

The Advisor

New FMLA Regulations Effective January 16, 2009: Provide for Military Family Leaves and Clarify Existing Provisions

*by Marilou F. Mirkovich, Joanna L. Blake, and Tara L. Morgan of
Atkinson, Andelson, Loya, Ruud & Romo*

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Council of Orange
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with the Employment
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State of California*

The U.S. Department of Labor's Wage and Hour Division ("DOL") published new Family Medical Leave Act ("FMLA") regulations on November 17, 2008. The new regulations attempt to clarify some of the confusing provisions from the original FMLA regulations published in 1995, and outline how employers must implement the new FMLA military family leaves of absence. The new regulations go into effect on January 16, 2009.

Eligibility requirements for FMLA leave have not changed. FMLA applies to employers that have 50 or more employees. To be eligible for a FMLA leave, an employee must: (1) work for the covered employer for at least 12 months, (2) have worked at least 1,250 hours for that employer during the previous 12-month

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Colorado and Arizona Employees Working in California Are Protected by California Overtime Laws According to the Ninth Circuit

by

Jim Hart, P.C., Littler Mendelson

The Ninth Circuit in *Sullivan v. Oracle Corporation*, (08 Cal. Daily Op. Serv. 13,881) (Nov. 6, 2008), came to three important conclusions regarding the reach of certain California laws:

- First, California's overtime laws may apply to nonresident employees (in the case itself, individuals from Arizona and Colorado were involved) for those periods of time that the employees temporarily work in California;
- Second, the court found that a company that has a sufficient presence in the state, such as Oracle, can be required to comply with California law without violating that employer's due process rights; and
- Third, the court found that California's unfair competition law does not apply to acts based on alleged federal wage law violations that occur outside of the state.

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EAC-OC OFFICE
EAC-OC/EDD COORDINATOR

EAC-OC Office – Barbara Bivens, Administrator
16033 Bolsa Chica Road #104-615
Huntington Beach, CA 92649
Phone: 714/890-0008 • Fax: 714/890-5865
email: info@eacorangelcounty.com

EAC-OC/EDD COORDINATOR – Abner Ivora
EDD Job Service
2450 E. Lincoln Ave., Anaheim, CA 92806-4272
Phone: 714/687-4834 • Fax: 714/518-2391
Email: aivora@edd.ca.gov

President’s Message . . .

by Stewart Lerner

Welcome to 2009! Clearly this will be a year of many challenges. As you know, the economic situation is expected to continue in the doldrums for much if not all of this year and the unemployment rate is predicted to go even higher. We hope that despite all of these issues, the work of your business will go on successfully.

However, once again, the new year will bring a number of important legislative changes. Not to worry! Your EAC will be on top of these issues and will provide you with the information you will need. In fact, you will note that a number of these changes are discussed in this quarter’s newsletter.

In addition, we will once again be presenting our annual New Laws Update on Thursday, January 22. I urge you to attend this program to learn first hand about the issues that will impact you in the year to come. Some of the issues that will be covered are crucial, such as the first significant changes in FMLA in fourteen years. Even if you are a smaller employer, you need to hear this because there are proposals out there to lower the threshold for FMLA from 50 to 25 employees. There are also important changes in wage and hour requirements and in the I-9 process. This is not a program you can afford to miss.

. . . the new year will bring a number of important legislative changes. Not to worry! Your EAC will be on top of these issues and will provide you with the information you will need.

Speaking of programs, once again, our Chair, Robert Orozco, has provided a slate of interesting and informative topics (see page 6) that will keep you on top in so many areas important to your business.

Finally, in regard to the many changes that could take place later in the year under the new administration, we will be ready to provide information or even develop timely seminar programs to keep you informed and in compliance. Now more than ever, your EAC membership is a valuable asset. Renewal notices will be going out shortly so please renew promptly! We look forward to working with you throughout the coming year and into the future.

The New I-9: Coming to a Theater Near You on February 2, 2009

*by Greg Berk & Robert Wenzel of
Atkinson, Andelson, Loya, Ruud & Romo*

U.S. Citizenship & Immigration Services (CIS) announced it is updating Form I-9 and certain related procedures. The I-9 is the document that all employers in the U.S. are required to use to verify employment authorization.

Why Is U.S. CIS Issuing a New Form I-9?

