

# The Advisor

## 2009 Legislative Report

by

Bruce Matlock, Esq. • EAC-OC Hotline

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This is the fifth 2009 report on California and Federal legislation, court decisions, and administrative actions that may affect employers. On September 11<sup>th</sup>, the Legislature finished work for the year. Any bills not enrolled (sent to the Governor) are dead and must be reintroduced next year. The Governor has 30 days to sign or veto the enrolled bills. I will issue a final update after October 11<sup>th</sup>. If you want information on any of these bills or copies of the bill language, contact me or go to [www.leginfo.ca.gov](http://www.leginfo.ca.gov). Please do not rely on this report as legal advice, because it isn't. If you need more detailed information, you should contact your local attorney, or give me a call. Also, please let me know if I missed any legislation.

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## Employee Privacy in The Workplace – E-mails, Video and MySpace

by

Jim Hart, Esq. – Littler Mendelson

Courts continue to examine the scope of an employee's privacy interest while at work, particularly as new technologies are introduced in the workplace. California's Constitution, as well as statutes, protect employee privacy. The questions courts ask when assessing privacy interests in the workplace are generally the same: Does the employee have a reasonable expectation of privacy? Was that expectation violated under the circumstances? Courts have considered employee privacy interests in e-mails and text messages, MySpace groups and videotaping. As discussed below, those decisions provide employers important guidance on how to avoid liability for violating employee privacy.

In *Quon v. Arch Wireless Operating Co., et al.*, the federal Court of Appeals for the Ninth Circuit recently considered the nature and scope of an employee's expectation of privacy in workplace text and e-mail messages. In that



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## ***President's Message . . .***

***by Stewart Lerner***

**T**his time of year is both interesting and challenging for those of us involved with planning EAC activities. We are in the process of winding up our 2009 programs while in the planning process for an entire new slate of programs in 2010.

In terms of this year, we have our final workshop in the Certificate Program scheduled for October and are getting ready for our very special membership rewards program in November.

Let me give you a preview of our special November program. First of all, our speaker will be Bruce Matlock. As many of you know, Bruce is the attorney who handles our EAC Hotline and does an excellent job for all of us. Bruce will provide updates on this year's major issues as well as provide a preview for 2010. He will also be reviewing the questions that cause our members the greatest problems based on his Hotline calls. You will also have an opportunity to submit any specific questions you may have in advance so that Bruce can cover them during his program.

In addition to what will be a great presentation by Bruce, we will be featuring our first table top display where members can share their products and services with their fellow professionals. Display tables will be FREE although we are asking participants to provide a door prize. If you are interested in having a display, please contact Barbara at our office.

Speaking of door prizes, once again there will be a bunch of them. Last year, one of every three members in attendance won a door prize. In addition to the door prizes, ALL those present will receive a gift from the EAC. Finally, as even more encouragement to attend, the program prices will be discounted 20%. If you do plan to be there – and we hope you will – allow some extra time since the program will run longer than usual to allow time for all the special activities.

Next year once again will be loaded with exciting programs. Our program chair, Robert Orozco, somehow manages to come up with new and interesting topics and 2010 will be no exception. In January we will begin with Craig Scott providing his annual update incorporating new laws and important court decisions. This has proven to be one of our most popular

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programs and always gets top reviews from our members.

Following Craig's presentation, we will begin our regular slate of programs. Watch for more information on the specific programs which will be coming out shortly. Once again, we will be providing an opportunity to save money by pre-paying and earning a certificate. It is also interesting that more and more members are taking advantage of the HRCI credits available with many of our programs.

Thank you again for your on-going support for our organization. We pledge to continue to provide quality programming and up-to-date information and education. I look forward to seeing you at our upcoming events.



## ***DLSE Agrees California's Partial-Week Furlough Options Are Coextensive With Federal Law***

by

Daniel Thieme, Esq. and Alison Hightower, Esq.  
Littler Mendelson, P.C.

**A**s the old cliché goes, “better late than never.” This applies to an important new opinion letter from the California Division of Labor Standards Enforcement (“DLSE”). In the opinion, the DLSE acknowledges, contrary to its prior view, that California’s approach to furloughing salaried “white collar” exempt employees follows the federal approach. This about face substantially reduces an area of potential legal risk for California employers who follow the federal guidelines for reducing both the workweeks and salaries of exempt employees.

