

First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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Employment Law Risk Avoidance (Part II)

Top Ten Preventive Things Employers Should Do Now

This bulletin concludes our two-part series for employers that seek to use best practices to avoid employee lawsuits and claims. The economic downturn has caused layoffs and other downsizing initiatives that tend to reduce options available to terminated employees. It has become more difficult for terminated or “downsized” employees to find new work. The result: current and former employees are taking their complaints to the courts and Department of Labor Standards Enforcement (“DLSE”) more frequently than ever before.

To minimize lawsuits and risk, the following five areas should be considered and, where feasible, acted upon. Topics 1-5 were covered in our March 2010 bulletin, which is available on our website at www.thoits.com.

6. Independent Contractor – Employee Distinction

This year, the IRS plans to conduct 6,000 random audits to identify misclassified employees. In California, the Employment Development Department (“EDD”) investigates misclassification of employees and, if misclassification is found, can issue an assessment against the offending business to recover tax-related withholdings the employer should have paid but didn’t, plus penalties. Misclassification can also result in individual or class action private suits seeking employee fringe benefits that weren’t paid because of the misclassification. This is a mistake few employers can afford, and it’s important to make sure employees are properly classified now. Some employers have instituted lay-offs only to immediately retain former employees as independent contractors doing the same job they did before the lay-off. This is particularly risky and should be avoided.

California Labor Code section 3353 defines an independent contractor as “any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.” People often think someone is an independent contractor if they ask to be called an independent contractor, or sign a contract defining them as an independent contractor, or if they only work occasionally or on call, or are only paid commissions, or if they do projects for other employers. But this is not the focus of the common law test in California. A California court will examine whether the contractor has a right to control the manner and means of accomplishing the desired result, as well as several other factors that indicate the degree of the contractor’s right to control. The requirements for determining a contractor’s status are available online at www.edd.ca.gov, and the federal requirements are available at www.irs.gov. Employers should take the time to review the requirements and consult legal counsel if they utilize any independent contractors.

7. Meal and Rest Break Requirements

Many lawsuits now include a claim that the employer failed to allow proper meal and rest breaks. Since wage and hour policies often affect a company's entire workforce, or a substantial segment of it, violations are often brought as class actions, meaning that the wages and penalties for missed breaks can add up substantially. In general, employees must be given a 30-minute undisturbed meal period for each 5 hours worked, and a 10-minute rest period for each 3.5 hours worked. The penalty for an employer's meal or rest break violation is one hour of pay for each day that a break is missed. In 2007, the California Supreme Court decided that the one hour of premium pay is considered a "wage" and not a "penalty," meaning that a three- or four-year statute of limitations will apply, instead of a one-year statute of limitations. This ruling greatly enhanced the potential value of these claims.

The California Supreme Court will soon decide another important issue concerning meal and rest breaks, and that is whether employers must ensure that breaks are taken or simply provide for them. The distinction is critical because employers can indeed take control of "providing" the breaks whereas they can't always control whether an employee actually takes the breaks that are provided.

The best practices for avoiding meal and rest break litigation start with good employee handbook policies, which should adequately describe that regular breaks are provided. Employers are required to document meal breaks on time sheets, but not rest breaks. Employers are advised to document both, however, since lack of good documentation may lead to a presumption that breaks were not taken. Employers want to be in a position to prove that breaks were provided and also taken. Toward that end, employers should require that employees certify each timesheet, as follows:

"I have been provided with, and have taken, all meal and rest breaks to which I am entitled each workday based on my hours worked; and I have not worked any overtime or regular time other than my time shown on this time sheet." [signed by employee.]

8. Bulletproof Final Release Agreements

First, there is no such thing. And it is particularly frustrating for an employer to settle a claim with an employee, expecting to conclude all matters, and discover there is more work to do. It is common for current and former employees to sign release agreements and then

continue to pursue a claim against the employer seeking further relief or to address another alleged wrong. It is especially tricky to obtain a full and final release of wage claims because California laws and public policy stringently protect an employee's right to be promptly paid all earned wages. It's also important to remember that wage claims can include bonuses and commissions that have been earned but remain unpaid. Further complicating things, conditioning an employee's execution of an agreement on a waiver of wages that are undisputedly due can be a misdemeanor (Labor Code §206.5.)

In settling any dispute, employers should ensure that typical, broad release language is used in the final agreement. On top of that, additional language can be used to help ensure that once the release is executed, additional or renewed claims will be difficult to pursue, and may be denied entirely. Two cases in 2009 clarified the requirements to gain an effective release of disputed wages. (*Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796, and *Watkins v. Wachovia Corporation* (2009) 172 Cal.App.4th 1576.)

A valid settlement and release should state facts showing: (1) the existence of a bona fide dispute regarding whether or not wages are owed, (2) that the employer has paid all the undisputed wages without regard to whether the employee signs the release, and (3) that the employee is receiving something of value in exchange for releasing the right to sue for additional wages. If all these factors are met, a court is more likely to find the release enforceable and deny the employee's additional claims after execution of the release. Both of the cases analyzing this issue involved overtime claims for misclassified employees, so they may be limited in scope. But they provide useful guidance for employers and their counsel drafting the release agreement. There are other issues calling for tight release language, such as age discrimination waivers and federal wage claims under the Fair Labor Standards Act. Care should be taken to prepare the final release so that the employer gets the full and final release that it bargained and paid for.

9. Use of Confidentiality Agreements to Protect Confidential Customer Lists

Employers should know that, after the California Supreme Court's 2008 ruling in *Edwards v. Arthur Andersen, LLP* (44 Cal. 4th 937), there is no such thing as an enforceable non-compete agreement in California. But many companies want to restrict their former employees' use of confidential information, including client lists. The question is, what is the best way to protect that information? After *Edwards*,

some thought it still might be possible to use a non-solicit agreement to prevent misuse of confidential information, even though the *Edwards* court seemed to suggest otherwise.

In 2009, the appellate court in *The Retirement Group v. Galante*, (176 Cal. App. 4th 1226), denied an employer's request for an injunction to restrain former employees' use of client information to compete. The case expanded upon *Edwards*, and held that the non-solicit agreement was unlawful, and the court would not enjoin the offending employees from "soliciting" clients. Instead, the court explained, the employer should focus on stopping the misuse of its trade secret information.

If an employer takes reasonable steps to keep customer lists confidential, and takes care to handle its sensitive information properly, the information may be a trade secret that former employees can't simply take and use after their employment ends. Employers need to know that non-compete and non-solicit agreements that restrict a person's ability to work in their chosen field won't be enforced, and the best way to protect the crown jewels is to treat them as such, with a focus on the laws that protect against theft and misuse of trade secrets. The best practice is to have a confidentiality agreement that defines the company's trade secret information and prohibits any misuse of that information.

10. Train Front-Line Managers on Best Practices

Front-line managers are often the company's first line of defense against problems including sexual harassment, discrimination and wage & hour issues, among other things. Consider that an employee may be inclined to trust his or her own manager with issues before going to human resources or upper level management. If trained well, the front-line managers can put out minor fires before they become explosions. Managers can be trained in the hiring process and the termination process, and everything in between, including recruitment, interviews, performance reviews and counseling, and final termination meetings. Best practices in all areas can be covered in detail in group or individualized training.

Employment counsel can add great value by helping companies manage risks to avoid costly mistakes resulting in lawsuits. Please contact us to discuss any of these topics or others, and be sure to subscribe to the firm's blog, at www.thoitlaw.com to stay informed of emerging issues in employment law.

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