CIS wanted to upgrade the level of security of the employment verification process by eliminating expired identity documents as acceptable I-9 documents from new hires. Expired identity documents are considered more prone to tampering and fraudulent use. U.S. CIS made other technical amendments to the form as well.

When will the New I-9 Form Be Required?

Employers will be required to use the new form effective February 2, 2009. Until then, they may continue to use the old form. Starting February 2, 2009, the new form will be available on the CIS website at www.uscis.gov. Click on "Immigration Forms" and scroll down to "I-9."

How Does the New Form Affect New Hires?

New hires can no longer tender an expired document for I-9 purposes. Previously, U.S. citizens could tender expired U.S. passports, drivers' licenses, and certain other expired documents for I-9 purposes.

How Does the New Form Affect Current Employees?

Current employees who are U.S. citizens or lawful permanent residents (green card holders) who are on the payroll prior to February 2, 2009, do not need to be re-verified merely because they previously tendered expired documents with their I-9 form. However, non-immigrants (those who are not U.S. citizens or green card holders) who are already on the payroll will only continue to be work authorized until their employment authorization documents expire. At that time, each non-immigrant must be re-verified using the new I-9 form.

What is the New U.S. Passport Card?

The U.S. Department of State has begun to issue a small plastic "Passport Card" for U.S. citizens for travel by land or sea in North America only. The Passport Card will be a "List A" document for I-9 purposes.

Other Technical Amendments

There were several other technical amendments to the I-9. They will be incorporated into the new form and new CIS I-9 manual, both of which will be available soon. For

example, one of the amendments points out that citizens of Micronesia and the Mariana Islands are work authorized pursuant to a U.S. treaty, and their passports are now considered "List A" documents.

Also, remember that U.S. citizenship or nationality belongs not only to persons born in the United States but also to all individuals born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island.

Can a Receipt for a Replacement Document Be Accepted?

Under certain circumstances, employers are allowed to accept a receipt for select documents where the employee lost the original document or it was stolen (i.e., U.S. passport, state driver's license, etc.). The Department of Homeland Security (DHS) will allow the employer to accept a receipt for I-9 purposes, but only for up to 90 days. The employer is responsible for calendaring this 90-day period and inspecting the actual replacement document in a timely fashion.

However, not all receipts are acceptable. For example, non-immigrants using a work permit must produce a new work permit. Merely producing a receipt for a renewal application of a work permit will not confer work authorization. On the other hand, select non-immigrants can continue working for up to 240 days with a receipt for extension of their non-immigrant status in the U.S. (including workers in H-1B, L-1, E, and TN status). The rules can be confusing and employers should confer with legal counsel when any doubt arises during the I-9 process for any employee.

Are All Social Security Cards Valid for I-9 Purposes?

No. There has been much confusion in the past about when a Social Security card is valid for I-9 purposes. If a Social Security card has any restrictive language on it, it is not valid for I-9 purposes and cannot be accepted as a "List C" document. For example, non-immigrants (i.e., H-1B's, TN's, etc.) are work authorized and can obtain a Social Security card that says "Valid for Work Only with DHS Authorization." While the employee may select which I-9 documents they tender, such a restricted Social Security card is never valid for I-9 purposes.

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period, and (3) work at a worksite at which 50 or more employees are employed by that employer within 75 miles of that worksite. Further, with the exception of the new military family leaves, an eligible employee must suffer from a serious health condition or have a qualifying family member with a serious health condition.

Changes to FMLA Regulations

Below are some of the changes contained in the new regulations:

Employer Notice Obligations

The new regulations contain specific notices employers must provide to employees who may be eligible for or request FMLA leave. An employee must receive an eligibility notice within five days of beginning the leave, now indicating whether the employee is eligible for FMLA. If the employee is not eligible, the notice must state at least one reason for ineligibility. Each time an employer issues an eligibility notice, it must also provide the employee a notice of rights and responsibilities under FMLA. Finally, an employer must provide an employee with a designation notice to inform the employee that the employer will count the leave against their FMLA entitlement.

