

# Labor and Employment Law Update January 1, 2009

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## I LEGISLATIVE UPDATE

### A. Summary of California Bills Signed Into Law

#### 1. Computer Professional Exemption (AB 10)

California law has long recognized that certain computer professionals are exempt from California's overtime compensation rules if they perform the types of duties identified in the Labor Code and if they are paid a minimum wage rate. To be exempt, the primary duties must consist of one or more of the following:

- Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
- Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
- Documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

An exempt computer professional as contemplated by the California Labor Code must be highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming or software engineering. The work the employee performs must also be intellectual or creative requiring the exercise of discretion and independent judgment. The Labor Code specifies a minimum hourly rate that must be paid although that rate is adjusted annually by the Division of Labor Statistics and Research (DLSR). A change in the law effective January 1, 2008, allowed that the employee may be paid the annualized full-time salary equivalent of the minimum hourly rate. AB 10 simplifies the compensation aspect of the exemption. The new law provides that, effective September 28, 2008, employees may be paid an annual salary of \$75,000, or \$6250 monthly. This group of exempt employees may also be paid monthly. Although the new law only went into effect the last quarter of 2008, it has already been subject to the annual review and adjustment by the DLSR.

Effective January 1, 2009, individuals under this exemption must be paid at least \$37.94 per hour or an annual salary of \$79,050.

## **2. New Penalties For Requiring Release With False Statement of Hours Worked (AB 2075)**

California Labor Code Section 206.5 state that “[no] employer shall require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wages has been made.” The result of the language is that an employer cannot create a document that purports to have an employee or former employee waive and release claims for wages or compensation due unless the full amount due is paid to the individual or the agreement is made in the context of a pending Labor Commissioner claim or court action. Unless the agreement is made under those latter circumstances, the agreement is null and void and entering into the agreement can be a misdemeanor.

AB 2075 expands Section 206.5 further. The specific language in the new statute states as follows: "For purposes of this section, "execution of a release" includes requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false." The new language prohibits an employer from requiring an employee to sign a statement of hours worked that the employer knows to be false. The modification to the Labor Code provides an opportunity for employers to re-visit the language on timesheets and timecards intended to have employees verify hours worked, meal periods, and rest periods to determine if the language is consistent with the change in the law. Employers should also re-visit their practices for requiring that the time records with such language be signed as a condition of being paid.

## **3. Payments of Wages for Temporary Employees (SB 940)**

For many years, California law has required, with limited exceptions, that all wages be paid twice during each calendar month, that wages be paid immediately upon discharge, and that wages be paid within 72 hours from when an employee quits. The rules have sometimes been difficult for employers to apply to workers in a traditional employment relationship. The rules have been even more challenging for temporary employee agencies that begin and end employment relationships on a daily basis. SB 940 seeks to clarify how wages should be paid by temporary services employers. The bill adds Section 201.3 to the Labor Code and amends other sections to be consistent with the new section. The bill first defines a "Temporary Services Employer" to mean an employing unit that contracts with clients or customers to supply workers to perform services for the clients or customers and that performs all of the following functions: (A) negotiates with clients and customers for matters such as the time and place where the services are to be provided, the type of work, the working conditions, and the quality and price of the services, (B) determines assignments or reassignments of workers, even if workers retain the right to refuse specific assignments; (C) retains the authority to assign or reassign a

worker to another client or customer when the worker is determined unacceptable by a specific client or customer; (D) assigns or reassigns workers to perform services for clients or customers; (E) sets the rate of pay of workers, whether or not through negotiation; (F) pays workers from its own account or accounts; and (G) retains the right to hire and terminate workers. SB 940 specifically excludes from the new rules farm labor contractors, garment manufacturing employers and bona fide nonprofit organizations that provide temporary service employees to client.

