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**NEW LEGAL
DEVELOPMENTS
FOR
CALIFORNIA EMPLOYERS**

January 2008

We hope you will find helpful the following summary of new legal developments affecting California employers. Please remember that this summary provides general information and is not intended to provide legal advice as to any specific factual situation. If you have questions about the application of these laws to a particular situation, you should consult with legal counsel. The attorneys in our labor and employment practice group would be happy to assist you.

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NEW CALIFORNIA STATUTES

◆ **MINIMUM WAGE INCREASES TO \$8.00 IN 2008**

- ❖ California Minimum Wage: On January 1, 2008, the minimum wage in California increased by 50¢ from \$7.50 to \$8.00 per hour.
- ❖ Effect on Exempt Employees: The minimum wage increase affects exempt executive, administrative and professional employees whose minimum salary requirements are tied to the state minimum wage under California law. For these exempt employees, the minimum salary will increase to \$2,773.33 per month (\$33,280 per year) on January 1, 2008. See discussion below on a new statute decreasing the hourly rate required for exempt computer professionals.
- ❖ Posting Requirements: Employers will need to post the new California minimum wage increase effective January 1, 2008. (Please remember that employers must also post the federal minimum wage notice even though the California minimum wage is higher than the federal minimum wage.)
- ❖ San Francisco Minimum Wage: Effective January 1, 2008, the minimum wage in San Francisco increased from \$9.14 to \$9.36 per hour. For commercial businesses and nonprofit organizations that contract with the City of San Francisco, the Minimum Compensation Ordinance rate increases from \$10.77 to \$11.03 per hour effective January 1, 2008, for contracts entered into or amended on or after October 14, 2007.

◆ **DECREASE IN HOURLY RATE FOR CALIFORNIA COMPUTER PROFESSIONAL EXEMPTION (LABOR CODE SECTION 515.5)**

- ❖ Effective January 1, 2008, the minimum hourly rate for the Computer Professional Exemption in California decreased from \$49.77 per hour to \$36.00.
- ❖ This rate annualized for a full-time employee working 40 hours per week is \$74,000, a dramatic decrease from the 2007 minimum of \$103,521.60.
- ❖ Remember that paying employees an annual salary of \$74,000 will not satisfy this compensation requirement; to remain exempt employees must be paid \$36.00 for each hour worked, including hours in excess of the standard 40-hour work week.

◆ **EMPLOYER-REQUIRED NOTIFICATION – EARNED INCOME TAX CREDIT (REVENUE AND TAXATION CODE SECTION 19850)**

- ❖ Effective January 1, 2008, California employers who are required to provide unemployment insurance must notify all employees that they may be eligible for the federal Earned Income Tax Credit (EITC).

- ❖ Employers must provide the notice within one week before or after, or at the same time, the employer provides an annual wage summary such as a Form W-2 or Form 1099.
- ❖ The notification must be handed directly to the employee or mailed to the employee's last known address. Posting this notification on a bulletin board or sending it through office mail is insufficient, but such notification may be used in addition to individual notifications as required under this new law.
- ❖ The notice shall contain either instructions on how to obtain notices from the IRS on the EITC or a notice with the sample language set forth in the statute as follows:
 - ◆ Based on your annual earnings, you may be eligible to receive the earned-income tax credit from the federal government. The Earned Income Tax Credit is a refundable, federal income tax credit for low-income working individuals and families. The Earned Income Tax Credit has no effect on certain welfare benefits. In most cases, Earned Income Tax Credit payments will not be used to determine eligibility for Medicaid, supplemental security income, food stamps, low-income housing or most temporary assistance for needy families' payments. Even if you do not owe federal taxes, you must file a tax return to receive the Earned Income Tax Credit. Be sure to fill out the earned income tax credit form in the federal income tax return booklet. For information regarding your eligibility to receive the earned income tax credit, including information on how to obtain the Internal Revenue Service notice 797 or Form W-5, or any other necessary forms and instructions, contact the Internal Revenue Service by calling (800) 829-3676 or through its Web site at <http://www.irs.gov/>.
- ❖ The law also reminds employers that they must process Form W-5 for advance payments of the EITC upon request of the employee, as required by federal law.