Ragsdale Update

The new regulations follow the U.S. Supreme Court's 2002 decision in *Ragsdale v Wolverine World Wide Inc.*, which held that an employer that had failed to follow the FMLA's notice and designation requirements was not required to provide an additional 12 weeks of protected leave to an employee who had already received the statutory amount of leave. This represents a shift from the prior FMLA regulations, which had been interpreted to provide the employee a new 12-week leave if the employer failed to designate the employee's prior leave as FMLA.

Employee Notice Requirements

Employees must now follow their employer's regular and customary call-in procedures, unless unusual circumstances exist. Interpretations of the prior version

of the regulation allowed some employees to notify their employers of the need for FMLA leave up to two full business days *after* an absence, even if earlier notice was possible.

Serious Health Condition

Although the new regulations retain the original "serious health condition" definitions, they provide clarification regarding those definitions on provisions that were open to interpretation. A serious health condition can involve three consecutive days of incapacity if coupled with two or more visits to a healthcare provider. The new regulations clarify that the first healthcare provider visit must be within seven days of the first day of incapacity and the second healthcare provider visit must occur within 30 days of the period of incapacity. For an employee taking FMLA for a chronic serious health condition, the new regulations require that the employee's "periodic visits to a healthcare provider" be at least two visits to a healthcare provider per year.

Medical Certification

The new regulations increase the amount of time for an employer to request a medical certification from two to five days after an employee gives notice of the need for leave.

In addition, the regulations now allow employers to communicate directly with an employee's healthcare provider to authenticate or clarify a medical certification. An employer can only make such contact after the employee is provided with written notice of any deficiencies in the certification and allowed seven days to cure them.

Finally, the regulations prohibit an employee's direct supervisor from making any contact with an employee's healthcare provider.

Light Duty

Responding to court decisions allowing employers to count an employee's light duty assignment as part of the 12-week FMLA leave entitlement, the new regulations specifically state that time spent in "light duty" work does

Lerner Lines

by

Stewart Lerner

Lerner & Associates

The first economic report of the new year once again brought dire news. The nation's unemployment rate rose to 7.2% in December and brought the total jobs lost for the year to the highest number since 1945. Even scarier, although the economy has lost 2.6 million jobs in the last twelve months, 75% of them vanished in the last four months with 524,000 jobs lost in December alone.

Economists say that the crisis that is driving down employment has several parts. First, Americans have cut back sharply on spending as they have watched the value of their homes and investments decline. Meanwhile, businesses sensing lower demand, are trimming hours and payrolls to conserve their resources. Moreover, fear is fueling a vicious cycle as both companies and consumers react in anticipation of further bad news, which in turn helps assure that future news will be bad.

How long will this go on? Economists expect that this recession, which began in December 2007, will continue through much of 2009.

In a situation clearly related to the economy, employers who are forced to layoff employees are now facing significant risks of legal challenges. Labor and employment lawyers warn that a "tidal wave" of wrongful termination suits is expected in the upcoming months as the jobless use their savings, run up debt and find few work prospects.

How best to defend yourself? Experts say it is important to make clear, fair and informed choices about which employees to let go and which to keep. Clearly, you must ensure that there is not a disproportionate dismissal of minorities, women or older workers – even if there was not a deliberate intent to target those workers.

Many companies are seeking counsel from attorneys and specialists on how to reduce staff without inviting litigation. Some law offices say that they have not been this busy since the late 1980s.

Finally, to ensure even greater protection, more and more employers are taking out employment practices liability insurance with as much as a 33% increase in policies reported by some insurance companies.

Apart from the economy, 2009 will, of course, bring a number of additional changes. At the federal level, there will be new FMLA regulations effective on January 16 AND yet another new I-9 form that must be used effective February 2, 2009.

Some of the many changes and expansions to FMLA (as set out in the article on Page 1) include specific notices you must provide to employees, clarification of what is a "serious health condition," increased time to request medical certifications, how "light duty" is treated as part of the FMLA leave entitlement, and incorporation of the Military Family Leaves.

The new I-9 is far less complex, but also contains a number of changes. Primarily, it eliminates previous forms and adds new forms as well as provides clarifications for which documents an employer may accept in verifying an employee's identity and authorization to work. It must be used for new hires and re-verifications occurring on or after February 2, 2009, but does not impact employees who have completed the I-9 form previously.

Here in California, it became illegal to text message while driving. The new law is similar to the cell phone law that went into effect July 1, 2008. To find out what you can and cannot do, check the California Highway Patrol website for details and questions and answers.

