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EMPLOYMENT LAW NEWS

Employers should be looking ahead to 2006. Those with 50 or more employees should already have provided the sexual harassment training required before January 1, 2006. In practice, all employers should provide this training – even a small employer can benefit from this easy and cost-effective way of avoiding, and creating a defense to, a harassment claim. Also discussed are some suggestions for 2006. Though some of the cautionary notes may sound daunting, the relative ease of compliance makes the "glass half full" for 2006 . . .

Employers with 50 or more employees must provide sexual harassment training to all supervisors, before the January 1, 2006 deadline. "50 employees" includes those out of state and independent contractors, making it difficult for employers to avoid the requirement. A two hour training session, including an interactive component, must provide information and practical guidance about both federal and state law, how to prohibit, prevent and correct sexual harassment, and what to do from a practical perspective if a situation arises.

The training sessions I have been giving to clients have entertained and enlightened – both the clients and myself. As we have engaged in detailed practical discussions about actual workplace incidents, I have learned much about the actual events and concerns that confront my clients on a day to day basis. This has enhanced my ability to offer advice that will actually improve their specific workplace conditions. At the same time, the clients, including supervisors who may not regularly have direct access to the company's employment attorney, have appreciated the opportunity to address their particular situations or concerns. As we all have become better educated, we have shared some interesting, instructive and often amusing examples, and worked through how to resolve them, providing very real tools for the supervisors to take back to work. This has been a sometimes unanticipated benefit of being forced into the sexual harassment training sessions.

Employers still have time to provide the legally required training to their supervisors. In the process, I expect they will react as most of my clients and their supervisors have: "That actually wasn't so bad after all!"

The Labor Commissioner has been aggressively pursuing employers who do not comply strictly with wage and hour requirements. The monetary penalties imposed can be substantial: up to 30 days wages as a penalty for unpaid wages, and one hour's pay for every missed rest or meal break, for every affected employee. Sometimes non-compliance is due to unfamiliarity with the rules. Note that because California's wage and hour laws provide greater benefits to the employee, it is the state law, not just the federal, that California employers must follow.

Here is a brief refresher: Every employee must be given a **paid** rest break of at least ten minutes for every four hours worked. This rest period should be taken, to the extent practical, near the middle of each four hour shift. These rest periods are counted as time worked. (For those employers who complain that these breaks are "impossible," there are practical ways to comply.) Each employee who works more than five hours must also have an **unpaid** meal break of at least one half hour. This meal break may be waived (in writing) if the total work day is less than six hours. The employee should "clock out" for this meal break, if for no other reason, so that the employer can prove that the meal break was provided. If the employee works more than ten hours, an additional unpaid meal break must generally be given.

Overtime is another complex issue. The general rule in California is that non-exempt employees must be paid time and a half for every hour worked in a week, over eight hours in a day, **or** over 40 hours in a week. (Thus both daily and weekly hours count to determine whether overtime pay is due.) In addition, an employee who works more than twelve hours in a day must be paid double time for those hours over twelve. The same rule applies to any employee who works seven consecutive days in a work week: Any hours over eight worked on the seventh consecutive day must be paid at double time.

A related issue is mis-classification of employees. Some employers attempt to avoid all of the picayune rules touched on above by classifying employees as "exempt" from the wage and hour laws. Many employers overuse the "exempt" classification, possibly exposing themselves to substantial penalties if the Labor Commissioner discovers this error.

As noted, the Labor Commissioner seems to be really coming down hard on employers not in compliance with these very complicated regulations. And, the above is only a brief summary – without examining every nuance and exception, or commenting on how any actual employer does business. **It is my strong suggestion** that every employer audit its wage and hour policies, including the classification of employees, before the Labor Commissioner requires a formal audit, and perhaps a penalty.

Now that everyone has thrown up their hands with a heavy sigh, a few additional notes:

Wage claims: New law requires employers to actively defend administrative wage claims, or be barred from presenting substantive defenses at a subsequent court hearing. In the past, employers sometimes ignored these claims at the administrative level, relying on their ability to appeal a negative ruling in the Superior Court. The Legislature apparently wanted to emphasize the force of the administrative proceedings, and lessen duplication of efforts, and the resulting burden on the courts.

Exemptions from overtime are hard to come by. Courts have found insurance sales people, electrical engineers, and loan originators non-exempt, and entitled to overtime pay. Though these employees might seem to be exempt administrative or professional workers, they fail to meet the complex criteria for exemption. One general rule is that production employees, or those who make or sell the product or service that the business exists to produce or sell are **not** exempt. The exemptions depend not only on the employee's duties, but on the nature of the employer's business. Exemptions **must** be evaluated carefully, on a case by case basis.

Undocumented workers have been another focus of our friends, the Labor Commissioner, the IRS and the Employment Development Department. Employers must ensure that every worker has presented the documentation required for completion of the I-9 Form, and that a current I-9 Form is in every employee's personnel file. Even if this was not done upon hiring, as they say, better late than never.

On a related note, a California court recently ruled that even illegal workers are entitled to workers' compensation protection. Thus, every worker should be covered, regardless of immigration status, at the employer's risk of yet another penalty – for failing to provide workers' compensation. Here too though, compliance is relatively easy, and is unrelated to a potential penalty arising from immigration status.

The job interview can be an invaluable screening process, if used thoughtfully. I often discuss with clients how to use questions to distinguish between appropriate and potential problem candidates. One important suggestion is for the employer to be candid about anticipated rough spots in the employment situation, so that the hesitant candidate has the opportunity up front to opt out. Correspondingly, the interviewer can gauge the applicant's responses, and focus on those who seem to fit.

Also of consequence is what questions and topics are appropriate for discussion with a job applicant. California law prohibits any non-job-related inquiries, including those concerning, even indirectly, race, religion, national origin or ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation. The employer **may** however, inquire into the applicant's physical ability to perform the job, and may **respond** to the applicant's request for accommodations. Only after a job has been offered may the employer ask about physical limitations or require a job-related medical or psychological examination. Of course, the employer may ask any job-related question of an applicant, while avoiding questions that focus on protected characteristics.

For example, while the employer cannot ask about the applicant's religion or observances, the employer can describe regular work days and shifts expected to be worked. Similarly, though the employer cannot inquire about national origin or ethnicity, the employer can and should advise that verification of the legal right to work in the United States will be required.

The bottom line is that the interview process **can** be used to great advantage, if the employer approaches it thoughtfully.

FOR MORE INFORMATION ON THESE OR OTHER EMPLOYMENT LAW ISSUES, OR FOR SEXUAL HARASSMENT TRAINING, PLEASE CONTACT SUSAN ZEME, ESQ., AT (510)652-6895, OR SUSAN@SWZEME.COM.