KOUMAS LAW GROUP

Employment Law Update

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INSIDE THIS ISSUE:

Expiration Date of Employment Eligibility Verification Form I-9 Extended to August 31, 2012

Following up on the August newsletter, the U.S. Citizenship and Immigration Services (USCIS) announced that the Office of Management and Budget has extended its approval of Form I-9 (Employment Eligibility Verification) to August 31, 2012. Accordingly, USCIS has amended the form to reflect a new revision date of August 7, 2009.

Employers may use the Form I-9 with the revision date of either August 7, 2009, or February 2, 2009.

The revision dates are located on the bottom-right-hand portion of the form. For more information on USCIS and its programs, or the I-9 Handbook for Employers", visit:www.uscis.gov/i-9.

Practice Tips: Employers are reminded of the following:

(1) an I-9 Form must be completed no later than 3 days of hire;
(2) I-9 Forms must be retained by the employer either for 3 years after the date of hire or 1 year after employment ends, which ever is later;
(3) The forms must be available for inspection by authorized governmental officials (*e.g.*, Dept. of Labor, Dept. of Homeland Security, or Office of Special Counsel); and
(4) The most recently issued I-9 Form, both in English and Spanish) is available on the firm's website at www.koumaslaw.com.

Federal Contractors E-Verify Requirement Begins

As a follow up to this firm's article in the August Newsletter, on August 27, 2009, the U.S. District Court for the District of Maryland upheld the legality of the 2008 federal regulation that requires many federal government contractors to use the E-Verify system to verify the employment eligibility of new hires as well as certain existing employees.

September 8, 2009, marked the effective date of this new requirement.

The regulation requires a new E-Verify clause to be included in *certain* federal contracts awarded or solicited on or after September 8, 2009. Distinguishable from voluntary E-Verify, employers who are a party to a contract (or subcontract) containing this E-Verify clause will be required to use E-Verify to confirm employment of 1) all individuals hired during the contract term by the contractor to perform employment duties within the United States, and 2) all individuals the contractor assigns to directly perform work within the United States under the federal contract. A provision allows employers the option of using E-Verify for all employees as an alternative to identifying and processing those who perform work directly under the contract.

Employers should note that several states require some use of E-Verify for in-state employers and/or state contractors. Arizona's E-Verify law (the most comprehensive in the country) was challenged on July 28, 2009, in the U.S. Supreme Court. The basis of that challenge is that the Arizona law is preempted by federal immigration law. The Supreme Court has not yet accepted the lawsuit. Additionally, counties in several states, where E-Verify is not mandated at the *state* level, have passed regulations that mandate the use of E-Verify by *county* contractors. By way of example, on August 25, 2009, the Los Angeles County Board of Supervisors voted to conduct a two-week review of E-Verify to determine whether it should be required for county contractors.

On September 1, 2009, the U.S. Chamber of Commerce and other business organizations filed an appeal with the U.S. Court of Appeals (Fourth Circuit), seeking to overturn the Maryland District Court decision, and also filed for an emergency motion for an injunction pending appeal.

Notably, E-Verify is an essential tool for employers committed to maintaining a legal workforce, and the number of registered employers is growing by the thousands per week.

PRACTICE TIP: Employers with federal government contracts should review every contract to determine the existence of any E-Verify clause, and if required, determine which of their employees/worksites are affected by the order to ensure that E-Verify is part of the employment verification process. For more information about E-Verify, visit: www.uscis.gov/e-verify or www.dhs.gov/files/programs/gc_1185221678150.shtm

Court Held Employers *Can* Be Liable For Accidents During Employee Commute

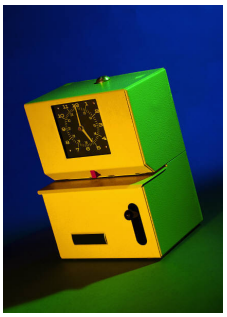
Employers should already be familiar with the *going and coming* rule, which has to do with employees traveling to and from work. Generally, any injuries that *an employee* would suffer or cause while traveling to and from work would not be compensable by the employer. Normally, an employee's regular commute to and from work is not considered to be "working" time, so employers aren't responsible for accidents that happen then. Every state has some exceptions to the going and coming rule, and one fairly common exception is when an employee is on a "special assignment." Although state law varies, this going and coming rule generally holds true - but the devil is in the details, as they say. A California court recently held that an employee who is commuting home from a work-related conference is on work time, and therefore the employer can be held liable for injuries caused by the employee during that commute.

