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# EMPLOYMENT LAW NEWS

**Having just attended a statewide employment law conference, highlighted with an appearance by our newly Schwarzenegger-appointed Labor Commissioner, I wanted to pass on the latest. As expected, though the Labor Commissioner's job is to protect employees, there are a few helpful lessons and tips for employers.**

**Wisdom from the new Labor Commissioner:** California's new Labor Commissioner, Angela Bradstreet, is a former management-side employment attorney. This, and Governor Schwarzenegger's pro-business bent, offer some continued reassurance for companies doing business in the state. Nonetheless, the Labor Commissioner's job is to protect employees, and enforce the employment laws, which exist to restrict employers, and she clearly takes her job seriously.

Ms. Bradstreet described the "sweeps" her office has been doing on industries including car washes, garment factories and restaurants, that her office perceives to engage routinely in wage and hour violations. The Labor Commissioner and staff enter unannounced, and interview employees en masse about their work schedules and the employer's practices. Not surprisingly, these are some of the same industries also perceived to engage routinely in immigration violations, which has made the "sweeping" process more frightening for both the employers and their employees. The Labor Commissioner characterizes this process as "pro-business," by weeding out and penalizing those unscrupulous employers who compete unfairly by employing illegal workers at below market wages, creating a competitive disadvantage for those who follow the laws.

The Labor Commissioner also pledged to vigorously pursue employee classification issues, again in the interest of leveling the playing field for those companies who properly classify their employees, and pay overtime to those entitled to it.

**Employee classifications are tremendously important for all employers.** As noted above, the Labor Commissioner is making this issue a priority, as have the California courts this year. There are two separate areas where properly classifying employees is crucial – employees v. independent contractors, and

exempt v. non-exempt employees. A word on both:

**Employees v. independent contractors:** Two new California cases make it clear that the courts are leaning heavily toward finding workers employees where at all possible, instead of independent contractors. Both cases involved drivers at courier companies like FedEx. In both, the courts found that because the companies exerted significant control over the workers' schedules, pay and other specifics, that they were employees, rather than contractors. The emerging trend seems to be that despite the numerous factors a court is supposed to consider, if it finds that the worker is performing the regular business of the employer, it will generally classify the worker as an employee.

This is despite the nine factors previously set out by the California Supreme Court: whether the worker is in a distinct occupation; whether that type of work is generally done by an employee or independent contractor; the skill required; who supplies the tools, supplies and place of work; the length of time for which services are expected; whether payment is by the hour or by the job; whether or not the work is part of the employer's regular business, and whether or not the parties believe they are creating an employee or independent contractor relationship. While each of these factors should be weighed, the employer's regular business currently appears decisive.

**Exempt v. non-exempt employees:** For a California employee to be exempt from the overtime and minimum wage laws, he or she must meet all of the criteria for one of the specific legal exemptions – executive, professional or administrative. (There are a couple of other minor exemptions, not discussed here.) Two recent cases examining the administrative exemption found workers mis-classified as exempt, while one new case found exempt store managers properly classified. The differences are instructive: Employees who spend the majority of their time providing customer service and training customers on the company's product were non-exempt. Similarly, claims adjusters who focused on resolving insurance claims, though exercising some independent judgment as to their particular claims, were non-exempt. On the other hand, store managers, who were the only exempt employees in the store, were responsible for managing the store and supervising every other worker in the store, were found properly classified as exempt.

The distinction arises from the factors applied to every classification determination: the employee must perform office or non-manual work directly related to management policies or general business operations of the business or its customers; regularly exercise discretion and independent judgment; perform under only general supervision work requiring special training; be engaged in exempt activities at least 50% of the time, and earn twice minimum wage. It is the first factor that the courts recently dissected, and the one that most often gets employers in trouble. In plain language, the employee must do administrative rather than production work to be exempt. Stated another way, if the employee's work is to make the company's product, rather than being involved in the general operations of the business, the employee is likely non-exempt.

These classification issues are difficult, counter-intuitive, and require a detailed analysis based on each situation. They are also on the Labor Commissioner's current "to do" list, and employers are advised to make sure they have them right. I suggest updating or creating written job descriptions

for each employee, having the employee chart his or her actual job duties and the amount of time spent on them each week, and reviewing them with counsel to ensure that employees are properly classified.

**Rest and meal breaks are another thorny issue.** Earlier this year, the State Supreme Court ruled that the penalties against employers who do not give the legally required rest and meal breaks are "wages" rather than "penalties." While the distinction may seem technical, in practice it substantially extended the time for which employers are liable for these penalties. That ruling also enabled employees to recover interest, attorneys fees, punitive damages and additional penalties under the Labor Code. Also included in this ruling are the Labor Code penalties for reporting time and split shift violations. (For those unaware, the Labor Code requires employees to be paid at least two hours' pay every time they report to work, and an additional hour's pay for being required to work a "split shift.")

There is however, a recent glimmer of hope for employers in relation to the rest and meal break penalties. It has long been murky under the law whether employers are required merely to "provide" the rest and meal breaks, or to "ensure" that employees take those breaks. General advice has been to affirmatively require that employees take the meal breaks, even if the employee prefers not to clock out for a half hour, because the time record is the only proof that the meal break was actually taken. The rules on the rest breaks are somewhat more flexible, because that break is on the clock, so the law does not expect there to be a verifiable time record. It has generally been sufficient to "permit" employees to take the rest breaks, without requiring employers to force and monitor those rest breaks.

A recent decision held, even further, that employees who work outside of the employer's regular workplace must still take meal breaks. Thus even where the employee does not monitor the employee's daily work schedule, the employer must be able to demonstrate that it provided meal breaks for those employees.

The good news comes in the form of a recent Federal District Court ruling, in which the court opined that the California Supreme Court would hold employers only to "provide" meal breaks, rather than "ensure" them. Though the State Court is not bound by the Federal Court's prediction, employers can hope it was based on inside information. If this holding foreshadows what our high Court will do, employers will not be required to force employees to take their unpaid meal breaks, but only to make those breaks available. Such a law would also benefit those employees who prefer not to take time off the clock during the work day, in favor of getting home earlier to their families.

In the meantime, please continue to use written policies instructing employees to take their ten minute paid rest breaks and their half hour unpaid meal breaks. Please make it clear that the rest breaks are available and should be taken, and act affirmatively to "ensure" by daily scheduling and the time clock, that the meal breaks are taken. This will avoid costly penalties down the road.

**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.**