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EMPLOYMENT & LABOR NEWS & INSIGHTS

JUNE 2016

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Employers Should Ensure Their Policies Comply with the Recent Amendments to the California Fair Employment and Housing Act

An overview of the Amendments to the California Fair Employment and Housing Act, including written policy requirements, means of dissemination and when translation to another language is required. Read More

Second Appellate District Rules Combined 20-Minute Break Acceptable When It Avoids Material Economic Loss Attributable to Particular Production Activities

California's Second Appellate District Court ruled that EME, Inc. was entitled to depart from the preferred break schedule, when the company was able to properly and validly support its contention that separate breaks are not practical given the demand of the particular business and the employees' consent to the arrangement. Read More

The Ninth Circuit Affirms Employer's Time-Rounding Practice

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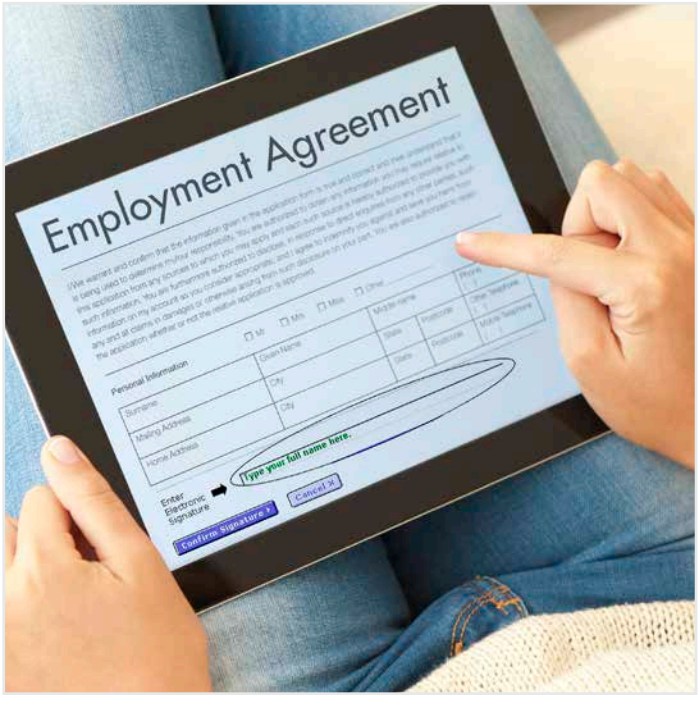
Members of Wilson Elser's Employment & Labor practice, located throughout California and the United States provide one convenient point of contact for our clients. Please contact us to discuss your organization's needs.

For more information about Wilson Elser's Employment & Labor practice, visit our website.

Employee's Electronic Signature on Arbitration Agreement Is Authentic

More and more companies are requiring employees to electronically review, sign and acknowledge a host of employment documents. Accordingly, it is important that employers understand the various factors courts look at to determine the validity of such electronic signatures. More than a decade ago, California and federal lawmakers issued legislation providing for the enforceability of electronic signatures. The relevant California statute, known as the Uniform Electronic Transactions Act, provides that an "electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which [*sic*] the electronic record or electronic signature was attributable." (Cal. Civ. Code § 1633.1 *et seq*.)

In the recent case *Espejo v. Southern California Permanente Medical Group*, the California Court of Appeal, Second District, established how to meet the requirement for authenticating such an electronic signature. In its April 22, 2016, decision, the Court deemed the electronic signature on an arbitration agreement as authentic, despite the plaintiff's claims that he had never seen that particular document and would not have signed it after only a minute's review. The Court found that the electronic signature was the "act" of the employee because the employer had established (1) the security precautions involved in the electronic access to the document and (2) the specific steps required to sign the document electronically.



The case now serves as a guideline for the precautions and steps of the electronic-signing procedure that allow a finding of authenticity:

- The employee receives an email containing a link to a homepage.
- Access to that homepage requires a private, unique username and password that are provided to the employee.
- Once the employee has logged on, he is required to create a new password; only when a new password has been created can the employee access the employment document.
- On viewing the document's signature page, an automatic prompt appears to "accept" the document's terms and conditions.
- Once the employee has chosen to "accept," he is prompted to type in his name.
- The employee's typed name is stored electronically together with the date, time and IP address of the signature.

