

California Employment Law

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California Employment Law 2002 — The Adventure Begins

As the new year arrives, employers with California operations once again will have to familiarize themselves with and adjust to new California workplace requirements. This article addresses some of the changes employers will encounter this year.

LACTATION ACCOMMODATION

Beginning January 1, 2002, employers must comply with new obligations regarding mothers who are breastfeeding their babies. More specifically, employers must:

- Make “reasonable efforts” to provide a private place where a mother can express milk; and
- Provide a reasonable amount of break time so that employees have sufficient time to express milk during their workday

Reasonable efforts to provide a private place.

The statute does not define what constitutes “reasonable efforts.” The private place must be a room or location other than a toilet stall and must be in close proximity to the employee’s work area. The room or location may include the place where the employee normally works if the workstation can be made private.

Reasonable amount of break time. The statute also does not define what constitutes a “reasonable amount” of break time. California

law already requires employers to provide employees with ten minutes of break time every four (4) hours, and the lactation accommodation statute provides that the lactation accommodation break shall, if possible, run concurrently with the break time California law already requires. If the lactation accommodation break time does not run concurrently with the mandated rest time, the lactation accommodation break time may be unpaid. Of course, employers should not deduct lactation accommodation time from exempt employees’ salaries because doing so likely would defeat the overtime exemption. Employers can decline providing additional break time *only* if providing such time would “seriously disrupt” the employer’s operations. The statute also leaves the term “seriously disrupt” undefined.

What employers should do now. Employers can take two measures now to prepare for their lactation accommodation obligations. First, employers should update their written policies to include lactation accommodation. Second, employers should begin considering what locations they will provide to employees who wish to avail themselves of the statute’s benefits.

NEW PROTECTIONS FOR DOMESTIC PARTNERS

On October 25, 2001, Governor Gray Davis signed comprehensive legislation (Assembly Bill 25) that adds many new legal protections to eligible couples that register with the state of California as “domestic partners.” These protections took effect January 1, 2002 and cover many areas of the law, including probate, tax, insurance and family law. Of particular interest to employers are the sections relating to providing sick leave, health insurance, and unemployment eligibility.

Definition of “domestic partner.” Under AB25, California will recognize a domestic partnership when:

- Both persons have a common residence;
- Both persons agree to be jointly responsible for each other’s basic living expenses incurred during the domestic partnership;
- Neither person is married or a member of another domestic partnership;
- The two persons are not related by blood in a way that would prevent them from being married to each other in California;
- Both persons are at least 18 years of age;
- Both file a Declaration of Domestic Partnership with the California Secretary of State; AND
- Both persons are members of the same sex or, if persons of opposite sexes, at least one of the persons is over the age of 62 and meets the eligibility criteria for Social Security.

“Kin care leave” extended. Currently, Labor Code Section 233 requires that employers allow employees to use one-half (1/2) of their annual accrued sick leave entitlement to attend to an illness of a child, parent, or spouse. AB25 amends Labor Code Section 233 so that

employees also may use one-half of their annual accrued sick leave entitlement to care for a domestic partner or the *child* of a domestic partner.

Unemployment benefits. Currently, the Unemployment Insurance Code provides that an employee has good cause to leave his or her work voluntarily to relocate with a spouse, such that the employee will still be eligible for unemployment insurance benefits. AB25 amends the Unemployment Insurance Code so that an employee also has good cause to leave his/her work voluntarily to relocate with his/her domestic partner.

Health insurance. Beginning January 1, 2002, health insurance providers must offer domestic partner coverage to employers that wish to purchase such coverage for their employees. If requested by the employer, the health insurance provider must offer coverage to the domestic partner of an employee, subscriber, insured, or policyholder, to the same extent, and subject to the same terms and conditions, as provided to a dependent of an employee, subscriber, insured, or policyholder. The health care provider may require a copy of a valid Declaration of Domestic Partnership.

What employers should do now: Employers should revise their sick leave policies to include using not less than one-half (1/2) of the available sick leave to care for a domestic partner or the child of a domestic partner as a permissible use of sick leave. Employers interested in purchasing “domestic partner” coverage should contact their health insurance providers to make arrangements to provide coverage for domestic partners.

