KOUMAS LAW GROUP

Employment Law Update

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INSIDE THIS ISSUE:

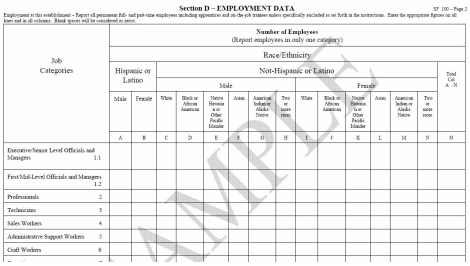
GINA IS HERE, ALONG WITH A NEW MANDATORY WORKPLACE POSTING

On May 21, 2008, Title II of the Genetic Information Nondiscrimination Act (GINA) was signed by the President. GINA protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits its disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

On **November 21, 2009** employers must begin to comply with GINA. Last spring, the Equal Employment Opportunity Commission (EEOC) issued regulations for public comment. The regulations included a new posting requirement for employers. The comment period is over, but the regulations have not been finalized yet.

Recently, the content of the *new* posting has been provided as a supplement to the current version of the EEOC poster (dated 9/02) and the OFCCP (Office of Federal Contract Compliance Programs) poster (dated 8/08), entitled "EEO is the Law" Poster Supplement. The new posting language includes both the addition of the GINA prohibitions, as well as revisions to the sections relating to individuals and veterans with disabilities, retaliation, and enforcement agency contact information. Please visit the firm's website at www.koumaslaw.com for the supplement, which is available for download, and post it next to your 2009 Employment Notices Poster.

DID YOU REMEMBER TO FILE YOUR EEO-1 SURVEY BY 9/30?



Section D – EMPLOYMENT DATA

Number of Employees (Report employees in only one category)

Job Categories	Hispanic or Latino		Not-Hispanic or Latino												Total Col. A - M
			Male						Female						
	Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Executive/Senior Level Officials and Managers 1.1															
First/Mid-Level Officials and Managers 1.2															
Professionals 2															
Technicians 3															
Sales Workers 4															
Administrative Support Workers 5															
Craft Workers 6															

SAMPLE

On or before September 30th of each year, certain employers must file a document, formerly known as the Employer Information Report, or "EEO-1 Report." The survey is a government form requiring many employers to provide a count of their employees by job category and then by ethnicity, race and gender. It must use employment numbers from any pay period in July through September of that year. The EEO-1 report is submitted to both the EEOC and the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP).

The entities which must file this report include:

(1) All *private* employers with 100 or more employees EXCLUDING State and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations; OR who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees;

(2) All *federal* contractors who have 50 or more employees, and are prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to $50,000 or more; or serve as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Notes.

All multi-establishment employers, (i.e. employers doing business at more than one establishment), must file:

1. a report covering the principal or headquarters office;
2. a separate report for each establishment employing 50 or more persons;
3. a consolidated report that MUST include ALL employees by race, sex and job category in establishments with 50 or more employees as well as establishments with fewer than 50 employees; and
4. a list, showing the name, address, total employment and major activity for each establishment employing fewer than 50 persons, must accompany the consolidated report.

The **preferred method** for completing the EEO-1 survey is the web-based filing system. The online form is totally web based. There is no Software to download or install. As much as possible, information is pre-filled from the previous year to speed up data entry. Data is transferred over the internet us-

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ing encryption, assuring your privacy. Access up to 10 years worth of EEO-1 data for your establishments. Online filing requires you to log into your company's database with a Login ID and Password. Notification letters are mailed to employers beginning in July. All companies should receive EEO-1 filing materials by mail no later than mid August 2009.

General information about the EEO-1 can be found at the EEOC's website at http://www.eeoc.gov.

SEPARATING EMPLOYEES– MUST YOU ADVISE THEM OF THEIR UNEMPLOYMENT RIGHTS?

Employer may be surprised to learn- -whether an employee is terminated, or voluntarily chooses to end his or her employment, California employers must give *all* departing employees information about their right to seek unemployment benefits.

California Labor Code § 1089 mandates that all California employers comply with two obligations relating to unemployment. First, post a notice in a conspicuous location frequented by employees, notifying employees of unemployment and disability insurance rights. Second, at the time *any* employee separates from employment, regardless of the reason for the separation, the employer must provide written information regarding the unemployment benefits available to the soon to be unemployed individual. Failure to provide *either* of these required notices about unemployment benefits is a misdemeanor, and may result in the imposition of civil penalties, which can be imposed either by the state, or through an employee lawsuit.

In addition to providing the foregoing notices about unemployment insurance benefits, California employers must also give departing employees written notice of:

- Change in the status of the employment relationship (e.g., laid off, terminated, or resigned);
- Notice regarding COBRA rights and Medi-Cal eligibility requirements; and
- Worker Adjustment and Retraining Act Notice (WARN) if there is a mass layoff meaning 75 or more employees in a 100 mile radius.)

PRACTICE TIPS:

- The poster setting forth the required unemployment and disability insurance rights can be downloaded from the California Employment Development Division (EDD) website— http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf

- To satisfy the duty to provide written information concerning the unemployment benefits available, a guide prepared by the EDD which contains the information, can be downloaded also— http://www.edd.ca.gov/pdf_pub_ctr/de2320.pdf

NO MORE "NO MATCH" LETTERS

Since 2007, employers have been faced with the challenge of keeping up with the controversial regulations pertaining to "no match" letters issued by either DHS or Social Security Administration. The U.S. Dept. of Homeland Security enforcement regulations have required employers to terminate employees upon receipt of a "no match" letter, which advised that a discrepancy between the employee's social security number and government records had been discovered. The rules also exposed employers to penalties if they did not fire an employee where a mismatch was discovered, and there was no justification offered for it. *See September 2007, Legal Update article by Ms. Koumas.* The rule has resulted in many illegal workers being discharged but it has also caught some legal employees in the termination fray, as a result of inaccurate and out of date government record databases.