Clearly, many of the above changes, as well as many others impacting various areas of federal and state law, are far too complex to discuss in a newsletter. For that reason, I strongly recommend that you attend the upcoming seminar sponsored by local Orange County Employer Advisory Council (OC-EAC) which is discussed at the end of this article (see page 9).

Finally, I want to share the latest on Wal-Mart Stores, Inc. Wal-Mart announced recently that it would pay as much as \$640 million to settle dozens of wage-and-hour class-action lawsuits across the country. The suits accused the company of short changing workers on overtime pay and not allowing them to take lunch breaks.

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EAC-OC's 2009 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 to February 2009. To receive certification you must pre-register and attend four out of the five workshops scheduled.



Certificate Workshops are certified by the Human Resources Certificate Institute and can be used for continuing education credits (2.75 per workshop) towards four professional designations: PHR, SPHR, GPHR and PHR-CA (please refer to their website for credential information – www.hrci.org).

NOTE: Each Certificate Workshop can also be attended as a GENERAL WORKSHOP, with reservations made for each specific Workshop.

COSTS & DISCOUNTS TO ATTEND WORKSHOPS

Please note that the Company is the Member of EAC and therefore, anyone in the Company can attend any workshop at the member price. **___ Check here and return to sign up for membership at \$95.00 per year. An application will be sent to you to fill out in order to get the Member rate for workshops.**

General Workshops	\$65 per member, \$85 per non member or guest
Certificate Workshops	\$275 per member, \$375.00 per non member or guest

General & Certificate Workshop Reservations

You may save money by signing up for any five or more workshops, both certificate and/or general for 2009.

\$55 per workshop, per member
\$75 per workshop, per member

FREE NOVEMBER 2009 MEETING

If you have perfect attendance in 2009 for nine scheduled workshops, you will be invited to be our guest at the 10th workshop in November 2009. **TEN FOR NINE IN 2009!!**

REGISTRATION FORM – 2009 EAC-OC WORKSHOPS

Company Name _____

Person Attending _____

Title _____ Email _____

Date	Topic	RSVP mark X		Date	Topic	RSVP mark X
22-Jan	New Laws			18-Jun	New Generation of ADA	
General Workshop Garden Grove				Certificate Workshop Garden Grove		
19-Feb	Managing Leaves of Absence			23-Jun	New Generation of ADA	
Certificate Workshop Garden Grove				Certificate Workshop Laguna Hills		
24-Feb	Managing Leaves of Absence			20-Aug	Internal Investigations	
Certificate Program Laguna Hills				Certificate Workshop Garden Grove		
19-Mar	Benefits of an HR Dept			25-Aug	Internal Investigations	
General Workshop Garden Grove				Certificate Workshop Laguna Hills		
16-Apr	Immigration			17-Sep	Employee Issues A - Z	
Certificate Workshop Garden Grove				General Workshop Garden Grove		
21-Apr	Immigration			15-Oct	Effective Interview Techniques	
Certificate Workshop Laguna Hills				Certificate Workshop Garden Grove		
21-May	Workers Comp & OSHA			20-Oct	Effective Interview Techniques	
General Workshop Garden Grove				Certificate Workshop Laguna Hills		
				Nov	Ask the Experts	
				General Workshop Garden Grove		

To attend the Certificate Workshops at the Hyatt in Garden Grove, put an X in the box next to the date & location. To attend the Certificate Workshops at the Holiday Inn, put an X in the box next to the date & location. You must sign up for five Certificate Workshops to qualify for HRCI certification. You can change locations, if needed, by calling the office prior to any class. You may also sign up on this form for additional general workshops at the discounted \$55.00 per workshop, prepaid.

To attend General Workshops or Certificate Workshops as a General Workshop, put an X by any workshop you plan to attend. **DISCOUNTS APPLY TO FIVE OR MORE WORKSHOPS PREPAID.**

PAYMENT FORM FOR 2009 EAC-OC WORKSHOPS

COSTS – 5 or more workshops will save \$10 per person, per workshop

Member Company – if your company is a member, you will be invoiced for your dues one month prior to your renewal date.

