

## Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

Professional Liability Litigation

Real Estate Litigation

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Retail Litigation

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## I.

### **ADMINISTRATIVE/LEGISLATIVE UPDATE**

#### **New FMLA Regulations Effective January 2009**

The Department of Labor has issued highly-anticipated changes to the Family and Medical Leave Act (“FMLA”), marking the first major revisions in 13 years. These rules will take effect on January 16, 2009. The highlights of these new regulations include the following:

#### ***Military Caregiver/Qualifying Exigency Leave:***

The new regulations address Military Caregiver Leave, which provides medical-oriented leave for those employees caring for family members with serious injuries or illnesses incurred in military duty. An eligible employee is entitled to 26 workweeks of leave to care for a covered service member in a “single 12-month period,” regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons. In that period, the employee is entitled to no more than 12 weeks of leave for any of the other types of FMLA leaves.

Qualifying Exigency Leave is a new type of FMLA leave which the employee may take to handle various non-medical exigencies arising out of the fact that the employee’s spouse, child, or parent is on active duty or on call to active duty status. This leave is subject to the usual maximum of 12-weeks of total FMLA leave in a year. The regulations list eight types of “qualifying exigencies” which may qualify for this type of FMLA leave:

- Short-notice deployment: Leave to address any issue that arises from an impending call or order to active duty in support of a contingency operation

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seven days or less prior to the date of deployment;

- **Military events and related activities:** Leave to attend any military ceremony, program, or event related to the active duty or call to active duty status or to attend certain family support or assistance programs and informational briefings;
- **Childcare and school activities:** Leave to arrange or provide for childcare or school-related activities;
- **Financial and legal arrangements:** Leave to make or update various financial or legal arrangements;
- **Counseling:** Leave to attend counseling (by someone other than a health care provider) when necessary as a result of the active duty or call to active duty status;
- **Rest and recuperation:** Leave to spend time with a covered military member who is on short-term, temporary, rest-and-recuperation leave during the period of deployment (up to five days);
- **Post-deployment activities:** Leave to attend arrival ceremonies (including funeral or memorial services), reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following active duty status; and
- **Additional activities:** Leave to address other events arising from military duty agreed upon between employer and employee.

### ***Employer Notice Obligations:***

The requirements set out four mandatory notices employers must issue:

1. A “General Notice” to be posted in every workplace and incorporated into any employee handbook. If a company does not maintain a handbook, the notice must be distributed to each employee upon hire;
2. A personalized “Eligibility Notice” within five days of either a request for leave or after learning that a leave may be FMLA-qualifying;
3. A written “Rights and Responsibilities Notice” at the same time as the Eligibility Notice;
4. A written “Designation Notice” within five days after receiving sufficient information to determine whether the need for leave is FMLA-qualifying.

The current rule states that an employer may not count any leave against an employee’s annual 12-week allotment until after it provides all required notices. The DOL’s new regulation clarifies that an employer is liable for failing to provide

notice only if an employee suffers actual harm, such as lost compensation and benefits, other monetary losses, or loss of employment or a promotion.

***Employee Notice:***

The new regulations modify a current regulation that allows some employees to notify their employers of the need for FMLA-qualifying leave up to two business days after an absence, even under the circumstance when the need for leave is known in advance. Under the new regulations, employees must follow their employer’s normal and customary call-in procedures, unless there are unusual circumstances.

***Serious Health Condition:***

The same broad definition of “serious health condition” is retained. However, for a serious health condition involving continuing treatment by a health care provider (as opposed to inpatient care), the new regulations require the employee (or sick family member) to make an in-person treatment visit to the health care provider within seven days of the first day of incapacity. The current regulations contain no such time limit. Also, to qualify as a chronic serious health condition (which often is the basis for intermittent leave), the condition must require at least two visits to a health care provider per year.

***Certification:***

An employer may directly contact an employee’s health care provider to authenticate or to obtain a clarification of information required by a certification form. An employee’s “direct supervisor” is prohibited from making these inquiries, limiting this right to a “health care provider, a human resources professional, a leave administrator (including third-party administrators), or a management official.”

The new regulations also require the employer to notify the employee in writing if the medical certification is incomplete or insufficient to make a determination as to “serious health conditions,” and to specifically identify the missing or insufficient information.

***Eligible Employees:***

The new regulations set out that an employee who has worked less than 12 months during a current stint of employment may still be eligible if, during the prior seven years, he worked a total of 12 months.

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***Paid Leave:***

Under the new regulations, an employer may now restrict the right to use any form of paid leave consistent with policies for similar, but non-FMLA reasons, and apply its normal rules subject to which form of paid leave was accrued.

***Light-Duty Work:***

The new regulations clarify that time spent performing light duty work does not count against the annual 12-week allotment of FMLA leave, and the employee's right to job restoration is held in abeyance during the light duty period.

***Net Effect:***

Employers need to update their respective policies and procedures to reflect new or changed requirements, obligations and options under the new regulations. Likewise, every employer must ensure that its leave designation, certification forms and notice obligations comply with the new regulations. We further recommend that employers provide training for front-line supervisors and management regarding their general duties under the FMLA.

**IRS Lowers Standard Mileage Rate for 2009**

The IRS standard-mileage-reimbursement rate for 2009 will be 55 cents per mile for all business miles driven. This rate is a reduction from the rate of 58.5 cents per mile that has been in effect during the second half of 2008.

**II.**

**JUDICIAL UPDATE**

**Ninth Circuit Confirms Applicability of California's Labor Laws To Non-Resident Workers**

The U.S. Court of Appeals for the Ninth Circuit has confirmed that the mandates of California's Labor Code apply to *all* work performed within the state, regardless of whether such work is performed by residents or non-residents. The Ninth Circuit also held that the application of California's labor laws to non-resident workers performing work within the state does not violate the U.S. Constitution.