◆ **SOCIAL SECURITY NUMBERS NO LONGER ALLOWED ON PAYCHECKS**

- ❖ As of January 1, 2008, and pursuant to California Labor Code Section 226(h) (SB 1618 and SB 101), only the last four digits of an employee's Social Security number may be shown on any paycheck provided to an employee.
- ❖ An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with Section 226 is entitled to recover penalties for each pay period in which a violation occurs, may bring an action for injunctive relief, and is entitled to an award of costs and reasonable attorneys' fees.

◆ **MILITARY SPOUSE LEAVE (ASSEMBLY BILL 392, MILITARY AND VETERANS CODE SECTION 395.10)**

- ❖ Employers with 25 or more employees must give qualified employees up to 10 unpaid days off when their spouses are on leave from military deployment.
 - ◆ A qualified employee is one who works for more than 20 hours per week, and whose spouse is a member of the Armed Forces, National Guard, or Reserves, who has been deployed during a period of military conflict.
- ❖ The employee must provide the employer with notice within at least 2 business days of receiving official notice that their spouse will be on leave from deployment and that he or she wishes to take leave. The employee must also provide the employer with written documentation certifying that the spouse will be on leave from military deployment.
- ❖ This bill was considered an urgency statute and became effective at the end of October 2007.
- ❖ Employers may want to update their military leave policies (or the leave of absence sections in their employee handbooks) to reflect this new right to unpaid but protected time off.

◆ **CIVIL RIGHTS ACT OF 2007 (ASSEMBLY BILL 14)**

- ❖ The Unruh Civil Rights Act entitles all people in California to full and equal accommodations, advantages, facilities, privileges or services in all business establishments regardless of sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status or sexual orientation. Numerous other California statutes prohibit discrimination in other activities, but these laws have been inconsistent as to the categories of individuals protected from discrimination. This bill makes consistent the list of individuals protected from discrimination in statutes, including those applying to:
 - ◆ Licensees under the Business and Professions Code;
 - ◆ Parties to business transactions involving a third party;
 - ◆ Persons granting credit or transfer of funds or goods;
 - ◆ Tennis, handball, racquetball and beach and athletic clubs;
 - ◆ Alcoholic beverage or other clubs with restricted memberships; and
 - ◆ Credit card issuers.

- ❖ This bill also removes the immunity normally provided to directors and officers of non-profit corporations who serve without compensation if the non-profit corporation they serve unlawfully discriminates against the list of individuals protected in the Unruh Civil Rights Act.

◆ **PROHIBITED DISCRIMINATION IN PUBLIC AND PRIVATE EDUCATION (SENATE BILL 777)**

- ❖ This bill revises existing statutes prohibiting discrimination against students by public and certain private schools. The bill expands the list of prohibited bases of discrimination to include disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic contained in the Penal Code's definition of hate crimes. Teachers at public schools and covered private schools are prohibited from giving instruction or sponsoring an activity that reflects adversely on one of these categories.
- ❖ The prohibition on discrimination applies only to public schools and private schools that receive financial assistance from the state or that enroll students who receive such financial assistance. There are also certain exemptions for schools affiliated with religious organizations.

◆ **PROHIBITION ON DRIVING WHILE USING HAND-HELD CELL PHONE TAKES EFFECT IN JULY (VEHICLE CODE SECTION 23123)**

- ❖ Starting July 1, 2008, it will be illegal to drive a vehicle while using a wireless telephone, unless the driver is using a "hands-free" listening device. The law provides exceptions for law enforcement and public safety agencies and for certain commercial vehicles. Also, a driver may still use a traditional wireless telephone to reach an emergency service provider. Violators will be fined \$20 for a first offense and \$50 for each subsequent offense.
- ❖ Employers may wish to update their personnel policies to reflect this change in California law.

NEW CASE LAW

◆ **WAGE AND HOUR**

- ❖ **Meal Breaks**: In *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), the California Supreme Court greatly increased the potential liability for employers on claims for violation of the meal break requirements.
 - ◆ California Labor Code Section 226.7 provides that employers must pay employees one additional hour of pay if the employees do not take the one-half hour mandated meal period. There had been much debate as to whether the additional hour of pay was a penalty subject to a one-year statute of limitations or a wage subject to a three-year statute of limitations.
 - ◆ In a much anticipated decision, the California Supreme Court disappointed employers by holding that the “one additional hour of pay” provided for in Labor Code Section 226.7 constitutes a wage subject to a 3-year statute of limitations rather than a 1-year statute of limitations. As a result, employers will be subjected to much more potential liability for violations of the meal period rules.
- ❖ **Expense Reimbursement**: In *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007), the California Supreme Court ruled that an employer may reimburse expenses in the form of a lump sum increase in compensation.
 - ◆ Labor Code Section 2802 requires employers to reimburse employees for all expenses incurred as a result of their employment. In *Gattuso*, the California Supreme Court ruled that an employer may satisfy its obligation under Labor Code section 2802(a) by paying employees enhanced compensation in the form of increases in base salary or increases in commission rates.
 - ◆ To satisfy Labor Code Section 2802 with a lump sum payment of enhanced compensation, the following requirements must be met:
 - ◇ Employers must provide a method to determine the amount that is being paid for reimbursement of expenses.
 - To comply with paycheck requirements, employers should indicate on pay stubs the amount paid for compensation and the amount paid for expense reimbursement.

