New Developments In Employment Law
What You Need To Know In 2007

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Wage & Hour
What We Will Cover

• Recent Verdicts & Settlements
• The Exemptions - FLSA & California
• Preservation of Exempt Status
• Current & Future Battlefields
• Penalties/Liability
Jury Of My Peers
Recent Settlements & Verdicts*

- $172M  Wal-Mart
- $135M  Gutierrez v. State Farm
- $120M  Sekley v. Allstate Insurance
- $120M  Bell v. Farmers Insurance Exchange
- $ 78M  Wal-Mart
- $ 37M  Burns v. Merrill Lynch
- $ 30M  Butler v. Countrywide Home Loans
- $ 15M  Kirschenbaum v. Electronic Arts

*Class Actions
In response to a settlement for alleged misclassification of employees as exempt from overtime, the company will deny liability and state:

- “It settled to avoid the expenses and business interference of protracted litigation.”

In response to the jury verdict of $78.5M for missed rest breaks and off-the-clock work, Wal-Mart announced:

- “Wal-Mart associates [hourly workers] are the lifeline of our company, and it is our policy to pay every associate for every hour worked.”
Two Sets of Laws

- Federal – The Fair Labor Standards Act (FLSA) & The Department of Labor (DOL) [www.dol.gov/esa]

- State – Labor Code & Industrial Welfare Commission Wage Orders (Wage Orders)* [www.dir.ca.gov/lwc/WageOrderIndustries]

- There are 17 “IWC Orders” or “Wage Orders” which regulate the wages, hours, and working conditions in certain industries or occupations.
  - *IWC defunded effective 7/1/04 by Legislature
Division of Labor Standards Enforcement

- Division of Labor Standards Enforcement ("DLSE") is an agency within the Department of Industrial Relations, which administers and enforces California’s wage and hour laws.

- The DLSE’s policies are contained in its 2002 Enforcement Policies and Interpretations Manual, available online at www.dir.ca.gov/dlse/Manual-Instructions.htm.*

  - Pursuant to Executive Order S-2-03, the DLSE opinion letters and the Enforcement Policies and Interpretations Manual are currently under review to determine their legal force and effect and to ensure compliance with the requirements of the Administrative Procedures Act.
Exemptions

- Administrative
- Executive
- Professional
- Computer
- Outside Sales
Side-by-Side Comparison

- The following charts compare the current requirements for exemption under the Fair Labor Standards Act and California Wage Orders for an executive, administrative, professional, computer, or outside sales employee.
## Executive Employees

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<tr>
<td>$455 per week</td>
<td>$540 per week</td>
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### Duties

**Federal Standard (8/23/04):**
- Primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision of the enterprise.
- Customarily and regularly directs the work of two or more other employees.
- Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

**California Standard:**
- The management of the enterprise or of a customarily recognized department or subdivision.
- Customarily and regularly directs the work of two or more other employees.
- Has authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees will be given particular weight.
- Customarily and regularly exercises discretion and independent judgment.
- Primarily engaged in duties that meet the test of the exemption.
### Administrative Employees

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<tr>
<td><strong>Salary</strong></td>
<td>$455 per week</td>
<td>$540 per week</td>
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<tr>
<td><strong>Duties</strong></td>
<td>Primary duty consists of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer’s customers; or the employee performs functions in the administration of a school system, an educational establishment, or institution that directly relate to the academic instruction or training of the establishment. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</td>
<td>Performing office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers; or performing functions in the administration of a school system or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and Customarily and regularly exercises discretion and independent judgment; and Regularly and directly assists a proprietor or employee employed in a bona fide executive or administrative capacity; Performs specialized or technical work requiring special training, experience, or knowledge, under only general supervision; or Executes special assignments and tasks under only general supervision; and <em>Primarily engaged in duties that meet the test of the exemption.</em></td>
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Learned Professional Employees

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<th>Federal Standard (8/23/04)</th>
<th>California Standard</th>
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<td><strong>Salary</strong></td>
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<td>$455 per week</td>
<td>$540 per week</td>
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<tr>
<td><strong>Duties</strong></td>
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<tr>
<td>Primary duty consists of the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.</td>
<td>Licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or Primarily engaged in an occupation commonly recognized as a learned or artistic profession; and Customarily and regularly exercises discretion and independent judgment in the performance of duties.</td>
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### Creative Professional Employees

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<tr>
<th>Federal Standard (8/23/04)</th>
<th>California Standard</th>
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<tr>
<td><strong>Salary</strong></td>
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<tr>
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<tr>
<td><strong>Duties</strong></td>
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<tr>
<td>Primary duty is the</td>
<td>[See Learned</td>
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<tr>
<td>performance of work</td>
<td>Professional</td>
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<td>requiring invention,</td>
<td>Exemption]</td>
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<td>imagination, originality,</td>
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<td>or talent in a recognized</td>
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<td>field of artistic or</td>
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<td>creative endeavor.</td>
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## Computer Employees

