

EMPLOYMENT MATTERS

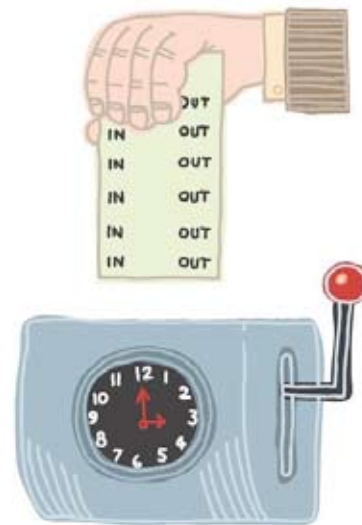
WHAT'S NEW FOR 2009

“FALSE” TIMECARD MAY MEAN MISDEMEANOR

Recent state legislation prohibits employers from requiring employees – as a condition of being paid – to sign a timesheet containing false statements of actual hours worked. Labor Code section 206.5 has been amended, effective January

1, 2009, to define an unlawful “execution of a release” to include an employee signing a statement of hours worked during a pay period which the employer knows is false, in order to be paid for the hours recorded (or worked).

Employers who require their employees to submit timesheets attesting to hours that have not yet been worked should evaluate that practice because such a practice could constitute a misdemeanor under the amended statute.



WEEKLY AND FINAL WAGES FOR TEMPORARY EMPLOYEES

Another new law for the new year provides that temps must be paid for the current week’s work on the regular pay day in the following calendar week. When an assignment is completed, the final wages for the assignment may also be paid on the regular pay day in the following week.

If the temp came through an agency, which terminates the temp’s employment, final wages are due immediately. If the temp quits, final wages are due within 72 hours, or immediately if the employee gave at least 72 hours’ prior notice of resignation. A non-exempt, non-clerical temp who is assigned “day to day”

from a centralized labor pool – and who starts and finishes the day’s work by reporting to the temp agency, in person or otherwise – must be paid at the end of each day’s work. Temporary striker replacements must also be paid at the end of each day’s work. None of these new rules applies if the

assignment is for more than 90 consecutive days of work – unless the agency pays the temp weekly. If you have not already contacted your temp agency, now is the time to make sure that your provider is familiar with the new law – and will comply on your behalf!

ADA AMENDMENTS

Congress has amended the Americans with Disabilities Act (“ADA”) effective January 1, 2009. The amendments emphasize that the definition

of “disability” should be interpreted broadly. The amended ADA will:

- expand the non-exhaustive list of “major life activities”

to include: walking (which was previously recognized by the Equal Employment Opportunity Commission as a “major life activity”),

as well as reading, bending and communicating;

- expand the non-exhaustive list of major bodily functions to include functions

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FIRM NEWS

Tracy Thompson is leaving our firm. We are sorry to see Tracy go, and we wish her all the best in her future endeavors. In the new year, our firm will be known as Cook Roos Wilbur LLP.

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ADA AMENDMENTS, CONT...

- of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive systems;
- mandate that mitigating measures other than “ordinary eyeglasses or contact lenses” *cannot* be considered in determining whether an individual is disabled;
- clarify that an episodic impairment (such as epilepsy or multiple sclerosis), or a condition in remission (such as cancer), will be considered a disability if it would substantially limit a major life activity when it flares up or otherwise becomes active;
- provide that an individual subject to an adverse employment action (such as a decision not to hire that individual) because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is transitory and minor; and
- provide that an individual whose only protected characteristic is being “regarded

as” disabled is not entitled to reasonable accommodation.

The amendments also direct the Equal Employment Opportunity Commission to revise its regulations that define the term “substantially limits.”

Employers in California must comply with both the ADA and the Fair Employment and Housing Act (“FEHA”).

NEW FMLA REGULATIONS

The U.S. Department of Labor (“DOL”) recently issued a new set of Family Medical Leave Act (“FMLA”) regulations that take effect on January 16, 2009.

The primary purpose of the new regulations is to implement the military family leave requirements that were enacted earlier this year. The new military family leave rules provide for two types of leave: (1) leaves of up to 26 workweeks in a single 12-month period for eligible employees to care for a covered service-member with a serious illness or injury incurred in the line

of duty on active duty; and (2) leaves of up to 12 workweeks for eligible employees with covered military members serving in the National Guard or Reserves to use for “any qualifying exigency” arising out of the fact that the military member is on active duty or called to active duty status in support of a contingency operation. The new regulations define the term “qualifying exigency” for purposes of the second type of leave to include all of the following: (1) short-notice deployment; (2) military events and related activities; (3) child care and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities;