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Employers Should Ensure Their Policies Comply with the Recent Amendments to the California Fair Employment and Housing Act

The Amendments to the California Fair Employment and Housing Act (FEHA) regulations that went into effect on April 1, 2016, provide helpful guidance to employers and further clarify the requirements of California law prohibiting harassment, discrimination and retaliation under FEHA. Employers should be aware of several important changes to the FEHA regulations as described here.

EMPLOYERS MUST HAVE A WRITTEN POLICY PROHIBITING DISCRIMINATION, HARASSMENT AND RETALIATION.

Pursuant to the amended regulations, this policy should meet all of the following requirements:

- List all currently protected categories under FEHA, which include race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, sexual orientation, gender, gender identity, gender expression, age (40 and over), and military and veteran status.
- Specify that employees are protected from unlawful workplace conduct not only by co-workers, supervisors and managers but also by third parties such as volunteers, interns, customers, vendors and independent contractors.
- Create a confidential complaint process that ensures employees that an investigation will be treated confidentially, to the extent possible. Employees also should be informed that they will receive a timely response; the employer will conduct a fair and impartial investigation by qualified personnel; the investigation will be documented and tracked to make certain it is progressing in a timely manner; and there will be appropriate remedial actions if misconduct is found, as well as a timely closure to the investigation.
- Make clear that employees and others involved will not be retaliated against as a result of making a complaint or participating in any workplace investigation.
- Inform employees that there are several ways to lodge a complaint under the policy, and be clear that not all complaints must be directed to the employee's direct supervisor. Other avenues may include designating a company representative or ombudsperson to receive the complaint, establishing a complaint hotline, and/or providing information regarding the California Department of Fair Employment and Housing and the Equal Employment Opportunity Commission.
- Specify that the complaint need not be in writing; employees are free to complain either verbally or in writing.
- Require supervisors to report any complaints of misconduct to a designated company representative.

Continued

EMPLOYERS SHOULD DISSEMINATE THE POLICY THROUGH APPROPRIATE MEANS.

The FEHA regulations provide that the policy prohibiting discrimination, harassment and retaliation must be disseminated by one or more of the following methods:

- Providing employees with a printed copy, including an acknowledgement form for employees to sign.
- Sending the policy via email with an acknowledgement return form.
- Including information regarding the policy and discussing it during employee new hire orientation.
- Posting on the company's intranet site with an appropriate tracking system designed to ensure all employees have read and acknowledged receipt.
- Any other method designed to ensure receipt of the policy.

EMPLOYERS MUST TRANSLATE THESE POLICIES

If more than 10 percent of employees in a given location primarily speak a language other than English, employers must translate the policy into those languages.

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Second Appellate District Rules Combined 20-Minute Break Acceptable When It Avoids Material Economic Loss Attributable to Particular Production Activities

"A combined rest period before or after a meal break is allowed if an employer can show separate breaks are not practical given the demand of the particular business and the employees' consent to the arrangement." *Rodriguez v. EME, Inc.*, April 22, 2016.

California Labor Code section 226.7 provides, "An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable order of the Industrial Welfare Commission…." IWC Wage Order No. 1-2001 obligates employers to provide a 30-minute meal period for a work period of more than five hours and rest periods accruing at the rate of 10 minutes per four hours or a major fraction thereof. Wage Order 1-2001 is applicable to the manufacturing industry where oversight of work hours, minimum wages and breaks are of paramount concern. Rest periods need not be timed to fall specifically before or after any meal period.

In the *Rodriguez* case, the Second Appellate District addressed the particular showing required of employers to depart from the norm with regard to timing of breaks for its employees. In this case, EME, Inc. offered evidence that a combined rest break of 20 minutes on one side of the meal break as opposed to separate 10-minute breaks on either side of the meal break was not detrimental to its employees. The arrangement at the EME facility allowed employees in a family-owned metal finishing company the option to eat their main meal in the morning (sometimes this involved heating and preparing food or ordering from a food truck), and then secure sufficient rest during the break before resuming work. EME employees also were allowed other breaks when necessary, and no complaints had been lodged regarding the combined morning break arrangement for the 30 years it had been in place.

