

# The Strategic **EMPLOYER**

Employment Law & Human Resources Consulting Services

## Employers Struggle to Keep Up


The anticipated onslaught of workplace legislation is now in full swing. Within this issue of *The Strategic EMPLOYER* is a summary of some of the more important new pieces of state and federal legislation affecting California employers, as well as indications of things to come. It is unlikely that Governor Gray Davis, supported by the unions and a democrat-controlled Legislature, is done concocting potent employment law cocktails for employers to swallow. In addition to what has already been enacted for January 1, 2000, employers should be on the lookout for the following:

**UNEMPLOYMENT COMPENSATION FOR NEW PARENTS ON LEAVE:** The U.S. Department of Labor has proposed new regulations that would permit states to use surplus unemployment benefits to pay employees who take family leave to care for newborn or newly adopted children. California is already one step ahead of the federal government: Governor Davis

signed SB 656 in 1999, requiring the EDD to examine the cost of extending unemployment benefits to any employee on family or medical leave—not just new parents. The EDD’s report to the Legislature is due July 1, 2000.

**OSHA PUSHES NEW ERGONOMIC SAFETY RULES:** The federal government is moving forward with its proposal aimed at lessening repetitive motion injuries. The so-called “ergonomic” regulations would be added to those already going into effect in California, adding another layer of requirements.

**RETURN FROM THE DEAD:** Several laws that did not make it to or past the Governor’s desk are expected to return this year. This includes bills that would expand family and medical leave to include time off to care for a grandparent, sibling or domestic partner, and to extend coverage to employers with as few as 20 employees. Another bill that evaporated but is likely to return would prohibit *pre-dispute agreements to arbitrate*, with penalties for violations.

*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.

We take great pride in our reputation as one of the Central Coast’s leading providers of employment law and human resources consulting services, working exclusively with employers. We believe that the success of our practice is based on our ability to provide practical, timely, accurate advice to employers of all sizes and industries.

Since 1998, Waag and Co. has worked with over 100 different employers with great success. These include companies engaged in industrial, high-tech, medical, dental, legal, non-profit, service, retail, wholesale, service, construction, engineering, government, hospitality, agriculture, ranch, communications, and media industries.

Susan Waag has substantial experience as an employment law attorney and human resources consultant (see firm resume on page 9). Since 1985, she has devoted her practice exclusively to serving employers. Ms. Waag has provided expert consultation to approximately one-third of the 75 largest employers in San Luis Obispo County.

Waag and Co. provides a variety of problem prevention services, including: **SUPERVISOR AND EMPLOYEE TRAINING, INTERNAL INVESTIGATIONS, PERSONNEL POLICY MANUALS, EMPLOYMENT RELATIONS AUDITS, HUMAN RESOURCES CONSULTING SERVICES and EMPLOYMENT CONTRACTS.** Our services cover a broad range of expertise in the matters most important to employers (see page 9).

*For more information or additional printed materials on the services we provide, please contact Susan Waag at Waag and Co. *

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# New Employment Laws for 2000

Y2K more than any other year in recent memory, has begun with a barrage of new and complex laws for California employers. Adding to the burden is the fact that previously existing employment law requirements have not been simplified, reduced or eliminated. New layers have been added, and new theories for lawsuits thus are born. With so many new laws, we are covering only those that would have the greatest impact on the day-to-day operations of most employers. We have divided them into general categories for easier reading.



## Section A: Discrimination & Harassment

### AB 1670: California Civil Rights Amendment of 1999

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** All Employers (most provisions)

Existing law prohibits business establishments from discriminating against, boycotting, blacklisting or refusing to buy from, sell to or trade with any person because of the race, creed, religion, color, national origin, sex or disability of any person or the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers.

This bill additionally prohibits discrimination because of

- 1. A perception that any of those persons has one or more of the above protected characteristics, or
- 2. A person is associated with someone who has, or is perceived to have, any of those characteristics.

Quietly slipped into the bill was the addition of language to the harassment prohibition found in the Fair Employment and Housing Act (FEHA). The new law makes it illegal to harass not only your employees, but any

person providing services pursuant to a contract. This means that independent contractors (including repairmen and others not employed by you) can now sue for harassment under the FEHA if they have done any work for you.

In addition, the bill makes it unlawful for an employer, or any other entity, to require testing for a *genetic* characteristic, or to inquire into or request information regarding the *physical or mental condition* of an applicant except as specified.

It also makes it unlawful for an employer to refuse to provide a reasonable accommodation for a pregnant employee if she requests it upon the advice of her health care provider. The bill authorizes the court to award the prevailing party, in a civil action brought under FEHA, reasonable attorneys' fees, costs and expert witness fees.