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<tr>
<td></td>
<td>$455 per week ($27.63 an hour)</td>
<td>$47.81 per hour (1/1/06)</td>
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**Duties**

- **Employed as a computer systems analysis, computer programmer, software engineer, or other similarly skilled worker in the computer field.**
- **Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.**

- **Primarily engaged in work that is intellectual or creative and requires the exercise of discretion and independent judgment.**
- **Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or (C) documentation, testing, creation or modification of computer programs related to the design of software or hardware for computer operating systems.**

- **Employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.**
# Outside Sales Employees

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<tr>
<th>Salary</th>
<th>None Required</th>
<th>None Required</th>
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<tbody>
<tr>
<td>Duties</td>
<td>Primary duty consists of making sales or obtaining order or contracts for services or the use of facilities for which a consideration will be paid by the client or customer. Customarily and regularly engaged away from the employer’s place or places of business.</td>
<td>Customarily and regularly works more than half the working time away from the employer’s place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.</td>
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</table>
Exemptions are narrowly defined and applied. The two laws are supplementary – when they differ, comply with the one that is most generous to the employee – usually California.
Exempt Status - must pay at least twice the minimum wage

AB 1835 - the minimum wage increases from $6.75 to $7.50 on January 1, 2007 and to $8.00 on January 1, 2008
Preservation Of The Exempt Status
Preservation of the Exempt Status (cont.)

- Key Principle: An exempt employee’s salary is not subject to reduction because of variations in the quality or quantity of the work performed.

- Thus, only subject to certain exceptions, exempt employees must be paid their full salary for any week in which they do any work, regardless of how few or how many hours they work.
Permitted Deductions – “Salary Docking”

- Absences of a full day or more for personal reasons – vacation, personal leave, and religious holidays
- Office closures due to inclement weather – may debit leave bank
- Partial – day absences of at least 4 hours if there is a bank of vacation or PTO time
- Partial or full day absences for sickness or disability, where an employee is compensated for absences under a sickness/disability plan - if no plan – can only deduct if absence exceeds one week
Preservation of the Exempt Status (cont.)

- FMLA/CFRA leave – even if less than a full day
- Pregnancy leave – not clear if less than a full day
- Workers’ compensation – if employee is compensated for loss of salary in accordance with workers’ compensation law and have a plan/practice that replaces compensation lost due to non-industrial sickness or disability
Preservation of the Exempt Status (cont.)

- Penalties imposed in good faith for infraction of safety rules of major significance (Fed only)
- Unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules* (Fed only)

*Caveat: failure to make up time or work the required number of hours is not a violation and disciplinary suspension rules must be applied equally and not related to performance or attendance
Preservation of the Exempt Status (cont.)

- No work performed in a week
- Days that are not worked in the employee’s first or final weeks of employment

DLSE Manual §§ 51.6.21, 51.6.21.1, 51.5.15 & 5.15.4; Conley v. Pacific Gas & Electric Co. (2005) 131 Cal. App.4th 260. [deductions from an employee’s vacation leave bank for partial-day absence does not violate CA salary-basis test because still receiving same amount in each pay period]
Provided no docking of wages, without risk of loss of exemption, employers may regulate the work hours of exempt employees*

- Establish number of hours exempt employee is to work (50)
- Require exempt employee to record hours worked
- Require exempt employee to make up work lost due to personal absences of less than one day


*You can also compensate exempt employees in addition to their salary without losing the exemption
Preservation of the Exempt Status (cont.)

- Do not make deductions for:
  - Quality or quantity of work
  - Unavailability of work
  - Disciplinary or safety violation reasons*
  - Jury/witness/military service
  - Lost or damaged equipment
  - Reduced workload
  - Temporary shutdowns [but can reduce workweek and reduce pay on a pro-rata basis provided it meets the salary test]

* Federal regulations permit
Current Battlefield
Meal Periods:

- “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and the employee” (Labor Code § 512(a))
Meal Periods:

- An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived (Labor Code § 512(a))
Meal And Rest Periods (cont.)

- Wage Order:
  - “No employer shall employ a person for a work period of more than five hours **without** a meal period of not less than 30 minutes….”
Meal And Rest Periods (cont.)

- **Meal Periods:**
  - Some inconsistency between statutory language ("providing") and Wage Order (requirement)
  - Existing law does not define the term "providing" contained in Labor Code § 512(a)
  - Labor Code appears to require employers to provide all employees meal periods, while Wage Orders suggest employers need not provide meal periods to exempt employees
Meal And Rest Periods (cont.)

