Fenwick Employment Brief

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Salaried "Computer Professional" Exemption Simplified

As of September 30, 2008, exempt computer professionals in California can be paid a minimum of $75,000 per year for full-time employment on a salaried basis, rather than the previous requirement of at least $36 per hour. This welcome change eliminates a significant timekeeping burden, as employers can now treat computer professionals like other exempt, salaried employees.

Under prior law, exempt computer professionals had to be paid a minimum of $36 per each hour worked (or an annualized full-time salary equivalent). Regardless of whether employers chose to pay computer professionals by an hourly rate or by the annual salary equivalent, employers previously had to record the hours worked by computer professionals to ensure that each hour of work was compensated at the minimum rate of $36. Failure to meet this minimum hourly rate for every hour worked would risk a loss of the exemption, and would result in possible claims for unpaid overtime, meal and rest period violations, and penalties.

The recent change to the law gives employers the attractive option of paying full-time, exempt computer professionals on a straight salary basis, without the need to keep track of the hours worked to ensure that the $36 hourly rate is met. The $75,000 minimum annual salary properly compensates exempt computer professionals for all hours worked throughout the year, regardless of the total number of hours worked.

To qualify for the exemption, the employee must be paid at least $6,250 once a month. The minimum hourly rate and minimum annual salary is subject to annual adjustment, to be effective January 1 of each year. The changes to the computer professional exemption do not affect the "duties" portion of the exemption, which still must be met in order for the exemption to apply.

Significant Changes To ADA Effective Next Year

President Bush recently signed the ADA Amendments Act of 2008 into law. The new law, effective January 1, 2009, reinstates the ADA's "broad scope of protection" and overturns key United States Supreme Court caselaw which Congress believed had eroded the scope of protection the ADA was intended to provide.

Specifically, the new law:

- Rejects the requirement set forth by the Supreme Court's 1999 *Sutton v. United Air Lines, Inc.* case and its related cases, that an impairment must be evaluated with reference to the ameliorative effects of mitigating measures such as medication, hearing aids, prosthetic devices, etc.;
- Rejects the "demanding standard" established by the Supreme Court's 2002 *Toyota Motor Mfg., Ky., Inc. v. Williams* decision that an impairment must prevent or severely restrict the individual from performing activities that are of central importance to most people's daily lives;
- Rejects the EEOC's narrow definition of "substantially limits" one or more major life activities and directs the EEOC to issue revised regulations to be consistent with the new law; and
- Broadens certain important definitions in the ADA, including "major life activities" and "regarded as" having an impairment.

These changes will make it easier for individuals with physical or mental impairments to qualify as "disabled" under the ADA, and will make it difficult for employers to dismiss ADA claims at an early litigation stage.

Although most of the changes to the ADA are consistent with the broad requirements of California's FEHA, the ADA will exceed the protections afforded by FEHA in certain respects. For example, the ADA's definition of "regarded as" disabled will be even broader than FEHA's, and will make it easier for plaintiffs to assert protected status. Employers subject to both the ADA and FEHA must carefully evaluate disability issues and accommodation requests in order to ensure compliance with both laws.

RIF "Selection Criteria" Should Be Included In OWBPA Releases

Unfortunately, the current economy has caused many employers to consider the option of implementing a reduction-in-force ("RIF"). Employers that wish to obtain full releases from employees age 40 and over during a RIF must be careful to comply with the strict requirements of the Older Workers' Benefit Protection Act ("OWBPA"), which requires releases to contain certain written disclosures in order to properly waive federal age discrimination claims.

A failure to comply with the hypertechnical requirements of the OWBPA will result in the release being invalid as to age discrimination claims. For example, one court recently held that an employer's written notification to employees that 154 employees were affected by the RIF (when the actual number was 152) was sufficient grounds to invalidate the age releases.

Particularly controversial is the inclusion of RIF "selection criteria" (*i.e.*, the criteria used by the employer to select individuals for layoff). [See http://www.fenwick.com/docstore/Publications/Employment/EB_10-27-05.pdf] Some employers have taken the position that selection criteria need not be included in the releases, as the statute and regulations do not explicitly refer to the inclusion of "selection criteria." However, several federal district courts have recently held that an employer must identify – at least in general terms – the criteria used by the employer in selecting individuals for layoff. These courts have held that employers can satisfy their obligations by identifying broad factors (such as job criticality and job performance) in the releases, but are not required to disclose which factors led to each individual's selection for layoff.

Accordingly, it is prudent for employers to include selection criteria in all OWBPA releases used in connection with a RIF. Employers should also consult with counsel early in the RIF planning stages to ensure that not only are the releases OWBPA-compliant, but that all other legal requirements related to the RIF (such as any applicable mass layoff or plant closing notice requirements) are met.

NEWS BITES

"Texting" While Driving Will Be Banned In California

Beginning January 1, 2009, drivers in California will generally be prohibited from writing, sending or reading text-based electronic wireless communications (including text messages, instant messages or electronic mail). The new law supplements the recently enacted "hands free" cellular phone statute, and does not prohibit the reading or entering of a telephone number or name for the purpose of making or receiving a telephone call. [See http://www.fenwick.com/publications/6.5.4.asp?mid=35]

Violations of this law will be punishable by a base fine of $20 for a first offense and $50 for subsequent offenses. The assessments of penalties can triple the base fine amount.

