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EMPLOYMENT LAW NEWS

Like most years, 2005 begins with some significant changes in the employment laws. However, for the first time in several years, many changes benefit employers. There are also significantly fewer changes than we have become used to. Whatever your personal opinion of Governor Schwarzenegger, he is helping your business. This newsletter will touch on most of the relevant new laws, and remind you to inquire further about those affecting your business. Please remember that it is important to audit and update your employee policies regularly in order to ensure that they comply with current law.

The Good News First: Governor Schwarzenegger signed what many have called the current most significant piece of employment legislation: SB 1809 amends last year's nightmare "Private Attorneys General Act of 2004" to correct its most treacherous provisions. Previously, the Act gave employees almost unlimited power to recover huge awards against employers for even minor Labor Code violations. Under prior law, large penalties were automatic, regardless of the employer's intent or the actual effect of a violation on the employee. Even minor, unintentional violations, such as failing to provide proper itemization on a pay stub, could result in tremendous liability for the employer, with no defense.

The new law requires employees to exhaust administrative remedies and give notice to the governing Labor Agency and to the employer, before bringing suit. This gives the employer 30 days to correct the violation, minimizing potential damages, before the employee can sue. It also permits a court to award less than the highest penalty, and substantially limits the types of violations for which employees can pursue claims. In addition, the new law eliminates employee claims for minor regulatory violations like posting, notice and agency reporting requirements, except for mandatory payroll and workplace injury reporting. These limits will avoid the most insidious claims – minor record keeping violations, where employees could catch the employer unaware, and win disproportionately large penalties.

Sexual harassment laws have been strengthened, giving employers better defenses. New law requires all employers with 50 or more employees to provide sexual harassment training to all supervisors. "50 employees" includes out of state employees and independent contractors, making it difficult for employers to avoid the requirement. The training must be presented by a professional with expertise in preventing harassment, discrimination and retaliation. It must take two hours, include an interactive component, and be repeated every two years.

Casting the training requirement in a positive light, it is likely to help employers avoid burdensome claims by educating their supervisors about how to avoid them. This is as important as ever, as the State Supreme Court recently confirmed employers' strict liability for sexual harassment committed by supervisors. However, the Court also held that the employee's damages may be limited if she fails to report the harassment, giving the employer an opportunity to correct the situation. The Court emphasized its desire to reward employers who take reasonable and effective steps to prevent and correct harassment. If the employer can show that the employee unreasonably failed to use available preventative and corrective procedures, the employee's damages will be minimized.

The lesson for employers is this: all employers **must** have effective policies and procedures to educate their staff about sexual harassment, prohibit it, and advise employees how to get help with a problem. These provisions will protect employers, hopefully by avoiding the problem in the first place, and by creating a framework for educating supervisors, and responding if a complaint does arise. The employer's handling of a complaint is every bit as important as trying to avoid one in the first place.

Paid Family Care Leave began last summer. California employees can now receive partial pay from the State in many family care leave situations. The pay provided is funded entirely by payroll deductions. Although no independent job protection is included, the FMLA and CFRA continue to apply. That is, employers with 50 or more employees within a 75 mile radius must continue to follow those laws – the only real difference is that employees can apply to the state for the paid benefit. With pay available for this family time off, employers may see employees who previously stayed at work requesting family leave time. The enclosed brochure should be distributed to all employees. More copies of the brochure are available at no cost from the EDD website: www.edd.ca.gov, or I can provide them.

Wage and hour laws are making big news. In large class action lawsuits, including one against Wal-Mart in California, employees seek multi-million dollar judgments against employers who fail to comply with lunch and rest break laws. As you know, employees are entitled to a ten minute paid rest break every four hours worked, and an unpaid meal break of at least one half hour, when they work a shift of more than five hours. California is one of the few states that fines employers for violating these rules. Most other states follow federal law, which does not even require rest or meal breaks, no matter how long the employee works. California law permits employees who miss a break to sue for one hour of pay for each missed break – going back as much as three years. For an employer who has numerous employees, and fails across the board to provide required breaks, the damages multiply quickly.

Avoiding this pratfall is relatively easy: Employee policies must specify that all

employees who work shifts of five hours or more take an unpaid meal break of at least half an hour. Policies also must provide that all employees may take a paid rest break of ten minutes or more during each four hour half of the work day. And, of course, these written policies must be followed in practice!

Though it can be impractical to encourage employees to take their breaks right in the middle of the work day, the alternative is far worse. And because these cases are in the news, it is highly advisable to insist that employees take a break.

Employee Privacy has earned increasing protection over the last several years. The newest law requires employers, by January 1, 2008, to provide itemized pay statements showing no more than the last four digits of the employee's social security number. Alternatively, an existing employee identification number can be used to identify the employee, rather than referring to the social security number at all. Because of the potential technical difficulties in updating payroll systems, employers are advised to begin implementation sooner, rather than later.

Employment Discrimination Laws are made consistent: California law contains various, differing prohibitions against employment discrimination. New law amends each of those provisions to prohibit discrimination on the same bases as the Fair Employment and Housing Act. Now the protected categories are: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex (including gender identity), age, or sexual orientation.

Domestic Partners now have most of the same rights, protections and benefits as married spouses under California law. The new law, the "California Domestic Partner Rights and Responsibilities Act" includes only domestic partners who have officially registered with the state. To qualify, the domestic partners must either be of the same gender, or of opposite genders if at least one of the individuals is over 62 years old. The partners must live together, not be related by blood, and not be married.

Though the new law does not expressly require that employers extend medical benefits to domestic partners, courts will likely find that if an employer extends benefits to married spouses, it must offer the same benefits to domestic partners. There is some uncertainty about when domestic partners must be added, but it is advisable to offer benefits during the next enrollment period.

The new law also requires that an employee who is entitled to family leave be permitted to take that leave to care for a domestic partner, and that Cal-COBRA benefits be extended where they would be available to a spouse. Similarly, protection against discrimination on the basis of "marital status" must now be read to include "domestic partner status."

Employers must audit their policies to ensure that they account for domestic partners. Further, when sensitivity, non-discrimination or sexual harassment training is given, employers must be sure it includes domestic partners.

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.