### **Background – Prior California Opinion Disapproved Partial-Week Unpaid Furloughs of Exempt Employees**

As the recession of 2008 continued into 2009, and layoffs were not sufficient to remedy revenue shortfalls or cut too deeply into critically needed employee resources, many employers considered requiring their employees to take unpaid time off (furloughs) as another cost-cutting option. While the employer reduces payroll expenses, the employee receives free time to do whatever he or she chooses. The employer does not have to hire and train new employees when the economy improves, and the employees still receive most of their normal pay.

Employers considering furloughs frequently were drawn to offering employees a reduced workweek, such as four instead of five days, with a corresponding reduction in pay. A three day weekend appeals to employers and employees alike as a meaningful quid pro quo for a significant pay reduction.

Partial-week furloughs of exempt employees, however, present legal challenges for employers because of the salary requirements for exempt employees under both federal and California law. Thus, implementing this cost cutting measure for salaried exempt employees has involved certain risks of losing the employees’ exempt status, particularly in California due to an unfavorable 2002 DLSE opinion.

### **The Salary Basis Test and Its Relevance to Furloughs**

In most cases, a key element of the “white collar” overtime exemptions is the “salary basis test.” Under that test, if a salaried exempt employee performs any work in a workweek, deductions may not be made from the full weekly salary for absences occasioned by the employer or by the operating requirements of the business. Thus, it is well established that an employer that imposes a reduced workweek may not correspondingly “dock” the salaries of salaried exempt employees without jeopardizing their exempt status.

The solution to this problem under federal law has been to impose an advance reduction in the employee’s salary rate in connection with the reduced work schedule. The federal Department of Labor (DOL) has opined that this approach does not involve an improper “docking” of salary under federal law, so long as the reductions are relatively “fixed” and not the result of week-to-week determinations.

**Bills Enrolled And Sent To The Governor**

**SB 242, Language Discrimination:** Would add the prohibitions against banning speaking a language other than English that exist in the Fair Employment and Housing Act to the Unruh Civil Rights Act. The Unruh Act deals with providing services to the public.

**AB527, Time Records:** If Labor Commissioner finds that some employer time records have been falsified, all employer records will be considered false.

**AB793, Wage Discrimination:** Would require California to conform to new Federal laws on Equal Pay Act violations.

**AB943 Consumer Credit Reports:** Would prohibit the use of consumer credit reports by employers.

**AB1288 E-Verify:** Would prohibit any California government agency from requiring employers to use E-Verify. Federal Government Contractors must begin using e-verify.

**AB335:** Would prohibit employers from requiring California employees to agree that any employment disputes must be tried outside of California.

**AB370:** Increases penalties for unlicensed contractors.

**AB2:** Adds significant requirements on health plan enrollment procedures and termination of coverage.

**AB108, Cancellation of Health Insurance:** Would prohibit a carrier from rescinding coverage if policy has been in effect for more than 18 months.

**AB838:** Requires Cal-OSHA to set standards for prevention of indoor heat illness.

case, Ontario Police Department employees were issued two-way pagers that permitted text messaging. The Department maintained several formal policies expressly warning officers that text messages are not private. However, when several police officers exceeded their monthly allotment of text characters, the officer in charge of the program, Lieutenant Duke, had told them that they could pay the overage payments on the pagers rather than face an audit concerning whether the overages were for business or personal reasons. After the employees paid the overages for several months, the police chief ordered an audit to determine whether the Department should increase the monthly text characters permitted or if the overages were due to personal matters. To accomplish this, the Department requested transcripts of the text messages from the service provider, Arch Wireless. The provider pulled and forwarded the transcripts, which revealed personal text messages, some of which were sexually explicit. Officer Quon sued the Department for invasion of privacy.

