

The Strategic *EMPLOYER*

Employment Law & Human Resources Consulting Services

The Road Ahead for Employers

Welcome to the first edition of *The Strategic Employer*. This newsletter is meant as a working tool for employers to help them explore areas that may be of strategic value to their business.

The actions that managers take today will affect the quality of your workforce for years to come. Such actions may also be judged by juries as many as three years from now. What will be the context in which such actions will be judged? In order to prevail in such circumstances, employers need to look to the horizon and recognize the approaching legal trends.

The goal of *The Strategic Employer* is to make you aware of some of the more important new laws that have come out in 1999, as well as what to expect as the year progresses. For better or worse, we expect that there will be no shortage of changes to report.

For years, California's Republican governors have vetoed most legislation that would have imposed burdens on

employers. As the November 1998 elections swept Democratic leaders into the Governor's office, the Attorney General's office, and the Legislature, this will change. Much of the previously vetoed legislation has already been proposed in the new session, and Governor Davis has expressed his support. The anticipated new laws are discussed on page 4 in this edition of *The Strategic Employer*.

Other trends will also be important. Attorney General Lockyer has announced that he will more than double the number of State attorneys and staff devoted exclusively to civil rights issues. He specifically mentioned tougher and broader enforcement of employment discrimination laws as a priority.

While sexual harassment is expected to continue in the spotlight, several other issues are expected to figure prominently in the coming year. Most significant will probably be disability discrimination, age discrimination, privacy, and dispute resolution.

We hope that the information we provide will be useful in your strategic planning. As always, Waag and Co. is available to assist employers in every aspect of employment relations.


Waag and Co.

In April 1998, attorney Susan S. Waag founded Waag and Co., a firm specializing in Employment Law and Human Resources Consulting Services, representing employers exclusively.

Waag and Co. was established with the goal of providing employers with practical, strategic guidance in personnel matters, backed up by strong legal expertise. So far, Waag and Co. has worked with over 65 different employers with great success. These include employers engaged in manufacturing, high tech, public sector, health care, government contracting, transportation, construction, banking, and service industries.

Susan Waag has substantial experience as an employment law attorney and human resources consultant. For more than thirteen years, she has devoted her career to working only with employers. This includes several years as in-house employment counsel to a Fortune 500 Company, and as a partner in a private law firm. (See firm resume on page 7). Susan also serves as the 1999 President of the Central Coast Personnel Association ("CCPA")—see page 10. In the last seven years, she has provided expert consultation to approximately a third of the 75 largest employers in San Luis Obispo County.

Waag and Co. also provides **Supervisor and Employee Training** (see page 5), expert **Human Resources Consulting Services** (see page 7), and a variety of **Problem Prevention Services** (see page 9). Our services cover a broad range of areas of expertise (see page 7).

For more information, please contact Susan Waag at Waag and Co. 



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- _____
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Workplace Law Compliance

New Employment Laws for 1999

New Restrictions on Employer Surveillance in Locker Rooms, Restrooms

Effective: January 1, 1999

Affects: All Employers

Some employers have felt it necessary to watch employees in locations ordinarily regarded as private in the hope of thwarting theft of company property or drug deals. A recent American Management Association survey revealed that about 63% of mid and large-sized firms monitor their workers. An ACLU report found that from 1992 to 1996, the number of people electronically monitored at work ballooned from about eight million to more than 20 million.

Under the new, stricter surveillance law, it's illegal to make an audio or video recording of an employee in a locker room, restroom or any area designated for changing clothes. Moreover, this restriction applies *even if you notify employees that the area is under surveillance*. The only exception to the new rule is if a court authorizes the recording.

Violating the new rule is a criminal infraction, which is less serious than a misdemeanor but may still result in a fine. Of equal if not greater concern, *the employee could file a lawsuit against you for violating their right to privacy*. Plus, if you discharge someone based on an illegal audio or video recording, the person could *sue for wrongful termination as well*.

For Surveillance Guidelines regarding using Cameras, recording conversations, and use of 2-way mirrors, contact Waag and Co.

Health Coverage Available For More Part-Time Workers

Affects: Benefits Administration for all Employers

Effective: January 1, 1999

Existing law requires that health care service plans and insurers serving small employers make coverage available without exclusions based on an employee's medical condition or history.

For purposes of this law, small employers are organizations with two to fifty employees.

Until now, insurers and health plans have been required to offer coverage only to regular (as opposed to temporary) employees who work at least 30 hours a week and satisfy any waiting period requirements. Even if an employer wanted to offer coverage to part-time employees, insurers and health plans had the right to refuse.

The new legislation gives employers the option of extending health benefits to many part-time employees not covered under the prior rules. If you are a small employer, your insurer or health care service plan must now give you the option of offering health benefits to regular part-time employees who work between 20 and 29 hours a week.

If an employer chooses to cover part-time employees, the benefits need to be made available on the same basis as they are to full-time employees, provided these conditions are met:

- 1. The worker meets the definition of an *eligible employee*. This means the employee must work at your regular place of business, satisfy any waiting period requirements and be employed on a regular, not temporary or substitute, basis.
- 2. The employee worked for you at least 20 hours per week during at least 50% of the weeks in the previous calendar quarter.
- 3. You offer health coverage to all part-time employees who meet the above conditions.

Deciding what type and level of benefits to offer employees involves numerous considerations. However, once those factors are decided, many employers will implement changes or make choices for handling particular issues without checking to see that their actions fall within the terms of the insurance contract. A well-known example is an employer who paid to continue an employee's life insurance policy while the employee was on a medical leave. The employee died and

the insurance company refused to pay, noting that the insurance contract did not permit coverage during an employee's unpaid leave. Since the employer had previously assured the employee's family that the life insurance would not be affected, the court ordered the employer to *pay the \$100,000 death benefit*.

Review insurance contracts to determine if current and desired practices comply with the actual terms of the contracts.

