Client Alert

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AMENDMENTS TO CALIFORNIA LAW RECENTLY SIGNED BY GOVERNOR DAVIS WILL EXPAND EMPLOYEE RIGHTS

In late September, Governor Gray Davis signed into law a series of amendments to the California Fair Employment and Housing Act ("FEHA") and the wage and hour and other provisions of the California Labor Code. Although signed with little fanfare and publicity, the amendments significantly expand certain employee rights under California laws. Most of these new provisions take effect on January 1, 2001; some took effect immediately. California employers should take note.

ASSEMBLY BILL 2222 (PHYSICAL AND MENTAL DISABILITIES)

Assembly Bill 2222 ("AB 2222") significantly broadens the protections afforded under the FEHA to mentally and physically disabled California employees; it takes effect on January 1, 2001. AB 2222 clarifies the FEHA's definitions of "mental disability" and "physical disability " and extends to job applicants and employees significantly greater protections under state law than under the federal Americans with Disabilities Act ("ADA"). The changes, which reflect the Legislature's determination that the ADA provides only a "floor of protection" and its intention that state law provide "broader coverage" than federal law, include the following:

Mitigating Measures Not Considered

Whether one is disabled "shall be determined without regard to any mitigating measures," contrary to the United States Supreme Court's rulings in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (under the ADA, measures to correct or mitigate an impairment must be taken into account when determining whether a person is substantially limited in a major life activity). One who successfully controls an impairment with medication, corrective lenses, or a prosthesis, for example, although not protected under the ADA, nevertheless may be disabled under the FEHA.

Substantial Limitation Not Required

One need not be "substantially limited" in a major life activity in order to be protected under the FEHA. Under the ADA, mere limitations in one's ability to perform a major life activity do not trigger the Act's protections; the limitations must be *substantial*. A substantial limitation is one which renders an individual *unable* to perform a major life activity that the average person in the general population can perform, or *significantly* restricts the condition, manner or duration under which the individual performs the activity as compared to the average person in the general population. California law will now extend protection to individuals with mental and physical impairments that "limit" a major life activity. Under AB 2222, an impairment "limits" a major life activity if it merely makes the achievement of the major life activity "difficult." While California courts will decide what the new law means based on its language, an individual who finds it "difficult" to work, for example, may be protected under California law. So too may individuals who have conditions that make it "difficult " for them to achieve any other major life activity, such as sleeping or walking.

Broad Definition of Major Life Activities

Major life activities "shall be broadly construed" and shall include "social activities," as well as physical and mental activities. Interacting with others will likely now qualify as a major life activity under the FEHA. Employees who find it "difficult" to get along with co-workers, or feel socially isolated in the workplace, may assert that they are entitled to protection under state law.

"Working" is a major life activity even if the limitation implicates only one particular job, rather than "a class or broad range of employment." Under federal law, an employee is substantially limited in the major life activity of working only if he or she is unable to perform a class of jobs or a broad range of jobs.

Interactive Process an Independent Duty

It is unlawful for an employer not to engage in a timely, good faith, interactive process with an employee or applicant to determine effective

reasonable accommodations in response to the employee's accommodation request. Under the ADA and the FEHA, courts have found that employers show good faith in the "interactive process" by meeting with the employee who asks for the accommodation, requesting limited information about the impairment and what limitations the employee has, asking the employee what accommodation he or she specifically needs, and offering to discuss available alternatives if the requested accommodation creates an undue hardship. Under federal law, many courts have held that an employer's failure to engage in the interactive process is not a "per se" violation, and some have held that an employer that acts in bad faith in the interactive process is liable only if the jury could reasonably conclude that there is a reasonable accommodation which would have enabled the employee to perform the job. Under AB 2222, the FEHA no longer conditions employer liability on the employee's ability to perform his or her job with an accommodation; *any* request now triggers the employer's duty to respond in good faith. Accordingly, California law will extend greater protection to applicants and employees requesting accommodations and may be interpreted by the courts to impose liability on employers even if no reasonable accommodation exists.

