



Issue 8 – August 31, 2006

California Minimum Wage Likely to Change for 2007 and 2008

California's lawmakers are likely to enact a new minimum wage that will be effective January 1, 2007. If all goes according to their plan, the California minimum wage will increase from \$6.75 to \$7.50 per hour. Then, on January 1, 2008, the minimum wage will increase to \$8.00 per hour. Not only will Employers have to ensure that their hourly employees are paid at least the minimum wage, they will also have to ensure that their exempt employees continue to meet the minimum salary requirement. To remain exempt, an employee must be paid a salary of at least \$31,200 in 2007 and \$33,280 in 2008.

California Supreme Court Issues Favorable Ruling to Employers Using At-Will Employment Language

Former employees commonly file breach of contract lawsuits alleging that some oral statement or document (e.g. an employee handbook or letter offering employment) impliedly created a contract between the parties that the employee would only be terminated for cause. The California Supreme Court recently determined that an offer of employment stating that employment was "at will" and that termination could occur "at any time" could not be interpreted so as to allow for an implied agreement that the employee would be terminated for cause only.^{1[1]} A key factor in the Supreme Court's decision was the absence of other language in the document that could be interpreted to suggest that termination would occur only when there is "cause." Employers wishing to create or maintain at-will employment relationships should

^{1[1]} *Dore v. Arnold Worldwide, Inc.* (2006) S124494.

carefully review their employment policies and other employment documents to ensure that there is no language contained therein that can alter the nature of the employment relationship.

Current Safety Issues: Injury and Illness Prevention Programs and Heat Regulations

An employer's injury and illness prevention program must adequately train and protect its employees that are leased to other employers. One employer was recently held liable for not having a compliant injury and illness prevention program when it leased an employee to another employer and the employee was killed at the other employer's jobsite.^{2[2]} The employer in that case wrongly believed that it was not responsible for identifying the hazards located at the secondary jobsite. An employer leasing its employees to others must train the employee on the hazards of the secondary job and that the employee should not work for the secondary employer if doing so is unsafe.

The emergency heat regulations that were adopted in August 2005 were made permanent July 27, 2006—with relatively minor changes.^{3[3]} Generally, the regulations require employers to provide enough water at the beginning of a shift to supply each employee with at least 1 quart of drinking water per hour for the length of that shift. Employers can begin the shift with less water if they effectively refill the water supply. Employers must also allow employees access to shade to prevent or treat a heat-related illness. Finally, employers must train their supervisors and employees on several specific topics enumerated in the regulations that have to do with heat-related issues. Employers should consult the regulations and/or legal counsel to ensure that they are complying with these regulations.

DLSE Allows Partial-Day Deductions from an Exempt Employee's Vacation or PTO Bank

Last summer a California Court of Appeals ruled that an employer may make deductions from an exempt employee's vacation or PTO bank for partial-day absences. The DLSE recently adopted that decision into its Enforcement Policies and Interpretations Manual.^{4[4]} The recent change is important for two reasons. First, the DLSE has clarified that it is going to follow the appellate court's decision and permit such deductions. Second, because of the facts presented to the appellate court, the appellate court left the question as to whether deductions for partial-day absences of less than four

^{2[2]} *Sully Miller Contracting Co. v. Cal. Occupational Safety And Health Appeals Bd.* (2006) 138 Cal.App.4th 684.

^{3[3]} 8 C.C.R. § 3395.

^{4[4]} DLSE Enforcement Policies and Interpretations Manual §§ 51.6.15 *et seq.*

hours were permissible. The DLSE's manual now provides clear authority that deductions for partial-day absences of **less than four hours are not permissible.**

Retaliation Claims Likely to Increase Nationally—Perhaps Decrease Here in the Ninth Circuit

Prior to *Burlington Northern*, jurisdictions across the country used different tests for determining whether an employer retaliated against an employee in violation of Title VII.^{5[5]} In *Burlington Northern*, the U.S. Supreme Court decided to use the test applied in the 7th Circuit and District of Columbia, a test that is potentially less favorable to employees than the test used in the Ninth Circuit. The Supreme Court says that to be retaliatory, an employer's conduct does not have to concern the employee's employment or workplace. Rather, an employer may retaliate in violation of Title VII by "taking actions not directly related to [the employee's] employment or by causing [the employee] harm *outside* the workplace." Under the Supreme Court's test, the retaliatory action must be materially adverse to the employee under the circumstances—in other words, something that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

For employers in the Ninth Circuit, perhaps the greatest lesson of *Burlington Northern* is that the employers must correctly make their suspension decisions the first time to avoid liability. In *Burlington Northern*, the employer suspended an employee without pay for insubordination and later determined that the employee had not been insubordinate. Once the employer determined that the employee had not been insubordinate, it immediately reinstated the employee and gave her backpay for the days that she was suspended. The Supreme Court held that despite reinstating the employee and paying her backpay, the employer's original action could have been retaliatory because denying the employee a source of income for a certain period, even if later reimbursed, still could have persuaded an employee to not file a discrimination charge.

Heavy Fines Proposed for Misclassification of Employees as Independent Contractors

The California Assembly is currently considering a bill that could cost employers \$25,000 for each employee that is misclassified as an independent contractor. ^{6[6]} The bill would allow the Employment Development Department ("EDD")

^{5[5]} *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (U.S., 2006).

^{6[6]} California Assembly Bill 2186.

to assess such a fine for each instance of misclassification that the Department finds to be willful, purposeful, or intentional. The fine could rise to \$50,000 per incident if the EDD found the employer to have a pattern or practice of misclassifying employees as independent contractors.



Dennis R.
Murphy



Kelly L. Borelli



Mary E. Farrell



Brian S. Crone



Randall J.
Hakes

You may contact the above attorneys via e-mail by clicking on their name or using the contact information below.

304 S Street
Sacramento, CA 95814
916/446-2300 (phone)
916/503-4000 (facsimile)

or

visit our website at www.murphyaustin.com

Please be assured that we make every effort to make certain that the information contained in this article is current at the time the article was prepared. Because laws and legislation are constantly changing, please contact us if you are unsure whether this material is still current. Nothing contained herein is meant to be legal advice. Please contact us to answer any questions you may have.

If you no longer wish to receive e-mails of this nature from the Labor and Employment Group at Murphy Austin Adams Schoenfeld LLP, please respond to this e-mail with "unsubscribe" in the subject line.
