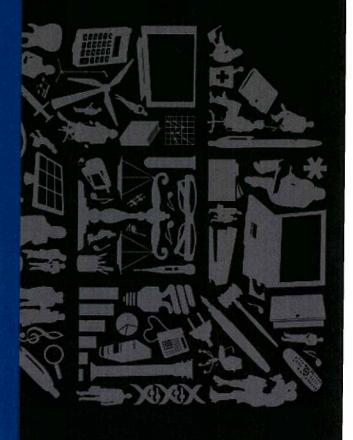


# Staying Ahead of the Curve

A Summary of New Employment Laws Affecting California Employers in 2010

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NEW LAWS



Vote: Do you think the number of EEOC charges filed against employers increased or decreased in 2009?



# Federal Family and Medical Leave Act ("FMLA")

- Review of general FMLA requirements:
  - Covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:
    - for the birth and care of the newborn child of the employee;
    - for placement with the employee of a son or daughter for adoption or foster care;
    - to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
    - to take medical leave when the employee is unable to work because of a serious health condition.



- Changes to the FMLA:
  - National Defense Authorization Act for Fiscal Year 2008, effective January 28, 2008
  - Department of Labor Final Regulations, effective January 16, 2009
    - Differences between New FMLA Regulations and California Family Rights Act ("CFRA") Regulations
    - Fair Employment and Housing Commission analysis available at: http://www.fehc.ca.gov/pdf/FMLA-CFRARegsTable-2.pdf
  - National Defense Authorization Act for Fiscal Year 2010, effective October 28, 2009



- Review of 2008 FMLA Amendments:
  - Added military family leave entitlements for eligible specified family members:
    - Up to 12 weeks of leave for certain qualifying exigencies arising out of a covered military member's active duty status, or notification of an impending call or order to active duty status, in support of a contingency operation, and
    - Up to 26 weeks of leave in a single 12-month period to care for a covered servicemember recovering from a serious injury or illness incurred in active duty.
      - Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave during the single 12-month period.

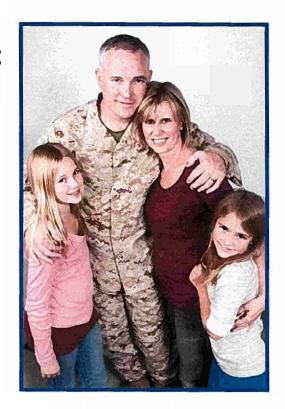


- Qualifying Exigency ("QE") Leave
  - 8 QEs:
    - Short-term notice deployment
    - Military events
    - Childcare and school activities
    - Financial and legal arrangements
    - Counseling
    - Rest and recuperation
    - Post deployment activities
    - Certain additional activities agreed upon by employer and employee





- QE Leave (continued)
  - FMLA Regulations, effective January 16, 2009:
    - QE leave only available for employees with family members in National Guard/Reserve, or retired regular armed forces, or reserve called to active duty in support of a contingency operation, but <u>not</u> regular Armed Forces.
  - New FMLA Amendment, effective October 28, 2009:
    - QE leave available for regular Armed Forces deployed to a foreign country.
    - QE leave available for National Guard/Reserve deployed to a foreign country, not just in support of a contingency operation.







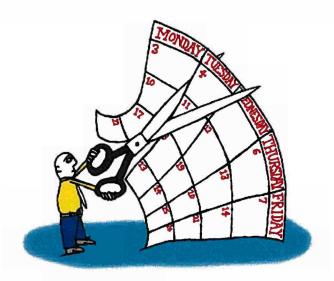
#### Military Caregiver Leave:

- Up to 26 weeks of leave per year available to care for a spouse, son, daughter, parent, or next of kin who is a "covered servicemember" suffering from a serious illness or injury incurred in the line of active duty.
- New FMLA Amendment, effective October 28, 2009:
  - "Covered servicemember" includes <u>veterans</u> who were in active service during the 5 years previous to date when care is needed.
  - Includes injuries or illnesses that were "aggravated" by active duty.

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#### California Alternative Workweek Schedules

- What is an "alternative workweek schedule"?
- Former Law:
  - Single fixed weekly schedule or menu of options only for everyone in identifiable "work unit."
    - Term "work unit" not defined in California Labor Code.
  - No option of continuing to work the traditional 8-hour day.





#### California Alternative Workweek Schedules

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#### New Law:

- Employer who offers employees a "menu of options" for alternative workweek schedules may also include a regular 8-hour-per-day/ 5-day-per-week work schedule among the menu of options.
- Employees can move from one alternative workweek schedule option to another from week to week, with the employer's consent.
- "Work unit" means a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof.
  - Can even be a single employee if the definition is met.



