CHANGES IN EMPLOYMENT PRACTICES MANDATED BY NEW LAWS

Palo Alto February 14, 2006	Los Angeles February 15, 2006	Orange County February 16, 2006
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CHANGES IN EMPLOYMENT PRACTICES MANDATED BY NEW LAWS

February 2006

Palo Alto - Los Angeles – Orange County

TAB

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EMPLOYMENT & LABOR GROUP

BREAKFAST BRIEFING SERIES

February 2006

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The Labor Code Private Attorneys General Act of 2004

Using the Act's New Notice Requirement to Advantage Employers

Stanley W. Levy, Esq.

Review: What is the Private Attorneys General Act of 2004?

- Commonly known as "PAGA" or the "Bounty Hunter Law"
- Allows employees to sue to enforce *almost* any provision of the California Labor Code
- Employees can now collect penalties that, previously, only the Department of Labor Standards Enforcement ("DLSE") could collect.

PAGA's Notice Requirement

- Amendment to PAGA requires employees to provide notice before filing a lawsuit seeking PAGA penalties.
- To Whom? The Employer and the DLSE
- Form? Written Notice
- Contents? Specific Sections of the Labor Code, Facts and Theories
- How? By certified mail

When is Notice Required?

- Unclear from language of the statute
  - Seems to imply that notice is required for any lawsuit alleging violations of statutes listed in Lab. Code § 2699.5, but this is not the case.
- Manatt, Phelps & Phillips, LLP was the first to litigate the notice requirement in *Caliber Bodyworks, Inc. v. Super. Ct. (Herrera, et al.)*, 134 Cal. App. 4th 365 (2005).

Caliber Bodyworks, Inc. v. Super. Ct. (Herrera, et al.)

- Court of Appeal held that notice is required for PAGA claims seeking "civil penalties," but not for lawsuits seeking "statutory penalties."
- "Civil" vs. "Statutory" Penalties
  - "Civil Penalties": Penalties that only the DLSE could collect before PAGA
  - "Statutory Penalties": Penalties that employees could collect by statute prior to PAGA

How Do You Know if a Lawsuit Seeks "Civil" or "Statutory" Penalties?

- Complaint may not mention PAGA, but may still involve PAGA claims.
- Requires analysis of the Labor Code and the plaintiff's Complaint to determine if "civil penalties" are being sought under PAGA

What To Do If You Are Served with a PAGA Notice?

- Consult counsel immediately to maximize advantages of advanced notice.
- Counsel Can:
  - Assess whether PAGA notice really applies;
  - Make sure notice complies with legal requirements;
  - Investigate claims;
  - Advise regarding damage control; and
  - Strategize regarding defense.

What To Do If You Are Served with a PAGA Notice? (ctd.)

- Some Options for Resolving Claims:
  - Strategize whether to request that the DLSE handle the claim;
  - Strategize regarding whether to negotiate the claim with the plaintiff's private attorney, perhaps before a lawsuit is filed.

What To Do If You Are NOT Served with a PAGA Notice?

- Consult counsel immediately to assess whether causes of action or requests for penalties can be thrown out for failure to comply with notice requirements.
- This was the case in *Caliber Bodyworks, Inc., et al. v. Super. Ct. (Herrera, et al.).*
- Reduces value of plaintiff's claims for settlement purposes

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The Current Uncertainty in Meal and Break Period Requirements

Stanley W. Levy, Esq.

Under California law, does an employer need to:

Require each employee to take a meal period;

Or

Provide each employee with a meal period and pay the employee for the meal period if he or she voluntarily agrees to skip the meal period and work instead?

Labor Code § 512(a)

(Effective 9/19/00)

"An employer may not employ an employee for a work period of more than five hours per day without ***providing*** the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee."

IWC Wage Order #4

(Effective 1/1/01, updated Jan. 2005)

"No employer shall employ any person for a work period of more than five hours without a meal period of not less than 30 minutes, except that when a work period of not more than six hours with complete the day's work the meal period may be waived by the mutual consent of the employer and employee."

Inconsistency between Labor Code [provide] and Wage Order [require]

Labor Code	Wage Order
"An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes..."	"No employer shall employ any person for a work period of more than five hours without a meal period of not less than 30 minutes..."

- Existing law does not define the term "provide"
- Without a clear definition to follow, both employees and employers are confused as to the requirements regarding meal periods.
- The confusion has resulted in an increase in lawsuits concerning meal periods.
- The Division of Labor Standards Enforcement (DLSE) issued proposed regulations to clarify the definition of "provide" but withdrew those proposed regulations in January 2006.

Proposed Regulations (withdrawn 1/14/06)

- §13700(a)(2) Definitions. As used in this section:

  "Provide" means ***to supply or make available*** a meal period to the employee and give the employee the opportunity to take the meal period

- §13700(b)(2). Requirement to Provide Meal Periods

  "An employer shall be deemed to have provided a meal period to an employee in accordance with Labor Code Section 512 if the employer:

  Has informed the employee after the effective date of this regulation, either orally or in writing, of his/her right to take a meal period and gives the employee the opportunity each day to take the meal period(s);"

But...

On January 14, 2006, Gov. Arnold Schwarzenegger's administration withdrew the proposed regulations for meal and rest periods, stating:

"The previous rule making became too adversarial. We want to approach it differently with advisory groups and fully talk it out."

-Schwarzenegger spokesman Rick Rice

What is an employer to do?

Labor Code Section 226.7(b)

"If an employer fails to provide an employee a meal period or rest period, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

IWC Wage Order Section 11(b)

"If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided."

Penalty? Or Wage?

Why does it matter?

- Statute of limitations for a *penalty* = **One year**. (Code of Civil Procedure Section 340)
- Statute of limitations for an action upon a liability created by statute, *other than a penalty* (e.g. a wage) = **Three years**. (Code of Civil Procedure Section 338)

Caliber Bodyworks v. Superior Court

(Court of Appeal, Second District (Los Angeles), November 23, 2005)

"Although section 226.7 does not expressly label this payment a penalty, it is in the nature of a statutory penalty because it requires the employer to pay more than the value of the missed meal or rest period. The section 226.7 payment does not compensate the employee for any extra time worked but rather punishes the employer for its failure to provide the meal or rest period mandated by the IWC."

Murphy v. Kenneth Cole

(Court of Appeal, First District (San Francisco), December 2, 2005)

- Legislature referred to it as a penalty
- "The payments imposed by the wage order and section 226.7 are not compensation for the missed 10 or 30 minute rest or meal break, but are fixed at one additional hour of pay. That compensation is not payment for labor performed, but is an arbitrary amount imposed on the employer in addition to the salary already paid during the time the employee was not eating or resting. It is not overtime pay for an allowed work period, but a penalty for violating the law that prohibits work during those times."

National Steel and Shipbuilding Co. v. Superior Court

(Court of Appeal, Fourth District (San Diego), January 20, 2006)

- The Legislature could have labeled it a penalty as they have done in other Labor Code sections, but did not.
- "The self-executing nature of the payment suggests it is not a penalty because the right to a penalty does not accrue until it has been enforced...Because the hour of pay under section 226.7 is owed when it is incurred, it is similar to earned wages."

Mills v. Bed, Bath & Beyond

(Court of Appeal, Second District (Los Angeles), January 27, 2006)

- "Wages are fundamentally 'compensation for services rendered'...the payments due under section 226.7 for missed breaks do not compensate an employee for additional services rendered. To the contrary, section 226.7 payments are fixed sums that become due the moment a break period is missed, regardless of the amount of time wrongly worked during a break period...the failure of section 226.7 to correlate any payment due to any additional labor performed by an employee undermines any argument the payment is a wage."

Case Name	District	Date	Wage (3-4 yrs.)	Penalty (1 yr.)
Caliber	Second (L.A.)	November 2005		✓
Kenneth Cole	First (S.F.)	December 2005		✓
National Steel	Fourth (S.D.)	January 2006	✓	
Mills	Second (L.A.)	January 2006		✓

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New Employment Law Statutes for 2006

Arthur Y. Whang, Esq.

Review of AB 1825: Mandatory Sexual Harassment Training

- 50 or more "employees"
- Two hours of "interactive" training
- Those employed as of 7/1/05: training due 1/1/06
- New "supervisors": within 6 months
- Every two years thereafter
- Possible consequences: DFEH and trial presumption

Assembly Bill 1311

- Permits substitute service of any complaint, notice, or decision relating to proceedings before Labor Commissioner.
- Leaving copy of materials at home or office of person being served, and mailing copy to same address.
- Enacted to curb avoidance of summons.

Assembly Bill 1669

- Extends period for filing Complaint of discrimination/harassment/retaliation with DFEH for minors.
- Minors have until "one year from the date" that he or she "attains the age of majority."
- Facts arise on Complainant's 16th birthday, he/she can wait until his/her 19th birthday to file Complaint with DFEH.

Assembly Bill No. 1093

Two important components:

(1) Payment of Final Wages by Direct Deposit (Lab. Code 213); and

(2) Change in Minimum Pay to Apply the "Computer Software Exemption" (Lab. Code 515.5)

Direct Deposit of Final Wage Payments Now Acceptable!

- Upon an employee's quit or discharge, employer may now deposit final wages in a bank account of the employee's choice that has a place of business in this state.
- Employee must have authorized the deposit.
- All other laws respecting final wage payments still apply!

Minimum Pay Change for Computer Software Exemption

- Minimum compensation as of 1/01/06: **$47.81 per hour**.
- "Or the annualized full-time salary equivalent of that rate, provided that all the other requirements for exemption are met and that in each workweek the employee receives not less than $47.81 per hour worked."
- $47.81 x 2080 hours = **$99,444.80 per year**.

- For salaried, computer software exempt employees:
- Minimum annual salary of $99,444.80 plus $47.81 per hour worked on top.
- "Employee A" makes statutory minimum and works 50 hours in a week:
- Normal salary plus $47.81 x 10 hours = $478.10

- Consequences for failure to pay properly:
- Liability for failure to pay wages, and
- Liability for overtime at premium rates (employee, if not paid per LC 515.5, will fall outside exemption, rendering him/her subject to overtime).

