

FEBRUARY 2007 EMPLOYMENT LAW UPDATE

I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

2007 Laws

Governor Schwarzenegger signed into law several bills that will impact California employers. They include:

SB 1441 (Kuehl): This law, which amends California Government Code section 11135, adds sexual orientation to existing classifications protected from discrimination by recipients of state funds. The law also expands the definition of discrimination to include the perception that a discrimination victim is a member of a protected class or that a person is associated with a person who has, or is perceived to have, any protected characteristics.

AB 2095 (Niello): This law, which amends California Government Code section 12950.1 and California Labor Code section 204, limits California mandated sexual harassment training to supervisors physically located in California. This new law also permits reporting of overtime hours on the same payroll date as the hours are paid when overtime is paid in the payroll period subsequent to the one in which it is owned. The law also provides that an employer has complied with payroll law if overtime hours worked in the “current pay period are itemized as collections on the pay stub for the next regular pay period” provided the subsequently issued pay stub identifies the dates of the pay period “for which the employer is correcting its initial report of hours worked.”

AB 1835 (Lieber): This law, codified at California Labor Code sections 1182.12 and 1182.13, increases California’s minimum hourly wage to \$7.50 per hour effective January 1, 2007 and \$8.00 per hour effective on January 1, 2008. This law also requires the Department of Industrial Relations to adjust the permissible meals and lodging credits by the same percentage as the increases in the minimum wage into a manual and to republish the Industrial Welfare Commission Wage Orders.

The minimum wage increase will also affect exempt executive, administrative and professional employees and certain inside sales persons whose minimum salary requirements are based upon California’s minimum wage. The California Wage Orders require that for an

employee to be classified as exempt from the Wage Orders, meal, rest period and overtime requirements, he or she must receive a monthly salary equivalent to no less than two times the state minimum wage for full-time employment, among other requirements. Thus, to remain exempt under the Wage Orders, exempt employees' minimum salaries increased to \$2,600 per month (\$31,200 per year) on January 1, 2007 and will increase to \$2,773.33 per month (\$33,280 per year) on January 1, 2008. Exempt inside sales persons must earn at least 1.5 times minimum wage (and must have at least 50% of their compensation derived from commissions).

II.

JUDICIAL UPDATE

“Release” of Temporary Worker Equates to “Discharge” for Purposes of Preparing Final Paycheck

Section 201 of the California Labor Code provides that when an employer “discharges” an employee, all wages earned and unpaid at the time of the discharge are due and payable “immediately.” Under Labor Code section 203, an employer’s willful failure to pay wages to a discharged employee subjects the employer to certain penalties.

In *Smith v. Superior Court*, Amanza Smith (“the Employee”) was working as a salesperson in a Beverly Hills boutique when a representative of L’Oreal U.S.A., Inc. asked her if she would like to be a “hair model” at an upcoming show featuring L’Oreal products. The Employee agreed, and L’Oreal offered to pay the Employee \$500 for one day’s work.

The Employee did not perform any other duties or attend any other shows on behalf of L’Oreal. L’Oreal, however, waited over two months to pay her the \$500 in wages that it owed to her. The Employee sued L’Oreal on behalf of herself and “all other similarly situated models” who worked for L’Oreal, for violation of Labor Code section 201. Pursuant to Labor Code section 203, the Employee also sought penalties against L’Oreal in the amount of \$15,000 for herself (representing 30 days of the applicable wage rate of \$500 per day), and penalties for each similarly situated model.

L’Oreal argued that the Employee could not recover penalties under section 203 because the “termination” that occurred when she completed her one-day work assignment did not constitute a “discharge” or “layoff” that triggered section 201’s requirement for immediate wage payment. The trial court agreed and dismissed the case. The California Court of Appeal also agreed, interpreting the “discharge” element to mean that an employer must affirmatively dismiss an employee from an “ongoing” employment relationship.

