



ROBINSON & COLE LLP

# Labor, Employment & Benefits



## Special Year-End Summary of New and Proposed Legislation for 2004

This last issue of e-News for 2003 summarizes new legislation or pending legislation for 2004 that may be of interest to employers.

### Federal Legislation

#### FAIR LABOR STANDARDS ACT: STATUS OF PROPOSED REGULATIONS ON EXEMPTIONS

On March 31, 2003, the U.S. Department of Labor published [new regulations](#) to overhaul the “white collar” exemptions (executive, administrative, professional, outside sales, and computer employees) under the Fair Labor Standards Act. The DOL regulations, initially established in 1938, were last modified in 1949 with respect to job duties and in 1975 with respect to salary levels. Under the proposed changes, the minimum weekly salary threshold to qualify as an exempt employee would increase from \$155 to \$425. Any employee earning less than the threshold salary would be non-exempt and entitled to overtime pay. The DOL also proposed streamlining the duties tests, by focusing on the primary duties, to determine the exempt categories. In addition, under the proposed regulations, employers would be able to deduct compensation from the salaries of exempt employees for full-day absences for disciplinary reasons (such as suspensions for sexual harassment), without risk of losing the exemption. The proposed regulations also contain a “safe harbor” provision. The regulations were described in our 4/7/03 issue.

Although the proposed changes generated much controversy and some opposition (see our 9/22/03 issue), it is anticipated that they will be enacted as early as the first quarter of 2004. For a summary of the proposed regulations, visit the [DOL Website](#).

#### WORKPLACE INVESTIGATIONS: CONSENT AND DISCLOSURE REQUIREMENTS

The [Fair and Accurate Credit Transactions Act \(FACT Act\)](#), signed into law by President Bush on December 4, 2003, amends the consent and disclosure requirements of the Fair Credit Reporting Act when conducting investigations of employee misconduct. The Federal Trade Commission, the agency in charge of enforcing the FCRA, had interpreted the FCRA to require employers to obtain consent from any employees who were the subjects of an investigation before a third party (such as a law firm or human resources consultant) initiated the investigation. According to the Federal Trade Commission’s interpretation, if the investigation conducted by a third party resulted in adverse action against the employee, the employer was required to give the offending employee a copy of the report before the adverse action was taken. Those steps are no longer required under the FACT Act.

The FACT Act excludes from the definition of consumer report or investigative consumer report any communications “made to an employer in connection with an investigation of suspected misconduct relating to employment or compliance with Federal, State or local laws and regulations ... or [with] any pre-existing written policies of the employer.” To be protected, the FACT Act requires the communication to be made “to an employer,” precluding disclosure to either the subject of the investigation or to the complaining party (as is common in sexual harassment investigations). If adverse action is taken, the employer is required to provide a *summary* of the report, which need not identify sources of information, including any individuals interviewed. The FACT Act also contains a separate provision concerning employer requests for medical information. The request for medical information must be job-related, employers are required to obtain specific written consent of the employee, and employers must disclose in “clear and conspicuous language” the intended use of the medical information. In accordance with the [notice of rulemaking](#) issued by the Federal Trade Commission and the Federal Reserve System, the effective date for these changes is anticipated to be March 31, 2004.

#### CONTINUATION OF HEALTH BENEFITS: PROPOSED REGULATIONS ON COBRA NOTICES

In May of 2003, the Employee Benefits Security Administration of the U.S. Department of Labor issued [proposed regulations](#) concerning the health-continuation COBRA notices to be issued by plan administrators, employees, and family members. The proposed regulations set guidelines concerning timing, method and content of notices, and provide sample forms. The regulations were initially intended to go into effect on January 1, 2004. However, in mid-October the DOL announced it would allow employers at least six months from the date of issuance of the final regulations to implement any administrative changes required by the new rules. The DOL expects the final regulations to be issued in early 2004.

#### IMMIGRATION: EXTENSION OF EMPLOYMENT VERIFICATION PROGRAM

Through passage of the [Basic Pilot Program Extension and Expansion Act of 2003](#), Congress extended through 2008 the employment eligibility verification program. Initially enacted in 1996 and limited to only five states (Florida, California, New York, Illinois, and Texas) the program allows employers to verify Social Security numbers and alien identification numbers with the Social Security Administration and the U.S. Citizenship and Information Services. The new legislation would extend the program to all 50 states by December 2004. Understanding that employers are reluctant to question the authenticity of documents presented to demonstrate employment eligibility, the new legislation would shield from liability an employer for actions taken in reliance on information provided by the verification service.