What are employers to do?

- Review exempt job positions to ensure compliance.
- Adjust pay to new, statutory level.
- All computer exempt employees should keep time records (may have to ensure payment of hourly rate for all hours worked).
- Check annually for increases in minimum pay.

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Recent Common Law Developments

Sharon B. Bauman, Esq.

Jay J. Wang, Esq.

The FMLA

- *O'Reilly v. Rutgers University*, 2006 WL 141895 (D.N.J. Jan. 19, 2006)
  - ✓ Employee requested FMLA leave
  - ✓ Employer requested that employee provide medical certification form
  - ✓ Employee refused to provide the form to her supervisor on "privacy" grounds
  - ➢ Court held: employee cannot dictate who can see the medical certification form

The FMLA

- *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005)
  - ✓ Employee requested time off when his wife developed difficulties with her pregnancy
  - ✓ Supervisor suggested that the employee take FMLA leave
  - ✓ Employee left a leave request form requesting 3 days off (July 5, 6, and 7)
  - ✓ On July 6, employee's car broke down and employee decides to fly to Atlanta to pick up his other car and drive it back to Seattle
  - ✓ When employee did not show up for work -- and the airline couldn't reach him – his employment was terminated
  - ✓ Employee claimed driving car back to Seattle should count as "caring for" his wife because it provided her "psychological comfort" to know she would have reliable transportation
  - ➢ Court held: caring means providing *actual* care

The ADA and The FEHA

- *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005)
  - ✓ 3 applicants for flight attendant positions, all HIV-positive
  - ✓ All were given "conditional" offers of employment, contingent on passing background checks and medical examinations
  - ✓ Employer sent the applicants for medical examinations while background checks were still pending
  - ✓ All applicants failed to reveal HIV status on the medical history questionnaire
  - ✓ Blood tests revealed HIV-positive status and employer rescinded job offers
  - ✓ Applicants sued, arguing employer could not require them to disclose personal medical information so early in the application process
  - ➢ Court held: Employers are not entitled to medical information until "real" job offer is made

The Compassionate Use Act

- *Ross v. Ragingwire Telecom., Inc.*, 132 Cal.App.4th 590 (2005)*
- ✓ Employer conducted pre-employment drug test
- ✓ Employee tested positive for marijuana
- ✓ Employee was using marijuana pursuant to a physician's recommendation for chronic back pain
- ✓ Employer discharged employee and employee sued
- ✓ Employee claimed the FEHA required the employer to accommodate his back pain and that the accommodation was allowing employee to smoke marijuana
- ➢ Court held: Because possession of marijuana is illegal under Federal law, the court cannot require an employer to accommodate the employee's use
- ➢ California Supreme Court has granted review of this decision

SEXUAL HARASSMENT

- *Miller v. Department of Corrections*, 36 Cal.4th 446 (2005)
- ✓ Sex
- ✓ Bickering
- ✓ More Sex
- ➢ Court held: Too much sex!

Harassment/Abusive Behavior

- *EEOC v. Nat'l Education Assoc.*, 422 F.3d 840 (9th Cir. 2005)
- ✓ 3 female employees sued for hostile work environment
- ✓ Claim was based on supervisor's frequent yelling, screaming and profanity
- ✓ There were NO sexual overtures and NO lewd comments
- ➢ Court held: There is no legal requirement that hostile acts be sex or gender-specific in content to state a claim under Title VII. The question to ask is: "Did the behavior affect women more adversely than it affected men"?

Retaliation

- *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028 (2005)
- ✓ Employee refused to follow supervisor's order to terminate employee who the supervisor believed was not "hot" enough
- ✓ Employee claimed the supervisor subjected her to heightened scrutiny and increasingly hostile treatment because she refused to fire the woman
- ✓ Employee quit and sued
- ➢ Court held: Employee need not expressly complain to be engaging in "protected activity" and "adverse employment action" is to be construed broadly

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The Labor Code Private Attorneys General Act of 2004

February 14, 2006

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* Stanley W. Levy, Esq. would like to thank **Hayley Macon, Esq.**, Associate, Litigation, Employment & Labor, resident in our Los Angeles offices for her assistance in drafting these materials. Ms. Macon's practice focuses on labor and employment law. Her experience includes defending employers in discrimination cases (sex, disability, race/ethnicity), traditional labor disputes, and wage and hour class actions. She has worked with clients in strategizing and implementing discovery plans, preparing motions for summary judgment and preparing appellate briefs.

Mr. Levy would also like to thank **Alison G. Sultan, Esq.**, Associate, Litigation, Employment & Labor, resident in our Los Angeles offices for her assistance in drafting these materials. Ms. Sultan's practice focuses on all areas of labor and employment law as well as general litigation.

THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF CURRENT EMPLOYMENT & LABOR LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

- **PAGA Summarized**: The Private Attorneys General Act of 2004 is commonly known as "PAGA" or the "Bounty Hunter Law." PAGA allows current and former employees to sue to enforce virtually any provision of the Labor Code and to collect penalties for those violations that, prior to PAGA, only the Department of Labor Standards Enforcement ("DLSE") could collect. In mid-2004, PAGA was amended to prevent lawsuits based on minor violations of the Labor Code, require court approval of all settlements, and require potential plaintiffs to provide notice before filing a lawsuit seeking PAGA penalties.

- **PAGA's Notice Requirement**: Before filing a lawsuit seeking PAGA penalties (see below), potential plaintiffs must provide certified mail written notice of the claim to both the DLSE and the employer. The notice must name the specific provisions of the Labor Code that were allegedly violated and include facts and theories to support the alleged violation. The DLSE then has the opportunity to investigate the claims and issue a citation, if appropriate, or allow the plaintiff to proceed with his or her lawsuit.

- **Compliance with PAGA's Notice Requirement**: The PAGA statute is complicated and it is not always clear whether a lawsuit is actually being brought pursuant to PAGA and, if so, to which claims PAGA's notice requirement applies. Manatt, Phelps & Phillips, LLP was the first to litigate the meaning of this notice provision on behalf of one of its clients. That Court of Appeal's decision currently defines when a potential plaintiff must comply with PAGA's notice requirements. *See Caliber Bodyworks, Inc., et al. v. Super. Ct. (Herrera, et al.)*, 134 Cal. App. 4th 365 (2005).

- **Defining PAGA Penalties**: In short, the Court in *Caliber* held that notice is required when "civil penalties" are sought, but not when "statutory penalties" are sought. The Court defined "civil penalties" as penalties that, prior to PAGA, only the government could collect. "Statutory penalties" were recoverable by private litigants before PAGA. The issue is complex and involves a detailed parsing of the claims that are made and the relief that is sought. Nonetheless, resolving the notice issue early on can help employers minimize damages in two major ways, depending on whether the potential plaintiff provides PAGA notice: 1) either by allowing the employer to prepare for a lawsuit before it is filed when notice is provided; or 2) by reducing the potential settlement value of the claim when notice is not provided.

- **PAGA Lawsuits When Notice Is Provided To the Employer**: Employers should consult their counsel immediately upon receiving notice of a PAGA claim. Doing so will allow the employer to prepare for a lawsuit before its filed and potentially avoid it altogether by: 1) making sure the notice itself meets statutory requirements; 2) investigating the claims; 3) controlling any potential damages; 4) strategizing regarding whether to request that the DLSE handle the claim; and 5) strategizing whether to negotiate the claim with the plaintiff's private attorney, perhaps even before a lawsuit is filed.

- **PAGA Lawsuits Where Notice Is Not Provided**: When PAGA notice was required, but not provided, employers may be able to get certain causes of action and claims for penalties dismissed at the outset, as was the case for Manatt's client in *Caliber Bodyworks, Inc., et al. v. Super. Ct. (Herrera, et al.)*, 134 Cal. App. 4th 365 (2005). This reduces the value of the plaintiff's claim for settlement purposes.

S.W.L.

http://www.latimes.com/business/printedition/la-fi-lunch14jan14,1,6433213.story?coll=la-headlines-pe-business

From the Los Angeles Times

Disputed Meal Rules Ditched

Unions say regulations proposed by the governor would have made it easier for employers to pressure workers to skip breaks.

By Marc Lifsher
Times Staff Writer

January 14, 2006

SACRAMENTO — Gov. Arnold Schwarzenegger's administration Friday ditched a set of regulations that labor unions contend would have made it easier for employers to pressure workers to skip lunch and rest breaks.

The proposed regulations, which had been in the works for more than a year, expired when the state Division of Labor Standards Enforcement failed to meet a legal deadline for submitting them to a review panel. Regulators said they planned to rewrite the rules at an unspecified future date after convening a series of informal talks with business and organized labor.

"The previous rule making became too adversarial," said Schwarzenegger spokesman Rick Rice. "We want to approach it differently with advisory groups and fully talk it out."

Labor leaders saw the administration's decision to pull back the rules as a sign of improved relations with the Republican governor. Schwarzenegger lost a bruising battle with unions last fall when he failed to get voter approval for four initiatives he championed on the November ballot.

"We're relieved that he's backed down at this point," said Art Pulaski, executive secretary-treasurer of the California Labor Federation. Pulaski contends that the proposed regulations distorted the intent of the meal break law signed in 1999 by then-Gov. Gray Davis.

Friday's decision disappointed employers, said Jot Condie of the California Restaurant Assn. He accused unions of "demagoguing the issue" to try to confuse workers that they could lose their right to take breaks.

"We think this actually is a loss for restaurant employees and a loss for owners," Condie said.

The proposed regulations, backed by retailers and restaurant operators, would have shifted the responsibility for taking a meal break from bosses to their employees. Workers would have had the option to give up their lunch break if they worked fewer than six hours a day. The regulations also would have reduced the period during which businesses could be fined for failing to provide rest periods from three years to one year.