Unemployment Benefits For Domestic Violence Victims

Effective: January 1, 1999

Affects: All Employers

Under existing law, employees who quit voluntarily cannot receive unemployment benefits unless they leave for *good cause*. Examples of good cause include discrimination or harassment, undue risk of industrial injury or illness, or the fact that a spouse is relocating too far away for the employee to commute.

The new law expands the good cause definition to cover *domestic violence*. Workers who quit to protect themselves or their children from domestic violence will be considered to have left the job for good cause—and will be eligible to collect unemployment benefits.

If you follow certain simple procedures, the benefits paid in such cases *won't be charged* against your unemployment insurance account. To avoid having your account charged, you must submit facts to the Employment Development Department (EDD) indicating that the employee left in order to seek protection from domestic violence. You must do this *within ten days of receiving notice* that an employee has filed for unemployment (or within 15 days of receiving a notice of computation if you weren't the most recent employer). This would be required even if the person has already told the EDD that this was the reason for his/her resignation.

continued on page 3



New Laws 1999...

Continued from
previous page

Employment Application Fee Prohibited

Effective: January 1, 1999

Affects: All Employers

It is now a misdemeanor for employers to require the payment of a fee or consideration of any type by an applicant for employment. Earlier this year, the Labor Commissioner sued Northwest Airlines for charging job candidates a \$25 application fee.

Genetic Characteristics Added to FEHA as Basis for Discrimination

Effective: January 1, 1999

Applies to: Employers with Five (5) or more Employees

The FEHA definition of *medical condition* has been expanded to include genetic characteristics, which are defined "as any scientifically or medically identified gene or chromosome...that is known to be a cause of a disease or disorder in a person or his or her offspring, or is determined to be associated with a statistically increased risk of development of a disease or disorder, or inherited characteristics that may derive from the individual or family member, that is presently not associated with any symptoms of any disease or disorder."

Review application forms and all policies and procedures relating to employment physical exams to ensure compliance.

Cal/OSHA Adopts Needlestick Safety Regulation on an Emergency Regulation Basis

Phase-In Date: August 1, 1999

Applies to: All Health Care Employers

The California Occupational Safety and Health Standards Board approved an emergency regulation to protect health care workers from potentially contaminated hypodermic needles and other sharp instruments.

The new measure applies to all worksites where employees face exposure to needlestick injuries.

Employers are required to phase in a series of *sharps injury prevention techniques*.

The regulation calls for all health care facilities and research laboratories to implement and maintain a written *exposure control plan* to eliminate or prevent needlestick injuries among workers.

Nearly 100,000 California health care workers are injured by accidental needlesticks annually, according to Cal/OSHA. Using the *sharps injury prevention devices* required by the new regulation could reduce the number of injuries by 76%, the Standards Board says.

Final Rule on OSHA Forklift Operator Training

Effective: January 1, 1999

The Occupational Safety and Health Administration issued a final rule that establishes new training requirements for forklift operators and drivers of other industrial trucks. Before operating the trucks, operators must receive classroom-type training, practical instruction and hands-on evaluation. Operators must also be evaluated periodically and receive *refresher training* whenever necessary. The final rule covers all industries in which powered industrial vehicles are used.



~TOWARDS 2000~

Business News Briefs

- Mega-Mergers to continue in 1999:** This era of record mergers makes the '80s look mild in comparison. The question for shareholders continues to be *will the merger be a long-term success?* The \$1.62 trillion of announced U.S. deals in 1998 almost doubled 1997's record \$906.5 billion, though the actual number of deals was about the same. The trends driving the merger frenzy—a push to compete globally, increase shareholder value, and achieve cost synergies—are *expected to continue in 1999*.
- Eleven nations launched the euro** on 1/1/99 to create the world's second-largest economy. The historic commitment by Germany, France, Italy, Spain, the Netherlands and half a dozen other nations launched the first common currency in Europe since the days of the Roman Empire two millennia ago. It will be three more years before euros—in the form of bills and coins—reach the public's hands, and until then the familiar German mark, French franc and other national moneys will remain in use. The euro is now the official basis for all stock and bond trading and for many noncash transactions like credit card charges or dealings between businesses. Experts concede that the *U.S. has little to fear* with the euro, which will vie with the U.S. dollar as the world's currency of choice. In fact, there are many benefits to the U.S., including savings in exchange fees and transactions costs.
- New IRS mileage rate** reduced from 32.5¢ per mile to 31¢—effective April 1, 1999. Many employers use this rate for mileage reimbursement for employee auto usage.
- The nation's economy surged forward** at the end of 1998, capping workers' best year since the 1960s as it shattered most forecasts of job growth for 12/98 and pushed down the unemployment rate to an unusually low 4.3%. Despite a flurry of headline-making layoffs throughout the fall, U.S. employers created 378,000 nonfarm payroll jobs in 12/98—almost double economists' expectations. Analysts were struck by the U.S. economy's powerful, enduring performance in a year that featured withering recessions throughout Asia and worldwide financial mayhem.



Bracing for a Turbulent Year

What to Expect from Our New Leaders

Over the past eight years, Governor Wilson vetoed almost 250 employment-related bills, many of them proposing increased benefits and protections for *workers*, or increased responsibilities and penalties for *employers*. With the election of Democratic governor Gray Davis, many of those bills will resurface this year—and some already have.

What's more, Governor Davis has already appointed a long-time labor activist to head the Department of Industrial Relations. This agency is critical to employment issues in California because, among other things, it oversees Cal/OSHA and the Labor Commissioner. Also, the newly-elected

Attorney General, Bill Lockyer has announced plans to double the number of civil rights attorneys, and has promised to play a more aggressive role in fighting discrimination and protecting the rights of women and minorities in all areas, including employment.

Employers should be alert to the following possible changes:

- Daily Overtime:** Davis has stated his intentions to repeal the IWC standard established last year, which did away with the daily overtime requirement under Orders 1, 4, 5, 7 and 9.
- Minimum Wage:** Davis is likely to be under great pressure from organized labor to increase minimum wage.

