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Public Law Update

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By Daphne M. Anneet, Esq., Kelly A. Trainer, Esq. and T. Linh Ho, Esq.

Of Special Interest

Published by:
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Public Law Update

BURKE, WILLIAMS & SORENSEN, LLP

February 2009 **Volume 3, Number 1**

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The Top 10 Things That Employers Need To Know About The New FMLA Regulations

By Daphne M. Anneet, Esq., Kelly A. Trainer, Esq. and T. Linh Ho, Esq.

The Family and Medical Leave Act ("FMLA") of 1993 entitles employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to 12 workweeks in a 12-month period for the birth of the employee's son or daughter and to care for the newborn child; for the placement of a son or daughter with the employee for adoption or foster care; to care for the employee's spouse, parent, son, or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition. On November 17, 2008, the Department of Labor ("DOL") published its final rule to implement long-awaited amendments to the FMLA. These new rules go into effect on January 16, 2009.

In general, the regulations resulted in a modest increase in employee rights and obligations, a moderate increase in employer rights and obligations, substantial improvements in the medical certification process, new military family leave entitlements, and a minor increase in tools to manage abuse. We have briefly summarized some of the highlights from the new regulations below.[1]

1. Eligibility Requirements for FMLA Leave

The new regulations provide several important clarifications and modification to the eligibility requirements. An eligible employee is an employee of a covered employer who:

1. Has been employed for at least 12 months,

2. Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

3. Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

a. Calculating 12 Months of Service. The new regulations provide that the employee's 12 months of service need not be consecutive and can include an employee's service with an employer within the past seven years. Additionally, even service beyond seven years is included in the 12 month of service calculation if the break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation, or a written agreement, including a collective bargaining

[1] This article is not intended to be a comprehensive review of the new regulations.

agreement, exists concerning the employer's intention to rehire the employee after the break in service.[2]

b. Attaining FMLA Rights During a Non-FMLA Leave. In calculating 12 months of service, the regulations provide that any week an employee is on the payroll is counted in the 12 months of service calculation, even if the employee is on paid or unpaid leave of absence. As such, an employee with less than 12 months of service may start a leave without the protection of FMLA, and acquire FMLA protection during the leave.

c. Calculating 1,250 Hours of Service - timing. The regulations clarifies that an employee must reach 1,250 hours of service in the past 12 months at the time the requested FMLA is to start, not when the employee submits the request.

d. Calculating 1,250 Hours of Service - method. In calculating the 1,250 hours of service, only hours where an employee actually performs services for the employer are included. As such, hours such as holiday pay, sick leave, or other compensatory time where no services were actually provided are not included in the 1,250 hours calculation.

e. Employees Returning from Military Reserve or National Guard Service. Employees returning from protected service are to receive the same FMLA rights and benefits they would have received had they remained in continuous employment.

f. Counting Holidays. If an employee works any part of a work week during which a holiday falls, the holiday will not count toward the 12-week FMLA leave entitlement unless the employee would otherwise have been required to work on the holiday.

g. Perfect Attendance and Similar Rules. Employers are not allowed to deny perfect attendance bonuses to employees who exercised their FMLA leave rights. However, if bonuses are based on the achievement of a specified goal, then FMLA absences may be taken into account if absences of employees on an equivalent non-FMLA leave are treated the same.

2. Notice Requirements for Employers and Employees under the FMLA[3]

One of the most significant amendments to the FMLA is the change to the employer's notice requirements. The new regulations have divided the

[2] 29 C.F.R. § 825.104 (2009).
[3] 29 C.F.R. § 825.300(b) (2009).

employer's notice obligations into four different types of notifications and also provided employers with more time to give notice.

a. General Notice. Every covered employer must post, and keep posted in conspicuous places on its premises, a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints.[4] Employers must provide notice to each employee by including information in employee handbooks or other written guidance, or by distributing a copy to each new employee upon hiring. Covered employers must post general notices even if no employees are eligible for FMLA leave. Furthermore, when a "significant portion of its workers are not literate in English," an employer must provide translation of the general notice. Employers may post the General Notice electronically.

b. Eligibility Notice. The Eligibility Notice must state whether the employee is eligible for FMLA leave, and if not, provide at least one reason why the employee is not eligible.[5] Note, an employee's eligibility is not based on an evaluation of the employee's reason for requesting leave. When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must provide the Eligibility Notice within five business days, absent extenuating circumstances. This provides the employer with some additional time to evaluate the situation and calculate whether the employee is eligible to take FMLA leave without compromising the employee's FMLA rights.

c. Rights and Responsibilities Notice. Employers must also provide written notice detailing the specific expectations and obligations of the employee and explain any consequences of failing to meet these obligations.[6] Such notice must include: any requirement to provide medical certification, the right to substitute paid leave, whether and how to pay premiums for continuing benefits, the employee's status as a "key employee," and job restoration rights upon expiration of FMLA leave. The employer may also provide optional information, such as whether the employer will require periodic reports of employee's status and the employee's intent to return to work. Finally, the employer must notify the employee of any changes within five business days of the first notice of the need for FMLA leave subsequent to any change.[7]

d. Designation Notice. An employer must notify the employee when leave is designated as FMLA leave within five business days of making the