Business owners have complained that the 1999 law was being applied inconsistently, denying workers the flexibility to skip lunch and leave work early. Servers at restaurants often lose tips when forced to take breaks in the middle of serving customers. Businesses also complained that the law's three-year enforcement period made them vulnerable to class-action lawsuits.

A recent state Court of Appeal decision made it less urgent to put new rules on the books, said Rice, the governor's spokesman. The appeals court sided with employers, who argued that they should be liable for only one year of back pay as a penalty for making workers miss their lunch breaks.

Democrats in the state Legislature, who have been forging a more cooperative relationship with Schwarzenegger since the election, also welcomed the decision to start over on drafting the meal break rules.

"From the start, this proposal made little sense, from both practical and political points of view," said Assembly Speaker Fabian Nuñez (D-Los Angeles), a onetime labor leader. "The pursuit of these regulations would have created an environment where employees would have had to choose between taking the break they deserved or losing their job."

The proposed lunch break rules were deemed an urgent matter when unveiled as "emergency regulations" in December 2004. In early 2005, the administration touted the rules by sending video news releases, with fake reporters interviewing government officials, to TV stations.

Last month, a Sacramento County Superior Court judge, ruling on a lawsuit brought by unions, declared that the Schwarzenegger administration violated state law by making and distributing the videos.

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New Employment Law Statutes for 2006

February 2006

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THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF CURRENT EMPLOYMENT & LABOR LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

Assembly Bill No. 1093

CHAPTER 149

An act to amend Sections 213 and 515.5 of the Labor Code, relating to employment.

[Approved by Governor August 30, 2005. Filed with Secretary of State August 30, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1093, Matthews. Employment: wages.

Existing law prohibits any person from issuing in payment of wages due or to become due, as an advance on wages to be earned, any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless negotiable and payable on demand without discount at some established place of business in the state. Existing law provides that provision shall not prohibit an employer from depositing wages due or to become due or an advance on wages to be earned in an account on any bank, savings and loan association, or credit union of the employee's choice in this state, provided the employee has voluntarily authorized the deposit, and provides that if an employee is discharged or quits, the voluntary authorization for deposit shall be deemed terminated and existing law relating to payment of wages upon termination of employment shall apply.

This bill would instead provide that the employer may deposit the wages or advance on wages in an account in any bank, savings and loan association, or credit union of the employee's choice that has a place of business in this state. This bill would additionally modify existing law to provide that if an employee is discharged or quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by depositing that sum into the account authorized by the employee, and would provide that existing law relating to the payment of wages upon termination or quitting of employment shall continue to apply.

Existing law requires that an employee in the computer software field be exempt from the requirement that an overtime rate of compensation be paid if certain conditions are met, including a requirement the employee's hourly rate of pay is not less than $41.

This bill would instead provide that requirement be that the employee's hourly rate of pay is not less than $41 or the annualized full-time salary equivalent of that rate, provided that all the other requirements for exemption are met and that in each workweek the employee receives not less than $41 per hour worked.

The people of the State of California do enact as follows:

SECTION 1. Section 213 of the Labor Code is amended to read:

213. Nothing contained in Section 212 shall:

(a) Prohibit an employer from guaranteeing the payment of bills incurred by an employee for the necessaries of life or for the tools and implements used by the employee in the performance of his or her duties.

(b) Apply to counties, municipal corporations, quasi-municipal corporations, or school districts.

(c) Apply to students of nonprofit schools, colleges, universities, and other nonprofit educational institutions.

(d) Prohibit an employer from depositing wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association, or credit union of the employee's choice with a place of business located in this state, provided that the employee has voluntarily authorized that deposit. If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.

SEC. 2. Section 515.5 of the Labor Code is amended to read:

515.5. (a) Except as provided in subdivision (b), an employee in the computer software field shall be exempt from the requirement that an overtime rate of compensation be paid pursuant to Section 510 if all of the following apply:

(1) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(2) The employee is primarily engaged in duties that consist of one or more of the following:

(A) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

(B) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

(C) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(3) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(4) The employee's hourly rate of pay is not less than forty-one dollars ($41.00), or the annualized full-time salary equivalent of that rate, provided that all other requirements of this section are met and that in each

workweek the employee receives not less than forty-one dollars ($41.00) per hour worked. The Division of Labor Statistics and Research shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.

(b) The exemption provided in subdivision (a) does not apply to an employee if any of the following apply:

(1) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(2) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(3) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(4) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(5) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for onscreen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(6) The employee is engaged in any of the activities set forth in subdivision (a) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

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Assembly Bill No. 1311

CHAPTER 405

An act to amend Sections 98 and 98.1 of the Labor Code, relating to labor standards.

[Approved by Governor September 29, 2005. Filed with Secretary of State September 29, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1311, Committee on Labor and Employment. Labor standards: enforcement hearings.

Existing law authorizes the Labor Commissioner to investigate employee complaints and to provide for a hearing in any action to recover wages, penalties, and other demands for compensation and to determine all matters arising under his or her jurisdiction. Existing law requires that, when one of these hearings is set, a copy of the complaint, together with a notice of time and place of the hearing, shall be served on all parties, personally or by certified mail. Existing law provides that, following an order, decision, or award in one of these hearings, the commissioner shall serve a copy of the decision on the parties personally or by first-class mail. Existing law provides a separate set of rules for valid service of a summons in a civil action, including a rule permitting service by leaving a copy of the summons and complaint at the home or office of the person being served, as specified, and thereafter mailing a copy of the summons and complaint to the person at the place where a copy of the summons and complaint were left.

This bill would additionally permit the service of the complaint, notice, or decision relating to one of these labor hearings to be served as provided in the rule permitting service of a summons in a civil action by leaving a copy at the home or office of the person being served, and thereafter mailing a copy to the person at the place where a copy was left.

This bill would incorporate additional changes in Section 98 of the Labor Code proposed by AB 879 that would become operative only if AB 879 and this bill are both chaptered and become effective on or before January 1, 2006, and this bill is chaptered last.

The people of the State of California do enact as follows:

SECTION 1. Section 98 of the Labor Code is amended to read:

98. (a) The Labor Commissioner shall have the authority to investigate employee complaints. The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner

including orders of the Industrial Welfare Commission, and shall determine all matters arising under his or her jurisdiction. It shall be within the jurisdiction of the Labor Commissioner to accept and determine claims from holders of payroll checks or payroll drafts returned unpaid because of insufficient funds, if, after a diligent search, the holder is unable to return the dishonored check or draft to the payee and recover the sums paid out. Within 30 days of filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held, or whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint. If the determination is made by the Labor Commissioner to hold a hearing, the hearing shall be held within 90 days of the date of that determination. However, the Labor Commissioner may postpone or grant additional time before setting a hearing if the Labor Commissioner finds that it would lead to an equitable and just resolution of the dispute.

It is the intent of the Legislature that hearings held pursuant to this section be conducted in an informal setting preserving the right of the parties.

(b) When a hearing is set, a copy of the complaint, which shall include the amount of compensation requested, together with a notice of time and place of the hearing, shall be served on all parties, personally or by certified mail, or in the manner specified in Section 415.20 of the Code of Civil Procedure.

(c) Within 10 days after service of the notice and the complaint, a defendant may file an answer with the Labor Commissioner in any form as the Labor Commissioner may prescribe, setting forth the particulars in which the complaint is inaccurate or incomplete and the facts upon which the defendant intends to rely.

(d) No pleading other than the complaint and answer of the defendant or defendants shall be required. Both shall be in writing and shall conform to the form and the rules of practice and procedure adopted by the Labor Commissioner.

(e) Evidence on matters not pleaded in the answer shall be allowed only on terms and conditions the Labor Commissioner shall impose. In all these cases, the claimant shall be entitled to a continuance for purposes of review of the new evidence.

(f) If the defendant fails to appear or answer within the time allowed under this chapter, no default shall be taken against him or her, but the Labor Commissioner shall hear the evidence offered and shall issue an order, decision, or award in accordance with the evidence. A defendant failing to appear or answer, or subsequently contending to be aggrieved in any manner by want of notice of the pendency of the proceedings, may apply to the Labor Commissioner for relief in accordance with Section 473 of the Code of Civil Procedure. The Labor Commissioner may afford this relief. No right to relief, including the claim that the findings or award of the Labor Commissioner or judgment entered thereon are void upon their

face, shall accrue to the defendant in any court unless prior application is made to the Labor Commissioner in accordance with this chapter.

(g) All hearings conducted pursuant to this chapter are governed by the division and by the rules of practice and procedure adopted by the Labor Commissioner.

(h) Whenever a claim is filed under this chapter against a person operating or doing business under a fictitious business name, as defined in Section 17900 of the Business and Professions Code, which relates to the person's business, the division shall inquire at the time of the hearing whether the name of the person is the legal name under which the business or person has been licensed, registered, incorporated, or otherwise authorized to do business.

The division may amend an order, decision, or award to conform to the legal name of the business or the person who is the defendant to a wage claim, provided it can be shown that proper service was made on the defendant or his or her agent, unless a judgment had been entered on the order, decision, or award pursuant to subdivision (d) of Section 98.2. The Labor Commissioner may apply to the clerk of the superior court to amend a judgment that has been issued pursuant to a final order, decision, or award to conform to the legal name of the defendant, provided it can be shown that proper service was made on the defendant or his or her agent.

SEC. 1.5. Section 98 of the Labor Code is amended to read:

98. (a) The Labor Commissioner is authorized to investigate employee complaints. The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner including orders of the Industrial Welfare Commission, and shall determine all matters arising under his or her jurisdiction. It is within the jurisdiction of the Labor Commissioner to accept and determine claims from holders of payroll checks or payroll drafts returned unpaid because of insufficient funds, if, after a diligent search, the holder is unable to return the dishonored check or draft to the payee and recover the sums paid out. Within 30 days of filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held, or whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint. If the determination is made by the Labor Commissioner to hold a hearing, the hearing shall be held within 90 days of the date of that determination. However, the Labor Commissioner may postpone or grant additional time before setting a hearing if the Labor Commissioner finds that it would lead to an equitable and just resolution of the dispute.