In addition, EME offered evidence that implementing the otherwise preferred schedule of separated breaks would unduly burden its production process and that the combined rest break was tailored to alleviate that burden. Due to the nature of the work processes in this particular industry,

workers typically took 10 minutes to prepare for a rest break after stopping production and an additional 10 minutes to resume their activities coming off a break, thereby incurring a hard stop of work totaling 20 minutes per employee in connection with each break. Thus, the potential 40 minutes of work stoppage per shift per employee (depending on job duties) was impractical and could constitute an undue burden on the production process.

The combined 20-minute break as opposed to two 10-minute breaks avoided material economic loss attributable to particular production activities. However, it was significant in this case that the employees partaking in the combined break arrangement did not protest the arrangement. Being mindful of the *economic impracticability*, but at the same time demonstrating *no detrimental effect* on employees, EME was able to properly and validly support its departure from the preferred break schedule, and the Second Appellate District ruled it was entitled to do so.

Wilson Elser's Employment & Labor practice attorneys are well versed in interpreting and structuring policies that properly reflect the myriad rules and regulations governing employer compliance.

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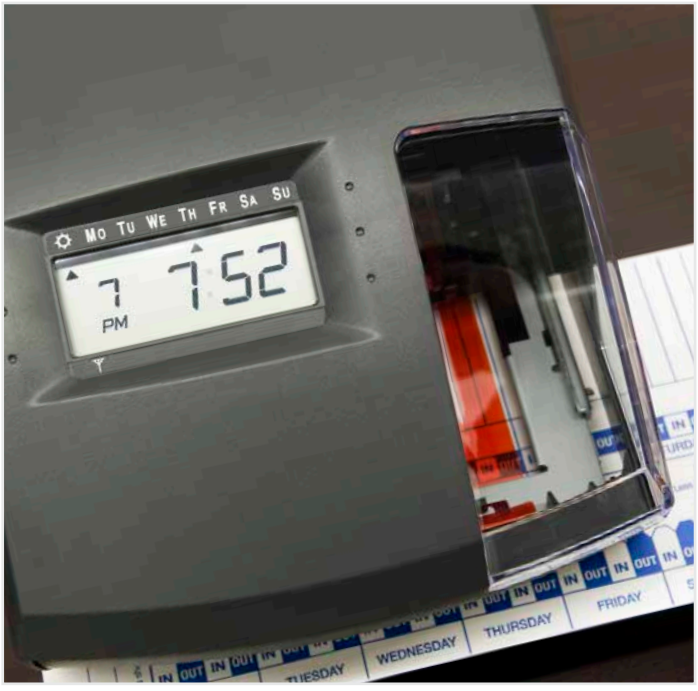
The Ninth Circuit Affirms Employer's Time-Rounding Practice

The Ninth Circuit recently reaffirmed the lawfulness of employer time-rounding policies that are both facially neutral and neutrally applied in *Corbin v. Time Warner Entertainment Advance/Newhouse Partnership*, May 2, 2016. In that case, the plaintiff claimed Time Warner Entertainment Advance/Newhouse Partnership's (TWEAN's) rounding policy, which rounded employee time stamps to the nearest quarter hour, deprived him and other similarly situated employees of overtime pay.

TWEAN's time clock system rounded employee time punches to the nearest quarter hour when they clocked in for the day, out and back in for lunch, and then out at the end of the day. For example, when employees clocked in at 8:07 a.m. their wage statement would reflect a clock-in of 8:00 a.m. Similarly, if employees clocked out at 5:05 p.m. their wage statements would reflect a clock-out of 5:00 p.m. From the time the TWEAN timekeeping system was put into place until the plaintiff resigned, he had worked 269 shifts and claims he lost a total of $15.02 of aggregate compensation.



