

SWERDLOW FLORENCE
SANCHEZ & RATHBUN
a law corporation

9401 Wilshire Blvd., Suite 828, Beverly Hills, CA 90212 • (310)201-4700 • Facsimile:(310)273-8680

2002 Legislative Update

TO: Clients and Friends of The Firm
DATE: January 1, 2002

As the new year approaches, Swerdlow Florence Sanchez & Rathbun would like to take this time to provide you with a brief overview of some critical changes in employment laws – some of which will take effect on January 1, 2002. Recent state and federal-court decisions and new state legislation have increased employee rights and employer obligations in a variety of different areas. Each of our attorneys will be available to answer any questions you may have concerning these news laws and to assist you in promptly complying with them.

I. Statutory Changes of General Application to All California Employers

A number of primarily pro-employee laws will take effect on January 1, 2002.

A. Minimum Wage Increase

California's hourly minimum wage increases from \$6.25 to \$6.75 on January 1, 2002. While the impact on your non-exempt (i.e., hourly) employees will be obvious, this minimum-wage change also impacts your exempt (i.e., salaried) employees. Under the salary-basis test (which employees must meet to qualify as exempt under California's executive, administrative, and professional exemptions) an employee must make "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." This means that, with the increase in minimum wage, an exempt employee now must make a minimum monthly salary of \$2,340 or a minimum annual salary of \$28,080.

As the minimum wage increases, so too does the potential liability for failure to pay properly and timely such a wage. Accordingly, if you have any questions regarding the proper classification of individuals as exempt or non-exempt, or as independent contractors as opposed to employees, or the lawful application of meal or lodging credits against your minimum wage obligation, or the proper method to calculate

January 1, 2002
Page 2

your overtime liabilities, or any others issues which could lead to wage and hour liabilities, we encourage you to contact us.

B. English Only Policies (AB 800)

The California Fair Employment and Housing Act (“FEHA”) has been amended to provide for a specific test for implementing English-Only rules in the workplace. The new law specifically prohibits an employer from adopting or enforcing a policy that limits or prohibits the use of any language in the workplace, unless: (1) the language restriction is justified by business necessity; and (2) the employer has notified its employees of the circumstances and the time when the language restriction is required to be observed and of the consequences for violating the language restrictions. The new statutory section defines business necessity as “an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, that the language restriction effectively fulfills the business purpose it is supposed to serve, and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.”

This new test places a difficult evidentiary burden on employers, especially since any employee may bring a lawsuit under this new law and since the new provision applies to all employers, regardless of size. Accordingly, employers should now be especially weary of broadly implementing such policies. For those of you considering implementing some form of an English-Only policy, it is important to discuss with your SFSR attorney how to best justify the “business necessity” underlying your choice and how to then draft and implement this policy.

C. Discrimination/Retaliation (AB 1015)

California Labor Code Section 98.6 currently protects employees from discrimination and retaliation for: (1) filing a claim with the Labor Commissioner, (2) testifying in a proceeding before the Labor Commissioner, or (3) otherwise exercising rights afforded by the California Labor Code. Effective January 1, 2002, these rights will be expanded in two significant ways.

January 1, 2002
Page 3

First, employees will now be able to allege claims under Section 98.6 based on additional activities, namely engaging in lawful off-duty conduct and exercising certain political rights. Fortunately for employers, however, employers may still lawfully require applicants or employees to sign conflict of interest agreements, provided that the prohibited off-duty conduct is actually in “direct conflict” with “the essential enterprise-related interests” of the employer and that breach of the agreement would constitute “a material and substantial disruption” of the employer's operation.

Second, the protections of Section 98.6, currently afforded employees, are being extended to applicants. Thus, applicants who are refused employment, not selected for a training program, or otherwise discriminated against in the terms and conditions of any offer of employment because they engaged in conduct protected by the Labor Code shall now be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

Although existing law already protects employees' rights to engage in lawful off-duty conduct, including certain political activities, by expanding these rights this new law simply reiterates that employers must be careful when encroaching into their employees' personal lives. Policies that in any way restrict an employee's off-duty conduct must be drafted purposely and narrowly to minimize legal exposure.

D. Domestic Partnership (AB 25)

A new bill has expanded the rights of employees with domestic partners in three distinct areas.¹

¹ Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring and meet the following requirements: (1) both persons have a common residence; (2) both persons agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership, (3) neither person is married or a member of another domestic partnership; (4) the two persons are not related by blood in a way that would prevent them from being married to each other in this state; (5) both persons are at least 18 years of age; (6) both persons are members of the same sex *or* meet the eligibility criteria for aged individuals; (7) both persons are capable of consenting to the domestic partnership; (8) neither person

January 1, 2002

Page 4

First, a person may now collect unemployment insurance if he or she leaves a job to relocate with a domestic partner to a place from which it is impracticable to commute and to which a transfer by the employer is not available. Under existing law, an individual who leaves his or her work voluntarily or without good cause is disqualified from receiving unemployment benefits. Second, domestic partners may now use kin care (sick leave) to care for the other partner or the other partner's child under the same circumstances as employees are currently permitted to take time off to attend to the illness of a child, parent or spouse. Third, the new law requires group health care service plans and policies of disability insurance that provide hospital, medical, or surgical expense benefits to offer the same benefits to domestic partners as they would dependents of employees.