- ✧ Because employees cannot waive their right to expense reimbursement by agreement, the amount of the lump sum must be sufficient to provide full reimbursement for actual expenses necessarily incurred. If an employee can show that the lump sum was inadequate to reimburse for actual expenses, the employer must make up the difference. Employers must provide a method or formula to identify the amount of employee compensation payment that is intended to provide expense reimbursement.
- ◆ Employers who elect to use a lump sum method should consult with legal counsel to ensure that their procedures comply with the *Gattuso* requirements.
- ✧ **Bonuses:** The California Supreme Court disapproved the earlier *Ralph's Grocery* decision concerning calculation of bonuses in a new case involving the same bonus plan, *Prachasaisoradej v. Ralph's Grocery Company Inc.*, 42 Cal. 4th 217 (2007) (*Ralph's II*).
 - ◆ In the 2003 decision *Ralph's Grocery Company, Inc. v. Superior Court*, 112 Cal. App. 4th 1090 (2003) (*Ralph's I*), a California court of appeal ruled that an incentive compensation plan was invalid as to non-exempt employees because the plan reflected storewide workers' compensation costs, cash shortages and merchandise damages and loss in the calculation of store profits. As a result of this case, employers were required to revamp their bonus plans to ignore the cost of doing business.
 - ◆ In *Ralph's II*, the California Supreme Court disapproved of *Ralph's I* and held that the *Ralph's* incentive compensation plan was not illegal "simply because, pursuant to normal concepts of profitability, ordinary business expenses, such as storewide workers' compensation costs, and storewide cash and merchandise losses, were figured in, along with other store expenses such as the electric bill and the costs of good sold, to determine the store's profit."
 - ◆ Employers in California need no longer avoid considering normal business expenses in establishing incentive compensation plans. Employers still need to be aware of the prohibition on holding employees responsible for their cash shortages and other normal losses.
- ◆ **ARBITRATION**
 - ✧ In *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), the California Supreme Court ruled that the employment arbitration agreements which contain a class arbitration waiver may not be enforced to preclude class arbitrations by employees for non-waivable statutory rights.
 - ◆ The *Circuit City* arbitration program at issue in the *Gentry* case included a provision that the arbitrator would not consolidate claims of different

associates into one arbitration proceeding. Gentry sought to avoid arbitration and brought a class action in Superior Court alleging failure to pay overtime.

- ◆ The case cleared up a split of authority on the issue. The Supreme Court held unenforceable a bar on class arbitration of claims for non-waivable statutory rights, such as overtime claims.
- ◆ Employers should review their mandatory arbitration programs to ensure that they do not contain a class-action waiver in violation of the *Gentry* case.

◆ **DISABILITY DISCRIMINATION**

- ❖ Decisions by the California Supreme Court and the Ninth Circuit Court of Appeals clarified that a plaintiff in a disability discrimination case must prove that he or she is a qualified individual with a disability under either the federal Americans with Disabilities Act (“ADA”) or the California Fair Employment and Housing Act (“FEHA”). *Green v. California*, 42 Cal. 4th 254 (2007); *Bates v. United Parcel Service, Inc.*, 2007 U.S. App. Lexis 29870 (9th Cir., 12/28/2007).
- ❖ In *Green*, the California Supreme Court was asked to resolve a conflict between lower California courts as to whether under the FEHA, a plaintiff has the same burden of proving that he is qualified to perform the essential functions of the job in question as he would have under the ADA. The Supreme Court found that the standards are the same.
- ❖ In *Bates*, the Ninth Circuit reviewed the decision of a district court that UPS violated the ADA by using a qualification standard for package truck drivers that screened out drivers with hearing impairments. UPS required drivers of package trucks to meet a Department of Transportation hearing requirement that was only applicable to drivers of trucks larger than package trucks. In reversing the district court’s decision, the Ninth Circuit overruled its own decision in a prior case and adopted a new standard for an employer to prove that a discriminatory qualification standard was justified by business necessity. The new standard should make it somewhat easier for employers to establish a business necessity defense.

