HR SPECIALIST

California Employment Law

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Trusted compliance advice for California employers

Editor: Joseph L. Beachboard, Esq., Ogletree Deakins, Los Angeles

In the News . . .

New overtime rules on hold!

Those new white-collar overtime rules you have been hearing about for almost three years? The ones that were finalized in May, raising to $47,476 the salary threshold that qualifies exempt employees for overtime pay? The rules you probably spent months preparing to implement in your organization?

Not so fast.

On Nov. 22, a federal judge in Texas issued a preliminary, nationwide injunction preventing the rules from going into effect as scheduled on Dec. 1.

The Obama administration has appealed, but it seems likely that the new rules may be permanently tossed out, with a possible do-over once President-elect Trump takes office.

For now, employers need only pay overtime to qualifying exempt workers who earn less than $23,660, the same threshold that has been in effect since 2004.

Visit **www.theHRSpecialist.com/overtime** to learn the latest on this developing story.

EEOC makes Sharp point on disability rights violations

Sharp Healthcare, a San Diego regional hospital system, has agreed to pay $90,000 to a surgical scrub technician to settle charges it violated the ADA when it refused to hire her.

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California Employment Law is published by **HR Specialist** and is edited by Joseph L. Beachboard, a shareholder with the law firm of **Ogletree Deakins** and the former publisher of the *California Labor Letter*. In addition to representing management in employment matters, he speaks regularly before employer groups. Contact him at (310) 217-8191.

Tell bosses: Playing 'FMLA cop' will backfire

Be sure supervisors understand they cannot interfere with employees' FMLA rights—and that any effort that appears intended to block FMLA leave will probably cause legal headaches.

That's because willful FMLA violations are subject to an extended filing period, giving the employee up to three years to file suit.

That can catch employers off guard, especially since there is no advance warning for FMLA claims. *Reason:* Filing a complaint with the Department of Labor isn't a prerequisite to a federal lawsuit.

Recent case: Robert worked as a security guard at the famed Performing Arts Center of Los Angeles County. Then his wife became ill and he requested FMLA leave to help care for her. He provided certification for the leave that his wife's doctor had prepared.

Still, he claims, his supervisor began questioning him about taking leave. About two weeks after he returned to work, his supervisor told Robert that he suspected Robert had committed FMLA leave fraud.

He then demanded to know if Robert was really married to the woman who had been ill. Robert said he was and showed his supervisor pictures from his cell phone depict-

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Ensure demotion has nothing to do with FMLA

Make sure any demotions that happen to occur during FMLA leave are clearly unrelated to the fact that the employee exercised his FMLA rights.

Otherwise, a court may conclude your actions amounted to interference with the right to take leave and were intended to punish the employee.

Recent case: Sam worked for many years as a skilled laborer, earning great reviews, including one that stated he was operating at his career peak.

Then he took a series of medical leaves in order to have eye surgery. Each time when he returned to work, he learned that his position had been changed and that he was required to take a pay cut.

Sam sued, alleging interference with FMLA leave and argued that he should have been reinstated each time to his old position.

He pointed to his good reviews as evidence that his performance wasn't a factor in the demotions. Therefore, he argued, the reason had to be his use of protected leave.

The court said Sam had enough

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'FMLA cop'

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ing his wedding. That wasn't good enough. The supervisor said Robert had to produce a copy of his marriage certificate. He did, but shortly afterward, he was fired anyway.

More than two years later, Robert sued, alleging interference with his FMLA rights.

The arts center argued he had waited too long. But the court said Robert's complaint was within the three-year period for a willful FMLA violation. The court said the fraud allegations and demand for marriage proof might be evidence that the employer willfully interfered with his FMLA rights. (*Kalestian v. Performing Arts Center of Los Angeles County,* No. 2:16-cv-05928, CD CA, 2016)

Demotion & the FMLA

(Cont. from page 1)

evidence to take the case to trial. The jury will now decide whether the demotions were justified by solid business reasons or were just an excuse to punish Sam for taking FMLA leave. (*Razo v. Timec, et al.*, No. 15-CV-03414, ND CA, 2016)

Final note: If you are planning on making changes to an employee's position and he happens to be on FMLA leave, make sure to very carefully document the underlying reasons. If the change affects other employees, it will help if none of them took FMLA leave.