[4] 29 C.F.R. § 825.300(a) (2009).
[5] 29 C.F.R. § 825.300(b) (2009).
[6] 29 C.F.R. § 825.300(c) (2009).
[7] 29 C.F.R. § 825.300(c)(4) (2009).

determination whether the leave has or has not been designated as FMLA, absent extenuating circumstances.[8] In order to lessen the burden of this notification, the final rule also permits the employer to notify the employee of the hours counted against the FMLA leave entitlement verbally and follow-up with written notification on a pay stub at the next payday (unless the next payday is in less than one week, in which case notice must be no later than the subsequent payday).

e. Consequences of an Employer Failing to Provide Proper Notice. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment reinstatement, promotion, or any other relief tailored to the harm suffered.[9]

f. Employee Notice Requirements. In the case of foreseeable FMLA leave, an employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or a family member, or the planned medical treatment of serious injury or illness of a covered servicemember.[10] In contrast, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case for unforeseeable FMLA leave.[11] Notice may be given by the employee's spokesperson if the employee is unable to do so personally.

3. Retroactive Designation of FMLA Leave[12]

In response to the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*,[13] the new rule provides a remedy provision that is dependent on an employee having suffered individualized harm as a result of any violation of the general, eligibility, or designation notice requirements. Employers may retroactively designate FMLA leave with appropriate notice where (1) an employer fails to provide timely notice and the delay does not cause employee

[8] 29 C.F.R. § 825.300(d) (2009).
[9] 29 C.F.R. § 825.300(e) (2009).
[10] 29 C.F.R. § 825.302 (2009).
[11] 29 C.F.R. § 825.303 (2009).
[12] 29 C.F.R. § 825.300 (2009).
[13] 535 U.S. 81 (2002). *Ragsdale* held that 29 CFR § 825.700(a), a Labor Department regulation that required Wolverine to grant her 12 additional weeks of leave because it had not informed Ragsdale that the 30-week absence would count against her FMLA entitlement, was contrary to the FMLA and beyond the Secretary of Labor's authority.

harm or injury, or (2) an employer and employee mutually agree that leave be retroactively designated as FMLA leave.[14]

4. Employees Must Provide Complete and Sufficient Medical Certification[15]

The FMLA now contains procedures for employers to request clarification when a medical certification is incomplete or insufficient. "Incomplete" certification occurs when one or more of applicable entries on certification have not been completed. Similarly, "insufficient" certification occurs when information provided is vague, ambiguous, or non-responsive. If a certification is either incomplete or insufficient, an employer must notify the employee of the deficiency and provide the employee with seven calendar days to cure any such deficiency. When certification is required by an employer, it is the employee's obligation to either provide a complete and sufficient certification or to provide any necessary authority to release complete and sufficient certification directly to the employer.

a. Timeline for Medical Recertifications. An employer may request recertification no more often than every 30 days and only in conjunction with an employee's absence.[16] If the medical certification indicates that the minimum duration of the condition is more than 30 days, then an employer must wait until that minimum duration expires before requesting a recertification.

5. Fitness-For-Duty Requirements[17]

The FMLA has always permitted employers to require a fitness-for-duty certification from employees returning from a continuous leave. The new regulations continue to permit fitness-for-duty certifications if required of all similarly-situated employees on a uniformly applied basis. The employer may also require the certification to specifically address the employee's ability to perform the essential functions of the employee's job. However, the regulations impose additional notice obligations.

a. Notice Requirements. Employers must now provide notice of the fitness-for-duty requirement in each designation notice. Without such notice, the employer cannot require a fitness-for-duty certification returning to work from FMLA leave.

b. Contents of Certification. If the employer requires the certification to address the employee's ability to perform the essential functions of the job, the employer must also provide a list of essential job functions with

[14] 29 C.F.R. § 825.300(d) (2009).
[15] 29 C.F.R. § 825.305(c) (2009).
[16] 29 C.F.R. § 825.308(a) (2009).
[17] 29 C.F.R. § 825.312 (2009).

the designation notice and clearly indicate in the notice that the employer will require this specific certification.

c. Clarification and Authentication. The employer may contact the employee's health care provider to clarify and authenticate the fitness-for-duty certification, as permitted with the initial medical certification process. However, no second or third opinions are permitted.

d. Intermittent Leave – Timing and Frequency of Certification. The new rules authorize employers to require a fitness-for-duty certification every 30 days (or longer interval) during an intermittent or reduced schedule leave if reasonable safety concerns exist based on the serious health condition that was the reason for the employee's FMLA leave.[18] "Reasonable safety concerns" means a reasonable belief that the returning employee may pose a significant risk of harm to himself/herself or others. An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification.[19] As with all medical certifications, employers should make certain that their requests comply with all state and federal privacy laws (i.e., California's Confidentiality of Medical Information Act) as well as the FMLA.