E. Unemployment Insurance (SB 40)

The California Insurance Code has been amended to increase unemployment insurance (UI) benefits in a variety of ways. Under the revised statute, an unemployed individual is not disqualified for eligibility for unemployment compensation benefits solely on the basis that he or she is only available for part-time work. And, the highest weekly benefit an individual can receive has increased to \$330 for claims filed in 2002.

F. Lactation Accommodation (AB 1025)

Federal and California laws extend various protections to pregnant employees. Effective January 1, 2002, additional rights have been extended to mothers who are nursing infant children. With the advent of this new legislation, every California employer must accommodate employees who wish to express breast milk at work by providing "reasonable" break time for doing so, unless allowing such break time would "seriously disrupt the operations of the employer." Any break time provided pursuant to this bill shall, if possible, run concurrently with an employee's existing break time, but in any event shall be unpaid.

has previously filed a Declaration of Domestic Partnership with the Secretary of State that has not been terminated under Section 299; and (9) both file a Declaration of Domestic Partnership with the California Secretary of State.

January 1, 2002
Page 5

The bill also imposes certain requirements for providing a private area where nursing employees can take such breaks. Specifically, employers shall make reasonable efforts to provide the use of a room or other location, other than a toilet stall, in close proximity to the employees' work area, for the employees to express milk in private. The room or location may include the place where the employee normally works if it provides the requisite privacy.

Employers who violate this new law will be subject to a \$100 civil monetary penalty for each violation. Employers should consult legal counsel before concluding that they fall under the "serious disruption" exception to the statute or if they need assistance in implementing this policy in the least disruptive manner possible.

G. New Consumer Security Laws (SB 168)

To assist in the prevention of identity fraud, a new California law provides for increased security measures in connection with the release of personal information by consumer credit reporting agencies. Moreover, this law will prohibit any person or entity, not including a state or local agency, from using an individual's social security number in certain ways, including posting it publicly or requiring it for access to products or services. Persons or entities may continue to use social security numbers in a manner inconsistent with the new law as long as they meet the following conditions: (1) the use of the social security number is continuous and uninterrupted; (2) the individual is provided an annual disclosure that he or she has the right to stop the use of his or her social security number in a manner prohibited by the new law; (3) any such request by an individual is implemented within 30 days of the receipt of the request; and (4) the individual is not denied services because he or she made such a request. The new law does not provide for specific penalties for violations. This new law will not be effective until July 1, 2002.

This law, therefore, is relevant to employers who may use employee social security numbers for identification purposes and post such numbers in areas to which the public may have access (*e.g.* on a wall near public restrooms). Accordingly, employers must take special care when posting employee social security numbers.

II. Weingarten Representative Rights Extended to Non-Union Workplace

SWERDIOW FLORENCE
SANCHEZ & RATHBUN
a law corporation

January 1, 2002
Page 6

As first reported in our last client newsletter, the National Labor Relations Board (“NLRB”) extended Weingarten rights from the unionized to the non-unionized workplace. As you will recall, Weingarten rights arise from the 1975 U.S. Supreme Court decision that held that non-supervisory employees in a unionized workplace may request the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action.

Significantly, in Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board, the NLRB extended these rights to non-supervisory employees in a nonunion workplace, finding that these non-supervisory employees have the right to request the presence of a co-worker during investigatory interviews that the employee reasonably believes could result in discipline – all of this despite the absence of a collective bargaining agreement. Now, the United States Court of Appeal for the District of Columbia has agreed with the NLRB. Thus, as a matter of federal law, Weingarten rights exist in both union and non-union workplaces.

Employers should keep in mind some notable limitations to Weingarten rights. First, as stated above, such rights only are afforded non-supervisory employees. Second, employees must request to have a representative present; employers are under no legal duty to offer employees that option. Third, employees may only request the presence of a co-worker. Exactly what is meant by coworker, however, is unclear. The question remains whether “co-worker” includes former employees or current supervisors, or whether such rights will be expanded to permit an employee to request the presence of a friend, family member, or attorney. Fourth, Weingarten rights only apply in the context of an investigatory interview which the employee reasonably believes might result in disciplinary action. Finally, once an employee requests to have a representative present, an employer is free to forego the investigatory interview and continue investigating the matter through other sources. Of course, California employers should cautiously proceed with disciplinary actions taken without the employee’s explanation as they may very well lose certain protections afforded them under California law.