Certificate Workshops \$55.00 per workshop per person
X # _____ of Workshops Equals \$ _____
General Workshops \$55.00 per workshop per person
X # _____ of Workshops Equals \$ _____

Non-Member Company – if your company joins as a Member for \$95 you save \$100 or more per person. Go to www.eacorangelcounty.com for application or call 714-890-0008

Certificate Workshops \$75.00 per workshop per person
X # _____ of Workshops Equals \$ _____
General Workshops \$75.00 per workshop per person
X # _____ of Workshops Equals \$ _____
Here is our Membership Dues (new members) \$ 95.00

TOTAL PAID

\$ _____

REGISTER & PAY ONLINE www.eacorangelcounty.com

or

PAY BY CHECK

Check payable to EAC OC

Mail with paperwork to EAC OC, 16033 Bolsa Chica Road #104-615, Huntington Beach, CA 92649

or

PAY BY VISA, MASTERCARD, AMERICAN EXPRESS

Return with paperwork and credit card information below to the EAC OC office – via fax at 714-890-5865 or via email to info@eacorangelcounty.com.

Company _____

Registrant _____ Email _____

CREDIT CARD INFORMATION

Name on Card _____

Authorized Signature _____

Credit Card # _____

Expiration Date ____/____ Security Code _____ Billing Zip Code _____

Confirmation email – for persons requiring a receipt _____@_____

QUESTIONS???? Please call the EAC OC office at 714-890-0008

New FLMA Regulations . . . from Page 4

not count against an employee's FMLA leave entitlement, and that the employee's right to job restoration is held in abeyance during the light duty period.

Perfect Attendance Awards

Under the new regulations, an employer who provides incentives or awards for perfect attendance may deny an employee who has used FMLA leave these incentives or awards as long as the employer treats employees taking non-FMLA leave the same way.

**Military Family Leaves Provided by FMLA
Injured Service Member Care Leave**

The first of the new FMLA leaves is provided to family members caring for a covered service member with a serious injury or illness incurred in the line of duty while on active duty. These family members may take up to 26 weeks of job-protected leave in a 12-month period (including the standard 12-week FMLA period). This leave applies to employees who are the spouse, parent, child, or next of kin (defined as the "nearest blood relative" or person "specially designated") of a service member who incurred a serious injury or illness on active duty in the Armed Forces.

Qualifying Exigency Leave

The other new FMLA leave allows qualifying family members of National Guardsmen or Reservists to take up to 12 weeks of job-protected leave to manage their affairs when the Guardsman or Reservist is on active duty or called to federal active duty status. This leave is only for "qualifying exigencies." The new regulations define "qualifying exigencies" as: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities where the employer and employee agree to the leave.

Employers FMLA notice obligations apply to the new leaves. Further, employers can require employees to submit certifications to allow the employer to determine if the employee qualifies for the leave. To assist with the

notification and certification requirements, the DOL published a poster explaining an employee's rights to the new military family leaves and certification forms specific to these two new types of leave. The use of these forms is optional.

What Do the New Regulations Mean for California Employers?

Employers must be aware of their expanded notice and leave obligations under FMLA and take appropriate action. This includes revising leave policies, forms, and procedures to cover required notices and include the new military family leaves as provided in the new FMLA regulations. However, employers must remember that these changes to the FMLA do not alter California employers' existing obligations under the California Family Rights Act ("CFRA"). Further, employers should note that, until it is clear whether California will adopt the new FMLA regulations, a California employer's duties under FMLA and CFRA respectively, may differ.



Lerner Lines . . . from Page 5

Wal-Mart's executive vice-president responded in a statement that "Many of these lawsuits were filed years ago, and the allegations are not representative of the company we are today." The 63 cases being settled involve thousands of current and former Wal-mart employees.

Let's now discuss the New Law Update seminar that I mentioned earlier. It will be held at the Hyatt in Garden Grove on Thursday, January 22. The speakers at this morning program will be attorneys R.Craig Scott and Anita York. Craig always provides a great handout and this one will provide not only important information, but new forms that you will need during the upcoming year. For information on the Orange County program, please contact Barbara Bivens at 714-890-0008.

Have a great month!

Factual Background

The plaintiffs, three nonresidents of California, brought a wage and hour class action against Oracle, a Delaware corporation with its headquarters in California. The three plaintiffs worked as “Instructors” who trained customers to use Oracle software. As part of their jobs, they traveled to California from Colorado and Arizona for periods of time ranging from several weeks to several months.