◆ **IMMIGRATION**

- ❖ So far, the AFL-CIO (along with employer groups’ support) has been successful in blocking efforts by the Department of Homeland Security (“DHS”) to implement its regulations on No-Match letters. These regulations were published in August 2007, and were part of the federal government’s larger effort to crack down on employment of illegal workers. The regulations described an employer’s obligations and the options available for an employer to avoid liability after receiving such a No-Match letter from either the Social Security Administration or the DHS. If an employer took the actions identified in the regulation, it would be entitled to a limited safe harbor in the event of an investigation.

- ❖ In conjunction with the new regulation, the DHS announced that it intended to send out 140,000 No-Match letters in an effort to ferret out illegal employment. However, the AFL-CIO brought a lawsuit to block the regulation. Business groups also opposed the regulation, which they argued placed an unfair burden on employers. Although the regulation was designed in part to provide greater clarity for employers on the proper response to No-Match letters, the overall impact was to require employers to take a larger role in policing work status compliance.
- ❖ In October 2007, Judge Charles Breyer issued an preliminary injunction in the lawsuit, blocking implementation of the rule until the lawsuit could be resolved. The DHS is moving on dual tracks to resolve the issue. First, in November 2007, the DHS filed a motion to stay the final ruling on the injunction until March 2008 in order to give the DHS time to revise the rules to address Judge Breyer's concerns. Second, in early December 2007, the DHS filed an appeal with the U.S. Ninth Circuit Court of Appeals in San Francisco, asking the court to review and overturn the injunction.
- ❖ Either through the appeal or through revised rules, expect to hear more about No-Match Safe Harbor Regulations in the Spring of 2008, and also expect more litigation before this issue is fully resolved.

◆ **FMLA ISSUES**

- ❖ In *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), *petition for cert pending*, the Court of Appeals for the Fourth Circuit held that a U.S. Department of Labor regulation requires that a settlement be approved by a court or the DOL in order to waive claims arising under the FMLA.
 - ◆ The court refused to accept the DOL's interpretation of its own regulation, that approval was only required for prospective waivers and not for settlements of past violations. Because the defendant has filed a petition for review with the United States Supreme Court, employers should consult with counsel concerning the effect of the *Taylor* case on releases of FMLA claims.
- ❖ In *Alice M. Repa v. Roadway Express, Inc.*, 477 F.3d 938 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit held that an employer could not require an employee to use accrued sick and vacation time for an FMLA leave when she was receiving temporary disability benefits.
 - ◆ Alice Repa was a union employee at Roadway Express, and her union contract provided for health & welfare benefits including short-term disability. Ms. Repa went on a leave of absence for a non-work related injury and her employer properly designated it as an FMLA leave. Roadway required her to use up her accrued sick and vacation days in addition to receiving temporary disability benefits. The Court of Appeal ruled that this requirement violated the FMLA, and affirmed summary judgment for Ms. Repa on that issue.

- ◆ At issue was a particular FMLA regulation, 29 C.F.R. Section 825.207(d)(1), which provides that when a leave of absence is taken due to a temporary disability or workers' compensation benefit plan, the regulation otherwise allowing substitution of paid leave is inapplicable. The Court of Appeal rejected all of the employer's arguments that Section 825.207(d)(1) was ambiguous and not applicable because the union (not the employer) managed the temporary disability plan. However, the Court did confirm that it was permissible to count the time on the disability leave against the employee's FMLA entitlement.
- ◆ Employers may want to revisit their FMLA policies, forms and practices, and confirm that employees on leave pursuant to a paid disability or workers' compensation plan are not required to use accrued vacation leave, sick leave and/or PTO.