- Proposed Regulations* meant to clarify language in Wage Order and Labor Code:

  - § 13700(a)(2). Definitions. “‘Provide’ means to supply or make available a meal period to the employee and give the employee the opportunity to take the meal period”

  - § 13700(b)(2). “An employer shall be deemed to have provided a meal period to an employee in accordance with Labor Code § 512 if the employer has informed the employee after the effective date of this regulation, either orally or in writing, of his/her right to take a meal period and gives the employee the opportunity each day to take the meal periods”

*Withdrawn
Meal And Rest Periods (cont.)

- Waiver of meal period provided there is a written agreement between employer and employee and only if:
  - Meal period time is paid
  - Workday exceeds six hours
  - Nature of the work prevents the employee from being relieved of all duty
  - Employee may revoke agreement at any time

Wage Order No. 4-2001, § 11(A)
Rest Periods

- No requirement under federal law to provide rest periods to employees
- California Wage Order No. 4, § 12(A) establishes rest periods as hours worked the employer must provide
- Employers must provide a rest period of a **net ten minutes** for every four hours worked or major fraction thereof
Rest Periods

- Only employees working less than three and one-half hours do not have to be provided a rest period.
- Wage Order requires rest periods of only nonexempt employees.
Potential Damages

- Labor Code § 226.7(b): “If an employer fails to provide an employee a meal period or rest period, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest period is not provided” (Emphasis added)

- Wage Order § 11(B): “If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided” (Emphasis added)

- Wage Order § 12 (B): “If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the rest period is not provided” (Emphasis added)
Meal And Rest Breaks (con’t)

Penalty vs. Wage?

- Split of authority and a clear conflict between the California appellate courts
  - *Caliber Bodyworks, Inc. v. Superior Court* - penalty
  - *Murphy v. Kenneth Cole Production* – penalty
  - *National Steel and Shipbuilding Co. v. Superior Court* – wage
  - *Mills v. Superior Court* – penalty

- 3 of the 4 pending appellate cases have decided it is a penalty and the DLSE has issued a “Precedent Decision” stating it is a penalty
What is the difference?

- If a penalty - the statute of limitations is one year
- If a wage - the statute of limitations is three years
- If a wage - the statute of limitations can be extended to four years pursuant to Business and Professions Code §§ 17200 et seq.
The California Supreme Court has agreed to review the *Kenneth Cole* decision *and decide* the following 2 issues:

- Is a claim under Labor Code Section 226.7 for the required payment of “one additional hour of pay at the employee’s regular rate of pay of compensation” for each day that an employer fails to provide a mandatory meal or rest period to an employee governed by a 3 year statute of limitations for a claim for compensation or the 1 year statute of limitations for a claim for payment of a penalty.

- When an employee obtains an award on such a wage claim in an administrative proceeding and the employee seeks *de novo* review in superior court, can the employee pursue additional wage claims not presented in the administrative hearing.
Common Sense Approach

- The payments that become due under Section 226.7 [or the Wage Orders] for missed breaks/meals do not compensate an employee for additional services rendered.
- There is no correlation between the break missed, the additional labor performed, and the amount to be paid.
Meal Period Exemption Stricken

- **Bearden v. U.S. Borax, Inc. (2006)**
  - The California Court of Appeal (Dist. 2) has ruled that a meal period exemption contained in Wage Order 16 – for construction and other related industries – is invalid. The Court found that the collective bargaining agreement denying a second meal period was at odds with the Labor Code and thus had to be stricken.
Docking of “Productivity Bonus”

- **Sommer v. Vanguard Group (2006)**
  - The U.S. Third Circuit of Appeals ruled that for a *production bonus* (based on how many hours worked) proration is allowed for the amount of any lost production, even if for an FMLA leave. However, proration due to FMLA leave is not permitted for absence-of-occurrence bonuses (such as for avoiding accidents or perfect).
  
  - Best practices – bonus program should be clearly spelled out and prorate other types of leaves [not sick/vacation] to avoid a claim of discrimination.
  
  - *Not binding in California (yet)*
The California Court of Appeals (Dist.1) upheld a commission agreement which provided that even though commissions were paid when an order (subscription) was booked, they were not earned and thus could be charged back to the employee if post-booking responsibilities were not fulfilled because of customer cancellation.*

*Labor Code section 221 prohibits an employer taking back wages from an employee after they are earned.
Overtime Limited on Alternative Workweeks

- **Singh v. Superior Court (2006)**
  - The California Court of Appeals (Dist. 2) held that Wage Order 5 regulating alternative workweeks (3/12) only required overtime pay for healthcare employees when an employee works more than 12 hours in one day or 40 hours in the week – **thus** no overtime for the 37–40 hours worked on days outside the 3/12.
Smith v. Superior Court (2006)

