



California Labor and Employment Law Update

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New 2009 FMLA Regulations Took Effect January 16 -- They Add Confusion for California Employers

On January 16, 2009, new regulations took effect under the Federal Family and Medical Leave Act ("FMLA"). The new regulations, which apply to employers with 50 or more employees, include extensive changes to regulations that were adopted by the U.S. Department of Labor ("DOL") almost 15 years ago. They also attempt to shed light on the FMLA amendments enacted on January 28, 2008, when President Bush approved legislation creating new job protections for military families.

The impact of the regulations and potential for confusion is even greater for California employers, who must now understand the differences between the federal standards and the rules adopted under the California Family Rights Acts ("CFRA") because both laws apply to California employees. In 1995, the California Fair Employment & Housing Commission adopted many of the standards embodied in the

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President Obama's First Signed Legislation Overrules Pro-Employer U.S. Supreme Court Decision re: Gender Discrimination

Two days after taking office, President Obama, on January 22, 2009, reversed the United States Supreme Court's decision *Ledbetter v. Goodyear Tire & Rubber Company* (550 U.S. 618 (2007)), a decision pertaining to the statute of limitations in gender discrimination cases under Title VII. President Obama's first signed legislation, entitled the "Lily Ledbetter Fair Pay Act of 2009," overruled the U.S. Supreme Court's 2007 decision which had barred the plaintiff's claims of unfair pay based on her gender. Plaintiff Ledbetter had alleged in her lawsuit that based on prior evaluations which discriminated against her because of her sex, she was not receiving equal pay. In order to get around the statute of limitations bar, Plaintiff had alleged that each time she received a new

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Court Permits Written Release of Wage Claim



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In an important decision in favor of employers, a California Court of Appeal has ruled that employers may enforce written release agreements regarding wage and hour disputes of individual employees. This is important because with the vastly increasing volume of wage and hour class actions and claims being filed, written releases are routinely used by employers when wage claims are settled with employees. However, under California Labor Code §206.5, the validity of any release agreement involving release of wage rights has been called into question. This statute precludes any employer from requiring an employee to release a claim to collect wages due or to become due, rendering such releases null and void, and providing that violation of this section by the employer is a misdemeanor.

In *Chindarah, et al. v. Pick Up Stix, Inc.* ((2009) 171 Cal. App. 4th 796), two former employees filed a class action lawsuit against their employer alleging claims for unpaid overtime and related penalties. Eventually, the claims were settled and releases were signed by the employees. However, they subsequently challenged the validity of the releases under Labor Code §206.5, arguing that this section rendered the releases void because they released claims for unpaid wages.

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DOL's 1995 regulations. Significant questions now arise as to the impact of the 2009 regulations and whether they will be followed by the California FEHC.

The FEHC recently issued a public statement indicating its plan to revise the CFRA regulations in the near future. The FEHC has posted a table on its Website that compares the revised FMLA regulations and the FEHC's current CFRA regulations. (The table can be found at www.fehc.ca.gov)

The table addresses four major differences between the FMLA and CFRA: (1) the treatment of pregnancy as a "serious health condition"; (2) coverage of registered domestic partners; (3) the definition of "qualifying exigency" on account of an employee's or family member's active military duty; and (4) the care for ill or injured service members. In summary, pregnancy can qualify as a serious health condition under the FMLA but not the CFRA; registered domestic partners are not covered under the FMLA but are covered under the CFRA just like spouses; the FMLA provides for "qualifying exigency" leave for military families whereas the CFRA does not; and the FMLA affords time off to covered employees to care for "next of kin."

The table also addressed various other issues, including: (1) pregnancy and baby bonding; (2) limitations on leave for spouses/parents working for the same employer; (3) the definition of "serious health condition"; (4) employee eligibility for leave; (5) computation of leave time periods and the treatment of holidays; (6) intermittent leave; and (7) the substitution of paid leave for FMLA/CFRA leave.

Punitive Damages are not Recoverable in Wage and Hour Cases

California law authorizes various remedies against employers who violate the wage and hour laws set forth in the Labor Code. These include possible waiting-time penalties for any unpaid wages, as well as interest and attorneys fees. However, although the remedies are broad, they are not unlimited. In the recent decision in *Brewer v. Premier Golf Properties*, 168 Cal. App. 4th 1243, a California Court of Appeal determined that

punitive damages were not available for certain Labor Code violations, including alleged violations of the state meal and rest period rules. On March 18, 2009, the California Supreme Court denied a petition to review this decision.

Arbitration Agreements that Waive Class Actions are Unenforceable

Since the California Supreme Court's decision in *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, employment arbitration agreements that attempt to prohibit employees from bringing class actions have generally been held to be unenforceable. Two more recent California appellate decisions have reinforced this trend. In both *Franco v. Athens Disposal Company* (March 2009) 171 Cal. App. 4th 1277, and *Sanchez v. Western Pizza Enterprises, Inc. [Dominos Pizza]* (March 2009) 172 Cal. App. 4th 154, arbitration clauses purporting to waive the employee's right to bring a class action were held to be void and unenforceable.

trial court considering the enforceability of a class arbitration waiver must consider (1) the modest size of the potential individual recovery, (2) the potential for retaliation against members of the class, (3) the fact that absent members of the class may be ill informed about their rights, and (4) other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. (The *Gentry* decision held that class action arbitration waivers are unenforceable if a court concludes under these factors that a class action would be a more effective means of vindicating the rights of affected employees.)

Both courts relied on the factors set forth by the Supreme Court in the *Gentry* case, which held that a

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paycheck, it constituted a new charging period for purposes of the statute of limitations. However, the U.S. Supreme Court, citing extensive prior case law regarding Title VII, held that this theory of the statute of limitations could not be reconciled with existing case law. The new legislation signed by President Obama provides that the statute of limitations begins *each time a discriminatory paycheck is provided*. These changes pertain to compensation claims under Title VII, the ADEA and the ADA, as well as the Rehabilitation Act of 1973.

The changes are also retroactive to May 28, 2007. The effect of the legislation will be to open the door to many gender discrimination lawsuits that would previously have been barred by the 180-day statute of limitations.

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The California Court of Appeal ultimately upheld the validity of the releases, concluding that the Labor Code statute does not prohibit an employee from releasing his claim to past wages as part of the settlement of a *bona fide* dispute over those wages. The court held that as long as there was a bona fide dispute over the payment of the wages, a release agreement settling the dispute would be upheld.

The release is valid if it doesn't attempt to exonerate the employer from future violations of overtime laws, or condition the payment of wages that it concedes are due on the execution of a release.