6. Authentication and Clarification of Medical Certification[20]

The new regulations also provide for certain circumstances when an employer may contact the employee's health care provider ("HCP") directly. However, under no circumstances may the employee's direct supervisor contact the employee's HCP.[21] While an employer may not request additional information from the HCP, the employer may contact the HCP for authentication and clarification of a medical certification. The new regulations define "authentication" as providing the HCP with a copy of the certification and requesting verification that the information on the form was completed and/or authorized by the HCP. In contrast, "clarification" involves contacting the employee's HCP in order to understand the handwriting on the medical certification or to understand the meaning of a response. No additional information beyond that included in the certification form may be requested.

Any contact with the employee's HCP must comply with the requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule. The FMLA regulations make clear that while an employer may not require a HIPAA consent authorizing communication with the employer, an employer can deny FMLA leave if the employee fails to provide consent when required by the HCP.

[18] Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. 29 C.F.R. § 825.202 (2009).
[19] 29 C.F.R. § 825.312(e)(2009).
[20] 29 C.F.R. § 825.307 (2009).
[21] 29 C.F.R. § 825.307(a) (2009).

Consequently, the employee must provide the consent to the HCP if he or she wishes to have his or her leave designated as FMLA.

The new "clarification" and "authentication" provisions are in addition the second and third opinion provisions in the FMLA. An employer who has reason to doubt the validity of a medical certification may require that the employee obtain a second opinion at the employer's expense.[22] If the opinions of the employee's and the employer's designated HCP differ, the employer may require the employee to obtain certification from a third health care provider (jointly approved by the employer and the employee in good faith), again at the employer's expense.[23] This third opinion will be final and binding. The employer must pay for any "out of pocket" travel expenses that the employee or family member incurred to obtain the second and third opinions.[24]

7. Substituting Paid Leave or Light Duty for FMLA Leave[25]

The FMLA permits eligible employees to choose to substitute accrued paid leave for FMLA leave. Under section 7(o) of the Fair Labor Standards Act ("FLSA"), public employers may, under certain circumstances, substitute compensatory time off ("CTO") in lieu of paying cash to an non-exempt employee who has worked overtime. Previously, the FMLA prohibited employers from running CTO and FMLA concurrently. However, the new regulations removed this restriction. Thus, a state or local government employer can now coordinate CTO with unpaid FMLA leave.

An employer cannot require an employee to perform modified or light duty work in lieu of taking FMLA leave. However, the employee may voluntarily agree to a light duty assignment in lieu of FMLA leave. Light duty assignments do not count against 12 weeks of FMLA leave or affect an employee's reinstatement rights.[26]

8. Coordination of FMLA with Workers' Compensation and Other Wage Replacement Benefits

The prior FMLA regulations prohibited employers from coordinating workers' compensation benefits with paid leave while the employee was on an FMLA-designated leave. Moreover, employees could not elect to coordinate leave balances with workers' compensation benefits while on an FMLA leave. These same restrictions applied when employees received similar wage replacement benefits, such as short- or long-term disability payments. However, under the newly revised regulations, the employer and the employee can mutually agree to

[22] 29 C.F.R. § 825.307(b) (2009).
[23] 29 C.F.R. § 825.307(c) (2009).
[24] 29 C.F.R. § 825.307(e) (2009).
[25] 29 C.F.R. § 825.207 (2009).
[26] 29 C.F.R. § 825.207 (2009).

supplement workers' compensation benefits or disability benefits with paid leave during an FMLA leave.

9. Anti-Discrimination and Retaliation Provisions

Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, firing, promotions, or disciplinary actions.

a. Perfect Attendance Bonuses. FMLA leave cannot be counted under "no fault" attendance policies. However an employer may now deny perfect attendance bonuses or similar awards to employees who take FMLA leave, so long as employees with non-FMLA leave absences are treated in the same manner.

b. Retaliation Prohibited. The regulations expressly prohibit retaliation against an employee who asserts his or her FMLA rights.