The California Supreme Court disagreed, however, concluding that “an employer effectuates a discharge within the contemplation of [Labor Code] sections 201 and 203, not only when it fires an employee, but also when it releases an employee upon the employee’s completion of a particular job assignment or time duration for which he or she was hired.” The court concluded as follows:

Excluding employees like [the Employee] from the protective scope of sections 201 and 203 would mean that employees who fulfill their employment obligations by completing the specific assignment or duration of time for which they were hired would be exposed to economic vulnerability from delayed wage payment, while at the same time employees who are fired for good cause would be entitled to immediate payment of their earned wages (section 201) and many employees who quit without fulfilling their employment obligations would have a right to wage payment no later than 72 hours after they quit (section 202).

At-Will Status Upheld by the California Supreme Court

In *Dore v. Arnold Worldwide, Inc.*, the California Supreme Court once again addressed the issue of at-will employment in California. Brook Dore (“the Employee”) was hired by Arnold Worldwide, Inc. (“the Employer”) in April 1999. The Employee’s offer letter included reference to a 90-day assessment period, after which time the Employer would consider naming the Employee an officer for the Employer. The letter further stated that the Employee’s employment was “at will,” which the letter defined as the Employer’s right “to terminate [the Employee’s] employment at any time just as [the Employee] has the right to terminate [his] employment with [the Employer] at any time.”

The Employee argued that since the language in his offer letter stated only that his employment could be terminated at any time (and left out the language “without cause”) that the Employer gave up its right to terminate his employment without cause. The California Supreme Court rejected this argument, stating, “We disagree with [the Employee] that the verbal formulation ‘at any time’ in the termination clause of an employment contract is per se ambiguous merely because it does not expressly speak to whether cause is required. As a matter of simple logic, rather such a formulation ordinarily entails the notion of ‘with or without cause.’”

The Court also rejected the Employee’s argument that since the Employer provided a “90 day assessment” and an “annual review,” the Employer granted him the right to be terminated only for cause. The Court confirmed that such language merely described the Employer’s evaluation schedule.

Although the California Supreme Court did determine, in this situation, that the Employee was indeed at will, and rejected his implied contract claims, we recommend that California employers proceed with great caution in preparing the appropriate at will language in offer letters, applications, handbooks and the like. While the employer was ultimately successful in this case, the time and expense spent vindicating the language contained in the offer letter must have been extraordinary.

Federal Court of Appeals Provides Guidance Regarding
Proration of Bonuses for Employees on FMLA Leave of Absence

California State and Federal law prohibit the discrimination or retaliation of employees taking a leave of absence under the Federal Family Medical Leave Act (“FMLA”) and/or the California Family Rights Act (“CFRA”). It has been somewhat unclear, however, how employers should handle the calculation of bonuses for employees who take a medical leave of absence during the course of the year. The Federal Third Circuit Court of Appeals provided some guidance.

Sommer v. Vanguard Group involved a claim by Robert Sommer (“the Employee”) that his employer, Vanguard Group (“the Employer”) illegally interfered with the Employee’s FMLA rights when, upon his return from an eight week FMLA leave of absence, the Employer awarded him a prorated portion of the bonus he would have earned under the company’s annual bonus plan. Under the bonus plan in question, the amount that a qualifying employee would receive depended upon three criteria: (1) job level; (2) length of service to the company; and (3) hours worked. Given those criteria, the court held that it was appropriate for the Employer to prorate the amount of the bonus the Employee would have received based upon the amount of hours he *actually worked* during the course of the year.

The court concluded that if the bonus plan “rewards employee production, then proration for FMLA absences is generally allowed; if it rewards the absence of an occurrence (like a safety or perfect attendance bonus), the proration is not allowed.” Thus, if the bonus is dependent upon a perfect safety record or perfect attendance by the employee, the employee will not be disqualified due to his or her FMLA leave of absence. The court opined that:

Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent that an employee who takes FMLA leave had met all of their requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave.

This is Pettit Kohn Ingrassia & Lutz PC’s first monthly update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Hilary Vrem or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.