The Ninth Circuit found that TWEAN's rounding policy was neutral on its face and consistent with the relevant state and federal authorities. The Court recognized that federal regulations permit employers to efficiently calculate hours worked without imposing any burden on employees, offering employers a "practical method for calculating work time and a neutral calculation tool for providing full payment to employees." Citing to California and federal authorities, the Ninth Circuit confirmed that the federal rounding rule applies to California state wage claims so long as the rounding is neutral both facially and as applied. In rejecting the plaintiff's argument, the Court noted that his interpretation would require employers to engage in calculations that the federal rounding regulation served to avoid, thereby eviscerating the purpose of the rounding tool.

Following the California Court of Appeal decision in *See's Candy v. Superior Court,* the Ninth Circuit rejected plaintiff's claim that rounding made him miss out on pay at daily overtime rates on days when his time was rounded down. The Court noted that a rounding policy "allows employees to gain overtime compensation just as easily as it causes them to lose it."

While this decision comes as continued good news on the rounding front, employers are reminded that they should consult counsel before implementing rounding policies to help ensure the policies are facially neutral and neutrally applied. In other words, over a period of time the policy should not disproportionately benefit the employer.

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Los Angeles Expected to Join Other Cities with Paid Sick Leave Ordinances

The Los Angeles City Council voted 13−1 to pass a motion directing the City Attorney's Office to move forward with a proposed ordinance requiring employers to provide paid sick leave to employees who work for them in the City of Los Angeles. If the ordinance is approved, Los Angeles will join Oakland, San Francisco, Emeryville and Santa Monica, which have already enacted paid sick leave ordinances. The Los Angeles ordinance will require employers to provide twice as much paid sick leave than is currently required under California state law.

DETAILS OF THE LOS ANGELES ORDINANCE

Under the proposed ordinance, an employee will receive up to 48 hours (6 days) of paid sick leave per calendar year. Paid leave will accrue at a rate of 1 hour for every 30 hours worked. Alternatively, an employer can elect to "front load" leave, making the full amount of leave available to the employee at the beginning of the year.

An employee will be able to carry over 72 hours into the following year, negating the 48-hour cap under the accrual method in current California law. The amount of leave can be capped at 72 hours, or an employer can opt to have a higher cap or no cap at all. If an employer currently has policies allowing for paid leave or paid time off, or provides compensated time off that grants at least 48 hours of paid leave, then it need not provide additional paid time off.

Any employee who works in Los Angeles for the same employer for 30 days or more within a year is eligible for paid sick leave. Paid sick leave will begin accruing on the employee's first day of employment or July 1, 2016, whichever is later. Employees hired after the effective date of the ordinance will be allowed to use accrued paid sick leave on the 90th day of employment. Those employees currently employed on the effective date of the ordinance can begin using leave as soon as it accrues.

The ordinance will be modeled after California's Healthy Workplaces, Healthy Families Act:

- An employer is required to provide paid sick leave time upon oral or written request by an employee.
- Leave may be used for the illness of the employee or a family member, or for any person related by blood or who has a close relationship equivalent to that of a family relationship.
- Upon the termination of the employee's employment, the employer is not required to compensate the employee for accrued or unused sick leave.
- Retaliation or discrimination against an employee who requests or uses paid sick time off is strictly prohibited.

The Los Angeles ordinance will be enforced by the Office of Wage Standard.

Continued

SUMMARY

Backers of the Los Angeles ordinance anticipate it will pass easily. The ordinance is now being drafted by the City Attorney's Office. If it is approved, the ordinance will go into effect on July 1, 2016, for employers with more than 25 employees, and July 1, 2017, for employers with 25 or fewer employees.

Employers with employees who work in Los Angeles and the other California cities that have enacted paid sick leave ordinances should act now to ensure they are in compliance. They should review and revise all existing paid sick leave or PTO policies and procedures as appropriate. Alternatively, they can establish a separate paid sick leave policy that complies with state law and local ordinances. In addition, employers need to update all internal systems so that they are harmonious with paid sick leave accrual of up to 72 hours.

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