SDEAC PLENARY SESSION

San Diego, CA || October 18, 2017

Presented by:
Justine Phillips
Ashley Hirano
DAY OF REST RULE
California law guarantees employees “one day’s rest therefrom in seven.”
But what does that mean?
Question: Is the day of rest calculated by the workweek, or does it apply on a rolling basis to any consecutive seven-day period?

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Question: Does the exemption for workers employed six hours or less per day apply so long as an employee works six hours or less on at least one day of the applicable week, or does it apply only when an employee works no more than six hours on each and every day of the week?
Question: What does it mean for an employer to cause an employee to go without a day of rest: force, coerce, pressure, schedule, encourage, reward, permit, or something else?
Takeaways:

- Train supervisors to refrain from encouraging employees to work seven days in a workweek.
- Employee handbooks should be revised to apprise employees of their entitlement to a day of rest.
- If an employee chooses to work a seventh day in a workweek, and is not exempt from the day of rest rule, the employee should acknowledge in writing that it was the employee’s choice to work the seventh day, and that the employee was not encouraged or pressured to do so.
MANDATED WRITTEN NOTICES
Employers are required to inform employees who are victims of domestic violence, sexual assault, or stalking about their right to take time off work.

The California Labor Commissioner developed a form ("Rights of Victims of Domestic Violence, Sexual Assault and Stalking") for employers to use to comply with the notice requirements under the law.

Employers can either use the form developed by the Labor Commissioner or prepare a notice that is substantially similar in content and clarity to the form.
DOMESTIC VIOLENCE, SEXUAL ASSAULT, & STALKING

The Labor Commissioner’s Office

EMPLOYERS MUST PROVIDE THIS INFORMATION TO NEW WORKERS WHEN HIRED AND TO OTHER WORKERS WHO ASK FOR IT

RIGHTS OF VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING

Your Right to Take Time Off:
- You have the right to take time off from work to get help to protect you and your children’s health, safety or welfare. You can take time off to get a restraining order or other court order.
- If your company has 25 or more workers, you can take time off from work to get medical attention or services from a domestic violence shelter, program or rape crisis center, psychological counseling, or receive safety planning related to domestic violence, sexual assault, or stalking.
- You may use available vacation, personal leave, accrued paid sick leave or compensation time off for your leave unless you are covered by a union agreement that says something different. Even if you don’t have paid leave, you still have the right to time off.
- In general, you don’t have to give your employer proof to use leave for these reasons.
- If you can, you should tell your employer before you take time off. Even if you cannot tell your employer before your employer cannot discipline you if you give proof explaining the reason for your absence within a reasonable time. Proof can be a police report, court order or doctor’s or counselor’s note or similar document.

Your Right to Reasonable Accommodation:
- You have the right to ask your employer for help or changes in your workplace to make sure you are safe at work. Your employer must work with you to see what changes can be made. Changes in the workplace may include putting locks on doors, changing your shift or phone number, transferring or reassigning you, or help with keeping a record of what happened to you. Your employer can ask you for a signed statement certifying that your request is for a proper purpose, and may also request proof showing your need for an accommodation. Your employer cannot tell your coworkers or anyone else about your request.

Your Right to Be Free from Retaliation and Discrimination:
Your employer cannot treat you differently or fire you because:
- You are a victim of domestic violence, sexual assault, or stalking.
- You asked for leave time to get help.
- You asked your employer for help or changes in the workplace to make sure you are safe at work.

You can file a complaint with the Labor Commissioner’s Office against your employer if he/she retaliates or discriminates against you.

For more information, contact the California Labor Commissioner’s Office. We can help you by phone at 213-587-6899, or you can find a local office on our website: www.labor.ca.gov/oa基层OfficeMap. If you do not speak English, we will provide an interpreter in your language at no cost to you. This Notice explains rights contained in California Labor Code sections 294, 296, and 296.1. Employers may use this notice or one substantially similar in content and clarity.

Labor Commissioner’s Office Victims of Domestic Violence, Sexual Assault and Stalking Notice 5/2017

Sheppard Mullin
DFEH issued a “Workplace Harassment Guide For California Employers” to assist employers in preventing and remedying workplace harassment.