# New Form I-9, Employment Eligibility Verification

- New Form I-9, Employment Eligibility Verification, issued by the federal government
  - Contains an updated list of acceptable documents employees must present upon hiring
  - States that all documents presented to establish identity and/or ability to work in the U.S. must not be expired
- New form approved for use through August 31, 2012
  - A copy of the form can be found at http://www.uscis.gov/i-9
  - Immediately stop using all previous versions of the Form I-9



# E-Verify Required for Federal Contractors and Subcontractors

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 Employers who are federal contractors or subcontractors now required to use the U.S. Citizenship and Immigration Services'
 E-Verify system to verify employees' eligibility to legally work in the United States



- No charge to employers to use E-Verify
- Federal contracts as well as subcontracts over \$3000 will include a clause committing government contractors to use E-Verify
- Register for E-Verify at https://e-verify.uscis.gov/enroll



# Federal Genetic Information Nondisclosure Act ("GINA")

- Employers may not discriminate against employees on the basis of their genetic information or retaliate against those who assert their rights under GINA.
  - This prohibits an employer from requesting or requiring employees to share genetic information.
  - Genetic information includes family history of disease.
- What effect does this have in California?





# GINA (continued)

#### Major Exceptions

- Employer inadvertently requests genetic information (the "water cooler" exception).
- Employer requests information to ensure compliance with family leave laws.
- Employer obtains the information as part of a voluntary employersponsored wellness program, subject to several limitations.



 If an exception applies, employers must comply with stringent confidentiality requirements.



# **Same-Sex Out-of-State Marriages**

- Existing law: California recognizes out-of-state marriages to the extent they are legal in the state where performed.
- New law: California now recognizes valid out-of-state same-sex marriages by according these couples the same status as registered domestic partners.





 New law designed to help ensure that patients and workers at hospitals do not become victims of workplace violence

 Requires hospitals to conduct a security and safety assessment and, using the assessment, develop a security plan with measures to protect employees, patients, and visitors from aggressive or

violent behavior

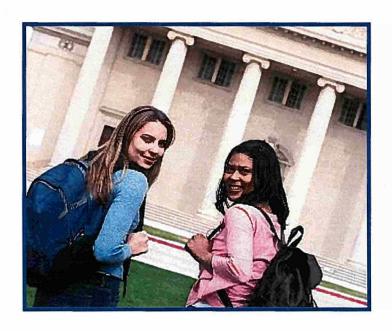
 Employers now required to review and update their security and safety assessment and plan on an annual basis





# **Safety in Educational Institutions**

- New law allows postsecondary educational institutions to seek temporary restraining orders and/or injunctions on behalf of a student
  - Institutions may seek temporary restraining orders and/or injunctions where a student has suffered a credible threat of violence from any individual
  - Must be with the written consent of the student





#### **Civil Air Patrol Leave**

- Private and public employers who employ more than 15 employees now required to provide not less than 10 days of leave per year for voluntary members of the California Wing of the Civil Air Patrol
  - Leave provided in order for such volunteers to respond to an emergency operational mission.
  - The California Wing of the Civil Air Patrol is a civilian auxiliary of the U.S. Air Force.





# Workers' Compensation for Injuries by Third Persons

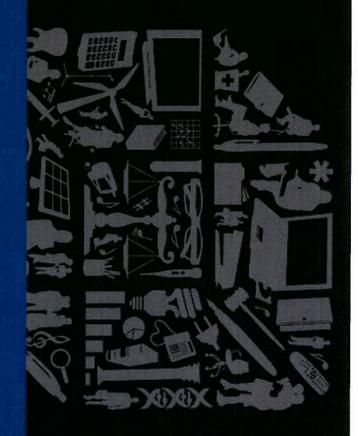
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 Labor Code Section 3600 is amended to include section (c), which states that a workers' compensation claim cannot be denied because an attacker's motivation is related to an "immutable personal characteristic."

Why was this new law enacted?







# NEW CASE LAW



- One mistake in accommodating an employee can be costly.
- A grocery store worker who was undergoing treatment for cancer sued her employer for failure to provide a reasonable accommodation by not letting her use the restroom on one occasion.
- Jury awarded employee \$200,000 in damages, \$148,000 of which were for emotional distress caused by the humiliation of the check stand incident.
- California Court of Appeal: Once the employer and employee have agreed upon the details of a reasonable accommodation, it falls to the employer to ensure that the accommodation is implemented.





 Independent contractors can sue for disability discrimination under the federal Rehabilitation Act.

In Fleming, a medical center did not provide to a doctor with a disability the

accommodations he requested.

He sued for employment discrimination in violation of § 504 of the Rehabilitation Act.

 The Ninth Circuit held that an independent contractor can seek remedies against his host facility under Section 504 of the Rehabilitation Act.

 Under Section 504, the standard for determining whether the facility has discriminated against the independent contractor mirrors that of the Americans with Disabilities Act.



- The City of New Haven administered a test to firefighters to determine eligibility promotions to lieutenant and captain positions.
  - The test disproportionately favored nonminority employees.
  - As a result, the City initiated an investigation and held several contentious public meetings. Eventually, the City decided to invalidate the test results.
- Plaintiffs, a group of nonminority employees, sued on the grounds that the decision constituted disparate treatment in violation of Title VII of the Civil Rights Act of 1964.
- United States Supreme Court: An employer generally cannot try to avoid liability under the disparate impact provisions of Title VII by violating the disparate treatment provisions of Title VII.

