



### FINALLY! THE LONG-AWAITED REVISIONS TO THE FEDERAL FAMILY MEDICAL LEAVE ACT

**A**fter almost a year delay, the long-awaited changes to the federal Family and Medical Leave Act ("FMLA") have been finalized. They were recently released and will **take effect Jan. 16, 2009**. Here is a synopsis of a few of the key changes to take effect:

- Supervisors will not be permitted to contact an employee's health care provider for medical information when a medical certification is needed.
- Employees will be expected to comply with an employer's rules for requesting leave in advance, "absent unusual circumstances."
- Employers will be allowed to request "fitness for duty" certifications for certain employees returning from leave prompted by their own serious health conditions, *if safety concerns exist*.
- Employers may disqualify employees from bonuses based on hours worked, products sold, perfect attendance, or the like if the employee has not met the goal due to taking FMLA leave, *unless* these bonuses are paid to employees on equivalent, non-FMLA leave.
- Clarification of previously released FMLA changes which relate to leave to care for injured military personnel, as well as new provisions relating to National Guard and Reserve personnel.
- Employees are currently eligible for FMLA leave only if they satisfy the following criteria:

1. the employee works at a site which has 50 or more employees, or is within 75 miles of 50 or more employees of the employer;
2. the employee has been employed by the employer for at least 12 months;
3. the employee has at least 1,250 hours of service in the 12-month period preceding the leave.

The proposed rule stated that, even though the 12 months of employment need not be consecutive, employment prior to a continuous break in service of *five years or more* need not be counted. Now, the final version amends the proposed rule to allow up to seven years' gap in service.

### INSIDE THIS ISSUE:

<b>Finally! The Long-Awaited Revisions to the Federal Family Medical Leave Act</b>	<b>1</b>
<b>Labor Law Year-End Review</b>	<b>2</b>
<b>Gov. Schwarzenegger Announces New FEHC Appointments</b>	<b>4</b>

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(Continued from page 1)

An employee who voluntarily returns to a light duty position retains the right to job reinstatement to the same position, or an equivalent one, until the end of the 12-month period that the employer uses to calculate FMLA leave entitlement.

The complete revisions to the FMLA can be accessed at: [http://federalregister.gov/OFRUpload/OFRData/2008-26577\\_PI.pdf](http://federalregister.gov/OFRUpload/OFRData/2008-26577_PI.pdf).



## LABOR LAW YEAR END REVIEW



The Senate Labor and Industrial Relations Committee Legislative Report 2007-2008 is available. The Assembly Labor and Employment Committee has not yet posted its report. As 2008 approaches its end, here are some select Labor Standards & Enforcement bills which did not “pass muster” and become laws.

### **Assembly Bill 537 – Swanson Family and Medical Leave.**

#### *Vetoed*

This bill would have increased the circumstances under which an employee is entitled to protected leave pursuant to the California Family Rights Act (CFRA). Specifically, this bill would have (1) eliminated the age and dependency elements from the definition of “child,” thereby permitting an employee to take protected leave to care for his or her independent adult child suffering from a serious health condition, (2) expanded the definition of “parent” to include an employee’s parent-in-law and, (3) permitted an employee to also take leave to care of a seriously ill grandparent, sibling, grandchild, or domestic partner, as defined.

### **Assembly Bill 435 – Brownley Wage discrimination: Gender.**

#### *Vetoed*

This bill would have required that all employers maintain their records of wages, wage rates, job classifications, and other terms and conditions of employment for five years, and would have extended the statute of limitations for a civil action to collect back wages to 4 years, or, in the case of willful misconduct, to 5 years.

### **Assembly Bill 1707 – Committee on Labor and Employment Private employment: employment records.**

#### *Vetoed*

This bill would have revised requirements of existing law concerning an employee’s right to inspect personnel records. Specifically, this bill would have required employers to maintain employment records for a specified time and to provide inspection and copies within a specified time to current and former employees or their representatives. In addition, this bill would have authorized employees to recover a \$750 penalty from an employer for failure to provide access to personnel records and to bring an action to obtain compliance, and it would have provided that a violation of these provisions would have constituted an infraction.

### **Senate Bill 622 – Padilla**

#### **Employment: misclassification of employees as independent contractors.**

#### *Vetoed*

Would have made it unlawful for any person or employer to willfully misclassify an employee as an independent contractor. Would have assessed a civil penalty of not less than \$5,000 and not more than \$15,000 in addition to any other penalties or fines permitted by law for such willful misclassification. Also, any person found guilty of a repeated pattern of these behaviors would have been assessed a civil penalty of not less than \$10,000 and not more than \$25,000 in addition to any other penalties or fines permitted by law.

### **Senate Bill 1192 – Margett**

#### **Employment: meal and rest periods.**

#### *Without further action*

This bill would have allowed employees to take their first meal period before the conclusion of the 6th hour of work, decreased the statute of limitations on penalties for failing to provide a meal period, and defined the em-

(Continued on page 3)

(Continued from page 2)

ployer's responsibility to provide a meal period as making a meal period available without interference.

**Assembly Bill 1989 – Swanson**  
**Employment.**

*Without further action*

This bill would have increased the notification requirements for a mass layoff, relocation, or termination, as defined, from 60 days to 90 days, decreased the qualifying number of employees for a mass layoff from 50 employees to 25 employees, added international relocation to the notification requirements, and required employers who give notice of a mass layoff, relocation, or termination provide sufficient meeting space for rapid response activity, as defined, and to allow providers of rapid response activity services to meet with the affected employees for not less than one hour.