Under the FMLA, you are allowed to take action you ordinarily would have taken even if an employee hadn't taken leave. However, that means you must be prepared to prove a negative: That the FMLA leave had nothing to do with your decision.

A kiss is not just a kiss when it's from the boss, and women don't have to tolerate it

The 9th Circuit Court of Appeals has decided once and for all that female employees don't have to put up with workplace behavior that makes them uncomfortable under the pretense of a supervisor being friendly and welcoming.

The court recently issued a stinging rebuke to the idea that a male supervisor can greet a female subordinate with a good morning hug and kiss.

9th Circuit: Hugging and kissing at work become unlawful when they are 'both unwelcome and pervasive.'

Recent case: Victoria worked for the Yolo County Sheriff's Office. She claimed her boss regularly greeted her by giving her a hug and kissing her. By her count, this happened at least one hundred times over a 12-year period.

She sued, alleging sexual harassment and a sexually hostile work environment.

The lower court bought the sheriff's argument that his embraces were nothing more than friendly gestures. Since it only happened a dozen times a year or so, the court said the greetings could not be objectively perceived as hostile or pervasive.

Victoria appealed. The 9th Circuit reversed the lower court's ruling and reinstated her lawsuit.

In doing so, it slammed other lower courts that had concluded such behavior wasn't sexual harassment. It wrote:

> "First, the district court extracted a supposed 'rule' that hugs and kisses on the cheek are not outside the realm of common workplace behavior, and, accordingly, concluded that such conduct could never support a Title VII claim. This 'rule' was created from just a few non-binding district court decisions. One of those decisions was twenty years old and another was fourteen years old at the time of the district court's decision."

The 9th Circuit then laid down the law like this:

> "Thus, those decisions likely do not reflect changing contemporary standards of socially acceptable conduct in the workplace—a decision more appropriately made by a jury. More importantly, in one of those decisions, the court explained that flirting, hugging, and even kissing in the workplace 'are very ordinary things that people do and are not per se intimidating, hostile, humiliating, or offensive,' but such conduct can, nevertheless, become unlawful when it 'is both unwelcome and pervasive.'"

The 9th Circuit went on to criticize the lower court's effort to quantify the hugs and kisses into a mathematical formula that supposedly proved the behavior wasn't pervasive and hostile. That sent a signal to other federal judges that they need to look to both contemporary mores and the impact constant comments have on women in the workplace. (*Zetwick v. County of Yolo*, et al., No. 14-17341, 9th Cir., 2016)

Final note: This case should serve as a warning that conduct that makes the person on the receiving end uncomfortable is outside the realm of what federal courts consider appropriate in the workplace. HR professionals may want to take efforts to ensure that similar actions do not create liability for their organizations or cause trauma for their employees.

See this month's "In the Spotlight" on page 6 for more information on what employers can do to assure that their organizations stay focused on creating a fair and equitable workplace.

Timing is everything: Note when you first tell employee about any adverse action

Do you occasionally orally inform an employee that she will not be getting a promotion, an accommodation or some other benefit before you provide official written notice? If so, make sure you note when that happened and what you said.

Reason: When it comes to deadlines for filing an EEOC complaint, the employee's clock begins to tick when she first receives that oral notice.

In a close case, that may mean you'll be able to get the case dismissed because she missed the filing deadline.

Recent case: Kathleen worked for the EEOC as an attorney.

She believed it took her supervisor far too long to approve reasonable accommodations Kathleen requested over the years. She has arthritis and asked for ergonomic equipment and software to help her do her job. Sometimes she got the accommodations she requested and sometimes she did not.

Then, after making a new accommodation request, the parties went back and forth.

However, Kathleen never received an outright, formal written denial of her request.

She filed an internal complaint that eventually led to a lawsuit.

However, the EEOC argued it was too late to sue. The commission argued that Kathleen should have known earlier that her request for accommodation was being denied, and should not be allowed an open-ended time limit to sue just because there was no written denial.

The court tossed out her lawsuit. Kathleen should have known her employer was denying the accommodation request much earlier. (*Mulligan v. Yang,* No. 15-712, CD CA, 2016)

Even in California, arbitration agreement can be valid if employee knowingly signed it

A federal court has ordered an FMLA interference case to be sent to arbitration pursuant to an agreement an employee signed when he was hired. The court ordered arbitration even though it was troubled by some terms of the agreement.