Supervisors and other employees who are involved in conducting internal investigations must be made aware of these expanded Weingarten rights and of their legal obligations to comply with these rights. If you have any questions regarding the extent of

January 1, 2002

Page 7

your obligations under this new law, if you need for your SFSR attorney to provide training on this matter, or if you wish to discuss how to best conduct workplace investigations in light of this expanded federal law, we encourage you to give one of our attorneys a call.

II. Industry-Specific Legislation

A. Drug Testing By Motor Carrier Employers (SB 871)

Motor-carriers that are subject to federal Department of Transportation drug and alcohol testing requirements are now subject to new state-law requirements and penalties. Among other things, this new California law will permit any person who suffers injury that is proximately caused by the driver of a commercial motor vehicle to recover treble damages from the driver's employer where it is shown that the driver was under the influence of alcohol or a controlled substance at the time and that the driver's employer willfully failed to comply with specified federal law requirements, such as those regarding controlled substances and alcohol use, transportation, and testing.

Accordingly, now more than ever, employers must take steps to ensure enforcement of both internal and government-imposed safety guidelines. Moreover, employers should continue to take advantage of pre-employment checks through which an applicant's history of drug or alcohol abuse or related accidents can be uncovered.

B. Applicability of Wage and Hour Laws to Collective Bargaining Agreements/Overtime Exemption For Doctors (SB 1208)

California has amended California Labor Code Section 514, which had previously set forth a broad exemption for employees governed by collective bargaining agreements from various laws regarding working hours and working conditions. As of January 1, 2002, union-represented employees will now be subject to the Labor Code's provisions regarding break periods, meal periods, make-up time and overtime exemptions. They will continue, however, to be exempt from the Labor Code's provisions providing for daily and weekly overtime and authorizing the adoption of an alternative work week schedule. Notably, the new law permits unionized employees to create alternative workweek systems through the collective bargaining process.

January 1, 2002
Page 8

Furthermore, the new law provides that the subject of one day's rest in seven may be controlled by a collective bargaining agreement.

Additionally, for those in the medical field, a new overtime exemption has been created for physicians who are paid on an hourly basis. Under existing law physicians could be exempt from the overtime laws under the professional exemption if they meet the salary basis test, but not if paid on an hourly basis. Now, under the new law, physician employees paid an hourly wage of \$55 or more are eligible for such an exemption.

C. Temporary Nursing Staff (AB 1643)

Section 1812.509 of the California Civil Code has been amended to place new requirements on employment agencies that provide temporary certified nursing assistants or licensed nursing staff for long-term health-care facilities. Before placing such an employee, employment agencies will now be required to, among other things, conduct a personal interview, verify his/her experience, training, and references, and verify that he/she is in good standing with the appropriate licensing or certification board. Violations of this statute constitute a criminal misdemeanor.

If you would like assistance in revising your employment applications to ensure they are facilitating informed hiring judgments, we would be happy to assist you. Also, if you would like assistance in conducting background checks on applicants, we can refer you to an experienced investigator.

D. New State and Federal Safety Laws

1. New Federal OSHA Regulations

In 2001 the federal Occupational Health and Safety Administration ("Fed/OSHA") issued new regulations governing the reporting and recording of workplace injuries and illnesses. Now, effective January 1, 2002, those regulations go into effect for employers governed by Fed/OSHA. Specifically, Fed/OSHA has replaced the OSHA Log 200 with the new OSHA Log 300 form, has revised its list of exempt industries, and has imposed new posting requirements. Employers that previously had

January 1, 2002
Page 9

been exempt from these Fed/OSHA regulations, but that will now be covered, include dry-cleaning establishments, janitorial services, personnel services, and auto supply stores.

California, which is a “state plan” OSHA state, has six months to issue its own regulations that are at least as effective as the new Fed/OSHA regulations.

2. Warehouse Store Safety Bill (SB 486)

Jarred into action by customers injured from falling pallets of stacked merchandise, California also has issued a new safety law that requires warehouse-type retail operations to take certain precautionary measures to protect customers and workers from the hazard of falling merchandise. Specifically, covered employers must secure merchandise stored on shelves higher than 12 feet above the sales floor (*i.e.*, any area where the public is invited to shop, whether indoors or outdoors), by installing safety devices such as rails, fencing, netting, security doors, gates, cables, or binding materials. The new law also requires that a safety zone be temporarily established to block customers from entering areas where merchandise could fall when heavy machinery is used to remove items from a shelf. In addition, the law requires such stores to file a report with Cal/OSHA for each serious injury that occurs as a result of falling merchandise, even if an employee is not seriously injured. Companies covered by the new law will have until July 1, 2002, to comply.

* * *

We hope that this overview has not only informed you of many new legal obligations, but also has prompted you to think critically about important workplace issues. You may call upon any of our firms’ attorneys to provide you with whatever assistance you may need to take the next step – compliance in a manner that is least disruptive to your business. Have a safe and happy holiday season and may your company enjoy a prosperous new year.