

First Wednesday

By Jeffrey A. Snyder

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

January 7, 2009

Issue No. 69



Jeffrey A. Snyder

Jeff is a Shareholder of Thoits, Love, Hershberger and McLean, specializing in employment law and related litigation.

He can be reached at
(650) 327-4200 – Phone
(650) 325-5572 – Fax
jsnyder@thoits.com

2009 Employment Law Update

Summarized below are the most important new laws and changes for California employers to know in 2009:

Driving and Texting

The Great American Novel shouldn't be penned while driving on Highway 101. Similar to the hands-free cell phone law that took effect last year, as of January 1, 2009, text-based communication while driving is illegal. Penalties are the same under both the cell phone and text prohibitions — \$20 for the first offense and \$50 for subsequent offenses. The law prohibits writing, sending or reading text-based communication, including text messaging, instant messaging and e-mail on a wireless device or cell phone.

Employers are subject to potential liability if the violator causes injury or property damage while on a work-related errand or otherwise acting within the scope and course of employment. Many employers have adopted cell-phone usage and driving policies in their employee handbooks; these should be reviewed and modified to address texting.

Salary Increase for Computer Professionals to Qualify as Overtime-Exempt

In late 2008, Governor Schwarzenegger signed urgency legislation amending the overtime exemption that applies to certain computer professionals working in California. This allowed an exemption from overtime requirements for a computer professional who is paid on an hourly basis at a rate of at least \$36 or, if paid on a salary basis, an annual salary of at least \$75,000. This amendment to California Labor Code section 515.5 was significant because it allowed employers to pay computer professionals a salary instead of tracking and paying for each hour of time worked. As of January 1, 2009, in order for the computer professional to qualify for exempt status, the required salary has been increased to \$79,050. If the employer wants to pay computer professionals by the hour, then the minimum hourly rate is increased to \$37.94. This requires that employers pay for every hour worked, including required travel time, but not any premium pay for overtime. However, the payment of a minimum \$79,050 annual salary covers all time worked.

The computer professional who makes or exceeds this level of compensation, and also meets the “duties” test, is exempt from overtime premium pay. This exemption, however, remains unique in that Labor Code section 515.5 only exempts these employees from the overtime requirements. The Division of Labor Standards Enforcement has taken the position that the computer professional employee remains covered by the other protections for non-exempt employees in the relevant wage orders, such as the rules regarding meal and rest periods.

Decrease for Mileage Reimbursement

Employers must reimburse employees for their expenses incurred while on the job. The Internal Revenue Service has lowered the standard business mileage reimbursement rate from 58.5 cents per mile to 55 cents per mile, effective January 1, 2009.

ADA Amendments Act of 2008

This may be the most significant and complex new legislation for employers to grapple with in 2009. The federal Americans With Disabilities Act (“ADA”) and the California Fair Employment and Housing Act (“FEHA”) are the main laws covering individuals with disabilities in the workplace. The ADA applies to all employers with 15 or more employees. The FEHA covers all California employers with 5 or more employees. Most California employers will have to comply with both laws when interacting with a worker who has a disability, or is regarded as having a disability. These laws essentially cover two broad areas: (1) the interactive process and employers’ duty to provide “reasonable accommodation” for a disabled individual; and (2) protection of a disabled employee from discrimination in employment. The new laws apply to the ADA only, and deal mainly with the issues arising under (1) of the preceding sentence.

The ADA Amendments Act of 2008 (“ADAAA”), effective January 1, 2009, broadened the definition of a “qualified individual with a disability,” changed the rules regarding consideration of that individual’s use of mitigating measures, such as medication and assistive technology, and broadened the definition of “major life activities.” When considering whether an employee is disabled, employers may no longer consider mitigating measures that the individual might use, with the exceptions of eyeglasses and contact lenses. Overall, these changes will make it less likely

that employers can prevail in the early stages of ADA litigation, meaning that more time and care should be taken in the pre-litigation “interactive process” with a disabled employee.

Employers need to review their existing policies and procedures for ADA compliance at every stage, including interviewing, hiring, medical testing, job accommodation, leave and termination. In very general terms, it is now less important to consider whether the individual is a “qualified individual with a disability” and much more important to consider issues such as whether the individual can be reasonably accommodated so as to perform his or her essential job functions, and whether such accommodations would create an undue hardship for the employer.

New Paycheck Rules for Temporary Workers

The California Legislature has added Labor Code section 201.3 regarding prompt wage payment obligations for temporary workers. The new law applies to the wage payment obligations of temporary staffing firms. Temporary staffing firms must pay temporary employees at least once per week, whether or not the assignment has ended, and not later than the regular payday of the following calendar week. Wages must be paid daily to temporary employees assigned to work for clients on a day-to-day basis, assuming the employee is not considered exempt under the California overtime rules. These pay provisions do not apply to temporary employees with assignments lasting over 90 consecutive calendar days, unless the staffing agency pays the employee weekly in accordance with the new provision. Discharged employees continue to be entitled to receive their final wages immediately, as required by Labor Code section 201.