Recent case: Brian began working for Ecothrift as a store manager in 2002. He significantly grew his store's revenues over the years.

Then he had to take time off to care for his ailing parents. Shortly before he was due to return, the company told him his services were no longer needed because, "This just isn't working out."

Brian sued in federal court and Ecothrift asked that the case be sent to arbitration. Brian had signed an arbitration agreement in 2002 that said, "Any dispute with the Company regarding the terms and conditions of Employee's hiring, employment, or termination shall be subject to binding arbitration to the maximum extent allowed by law, under terms and conditions which the parties may mutually agree upon…."

Brian argued that the agreement was unfair on multiple levels.

The court said that while some parts of the agreement might have been unfair, Brian had signed it. Plus, the court noted that Ecothrift had agreed to pay Brian's arbitration costs—a move that helped persuade the court that the arbitration process was fair enough. (*Dalton v. J. Mann DBA Ecothrift,* No. 16-CV-03409, ND CA, 2016)

Legal Briefs

Is that harassment, or just obnoxious bullying?

Not every unpleasant workplace incident is grounds for a lawsuit. Take, for example, a co-worker who yells at co-workers or is generally unpleasant. Unless the individual is targeting one group for poor treatment, there's not much grounds for a lawsuit.

Recent case: Margaret, an education specialist at a prison, did not get along with one of the correctional officers. She sued, alleging that he was a sexual harasser.

But none of her examples were related to sex and she had no evidence the officer specifically targeted female co-workers for his tirades. Without that, she had no case. (*Froby v. Clark County,* No. 14-16843, 9th Cir., 2016)

Final note: Of course, there are reasons to curtail bullying behavior even if it may not rise to the level of harassment. Why tolerate behavior that's disruptive and unnecessary?

Telling boss about disability counts as official notice

An employee doesn't have to tell HR about a disability to gain protection from discrimination. It's enough for the employee to tell her supervisor.

That's why it is important to remind supervisors that they need to involve HR as soon as an employee reveals a potential disability.

Recent case: Sophia worked as an on-air personality for Univision when she developed what ultimately turned out to be a benign stomach tumor. She never told HR about her medical problems, but did inform her supervisor directly. She received time off for medical appointments. Eventually, she had surgery.

Then she lost her job due to other work issues. Sophia sued, alleging she was fired for being disabled.

Univision argued it wasn't liable because since Sophia never told HR, the company didn't know about the disability. The court rejected that argument, reasoning that telling one's supervisor amounted to providing notice. (*Soria v. Univison,* No. B263224, Court of Appeal of California, 2016)

Performance evaluations: Steer clear of two major errors

Say a supervisor manages Kevin, a 55-year-old employee whose productivity drops over the year.

Instead of citing specific, measurable examples of this decline in his performance review, his boss notes that, "Kevin doesn't seem to have the energy level anymore to truly succeed in this department." Still, he rates Kevin's work as "average," the same as last year.

That example highlights two of the more common and legally dangerous pitfalls in writing performance reviews: evaluating attitude instead of performance and evaluation inflation.

Not evaluating performance

Vague statements that attack an employee's demeanor could be interpreted as some kind of illegal age, race, gender or disability discrimination. Instead, supervisors should use concrete, job-based examples to illustrate any criticism.

Referring to Kevin's "energy level" could give him reason to complain about age discrimination. The review should have cited examples, such as, "Kevin has completed three of the five major projects late this quarter and has not contributed one new product idea in six months."

The word "attitude" should never appear in a review. Courts often see that as a code word for discrimination.

Evaluation inflation

Supervisors too often rate mediocre employees as "competent," competent employees as "above average" and above-average employees as "superior."

The problem comes when an employee is fired for poor performance, yet his or her history of reviews tells a different story. The employee, then, has supposed proof that the real reason for the firing was something else, maybe something illegal.

Here are the main causes of evaluation inflation:

Don't let good reviews excuse misconduct

Have you worried about disciplining or discharging an employee who just got an outstanding evaluation? It's a legitimate concern, but don't let it prevent you from taking action.

