behavior during the meeting. Gambini filed suit alleging violation of the FMLA. The Ninth Circuit held, under Washington law, that

firing a bipolar woman for use of profanity where her misconduct was caused by her disability, was a firing because of a disability, in violation of law.

## **Leaves of Absence**

### **FMLA**

*Farrell v. TriCounty Metropolitan* (9<sup>th</sup> Cir. 2008) 530 F.3d 1023.

The *Farrell* case presented the question of whether the FMLA allows a plaintiff to recover damages for absences from work that were caused by an emotional condition that itself resulted from the employer's wrongful denial of FMLA leave. During a pre-employment physical, Farrell learned that he had diabetes. He also suffered from eczema, chronic obstructive pulmonary disease, asthma, emphysema, and/or chronic bronchitis. He repeatedly requested permission under the FMLA to be absent from work as a result of his medical conditions. His requests were denied. Shortly thereafter, Farrell was diagnosed with an adjustment disorder, anxiety and depression. Farrell sued under the FMLA and ADA, as well as under Oregon state law, for lost wages for days he missed because of stress or other mental problems resulting from the wrongful denial of FMLA leave. He also sought damages for emotional distress resulting from the wrongful denial of leave. The Ninth Circuit held that emotional distress damages are not recoverable under the FMLA, but that lost earnings damages for absence from work resulting from stress are recoverable.

*In re Marriage Cases* (2008) 43 Cal.4<sup>th</sup> 757.

In 2004, the City and County of San Francisco issued marriage licenses and performed ceremonies for over 4,000 same-sex couples. The California Supreme Court halted these actions while it considered legal challenges. In August 2004, in *Lockyer v. City and County of San Francisco*, the Court ruled unanimously that San Francisco could not issue licenses contrary to California state law until there had been a judicial determination that California's marriage laws were unconstitutional. Subsequently, several couples filed constitutional challenges, which were consolidated into the single case just decided.

*In re Marriage Cases* held that denying same-sex couples the right to marry violated the equal protection clause of the California Constitution, and therefore was a form of unconstitutional discrimination based on sexual orientation. The decision requires California counties to issue marriage licenses to same-sex couples when the ruling becomes final. On June 4, 2008, the Court denied a petition for hearing. It ordered that the decision become final on June 16, 2008 at 5 p.m.

The primary immediate impact on employers will be that any provision of California law referring to "spouse" now will include same-sex spouses as well. Thus, for example, employees will be eligible for family and medical leave under the California Family Rights Act to care for a same-sex spouse or to use sick leave under the "kin care" law for a same-sex spouse. California same-sex marriages will not be recognized under federal law. For purposes of federal law, DOMA provides that "'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Thus, the same-sex marriages will not affect an employee's rights under the federal Family and Medical Leave Act or Social Security, for example.

If they are not subject to the federal Employee Retirement Income Security Act (“ERISA”), spousal benefits provided by employers will have to be extended equally to same-sex spouses. Not doing so could result in state law claims of sex or sexual orientation discrimination, both of which California law prohibits. Benefits covered by ERISA will not be affected because ERISA preempts California law and applies federal law.

Additionally, because federal law will not recognize same-sex marriages under DOMA, same-sex spouses’ benefits will generally be taxed as income under federal law, even though opposite-sex spousal benefits are not. The exception is if the same-sex spouse also qualifies as the employee’s dependent for tax purposes. California will not tax same-sex spouses’ benefits. Currently, California does not tax domestic partner benefits, while federal law does, unless the employee’s domestic partner qualifies as a dependent.

*Taylor v. Progress Energy* (2007) 493 F.3d 454:

This case held that employees cannot waive, nor can employers induce employees to waive, their rights under the FMLA. The U.S. Supreme Court has denied Progress Energy’s petition for writ of certiorari to the Court of Appeals for the Fourth Circuit.

### **Related issue of disability benefits**

*Dobos v. Voluntary Plan Administrators, Inc.* (2008) 166 Cal.App.4<sup>th</sup> 678.

The court concluded that the plaintiff applicant was not eligible for long-term disability benefits under the county’s plan. Based on the plain language of the county code provisions setting forth the terms and conditions of the plan, the applicant had to be employed by the county until the end of the six-month qualifying period to be eligible for long-term disability benefits. However, it was undisputed that the applicant’s employment with the county had terminated before the expiration of the qualifying period. Although the applicant claimed that construing the relevant county code provisions to require current employment with the county to be eligible for benefits would be contrary to public policy because it would allow an employer to discharge employees who are on disability-related leaves of absence in violation of both the FMLA and the CFRA, the applicant’s argument was unavailing. The county’s decision to discharge an employee who has not yet met the eligibility criteria for reasons unrelated to his or her application for benefits does not deprive the employee of the right to any vested disability benefits.

### **Case to watch re “Kin Care” Statute**

*McCarther v. Pacific Telesis Group* (2008) 163 Cal.App.4<sup>th</sup> 176.

A collective bargaining agreement contained a sickness absence policy under which employees, after working for one year, were provided as a matter of right with increments of up to five consecutive days of compensated leave for absences each time they became ill or injured, subject to an attendance management policy. The reviewing court concluded that the kin care requirements of Labor Code §233 extended to that policy, reasoning that the policy provided for “accrued increments” of leave, within the plain meaning of the statute, even though employees did not bank any increments prior to illness or injury. As used in §233, “accrued” connoted increments of compensated leave to which employees gained rights, in other words, to which they became entitled or which they earned. The court rejected the employers’ argument that the only plausible reading of “accrued” was periodic accumulation over time and their argument that

they would be unable to regulate kin care leave because of the prohibition contained in Labor Code §234. Employers were authorized by Labor Code §233 to regulate kin care leave under the same guidelines used for sick leave, and Labor Code §234 did not contradict that mandate.

### **Non-compete**

*Edwards v. Arthur Andersen* (2008) 44 Cal.4<sup>th</sup> 937.

In August 2008, the California Supreme Court handed down its long-awaited decision in *Edwards v. Arthur Andersen LLP*. The Court departed from prior decisions in the federal courts by determining that a provision in an employment agreement that even “partially” or “narrowly” restricts an employee from serving customers or competing with a former employer, was invalid and prohibited by California law. The Court also stated that an agreement which requires an employee to waive “any and all rights,” but which does not expressly carve out an employee’s indemnity rights, is acceptable because the indemnity rights are nonwaivable statutory claims.

