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The Berlin Brief

For Clients and Friends of The Berlin Law Firm

New Federal Law The Patient Protection and Affordable Care Act

This Act requires changes to be phased in until 2018 with the most significant coming in 2014. At that time individuals will have to buy insurance and employers will have to provide it, or both will face penalties.

'Play or pay' employer mandate. States are required to offer insurance exchanges to facilitate the purchase of coverage and administer tax credits to individuals who need them to buy coverage by 2014. Employers with 50 full-time employees will be fined if they do not offer insurance.

Reporting Requirements. The legislation required disclosure of health benefits value on employees' W-2 Forms in 2011. However, in October the IRS issued a notice delaying this requirement. The notice did not address the requirement that employers report excess amounts that are subject to the "Cadillac plan" excise tax for plans costing more than \$10,200 for an individual, or that by 2014 employers report health insurance coverage for participants and beneficiaries.

Tax Credit for small business. Employers with 25 employees and average annual wages less than \$50,000 may be eligible for a tax credit up to 35% of the contribution to provide health insurance. Small nonprofits would be eligible for a 25% credit. The credit began in 2010 and increases to a 50% credit for small businesses and 35% for nonprofits in 2014.

New Laws and Court Decisions Affect California Employers

2010 saw several significant employment law decisions from the California Supreme Court, including cases dealing with Kin Care Leave and the definition of "employer" for purposes of state wage and hour laws. The U.S. Supreme Court also entered the fray issuing an opinion that could extend the time that employers are vulnerable to disparate impact claims brought under Title VII, federal anti-bias statute.

Mandatory Leave

SB 1304 requires employers with 15 or more employees to allow employees to take paid leaves of absence for organ and bone marrow donation. Employees who have exhausted all available sick leave are entitled to take a paid leave for organ donation (not exceeding 30 days) and bone marrow donation (not exceeding five days). Upon the employee's return to work he/she must be restored to the same position held prior to the leave or equivalent position. You may not interfere with an employee taking the leave or retaliate against him/her for taking the leave or opposing an unlawful employment practice related to the leave. This law creates a "private cause of action" which means an employee can sue the employer directly for violations, rather than leaving enforcement to state authorities.

Kin Care and Uncapped Sick Leave Policies

California Labor Code, section 233, states that when an employer provides a paid sick leave benefit to employees in any given calendar year, the employer must allow an employee to use the equivalent of the amount of sick leave the employee would earn in a 6-month period to care for a child, parent, spouse or domestic partner. Unlike unpaid family and medical leave provided under state and federal law (which applies only to employees with a certain number of employees and can only be used if the family member has a "serious health condition"), an employee can use this Kin Care paid sick leave to care for family members in the same way that the employee could use the paid leave for his or her own sickness. If an employee takes advantage of Kin Care, the employee's absences cannot be used against the employee under any absence control or attendance policy.

'Employer' Under Wage and Hour Laws

In *Martinez v. Combs* several agricultural employees claimed minimum wage and hour violations against their employer, Munoz, and several produce merchants their employer did business. Munoz went bankrupt and was dropped from the lawsuit, but the employees continued suing the produce merchants. The California Supreme Court held the expansive IWC wage orders definition of "to employ" applies to wage and hour claims. It found the wage orders provide three definitions of "to employ": (1) to exercise control over wages, hours or working conditions; (2) to suffer or permit to work; or (3) to engage, creating a common law employment relationship. While the court ruled in favor of the defendant companies in the case, its decision might actually result in employees bringing more wage and hour cases against companies that use contractors or temporary employment agencies. The court noted, the IWC definitions would ensnare unusual working arrangements that normally would not trigger liability due to the absence of the traditional "master-servant" relationship.

'Proof of Discrimination'

Under the "stray remarks" doctrine, isolated remarks by employees who did not make the allegedly discriminatory employment decision — or statements by decision-makers outside the decision process — are considered stray and thus irrelevant to the question of whether discrimination occurred. The stray remarks doctrine is widely applied in the federal courts, but the state Supreme Court declined to adopt it for California cases. This Court explained that stray remarks can corroborate direct evidence of discrimination or become more significant in conjunction with other circumstantial evidence. When combined with other evidence that an employer's offered reasons for its actions are false or "pretextual," the court said, an otherwise stray remark could provide sufficient evidence to go to trial. But the Supreme Court stressed that stray remarks alone are not enough to establish a valid discrimination claim. The court stated, "a slur, in and of itself, does not prove actionable discrimination."



First Class Mail

For Clients and Friends of The Berlin Law Firm

Philip E. Berlin, Esq.
The Berlin Law Firm
2550 N. Hollywood Way, Suite 404
Burbank, CA 91505-4650

Phone: 818•558•1088
Fax: 818•848•5005
Email: PhilipBerlin@berlinlaw.com

**comments, requests for clarification
or questions are welcome**

Information contained in this newsletter is not intended as legal advice for a particular situation but reflects frequently asked questions or client concerns. If you need policies reviewed, contracts drafted or have comments, questions or need clarification, we welcome your inquiries.

— Phil Berlin (818) 558-1088

NEW E-Mail Communications between Attorney and Client on Employer's Computer/Privilege?

A recent California court of appeals decision concluded that e-mails sent by an employee to her attorney regarding possible legal action against her employer did not constitute “confidential communication between client and lawyer” within the meaning of Evidence Code section 952. This is so because the employee used a computer belonging to the company to send the e-mails even though (1) she had been told of the company’s policy that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal e-mail, (2) she had been warned that the company would monitor its computers for compliance with this company policy and thus might “inspect all files and messages ... at any time,” and (3) she had been explicitly advised that employees using company computers to create or maintain personal information or messages “have no right of privacy with respect to that information or message.”

An attorney-client communication “does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation or storage of electronic communication may have access to the content of the communication.” (Evid. Code, § 917, subd. (b).) However, the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer’s conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him. By using the company’s computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of e-mail usage, The employee did not communicate “in confidence by means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.” (Evid. Code, § 952.) Consequently, the communications were not privileged.

Unemployment Compensation — Good Cause to Leave Work

AB2364 revised various provisions governing eligibility for unemployment compensation benefits to specify that a claimant is eligible for benefits where h/she left the job to protect his/her family from domestic violence abuse. Previously the provision only allowed employees to retain eligibility if they left the job to protect their children.
