

The Strategic **EMPLOYER**

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Part 1: Continued Confusion in California Wage & Hour Law

Recently, the Division of Labor Standards Enforcement has been issuing numerous opinions on many wage and hour issues. Some have indicated major changes in DLSE enforcement policy; some have resulted in upheaval for the DLSE itself. Some of the most significant are as follows:

A. SALARY BASIS - MONTHLY STANDARD

In March, 2001, Waag and Co. reported that the DLSE was interpreting the new AB 60 legislation as requiring employers to calculate an exempt employee's salary on a calendar-month basis. The result of this interpretation is that for any calendar month in which the exempt employee works at all, the employee normally must receive his/her full salary, or else the exemption will be lost.

Since that time, the DLSE has been publishing numerous interpretations based on this premise, particularly regarding how and when an employer may make any deductions from an exempt employee's monthly salary and still retain the exemption. On May 30, 2001, the DLSE's Chief Counsel, Miles Locker, issued an opinion letter stating that an employee's exempt status would be lost if an employer shut down a facility for any period less than a full calendar month without paying the exempt employee for the period of the shut down.

The opinion letter (as well as the earlier pronouncement of the calendar-month standard for the salary-basis test) made dramatic changes that are departures from previous state interpretations as well as from federal law. This opinion raised such an uproar in the business community that it garnered the attention of Governor Davis. As a result, on June 22, 2001, the Labor Commissioner (Arthur Lujan) issued a letter rescinding the May 30th letter, and Mr. Locker was demoted from his position as Chief Counsel. The June 22nd letter promised

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Waag and Co.

We take great pride in our reputation as one of the Central Coast's leading providers of employment law and human resources consulting services, working exclusively with employers. We believe that the success of our practice is based on our ability to provide practical, timely, accurate advice to employers of all sizes and industries.

Since 1998, Waag and Co. has worked with over 135 different employers with great success. These include companies engaged in industrial, high-tech, medical, dental, legal, non-profit, service, retail, wholesale, service, construction, engineering, government, hospitality, agriculture, ranch, communications, and media industries.

Susan Waag has substantial experience as an employment law attorney and human resources consultant. Since 1985, she has devoted her practice exclusively to serving employers. Ms. Waag has provided expert consultation to approximately one-third of the 75 largest employers in San Luis Obispo County.

Waag and Co. provides a variety of problem prevention services, including: Supervisor and Employee Training, Internal Investigations, Personnel Policy Manuals, Employment Relations Audits, Human Resources Consulting Services and Employment Contracts. Our services cover a broad range of expertise in the matters most important to employers.

For more information or additional printed materials on the services we provide, please contact Susan Waag at Waag and Co.

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Part 1: Wage & Hour

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that the issue would be reconsidered and resolved soon. *At the moment, the future of the calendar-month standard is unclear, at least with respect to a plant shutdown.* Waag and Co. will keep you informed of developments.

B. SALARY BASIS - DEDUCTIONS FOR ABSENCES

As stated above, the question of whether or not an exempt employee's salary will be judged by the calendar month or by the payroll workweek is currently up in the air. Whichever standard is ultimately adopted, the DLSE has clarified some other points regarding when and how deductions may be made from an exempt employee's salary without jeopardizing the exemption. Please remember that the following information relates only to **exempt** employees.

Pro Rata Pay at Start and End of Employment: The DLSE will continue to follow the rule that permits an employer to pro rate the exempt employee's salary for the partial "salary period" at the beginning and ending weeks of the employment. Under federal law (which judges the salary by the payroll workweek), an employer may pay the pro rata portion of an exempt employee's weekly salary where the employee is hired with a mid-week start date. The same pro ration is permitted if the employee's termination date is mid-week. The DLSE will apply the same, pro rata concept.

Vacation Pay: The DLSE will also continue to permit employers to charge an exempt employee's vacation pay (or no pay if vacation pay is unavailable) for any vacation absences of *full-day* increments. As before, the employer may not deduct any pay from the exempt employee's salary for partial-day vacation absences. However, the DLSE has clarified that an employer cannot apply the exempt employee's vacation pay to absences of less than a full day.

The DLSE has reasoned that since the employer is required to pay the exempt employee's regular salary for that day, the employer cannot deduct anything from the employee's other "wages" (i.e., the vacation pay) to cover it.