- [Or how a $500/day wage becomes $15,000/day wage]*
- Under Labor Code sections 201 & 203 – an employee is “discharged” not only when fired but when the employee completes the job the employee was hired to do
- Wages are due at the completion of the assignment - otherwise treating fired employee more favorably

*30 day waiting time penalty (30 x $500) [L’Oreal took more than 2 months to pay]
Future Battlefield
Hours Worked

- Time employee is “suffered or permitted” to work
  - On-duty
  - Off-duty
  - On-call/standby/waiting time
  - Call back
  - Reporting time
  - Travel time
On-Duty

- Time spent on duty during unplanned inactivity and employee is unable to use the time effectively for his or her own purposes and the time is *controlled* by the employer.
“Idle” time during which an employee is completely relieved from duty and which is long enough to enable the employee to use the time effectively for his or her own purposes.
On-Call Time

- Controlled on-call is worktime
- Uncontrolled on-call is not worktime
- It is considered controlled on-call if the employee’s ability to effectively use the time for personal pursuits is interfered with – waiting can be work
- If controlled on-call, must pay at least minimum wage but can pay less than normal rate and may have to pay overtime
- If uncontrolled on-call, no need to pay or pay at any rate – less than minimum wage
An employee who is required to remain on-call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while “on-call.”

An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while “on-call.”

29 CFR § 785.17
On-Call Time (cont.)

- California*
  - To determine whether on call may be hours worked consider:
    - Whether there are excessive geographical restrictions on employees’ movements;
    - Whether the frequency of the calls is unduly restrictive;
    - Whether a required response time is unduly restrictive;
    - Whether the on-call employee can easily trade his or her on-call responsibilities with another employee; and
    - The extent of personal activities engaged in during on-call time. DLSE Manual § 46.6.3; Berry v. County of Sonoma, 30 F. 3d 1174 (9th Cir. 1994))

*Not defined in Labor Code or Wage Orders
There may be instances when travel from home to work is work time. For example, if an employee who has gone home after completing his day’s work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer’s customers, all time spent on such travel is working time.

The DOL has not taken a position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time. 29 C.F.R. § 785.44.
Call-Back Time

- California
  - “If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee’s regular rate of pay, which shall not be less than the minimum wage.” Wage Order 4, § 5(B)
  - “The Division does not take the position that simply requiring the worker to respond to call-backs is so inherently intrusive as to require a finding that the worker is under control of the employer. The factors to be considered are: (1) geographical restrictions on employee’s movements; (2) required response time; (3) the nature of the employment; and (4) the extent of the employer’s policy would impact on personal activities during on-call time.”
  - The bottom line is the amount of “control” exercised by the employer over the activities of the worker.” DLSE Manual § 47.5.6.1
Reporting Time

- **FLSA**
  - **Employee Immediately Sent Home**
    - “If an employee is told upon reporting for work that there is no work available and is immediately sent home, he/she will not be considered to have spent any time working.”
  - **Employee Sent Home After A Period of Waiting For Work**
    - “If, however, the employee reports for work at the scheduled place at the prescribed time and is not immediately sent home but is suffered or permitted to wait for work after the regular shift was scheduled to begin, the time spent in waiting between the scheduled commencement of the shift and the time the employee starts work or is sent home is counted as working time.”

DOL Field Operations Handbook § 31a00
California

- “Each workday an employee is required for work and does report, but is not put to work or is furnished less than half of the employee’s usual or scheduled day’s work, the employee shall be paid for half the usual or scheduled day’s work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee’s regular rate of pay, which shall not be less than the minimum wage.” Wage Order 4, § 5(A)

- DLSE Enforcement Advice: “Required meeting is scheduled for a day when the worker is not usually scheduled to work. The employer tells all of the workers that attendance at the meeting is mandatory and a one- or two-hour shift is ‘scheduled’ for this meeting. For those workers not ‘regularly scheduled’ to work, the employee must be paid at least one-half of that employee’s usual or scheduled day’s work.” DLSE Manual § 45.1.4
Travel Time

- Normal travel time to and from work – not considered hours worked
- Travel during work day is hours worked
- One–day assignment to another city – all time included except travel time to point of departure and meals
- Extended travel - time spent traveling after hours to destination which exceeds normal commute time but does not include taking a break from travel such as eating/sleeping (CA / not Fed)
  - Rate of pay may be different provided not less than minimum wage and employee is informed prior to the travel. (Regular rate of pay for overtime will be determined by a “weighted average” - DLSE Manual § 46.3.2)
Penalties

- Labor Code Penalties
  - Sections 203, 210, 225.5, 226(e), 226.3, (226.7), 256, & 558
Private Attorney General Act Penalties