Edwards was a tax manager at Arthur Andersen. Upon accepting employment with Andersen, Edwards signed a non-competition agreement which prohibited him from working for or soliciting certain Andersen clients for limited periods following his termination. In March 2002, the United States government indicted Andersen in connection with its investigation into Enron Corporation. In April 2002, Andersen began selling off its practice groups to various entities, who would hire on many of Andersen’s employees.

HSBC USA, Inc. offered Edwards employment. Before hiring any of Andersen’s employees, HSBC required the employees to execute a “Termination of Non-Compete Agreement.” This agreement required employees to, among other things, voluntarily resign from Andersen, and release Andersen from “any and all” claims. In exchange, Andersen would accept Edwards’ resignation, agree to his employment with HSBC, and release Edwards from the non-competition agreement. Edwards refused to sign the HSBC Termination of Non-Compete Agreement. In response, Andersen terminated Edwards’ employment and withheld severance benefits, and HSBC withdrew its offer of employment.

Edwards sued Andersen, HSBC and others for intentional interference with prospective economic advantage and anticompetitive business practices in violation of the California Business & Professions Code. Specifically, Edwards claimed that the Andersen non-competition agreement violated B&P Code §16000, which voids any contract that restrains a person from engaging in a lawful profession, trade or business. Further, Edwards alleged that HSBC’s Termination of Non-Compete Agreement was invalid because it contained a clause requiring him to waive “any and all” claims against Andersen, and that clause constituted a waiver of Edwards’ indemnity rights in violation of California Labor Code sections 2802 and 2804.

Under the plain meaning of B&P Code §16000, an employer cannot restrain a former employee from engaging in his or her profession, trade or business except under certain limited circumstances. The Court rejected Andersen’s argument that only contracts that *totally* prohibit an employee from engaging in his or her profession are illegal, and that an employer should be permitted to place some limitation on an employee’s ability to practice his or her vocation, as long as it is reasonable – otherwise known as the “narrow restraint” exception to B&P Code

§16000. In *Edwards*, the Court rejected the “narrow restraint” exception and stated a zero-tolerance policy on any sort of restraint on a former employee’s ability to pursue his livelihood.

Andersen had made Edwards’ new employment with HSBC contingent on his agreement to waive “any and all” claims he had or might have against Andersen. Labor Code §2802(a) provides for an employee’s right to indemnity. Edwards asserted that the release language infringed his statutorily nonwaivable right to indemnification. The Court found that the waiver did not include indemnity rights. Andersen contended that it did not carve out indemnity rights from the release because it was aware that under Labor Code 2804, such rights are statutorily nonwaivable. Such an exception was therefore legally unnecessary. On the other hand, Edwards argued that Andersen should have narrowed the release by drafting it to waive “any and all claims *except as otherwise prohibited by law.*” The Court disagreed and stated that no release of claims can waive an employee’s indemnity rights, and the courts will treat such releases as expressly incorporating the law that those rights cannot be waived. Therefore, voiding all existing releases which waive “any and all” claims would be inappropriate.

The California Supreme Court has clearly stated that non-competition agreements are invalid unless they fall under specific statutory exceptions. These include agreements to protect trade secrets, or in connection with the sale or dissolution of corporations (§16601) or limited liability corporations (§16602.5). Employers should review the language of contracts such as employment agreements, non-solicitation agreements, and non-disclosure agreements to be sure they comply with the law.

*SEIU, Local 250 v. Colcord* (2008) 160 Cal.App.4<sup>th</sup> 362.

In a case where an employer sought to recover damages for injuries from an employee who was secretly competing with the employer, the trial court awarded as compensatory damages the cost of one employee’s union salary and benefits during the period in which the breaches occurred, as well as campaign costs that the union incurred in its unsuccessful effort to prevent decertification. The court found that nothing in the law suggested that the federal salary basis regulation (or its state law equivalent) in any way controlled the employer’s legal right to recover salary and benefits previously paid to a faithless employee as damages or as restitution in a civil lawsuit for breach of fiduciary duty. The disgorgement of the one employee’s salary and benefits was an appropriate remedy because he supported himself with compensation received from the union while he plotted against its interests. The evidence that the employees would have been unsuccessful in their decertification campaign, or would not have dared to attempt it had they not breached their fiduciary duty to the union, was simply too speculative to support the judgment in that regard. However, the one employee’s intentional tortuous conduct was sufficiently egregious that a punitive damages award against him was entirely appropriate.

## **Employee Raiding**

*CRST Van Expedited, Inc. v. Werner Enterprises, Inc.* (9<sup>th</sup> Cir. 2007) 479 F.3d 1099.

CRST Van Expedited, Inc. claimed that Werner Enterprises had intentionally interfered with appellant’s employment contracts by soliciting and hiring away truck driver employees whom CRST had trained at its expense. CRST alleged that it made use of a three-phase driver training program to help individuals become certified to be truck drivers without having to spend their own money on such certification. The court found that CRST’s employment contract provided

for employment for a specified term, during which the employer's termination rights were limited. As such, the contract did not provide for at-will employment during the first year.

Employers should contrast this ruling with that in the case of *VL Systems, Inc. v Unisen, Inc.* (2007) 152 Cal App. 4<sup>th</sup> 708. VL Systems, Inc. ("VLS") is a computer software consulting company that provides technical consulting services to various companies. As such, it entered into a short term consulting contract with Star Trac Strength ("Star Trac") in 2004. That contract contained a provision that Star Trac would not hire any VLS employee for 12 months after the contract's termination, or be subject to a penalty for a violation, which was the equivalent of a percentage of the salary of the hired VLS employee. Star Trac after completion of its consulting contract with VLS; but within the prohibited one year period hired David Rohnow, a former VLS employee who had never done any work on the Star Trac account during his brief period of employment. After Rohnow's hire, VLS sent an invoice to Star Trac for the liquidated damage sum of 60% of Rohnow's salary.