- Age Discrimination:** Legislation vetoed by Governor Wilson would have prohibited the use of salary distinctions as a basis for hiring or discharge determinations, if such distinctions would adversely impact older workers. This legislation will resurface.
- Arbitration:** The changing of the guard may also affect the enforceability of arbitration agreements (see page 10). Recently, the legislature passed and Governor Wilson vetoed a bill which would have rendered unenforceable pre-dispute agreements to arbitrate employment claims.
- Aggressive Regulatory Activity:** Governor Davis will be pressured to make less conservative appointments to various posts, such as the California Occupational Safety and Health Standards Board. Such appointees may be inclined to issue *even stricter* occupational safety and health regulations.
- Employee Absence:** Laws creating more protections for employees taking time off for court appearances.
- Healthcare:** Requirements for health insurers to offer domestic partner coverage.
- Independent Contractor Status:** Changes in the rules for determining if a worker is an independent contractor or an employee.
- Judicial Appointments:** A great wild card will be the effect of Davis' labor-oriented judicial appointments. Such appointments can drastically affect the *interpretation of employment laws*.
- Miscellaneous:** Many more proposals are expected throughout the year, including those which would *liberalize family leave laws, extend sexual harassment protections to independent contractors, and require pregnancy accommodation.*



~RIDE THE WAVE~

Human Resources Mega-Trends

- Absenteeism on the Rise:** *Unscheduled absences* because of conflicts between work and family have jumped to the top of the list of reasons for missing work, pushing ahead of the traditional leader, *illness*. A new survey of 400 employers reveals that unscheduled absences hit an all-time high in American workplaces, increasing 25% over the last 12 months. Possible solutions (if properly implemented): 1. Paid time off plans 2. No-fault policies 3. Alternative work arrangements 4. Flexible scheduling Attendance bonuses.
- Trend Observation:** With the decline in organized labor, labor policy based on union collective bargaining is increasingly being replaced with legislation and judicial mandates guaranteeing individual worker rights.
- One of the Most Underreported Labor Movements:** Across the U.S., at least 30 cities have enacted *living wage legislation*, with a dozen or more additional campaigns waged by organized labor and community groups on the way. The living wage movement centers around wages, benefits, and worker protections for individuals, much like unions provide for groups.
- The High Costs of Middle-Ageism:** The low national unemployment rate masks a decrease in the age at which high income earners hit their peak earnings. The median earnings for the two million men between 45 and 54 with four years of college fell in constant dollars from \$55,000 in 1972 to \$41,900 in 1992. Only those with a *tenure* employment profile—labor, government, academia—see their earnings peak at retirement. Many well-compensated mid-age earners are being displaced in the workforce, and often settle for *underemployment*, with no pension in sight.
- Office Romance:** Companies are taking an increasingly active role in the delicate area of sexual relationships between employees. With workplace lawsuits running wild, employers are resorting to new techniques, such as 1. Informed consent contracts 2. Increased harassment prevention programs 3. Banning or discouraging boss-subordinate relationships.



Waag and Co. Services

Management Training

Waag and Co. offers a wide range of management and employee training courses to educate and prepare your staff for problem prevention and efficient workplace practices. For each course offered, Waag and Co. meets with you in advance to customize the materials to meet your particular needs. The curriculum is presented with overhead slides prepared for your session, along with extensive, printed reference material for all participants.

Managing Performance, Minimizing Risk MT-01 Course covers quality management practices, including the employment relationship (at-will, express and implied contract), the dangers of mismanagement, and managing employees while minimizing exposure to liability. Generally covers all phases of employment, including hiring, appraisals, discipline, and termination. *Our most popular course.*

Sexual Harassment Training MT-02a, MT-02b No employer expects to face a complaint of sexual harassment. However, recent Supreme Court rulings have heightened awareness among employees and their lawyers regarding harassment litigation. Employers are increasingly facing suits by both the alleged victim and the harasser arising out of the investigation (or lack thereof)

of harassment complaints. The best approach to dealing with this issue is prevention, with quality training for both supervisors and non-supervisors as a critical component.

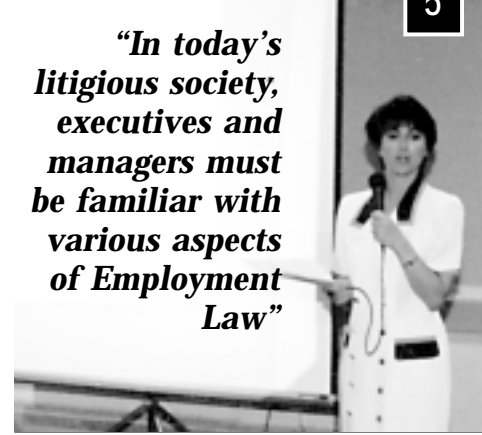
Performance Evaluations and Employee Documentation MT-03, MT04 Covers a range of employment documentation, including applicant data, personnel files, medical records, rehabilitation records, injury records, third-party requests for records, personnel policy manuals, recommended documentation, inappropriate records, and e-mail.

Additional Courses covering: Wage and Hour Law, Protecting Business Information, Leaves of

“In today’s litigious society, executives and managers must be familiar with various aspects of Employment Law”

Absence, Workplace Privacy, Hiring, Discipline, Discharge MT-10, MT-11, MT-12, MT-13, HD-01, HD-02, HD-03

Need more information? Please call Waag and Co. to discuss your training needs. We can send you detailed outlines and pricing information for each course. Other course topics are also available.



~Cal Poly~

Advanced Employment Law—Spring '99

Tuesday evenings (6:30pm-9:10pm) beginning March 30, attorney Susan S. Waag will be teaching *Employment and Labor Law II* at Cal Poly Extended Education. This is an advanced-level course and is open to all interested parties who already possess basic knowledge of employment issues. This 10-week course is popular with local Business Managers and HR Professionals wishing to expand on a solid foundation in this constantly changing field. The course fee is \$165; call Cal Poly Extended Education at (805) 756-2053 (course #MDS-94062) to reserve your space.



