PERSPECTIVES

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

California To Require Paid Sick Leave Beginning July 2015

In This Issue

On September 10, 2014, Governor Brown signed AB 1522, otherwise known as the Healthy Workplaces, Healthy Families Act of 2014. AB 1522 will make California only the second state in the United States to require employers to provide paid sick leave to nearly all employees.

While other jurisdictions in the United States "such as Connecticut, San Francisco, and Washington, D.C. "have passed paid sick leave laws, AB 1522 marks by far the largest expansion of paid sick leave for employees to be implemented anywhere in the United States. Assemblywoman Lorena Gonzalez, who sponsored the bill, estimated it will extend paid sick leave to nearly 6.5 million additional workers in California. Its provisions are set to take effect in July 2015.

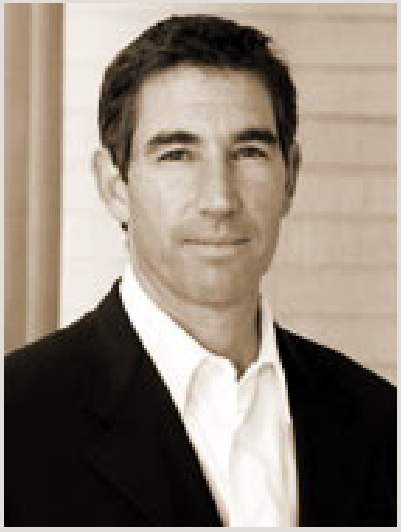
AB 1522 will apply to all employers regardless of their size. Under its provisions, paid sick leave is to accrue at a rate of one (1) hour per every thirty (30) hours worked beginning either upon the latter of an employee's commencement of employment or July 1, 2015. ("œExempt" employees are presumed to work forty (40) hours per week for purposes of this accrual calculation.) Employers may cap total accrued sick leave at six (6) days under AB 1522 and may further limit an employee's use of paid sick leave to no more than three (3) days (or twenty-four (24) hours) annually. Employers may set minimum usage increments for such leave that may not exceed two (2) hours. If an employer already offers some form of paid time off or has a paid leave policy, it may be exempt from these mandates presuming the amount of such leave conforms with the above accrual rates. Use of accrued sick leave may begin on an employee's ninetieth day of employment.

As with nearly all laws in California providing employee benefits or

than One day

ALERT for Non-Profit Corporations: New Form 1023EZ Released July 1, 2014

Partner Notes



Brandon Smith

My 11 year old daughter said to me the other day "Of course the Giants are fighting to win the World Series again, it's an even year!" She's right of course that the Giants have been in the World

protections, AB 1522 includes recordkeeping requirements and penalties for noncompliance. Employers must keep accurate records of hours worked, sick leave accrual, and sick leave usage for each employee going back at least three (3) years. For non-compliance Penalties range up to $4,000. AB 1522 further prohibits retaliation against employees for complaining about an employer's failure to offer requisite paid sick leave. Also included are new notification and informational requirements, including a forthcoming workplace poster to be created by the Labor Commissioner's office that must be posted on all employer premises once the law goes into effect in 2015.

In addition to its stated goal, AB 1522 will almost certainly provide the basis for employment-related litigation in years to come, including Labor Commissioner claims, individual suits in state courts, and likely class or representative actions. In light of such risks as well as AB 1522's express penalties, employers should take care to understand its requirements and begin the implementation of systems to ensure compliance beginning in July 2015. We at Scherer Smith & Kenny remain available to answer any questions you may have about AB 1522 or any other employment- or business-related legal matters. Please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or Negin Yazdani at nny@sfcounsel.com for more information.

- *Written by Ryan Stahl*

Employers Beware: Conducting Credit Checks May Lead To Lawsuits!

Series an incredible three times in five years (2010, 2012 and 2014). I had to remind her though that before 2010, the Giants hadn't won a World Series since 1954. An amazing 60 year span. I mentioned that there are fans (and players) that witnessed them winning in 1954 and then grew up, had kids (and even grandkids) and then (finally!) the Giants won the World Series.

Think about what the Giants went through for years before finally winning again in 2010. They had to experiment with different managers, different players and even a different

In recent years, several laws have been passed to limit employers' use of criminal background and credit checks in the hiring process. This article addresses the specific constraints placed upon California employers and *prospective* employers' use of "consumer credit reports" (often referred to as "credit checks") for hiring or employment purposes. Our firm wrote a separate article addressing current restrictions on the use of criminal history and background checks in the hiring and employment process, which was also featured in our July, 2014, *Perspectives* Newsletter.