The Court of Appeal reversed the trial court decision in VLS's favor, holding that a "no-hire/no solicitation clause in a consulting agreement between two companies amounts to a restrictive covenant with respect to a former employee, who is not the signatory to the agreement, because it restricts his ability to work for a company that would not have hired him, if it knew it would have to pay a penalty for such a hire. In this case, Mr. Rohnow was not solicited by Star Trac, and had nothing to do with the consulting contract between VLS and Star Trac. While limited restrictions that tend to promote rather than restrain free trade might be acceptable, a blanket restriction on all employees is not. As most companies do have non-solicitation/no-hire provisions in their consulting agreements, after this case, the narrower the restriction, the more likely it will be enforceable.

## **Discipline and Protected Activities**

### **Arbitration**

*Mitri v. Arnel Mgmt Co.* (2007) 157 Cal.App.4<sup>th</sup> 1164:

Mitri and other plaintiffs sued their former employer and individual supervisors for sexual discrimination and harassment. The employer filed a motion to compel arbitration of plaintiffs' claims on the ground plaintiffs had each signed a binding arbitration agreement. The trial court denied the motion because the employer could not prove the existence of any such agreement to arbitrate. The employee handbook held that as a condition of employment, all employees are required to sign an arbitration agreement, but the employer could not produce any signed arbitration agreement. The court rejected the employer's contention that the handbook's reference to arbitration, without an actual signed agreement, is sufficient to force plaintiffs to arbitrate their claims.

### **Procedural Developments in Discrimination and Civil Rights Law**

*Sprint/United Management Co. v. Mendelsohn* (2008) 128 S.Ct. 1140.

In an age discrimination case, Sprint had moved to exclude the testimony of former employees alleging discrimination by supervisors who had no role in the employment decision Mendelsohn challenged. The Court of Appeals court held that such "Me too" evidence was admissible on a

case-by-case basis but should be excluded where different supervisors and events were not in “temporal proximity” with the facts giving rise to the current plaintiff’s claims. The U.S. Supreme Court vacated and remanded the Tenth Circuit’s decision in February 2008, finding that since the trial court had been unclear about the basis for its ruling, the Court of Appeals should have remanded the case for clarification. While the employer’s argument had cited to one case that stated employees were similarly situated only if they had the same supervisor, and the district court’s order mirrored that blanket language, the district court’s discussion of the evidence neither cited that case nor gave any other indication that it was relying on it. And, that case defined “similarly situated” in an entirely different context.

*EEOC v. FedEx Corp* (06-1724, January 23, 2008).

In a case of first impression, the Ninth Circuit decided that the EEOC retains the authority to issue an administrative subpoena against an employer after one who files a charge of discrimination (also known as a “charging party”) has been issued a right-to-sue notice and instituted a private action.

Tyrone Merritt, a FedEx employee, filed a Charge of Discrimination with the EEOC on behalf of himself and other African-American and Latino employees, alleging that FedEx engaged in discrimination against them. Specifically, Merritt claimed that FedEx’s Basic Skills Test, a cognitive ability test, which employees were required to pass to be eligible for promotion, had a statistically significant adverse impact on African-American and Latino employees. Further, Merritt claimed he had been denied promotion opportunities, unfairly disciplined, and denied compensation on account of his race.

After filing a Charge of Discrimination, Merritt requested and was granted a Right-to-Sue letter by the EEOC, which allowed him to pursue litigation against FedEx. In October 2005, Merritt joined an already-pending class action lawsuit. In February 2006, the EEOC issued an administrative subpoena to FedEx directing it to identify basic information about the computer files that FedEx maintains, so that the EEOC could fashion a more detailed request if the need for more information should arise later in the investigation. FedEx refused to comply with the subpoena, and the EEOC filed its own action to enforce the subpoena.

FedEx argued that the EEOC is divested of its investigatory authority once a charging party initiates or joins a private action. The district court rejected FedEx’s argument and granted the EEOC’s application to enforce the subpoena. FedEx appealed to the Ninth Circuit. The Ninth Circuit affirmed the lower court’s decision, stating that (1) the EEOC’s investigative mandate is triggered by the filing of a valid charge; (2) the EEOC may bring its own action or may issue a right-to-sue to the charging party; and (3) even though the EEOC normally terminates the processing of the charge when it issues the right-to-sue notice, it can, under limited circumstances, continue to investigate the allegations in the charge. This includes the authority to subpoena information relevant to the charge.

Merritt had filed a charge alleging personal discrimination and discrimination against other similarly-situated African-Americans and Latinos. The EEOC issued to him a right-to-sue notice. The EEOC decided to continue its investigation because it involved a possible “policy or

pattern of discrimination affecting others.” The Ninth Circuit ruled that the EEOC did not exceed the scope of its authority by doing so.

*Lukovsky v. San Francisco* (9<sup>th</sup> Cir. 2008) 535 F.3d 1044.

The plaintiff applicants claimed that they applied for several permanent electrical transit systems mechanics jobs but were rejected because defendants gave preferential hiring treatment to Asian and Filipino workers. The district court held that the applicants had notice of their injury when they received the notices that informed them that they were not being hired. The appellate court found that the claims accrued upon awareness of the actual injury, i.e., the adverse employment action, and not when the applicants suspected a legal wrong. As such, the applicants’ claims accrued when they received notice that they would not be hired. At this point, the applicants knew they had been injured and by whom even if at that point in time they did not know of the legal injury, i.e., that there was an allegedly discriminatory motive that was underlying the failure to hire.

*Zolotarev v. City & County of SF* (9<sup>th</sup> Cir. 2008) 535 F.3d 1044 (a case consolidated with *Lukovsky*, above).

In the absence of active concealment of discrimination by the employer, a one-year statute of limitations applies from the date of the adverse action even if the plaintiff is unaware of preference given to other races in the hiring process until years later.

*Jones v. Torrey Pines* (2008) 42 Cal.4<sup>th</sup> 1158.

In March, the California Supreme Court, in a 4-3 split decision, held that non-employer individuals cannot be personally liable for retaliation under the Fair Employment and Housing Act (FEHA). This case reversed a trend among the California appellate courts, which allowed individual managers and supervisors to be sued for their decisions to discipline, demote or terminate employees who made complaints of discrimination. See *Jones v. The Lodge at Torrey Pines Partnership* (08 C.D.O.S. 2511).