The new law provides, with certain exceptions, that temporary service employees must be paid no less frequently than weekly, regardless of when the assignment ends, and compensation for work performed during any calendar week is due and payable not later than the regular payday of the following calendar week. A temporary services employer is deemed to have timely paid wages upon completion of an assignment if wages are paid in the above manner. The exceptions to the basic rules are as important as the rules themselves. The first two exceptions describe that if the temporary employee is discharged by or quits the temporary services employer directly (as opposed to leaving the assigned job with the customer/client), the regular rules for paying final wages under Section 201 and 202 apply. The next exception is that if the employee is assigned to work for a client engaged in a trade dispute, the employee's wage are due and payable at the end of each day, regardless of when the assignment ends. Another exception applies to employees who are assigned to work for a client on a day-to-day basis. In that situation, the employee's wages are due and payable at the end of each day, regardless of when the assignment ends, if each of the following occurs: (A) The employee reports to or assembles at the office of the temporary services employer or other location; (B) The employee is dispatched to a client's worksite each day and returns to or reports to the office of the temporary services employer or other location upon completion of the assignment; (C) The employee's work is not executive, administrative, or professional, as defined in the wage orders of the Industrial Welfare Commission, and is not clerical. Finally, SB 940 also provides that if an employee of a temporary services employer is assigned to work for a client for over 90 consecutive calendar days, the new rules regarding payment of final wages do not apply unless the temporary services employer pays the employee weekly.

#### **4. No Texting While Driving (SB 28)**

On September 24, 2008, Governor Schwarzenegger signed SB 28 into law with an effective date of January 1, 2009. The new law amends the recently enacted hands free cell phone law by modifying the California Vehicle Code to state: "A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication." Certain activities are outside the definition of the no-texting rule. The new law specifically states "[f]or purposes of this section, a person shall not be deemed to be writing, reading, or sending a text-based communication if the person reads, selects, or enters a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call." The penalty for violating the law is \$20 for the first violation and \$50 for subsequent

violations. Employers should review their cell phone usage policies to ensure compliance with the new law.

**B. Selected Bills Vetoed By Governor Schwarzenegger**

1. AB 2279 (no discrimination against persons prescribed medical marijuana)
2. AB 2386 (card check system for agricultural union authorization)
3. AB 2918 (limitations on use of credit reports for background checks)
4. AB 3063 (use of criminal convictions that have been sealed or discharged)
5. SB 1115 (no discrimination in providing workers' compensation benefits)
6. SB 1583 (liability for incorrectly advising about independent contractor relationship)
7. SB 1661 (modifications to PFL/FTDI)

**C. Changes to Federal Statutory Law**

**1. Family and Medical Leave Act.**

On January 28, 2008, President Bush signed H.R. 4986 into law. The statute amends the Family Medical Leave Act (generally applies to employers with 50 or more employees). The primary change to the FMLA is that the revised law requires that employers provide up to 26 weeks of unpaid leave during a single 12 month period for an eligible employee who is the spouse, son, daughter, parent, or next of kin of a "covered servicemember" to care for the covered servicemember. The definitions are central to the revised law. "Next of kin" is defined as the nearest blood relative. "Covered Servicemember" is defined as a member of the Armed Forces, including a member of the National Guard or Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise an outpatient status, or is otherwise on the temporary retired list, for a serious injury or illness. "Serious injury or illness" is defined as "an injury or illness incurred by the member in line of duty or active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." The statutory language does not define the term "line of duty." In addition to the above new provisions the amendment also provides that an eligible employee may take up to 12 weeks of unpaid leave if the employee's spouse or child is on active duty or is a Reservist and faces recall to active duty if a "qualifying exigency" exists. This term is explained further in the new regulations described below.