- Labor Code § 2699(a):
  - “Notwithstanding any provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.”
Individual Liability

- Are Individual officers/shareholders/directors liable for the employer’s failure to pay overtime wages? No!
  - *Jones v. Gregory* 137 Cal.App. 4th 798
  - *Reynolds v. Bement* 36 Cal. 4th 1075

- **However**: Individual liability may exist for penalties in actions under Labor Code sections 558 & 2699.
Communicate
Medical Leave Laws
Difficult Issues and Recent Developments
### Types of Medical Leaves

- Family and Medical Leave Act ("FMLA")
- California Family Rights Act ("CFRA")
- Americans with Disabilities Act ("ADA")
- Fair Employment and Housing Act ("FEHA")
- Pregnancy Disability Leave ("PDL")
- Workers’ Compensation Leave
- Family Sick Leave
Analyzing a Leave Situation
Robert, an army reservist, begins working at the company on January 1, 2005. On March 1, he is called to active duty, and he returns on January 1, 2006. On February 1, 2006, he develops a serious health condition and requests leave under FMLA/CFRA.

Is Robert entitled to FMLA/CFRA leave for this purpose?
Answer: Yes.

Reservists called to active duty in the U.S. armed forces may count their time on active duty towards the 12 month/1,250 hour eligibility requirement. (Dept. of Labor Memo 7/26/02.)
Mary’s 25-year-old daughter, Alice, is pregnant. In order to help out both before and after the birth of her new granddaughter, Mary would like to take off one week before and four weeks after the due date. She submits a request to her employer.

Is Mary’s employer required to honor this request under FMLA/CFRA?
FMLA for Grandma?

Answers:

Before the birth: Probably not.

A “child” must either be under 18 or incapable of self care due to disability. Result may be different if there are complications.

After the birth: No.

Baby bonding leave is only for the employee’s own child.
Bob, a long term full time employee, tells his supervisor that he will need to be off work for the next two weeks because he is having plastic surgery and his doctor told him he needed that much time off. Since Bob has no more accrued sick leave, his supervisor says no.

Has Bob’s employer violated his rights under FMLA/CFRA?
Answer. No.

Under FMLA regulations, cosmetic surgery is not considered a serious health condition unless there is inpatient care or complications develop.
Karen is employed as a receptionist at ABC Company. She is out on FMLA/CFRA leave due to stress. ABC Company discovers that while out on leave, Karen has been working as a receptionist at XYZ Company.

Is Karen entitled to continue her FMLA/CFRA leave?
“Moonlighting” While on Leave

Answer: Unclear.

This issue is currently pending before the California Supreme Court (Lonicki v. Sutter Health Care, Case No. S130839).
Richard works in the company’s payroll department. Every two weeks, at the busiest time in the department, he experiences migraine headaches and takes intermittent FMLA/CFRA leave, causing disruption in processing of payroll.

Is the company legally required to allow Richard to take this time off?

What can the company do to prevent the disruption?
Intermittent FMLA/CFRA Leave

Answer: Yes, but....

A migraine headache is a “serious health condition” under FMLA/CFRA, and intermittent leave must be provided.

But the employer may transfer the employee to another equivalent position that better allows for the intermittent leave. (2 C.C.R. §7297.3(e)(1).)
How Much Leave is Required?

ABC Company has a policy of granting up to 16 weeks leave for any medical disability. Phil has been out on leave due to stress for 16 weeks. Each month, his doctor submitted a note stating that he would need to be out for another month because his condition has not improved and he is unable to work.

Once the 16 weeks expires, is the employer required to continue to grant these requests?
Duration of ADA/FEHA Leave

Answer: Not indefinitely.

Neither the ADA nor FEHA requires that an employee be granted a leave of indefinite duration as a reasonable accommodation, particularly when it would be an undue hardship for the employer to do so.

Employer’s obligation depends on the particular circumstances.
Duration of ADA/FEHA Leave

Factors include:

- duration of leave so far
- amount of leave per company policy
- projected date of return
- medical support for employee’s request
- hardship to employer
Martin is diagnosed with cancer and begins an unpaid leave in March 1995. He undergoes bone marrow treatment in November 1995, and in March 1996, his doctor certifies that he will be able to return in July. In June 1996, the company terminates Martin’s employment, citing its policy of granting no more than one year of disability leave. Until that time, the company had been using temps to fill Martin’s position, with no apparent problem.

Has the company violated Martin’s rights under disability laws?
Duration of ADA/FEHA Leave

Answer: Yes

- A definitive return date was provided.
- The requested leave would only slightly exceed the amount per the company policy.
- The employer was suffering no hardship.