Sick Pay: There is no change to the basic rules regarding sick pay and an employee's exempt status. Specifically, employers may not deduct any pay from an exempt employee's salary due to illness unless the illness covers the entire salary period (the big question is whether the calendar-month standard will remain in effect, or if this will revert to the payroll workweek standard).

However, employers may deduct pay for absences due to illness in full-day increments, **provided** that the employer has a paid sick-leave plan that provides for some period of full pay during illness, and the employee has exhausted all available sick pay. Just as with the vacation pay, the employer may not apply sick pay to cover partial-day absences. The DLSE has also issued an opinion that the employer may deduct from an exempt employee's salary (i.e. provide no pay) for full-day illness absences that occur before the employee is eligible for paid sick time.

C. ALTERNATIVE WORKWEEK SCHEDULE

As reported in previous Waag and Co. bulletins and newsletter articles, employers may permit employees to adopt an alternative workweek schedule of up to ten hours per day, forty hours per week. The employer is required to comply with specific procedures in order to do this. Once the schedule has been properly adopted, the employer is required to accommodate affected employees who cannot or will not work the new schedule. The rules contemplate that the employer would simply continue having such an employee work a normal five day, 8-hours-per-day workweek. Accordingly, the regulations state that when accommodating such an employee, the employer shall not schedule the employee to work more than 8 hours on any one day.

Many employers who adopt an alternate workweek switch to a 4-day, 10-hours-per-day schedule. A large number of these will not be operating at all on the other 3 days of the week; therefore, there is no way to schedule an employee for five, 8-hour days. What if the employee who cannot work the full 10-hours each day (because of childcare or other needs) is able to work 9 hours each day? Would it not be great to give the employee as many hours as possible? The DLSE has stated that the regulations do not leave room for this. They clearly state that the accommodation cannot result in more than 8 hours in the workday.

The employer's choices are: (1) schedule the employee for 9 hours a day, paying the overtime premium for the 9th hour; or (2) only permit the employee to work 8 hours per day (meaning the employee will only get 32 hours of work per week). Many employers are reluctant to offer the first option; the employee would be receiving almost as much pay each week for 36 hours as the co-workers who are putting in 40. But the second option may result in the employee losing eligibility for various benefits plans. *Editorial comment: Another example of how the rules designed to protect employees fail to have that effect.*

D. MEAL PERIODS

Many employers have been confused about when an employee must take the required meal break. Remember: Non-exempt employees who work more than five hours in a workday must take a meal break. (See Waag and Co.'s bulletins from December 2000 and March 2001 for details.) Some employers were thinking that the meal break should be taken near the mid-point of the day; others thought that it could be taken whenever it made sense. The exact wording of the regulations, however, state: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes...."

The DLSE has confirmed that this means the employee must take the meal

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Pending State and Federal Legislation

Part 2: Legislative Developments

A. PENDING STATE LEGISLATION

Arbitration: AB 1067 and SB 410 are pending arbitration bills and are briefly described below. Note that there is also pending federal legislation related to arbitration that is described in "Part 2, B. Pending Federal Legislation."

AB 1067 would require arbitrators to meet minimum qualifications and comply with ethical standards established by the Legislature. This bill would also expand the grounds and conditions for vacating arbitration awards, making it substantially easier for parties to overturn an arbitrator's decision. This bill would not allow parties to waive the provisions of this law by contract or otherwise. AB 1067 would require an arbitrator to include in the award a written explanation of the basis for the award, including findings of fact and conclusions of law. The bill

would not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

SB 410: Existing law provides that a written agreement to submit to arbitration of an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract. SB 410 would create an exception to this rule of law. If passed, it would provide that no employer may require an employee to agree to arbitrate any claims arising under the Fair Employment and Housing Act as a condition of employment or continued employment. Additionally, the bill would make it unlawful for an employer to harass, discharge, expel, or otherwise discriminate against any person in any term or condition of employment because he or she has refused to agree to arbitrate any such claim.

Punitive Damages: Existing law provides for the award of punitive damages where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. AB 840 would limit punitive damages against a defendant who is a small business to 3 times the compensatory damages. Where an award of punitive damages is made against a defendant who is not a small business, and the amount of that award exceeds 3 times the compensatory damages, the punitive damages award will be subject to a review *de novo* by a court of appeal. The bill would use the same definition of a "small business" as used in Part 121 of Title 13 of the Code of Federal Regulations.