The Court relied on its reasoning in *Reno v. Baird* (1998) 18 Cal.4<sup>th</sup> 640, which barred claims against supervisors for discrimination, to hold that supervisors cannot be held individually liable for retaliation. In *Jones v. The Lodge at Torrey Pines Partnership*, the jury returned a verdict for the plaintiff on a claim of sexual orientation discrimination in violation of FEHA against the employer, and against the employer and supervisor for retaliation. The jury awarded compensatory damages of almost \$1.4 million against the employer and \$155,000 against the supervisor. The trial court entered judgment on the verdict, but then granted judgment, notwithstanding the verdict as to both defendants. The California Court of Appeals for the Fourth District reinstated the original judgment on the verdict.

The California Supreme Court granted petition for review limited to the question of individual liability for retaliation, and reinstated the trial court judgment for the individual supervisor. The majority opinion was by Justice Chin with two dissenting opinions by Justice Werdegar and Justice Moreno.

While this case is welcomed news for individual supervisors who have been sued for retaliation, employers should note that there is continuing risk of liability against the company for claims of retaliation. While supervisors cannot be held personally liable if an employment

action such as hiring, demotion, denial of a raise or termination is found to be the result of a discriminatory or retaliatory motive, the employer on whose behalf such action was taken, will still be liable. Other cases in California have recently held that tangible employment actions such as demotions or denial of pay raises, which fall short of termination, can still result in claims of retaliation. In addition, an individual supervisor or manager may still be sued and can be found personally liable for discriminatory harassment.

*DeJung v. Superior Court* (1<sup>st</sup> DCA 2008) 169 Cal.App.4<sup>th</sup> 533.

DeJung brought an age discrimination case against the Sonoma County Superior Court under the FEHA. The trial court initially granted the Superior Court's motion for summary judgment, holding that the Superior Court is protected from suit under FEHA based on the affirmative defense of discretionary immunity, but the Court of Appeals reversed, holding that statutory immunity does not protect against direct public entity liability under FEHA, and the Superior Court can be sued for age discrimination in hiring decisions.

*Ortega v. Contra Costa Community College* (1<sup>st</sup> DCA 2007) 156 Cal.App.4<sup>th</sup> 1073.

Ortega was demoted from his position as head football coach at Contra Costa Community College and ultimately terminated from employment. Ortega sued under the FEHA challenging the demotion and the termination. The trial court dismissed his complaint, concluding that Ortega failed to exhaust the administrative remedies provided in the collective bargaining agreement. The appellate court reversed, stating that since the internal grievance procedures were created by a collective bargaining agreement and culminated in an arbitration, neither administrative nor judicial exhaustion applies to bar Ortega's claims. In other words, a public employee can sue under FEHA without exhausting administrative remedies under the collective bargaining agreement.

*Dukes v. Wal-Mart Stores, Inc.*

On December 11, 2007, the Ninth Circuit affirmed certification of a class against Wal-Mart in discrimination case involving women employed at 3,400 stores, based on claims of discrimination, job training, assignments and pay. Wal-Mart will likely appeal this decision to the U.S. Supreme Court.

*Harvey v. Sybase* (1<sup>st</sup> DCA 2008) 161 Cal.App.4<sup>th</sup> 1547.

The employer argued that it was entitled to a judgment on liability because the same person who terminated the employee had previously hired and promoted her. The reviewing court disagreed. Although there was strong same-actor evidence, there was also substantial evidence that the supervisor who hired, promoted, and terminated the employee had formed the intent to make race- and gender-based personnel decisions. Specifically, there was evidence that the supervisor understood a superior's remark as a directive to increase the proportion of white males. The court held that same-actor evidence was simply evidence and was not in a special category as a rule or presumption or a "strong" inference. The California Supreme Court initially granted review and then refused to hear this case, thereby leaving standing this decision that "same actor" defense does not apply in face of evidence that the manager expressed her desire to add more white males so the workplace would "not look like an airport" even though manager was also a Filipina who had hired, trained and promoted the plaintiff.

## Case to Watch

The California Supreme Court granted a hearing on a case discussed in our 2008 update, *McDonald v. Antelope Valley Community College Dist.* (2007) 151 Cal.App.4<sup>th</sup> 961. The Court of Appeals had found that equitable tolling of the statute of limitations is potentially available to a plaintiff who files an administrative complaint under FEHA more than one year after an act of unlawful discrimination, and liberal construction of the section 12960(d) one-year statute of limitations is inconsistent with an absolute bar on the application of equitable tolling rules. The court also held that where the last discriminatory act alleged occurred on December 7, 1999, and there was no evidence of any discriminatory acts taking place after October 11, 2001, the December 7, 1999 conduct was outside the scope of the plaintiff's October 11, 2002 DFEH complaint, because there was no continuing violation.

## Workplace Privacy

*Quon v. Arch Wireless* (9<sup>th</sup> Cir. 2008) 529 F.3d 892.

Under the Stored Communications Act, employee text messages are protected from unreasonable search and seizure by employer even though device (2-way pager) and account were paid for by the City employer.

*TGB Insurance Services Co. v. Superior Court* (2008) 96 Cal.App.4<sup>th</sup> 443.

An employer provided two computers for an employee's use, one for the office, the other to permit the employee to work at home. The employee, who signed his employer's electronic and telephone equipment policy statement and agreed in writing that his computers could be monitored by his employer, was terminated for misuse of his office computer. The employee refused to produce the computer, and the trial court refused to compel production. On the employer's petition, the court concluded that, given the employee's consent to this employer's monitoring of both computers, the employee had no reasonable expectation of privacy when he used the home computer for personal matters, and the trial court erred in refusing to compel production.

*Alch v. Superior Court* (2008) 165 Cal.App.4<sup>th</sup> 1412.

