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ATTORNEYS AT LAW

# California Update

## EMPLOYMENT LAW

Winter 2011

### Wage Rates Increased for Computer Professional and Physician and Surgeon Exemptions

Some computer professionals, and licensed physicians and surgeons, are exempt from overtime if they meet specific wage requirements. The minimum pay rates are determined annually by the California Division of Labor Statistics and Research.

After two years without changes, the rates will increase in 2012.

Effective January 1, 2012, computer professionals must make at least one of the following rates in order to be eligible for

the exemption: \$38.89 per hour, \$6,752.19 per month or \$81,026.25 per year.

Effective January 1, 2012, licensed physicians and surgeons must make at least \$70.86 per hour.

### New Procedural Regulations from DFEH

The Department of Fair Employment and Housing issued new regulations governing the procedures for administrative complaints. The regulations became effective on October 7 of this year and are codified at Title 2, California Code of Regulations, sections 10000 through 10066. Although the new regulations are said to merely codify the agency's existing directives on how to handle administrative complaints, some of the regulations actually depart from past practices.

Significantly, the DFEH will no longer require the charging party to sign the complaint. Although a complaint is required by statute to be "verified," the regulations provide that the complaint may be signed by anyone "authorized" by the charging party. Verification may be done by oath or affidavit, though the regulations do not specify that it needs to be written to be effective. The DFEH will now even

accept an unsigned complaint for filing when no one is able to sign it before the statute of limitations expires. The DFEH has also codified its liberal construction of complaints. It will construe complaints to include all claims supported by the alleged facts, regardless of whether such claims are expressly asserted by the complainant. Consequently, if the facts alleged in an age discrimination complaint also support a

claim of harassment, the DFEH will construe the complaint to include both claims, even if the claimant did not assert a claim of harassment.

These changes will make it even easier for claimants to file complaints against their employers and more difficult for employers to assert that employees failed to exhaust administrative remedies.

### Provide or Ensure? An Update on *Brinker*

On November 8, the California Supreme Court heard oral arguments in the case of *Brinker v. Superior Court (Hornbaum)*. In this long-awaited case, the plaintiffs have argued that an employer must affirmatively ensure that their employees take the required meal periods, while defendants claim that the employer's duty is only to provide the employee the opportunity to take the meal period free of any control by the employer. Much of the case rests on the court's interpretation of the Labor Code, which indicates that the employer is to "provide" a meal period.

During oral arguments, the plaintiff argued that under the "ensure" standard employers would be justified in disciplining or even firing employees who did not follow instructions on taking their meal breaks. The Court, however, seemed hesitant to adopt a standard that could lead to this

outcome, and appeared to favor a standard that provided flexibility, leaving the choice up to the employee as to whether or when they would take their meal break. The most insightful comment from the bench on this issue pointed out that, if the hallmark of a meal period is the employer suspending control over the employee, then the employee should be able to choose for him or herself whether to take the meal period at the designated time. Overall, the tenor of the questions suggested that the Court is in favor of a standard that leaves the employees some flexibility in deciding whether to take their meal breaks.

Whatever the outcome, the *Brinker* case will be one of the most important wage and hour cases in California's recent history. The court should issue a decision by February 6, 2012.

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**Effective January 1, 2012, the San Francisco minimum wage increases from \$9.92 to \$10.24 per hour.**

### New Laws Provide Additional Protections to Employees

Several employment-related bills were signed into law by Gov. Jerry Brown, all of which provide additional protections for employees. Many place new requirements on California employers, so it is important to understand how to comply with these new requirements.

#### **AB 22: Additional Restrictions on Use of Consumer Credit Reports**

This new law limits employers in how they may use consumer credit reports. The regulated consumer credit reports are those that contain any information about an individual's credit worthiness, credit standing, or credit capacity, when they are used for employment purposes. Specifically, employers must explain the reason for the credit check in their notice and authorization form, and they may not get a credit report unless the position sought or occupied is:

- A position in management.
- A position in the State Department of Justice, a sworn peace officer or law enforcement.
- A job that affords access to confidential or proprietary information.
- A job that affords regular access during the workday to the employer's, a customer's or a client's cash totaling at least \$10,000.
- The employer is required by law to consider credit history information.
- A position that requires regular access to bank or credit card account information, Social Security numbers, or dates of birth (but not if access to such information merely involves routine solicitation and processing of credit card applications in a retail establishment).
- A position in which the employee will be a named signatory on the bank or credit card account of the employer.
- A position in which the employee will be authorized to transfer money or authorized to enter into financial contracts on the employer's behalf.

There are penalties for employers that fail to follow these requirements.

For employers who do not run consumer credit reports, and only run criminal background checks and/or reference checks from previous employers, this new law requires only that the employer now add the reporting agency's website to the information the employer is already required provide to the employee.