◆ **NLRB DECISIONS**

- ❖ **Recognition Bar:** In *Dana Corporation/Metaldyne Corporation*, 351 NLRB No. 28 (September 29, 2007), the National Labor Relations Board reviewed its recognition-bar doctrine and amended it.
 - ◆ In this case, the employers entered into neutrality and card-check agreements with a union. Both employers recognized the Union following card-checks. After recognition, employees in the units filed petitions for decertification with the NLRB. At the time the employees filed the petitions, the recognition-bar doctrine provided that if an employer voluntarily recognized a union in good faith, that recognition would bar an election petition filed by an employee or a rival union for a reasonable period of time. Following this doctrine, the NLRB's regional office dismissed the decertification petitions.
 - ◆ On appeal, the Board modified the recognition-bar doctrine to allow employees greater freedom of choice. The Board concluded that there would not be an election bar based on voluntary recognition unless "(1) employees in the bargaining unit receive notice of recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition."
- ❖ **Non-Solicitation Policies:** In *The Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 70 (December 16, 2007), the National Labor Relations Board, in a 3-2 decision, held that an employer did not violate Section 8(a)(1) of the National Labor Relations Act by maintaining a policy that prohibited employees from using the employer's e-mail system "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations."

- ◆ The Board also rejected the argument that the employer discriminated against union activity in applying its policy. In reaching this conclusion, the Board reversed its position in prior cases and held that it was not unlawful for the employer to discipline an employee who used the e-mail system for union solicitations despite evidence that the employer was aware that employees used the e-mail system for personal communications such as baby announcements, party invitations and the occasional offer of sports tickets or request for services such as dog walking.
- ◆ In reaching this conclusion, the Board set forth a new standard for evaluating claims for discriminatory application of a non-solicitation policy. Even if employers allow employees some personal use of e-mail, employers may lawfully prohibit solicitations so long as union activity is not singled out. For example, employers may draw distinctions between solicitations on behalf of charitable and non-charitable organizations, personal solicitations and commercial solicitations, and invitations on behalf of an organization and personal invitations.
- ◆ In light of this decision, employers may wish to review their non-solicitation policies. Employers should be cautious, however, until all appeals of this decision are exhausted.

◆ **LEAFLETTING**

- ❖ In *Fashion Valley Mall, LLC v. National Labor Relations Board*, 2007 Cal. Lexis 14427 Cal. Sup. December 24, 2007, the California Supreme Court ruled that the California Constitution prohibits a shopping mall from banning third parties from distributing leaflets encouraging customers to boycott stores in the mall.

NEW CALIFORNIA REGULATIONS

◆ **FAIR EMPLOYMENT AND HOUSING COMMISSION'S REGULATIONS ON SEXUAL HARASSMENT TRAINING**

- ❖ The regulations implementing the Fair Employment and Housing Act's sexual harassment training requirement were formally approved and became effective on August 17, 2007.
- ❖ The regulations establish the content of the mandatory training, the acceptable methods of training and the qualifications of trainers.
- ❖ The regulations also make clear how to calculate the two year period for refresher training, giving employers the option to use calendar years rather than measuring two years from the date each employee received the initial training. Accordingly, a manager trained in 2007 need only be trained again sometime in 2009.

◆ **SAN FRANCISCO HEALTH CARE SECURITY ORDINANCE**

- ❖ The San Francisco Health Care Security Ordinance requires employers with fifty or more employees to begin making minimum health care expenditures in January 2008 on behalf of all employees working 10 or more hours per week in San Francisco. Employers with twenty or more employees will be required to make health care expenditures beginning in April 2008. Non-profit employers with fewer than fifty employees are exempted from the expenditure requirement.
- ❖ Employers can satisfy the health care expenditure obligation by purchasing insurance or contributing to a San Francisco public health care fund or making certain other payments. More detailed information on the ordinance's requirements is available at <http://www.sfgov.org/site/olse>.
- ❖ There is a legal challenge to the ordinance pending, but the challenge does not currently relieve employers from complying with the ordinance. A federal judge ruled on December 26, 2007 that the provisions of the San Francisco Health Care Security ordinances imposing burdens on employers were preempted by ERISA, the federal law governing employee benefit plans. *Golden Gate Restaurant Association v. City and County of San Francisco* (U.S. Dist. Ct. ND Cal. # C-06-06997JSW). The City and other interested parties, however, filed an appeal of the decision and the Ninth Circuit Court of Appeal issued an emergency stay allowing the City to enforce the ordinance pending the resolution of the appeal.
- ❖ Employers with employees working in the city of San Francisco should consult legal counsel to ensure compliance with this new ordinance.