WORKPLACE LANGUAGE POLICIES

Our October 2001 California Employment Law Alert discussed an amendment to the California Fair Employment and Housing Act that

prohibited employers from adopting or enforcing policies that limit the use of any language in the workplace unless there is a “justified business necessity.” The statute defines “justified business necessity” very narrowly and requires that the employer establish that there is no alternative practice to the language restriction that would accomplish the employer’s business purpose. This legislation took effect on January 1, 2002. A copy of the October 2001 California Employment Law Alert is available at the Kirkpatrick & Lockhart website (www.kl.com).

INCREASE IN STATE MINIMUM WAGE

Effective January 1, 2002, the state minimum wage will increase by fifty cents to \$6.75 an hour.

INCREASE IN MINIMUM SALARY FOR EXEMPT EMPLOYEES

As a result of the increase in the state minimum wage rate, the amount that an employee must earn in order to meet the minimum salary requirement for being an exempt employee also has increased. Effective January 1, 2002, employees must earn an annual salary of at least \$28,080.00 in order to be considered exempt.

INCREASE IN HOURLY WAGE FOR EXEMPT COMPUTER PROFESSIONALS

California allows employers to classify as exempt some computer professionals who are paid on an hourly basis. Beginning January 1, 2002, employers must pay these computer professionals at least \$42.64 an hour in order for the exemption to apply.

INCREASE IN UNEMPLOYMENT BENEFITS

Effective January 1, 2002, the maximum weekly California unemployment insurance benefits will increase from the current \$230 to \$330.

INCREASE IN MILEAGE REIMBURSEMENT RATES

Beginning January 1, 2002, the standard mileage rate allowed by the Internal Revenue Service for operating a car for business travel increases by two cents from 34.5 cents to 36.5 cents.

NO DISCRIMINATION AGAINST APPLICANTS FOR LAWFUL OFF-DUTY ACTIVITIES

Section 96(k) of the California Labor Code prohibits employers from discriminating against employees “for lawful conduct occurring during nonworking hours away from the employer’s premises.” Effective January 1, 2002, Assembly Bill 1015 extends that protection to *applicants* as well.

SPECIAL TAX TREATMENT FOR EMPLOYEE DONATIONS

Interest in employer-sponsored leave donation programs has increased since the events of September 11, 2001. These programs allow employees to donate all or a portion of their accrued vacation, sick leave, or paid time off (“PTO”) to charitable organizations. Ordinarily, such donations would be taxable to the employee.

In response to the September 11 tragedy, the Internal Revenue Service in Notice 2001-69 announced that employer-sponsored leave donations made before January 1, 2003, would not be considered taxable income to the employee nor subject to FICA and Medicare taxes. However, since this donation will not count as taxable income, the employee will not be able to take a deduction for this contribution when filing his/her income tax return. But the employer can continue to deduct the contribution as compensation paid to an employee.

NEW POSTER REQUIREMENTS

Beginning January 1, 2002, California employers will need to post new versions of mandatory posters. The state minimum wage poster has been revised to reflect the increase in the state minimum wage. Similarly, the mandatory poster "Harassment or Discrimination in Employment is Prohibited by Law" has been revised to reflect California's new law limiting English-only policies.

CALIFORNIA COURT REJECTS FEDERAL AFFIRMATIVE DEFENSE IN CALIFORNIA SEXUAL HARASSMENT CASES

On December 3, 2001, in *Department of Health Services v. McGinnis*, a California Court of Appeals held that an affirmative defense available to employers in *federal* sexual harassment cases could *not* be used in *state* sexual harassment cases under the California Fair Employment and Housing Act ("FEHA"). Under federal law, employers can defend themselves against liability for harassment by supervisors that does not result in a tangible employment action if (1) employers take reasonable steps to prevent and correct harassment; and (2) the employee unreasonably does not promptly complain.

Because employers cannot rely on the federal affirmative defense in state unlawful harassment cases, employers should implement measures to prevent unlawful harassment from occurring, including implementing comprehensive internal complaint procedures and educating the workforce regarding harassment.

Please let us know if we can assist you in understanding or implementing any of these recent changes in California employment law. We look forward to working with you in 2002.

Northern California

Charles L. Thompson IV
415.249.1017
cthompson@kl.com

Southern California

Thomas H. Petrides
310.552.5077
tpetrides@kl.com

CHARLES THOMPSON

cthompson@kl.com
415.249.1017



Kirkpatrick & Lockhart LLP

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