

2007 Employment Law Developments

Hire

Employment Agreements

1. ***Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th 384 (2006)**
Plaintiff claimed his employer promised long-term employment throughout the hiring process. Upon hire, plaintiff signed an offer letter indicating that his employment was terminable at will "at any time." *Held*: After signing an at-will employment agreement, an employee cannot sue for false promises of long-term employment.

Employment Policies

1. ***Jespersion v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)**
Casino policy required its female beverage servers to wear makeup. Male employees were required to maintain neatly trimmed fingernails and hair. Female plaintiff refused to wear makeup, was fired and claimed sexual discrimination. *Held*: Employers may require employees to adhere to gender specific grooming standards as long as such standards do not impose a greater burden on either male or female employees.

Manage

Harassment/Discrimination

1. **Sexual Harassment Training Regulations (AB 2095)**
Limits mandated sexual harassment training to supervisors located in California. Additionally, the Fair Employment and Housing Commission has proposed modified sexual harassment training regulations which, if adopted, will be effective February, 2007. For more on the Commission's proposed regulations, visit http://www.fehc.ca.gov/pub/harassment_training.asp.
2. **Adding Sexual Orientation to Existing Protected Classifications (SB 1441)**
Adds "sexual orientation" to the classifications protected from discrimination in state funded agencies, programs and/or activities. Expands the definition of discrimination to include a perception that a person has, or is associated with a person who has or is perceived to have, any of the protected characteristics.
3. ***Lyle v. Warner Bros. Television Productions***
Typist working in the writer's room of the popular "Friends" sitcom alleged a hostile work environment due to open and sexually explicit conversations and depictions among the writers while discussing show ideas. Sexually charged atmosphere was not sexual harassment because discussions were never directed at plaintiff and her exposure was not "because of sex."
4. ***Ash v. Tyson Foods*, 546 U.S. 454 (2006)**
African-American male employees were referred to as "boy" and were passed over for promotions in favor of white males. *Held*: Reference to African-American employees as "boy," when considering such factors as context, inflection, tone, local custom and historical usage, could be evidence of discrimination.
5. ***Stamps v. Superior Court*, 136 Cal.App.4th 1441 (2006)**
The court confirmed an employee's right to sue for violation of the Tom Bane Civil Rights Act, California Civil Code §§ 51.7 and 52.1, where the employee is subjected to violence or intimidation based on "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute."

Health and Safety

- 1. Clarifying the Prohibition on Smoking in the Workplace (AB 2067)**
Smoking prohibition in places of employment includes lobbies, lounges, waiting areas, stairwells, elevators and restrooms.
- 2. Authorization of License Suspension in Barbering and Cosmetology (AB 409)**
Without a hearing, the State Board of Barbering and Cosmetology's executive directors may suspend a licensed cosmetologist, barber, esthetician, manicurist or electrologist, if doing so is required to protect the public's health and safety.
- 3. Roofing Contractors must have Workers' Compensation Insurance (AB 881)**
Requires all roofing contractors to have workers' compensation insurance. Also requires insurers to conduct annual audits and directs the Workers' Compensation Insurance Rating Bureau to compile an annual report. Failure to maintain such insurance authorizes removal of the roofing classification from a contractor's license.
- 4. Cell Phone Use Prohibition (SB 1613)**
Effective July 1, 2008, driving while using a cell phone without a hands-free device is a violation of the vehicle code. This prohibition is inapplicable if using a cell phone to contact a law enforcement or public safety agency for emergency purposes. This prohibition does not apply to emergency services professionals while operating an authorized emergency vehicle.
- 5. Emergency Response and Disaster Preparedness Handbook (AB 3058)**
Requires the Office of the Small Business Advocate, the Office of Emergency Services and the Department of Industrial Relations to hold meetings and collaboratively develop a web-based handbook for small businesses devoted to emergency preparedness, emergency response and recovery strategies.
- 6. Emergency Regulation Creation (AB 1302)**
Imposes new limitations and stricter requirements for the adoption of emergency regulations while allowing for increased public notice and participation in the regulation adoption process.
- 7. San Francisco Proposition F**
San Francisco voters passed proposition F (SF Paid Sick Leave Ordinance) this past November requiring paid sick leave for all employees who work in the city's geographic boundaries. The ordinance becomes effective February 5, 2007 and requires that 1 hour of paid sick leave be accrued for every 30 hours worked with an accrual cap of 40 hours paid sick leave for employers with less than 10 employees and a cap of 72 hours paid sick leave for those employers with 10 or more employees. Currently there is no distinction between exempt and non exempt employees.