~Waag and Co. Course List~

| No. | ~ Course Description~ | Recommended Course Hours | Range of Hours |
|--------|---|--------------------------|----------------|
| MT-01 | <input type="checkbox"/> Managing Performance, Minimizing Risk | Four | Four to Eight |
| MT-02a | <input type="checkbox"/> Sexual Harassment Prevention for Supervisors | Three | Two to Four |
| MT-02b | <input type="checkbox"/> Sexual Harassment Prevention for Non-Supervisors | Two | Two to Three |
| MT-03 | <input type="checkbox"/> Quality Performance Evaluations | Two | Two to Four |
| MT-04 | <input type="checkbox"/> Effective Employee Documentation | Two | Two to Four |
| MT-10 | <input type="checkbox"/> Hot Topics in Wage and Hour Law..... | Two | Two to Four |
| MT-11 | <input type="checkbox"/> Protecting Confidential Business Information..... | Two | Two to Three |
| MT-12 | <input type="checkbox"/> Understanding Leaves of Absence | Two | Two to Three |
| MT-13 | <input type="checkbox"/> Issues in Workplace Privacy | Two | Two to Three |
| HD-01 | <input type="checkbox"/> Hiring Employees..... | Two | Two to Four |
| HD-02 | <input type="checkbox"/> Employee Terminations | Two | Two to Three |
| HD-03 | <input type="checkbox"/> Effective Handling of Employee Problems..... | Two | Two to Three |

~Millennium Bug~

Y2K and HR

HR professionals will face many challenges as they join in the preparation for the Year 2000 computer glitch, ensuring that employee records, 401(k) plans, benefit programs and other benefits records remain intact. To aid in that activity you should be: contacting your software and hardware vendors to check on the status of Y2K compliance issues, and developing detailed contingency plans for HR. **Help:** To aid in your efforts, the government has set-up a Toll-Free Y2K information hotline. By dialing (888) USA-4Y2K or going to <http://www.y2k.gov>, consumers can get status seven days a week, 24 hours a day on how personal computers, small businesses, telephones and other products or services will be affected by the approaching year 2000.

First Real Y2K Test: Worries that the first few days of 1999 would bring computer problems similar to those expected when the dreaded Y2K bug hits appear to be mostly unfounded. There were concerns that computers looking a year ahead could crash, or that the 99 in 1999 would signal programs to cease calculating. For the most part, computers operated smoothly. *Report Source: AP 1/5/99*

Buy a Y2K Compliant Computer: About 1.5 million owners of small businesses, from accounting firms to restaurants to jewelry makers, said they *have not taken any action* to prevent the dreaded millennium bug, according to the study by the National Federation of Independent Business. In a recent poll, one-third of small business owners plan to do *nothing*, a new study shows. Some of the holdouts say the expense and the time required to upgrade systems and software is too heavy a burden for a small business to bear. The solution for many is simply to *get rid of their computer* and buy a new one! *Report Source: AP 1/7/99*



New E - Laws

E-News for Employers

E-mail Threats: An existing law against threatening *telephone calls* is expanded to cover threatening *e-mail messages*. Violators face a fine of up to \$1,000 and as much as three years in state prison.

Unwanted E-mail is Trespassing: A California judge has issued a preliminary injunction prohibiting a former Intel Corp. employee from sending messages critical of the company to his former coworkers. Intel successfully argued that the messages, which were sent to as many as 30,000 employees, constituted a form of trespass. In his ruling, Superior Court Judge John Lewis noted that Intel's computer system "is not a public forum."

Anti-Spam Laws: A new law makes it a crime to use a California computer network to send online ads that violate the policies of an e-mail provider. People or companies that send blizzards of so-called *spam* in violation of bans will be subject to civil penalties and criminal fines of up to \$25,000 a day. Another new law requires senders of unsolicited e-mail advertisements originating in California to add *ADV: or ADV:ADLT* to the subject lines of all messages, allowing users to more easily delete unwanted e-mail. Anyone sending such messages must also allow consumers to remove their names from future mailing lists.



Taming the E - Beast

Internet Access Policies

While there is no one-size-fits-all Internet access policy for all companies, control over what happens when your employees access the Internet is important. A good Internet access policy should be developed to avoid issues ranging from invasion of privacy to sexual harassment.

Your company policies for Web and Internet access should spell out activities that are strictly forbidden, such as pornography, but still remain flexible enough to accommodate a variety of circumstances. The consequences for violating the policy, from a warning to dismissal, should be clearly spelled out.

Concerns by employers range from employees wasting time to creating a hostile workplace environment that can lead to charges of sexual harassment.

Employers can install various kinds of software on workplace computers to monitor or restrict Internet access by employees, allowing managers to identify which workers are at risk of wasting too much time or engaging in improper activities.

While the effectiveness of such software can vary, employers need to balance this against the impact such an approach (particularly the "Big Brother" types) may have on morale.

Stories of Internet abuse abound. When retail giant K-Mart rolled out Internet access to 1,000 employees with high expectations, the person in charge of maintaining its Web-site created a link between their official home page and a pornographic Web-site. Not exactly the type of productivity that management had in mind.