In its decision, the court first affirmed that users have no expectation of privacy in either the “to/from” fields of text messages or the size of text messages. The court reasoned that users should know that this information is provided to and used by Internet service providers for the specific purpose of routing the information. The court ruled that Officer Quon had a reasonable expectation of privacy in his text messages because Lt. Duke had effectively countermanded the Department’s written e-mail and text message policy by telling Quon that his text messages would not be audited if he paid the overage charge. The court also ruled that the Department’s audit was unreasonable in scope because there was less intrusive means of achieving the Department’s interest in reducing the use of its two-way pagers for personal text messaging, such as by expressly rescinding the informal policy expressed by Lt. Duke and then conducting an audit.

As a result, if an employer intends to audit or monitor employee e-mails, it should draft policies that clearly warn employees of such monitoring activities ahead of time; it also should ensure that operational practices are consistent with the formal policy.

**T**here was more negative news on the employment front as the nation's unemployment edged closer to double digits in September. The government reported that the jobless rate rose to a 26-year high of 9.8%, up from 9.7% in August. During the month, employers cut their payrolls by 263,000 jobs, far more than analysts had expected.

Unfortunately, these figures tell only part of the story. For example, those who had jobs last month worked an average of only 33 hours per week, a record low. AND, in addition to the 15.1 people counted as officially unemployed, 9.2 million workers were working only part time because their employers had scaled back their hours or they simply could not find full-time jobs.

Alan Krueger, the Treasury Department's chief economist attempted to put the best light on the situation saying that "At least we're seeing less job loss and that's necessary before we begin to see job growth." He did acknowledge, however, that the large number of involuntary part-time workers is one important reason that "the job market poses a severe challenge."

Staying with news at the federal level, the U.S. Equal Employment Opportunity Commission (EEOC) is once again taking a swing against a major employer. You may remember in our September issue we discussed what could be a massive lawsuit filed against United Parcel Service for rejecting an extension of medical leave as a reasonable accommodation for its employees with disabilities. This month, the EEOC in a press release announced what they are calling the "largest ADA settlement in a single lawsuit in EEOC history."

The settlement resolved a class lawsuit against Sears, Roebuck and Co. under the Americans with Disabilities Act (ADA) for \$6.2 million. The case arose from a charge of discrimination filed by a former Sears service technician. The employee was injured on the job, took workers' compensation leave, and although remaining disabled by the injuries, repeatedly attempted to return to work. An EEOC spokesperson explained that Sears "could never see its way clear to provide the employee with a reasonable accommodation which could have put him back to work and, instead, fired him when his leave expired."



## **Lerner Lines**

by  
Stewart Lerner  
Lerner & Associates

The spokesperson then stated the EEOC position in matters of this kind which should serve as a clear warning to all employers. "The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are over . . . inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law."

Let's move on to California and review some of the significant new legislation that employers may have to deal with in 2010. The good news is that I did not find many bills that would cause significant concern. Two that might be of the greatest interest to employers are Assembly Bills 527 and 943. AB 527 provides that if the Labor Commissioner determines during an investigation or hearing that there is a pattern of falsification of payroll records submitted for any pay period, then ALL payroll records pertaining to that claim or complaint must be presumed false. For purpose of this bill, a "pattern of intentional falsification" means two or more intentionally falsified payroll records.

AB 943 restricts the ability for most employers to utilize consumer credit reports for employment purposes. It provides that an employer shall not use a consumer credit report unless the following criteria are satisfied:

- (1) The information contained in the report is substantially job-related, meaning that the position of the person for whom the report is sought has access to money, other assets, or confidential information.
- (2) The position of the person for whom the report is sought is one of the following:
  - (A) a management position
  - (B) a position in the state Department of Justice
  - (C) a position in a city, county, or both city and county
  - (D) that of a sworn peace officer or other law enforcement position
  - (E) a position for which the information contained in the report is required to be disclosed by law or to be obtained by the employer.

Both of these bills are now on the governor's desk awaiting action.

That will do it for this month's report. We will be back next quarter with more news and commentary.

## **New Wage and Hour Issues**

**Meal and Rest Period Issues:** We are still waiting for the California Supreme Court to review the Brinker and Brinkly decisions where two Courts of Appeal have ruled that an employer need only “provide an opportunity” for meal and rest periods.