Either the brochure or the poster satisfies an employer’s responsibility to provide employees an information sheet regarding sexual harassment under California Government Code Section 12950(b).

The brochure and poster can be found on the DFEH’s website at www.dfeh.ca.gov.
WORKPLACE HARASSMENT GUIDE

THE DIRECTION OF OUR EMPLOYMENT AND HOUSING IN THE ADOPTION OF THIS POLICY OF NON-DISCRIMINATION FOR EMPLOYMENT, HOUSING AND PUBLIC PROGRAMS, AND FROM THE PROHIBITION OF ACTS OF VIOLENT HOME

SEXUAL HARASSMENT

THE FACTS

Sexual harassment is a form of discrimination based on sex, gender, sexual orientation, or age. It includes any unwelcome sexual advances, solicitation, requests for sexual favors, or any physical contact of a sexual nature, which is unwelcome.

THERE ARE TWO TYPES OF SEXUAL HARASSMENT:

1. "Sexual advances" Sexual advances occur when someone makes sexual advances on you, including touching, oral sex, or sexual intercourse.

2. "Sexual harassment" Sexual harassment occurs when an employer或者 employee engages in any unwelcome sexual advances or any other sexual behavior that creates a hostile work environment.

BEHAVIOR THAT MAY BE SEXUAL HARASSMENT:

- Unwanted sexual advances
- Contact of a sexual nature
- Sexual harassment
- Sexual advances or conduct that creates a hostile work environment

EMPLOYER RESPONSIBILITY & LIABILITY

All employees, regardless of the number of employees, are covered by the state’s antidiscrimination provisions of California law. Employers are liable for harassment by their supervisors or agents. All harassment claims, including those by employees of small businesses, are covered by state law. Employers are liable for harassment by supervisors or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take steps to prevent harassment, the employer is liable for harassment by a supervisor or other employee. An employer may be liable for harassment by a non-employee if the employer has knowledge of the harassment and fails to take reasonable steps to prevent and correct harassment. An employer will only be liable for this type of harassment if it occurs or should have known of the harassment, and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment. A program to eliminate sexual harassment from the workplace is not only required by the law; it is the most practical way for an employer to avoid cost and liability if harassment occurs.

ALL EMPLOYERS MUST TAKE THE FOLLOWING ACTIONS TO PREVENT HARASSMENT AND CORRECT IT WHEN IT OCCURS:

1. Distribute a copy of this brochure to all employees at least once per year.
2. Provide a copy of the EEOC’s primary materials to all employees.
3. Provide training to all employees on harassment.

CIVIL REMEDIES

1. Damages for emotional distress from each employer or person in violation of the law
2. Hiring or reinstatement
3. Back pay or promotion
4. Changes in the policies or practices of the employer

For more information, contact Sheppard Mullin at (800) 894-1968 or by email at contact.sheppardmullin.com

FOR MORE INFORMATION

Telephone: (800) 894-1968 or (805) 786-2440
Website: www.sheppardmullin.com

THE TEAM IS CONDUCTED WITH PROFESSIONAL DIGNITY, RESPECT, AND IN HARMONY WITH CALIFORNIA LAW. WHILST OUr ATTORNEY-GOALS ARE TO WORK TOGETHER TO RESOLVE DISPUTES AND TO PROVIDE THE BEST POSSIBLE SERVICE TO OUR CLIENTS. THE TEAM IS CONDUCTED IN A PROFESSIONAL MANNER Modes Of Communication And Identity That May Be Relevant To The Case.
Other written disclosures mandated by California

- Discrimination, harassment and retaliation prevention
- DLSE 2810.5 for Non-Exempt Employees
- And a whole host of other required postings and notices!
# MEAL AND REST PERIODS FOR ON-CALL EMPLOYEES

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Absent circumstances permitting an on-duty meal period, employers are obligated to provide off-duty meal periods:
- Uninterrupted
- Thirty Minutes (or more)
- Duty Free
- Unpaid

As well as off-duty rest periods:
- Uninterrupted
- Ten Minutes (or more)
- Duty-Free
- Paid
What does it mean to be “off-duty”? 
“Time during which an employee is relieved from all work-related duties and from employer-control.”