The case followed a decision by Oracle to reclassify the Instructors from exempt to nonexempt without retroactively providing overtime payments for the work performed prior to the reclassification. The plaintiffs brought a proposed class action seeking unpaid overtime for out-of-state Instructors who worked complete days in California. The plaintiffs also brought a claim under California’s Unfair Competition Law (commonly referred to as Business and Profession Code § 17200), both for violations that occurred in California and throughout the United States.

The district court granted summary judgment in favor of Oracle, finding that California’s labor laws do not apply to Arizona and Colorado employees temporarily working in California. The plaintiffs appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit’s Analysis

Arizona and Colorado Employees Should Be Compensated Under California Law for Any Complete Day’s or Week’s Work Performed in the State

The Ninth Circuit Court of Appeal first considered whether the overtime provisions of California’s Labor Code should apply to work performed in California by residents of Colorado and Arizona. The court applied the following three-part “choice of laws” test to come to its conclusion that California law should be applied:

- **Are there material difference in the laws?** If one state has overtime provisions that would apply to the pertinent situation and another state does not, then the applicable law in each state is materially different. The court found California’s labor laws were materially different than Arizona’s and Colorado’s because Arizona had no state labor laws and Colorado’s laws were less stringent.

- **What are the states’ interests?** If the states’ laws are materially different, then, according to the Ninth Circuit, the court must determine “what interest, if any, each state has in having its own law applied to the case.” The court in Oracle found that while Colorado has expressed the same interests as California in the welfare of its workers, the state had provided no protection whatsoever to workers performing work outside Colorado. Arizona, by contrast, had expressed no interest as it had no state overtime law. By contrast, California clearly intended its labor laws to apply to work done in California by nonresidents. The court noted that California’s interest includes preventing employers from hiring cheaper nonresidents, which would substantially disadvantage California residents.
- **Which interest controls?** The final part of the test requires the court to select the law of the state whose interests would be more impaired if its law were not applied. The Ninth Circuit declined to apply this element as it found Colorado and Arizona have no expressed interest in applying their minimum wage laws (or lack thereof) to the plaintiffs’ work in California, whereas California did have a strong interest.

The court concluded based on this test that there was no reason to believe that Colorado or Arizona had any interest in ensuring that their residents are paid less when working in California than California residents who perform the same work.

Oracle Maintained a Sufficient California Presence to Require Adherence to California law Without Violating Due Process

The court also considered whether California’s Labor Code could be applied to Oracle in this case without violating the Due Process Clause of the United States Constitution. The Due Process Clause generally permits a state to apply its laws to a case so long as there exists “significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” The court found that

Employer Advisory Council Contributes to Career 2008 Job Fair

By Cindy Roy, Santa Ana Cluster Manager

On October 16, 2008, the Careers 2008 Job Fair was held at the Coastline Community College in Garden Grove. The job fair was hosted by Coastline Community College and the Orange County One Stop Center in partnership with the Employment Development Department Santa Ana Cluster and Anaheim Workforce Services offices, the Santa Ana Work Center, Property, Inc., Anaheim Workforce Center, Anaheim Community Services, ROP North Orange County, Santa Ana College, and the generous contribution and support of the Employer Advisory Council (EAC) of Orange County.

The job fair was attended by 55 employers, various resource providers, and over 850 job seekers. The employers included Macy's, Hyatt, City of Huntington Beach, Washington Mutual, Orange Police Department, Long Beach Police Department, Toys R US, Rainmaker Staffing, AFLAC, and Goodwill.

During the job fair, there were motivational workshops given such as *Putting the Human back into Human Resources* presented by Esau Ramirez of Dynamic Cooking Systems, and *It's All About the Attitude*, by Diana McCord of Orange County One Stop Center, Brian Freeborn, and Aliah Silva of Santa Ana College. Staff also assisted with job seekers with resume critiquing.

The Job Fair was a success with the support and contributions of OC EAC, partners and staff as stated in the evaluations completed by both employers and job seekers. The Employer Advisory Council's generous contribution helped provide water and food for the employers that worked continuously from 6 a.m. to 2 p.m. to make the Career 2008 Job Fair another successful event.