Privacy

- 1. Access to Obscene Materials (AB 546)**
Outlaws the use of state-owned or state-leased computers by government officials or employees to access obscene materials.
- 2. Background Checks and Fingerprint Imaging in the Health Care Industry (SB 1759)**
Establishes requirements for background checks of certain administrators, executives and employees in the health care industry. Also establishes requirements for fingerprint transmissions.

Workers' Compensation

- 1. Exclusion of Public Safety Employees from the Presumption that Medical Apportionment Applied (AB 1368)**
Certain public safety members and employees are not required to meet the presumptive medical apportionment standard regarding the causes of specified job related illnesses and injuries.
- 2. Pre-designation Percentage and Sunset Date Extension (AB 2068)**
Permits employee pre-designation of a medical group as a primary treating physician. Also extends the sunset date of an employee's right to pre-designate to December 31, 2009 and deletes the maximum number of employees that may pre-designate.
- 3. Workers' Compensation Death Benefits to the Estate of a Deceased Worker (AB 2292)**
Specifies that death benefits must be paid to surviving dependents, personal representatives, heirs or other persons entitled to compensation under the workers' compensation laws notwithstanding the employee's accrued and unpaid compensation paid or owing to such a person.

Compensate

Wage and Hour

- 1. Increased Minimum Wage and Exempt Salary Standards (AB 1835)**
Increases California's minimum wage to \$7.50 per hour effective January 1, 2007, and then \$8.00 per hour effective January 1, 2008. The Department of Industrial Relations' permissible meals and lodging credits and wage orders must also be amended as a result of the increase.
- 2. Clarification to Computer Professional Exemption**
Computer software employees are exempt from California's overtime requirements if their rate of pay is at least \$49.77 per hour or the annualized full-time equivalent of that rate, provided all other requirements for the exemption are met.
(Caution: \$49.77 is the 2007 rate, which will change each year in relation to the California Consumer Price Index. Using the 2007 rate, the annualized full-time salary equivalent would be \$103,521.60).
- 3. Overtime Exemption for Teachers in Private Educational Institutions (AB 2613)**
Overtime compensation requirements do not apply to teachers at private elementary or secondary academic institutions, grades 1-12 inclusive.
- 4. Mileage Reimbursement Rate**
Increases the standard mileage deduction for business use of a motor vehicle to 48.5 cents per mile. Employers that reimburse at the IRS rate or lower may deduct that amount as a business expense. Employees reimbursed at a rate higher than 48.5 cents per mile may be required to pay taxes on the difference between their reimbursement rate and the IRS standard mileage rate.
- 5. Repeal Date Extension of Compliance Program in the Carwash Industry (SB 1468)**
Specific record keeping requirements must continue to be met by employers of car washers with regard to wages, hours and working conditions through the extended repeal date of January 1, 2010. The previous repeal date was January 1, 2007.
- 6. Penalty Assessment for Assisting an Employee or Contractor Obligor to Evade Child Support Obligations (AB 2440)**
Imposes a penalty on employers that assist an employee or contractor in evading child support obligations. The penalty imposed against the employer equals 3X the value of what the employer assisted the obligor in evading. However, the maximum liability owed must not exceed the entire child support obligation due.

7. **Overtime Reporting Requirements (AB 2095)**
Employers meet paycheck itemized statement requirements if overtime hours worked in the current pay period are itemized as corrections on the pay stub for the next regular pay period.
8. **Koehl v. Verio, Inc., 142 Cal.App.4th 1313 (2006)**
The employer's policy required sales associates to pay back any advanced commissions from sales to customers who cancel their internet service prior to paying for the first three months. Plaintiff alleged that requiring such payback violated California's Labor Code and Unfair Competition Law. The court ruled for the employer. Because the commissions were not "wages" until they were "earned," they could be charged back to the employee at any time before all conditions for earning the commissions were met.
9. **Neisendorf v. Levi Strauss & Co., 143 Cal.4th 809 (2006)**
Plaintiff was terminated in November. The following February, employee bonuses were disbursed. The court held that an employee terminated prior to the actual bonus pay out date is not entitled to the bonus.

Disability Discrimination/Failure to Accommodate

1. **Gelfo v. Lockheed Martin Corporation, 140 Cal.App.4th 34 (2006)**
Plaintiff was laid off. Thereafter, plaintiff was offered another position, but the offer was revoked because the employer determined that plaintiff's back injury did not permit him to perform the functions of the position. *Held:* Employers MUST engage in an interactive process aimed at effecting a reasonable accommodation to an applicant it regards as physically disabled.