The Internet is a valuable business tool for its ability to send documents and electronic mail quickly and cheaply, as well as its immediate access to up-to-date reports, research and information. Having a *written policy* is critical to protecting sensitive company information, avoiding lost productivity and preventing legal problems such as harassment. Unfortunately, only about one-third of companies surveyed have established formal policies regulating online behavior. *What about your company?*



Waag and Co. Services

Human Resources Consulting Services

For select clients we provide HR Consulting and Employment Law Services on a *contract basis*. These contracts are flexible in duration, hours and services delivered. Waag and Co. has experience providing services to Fortune 500 companies, as well as hundreds of central coast businesses. We will work as part of a team with your management and staff to meet your goals. Exact terms of the contract are designed to meet your specific needs. Typical services delivered by Waag and Co. on a contract basis include:

- In-House Training
- Training of In-House Trainers
- Sexual Harassment and other Employee Problem Investigations
- Human Relations Audits
- Strategic Planning
- Personnel Policy Manuals
- Hiring, Discipline, Discharge
- Compensation and Benefits
- Mergers and Acquisitions
- Protecting Trade Secrets
- Workplace Law Compliance
- Wage and Hour Law
- Employment Contracts
- Drug Testing Policies
- Litigation Avoidance
- Employer Representation before the DFEH, EDD, DLSE, NLRB, EEOC, and other government agencies

Services are delivered based on the following steps:

- 1. Needs Analysis:** Performed at no charge to determine how we may meet your needs, Waag and Co. will meet with you to discuss your Employment Law and Human Resources Consulting requirements. The goal is to detail the services needed and time requirements.
- 2. Frequency:** A typical contract consists of the general type of Consulting Services to be performed within a specified hourly time commitment each month. Examples:

one-year contract at twelve hours per month; six-month contract at eight hours per week; etc.

- 3. Billing Rate:** With the contract comes a reduced billing rate for both contract hours and any additional hours requested. When the contract comes up for renewal, any unused

hours may be rolled forward to the next contract period.

- 4. Request for Proposal and Referrals:** We will respond immediately to your request for a proposal and supply referrals from companies who have contracted with Waag and Co.



~FIRM RESUME~

Susan S. Waag, Esq.

Susan S. Waag is a seasoned employment law attorney who works exclusively with businesses and non-profits to prevent and resolve personnel issues. Since 1985, she has been providing representation and advice to Fortune 500 companies as well as small businesses, including proactive counseling and in-house training to TRW Inc. and the Golden State Warriors of the NBA. Her practice focuses on litigation avoidance and helping employers understand and comply with the myriad of laws affecting them. This includes a broad range of advice to employers, from handling day-to-day employment matters to successfully navigating high risk personnel issues, plus development of proactive strategies for problem prevention.

Ms. Waag has counseled employers with respect to employee disciplinary action and termination, sexual harassment, leaves of absence, wage and hour, discrimination, disability accommodation requirements, labor union matters, employee drug testing, violence in the workplace, and other issues. Ms. Waag also assists employers in drafting personnel policy manuals, preparing employment contracts, and in developing high quality, realistic personnel practices. She represents employers before numerous government administrative and enforcement agencies regarding discrimination, wage and hour, union issues, and more. Ms. Waag frequently provides in-house training for companies on a variety of subjects related to quality management and litigation avoidance.

Ms. Waag is a *cum laude* graduate of U.C.L.A., and received her law degree from U.S.C. in 1985. While attending U.S.C., Ms. Waag was a member of the Law Review. Following law school, Ms. Waag was associated with the Los Angeles law firm of Hill, Farrer & Burrill as a labor attorney. In 1989, she joined TRW Inc. as in-house labor counsel with responsibility for its 25,000 employee Space & Defense Sector. Upon moving to San Luis Obispo in 1992,

Ms. Waag joined the firm of Sinsheimer, Schiebelhut & Baggett, where she became a partner in its employment law practice.

In 1998, she founded the firm of Waag and Co., which is dedicated to helping businesses create quality personnel practices and avoid problems through a full range of employment law and human resources consulting services. Ms. Waag is a member of the Labor and Employment Law Section of the California Bar Association, and is President of the Central Coast Personnel Association. She also teaches Labor and Employment Law courses at California Polytechnic State University, San Luis Obispo.





Workplace Safety

Workforce Drug Testing Update 1999

Short-Term Employee Retains "Applicant" Status for Purposes of Drug Testing

The plaintiff in this case was hired as a managerial employee on the condition that he pass a pre-employment drug test. Although the drug test was supposed to have been administered *before* plaintiff commenced his employment, it did not occur until four days after plaintiff was placed on the payroll due to scheduling problems *caused by the plaintiff*.

When he tested positive for marijuana use, the company withdrew the offer of employment since he had not yet performed any services for defendant.

The plaintiff sued, alleging wrongful termination in violation of public policy and violation of his right to privacy. Plaintiff claimed that since he was an *employee* and not an *applicant* at the time of the drug test (a fact the employer did not dispute), the employer

could not require him to be subjected to a *suspicionless* drug test.

The court held that plaintiff was an applicant for purposes of determining whether he could be drug tested without a reasonable suspicion of the use of drugs, since he had been employed for such a short period of time and had spent most of those four days away from the office searching for new housing.

Had the facts been slightly different (such as the employee having done meaningful work during his few days of employment), the result *may* have gone the other way. Pre-employment practices are extremely valuable—but only if they are followed *diligently*.

Mandatory Drug Tests Ruled "On Company Time"

The time employees spend taking mandatory drug tests and physical examinations must be compensated as working time, according to a recent

opinion letter issued by the Department of Labor ("DOL"). This is true even if employees must submit to this testing during non-work hours.

Employees who were subject to the federal Department of Transportation's ("DOT") rules were required to take mandatory random and post-accident drug tests and physical exams.

Generally, when an employer imposes special requirements which employees must meet before they begin or continue work, the time spent fulfilling these requirements benefits the employer and is integral to the jobs employees are hired to perform. The DOL also noted that it was *immaterial* that employees were tested during non-work hours.

Action: Update employment policies to reflect mandatory drug-testing is performed "on the clock."

CHP Units Cracking Down on Written Drug Testing Policies

Waag and Co. was recently alerted to a situation regarding Department of Transportation ("DOT") drug testing requirements that may affect your business. In the past, California Highway Patrol ("CHP") inspection units tended to focus on checking to see that DOT-regulated drivers have been subject to random testing.

