

April 5, 2004

A Fresh Wind From California

With the advent of the Schwarzenegger administration, companies doing business in California have an historic opportunity to influence California employment law. We seek your ideas on how we can bring needed balance to the way California enforces its law.

Upon taking office, Governor Arnold Schwarzenegger's second executive order directed all executive branch agencies to identify outstanding opinions or rulings of "general application" that have not been submitted for review through the administrative-procedure process. Pending review, the agencies are to use such opinions and rulings "on an opinion-only basis, which will not carry the force of law."

What does this mean for companies employing people in California?

For many years, California's Division of Labor Standards Enforcement (DLSE), whose chief is the Labor Commissioner, enforced California employment laws in a way that management criticized as "anti-business." Opinion letters reflected the Labor Commissioner's views. He pulled together many of them, adding further text, in a three-and-a-half-inch-thick *Enforcement Policies and Procedures Manual*, available on the Internet at: www.dir.ca.gov/dlse/Manual-Instructions.htm. Other DLSE opinion letters are posted on the Internet at: www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm.

In this manual, the Labor Commissioner contended that its opinion letters and commentaries were "entitled to great weight and should not be disturbed unless clearly erroneous," Manual Paragraph 1.1.4.

Plaintiffs' attorneys in employment litigation cite them in court. Judges sometimes defer to them or are influenced by them. Individual employees may bring claims before DLSE hearing officers. Hearing officers are not lawyers. The DLSE manual, and the division's other written opinions, are often the only written source of law available to hearing officers.

In response to Governor Schwarzenegger's executive order, the DLSE posted notices on its Web sites, for both its manual and its opinion letters. The notices state that they are "currently under review to determine their legal force and effect," adding that DLSE opinion letters are "advice in specific cases only."

The DLSE also invites readers who believe a section of the manual or an opinion letter should be reviewed to submit their comments to the DLSE. We think this invitation is sincere — and that the new administration intends to scrutinize years of DLSE interpretations. That process is now in its early stages.

Too many outstanding opinion letters cover too many subjects to rely on the state to identify the most troublesome ones. The job is huge. The new administration wants to hear from interested parties. DLSE will receive comments by e-mail: dlsecomments@dir.ca.gov.

Companies that have been subjected to unfavorable DLSE opinions should bring them to the DLSE's attention. Maybe it happened because the company had formally requested a written opinion. It may have happened because the company researched DLSE opinions and discovered an unfavorable one. Or it may have happened because the unfavorable opinion was cited against the company in a DLSE hearing or in court. Unless companies speak up, those opinions could remain on the books by default.

Seyfarth Shaw LLP is prepared to make formal presentations to the DLSE on specific subjects. For example, the firm plans to request that the DLSE reconsider its ruling that an employee may not qualify for the professional exemption from overtime under California law, unless the position requires a master's or doctorate degree. Under that opinion, employees in positions requiring, for example, a bachelor of science degree in computer science, would not qualify under California law for the general professional exemption, even though they qualified under federal law.

Any company interested in joining this effort — or having Seyfarth Shaw LLP make a formal presentation on its behalf — should contact your Seyfarth Shaw attorney or send an email to seyfarthshaw@seyfarth.com.

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