



# Employment Law 2009 Update

## New 2009 Federal and California Laws for Employers and Compliance Tips

### NEW FEDERAL LAWS

#### The Americans with Disabilities Amendments Act (“ADA Amendments Act of 2008”) [50 employees or more]

The ADA Amendments Act of 2008 is extremely significant because it makes important changes to the way that the term “disability” is interpreted (including that the word shall be construed in favor of *broad* coverage), which will have a sweeping impact on employers, as follows:

- Employers must determine whether an employee or job applicant’s impairment “substantially limits” a major life activity (which is key in determining whether the impairment *is* a “disability”) *without considering corrective factors* such as medication, hearing aids or cochlear implants, mobility equipment (a wheel-chair, for example) and prosthetic devices.
- The definition of “major life activity” now specifically includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The operation of major bodily functions are also now considered a “major life activity.”
- An employee or applicant could previously file a claim of discrimination if he/she was “regarded as” disabled by an employer even though the employee or applicant was not in fact disabled. The new amendments ease the legal proof required in order to have a valid claim; the individual need only show that the employer perceived impairment, even if the impairment does not limit or is not perceived to limit a major life activity.

#### New FMLA Regulations & Military Family Medical Leave

On November 17, 2008, the Department of Labor (“DOL”) issued final revised regulations interpreting the Family and Medical Leave Act (“Regulations”), which is applicable to employers of 50 or more. This 762 page rewrite of the regulations goes into effect January 16, 2009. The Regulations clarify and make significant changes to the interpretation of the statute, as well as add new obligations on the part of both employees and employers. In addition, the Regulations provide important guidance on the interpretation of the National Defense Authorization Act (“NDAA”), which was signed by the President in January 2008. The NDAA expanded the coverage of FMLA to create two new

entitlements to FMLA leave: (1) military caregiver leave and (2) qualifying exigency leave. The Regulations interpret and fill in much needed details missing from the NDAA. Employers are advised to carefully review their handbooks and policies and incorporate the changes made by the revision to the Regulations. Some of the key changes are highlighted below.

The FMLA military caregiver leave created by the NDAA provides up to 26 weeks of leave for eligible employees (i.e., spouse, parent, child, or next of kin) to care for a service member with a serious injury or illness. Although the Regulations define “parent” broadly, they exclude “in-laws” from the definition. “Next of kin” is defined by prioritizing categories of blood relatives.

Several provisions relating to FMLA leave for individuals in this category differ from FMLA leave taken in other situations. First, employees may be entitled to up to 26 weeks of leave to care for a covered service member, rather than just 12 weeks, in a “single 12-month period.” Second, the 12-month period in which leave in this category can be taken begins “on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons.” Thus, employers normally using the calendar-year, a fiscal-year, or a rolling year to track FMLA leave will have to use a different method for leave taken under this category. Third, eligible employees may be entitled to take up to 26 weeks of leave to care for one service member and one injury; additional weeks of leave (in a new “single 12 month period”) can only be taken to care for a different illness or injury of the service member or to care for a different service member. Leave may be taken intermittently where medically necessary.

Employers are entitled to specific information from employees to verify the need for FMLA leave under this provision, and the DOL has developed a certification form that employers may use and that complies with the Regulations.

The Regulations provide guidance on the breadth of a “qualifying exigency.” Eligible employees are entitled to up to 12 weeks of leave *because of* “any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. The Regulations clarify that generally this leave applies only to families of National Guard members and Reservists, because Regular Armed Forces do not serve “under a call or order to active duty,” as required by the NDAA. In addition, the call to active duty is limited to a federal call, not a State call to active duty. Furthermore, the Regulations explain that “a contingency operation” refers to military actions, operations, or hostilities against an enemy of the United States or against an opposing military force (e.g., Iraq or Afghanistan). In other words, a qualifying exigency leave is not available for every Reserve call-up to active military duty.

What constitutes a “qualifying exigency” has also been delineated by the Regulations. A qualifying exigency may include any of the following: (1) a “short-notice” deployment calling a covered military member to service within seven or fewer days notice; (2) attendance at military events and related activities (e.g., official ceremony, program, informational briefings); (3) arrangement of childcare and school activities; (4) making of financial or legal arrangements; (5) attendance at counseling; (6) time to spend with person on short-term, temporary rest and recuperation leave (up to five days for each instance of rest and recuperation); (7) post-deployment activities for up to 90 days after the termination of active duty service or to address issues that arise from the death of the service member; and (8) additional activities. The activities that trigger leave entitlement under this provision must be related to, arise out of, or be necessitated by the active duty or call to active duty.

The Regulations also interpret a few key provisions of the FMLA and place greater emphasis on communication between the employer and the employee.

For example, the Regulations clarify that impairments which are temporary, minor, or transitory (with an actual or expected duration of six months or less) do not qualify for the “regarded as” protection.”

