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Weekly Employment Brief

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Suspensions without Pay Rendered Employees Non-exempt and Entitled to Overtime Pay

In a reminder to California employers that suspending exempt employees without pay jeopardizes their exempt status, the Ninth Circuit Court of Appeals in *Block v. City of Los Angeles* upheld the right of several employees to sue the City of Los Angeles on the basis that the City's policy and practice of suspending employees without pay for disciplinary reasons defeated the employees' exempt status. Federal and more recently California overtime laws generally require employers to pay exempt employees a guaranteed salary that is not subject to any deductions for missing part of a workweek. One exception to this rule is that an employer may make deductions from an exempt employee's salary for violations of major safety rules. The Court explained that the partial-week suspensions without pay clearly violated the Fair Labor Standards Act because the City failed to prove that the suspensions resulted from violations of major safety rules. Also, the Court rejected the City's argument that suspensions without pay for more than a week were allowed. By way of example, the court explained that if an employee was suspended "from Monday to Friday of one week and Monday and Tuesday of the next week, the employee would perform work on Wednesday, Thursday and Friday of the second week and be entitled to full salary for the second week as a result." Id. at 417. The court held that 13 suspensions without pay over a 6 year period was sufficient to create an "actual practice" of improper deductions that defeated the employees' exempt status.

Warn Act Likely Applies Despite the Events ff September 11

Employers faced with the need to reduce costs in recent weeks have asked whether the events of September 11 affect the requirement under the WARN Act to provide 60 days advance notice of a plant closing or mass layoff. Although the WARN Act contains an exception for "unforseeable business circumstances," generally that exception applies only to an employer that is forced to have a plant closing or mass layoff as a direct result of the events of September 11. For example, airlines that implemented workforce reductions shortly after September 11, in direct response to the events of that day, may be able to claim this exception. By contrast, an employer that proceeded with a workforce reduction because it believed the events of September 11 delayed a hoped-for economic rally would not be able to claim this exception. Employers should also take note that even if the "unforeseeable business circumstances" exception applies, it does not dispense altogether with the requirement to provide advance notice under the WARN Act. Rather, it shortens the notice period from 60 days to the amount of notice the employer is reasonably able to provide under the circumstances.

Caught You Looking...

A California Court of Appeal recently ruled in *Birchstein v. New United Motor Manufacturing Inc.* that staring at a fellow employee might constitute sexual harassment in the workplace. Although the company had asked Michelle Birchstein's co-worker to stay away from her after he had asked her out on several dates and repeatedly made suggestive comments, he continued

to stare at her from a distance for as long as five to ten minutes at a time. The Appeals Court found that staring may be a "continuous manifestation of a sex-based animus," and could be viewed as a continuation of the sexual harassment. The case was remanded to the trial court to determine whether the employee's behavior was severe or pervasive enough to constitute sexual harassment. However, employers should be aware that requesting that a harassing employee stay away from his co-worker may not be sufficient to end sexual harassment.

Employers May Not Mandate English-only at Their Workplaces

Signed by the Governor last month, California enacted Assembly Bill 800, which prohibits an employer from enforcing any policy that limits or prohibits the use of any language in the workplace, unless justified by a "business necessity." Only in rare situations, such as necessity for a safe and efficient business operation, may an employer prohibit a particular language. While California may recognize English as its official language, employers may not make English the exclusive language spoken at their workplace.