10. New Military Family Leave Provisions

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 ("NDAA"), which created two new leave entitlements under the FMLA for certain family members of military personnel. The new FMLA regulations provide additional guidance and clarification for these new leave provisions.[27]

a. Military Caregiver Leave. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a "covered servicemember" will be able to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered servicemember with a serious illness or injury incurred in the line of duty on active duty. Military Caregiver Leave is a special provision that extends FMLA job-protected leave beyond the normal 12 weeks of FMLA leave. This provision also extends FMLA protection to additional family members (i.e., parent, spouse, child, or next of kin) beyond those who may take FMLA leave for other qualifying reasons. The 12-month period commences on the date an employee first takes leave to care for a covered servicemember with a serious injury or illness.[28] One statutory limitation to during a "single 12-month period," applies to a husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 weeks of Military Caregiver Leave during the "single 12-month period."[29]

[27] 29 C.F.R. §§ 825.127, 825.310 (2009)
[28] 29 USC 2612(a)(3)-(4).
[29] 29 C.F.R. § 825.127 (2009).

b. Qualifying Exigency Leave.[30] This provision makes the normal 12 workweeks of FMLA leave available to eligible employees with a covered military member (who is the employee's spouse, child, or parent) serving in the National Guard or Reserves to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. "Qualifying exigency" refers to eight specific broad categories for which employees can use FMLA leave: (1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities not encompassed in the other categories, but agreed to by the employer and employee.[31]

An employer may require certification completed by an authorized health care provider of the covered servicemember. The employer must accept as sufficient certification "invitational travel orders" ("ITOs") or "invitational travel authorizations" ("ITAs") issued to any family member to join an injured or ill servicemember at his or her bedside.[32]

The regulations also provide for a certification that employers can require the first time an employee requests leave because of a qualifying exigency arising out of the active duty or call to active duty status of a covered military member. An employer may require the employee to provide a copy of the military member's active duty order or other documentation issued by the military member's active duty service.[33]

Recommended Steps That Employers Should Take Now to Comply with the New FMLA Regulations

- Update FMLA policies.
- Update FMLA posters and notices.
- Develop FMLA guidelines and procedures and ensure consistent application.
- Update/Develop standardized certification forms and template letters.
- Educate employees about their rights.

[30] 29 C.F.R. §§ 825.126, 825.309 (2009).
[31] 29 USC 2612(a)(1)(E).
[32] 29 C.F.R. § 825.310 (2009).
[33] 29 C.F.R. § 825.309 (2009).

- Educate supervisors and decision-makers about obligations and procedures.

- Implement written policies and procedures to ensure timely designation of protected leave.

- In resolving a split in the US Court of Appeals, the final rule states that the FMLA's waiver provisions apply only to prospective FMLA rights; they do not prevent employees from settling past FMLA claims without Department or court approval. Thus, employers should modify general releases to include the waiver of FMLA claims.

- When updating policies and procedures, California employers should be aware that the California Family Rights Act ("CFRA") remains unchanged. At this time, the Fair Employment and Housing Commission has not released any statement about the new FMLA regulations. We have been advised that the current state budget issues are impacting their ability to do so, and that employers should not expect additional guidance in the near future from the Commission on the effect of the new federal regulations on state laws. Therefore, employers should be cautious when complying with the new federal regulations to avoid a violation of California law.

- For more information, please visit the special DOL Website on the FMLA at: www.dol.gov/esa/whd/fmla/finalrule.htm

Our office is currently assisting employers and is in the process of updating their FMLA policies and forms. Please feel free to contact one of our Labor and Employment attorneys if you would like any assistance with such matters or if you have any additional questions about the new FMLA regulations.

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LAND USE

Coastal Commission Lacks Jurisdiction to Prevent Fence Being Constructed on Beach Because Fence Is Integral Part of Boundary Settlement With State Lands Commission (Which is Not "Development")
Boundary settlement--in which State Lands Commission, other entities of the state, a city, and affected homeowners specifically described a long chain link fence as an essential component of an agreed-upon boundary separating a sandy beach easement for public use from adjacent privately owned land--was statutorily exempt from the purview of the Coastal Commission, which had no jurisdiction to require a permit for the fence.

Burke v. California Coastal Commission - filed December 1, 2008, Second District, Div. Two

Cite as 2008 SOS 6507

Full text http://www.metnews.com/sos.cgi?1108%2FB207188

Amendment to General Plan Triggered New 90-Day Statute of Limitations Under 65009
Enactment of measure amending city's general plan and extending by 10 years a growth control ordinance that had been set to expire triggered new 90-day limitations period under Government Code Sec. 65009 in which to challenge measure. Action by owner of property subject to existing density restriction that was extended by measure, asserting that the extension violated equal protection and takings clauses, was timely where brought within 90 days of enactment.

Arcadia Development Company v. City of Morgan Hill - filed December 16, 2008, Sixth District

Cite as 2008 SOS 6700

Full text http://www.metnews.com/sos.cgi?1208%2FH032201

Tribal Sovereign Immunity Applies To Off-Reservation Business
Doctrine of tribal sovereign immunity applies to off-reservation, for-profit payday loan companies. Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on equities of a given situation. Where tribe limited its waiver of sovereign immunity "only to the extent of the specific terms of the applicable contract or obligation," tribe did not consent to actions by public entity to enforce liabilities by virtue of tribal company's conduct. Where payday

loan contracts with consumers contained an arbitration clause providing that any dispute regarding any loan from tribal company shall be resolved by binding arbitration, such clause only waived immunity in a suit brought in an arbitral forum by a party to a contract, not an enforcement action in state court.