While it may seem odd that a procedure as common and long-established as conducting credit checks can now leave employers vulnerable, here are the basics for what you need to know to avoid potential lawsuits.

By way of background and context, following the 2008 economic crisis, the Equal Employment Opportunity Commission ("EEOC"), as well as other state and local regulators, became increasingly concerned that minority workers, many of whom had lost their jobs or were suddenly unable to pay their mortgages, were more likely to have their credit scores negatively affected than their non-minority counterparts. While it may appear that a "facially-neutral" policy, such as credit checks, which apply to all applicants or employees, must be legal, such policies may actually support claims of discrimination. This is the case when such a policy disproportionality affects (*i.e*. has a disparate impact on) certain minority groups (known as a protected classes), and the employer is unable to demonstrate a sufficient business need for the policy. Examples of similar facially-neutral hiring practices which, depending on the circumstances, have been found to constitute disparate impact

ballpark. It didn't come easy and it didn't come cheap (I'm sure). However, they dug in, showed grit, tried new approaches and eventually put together an incredible team. Even after winning in 2010 and 2012 though they could not coast along; they had to make constant changes to reach where they are now.

Like the Giants, small businesses must also constantly change. They cannot just rest on their past success. They must watch their competitors and the markets to gauge where their customers will be and what they'll want in the future. They need to use new

discrimination, include certain types of criminal background checks and pre-employment tests, among other policies. As a result, the EEOC is aggressively bringing claims against employers that use credit checks as a hiring criterion.

Consistent with the EEOC's crackdown on background checks in the hiring and employment process, California recently enacted Labor Code section 1024.5, which limits an employer's ability to use credit checks for employment purposes *unless* the position of the person for whom the report is requested falls within certain exceptions listed in the statute including positions (1) involving access to finances, trade secrets, and personal data (*e.g.*, social security numbers or dates of birth), among other confidential information; (2) classified as a "œmanagement position" (defined as an employee meeting the "œExecutive" exemption under California law); and (3) involving regular access to $10,000 or more of the employer's funds, among other exceptions.

In response to such laws and actions, employers are advised to use great care and to consult an attorney regarding the use of credit checks in their hiring practices. The following are a few tips:

- Only use credit checks when their use is permitted by law and can be justified. For example, if a position involves working with the employer's, customers', or clients' financial information, personal confidential data, or funds, a credit check may be justifiable.
- Have an attorney periodically review company policies and compare them to changing federal, state, and local laws to ensure compliance.

technologies to become more efficient and responsive. They must look inward and evaluate their most critical asset, their employees, to see how they can better help employees who are succeeding and what they need to do to motivate or manage employees who are not. Sometimes these changes are hard, such as letting employees go, or shedding a product line, and sometimes they are exciting and invigorating, such as moving to a new location or launching a new website or brand.

The point is, everyone needs to take stock from time to time

- Do not rely on vendors to conduct credit checks without ensuring they are compliant with the law, as employers may be responsible for their vendor's errors.
- Only conduct credit checks after extending conditional employment offers to candidates.

To avoid potential lawsuits related to these issues, employers are advised to seek legal advice concerning current hiring and employment policies and practices. If you have questions regarding these employment and HR-related matters, we as Scherer Smith & Kenny LLP are happy to assist you. Please contact Denis Kenny (dsk@sfcounsel.com), Ryan Stahl (rws@sfcounsel.com), or Negin Yazdani (nny@sfcounsel.com) for more information.

- *Written by Negin Yazdani*

Half-Day Vacay: Update on what Employers Need to Know About Exempt Employee Absences of Less Than One day

As a result of the 1982 California Supreme Court Case of *Suastez v. Plastic Dress-Up Co.*, which concluded that an exempt employee's accrued vacation for all employees exempt and non-exempt alike qualifies as earned wages, employers cannot exercise the "œuse it or lose it" policy for their exempt employee's unused accrued vacation and must pay out all accrued and unused vacation and PTO at termination. Of course, employers were permitted to deduct a day from an exempt

about where you are, how you got there and what you need for the next phase of your business. Rather than relying on what's worked for 10 or 20 years (or longer) and assuming it will get you to where you want to be. We urge you to embrace change to find the exciting and challenging side of it.

