



# Employment LAW BULLETIN

Issue 1- 2008

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The information provided in this Employment Law Bulletin is for general information purposes only. Any questions about the law and your obligations under it should be reviewed with counsel. If you have any questions about these issues, or any issues confronting employers, please contact:

Paul V. Simpson, Ronald F. Garrity, Laura E. Innes, Sarah Lucas, Marc L. Jacuzzi, Jamie Rudman, Kendall Burton or Tim O'Donnell.

## EVERYTHING OLD IS NEW AGAIN!

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Happy New Year from Simpson, Garrity & Innes, PC. Start the New Year right by updating your forms, publications and reference sheets. Here are some highlights:

**Paid Family Leave** The new Paid Family Leave Brochure was published yesterday. You can download the new form at <http://www.edd.ca.gov/direp/pflpub.asp>. Employers are required to provide the Paid Family Leave brochure only to new employees and persons who request leave to care for a seriously ill family member or bond with a new minor child. These brochures may be downloaded and provided as official notices to employees.

- [DE 2511 - Rev. 5 \(1-08\) - English](#)
- [DE 2511I - Rev. 4 \(1-08\) - English - Printer-friendly version](#)
- [DE 2511/B - Rev. 4 \(1-07\) - Cambodian](#)
- [DE 2511/C - Rev. 4 \(1-07\) - Chinese](#)
- [DE 2511/K - Rev. 4 \(1-07\) - Korean](#)
- [DE 2511/L - Rev. 4 \(1-07\) - Laotian](#)
- [DE 2511/S - Rev. 4 \(1-07\) - Spanish](#)
- [DE 2511I/S - Rev. 4 \(1-08\) - Spanish - Printer-friendly version](#)
- [DE 2511/T - Rev. 4 \(1-07\) - Thai](#)
- [DE 2511/V - Rev. 5 \(1-07\) - Vietnamese](#)

**New I-9 Grace Period Over** The United States Citizenship and

Immigration Services ("USCIS") issued a reminder yesterday that employers must use the New Form I-9. After December 26, 2007, employers who fail to use the new Form I-9 may be subject to all applicable penalties. All employers are required to complete a Form I-9 for each new employee hired in the United States. [To download the new form, click here.](#)

**Minimum Wage Increase to \$8.00 per hour. Do Not Forget Your Salary Exempt Employees!** Download the new minimum wage poster at: <http://www.dir.ca.gov/Wage.htm> The salary base for exempt workers is now: \$2,773.33 per month. (\$8.00/hr. \* 2 \* 2080 /12) \$33,280.00 per year

**Computer Professional Exemption Lowered** Effective January 1, 2008, computer professionals' minimum hourly rate is reset to a minimum hourly rate of pay to \$36.00 per hour – reduced from last years' \$49.77. Cost-of-living increases will be based on the \$36.00 base starting 2009.

**IRS Mileage Reimbursement** Beginning Jan. 1, 2008, the standard mileage rates for the use of a car (including vans, pickups or panel trucks) is:

50.5 cents per mile for business miles driven;  
19 cents per mile driven for medical or moving purposes;  
and  
14 cents per mile driven in service of charitable organizations  
<http://www.irs.gov/newsroom/article/0,,id=176030,00.html>

**Poster Check** Now is the time to check your employment posters for currency. Consider purchasing an "all-in one" for ease of posting. A great source for these is the California Chamber of Commerce. <http://www.calchamber.com>

**Harassment Prevention Training** If you have hired new supervisors since July 1, 2005, you may need to provide booster harassment prevention training. If you have any questions about the new training regulations, log on to the California Fair Employment and Housing Commission website and take a look at their new PowerPoint guidance. It is located at: <http://www.fehc.ca.gov/act/harass.asp>. To schedule training, contact the attorneys at Simpson, Garrity & Innes, PC. Call us at (650) 615-4860 or email to [psimpson@sgilaw.com](mailto:psimpson@sgilaw.com); [rgarrity@sgilaw.com](mailto:rgarrity@sgilaw.com); [linnes@sgilaw.com](mailto:linnes@sgilaw.com); or [mjacuzzi@firstalarm.com](mailto:mjacuzzi@firstalarm.com)

