

Employment Law News: What Employers Need to Know for 2011

Chamber Business Journal

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January 5, 2011

Here is a summary of what employers need to know going into 2011.

New California Laws and Regulations.

Compensation Insurance. A new California law empowers the registrar of contractors to issue a stop order on any contractor who has failed to secure workers compensation coverage, and to require such employer to pay employees for lost time, up to ten (10) days, while the employer arranges for compensation coverage. Another law requires employers to post a new workers compensation poster which includes information about Managed Professional Networks. These posters are available from the California Chamber of Commerce and other publishers.

Leave for Organ and Bone Marrow Donors. A new law requires employers with 15 or more employees to give up to 30 work days of leave to employees serving as organ donors, and up to 5 work days for bone marrow donors.

Serious OSHA Citations. Cal-OSHA will be able to sustain more citations for “serious” violations because of a change in the definition of “serious” violations. The new law requires Cal-OSHA to show only that the violation creates “a realistic possibility” of death or serious physical harm. “Serious” citations are substantially more expensive and expose employers to greatly increased penalties for future violations.

New Heat Illness Prevention Regulations. Cal-OSHA has revised its heat illness prevention regulation to state specific requirements for employers whose employees work outside. Employers must be ready to provide shade for outdoor workers at all times, and must actually set up shade sufficient to accommodate ¼ of the workers whenever the ambient temperature reaches 85 ° F. Employees asking for relief from the heat must be given at least five minutes of rest in the shade and be provided with at least one quart of water per employee per hour for the entire shift. Employers should make sure they’re in compliance because in case of a citation, Cal OSHA will seek the stiff penalties for a “serious” violation.

Meal and Rest Period Premium Pay Exemptions. Another new law exempts from meal and rest period penalties certain employers with collective bargaining agreements which address those breaks in detail. The affected industries are construction, commercial drivers, private security services, and electrical and gas utilities.

Developments in Court Cases.

Arbitration. California employers often require employees to sign agreements to arbitrate all employment disputes. California courts have overturned many such agreements as unconscionable. The question arises whether the court or the arbitrator should decide whether the dispute is arbitrable. A California court recently held that where the employee argues that the agreement is not enforceable,

the issue is to be decided by the court, not the arbitrator. Employers using arbitration agreements should have them reviewed by counsel on a regular basis to make sure they comply with current California law.

Meal and Rest Periods. The California Supreme Court is expected to issue its decision this year in *Brinker Restaurant Corp. v. Superior Court*. *Brinker* presents the question of whether the employer must compel employees to take their meals, or whether it is sufficient if the employer authorizes and permits employees to do so. Related issues include whether the 30 minute meal period must start before the employee completes five hours of work in the work day, and whether the 10 minute rest periods must be scheduled in the middle of each four hour work period. While we await the decision of the California Supreme Court, we are still operating under the guidance of the Labor Commissioner. The Labor Commissioner requires that the meal period commence before the completion of five hours. Further, the Labor Commissioner requires the employer to show that it made a meal period available to the employee in a meaningful manner, even if the employee declined to take it. Because employees may also bring these cases in court as class actions, the claims can get very expensive. Employers should be especially careful to offer the required meals and rest periods.

Overtime Classification. 2010 saw a steady stream of appellate decisions reviewing class actions brought by employees claiming that they were misclassified as exempt from overtime. Under California law, misclassification is very expensive because the salary is deemed to pay only for the non-overtime hours, rendering the employer liable for all overtime hours at 1.5 times the salary divided by the straight time hours. Job duties and not job titles determine the classification. Recent cases have found the employees to be non-exempt on the evidence of their particular duties: loan officers, newspaper reporters, production and merchandising supervisors for a bottling plant, and store managers at a retail chain. Employers should have counsel review overtime classifications to guard against expensive claims.

Employee/Independent Contractors. For many years now, courts have looked to the “economic realities” of the relationship rather than the traditional “right of control” to determine whether the putative contractor is actually an employee. Misclassification can be very expensive, leading to EDD tax audits and uninsured workers compensation claims. Recent appellate decisions have held newspaper delivery people and truck drivers to be employees rather than independent contractors. As with overtime, these cases turn on the details of the arrangement rather than on position titles.

Other Issues

The 8 hour Work Day and the Card Check Law for California Agricultural Employees. Governor Schwarzenegger vetoed SB 1121 that would have required overtime pay for agricultural employees after 8 hours in the work day, and the overtime threshold for that industry alone remains at 10 hours. The Governor also vetoed SB 1474 which would have extended bargaining rights to unions claiming to represent agricultural workers on the basis of signatures on authorization cards, without holding a secret ballot election. While they dodged these bullets in 2010, agricultural employers must wonder whether Governor Jerry Brown would sign what Governor Schwarzenegger vetoed.

The Federal Card Check Law. The U.S. Senate blocked legislation called the Free Choice Act that would have extended bargaining rights throughout private industry to unions showing a card check majority. Organized labor now represents only 7% of the private work force in the U.S. and had made the Free Choice Act its top legislative priority to reverse its declining union membership. The Republican victories in the November elections ensure that the Free Choice Act will be off the table for another two years.

The Health Insurance Reform Act. The Health Insurance Reform Act of 2010 phases in slowly over the next four years. While the new Congress will attack many provisions of this law, Republicans will not be able to overcome a presidential veto in the next two years. Unless the law is revised, large employers will bear the brunt of play or pay starting in 2014. Congress is less likely to tamper with tax credits for small employers who provide health insurance for their employees. Eligible small employers receive a tax credit if they pay at least half of the cost of qualifying health insurance for their employees starting in 2010 and continuing through 2013. Employers with no more than 10 employees and average annual wages below \$25,000 receive a 35% tax credit for their premium costs. Tax credits scale down to 25% for employers with 25 employees and average wages less than \$50,000. Larger employers and small employers with average annual wages above \$50,000 are not eligible for these tax credits.

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