It is the intent of the Legislature that hearings held pursuant to this section be conducted in an informal setting preserving the rights of the parties.

(b) When a hearing is set, a copy of the complaint, which shall include the amount of compensation requested, together with a notice of time and place of the hearing, shall be served on all parties, personally or by

certified mail, or in the manner specified in Section 415.20 of the Code of Civil Procedure.

(c) Within 10 days after service of the notice and the complaint, a defendant may file an answer with the Labor Commissioner in any form the Labor Commissioner prescribes, setting forth the particulars in which the complaint is inaccurate or incomplete and the facts upon which the defendant intends to rely.

(d) No pleading other than the complaint and answer of the defendant or defendants shall be required. Both shall be in writing and shall conform to the form and the rules of practice and procedure adopted by the Labor Commissioner.

(e) Evidence on matters not pleaded in the answer shall be allowed only on terms and conditions the Labor Commissioner shall impose. In all these cases, the claimant shall be entitled to a continuance for purposes of review of the new evidence.

(f) If the defendant fails to appear or answer within the time allowed under this chapter, no default shall be taken against him or her, but the Labor Commissioner shall hear the evidence offered and shall issue an order, decision, or award in accordance with the evidence. A defendant failing to appear or answer, or subsequently contending to be aggrieved in any manner by want of notice of the pendency of the proceedings, may apply to the Labor Commissioner for relief in accordance with Section 473 of the Code of Civil Procedure. The Labor Commissioner may afford this relief. No right to relief, including the claim that the findings or award of the Labor Commissioner or judgment entered thereon is void upon its face, shall accrue to the defendant in any court unless prior application is made to the Labor Commissioner in accordance with this chapter.

(g) All hearings conducted pursuant to this chapter are governed by the division and by the rules of practice and procedure adopted by the Labor Commissioner.

(h) Whenever a claim is filed under this chapter against a person operating or doing business under a fictitious business name, as defined in Section 17900 of the Business and Professions Code, which relates to the person's business, the division shall inquire at the time of the hearing whether the name of the person is the legal name under which the business or person has been licensed, registered, incorporated, or otherwise authorized to do business.

The division may amend an order, decision, or award to conform to the legal name of the business or the person who is the defendant to a wage claim, provided it can be shown that proper service was made on the defendant or his or her agent, unless a judgment had been entered on the order, decision, or award pursuant to subdivision (e) of Section 98.2. The Labor Commissioner may apply to the clerk of the superior court to amend a judgment that has been issued pursuant to a final order, decision, or award to conform to the legal name of the defendant, provided it can be shown that proper service was made on the defendant or his or her agent.

SEC. 2. Section 98.1 of the Labor Code is amended to read:

98.1. (a) Within 15 days after the hearing is concluded, the Labor Commissioner shall file in the office of the division a copy of the order, decision, or award. The order, decision, or award shall include a summary of the hearing and the reasons for the decision. Upon filing of the order, decision, or award, the Labor Commissioner shall serve a copy of the decision personally, by first-class mail, or in the manner specified in Section 415.20 of the Code of Civil Procedure on the parties. The notice shall also advise the parties of their right to appeal the decision or award and further advise the parties that failure to do so within the period prescribed by this chapter shall result in the decision or award becoming final and enforceable as a judgment by the superior court.

(b) For the purpose of this section, an award shall include any sums found owing, damages proved, and any penalties awarded pursuant to this code.

(c) All awards granted pursuant to a hearing under this chapter shall accrue interest on all due and unpaid wages at the same rate as prescribed by subdivision (b) of Section 3289 of the Civil Code. The interest shall accrue until the wages are paid from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2.

SEC. 3. Section 1.5 of this bill incorporates amendments to Section 98 of the Labor Code proposed by both this bill and AB 879. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2006, (2) each bill amends Section 98 of the Labor Code, and (3) this bill is enacted after AB 879, in which case Section 1 of this bill shall not become operative.

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Assembly Bill No. 1669

CHAPTER 642

An act to amend Section 12960 of the Government Code, relating to employment.

[Approved by Governor October 7, 2005. Filed with Secretary of State October 7, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1669, Chu. Employment: discrimination.

Under existing provisions of the California Fair Employment and Housing Act, a person filing a complaint for an unlawful practice with the Department of Fair Employment and Housing is required to file the complaint within one year, except that the period for filing may be extended in specified circumstances.

This bill would additionally provide that the period for filing a complaint for an unlawful practice may be extended for a period of time not to exceed one year from the date a person allegedly aggrieved by an unlawful practice attains the age of majority.

The people of the State of California do enact as follows:

SECTION 1. Section 12960 of the Government Code is amended to read:

12960. (a) The provisions of this article govern the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

(b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.

(c) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

(d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows:

(1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.

(2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

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Recent Common Law Developments

February 2006

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THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF CURRENT EMPLOYMENT & LABOR LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

Murphy v. Kenneth Cole Productions, Inc.
134 Cal. App.4th 728 (December 2, 2005)

Facts: Retail store manager sought recovery of unpaid wages from employer based on misclassification of employee as an exempt employee. Employee argued that he was entitled to overtime and payments for missed meal and rest periods, as well as waiting time penalties associated thereto. The trial court not only awarded all amounts to the employee, but granted employee's motion for attorneys' fees and costs that almost equaled the total award amount.

Court Decision: The California Court of Appeal affirmed the payment of overtime wages to the employee as a nonexempt individual based on the determination that the retail store manager spent only 10 percent of his time engaged in managerial duties, did not customarily and regularly exercise discretion and independent judgment, and did not have the requisite level of authority or input regarding hiring and firing decisions. However, the court refused to award damages for failure to provide meal or rest periods as such amount was a penalty requiring that a person bring such claim within the one-year statute of limitations under California Code of Civil Procedure section 340.

Pertinent Language: "The settled rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature, and thus governed by the one-year period of limitations."

What an Employer Should Do: While the ruling in Murphy appears to assist employers by limited the time frame in which meal and rest period penalties are recoverable, the Court of Appeals reaffirms the strict standard by which employers must classify their exempt and nonexempt employees. The court reinforced that under California law, the executive exemption does not focus on defining the worker's principal function, but requires that an employee be primarily engaged in the duties that meet the test of the exemption. The mere fact that an employee is labeled a "manager" is insufficient to satisfy the executive exemption requirements. Employers must examine the job duties and descriptions for their supervisors and ensure that more than half of the individual's time is spent exercising independent judgment in matters of significance, i.e. the authority or power to make an independent choice free from immediate direction or supervision.

Note: In January 2006, a petition for review of this case was filed with the California Supreme Court. The California Supreme Court has not yet decided whether it will review the decision. The issue before the Supreme Court, should the Court review the case, will be the penalty/one-year statute of limitation issue.

Gattuso v. Harte-Hanks Shoppers, Inc.
133 Cal. App.4th 985 (October 27, 2005)

Facts: Employee sales representatives sought damages from the alleged violation of California Labor Code section 2802 by the employer in regard to reimbursing automobile expenses incurred by the employees. Employees were outside sales representatives whose duties included using their personal automobiles to distribute advertising publications in California. The trial court denied class certification, and determined that there was no violation of section 2802.

Court Decision: The California Court of Appeal affirmed the trial court's rulings, noting that Labor Code section 2802 permitted an employer to pay increased salaries or commissions instead of reimbursing the employee for actual automobile expenses incurred or paying a reasonable mileage rate provided such increased compensation sufficiently indemnified employees for expenses incurred inclusive of taxes the outside sales representatives are required to pay.

Pertinent Language: "But on its face, [Labor Code section 2802] does not specify any particular method by which the employer must indemnify the employees for necessary expenditures or losses. And nothing in the statute indicates that the Legislature intended to create one exclusive method for such indemnification."

What an Employer Should Do: Employers have been provided alternative means by which to compensate employees forced to incur automobile expenses during the course and scope of their employment. Rather than just paying actual expenses incurred or the mileage rate set by the Internal Revenue Service, employers can take a proactive approach and increase salary to avoid the administrative requirements of reimbursing expenses. However, this does not preclude the employer's responsibility in ensuring that the increase in salary sufficiently covers any such expenses, even after tax withholdings are discounted; nor does this mean that employees can enter into an agreement waiving the requirements of Labor Code section 2802. Such agreements excusing an employer from reimbursing automobile expenses are still null and void. Employers must conduct a cost-risk analysis to determine whether this new approach approved by the Court of Appeal would be more beneficial to the administration of the employer's business in terms of cost and resources.

MacIsaac v. Waste Management Collection and Recycling, Inc.
134 Cal. App.4th 1076 (December 12, 2005)

Facts: Plaintiff employee alleged that his layoff due to a reduction in force constituted a "mass layoff" requiring notification to the employee pursuant to the California Worker Adjustment and Retraining Notification Act ("WARN"). Plaintiff relied upon the sale of a city contract to another company in which 42 employees were transferred to the new company, coupled with the layoff of 20 employees, to meet the "50 people in 30 days" threshold requirement under the WARN Act. The trial court granted summary judgment for defendant.

Court Decision: The California Court of Appeal affirmed the judgment for defendant, finding that there was no mass layoff triggering the WARN Act's notice requirements. The court held that under the statute's unambiguous definition of layoff, the determining factor was whether an employee had been separated from a position rather than from a specific employer. As such, since the 42 employees that were transferred to the new company following the sale of a city contract maintained the same positions, salary, and duties as their employment with defendant, there was no "layoff."

Pertinent Language: "The statute defines 'layoff' as 'a separation *from a position* for lack of funds or lack of work.' (§ 1400, subd. (c), italics added.) In contrast to the plain language of the statute, MacIsaac focuses on whether the employee was separated from a particular *employer*. But under the Legislature's express definition, that is clearly the wrong question. Under the Legislature's chosen definition of 'layoff,' the determining factor is whether the employee has been separated from 'a position, not whether the employee is separated from an 'employer.'"