Instead, consider what triggered the decision to look into termination. If the employee broke a clearly stated rule or was out-and-out insubordinate, you can and should take prompt action—up to and including termination.

The key is to consider the seriousness of the transgression and whether you would take the same action against another employee for the same offense. A stellar evaluation doesn't mean you can't act.

- **Misinterpreting a rating scale or instructions.** *Example:* Using a review with a 0 – 4 rating scale, a supervisor gives an employee a "2" for attendance and fires her. She sues, arguing that a "2" is average and acceptable, and wins. The boss wrongly believed that anything less than "4" was unacceptable.
- **Fear of confronting employees**. *Example:* A worker has acceptable work quality but hurts morale because of poor teamwork and aggressive behavior. To avoid an angry confrontation, the boss rates him as average in soft skills.
- **Giving positive areas too much weight** over negative ones. *Example:* A factory worker is to be rated on quality, quantity, dependability, teamwork and safety. Despite poor quality, her boss rates it average because of the "glow" from other "above-average" categories.

Final tip: To see if inflation is a problem, ask yourself these questions: Who are the worst performers? Knowing what we know about them now, would we hire them again? Do their reviews reflect their true performance?

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Start using new I-9 by Jan. 22

Out with the old, in with the new. This year's turn of the calendar also carries a new paperwork duty for all employers: Trash your old version of the I-9 (the Employment Eligibility Verification form) and start using the new "smart" version by Jan. 22.

The new form carries an 8/31/2019 expiration date. Find it online at **www.uscis.gov/i-9**.

You can continue using the current I-9 version (carrying a 3/31/16 expiration date) until the new one becomes official on Jan. 22, 2017. At that point, the new version becomes mandatory for all employers.

The new version is being called the "smart" I-9 because the interactive PDF also includes enhanced features to reduce errors and make it easier to complete the form.

Federal court permanently enjoins 'persuader rule'

The U.S. District Court for the Northern District of Texas has converted a previous temporary injunction preventing implementation of the U.S. Department of Labor's revised "persuader rule" into a permanent injunction that applies nationwide.

That means employers won't have to disclose who advises them on ways to discourage union organizing.

According to Judge Sam R. Cummings' order, the court converted the preliminary injunction to a permanent one for the same reasons "stated in the Court's Preliminary Injunction Order entered June 27, 2016" in *National Federation of Independent Business et al. v. Perez, et al.*

He found the DOL's revised persuader rule to be "not merely fuzzy around the edges. Rather the New Rule is defective to its core."

The June order prohibited the DOL from implementing and enforcing its revised persuader rule on a national basis. In granting the preliminary injunction, the court had found that plaintiffs' challenge to the new rule, which would have gone into effect July 1, 2016, had a substantial likelihood of success on the merits and that the plaintiffs had shown that they would be irreparably harmed if the rule was not enjoined.

Lead counsel representing the plaintiffs in the Lubbock case is Jeffrey C. Londa, a shareholder in Ogletree Deakins' Houston office. Londa said, "We are delighted with this major victory for employers, preserving their right to secure counsel when faced with union organizing. The rule that has now been permanently enjoined on a nationwide basis was part of an effort by the DOL to favor unions when they attempt to organize employees."

DOL obtains $866k judgment against bank ESOP fiduciaries

The U.S. Department of Labor Employee Benefit Security Administration has obtained a judgment against fiduciaries for the California Pacific Bank's Employee Stock Ownership Plan after they failed to make employees whole following the plan's dissolution.

The bank terminated the ESOP in 2010. The Employee Retirement Income Security Act required the fiduciaries to sell company stock and place the cash into individual employee retirement accounts. DOL investigators found that the fiduciaries—the bank's chairman and several trustees—instead divided the stock and placed it in the employees' accounts. Because the stock is not publicly traded, the plans would have had little opportunity to sell it.

The fiduciaries also diverted $81,407 of a plan account receivable into the bank, and transferred $69,745 from the plan's account to the bank.

With interest the judgment totaled $866,840.

ADA rebuke in San Diego

(Cont. from page 1)

Sharp had conditionally offered the technician the position pending a physical examination. When the physical revealed a minor ankle injury, Sharp rescinded the job offer.

The tech filed a complaint with the EEOC alleging Sharp violated the ADA by perceiving her to be disabled when she was not. She bolstered her claim by showing she currently works in an identical position with another employer.

