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The Berlin Brief

For Clients and Friends of The Berlin Law Firm

WAGE & HOUR

Key Exemption Concepts

1. Comply with California law which is more restrictive than federal. Never assume over-time policies from out of state management will comply.
2. Employers have the burden to prove employees are exempt from overtime.
3. Must pay exempt employees the required minimum monthly salary.
4. Actual job duties determine exempt status — not job titles or job descriptions.
5. Employee must spend 50% of their time performing work that qualifies as exempt.
6. Job duties must be carefully evaluated before a decision is made to treat an employee as exempt. Most employees are non-exempt.
7. If you improperly classify employees as exempt, you could owe overtime going back as many as 4 years. If you don't have records of hours worked, the hours you owe may be determined by the employee claims.
8. Every California employer is subject to a Wage Order for their specific industry.
9. Don't make improper pay deductions to discipline an employee for being late or if you don't have fulltime work — you could lose the exemption and owe for back overtime pay.

New Laws Effect California Employers

Our intention is to update you on several new laws that impact employers in 2009. It is important to comply with these laws by reviewing your policies and practices, making needed revisions, and communicating these to your supervisors and managers. There were massive changes to the Federal Americans with Disabilities Act, a landmark law barring genetic discrimination, as well as changes to family and medical leave rights. In addition to the new laws, the courts issued decisions concerning non-compete agreements, age discrimination, medical marijuana, and retaliation.

WAGE AND HOUR ISSUES

Exempt computer software professionals. California's AB 10 exempts overtime for computer software employees who earn at least \$36 per hour. Also, fulltime employees who are paid a salary of at least \$75,000 annually are exempt. To qualify, a salary of no less than \$6,250 must be paid at least one month. Future salary and hourly levels will be adjusted annually based on Consumer Price Index changes.

Timesheet fraud. AB 2075 made it illegal to require an employee to sign a timesheet or statement of hours worked for a pay period if the employee knows the statement is false.

AMENDMENTS TO AMERICANS WITH DISABILITIES ACT NOW IN SYNC WITH STATE LAW

Whether an impairment substantially limits a major life activity, rising to the level of a disability, must be made without considering the effects of medication, or devices such as a wheelchair, hearing aid, etc. Examples of major life activities include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Operations of major bodily functions also amount to a major life activity.

The standard of "regarded as" disabled has been eased. An individual only needs to show that discriminated was because of an actual or perceived impairment, even if the impairment does not limit or is not perceived to limit a major life activity. Transitory or minor (6 months duration or less) impairments do not qualify for the "regarded as" protection.

MILITARY FAMILY & MEDICAL LEAVE ACT (FMLA) LEAVE

The National Defense Authorization Act expands the FMLA to permit two new leaves for family members of military personnel.

- 1) Employees with an immediate family member (spouse, son, daughter or parent) who is on active duty or called to active duty in the reserves or National Guard may take up to 12 weeks of unpaid leave during any 12-month period for any "qualifying exigency."
- 2) Service member caregiver leave became effective in 2008, for service member family leave. An eligible employee who is the spouse, child, parent or next of kin (nearest blood relative) of an Armed Forces member injured in the line of duty can take up to 26 weeks of unpaid leave during a 12-month period to care for a service member. This leave is available only during a single 12-month period. During a 12-month period when a service member family leave is used, the employee is limited to a combined total of 26 weeks of FMLA leave for any reason.



First Class Mail

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of The Berlin Law Firm**

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**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 GENETIC INFORMATION NONDISCRIMINATION ACT (“GINA”) effective November 21, 2009

“GINA” amends Title VII, the federal anti-bias law, to prohibit private employers with 15 or more employees and public employers from refusing to hire an applicant, and from discharging or otherwise discriminating against an employee because of genetic information. It is designed to curb the abuse of the use of genetic information by employers and insurers. Employers may not use genetic information to limit, segregate or classify employees in a way that would deprive employment opportunities or negatively impact employment status. Further it prohibits employers from requesting, requiring or purchasing genetic information about an employee or an employee’s family member, with a few specific exceptions. It also places strict confidentiality requirements on employers who have employee or family member genetic information. In May 2009 GINA made it illegal for insurers to raise premiums or deny coverage based on genetic information.

“Genetic information” about an applicant or employee refers to genetic tests of the person or family members, or to the manifestation of a disease or disorder in family members. “Family member” is broadly defined to include an applicant or employee’s dependents (spouse or children) but also other relatives from the first to the fourth degree, e.g., mother, grandmother, great-grandmother and great-great-grandmother.

NEW EMPLOYEE NON-COMPETE AGREEMENTS & TRADE SECRETS / INTELLECTUAL PROPERTY

The California Supreme Court in *Edwards v. Arthur Andersen* ruled that California’s Unfair Competition Law forbids employee non-compete agreements unless the agreement falls within one of the statute’s specific exceptions. The law allows non-compete agreements only in connection with the sale or dissolution of corporations, partnerships and limited liability corporations. The court’s decision is applicable to all non-compete provisions, even those that place only narrow or reasonable restrictions on an employee.

This recent decision places more importance on company owned trade secrets and invention assignment agreements because new innovations will be developed by your current employees. It is critical for companies to ensure that they own the ideas (“intellectual property”) that their employees develop. While it is important to establish these agreements, it is also important that employees document their ideas, even brainstorming when there is no immediate application or use. This will help establish who owns the ideas in the future.