#### **SB 459: A Prohibition on Misclassification of Independent Contractors**

With increasing agency enforcement and civil suits claiming misclassification on the rise, it is important for employers to ensure that they have not misclassified employees as independent contractors. SB 459 adds additional incentive to employers to ensure proper classification. Specifically, this bill provides for the following:

- A prohibition on "willful" misclassification of employees as independent contractors.
- Civil penalties in the amount of \$5,000 to \$15,000 (\$10,000 to \$25,000 for an established pattern or practice) for violations of the law.
- Labor Commissioner may assess additional civil and liquidated damages.
- Joint and several liability for a consultant that incorrectly advises an employer to treat an employee as an independent contractor.
- Reporting to the State Contractor's Licensing Board for contractor employers, and a requirement that the Board initiate disciplinary procedures for violators.
- Posting of a notice on the website or in a public area of the employer **for one year** if found to be in violation.

Proponents of the bill praised it as a deterrent to employers intentionally misclassifying employees and as a way of leveling the playing field for those employers following the rules. Opponents cited the difficulty in properly classifying employees, and pointed to the different standards used by various state agencies as proof that

properly classifying employees can be tricky. This bill, authored and promoted by labor unions, raises the penalties for employers that do not classify their employees properly, but does not give any additional guidance on how to properly classify employees.

#### **AB 887: Gender Identity and Expression**

This new law amends the Fair Employment and Housing Act (as well as various other laws) to define gender as including both gender identity and gender expression. Gender expression refers to a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. The law makes it clear that discrimination on the basis of gender identity and "gender expression" is prohibited. The new law also requires employers to allow an employee to appear or dress consistently with the employee's gender expression.

#### **AB 1396: Commission Agreements Must Be in Writing**

By 2013, employers must provide a written contract when the "contemplated method of payment" will include commissions. This writing must include the method by which the commissions are to be calculated and paid, and applies only when the services will be rendered within California.

#### **AB 469: The Wage Theft Protection Act**

In October 2011, Governor Brown signed AB 469, requiring employers to provide their non-exempt employees with a notice of their pay at the time of hire and any time their pay changes. Some employees are excepted from this requirement, including exempt employees and employees covered by certain collective bargaining agreements. The law becomes effective on January 1, 2012.

The law specifically requires an employer, *at the time of hiring*, to provide an employee with a notice that states:

1. The rate and the basis, whether hourly, salary, commission, or otherwise, including overtime, of the employee's wages
2. Allowances if any (meal/lodging allowances)
3. Regular payday
4. Names of the employer including any "doing business as"
5. Address of the employer's main office or principal place of business, and a mailing address
6. Employer's telephone number
7. Name, address, and telephone number of the employer's worker's compensation insurance carrier and

8. Any other information the Labor Commissioner deems material and necessary."

Additionally, if there is a change to any of the above stated items during the employee's employment, the employer must notify the employee in writing within 7 calendar days of the date of the change unless the change is reflected on a timely wage statement or another writing.

To comply with this law, California employers should consider:

- amending offer letters to include the required information
- creating new pay notice forms for new hires

- creating new pay notices forms for any time such pay information changes, and
- changing pay procedures to ensure employees are promptly notified when changes are made.

New penalties were enacted under this law as well, including increasing the statute of limitations for the DLSE to collect statutory penalties from one to three years. The Labor Commissioner expects to draft a template for these notice requirements. The template should ultimately be available at <http://www.dir.ca.gov/dlse>.

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## NLRA Rights Apply to Employees at Non-Unionized Workplaces Too

On or before January 31, 2012, all private-sector employers in the country must post the National Labor Relations Board's poster that outlines employees' rights under the National Labor Relations Act (NLRA). The notice will provide information about the rights of employees to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to

refrain from any of these activities. It will also provide examples of unlawful employer and union conduct and instruct employees how to contact the NLRB with questions or complaints. Even non-unionized employers are required to post the notice. Rights under the NLRA apply to both union and non-union workplaces. Failure to post the notice may be treated as unfair labor practice under the NLRA.

There is litigation underway that challenges this requirement. But as of now, employers must display the poster (which you can download at [www.nlr.gov/poster](http://www.nlr.gov/poster)) by January 31, 2012.

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## Attorney Fee Disputes Between Employers and Employees Clarified

A California Court of Appeal recently determined that Labor Code section 2802 does not require an employer to reimburse an employee for attorney's fees incurred in the employee's successful defense of the employer's action against that employee. In the case, an employer filed a lawsuit against a former employee for breach of contract, conversion, negligence and several other causes of action. After the former employee successfully defended the action, he sought to recover his attorney's fees from his former employer under California Labor Code section 2802 because he alleged that the fees incurred in

defending himself were an expense that arose out of his employment with his former employer. Under Section 2802, employers must "indemnify" their employees for "all necessary expenditures or losses incurred by employees in direct consequence of the discharge of their duties." The appellate court denied the request for fees. The court questioned whether the legal fees incurred by the former employee were "in direct consequence" of his employment, and explained that the word "indemnify" in this context is usually understood as an obligation to pay for expenses incurred in a lawsuit by a third party, not expenses

incurred in a "first party" dispute between an employer and an employee. Further, the court indicated that the broader intent of the law does not support extending the reach of section 2802 to an employer's claims against its employees.

While employers in California have a range of indemnification obligations to their current and former employees, this case clarifies that employers *do not* need to reimburse employees for legal fees or costs expended in defense of claims made against them by their employers.

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