ASSEMBLY BILL 1856 (PERSONAL LIABILITY FOR SEX HARASSMENT)

Assembly Bill 1856 ("AB 1856") effectively reverses the California Supreme Court's decision in *Carrisales v. Department of Corrections*, 21 Cal. 4th 1132, 90 Cal. Rptr. 2d 804 (1999) (a non-supervisory co-worker is not personally liable for sexual harassment under the FEHA; "If the Legislature believes it necessary or desirable to impose individual liability on coworkers, it can do so"). This decision was consistent with rulings in federal courts which have held repeatedly that an individual employee, whether supervisory or nonsupervisory, cannot be personally liable for hostile work environment sexual harassment under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

Personal Liability for Harassers

Beginning January 1, 2001, an employee of an employer covered by the FEHA may be held personally liable for any unlawful harassment, regardless of whether or not the employer also is liable because it knew or should have known of the conduct and failed to take immediate and appropriate corrective action. The proponents of AB 1856 noted in the State Senate that the amendment does not change existing law as to what *constitutes* harassment. "People will not be able to sue their coworkers for any little thing they find offensive. In order to create liability under FEHA, the harassment must be so severe that it produces an abusive working environment. This bill does nothing to change that standard." Senate Rules Committee, Third Reading. Opponents of AB 1856 argued, in part, that the amendment would lead to more lawsuits against individual employees, add to the already high cost of employment litigation, and interfere with an employer's ability to investigate and remedy incidents of harassment. *Id.* AB 1856 will be of particular interest to employers in light of the California Court of Appeal's recent ruling in *Jacobus v. Krambo Corp.*, 78 Cal. App. 4th 1096, 93 Cal. Rptr. 2d 425 (2000) (an employee who is sued by a coworker for sexual harassment is entitled to indemnification from his employer of the legal costs incurred in successfully defending the sexual harassment action). AB 1856, coupled with the indemnification provision in California Labor Code Section 2802, underscores for California employers the importance of establishing and communicating unambiguous sexual harassment policies, and ensuring and documenting that all employees regularly participate in employer-sponsored sexual harassment prevention training.

SENATE BILL 88 (WAGE AND HOUR PROVISIONS)

Senate Bill 88 ("SB 88") was designated as urgency legislation and took effect on September 19, 2000. It codifies changes in the rules regarding meal times, exempt status in general, and the exempt status of computer professionals in particular. The new Industrial Welfare Commission ("IWC") wage orders which took effect on October 1, 2000, likewise reflect these changes.

Computer Software Professionals are Exempt from Overtime

Although California employers hoped that SB 88 would create a computer professional exemption comparable to the federal computer professional exemption, the Act does not fulfill those expectations. First, SB 88 applies only to employees in the "computer software field," thus excluding computer professionals whose focus is computer hardware. Second, the list of skills required to qualify for the computer software exemption are far more detailed than those contained in the broader federal rule. Third, the hourly rate of pay necessary to qualify for the exemption is $41, or approximately $85,000 per year. Not only is this figure significantly above the federal hourly requirement of $27.63 which has remained unchanged since 1992, but the state rate will increase each October. To qualify for the California exemption, the employee must meet the following duties test: (1) be primarily engaged in work that is

intellectual or creative and requires the exercise of discretion and independent judgment; and (2) be primarily engaged in duties constituting the application of systems analysis techniques and procedures, or the design, development, documentation, analysis, creation, testing or modification of computer systems or programs or computer programs related to the design of software or hardware for computer operating systems. The employee also must be highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming and software engineering.

Beware: Some Computer Software Employees are NOT Exempt from Overtime

Under SB 88, the following types of employees do not fall within the scope of the special computer software professional exemption, even if they utilize some computer skills in the performance of their job duties: trainees; entry level employees; operators; employees engaged in the repair / maintenance of computer hardware; engineers who are dependent upon computer-aided design software but who are not in a computer systems analysis or programming occupation; writers; and computer software professionals who apply systems analysis techniques and procedures in the motion picture, television or theatrical industries.

All Exempt Employees Now Must Regularly and Customarily Exercise Discretion and Independent Judgment to Qualify

Prior to passage of SB 88, executive, administrative and professional employees were exempt from the overtime compensation requirements if they were primarily engaged in the duties that meet the test of the exemption and earned a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. SB 88 added the requirement that employees must customarily and regularly exercise discretion and independent judgment in order to qualify as exempt. Thus, an employee who occasionally is primarily engaged in exempt duties, but is not customarily and regularly so engaged, will not qualify. Note that there is certain to be confusion over the interpretation of this requirement, because the new Act uses both the words "primarily " and "customarily." The new wage orders define primarily to mean "more than one-half of the employee's work time," but the term "customarily" is not defined.

The Exclusion of Certain Registered Nurses From the Overtime Exemption Does Not Apply to Certified Nurse Midwives, Anesthetists and Practitioners

SB 88 allows employers to classify certified nurse midwives, certified nurse anesthetists and certified nurse practitioners as exempt from the payment of overtime compensation as long as they are primarily engaged in performing duties for which the respective certification is required and they meet the minimum monthly salary requirement.

