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# THE REPORT

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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 is aimed at outfits called professional employment organizations, that bundle payroll and workers' comp 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.

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.

## Ban on Arbitration Agreements

AB 2617 prohibits mandatory arbitration 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 passage of 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. ❖


CONTACT US

**Gilroy Office**
9015 Murray Ave #110
Gilroy, CA 95020
Phone: 408-842-2131

**Pleasant Hill Office**
200 Gregory Lane, Bldg A
Pleasant Hill, CA 94523
Phone: 925-686-2860

**Los Gatos Office**
20 S. Santa Cruz Ave Ste. 319
Los Gatos, CA 95030
Phone: 408-354-7711

License No. 0504035

## 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.

## 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 Insurance 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

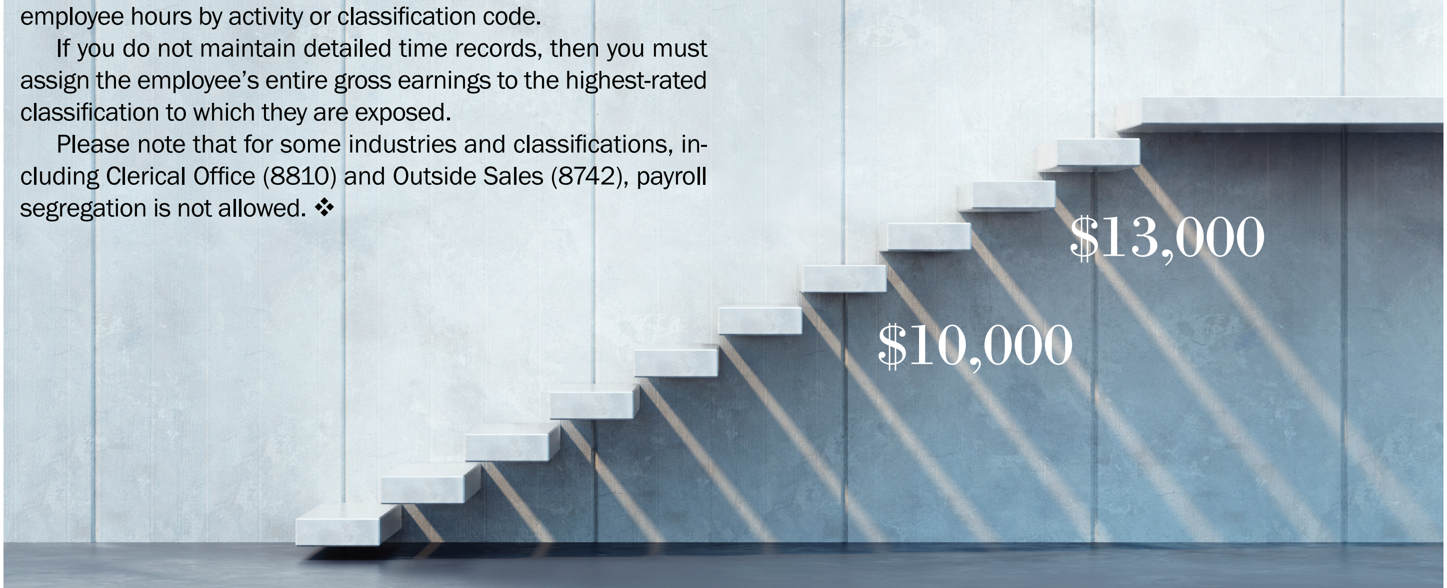
- Payroll records (registers, journals, earnings cards, etc).
- Payroll, overtime and Section 125 Cafeteria Plan (if any), which must be summarized by month, quarter or policy period for each classification code.
- State tax reports (EDD: DE9 and DE-9C).
- Payroll records associated with Waiver of Subrogation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



## HEALTH BENEFITS

# 60-day Waiting Period Repealed in California

GOV. JERRY Brown has signed legislation repealing a California law that required employers in the state to offer health coverage to employees after just 60 days of hiring.

By signing the new legislation, California law will be aligned with federal law, which requires that employers offer health coverage to new employees within 90 days of hiring them.

The bill, SB 1034, was pushed through the Legislature to ease administration and compliance for multi-state employers by ensuring they have just one date to keep in mind when determining when a new hire must be enrolled in a health plan.

The law also clarifies that in California, employers may now simply default to the federal law on that matter and insurers are free to administer the employer's selected waiting period.

In other words, the availability date for the new waiting period will vary by carrier. ❖

# EEOC Cracks Down on Pregnancy Discrimination

SINCE THE Equal Employment Opportunity Commission issued an advisory about pregnancy discrimination in July, the agency has been busy targeting employers it accuses of breaching the Pregnancy Discrimination Act.

## Consider the following cases:

### CASE 1

In September, a Wisconsin Merry Maids franchise owner agreed to pay $40,000 to settle a pregnancy discrimination suit filed by the EEOC.

**The accusation:** The company allegedly fired a woman because she had suffered from pregnancy-related issues at work.

### CASE 2

Pet food manufacturer Triple T Foods Inc. in August settled a pregnancy discrimination case filed by the EEOC for $30,000.

**The accusation:** The company allegedly fired a lab technician an hour after she had informed management she was pregnant. The company said it had to let her go due to safety concerns for the mother and baby.

### CASE 3

The EEOC in August sued Savi Technology Inc. after it withdrew a job offer upon learning the candidate had just given birth.

**The accusation:** The firm allegedly withdrew the offer for its human resources director position after the woman told the company vice president and general counsel that she had had pregnancy-related surgery after her recent birth.

Surprised? You shouldn't be. Since the end of 2011, the EEOC has filed more than 45 pregnancy discrimination lawsuits.

Said an EEOC lawyer in a recent press release:

"Too many employers have continued to deny female workers equal opportunity to earn a living for their families and themselves, simply because they are pregnant or 'showing.'

"The EEOC continues to combat such prejudices and practices as part of its efforts to educate the public about the rights of women in the workplace [and] everyone should be free from this obvious form of sex discrimination."

## What you can do

Many employers erroneously make decisions to fire or remove pregnant employees from certain jobs out of misguided notions of protecting the employee or the unborn child from certain work conditions, or out of a general fear that the pregnant employee will get hurt and sue – or file a workers' comp claim.

Hiring managers and supervisors must understand that this type of thinking is no longer acceptable.

It's best to make an individual assessment of each situation and take appropriate action when necessary.

That means consulting with the employee and suggesting she ask her doctor if she should refrain from any work activities. ❖