California and Arizona Employees . . . from Page 10

Oracle had sufficient contacts with California to require it to comply with the state's labor laws. The employer, Oracle, has its headquarters and principal place of business in California. In addition, the court noted that Oracle made the decision in California to classify the plaintiffs as teachers and to deny them overtime pay, and the work in question was performed in California.

California's Unfair Competition Law Does Not Apply to Acts that Occur Outside of the State

Finally, the court considered the reach of California's unfair competition law, Business and Professions Code section 17200. Specifically, the court considered whether the plaintiffs could assert a section 17200 for alleged violations of the federal Fair Labor Standards Act (FLSA) that occurred outside of California. The court of appeals found that section 17200 does not apply to such violations occurring outside of California.

Implications

Multi-state employers who conduct business in California should take several steps following the Oracle decision to determine whether they are at risk of having to comply

with California wage laws every time they send a worker to spend a day or more in California:

- **Determine employer contacts with California.** Employers should consider whether they have sufficient continuing contacts with California to require them to comply with the holding in *Oracle*. The assistance of experienced legal counsel may be needed in making this determination. However, it is unlikely that the company would be required to be headquartered in California or that a decision about an employee's status be made there. Empowered by this decision, California (and the plaintiffs' lawyers who practice there) are likely to seek enforcement of California law in circumstances where an employer has far fewer connections with the state than Oracle had.
- **Consider the different state laws.** The holding in this case specifically concerns Colorado and Arizona employees temporarily working in California. Because this decision required a consideration and comparison of individual state laws, it is *possible* that a court may come to a different decision depending on the out-of-state law in question, particularly where a state has expressed a specific interest in the extraterritorial

Limitations of the New I-9 Form

The new I-9 form will not solve all work authorization issues. For example, new hires using false documents or a stolen identity are not easily detected. However, the new form is the latest in the government's continuing effort to minimize the employment of unauthorized individuals.

Can I or Should I Audit the Whole Company?

An employer may audit the I-9's of their entire workforce to ensure that they are in compliance. If an employer discovers any deficiencies, it may take corrective action. However, an employer may not single out only certain individuals for audit. Such arbitrary conduct could give rise to discrimination claims. If an employer has any doubt about whether its I-9 process could withstand an audit by Immigration & Customs Enforcement (ICE), an internal self-audit is one of the best ways to identify potential problems.

How Do You Know if the Documents Are Valid?

An employer must examine the documents tendered by the new hire to determine if (a) they reasonably appear to be genuine on their face and (b) they relate to the person presenting them. If the documents fail either of these two elements, an employer must not accept the documents.

Are You I-9 Compliant?

Most employers know that DHS regulations require that they complete an I-9 no later than the third day of employing an individual. This includes both sections one and two of the form. Both the employee and employer must sign the form. These records should be kept separate from the personnel files. Further, an employer must retain I-9 forms for three (3) years after the date of hire or one (1) year after the date of termination, whichever is later.

Too often, employers rush through the process or fail to maintain a comprehensive I-9 system. Given ICE's renewed focus on I-9's, compliance is very important in order to avoid civil and criminal penalties for both individuals and the company.

What Are An Employer's Rights if ICE Visits the Company?

ICE is required to provide employers with three (3) days notice prior to conducting an I-9 audit. However, if ICE obtains a criminal or civil subpoena from a federal administrative law judge, then ICE may enter the premises without a three-

day notice and take documents, computers, etc. that are listed on the subpoena. ICE usually does not seek a subpoena unless gross violations are alleged.

Should I Use E-Verify to Assist with Employment Eligibility Verification?

E-Verify is the DHS on-line verification system of I-9 data which assists an employer in determining if a new hire is work authorized in the U.S. Management and the employee must still fill out a Form I-9, but the E-Verify system queries various government databases and to help reduce (but not eliminate) the hiring of individuals lacking work authorization.



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application of its wage laws. That said, most (if not all) states have less detailed wage and hour laws than California (or no such laws), meaning that a comparative reading of any state's law versus California's law will likely not be helpful to employers.