**2. Americans with Disabilities Act.**

President Bush signed the ADA Amendments Act of 2008 (ADAAA) into law on September 25, 2008. Through the ADAAA, Congress sought to change several U.S. Supreme Court decisions that it believed were wrongly decided. A trio of Supreme Court decisions held that the employer should take mitigating measures into account when determining whether an employee is disabled. Thus, for example, an employee with poor eyesight would not be disabled if the employee's corrected lenses brought the employee's eyesight to near 20/20. An employee with high blood pressure would not be disabled if his/her medication brought the blood pressure to an acceptable level. As a result of the ADAAA, federal law now provides otherwise. Now, the employer cannot take mitigating measures into account when determining whether an individual is a qualified individual with a disability. An employee with a physical limitation should be evaluated for purposes of disability discrimination without regard to mitigating measures. In addition to the above change, the ADAAA established a list of examples of major life activities to the statute. Adding to several major life activities recognized by the EEOC, the ADAAA added eating, sleeping, bending, reading, concentrating, thinking and communicating. The new law also modifies a prior Supreme Court decision to the extent it established a different standard for determining whether someone is disabled. Existing law states that an individual must be substantially limited in a major life activity in order to be disabled. The Supreme Court had concluded that one must be "significantly restricted" in a major life activity to meet the substantially limited standard. The ADAAA rejected that standard and directed the DOL to create a new standard. Another key change in the law involved the manner in which "regarded as" claims will be handled. Previous court decisions held that an individual could not proceed with a claim that they had been discriminated against because of being regarded as disabled unless the person could demonstrate that the perceived impairment substantially limited them in a major life activity or was perceived as limiting them in an major life activity. The ADAAA concludes that if a person suffers discrimination due to being perceived as disabled, the person does not need to show that they were limited in a major life activity or perceived to be so limited. Importantly, such claims cannot be based on impairments that are transitory or minor, which is defined as an impairment with an actual or expected duration of six months or less. Finally, the ADAAA made clear that the ADA does not allow for claims of reverse discrimination -- the lack of a disability cannot be the basis for a claim.

**D. Other Changes of Note**

1. Beginning January 1, 2009, the recommended IRS mileage reimbursement rate will be reduced to 55 cents per mile.
2. The Division of Labor Statistics and Research has determined that the minimum wage rate for physicians who are exempt from overtime obligations pursuant to Labor Code section 515.6 shall increase to \$69.13 per hour effective January 1, 2009.

3. Effective February 2, 2009, employers must begin using a new I-9 form. The new form includes several changes to the types of documents that can be accepted for purposes of determining identity and authorization to work. A key change to the process of completing the I-9 form is that expired documents can no longer be accepted. Employers will need to download the new form, carefully check the list of acceptable and unacceptable documents and complete the I-9 correctly. Employers do not need to go back and change or update previously completed I-9 forms.

## II REGULATORY UPDATE

### 1. Amendments To Federal Family Medical Leave Act

#### a. Clarifications to Military Family and Caregiver Leave Law

i. *Qualifying Exigency.* A missing component of the modifications to the FMLA that went into effect in January, 2008, was a definition of what constitutes a “qualifying exigency” such that a family member could be entitled to a leave of absence. The new regulations describe the following qualifying exigencies: 1) short-notice deployment, 2) military events and related activities, 3) childcare and school activities, 4) financial and legal arrangements, 5) counseling, 6) rest and recuperation, 7) post-deployment activities, and 8) additional activities to address other events that arise out the covered military member’s active duty or call to active duty status provided the employer and employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of such leave. Each of these circumstances is more fully described in the regulations.

ii. *Notice and Certification of Leave.* An employee who believes he/she is eligible for leave under the military caregiver leave law is obligated to provide notice that is reasonable and practicable. No specific amount of notice from the employee is required. The employer may require that the employee provide a certification of the need for the medical leave. A new certification form (Form WH-384) may be used to obtain the necessary information from the employee. The employer may also require the employee to provide a copy of the military member’s active duty orders or other information from the military that confirms the fact and duration of active duty status. The employer must inform the employee in writing that the written certification is expected. If the employee fails to provide the certification, the employer may verify the need for the leave.

iii. *Amount of Leave.* The regulations sought to clarify how the military caregiver leave should operate alongside the previously existing family and medical leave laws. An eligible employee is entitled to a total of 26 workweeks of military caregiver leave during any single 12-month period. The

26 workweek total includes both military caregiver leave and any other FMLA qualifying leave. An employee may take more than one 26 workweek leave in the course of employment with an employer. The regulations establish that the calculation of the applicable 12-month period for purposes of the military caregiver leave shall be a single 12-month period beginning on the first day the eligible employee takes military caregiver leave and ends 12 months after that date. This measurement method must be used even if the employer uses a different method of calculating the 12 months period for other types of FMLA leave.

iv. *Designating Leave.* Similar to other forms of FMLA leave, the employer must designate the military caregiver leave as such and inform the employee in writing that the leave has begun, whether the leave will be paid or unpaid, and the expected duration of the leave. The leave may be designated retroactively, subject to the same restrictions as other types of leave. If the leave qualifies as both military caregiver leave and leave to care for a family member with a serious health condition, the leaves do not run concurrently. The 26-week military related leave will be counted first. The dual qualifying leave remains subject to the maximum 26-weeks of leave during the 12-month period.