What an Employer Should Do: This case provides some leeway for employers in terms of the notice requirements that must be provided under the California WARN Act. The case clarifies the fact that where a position is transferred to another employer, the 60-day WARN notification is not required. However, employers are cautioned they do not have *carte blanche* and that this should be taken to mean that any transfer of employees to a new employer is free from WARN notification requirements. The transfer must involve the employee being placed in a similar position with the same functions, duties, salary, and benefits. Employers should consult with counsel prior to any sale regarding appropriate compliance with the California WARN Act and must also consider whether the Federal WARN Act would require the employer to provide notice to employees.

Ross v. Ragingwire Telecommunications, Inc.
132 Cal. App.4th 590 (September 7, 2005)

Facts: An eight-day employee brought claims for wrongful termination, employment discrimination, and breach of contract against his employer for terminating him upon discovery of the employee's use of medical marijuana pursuant to the Compassionate Use Act during a pre-employment drug test. The trial court determined that since the employee's use of marijuana violated federal criminal statutes, the employer was justified as a matter of law in terminating the employment relationship.

Court Decision: The California Court of Appeal affirmed the dismissal of the employee's case based on the recognized interests of an employer not to employ persons who use illegal drugs. The court held that nothing in the Fair Employment and Housing Act ("FEHA") precluded an employer from firing, or refusing to hire, a person who uses an illegal drug. Furthermore, the medical use of marijuana pursuant to the Compassionate Use Act does not prevent an employer from exercising its rights to protect its interests in removing a worker with increased safety issues, diminished productivity, and/or greater health costs. The Compassionate Use Act merely permits use of marijuana for medicinal purposes without incurring state criminal law sanctions; it does not protect employment rights of marijuana users, even if taken for a known disability.

Pertinent Language: "FEHA, like the American with Disabilities Act of 1990, requires only reasonable accommodation of an employee's disability [citations omitted]. It is not reasonable to require an employer to accommodate a disability by allowing an employee's drug use when such use is illegal."

What an Employer Should Do: Employers can condition an offer of employment upon passing a pre-employment drug test in certain situations. More importantly, as a result of this ruling, this includes use of marijuana for medicinal purposes as permitted under the Compassionate Use Act.

Note: The California Supreme Court has granted a petition to review this case.

Miller v. Department of Corrections
36 Cal.4th 446 (July 18, 2005)

Facts: Two former employees at the Valley State Prison for Women alleged sexual harassment against the warden of the prison for providing unwarranted favorable treatment to numerous female employees with whom the warden was having an affair. The former employees claimed that they were denied certain employment benefits due to sexual favoritism for those women in relationships with the warden. The trial court granted summary judgment for the Department of Corrections and concluded the conduct did not constitute sexual harassment against the two former employee plaintiffs.

Court Decision: The California Supreme Court reversed the judgment in favor of the Department of Corrections and held that there was sufficient evidence to establish a *prima facie* case of sexual harassment. The court adopted the EEOC's 1990 policy statement that widespread sexual favoritism may create a hostile work environment by sending the demeaning message that managers view female employees as "sexual playthings" or that "the way for women to get ahead in the workplace is by engaging in sexual conduct." Based on the warden's affairs with three subordinates, and the resulting granting of unwarranted and unfair employment benefits to these subordinates (including the power to abuse other employees who complained about the affairs), the plaintiffs' working conditions were altered and a hostile work environment was created.

Pertinent Language: "...we conclude that, although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment..."

What an Employer Should Do: Employers must be even more diligent about implementation of their policies against harassment, and investigating claims made by employees. Policies may even need to be revised to incorporate protections against favoritism. The initial reaction to this ruling would be to prohibit consensual relationships between employees; however, employee privacy concerns may restrict an employer's ability to prohibit any employee from having a romantic relationship with another employee, particularly in situations where there is no supervisor/subordinate work relationship. Employers should consult with counsel regarding any additional policies that may be adopted, including requirements related to disclosing employee relationships to the company.

Yanowitz v. L'Oreal USA, Inc.
36 Cal.4th 1028 (August 11, 2005)

Facts: Former employee alleged that she was constructively discharged after refusing to carry out an order from a male supervisor to terminate a female sales associate for not being sufficiently sexually attractive. The former employee claimed that following such refusal she was subject to heightened scrutiny and increasingly hostile adverse treatment. The trial court granted summary judgment for the employer.

Court Decision: The California Supreme Court issued a far-reaching opinion that set forth three important propositions:

- An employee's refusal to follow a supervisor's order that is reasonably believed to be discriminatory constitutes protected activity under the Fair Employment and Housing Act ("FEHA") that cannot be retaliated against even where the employee does not explicitly state that they believe the order to be discriminatory. The court held that an employee was not required to use legal terms or buzzwords when opposing discrimination; the relevant question is whether the employee's communications sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful, discriminatory manner.

- The proper standard for defining an adverse employment action is the materiality test, whereby the adverse action materially affects the terms and conditions of employment. The court rejected the plaintiff's interpretation that the FEHA should extend to employment actions broader than those that affect the terms, conditions, or privileges of employment. In other words, there must be a material effect on the terms, conditions, or privileges of employment rather than just some action that would reasonably deter an employee from engaging in a protected activity.

- In determining whether an employee has been subjected to treatment that materially affects the terms and conditions of employment, it is appropriate to consider the totality of the circumstances and apply the "continuing violation" doctrine. This extends an employer's liability to actions beyond the one-year statute of limitations provided such actions are sufficiently linked to unlawful conduct that occurred within the statute of limitations. Thus, as long as unlawful conduct occurred within the past year, a plaintiff will be allowed to bring into their allegations those incidents in previous years that exhibit the unlawful conduct.

Pertinent Language: "Employees often are legally unsophisticated and will not be in a position to make an informed judgment as to whether a particular practice or conduct actually violates the governing anti-discrimination statute. A rule that permits an employer to retaliate against an employee with impunity whenever the employee's reasonable belief turns out to be incorrect would significantly deter employees from opposing conduct they believe to be discriminatory."

What an Employer Should Do: Several concerns arise from this decision. First, in terms of the court's recognition of retaliation claims even where employees do not explicitly complain of discrimination, employers must now pay more attention to the details of an employee's complaint to ensure there is not a potential retaliation claim for complaining about discrimination. As always, employers should treat all employee complaints with the highest deference and properly investigate the matters. Second, due to the court's adoption of the continuing violation doctrine as to retaliation claims, it is more important than ever to have complete documentation of an employee's work history. This documentation is needed to ensure that should a retaliation claim be brought by an employee, the employer is able to provide sufficient and legitimate basis for any adverse employment action taken against that employee.

Equal Employment Opportunity Commission v. National Education Association, Alaska
422 F.3d 840 (9th Cir. September 2, 2005)

Facts: Female employees brought an action for violation of Title VII based on a male supervisor's use of verbally abusive language and incendiary behavior that was not sex-related or gender specific. The trial court granted summary judgment for the employer.

Court Decision: The Ninth Circuit Court of Appeals reversed the district court's decision, finding that a reasonable question of fact existed as to whether the pattern of abuse directed at female employees differed in quality and quantity from that directed towards men to support a claim of sex-based discrimination, and whether the work environment created was sufficiently severe to be illegal under Title VII. The court decided that to determine whether discrimination existed, one must look beyond the objective differences (such as whether the boss is more abusive to women as opposed to men), and that subjective effects of the supervisor's conduct must also be considered. In other words, where a type of conduct may not be harmful to male subordinates but causes female subordinates great injury, the females could state a claim for discrimination.

Pertinent Language: "...offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees."

What an Employer Should Do: Courts now recognize conduct that is not necessarily sex or gender specific as forming a viable discrimination claim. This greatly broadens the protections provided by Title VII. Furthermore, it may be necessary to identify "problem" supervisors who treat subordinates in a demeaning fashion and require additional training for them as to professional conduct and how to work with others. The court reinforces the fact that all abusive conduct in the workplace is inappropriate.

Leonel v. American Airlines, Inc.
400 F.3d 702 (9th Cir. March 4, 2005)

Facts: Applicants brought suit against defendant airline company for violations of the Fair Employment and Housing Act and of California Business and Professions Code section 17200 et seq. Applicants alleged that their offers of employment were improperly rescinded for allegedly lying after the airline learned that the applicants were HIV-positive through their pre-employment blood test results. The trial court granted summary judgment for the employer.

Court Decision: The Ninth Circuit Court of Appeals reversed the trial court, noting that the American with Disabilities Act and the Fair Employment and Housing Act not only bar intentional discrimination, but also regulate the sequence of an employer's hiring processes. Because both statutes prohibit medical examinations and inquiries until after the employer has made a real job offer, defendant was precluded from rescinding these applicants' job offers since the medical examinations came prior to a "real" job offer being made. A real job offer is where an employer has completed ***all*** non-medical components of its application process. In this case, since the offers were contingent on not just the medical examination but a background check, employment verification, and criminal history check, the medical examination process was premature and the airline could not penalize the applicants for failing to disclose their HIV-positive status at the time of the medical examination.

Pertinent Language: "Whether or not it looked at the medical information it obtained from the appellants, American was not entitled to get the information at all until it had completed the background checks, unless it can demonstrate it could not reasonably have done so before initiating the medical examination process."

What an Employer Should Do: Employers must be sure to complete all background checks and job interviews, etc. before conducting a medical exam on the applicant. Only an applicant with a real job offer may be asked to undergo a medical exam.

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Professional Experience

Ms. Bauman is Co-Chair of the Firm's Employment and Labor practice group. Her practice focuses on advising management regarding all aspects of labor/employment law including discrimination, harassment, retaliation, discipline and discharge issues, layoffs, overtime and other related wage and hour issues, leaves of absences (family and medical leave, disability, workers' compensation, etc.), workplace violence issues, occupational safety and health issues, trade secrets, executive agreements, and severance issues, among others.