The EEOC filed suit after failing to resolve the dispute through its conciliation process.

In addition to the monetary damages, Sharp agreed to retain an external equal employment monitor to revise its disability accommodation policies and practices to bring them into compliance. It will also deliver annual disability discrimination training to staff and provide regular compliance reports to the EEOC

EEOC guidance targets national origin bias

The EEOC has issued updated enforcement guidance on national origin discrimination, addressing Title VII's prohibition on bias that targets employees based on their ethnic and cultural heritage.

The guidance highlights best practices employers can establish to prevent discrimination and addresses developments in the courts over the last 15 years.

The new guidance, released Nov. 21, replaces information contained in one section of a 2002 EEOC compliance manual.

In fiscal year 2015, approximately 11% of the 89,385 private sector charges filed with EEOC alleged national origin discrimination. These charges alleged a wide variety of Title VII violations, including unlawful failure to hire, termination, language-related issues and harassment.

Online resources Find the EEOC's national origin discrimination enforcement guidance at **www.eeoc.gov/laws/guidance/national-origin-guidance.cfm**. A question-and-answer document is at **www.eeoc.gov/laws/guidance/national-origin-qa.cfm**. Information specifically addressing small businesses concerns can be found at **www.eeoc.gov/laws/guidance/national-origin-factsheet.cfm**.

by Carson G. Burnham and Bonnie Puckett, Esqs., Ogletree Deakins

In contentious times, reaffirm your commitment to diversity

HR professionals have some of today's most sensitive jobs. They have to make sure their organizations comply with equal opportunity laws at the federal, state and local levels. And they have to do that even as political winds shift and compliance emphases change.

Right now, you may have employees who feel uncomfortable.

Some women, employees with diverse racial and ethnic backgrounds, those from different countries and noncitizens who work in the U.S. might be feeling intimidated by news about hostility in the workplace.

Some may feel physically threatened. They may feel silenced, even afraid to use your internal complaint procedures to report concerns about harassment or discrimination.

HR can help

Now is a good time to consider taking steps to reinforce your commitment to diversity and inclusion and to reassure potential victims of harassment and discrimination.

This may include updating or recirculating policies and protocols related to diversity, inclusion, harassment and bullying. It is also appropriate to remind employees how to initiate internal complaints.

If you have never developed these policies you may want to consider doing so now.

Reassuring a nervous workforce

Making a statement now about diversity, harassment and discrimination risks the perception that the company is protesting the beginning of a new administration. Concerned employers can:

- Include disclaimer language to assure employees that reiterating the company's harassment and discrimination policies does not amount to support of any political position
- Direct questions about the statement to a specific person in HR
- Frame the statement organically through an existing meeting or policy review that addresses other subjects.

In evaluating your policies and codes of conduct, there are a few considerations (particularly for global employers) to consider.

EEO policies: Employers may wish to consider a broad policy statement of tolerance and inclusion that encompasses certain categories regardless of local law, such as ethnicity, race, color, gender identity, gender equality, concern about sexual or racial harassment, physical or mental disability and political ideology.

Also consider strengthening language prohibiting bigotry, sexism, racism, homophobia and xenophobia in action or attitude.

It is also helpful to review sexual harassment definitions and examples to ensure they are timely and comprehensive.

Bullying: Bullying or harassment not tied to a protected category violates the law in an increasing number of non-U.S. jurisdictions, so global employers may wish to include a general anti-bullying statement in their policies.

These may contain a nonexhaustive list of prohibited behavior such as imposing unreasonable deadlines, humiliating workers or third parties, withholding material information to reduce an individual's effectiveness and blocking training opportunities.

Make clear that bullying is prohibited whether it takes place over email, instant message, text message or social media, as well as in person. Remember that even bullying that occurs outside the workplace may create risks for employers.

Discipline for violations: Make clear in the policy that violations will result in discipline, up to and including termination.

Investigation protocols: When overhauling tolerance and diversity policies, include investigation protocols in the review—and ensure thoroughness and fairness when investigating complaints. Employers should review their investigation protocols, as well as how they are implemented in various jurisdictions.

Beware limiting access: Look out for provisions in investigation protocols that may put undue pressure on employees to resolve issues themselves or that permit employees to raise issues only with their immediate supervisors.

