

News You Can Use

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CAPITOL ROUNDUP

New Laws Affecting California Businesses

CALIFORNIA BUSINESSES will have to prepare for new liabilities and expenses as a result of a series of measures Gov. Jerry Brown has signed since the end of the legislative session.

The main bills that will affect businesses are one in which companies will be liable for failures of labor contractors to pay wages and cover their employees for workers' compensation, and another that expands the authority of the labor commissioner to issue citations for underpayment of wages. And earlier in September, Brown signed a bill that requires paid sick leave.

The biggest bills are:

Employers Liable for Labor Contractors

AB 1897 requires employers to share, with their labor contractors, liability for the payment of wages and failure to obtain valid workers' comp coverage.

This measure takes aim professional employment organizations, which bundle payroll and workers' comp services into one and become the employer of record.

Some PEOs have failed to secure workers' comp coverage in the past or greatly underreported payroll to reduce the premiums they pay. And some, have failed to adequately pay the workers.

Mandatory Sick Leave

AB 1522 requires all California employers to provide paid sick leave, beginning on July 1, 2015. Under this law, there is no exception for "small" employers.

Workers will accrue one hour of paid sick leave for every 30 hours worked. Employers may have sick leave policies that provide employees with greater benefits than those mandated by the new law.

AB 2617 prohibits mandatory arbitra-

Ban on Arbitration Agreements

tion agreements, pre-litigation settlement agreements, and severance agreements, which include a waiver of any alleged violations of hate crimes provisions under the Civil Code or the right to pursue such

claims in court.

The California Chamber of Commerce has lamented the bill, saying that it directly interferes with the Federal Arbitration Act and California Arbitration Act.

'Waiting Time' Wage Enforcement

AB 1721 expands the Labor Commissioner's power to issue citations for underpayment of wages to include waiting time penalties. Waiting time is defined as the time when an employee is at the workplace but waiting to clock in when it gets busy, such as in a restaurant.

The Labor Commissioner has been cracking down on this act. Under the old law, waiting-time penalties under Labor Code section 203 may only be recovered as part of an administrative hearing or civil action.

This new law allows the commissioner to issue citations. ❖

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LITIGATION PROTECTION

Off-the-clock Ban Can Save You Legal Problems

WAGE AND hour lawsuits are on the rise, typically with non-exempt employees claiming they weren't paid either for overtime or for work they may have performed before or after their shift.

But, if you have ironclad policies in place, you can greatly minimize both the chances of being sued and also losing the case.

A recent California case illustrates how one employer, thanks to its policies on prohibiting work off the clock, was able to avoid a trial and payment of damages after an appeals court threw out a potential class-action suit by employees claiming they hadn't been paid for overtime work for which their employer lacked knowledge.

The California Appellate Court dismissed the case, *Jong vs. Kaiser Foundation Health Plan*, finding that Kaiser could not be held liable for overtime pay because:

- The company explicitly prohibited off-the-clock work;
- The employee worked off the clock contrary to this policy; and
- The employer had no actual or constructive notice of the employee's unapproved off-the-clock work and, thus, could not be liable.

This case illustrates the importance of putting your off-the-clock policy in writing and following through with consistent enforcement.

The case

Henry Jong was a non-exempt outpatient pharmacy manager (OPM) for Kaiser. In 2009, Kaiser reclassified its OPMs as non-exempt as part of a settlement of an earlier lawsuit in which it had been accused of improperly classifying OPMs as exempt.

Jong said that after the reclassification there was no change in his duties and that the job Kaiser expected him to perform could only be performed in 50 hours per week if he were to properly fulfill his duties.

OPMs were also required to hit budget targets and Kaiser had disciplined Jong for going over budget, partly due to overtime that he reported and was paid for.

In the lawsuit, Jong asserted that Kaiser knew or should have known about the off-the-clock hours that he worked and therefore should have paid the unreported overtime.