**Handbook Update** If you have not had your employee handbook updated in a few years, this year is a good year to get that task checked off your list. A California legal review of handbook policies and protocols are an employer's best defense in navigating employment law matters. The attorneys at Simpson, Garrity & Innes, PC can help. Call us at (650) 615-4860 or email to [psimpson@sgilaw.com](mailto:psimpson@sgilaw.com); [rgarrity@sgilaw.com](mailto:rgarrity@sgilaw.com); [linnes@sgilaw.com](mailto:linnes@sgilaw.com); or [mjacuzzi@firstalarm.com](mailto:mjacuzzi@firstalarm.com)

**Did you know?** That effective January 7, 2008, the California Department of Fair Employment and Housing rolled out its new online appointment system for filing discrimination claims? Appointments can still be made via telephone during regular business hours Monday through Friday, 8:00 a.m. to 4:00 p.m., by calling 800-884-1684 (within California) or 916-478-7200 (outside California). Hearing-impaired individuals may call TTY 800-700-7320. <http://www.dfeh.ca.gov/onlineAppt/>

**If you missed it earlier this week...** Effective January 1, 2008, all employers are required to notify all of their employees of the federal Earned Income Tax Credit (EITC). Employers must give notification to employees within one week before or after the Wage and Tax Statement (Form W-2) or Miscellaneous Income (Form 1099) is given. Employers may provide the EITC notification with or at the same time as the Form W-2 or Form 1099 is given to employees. Posting this information on an employee bulletin board will not satisfy the notification requirement.

**Earned Income Credit Notice**

*Based on your annual earnings, you may be eligible to receive the earned income tax credit from the federal government. The earned income tax credit is a refundable federal income tax credit for low-income working individuals and families. The earned income tax credit has no effect on certain welfare benefits. In most cases, earned income tax credit payments will not be used to determine eligibility for Medicaid, supplemental security income, food stamps, low-income housing or most temporary assistance for needy families payments. Even if you do not owe federal taxes, you must file a tax return to receive the earned income tax credit. Be sure to fill out the earned income tax credit form in the federal income tax return booklet. For information regarding your eligibility to receive the earned income tax credit, including information on how to obtain the IRS Notice 797 or Form W-5, or any other necessary forms and instructions, contact the Internal Revenue Service at 1-800-829-3676 or through its Web site at [www.irs.gov](http://www.irs.gov).*

**SAN FRANCISCO HEALTH  
CARE SECURITY  
ORDINANCE – BACK ON**

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As you may already know, in July 2006, the San Francisco Board of Supervisors unanimously passed the San Francisco Health Care Security Ordinance which would require San Francisco employers to provide for its San Francisco workers, healthcare coverage by making a "health care expenditure" through some discretionary means. Last spring, the Golden Gate Restaurant Association ("GGRA") sued the City in federal district court claiming that the spending requirement of the Ordinance was preempted by federal law and should not be enforced. In April 2007, the City amended the Ordinance deferring the implementation date to January 1, 2008. This summer, a motion for summary judgment was heard by the district court – the GGRA convinced the district court that the spending requirement was preempted by federal law and not enforceable.

Not accepting that result, right after Christmas, the City appealed the decision to the Ninth Circuit Court of Appeals asking that the court stay the district court's judgment pending decision. Last week, the Ninth Circuit Court of Appeal did just that – it stayed the district court ruling pending a decision on the merits of the appeal. That means that until the Ninth Circuit Court of Appeal makes its formal decision, the implementation date for the spending portion of the Ordinance is back on – effective now.

**Here is how it works:** Covered employers, defined as employers engaging in business within the City that have an average of at least twenty employees performing work for compensation during a quarter, and non-profit corporations with an average of at least fifty employees performing work for compensation during a quarter, must make a "health care expenditure" (calculated by multiplying the total number of hours paid for each of its "covered employees" during the quarter . . . by the applicable health care expenditure rate") through some discretionary means. For purposes of the

ordinance, "covered employees" means individuals who (1) work in the City, (2) work at least ten hours per week, (3) have worked for the employer for at least ninety days, and (4) are not excluded from coverage by other provisions of the Ordinance.