The bill also adds a definition of *supervisor* to the FEHA, in order to make it easier to hold employers liable for co-worker harassment. An employer is liable whenever an employer (i.e., its supervisors) knew or should have known of harassment and failed to take immediate corrective action. The new definition of *supervisor* is broad, and includes any individual who directs others or can effectively recommend employment actions.

Finally, the bill increases the damages cap on administrative fines in proceedings before the FEHC from \$50,000 to \$150,000.

**STRATEGY:** Review personnel policies to ensure they prohibit harassment of any person, not just employees. Ensure that policies provide for reasonable accommodations for pregnant workers. Step-up anti-harassment training for all employees who may be deemed "supervisors." Make sure that employees responsible for purchasing and marketing decisions are not exercising any illegal prejudices and understand their obligations under this new law.

### SB 26: Age Discrimination—Disparate Impact

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** Employers of 5 or more employees

With this bill, the Legislature rejects *Marks v. Loral Corp.*, 57 Cal.App.4th 30 (1997), in which the California Court of Appeal held that existing law permits an employer to make layoff selections based on an employee's higher salary, even though this practice may have a disproportionate impact on older employees who tend to earn higher salaries. The bill declares that a court may find that the use of salary as a criteria for termination constitutes age discrimination *if older workers are disproportionately affected*.

As a result, the court may view *higher salary* as a proxy for *age*, and it is no longer a defense to an age discrimination claim to assert that salary levels, not age, were the basis for a layoff decision.

**STRATEGY:** Have a carefully thought-out compensation structure that bases pay levels on the value of work performed, not on how long a person has been employed. Take care that reasons for all personnel decisions are clearly articulated and properly documented. Periodically analyze personnel matters to avoid possible adverse-impact problems.

### AB 1001: Adding Sexual Orientation to FEHA

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** Employers of 5 or more employees (one or more re: harassment)

This bill moves the provisions prohibiting employment discrimination on the basis of sexual orientation from the Labor Code to the FEHA. Thus, the same statute of limitations (one year instead of 30 days) and remedies (including attorneys' fees) for other types of discrimination now apply to sexual orientation discrimination.

One additional change is that FEHA

**New Laws** continued on next page

## New Laws 2000...

*Continued from previous page*

exempts only certain nonprofit religious organizations, whereas the Labor Code exempts *all* nonprofit organizations.

The bill defines sexual orientation as heterosexuality, homosexuality or bisexuality, and protects employees against discrimination on the basis of actual or perceived sexual orientation.

**STRATEGY:** *Ensure that anti-discrimination/harassment policies, practices and training reflect this issue.*

### SB 211: Employer Now Identified by W-2 Form in Discrimination Cases

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** *Employers of 5 or more employees (one or more re: harassment)*

This bill creates a rebuttable presumption that *employer*, as defined by the FEHA, is the employer listed on the employee's IRS Form W-2. Once the W-2 employer rebuts this presumption, the employee has an additional one year to file a complaint with the DFEH naming the *true* employer.

### AB 1541: Religious Organizations Lose Exemption Under FEHA

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** *Religious entities with 5 or more employees (one or more re: harassment)*

Under existing law, employers subject to the California FEHA do not include religious associations and corporations that are not organized for private profit.

The bill makes the Act's exemption inapplicable with respect to persons employed to perform duties, other than religious duties, at a *health care facility* operated by the religious corporation or association at which health care is not limited to adherents of the religion that formed the association or corporation.

The exemption remains, however, as to

1. Religious corporations with respect to the employment and promotion of individuals of a particular religion, and application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of

health care and

2. Nonprofit public benefit corporations incorporated to provide health care on behalf of a religious organization with respect to employment and promotion of individuals in executive or pastoral-care positions connected with the provision of health care.

**STRATEGY:** *Organizations no longer exempt from the FEHA need to review policies and provide training to managers regarding FEHA obligations.*



## Section B: Payroll & Benefits

### AB 60: Daily Overtime

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** *All Employers*

There are numerous aspects of this law. Refer to *The Strategic EMPLOYER*, August 1999, page 1 and page 2.

Overtime premiums must now be paid (under most Wage Orders) at time-and-a-half for hours worked in excess of eight in a day and 40 in a week. Employees must also be paid time-and-a-half for the first 8 hours on a seventh day worked in a workweek. Double-time must be paid for hours worked in excess of 12 in a workday and in excess of 8 on the seventh day worked in a workweek. For the first time, on-site construction workers will also be covered by the overtime requirements.

