

MARCH 2007 EMPLOYMENT LAW UPDATE

I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Mandatory Paid Sick Leave Benefit Ordinance Goes Into Effect in San Francisco

On November 2006, city and county residents of San Francisco enacted Proposition F, an ordinance which requires employers to provide paid sick leave benefits for all employees who work within the City or County of San Francisco. The ordinance took effect on February 7, 2007. The following is an overview of this new law.

Covered Employers: All persons and entities who employ one or more employee, either directly or indirectly “or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity.”

Eligible Employees: All employees who have completed 90 days of employment with one employer.

Accrual of Paid Sick Leave Benefits: After an employee has completed 90 days of employment, the employee will accrue one hour of paid sick leave for every 30 hours the employee works. Paid sick leave accrues only in one-hour increments. For businesses employing less than ten employees during a given week, an employee may not accrue more than 40 hours of paid sick leave. For all other employers, there shall be a cap of 72 hours on accrued paid sick leave. Accrued but unused sick leave benefits carry over from year-to-year, subject to the foregoing caps.

It is important to note that an employer is not required to “pay out” accrued but unused paid sick leave benefits upon the termination of the employment relationship.

Use of Paid Sick Leave: Employees may use paid sick leave benefits for their own medical care, treatment, or diagnosis. Further, paid sick leave may be used to care for the following persons when they are ill or injured or receiving medical care, treatment, or diagnosis: the employee’s child, parent, legal guardian or ward, sibling, grandparent, grandchild, spouse, or registered domestic partner. Familial relationships include not only biological relationships but also relationships resulting from adoption, step-relationships, and foster care relationships. If the employee does not have a spouse or registered domestic partner, the employee may designate

one person for whom the employee may utilize his or her paid sick leave benefits. The employee must make this designation within ten work days from the time the employee has worked 30 hours after paid sick leave benefits begin to accrue. Thereafter, the opportunity to make such a designation, including the opportunity to change a previously made designation, shall be extended to the employee only on an annual basis, with a window of ten work days for the employee to make the designation.

Additional Provisions:

- It should be noted that employers that already have a paid leave policy, such as PTO or vacation policy, that makes available to employees paid leave that may be used for the same purposes specified in the ordinance and that is sufficient to meet the ordinance's accrual requirements are not required to provide additional paid sick leave.
- Employers may require employees to give reasonable notification of an absence from work for which paid sick leave is or will be used.
- Employers may only take reasonable measures to verify or document that an employee's use of paid sick leave is lawful.
- It is unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, an employee's right to earn, accrue, or utilize paid sick leave benefits.
- It is unlawful for an "absence control policy" to count paid sick leave taken as an "absence" that may lead to or result to discipline, discharge, demotion, suspension, or any adverse employment action.
- Taking any adverse employment action against a person within 90 days of the employee's filing a complaint with either the Office of Labor Standards Enforcement or in civil court creates a "rebuttable presumption" that such adverse action was taken in retaliation for the employee's exercise of his or her rights.
- If the Office of Labor Standards Enforcement, after a hearing, determines that a violation of this statute has occurred, it may order "any appropriate relief," including, "reinstatement, back pay, the payment of any sick leave unlawfully withheld, and the payment of administrative penalties to each employee or person" whose rights were violated.
- The requirements of the statute can be waived through a collective bargaining agreement, if done so in "clear and unambiguous terms."

Pending California Legislation

A number of bills are pending in the California legislature which, if enacted, would impact California's employers. These bills include:

- **AB 510 (Benoit)** would permit a non-exempt employee, with the consent of his or her employer, to work up to ten hours per day within a 40 hour workweek without overtime pay. Overtime pay would be required for more than ten hours of work in a workday or 40 hours in a workweek. Double time pay would still be required after 12 hours in a workday. California is one of only four states that has not conformed its wage and hour laws to the federal standard which bases its overtime compensation requirements on total hours per week rather than per day. The daily overtime regulation was removed by the Industrial Welfare Commission in 1998, but resurrected in a Gray Davis era bill (AB 60) that took effect on January 1, 2000. Current California law requires that overtime compensation be paid for work performed in excess of eight hours in a day or 40 hours in a week, with an exception for an alternative workweek schedule. AB 510 currently waits a hearing date in the Assembly Labor and Employment Committee.
- **AB 613 (Tran)** would establish a working group of employee and employer representatives to ensure current state-mandated workplace posters use simple, plain language. The new postings would use common, everyday words, short sentences, and terms and definitions that are simply and clearly defined. This group of representatives would be overseen by the Division of Labor Standards Enforcement. AB 613 has been assigned to the Assembly Labor and Employment Committee; a hearing date has not been set. In 2006, similar legislation failed to pass the committee.
- **AB 1439 (Levine)** would provide California businesses a tax credit equal to 10% of what the business spends each year to improve the fitness of its employees. The bill would also allow employers to claim the same tax credit for half the costs of hiring a person or company to provide, for example, nutritional advice, yoga instruction or substance abuse prevention.

II.

JUDICIAL UPDATE

Court of Appeal Rejects Retaliation/Wrongful Termination Claim

In *Carter v. Escondido Union High School District*, a California Court of Appeal reversed a trial court's verdict of over \$1 million in favor of a former Monte Vista High School teacher. The teacher, James Carter ("Carter"), alleged that his employment was wrongfully terminated in retaliation for his "blowing the whistle" on the school's football coach after the coach had recommended that a student take a nutritional supplement to help him gain weight.

After taking protein drinks made by substances bought at a local GNC store, the student began having problems with his kidneys and required temporary hospitalization. After reporting the alleged wrongdoing, Carter's contract was not renewed by the school district.

For an employer to be liable for wrongful termination in violation of public policy, the employer's conduct must violate a public policy that is "fundamental, well-established, and carefully tethered to a constitutional or statutory provision." Carter argued that his employer violated a "public policy against teachers recommending weight-gaining substances to students." The court, however, disagreed, holding that while there may exist "sound policy reasons" to bar football coaches from recommending weight-gaining substances to students, there is currently no law that prohibits such conduct. The court confirmed that any such prohibition must be enacted explicitly by the legislature, not implicitly by the courts, and concluded that while the school district's decision to terminate its relationship with Carter "may have been arbitrary, misguided, and petty, it was not prohibited by law or in contravention of well-established public policy."

The court similarly held that Carter's "whistle blower" claim was legally unsupported. California Labor Code section 1102.5 prohibits discharge of an employee for "disclosing information to a government or a law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or non-compliance with a state or federal rule or regulation." The court held that Carter's conduct (disclosing that the coach had recommended a protein shake to a student) was not protected by section 1102.5, as the information disclosed did not involve a "violation of state or federal statute, or violation or non-compliance with a state or federal rule or regulation."

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, Hilary Vrem or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.