After flying back from a conference in Sunnyvale, a vice-president with Los Angeles-based Warner Bros. Entertainment, Inc. picked up his car from the airport and started driving home. During the drive, a collision ensued, which included three pedestrians, one of whom died. The two injured pedestrians, along with the estate of the third who died, sued Warner Bros. Initially, the trial court dismissed the case on the basis that an employer is not liable for injuries that occur during an employee's regular commute. But the Court of Appeals disagreed, holding that **when an employee is on a business trip, the trip does not end until the employee reaches his or her home.** If an employee injures third parties while working, his or her employer can be held liable for those injuries. If the Vice President was responsible for the accident, then his employer may be held responsible for the injuries resulting to third parties.

PRACTICE TIPS: *Before* allowing employees to drive for business related reasons, it is recommended that employers:

1. confirm employees operating personal or company vehicles for work purposes possess valid automobile insurance and report any changes to it;
2. confirm employees operating personal or company vehicles for work purposes possess valid driver's licenses and report any changes to it;
3. obtain consent/authorization to obtain driving records for job applicants who will be required to operate personal or company vehicles for work purposes if hired;
4. obtain an acknowledgement from all employees that they understand they are not permitted to operate either a personal or company vehicle for business purposes without possessing valid insurance and driver's license.
5. Remember to reimburse employee mileage (currently 55 cents/mile) for business-related travel.

Economically Driven Reduced-Hour Workweeks……Are Your Exempt Employees Still Exempt?



One type of reduced-hour workweeks arises from the implementation of an AWS (alternative Workweek Schedule), which can only by validly adopted by adhering to the strict election process set forth in section 3(B)of the Industrial Welfare Commissions Wage Orders, and California Labor Code section 511. California wage and hour law requires that non-exempt employees be paid overtime for time worked in excess of 8 hours per workday, unless the employer and relevant employees adopt an "alternative workweek" – something other than the standard 8 hours a day, 5 days a week.

The other type of reduced workweek happens where there is a reduction of hours in the regular workweek. For nonexempt employees, this means that the employees are simply paid for fewer hours per week.

For exempt employees, until August, the DLSE had maintained the position that if an exempt employee's salary is reduced in proportion to a reduction in hours, the employee's exempt status would be lost. However, many employers are experiencing significant economic difficulties due to the present severe economic downturn facing California, as well as the rest of the country. Many employers seek to cut costs until the business climate improves and where they have already implemented layoffs. To accomplish this goal, many employers have or are considering reducing the number of its employee's schedule work days from five days to four days per week. However, in implementing this reduction, employers face questions about how exempt employees must be compensated. Non-exempt employees would not be paid for the day that they are not required to work. But can the employer reduce the salaries of the exempt employees by 20% or some other proportion?

Reversing this position, the Labor Commissioner (who heads the California Division of Labor Standards Enforcement) published an opinion letter (August 19) stating that consistent with federal policy, *California law* does <u>not</u> prohibit employers from reducing an exempt employee's salary in connection with a bona fide reduction in the regular workweek. The Labor Commissioner noted that a workweek reduction is only bona fide if it's related to an effort to avoid layoffs or reduce costs in response to economic difficulty. Where the employer views such a reduction as highly unusual and temporary, in light of the economic challenges currently being faces, and where the employer has every intent to restore both the full five-day workweek schedule and full salaries to its exempt employees, when business conditions permit, the DLSE has said it will view the reduction as permissible without undermining or causing a loss in the exempt status.