Civil Rights/Privacy: AB 1015 would amend the California Fair Employment and Housing Act ("FEHA") to make it

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Part 1: Wage & Hour

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break before five hours are worked. Accordingly, the employee who takes the meal period after working more than five hours has "missed" the meal period and would need to receive the penalty payment. What if the employee takes his/her lunch after working three hours, but ends up working an extra hour of overtime? The employee will have worked six hours (after the lunch break) without another meal period. Is this a problem?

Perhaps recognizing that, although the language of the regulations would suggest otherwise, it would make no sense to impose a penalty in such a situation, the DLSE has not given a direct answer to this question.

E. MISCELLANEOUS

Cash-Out of Accrued Vacation: The DLSE has issued an opinion regarding an employer's obligation to cash-out

accrued vacation pay upon the sale of a business. The DLSE has stated that when an employer sells its business, the employees are technically terminated from that Company's employ. This is so even if the buyer agrees to hire the existing workforce. Accordingly, the seller must cash-out any accrued vacation pay at the time of the sale/termination of employment.

Amended Wage Orders: Several of the Wage Orders have been amended. Specifically, Wage Orders 1 through 5, 7, 9 and 16. All of the amendments are merely technical corrections and do not make any substantive changes. Additionally, there have been some changes to Wage Order 14 affecting only shepherders. Nevertheless, all employers covered by any of the amended Wage Orders must take down their old copies and post the new, amended version. All of the DLSE's Wage Orders can be accessed through Waag and Co.'s web-site - or go to www.dir.ca.gov/ICW

Truck Drivers: Wage Order 9, which covers employees working in the transportation industry, exempts from its coverage those employees whose hours are subject to regulation by the federal Department of Transportation. This is known as the "Motor Carrier Exemption." Recently, the DLSE issued an opinion regarding workers who drive commercial vehicles on, at or in conjunction with a construction, oil drilling, mining or logging site, or deliver materials or personnel from such a site to another location which is owned or controlled by a contractor or other employer engaged in such industry. Specifically, the DLSE stated that such workers would normally be governed by the new Wage Order 16, which applies to workers in the occupation of on-site construction. The key issue is that Wage Order 16 does not contain the Motor Carrier Exemption. Accordingly, the DSLE is of the opinion that such drivers are not exempt from the requirements of Wage Order 16.

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an unlawful employment practice to engage in specified employment discrimination based upon a person's lawful conduct that occurred off the premises of the current or prior employer and outside the person's hours of employment. It would also protect an employee's rights to engage in unionizing or other political activities that occur outside work hours and without unauthorized use of employer property. The bill would not apply to state or local law enforcement agencies. Interestingly, there are already a number of statutes in California that provide this protection; however, the amount of litigation would most likely increase significantly if this bill adds these protections to the FEHA.

ADA Notification: AB 1040 would allow businesses a 90-day grace period to fix any identified ADA violations before a lawsuit could be filed. This grace period only applies to businesses that can document that prior to receiving the notice, they either took action recommended by a qualified ADA consultant or complied with the ADA requirements necessary to receive a building permit. If a business fails to fix the violations during the 90-day grace period, a lawsuit could then be filed.

Domestic Partner Benefits: The state Assembly has just passed AB 25, which would expand the rights of registered domestic partners in the areas of health care, estate planning and employment. The bill requires, among other things, that employers let workers use sick leave to care for an ill domestic partner and that health plans offer coverage for domestic partners of employees. The State Senate is expected to approve the measure and Gov. Davis has announced that he will sign it.

State Minimum Wage Hike: AB 181 seeks to increase the minimum wage to \$8.75 an hour by 2006. Specifically, AB 181 would raise the minimum wage to \$7.25 in less than two years and to \$8.75 in 2006, at which time it would begin increasing every year, based on the Consumer Price Index.

Employee Status / Unemployment Insurance: Under existing law, a person who is considered to be an employee may be entitled to receive unemployment compensation benefits, while independent contractors are not. SB 1128 would expand the definition of who is an employee for the purpose of eligibility for unemployment compensation benefits. A determination that a person is an employee for this purpose will consider whether the goals of the Unemployment Insurance Code would be met by imposing the risk of unemployment directly on that person or upon the putative employer.

Unemployment Benefits Penalty: SB 40 phases in several unemployment benefits increases by 2004. It would impose a \$250 penalty on employers that don't provide claim information to the Employment Development Department, and it would also permit workers to collect unemployment while receiving payments under the federal Worker Adjustment and Retraining Notification Act.

