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EMPLOYMENT LAW NEWS

This newsletter will highlight just a couple of issues, that may make a big difference in the ability of employers to manage and control their employment relationships, and the associated costs. By foreseeing potential problems, and articulating the solutions in advance, employers can create the tools to avoid costly errors and claims.

Employment contracts may be worth considering . . . Employers' attorneys generally advise against written employment agreements for most employees, as unnecessary and potentially creating problems where none would otherwise exist. Nonetheless, I have recently had a change of heart, and am suggesting that employers consider **simple** written agreements for all employees. Here is the reason why:

Dispute resolution and the associated attorneys fees and costs are expensive, unproductive and draining for employers. If not contemplated and controlled in advance, California law skews harshly toward the employee. However, with some foresight, employers can minimize their exposure.

Almost always, California employers want their employees to be employed "at will." This is the default under our Labor Code, and if not specified otherwise, employment at will is presumed. However, there are exceptions, including implied exceptions, so spelling it out may be beneficial. That way, a court is certain to find termination at will proper, and the employee's potential counsel is discouraged from trying to prove otherwise.

Dispute resolution is another important issue to establish in writing. Courts, including the U.S. Supreme Court, have supported employers who require their employees to try an informal, internal dispute resolution procedure before going to court. Putting this in writing at the inception of the employment relationship not only documents the practice, but may set a cooperative tone. An instruction to employees to seek counsel from a particular person in the workplace, who has agreed in advance to attempt to resolve any workplace problem or dispute, may provide reassurance to an employee with a genuine problem. It also cautions a vengeful employee against avoiding informal resolution in favor of litigation.

An arbitration provision should also be considered. Most employers' attorneys have mixed feelings about the benefits of mandatory arbitration to employers. In some instances it can be even more expensive, and

less beneficial to the employer/defendant than formal litigation However, if appropriate, an arbitration agreement could be incorporated with a simple employment agreement.

Perhaps most important to employers is the issue of attorneys fees. When an employee files suit, the general rule is that unless recovery of attorneys fees is provided in the applicable statute or contract, each party pays its own fees. However, in California, there is a tremendous imbalance in the employment law arena, because the Fair Employment and Housing Act provides that the prevailing employee in a discrimination or harassment case recovers attorneys fees. The statute also nominally provides that the prevailing employer may recover its fees and costs where the employee's suit was frivolous, unreasonable or lacking foundation, but in practice, courts rarely award fees to the employer. This, of course, gives employees and their attorneys great license to sue employers without risk, costing employers dearly, to defend even a meritless suit.

An employment contract containing a provision for attorneys fees would mitigate this problem. Though this contract provision could not remove the employer's risk entirely, it would provide that in any suit related to enforcement of the employment contract, the prevailing party could recover its attorneys fees and costs. The provision would also state that the prevailing party recovers its fees and costs in even a discrimination claim under the Fair Employment Housing Act. This provision would remain at the judge's discretion, but would have to make the employee think twice before filing suit. This type of employment contract is something for all employers to consider – for its liability limiting potential alone. **Please let me know if you are interested in employee contracts.**

Wage and hour violations are more costly for employers, as the result of a the State Supreme Court's unanimous decision that the penalty imposed by the Labor Code upon employers who do not provide employees with rest and meal breaks is a "wage" rather than a penalty. This substantially extended the limitations period and penalties available on those claims.

California's Labor Code imposes a penalty of one hour's pay, per day, per violation, against employers who do not provide employees with the legally mandated paid ten minute rest breaks and/or the required unpaid half hour meal break. Until now, it was unclear whether ths penalty was intended to compensate the employee for a lost wage, or to penalize the employer for failing to provide the breaks.

Employers contended that the "one hour's pay" was a penalty, designed to punish and deter employers from failing to provide the breaks. If so, the statute of limitations on these claims would be one year, and there would be no additional Labor Code penalties available for this violation.

Employees argued that the "one hour's pay" was intended to replace unpaid wages, entitling aggrieved employees to claim up to four years' worth of the penalty amount, and additional penalties imposed by the Labor Code for failure to pay wages when due. (Despite the Court's ruling, this position does not make sense, since the employees already were fully paid.)

Unfortunately, the Court sided with employees, dealing a heavy blow to employers, extending the statute of limitations, and making the additional Labor Code penalties available. So, employers are left to get their policies and procedures straight, in order to avoid these claims in the first place.

This brings us to a review of the applicable legal requirements. The following requirements technically apply to all employees, but are not generally relevant to exempt employees. Exempt employees are expected to use their own judgment and discretion in scheduling their rest and meal breaks, and because they are salaried by definition, their pay remains constant. The important issue in relation to exempt employees is merely to ensure that they are advised of the expectation that they will take rest and meal breaks, and to use their own discretion in scheduling them.

Non-exempt employees must be more carefully monitored. Written employee policies should specify that non-exempt employees may take a paid break of at least ten minutes during every four hour work shift. The breaks should be scheduled as near the middle of the work shift as possible, subject to work needs and scheduling concerns. The employee must be relieved of all duties, and permitted to take care of personal needs such as personal phone calls, using the restroom and the like. The breaks do not have to occur precisely when the employee desires, nor do they have to be regularly scheduled in advance. However, it must be clear to both the employee and supervisor that the breaks are available during every four hour shift.

The breaks may be divided up at the employee's option, for example, five minutes at a time to get a snack or make personal phone calls. And the employer should specify that the breaks are to be used as rest breaks, and not to extend a meal break, arrive late, or leave work early.

Because the rest breaks are paid, they are generally not documented on a formal record of hours worked. This makes it doubly important for employers to make it a regular, and well-known practice to provide the breaks, such that all supervisors and employees are aware of the practice, and that it is documented in written employee policies. This is the employer's only proof that it provided the legally required rest breaks, in the event of an employee claim.

The meal break**s** are a bit different. California law requires that employees be permitted to take an unpaid meal break of at least a half hour, during every work shift exceeding five hours. The minor exception here is that if the work day is six hours or less, the employee and employer may agree mutually to waive the meal break. In this situation, my strong advice is to document this arrangement in writing, should the employer later need to prove it.

Because the meal break is unpaid, hourly employees should "clock out" for it, and salaried employees should confirm taking the break on their time records. At the very least, the written time record should state that by signing it, the employee confirms taking all required rest and meal breaks.

Rather than be afraid of the State Supreme Court's recent penalty hike, employers should consider this an opportunity to audit their policies and practices and to avoid a problem. Written policies should be checked to ensure that they accurately state the rest and meal break rules, and supervisors should be trained to ensure compliance. All employees should be advised that the employer's policy is to make sure they take all required rest and meal breaks, and of their obligation to verify
having done so on each time record.

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.