Can you require the employee to be “on-call” during a meal or rest period?
- i.e. carry a pager or radio?
- NO
MEAL AND REST PERIODS FOR ON-CALL EMPLOYEES

Takeaways:

- Make sure employees are truly off-duty/off-call during meal and rest periods
- Revise handbooks/policies to make it clear employees may do what they want with their time
- This includes permitting them to leave the premises during rest periods!
CALIFORNIA’S
NEWEST VACATION DECISION

Employee alleged that the employer’s vacation policy violated state law because it allegedly required employees who worked for less than one year to “forfeit” vested vacation pay.

California Court of Appeal found that the employer’s vacation policy, as set forth unambiguously in writing, lawfully provided that employees do not begin to earn vacation time until after the end of the employee’s first year.

Because the employee’s employment ended during his first year, he did not have any vested or accrued vacation pay, and thus was not owed any vacation wages.
Takeaways:

- An employer may lawfully decide it will not provide paid vacation.
- An employer may lawfully decide it will provide paid vacation after a specified waiting period at the front end.
- An employer may limit the amount of vacation pay that is earned by restricting vacation accrual on the back end.
- But once the vacation pay benefit is earned, it cannot be taken away.
COMPENSATION FOR BAG CHECKS
Frlekin v. Apple Inc., Case No. 15-17382 (9th Cir., August 16, 2017)

The Ninth Circuit has just asked the California Supreme Court to address the question of whether time spent on the employer’s premises for required exit searches of employee belongings was compensable as “hours worked.”
COMPENSATION FOR BAG CHECKS

Takeaway:

- Employers with similar bag check requirements should closely monitor the resolution of this issue, and be prepared to change their policies and practices should the California Supreme Court determine that time spent conducting employee bag checks is compensable.
SICK PAY FOR EMPLOYEES PAID DIFFERENT RATES
SICK PAY FOR EMPLOYEES PAID DIFFERENT RATES

- California’s “Healthy Workplaces, Healthy Families Act” requires employers to provide sick pay to eligible employees.
- On July 21, 2017, an attorney for the Labor Commissioner issued an opinion concerning the calculation of paid sick leave for an on-call employee paid two different hourly rates of pay under Labor Code Section 246(l).
The DLSE stated that:

“the statute defines ‘paid sick days’ as ‘time that is compensated at the same wage as the employee normally earns during regular work hours....’ (Labor Code § 245.5(e).) This provision reflects and embodies the Legislature’s overall express intent that employees be entitled to take sick days without losing any of the compensation they would otherwise normally have earned for that day.”

The opinion noted that Labor Code § 246(l) gives the employer the option of using the regular rate of pay in the workweek in which the leave time is taken or a 90 day look-back period to average pay by hours.
The opinion went on to state that the hourly rate of pay in the scenario presented is either $40.00 or $10.00, depending on the assignment.

The employer would comply with subsection (1) by applying the rate in effect for the type of shift missed in the workweek because the statute envisions paid sick days, by definition, as time that is compensated at the same wage rate the employee would have earned but for the use of paid sick leave.
The opinion observed that an employee “must be scheduled to work in order to be paid for a paid sick day” under ordinary circumstances.

Therefore, if the employee was scheduled to work a shift where the employee was to be paid $40.00 per hour, the employee should be paid for the hours utilizing paid sick leave at $40.00 per hour.

For the standby shifts, there is a contractual obligation to pay the employee $10 per hour, so if the employee chose to use accrued paid sick leave for this time then the employee need to be paid at $10.00 per hour.

