

PROBLEM PREVENTION BULLETIN ~ JANUARY 2009

## Employment Law Briefs

### **Time to Post Injury & Illness Log:**

From February 1, through April 30, 2009, most employers must post the Cal/OSHA Form 300A, which is the annual summary log of workplace injuries and illnesses that occurred during 2008. The Form 300A must be posted in a conspicuous place, where other employee notices are normally posted. Employers are required to ensure that no one removes, covers or defaces the notice.

### **Court Delays Implementation of Dept. of Homeland Security Social Security No-Match Safe Harbor Rule:**

The U.S. District Court for the Northern District of California has denied the Department of Homeland Security's request to expedite consideration of its Supplemental Final Rule on Social Security no-match letters, effectively blocking implementation of the safe harbor rule until at least some time in 2009.

The Final Rule, originally issued in August 2007, was blocked by a court injunction on October 10, 2007. The court enjoined implementation of the rule to consider challenges raised by employer associations which asserted that the rule violates the law, violates workers' rights, imposes burdensome obligations on employers, and will cause discrimination against workers perceived to be immigrants. The "Final Rule" has been subject to many false starts ever since. In late 2008, the DHS returned to the District Court to request an expeditious decision so that the Supplemental Final Rule could be implemented. That request was denied in a December 8, 2008 ruling.

The rule provides a "safe harbor" from liability for the unlawful employment of aliens to employers who receive a no-match letter from the Social Security Administration or a "notice of suspect document" from DHS. Receipt of a notice from SSA or DHS will not impute "constructive knowledge" of the employee's

unauthorized status to the employer if the employer follows the procedures set forth in the rule for responding to the SSA or DHS notice.

The U.S. District Court has set a schedule for written arguments and a hearing on the remaining issues. A decision on implementation of the Supplemental Final Rule is not expected until February or March 2009, at the earliest. We will provide you with further updates.

### **New Posters Due:**

At the start of each year, employers should be sure to update the legally-mandated posters that provide notice to employees of their many rights. These posters change every time the laws do. Most employers purchase an "All-In-One," laminated poster that covers federal and state requirements. These can be purchased from many outlets, including the Chamber of Commerce. However, most employers fail to examine these posters and fill in the many blank portions left for the employer to complete. These portions include identifying the employer's workers' compensation carrier and related information, as well as stating the employer's pay periods and payday information. Also, these standard posters cover most, but not all, of the required notices. There are several that are specific to a limited number of employers that are not included on such a general item. Also, each employer must post the Wage Order applicable to its specific industry. These are available from the Labor Commissioner's Office, which can be accessed on-line through WAAG AND CO.'S website at "government links."

### **New I-9 Forms Required Starting February 2, 2009:**

There is (yet another) update to the I-9 that employers are required to use, starting February 2, 2009, but Homeland Security doesn't have it ready yet. It is expected to contain minor changes, including the list of acceptable identification documents — stay tuned.

#### **A**ction Notes:

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#### **R**oute to:

HR Dept: \_\_\_\_\_

Accounting Dept: \_\_\_\_\_

Benefits Admin: \_\_\_\_\_

Managers: \_\_\_\_\_

*This bulletin is a general overview of the subject matter, and is not meant to provide professional opinions regarding any specific case, matter, or set of facts, or to substitute for the professional advice of WAAG AND CO. Instead, please contact SUSAN S. WAAG, ESQ. for additional information.*

## □ **Additional Litigation Bonanza: The Paycheck Fairness Act:**

In our recent newsletter (*The Strategic EMPLOYER*, December 2008, available now at [www.waagandco.com](http://www.waagandco.com)), we featured a lengthy article on page 8 - 9 that discussed some of the more prominent employment-related legislation being promoted by the coming Obama administration and democrat Congress. We have another major piece of legislation to be added to the list of payback for the trial lawyers involving the concept of “comparable worth” in employment.

The so-called “Paycheck Fairness Act” goes something like this: gender discrimination is the only possible explanation for why truckers (working in a male-dominated profession) get paid more than teachers (working in a female-dominated profession), even though teaching requires a higher degree of education! Certainly, it couldn’t be because truckers work long, hard hours spent away from home for days or weeks at a time, often without benefits, whereas teaching, though often a challenging profession, is considered by the teachers themselves to be a rewarding field, complete with full benefits, along with all national holidays and entire summers taken as time off from work.

The Paycheck Fairness Act would nonetheless require labor officials to use the concept of “comparable worth” in creating “voluntary” guidelines for industries. Voluntary or not, these guidelines would become the basis for litigation against companies that don’t follow them. Meanwhile, the legislation would strip companies of many defenses against claims of sex-based pay discrimination. For instance, the act may result in the following situation:

*Consider a company with two employees in a division: a man with ten years experience and a newly hired woman. If the company paid the man greater wages for his greater experience, the woman could insist that the employer provide her with intensive training to make up the experience gap, and then pay her identical wages. And if the company refused? The woman in question could sue.*

Without going into the exhaustive details of this possible new and complex workplace legislation, the act would make it easier to bring class actions, and allow plaintiffs to claim unlimited punitive damages even in cases of unintentional discrimination.

This legislation was passed in Congress last year, but was blocked by Senate Republicans. With at least seven more Democrats in the Senate, they may be able to convince enough Republicans to get it passed into law. President-elect Obama, of course, supports this legislation and would assumedly sign it into law, regardless of the fact that it would raise employer workforce costs in the middle of a deep recession.

## □ **Susan Waag to give Legal Update for HRACC on January 13, 2009:**

Human Resources Association of the Central Coast (“HRACC”) will be featuring employment law attorney Susan Waag as their Legal Update speaker. The HRACC regular professional development meetings are held on the 2nd Tuesday of the month. Meetings are from 11:30am - 1:00 pm at: The Madonna Inn (unless noted otherwise), located at 100 Madonna Road in San Luis Obispo, CA 93401 (805) 543-3000.

HRACC Meeting Agenda: 11:30am-Noon: Networking and lunch served; Noon-1pm: Professional Development Program See [www.hracc.net](http://www.hracc.net) or email [operations@hracc.net](mailto:operations@hracc.net) for more information. Mark your calendars now and plan on attending.

Attendees: Non-HRACC members are welcome at these meetings. Reservations should be made by going to the HRACC website at [www.hracc.net](http://www.hracc.net). Meetings with lunch are currently \$20 for members with advance reservations; Members with late reservations are \$25; Guests of members with lunch are \$25; and Non-Members with lunch are \$30. Meetings without lunch are currently \$10 for members, guests, and non-members.

## □ **Susan Waag to give Legal Update for the Atascadero Chamber of Commerce on January 20, 2009 at 7:30am:**

Susan Waag will also be giving an employment law update for 2009 at the Atascadero Chamber of Commerce’s “Empower Hour” on January 20, 2009 at The Carlton Hotel, 6005 El Camino Real. Please see [www.atascadereochamber.org](http://www.atascadereochamber.org) for more info, or email [info@atascadereochamber.org](mailto:info@atascadereochamber.org), or call (805) 466-2044. This Networking Breakfast is only \$10.00 (at the door) and runs from 7:30am to 8:30 a.m.

*Attorney SUSAN S. WAAG speaks frequently before business organizations, non-profit groups, and professional associations at breakfast, noon-hour, and evening programs. Contact her office for availability for your organization or association.*

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