# Costco Wholesale Corp. v. Superior Court of Los Angeles

- Costco retained outside counsel to investigate and advise in an opinion letter whether its managers should be considered exempt or non-exempt.
  - The trial court had a discovery referee review the letter in camera and required Costco to produce a redacted version of the letter that only included the facts gathered from the interviews.
- The California Supreme Court held that the entire attorney-client communication is protected by the attorney-client privilege, regardless of whether the communication contains non-privileged material.



# Schachter v. Citigroup, Inc.

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- Under an employer-sponsored incentive program, the plaintiff chose to receive a percentage of his total annual compensation in the form of stock, instead of a cash bonus.
  - Under the terms of the plan, the stock would not vest for two years;
    if an employee voluntarily resigned, he would forfeit the stock.
- Plaintiff: Restricted stock is a "wage" that should have been paid upon resignation.



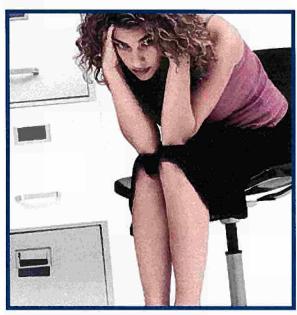
 The California Supreme Court held that the amount set aside as restricted stock was not "earned" wages and, therefore, did not run afoul of the Labor Code.



- ◆ Two female employees sued their employer for invasion of privacy, after discovering that the employer had set up a hidden camera in the women's private office to investigate its suspicions that someone was using one of the computers to view pornography at night.
- The California Supreme Court found that setting up the camera in a private office without giving the employees any notice constituted an intrusion because the employees had a reasonable expectation of privacy in the office.
- But, the Court held that the two employees had no invasion of privacy claim because the "intrusion" at issue was not sufficiently "serious" or "offensive" to constitute a tort.
  - Surveillance was narrowly tailored in place, time and scope and prompted by legitimate business concerns

# Roby v. McKesson Corporation

- Employee brought disability discrimination and harassment claim after being fired for excessive absenteeism where she had a panic disorder that caused her to be frequently absent from work.
- The California Supreme Court held that personnel management actions can be evidence in a harassment claim.
  - The Court pointed out that biased personnel actions can play a role in harassment claims in at least two ways:
    - contributing to harassment by communicating a hostile message, and
    - evidencing discriminatory animus on the part of those engaging in offensive behavior.





# Roby v. McKesson Corporation

- Court also reduced the jury's punitive damages award
  - Court analyzed the award based on the factors in State Farm
  - Determined that based on the low degree of reprehensibility and the substantial award of noneconomic damages in the case a "oneto-one" ratio between compensatory and punitive damages was the federal constitutional limit



# Gross v. FBL Financial Services, Inc.

- Plaintiff sued for age discrimination under the Age Discrimination in Employment Act (ADEA), claiming that he was demoted because of his age. Plaintiff presented only circumstantial evidence that age played a role in the demotion.
  - Company claimed employee's reassignment was part of corporate restructuring.





#### Gross v. FBL Financial Services, Inc.

- The U.S. Supreme Court held that the ADEA requires employees to prove that age was the decisive factor (i.e., "but for" cause) in the employer's adverse employment action.
  - Decision eliminated so-called "mixed motive" claims on the basis of age.
  - Employee cannot simply show that age was one of several contributing factors to the employer's action.
    - Must now show that age bias or discrimination was the employer's deciding factor in taking adverse action against the employee.
- Possible Legislation: Lawmakers have introduced legislation in both houses of Congress that would overturn the Supreme Court's opinion.
  - Known as the Protecting Older Workers Against Discrimination Act, the bill is currently going through congressional committees



#### Boucher v. Shaw

- Employees of a bankrupt hotel company brought a class action for unpaid wages, vacation and holiday pay under the federal Fair Labor Standards Act ("FLSA").
  - Employees named the company's CFO and CEO in the lawsuit as each owned a substantial interest in the corporation.





- The Ninth Circuit Court held that the former employees could pursue federal wage and hour claims against the CEO, CFO and other officers of the corporation personally.
  - Court held that in appropriate cases, an individual who exercises "control over the nature and structure of the employment relationship," or "economic control" over the relationship, may be considered an "employer" for FLSA purposes.
  - Court found that plaintiffs could survive a motion to dismiss because they had alleged that the company's officers had "control and custody of the plaintiff class," ownership interests in the corporation, and responsibility for cash management and employment matters.
  - Thus, a jury question existed as to whether these individuals were responsible for the alleged wage and hour violations.



#### What's ahead in 2010

- Meal and Rest Periods
  - Brinker/Brinkley
    - Are employers only required to "provide" meal and rest breaks, or must employers ensure that such breaks are actually taken?
    - California Supreme Court granted review in October 2008, the case has been fully briefed, argument and a decision are expected sometime in 2010.
  - Legislation SB 807, SB 287
- Paid Sick Leave
- Class Actions
  - Dukes v. Wal-Mart
- Arbitration
  - Arbitration Fairness Act



# Q&A

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