**Reducing Exempt Employees Pay and Hours:** The Labor Commissioner has issued an opinion letter reversing a previous ruling and allowing employers to reduce the salary of exempt employees when working hours are reduced. If the exempt employee is only going to work 4 days a week, the salary could be reduced by 20%. The opinion letter lists several requirements for such a reduction to be legal. They are:

The employer is experiencing significant economic difficulties due to a severe economic downturn;

The employer is reducing the exempt employee’s work schedule and salary to cut costs until business conditions improve;

The employee is subject to the executive, administrative or professional exemption and will continue to receive a monthly salary no less than two times California’s minimum wage for full-time employment; and

The employer intends to restore full-time work schedules and full salary to the exempt employee as soon as business conditions permit.

While the opinion letter discusses exemptions under Wage Order #4, it may also apply to other Wage Orders as well. Check with your counsel before relying on this opinion letter.

**New I-9’s:** The USCIS has issued a new I-9 form revised 8-7-09 which will expire on 8-31-12 unless revised sooner. The form is to be used for all new hires. Current employees do not need to file out a new I-9 form.

## **Bills That Did Not Get Sent to the Governor:**

**SB810 Universal Health Care:** Would establish a single payer universal health care system for California. The bill has 43 co-authors.

## **Wage and Hour Issues**

**AB141, SB187, 10 Hour Schedule:** Would allow an individual employee to agree to a 10 hour day without overtime.

**AB227, Labor Commissioner Consulting:** Requires the Labor Commissioner to set up a consulting service similar to CalOsha Consulting. If the employer corrects all deficiencies, there would be no penalties

## **Health Insurance**

**AB29, Dependent Health Insurance:** Would require group Health Insurance coverage for dependent children up to age 27.

## **Discrimination**

**AB1001, Familial Status:** Would add “Familial Status” to categories protected from employment discrimination.

## **Mandatory Sick Leave**

**AB1000:** Would require all employers to provide one hour of sick leave for each 30 hours of work. Carry over from 2008 when the bill did not get out of the Legislature.

## **New Hire Issues**

**AB390 Marijuana Use:** Employers would not be allowed to deny employment or terminate employees for using medical marijuana. This bill was vetoed by the Governor in 2008.

## **Unemployment Insurance**

**AB1298:** Would increase annual wages subject to UIB taxes from \$7,000 to \$16,600 and increase tax rates.

## **Litigation Issues**

**AB298:** Allows immediate appeal of “class” certifications.

## **California Family Rights Act**

**AB849:** Allows CFRA leave for any dependent child, parents-in-laws, grandparents, siblings, grandchildren and domestic partners.

## **California WARN Act**

**AB 842:** Increases required notice of layoffs from 60 to 90 days.

# E-Z FORM 2010 Workshops

## General Workshops

5 Per Year • 1 Location per Workshop

The General Workshops are open to all members, nonmembers and guests. They are normally held on the third Thursday of each **ODD** month at the Hyatt Regency, 11999 Harbor Blvd, Garden Grove, CA. The only exceptions are July and December, when no workshops are held. Reservations can be made in advance, at a discounted rate, or for each specific workshop individually.

## Certificate Workshops

5 Per Year • 2 Locations per Workshop

The Certificate Workshops are open to all members, nonmembers and guests. They are held on the third Thursday of each **EVEN** month at the Hyatt Regency, 11999 Harbor Blvd, Garden Grove, CA AND on the fourth Tuesday of each **EVEN** month at the Holiday Inn, 25205 La Paz Road, Laguna Hills, CA. Signup for the Certificate Workshops will be from November 2008 through February 2009. To receive certification you must pre-register and attend four out of the five workshops scheduled.

### Questions?

Please call Barbara Bivens at the  
EAC office  
at 714-846-2510  
or email  
info@eacorangecounty.com



These programs have been approved for 2.75 recertification credit hours through the HR Certification Institute. For more information about certification or recertification, please visit the HR Certification Institute home page at [www.hrci.org](http://www.hrci.org). The use of this seal is not an endorsement by HRCI of the quality of the program. It means that this program has met HRCI's criteria to be pre-approved for recertification credit.

