

## **An Employer's To-Do List**

A guide to keeping up with California's workplace laws

By Kelly L. Hensley

**C**alifornia has some of the strictest employment laws in the nation. New legislation and case law developments underscore the need for all employers to be proactive and diligent in assessing compliance issues. This need is magnified by the increasing number of class actions filed against employers every day. Now more than ever, California employers should address compliance issues. At a minimum, the following checklist will help employers as they navigate the current legal landscape:

### **1. Update employee handbooks and employment-related forms.**

All employers should have a well-drafted handbook that complies with California and federal laws. Among other things, the handbook should contain certain key policies such as: a right-to-revise policy; a sexual harassment policy; an equal opportunity statement; an acknowledgment form; employment at-will statements; disciplinary policies; medical and family leave policies; workplace security and violence prevention policies; electronic communications policies; and benefit description disclaimers.

In addition, in light of recent legislation employers should confer with their labor counsel and include policies addressing Family Temporary Disability Insurance (FTDI), which becomes available to employees on July 1, crime-victim leave policies and policies addressing the interrelationship of protected leave of absence rights.

### **2. Take a firm stance against sexual and other forms of harassment.**

Sexual harassment claims are the most

prevalent type of discrimination claims filed in California. The California Supreme Court in November issued its most recent pronouncement on sexual harassment in California. In *State Department of Health Services v. Superior Court (McGinnis)*, the Supreme Court ruled that an employer will be strictly liable for hostile environment harassment when the harassment is committed by a supervisor. However, the court also announced for the first time a defense based on the doctrine of avoidable consequences that can be used to limit a plaintiff's recoverable damages.

In light of *McGinnis*, employers should consider a number of proactive measures. At a minimum, all employers should ensure that they have a strong written policy against all forms of harassment. This policy should include a detailed complaint mechanism, ensure that complaining employees are subject to no reprisal or retaliation and provide examples of conduct that may constitute sexual harassment. In addition, all employers are legally required to disseminate a sexual harassment information fact sheet to all new hires and existing employees and should ensure that all employees regularly receive training on sexual harassment issues.

### **3. Legally review your company's pay practices.**

Wage-and-hour class actions are filed every day against employers in California. These class actions have resulted in huge settlements and rulings and have typically involved claims for unpaid overtime and employee misclassification issues. Increasingly, these class actions include allegations that employers have failed to comply with the meal and rest period rules set forth in the California Wage Orders.

California law provides that non-exempt employees in most cases may not work more than five hours without at least an uninterrupted meal period of 30 minutes. Employers who fail to provide meal and rest periods or fail to provide them in a timely manner are responsible for paying a penalty of up to two hours per day per employee. Moreover, employers should be mindful of SB 796 (commonly referred to as the "bounty hunter" law), which went into effect on Jan. 1. This controversial legislation constructs a system of rules that will stimulate more litigation over Labor Code issues and reward employees and their attorneys with bounties for challenging employer payroll practices. It will also result in additional class actions. As a result, there is no time like the present for employers to conduct internal audits of their payroll practices with competent labor counsel.

### **4. Update your company's employment application form.**

Most employers ask prospective employees to complete a written job application. California and federal laws limit the inquiries that can legally be included in such applications. Last year, a class action was filed against more than 100 employers who included a criminal background inquiry in their application forms, allegedly in violation of California Labor Code §432.7. This statutory section prohibits employers from inquiring about arrests that did not result in convictions. Labor Code §432.8 also prohibits employers from asking about certain types of convictions. In light of this lawsuit, all employers should have their application forms reviewed by counsel.

### **5. Review profit-based bonus and compensation plans.**

It is widely recognized that profit-based

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compensation systems provide benefits to employers and employees. In fact, numerous employers provide profit-sharing programs, bonuses and commissions based on net profit to their eligible employees. Although these profit-based systems are quite popular, a recent development in California law raises serious issues regarding the permissibility of such compensation systems.