State Labor Agency: SB 25 would create a single state labor agency combining various state departments that handle workplace issues.

Employee Computer Records: SB 147 would prohibit employers from secretly monitoring employee e-mail and other computer records.

Workers' Comp Fraud: AB 129 would permit employers to ask job applicants if they ever gave false statements in connection with a workers' comp claim and to fire employees who didn't disclose this information in an employment application.

B. PENDING FEDERAL LEGISLATION

Health Care & Benefits: The National Health Insurance Act (HR 16) would provide a program of national health insurance. The Mental Health and Substance Abuse Parity Amendments of 2001 (HR162) would amend the Public Health Service Act, the Employee Retirement Income

Security Act of 1974 and the Internal Revenue Service Code to prohibit group and individual health plans from imposing treatment limitations or financial requirements on the coverage of mental health benefits and on the coverage of substance abuse or chemical dependency benefits if similar limitations or requirements are not imposed on medical or surgical benefits. HR 167 would amend the Internal Revenue Service Code to allow up to \$3,000 of unused benefits from cafeteria plans or flexible spending or similar arrangements to be carried over into later years and used for health care reimbursement rollover accounts and certain other plans, arrangements or accounts. In lieu of a carryover, it would allow such amounts to be rolled over as nontaxable income when transferred to certain retirement plans, a medical savings account, an education or individual retirement account or health care reimbursement rollover account.

Discrimination: HR 217, the "Civil Rights Act of 2001", would amend the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of affectional or sexual orientation. *Note that California law already protects employees and applicants on this basis.* HR 840, the Civil Rights Tax Relief Act, would amend the Internal Revenue Code to exclude from gross income damages received as a result of employment discrimination. Various bills have been introduced (S19, S318 and HR602) concerning discrimination in the workplace based on genetic information.

Federal Wage & Hour Issues: HR 222 would increase the federal minimum wage (currently \$5.15 per hour) by \$1 over two years, or to \$5.65 per hour during the year beginning July 1, 2001, and to \$6.15 per hour beginning July 1, 2002 -- all of which is still less than California's current minimum wage. The Enhancing Economic Security for America's Working Families Act (S8) would amend the FLSA to increase the minimum wage, to revise remedies for and

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Part 3: Significant Case Law Developments

A. FEDERAL CASE LAW

U.S. Supreme Court Harassment Ruling; Practical Advice: In *Clark County School District v. Breeden*, the U.S. Supreme Court ruled that a single remark by a supervisor did not constitute "harassment." The incident occurred when Ms. Breeden's supervisor related a story about a sexual comment someone had made and stated that he did not know what the comment meant; another coworker told the supervisor he would explain it to him later, and both men laughed. Ms. Breeden was at this meeting. There were no other incidents. The Supreme Court ruled that no reasonable person could have believed that this was harassment.

The court explained that whether conduct is sufficiently offensive to violate federal anti-discrimination law depends on a number of factors, including its frequency and severity, whether it's physically threatening or humiliating or is merely offensive, and whether it interferes with the employee's work performance. According to the Court, simple teasing, offhand comments and isolated incidents, unless extremely serious, do

not amount to illegal harassment.

After Ms. Breeden filed her harassment lawsuit, her employer gave her an unwanted transfer. Ms. Breeden amended her claims to allege retaliation for filing her suit. The Supreme Court struck down this claim, stating that because no reasonable person could have believed that the episode in dispute here amounted to sexual harassment, Ms. Breeden's complaints about the incident were not protected by anti-retaliation rules. Moreover, the Court also cited the timing of Breeden's transfer as too remote from Breeden's filings — almost two years later — to suggest that it was retaliatory.

Practical Advice: Although the employer was not liable in this case, it took years—and hefty defense costs—to end the dispute. Take these practical steps to protect yourself:

1. *Caution employees about language.* Warn supervisors and employees to avoid using — or repeating — sexually offensive remarks. Solid training regarding harassment issues is critical.

2. *Take action immediately.* A single crude remark typically won't amount to illegal harassment. But you still must promptly investigate and resolve all

complaints to be sure the incident really is an isolated episode and to prevent a minor problem from mushrooming into a lawsuit.

3. *Document personnel decisions.* It is best to let some time pass (if possible) before taking legitimate action against an employee who has complained. Be sure to keep detailed records of the legitimate reasons for an adverse action and the timing of your decisions to prove your action was not retaliatory. Do not wait until after there is a complaint to start documenting those long-standing performance issues.