b. Modifications and Clarifications to General FMLA Rules

i. *Effective Date.* New regulations, including several new forms for administrating the FMLA, will go into effect January 16, 2009.

ii. *Notice by Employer.* The Employer must post a general FMLA notice at all locations where employees and applicants are likely to see it. For new hires, the employer may provide notice in an employee handbook or be given other information at the time of hire. The notice must be provided in the language in which the employee is literate. The notice requirements are now divided into two (at least) categories. Employees must be provided notice of their eligibility for FMLA leave. The eligibility notice must be provided within 5 business days, absent extenuating circumstances. The new regulations offer a new form that may be used. The notice may be sent along with the certification form. After the employer obtains enough information to conclude that the employee's leave is covered by the FMLA, the employer must inform the employee in writing within five business days that the leave has been designated as FMLA leave. Critically, if the leave is determined NOT to be FMLA qualifying, employers must inform the employee of that fact and the reasons for the decision. Several new forms are included within the regulations. If an employer fails to provide the appropriate and timely notice of leave, that failure can be considered "interference" with the employee's rights and can increase the employer's exposure to damages. Interestingly, the new regulations allow retroactive notice if the initial notice is not provided and the delay does not cause the employee any harm or injury.

*iii. Notice from Employee.* When the need for the leave is foreseeable, the employee must provide the employer notice of the leave at least 30 days in advance of the leave and, if that is not possible, notice must be given “as soon as practicable”. The employer may request that the employee provide a written explanation about why the 30 days notice was not practicable. The new regulations state that the notice should be given within one or two business days after the employee becomes aware of the need for the leave. The notice may be verbal and need only be sufficient to inform the employer that the leave may be FMLA qualifying. The employee must discuss the timing and length of the leave. If the employee fails to give appropriate notice, the leave may be postponed for the time period the employee delayed up to 30 days.

*iv. General Certification.* The new regulations provide for new medical certification form to be used by employers. The time within which the certification form should be provided to the employee has been increased from two days to five days. A different form should be used when the leave is for the serious health condition of the employee as opposed to the health condition of a family member. The employee is obligated to provide a complete and sufficient certification. If the certification is not complete or sufficient, the employer must notify the employee in writing and allow 7 days for the employee to correct any deficiency. After allowing the employee to correct the deficiency, an employer that still has concerns about the certification can contact the employee’s healthcare provider to obtain clarification or to authenticate the certification. Prior regulations prohibited the employer from directly contacting the health care provider in such circumstances. The new regulations allow the employer to contact the health care provider directly through a human resources professional, management official or leave administrator. The contact must be limited to obtaining information directly related to the certification form. If an employee is out for an extended period of time, medical recertification may be requested every six months. In some cases medical recertification may be required more frequently. If an employee’s leave goes beyond a single leave year, an annual recertification may be required.

*v. Fitness For Duty Certification.* The regulations continue to allow an employer to obtain a fitness for duty certification from employees returning to work following an FMLA leave of absence. The new regulations allow an employer to require that the fitness for duty certification address an employee’s ability to perform the essential functions of the job. However, the employer must provide the employee with advance notice at the time the designation notice is given that the fitness for duty certification will be required and describe the essential functions of the job.

## **2. New DOT Drug and Alcohol Testing Regulations**

The U.S. Department of Transportation (DOT) published new regulations addressing

drug and alcohol testing for DOT covered operations. A key change relates to the process of collecting a specimen for testing. Under the new rules, all return to duty and follow up drug tests must be obtained using direct observation. In addition, modifications to the circumstances when an employee can be deemed to have refused to engage in the test were implemented. When the drug test is to be directly observed, the observer may require the individual to lift, drop and spin. Clothing must be lifted above the waist so that skin is showing, all lower body clothing must be lowered sufficiently to allow observation, and the individual must turn around so that the observer can determine if any devices are being used that could interfere with or adulterate the collection process. Failure to follow the instruction to lift, drop and spin will be considered a refusal to test. In addition, if the individual admits that the specimen has been adulterated or substituted, or if a prosthetic or other apparatus is observed that could interfere with the collection process, the individual will be deemed to have refused to test.