NEW FEDERAL REGULATIONS

◆ **NEW FORM I-9**

- ❖ On November 7, 2007, the U.S. Citizenship and Immigration Services (USCIS) finally published a revised version of the Form I-9. Effective January 1, 2008, this form should be used for all new hires.
- ❖ The documents that can be used to verify identity and eligibility to work in the United States on the I-9's List A have been amended, so please check the new form carefully. The revised list of acceptable documents applies to both initial hires and re-verification of existing employees. Employers are not required to complete new Form I-9s for existing employees unless and until the employees are subject to re-verification.
- ❖ The new Form I-9 contains a revision date of June 5, 2007 and is available on the USCIS website at <http://www.uscis.gov/files/form/I-9.pdf>.
- ❖ In addition, the DHS also revised the Employer Handbook for I-9 completion, which you can refer to online at: <http://www.uscis.gov/files/nativedocuments/m-274.pdf>.

◆ **SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTER REGULATIONS ARE ON HOLD (SEE CALIFORNIA CASE LAW SECTION FOR DETAILS)**

- ❖ In early August, U.S. Immigrations and Customs Enforcement (“ICE”), an agency of the Department of Homeland Security (“DHS”), issued a regulation regarding No-Match letters and employers’ obligations when they receive such letters from either the Social Security Administration or similar letters from the DHS. These were known as the Safe Harbor Regulation.
- ❖ As is discussed in the California case law section of this handout, shortly before the regulation was due to take effect, a federal judge issued an preliminary injunction in the AFL-CIO lawsuit, blocking implementation of the rule until the lawsuit could be resolved. The prior version of the regulation is now on hold, and the DHS has announced that it aims to revise the regulation again with a target date of March 2008.

◆ **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REGULATIONS AND GUIDANCE**

- ❖ Regulations under the Age Discrimination in Employment Act (“ADEA”)
 - ◆ In July 2007, the EEOC published a final rule to amend its ADEA regulations to conform them to the Supreme Court's holding in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), that the ADEA only prohibits

discrimination based on relatively older age, not discrimination based on age generally.

- ◆ Thus, the final rule deletes language in EEOC's prior ADEA regulations that prohibited discrimination against relatively younger individuals. The new rule explains that the ADEA only prohibits employment discrimination based on old age and, therefore, does not prohibit employers from favoring relatively older individuals.
- ❖ Final Regulations on Retiree Health Plans and the Age Discrimination in Employment Act
 - ◆ On December 26, 2007, the Equal Employment Opportunity Commission issued its final rule permitting employers to maintain certain retiree health plan designs, such as Medicare bridge plans and Medicare wrap-around plans, without violating the Age Discrimination in Employment Act of 1967 (ADEA). By these rules, the EEOC is creating a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program.
 - ◆ The rule is intended, in part, to address the decision in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000) in which the Third Circuit Court of Appeals held that an employer violated the ADEA if it reduced or eliminated retiree health benefits when retirees became eligible for Medicare, unless the employer could show either that the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare or that it was expending the same costs for both groups of retirees.
- ❖ May 2007 Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities
 - ◆ In May 2007, the EEOC issued its Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities. The EEOC explains in the Guidance that although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment.
 - ◆ The Guidance is not intended to create a new protected category but rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability.

- ◆ An employer may also have specific obligations towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws.
- ❖ December 2007 EEOC Fact Sheet on Testing Procedures
 - ◆ The EEOC's fact sheet on Employer Tests And Selection Procedures provides an outline of the issues raised by tests and selection procedures in light of the federal discrimination laws, a summary of recent court decisions on the topic and a list of "best practices."
 - ◆ The Fact Sheet is available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html
- ◆ **DEPARTMENT OF LABOR OPINION LETTER ON DEDUCTIONS FOR ABSENCES FOR STATE LEAVE**
 - ❖ A February 2007 Opinion Letter from the Administrator for the Wage and Hour Division of the DOL confirms that employers may not make deductions from exempt employees' pay for partial-day absences required by state leave laws. *Op. U.S. DOL FLSA 2007-6* (February 8, 2007). The Opinion Letter analyzed a law similar to the California law requiring unpaid time off for an employee to attend his or her child's school.
 - ❖ The Administrator concluded that while employers could make deductions from employees' pay for full day absences or charge employees' accrued leave (such as a sick leave bank) for partial-day absences, employers may not make deductions from pay for partial-day absences of exempt employees. To do so would be inconsistent with the salary requirement for exempt employees under the Fair Labor Standards Act ("FLSA").
 - ❖ The FLSA allows such partial-day deductions only for leave covered by the FMLA. Leave under California's school leave law would not qualify as FMLA leave, nor would leave to care for domestic partners required under the CFRA.
- ◆ **IRS INCREASES MILEAGE RATE**
 - ❖ As of January 1, 2008, the IRS has provided an updated optional standard mileage rate of 50.5 cents per mile for all business miles driven starting January 1, 2008 (up from 48.5 cents in 2007).

