



## Employment Auditor's Notepad

### CALIFORNIA UNEMPLOYMENT INSURANCE: RESPONDING TO THE EDD

California provides unemployment insurance benefits to, among others, claimants who become unemployed through no fault of their own, i.e., who are discharged because of a lack of work. The EDD presumes that claimants are eligible for benefits and the burden is on the employer to show otherwise. In order for a company to successfully combat a former employee's claim for unemployment benefits, the company must provide sufficient fact to the EDD that the former employee was discharged for "misconduct."

Misconduct includes excessive unexcused absences, attitude, unfair competition with the employer's business, dishonesty, insubordination, use of drugs or alcohol that adversely affects the former employee's performance, and failure to perform adequately/neglect of duty.

The EDD will require proof of the former employee's misconduct. This means that in recessionary times, it is more important than ever that employers have periodic performance reviews, give honest feedback and constructive criticism and create identifiable goals for performance improvement. A lack of documentation in an employee's file may lead the EDD to find that the company has not met its burden of showing misconduct.

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## Court Overturns \$86 Million Judgment Against Starbucks for Tip-Pooling Practices

EMPLOYER'S AGENTS MAY SHARE IN TIPS RECEIVED FOR THEIR OWN SERVICES?

California Labor Code section 351 prohibits employers or their agents (for example, managers and supervisors) from taking or receiving any part of a gratuity left by a patron for an employee. Last year, a San Diego trial court ruled that Starbucks' policy permitting shift supervisors to share in tips that customers placed in a collective tip box violated the law. After that ruling, judgment was entered against Starbucks in the amount of \$86 million plus interest.

On June 2, 2009, the Court of Appeal of California reversed the trial court's ruling, ordering the trial court to enter judgment in Starbucks' behalf. The court held that Starbucks did not violate California Labor Code section 351's prohibition of tip pooling. Starbucks employees serve customers as part of a customer service team. The team includes both entry-level employees and shift supervisors. The money in the collective tip box was divided among the entry-level employees and shift supervisors. Because the shift supervisors were part of the customer service team, and actually participated in performing the same service tasks as entry-level employees, they were entitled to receive an allocation from the collective tip box, in effect, keeping tips that they received as a result of their own services. When a customer places a tip in a collective tip box, the customer understands that the tip will be shared among all employees and agents in the line of service. Thus, the practice does not violate California law.

## The Ninth Circuit Asks the California Supreme Court For Guidance Regarding California's Outside Salesperson Exemption

ARE PHARMACEUTICAL SALES REPRESENTATIVES "OUTSIDE SALESPEOPLE?"

In *D'Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir. 2009), the Ninth Circuit asked the California Supreme Court for guidance on the following issues: (1) Are pharmaceutical sales representative exempt from overtime requirements under California law's "outside salesperson" exemption if they work more than half the time away from the office and personally interact with doctors and hospitals on behalf of the employer; and (2) In the alternative, are they exempt from overtime requirements under California's "administrative exemption" under California law? Stay tuned...

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