Given the two different natures of the shifts, there would be no averaging of the pay rates.
Takeaways:

- This letter provides a practical solution to a situation where an employee receives substantial compensation that is not for hours worked and an hourly rate of pay for hours that are worked.
- It also provides a solution where employees are paid two or more rates for different types of work.
- The rate in effect method endorsed by the opinion is equitable because it compensates sick time at the same wage rate the employee would have earned if he worked rather than missed work and used paid sick leave.
STEREOTYPING AND DISCRIMINATION

- Stereotyping can be evidence of discriminatory animus.
- Employee presented evidence that his supervisor:
  - Articulated opinions about the appropriateness of gender identity expressions.
  - Commented on his own sexual orientation.
  - Suggested that the employee cut his hair.
  - Ridiculed him for wearing a scarf as an accessory when it was not cold outside.
Despite providing a legitimate business justification for termination, Court of Appeal found this constituted a “reasonable inference” that discriminatory animus – a dislike for the employee being “too gay” – also contributed to his termination.
Takeaways:

- Comments on employee’s apparel should be tied to objective criteria (e.g. uniform requirements).
- Do not comment on protected characteristics (e.g. race, gender, sexual orientation, age, etc.).
BAN THE BOX MOVEMENT
BAN THE BOX LEGISLATION

- 9 States and 15 localities, including San Francisco and Los Angeles, have laws limiting the ability of private employers to inquire about applicants’ criminal history.
- Referred to as “ban the box” laws because they prohibit the use of a criminal history “box” on job applications.
- California has not yet enacted state-wide ban the box laws which apply to private employers.
BAN THE BOX—LOS ANGELES

- Applies to any employer with at least 10 employees who work two or more hours each week within the City of Los Angeles.
- Prohibits an employer from asking or requiring disclosure of a job applicant’s criminal history prior to a conditional offer of employment.
- Employers must also engage in a “Fair Chance Process” before withdrawing a conditional offer of employment based on the applicant’s criminal history, no matter how severe the disclosed offense may be.
The Fair Chance Process requires the following:

- Before withdrawing a conditional offer based on applicant’s criminal history, an employer must notify the applicant that the job offer may be withdrawn due to the applicant’s criminal history, and must prepare a “written assessment” that addresses why the applicant’s criminal history is relevant to the position.

- The employer must give a job applicant five business days to respond to the written assessment.

- If the applicant provides any documentation or information in response, the employer must prepare a “written reassessment,” again with notice and a copy of the reassessment sent to the job applicant.
Ordinance also places additional obligations on employers with respect to advertisements and notices:

- Employers must state in every advertisement seeking applicants for employment that they will consider qualified applicants with criminal histories.
- Employer must prepare and post a notice informing applicants of the Ordinance’s provisions in a conspicuous place at any location job applicants may visit.
- Employers must send copies of the posted notice to every labor union with which they have a collective bargaining agreement.
Employers may not retaliate against an employee or applicant for reporting any alleged violation of the Ordinance or for participating in the Fair Chance Process.

Employers may be fined a maximum of $2,000 per violation.
WHERE DID MY EMPLOYEES GO?

- Employee missed four consecutive scheduled workdays
- Employer’s attendance policy said three or more consecutive days of no call/no show constituted a voluntary termination
- Employee never informed employer, nor did she provide a doctor’s note
- Employer terminated employee’s employment
- After termination, the employee self-enrolled in chemical dependency program for marijuana abuse
So she sued... claiming that her employment was terminated because of:

- (1) her alleged disability of anxiety and severe stress;
- (2) she was obtaining treatment for substance abuse; and
- (3) she had complained about being shorted on her paychecks.
Court said “Nope.”

Employee failed to produce evidence that the employer knew about her alleged disability, her treatment for substance abuse, and alleged complaints about being shortened on her paychecks.

In addition, there was no evidence that her direct supervisor or anyone else harbored discriminatory intent.
WORKING FROM HOME AS ACCOMMODATION UNDER ADA
WORKING FROM HOME AS ACCOMMODATION UNDER THE ADA

- Court of Appeals addressed whether employer was required to allow employee to work from home indefinitely to accommodate employee’s disability.
- State of Louisiana (“DOJ”) attorney developed serious health problems due to complications from a kidney transplant.
- Attorney was granted an accommodation to work from home for approximately six months.
WORKING FROM HOME AS ACCOMMODATION UNDER THE ADA