There are complex provisions for adopting alternate workweek schedules without overtime obligations and for allowing employees to make up limited time off during a workweek. Employers should consult legal counsel before attempting to utilize such schedules.

**STRATEGY:** *Revise policies, notices and payroll practices to conform to new laws.*

**New Laws** continued on next page



~The New Millennium~

## Business News Briefs

- Y2K RELIEF FOR FILERS WHO CAN'T COMPLY WITH TAX RULES BECAUSE OF COMPUTER SNAFUS:** The IRS will abate penalties and interest for individual and business taxpayers if they can prove they tried to prevent Y2K glitches that caused the non-compliance, tried to comply despite the problems, and promptly notified the IRS of problems at 1-800-829-1040.
- NEW IRS MILEAGE RATE** allowed for business use of a car in 2000 is 32.5 cents, up from 31 cents since April 1999. Many employers use this rate for mileage reimbursement for employee auto usage.
- IN A CONCESSION TO THE RESTAURANT INDUSTRY,** the IRS will no longer audit restaurateurs on tip reporting, so long as they try to comply with tax laws on reporting of tips—even if their waiters and waitresses are cheating.
- THE ANNUAL IRS INTEREST RATE** for the period January 1 through June 30, 2000, for delinquent taxes and contributions will be eight percent (.08), compounded daily. The daily interest factor will be .000219.
- MANY BUSINESSES OBJECT TO NEW RULES ON THE TAXING OF ASSET SALES:** Tucked into a bill recently signed by President Clinton is a provision that changes the way "accrual method" businesses are taxed when they sell assets and receive installment payments. Up to now, when a firm sold assets or its entire business, the buyer often paid in cash installments and the seller owed taxes on profits as it received installments. Under new rules, the seller would pay taxes on the full purchase price in the year of sale. Lobbyists will try to reverse the rule.
- TAX TEASE:** Numerous tax breaks were proposed but not passed in 1999. Will 2000 bring relief? Y2K being an election year, the usual pundits are betting that nothing significant on the tax front will be passed into law.

## New Laws 2000...

*Continued from previous page*

### AB 109: Sick Leave for Family Members' Illness

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** All private, state and municipal employers

For employers who offer any kind of paid sick leave, AB 109 requires that workers be allowed to use paid sick leave not only for their own illness, but also to care for a sick child, spouse or parent. Employers cannot add restrictions, such as requiring children or parents to live with the employee in order to use this benefit. Grandparents and other relatives are *not* covered. The law does not require employers to offer or increase paid sick leave; it controls the operation of paid sick leave policies.

Employers must permit workers to use at least one-half of their annual allotment of paid sick leave to care for sick family members. However, the issues involved in tracking this limitation on the use of sick leave *may not be worthwhile*. Nothing in the law prevents employers from simplifying the

issue and just permitting employees to use any or all of their paid sick leave for either their own or family members' illnesses.

If you place restrictions on a worker's ability to take sick leave—for example, by requiring medical certification for extended absences—you can impose the same limitations on time off to care for an ill family member. Similarly, if you allow employees to use sick time for their own doctors' appointments, you must allow use for doctors' appointments of covered family members.

The new law also provides for stiff penalties for penalizing or otherwise retaliating against workers who use sick leave under the new law.

**STRATEGY:** *Ensure that personnel policies reflect the new law.*

### SB 56: Time Off to Appear in Court for Victims of Domestic Violence

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** All employers

Existing law prohibits employers from discriminating or retaliating against employees who must serve on a jury or appear as a witness.

This bill additionally prohibits employers from discriminating or retaliating against employees who are victims of domestic violence and must appear in court to obtain restraining orders or other injunctive relief necessary to ensure their health and safety. The employee must give the employer reasonable notice except in emergencies. Employees must be permitted to use any paid vacation time that is otherwise available to them to cover time lost for this purpose.

**STRATEGY:** *Ensure that supervisors understand this new provision and excuse employees from work for this purpose.*

### Federal Law: Work Incentives Improvement Act

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** All employers

Currently, once a disabled person is accepted into the Social Security Disability or Supplemental Security Income program, he or she becomes

eligible for Medicare or Medicaid but can earn no more than \$700 per month. If he or she earns more, government support is entirely cut off.

The Work Incentives Improvement Act revamps the law so that workers with disabilities can continue to receive Medicaid and Medicare benefits, even if they work full-time. It also allows them to choose between state-funded vocational rehabilitation and private programs that link them to jobs.

### SB 651: Pharmacists Lose Exemption

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** All Pharmacists

Certain categories of workers are exempt from the overtime provisions of California's wage and hour laws. One exemption is for *professional employees*, which is *narrowly* defined to include only people who are licensed or certified to perform in one of several listed occupations. With this new law, *pharmacists* have been removed from this list.