Television writers who had filed a class action lawsuit against Time Warner Entertainment Company, asserted an industry-wide pattern and practice of age discrimination. The writers served subpoenas on third parties, including a guild representing writers, seeking data from which they could prepare a statistical analysis to support their age discrimination claims. A privacy notice was sent to guild members, advising them of their right to object to disclosure of personal information on privacy grounds. Some 7,700 individuals filed objections. The Court of Appeal concluded that the trial court abused its discretion when it sustained all objections to the disclosure of the requested information on privacy grounds. The writers could not prove their claims without access to evidence from which they could perform a statistical analysis. The writers demonstrated that the requested information was directly relevant to their claims and essential to a fair resolution of their lawsuit. The trial court erred in its purported balancing of the objector's privacy rights and the countervailing interests of the litigants and the state, failing to analyze the types of information requested, failing to consider the state's interest in preventing

discrimination, and erroneously concluding the writers could proceed with a statistical analysis without information from the objectors.

### **Wage and Hour Issues**

*City of Oakland v. Hassey* (2008) 163 Cal.App.4<sup>th</sup> 1477.

The City of Oakland sued its employee for breach of contract after he failed to reimburse the city, as agreed, for the costs of training him to become a police officer. The employee filed a cross-complaint alleging that the agreement to repay the city for training costs violated the Fair Labor Standards Act (FLSA) and various state laws. The court held that the employee failed to establish that the agreement to reimburse the city for training costs violated the FLSA. The city was permitted to seek reimbursement from police officers who gained the benefit of its training program and its police academy but did not stay with the police department long enough for the city to benefit from that training. The city's withholding of the employee's final paycheck to cover his debt did violate the FLSA. The deduction of unpaid amounts from the employee's final paycheck, which reduced wages for the last period worked below minimum wage, is not enforceable as employees cannot consent to waive the minimum wage.

*Gonzales v. Beck* (12/27/07) 158 Cal.App.4<sup>th</sup> 598.

A former employee filed a claim for unpaid wages against its employer. When the employer failed to answer or appear at the Berman hearing, the employee obtained an award upon which a judgment was entered in the trial court. The employer moved to have the judgment set aside, claiming that they did not receive actual notice of the administrative proceedings until well after the judgment was entered in the Superior Court. The court said that the employer's remedy was to apply to the Labor Commissioner for relief. If a defendant in an administrative wage claim fails to file a timely appeal in the trial court, the right to administrative relief had to be exercised and exhausted prior to seeking relief from a failure to answer or appear in any court.

*Schachter v. Citigroup* (2d DCA 2008) 159 Cal.App.4<sup>th</sup> 10.

The employer's incentive compensation plan allowed participants the option of using a portion of their annual earnings to purchase shares in the parent company's stock at a price below the company's publicly-traded market price. If the participating employee resigned or was terminated for cause within a two-year vesting period, he forfeited the stock as well as the money used to purchase it. The court found that, as a matter of economic reality, employees who elected to participate in the plan's stock-purchase program were paid all the wages they designated to invest in company stock. If the employee was not paid directly the money used to purchase the restricted stock, those funds were deducted for that purpose pursuant to the employee's request and at his explicit authorization, and that deduction was lawful under Labor Code §224. The employee could not show that the funds used to purchase the shares were actually earned. The employee's reliance on Labor Code §219, as a basis to invalidate the plan's forfeiture provisions was misplaced, as there was simply no unlawful forfeiture of earned wages. The plan's forfeiture provisions did not violate the Labor Code.

*Brewer v. Premier Golf Properties* (2d DCA 2008) 168 Cal.App.4<sup>th</sup> 1243.

Brewer, a waitress at the Cottonwood Golf Club restaurant, quit her job, then filed an action for age discrimination and meal and rest break violations, and sought compensatory and punitive damages and attorneys fees. The court held that punitive damages against the employer were not

recoverable where the only basis of liability were the Labor Code sections relating to meal and rest breaks, pay stubs and minimum wages. The statute provides the exclusive source of recovery for such actions, and the remedial scheme created by that statute does not include punitive damages.

### **Overtime**

*Advanced Tech Security Services, Inc. v. Roman* (2d DCA 2008) 163 Cal.App.4<sup>th</sup> 700.

This case presents the issue of, where an employer who pays time-and-a-half for work on designated holidays must pay an employee time-and-a-half of the premium holiday pay as overtime if the employee works more than 8 hours in a day or 40 hours in a week. The court held that the plain language of Labor Code §510 does not require an employer to compensate an employee at a rate higher than one-and-one-half times the regular rate of pay. The employer is entitled to credit the time-and-a-half premium pay on holidays against otherwise earned overtime.

*Sullivan v. Oracle Corp* (9<sup>th</sup> Cir. 2008) 547 F.3d 1177.

Oracle employs hundreds of workers to train Oracle customers on the use of its software. During the period relevant to the lawsuit, Oracle classified these workers as teachers who were not entitled to compensation for overtime work under federal or California law. Three non-residents of California brought a would-be class action against Oracle seeking damages under California law for failure to pay overtime. The court held that non-California residents who work in California for a California employer are entitled to receive daily overtime for work performed in the state. California law is often more generous than federal or laws of other states.

### **Meal Periods and Rest Breaks**

*Brinker Restaurant Corporation v. Superior Court of San Diego (Hohnbaum)* (2008) 165 Cal.App.4<sup>th</sup> 25.

On July 22, 2008, the Fourth District Court of Appeal published its decision in *Brinker Restaurant Corporation v. Superior Court of San Diego (Hohnbaum)*. The court reached several conclusions favorable to employers, particularly those in the restaurant and hotel industries, on the issue of meal periods and rest breaks. The court held that employers have some flexibility in scheduling meal periods and rest breaks, and that while employers must provide meal periods, they are not necessarily liable if the employees do not actually take them. For reasons that are particularly beneficial to employers of multiple work-site establishments, the court denied class certification.

Brinker operates 137 restaurants in California, including Chili's Grill and Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. In 2006, Brinker was sued by a purported class of employees for failing to provide meal periods and rest breaks under California Labor Code section 227.6.

The contentions of the parties in this case focused on key issues in California's meal and rest break law. Plaintiffs claimed that Brinker used an improper system of "early lunching" – requiring employees to take their first meal period shortly after their shifts began, then requiring employees to work an additional five to nine hours without a second meal break. Plaintiffs also

claimed they were required to work while off the clock during meal periods, and that Brinker management “shaved” or altered employee time cards. Plaintiffs further argued that employers have an affirmative duty to ensure that employees receive meal periods, and that Brinker could not meet this obligation simply by making meal periods available. Brinker argued that if an employee worked more than five hours but less than ten, Brinker was only required to give that employee one meal period at some time during the shift, and that Brinker was not required to give employees one meal period every five hours, as Plaintiffs were suggesting.