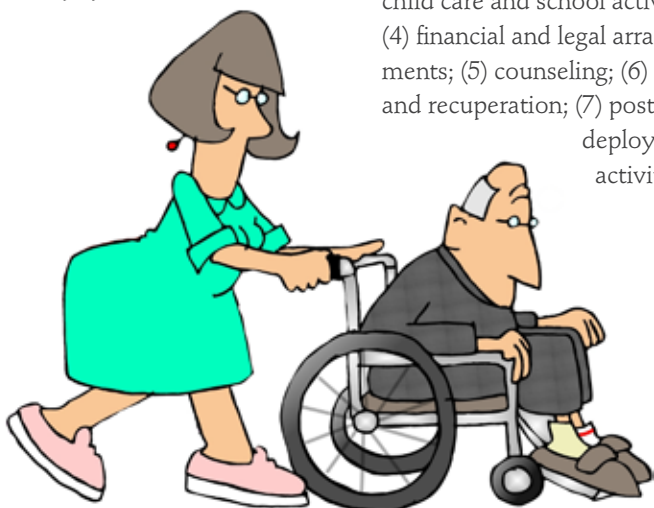
and (8) other activities not provided by the regulations but agreed to by the employer and employee. The new regulations also include two new DOL certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family rules.

In addition to implementing the new military family leave rules, the new regulations also include regulatory changes and clarifications that respond to recent court decisions involving other issues under FMLA.

For example, in *Ragsdale v. Wolverine World Wide, Inc.*, the U.S. Supreme Court struck down an earlier regulation that provided a “categorical” penalty for an employer’s failure to designate leave as FMLA-protected leave. The new regulations remove the so-called “categorical” penalty provisions of the regulations and replace them with a provision that the employer may be liable where an employee suffers individualized harm

because the employer failed to follow the notification rules.

In addition, the new regulations: (1) provide that an employee on a “light duty” assignment is not on FMLA leave; (2) clarify that it is DOL’s longstanding position that FMLA claims can be released without DOL or court approval; (3) clarify the definition of “serious health condition;” (4) provide that all forms of paid leave offered by an employer (sick leave, vacation, paid time off) are treated the same for purposes of substituting paid leave for the unpaid leave mandated by FMLA; (5) allow employers to deny “perfect attendance” awards to employees who take FMLA-protected leave as long as the employer treats employees taking non-FMLA leave the same way; (6) clarify the employer notice requirements and the employee notice requirements; (7) modify the medical certification process; and (8) make changes to the rules regarding fitness for duty certifications.



ATTENTION: SAN FRANCISCO EMPLOYERS

2009 HEALTH CARE EXPENDITURE RATES UNDER HEALTH CARE SECURITY ORDINANCE

Businesses with employees who work in San Francisco (but who are not necessarily based in San Francisco), and that are subject to the Health Care Security Ordinance (“HCSO”), must make health care expenditures on behalf of employees who are covered by the San Francisco legislation.

As of January 1, 2009, the amount of contribution increases from \$1.76 per hour to \$1.85 per hour for companies with more than 100

employees. On the same date, the contribution for companies with 20 to 99 employees increases from \$1.17 per hour to \$1.23 per hour.

Managers, supervisors and confidential employees are exempt from the HCSO if they meet the definitions for the exempt categories of employees and they meet the salary exemption. As of January 1, 2009, the salary exemption has

been increased from \$76,851 per year to \$80,397 per year, or \$36.85 per hour.

The HCSO went into effect in January 2008, but has been challenged in federal court by the Golden Gate Restaurant Association. Recently, a three-judge panel of the Ninth Circuit Court of Appeals

rejected the Restaurant Association’s challenge and ruled that the ordinance does not violate ERISA. The Restaurant Association has petitioned for a hearing *en banc*. Until the Ninth Circuit decides whether to rehear this issue, and to reinstate an injunction, the HCSO remains the law in San Francisco.

INCREASE IN SAN FRANCISCO MINIMUM WAGE

Another change for San Francisco employers is that the City’s minimum wage increases, on January 1, 2009, from \$9.14 per hour to \$9.79 per hour. San Francisco’s minimum wage applies to every employer that employs anyone to do at least two hours of work in any week in San Francisco.

WAGE AND HOUR UPDATE

QUESTION REMAINS WHETHER CALIFORNIA EMPLOYERS HAVE TO POLICE EMPLOYEES’ MEAL BREAKS

The California Supreme Court will decide the issue

Earlier this year, in *Brinker Restaurant Corporation v. Superior Court*, a California Court of Appeal concluded that “employers need only make meal breaks available, not ‘ensure’ they are taken.” *Brinker* specifically noted that public policy does not support the notion that employers must “ensure” that meal periods are taken. If that were the case, said the Court of Appeal, employers would be required to police their employees and force them to take meal breaks. As expected, the plaintiffs in the *Brinker* case petitioned the California Supreme Court to review the issue. In October, the Supreme Court agreed to accept review.

In the meantime, the California Labor Commissioner will follow the appellate court’s rationale

Angela Bradstreet, the State Labor Commissioner, responded to the Supreme Court’s decision to accept review in *Brinker* by issuing a memorandum concluding that the meal period statute and regulation, as well as state and federal case law interpreting the meal period obligations, demonstrate “compelling support for the position that employers must provide meal periods but do not have an additional obligation to ensure that such meal periods are actually taken.”