Due process: Observe due process to ensure that discipline will hold up to challenges. Some countries give employees under investigation the right to an accompanying representative during a meeting; management must be aware of all available legal protections.

Written fact-finding: To protect employers in situations in which claims are possible on both sides, investigations should conclude with written fact finding (including credibility evaluations), rather than reaching a legal conclusion, such as "lack of sufficient evidence."

Nonretaliation: An audit of retaliation language is critical to your tolerance efforts. Employers have a duty to protect employees from retaliation and to ensure and promote a positive and respectful working environment.

Put anti-retaliation language where employees can see it. That helps foster a culture where they feel safe enough to report violations without reprisal. This not only reduces legal risk, it improves workforce morale.

While no easy answers exist in a divided political climate, the time is ripe for reflecting on and reaffirming diversity and inclusion.

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Trump administration may mean big employment law changes

By Jan. 20, when Donald J. Trump is sworn in as president, Republicans will have control of the White House and both houses of Congress for the first time since 2007. Expect them to use that power to reshape the employment law landscape.

THE LAW President Trump will have the opportunity to nominate a Supreme Court justice that could provide a 5-4 conservative majority. The administration change will also tilt the balances of the National Labor Relations Board and the EEOC.

Trump's Labor Department will probably not defend the Obama administration's overtime regulations that are currently in legal limbo. *(See "Court halts Obama overtime regs" at right.)*

During the campaign, Trump promised to repeal many of President Obama's executive orders, but it is not clear which ones he has in mind. Obama made extensive use of executive orders to require federal contractors to pay a higher minimum wage, provide paid leave and set goals for hiring disabled workers.

WHAT'S NEW Almost everyone who heads executive agencies will be new under President Trump. At the NLRB, most expect Republican board member Phillip A. Miscimarra to become chair of the board, and two Republican appointees will return the board to its full complement for the first time since 2015.

During the Obama years, the NLRB issued a steady stream of pro-union, pro-employee rulings that likely will be curtailed under a Republican-controlled board. Miscimarra was often a dissenting vote on those decisions.

The EEOC's investigatory practices have been the subject of two Supreme Court cases under the Obama administration, with employers alleging the commission strong-armed them into settlements or issued overly broad subpoenas. Chair Jenny Yang, who has pushed the EEOC's aggressive policies, will leave her position July 1, 2017. The Trump administration will have the opportunity to appoint a new chair and conceivably change the commission's direction.

At the Department of Labor, fast-food executive Andrew Puzder will likely be confirmed as Labor Secretary.

Expect big changes under his leadership.

It is doubtful whether the overtime overhaul in its current form will ever see the light of day again after being blocked in federal court.

HOW TO COMPLY Changes will take hold over the coming months as the new administration gains its sea legs.

NLRB issues

Changes at the NLRB could occur quickly or drag out for as long as a year. Terms at the board are staggered; the first to expire is that of Miscimarra, a Republican. In the wake of the Supreme Court's ruling in *NLRB v. Noel Canning*, the NLRB cannot make any decisions unless it has a quorum of three members.

A "kill the board" lobby in the Senate could get its wish by either not confirming anyone President Trump nominates or persuading him not to nominate anyone.

The alternative is for President Trump to re-nominate Miscimarra and two new Republican appointees.

General Counsel Robert D. Griffin's term expires Nov. 4, 2017. Griffin's role is to bring unfair labor charges against employers if complaints warrant that action. He has been a sympathetic ear for organized labor during his term.

An EEOC reversal

Most likely President Trump will appoint as EEOC chair a less aggressive successor to the controversial Yang. Trump campaigned on a platform of less regulation and the EEOC has been a lightning rod for criticism during the Obama administration.

Additionally, a Supreme Court case testing the limits of the EEOC's subpoena power will be decided before the court adjourns in June. However, the court may still have only eight members at that time.

No doubt the Trump administration will govern very differently than the departing Obama administration. Stay tuned.

Court halts Obama overtime regs

Days before the Obama administration's overtime regulations were scheduled to go into effect on Dec. 1, 2016, a federal judge issued an injunction blocking them until two lawsuits challenging them are resolved.

The final regulations raised the salary threshold, moving the minimum exempt salary from $23,660 to $47,476 per year. It included no changes to the duties test.