30-Minute Meal Period

SB 88 provides that to the extent the IWC adopts or amends wage orders pertaining to meal periods, it may not do so in a way that conflicts with current law that requires an employee working more than five hours in a day to receive a meal period of at least thirty minutes, and an employee working more than 10 hours in a day must receive a second meal period of at least 30 minutes.

ASSEMBLY BILL 2509 (WAGE AND HOUR PROVISIONS)

Assembly Bill 2509 ("AB 2509"), which takes effect on January 1, 2001, makes a number of significant amendments to the California Labor Code, including the following:

Penalty for Violating Meal Period Rules

As discussed above, the California Labor Code mandates unpaid meal periods. Additionally, all employees who work an eight hour shift are entitled to two 10 minute rest periods. Under AB 2509, if an employer deprives an employee of the required meal or rest period, the employer must pay the employee a penalty of one hour's pay at the employee's regular hourly rate of pay for each workday that the employee misses a meal or rest period. Of course, the penalty would not apply if the meal period was properly waived. Current law provides that the meal period may be waived by mutual consent of the employer and the employee if the total work period for the day is no more than six hours. If the total work period for the day is more than 10 hours but less than 12, the second meal period may be waived by mutual consent of the employer and the employee, but only if the first meal period is not waived. Finally, note that this obligation will be codified as Labor Code Section 226.7 and not within Labor Code Chapter 500. This placement creates an issue regarding the scope of the collective bargaining exemption in Labor Code Section 514, because that exemption expressly limits its scope to matters found within Chapter 500.

Wage/Hour Appeals

Under the new law, an employer that appeals an award, order or decision by the Labor Commissioner is required to post a bond for the amount of the award. Further, while

an employee who prevails on a claim for unpaid overtime wages or unpaid minimum wages is entitled to recover attorneys' fees from the employer, the new law bars such a recovery for employers. The result, of course, being that there no longer will be any risk related to the filing of a meritless claim by an employee or former employee.

Employer Penalties for Issuing Checks to Employees Drawn on Nonexistent Accounts or Accounts with Insufficient Funds

An employer may be liable for a penalty up to 30 days' pay and fringe benefits for issuing checks to employees drawn on nonexistent accounts or accounts with insufficient funds unless the employer can prove, to the Labor Commissioner's satisfaction, that the violation was unintentional. The employee must attempt to cash the check within 30 days of its issuance.

Payroll Recordkeeping

While most employers currently provide employees with an itemized wage statement listing all applicable hourly rates and the number of hours worked by the employee at each rate, the new law requires this be done at least semi-monthly with the payment of wages. For piece-rate employees, the employer must disclose the number of piece-rate units and the applicable piece-rate for employees paid on that basis. Knowing and / or intentional noncompliance with this requirement may result in penalties of up to $4,000 per employee and payment of an employee's attorneys' fees.

Gratuities May Not be Deducted from Wages

AB 2509 provides that gratuities are the sole property of the employee(s) to whom it was paid. Accordingly, employers may not deduct gratuities intended for employees from wages otherwise owed to the employee. Further, employers must remit to employees, no later than the next regular payday, the full amount of gratuities paid by credit card. The employer may not deduct credit card fees from the gratuity left for the employee.

SENATE BILL 1305 (EMPLOYEE EXPENSE REIMBURSEMENT)

Senate Bill 1305 ("SB 1305") also takes effect on January 1, 2001. This law amends California Labor Code Section 2802. Section 2802 currently requires employers to reimburse employees for expenditures and losses incurred in connection with their employment. SB 1305 increases the penalties to employers who violate this law. Employees will be able to recover interest, costs and attorneys' fees if they are successful in a claim for unreimbursed business expenses.

Questions

California employers should immediately review their policies, procedures and practices to ensure compliance with the new laws. We encourage you to contact the Paul, Hastings, Janofsky & Walker LLP attorney with whom you work to discuss these amendments or:

Kirby Wilcox in our San Francisco office at (415) 835-1602 or mkcwilcox@phjw.com; **Stephen Berry** in our Orange County office at (714) 668-6246 or slberry@phjw.com; **Stephen Sonnenberg** in our Los Angeles office at (213) 683-6104 or spsonnenberg@phjw.com; **Leslie Abbott** in our Los Angeles office at (213) 683-6310 or llabbott@phjw.com.

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