4. *Seek qualified counsel* as to the best way to handle an investigation and any tricky situations.

Camargo v. Tjaarda Dairy. The California Supreme Court ruled on July 5, 2001, that someone who hires a contractor to perform dangerous work is not liable if the contractor's employees covered by workers' compensation insurance are hurt or killed on the job. The Court, in a unanimous vote, ruled that employees or their survivors in such situations can collect only workers' compensation benefits, even if the hirer failed to make sure the contractor was qualified for the work.

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enforcement of prohibitions against sex discrimination in payment of wages and to provide health care coverage to parents and targeted low-income children. The Paycheck Fairness Act (S 77) would amend the FLSA to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, add non-retaliation requirements, increase penalties and authorize the Labor Secretary to seek additional compensatory and punitive damages.

Education Assistance: The Employee Educational Assistance Act (S133) would

amend the Internal Revenue Code to permanently extend the exclusion from gross income of employer-provided educational assistance and to restore the exclusion for such assistance on the graduate level.

Family and Medical Leave: S 849 would amend the Family and Medical Leave Act, making employees responsible for requesting leave and letting workers choose between FMLA leave or paid leave. And HR 1312 would permit parents with minor children to take leave after a spouse dies.

Federal Arbitration: In addition to the California bills pending regarding arbitration, the U.S. Senate has

proposed S.163, which would amend certain Federal civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex national origin, age, or disability.

Mandatory Overtime For Nurses: Under HR 1289, employers could not require nurses to work more than eight hours a day or more than 80 hours over two weeks.

Telecommuting: HR 1012 and S 521 would provide tax credits to workers or their employer for purchasing equipment that allows an employee to telecommute.

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The Court said that the hirer should not have to pay for injuries caused by the contractor's negligent performance, because the workers' compensation system already covers these injuries.

This case was previously reported in the November 2001 edition of *The Strategic EMPLOYER* on page 7 under "Part 3: Case Law." In that article, a California Court of Appeal ruled that when you hire an independent contractor to perform a potentially dangerous job for you, you *can* be sued if the contractor's employee is injured while performing the work — unless you've taken steps to ensure the contractor is competent to do the job. The recent California Supreme Court ruling overturned this decision.

California Supreme Court to Review Two Bias Rulings: The California Supreme Court has agreed to review two recent Appellate Court decisions regarding discrimination. Both will have a significant impact on an employer's control over certain workplace matters. Waag and Co. will keep you informed of any developments.

Bias Ruling 1: Age Bias. The Supreme Court will decide whether employers can deny educational assistance benefits to employees over age 40 while providing such benefits to younger workers. In *Esberg v. Union Oil Company*, Esberg, who was almost 60 years old, had requested his employer to pay for his pursuit of a master's degree. His supervisor denied the request, commenting that Esberg was "too old to invest in." His request was denied at the same time that three other employees received financial aid from his employer for a master's program. Esberg sued, alleging violation of California's Fair Employment & Housing Act ("FEHA") and breach of implied contract.

The lower courts threw out the FEHA claim. While it is illegal under the FEHA to discriminate against older workers when hiring, firing, or demoting employees, the FEHA does not prohibit age discrimination in

offering benefits. It is important to note that there are federal laws that prohibit age-based discrimination in employment benefits; however, Esberg sued only under the state FEHA. The lower court sent the implied contract claim to the jury, who found that the employer had tacitly agreed to pay education costs for all employees, regardless of age. This was a result of how the employer's education program was written and publicized to employees. The Appellate Court upheld the award for Esberg on the contract claim.

Regardless of how the Supreme Court rules, employers still must avoid age-based discrimination in fringe benefits, because it is illegal under federal law. Plus, it is possible that the Legislature may amend the FEHA to overturn any ruling that would permit an employer to discriminate on this basis. This case is also a reminder that your policies and practices can create unintended obligations unless carefully drafted.

Bias Ruling 2: Religious Discrimination. In *Silo v. CHW Medical Foundation*, an employee (Silo) was fired for harassing his coworkers by endlessly proselytizing at work. Silo was warned not to "soul save" at work, but he kept on preaching. Other employees continued to complain and Silo was fired. Silo sued under both the FEHA and the California Constitutional provision that prohibits discrimination on a number of bases, including religion.