(Garcia-Ayala v. Lederle Parenterals, Inc. (1st Cir. 2000) 212 F.3d 638.)
Lisa begins a medical leave on January 31, 2006, due to a non-work related back injury. Her doctor’s initial certification indicated that she would return by March 2. Since that time, Lisa has submitted requests, based on medical certifications, for 5 consecutive extensions of the leave; the current extension runs out on September 5.

While the employer has been using temps to fill in for Lisa, it is creating logistical and morale problems because her work is not getting done in a timely fashion.

The company has a policy providing 16 weeks of medical leave to its employees. Can the company tell Lisa that if she does not return on the 5th, her employment will be terminated?
Duration of ADA/FEHA Leave

Answer: Yes.

- Lisa has exceeded the company-provided leave.
- The duration has been significant.
- There is no indication that the situation is likely to change.
- Lisa’s absence has created a hardship.

Lisa should be advised that she is welcome to return, if able, if a position is available for which she is qualified.
How Much Leave is Required?

XYZ company has a policy of providing up to 6 months’ paid medical leave annually. XYZ policy also states that after 12 weeks, there is no reinstatement guarantee, but the employee will have 60 days to look for a job within the company, 30 of which would be paid.

Brian begins a stress leave in October 2000. During the first 12 weeks of his absence, XYZ used temps to do his job, but it is creating logistical and morale problems, and after 12 weeks, XYZ fills the position with a regular employee, since it is uncertain when Brian will return. Brian returns after seven months, but despite all efforts, there is no job available for which he is qualified. Brian’s employment is then terminated.

Has XYZ violated Brian’s right to disability leave?
Answer: So far, the answer is no.


The Court of Appeal held that Genentech sufficiently accommodated the disability by providing 12 weeks of reinstatement guarantee, and that the plaintiff was not qualified for his position at the end of the 12 weeks.

Termination was proper because no jobs were available when plaintiff returned.

This case is now under review by the California Supreme Court. Stay tuned . . .
Duration of ADA/FEHA Leave

Best practices:

- Adopt and consistently apply a medical leave policy.
- Carefully document the ongoing status of the employee’s leave.
- Carefully document the reasons for the decision not to extend leave.
- If the employee’s position has been filled, explore the possibility of a different position when the employee is ready to return.
Jane commences PDL/FMLA on March 1, 2004, and uses her entire allotment of PDL/FMLA leave before the end of July. Her child has not yet been born, and she requests leave because her doctor advises that she is still disabled and needs time off from work.

Is Jane entitled to leave for this purpose?
Answer: Probably.

Because pregnancy disability is not considered a “serious health condition” under CFRA, there is no right to CFRA leave. But CFRA invites the employer, at its discretion, to allow CFRA leave if medically necessary. (2 C.C.R. § 7291.13(c)(1).)

In addition, Jane probably has leave rights under the ADA/FEHA as a reasonable accommodation.
ABC Company has a policy that employees on workers’ compensation leave will be terminated if they do not return to work after one year.

Paul, a California employee, has been on leave due to a work-related injury for eleven months. His doctor advises that he will be able to return to work in another two months. Citing its one-year policy, ABC Company terminates Paul’s employment at the conclusion of the twelfth month.

Does Paul have a claim for violation of Labor Code section 132a?
Duration of Workers’ Comp Leave

Answer: Probably.

An employer may violate section 132a if it terminates an employee on workers compensation leave, unless either

- the employee is permanently disabled from performing the job; or
- termination of employment is necessary in light of demonstrated business realities.
Disability Discrimination & More!
Disability Discrimination

- The Americans With Disabilities Act
- The California Fair Employment & Housing Act
What’s New For 2007?

Under the ADA a person is disabled if he/she:

- Has a medical condition or a mental or physical impairment…
- that “substantially limits”…
- one or more “major life activities” of central importance to daily life after considering mitigating measures
What’s New For 2007?

Under FEHA A Person Is Disabled:

- If he or she has a medical condition or mental or physical impairment…

- that merely makes an activity more difficult to perform, even if the person is not “substantially limited”…

- and even if mitigating measures reduce or eliminate the disability
Under FEHA An Employer Has The Duty To Provide A Disabled Employee:

- Reasonable accommodations to permit the employee to perform essential job functions…

- to conduct a timely, good faith interactive process in response to a request for an accommodation
Louise, a receptionist, is criticized for her response to an unwanted visitor. Louise begins to hyperventilate, goes to the emergency room to treat her asthma, and begins what turns into a seven month leave of absence. While on this leave she asks for reassignment to a new supervisor, complaining that her supervisor is unfair, and that this is a reasonable accommodation for her disability.

**True or False?** This is a reasonable accommodation.
Court of Appeal upheld the denial of this request. But review of this decision is pending in the California State Supreme Court.

