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What Employers Include on Their Holiday Wish Lists

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Gov. Arnold Schwarzenegger's post-election comments signal a willingness to consider legislative proposals that would improve California's overall business climate while upholding employee protections. With that spirit in mind, employers hope the Legislature and governor might consider the following proposals.

Wage-and-Hour Issues

Labor Code Section 512 requires employers to provide 30-minute meal periods, depending on the hours worked, but does not clearly specify when during the shift these meal periods must be provided. With nine-figure damages awards possible for technical Labor Code violations, employers need additional clarity on this particular point. The Department of Labor Standards Enforcement's proposed regulations might have clarified the issue, but they have been stalled since early this year. Hopefully, the department will push forward with these regulations, or the Legislature will consider amending the statute.

Section 512 also provides no guidance on what it means to "provide" meal periods. Most employers attempt to enforce policies mandating employees take meal periods, but they cannot guarantee that employees take the full meal period unless they physically escort employees from the premises. Requiring such Draconian steps is counterproductive, as is penalizing employers who attempt to comply with the law, which may effectively reward a misbehaving employee. The department's proposed regulations state that employers will be deemed to have provided a meal period if they inform employees of the right to take a meal period, give employees the opportunity to take the meal period and keep accurate time records. Again, employers hope the department regulations will be enacted or the Legislature will consider corresponding amendments to Section 512 to protect employers.

Labor Code Section 226.7 imposes a statutory penalty of one additional hour of pay on employers who fail to provide required meal periods. Although this penalty clearly applies when the meal period was denied altogether, whether it applies to very minor violations (for example, the employee's 30-minute meal period ends one minute early or the employee goes to lunch five minutes late) is less clear, especially when the employee is responsible for the violation. The Legislature should take the common-sense approach used by federal courts in not penalizing employers for "de minimis" violations of federal overtime provisions.

California's wage orders exempt certain employees from overtime requirements, but they do not define exempt status clearly. In contrast, the Labor Department has issued very clear and surprisingly easy-to-read guidelines and issued opinion letters that address frequently asked questions regarding the Fair Labor Standards Act. Hopefully, the Legislature will create similar exemption rules for California. Examples might include adopting the act's interpretation of the "highly compensated employee" (earning at least $100,000 annually) exemption, which would provide at least one bright-line rule. Another example might include adopting the act's primary-duties test rather than the nearly indecipherable 51 percent test used in California.

FEHA Issues

The California Supreme Court adopted portions of the federal Farragher/Ellerth affirmative defense to harassment claims but did so as a basis for reducing damages rather than as a complete defense.

State Dept. of Health Services v. Superior Court (McGinnis), 31 Cal.4th 1026 (2003). Many interpret this to mean that harassment claims based on supervisor misconduct must go to trial, even where it is undisputed the employer acted reasonably and the employee acted unreasonably from Day One.

However, mandating trials on such facts only drives up employer defense costs or extorts settlements based on the threat of runaway jury verdicts rather than the case's merits.

McGinnis emphasized that FEHA's statutory language at the time dictated this result, and it invited the Legislature or the Fair Employment and Housing Commission to make further amendments. The Legislature and the commission should accept this invitation and

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amend the act to allow employers to dispose of baseless claims at the summary-judgment stage.

Although the California Approved Civil Instructions improved on the Book of Approved Jury Instructions in many respects, the causation standard for FEHA claims remains ambiguous. The CACI instructions mysteriously put FEHA liability in terms of a protected criterion being a "motivating reason" for the challenged action, but the act prohibits unlawful employment practices "because of" a protected classification. The CACI instructions also fail to define "motivating reason" and omit the "mixed motive" affirmative defense required under federal law whenever a plaintiff pursues the more lenient "motivating factor" legal theory. In 2007, the Legislature and/or judicial council hopefully will resolve these ambiguities by adopting a clearer causation standard.

A quartet of recent California Supreme Court decisions, coupled with sound public-policy considerations, make clear that supervisors should not be individually liable for FEHA retaliation. *Reno v. Baird,* 18 Cal.4th 640 (1998) (supervisors immune from FEHA discrimination claims for adverse employment actions taken on behalf of employer); *Yanowitz v. L'Oreal USA,* 36 Cal.4th 1028 (2005) (adopting same definition of "adverse employment action" for FEHA discrimination and retaliation claims); *Carrisales v. Dept. of Corrections,* 21 Cal.4th 1132 (1999) (FEHA's designation of "person" as entities prohibited from harassing does not authorize individual liability); and *McClung v. Employment Dev. Dept.,* 34 Cal.4th 467 (2004) (amendment authorizing individual liability for harassment "changed" FEHA by adding liability that did not previously exist and therefore cannot apply retroactively).

Using a simplistic statutory interpretation rejected by *Carrisales*, some courts allow retaliation claims against supervisors. The result is supervisors are immune from most claims but face costly litigation on the same facts simply because the plaintiff pleads a retaliation claim, not a discrimination claim.

As *Reno* predicted, this perverse result adds nothing to the lawsuit and simply frightens supervisors and encourages gamesmanship. However, if the Legislature intends to hang a proverbial sword of Damocles over supervisors for every personnel-related decision post-complaint, then the Legislature should codify this intent by amending the retaliation provision.

Leave Laws

Both the California Family Rights Act and the Family and Medical Leave Act permit employees to take leave on an intermittent- or reduced-schedule basis, including on the shortest period of time that the employer's payroll system can track. Such intermittent leaves, which theoretically may be taken in one-minute increments, present obvious administrative nightmares in accounting for the leave. They also create a new category of employee on an indefinite reduced-schedule leave of absence.

Because no one intended such never-ending leaves, the Legislature might consider either enacting some form of minimum leave requirement or a cap on how long intermittent leave can be used for any single qualifying event.

Employers may have an obligation to provide a leave of absence as a "reasonable" accommodation under FEHA and the Americans with Disabilities Act and to effectively hold the employee's position open during this leave. The statutes provide no meaningful guidance on how long the employer must hold the position open or at what point additional leave becomes unreasonable, other than to suggest that leave becomes unreasonable once it creates an "undue hardship." Employers could benefit from a legislative pronouncement that leave need not last forever or at least that sets a benchmark end date.

Procedural Rules

The ADA's goal of providing equal access to public accommodations has been trampled by a cottage industry of serial plaintiffs filing quick-strike lawsuits to obtain significant attorney fees. Disproportionate fee awards increasingly prompt either quick settlements or forced closure of small businesses.

Requiring advance notice and an opportunity to cure before litigation would further the act's original purpose without depriving plaintiffs of a remedy in the case of recalcitrant property owners.

People commonly say that doing business in California is tough. It is near impossible when employers must comply with both statewide legislative enactments and local ordinances. Proposition F, which was enacted recently in San Francisco, mandates paid sick leave for employees. Although employers should be encouraged to provide benefits beyond those mandated by state law, subjecting them to every political subdivision's whims imposes unreasonable obligations and business costs. Accordingly, the Legislature might consider clarifying that the Labor Code (and similar) provisions have pre-emptive effect over conflicting municipal and similar provisions.

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