EEOC Issues Helpful ADA Guidance

In light of the duty to reasonably accommodate and avoid discrimination against qualified employees with disabilities, managing a disabled employee with performance or conduct problems can be difficult. To provide practical guidance in

this problematic area, the EEOC recently published a memorandum which addresses some of the recurring issues. (This memorandum is subject to minor changes due to the passage of the ADA Amendments Act, although the changes would not affect the overall content or guidance in the memorandum.)

The memorandum, which can be found at http://www.eeoc.gov/facts/performance-conduct.html, provides answers to commonly asked questions. For example, the memorandum explains how to respond to an employee who first requests an accommodation in response to counseling or a low performance rating, and explains how to address attendance and leave issues for disabled employees.

While the memorandum sets forth the EEOC's position, it is not the equivalent of law and should not be relied upon exclusively. California employers must also ensure that their actions also comply with FEHA's requirements, which are not identical to the ADA.

San Francisco Healthcare Ordinance Withstands Legal Challenge

In *Golden Gate Rest. Ass'n. v. San Francisco*, the Ninth Circuit Court of Appeals held that a portion of a San Francisco ordinance which requires covered employers to make a certain level of health care expenditures (of at least $1.17 an hour) on behalf of their eligible employees was not preempted by federal law. Although a group of employers claimed that the ordinance impermissibly encroached upon ERISA, the court determined that the law did not create, or relate to, an ERISA "plan."

The Ninth Circuit's decision (which has jurisdiction over California, among other western states) may open the door for similar health care funding legislation by other municipal or local governments in California.

Employer That Followed Doctor's Advice Did Not "Regard" Employee As Disabled

In *Kozisek v. County of Seward*, an employee was arrested for making terroristic threats to his wife and for killing and wounding his family's farm animals with a firearm while intoxicated. After a psychological and substance abuse evaluation, a mental health practitioner recommended that the employee complete inpatient alcohol treatment prior to returning to work. The employee refused, and instead offered to undergo outpatient treatment as recommended by another counselor. This left the employer in an unenviable position: either allow the employee to elect outpatient treatment and return to work, or insist on inpatient treatment. The employer chose the latter course, and when the employee refused the inpatient treatment, the employer terminated the employee.

The employee filed a lawsuit, and among other things, claimed that the employer "regarded him as" as an alcoholic under the ADA. The Eighth Circuit Court of Appeals disagreed, and determined that the employer did not "regard" the employee as disabled because its decision was legitimately based on the recommendation of a licensed mental health professional. This case illustrates the importance of obtaining and relying upon medical opinions when faced with difficult return to work situations, as a medical opinion may provide a credible defense to a claim of disability discrimination.

California Jury Awards $4.5M For Trade Secret Misappropriation

In a case involving stolen trade secrets between competitors, a California jury awarded Contessa Premium Foods Inc. $2.8 million in compensatory damages and $1.7 in punitive damages against Chicken of the Sea Frozen Foods and several affiliated companies. The jury determined that the defendants, along with two former sales managers of Contessa, misappropriated valuable trade secrets – including food ingredients and customer lists – to promote competing food products.

This case should serve notice to employers of the significant risks involved when employees are hired either from or by a competitor, and the need to be vigilant to protect and safeguard valuable proprietary and confidential information. Employers should have clear, established procedures to minimize the risk that departing employees will take valuable company information with them, and to prevent entering employees from bringing confidential information from their prior employers.

Gender Discrimination Class Lawsuit Against Smith Barney Settled For $33 Million

A group of female financial advisers settled their claims of gender discrimination against Smith Barney – brought in a San Francisco federal district court – for $33 million. The plaintiffs alleged that they were subjected to discriminatory treatment, and in response to their complaints Smith Barney subjected them to a hostile work environment, disclosed their complaints to male co-workers, and retaliated against them for having made the complaints. The plaintiffs also alleged that Smith Barney promoted policies or practices that denied or restricted business opportunities, compensation and other employment conditions for women.

Court Approves $12 Million Settlement of Race Discrimination Class Lawsuit Against Xerox

A New York federal court approved a $12 million settlement for a class of approximately 1,500 African American current and former sales representatives of Xerox Corporation who alleged that they were discriminated against on the basis of race. Members of the class had claimed that Xerox assigned black sales employees to predominately African American communities and/or less lucrative customers, which resulted in lower commissions, bonuses, and opportunities for promotion.

Reminder: Time Off For The Upcoming General Election

November 4 is quickly approaching and employers should be mindful of their employees' voting rights. Under California law, employers must provide eligible voters with up to 2 hours of paid time off to vote if employees do not have sufficient time outside of working hours to vote. (Voting hours are from 7 a.m. to 8 p.m.) Employers may require that the time off be at the beginning or end of the regular working shift, whichever allows the most free time to vote and the least amount of time off from work. Employers also must grant unpaid leave to employees working as election officials.

At least ten days prior to the election – Friday, October 24 for most companies – employers must post a notice that advises employees of their rights. The notice is available for downloading here: http://www.sos.ca.gov/elections/elections_tov.htm.