That point caught the court's attention. Plaintiffs in two federal lawsuits requested an emergency injunction to halt the regulations, arguing that implementing them would cost employers millions of dollars. They said the overtime rules went beyond what the Fair Labor Standards Act authorized the DOL to regulate.

The judge hearing the cases concluded that it is likely that the FLSA does not authorize the doubling of the salary level without also making changes to the duties test that define who is an exempt employee. Thus, he reasoned the plaintiffs are likely to prevail in the end and issued the injunction.

by Joseph L. Beachboard, Esq., Ogletree Deakins, Los Angeles

What kind of pregnancy and family leave rights do gestational surrogates have?

Q One of our employees is a gestational surrogate for a woman who cannot carry a child. Is our employee entitled to pregnancy disability, FMLA or CFRA leave as a surrogate?

A California law is generally protective of surrogacy arrangements. It requires all public employers and private employers with five or more employees to provide up to four months of job-protected pregnancy disability leave if a woman is "actually disabled" by her pregnancy.

A woman qualifies if "in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons."

Examples of such conditions include severe morning sickness, bed rest, preeclampsia, childbirth and recovery from childbirth.

Eligibility does not depend on the reason for the pregnancy. Thus, a worker who is a surrogate mother would be entitled to pregnancy leave if she were disabled by her pregnancy.

Employers with 50 or more workers are required to provide 12 weeks of leave under the federal FMLA and the California Family Rights Act (CFRA) to those who have been employed by the company for 12 months and who have worked at least 1,250 hours.

The FMLA provides that leave for pregnancy disability leave under the FMLA may run concurrently with California pregnancy disability leave, enabling the four months of pregnancy disability leave and 12 weeks of FMLA leave to be used simultaneously. However, if an employer fails to provide notification that it intends to run FMLA and pregnancy disability leave concurrently, the employee may be entitled to additional FMLA leave if she exhausts pregnancy disability leave and still suffers from a serious condition.

Like the FMLA, the CFRA also provides for leave that many people take when they have a child. However, unlike the FMLA, CFRA and pregnancy disability leave do not run concurrently. California law provides that a worker's entitlement to CFRA is "separate and distinct" from her entitlement to pregnancy disability leave. Thus, at the end of her pregnancy disability leave, a new mother can generally request up to 12 weeks of CFRA leave "for reason of the birth of her child" (which is often referred to as "bonding" leave).

However, as a surrogate generally gives the child to its legal parents at birth and the child is not hers, a surrogate would likely not be eligible for bonding leave under the CFRA. An exception to this occurs if the surrogate stands *in loco parentis* to the child.

Mothers using surrogates

A related question concerns employees who are using a gestational surrogate to have a child. Are they entitled to pregnancy leave or bonding leave? No and yes.

Since a woman using a gestational surrogate would not be pregnant, she would not be entitled to pregnancy disability leave. However, she would be entitled to 12 weeks of leave under the FMLA and CFRA to bond with her child (if the employer were covered by the FMLA or CFRA).

Though CFRA does not mention surrogacy, it does provide for leave to bond with the new child in the first year after his or her birth or placement with the family—be it an adopted or biological child. A child born with the help of a gestational surrogate is not likely to be an exception, as CFRA covers several types of families. It is important to note that FMLA and CFRA leave run concurrently, so a woman who used a gestational surrogate would not be entitled to 24 weeks of bonding leave.

Call of (jury) duty: What must we do?

Q What are California employers' obligations with regard to workers who get called on for jury duty?

A California Labor Code Section 230 prohibits employers from discharging or otherwise discriminating "against an employee for taking time off to serve as required by law on an inquest jury or trail jury" if the worker provides "reasonable notice."

The California Division of Labor Standards Enforcement and the Department of Industrial Relations handle complaints about violations. A worker who has been discharged in violation of this provision is entitled to reinstatement and the payment of back wages and lost benefits. An employer that willfully refuses to rehire, promote or otherwise restore an employee is guilty of a misdemeanor.

California employers are not required to pay workers during jury service. However, an employee can use his or her accrued vacation time, personal leave or compensatory time off for this purpose.

Advice: Consider that not paying for time at jury duty could affect an employee's exempt status.

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