Ernesto is unable to perform his normal job because of stress and, while on a leave of absence, requests a transfer to another job for which he lacks the requisite experience. However, Barbara tells Ernesto that the company has waived the experience requirement for others in the past. The company refuses to waive the experience requirement, and instead terminates Ernesto because he has not found a position within the company for which he is qualified.

**True or False?** Ernesto is entitled to the transfer because the Company must show that Ernesto is unqualified for the position he seeks and the Company cannot do so.
To Be Determined in 2007

Pending in *Green v. State Department of Corrections* and *Williams v. Genentech*

Who bears the burden of proof:

Does the Employee prove s/he is qualified to perform the essential functions of the job despite the disability?

OR

Does the Employer prove that the employee is NOT qualified to perform the essential functions of the desired job?
Charles injured his back on the job, but was retrained for a plastic parts fabricator position. Charles says he feels fine, but his workers’ compensation doctor has not eliminated restrictions on his ability to bend, lift, etc. His employer thus won’t let him take the fabricator position, and Charles sues, saying he has been “regarded as” disabled when he was not and that he was entitled to an interactive discussion to determine reasonable accommodations.

**True or False?** Charles was not entitled to an interactive process or any accommodation.
If the employee proves that the employer believed he or she was disabled, then the employee was “regarded as” disabled and may be entitled to the same interactive process and reasonable accommodations as a disabled employee.

Visually impaired individuals and advocacy groups sued a retailer, claiming that its website violated ADA because website was not designed with embedded “alternative text” that can be read with screen reader to vocalize content of website. The retailer’s physical stores were accessible to plaintiffs.

**True or False?** Even though physical stores were accessible, retailer must make its website accessible to the visually impaired.
The website itself is not a place of public accommodation under the ADA. But, plaintiffs did state claim under ADA by alleging that an inaccessible website denying them equal access to and enjoyment of the physical stores. Note that the court’s decision was to deny motion to dismiss; there has been no final decision.

Legislative & Case Alert
Recent Court Decisions
Recent U.S. Supreme Court Decisions

- **IBP, Inc. v. Alvarez** – dressing and undressing in required protective clothing is part of work day

- **Domino’s Pizza, Inc. v. McDonald** – a section 1981 racial discrimination claim cannot be made by a non-party (president/shareholder) to the contract

- **Burlington Northern & Santa Fe Ry. Co. v. White** – a sanction or adverse measure to which an employee is subjected in retaliation for protected conduct is actionable so long as the employer's action is "reasonably likely to deter employees from engaging in protected activity"

- **Garcetti v. Ceballos** - public employees’ statements made pursuant to their official duties, are not protected speech under the first amendment

- **Ash v. Tyson** – use of the word “boy” could be evidence of racial animus (Be careful: not only what you say, but also how you say it matters!)
Recent Court Decisions

Sexual Harassment

- **General Rule**: Severe and pervasive use of sexually coarse and vulgar language and gestures will create a hostile work environment.

- **Exception**: However, sexually inappropriate language and conduct will not create liability if the behavior is not so objectively offensive as to alter the conditions of the victim’s employment and creates a hostile or abusive work environment.

Lesson To Be Learned:

- Confirmation of the reasonable victim’s standard considering all circumstances.

*Lyle v. Warner Bros.* 38 Cal.4th 264
Recent Court Decisions

**Sexual Harassment**

  (9th Cir. 2005) 422 F. 3rd 840

**Lesson To Be Learned:**

- Facialy gender neutral motivated behavior with no discriminatory animus which is subjectively experienced differently by members of the opposite sex could constitute sexual harassment. (Don’t be a bully.)
Harassment by Non-Employees

- *Carter v. California Dept. of Veterans*, 38 Cal.4th 914
  - Clarification of Legislative intent in Government Code section 12940(j)(i) –
  - California employers must protect employees from non-employee harassment when the employer knows or should have known of the harassing conduct.

- *Galdamez v. Potter*, 415 F.3d 1015
  - Similarly, under federal law, employers must protect their employees from non-employee harassment when the employer knows or should have known of the harassment.
Recent Court Decisions

General Release of Covenant Not To Sue

- **Syverson v. IBM**, 2006 U.S.App. LEXIS 22504

Lesson To Be Learned

- Not all release and/or covenants not to sue are adequate to waive age discrimination claims. A proper waiver must: 1) be drafted in plain language; 2) specifically refer to rights or claims arising under the OWBPA; 3) cannot be prospective; 4) requires consideration; 5) advises the employee in writing to consult an attorney before signing; 6) provide at least 21 days to consider the waiver; 7) allows at least 7 days following signing to revoke the waiver, and additional requirements if sought in connection with an exit incentive or employment termination program offered to a group of employees. (29 U.S.C. § 626(f)(1).)
Recent Court Decisions