Ameriloan v. Superior Court (People) - filed December 15, 2008, Second District, Div. Seven

Cite as 2008 SOS 6711

Full text http://www.metnews.com/sos.cgi?1208%2FB203548.

Court Upholds Coastal Commission's Denial of De Novo Hearing Regarding Proposed Malibu Construction

On appeal from a denial of a petition for writ of mandate, appellate court's role is to review for legal error; trial court's conclusions and disposition of issues is not conclusive. Coastal Commission's determination that litigants failed to raise requisite "substantial issue" presenting a "significant question" as to conformity with certified local coastal program was not an abuse of discretion where plaintiffs were challenging administrative construction of a governing statute was reasonable and in keeping with purposes of certified local coastal program.

Alberstone v. California Coastal Commission (Stibel), filed December 29, 2008 - Second District, Div. Eight

Cite as 2009 SOS 5

Full text http://www.metnews.com/sos.cgi?0109%2FB202008

PUBLIC LAW

League of California Cities Releases Summary of New Statutes Affecting Local Government

The League of California Cities released its "Legislative Report: A Compilation of 2008 Statutes." The document is 147 pages in length.
http://www.cacities.org/resource_files/27473.Cover%20Report%202008%20Leg%20Briefing.pdf

Eminent Domain - Landowners Not Entitled to Compensation for Loss of Goodwill

Landowners who had sought to develop housing on property but had neither obtained building permit, begun construction, nor pre-sold or pre-leased units when government took undeveloped parcel by eminent domain were not entitled to compensation for loss of business goodwill under Code of Civil Procedure Sec. 1263.510 because they were not engaged in an ongoing business.

City and County of San Francisco v. Coyne - filed December 5, 2008, First District, Div. Five

Cite as 2008 SOS 6591

Full text http://www.metnews.com/sos.cgi?1208%2FA118222

9th Circuit - City of Seattle Gave Police Chief Too Much Power In Parade Permit Procedures

City ordinance--giving police chief wide discretion when issuing parade permit to force marchers to use sidewalks instead of city streets without any requirement to explain reasons for doing so or to provide some forum for appealing decision--violated free speech guarantees of First Amendment because on its face it impermissibly granted licensing official unduly broad discretion.

Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle - filed December 12, 2008

Cite as 06-35597

Full text http://www.metnews.com/sos.cgi?1208%2F0635597

Baseball - Los Angeles Angels of Anaheim Can Keep Their (Strange) Name

News Story: http://www.ocregister.com/articles/city-anaheim-angels-2263377-team-name

9th Circuit - Plaintiff Held to Be Prevailing Party After $20,000 Settlement; Attorney Fees Calculation Potentially Too High

Where plaintiff sued city alleging violations of 42 U.S.C. Sec. 1983, including wrongful detention, false arrest, and use of excessive force in connection with arrest, and settled remaining claim for $20,000 after most were dismissed under agreement stipulating plaintiff was prevailing party under Sec. 1988 entitled to appropriate fees and costs, district court's finding that $200,000 award was reasonable in light of degree of success, overlapping issues involved, and public interest served by prosecuting difficult case until eve of trial--but which provided no other explanation for final number of hours allowed in lodestar calculation, or how court arrived at an applicable hourly rate--could not be meaningfully reviewed, and remand was necessary. District court erred in calculating fees, despite properly treating all of plaintiff's claims as related, where court failed to analyze whether plaintiff achieved a level of success making hours reasonably expended a satisfactory basis for making award, because attorney's fees awarded under Sec. 1988 must be adjusted downward where plaintiff has obtained limited success on pleaded claims and result does not confer a meaningful public benefit. Plaintiff did not achieve "excellent result" supporting grant of attorney's fees in full despite limitation of monetary success because he failed to allege or establish any animus within police department against him or others like him, and settlement did not result in any change in department policy.

McCown v. City of Fontana - filed December 29, 2008

Cite as 07-55896

Full text http://www.metnews.com/sos.cgi?1208%2F0755896

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BURKE, WILLIAMS & SORENSEN, LLP

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ELECTIONS

Veteran's Administration Lawfully Excluded Democratic Party From Holding Voter Registration Drive on Hospital Grounds

Where political group requested permission from veterans hospital to register voters at facility but hospital denied access to individual party member who came to register voters under 38 C.F.R. Sec. 1.218(a)(14), which prohibits partisan activities on veterans' administration grounds, individual had direct standing to bring an as-applied First Amendment challenge to regulation. Because hospital was a nonpublic forum, regulation was viewpoint neutral and hospital's concern that voter registration drives could compromise its ability to provide health care services to veterans and that allowing plaintiffs on property would give appearance of partisanship by hospital, hospital had reasonable rationale for denying plaintiffs permission to register voters at hospital facilities and such exclusion was not unconstitutional.