Because Silo's employer was a religious-affiliated non-profit corporation, it was exempt from the FEHA and the FEHA claim was thrown out. (Note: The FEHA exemption was recently narrowed, and this issue might be decided differently if it arose today.) However, the Constitutional provision contains no such exemption, and the trial court allowed Silo's claim for wrongful termination in violation of public policy (i.e., the Constitutional provision) to go to the jury. The jury awarded Silo over \$160,000, most of which was attorneys' fees. This was unusual, since attorneys' fees are normally not available unless the claim is brought under a statute that

specifically authorizes them.

The Appellate Court upheld the award even though it acknowledged that no statute authorizing fees applied; the Court said that fees were warranted because Silo had enforced a significant right affecting the public interest. (Of course, it would be interesting to guess what would have happened if the employer were sued not by Silo, but by one of his co-workers claiming to be subjected to religious-based harassment at work.)

The California Supreme Court will review this case, and will look not only at the attorneys' fees issue, but also at the issue of an employer's obligation to make reasonable accommodations for an employee's religious beliefs. Employers need to be cautious about restricting religious activity by employees. Generally, you can restrict religious discussions if necessary to maintain discipline or protect other workers' rights. This means you probably can discipline someone who disrupts work with religious proselytizing, but you cannot ban all religious speech. Any policies regarding religious activities must be neutral toward any particular religious groups. For example, if you allow employees to post non-work material at work, you must also permit them to post religious messages; if you allow Christmas displays, you must also allow Hanukkah ones. Most important, if you encounter a situation regarding religious issues, actively explore reasonable accommodations before taking any disciplinary action.

U.S. Supreme Court Lets Stand Decision Finding FMLA Notification Rule Invalid

On May 21, 2001, the U.S. Supreme Court let stand an appeals court decision invalidating a Department of Labor regulation regarding notice requirements under the Family and Medical Leave Act ("FMLA"). The DOL rule allowed employees who have not met the FMLA's time-in-service requirements to nevertheless take protected leave if the employer does not object within two days of the leave request.

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Part 3: Case Law

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The FMLA provides that employees must have been with the employer for at least one year and worked at least 1,250 hours during the previous 12 months to be eligible for FMLA leave. But a DOL rule states: "Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice" (29 C.F.R. § 825.110(d)).

In *Brungart v. BellSouth Telecommunications Inc.*, the U.S. Court of Appeals for the Eleventh Circuit decided that the rule "is invalid insofar as it purports to extend the eligibility provisions of the [FMLA] to an otherwise ineligible employee who is not promptly notified after requesting leave that she is ineligible under the statute." The Eleventh Circuit said that, "when an administrative agency seeks to improve legislation by altering the basic coverage provisions that Congress has written into the law, it has gone too far."

Robin Brungart had requested immediate leave to care for her mother following emergency heart surgery and received a written reprimand when she returned to work. Almost a month later, the company told Brungart she was ineligible for FMLA leave because she had not worked sufficient hours in the past 12 months.

In her petition seeking Supreme Court review, Brungart argued that an "employer's failure to give an employee notice of the employee's eligibility as required by the FMLA regulations estops the employer from denying the employee's eligibility for FMLA leave, even if the employee is in fact ineligible under the statute." She asserted that the DOL rule "is consistent with the stated purpose of the FMLA, to 'balance the demands of the workplace with the needs of the family.'" In its brief opposing the Supreme Court review,

BellSouth argued the DOL rule "is patently contrary to and in direct conflict with the explicit terms of the FMLA," which requires 1,250 hours of work within the last year for an employee to be eligible. The U.S. Supreme Court denied the petition to review the case, letting the Eleventh Circuit's decision stand.

□ **Employee Lawsuits: Workers' Comp Release Barred Sexual Harassment Claim**

Mary Jefferson alleged that a coworker and others regularly used derogatory language when referring to women. Ms. Jefferson filed a workers' compensation claim, contending that she suffered work-related stress from a sexually hostile work environment. She also filed a sexual harassment charge with the state Department of Fair Employment and Housing.

Jefferson settled her workers' compensation claim for \$49,500 and signed a preprinted workers' compensation compromise and release form. It stated that she was releasing her employer from all claims, known and unknown, stemming from her injury, including civil claims against coworkers. Ms. Jefferson then sued her employer for sexual harassment. The Court dismissed the case because of the signed release. Ms. Jefferson appealed, arguing that she never intended to waive her harassment claim and that the workers' comp waiver did not specify such claims.