- **Analyze employee exemption status under California Law.** An employer should also determine whether an employee assigned periodically to work in California, who is exempt under his or her home-state law, would still be considered exempt under California law. While it was not a specific issue considered in this case, the opinion raises the possibility that an employee who is exempt under the law of his or her state may nevertheless be considered nonexempt while working in California.
- **Evaluate payroll practices.** Employers should also review payroll practices and capabilities to ensure that a procedure is in place to communicate to payroll departments the occurrence of out-of-home-state travel to California so that appropriate wage payments can be calculated under California law. This requirement is particularly crucial if an employer sends nonexempt workers on temporary work assignments in California, where such workers could arguably be entitled to overtime after eight hours in a day and perhaps even statutory meal and period rights.

There are Increasing Threats to a Business in Today's Economic Situation

By Walt Storch
Elkins Jones Insurance Agency, Inc.

Business owners today are faced with a deteriorating business climate brought on by the financial crisis, the Stock Market's precipitous drop and the deepening recession. A possible consequence of these events includes employee claims against the employer. This article briefly explains the three areas of employer liability and insurance products developed to address those areas of liability.

Three areas of employee lawsuits are: Employment Practices Liability; Fiduciary Liability; and Directors and Officers Liability – Private Companies.

Examples of frequently alleged wrongful acts:

The following is a list of Employment Practices Liability, which can include claims for

- Discrimination
- Retaliation
- Sexual Harassment
- Workplace Harassment
- Breach of Employment Agreement
- Violation of Family Medical Leave Act
- Employment Related Misrepresentation
- Defamation, including libel or slander, or invasion of privacy
- Wrongful discipline
- Denial of training
- Deprivation of career opportunity
- Denial or deprivation of seniority or evaluation
- Negligent hiring
- Failure to hire, and
- Failure to create or enforce adequate workplace or employment policies and procedures, employ or promote, or grant tenure

Fiduciary Liability can include claims of

- Administrative error
- Denial or change of benefits
- Inappropriate selection of advisors, insurance companies, mutual fund or third party service providers
- Incorrect benefit calculation
- Improper advice or counsel
- Misleading representation
- Wrongful termination of plan
- Civil rights denial or discrimination
- Failure to adequately fund a benefit program
- Conflict of interest
- Imprudent Investment
- Cash Balance Plan Conversions, and
- Lack of Investment Diversity

Directors and Officers Liability can include claims of

- Violation of state and federal laws
- Consumer protection violation

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- Breach of fiduciary duty/mismanagement of the business and operations
- Wrongful interference with a contract
- Failure to deliver services
- Disclosure of materially false or misleading information
- Unfair trade practices
- Self-dealing and conflicts of interest, and
- Theft of trade secrets

There are three basic methods of handling risk:

- Risk Avoidance – Do not undertake the activity (if you have started a business and have employees and implemented Employee Benefit Plans you have assumed the risk).
- Risk Mitigation:
 - Employment Practices Liability
 - Employee Manual – updated frequently and implemented effectively and uniformly
 - Conduct training for supervisors and employees
 - Develop hiring practices that adhere to law and sound Human Resource principles
 - Employee evaluations – conduct regular written, uniform, systematic and objective evaluations for employees annually
 - Conduct exit interviews
 - Implement fair disciplinary action and termination procedures
 - Use legal counsel
 - Fiduciary Liability
 - Review Employee Benefit Plans annually
 - Appoint independent fiduciaries
 - Communicate frequently and accurately to participants
 - Encourage diversification of investments
 - Limit or eliminate company stock in the plan
 - Directors and Officers Liability
 - Effective implementation of Human Resource activities
 - Effective communication to employees as respects Employee Benefit plans
 - Effective and open management of Employee Benefit Plans
 - Use legal counsel frequently
 - Straight forward communications with investors

Risk Transfer – Many employers believe that General Liability Insurance and Umbrella Insurance will respond to all lawsuits received by a company. This is no longer the case. As the business world became more complex the claim examples listed above were excluded from General Liability policies and new policies to provide protection were developed.

These policies are:

- Employment Practices Liability Insurance
- Fiduciary Liability Insurance
- Directors and Officers Liability Insurance

The policies are unique to each area of liability and are developed by the individual insurance company offering the coverage. The policies have not been standardized. The policies are similar in coverage but many companies have enhanced the coverage and services offered as competition for your business has increased.

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

OFFICE	ADDRESS	PHONE
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 Santa Ana, CA 92701	800-480-3287
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."