Under this law, a person employed in the practice of pharmacy is not exempt from coverage under any provision of the wage orders, unless he or she individually meets the criteria established for exemption as executive or administrative employees (i.e., the pharmacist is also a supervisor, etc.).

**STRATEGY:** *Apply normal hourly payroll practices to pharmacist employees.*

### AB 633: Garment Manufacturers

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** All garment-industry employers

This bill revises the definitions of several key terms to broaden the scope of laws covering garment manufacturers. The bill makes garment manufacturers liable for payment of minimum wage and overtime compensation to their contractors' employees. Employees may collect double the amount of their unpaid wages, plus attorney's fees.

Manufacturers who purchase the business of another manufacturer are also liable for the unpaid wages owed

**New Laws** *continued on next page*

### ~Court Ruling~

#### "Perma-Temps" Ruling Stands

On 1/10/00 the Supreme Court refused to free Microsoft Corp from having to pay as many as 10,000 temporary employees who were not allowed to join the company's lucrative stock-purchase program. The justices let stand a federal appeals court ruling that Microsoft said has far-reaching implications for the field of employment law. Microsoft had classified some employees as temporary workers to avoid paying certain benefits and to cut costs. The price of Microsoft's stock has risen nearly 2,400 percent since the original lawsuit was filed in 1992. Refer to *The Strategic Employer* August 1999 page 6 and February 1999 page 12 for additional coverage of this case.

## New Laws 2000...

*Continued from previous page*

by the seller.

Under prior law, the DLSE could confiscate any goods produced by a manufacturer who is unregistered; the new law permits the DLSE to confiscate the manufacturer's production equipment as well. The bill also raises registration and renewal fees.

**STRATEGY:** Increase diligence in ensuring that contractors comply with wage and hour obligations. Review contracts for indemnification and other protections in the event of a problem.



### Section C: Workplace Safety

#### AB 1127: Be a Manager, Go To Jail Longer

**EFFECTIVE:** January 1, 2000

**APPLIES TO:** All employers

This bill extends from 30 days to 6 months the time within which to file an administrative complaint for discharge of, or discrimination against, an employee who complains of unsafe working conditions or who refuses to engage in unsafe work.

The bill also increases the penalties for safety violations. The law provides that every officer, management official or supervisor having direction, management, control or custody of any employment, place of employment or any other employee who knowingly or negligently commits a serious violation of, or repeatedly violates, or refuses to comply with any Cal-OSHA safety order or standard is guilty of a misdemeanor.

Officers, managers and supervisors can be jailed for up to one year and/or fined up to \$15,000, with a fine of up to \$150,000 for corporations. If the violation results in a serious injury or death, the penalty is imprisonment of up to three years and/or a fine of up to \$250,000 for individuals, and a fine of up to \$1.5 million for corporations.

In addition, the bill repeals the prohibition against assessing certain civil penalties against government

agencies. Instead, the law authorizes civil or administrative penalties against a school district, community college district, California State University, University of California or other specified educational entities to be deposited into the Workplace Health and Safety Revolving Fund, to be refunded or used for specified purposes.

#### New Cal/OSHA Rules: Training Requirements for Forklift / Industrial Truck Operators

**EFFECTIVE:** July 15, 2000 (note date)

**APPLIES TO:** All employers except agricultural operations.

Cal/OSHA has released comprehensive new guidelines for training forklift and other industrial truck operators.

Covered vehicles are those that carry, push, pull, lift, stack or tier material.

The new standards mirror recent

federal requirements.

Every employee hired before July 15, 2000, who operates an industrial vehicle, must receive thorough training by that date on how to use the equipment. All those hired after July 15, 2000, must complete the training before operating an industrial vehicle. Training programs must include classroom instruction, on-the-job training and evaluations of each worker. Specific topics must be covered.

Each employee must undergo full training at least once, and must be reevaluated at least once every three years. Refresher training is also required under each of the following circumstances:

- 1. The employee operates the vehicle in an unsafe manner, is involved in an accident or near-miss, or, as shown by an evaluation, is not operating the truck safely.

**New Laws** continued on next page



~Looking to 2001~

## New-Hire Reporting Expanded

### AB 196 and SB 542: Independent Contractor Reporting

**Effective:** January 1, 2001 (note date)

**Applies to:** All businesses

Under existing law, employers must report certain details about new hires to the Employment Development Department. This information is used to track down parents who are delinquent in paying child support. Beginning January 1, 2001 (the start date was pushed back from July 1, 2000), new-hire reporting requirements will be expanded to include the requirement that employers report the hiring of independent contractors.