Recently, some of our clients have reported that CHP inspection officers are also scrutinizing written DOT drug testing policies. In particular, the CHP may be concerned with whether you have a zero-tolerance policy, or if not, how you will respond to a positive drug test. The CHP will also be focusing on whether or not you are properly conducting pre-employment screening and background investigations.

Waag and Co. has prepared written DOT drug testing policies and procedures for many clients, and can provide your company with customized policies and procedures for a reasonable fee.



~THIS IS NEW!~

Employment Law Briefs

- Unpaid Wage Claims:** The California Court of Appeal held that an ex-employee who brought a claim for unpaid wages was entitled to a waiting time penalty based on one day of pay for each day of delay up to 30 calendar days of pay (rather than a day of pay for each *work* day during a 30 day period). Accordingly, penalties continue to accrue even on days the employee would *not* have worked.
- Minimum Driving Age Down to 17:** A new federal rule sets the minimum job-related driving age at 17, but with restrictions including:
 - 1. such driving may amount to no more than one-third of the minor's work time in a day, or 20% during a full week;
 - 2. driving is allowed only during daylight;
 - 3. the teen must complete a drivers' education course.*Previously*, employees under 18 could not drive unless it was only occasional and incidental to their job.
- Texaco pays \$3 million to women workers** who received less than their male counterparts in a settlement that sends a strong message to other businesses. The pay disparity at Texaco, a company that was the subject of a landmark racial discrimination settlement just over a year ago, was discovered through federal audit.



Waag and Co. Services

Problem Prevention Services

Employment laws and regulations change at a dizzying pace, and employment litigation is flourishing. Involvement in disputes is time-consuming, expensive, and a drain on a business's productivity and resources.

Ironically, many such disputes could have been avoided through the adoption of relatively inexpensive programs, policies, and diligent human resources management techniques.

Many Waag and Co. clients have elected to aggressively pursue litigation prevention measures. Although no technique can eliminate the risk of litigation, all employers can benefit from an analysis of their exposure to employment litigation and the adoption of prevention-oriented policies, practices and employee training.

Below is a brief list of just some of the unique prevention services available from Waag and Co.

Employment Relations Audits range from brief reviews of critical employment documents to intensive on-site examination of the full spectrum of the employment relationship and legal compliance. Special focus audits can be provided to closely examine one or more specific issues, such as anti-discrimination laws, wage and hour regulations, union avoidance, sexual harassment, etc.

Employment Contracts: Employment and arbitration agreements are not just for key individuals, but also for persons at all levels of pay and responsibility. Employment contracts that define the rights of employers, employees, and independent contractors help reduce or eliminate employment disputes, and limit liability.

Supervisor and Employee Training: Quite often, litigation arises or a case is lost as a result of a front-line manager saying or doing the wrong thing, even if well intended. Waag and Co. provides training for managers and employees, or we can work with your in-house staff.

See Page 5 of this newsletter for courses available from Waag and Co.

Forms and Guidelines are available to Waag and Co. clients to deal with both standard and difficult employment relations issues. They are kept current to comply with state and federal employment laws, cover a variety of topics and can be customized for your company's special needs. Just a few examples:

- Hiring and Termination Checklists*
- Interviewing Techniques, Effective Questions, and Do's and Don'ts*
- Discipline and termination letters*
- Unionization Issues*
- ADA Accommodations*
- Time and Attendance Sheets*
- Exit Interviews*
- Leaves of Absence*
- Personnel Transaction Forms*
- Performance Evaluations*
- Trade Secret/Confidential Information Protection*
- Job Descriptions*
- Educational Reimbursement Programs*
- Safety Incentive Programs*

Personnel Policy Manuals are among the most effective tools available to an employer to promote good employee relations and prevent and defend lawsuits. However, such manuals are not one-size-fits-all, but instead must be custom tailored to meet the business and legal needs of your workplace. We work closely with you to develop a set of policies that meet the needs of your business in a manner that will be understood by your employees.

An employer's workforce represents one of its most significant assets. Many employers wisely establish programs and policies to enhance employee morale and facilitate performance. Employee discontent can lead to union organizing efforts, diminished productivity, lawsuits, and more.

A well drafted employee handbook is among the most important and effective tools available to an employer to promote good employee relations and to prevent and defend lawsuits. It clearly tells employees what is expected of them, and tells them of actions they

might expect of management. A well drafted handbook does this while providing the flexibility needed to respond to different situations.

Look at just one example: An employer facing a layoff without a written layoff policy will often be met with a hostile workforce claiming unfairness. Employees will react strongly to any layoff selection criteria used (i.e., seniority, merit, job transfers, bumping, etc.) This situation is one of the most common triggers of union organizing drives, and one that may be easily avoided by adopting a layoff policy before any layoffs are needed. Moreover, the policy can be drafted in a variety of ways, affording the company the means to effect the layoff while protecting its continued viability.

~Waag and Co.~

Problem Prevention Bulletins

Waag and Co. issues *Bulletins* to keep clients up-to-speed on important employment law news as it occurs. These bulletins analyze the issue in detail, and are sent primarily to clients, via e-mail, regular mail or fax. Below is a partial list of bulletins that have been issued recently by Waag and Co. To receive a copy of any of these bulletins, please fax your request to Waag and Co., and be sure to provide all necessary contact information. Please indicate how you would like receive it (Fax, Mail, E-mail).

- New U.S. Supreme Court Rulings on Sexual Harassment (07/98).
- Offering Several Individual Health Policies Results in Group Plan Subject to COBRA (11/98).
- State Supreme Court Rules Disability Discrimination May Now Be Brought Under Worker's Comp and FEHA (11/98).
- Individual Liability Under FEHA Reduced (11/98).



Alternative Dispute Resolution

Mandatory Arbitration: Uncertain Times

Employers are often hearing about the advantages of arbitration over litigation: it is likely to be faster and much less expensive. Usually, the arbitrator is also an expert in the field of employment law, and will not be as susceptible as juries to *emotional arguments* that might nullify legal principles.