## Registration Form

**Location:** Please check date and location on page 8.  
**Times:** 7:15 to 8:00 am: check-in and breakfast • 8:00 to 11:30 am: Workshop with a 15-minute break  
**Costs:** \$65 per workshop per person; for non-members \$85 per workshop per person

**Registrant Name** \_\_\_\_\_

**Company** \_\_\_\_\_

**Contact Phone** \_\_\_\_\_ **Contact Email** \_\_\_\_\_

**Pay by Check:** EAC-OC, 16033 Bolsa Chica Rd. #104-615, Huntington Beach, CA 92649

**Pay by FAX:** 714-844-4779

**Pay by Email:** info@eacorangecounty.com

**Credit Card Information:** \_\_\_\_\_

Name on Card \_\_\_\_\_ Authorized Signature \_\_\_\_\_

Credit Card # \_\_\_\_\_ Exp \_\_\_\_\_ / \_\_\_\_\_ Security # \_\_\_\_\_

Billing Zip Code \_\_\_\_\_

# ***SIGN UP for the Two Remaining WORKSHOPS!***

**Please check date and location for the WORKSHOPS you will be attending and send this page in with the Registration Form.**

**COMPANY NAME** \_\_\_\_\_

**YOUR NAME** \_\_\_\_\_

## **October - Employment A to Z**

### **Certificate Program 5**

Oct 15, 2009 – Garden Grove, Hyatt Regency

Oct 20, 2009 – Laguna Hills, The Holiday Inn

## **November 19 – Hotline Q&A & Member**

### **Appreciation Breakfast**

Nov 29, 2009 – Garden Grove, Hyatt Regency

## **Note: EAC IS AN APPROVED PROVIDER FOR HRCI WORKSHOPS**

*Each year the EAC develops a series of five workshops that are approved for HRCI (Human Resource Certificate Institute) credits. For each workshop attended you will receive a certificate for 2.75 credit hours. This program will start again in 2010 in the months of February, April, June, August and October. You need to prepay for all five workshops but EAC offers a discounted rate for pre-payment.*

*Information on the 2010 Certificate Program will go out in November 2009. You can sign up between November 2009 and February 2010.*

*HR certification is a career-long commitment that proves to your peers and your organization that you are driven to be successful in HR management. Earning your HR credentials can:*

- Increase your professional confidence
- Set you apart from your peers
- Result in greater respect from the organization in which you work

**Overview:** The HR Certification Institute offers four certifications for HR professionals:

- PHR® (Professional in Human Resources)
- SPHR® (Senior Professional in Human Resources)
- GPHR® (Global Professional in Human Resources)
- PHR-CA® and SPHR-CA® (PHR with state certification in California and SPHR with state certification in California)

*Certification is a voluntary action by a professional group to establish a system to grant recognition to professionals who have met a stated level of training and work experience. Certified individuals are usually issued a certificate attesting that they have met the standards of the credentialing organization and are entitled to make the public aware of their credentialed status, usually through the use of initials (i.e., PHR or SPHR) after their names.*

*Certifications differ from certificate programs because certifications include an experience component. Certificate programs, on the other hand, award certificates once a course of study has been completed and do not require previous work experience.*

*EAC also offers general workshops in January, March, May, September and November. And even if you do not need the credits, you can sign up for the Certificate Workshops on a monthly basis.*



The California Supreme Court has recently weighed in on secret workplace videotaping in *Hernandez v. Hillside, Inc.* The case was prompted after a director at Hillside, a residence for abused children, learned that an unknown person was using a work computer late at night to access pornographic Web sites. The computer was located in an office shared by two employees. The director authorized the placement of a hidden video camera in the office that could be remotely activated to view or record, but did not inform the two employees occupying the office of the decision to install the video recording equipment and to conduct surveillance.

The employees occupying the office discovered the hidden video camera and brought a lawsuit claiming invasion of privacy. The court found that the employees had a reasonable expectation of privacy, explaining . . .

While plaintiffs' privacy interests in a shared office at work were far from absolute, they had a reasonable expectation under widely held social norms that their employer would not install video equipment capable of monitoring and recording their activities — personal and work related — behind closed doors without their knowledge or consent.

While the court found that employees could expect privacy, it determined that the videotaping was neither "highly offensive" nor "sufficiently serious to constitute a privacy violation." The court reached this conclusion because the complaining employees, who worked during the day, were never actually recorded or surveilled, and the recordings only lasted three weeks.

