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OBAMA SIGNS THE NDAA, RESULTING IN NEW FMLA PROVISIONS, AGAIN!

Just when employers were getting comfortable with the new FMLA obligations, Congress has, for a second time in the last two years, expanded the FMLA. President Obama signed the 2010 National Defense Authorization Act (NDAA) which is found at H.R. 2647. The new law, which is effective immediately, expands which expands coverage for military exigency leave and military caregiver leave under the Family and Medical Leave Act (FMLA). The changes take effect immediately.

A summary of the new provisions include as follows:

- *Military exigency leave* has been expanded to include **active duty** service members who have been deployed to a foreign country. Exigency leave was limited to reservists under the prior rules.
- *Military caregiver leave* has been expanded to include care for a service member who aggravates a prior injury or illness during the course of his military service. Aggravation of an illness or injury was not covered by the prior military caregiver leave rules.
- *Military caregiver leave* has been extended to include veterans who undergo medical treatment, recuperation or therapy for a "qualifying injury or illness", as long as the service member was a member of the reserves or armed forces at any time during the five years before the veteran undergoes treatment. Caregiver leave was previously not available to veterans. Note, that this provision will not be effective until the Secretary of Labor defines the term "qualifying injury or ill-



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ness” for a veteran.

Recall the most recent prior amendments to the Family and Medical Leave Act of 1993 (FMLA), also prompted by the NDAA, permit a “spouse, son, daughter, parent, or next of kin” to take up to 26 workweeks of leave to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.” The NDAA also permits an employee to take FMLA leave for “any qualifying exigency (as the Secretary of [Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”

PRACTICE TIPS: Employers should-

- revise their FMLA policies to incorporate these changes immediately;
- keep an eye out for a new FMLA poster from the U.S. Department of Labor which will include these changes and post it in lieu of the current FMLA poster.

SURPRISE IMMIGRATION INSPECTIONS UNDERWAY



As promised, the United States Customs and Immigration Service (USCIS) is stepping up its immigration enforcement efforts. After obtaining a large number of new inspectors in July, 2009, training has been completed. Therefore, the federal agency recently began its surprise investigation program. For those employers who think the government is low on funds so they will not really conduct these inspections, think again. The inspection program is being funded by the \$500 "fraud fee" that employers pay with any initial application to sponsor an employee for an H-1B visa.

The H-1B visa program is used by some U.S. employers to employ foreign workers in specialty occupations that require theoretical or technical expertise in a specialized field and a bachelor's degree or its equivalent. Typical H-1B occupations include architects, engineers, computer programmers, accountants, doctors and college professors.

Purportedly, the names of more than 40,000 employers have been forwarded to the agency's inspections department, each of whom will receive a surprise visit. Because there is a high likelihood that no advance notice will be provided for an inspection, employers with H-1B visa workers are strongly encouraged to take the following steps now to ensure any inspection does not result in a finding of noncompliance:

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- Review H-1B applications to ensure that no visas have expired, and that foreign employees are actually performing the work identified in each employee's visa application;
- Make sure that all H-1B visa documents are accurate and up to date, and readily accessible at each location with foreign workers are located;
- Inform H-1B workers of the possibility of inspections, so that they can notify the company of any changes in their circumstances that may effect visa status;
- If discrepancies or questions about a worker's visa status or documents are discovered, promptly contact an immigration attorney to resolve the issue before an inspection occurs; and
- Inform management, supervisors and front-officer personnel of the possibility of an inspection, and instruct them first and foremost not to panic if a USCIS inspector shows up, and then to contact a specific person in the company who is authorized to interact with and monitor inspectors.

FAILURE TO PAY BACK WAGES RESULTS IN EMPLOYER BEING JAILED

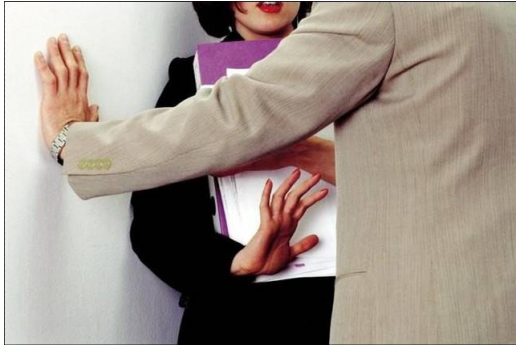


The new Labor Secretary, Hilda Solis, means business when it comes to employers failing to pay employees properly. The owners of a Southern California based cleaning company learned this lesson the hard way.

Armed with more than 200 new wage and hour inspectors, the U.S. Department of Labor (DOL) is prepared to take action against employers who fail to pay back wages, which recently included the harsh punishment of jail time. After a lawsuit initiated by the DOL, a California court in 2007 ordered Sergio Maldonado and Lorenzo Rubio to pay over \$3 million in back wages and penalties to almost 400 current and former employees. The owners did not comply with the court order. Subsequently, the DOL obtained a contempt order, and in October 2009, the two owners were arrested and jailed for four days. When the owners were released following a hearing, they were ordered again to pay the back wages by mid-November, or face new contempt charges.

With the added resources, the DOL can not only obtain judgments, but also enforce them. This recent jailing should make it clear just how far a government agency will go to punish an employer who does not pay back wages. Employers should not be surprised to see California's Department of Industrial Relations to follow suit.