Labor Code section 512(a) plainly provides that a California employer has a duty to make a first 30-minute meal period available to an hourly employee who is permitted to work more than five hours per day unless (1) the total work period per day is six hours or less; and (2) both the employer and the employee agree by mutual consent that the employee waives the meal period. Section 512(a) also states that an employer must make a second 30-minute meal period available to an hourly employee who worked more than 10 hours per day, unless (1) the total hours worked per day is 12 or less; and (2) the first meal period was not waived.

Plaintiffs contended that, where hourly employees take their first meal period approximately one hour into their shift, they are entitled to a second meal period five hours after they returned to work from the first meal period. The court disagreed, and found that employees are entitled to a first meal period for every work period of more than five hours per day, not a meal period for every five hours worked. Further, the wage order contains no restriction on the timing of meal periods, so Brinker was not violating the law by requiring “early lunching” by some of its employees.

Following IWC Wage Order 5-2001, which applies to the public housekeeping industry, and the applicable Regulation 11050(12)(A), the court found that the plain language of the wage order, which requires an employer to permit a 10-minute rest period “per four hours of time worked or major fraction thereof,” does not mean that a rest period must be given every 3.5 hours. Plaintiffs asserted that a rest break was required when employees work any time over the midpoint of each four-hour block of time. The Brinker court rejected this interpretation. The appropriate number of breaks is based on total hours worked daily. It is only when an employee is scheduled for a shift longer than 3.5 hours, but less than four hours that he or she is entitled to take a rest break before the four-hour mark.

The Brinker court also found that Regulation 11050(12)(A) does not require employers to authorize and permit a first rest break before the first scheduled meal period. The regulation is silent as to the timing of the first rest break, vis-à-vis the first scheduled meal period. The regulation only states that rest breaks, “in so far as is practicable, shall be in the middle of each work period.” The court noted that the language of the regulation is clearly intended to afford the employer some discretion not to have rest periods in the middle of a work period if, because of the nature of the work or the circumstances of a particular employee – such as a restaurant server whose busiest time is likely at mid-shift – it is not “practicable.”

Brinker differs from prior cases involving meal periods and rest breaks. In *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, the court found that an employer’s obligation to provide meal breaks was only satisfied if employers ensured that workers are actually relieved of all duties during those times. The obligation was not satisfied by an

employer's assumption that employees took their meal periods. However, in *Cicairos* the employees were truck drivers, and the employers had computerized systems tracking each driver's speed, starts and stops, and time spent driving. In short, the employer knew that the drivers were driving while eating, and did not take steps to address the situation. The Brinker court noted that employers cannot police thousands of employees working multiple shifts and force them to take meal breaks. An employer's obligation is to make a meal period available to its employees, and not to dissuade, deter, or discourage the employees from taking their meal periods, but not to ensure that employees take them.

In *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, the California Supreme Court found the employer liable for one hour of pay at the employee's regular rate per each meal period and rest break during which Murphy, a retail store manager, was not relieved of his duties. The focus of that case was whether the premiums constituted wages (which carry a three-year statute of limitations), or penalties (which have a one-year statute of limitations). The court found that the premiums were wages and Murphy was entitled to seek three years' worth of premiums. Brinker focused on whether the employer has a duty to ensure that its employees take their meal breaks, and stated that while the employer has an affirmative duty to ensure that a meal period is made available, and that the employee is relieved of his or her duties during that time, the employer should not have to pay additional premiums if an employee voluntarily chooses not to take the meal period or to take a shortened one.

The court in *Sav-On Drug Stores, Inc. v. Superior Court of Los Angeles County (Rocher)* (2003) 113 Cal.App.4th 1152, held that issues such as employee classification and unpaid overtime could be properly asserted as class actions because the question was one of common or general interest, and issues of the employer's policies and practices and operational standardization were likely to predominate a class proceeding over any individualized calculation of actual overtime hours owed. In contrast, the Brinker court denied class certification, stating that the individualized inquiry that would be required by the nature of the plaintiffs' claims and the circumstances of the parties were not amenable to class treatment. Brinker had explained that there was no uniform meal or rest break policy because it was different for servers, hosts and bartenders than for cooks and dishwashers, and the policy differed for lunch and dinner shifts, and between restaurants and locations. The court said these circumstances would result in hundreds of "mini-trials," and the claims were not suitable for class determination.

Brinker is good news for California employers who have been struggling with how to force an employee to take meal periods and rest breaks, or whose operations are such that requiring a mid-shift meal period or rest break is very difficult or impossible. It is not likely to be the last word. Because of the contrast between this case and other prior California cases discussed above, it is likely that the California Supreme Court will be requested to hear this case.

**Note:** On August 29, 2008, the California Supreme Court granted a hearing to review Brinker. In July 2008, the DLSE sent a letter to its deputy labor commissioners instructing them to follow the holding in Brinker. Further, the DLSE has written to the Brinker court urging it to resolve this matter in a published opinion.

*Brinkley v. Public Storage* (2d DCA 2008) 167 Cal.App.4<sup>th</sup> 1278.

Brinkley sued his employer for providing pay stubs containing misstatements in violation of Labor Code §226. An employer cannot be liable for misstatements on pay stubs unless it knowingly and intentionally makes such misstatements and the employee suffers an injury as a result. Plaintiff also asserted claims on the ground that the employer failed to ensure that the plaintiff took all meal periods and rest periods he was entitled to take. Like the *Brinker* court before it, the *Brinkley* court held that California law only requires that employers make available such periods, which Public Storage did, and gives the employer discretion with regard to scheduling meal and rest breaks.

## **PAGA Cases**

*Bradstreet v. Wong* (1<sup>st</sup> DCA) 161 Cal.App.4<sup>th</sup> 1440.

The defendant corporations failed to pay earned wages and accrued vacation pay for several months and then went out of business and declared bankruptcy. One of the corporations contracted with another corporation under the same ownership and management. In an action brought by the Labor Commissioner, the trial court held that the owners, officers, and managers were not employers and had no personal liability. The appellate court relied on *Reynolds v. Bement*, to find no individual liability of managers or business owners, in the absence of evidence that they obtained money or gained personally from the non-payment to employees, or evidence that the corporate veil should be pierced (inadequate capitalization, commingling of funds).

