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EMPLOYMENT LAW NEWS

What's new for 2007? A few moderately significant things, and a big change for San Francisco employers. All California employers have increased obligations with respect to sexual harassment training and a higher minimum wage. The Immigration laws have also become a bit more demanding on employers, but employers may avoid liability for employees' misuse of e-mail systems. San Francisco employers have a higher minimum wage, and the biggest change of all: paid sick leave for all employees. So, let's get started!

Paid Sick Leave for all San Francisco employees begins on February 5, 2007. The new City ordinance applies to any person who performs work in San Francisco, including part time and temporary employees. Paid sick leave begins to accrue on February for all existing employees, and for those hired after February 5, paid sick leave begins to accrue 90 days after the first day of work.

The employee earns one hour of paid sick leave for every 30 hours worked. For employees working for employers with fewer than 10 employees, the sick leave earned is capped at 40 hours. Employees of larger employers can earn up to a cap of 72 hours. The accrued paid sick leave does not expire – it carries over from year to year. It need not be paid upon termination of employment though.

Employers with existing paid time off policies permitting employees to take paid time for illness or family care, in amount sufficient to meet the requirements of the new law need not provide additional paid leave. (However if not all employees are eligible, they would be entitled to the leave provided by the new laws.)

The paid sick leave may be used for the employee's illness or treatment, or for the illness or care of a family member, domestic partner or a designated other person, absent a family member or domestic partner.

San Francisco employers are required to post the City's Official Notice of the new paid sick leave policy in a conspicuous place, to maintain related records for four years (which is one year longer than most employment records are kept) and to refrain from retaliating against an employee who asserts the right to use paid sick leave. The Official Notice is enclosed for my San Francisco clients, and may also be obtained on line from the City's Office of Labor

Standards Enforcement.

Minimum Wage has increased. Throughout California, the minimum wage increased to $7.50 per hour on January 1, with an additional scheduled increase in January 2008, to $8.00. San Francisco's Minimum Wage Ordinance calls for additional annual rate adjustments designed to track the local Consumer Price Index. The San Francisco minimum wage increased this year to $9.14.

Even employees earning above minimum wage may be affected by these increases, if they are on the salary edge of exempt status. That is, if an exempt employee just meets the salary test of twice minimum wage, he or she may need a corresponding increase to maintain exempt status.

Sexual Harassment Training requirements have been clarified. Since January 1, 2006, all California employers with 50 or more employees must provide all supervisors with legally proscribed sexual harassment training, at least every two years. New law limits these requirements to supervisors located in California, and notes that they are part of the affirmative obligation of every California employer to prevent sexual harassment. The law also specifies that even a company based outside of California must provide sexual harassment training to any supervisors located within the state.

Plaintiff's lawyers have already been heard making the argument that an employer who fails to train its supervisors in avoiding and preventing sexual harassment does not take its legal obligations seriously, and should therefore should be assessed punitive damages. For those clients who have put this off (and you know who you are!) now is a great time to implement a regular sexual harassment training program.

No-Match Letters from the Social Security Administration are on the rise . . . The SSA has become more diligent in matching information provided by employers with information received from the IRS. When the information received about an employee does not match, SSA issues a "no-match letter."

According to SSA, there are many reasons for a no-match, including typos, transposed numbers and name changes. Sometimes, but by no means always, a "no-match" may indicate a problem with immigration status, but employers should never make this assumption.

What to do if a no-match letter is received? First, what **not** to do: An employer should **never** assume that an employee lacks the legal right to work, or take any adverse action against an employee, solely on the basis of a no-match letter. Instead, the employee should be asked about the situation, and whether the information presented on the no-match letter is correct, or whether a typographical error is to blame. If the employee verifies that the information appears to be correct, he or she should be directed to go to the local SSA office, and have the matter cleared up. An employee who does so, creating a reasonable appearance of compliance, should not be subject to any negative treatment.

Employers can avoid liability for Employees' Cyber Threats. In an unusual case for employers, two employees used the company's internet service to communicate threats to third parties. Once the company learned of the employees' misconduct, it disciplined and then terminated them. The third parties sued both the offenders and their employer for intentional infliction of emotional distress.

The court found that the employer was an "internet service provider," subject to the Communication Decency Act, and thus potentially responsible for employees' communications on its internet service. However, the company prevailed in the lawsuit, because there was no evidence that it knew of the employees' misconduct, there was no evidence of negligent supervision, the company had an adequate policy prohibiting misuse of its internet service, and the employees' threatening e-mails were prompted by their own malice toward the third parties, unrelated to the employer.

This ruling demonstrates that there is some protection for employers whose employees misuse the internet, for non-work related communications. It reminds us of the importance for employers to have a good electronic systems use policy, detailing what uses are permitted, and which are prohibited. We are also reminded of the importance of enforcing the policy once it is in place, in order to demonstrate, both to employees and ultimately to others, that the employer is not liable for any employee misuse of the system.

Telecommuting employees need to be closely monitored. The ranks of employees who work all or part of the time from home, or "telecommuters," have skyrocketed in recent years. Along with the increase in these sometimes unsupervised workers has come a variety of new types of employee claims. A few years ago, employees injured in home workplaces made workers compensation claims, leading employment attorneys to recommend policies advising telecommuters that they are liable for the safety of home workplaces.

Now, we are seeing wage and hour claims by telecommuters. There are generally claims by non-exempt employees that they worked lots of overtime. Employers may have classified these workers as "exempt," and failed to monitor overtime worked, only to be surprised by a large claim for back wages and penalties.

We are also seeing claims by workers that the company considered "independent contractors." Achieving this status is much more complicated than simply assigning the title of "independent contractor." The worker must actually have a substantially different role from the company's employees, work without supervision, and several other qualities. Before assigning a classification to any worker, especially one in an unorthodox work situation, or one that resembles an "employee," counsel should be consulted, and a clear understanding put into writing.

Electronic Wage Statements? All employers are required by the Labor Code to provide itemized wage statements to every employee, with every paycheck. The wage statement must include details of hours worked, gross wages, all deductions taken, the dates included, and the employee's name and social security number. The Labor Code also assigns a penalty for each paycheck not in compliance. The Department of Industrial Relations recently ruled that, provided all rules are followed, an electronic wage statement may be permissible. We are also seeing an increase in employee claims that they did not receive itemized wage deduction statements, and the related penalty. This is a reminder to employers to ensure that an adequate payroll system is in place.

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.