### Selected State Legislation

#### MINIMUM WAGE INCREASES

A number of states enacted legislation to increase the minimum wage in 2004, including:

Connecticut: \$ 7.10 as of January 1, 2004

Illinois: \$ 5.50 as of January 1, 2004 and \$ 6.50 as of January 1, 2005

Maine: \$ 7.00 as of October 1, 2004

Oregon: \$ 7.05 as of January 1, 2004

Rhode Island: \$ 6.75 as of January 1, 2004

Vermont: \$ 6.75 as of January 1, 2004 and \$ 7.00 as of January 1, 2005

Washington: \$ 7.16 as of January 1, 2004

Visit the U.S. Department of Labor website for a [chart of national minimum wage rates](#) in effect as of January 1, 2004.

#### **CALIFORNIA**

##### Employment Discrimination: Employer Liability for Third Party Harassment

[Assembly Bill 76](#) amends the California Government Code by imposing liability on an employer under the Fair Employment and Housing Act for sexual harassment of employees by customers, clients, or other third parties if the employer knew or should have known of the harassment and did not take appropriate corrective action.

##### Employment Discrimination: "Sex" Expanded to Include Transgender

[New legislation](#) amends the definition of "sex" in the Fair Employment and Housing Act to include an applicant's or employee's "gender," which is defined as the person's "sex, the employer's perception of the person's sex, the employer's perception of the person's identity, appearance or behavior whether ... identity, appearance or behavior is different from that traditionally associated with the applicant's or employee's sex at birth."

##### Labor Code: Private Attorneys General Act

Effective January 1, 2004, this [bill](#) allows an employee to bring an action "on behalf of himself and other current or former employees" to recover civil penalties for an employer's violation of the Labor Code. The employee may retain up to 25% of the fines imposed on the employer, with the remainder going to the state. The bill provides for award of attorney's fees and costs, as well as for increased penalties.

##### Labor Code: Attorney's Fees for Any Successful Wage Claim

Under this [law](#) an employee may recover attorney's fees and costs if, on appeal from a Labor Commissioner's decision, a reviewing court finds for the employee, regardless of whether the appellate decision was more favorable than that issued by the Commissioner.

##### Labor Code: Increased Penalties

Fines for wage violations are increased to \$100 for a first violation and to \$200 for any subsequent violations. Employers who pay less than the minimum wage are subject to a \$100 fine per underpaid employee per pay period.

##### Labor Code: Whistleblower Provisions

Under the Labor Code, employers are prohibited from preventing an employee from disclosing a violation of a state or federal law or regulation. Under the [newly enacted amendment](#), an employee is no longer required to disclose any alleged violation to an outside agency in order to present a retaliation claim. Reporting to the employer is sufficient to trigger the protection. Employers also are required to post a notice of rights and responsibilities under the whistleblower laws, which poster must include a toll-free whistleblower hotline.

##### Leave: Family Temporary Disability Insurance

This new [law](#), effective July 1, 2004, allows employees up to six weeks of partial wage replacement when absent from work for an injury or illness of a spouse, parent, domestic partner, or child or for the purpose of bonding following a birth, adoption, or placement of a foster child. The leave is funded by employee contributions, which they make begin making in January 2004.

##### Leave: Victims of Crime

This new [law](#) establishes a right to workplace leave to attend judicial proceedings for employees who are victims of a violent felony, a serious felony, or a felony involving theft or embezzlement. The leave also applies to employees who are immediate family members, registered domestic partners, or children of a registered domestic partner of a victim. Employers are prohibited from retaliating or otherwise discriminating against employees for exercising their leave rights.

##### Domestic Partner Rights and Responsibilities Act

This new [law](#), effective January 1, 2005, requires employers to provide the same rights and benefits provided to employees with spouses to those with domestic partners, such as leave under the California Family Rights Act.

##### Mandated Health Care Coverage

In 2003, California enacted [mandated health insurance coverage](#). Beginning on January 1, 2006, employers of 200 employees or more will be required to provide health insurance benefits to employees or to pay into a state insurance fund. On January 1, 2007, the insurance coverage requirement extends to employers with 20-199 employees. Exempt from the obligations are employers with less than 20 employees.

#### **CONNECTICUT**

##### Change in Overtime Rate Calculation

Variable rate overtime is now prohibited for delivery drivers or sales merchandisers who are paid a base salary and commission. The employee's regular rate will now be calculated to one-fortieth of the employee's weekly compensation. Effective October 1, 2003.

##### Smoking in the Workplace

Employers with five or more employees must prohibit smoking in any business facility under the employer's control, except in specially designated smoking rooms (which employers may, but are not required to, provide). This act took effect October 1, 2003.

##### Corporate Fraud Accountability and Volunteer Fire Fighters

This act prohibits publicly-traded employers from retaliating against employees engaged in financial whistleblowing activity. In addition to the whistleblower protection, an attachment to this act includes protection for volunteer firefighters and volunteer personnel of ambulance companies. Employers are prohibited from discharging or discriminating against an employee who is an active member of a volunteer firefighting organization or a member of a volunteer ambulance company because the employee is late arriving to work or is absent from work as a result of responding to a fire or ambulance call prior to or during the employee's regular hours of employment. This law became effective October 1, 2003.