VETOED EMPLOYMENT LEGISLATION

THESE LAWS DO NOT TAKE EFFECT JANUARY 1, 2008

◆ **BEREAVEMENT LEAVE (SB 549, CORBETT)**

- ❖ Would have allowed for up to four days of unpaid bereavement leave for the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. The four days would not have needed to be consecutive, and the bill provided that the days must only be completed within 13 months of the family member's death.
- ❖ The bereavement leave would have been unpaid, although the employer would have had to allow the employee to use available vacation or personal leave.

◆ **FAMILIAL STATUS (SB 836, KUEHL)**

- ❖ Would have added "familial status" to the list of categories protected from unlawful employment practices under the Fair Employment & Housing Act.
- ❖ The bill broadly defined "familial status" as "being an individual who is or who will be caring for or supporting a family member."
 - ◆ "Caring for and supporting" was defined broadly as:
 - ❖ Providing supervision or transportation;
 - ❖ Providing psychological or emotional comfort or support;
 - ❖ Addressing medical, educational, nutritional, hygienic, or safety needs;
or
 - ❖ Attending to an illness, injury, or mental or physical disability.
 - ◆ "Family Member" was also defined broadly as child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent or grandchild.

◆ **EXPANSION OF FAMILY MEDICAL LEAVE (AB 537, SWANSON & KUEHL)**

- ❖ Would have increased an employee's ability to take protected time off under the FMLA and California's Family Rights Act (CFRA) by broadening the definitions of "parent, child and spouse" as follows:

- ◆ Eliminating the age and dependency requirements of “child” to allow an employee to take protected leave to care for his or her independent adult child suffering from a serious health condition.
- ◆ Expanding the definition of “parent” to include an employee’s parent-in-law.
- ◆ Permitting an employee to take leave for a seriously ill grandparent, grandchild, sibling, or domestic partner.

◆ **NUTRITIONAL INFORMATION ON MENUS (SB 120, PADILLA & MIGDEN)**

- ❖ Would have required each food facility to make nutritional information available to consumers for all standard menu items.
 - ◆ “Food Facility” was defined as a franchised outlet, or as at least 14 other food facilities operating under common ownership with the same name in the state that offer substantially the same menu items.
 - ✧ Exceptions would have included: Farmers’ markets, commissaries, public and private school cafeterias, temporary food facilities, vending machines and grocery stores.
- ❖ The following information would have been required on menus:
 - ◆ Total calories, grams of saturated fat, grams of trans fat, number of carbohydrates, and milligrams of sodium for each standard menu item.
 - ◆ Menus would have had to include the following statement: “Recommended limits for a 2,000 calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium.”
- ❖ Violations after July 1, 2009 would have been infractions and punishable by a fine of up to \$500.

◆ **WAGE DISCRIMINATION (AB 435, BROWNLEY)**

- ❖ Would have required employers to maintain wage and job classification records of employees for 5 years (instead of the current 2 years).
- ❖ Would have extended the statute of limitations for wage discrimination cases from 3 years to 4 years, or 5 years in cases of wrongful misconduct by the employer.
- ❖ The likely impact would have been to increase lawsuits against employers for untimely claims.

◆ **MISCLASSIFICATION OF AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR (SB 622, PADILLA)**

- ❖ Would have prohibited the willful misclassification of employees as independent contractors.
 - ◆ “Willful” was defined as voluntary and intentional.
- ❖ Would have subjected employers to fines in addition to other remedies already available under the law.

◆ **PAYMENTS TO LOCKED OUT EMPLOYEES (AB 504, SWANSON)**

- ❖ Would have required employers who are convicted of a crime involving fraud, misrepresentation, or misconduct related to a lockout, to make restitution to employees for lost wages and benefits during the lockout.
- ❖ Broadly defined lockout to mean “a period of time during which an employer prohibits an employee from performing his or her work or returning to work because of a labor dispute with the employer regarding the employee’s wages, hours, or other terms or conditions of employment.”

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