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In *Sullivan v. Oracle Corporation*, a group of Oracle Corporation (“Oracle”) employees who were classified as “teachers” (and therefore, according to Oracle, not entitled to compensation for overtime work under either federal or California law) brought a would-be class action lawsuit against Oracle for failure to pay overtime compensation and other claims. The plaintiffs alleged that Oracle failed to pay overtime to teachers who were domiciled in other states but who completed full days of work in California. The federal district court granted summary judgment on the claim in favor of Oracle on the ground that the relevant provisions of California law did not, or could not, apply to the work performed by the out-of-state plaintiffs. The Ninth Circuit reversed the summary judgment.

Applying California’s “choice-of-law” rules, the Ninth Circuit determined that although some of the plaintiffs lived in other states with different labor laws, California’s overtime laws — which apply to *all* work performed within the state, regardless of the residence or domicile of the employee — should apply to their compensation claims in light of the fact that: (1) California has an interest in the effect compensation for non-residents working in California has on California residents;<sup>1</sup> and (2) the other states have no interest in applying their minimum wage laws (or lack thereof) to work performed in California by their residents.

### No Punitive Damages for Meal and Rest Period Violations

In *Brewer v. Premier Golf Properties*, a California court of appeal held that punitive damages may not be awarded for violations of California’s meal and rest period. Christine Brewer (“the Employee”) was a waitress at Cottonwood Golf Resort’s restaurant. She sued for meal and break violations, among other employment claims. The jury awarded the Employee approximately \$26,000 for unpaid wages and various statutory penalties, such as missed meal and rest periods, improper pay stubs and waiting time penalties. The jury also awarded the Employee an additional \$195,000 as punitive damages to punish the restaurant’s “fraud, oppression or malice.”

The court of appeal reversed the punitive damages awarded. The court confirmed that the Labor Code creates new rights which are not available at common law. Therefore, the remedies set forth in the Labor Code are exclusive. The court also held that a claim for unpaid meal periods and other Labor Code violations “arise” out of a contract; i.e., the employment relationship. As such, punitive damages are not available.

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<sup>1</sup> The Ninth Circuit reasoned that if a California employer could avoid the requirements of the state Labor Code by simply hiring non-residents, then California residents would be substantially disadvantaged in the labor market by the cheaper labor available to California employers.

Class Action Certification Denied  
In \$26 Million Claim Alleging Illegal Job Applications

California Labor Code sections 432.7 and 432.8 make it illegal for an employer to ask an applicant for employment to disclose any convictions for marijuana-related offenses that are more than two years old. Section 432.7 provides that an applicant who is required to disclose such information may recover “actual damages” or \$200, whichever is greater, plus costs and reasonable attorneys’ fees. In *Starbucks Corp. v. Superior Court*, three individuals (“the class representatives”) brought a class action lawsuit on behalf of some 135,000 unsuccessful Starbucks job applicants. The class representatives alleged that the Starbucks employment application contained an “illegal question” about prior marijuana convictions that are more than two years old.

The Starbucks application in question, which was used throughout the United States, included a question on its first page that said: “Have you been convicted of a crime in the last seven (7) years? If Yes, list convictions that are a matter of public record (arrests are not convictions). A conviction will not necessarily disqualify you for employment.” The reverse side of the application contained various disclaimers for U.S. applicants, as well as for applicants in Maryland, Massachusetts, and California. These disclaimers were located in a very lengthy paragraph directly above the signature line. The “California disclaimer” provides as follows: “*CALIFORNIA APPLICANTS ONLY: Applicant may omit any convictions for possessions of marijuana (except for possessions of marijuana on school grounds or the possession of concentrated cannabis) that are more than two (2) years old, and any information concerning a referral to, and participation in, any pre-trial or post-trial diversion program.*”

Despite the fact that none of the three class representatives had ever used marijuana or been convicted of any marijuana-related offense, and two of the three individuals had read and understood the California disclaimer, they nevertheless filed suit on behalf of over 135,000 individuals, each seeking recovery of the \$200 statutory damages set forth in Labor Code section 432.7. Starbucks filed a motion for summary judgment, alleging that the disclaimer was appropriate, and that the class representatives had no standing to pursue a claim (on behalf of themselves or as representatives of a class) because they had not been personally damaged. The trial court denied the motion, and Starbucks appealed.

The California Court of Appeal, Fourth District, held that summary judgment should have been granted, and reversed the trial court. In doing so, the court held that because the class representatives had not been personally damaged (i.e., they were not denied employment for any marijuana use) they had no standing to pursue a claim on their own behalf or as class action representatives.

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The court, however, noted that although Starbucks' disclaimer was appropriately worded, the fact that it was "placed at the very end of a 346-word paragraph, with a U.S. disclaimer, followed by a host of irrelevant provisions from states like Maryland and Massachusetts," was improper. The court added that "any value to be gained by emphasis is submerged in a variable sea of boldface type." The court concluded by stating that: "We see no problem with the language of the California disclaimer, but see significant problems with its placement. Had Starbucks included the California disclaimer immediately following the convictions questions, Starbucks would have been entitled to summary judgment in its favor on the reasonableness of the employment application."

Based upon the court's ruling, the inclusion of a properly-worded marijuana convictions disclaimer in an employment application may not necessarily shield an employer from potential liability for violating Labor Code sections 432.7 and 432.8, unless such disclaimers are set forth immediately after the "convictions" question on the application.

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*This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Cara Patton, Tyler Theobald or Jenna Leyton at (858) 755-8500 or Eric DeWames at (310) 417-1137.*