COMPANY LIABLE FOR FAILING TO PREVENT SEXUAL HARASSMENT



A claim that an employer failed to provide AB 1825-mandated sexual harassment training does not automatically result in the liability of an employer for harassment. Nevertheless, plaintiffs will argue that the failure to meet the new training mandates is evidence of an employer's failure to take all reasonable steps to prevent sexual harassment. In a recent decision issued by the Department of Fair Employment and Housing (DFEH), a Fresno-based

company and its president were found liable for sexual harassment and sex discrimination.

After being employed for only four months as a front office manager, a former employee resigned and filed a complaint with the DFEH, alleging the president, an on-site manager, routinely harassed his female employees, relating his sexual escapades to them in graphic detail, commenting on their appearance and attire in a suggestive manner, and propositioning them to meet him for drinks or engage in sexual conduct.

The DFEH also found that the employer was liable for failing to take all reasonable steps to prevent sexual harassment and sex discrimination because the company:

- Failed to distribute an anti-harassment policy to employees;
- Failed to enforce its anti-harassment policy;
- Failed to post required DFEH notices regarding equal employment laws, **and**
- **Failed to provide managers and supervisors with the sexual harassment training.**

The former employee was awarded more than \$60,000 in back wages and emotional distress damages, and the DFEH also imposed a \$25,000 fine against the company. The failure to comply with the training mandate opened the door for the company to receive a hefty fine.

PRACTICE TIP: Are you on top of your A.B. 1825 training obligations for this year? The deadline for the first round of AB 1825 training was December 31, 2005. Thereafter, employers must provide two hours of sexual harassment training to each supervisory employee, every two years (*e.g.*, 2007, 2009.) There is still time to schedule your 2009 compliance training.

Please visit our website for more information about training classes available, and contact Elizabeth J. Koumas at (619) 398-8301 for more information about how to obtain for a **flat rate fee agreement** for this service.

REFLECTING BACK ON 2009..... LOOKING FORWARD TO 2010



- ▶ Federal Minimum Wage Increase: Effective July, 2009, minimum wage under federal law increased to \$7.25 per hour. *For more details on the history of this new law, please see this firm's July newsletter.*
- ▶ California Computer Professional Exemption: Effective in 2009, the minimum hourly rate to qualify for the exemption was increased to \$37.94, an annual salary of \$79,050, or no less than \$6,587.50 per month. In 2010, there will be no rate increase.
- ▶ California Electronic Discovery Act: Passed in June, 2009, it established new state court litigation procedures for parties to obtain and handle electronically stored information, serving as an important reminder that all employers need to preserve all such evidence.. *For more details on this new law, please see article in the firm's August newsletter .*
- ▶ Genetic Information Nondiscrimination Act (GINA): Effective November, 2009, this law prohibits several acts, including: discrimination based on genetic information, retaliation for complaints about genetic discrimination, disclosure of lawfully obtained genetic information, and limits an employer's ability to obtain genetic information. *For more details on this new law, please see the article in the firm's November newsletter .*
- ▶ National Defense Authorization Act: Effective in January, 2009, this act added military leave provisions to the Family Medical Leave Act, which included leave to care for an injured servicemember, and leave for a qualifying exigency. *For more information about this prior new law, please see the article in the firm's January newsletter.*

In 2010, due to recent amendments, this act has added new FMLA provisions, which expand military exigency leave to *all* Armed Forces, not just the National Guard and Reserves. It also expands military caregiver leave to veterans going back 5 years. *For more information about this new law, please see the article in this newsletter commencing on page 1.*

Some very important employment law legislation was vetoed this year (but could be back again for signature in the future). *For more details, see the legislative update in our November newsletter.* We are still eagerly awaiting the California Supreme Court's decision on the correct meal period standard. *For more information about this important issue, see the firm's February newsletter.* Copies of past newsletters are available on the firm's website.



► Several people were interested in attending this informative seminar, but due to the date and/or time, they were unable and missed it. As a result of additional interest shown in this seminar, it will be scheduled again in the new year. If you are one of the many who wanted to attend but could not due to a schedule conflict, NOW IS YOUR CHANCE. Please email Elizabeth Koumas at ejk@koumaslaw.com to express your interest. Please include preferred day(s) of the week for attending the seminar so the firm can best meet your needs.

FUTURE SEMINARS

Elizabeth Koumas is scheduled to speak at an employment law luncheon seminar, sponsored by East County Personnel Association (ECoPA). ECoPA is an association established to provide personnel and human resource professionals with education, networking and services to assist in meeting these issues.

Date: February 18, 2010

Time: 11:30am-1:00pm

Location: The Brigantine Restaurant,
La Mesa

Topic: TBD

Cost: Members \$30, Non-members \$35

A flyer will be circulated closer to the date of the event, with more information on the topic for presentation.



Surviving the Economic Times: 50 Tips For Avoiding Employment Lawsuits

Back due to popular demand! This luncheon seminar will provide a 50-point self-audit checklist of important areas that should be reviewed at least annually by small and large employers. Periodic compliance of procedures is an essential preventative tool, especially in the current economic climate where many companies face daily challenges to remain in business. One lawsuit could decide that fate and close the doors. We will discuss practice tips for before, during and after employment, as well as 10 tips if you are sued.

Date: TBD **Time:** 12:00 p.m. to 1:30 p.m. **Cost:** \$35pp

Location: The Chamber Building, 110 West C Street,
7th Floor Conference Room A, San Diego, CA 92102

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