In addition, employers must post a general FMLA notice at the workplace and provide employees with a notice of their FMLA rights by including the notice in the employee handbook or, if the employer does not have a handbook, distributing the notice to employees when they are hired. The notices can be obtained on the USDOL website [<http://www.dol.gov/esa/whd/fmla/finalrule.htm>].

The Regulations also state that an employer has 5 days to notify an employee whether or not he is eligible for FMLA leave. The USDOL has an optional form for employers to use, and it can be obtained on the agency's website.

Along with the eligibility notice, employers must give the employee a notice of "Rights and Responsibilities," the purpose of which is to clarify employee expectations. The notice can be downloaded from the USDOL website.

California employers, however, SHOULD NOT use the medical certification forms on the USDOL website, because the forms allow the health care provider to indicate the diagnosis of the employee or his/her family member's serious health condition and California law does not permit employers to obtain this information. The California DFEH website has a sample form.

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### Genetic Information Nondiscrimination Act ("GINA")

This new federal statute takes effect on November 21, 2009. "GINA" is intended to curb the abuse of genetic information by employers and insurers. The federal discrimination statute, Title VII, is amended by GINA to prohibit employers with 15 or more employees from firing or otherwise discriminating against an employee because of genetic information. Employers are prohibited from using genetic information to limit, segregate, or classify employees in a way that deprives them of employment opportunities or negatively impacts employment status. GINA makes it illegal for employers to request or purchase genetic information about an employee or an employee's family member, with a few exceptions. The law also places strict confidentiality requirements on employers that have employee or family member genetic information. Beginning in 2009, it will be illegal for insurers to raise premiums or deny coverage based on genetic information.

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### Bike Commuting Fringe Benefit Part of Financial Bailout Plan

The \$700 billion financial bailout plan – Emergency Stabilization Act of 2008 signed by President Bush in October 2008 – provides that effective for tax years beginning January 1, 2008, employer reimbursement for bicycle commuting will be on the list of qualified transportation fringe benefits. The maximum amount that can be excluded from an employee's gross income is \$20 for each month the employee used a bike for a substantial portion of commuting. The reimbursement can cover reasonable expenses the employee incurred for bike purchase, improvements, repair, and storage. Bike reimbursement is not tax deductible if the employee receives another transportation fringe benefit in the same month.

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## NEW CALIFORNIA LAWS

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### Salary Rule for Exempt Computer Software Professionals

Labor Code sec. 515.5 exempts certain computer software professionals from overtime if they meet the duties and pay requirements specified under the statute. Prior to the passage of AB 10, which was signed into law on September 30, 2008, computer software employees had to earn no less than \$36 per hour to be exempt from overtime. The amended code section now also exempts

employees who are paid a salary of at least \$75,000 annually for full-time employment. A salary of no less than \$6,250 must be paid at least once a month. Salary and hourly rates will be adjusted annually based on Consumer Price Index changes.

California employers are cautioned that employees must also meet *all* the following duties requirements to meet the overtime exemption, which differ from the federal exemption: (1) spend more than half of his/her work time in work that is intellectual or creative, (2) spend more than half of his/work time in work that requires discretion and independent judgment, (3) spend more than half of his/her work time engaged in duties that consist of one or more of the following: (a) applying systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (b) designing, developing, documenting, analyzing creating, testing, or modifying computer systems or programs, including prototypes, based on and related to user or system design specifications; and/or (c) documenting, testing, creating, or modifying computer programs related to the design of software or hardware for computer operating systems; and, (4) be highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

### Safety - Text Messaging While Driving

Effective January 1, 2009, it is an infraction to drive a motor vehicle while using an electronic wireless communications device to write, send or read a text messages, email, or instant messages. This includes using iPhones, iPod Touch devices, pagers, cell phones, and laptop computers. Rynn & Janowsky LLP clients are advised to address this prohibition (as well as violations of the recent law requiring the use of hand-free devices for telephoning while driving) as a policy/work rule in their employee handbooks and/or in a policy memo to employees. The failure to address these laws could result in lawsuits against employers by, for example, a third party who is injured as a result of a violation of the law. (S.B. 28)

### Timesheet Fraud

AB 2075 amended the California Labor Code by adding a new subsection that forbids employers from requiring employees, before to payment of their wages, to sign a statement detailing the hours the employee worked "which the employer knows to be false." Employee attestations on time sheets and timecards confirming that the employee took meal and break periods have become popular recently due to the penalties imposed under California law for an employer's failure to provide mandated meal and break periods. Some employers demand that the statement be signed as a condition to the employee receiving his/her paycheck. This new law does not prohibit such practices, BUT it makes it illegal for the employer to require the employee to sign such a statement when the employer *knows the statement is false*. (Labor Code sec. 206.5)



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