Preminger v. Peake - filed August 8, 2008, amended December 22, 2008
Cite as 08-15714
Full text http://www.metnews.com/sos.cgi?1208%2F0815714

ENVIRONMENTAL LAW

9th Circuit - Cumulative Effects of Future Timber Sales May Be Aggregated; FEIS Must List More Than a Single Prior Timber Sale

Forest Service may consider future cumulative environmental effects of other timber sales and grazing in area for proposed project in the aggregate rather than on an individual basis. Where Forest Service's final supplemental environmental impact statement noted that past timber sales had occurred but only mentioned one such sale, agency's FEIS was arbitrary and capricious. FEIS cannot incorporate by reference another document that was not subject to National Environmental Policy Act review. Declarations by agency employees that they trained and oversaw a crew marking and measuring trees to avoid harvesting trees over 21 inches in diameter were sufficient to establish that Forest Service complied with National Forest Maintenance Act and applicable land and resource management plan. Where project indisputably would not affect connectivity-compliance percentages, project satisfied NFMA and land and resource management plan's requirements that agency "maintain" such connective corridors.

League of Wilderness Defenders--Blue Mountains Biodiversity Project v. United States Forest Service - filed December 11, 2008
Cite as 06-35780
Full text http://www.metnews.com/sos.cgi?1208%2F0635780

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9th Circuit Upholds Its Own Prior Interpretation of Clean Water Act Regarding Discharges From Non-Point Sources

U.S. Supreme Court's conclusion that expulsion of water from dam turbine was a "discharge" subject to Sec. 401 of Clean Water Act was not irreconcilable with prior Ninth Circuit opinion limiting interpretation of term to effluents from point sources as opposed to nonpoint sources, such as livestock grazing, and doctrine of stare decisis supported district court's order granting U.S. Forest Service's motion for judgment on pleadings under Rule 12(c) of Federal Rules of Civil Procedure in suit challenging issuance of grazing permits on Forest Service lands.

Oregon Natural Desert Association v. United States Forest Service - filed December 11, 2008

Cite as 08-35205

Full text http://www.metnews.com/sos.cgi?1208%2F0835205

California Supreme Court Case on EIRs Slightly Modified

Save Tara v. City of West Hollywood - filed December 10, 2008

Cite as 2008 SOS 6657

Full text http://www.metnews.com/sos.cgi?1208%2FS151402M

Absent Evidence of Legal Violation, Well Owner Has Vested Fundamental Right to Extract Oil

Where Director of Conservation's order to plug and abandon 28 wells would have effect of shutting down a business that had been in existence for over 20 years and terminating party's right to produce oil, absent any evidence that real property underlying wells was not legitimately acquired or that operation of wells was not undertaken in accordance with applicable statutory mandates, party had a vested fundamental right to extract oil. Because a vested fundamental right was at issue, an independent judgment standard of review applied, and Public Resources Code did not clearly express a substantial evidence standard, trial court erred in applying the substantial evidence standard of review.

The Termo Company v. Luther (Hunt Petroleum (AEC), Inc.) - filed December 17, 2008, Fourth District, Div. Three

Cite as 2008 SOS 6791

Full text http://www.metnews.com/sos.cgi?1208%2FG038435

EDUCATION

School Potentially Liable For Failing to Seal Off Location Where Special Needs Child Could Be Victimized

School's maintenance of a hiding place where a "special needs" child suffering from mental and/or physical disability can be victimized satisfies foreseeability factor of duty analysis even in absence of prior similar occurrences. Trial court erroneously granted motion for summary judgment against "special needs" child in her negligent supervision action against school alleging she was sexually assaulted by another "special needs" student on school grounds because triable

issue of material fact existed where plaintiff's expert witness opined that school employees had negligently supervised plaintiff, and opinion was adequately supported by reasoned explanation. Trial court erroneously granted motion for summary judgment on claim for maintaining a dangerous condition of public property action because expert witness testimony raised a triable issue of material fact as to whether school had maintained a dangerous condition by not sealing off hidden area.

Jennifer C. v. Los Angeles Unified School District - filed December 8, 2008, Second District, Div. Six

Cite as 2008 SOS 6596

Full text http://www.metnews.com/sos.cgi?1208%2FB205903

LA Unified School District's Court Ordered Use of Race in Magnet School Integration Program Is Exempt From Proposition 209

School district's Magnet and Permit with Transportation programs, eligibility for which was based in part on a student's race or ethnicity, were exempt from Proposition 209 ban on favorable or discriminatory consideration of race or ethnicity in public education because they were part of an existing court-ordered integration plan approved and implemented prior to enactment of Proposition 209. Where trial court, prior to adoption of Proposition 209, vacated previous desegregation order subjecting district's efforts to court supervision; approved with modifications new desegregation plan proposed by district; and ended supervision, new order did not end court-ordered desegregation and did not compel conclusion that subsequent adoption of Magnet and PWT programs constituted voluntary adoption of racial preferences in violation of Proposition 209.