However, this last reason is why plaintiffs' lawyers love juries—the *emotional issues* often represent the real dollar potential of a case. Plaintiffs' lawyers have always waged war against arbitration. But recently, they have been *winning* some of the major battles, leaving everyone wondering about the future of mandatory arbitration agreements.

Recently, a number of *conflicting court decisions* affecting California employers have been issued. These

cases have focused on discrimination claims and the importance of a jury in seeking relief for alleged civil rights violations.

□ **Federal Courts:** First, the Federal Court of Appeals held that a mandatory arbitration provision unilaterally placed by management in an employee handbook was *not* a knowing and voluntary waiver of an employee's right to a jury trial. The court was concerned that the employee may not have read the provision, and also did not have an opportunity to accept or reject the arrangement.

Then, in May, 1998, the same court invalidated a detailed, stand-alone arbitration agreement. The employee signed the agreement as part of her acceptance of various terms and conditions of her employment offer.

The court held that this also was not *truly* voluntary, since the person had to choose between accepting employment and retaining her right to a jury trial for discrimination claims. The court indicated that one of the main flaws of

the arbitration agreement was that it did not give the employee the chance to sign an arbitration agreement that *excluded* federal discrimination claims. This ruling suggested that an arbitration agreement with an option for excluding such claims *should* be enforceable.

□ **California Courts:** Meanwhile, the *California courts* were issuing conflicting rulings. In September 1998, the State Court of Appeal dismissed a sexual harassment suit by an employee who sought to avoid an arbitration provision contained in an employee handbook. The court held that signing a handbook receipt that included a statement agreeing to abide by the company's mandatory arbitration process was an *enforceable* promise to arbitrate.

□ **Back to the Federal Courts:** In December 1998, the same Federal court took the matter a step further and held that the Federal Arbitration Act—a law that favors arbitration—*simply did not apply* to employment agreements. Accordingly, the court held that the arbitration agreement involving the employee was unenforceable. This issue is expected to be appealed to the U.S. Supreme Court.

□ **Possible Legislation:** The California legislature has put employment arbitration agreements in its gun-sights. Legislation has already been proposed to invalidate arbitration agreements with employees that are signed *before* a dispute has arisen.

□ **What Can Businesses Do Now?**

While the wrangling over this issue continues, mandatory arbitration of certain employment issues *should* still be valid. If you do want to use an arbitration agreement, it must be properly drafted to maximize the degree of enforceability. Among other things:

- 1. Do not hide the arbitration provision in an employment application or just drop it into a handbook.
- 2. Use a stand-alone agreement that fully spells out the impact of the arrangement.
- 3. Provide an option to exclude federal discrimination claims.

~Court Ruling~

Spouse May Sue Partner's Employer

Husbands or wives can sue their spouse's employer if bosses make false promises to lure them into relocating for a new job, a federal appeals court ruled recently.

The decision provides families of increasingly mobile workers with new recourse when employers fail to make good on their hiring offers. In ruling against defense contractor Raytheon Co., the U.S. 9th Circuit Court of Appeals in San Francisco said it realized that "spouses make decisions as a family unit rather than as separate individuals." The case will be returned to the lower court for a trial.

□ **Action:** Take extra precautions when recruiting prospective employees who would need to relocate. Be sure hiring managers know what they should and should not say about opportunities and expected longevity.



C.C.P.A.
CENTRAL COAST PERSONNEL ASSOCIATION

Susan Waag was elected President of the Central Coast Personnel Association ("CCPA") for 1999. The CCPA functions as a Network of Personnel Professionals, as well as a Human Resources Educational Association. CCPA Professional Development Luncheons are held on the 2nd Tuesday of the month from 11:30am to 1pm at the Embassy Suites in San Luis Obispo. If you are interested in additional information on the CCPA, or would like to attend a CCPA meeting as a guest, please contact Susan Waag at (805) 783-2300.



Problem Prevention Focus

Employer Investigations: The Key to Good Faith

There has been much in the news about the need to investigate claims by employees that they have been victims of discrimination or harassment. The courts will conclude that if you did not investigate it, then you must have condoned the bad behavior.

In response to this concept, some employers have preferred to avoid any appearance of condoning wrongdoing by simply terminating *suspected* wrongdoers. The problem is that these alleged wrongdoers can also *sue you*. If the fired employee can establish an express or implied agreement not to dismiss except for *good cause*, the employee would have the opportunity to attack whether or not good cause really existed. *If you did not even investigate, then how could you have had good cause?*

The California Supreme Court ruled last year that if the company did a fair and thorough investigation, and as a result had a *good faith belief* that the bad conduct occurred, the jury should not be given the chance to examine whether or not the employer was right.

In a wrongful discharge case, the only questions for the jury are:

- 1. Did the employer have reasonable grounds for believing that the bad conduct occurred?
- 2. Was the situation thoroughly investigated?
- 3. Did the employer otherwise act fairly?

More recently, some employers have also been sued for *defamation* when they took action based on unsubstantiated allegations.

In one case, an employee was accused by a supervisor of selling company property at a garage sale. The employee was fired without being given a chance to explain. It turns out he was at a company meeting during the time of the alleged garage sale, and no one had actually seen him doing anything.

The court held that by acting on *gratuitous gossip* without an adequate investigation, the supervisor was guilty of defamation. Since the supervisor was acting as an agent of the employer, and the employer ratified the defamation by *not investigating*, the employer was also

held liable.

What to Do: Whenever there is an allegation of wrongdoing, be sure to get the facts properly:

- 1. Talk to the accused employee and get both sides of the story, and make sure you get the complete version.
- 2. Talk to all witnesses the accused employee thinks might have relevant information.
- 3. Conduct these interviews as discreetly as possible. Discourage gossip, even if it seems innocent; if it spreads, it can be big trouble.
- 4. Keep disciplinary actions confidential from those without a genuine need to know.
- 5. Before you undertake an investigation, get advice from experienced counsel regarding the issues involved and how best to proceed. If you are uncomfortable investigating the matter yourself, or have concerns about the appearance of impartiality, have a trained professional conduct the investigation for you.