Although a workers' comp release will ordinarily be held as not applicable to civil claims, the appeals court upheld the release and threw out Ms. Jefferson's lawsuit. The court said that the general release Ms. Jefferson signed clearly waived all claims related to her underlying injury and did not exclude harassment claims. Plus, the inclusion of a waiver of claims against coworkers in the release suggested that it was intended to encompass issues besides workers' comp because coworkers are not subject to workers' comp liability. Plus, an attorney represented Ms. Jefferson when she signed the release.

This case opens opportunities to gain the release of civil claims while obtaining a workers' comp settlement. If

you are settling a workers' comp claim, you should consult qualified counsel to work with your workers' comp carrier to insert language that will be broad enough to release all claims, not just the workers' comp claim. Allow employees to consult an attorney before signing the release. Giving employees the opportunity to seek legal advice before signing can help reduce the risk of a later challenge. And finally, be aware of special rules for older workers. Note that there are special requirements for waiving claims involving workers age 40 and older.

□ **More Employers Hit With Misclassification Disaster**

Many employers are having increasing difficulty in determining when an employee can legitimately be classified as exempt from California and federal overtime pay requirements. As a result, the likelihood of an employer facing an expensive wage-and-hour claim has vastly increased. Meanwhile, employees are making sure that they become better educated on the subject. Employers should review their pay practices and the correctness of the exempt/non-exempt classification of all positions before they are next.

In March, 2001, a Court ruled that **Farmer's Insurance Exchange's** adjusters were improperly classified as exempt and would be entitled to back payment for unpaid overtime hours. On July 11, 2001, a court hit Farmers with a \$90 million judgment. The next day, a lawsuit was filed against **21st Century Insurance Group** charging that company with cheating its claims adjusters and examiners out of premium pay.

Similar lawsuits are pending against at least nine other insurers in California, where labor laws and court rulings favor white-collar workers' demands for overtime pay.

The verdict against Los Angeles-based Farmers is expected to further fuel a boom in class-action overtime lawsuits by low-level managers, supervisors and administrators, a legal trend that began in the retail industry and has taken off in recent years. Since Jan. 1, 2000, white-collar workers have

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Part 4: Employment News & Information

DOT Revises Drug and Alcohol Testing Rules

The U.S. Department of Transportation has implemented several changes in drug and alcohol testing regulations that impact transportation employees in safety-sensitive positions, such as bus drivers, railroad workers, airline mechanics and flight crews. The most important changes involve validity testing, which is designed to detect samples that have been tampered with or substituted. To ensure fairness to employees, when a laboratory suspects that a sample has been adulterated, an employer-paid physician must review the test results to determine whether there is a legitimate medical reason that accounts for the results. An employee can also have a sample retested by a different lab. These provisions took effect on Feb. 19, 2001. Other changes, including enhanced training requirements for drug and alcohol testing personnel, go into effect Aug. 1, 2001.

Congress Scraps OSHA's Ergonomic Rule—For Now

In a major victory for business, Congress voted in March 2001 to rescind the federal ergonomics rule that took effect in the final days of the Clinton

Administration (see Waag and Co. bulletin from December 2000). The ergonomics regulations covered 102 million workers at 6.1 million work sites. OSHA estimated the cost of compliance at \$4.5 billion per year, but some critics said businesses would have to spend over \$100 billion a year.

But the federal ergonomics rules aren't dead — yet. After Congress scrapped OSHA's ergonomics standard earlier this year, new congressional bills were introduced — over the objections of President Bush and the Labor Department — that would require OSHA to issue a final ergonomics rule in two years. Labor Secretary Elaine Chao has said she will decide by September whether to pursue another mandatory ergonomics regulation or a voluntary policy. Ms. Chao has scheduled three hearings on subject, including a July 24 hearing in California. It is important to note that the Cal/OSHA ergonomics standard remains in effect, regardless of the recent federal activity.

IRS Issues New Withholding Tables, Required Employee Notice

The Internal Revenue Service has published revised income tax tables reflecting income tax decreases signed into law earlier by President Bush.

Employers should begin using the revised withholding tables as soon as possible for wages paid after June 30, 2001. The W-4 Form for employee withholding was not changed.