##### Access to Electronically Recorded Personnel Files

Personnel files are now defined to include electronic mail and facsimiles. Employers are now required to keep in an employee's personnel file those communications conducted via electronic mail and/or facsimile if they were part of any company decisions made about the employee. It is important to note that this change in the law does not include communications conducted using instant messaging or voicemail. Effective October 1, 2003.

#### Confidentiality of EAP Client Communications

This law amended Connecticut's Personnel Files Act to protect against the disclosure of information or release of records concerning an employee's voluntary participation in an employer-sponsored employee assistance program without the employee's consent, unless the disclosure is necessary to prevent harm to the employee or others.

#### Family and Medical Leave Act

This law provides that an employer that has a bona fide sick leave policy must allow its employees to use up to two weeks of accumulated paid sick leave to attend to a serious health condition of a child, spouse, or parent, or for the birth or adoption of a child of the employee. Although the act does not expand the total amount of time allowed to employees under the Connecticut FMLA, it forbids employers from denying or discouraging their employees the opportunity to use accumulated paid sick leave for at least two weeks of the leave. Employers affected by Connecticut's FMLA law are those with 75 or more employees and those employers who have a bona fide written sick leave policy. Effective October 1, 2003.

#### Expenditures in Revenue for period ending June 30, 2005

Included in the budget passed this year is a provision requiring employers to turn over unclaimed wages to the State Treasurer. Employers are required to mail paychecks to an employee's last known address. If the paycheck is returned to the employer, the employer is now required to turn the uncashed or uncollected paycheck to the State Treasurer within three years. If the employee comes to the employer seeking to claim the uncollected wages, the employer can direct the employee to file a claim directly with the State Treasurer's office.

### **ILLINOIS**

#### Equal Pay Act

In addition to prohibiting gender-based wage discrimination, the Illinois [Equal Pay Act](#), which becomes effective January 1, 2004, prohibits employers from discharging or discriminating against an employee for asking, disclosing, comparing or otherwise discussing the wages of any employee.

#### English-Only Banned

Effective January 1, 2004, an amendment to the [Illinois Human Rights Act](#) prohibits any employer with 15 or more employees from instituting a rule that prevents employees from using a language other than English when communicating about matters unrelated to their duties. The legislation provides for compensatory and punitive damages, attorney's fees and civil penalties of up to \$75,000.

#### Amendments to Strikebreakers and Day and Temporary Labor Services Act

Effective January 1, 2004, Illinois employers may not contract for, nor agencies providing temporary labor services may knowingly send laborers to worksites on strike, lockout or other labor conflicts. A temporary laborer already assigned to the employer may continue working for the employer. Employers are also prohibited from contracting with a day or temporary labor organization that is not registered with the State of Illinois Department of Labor.

#### Whistleblower Act

The [law](#), prohibits employers from enforcing rules preventing employees from disclosing information to state or law enforcement agencies if the employee has a reasonable belief that the information relates to a violation of state or federal law. Employers also prohibited from retaliating against an employee.

### **MASSACHUSETTS**

#### Unemployment Compensation

Massachusetts amended its unemployment compensation benefits statute to deny benefits to employees of temporary employment agencies who do not contact the employment agency for reassignment before filing for benefits.

#### Military Leave for Public Employees

Public employees who have been granted military leave to engage in active service after September 11, 2001 are entitled to receive their regular base salary and to maintain seniority and accrued vacation leave for each period of military leave through September 11, 2005.

### **NEW HAMPSHIRE**

#### Whistleblower Protection

Pending before the New Hampshire General Court with a floor date of January 7, 2004, is [a new law](#), which would protect employees from discharge or discrimination when the employee has spoken about a matter of public importance concerning his or her employment. Exempted from protection are disclosures of trade secrets, patents and other confidential information.

### **NEW YORK**

#### Anti-Smoking Law

Effective July 24, 2003, New York implemented strong-anti-smoking legislation. The [law](#) prohibits smoking in all indoor workplaces.

#### Military Status as Protected Category

Effective July 3, 2003, New York amended its antidiscrimination statute to prohibit discrimination on the basis of "a person's participation in the military service of the United States or the military service of the state." The [amendment](#) is also known as the Patriot Plan.

### **VERMONT**

During its 2003 legislative session, Vermont lawmakers presented five different bills to amend the state's unemployment laws. None of them passed.

### **WASHINGTON**

A citizen initiative prompted the repeal of Washington state's Ergonomic regulations. For more information, see the statement issued by the [Department of Labor & Industry](#).

### **Happy Holidays!**

Finally, on behalf of all of us working on e-News, we wish you a safe, healthy, and happy holiday, and offer our best wishes for a productive new year.

This is an archive of past issues. As a result, it may contain information that is not current.