Ms. Bauman also represents management in employment litigation matters in the federal and state courts, as well as before administrative agencies, in arbitration and in mediation. Ms. Bauman routinely develops and implements training programs and auditing programs for employers on a variety of employment-related subjects, as well as develops and implements employment policies and procedures for clients.

Ms. Bauman performs these services for both large and small corporations in a variety of industries including service industries, healthcare, banking, retail and manufacturing. She also performs services for various areas of the entertainment industry.

Education

University of Southern California Law School, J.D., 1995.

University of Southern California, M.A., 1996.

University of Maryland, College Park, B.A., 1992.

Memberships & Activities

Admitted to practice before the U.S. District Court for the Central District of California, the Ninth Circuit Court of Appeals, the California Supreme Court and all other California State Courts.

Admitted to practice in California.

Member, Los Angeles County Bar Association.

Member, Board of Directors, Legal Aid Foundation of Los Angeles.

Secretary and Board Member, Human Resources Executive Network.

Judge Pro Tem, Los Angeles County Superior Court

Publications

"Bully Managers: the Legal Risks of Tolerating Tyrants in the Workplace," *Workplace Violence Prevention Reporter*, Vol. 8, No. 4, May 2002.

"Y2 Pay?: Misclassification of Computer Personnel Can Be Costly," *Labor and Employment Bulletin*, Vol. I, No. 3, Matthew Bender Publications, March 2, 2001.

"Online Overtime", *Cyber Esq.,* Supplement to the *Los Angeles Daily Journal, San Francisco Daily Journal, Washington Journal, Colorado Journal, Arizona Journal* and *Nevada Journal*, Summer 2000.

"California Employers May Assert Affirmative Defenses to Claims of Sexual Harassment, Court Rules," *California/National Personnel Law Update*, June 1999.

"The Workings Of the Labor Commissioner - A Guide For Employers," *The California Labor Letter*,Volume VII , No.4, April 1996.

Speaking Engagements

Ms. Bauman speaks regularly to employment-industry groups on all areas of employment and labor law.

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Professional Experience

Mr. Fox leads large and complex litigation matters in state and federal courts, in cases involving trade secrets, class actions, corporate investigations, and the use of statistics in employment matters. He also provides business and strategic advice for a wide range of companies relating to their employment practices and workforce management. Mr. Fox serves clients in industries including financial services, technology, manufacturing and retail, as well as in the public sector.

Prior to joining Manatt, Mr. Fox was a partner with a well-established firm headquartered in the Silicon Valley. He previously held the position of Executive Assistant to the Director of the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, where he was responsible for all enforcement and policy matters. In addition to drafting substantive employment discrimination guidelines, he was responsible for contacts with the Congress and other federal agencies and the White House.

Education

George Washington University Law School, J.D., 1976.

University of California, Riverside, B.A., Phi Beta Kappa, cum laude, 1973.

Memberships & Activities

Admitted to practice in California and the District of Columbia as well as numerous federal district courts and courts of appeals across the nation.

Member, Advisory Board, National Employment Law Institute.

Honors & Awards

Dean L. Broadbent Award for outstanding contribution to the community and academic excellence.

Stanley W. Levy

Counsel
Employment & Labor
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Professional Experience

Mr. Levy's practice specializes in complex matters in a variety of fields and industries.

From 1992 until early 1996, Mr. Levy served as General Counsel of Guess?, Inc., where he concentrated on business transactions, government relations and litigation in the fashion and apparel industry.

From 1984 through 1992, Mr. Levy litigated in the area of complex financial analysis. He successfully served as lead counsel for the uninsured depositors and special counsel to the U.S. Department of Justice and the National Credit Union Administration in the Federal Court litigation involving bank fraud and accounting malpractice in the failure of Penn Square Bank, one of the largest bank failures in U.S. history. In the late 1980's, he also successfully represented the bond holders in a major federal class action lawsuit against Burlington Northern.

From 1976 through 1983, Mr. Levy produced albums and concerts. During this time he also represented a number of clients in the music and recording industry in the negotiations of recording agreements, film scores, soundtrack albums, concerts and tours.

From 1967 to 1976, he was a successful civil rights and public service lawyer, serving as Deputy Director of the Western Center on Law and Poverty, the first Executive Director of what is now Public Counsel, the Los Angeles County Bar's sponsored legal aid organization and Director of Training for the Los Angeles City Attorney's Office.

In the labor and employment area, Mr. Levy developed the apparel industry's first comprehensive programs and agreements for monitoring apparel factories' compliance with federal and state labor, health and safety laws. The programs became the industry model and received the highest commendations from the U.S. Department of Labor.

In 1996, Mr. Levy was appointed by President Clinton to the White House Apparel Industry Partnership. The purpose of the partnership was to develop industry options to ensure that apparel and footwear products are not made under adverse labor conditions. He is a former member of the Apparel and Footwear Industry Working Group on the Environment. Since 1996, Mr. Levy has been Chairperson of the Labor Committee and Member of the Executive Board of the California Fashion Association. He has represented companies in many industries in the area of labor and employment law, including contractor compliance with federal and state labor laws, as well as international labor standards. Recently he was an expert witness in a class action wage and hour civil suit in the U.S. District Court in Los Angeles.

At the request of the United States Department of State, in the spring of 2000, Mr. Levy engaged in a series of speeches in Mexico City to Mexican businesses, trade associations, labor unions, human rights groups and university graduate students about labor and human rights standards with which most major U.S. apparel manufacturers and retailers expect their Mexican factory vendors to comply.

In the licensing area, he has handled all legal aspects of domestic and international licensing agreements for the manufacture, distribution and sale of a variety of apparel and related products, and retail stores licenses oversees, and shopping center leases and construction contracts for retail stores in the U.S. He also coordinated the legal work in setting up European and Southeast Asian operations. He recently testified as an expert witness on behalf of a licensor in an AAA arbitration with one of its licensees.

In the finance and securities area, he has coordinated the legal aspects of incorporation, corporate restructuring, public offerings, bridge financing, and revolving credit facilities. In 1998 he was a member of the faculty at the Fulcrum Information Services Apparel Industry Mergers and Acquisitions Forum in New York City.

In the trademark and intellectual property area, Mr. Levy has developed very effective trademark protection and anti-counterfeit programs. In conjunction with directing aggressive Federal Court civil litigation against trademark infringers and counterfeiters, he has worked closely with the FBI and U.S. Customs Service and is credited with helping to establish the Los Angeles Police Department's Anti-Counterfeiting Task Force and the Los Angeles District Attorney's Felony Counterfeiting prosecutions, including seizing the machinery and equipment used in counterfeiting operations.

Mr. Levy has successfully represented major fashion and apparel companies in matters with the United States Department of Labor, the Federal Trade Commission, and the United States Consumer Product Safety Commission as well as successfully representing these companies in civil litigation.

Several years ago Mr. Levy was consulted by the U.S. Department of Justice and Department of Labor regarding labor conditions in apparel factories in Japan. Mr. Levy was also the apparel industry representative working with the California Legislature, Governor's Office, State Labor Commissioner's office and labor and human rights groups in drafting legislation to establish a manufacturer's guarantee for workers wage and hour violations and apparel contractors.

Currently, Mr. Levy has been the lead counsel for a group of manufacturers (including Wal-Mart) negotiating with human rights organizations and the California Labor Commission regarding labor abuses in apparel factories in San Francisco.

Mr. Levy's major clients have included:

- McDonald's Corporation
- Sun Microsystems
- Guess?, Inc.
- Tommy Hilfiger, USA, Inc.
- Williams-Sonoma
- Maxon Industries
- Karen Kane, Inc.
- Byer California
- Kellwood
- Toyota
- PricewaterhouseCoopers
- Nike

Education

University of California at Los Angeles School of Law, J.D., 1965.

University of California at Los Angeles, Economics, B.A., 1962.

Professional Memberships and Activities

Member, State Bar of California.

Admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Ninth and Tenth Judicial Circuits, and the United States District Court for the Central District of California.

Co-founder, past president and current board member of Bet Tzedek-the House of Justice, a free legal services organization.

Former Adjunct Professor of Law at Loyola University School of Law.

An ordained Rabbi, Mr. Levy is the Spiritual Leader of Congregation B'nai Horin - Children of Freedom in Los Angeles, and President of Board of Governors of The Academy for Jewish Religion, California.

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Rebecca L. Torrey

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Professional Experience

Ms. Torrey is experienced in all aspects of employment law with an emphasis on defending employers in single plaintiff and class action cases in state and federal court.

Ms. Torrey regularly advises employers in the full range of employment matters, including wage and hour issues; protecting trade secrets and the use of nondisclosure agreements; unlawful harassment prevention; EEO and affirmative action compliance (including regression and adverse impact analysis); leaves of absence; background and drug screening; employment agreements; the use of independent contractors; hiring and termination decisions; personnel practices and policies; employee counseling and discipline; reductions in force and layoffs; and, generally, compliance with state and federal laws.

Ms. Torrey represents middle market California businesses, start-ups and large national companies in most industries, including technology; manufacturing and distribution; professional and financial services; entertainment; PEO and staffing services; background investigations; import/export; healthcare; property management; advertising; and tax exempt organizations.

Ms. Torrey frequently presents seminars to employers and professionals on various topics, including wage and hour issues, the prevention of unlawful harassment, EEO and affirmative action, compliance with Fair Credit Reporting laws and litigation prevention.

Prior to her law firm practice, Ms. Torrey served as a Law Clerk for Chief Judge Deanell Reece Tacha for the Tenth Circuit, U.S. Court of Appeals

Education

Duke University School of Law, J.D., LL.M. in International & Foreign Law

Duke Law Journal, Executive Editor

University of Kansas, M.A.in European History

Emporia State University, B.A. in Physics and French Literature

Professional Memberships and Activities

Admitted to practice before the Ninth Circuit Court of Appeals, the U.S. District Court for the Central District of California, and the U.S. District Court for the Southern District of California. Admitted to practice in California.