Arbitration Agreements & Limitation on Class Actions

*Gentry v. Superior Court*, 135 Cal. App. 4th 944
(Review Granted)

- The California Supreme Court agreed to decide whether or not class action waivers in arbitration agreements are valid. Make sure your arbitration agreements are procedurally & substantively conscionable.
Recent Court Decisions

**Bonus Calculations**


- The California Supreme Court agreed to decide whether, in calculating profit for bonus distributions, deducting the cost of workers’ compensation insurance and cash & inventory losses is in violation of the California Labor Code.
Recent Court Decisions

- **Dore v. Arnold Worldwide, Inc.**, 39 Cal.4th 384, the term "at will" in an employment contract means the employment relationship can be ended by either party at any time without cause.

- **Jespersen v. Harrah's Operating Co., Inc.**, 444 F.3d 1104, workplace appearance policies containing legitimate sex-differentiated requirements are not gender discriminatory.

- **Rivera v. Baker West, Inc.** (9th Cir. 2005) 430 F.3d 1253, settlement proceeds in a Title VII discrimination case are taxable.

- **Carr v. Fresenius Medical Care**, 2006 U.S. Dist. LEXIS 29627, settlement proceeds in FMLA case are not taxable.
2007 Round Up
New Statutory Law
Discrimination/Harassment

- Sexual Orientation Discrimination protection added to state operated or funded programs or activities
  (Gov. Code § 11135; SB 1441)
- Unlawful to use State owned or leased computer to access obscene matter
  (Gov. Code § 8314.5; AB 546)
- Sexual Harassment Training – California Sups Only
  (Gov. Code § 12950.1; AB 2095)
The minimum amount of compensation per hour that an employer is required by law to pay an employee for all hours worked. ($6.75 since January 1, 2002.)

AB 1835 - The minimum wage increases to $7.50 on January 1, 2007 and to $8.00 on January 1, 2008. (Lab. Code §§ 1182.12, 1182.13)
Minimum Wage & Exempt Status

- Exempt Status – minimum salary will increase from the current:
  - $540/week to $600/week to $640/week
  - $2,340/month to $2,600/month to $2,773.33/month
  - $28,080/year to $31,200/year to $33,280/year
Minimum Wage - Impact

- Exempt Status - must pay at least twice the minimum wage
- Commissioned inside sales – are exempt from overtime if more than one-half of their compensation is from commissions and weekly earnings are at least $1.5$ times minimum wage.
- Tools & equipment - employees can be required to provide and maintain their own hand tools and work related equipment if their base pay is twice the minimum wage.
- Increases in a host of labor related costs: workers’ compensation, unemployment insurance, social security, state disability, etc.
Minimum Wage – To Do List

**Best Practices:**
- Revise your wage and salary structure – if does not meet new minimum
- Review earnings of exempt employees and establish a plan for compliance
- Assess impact on your compensation structure
- Revise budget
- Notify your payroll service
- Post new state minimum wage poster and wage order
Wages

- Reporting Overtime Wages
  (Lab. Code § 204(b)(2); AB 2095)

- Knowingly assisting avoidance of child support
  (Civ. Code §§ 1714.4, 1714.41; AB 2440)
Background Checks

Criminal Background Checks for Certain Healthcare Administrators, Executives & Employees

Affected Individuals:

- Certified nurse assistants & home health aides
- Nursing home administrators
- Administrators, program directors, and fiscal officers of adult day healthcare centers
- 10% or greater owners & administrators of home health agencies and private duty nursing agencies

(Various Health & Safety Code sections; SB 1759)
Enclosed Spaces of Workplace Buildings

- Lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of a workplace building or covered parking lot are now smoke free.

(Gov. Code § 7596 & Lab. Code § 6404.5; AB 2067)
Workers’ Compensation

- Pre-designated Primary Treating Physicians
  Includes Medical Groups
- Pre-designation of a primary treating physician for workers’ comp treatment extended to December 31, 2009.

(Lab. Code § 4600; AB 2068)
Payment of Workers’ Compensation Death Benefits

- To surviving dependent, heir, or other qualified person notwithstanding any of the employees accrued and unpaid comp paid or owing to such person

- Payment of death benefits to the Dept. of Industrial Relations when no surviving person entitled to dependency death benefit is not applicable if death benefit is paid to the estate of the deceased employee

(Lab. Code §§ 4702, 4706; AB 2292)
Only hands free cell phones 7/1/08
(Veh. Code § 23123; SB 1613)

Recovery of attorneys fees & costs in trade secret litigation
(Civ. Code § 3426.4; SB 1636)

Office of the small business advocate to develop web-based handbook for small businesses on emergency preparedness, emergency response, and recovery strategies.
(Gov. Code section 65054.5; AB 3058)
Questions??