The Appeals Court noted that there had been an earlier class action in which another court concluded that Kaiser had failed to pay overtime to OPMs who had regularly worked 48 hours per week. Kaiser eventually settled the case and, as part of the settlement, reclassified all of its OPMs as non-exempt employees (so that they would be eligible for overtime pay).

After Kaiser had reclassified its OPMs, Jong and two other OPMs filed suit, alleging that Kaiser refused to pay overtime and that it had not adjusted the responsibilities of OPMs so that they could perform their jobs in 40 hours a week.

The court cited Jong's deposition that he was aware of Kaiser's overtime rules, including that it would pay for overtime work even if it had not been pre-approved. Jong had also signed an affirmation acknowledging that off-the-clock work was prohibited.

During his deposition, Jong also said that he wasn't sure if any of his managers knew he was working off the clock. He also had not recorded his off-the-clock work and didn't know how many hours he'd worked off the clock.

The takeaway

This case illustrates the importance of having strong and well-documented policies, including procedures for requesting approval for overtime as well as a prohibition on off-the-clock work. ❖

Off-the-clock Policy

KAISER WAS granted case dismissal thanks to its explicit policies on off-the-clock work and the fact that it had required its employees to sign an acknowledgement that they would not work off the clock.

You may want to consider instituting policies and procedures that are similar to Kaiser's if you want to avoid any off-the-clock work complaints. Its policies were:

- All non-exempt employees will be paid overtime for all overtime hours recorded.
- All non-exempt employees should be clocked in whenever they are working.
- All non-exempt employees must request approval to work overtime.
- All non-exempt employees are required to sign an attestation form acknowledging that they will not work off the clock.

You should review your wage and hour policies with an employment attorney and implement policies and procedures that can keep your firm from being sued by employees for overtime, meal break and off-the-clock violations.



Last Line of Defense

Your last line of defense should be an employment practices liability policy. For more information, call us.

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WORKERS' COMP

New Audit Threshold: \$13,000 in Annual Premium

STARTING JAN. 1, 2015, all policies with more than \$13,000 in annual premium will be subject to yearly payroll audits.

The Workers' Compensation Rating Bureau made the change, from \$10,000 in annual premium – a threshold that's been in place since 2007 – and it means that fewer employers are likely to be audited next year.

However, all roofing companies, regardless of their premium, will be audited annually. In addition, construction firms with employees in high-wage classifications in the state's dual-wage system will be subject to audits every three years.

Premium audits explained

Your insurer will review your records and operations to gauge if the premium it charged at the start of the policy period was correct. It does this by checking employee numbers, hours worked and if you have put your employees in the proper workers' comp classification. It then compares that information with what you reported when the policy was written for the year.

An audit is usually performed shortly after your policy expiration, but the insurer can also perform it earlier.

What to do

It is important to keep detailed payroll records. It is even more significant if you wish to divide your wages between classification codes. This is often referred to as "payroll segregation". If you have an employee who does more than one type of work during the day, you must detail that information.

In general, if an employee divides time between two or more activities that are separately classified, you can divide the employee's wages if you maintain detailed payroll records documenting the number of hours they spend in each separately classified activity.

These records may include time cards or a daily log that tracks employee hours by activity or classification code.

If you do not maintain detailed time records, then you must assign the employee's entire gross earnings to the highest-rated classification to which they are exposed.

Please note that for some industries and classifications, including Clerical Office (8810) and Outside Sales (8742), payroll segregation is not allowed. ❖

Documents Needed for an Audit

- Payroll records (registers, journals, earnings cards, etc).
- Payroll, overtime and Section 125 Cafeteria Plan (if any), which must be summarized by month, quarter or policy period for each classification code.
- State tax reports (EDD: DE9 and DE-9C).
- Payroll records associated with Waiver of Subrogation and/or Owner Controlled Insurance Policy, if endorsed on your policy.