## **Case to watch**

*Arias v. Superior Court of San Joaquin County (Angelo Dairy)* (2007) 153 Cal.App.4<sup>th</sup> 777.

Arias brought a class action claim on behalf of himself and others under the Unfair Competition Law and the Labor Code Private Attorneys General Act (PAGA). The issue in this case was whether an individual bringing a would-be class action under these statutes must bring his representative claims as a class action. The Court of Appeal, Third Appellate District, held that the Unfair Competition Law requires that a representative claim be brought as a class action, and that the PAGA expressly allows a person to prosecute a representative claim without requiring that it be brought as a class action. In other words, the court allowed a PAGA-plaintiff to file a class action without meeting the requirements for California's class action and class certification statutes. The California Supreme Court has granted review of this case.

## **Workers' Compensation**

*Chin v. Namvar* (2008) 166 Cal.App.4<sup>th</sup> 994.

Chin fell from a ladder and broke his leg while working as a painter in a shopping center in Southern California. Chin had worked for the shopping center's owner from 2001-2005 for extended periods, but never informed Namvar that he had let his contractor's license lapse. Namvar regularly issued Chin 1099s to reflect the compensation paid to him. According to Namvar, the first time he learned Chin did not have a contractor's license was long after his injury. Chin claimed that Namvar fired him after he fell from the ladder. Chin used for violation of wage and hour provisions, wrongful termination, disability discrimination, retaliation. His claims rested on his contention that he was an employee of the shopping center, not a contractor.

The trial court rejected all of Chin's claims on the grounds that he was an independent contractor, not an employee, and the Court of Appeals agreed. Both courts rejected Chin's argument that he should be presumed an employee because he did not hold a contractor's license. Chin was essentially trying to gain an unfair advantage from his own failure to keep his license. Specifically, he had led Namvar to believe he was a licensed contractor, and was barred from asserting that his unlicensed status – a condition he himself had created and failed to correct – made him an employee. .

*Tomlin v. Workers' Comp. Appeals Board* (2008) 162 Cal.App.4<sup>th</sup> 1423.

A police officer who was a SWAT team member sustained an injury while he was on vacation, training for an upcoming departmental physical fitness test. The California Workers' Compensation Appeals Board denied his petition for reconsideration after an administrative law judge denied him workers' compensation benefits. The police officer believed that the police department expected him to train for the SWAT physical fitness test while on vacation. The court concluded that if a SWAT officer was injured in a work-related activity, there was no reason why it should matter for purposes of Labor Code §3600(a)(9), where the officer was or what time of day it was when the injury occurred. The relevant inquiry was whether the activity was a reasonable expectancy of the officer's employment. Here, the officer was required by his employer to maintain physical fitness and pass annual, mandatory physical fitness tests. There was no evidence that his fitness regimen was grossly disproportionate to the training necessary to pass the physical fitness test or otherwise to meet the fitness requirements of his job.

### **Avoiding Workplace Violence**

In recent civil cases, California courts have taken different approaches in addressing the employer's liability for workplace violence:

*Franklin v. Manadnock* (2007) 151 Cal.App.4<sup>th</sup> 252.

The court held that Labor Code §6310, which prohibits discrimination or retaliation against an employee who complains of an unsafe working condition, protects an employee from termination, after the employee makes good faith complaints of a co-worker's threat to have the employee killed.

*Marie de Villers v. County of San Diego* (October 2007) 156 Cal.App.4<sup>th</sup> 238.

The court held that the county employer was not civilly liable – directly or vicariously – when a county employee murdered her husband, notwithstanding the fact that she was not drug-tested or subjected to a background check prior to being hired to work in a medical examiner's office where she had access to controlled substances, learned of the means to use fentanyl to accomplish the crime, and stole the drugs used to kill her husband after he confronted her about her affair with her supervisor. The employer had no duty to protect against criminal attacks, even though access to the "weapon" (drugs) was provided by the workplace.

The distinction between these cases is that the employer is liable for retaliating against an employee who seeks to invoke protections against workplace violence, but is not liable outside of the workers' compensation system to their victims (or their survivors) for the actual injury resulting from criminal violence perpetrated by an employee, even where the criminal conduct has a factual nexus to the workplace.

## **Civil Rights**

*North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court (Benitez)* (2008) 44 Cal.4<sup>th</sup> 1145.

A physician's refusal to provide intrauterine insemination for a lesbian woman held to violate Unruh Civil Rights Act. The physician's rights of free speech and free exercise of religion did not permit discrimination by the business establishment.

*Aramark v. SEIU* (9<sup>th</sup> Cir. 2008) 530 F.3d 817.

The Ninth Circuit upheld arbitrator's decision in collective bargaining arbitration to overturn termination based on no-match letters and the employee's failure to correct within a reasonable time.

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## EMPLOYMENT LAW

Berliner Cohen's employment practice, in conjunction with its successful employment litigation practice, utilizes the skills of experienced attorneys to advise and represent employers of all sizes on a full range of legal issues affecting the workplace. The employment attorneys respond effectively and efficiently to the needs of each client, whether it is an individual employer, a start-up enterprise, a corporation or a public entity. The group's attorneys offer preventative advice, counsel and training on a wide variety of topics, including harassment and discrimination, wrongful discharge, wage and hour issues, unfair competition and trade secrets.

### **Advice and counsel**

The employment group is available to meet its clients' needs for advice at every step in the employment process, from hiring through leaves of absence, reductions in force and termination. The attorneys draft and update employment agreements, offer letters, proprietary information agreements, employee handbooks and policy manuals. Berliner Cohen's employment attorneys have also assisted clients in investigating allegations of harassment and discrimination in the workplace.

### **Litigation**

Berliner Cohen's employment trial attorneys have represented clients in federal and state courts throughout California. The attorneys in the group have compiled an impressive record of favorable court rulings on motions to dismiss and for summary judgment, jury trial verdicts, and appeals. Berliner Cohen's employment group has successfully represented employers in many types of cases, including discrimination, wrongful termination, individual and class action wage and hour claims, recovery of misappropriated information and funds, and civil rights litigation.