American Bar Association, Member

Los Angeles County Bar Association, Member

Publications

"CEO Advisor: A Little Relief?" *California CEO*, Fall 2004

"Doing Due Diligence to Uncover 'Bad Apple' Applicants," *Los Angeles Business Journal* and *Pacific Coast Business Times*, October 2002

"Affirmative Office: Labor Department Steps Up Audits of Government Contractors," *Los Angeles Daily Journal*, 1999

"Even-Handed," *Los Angles Daily Journal*, 1996

"First Amendment Claims Against Public Broadcasters: Testing the Public's Right to a Balanced Presentation," *D.L.J.* 1386, 1989

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Jay J. Wang

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Professional Experience

Mr. Wang's practice focuses on employment litigation that includes civil claims involving wrongful termination, harassment, unpaid wages, discrimination, trade secrets and workplace violence claims. He is also involved in counseling his clients as to human resources issues ranging from family leave practices, workplace investigations, and disciplinary write-ups.

Prior to joining Manatt, Mr. Wang was an associate at a national labor and employment defense law firm where his practice focused on both employment and insurance litigation. He has also served as counsel in civil insurance defense claims related to professional malpractice claims and product liability. Mr. Wang has authored two published articles relating to labor and employment matters.

Education

Georgetown University Law Center, J.D., 1999.
Articles Editor, *Journal of Legal Ethics,* 1998-1999.

University of California Los Angeles, B.A., 1995.

Memberships & Activities

Admitted to practice in California and before all California state and federal courts.

Member, California Republican Lawyers Association.

Member, American Bar Association.

Member, Orange County Bar Association.

Member, Labor and Employment Section of the California State Bar.

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Arthur Y. Whang

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Professional Experience

Mr. Whang's experience focuses on employment, trade secrets, and complex business disputes. He has defended clients against claims including sexual harassment, race, disability, and sex discrimination, and various common law and tort claims.

In addition, Mr. Whang served as a certified criminal prosecutor for the Los Angeles City Attorney. Prior to joining Manatt, Mr. Whang was a litigation associate at two well-respected national law firms.

Education

Georgetown University Law Center, J.D. 1999.

University of California, Santa Barbara, B.A., *magna cum laude*, 1995.

Professional Memberships and Activities

Admitted to practice in the State of California, the United States Court of Appeals for the Ninth Circuit, and the federal courts in the Central and Southern Districts of California.

Recent Articles

"Well, It's Smaller than a Breadbox," *The Recorder*, November 2003. An article on the initial disclosure requirements of California Code of Civil Procedure Section 2019(d)

"On the Verge of Expiration...Or Not: Copyrights and the Sonny Bono Copyright Term" Extension Act of 1998. *Intellectual Property Report, Vol. 3, No. 1*, August 2003. A Note of the *Eldred v. Ashcroft* case.

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Employment & Labor

Manatt's employment and labor attorneys work in partnership with our clients, bringing value by serving as an extension of their in-house human resources and legal groups. We offer comprehensive counsel on employment relationships to employers of all sizes across a wide business and industry spectrum. Our attorneys apply years of experience, extensive employment law skills and the firm's substantial national resources to:

- Prevent problems by establishing policies and procedures, and designing training and auditing programs, that keep you in compliance with the law;
- Educate you about and guide you through the maze of federal and state regulatory employment and labor laws;
- Provide you with aggressive and effective representation before courts, administrative agencies, arbitrators and mediators; and
- Handle the collective bargaining process and advance your interests in all other dealings with labor unions.

Practical Strengths

Our employment and labor counsel rests on a foundation of practical strengths that demonstrate our real-world understanding of the issues you face. Manatt employment attorneys know more than just labor law. We understand your competitive problems and the human considerations that shape your employment relationships.

Comprehensive employer coverage

Our employment attorneys work with small family businesses, emerging and startup companies, middle-market firms and "Fortune 500" multinationals. We understand their problems and develop solutions for labor and employment issues in virtually every sector of the economy:

- Aerospace
- Apparel
- Construction
- Entertainment
- Financial services
- Healthcare
- Hospitality and hotels
- Manufacturing
- Public sector
- Real estate
- Retailing
- Technology
- Transportation

Global economy knowledge

Manatt has the in-depth knowledge our clients need about labor standards and practices in the global economy. For example, one of our employment law partners (who developed the apparel industry's first comprehensive programs and agreements for monitoring apparel factories' compliance with federal and state labor, health and safety laws) helps a number of major fashion and apparel companies comply with international labor standards, and has represented the U.S. Department of State in discussing with Mexico's apparel industry the labor and human rights standards that most major U.S. apparel manufacturers and retailers expect their Mexican factory vendors to observe.

Multiemployer experience

We are labor counsel to the Western League of Savings Institutions and represent numerous savings institutions and banks in labor law matters. Our team includes unique specialized experience in collectively bargained multiemployer pension plans, reflecting years of experience as plan counsel to major multiemployer (Taft-Hartley) trusts.

Public policy understanding

We have worked with a number of large public sector employers from coast to coast, including the Los Angeles Department of Water and Power and the New York City Transit Authority. One of our employment team members is currently President of the City of Los Angeles Board of Civil Service Commissioners. Some of our attorneys, while serving with the United States Department of Justice, the National Labor Relations Board, the Equal Employment Opportunity Commission, and various congressional committees, participated in the drafting of many labor laws and regulations currently in effect.

Workplace diversity commitment

Manatt's own commitment to diversity helps us understand and reinforce the workplace diversity efforts of employers. We rank in the top 15% of the nation's 250 largest law firms on the *Minority Law Journal's* scorecard.

Counseling and Training

We believe the best approach to employment law problems is to minimize and eliminate the causes of employee dissatisfaction, regulatory action and ensuing litigation. Our attorneys work directly with your human resources personnel to:

- Offer counseling and guidance on personnel policies and procedures
- Advise on what the law requires on issues like discrimination, harassment and family leave
- Conduct investigations and audits of your company's compliance with its legal obligations
- Provide training that helps your managers keep employee issues from becoming problems
- Handle special issues that involve immigration, mergers, layoffs and terminations.

Diversity

With our firm's own strong commitment to diversity as a foundation, Manatt employment attorneys help our clients review and assess the effectiveness of their current diversity programs and make necessary changes to better reach their goals. The organizations and individuals we work and consult with are themselves a highly diverse group and include:

- "Fortune 100" companies in the aerospace, food and beverage, hospitality, automotive, financial, energy, construction, and design industries
- Business associations
- Non-profit and tax-exempt organizations
- Universities
- Federal and local governments
- Foreign governments
- African American, Hispanic, Asian Pacific American, Native American, and female appointed and elected officials, business leaders, and civil rights leaders.

A typical diversity review includes such issues as employment policies, commercial procurement, government contracts, government relations and environmental compliance. We make specific recommendations that reflect government regulatory standards, industry best practices, each organization's own business policies and structure, and the current focus of public scrutiny. Manatt specialists on legislation and international trade often contribute to our development of diversity strategy and policy recommendations.

Employment agreements and executive compensation

We design executive employment agreements that protect trade secrets and confidential information for businesses, including preparation of appropriate confidentiality and non-disclosure/non-use language. Our employment attorneys also handle the proper construction of severance agreements when management or executive employees are terminated, to ensure that the employer meets all the procedural requirements of the Age Discrimination in Employment Act and the Older Workers' Benefit Protection Act. Compensation terms are another key aspect of employment agreements, and we help many companies establish incentive and non-statutory stock option plans and non-qualified deferred compensation arrangements such as excess benefit or top hat plans as part of their executive contracts.

Immigration

Manatt attorneys in our Washington office have extensive contacts with the Department of State, Immigration and Naturalization Service and other agencies with immigration responsibilities. We represent clients who wish to employ non-residents, as well as U.S. citizens doing business abroad, on visa preparation and handling. Our insider status in the nation's regulatory center keeps us on top of the latest immigration law developments, such as the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program begun in 2004. We have already advised clients that failure to comply with the program's departure procedures may limit an employer's ability to hire or retain non - U.S. employees and could limit

otherwise available time to extend an authorized stay for employment in the U.S. Such proactive advice for problem avoidance is typical of our employment law counsel.

Investigations and audits

Our employment team will visit the individual facilities of your company to review compliance with employment law in such areas as wage and hour standards, equal employment opportunity and records retention. We will also make a comprehensive review of performance against all internal employment policies and practices. Our audits help us to advise you proactively on any changes necessary to reduce the likelihood of employee complaints, government enforcement actions, litigation, and other legal costs. And we continue ongoing assessment of your working environment to minimize the risk of new problems developing.

The most serious workplace problems are those involving alleged business crimes, and we work with you to undertake compliance audits, draft and edit compliance plans, and help with the ongoing implementation of the plan and other remedial measures. Our goal is to train your personnel to avoid and, if necessary, detect conduct that could violate federal or state laws and regulations, including the Sarbanes-Oxley Act. Beyond implementing audit programs, we also conduct internal and special investigations for clients, their boards of directors and audit committees to help uncover wrongdoing, comply with government rules and regulations, and take advantage of voluntary disclosure and sentencing guidelines for business that have compliance programs.

Labor brokerage and leased employees

We are familiar with all the complex issues involving leased employees who are on the payroll of a third-party broker that you pay to administer all the human resources details. We help you weigh the positives (often lower administrative costs) and negatives (continued responsibility for employees under the labor laws), and decide whether leasing is the right option for you.

Mergers and acquisitions

Manatt's employee benefits attorneys, working with our colleagues in the corporate group, analyze the labor contract and employee benefits issues that arise during mergers and acquisitions. In preparing documentation and due diligence for these transactions, we assess and allocate among the parties the benefit and contractual liabilities that may accompany the acquisition or disposition of ongoing businesses. We also advise selling and acquiring companies about the impact of unfunded pension, healthcare and other benefit plan liabilities as they relate to the value of the acquired company and to restrictive covenants in the acquisition financing. We often sort out these issues in large, complex transactions. For example, in a $5.3 billion transaction, we represented the acquired company with respect to all employee benefits issues. This included issues involving funded and unfunded pension liability, active and retiree healthcare, severance pay, "golden parachute" payments, stock options and stock appreciation rights issues, all on an international scale.