This case illustrates the fact-specific inquiry needed to determine whether an employee has a reasonable expectation of privacy and whether that expectation has been violated. A reasonable expectation of privacy may depend on whether and how a work space is enclosed — by window blinds, doors, or locks. It will depend on the communications made by the employer to employee, the motives behind the intrusions, the extent of the intrusion, and the reasonableness of the intrusion compared to the purpose of the intrusion. As a consequence, before any decision is made to monitor employees electronically, employers should consider these factors, account for all

relevant facts, and seek the least invasive means of monitoring the employees consistent with the purpose of the monitoring.

Finally, courts have recently considered the interplay between work and such electronic forums as MySpace. In *Pietrylo v. Hillstone Restaurant Group*, an employee at a Houston's Restaurant in Hackensack, New Jersey, created a "private," invitation-only discussion group about his workplace on his personal MySpace Web page. A manager learned of the group and asked a member for her sign-in information. The manager accessed the discussion group and found sexual comments about employees and customers, disparaging jokes about company practices, references to drugs and violence, as well as a copy of an employee wine test. These findings led to the termination of two employees, who sued, alleging, among other things, that the company violated federal and state laws that prohibit unauthorized access to electronic communications stored by an Internet service provider.

A jury returned a verdict against Houston's. The jury found that the Houston's managers knowingly accessed the private group without authorization even though one of the group's members provided the password. The jury apparently believed that this employee had not acted voluntarily but rather acted out of fear of adverse repercussions on her employment. The ultimate damages award was relatively small — \$3,500 in total — because the terminated employees had quickly found alternative employment. Employers should beware, however, that the federal Stored Communications Act permits an award of actual damages or \$1,000 in statutory damages per violation, plus punitive damages and attorney's fees. Consequently, in other cases, an adverse jury verdict could be costly.

In light of the potentially substantial exposure, employers generally should avoid accessing restricted social media sites. If a group member is willing to disclose the site's contents, an employer can reduce risk by asking the group member to print or e-mail specific content and provide it to the employer. Alternatively, the employer should document that the group member's consent to the employer's accessing the site is voluntary.

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### *Partial Week Furlough Options . . . from Page 3*

The California DLSE, however, had expressed a conflicting viewpoint.

#### **The California DLSE 2002 Opinion Letter**

In 2002, the California DLSE issued an opinion letter frowning on the approach blessed by the federal DOL, and indicating that any reduction in salary rates made in connection with the introduction of a reduced workweek would violate the salary basis requirements under California law. No California case has addressed the legality of reducing exempt employees' salaries for a partial workweek, and as of 2002 only a few federal courts had considered the issue. Those federal courts reached opposite conclusions. In Massachusetts, a federal district court followed the federal DOL's approach and interpreted the applicable federal regulations as prohibiting **deductions** from pay already earned, but as not prohibiting all **prospective** reductions of future work periods and the corresponding salary **rate**. That court upheld an unpaid furlough of exempt employees for less than a week because the furlough and pay reduction were implemented in an upcoming pay period, not midway during a current payroll period.

By contrast, a New York federal district court disapproved of the reduction of a workweek to four days with a corresponding reduction in salary of 20 percent as violating the salary basis test, relying on the federal regulation, which the court concluded "makes it clear that a reduction in work time that is imposed by the employer may not be the basis for a reduction in salary." The New York decision did not discuss the federal DOL opinion letters that had taken the contrary position.

In its 2002 Opinion Letter, the California DLSE followed this New York opinion, and rejected the interpretation of the Massachusetts federal court and the federal DOL as supposedly violating the "plain language" of the federal regulations implementing the "salary basis test" for exempt employees. Therefore, according to the DLSE, California employers could reduce the salaries of exempt employees without reducing the employees' workweeks, or furlough them for an entire workweek without pay, but could not reduce the number of workdays expected of exempt employees in a workweek while also reducing their salary.

DLSE opinions are not binding on the courts.

Nonetheless, the 2002 Opinion Letter was a yellow if not red light, cautioning California employers to consider limiting unpaid furloughs of exempt employees to an entire work week, or simply reducing salary rates without reducing their work schedules.