**Assembly Bill 2076 – Fuentes**

**Employment: hiring practices: electronic employment verification.**

*Without further action*

This bill would have prohibited the state, or a city, county, city and county, or special district from requiring any employer to use the electronic employment verification program of E-Verify, as defined. In addition, this bill would have made several findings and declarations pertaining to the deficiencies of electronic employment verification programs. The E-Verify Program of the United States Department of Homeland Security, in partnership with the United States Social Security Administration, enables participating employers to use the program, on a voluntary basis, to verify that the employees they hire are authorized to work in the United States.

**Assembly Bill 2134 – Swanson**

**Employment discrimination: family and medical leave.**

*Without further action*

This bill would have conformed the California Family Rights Act (CFRA) to the leave requirements for service member families in the federal Family Medical Leave Act (FMLA), and would have expanded the coverage of the requirements for service member families to include eligible siblings, grandparents and grandchildren.

**Assembly Bill 2716 - Ma**

**Employment: paid sick days.**

*Without further action*

This bill would have created the Healthy Families, Healthy Workplaces Act of 2008, which would have required employers to provide paid sick days to employees who work seven or more days in a calendar year. Specifically, this bill would have provided that paid sick days be accrued at a rate of no less than one hour for every 30 hours worked. The employee would have been entitled to use accrued sick days beginning on the 90<sup>th</sup> calendar day of employment for diagnosis, care, or treatment of health conditions of the employee or an employee's family member, or for leave related to domestic violence or sexual assault.

**Assembly Bill 2879 – Leno**

**Employee wages and working hours: violators.**

*Without further action*

Would have required the Labor and Workforce Development Agency, in consultation with the Franchise Tax Board (FTB) and the Economic and Employment Enforcement Coalition (EEEC), to develop and implement a set of standards that, if met by an employer, would trigger a recommendation for a tax audit or investigation of employers violating state laws regarding wages, hours and working conditions.

**Senate Bill 1283 – Harman**

**Employment: wages: discharged employee.**

*Without further action*

This bill would have permitted an employer to pay a discharged employee up to six hours after the start of the accounting unit's next regular workday if the accounting unit was at the work site, or 24 hours after the start of the accounting unit's next regular workday if the employer's accounting unit is located off the work site.

(Continued on page 4.)

**Senate Bill 549 – Corbett**  
**Bereavement leave.**  
*Vetoed*

Would have given employees in California the right to take up to four days of unpaid leave from work upon the death of specified relatives.

**AB 1989 – Swanson**  
**Employment.**  
*Without further action*

This bill would have increased the notification requirements for a mass layoff, relocation, or termination, as defined, from 60 days to 90 days, decreased the qualifying number of employees for a mass layoff from 50 employees to 25 employees.

## **Gov. Schwarzenegger Announces New FEHC Appointments**



**Dave Carothers**, 51, of Carlsbad, has been appointed to the Fair Employment and Housing Commission. He has served as a managing partner at Carlton, DiSante & Freudenberger since 2000. From 1997 to 2000, Carothers was a partner at Chapin, Shea & Carter (and briefly overlapped a period of time during which Ms. Koumas was also practicing with that firm.) He was a partner at McInnis, Fitzgerald, Rees, Sharkey & McIntyre from 1985 to 1997. Carothers is a veteran of the U.S. Navy. He earned a Juris Doctorate degree from the University of Southern California School of Law and a Bachelor of Science degree from California State University, Dominguez Hills. Carothers is a Republican.

**Stuart Leviton**, 42, of West Hollywood, has been appointed to the Fair Employment and Housing Commission. He has been a shareholder in the Leviton Law Group since 2004 and has served as a partner at Reed & Davidson since 2006. Prior to that, Leviton was an associate at Levinson, Arshonsky & Kurtz from 1999 to 2004, Orrick, Herrington & Sutcliffe from 1998 to 1999, Folger, Levin & Kahn from 1997 to 1998 and Latham & Watkins from 1993 to 1997. From 1988 to 1990, he was a risk management analyst at Tillinghast. Leviton is a member of the West Hollywood Chamber of Commerce Board of Directors and vice president of the West Hollywood Community Housing Cooperation Board of Directors. He holds a Juris Doctorate degree from the University of Texas at Austin School of Law and a Bachelor of Science degree in economics from the Wharton School, University of Pennsylvania. Leviton is a Democrat.

**Patricia Perez**, 41, of Jamul, has been appointed to the Fair Employment and Housing Commission. She has been president and chief executive officer of Puente Consulting since 2001. Previously, Perez served as in-house employment counsel and human resources manager at Skadden, Arps, Slate, Meagher & Flom in Washington, D.C. from 2000 to 2001. She was a consultant to the National Center for State Courts in Virginia from 1988 to 2000. Perez was an associate at Barnhorst, Schreiner & Goonan from 1996 to 1998 and Balestreri, Pendleton & Potocki from 1993 to 1996. She is a member and vice chair of the executive committee of the California Bar Association's Labor & Employment Law Section. Perez is also a member of the American Bar Association, Society for Human Resource Management, San Diego County Bar Association, San Diego La Raza Lawyers Association, National Association of Women Business Owners and the University of California, Los Angeles Alumni Association. She holds a Juris Doctorate degree and a Bachelor of Arts degree from the University of California, Los Angeles. Perez is registered decline-to-state.

Notably, each of these positions requires Senate confirmation and the compensation is \$100 per diem.

### **FEHA'S 50<sup>TH</sup> ANNIVERSARY COLLABORATION OPPORTUNITY**

**2009 IS THE 50<sup>TH</sup> ANNIVERSARY OF THE FAIR EMPLOYMENT AND HOUSING ACT. THE STATE BAR LABOR & EMPLOYMENT LAW SECTION AND THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT & HOUSING WILL BE CO-SPONSORING MANY PROGRAMS TO MARK THIS IMPORTANT MILESTONE THROUGHOUT THE YEAR.**

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