To make the expenditure, employers can, for example:

- a. make contributions on behalf of covered employees to a health savings account. e.g. ERISA or IRC 125 plan;
- b. provide reimbursement for expenses incurred in the purchase of health care services;
- c. make payments to a third party for the purpose of providing health care services for covered employees; or
- d. by making payments directly to the City.

The health care expenditure rates for 2008 and 2009 are as follows:

Employer Health Care Expenditure Rate Schedule				
Business Size		January 1 2008	April 1 2008	January 1 2009
Large	100+ Employees	\$1.76/hour		\$1.85/hour
Medium	50-99 Employees	\$1.17/hour		\$1.23/hour
	20-49 Employees*	Not Applicable	\$1.17/hour	
Small	1-19 Employees	Not Applicable		

\* Non-profits with less than 50 employees are exempt from the spending requirement.

For more information about how to implement this program, visit the San Francisco Office of Labor Standards Enforcement website located at: [http://www.sfgov.org/site/olse\\_index.asp?id=45168](http://www.sfgov.org/site/olse_index.asp?id=45168) . Or contact the attorneys at Simpson, Garrity & Innes, PC. (650) 615-4860.

## CALIFORNIA SUPREME COURT FINALLY RULES ON MEDICAL MARIJUANA CASE

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The long awaited opinion in *Ross v. Ragingwire* finally issued from the Supreme Court today. In this case, Ross, whose physician recommended he use marijuana to treat chronic pain, was fired when a pre-employment drug test required of new employees revealed his marijuana use. The lower courts decided that Ross could not sue his employer for disability-based discrimination under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq) or for wrongful termination in violation of public policy. The California Supreme Court concluded the lower courts were correct: Nothing in the text or history of the Compassionate Use Act (the State law allowing the use of medical marijuana) suggests that voters intended the measure to address the respective rights and duties of employers and employees. Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions. (*Loder v. City of Glendale (1997) 14 Cal.4th 846, 882-883.*) The Supreme Court, thus, affirmed the lower courts rulings in favor of the employer.

Employers conducting drug testing must do so under an appropriate policy and using appropriate procedures. If you have questions about the use of such tests, both before and during employment, call the employment lawyers at Simpson, Garrity &

## NEW AMENDMENTS TO FAMILY AND MEDICAL LEAVE ACT

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On January 28, 2008, Pres. Bush signed the “National Defense Authorization Act for FY 2008” (“NDAA”) into law. Buried in that defense appropriation bill is a section that amends the Family Medical Leave Act to: (1) permit an employee to take up to 26 workweeks of leave to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness”, and (2) permit an employee to take up to 12 weeks of leave for any “qualifying exigency” arising out of the fact that the employee’s spouse, child, or parent is on active duty in the Armed Forces. Details of these new requirements follow.

### Who must provide leave?

The same employers who are required to provide FMLA leave in general – those with 50 or more employees.

### Who is entitled to leave?

*“Qualifying Exigency Arising From Active Duty” Leave:* An employee eligible for FMLA leave may take up to 12 weeks of leave in a 12 month period for any **“qualifying exigency”** arising out of the fact that the spouse, son, daughter, or parent of the employee is on **active duty** (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a **contingency operation**.

**“Active Duty”:** Duty under a call or order to active duty.

**“Contingency Operation”:** An operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the U.S. or against an opposing military force, or results in the call or order to active duty during a war or national emergency.

**“Qualifying Exigency”:** **Not defined yet. The new provision providing leave for any qualifying exigency arising from the active duty of the employee’s spouse, child or parent will not be effective until final regulations are issued defining the term “qualifying exigency.”**

*“Servicemember Family Leave”:* An employee eligible for FMLA leave who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a single 12-month period to care for the servicemember.