Disability Leave

1. **Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006)**
An epileptic heavy equipment operator was terminated after having a seizure while operating heavy equipment. Employer alleged that plaintiff could not perform the essential functions of his position and that plaintiff's 'misconduct' posed a threat to the safety of others. Summary judgment initially granted against plaintiff, but subsequently reversed. Plaintiff's alleged 'misconduct' was a pretext for discrimination on the basis of a disability and a genuine issue of material fact existed as to whether a reasonable accommodation could have been provided in lieu of termination.
2. **Williams v. Genentech, 139 Cal.App.4th 357 (2006)**
Plaintiff received criticism from her supervisors regarding poor job performance, resulting in stress and worsening an existing medical condition. Plaintiff took a seven-month medical leave of absence. In the meantime, plaintiff's position was filled. Upon her return, plaintiff was terminated. *Held:* No disability discrimination was evident in plaintiff's termination because she was deemed to be "totally disabled" at the time her position was filled.

Payroll Taxation

1. **Domestic Partners May File Joint or Separate Tax Returns (SB 1827)**
Removes the inconsistency between registered domestic partners and spouses with respect to state income taxation. Domestic partners may now file their income tax returns jointly or separately. Additionally, the earned income of registered domestic partners will be considered community property.

Separate

Retaliation

1. ***Burlington Northern & Santa Fe Ry.Co. v. White***

Deterrence standard for Title VII Claims set forth. A retaliation claim exists if the employer's actions "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

Yanowitz v. L'Oreal USA, Inc.

Materiality standard for FEHA claims. A retaliation claim exists ONLY for employment actions that *materially affect* the terms and conditions of employment.

3. ***Taylor v. City of Los Angeles Department of Water and Power, 144 Cal.App.4th 1216 (2006)***

Complaint alleged the DWP stripped plaintiff's supervisory authority, threatened to terminate his 4/10 work schedule, barred him from completing supervisory certification courses, deprived him of information necessary to carry out job duties, and denied him a promotion. *Held*: Complaint sufficiently alleged retaliation under both California's "materiality" test AND the Federal "deterrence" test.

Unemployment Insurance

1. **Treatment of Payroll Service Companies in the Motion Picture Industry (SB 1428)**

A payroll service company can be treated as an employer of motion picture production employees in the motion picture industry if it reports such status to the Employment Development Department within 15 days of paying its first payroll or by January 15, 2007, whichever is earlier.

2. **Penalties Against Educational Employer's Willfully False Submission (AB 2293)**

Authorizes the Director of the Employment Development Department to assess penalties against an educational institution employer, employee or agent of the employer for willfully making false statements or representations concerning the termination of an employee's employment. Claimants must be performing services for an educational institution. Penalties are to be deposited into the Employment Development Contingent Fund.

Wage and Hour

1. **Final Paycheck Payment in the Entertainment Industry (SB 1719)**

In a collective bargaining agreement, entertainment industry employees and employers may establish specified time limits to pay wages after the employee is discharged or laid off.

Significant Vetoes

Requiring Large Employer Minimum Expenditure Levels for Employee Health Care (SB 1414)

SB 1414 would have required employers with 10,000 or more employees to spend between six and eight percent of their total wages on employee health insurance costs or to pay a specified amount into a fund for lower-income employees in need of health care assistance.

Increasing the Civil Penalty for Violation of the California Equal Pay Law (AB 2555)

AB 2555 would have increased the damages for which an employer may be liable for violations of California's Equal Pay Law. This bill also sought to require employers with 50 or more employees to provide each employee with a written statement setting forth the employee's job title, wage rate, and explanation as to how the employee's wages are calculated.

Requiring Contractors to Pay for Jury Service (SB 1281)

SB 1281 would have prohibited state agencies from entering into contracts to acquire goods or services with contractors (individuals or business employing more than 100 full-time employees) who do not adhere to a written policy annually providing full-time employees with at least 5 days of regular pay for actual jury service.

Increasing Permanent Disability Benefits Payable Under Workers' Compensation (SB 815)

SB 815 would have revised the current formula for computing Workers' Compensation, to increase the payments to individuals who sustain permanently disabling injuries in the course of employment.

Adding "Victims of Domestic Violence" as a Protected Class (SB 1745)

SB 1745 would have instituted a public policy violation where employers harass, refuse to employ, discharge or otherwise discriminate against individuals who have been victims of domestic violence, sexual assault or stalking.

Expanding Unemployment Insurance Benefits During a Lockout (AB 1884)

AB 1884 would have permitted otherwise eligible locked-out employees to receive unemployment compensation benefits. Such benefits would have been due even if the lockout resulted from a trade dispute with the worker's employer.