Laws Regarding Meal and Rest Periods in Flux

Last summer, the California Court of Appeal in San Diego decided a major case involving the issue of whether employers had to ensure that employees take their meal and rest breaks, or whether the meal and rest breaks simply needed to be provided. In the *Brinker Restaurant* case, the appellate court ruled that employers had to provide meal periods, but not ensure they were taken. This decision clarified a point of major concern for employers, because the

penalties for non-compliance can add up quickly. However, since the California Supreme Court has now decided to review the *Brinker* decision, the issue is unsettled. In essence, the *Brinker* appellate court decision cannot be relied upon as good law, and there are conflicting appellate court decisions on this issue. Most recently, in *Brinkley v. Public Storage, Inc.*, the appellate court in Los Angeles determined, similar to *Brinker*, that the employer merely had to provide meal breaks and not ensure they were taken.

Until the California Supreme Court provides more guidance, it is highly recommended that employers use a written verification that the employee has been provided with his meal and rest breaks, such as using a typed statement on the timesheet forms that the employee signs and certifies that the proper breaks were provided. If the employee missed a break, it should be specifically noted. The most conservative employers will take extra steps to make sure the breaks are actually taken, but this can be impractical. Provision for the legally-required meal and rest breaks should also be spelled out in the employee handbook.

Expanded Definition and Penalties for Invalid Release of Wages

It has long been the law that an employer cannot require the execution of a release of a claim or right on account of wages due, or to become due, unless payment of those wages has been made. Under existing law, it is a misdemeanor for an employer to violate this prohibition and a release required or executed in violation of the prohibition is void. Labor Code section 206.5 has now been amended to expand the definition of “execution of a release” to include cases where an employer requires an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false. By adding to what is included within the definition of an “execution of a release,” this law effectively expands the crime resulting from a violation of the statute.

Individual Supervisor Liability

In a victory for supervisors, the California Supreme Court held that individual supervisors cannot be held liable for retaliation under the Fair Employment and Housing Act (“FEHA”). This ruling, *Jones v. The Lodge at Torrey Pines*, followed a 1998 ruling in

which the California Supreme Court held that supervisors are not personally liable for discrimination under FEHA. The rationale is that a supervisor facing the possibility of personal liability to employees would ultimately chill the ability or desire of supervisors to perform their job out of fear that any decision ultimately made by the employer could expose them to liability. “If an employee gains a reputation as a complainer, supervisors might be particularly afraid to impose discipline on that employee or make other lawful personnel decisions out of fear the employer might claim the action was retaliation for complaining.” One issue that was not addressed by the court was whether a supervisor who is personally liable for harassment (not discrimination, but harassment) can also be personally liable for retaliating against someone who reports or opposes that harassment. In summary, supervisors can still be held individually liable for harassment, but not on a discrimination or retaliation theory, with the possible exception of retaliatory conduct following the supervisor’s own harassment of the employee.

Revised FMLA Regulations

The new Family and Medical Leave Act (“FMLA”) regulations take effect on January 16, 2009. FMLA is a federal law that allows eligible employees to take unpaid leave for up to 12 weeks with the guarantee of reinstatement to the same or similar position after returning from the leave period. California has a similar law, known as the California Family Rights Act (“CFRA”). Both FMLA and CFRA apply to employers with 50 or more employees within a 75-mile radius. These amendments are the first significant overhaul of FMLA regulations and implementation since its enactment over 15 years ago. Employers should review their work force to determine whether (1) FMLA applies to them, due to the 50/75 rule, and (2) if so, whether their guidelines meet the new legal requirements.

The new FMLA regulations will be covered in depth in a future edition of this newsletter. The significant changes include new provisions on military caregiver leave, related rules on qualifying exigency leave, and revisions and additions to existing FMLA rules including the following: employer and employee notice requirements, new medical and fitness-for-duty certifications, clarification of the definition of serious health condition, intermittent leave, breaks in service

and FMLA eligibility, light duty, substitution of paid leave, relief for employers who fail to properly designate FMLA leave, perfect attendance awards, rules specific to professional employer organizations, new FMLA forms and new poster and notice requirements.

In conclusion, 2008 was very active in terms of federal legislation affecting employers and granting further protections to disabled employees and those in need of leave, in particular. California employers will need to continue to follow both federal and California law in these important areas.

First Wednesday Distribution List:

- If you are not receiving this newsletter directly, please send me your e-mail address and I will add you to the First Wednesday Distribution List.
- If you would like this newsletter redirected to others within or outside your organization, please send me their e-mail addresses.
- First Wednesday is a publication of general applicability and not specific to any set of facts. Thus, it should not be relied upon for any specific case or matter without further discussion. No attorney-client relationship is formed as a result of your reading or replying to this newsletter, which is not intended to provide legal advice on any specific matter, but rather to provide insight into current developments and issues.

THOITS, LOVE, HERSHBERGER & McLEAN JEFFREY A. SNYDER

Thoits, Love, Hershberger & McLean
Two Palo Alto Square, Suite 500
3000 El Camino Real
Palo Alto, California 94306
Telephone: (650) 327-4200
Facsimile: (650) 325-5572
E-mail: jsnyder@thoits.com