American Civil Rights Foundation v. Los Angeles Unified School District - filed December 19, 2008, Second District, Div. Five

Cite as 2008 SOS 6821

Full text http://www.metnews.com/sos.cgi?1208%2FB205943

News Coverage: http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/22/BA1814RGSM.DTL

Information Practices Act Does Not Require UC to Allow Student to Inspect or Copy His Exams

Because student exams were not "records" containing "personal information" for purposes of the Information Practices Act, university's alleged failure to allow plaintiff to inspect or copy his exams did not violate act as a matter of law.

Moghadam v. The Regents of the University of California - filed December 19, 2008, Second District, Div. Four

Cite as 2008 SOS 6827

Full text http://www.metnews.com/sos.cgi?1208%2FB194314

Public Law Update

BURKE, WILLIAMS & SORENSEN, LLP

February 2009 Volume 3, Number 1

9th Circuit - Nevada - School District Has Duty to Conduct IDEA Evaluations

Where school district failed to notify parents of impending evaluations of children for disabilities in violation of the Individuals with Disabilities Education Act and Rehabilitation Act, and parents took children to a private center for an evaluation, parents' conduct in seeking a private evaluation was reasonable. Even if parents had shared results of private evaluation with school district, district still had an obligation to conduct its own evaluations; because parent's refusal to share information from private evaluation with district did not affect district's obligations, trial court abused its discretion in reducing parent's award for equitable reasons and not awarding full cost of private evaluation. Parents were not entitled to compensation for services rendered before district determined that children were eligible for such services. Nevada's 45-school-day timeline for evaluating students was not an inconsistent interpretation of IDEA's reasonable timeliness requirement, but did not provide district with a safe harbor; although failure to comply with state regulation was good evidence of unreasonable delay, compliance did not mean district completed its investigation in a reasonable period. A 110-day delay between date district was required to give parents notice and a consent form until date children began receiving services was reasonable because district did not have knowledge or notice of children's autism until two weeks before scheduled assessments, district completed evaluations within three months of receiving such notice, and delay was needed to promote effective test results. Where district could not immediately administer autism tests in a valid manner, district's evaluation of children without administering tests qualified as an initial evaluation under IDEA. Where district provided children with speech and language services while pursuing autism eligibility determinations and continued same services after autism determination and where assessments only showed one difference between twin children regarding motor skills, district provided children with a free appropriate public education that was sufficiently individualized to meet each child's needs. Where district had contracted with two private behavior analysts and trained personnel from the University of Nevada to evaluate children and arranged for additional training for special education teacher, such evidence demonstrated that district would have had qualified staff within a reasonable amount of time to provide services to children. District court lacked jurisdiction over parents' claim that children's placement was discriminatory due to parents' failure to properly present claim.

JG v. Douglas County School District - filed December 29, 2008
Cite as 06-17380
Full text http://www.metnews.com/sos.cgi?1208%2F0617380

Public Law Update

BURKE, WILLIAMS & SORENSEN, LLP

February 2009 **Volume 3, Number 1**

EMPLOYMENT LAW

Plaintiffs Generally Cannot Recover Punitive Damages In Claims Regarding Meal and Rest Periods or Payment of Minimum Wages

Labor Code provisions governing meal and rest breaks, minimum wages, and accurate pay stubs constitute statutory obligations imposed only when parties have entered into an employment contract and are obligations arising from employment contract. Breach of an obligation arising out of an employment contract, even when obligation is implied in law, permits contractual damages but does not support tort recoveries. Punitive damages are not recoverable when liability is premised solely on the employer's violation of the Labor Code statutes that regulate meal and rest breaks, pay stubs, and minimum wage laws. Labor Code statutes regulating meal and rest breaks, pay stubs, and minimum wages provide express statutory remedies, including penalties for violation of those statutes that are punitive in nature, that are available when an employer has violated those provisions, and are exclusive remedy available for such statutory violations absent evidence that statutory remedy is inadequate.

Brewer v. Premier Golf Properties - filed December 3, 2008, Fourth District, Div. One

Cite as 2008 SOS 6530

Full text http://www.metnews.com/sos.cgi?1208%2FD050686

9th Circuit – Union's Lack of Standing to Bring Suit on Behalf of Retirees When Employer Reduced Retirement Benefits Did Not Deprive the Union of Standing to Bring Suit to Compel Arbitration on Behalf of Current Union Members

Union seeking arbitration to determine whether employer had impermissibly reduced retirement benefits under applicable collective bargaining agreement pursuant to that agreement's arbitration provision did not need to obtain consent from affected retirees before pursuing arbitration because reductions in retiree benefits might also affect current employees who were undisputedly represented by union. Union's lack of standing to bring suit on behalf of retirees did not deprive union of associational standing to bring a suit to compel arbitration on behalf of its current members. Contemplated arbitration would not necessarily preclude subsequent suits by retirees no longer represented by union; possibility that employer may be exposed to duplicative proceedings was a result of employer's own bargaining.