#### **The DLSE's About Face**

On August 19, 2009, the DLSE responded to an employer's request that the DLSE's 2002 Opinion Letter be withdrawn with a refreshing acknowledgement that its prior opinion was misguided. After acknowledging that California generally follows the federal approach to the salary basis test for white collar exempt employees, and upon a review of the federal case law and DOL opinion letters interpreting the federal regulations, the Chief Counsel of the DLSE concluded:

[T]he DLSE's prior reliance upon [the New York federal decision in] Dingwall for the conclusion that the federal regulations prohibit the simultaneous reduction of a workweek schedule and salary presented in this case is not persuasive ...

The DLSE went on to approve of the requesting employer's proposal to reduce the number of its exempt employees' scheduled work days from five to four days per week, with a corresponding reduction in salary, to address significant but temporary economic difficulties, with the expectation that as soon as business conditions permit, the employer intends to restore the full five-day work schedule and the full salaries of these exempt employees.

Although this new DLSE opinion is not binding on the courts, it will be followed in proceedings before the California Labor Commissioner. Also, its issuance substantially reduces the risk of a court finding the adverse 2002 opinion to be persuasive authority on this issue.

#### **What Restrictions Remain on Partial-Week Furloughs of Salaried Exempt Employees?**

This development does not give a green light to *all* partial-week unpaid furloughs. Employers are well advised to proceed with caution, keeping in mind limitations that are noted in the federal regulations and DOL opinion letters.

First, it is advisable to structure any salary reduction as

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*Partial Week Furlough Options . . . from Page 10*

an advance reduction in the weekly salary *rate*, and not as “deductions” from an established salary rate for missed work days. While a recent Illinois Court of Appeals decision provides authority for a “deductions” approach, as long as it is announced in advance, other courts could find such an approach violates the federal regulation prohibiting “deductions from the employee’s predetermined compensation ... for absences occasioned by the employer or by the operating requirements of the business.”

Second, any combined work schedule and salary rate reductions should be in place for a substantial period of time. The federal DOL has consistently stated that short-term reductions in salaries “due to the day-to-day or week-to-week determinations of the operating requirements of the business are precisely the circumstances the salary basis test is intended to preclude.” Indeed, recent federal DOL opinions describe lawful reductions as involving a “fixed” or “permanent” reduction in hours and pay rate. We know that reductions need not last forever – they may be reversed after economic conditions improve. Beyond that, however, no guidance exists as to how briefly a reduction may be in place while still qualifying as “fixed” or “permanent.” Given the lack of guidance, we believe it is advisable to describe partial-week furloughs as intended to continue indefinitely while unusual economic difficulties continue.

Third, an employer must not adjust salary rates and schedules too often. This limitation likewise derives from the federal DOL’s disapproval of reductions that are made “for short-term business needs,” or that are “occasional ... and transitory.” Similarly, the new DLSE opinion approved the employer’s partial-week furlough based, in part, on the fact the employer was imposing only an unusual, one-time reduction. A recent Tenth Circuit federal decision expresses that an employer may be able to change an employee’s schedule and salary “at least twice during the course of a year,” but it is not clear that all courts would agree. Given the uncertainty that surrounds this question, caution is advised before implementing a partial-week furlough program more often than once in connection with the current economic downturn.

Finally, any reduced salary must not fall below the minimum salary rate required for exempt status – currently \$2,773.33 per month in California.

## **EAC PROVIDES HELP FOR HOMELESS AND LOW INCOME VETERANS**

by

*Stewart Lerner, Lerner & Associates*

**I**n partnership with the Greater Harbor Area Employer Advisory Council and Christian Outreach in Action, the Orange County EAC has provided support for a Veterans Stand Down held in the Long Beach area on August 8, 2009.

To reach veterans needing assistance, fliers were distributed to colleges, Veterans Affairs offices and numerous other support facilities. As a result, over 150 attendees participated in the event. The day’s activities included medical screening by the Long Beach Veterans Hospital, legal advice from the Legal Aid Foundation, and employment and job search assistance from our friends at EDD.

Haircuts were available and each client received a gift bag with toiletries, new socks, and other assorted items. Breakfast and lunch were served and everyone was allowed to go “shopping” in a free clothing area.

