

Areas of Practice

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Pending California Legislation

SB 1192 (Margett) seeks to extend the time in which a meal period must be taken to any time before the sixth hour of work. Under current law, non-exempt employees are mandated to take meal breaks by the fifth hour of work. The bill also seeks to overturn the California Supreme Court's decision in *Murphy v. Kenneth Cole* and specify that the failure to provide a mandated meal or rest period is a statutory penalty which does not constitute additional wages to the employee. SB 1192 has been referred to the Senate Committee on Labor and Industrial Relations.

Congress Expands the Family and Medical Leave Act

On January 28, 2008, President Bush signed the National Defense Authorization Act for 2008 ("NDAA") into law. The NDAA expands the Family and Medical Leave Act ("FMLA") to include special provisions for family members of individuals on active duty with the Armed Forces.

The new provisions, part of which took effect immediately, provide up to twenty-six weeks of leave for an employee to care for his or her service member spouse, child, parent or next of kin who is recovering from a serious injury or illness incurred in the line of duty. An employee is also entitled to take up to twelve weeks of leave for any "qualifying exigency" which occurs because that employee's spouse, child, or parent is either on active duty or has been notified that he or she will be placed on active duty. However, the "qualifying exigency" leave is not available until the Department of Labor defines "qualifying exigency." The proposed regulations define "qualifying exigency" as any issue arising directly from the deployment of a spouse, child, or parent, including: making legal, financial, economic, childcare or other familial arrangements; attending deployment or return meetings, sessions or ceremonies; attending family support sessions; and, attending to the affairs caused by the missing status or death of the service member.

Although the Department of Labor has not yet issued final regulations covering these additions, it is urging employers to act in good faith to provide the leave authorized under the amended FMLA.

Attached is additional language which may be added to your company's FMLA policy. Also attached are policies relating to California's expansion of military leave rights (enacted last fall), and the prohibition against using cellular/mobile phones (without a "hands free" device) which goes into effect on July 1, 2008.

Potential Changes in Store for the Americans with Disabilities Act

Two bills currently making their way through the U.S. Congress (HR 3195 and S 1881) seek to amend the Americans with Disabilities Act ("ADA") by redefining the term "disabled." The law currently covers individuals whose medical or mental condition poses a "substantial" limitation on the major life activity. The new laws would amend this definition to cover those individuals whose conditions merely create a "limitation" upon major life activities. The bills would also prohibit employers from considering the effects of mitigating measures (such as eyeglasses, medications, and the like) when determining whether an individual is "disabled." These provisions would make the ADA consistent with California's Fair Employment and Housing Act.

Anti-Arbitration Bills Move Forward in Congress

HR 3010 and S 1782, both entitled the "Arbitration Fairness Act of 2007," would prevent employers from requiring employees to agree to arbitrate future employment disputes as a condition of employment. Both bills are currently in committee.

II.

JUDICIAL UPDATE

"But I Didn't Inhale!" – California Employers Have No Duty To Accommodate Employees Who Used Medical Marijuana

The California Supreme Court recently ruled that an employer may discharge an employee who is using marijuana for medical purposes. In *Ross v. RagingWire Telecommunications, Inc.*, the employee, Mr. Ross, suffered from back problems. His doctor had recommended the use of marijuana, pursuant to California's Compassionate Use Act ("the Act"). The employer, RagingWire, offered Mr. Ross a job, but required him to take a pre-employment drug test. Mr. Ross tested positive for marijuana use, and RagingWire terminated his employment as a result, even though Mr. Ross had informed RagingWire of his doctor's recommendation.

Mr. Ross filed a lawsuit claiming that RagingWire discriminated against him on the basis of his disability, and wrongfully discharged him. At trial, Mr. Ross claimed that his use of marijuana did not affect his ability to perform the job he was offered, and he had been working in the same field without any complaints or problems before being hired by RagingWire.

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The case eventually made its way to the California Supreme Court, which ruled that employers may decline to hire applicants who use marijuana, even if that use was not a violation of the State's criminal laws. It is important to remember that although marijuana use for medical purposes is legal in California, all marijuana use is illegal under federal law. The Court declared that "under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions."

The Court further held that the California Fair Employment and Housing Act ("FEHA") did not require employers to accommodate the use of illegal drugs. The Court recognized that employers have a legitimate reason for conducting such testing. Finally, the Court decided that because the Compassionate Use Act was not directed at the employer-employee relationship, the Act did not require employers to consider the Act as an additional requirement of FEHA.

Administrative Exemption Upheld

In *Combs v. Skyriver Communications, Inc.* a California company avoided costly penalties for alleged unpaid overtime and meal and rest breaks after a California Court of Appeal upheld the administrative exemption for a high-level IT position. The employee who filed the claim was responsible for maintaining a broadband Internet provider's network "well-being." Employees who direct network operations, do project management, purchasing, forecasting and oversight of day-to-day operations, among other job duties, more than 50% of the time, and earn at least two times the minimum wage, may be exempt from overtime and meal and rest break requirements.

California Supreme Court to Consider "Stray Remarks" Rule

In a discrimination case, the plaintiff may attempt to introduce allegedly biased comments by a person unrelated to the negative decision that is the subject of the lawsuit as evidence of the employer's discriminatory animus. A number of courts have characterized these as stray remarks that have no bearing on the plaintiff's case.

In last year's *Reid v. Google*, a California Court of Appeal expressed its distaste for the stray remarks doctrine, holding that the trial court should have let a jury decide the remarks' importance. The California Supreme Court accepted review of the *Reid* case and will consider whether such evidence defeats a motion for summary judgment.

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