### **Training**

Berliner Cohen's employment attorneys believe in taking a proactive approach to workplace problems, and frequently help clients avoid problems through measures such as educational seminars and training. Qualified attorneys can provide California state-required sexual harassment training for managers and employees, either at the Firm's offices or at the client's workplace. The quarterly "Breakfast with Berliner" series provides human resources or operations representatives with information on timely and significant topics and developments in the law. The topics range from the annual employment law update to conducting workplace investigations and avoiding payroll pitfalls.

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## EMPLOYMENT LAW



**Roberta S. Hayashi** has over twenty-five years experience representing Silicon Valley employers in employment and business litigation. She has trial experience in wrongful termination, discrimination, and misappropriation of trade secrets and proprietary information actions in both state and federal court. Ms. Hayashi has been named one of the "Top 50 Women Litigators" in California by *The Daily Journal*.



**Christine H. Long** represents and counsels clients on employment issues and disputes, real estate matters, and contract claims. She advises clients ranging from Santa Clara Valley's oldest businesses and families to emerging technology, real estate, hospitality, medical and professional, local service and retail businesses. Ms. Long has litigated disputes covering the entire range of the employment relationship from hiring to post-termination competition.



**Kara L. Erdodi** represents individuals and businesses in employment and general litigation, including wrongful termination, unfair competition, misappropriation of trade secrets, and discrimination. Ms. Erdodi has experience litigating and representing employers before the Labor Commissioner on issues including unpaid overtime and vacation. She advises and counsels on employee classification, leaves of absence, wage and hour law, and reduction in force.



**Kate Wilson** represents companies on employment matters at administrative hearings, fact-finding conferences, and settlement conferences. She assists clients in drafting personnel policies, employee handbooks, settlement agreements, and separation and release agreements. Ms. Wilson provides training in workforce sexual harassment, discrimination and retaliation, and conducts audits of workplace policies and procedures.

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## *Employment Law Alert*

January, 2009

Any employer who is including a severance provision in an offer letter to a prospective new hire, offering post-termination payments to a departing employee, or implementing any deferred compensation arrangement or severance plan or policy needs to carefully consider the impact of Section 409A of the Internal Revenue Code. Congress enacted Section 409A in 2004 as part of the American Jobs Creation Act.

Since then, proposed and now final treasury regulations regarding 409A, along with additional notices and other related guidance issued, form a complex set of legal rules that impose serious financial consequences for a misstep.

The consequences of failing to meet the requirements of Section 409A are costly. Income deferred under the arrangement must be included in the employee's income currently, eliminating the potential tax benefits of deferring the compensation in the first place. Section 409A also imposes an additional federal penalty of 20% of the tax due on the amount of deferred compensation upon a determination that the arrangement is not in compliance with Section 409A. Other penalties and interest could also be imposed. Further, state income tax authorities may impose penalties for failing to comply with Section 409A. For example, California imposes its own 20% penalty for failing to comply. The employer may risk liability for failure to properly report income paid to the employee, or for improper deductions.

Section 409A applies to a broad range of deferred compensation arrangements, such as severance plans, even if those compensation arrangements were created prior to the statute's effective date of January 1, 2005. Before making payments pursuant to such older compensation arrangements, employers should consider the impact of Section 409A. More importantly, employers must ensure, however, that compensation arrangements drafted in the future

## *Watch Where You Step:* **IRS 409A's Impact on Severance or Deferred Comp**

comply with Section 409A. Section 409A generally applies to all nonqualified deferred compensation plans.

### *A Nonqualified Deferred Comp Plan*

*The term "nonqualified deferred compensation plan" includes any plan that provides for the deferral of compensation. A plan provides for the deferral of compensation if, under the terms of the plan and the relevant facts and circumstances, the service provider (employee) has a legally binding right during a taxable year to compensation that, pursuant to the terms of the plan or arrangement, is or may be payable to (or on behalf of) the employee in a later taxable year. Such compensation is treated as deferred compensation for purposes of Section 409A.*

Because the definition of a "nonqualified deferred compensation agreement" is written broadly, the following arrangements are potentially subject to Section 409A:

- Employment agreements, including offer letters
- Severance and/or change-in-control arrangements
- Stock, stock option, and stock appreciation rights (SAR) plans or arrangements
- Bonus or commission plans
- Reimbursement arrangements
- Split-dollar life insurance policies
- Tax gross-up payments
- Deferred Compensation Plans or Agreements

Where an arrangement is subject to Section 409A, it must satisfy three requirements:

The first requires that the compensation deferred under the arrangement is not distributed earlier than six different possible events. The six events are: a participant's separation from service, a participant's disability, a participant's death, a specified time or pursuant to a fixed schedule, a change in ownership or control of the service recipient, or the occurrence of an unforeseeable emergency.

Secondly, although several exceptions exist under the Treasury Regulations relating to Section 409A, generally a plan may not allow for the acceleration of the time or schedule in which benefits are paid under the plan.

Finally, the plan must comply with various restrictions on elections provided under the plan, such as for the initial election to defer compensation under the plan, as well as for later elections to change the time or form of distribution under the plan.

Amongst the several exceptions to the Section 409A requirements, employers have attempted to utilize three in particular in drafting severance provisions:

- the "short term" deferral exception
- the "2x2" exception
- the "reimbursement exception"

Careful analysis and drafting of the severance provision is essential to ensure the exception will apply.

For example, the "short term" deferral exception may permit severance compensation to be paid by March 15<sup>th</sup> of the year after the year in which the termination occurs. However, this is not a simple rule that can be applied in a vacuum to every situation, and a publicly traded company may run afoul of the "specified employee" delay requirement which mandates a delay of six months following separation for severance payments to the top officers whose annual compensation is greater than a particular dollar threshold.

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© *Berliner Cohen*. This Berliner Cohen Employment Law Alert is only a general overview of how Section 409A may apply to employee severance provisions and the consequences of failing to consider its requirements. When drafting arrangements that may involve issues of compliance with Section 409A, employers should seek professional assistance with respect to their specific concerns. This Alert is not intended to and does not constitute legal advice or a solicitation for the formation of an attorney-client relationship and no attorney-client relationship is created through your receipt of the materials.