Your EAC was proud to support this very worthwhile event.



# The Future of Workers' Compensation Rates

by

Walt Storch, Elkins Jones Insurance Agency, Inc.

The Workers' Compensation Insurance Rating Bureau (WCIRB) has recommended a 22.8% increase in pure premium rates (dollars required to cover actual claim costs without expenses) effective January 1, 2010. This is the second recommendation this year for double digit increases in pure premium rates (the percentage estimates the average effect over all of the classes). The WCIRB will review and modify the initial rate indication based on Accident Year Losses valued as of June 30, 2009, and current legislative, regulatory and judicial actions (the impact of the *Ogilvie v. City and County of San Francisco* and *Alamaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* is substantial).

Workers' Compensation reform was instituted in April 2004. At that time the average pure premium rate per \$100 of payroll was \$6.11. The rate steadily declined to the current average pure premium rate of \$2.33. The prospect for rates based on current Accident Year Loss Ratios is for the average pure premium rate to increase.

The insurance companies will compare the WCIRB recommended rates by class along with the outcome of any hearings held by the Insurance Commissioner with their own losses for each classification and file their own individual rates with the Insurance Commissioner. The result will vary by company and classification and the probable result will be an overall increase in rates with some classes receiving a decrease rate.

Employer's actions can have a positive impact on Workers Compensation costs for their own company's annual premium. Below are some suggestions to stimulate your actions:



**Workplace Safety** – Institute and maintain an up-to-date Safety Program that has workplace rules in place to avoid accidents and injuries – involve the employees in the process of setting the rules. Investigate accidents immediately with the goal to learn how to avoid similar accidents and or injuries. Modify workplace rules per the findings.

**Injuries** – Institute and maintain a Return to Work policy - respond to injuries immediately with the goal of bringing

the employee back to health and work as quickly as possible – provide meaningful work for the employee – communicate with the care provider that your goal is to have the employee back at work and productive as soon as possible.

**Experience Modification** – The XMOD is

driven by frequency and dollar severity of injuries. The calculation of the modification is based on the last three (3) years' loss experience. The Unit Statistical Report is filed with the WCIRB six (6) months into the current policy period. Review all claims for the 3 year period 4-5 months into the current policy to confirm that the closed claims are correctly reflected in the loss runs. Work with the claims adjuster from each policy period to reduce estimated claims costs as appropriate.

Now, as rates appear to have flattened and begun to rise, it is an excellent time to be proactive and review your current premium rates, XMOD and plans and make adjustments to improve your safety record and reduce overall loss costs.

*This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or expert assistance is required, the service of a competent professional person should be sought.*

**EMPLOYMENT DEVELOPMENT DEPARTMENT (EDD)**  
**Orange County Locations**

<b>OFFICE</b>	<b>ADDRESS</b>	<b>PHONE</b>
Anaheim Job Service .....	2450 E. Lincoln Ave. .... Anaheim, CA 92806	714-518-2315
Anaheim Workforce Center .....	50 S. Anaheim Blvd. .... Anaheim, CA 92805	714-765-4350
Irvine One-Stop Center .....	125 Technology Drive #200 .... Irvine, CA 92618	949-341-8000
Westminster One-Stop Center .....	5405 Garden Grove Blvd. .... Westminster, CA 92863	714-241-4900
Santa Ana W.O.R.K. Center .....	1000 E. Santa Ana Blvd., Ste. 220 .... Santa Ana, CA 92701 (At the train station)	714-565-2610
Santa Ana Disability Insurance .....	P.O. Box 1466 .....	800-480-3287
	Santa Ana, CA 92701	
Employment Tax Audit Area Office .....	2099 So St College Blvd., Ste. 401 .... Anaheim, CA 92816-6014	714-935-2920
EDD Labor Market Information .....	South County .....	949-341-8051
	North County .....	714-687-4816

The relationship between the California Employment Development Department (EDD) and the Employer Advisory Council (EAC) is defined as a partnership. "The partnership's commitment to both the employer and the worker is to improve EDD services, increase cooperation and communication among EDD and the private sector, and to increase employer's knowledge of EDD programs and services."