The following records may be required to complete the audit and must be sent to the auditor if requested:

- Federal tax reports and schedules (941s/940; 1099s/1096; W2s/W3; schedule C, K, E, F, etc.).
- Check register and cash disbursements journal.
- General ledger.

For all construction policies, insurers will typically also require:

- Employee time cards with daily start/stop times, necessary to validate the use of a high-wage classification.
- If independent contractors and/or subcontractors were used, provide the Contractors State License Board (CSLB) number with expiration date for all contractors. If no CSLB, provide name, amount paid, date and work performed. (You may check licenses at www.cslb.ca.gov).



\$13,000
\$10,000

RISK MANAGEMENT

Surveillance Cameras and Video Monitoring

IF YOU ARE concerned about loss through employee theft, thieves breaking in after you close, or just want to improve security on your premises, video surveillance is the way to go.

Video monitoring and surveillance have become extremely affordable, easy to implement and effective, and they are excellent risk management and loss reduction tools.

For a small investment, cameras can stream video onto the Internet so you can monitor and record activities at your business, on-site or remotely.

Image storage is almost limitless and the video history of the store can be kept in multiple locations for safety and ease of replacement.

Each day of video can be kept in a log and easily indexed.

This video record has multiple uses. In real time, monitoring can deter violent crime, shoplifting or employee theft. It can help address customer service by dispatching employees to underserved areas of a store, and recognize a need for restocking merchandise or securing a blind area on the premises.

It also helps keep an eye on employees when there are no supervisors monitoring behavior, as well as enabling you to monitor your business from any remote location.

Effective uses of monitoring, surveillance

Certainly, watching the perimeter of the business, exits, entrances and sensitive areas prevents break-ins and provides evidence when crimes occur. Monitoring the inside of the business after hours does much the same and helps detect fires, water leakage, earthquake damage and other losses where a quick response is vital.

Video on your business's premises can:

- Discourage criminals from choosing your facility as a target,
- Catch parking lot fender-benders and other accidents,
- Be useful inside a store to prove the legitimacy or illegitimacy of slip and fall claims, and
- Create a record of what occurs (and doesn't) on your premises.

It can also be an effective training tool. You can use tape to:

- Show staff and new hires examples of good customer service, poor service and difficult customers;
- Help new employees identify regular customers on sight;
- Demonstrate good lifting techniques and other safety tips;
- Show examples of correct and incorrect behavior.

You cannot possibly see and know everything that goes on in your business without employing many eyes.

Cameras and surveillance equipment work 24 hours a day, seven days a week for a one-time cost that is very affordable.

No vacations, no health benefits, and reliable and accessible from anywhere at any time. And, their memories are flawless.

Drawbacks?

There are also a few disadvantages of setting up video surveillance systems in the workplace:

- **Employee privacy** – It is not necessary that the employer should monitor the employees' each and every step and activity. There is also a limit to the surveillance factor, and the employer is required to take steps keeping the conditions in mind.

Moreover, if the video surveillance systems and cameras are set up at inappropriate places, you can be liable for invasion of privacy claims. It is important to keep in mind the potential legality involved in such claims, and devise and incorporate the video surveillance system accordingly for the purpose of averting pricey legal formalities and actions.

- **Decrease in morale** – Video surveillance can really have a bad effect on the morale of employees. It can create a feeling in the minds of workers that the company does not trust them and has a doubt about their activities. This might even lead to unhealthy relations between the employees and company management, and a decrease in employee productivity.

- **False sense of security** – An employee surveillance system can sometimes lull you into a false sense of security. When you have active surveillance, you automatically assume that you have all of the necessary angles covered.

- **Not 100% foolproof** – Employees that want to defeat your monitoring system can find methods that you may have missed when you installed the system.

A final word on what to do if you catch someone doing something illegal. If you are confronted with a situation that could turn confrontational, you may want to consider having trained security personnel at the ready. ❖