<u>Note</u>: Exempt employees still must be paid at least twice the minimum wage on a monthly basis in order for the exemption to be maintained. Additionally, a salary reduction for exempt employees would

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not be appropriate if an employer is simply changing to an alternative workweek schedule (such as a 4/10 schedule) for both exempt and nonexempt employees, since lengthening the number of daily hours worked over the course of fewer workdays would not be a bona fide reduction in the workweek. Reminder: An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

PRACTICE TIPS: Employers should remember the following rules regarding exempt employees:

- Under the salary basis test, an exempt employee must be paid a salary equivalent to no less than two times the state minimum wage for a full 40 hour workweek.
- Exempt employees are not permitted to be subject to partial *pay* deductions based on the number of hours worked, *except*:
  - for full day personal absences other than sickness or disability; (partial day deductions from an employee's vacation leave bank for partial day absence of at least 4 hours)
  - for full day sickness or disability if pursuant to a bona fide plan for paid benefits for illness and no accrued time on books; (can charge sick account for partial day absence)-
  - hours taken as unpaid FMLA leave;
  - offsets for jury fees, witness fees and military pay; (no partial pay deductions for partial week absence)
  - initial or terminal week of employment; and
  - deductions imposed for violations of significant safety rules.

EMPLOYMENT LAW COMPLIANCE AND RISK REDUCTION SERVICES

Annual Audit of Employee Handbook

"When was the last time an audit was conducted of your written policies, to ensure compliance with current labor laws?"

It is critical to the success of any business operations to learn how to protect your company's interests while conveying your employees' rights and obligations in a handbook. Periodic review of your policies and practices will help ensure compliance with the ever changing labor laws. By way of example only, if you are a covered employer, do your leaves of absence policies contain the new protections for leave relating to active duty reservists (enacted in October 2008), or to care for injured military personnel (effective January 2009)? To prevent your written policies from being used against you, including but not limited to, your discipline policy creating an implied contract to discharge employees only for good cause, and granting leave of absence rights where you are not otherwise obligated to provide them, schedule an audit of your employee handbook immediately.

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Sexual Harassment Training Workshops for Employees and/or Supervisors

" When was the last time you provided training to your employees and supervisors to prevent sexual harassment in the workplace?"

Whether you are an organization that employs 50 or more employees, (or one who regularly receives services from 50 or more persons), *required* by California Assembly Bill 1825 to conduct California supervisor training every other year since January, 2005, or a smaller business equally interested in preventing workplace harassment, in order to demonstrate that you exercise reasonable diligence to establish a work environment that is harassment free, schedule your 2007 Sexual Harassment Prevention Training workshop. This can be an important factor if a court needs to decide whether or not there is employer liability for the conduct of one of its employees.

Staff Workshops are intended to inform employees what harassment is (and is not), your company's specific policy, and the reporting procedures in place to protect the employee's rights.

Supervisor Workshops are intended to ensure that your managers not only understand the law and the possibility of personal exposure for their own actions, but also their role and duties in preventing harassment; as well as understanding the proper procedures to follow should a complaint be received from an employee. Since January 2005, Assembly Bill 1825 requires all supervisors to be provided with at least two (2) hours of training relating to sexual harassment. All new supervisors (hired or promoted) must receive training within 6 months of obtaining the position. The training must be repeated every 2 years. The *minimum* training must:

- Provide guidance on federal and state statutory provisions re: harassment, discrimination, retaliation,
- Provide information on the correction of sexual harassment and the remedies available to victims,
- Provide practical examples for instructing supervisors on prevention,
- Be conducted by trainer or educator with knowledge and expertise in preventing such conduct, and
- Provide classroom or other effective interactive method (videos or non-interactive web based product are not enough.)

Have you conducted training lately?

Please contact Elizabeth J. Koumas at (619) 398-8301 for more information about how to obtain for a **flat rate fee agreement** for either of these services.

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