- After exhausting FMLA leave, DOJ again granted attorney’s request to work from home in October 2013.
- In August 2014, DOJ formally denied attorney the ability to work from home.
- Attorney sued DOJ for its alleged failure to accommodate her disability.
WORKING FROM HOME AS ACCOMMODATION UNDER THE ADA

- Court ruled that the attorney was not an otherwise “qualified individual” because attorney could not perform her essential job duties working from home.
- Court reasoned that the attorney’s position was interactive, team-oriented, and required day-to-day coordination with supervisors.
- Court that “regular work-site attendance is an essential function of most jobs.”
Takeaways:

- If applicable, consider including “regular work-site attendance” as an essential job duty on employee job descriptions.
- Temporary work-from-home accommodations may be required as a reasonable accommodation under the ADA.
- Employers are not required to provide employees with an indefinite work-from-home accommodation under the ADA so long as work-site attendance is essential to the position.
NEW EMPLOYMENT LEGISLATION!
AB 168 – Salary inquiry ban

- Would prohibit an employer from seeking salary history information from an applicant
- Would require an employer, upon request, to provide a pay scale for a position to an applicant
LEGISLATIVE UPDATE

- **AB 450 – California as a Sanctuary State**
  - Would prohibit employers from allowing immigration enforcement agents to have access to non-public areas of a workplace without a judicial warrant.
  - Would prohibit an employer from providing voluntary consent to an immigration enforcement agent to access, review, or obtain the employer’s employee records without a subpoena or court order.
AB 450 – California as a Sanctuary State

Would require, except as required by federal law, an employer to provide a notice, containing specified information, of an inspection of I-9 forms or other employment records conducted by an immigration agency within 72 hours of receiving the federal notice of inspection.
LEGISLATIVE UPDATE

- AB 450– California as a Sanctuary State
  - Would prohibit an employer from re-verifying the employment eligibility of a current employee at a time or in a manner not required by specified federal law
SB 63 – Expanded parental leave

Would expand CFRA by requiring employers with 20 or more employees in a 75-mile radius to provide employees with up to 12 weeks of parental leave to bond with a new child within one year of the child’s birth, adoption, or foster care placement if the employee has at least 2 months of service with the employer, has worked at least 1,250 hours.

Would prohibit an employer from refusing to maintain and pay for coverage under a group health plan for an employee who takes this leave.
AB 1008 – Statewide Ban the Box

Would make it unlawful under FEHA to:

- include on any application any question that seeks the disclosure of an applicant’s conviction history;
- inquire into or consider the conviction history of an applicant until that applicant has received a conditional offer of employment; or
- consider, distribute, or disseminate information about any specified arrests not followed by conviction, referral to or participation in pretrial or post-trial diversion programs, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated
AB 1008 – Statewide Ban the Box

Would require employers who intend to deny employment based solely or in part on conviction history to perform an “individualized assessment” of whether the conviction history has a “direct and adverse relationship with the specific duties of the job that justify denying the applicant the position” and to provide the applicant written notification of the decision and the disqualifying conviction history if a preliminary decision to deny employment is made.

Applicant would be entitled to respond to the notice before the employment decision becomes final and the employer would be required to consider any information provided by the applicant in response to the notice.
LEGISLATIVE UPDATE

- AB 1008 – Statewide Ban the Box
  - Would require an employer who has made a final decision to deny employment to the applicant to notify the applicant in writing of the final decision, of any procedures for challenging the decision, and of the right to file a complaint with the DFEH
AB 1209 – Public salary database

- Would require any employer that has more than 500 employees in CA to collect information on gender wage differentials every two years, beginning on 7/1/2019
- Would require the employer to submit the information to the Secretary of State by 7/17/20, and every two years thereafter
- Would require the Secretary of State to publish this information at a public website
- AB 569 – Reproductive health discrimination
  - Would prohibit employers from taking adverse action against employees based on reproductive health decisions
  - Must be included in all handbook updates
  - Exempt religiously-affiliated institutions are not exempt unless the employee qualifies as a minister
AB 978 – Illness and Injury Prevention Plans

Would require an employer to provide (*upon request) a copy of the written injury and illness prevention program to a current employee or authorized representative
QUESTIONS? THANKS FOR JOINING US!

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