International Brotherhood of Electrical Workers v. Citizens Telecommunications Co. of California - filed December 5, 2008

Cite as 0616189

Full text http://www.metnews.com/sos.cgi?1208%2F0616189

Public Law Update

BURKE, WILLIAMS & SORENSEN, LLP

February 2009 Volume 3, Number 1

Court Dismisses Class Action Alleging That Employer Illegally Asked Applicants About Prior Convictions Related to Marijuana Convictions Because None of the Class Representatives Had Been Convicted of a Marijuana-Related Offense and All Were Aware That They Could Not Be Required to Disclose Any Such Conviction

Employment application did not comply with Labor Code provision barring applicants from being asked about convictions for certain marijuana-related offenses occurring more than two years earlier where application contained broad question about criminal convictions, and language excluding marijuana-related convictions appeared later at the end of a lengthy paragraph dealing with unrelated matters and "in a veritable sea of boldface type" that a reasonable applicant might ignore. Applicants not convicted of marijuana-related offenses could not recover damages for violation of code provision barring inquiry regarding such convictions. Inclusion of minimum damage provision in statute did not render applicants, who had not been convicted of marijuana-related offenses, "aggrieved" and did not permit such persons to represent class of applicants who had allegedly been impermissibly asked about such convictions. Writ relief from denial of summary judgment was appropriate where potential size of class recovery would likely force defendant to settle regardless of merits, thus depriving it of an adequate remedy in the trial court.

Starbucks Corporation v. Superior Court (Lords) - filed December 10, 2008, Fourth District, Div. Three

Cite as 2008 SOS 6624

Full text http://www.metnews.com/sos.cgi?1208%2FG039700

Court Refused to Require an Attorneys Fee Award Be Granted to a Supervisor Who Was the Target of a Frivolous Claim When the Employer Paid the Supervisor's Attorneys Fees

Where plaintiff filed a Fair Employment and Housing action that was found to be frivolous as to one defendant but not to other--the latter of whom paid attorney fees for both--trial court did not abuse its discretion in refusing to award attorney fees to the former because actual beneficiary of such award would have been latter defendant who was not entitled to an award of fees.

Young v. Exxon Mobil Corporation - filed December 11, 2008, Second District, Div. Eight

Cite as 2008 SOS 6645

Full text http://www.metnews.com/sos.cgi?1208%2FB189263

Courts, As Well As Other Public Entities, Are Subject to the FEHA'S Ban on Employment Discrimination

Public entities, including courts, are subject to Fair Employment and Housing Act's ban on discrimination in employment. Specific inclusion of public entities in FEHA's definition of "employer" takes precedence over more general and earlier-enacted discretionary immunity provisions of the Tort Claims Act. Where superior court abolished half-time commissioner's position and chose a 43-year-old as full-time commissioner in preference to incumbent half-time commissioner who

was 65 years old, evidence that presiding judge made comments to plaintiff commissioner and others that judges were looking for a younger person to fill post; that appointee was chosen over dozens of older applicants, including three who received higher rankings from interview panel; and that plaintiff had served as commissioner for many years without serious complaint was sufficient to create triable issues as to why court did not appoint plaintiff to fulltime position and whether its claim that appointee was better qualified was pretextual.

DeJung v. Superior Court - filed December 19, 2008, First District, Div. Four

Cite as 2008 SOS 6883

Full text http://www.metnews.com/sos.cgi?1208%2FA116911

9th Circuit Holds That Employer's Bonus Structure Violated Neither California Nor Federal Law

Employer's formula for paying certain employees a bonus based on hours paid up to a specified maximum did not violate California law, and DLSE interpretation of such bonuses as "flat sum" bonuses for purposes of determining overtime premium was void as unsupported by a statute, regulation, court decision, opinion letter, or "administrative decision" or "precedent decision" of the Labor Commissioner. Nothing in federal overtime regulation prohibited use of "hours paid" method of calculating bonus overtime.

Marin v. Costco Wholesale Corporation - filed December 23, 2008, First District, Div. One

Cite as 2008 SOS 6929

Full text http://www.metnews.com/sos.cgi?1208%2FA116847

9th Circuit – One-Year Limitations Period Under City Charter For Bringing Administrative Misconduct Charges Against a Police Officer Was Tolled During an Internal Criminal Investigation

City charter's one-year limitations period for bringing administrative misconduct charges against police officer was tolled during internal criminal investigation into same misconduct that formed basis of the administrative charges; tolling provision applies during criminal investigations, regardless of whether they are conducted by officer's own agency or by another agency, and also regardless of whether or not the investigation results in matters being presented to prosecutor's office. Tolling provision applies to charges that do not involve criminal conduct but which are related to criminal investigation.

Lucio v. City of Los Angeles - filed December 23, 2008, Second District, Div. Three

Cite as 2008 SOS 6935

Full text http://www.metnews.com/sos.cgi?1208%2FB201511

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