I look forward as does everyone here at the firm, to continuing to provide outstanding service to you, our clients and to seeing you succeed.

employee's vacation or Paid Time Off (PTO) bank if the employee took a full day off.

However, employers were advised that if an exempt employee worked a partial day, deductions from the employee's vacation or PTO bank would violate California laws. This is because in order for an employee to qualify as exempt, the employee must earn a salary (the Salary Basis Test), one of the methods in which an exempt employee's status is determined. For an employee to earn a salary, the employee must receive the same rate of pay regardless of the quantity or quality of work performed. Just as an employee does not earn overtime wages if she or he works hours beyond the employee's normal hours, an employer cannot reduce an employee's pay when the employee works less than her or his normal schedule. Thus, a reduction in employee pay for a partial- day worked would violate the Salary Basis Test and compromise an exempt employee's status.

In a recent California appellate decision, *Rhea v. General Atomics* the court provided employers with a rare "win". Specifically the court held that an employer can deduct PTO for partial day absences without jeopardizing the employee's exempt status, even for absences of less than four hours.

While this is good news for employers in California, employers must consider employee relations in requiring these deductions. By way of example, if an exempt employee works six 12-hour days, a policy of deducting that employee's PTO balance for working only one or a few hours on the seventh day in the week may be viewed as nit-picky and could be bad for morale. Nonetheless, it is within an employer's right to enforce such a policy.

Additionally, employers should be aware of the following non-exhaustive

list of important limitations on these types of policies to avoid jeopardizing an exempt employee's status:

Â· Employers may not deduct negative vacation or PTO balances from final pay upon termination of an exempt employee's employment.

Â· Employers may not reduce an exempt employee's pay to reflect the reduced number of hours worked, as this would violate the Salary Basis Test for exempt classifications (which, again, mandates that an exempt employee be paid a full salary for any week in which they perform any work).

We at Scherer Smith & Kenny remain available to answer any questions you may have about implementing and drafting appropriate policies related to vacation or PTO use for exempt employee partial-day absences or any other employment- or business-related legal matters. Please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or Negin Yazdani at nny@sfcounsel.com for more information.

- *Written by Negin Yazdani*

ALERT for Non-Profit Corporations: New Form 1023EZ Released July 1, 2014

On July 1, 2014, the Internal Revenue Service released a new, shorter and simpler application form to help small charities apply for 501(c)(3)

tax-exempt status. The Form 1023-EZ, Streamlined Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code ("œEZ Form") significantly expedites the approval of applications for eligible smaller organizations, thereby allowing the IRS more time to spend on larger, more complex applications. Currently, the wait time to achieve tax-exempt status on standard Form 1023 applications is approximately one to two years, while the turnaround time on the new EZ Form is expected to be only a couple of months.

The EZ Form is 3 pages long (versus the 26-page standard application) and contains none of the rigorous application requirements of the standard Form 1023. In fact, eligible small organizations are allowed to self-certify their own 501(c)(3) status by checking certain boxes on the EZ Form attesting that they will comply with the rules governing 501(c)(3) status. In addition, the EZ Form does not require any supporting documentation, whereas the standard Form 1023 requires at a minimum a written narrative, financial data (or estimated financial data), a Conflict of Interest Policy, and copies of contracts with officers and directors.

Eligibility to use the EZ Form depends primarily on the size of the organization. Generally, it is available to most organizations that have: (a) assets valued at $250,000 or less, **and** (b) annual gross receipts of $50,000 or less. In addition, the EZ Form must be filed online and requires a $400 application processing fee due at the time of filing.

Public response to the EZ Form has been mixed. Proponents praise the simplification of the process and the IRS' seeming recognition that the standard Form 1023's demanding application process is not suited for smaller organizations. Critics, however, raise concerns about fraud

and abuse since presumably there will be little oversight of the EZ Form by the IRS. The IRS has responded to this criticism by promising to shift its focus to "œback-end" enforcement by way of post-operation audits of small organizations. Only time will tell whether the IRS has the resources to fulfill the promise and what impact that will have on the success of the EZ Form.

For more information on the EZ Form, and whether it's right for your nonprofit, please contact Heather Sapp (hgs@sfcounsel.com), or Brandon Smith (bds@sfcounsel.com), or Bill Scherer (wms@sfcounsel.com) for more information.

- *Written by* Heather Sapp

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