In *Ralph's Grocery Co. v. Superior Court*, 112 Cal.App.4th 1090 (2003), the Second District Court of Appeal in October found that a profit-based bonus plan violated California law in instances where workers' compensation costs and other specified costs were used to lower the profit upon which the bonus was based. In light of this case, it is imperative that employers review all profit-based bonus and compensation plans, assess their potential liability and take proactive steps to avoid or reduce any liability in the future.

#### **6. Review your company's pay stubs.**

Many of the current class actions against employers include allegations of violations of Labor Code §226. This statutory section requires employers, among other things, to include the following information on their employees' pay stubs: gross wages earned; total hours worked (except for employees whose compensation is solely based on a salary and who are exempt from overtime pay); the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item; net wages earned; inclusive dates of the period for which the employee is paid; name of the employee and his or her Social Security number; name and address of the employer's legal entity; and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Section 226 requires that every employer furnish each employee with this information semi-monthly or at the time of each payment of wages.

Employers who fail to comply with this section are subject to steep penalties.

#### **7. Evaluate relationships with independent contractors.**

Companies that misclassify workers as independent contractors expose themselves to significant liability. The courts and agencies that assess independent contractor issues typically apply a "right to control" test and an "economics realities" test. The agencies will evaluate whether the hiring entity reserves the right to control the manner and means in which the worker performs his or her work. The agencies will also look at the amount of income that the worker derives from the hiring entity. As a rule, the more income paid to the worker, the more difficult it will be to successfully argue independent contractor status.

In addition, a pool of factors is typically evaluated to determine whether a worker is properly classified as an independent contractor. For example, the Internal Revenue Service considers 20 common law factors when assessing whether a worker is truly an independent contractor. The agencies and courts make it clear that simply having a worker sign an independent contractor agreement will not convert that person into an independent contractor. Companies that misclassify a worker as an independent contractor may be exposed to overtime liability, state and federal tax liability (including penalties), and back benefit assessments.

#### **8. Conduct internal training programs.**

In today's employment climate, employers should regularly conduct internal training for their supervisors as well as for rank and file employees. As mentioned above, the *McGinnis* case emphasizes how important it is for employers to be proactive in the sexual harassment area. Employers should train all of their employees regarding their strict stance against discrimination and harassment, internal complaint processes, theories of harassment and employers' expectations regarding conduct in the work place. Additionally, employers should consider general supervisor training since it is the supervisors who are asked to interact daily with their subor-

dinates and handle employment issues.

#### **9. Update company employment postings.**

Employers are required to obtain and post certain notices prepared by various civil rights and other enforcement agencies. The notices generally must be posted and displayed prominently in conspicuous places in the work place. In addition to the previously required postings, SB 777 (effective Jan. 1) adds Labor Code §1102.8, which requires employers to prominently display a list of employees' rights and responsibilities under new whistle-blower laws. SB 777 also prohibits retaliation against employees for refusing to participate in any illegal activity or any activity that may result in violations of state or federal law. It further prohibits retaliation against employees for having exercised their whistle-blower rights in any previous job.

#### **10. Prepare for FTDI**

In September 2002, then-Gov. Gray Davis signed legislation to authorize paid family leaves for California workers. The legislation, SB 1661, is the first of its kind in the nation. It allows eligible employees to receive "family temporary disability insurance" (FTDI) benefits beginning July 1. The benefits will be paid to eligible employees who take time off from work either to care for a seriously ill spouse, child, parent or domestic partner or to bond with a new child. The benefits are financed by increased employee payroll taxes that employers must already withhold.

Employers are likely to experience problems with staffing, productivity and economic costs as the result of the legislation. All employers should understand the FTDI program and should update their policies and practices to implement measures designed to minimize problems that may arise due to the new law. Employers also must assess their notification obligations and should assess personnel policies that may be affected by the new law, including policies requiring advance notification where absences are foreseeable and policies involving vacation and paid time off benefits, leaves of absence and absenteeism. ❁