And another appellate court rules the same way as *Brinker*

Several days after the Supreme Court granted review

in *Brinker*, another appellate court applied the same type of reasoning and concluded that the “meal period laws do not obligate employees to take meal periods or employers to ensure that meal periods are taken.” The more recent case is *Brinkley v. Public Storage, Inc.*, 167 Cal.App.4th 1278 (2008).

What this means for employers

In the balance hangs whether employers with appropriate personnel policies and practices for taking meal periods can be liable to employees who violate those policies, and then sue their employer for failing to enforce its own policies. Until *Brinker* is decided by the Supreme Court, California employers should continue to: (1) maintain written policies that comply

with the Labor Code and the wage order that applies to the company’s industry; (2) make time available for meal periods and rest breaks; (3) require employees to record their work time, and unworked time, accurately; and (4) continue to monitor compliance – and non-compliance – with company policies. Employers who rely on the rationale of the Appellate Court in *Brinker*, the Labor Commissioner’s memorandum, or other authorities could be doing so at their peril.



NINTH CIRCUIT SAYS CALIFORNIA WAGE AND HOUR LAW APPLIES TO NONRESIDENT EMPLOYEES

If an employee resides outside California but occasionally performs work in California, is the employee subject to California's overtime laws when working in California or to the overtime laws of his home state? According to the 9th Circuit, California law applies.

The case involved employees of a California company who live out of state but perform some work in California.

The 9th Circuit's recent decision in *Sullivan v. Oracle*, No. 06-56649, 2008 U.S. App. LEXIS 23394, (9th Cir., November 6, 2008), involved overtime claims brought by a group of Oracle employees who are responsible for training customers in the use of Oracle's software. Oracle previously classified these employees as "teachers," and treated them as exempt from the overtime provisions of the California Labor Code and the federal Fair Labor Standards Act (FLSA). However, a 2003 class action lawsuit in California challenged Oracle's classification of the instructors, and sought damages on their behalf under California law and the FLSA. The 2003 class action was settled and the instructors were reclassified, but the settlement specifically excluded claims under California law for periods of time when

instructors may have worked in California but were not residents of California.

After the settlement of the first lawsuit, a group of Oracle instructors who were not California residents filed a second class action, also in California. Each of the instructors who were named plaintiffs in the second case had performed some work in their home state, some work in California, and some work in other states.

The 9th Circuit held that California overtime laws apply when the employees perform work in California.

The trial court granted summary judgment to Oracle on the nonresident employees' claims, holding that California law did not apply to any of the work they performed. However, the 9th Circuit reversed the summary judgment and held that California's overtime laws applied when the employees performed work in California.

The 9th Circuit concluded that the California Labor Code is "clearly intended to apply to work performed in California by nonresidents." The court also concluded that California has an interest in regulating the pay of nonresidents for work they perform in California because of the effect it can have on California

residents. By contrast, said the court, the plaintiffs' home states have no interest in applying their own law to work performed in California. Finally, the court also concluded that there was no merit to Oracle's argument that it would violate the United States Constitution to apply California law to the claims of nonresidents for work they performed in California.

Sullivan leaves a number of issues unresolved.

In the *Sullivan* decision, the 9th Circuit noted the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557 (1996). In *Tidewater*, the California Supreme Court held that California residents working outside California were covered by the Labor Code.

The *Tidewater* decision says that the California legislature "may not have intended" the Labor Code to apply to "out-of-state businesses employing nonresidents, though the nonresident employees enter California temporarily during the course of the workday." The 9th Circuit interpreted this passage to mean that "an out-of-state employer's employees coming into California temporarily during the course of a workday" was "the

marginal case for Labor Code coverage." Thus, by implication, said the 9th Circuit, when an "in-state employer's employees come into California for entire workdays and workweeks, that is not a marginal case," and the Labor Code clearly applies.

The 9th Circuit's decision leaves open the question of the extent to which its rationale will apply to employees of out-of-state companies. On the one hand, the *Sullivan* decision makes no distinction between California companies and non-California companies when the court states in no uncertain terms its conclusion that "the California Labor Code is clearly intended to apply to work done in California by nonresidents." However, the court also clearly ties its holding to the fact that Oracle is a California company and the fact that the nonresident employees at issue worked entire workdays and entire workweeks in California.

The 9th Circuit's decision also leaves open the question of whether other provisions of the Labor Code (e.g. meal and rest period requirements, itemized wage statement requirements, etc.) would likewise apply to nonresidents when they perform work in California.

Cook Roos Wilbur Thompson LLP is a full-service employment and labor law firm. The Firm combines the experience, training and talent often found only in much larger law firms with the flexibility and efficiency of a small, highly focused team. The Firm represents employers in all phases of litigation and counsels them on a variety of labor and employment-related issues.

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