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Reporter

Employment Law

by Karina B. Sterman

Notable Developments in Employment Law**A. New California Military Leave**

Governor Schwarzenegger signed AB 485 into law - "Civil Air Patrol: California Wing: Employment Leave." Accordingly, employers with 15 or more employees are now required to provide at least 10 days of leave per year (beyond any other leave required by law) to any employee who is a volunteer member of the California Wing of the Civil Air Patrol (the civilian auxiliary of the U.S. Air Force) when the employee is called to respond to "an emergency operational mission."

B. Texting While Driving Prohibited: Senate Bill 28

This law made it illegal when driving in California to use an electronic wireless communications device to "write, send, or read a text-based communication," including e-mails. Violators will be charged a \$20 fine for a first offense and a \$50 fine for repeat offenses. The bill expands a similar prior law that required motorists to use hands-free devices and prohibited drivers under the age of 18 (subject to certain exceptions) from using an electronic device while driving. **Inform employees of the law, update policies and handbooks to reflect the new law, and ensure that supervisors are applying it in practice.**

C. Minimum Pay for Exempt Computer Professionals: Assembly Bill 10

As a result of the Governor's emergency legislation, Labor Code 515.5 was amended to allow payment to exempt computer professionals as *either* hourly workers or monthly or annual salaried workers. Before this change, computer professionals had to earn a minimum hourly rate, set by the

Division of Labor Statistics and Research (DLSR) annually, and their hours therefore had to be tracked. This hourly rate for 2009 is increased from \$36.00 to \$37.94. For 2009, however, exempt computer professionals who are paid a salary must receive a minimum of \$6,587.50 per month (\$79,050.00 per year) and their hours do not need to be tracked. **Remember, though, that the substantive component of the exemption must also be met, and that is sometimes harder than the wage component.**

D. Invalid Waivers of Rights: Assembly Bill 2075

Prior law made it a misdemeanor for an employer to require an employee to execute a release based upon wages that were due but had not been paid. This bill has amended Labor Code 206.5 with the following language: "For purposes of this section, 'execution of a release' includes requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period, which the employer knows to be false." This new language expands the definition of "execution of a release" in order to address concerns that some employers were forcing employees to sign false affidavits of hours worked in the course of wage and hour lawsuit defense. **Releases are legal documents and should be drafted by an attorney. Avoid copying an old release because it is likely not compliant with current law.**

E. Disability Access Reform: Senate Bill 1608

This law represents a landmark disability bill designed to

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improve accessibility for Californians with disabilities, while at the same time reducing businesses' exposure to expensive litigation over access violations. The bill attempts to strike a fair and reasonable balance between these two goals by providing a state advisory committee on disability access, improved continuing education on disability access laws for building inspectors and architects, and incentives for building owners to use state-certified access specialists to ensure compliance.

In an effort to reduce or otherwise eliminate litigation, the bill provides for new court procedures to encourage early resolution of disability access lawsuits. It also makes various clarifications to prior law to help reduce unjustified damages and attorneys' fees. Most notably, the bill limits damages to violations personally encountered or for violations that deterred the plaintiff's access on a particular occasion. **The bill is welcome news for California businesses faced with defending lawsuits often filed for monetary gain rather than to gain access for the disabled.**

F. CA Labor Commissioner Eases Up on Exempt Employee Pay

In an unexpected departure from its long-standing prior analysis, the CA Labor Commissioner issued an opinion letter essentially reversing its position on the permissibility of reduced pay with reduced hours for exempt employees. In the past, if an exempt employee's pay was reduced due to the employee's reduced hours, the salary basis test was violated and therefore the overtime exemption was lost. In response to recent economic turmoil and employer

pleas, the Labor Commissioner indicated that a reduction in pay due to a reduction in work days that arose out of an employer's "significant economic difficulties," does not violate the salary basis test and the exemption was not lost so long as the exempt employee still met the substantive portion of an exemption and still earned a salary of at least twice the minimum wage. **While this is welcome news for employers, the Labor Commissioner did indicate that its opinion was based on the specific facts of the employer it analyzed, which included a representation that the employer intended to return the exempt employees' hours to full-time when business permitted it to do so.**

G. Family Medical Leave Act (FMLA) Amended Again

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84 ("NDAA for 2010" or "HR 2647") amending, among other things, the family military-leave provisions of the FMLA and apparently going into effect immediately. Most notably, the "exigent leave" is extended to apply to family members of active duty service members, not just to family members of National Guard and Reservists. The "military caregiver leave" is extended to apply to employees caring for veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time within five years prior to the treatment or therapy. The full text of HR 2647 can be found at <http://www.govtrack.us/congress>.

Did you know...

Employers are required to post a new and revised "Equal Opportunity is the Law" poster by November 21, 2009? It is available for free download from the EEOC's website at www.eeoc.gov.

November 2009 marks the launch of the IRS' random audit of 5000 employers of various sizes geared at ferreting out employers' improper tax practices arising out of incorrect independent contractor (versus employee) classifications, hidden owner compensation, and untaxed income hidden in employee fringe benefits? **Are you sure you can pass the audit? Let our Employment and Tax law departments help!**

Now you know!

Congratulations to Kelly Scott, Head of ECJ's Employment Law Department, for being listed as a top attorney in the area of Employment and Labor law in the November/December 2009 issue of *Super Lawyers Corporate Counsel Edition* published by Law & Politics.

If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ's Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com; or Karina B. Sterman, Esq. at (310) 281-6395 or ksterman@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.