Terminations and reductions in force

Manatt attorneys guide employers through every kind of individual and group employee termination:

- *Executives.* When management or executive employees are terminated, we make sure that their severance agreements are properly constructed to meet all the requirements of the Age Discrimination in Employment and Older Workers' Benefit Protection Acts. We also advise on other typical provisions of such agreements, covering ERISA and COBRA, security arrangements, and severance and accrued pay.
- *Unionized employees.* For terminations under a collective bargaining agreement, we ensure that your policies conform to the contract terms, represent you in employee grievances over discharge, and resolve wrongful discharge disputes before the NLRB or in court.

- *Workforces.* Our attorneys handle all the legal requirements of mass workforce reductions, including layoffs, mass firings, plant closings, restructurings and forced retirements. We help your human resources personnel to plan a fair reduction process (observing all EEOC prohibitions against skewing toward racial or age groups), determine appropriate separation terms, develop full documentation, inform all employees about the situation, and effectively manage communication. We determine whether notice is necessary under the Worker Adjustment and Retraining Notification (WARN) Act and inform local and state officials.

Training

We offer a variety of interactive training programs covering the most important workplace issues that managers face. They are conducted by our experienced employment law attorneys and are available as on-site programs or electronically, and are tailored to the unique requirements of your company's environment and culture. Areas covered include:

- Equal Employment Opportunity and affirmative action compliance
- Family Medical Leave Act compliance
- Workplace investigations
- Labor relations and union avoidance
- Sexual harassment investigations and remedies

The goal of all our training is to identify what the law requires and to help your company adapt its policies and practices to prevent problems from occurring.

Workplace policies and procedures

Manatt employment attorneys show your human resource staff how to create personnel practices and policies that minimize exposure to employee complaints, governmental agency actions, and union-related problems. A critical component of our counsel is helping companies create the handbooks, policy summaries and other communication tools that inform employees about their workplace rights and the procedures to follow for enforcing them. We ensure that these are at the core of a proactive employment strategy that complements your company's core objectives and values while fostering a positive working environment. The goal is to help you minimize employee claims (and potential lawsuits) for discrimination, sexual harassment, racial

and ethnic harassment, unfair competition, wrongful termination, FLSA and state wage violations, and violations of the Americans with Disabilities Act (ADA).

Workplace security

We help you handle the most sensitive issues involving employee misconduct, including fraud, theft, assault, drug and weapon possession, and harassment that creates a hostile workplace. With years of experience at conducting effective investigations, we help you determine the right disciplinary actions, especially involving whether to terminate or continue the employment of disciplined employees. We make sure that all penalties conform to company policy and legal requirements against discrimination. If termination is necessary we help you with appropriate security measures such as canceling computer system access. Our goal is a fair and unemotional process that is your defense against a lawsuit for defamation, harassment or discrimination.

Litigation

Our attorneys represent clients in federal and state courts and before administrative agencies in all matters pertaining to the employer-employee relationship, including:

- Complex individual and class action litigation
- Appellate litigation
- Equal employment cases
- Contract and tort cases arising from employment relationships
- Disputes involving union-management issues
- Grievance and arbitration hearings, including enforcement arbitration agreements
- Other forms of alternative dispute resolution
- Administrative hearings and actions before the National Labor Relations Board, U.S. Department of Justice, Equal Employment Opportunity Commission, state labor and employment agencies, U.S. Department of Labor and the Occupational Safety and Health Administration.

We are capable of handling legal issues arising under virtually all state and federal labor and employment laws, as well as complicated class action litigation instituted by the Equal Employment Opportunity Commission, the U.S. Department of Justice and private litigants. We also handle unfair competition claims and compliance reviews by the U.S. Department of Labor and the Office of Federal Contract Compliance Programs. Areas of particular focus for our employment litigation practice include the following.

Discrimination and harassment

We counsel companies of all sizes and in all industries about their obligations to comply with federal and state equal employment opportunity and discrimination regulations governing:

- Employment discrimination (sexual, racial and ethnic EEO requirements as well as allegations over hiring practices, wrongful termination, drug and alcohol use)
- Workplace disabilities, work redesign and reasonable accommodation questions
- Sexual harassment
- Family and medical leave of absence policies

- Affirmative action
- Civil rights, including the Civil Rights Act of 1866 (Sections 1981, 1982, and 1983)
- Government contract compliance

Our attorneys work with your human resources personnel to design policies and procedures that foster a positive working environment and minimize employee claims. If claims are made, we help you assess the accusations and take appropriate action if the claim is justified. If a claim is without merit but leads federal or state agencies to take action, we are effective advocates in hearings and proceedings and often are able to conclude matters with no penalties or other remedial actions.

OSHA

A government safety inspection that's not properly addressed can jeopardize your company's future. Manatt's employment lawyers respond promptly to all the issues involving federal and state employee health and safety regulations. We defend OSHA claims of any type, including multiple death cases. After working with clients in many industries, we have developed policies and procedures that help assure facility compliance with health and safety regulations. We also coordinate with our clients to prepare for investigations, and defend notices of violation related to regulatory investigations. Where necessary, we go to trial and help our clients prepare for hearings and trials involving OSHA matters.

Healthcare

Our attorneys regularly advise and defend hospitals, nursing homes and other healthcare providers on all aspects of employment law and litigation. Our employment litigators have foreclosed litigation through careful crafting of employee handbooks for healthcare providers, preparation of separation and related confidentiality agreements for employees, which also protect healthcare providers' customer lists and other proprietary business information, and proactive counseling to clients on an ongoing basis regarding all aspects of employment and labor law. Our employment lawyers also conduct internal investigations of alleged workplace complaints including harassment, discrimination and retaliation, in the delicate healthcare delivery setting, in which the demands of professionalism and teamwork are as high as the pressure to provide quality patient care.

Our lawyers also have successfully defended numerous employment termination, discrimination and other actions, in state and federal courts, for some of the country's largest multi-facility healthcare providers. Recently, our employment litigators made new California law, when they won the defense of a proposed class action for California's largest hospital system. In that action, the trial court refused to allow class claims, through which a single plaintiff sought to transform an individual claim for alleged wage and hour Labor Code violations, into a class action on behalf of potentially hundreds of other hospital employees and involving dozens of other commonly owned facilities. The Court of Appeal then dismissed the plaintiff's appeal, ruling for the first time that orders rejecting proposed class claims were not appealable.

Trade secrets and unfair competition

Our lawyers often handle disputes involving confidential business and technology information and trade secrets. We work with confidentiality and nondisclosure agreements under the Uniform Trade Secrets Act and the corresponding laws of various states. We also handle all antitrust aspects of non-competition agreements, including non-disclosure and confidentiality agreements as part of licensing arrangements. When there are disputes over these issues, we secure injunctions that enforce employers' rights, and litigate contractual disagreements.

Wage and hour law

Courts increasingly hold employers liable for violations of the Fair Labor Standards Act, awarding millions of dollars in back overtime pay to nominally exempt white-collar employees when company policies undermine the exemption basis. Our attorneys advise employers on their wage and hour concerns, helping them implement alternative work schedules and audit their wage and hour practices for compliance. We analyze job categories to ensure that they involve the management and supervisory duties that define exempt status, and advise whether particular individuals should be classified as employees or independent contractors. If wage and hour disputes become class action lawsuits, we mount a vigorous defense and are frequently able to deny class status and secure a satisfactory settlement.

Traditional Labor

Since the 1930s, federal and state labor laws have defined the workplace as an adversarial relationship between employers, employees and labor unions. Manatt labor attorneys are skilled advocates for employers in this environment, advancing your interests and protecting your rights.

Collective bargaining

Our lawyers take an active role as members of your collective bargaining team. We serve as spokespersons, advise at the negotiating table, and consult on strategy behind the scenes. Members of our team have the background to bargain individually, engage in coalition bargaining, or coordinate multi-location and multi-union bargaining. We have bargained for clients in a wide range of industries, dealing with major unions at the international, regional and local levels.

Dispute arbitration

Once a contract is negotiated, we help you comply with the terms, avoid grievances where appropriate and respond to grievances when filed. We frequently arbitrate issues under collective bargaining agreements, including discipline cases, plant closings and subcontracting issues. We help employers plan and carry out plant closings and workforce reductions that comply with WARN Act notification procedures and all relevant discrimination statutes.

Labor practice controversies

When labor-management disputes become strikes, we coordinate contingency plans, advise on public relations matters and handle legal issues that may arise in connection with replacement employees, state court mass picketing injunctions, show cause orders, contempt citations, damage actions and RICO actions. When strikes and labor-management disputes involve action by federal or state regulators, our attorneys are experienced at representing employers in administrative hearings and arbitrations before the NLRB, OSHA, and other federal and state agencies.

Organizing efforts

Finally, because the potential for collective bargaining always exists at non-union employers, we use the experience we have gained advising on organizing campaigns and NLRB election law to advise these clients. Among other matters, we litigate appropriate bargaining unit issues, advise on the development of company campaign strategy and tactics, review communications tools, and advise managers and supervisors on their conduct. We also counsel on decertification issues and campaigns.

Selected Clients

- Activision, Inc.
- Aerospace Corporation
- Alaska Airlines
- Albertson's, Inc.
- Alliance Atlantis Entertainment
- American Film Marketing Association (AFMA)
- Association of Independent Commercial Producers
- Brillstein Grey Entertainment
- California National Bank
- Carsey-Werner-Mandabach
- Catholic Healthcare West
- Farmer's Insurance Group, Inc.
- Genex Technologies, Inc.
- Greater Bay Bancorp, Inc.
- Guess? Inc.
- HealthSouth
- Kellwood Company
- Los Angeles Clippers
- Showtime Networks, Inc.
- Ticketmaster Corp.
- U.S. Bank
- U.S. Healthworks, Inc.
- United Pan American Financial Corp.
- Williams-Sonoma, Inc.