DHS has officially decided to cease the "no match" rule. Even though the "no match" rule has been rescinded, the underlying duty to act and resolve a social security number and name discrepancy remains. DHS is not easing up on immigration enforcement, and even plans to increase the number of inspectors used in the field to support investigative efforts to locate illegal workers. The result of the foregoing will most likely shift the focus from locating individuals who lack valid social security numbers to catching employers who customarily hire illegal workers. Consequently, even those employers who are legally compliant will have to undergo routine investigations by the DHS, as part of the increased enforcement efforts. **TIP:** Employers should use the voluntary E-Verify system to confirm SSNs.

RECENT COURT DECISION REQUIRED EMPLOYER TO PAY UP TO TWO HOURS OF ADDITIONAL PAY PER DAY FOR FAILURE TO PROVIDE MEAL AND REST PERIODS

A federal district court recently interpreted California Labor Code §226.7 and wage orders to require a maximum of up to two hours of pay to an employee for each work day on which the employee was not provide meal periods and rest periods as required by law. *See* Marlo v United Parcel Service, Inc., 2009 U.S. Dist. Lexis 41948 (C.D. Cal.2009). Section 226.7 requires employers to pay one additional hour of pay per day, if they fail to provide meal or rest periods in accordance with the provisions of the wage orders. The court determined that the language in the wage orders authorizes separate sanctions for meal and rest period violations. The court concluded that even where an employer commits multiple violations of the meal period or rest period rules in a given day, an employee would be permitted to a maximum of one hour of additional pay for the meal period violations, and one additional hour of pay for the rest period violations.

Thus, the court determined an employee can receive up to two additional hours of pay, one hour of which represents the sanction for all missed meal periods in the day, and the other hour of pay as a sanction for all rest periods violations in that same day. The court

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CALIFORNIA LEGISLATIVE UPDATE

Governor Schwarzenegger signed SB 54 into law, eliminating one of the gray areas created by the Supreme Court's recent decision to uphold the voter-created invalidation of same-sex marriages entered into in California. SB 54, which amends Section 308 of the California Family Code, provides that California *will* recognize same-sex marriages validly contracted outside of California, and ensures that these same-sex couples will have the same rights, protections and benefits, and will be subject to the same responsibilities, duties and obligations under law as married couples, except they will not be bestowed the designation of "marriage" in California.

For California employers, this means that same-sex couples legally married outside of California will need to be afforded the same rights and benefits as registered domestic partners. Recall in 2003, California enacted a law granting registered domestic partners many of the same rights and benefits as married couples. This includes access to family health insurance plans and the ability to use certain types of leave to attend to the illness of a domestic partner.

The Governor also *vetoed* several employment related bills, including but not limited to:

- SB 242 (Workplace Language), which would have made it unlawful for an employer to discriminate against an employee based on the employee's primary language, or to limit or prohibit an employee from speaking any language in the workplace unless the policy is justified by a business necessity and notification has been provided of the circumstances and the time when the language restriction is to be observed and of the consequences for its violation. The bill would have authorized damages and attorney's fees for a violation.
- AB 335 (Employment Contracts), which would have invalidated employment agreements, if the forum selection and choice of law clauses provided for a forum or law of a state other than California for resolution of disputes between a California employee and the employer. Multi-state employers often have contracts that provide that the law of the company's home state controls the employment relationship.
- AB 943 (Employee Credit Reports), which would have made it unlawful for an employer to refuse to hire, to fire, or to in any way discriminate against an employee who refused to provide written authorization to obtain the employee's credit report, unless the employee's credit history was essential to the employee's job duties. Under current law, an employer can obtain an applicant's or an employee's credit report if the employer gets written authorization from the applicant or employee and provides the employee with a copy of the report.
- AB 527 (Employment Records), which would have amended existing law regarding investigation of payroll practices, and created a presumption in Labor Commissioner proceedings that all pay records relating to the claim would be presumed false if the Labor Commissioner found that two or more records for any pay period were falsified by the employer.

Although more employment related bills were vetoed by the Governor rather than signed, employers should not be surprised if they see some of these bills back on his desk for signature in the future.

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further commented that even if there are *only* meal period violations (or alternatively, *only* rest period violations) in a single work day, the employee may only recover one additional hour of pay for all of the *same type* of violations combined, no matter how many occurred in that workday.

The court also reviewed the currently still pending debate over whether the duty to provide meal periods requires employers to "ensure" that they are taken or solely requires that the meal periods are "made available" to workers. The California Supreme Court will resolve this issue in 2010, at the time of its review of the case of *Brinker Restaurant v Superior Court*. We previously reported on this undecided issue in the firm's November, 2008 Legal Update, which can be accessed on the firm's website at www.koumaslaw.com. We will provide you with the outcome on this issue once it is decided by our high court.

A special "thank you" to Michael Miller, a third year law student with an emphasis in Employment Law, for his contributions and assistance with this newsletter.

FUTURE SEMINARS

East County Personnel Association (ECoPA) will sponsor an employment law luncheon seminar, at which Elizabeth Koumas has been asked to speak. ECoPA is an association established to provide personnel and human resource professionals with programs, 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.

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