**“Next of Kin”:** Nearest blood relative.

**“Covered Servicemember”:** A member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in **outpatient status**, or is otherwise on the temporary disability retired list, for a **serious injury or illness**.

**“Outpatient Status”:** Assigned to a military

medical treatment facility as an outpatient or to a unit established to command and control members of the Armed Forces receiving medical care as outpatients.

**“Serious Injury or Illness”:** An injury or illness incurred by the member in the line of duty while on active duty that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.

#### **How much leave must be provided?**

Employees may be entitled to a combined total of 26 weeks of leave during a single 12-month period.

#### **How much leave must be provided to spouses employed by the same employer?**

The husband and wife are entitled to an aggregate of 26 weeks of leave during a single 12 month period if they have taken servicemember family leave, or if they have taken a combination of servicemember family leave, leave for baby bonding, and/or leave to take care of a sick family member. If the husband and wife have taken a combination of leaves, the husband and wife are entitled to an aggregate of 12 weeks of leave for baby bonding or to care for a sick family member.

#### **How much notice is required for foreseeable leave?**

*“Qualifying Exigency Arising From Active Duty”*  
Leave: Employee must provide such notice as is reasonable or practicable.

*“Servicemember Family Leave”:* If the leave is foreseeable due to a planned medical treatment, an employee must provide at least 30 days advance notice. If the planned medical treatment requires leave to begin in less than 30 days, the employee must provide such notice as is practicable.

#### **May an employer require any certification supporting the employee’s need for leave?**

*“Qualifying Exigency Arising From Active Duty”*  
Leave: An employer may require a request for leave to be supported by any certification prescribed by regulation. (No regulations have been issued yet).

*“Servicemember Family Leave”:* An employer may require a request for leave to be supported by a certification issued by a health care provider.

#### **May an employer require any certification supporting the employee’s need for leave?**

*“Qualifying Exigency Arising From Active Duty”*  
Leave: An employer may require a request for leave to be supported by any certification prescribed by regulation. (No regulations have been issued yet).

*“Servicemember Family Leave”:* An employer may require a request for leave to be supported by a

certification issued by a health care provider.

**May the employee take leave on intermittently or on a reduced leave schedule?**

*“Qualifying Exigency Arising From Active Duty”*  
Leave: Yes.

*“Servicemember Family Leave”*: Yes, if medically necessary.

**May the employer require the employee to temporarily move into an alternative position?**

*“Servicemember Family Leave”*: If the employee is taking leave intermittently or on a reduced leave schedule, the employer may require the employee to temporarily transfer into an available alternative position for which the employee is qualified which (1) has equivalent pay and benefits, and (2) better accommodates recurring periods of leave than the regular employment position of the employee.

**May an employer require an employee to use accrued paid leave?**

*“Qualifying Exigency Arising From Active Duty”*  
Leave: Yes. An employee may elect to use, or an employer may require the employee, to substitute any accrued paid vacation leave, personal leave or family leave for any part of the 12 weeks of leave.

*“Servicemember Family Leave”*: Yes. An employee may elect to use, or an employer may require the employee, to substitute any accrued paid vacation leave, personal leave or family leave for any part of the 12 weeks of leave. However, employers are not required to provide paid sick or medical leave in any situation in which the employer would not normally provide any such paid leave.

**When do the new FMLA provisions take effect?**

*“Qualifying Exigency Arising From Active Duty”*  
Leave: This provision is not effective until the Secretary of Labor issues final regulations defining “any qualifying exigency.” The Department of Labor is encouraging employers to provide this type of leave to qualifying employees in the interim.

*“Servicemember Family Leave”*: **Immediately.**

This recently-signed federal law will likely require employers with 50 or more employees to make revisions to their Family Medical Leave Act policies. If you need assistance with your policy revisions, please contact the shareholders at Simpson, Garrity & Innes, P.C. – Paul V. Simpson, Ronald F. Garrity, Laura E. Innes, Marc L. Jacuzzi. 601 Gateway Boulevard, Suite 950, South San Francisco, CA 94080. (650) 615-4860.

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