Employers must also make a new IRS notice about the tax decreases available to employees. The new notice informs employees that they may submit a new W-4 Form so the correct amount of tax is withheld from their pay. To download the new employee notice and a 2001 W-4 Form, go to: <http://ftp.fedworld.gov/pub/irs-pdf/p15t.pdf>

Tax Credit for Businesses

Complying with the ADA: President Bush is urging small businesses to take advantage of the Disabled Access Credit, a tax incentive program created in 1990, to help them comply with the Americans with Disabilities Act (ADA). Businesses with 30 or fewer full-time employees, or total revenues of \$1,000,000 or less, may use a credit of up to \$5,000 a year to offset costs of altering facilities, using interpreters, or other steps to improve accessibility for customers or employees. Details regarding these tax credits are available at www.whitehouse.gov/news/freedominitiative/index.html.

Part 4: *continued on next page*

Part 3: Case Law

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filed at least 175 class-action overtime lawsuits in California. Meeting the requirements for exempt status in California can be difficult. The employee's title is *not* the issue — the nature of the employee's duties is. Moreover, in California, an employee must also meet minimum pay standards to be exempt.

On another mis-classification front, Starbucks Co. has also been hit with lawsuits accusing the company of cheating its managers and assistant

managers out of overtime pay by misclassifying them as exempt employees. Starbucks denies any wrongdoing.

Starbucks has joined hundreds of other businesses to face lawsuits challenging the exempt status of managers and assistant managers. **Taco Bell** recently agreed to pay \$13 million to settle an overtime lawsuit involving 3,100 restaurant managers and assistants in California.

In both the Taco Bell case and the current Starbucks situation, the managers and assistant managers claimed that they spent the vast majority of their time serving product,

cleaning, and performing the same work as their subordinates.

The risk of lawsuits due to misclassifying hourly workers as exempt managers or administrators is now one of the greatest litigation risks faced by employers. Give the current notoriety of these awards, employers should carefully examine whether or not each "exempt" employee is properly classified. Advice of qualified counsel is highly recommended in this analysis, given the current high stakes.



Problem Prevention Focus

What To Do If the Lights Go Out (Or At Least, What To Pay)

The DLSE has had a large number of inquiries regarding employers' wage and hour obligations when faced with electrical power outages. What are an employer's pay obligations when a rolling black out means employees must be sent home from work? The DLSE has offered the following guidelines:

Reporting Time Pay: The Wage Orders provide that each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage. If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, the employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

However, the Wage Orders specifically state that reporting time pay provisions are not applicable when public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system or if the interruption of work is caused by an Act of God or other cause not within the

employer's control. Therefore, if an employer suffers through a general, rolling blackout, that causes the employer to shut down production and send its workers home, the employer will not be liable for reporting time pay. However, if the employer voluntarily agreed to a power cutoff, then this exception would not apply.

The Wage Orders also state that the reporting time pay requirements shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

Employer Control/"Hours Worked:" If an employer facing a power outage (regardless of cause) requires its employees to remain on the premises and wait for the power to return, that time would be compensable "hours worked" within the meaning of the Wage Orders, and the employees must be paid. The same would be true if the employer allowed the workers to leave the premises, but so significantly restricted their movement as to constitute "controlled stand-by time" (e.g., employee must wear beeper, and return within ten minutes of notification that electricity has been restored).

Split Shift Premium: The Wage Orders define a "split shift" as "a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods." The Wage Orders

require that "when an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment." So if an employer facing a power outage sends its workers away from the premises, with instructions to return say 2 or 3 hours later, there may be split shift premium liability.

Impact on Alternative Workweek Schedule: If an employer has employees working an Alternative Workweek Schedule, but has the employees work less on a given day than the hours normally set for that day, then there may be overtime liability. In such cases, the employer must pay overtime pay for all hours worked in excess of 8 on that day. So, if an employer has an Alternative Workweek Schedule by which the employees work 10 hours a day, but sends the employees home one hour early because of a power outage, the employer must pay time-and-a-half for the ninth hour. Also, if the employees are asked to come back and make up their lost hours on a day that is not a regularly scheduled workday, the first 8 hours worked on the non-regularly scheduled workday must be paid at time and a half, and all hours worked in excess of 8 on the non-regularly scheduled day must be paid at twice the regular rate. ✓

Part 4: News

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Employers can also obtain a free ADA Guide for Small Businesses or ADA Tax Incentive Packet at www.usdoj.gov/crt/ada/adahoml.htm

✓ The Strategic EMPLOYER

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