Fenwick Employment Brief

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CALIFORNIA REDUCES COMPUTER SOFTWARE PROFESSIONAL WAGE REQUIREMENT

Effective January 1, 2008, the minimum hourly rate for exempt computer software professionals will be $36, down from this year's minimum of $49.77. On an annualized basis (based on a 40-hour workweek), the new minimum salary will be $74,880 (down from $103,521.60).

However, employers should be cautious not to fall prey to a common misapplication of this exemption arising from a 2006 amendment to the Labor Code. To qualify as an exempt computer software professional, in addition to satisfying the duties test, the computer worker must receive the minimum rate for each hour worked, even if he or she is compensated on a salary basis. For example, a computer worker who receives a set annual salary of $85,000 but works a 50-hour week would not qualify for the exemption for that week, as the worker's hourly rate for the week would be $32.69, below the $36/hour minimum for 2008. Thus, employers must be careful to take into account the computer worker's entire work schedule when assessing qualification for the exemption.

The soon-to-be-effective rate reduction provides employers an excellent opportunity to reassess their current practices to confirm compliance with this exemption.

EMPLOYERS MAY REIMBURSE EMPLOYEE EXPENSES THROUGH INCREASED COMPENSATION

The California Supreme Court recently held that an employer may reimburse employees for work-related expenses by increasing their salary or commissions. In *Gattuso v. Harte-Hanks Shoppers, Inc.*, current and former outside sales reps of Harte-Hanks Shoppers claimed the company failed to reimburse them for work-related vehicle expenses. In response, Harte-Hanks cited its practice of paying outside sales reps higher base salaries and higher commission rates than its inside sales reps, with the increase intended to account for the expenses.

The Supreme Court affirmed the rulings of two lower courts, which found that Harte-Hanks' practice was lawful, and specifically held that the obligation to reimburse employees for work-related expenses may be fulfilled through increased compensation (salaries and/or commissions) rather than through separate reimbursement for the actual expenses. The lawfulness of this reimbursement option is contingent on the following:

- Employees must be able to challenge the sufficiency of the payment to cover actual expenses;
- Employers must communicate to affected employees a method or formula that identifies the portion of the payment attributable to the reimbursement; and
- Employers must make up the difference, if any, between the reimbursement payment and the employee's actual expenses.

Further, the Supreme Court suggested (without specifically requiring) that employers separately identify (*e.g.*, on a pay stub) the amounts attributable to labor performed and expense reimbursement.

Employers who opt to use increased compensation to meet their expense reimbursement obligations must comply with these requirements and document their compliance.

COMPILATION TRADE SECRET CLAIM REVIVED

A California appellate court recently confirmed that compilations of non-confidential business information may constitute protectible trade secrets. In *San Jose Construction, Inc. v. S.B.C.C., Inc.*, a dispute between two Bay Area general contractors, the plaintiff's ("SJC") former employee disclosed the contents of five project folders to his new employer ("SB"). SJC sued SB, claiming that the project folders contained information related to bidding, estimating and cost processes, project management systems, preferred vendors and subcontractors, design build parameters, costs and other information, and that the compilation of this information in project folders constituted protectible trade secrets. SJC further alleged it invested substantial time and money to develop this project/customer data, and that the information permitted SJC to develop further business and provide services more effectively and economically than its competitors.

A trial court dismissed SJC's claims on the grounds that (1) the materials could not contain trade secrets because they had been generated by or disclosed to third parties and SB already used the same subcontractors, and (2) the information had no economic value.

The appellate court reversed and sent the matter back for trial. It found "the overall compilation of the correspondence involving architects, SJC, and project owners; descriptions of the proposed scope of each project, measurements for each project building, and detailed cost estimates" to be a protectible trade secret. The compilation involved a substantial investment of thousands of dollars in time and resources – far more than merely contacting names on a list and soliciting bids. Moreover, SJC proved the projects were time-sensitive, making its completed and accepted proposals even more valuable. On these facts, the court held that a jury should be allowed to determine whether SJC's information constituted a protectible trade secret.

This decision provides important guidance to businesses regarding trade secret protection.

NEWSBITES

Effective Immediately: New Military-Spouse Leave
On October 9, 2007, Governor Schwarzenegger signed into law a bill requiring employers of 25 or more employees to provide up to ten days of unpaid leave to eligible spouses of certain military personnel. An eligible employee is one who works an average of 20 or more hours per week and whose spouse is a member of the Armed Forces, National Guard, or Reserves deployed during a period of military conflict. Further, the California Domestic Partners Rights and Responsibilities Act of 2003 extends this benefit to registered domestic partners.

To qualify for the leave, an eligible employee must notify the employer within two business days of receiving official notice that his or her spouse (or registered domestic partner) will be on leave from deployment and provide written documentation certifying that leave from deployment. Designated "emergency legislation," the new law took effect immediately.

No "No-Match Letters" for 2007
The Social Security Administration ("SSA") announced this month that it will not issue "no-match letters" this year. The SSA typically issues informative "no-match letters" to employers to alert them that a worker's Social Security number does not match employer-provided information. Under a new rule, however, the letter would have threatened employers with civil and criminal liability under immigration law for failing to resolve the discrepancy within 90 days. A consortium of labor, civil rights, and business groups filed suit in California federal court and obtained a preliminary injunction preventing the SSA from including the revised language.

Drivers, Hired as Contractors, Entitled to Expense Reimbursements

In the latest decision regarding FedEx's embattled contractor business model, the plaintiffs successfully challenged FedEx's practice of classifying single route drivers as "contractors" and sought reimbursement for their work-related expenses. In *Estrada v. FedEx*, following several decisions related to class certification and equitable relief, a California court of appeal finally considered the ultimate question: whether the contract drivers were actually employees for purposes of expense reimbursements. The court responded with a resounding "yes," and based its decision on the fact that FedEx provided benefits; imposed work schedules and routes; dictated dress and appearance; actively supervised the drivers; and paid them on a weekly, not project basis. The court also noted that the drivers were not engaged in an independent business.

The court concluded that "FedEx's control over every exquisite detail of the driver's performance . . . supported the trial court's conclusion that the drivers are employees, not independent contractors." The court ignored the express "contractor" label in the parties' agreement where their actual practice established otherwise.

This case underscores the fact that independent contractor labels carry little weight, and it confirms that the risks associated with worker misclassification can be very significant.

Arbitration Agreement "Permeated by an Unlawful Purpose" Unenforceable

In September, we reported on *Gentry v. Superior Court* (September 10, 2007 FEB Publication), where the California Supreme Court articulated a test to determine whether a class action waiver in an employer-employee arbitration agreement is enforceable. In a recent appellate court decision, *Murphy v. Check 'N Go of California, Inc.*, the court applied *Gentry* and invalidated a class action waiver on the grounds that prospective class members would have difficulty obtaining individual counsel; the potential for retaliation against current employees existed; and many prospective class members might be ill-informed of their rights. However, the court went one step further and invalidated the entire arbitration agreement (despite the existence of a severability clause), concluding that it was "permeated by an unlawful purpose," based in part on the fact that the agreement precluded the courts from assessing unconscionability. This decision is an important reminder that employers must regularly examine their arbitration language to ensure enforceability.