Leased Workers... *Continued from back page*

managers. Or, the business can accept the prospect of joint employer status and include as part of the staffing agreement a clear and solid indemnification provision that apportions liability. In either event, a good indemnification agreement is a prudent precaution. If you are engaging an individual as an independent contractor, a written agreement and clear understanding of the arrangement is also essential.

2. Use a Quality Staffing Service: Make sure that the Staffing Service is solvent and reputable; ask if they can provide proof of bonding or insurance. Obtain written assurances that the Staffing Service properly follows all applicable labor and employment laws, and explore what that means to them.

3. Review Your Benefit Plans: If you are not providing your own company's benefits to the contingent workers, make sure that your plan documents clearly state that the plan only includes workers who are listed on your payroll as regular employees and make specific exclusions to address the contingent worker issue. In doing so, you should first consult with legal counsel to ensure that you are properly able to exclude certain groups of workers from any selected benefit plan.

4. Require a Waiver: Assuming proper exclusion, you may also gain protection by having all contingent workers sign a waiver of any rights to employee benefits for the period during which you had designated them as contingent workers.

~Opportunities~

Looking for a Guest Speaker?

Attorney Susan S. Waag speaks frequently before business organizations, non-profit groups, and professional associations at breakfast, noon-hour, and evening programs. She is available throughout the year for a limited number of engagements, and can cover any Employment Law or Human Resources topic of interest to employers. Hand-outs are provided for general guidance on the topic chosen. Popular topics include:

- What's New in Employment Law
- Sexual Harassment
- Performance Appraisals
- Termination Do's and Don'ts
- Wage and Hour Law
- Dealing with Problem Employees



Employer Beware: The True Status of “Leased” and “Temporary” Workers

It is an understatement to say that employing a person in the State of California is a highly regulated activity. Many businesses believe that they can rid themselves of such complications by using *leased* or *temporary* employees from a *Professional Employer Organization* or a *Temporary Employment agency* (collectively referred to as *Staffing Services*).

Business owners know that such workers have a formal employment relationship with the Staffing Service. For this reason, business owners often will assume that they have *no legal relationship* of their own with the workers, and that the Staffing Service will be *solely liable* for employee injuries, discrimination claims and wrongful termination.

Unfortunately, such assumptions can result in costly mistakes for the business. Businesses using such services should be aware of the risks as well as the benefits and take steps to protect themselves when deciding to use a Staffing Service.

When Are Workers Employees?

Under many laws, the question of who is the legal employer will depend on the *economic realities* of the relationship. A court or enforcement agency will look at factors such as:

- 1. Who controls and directs the employee’s day-to-day activities;
- 2. Who is in the best position to ensure safe working conditions;
- 3. Who interviewed and selected the employee;
- 4. Who provides the equipment and tools;
- 5. Where is the work performed;
- 6. How long has the person worked for you;
- 7. Who determined the employee’s pay level.

Accordingly, even when workers are hired and paid by a Staffing Service, they may still be considered *your employees*. In other words, if the workers look, act and sound like your employees, they probably are. This can be true even if the Staffing Service is *claiming* to be the worker’s employer; the court may recognize you both as *joint employers*.

The Federal Court of Appeals covering California has issued rulings imposing liability on businesses for

benefits owed to leased workers.

In a recent case, PG&E had thirteen workers who initially worked at PG&E through various outside staffing firms and were classified as temporary or leased employees. They were trained by PG&E, used PG&E equipment, and were provided with PG&E business cards and letterhead. The staffing agencies, however, paid them and claimed to be the employer.

After several years, PG&E changed the arrangement, transferring day-to-day control to the staffing agency, and stopped allowing the workers to use PG&E business cards and letterhead or otherwise to hold themselves out as PG&E employees. The employees were laid off and then sued for unpaid benefits. PG&E argued that the workers were employees of the staffing agency, and that the benefits plans excluded *leased workers*.

The Court of Appeals reviewed the IRS Code, which defines *leased employees* as:

- 1. Non-employee workers who work for you for more than one year;
- 2. Are supplied under an agreement between you and a Staffing Service, and
- 3. Are under your control.

The Court questioned whether the PG&E workers were truly “non-employee” workers, based on consideration of 20 separate factors, including:

- 1. How much control PG&E had;
- 2. Who provided equipment and tools;
- 3. Where the work was performed;
- 4. Discretion over hours and time of work, and
- 5. All the other factors mentioned above for

determining who is the employer.

Under these criteria, many workers are likely to be judged to be *employees*, much to the surprise of the company *leasing* them. In the PG&E case, it was sent back to the trial court to determine *whether or not they were employees*.

Remember the Microsoft Case? The court for the PG&E case is the same court that previously issued a similar ruling against Microsoft. In that case, the IRS had audited Microsoft’s records and concluded that many of their *independent contractors* were actually *employees* for the purpose of withholding and employment taxes.

The misclassified workers then brought suit to obtain certain employment benefits that Microsoft had made available only to its *employees*. The court held that thousands of workers should collect retroactive 401(k) benefits and stock worth \$133 a share that the *employees* were allowed to buy at \$5 per share in 1987!

Precautions You Can Take: As more companies turn to contingent workers, concern over claims of misclassification and imposition of *employer obligations* will grow. Qualified and experienced legal counsel can protect you by:

- 1. Properly Structuring the Arrangement:** A business using a Staffing Service can protect itself from unexpected joint employer liability in two ways. It can try to avoid joint employer status by structuring the staffing arrangement in such a way that the business exercises little or no control over the workers. However, this option may present operational difficulties for

Leased Workers... *continued on page 11*

WAAG AND CO.

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