Employers will have to supply a host of information—such as the identity of the contractor and the contract's dollar amount—to the EDD for any contractor who is not an employee if your payments to the individual are, or will be, at least \$600 in any year. The data must be submitted within 20 days of the earlier of:

- 1. The point at which payments to the contractor reach \$600 in a year; or
- 2. The date you enter into a contract with an independent contractor providing for payments that equal or exceed \$600 in any year.

Because of this new legislation, the EDD will learn details about your relationships with independent contractors. Although the law restricts the EDD from releasing the information you provide, it's possible the data could prompt the agency to audit your classification of workers. At that point, watch out for the Targeted Industries Partnership Program and the Joint Enforcement Strike Force (see article on page 7).

**STRATEGY:** It will be more important than ever to be sure you can justify classifying workers as independent contractors rather than as employees. Take time during the year 2000 to analyze your independent contractor relationships and ensure that they each can establish their independent status. If at all possible, obtain documentation that will support independent contractor status, such as a business license, etc.

## New Laws 2000...

*Continued from previous page*

- 2. The employee is assigned to drive a different type of truck.
- 3. There is a change in workplace conditions that could affect safe truck operation.

The new rules mandate that you certify in writing all required training, evaluations and reevaluations. The certification must include the worker's name, the dates of the training or evaluation, and the name of the person who conducted it. Although the new rules don't specify penalties for noncompliance, Cal/OSHA can impose steep fines and even jail time.

**STRATEGY:** *Obtain a full set of the requirements from your workers' compensation carrier. Start training and evaluating employees. Establish a calendaring system to track reevaluation dates.*



### Section D: Workplace Privacy

#### AB 1689: Employee Discipline for Off-Duty Conduct

- EFFECTIVE:** *January 1, 2000*
- APPLIES TO:** *All employers*

With little public discussion, A.B. 1689 was signed by Governor Davis and went into effect on January 1. The law allows the Labor Commissioner to seek lost wages for employees who are demoted, disciplined or fired for *lawful conduct occurring during non-working hours*

*away from the employer's premises.*

Existing laws already bar you from interfering with some of what an employee can do after hours, such as engaging in political activities, but this new provision is *potentially much broader*. It bans any interference with an employee's lawful conduct during their personal time—a practice sometimes referred to as *lifestyle discrimination*.

Although it will take some time for courts to sort out what's covered by the new measure, the impact of A.B. 1689 could be far-reaching and significantly change current law. For example, the law might apply if you discipline an employee for moonlighting for a competitor or for having a romantic relationship with a subordinate employee—although one hopes that courts would consider whether you had a legitimate business reason for your actions.

Under the new law, an employee could file a claim for lost wages with the Labor Commissioner. Plus, the law may make it easier for someone to win a wrongful termination lawsuit. This is because the statute could support a worker's argument that firing them for off-duty conduct violated public policy.

Policies that require employees to avoid conflicts of interest and to report potential conflicts should still be valid, so long as they are used to resolve conflicts rather than to fire workers. Because of the significance of such conflicts and the possibility that the courts may apply common sense to the interpretation of such policies, it may be premature to simply eliminate such policies. *Extreme caution is advised.*

**STRATEGY 1:** *Focus on performance.*

You can, of course, discipline or terminate a worker whose personal actions directly interfere with or negatively impact their job performance. Make sure work-related problems are well documented and the person has been made aware of them. Focus on those issues—rather than the after-hours activity—when taking disciplinary action.

**STRATEGY 2:** *Protect trade secrets.*

Although a blanket prohibition on moonlighting may not be enforceable, prohibiting moonlighting for a competitor may still be legitimate. You can still take action if you learn that your trade secrets have been disclosed or used other than for your benefit.

**STRATEGY 3:** *Terminate with caution.* You usually can discharge at-will employees at any time without providing a reason. But steer clear of mentioning off-the-job activities. Even a hint of a connection between the termination and after-hours conduct could set you up for an expensive legal dispute.

#### SB 19: Confidentiality of Medical Records

**EFFECTIVE:** *January 1, 2000*

**APPLIES TO:** *All employers*

Existing law, known as the Confidentiality of Medical Information Act (Civ. Code §§ 56 et seq.), prohibits health care providers from disclosing medical information except in specified circumstances. This bill *broadens* the prohibitions on disclosure of medical information to include all health care service plans and contractors of health care providers, as defined, including medical groups, medical service organizations and pharmaceutical benefit managers. The bill expressly prohibits:

- 1. Negligent disposal or destruction of medical information; and
- 2. The intentional sharing, sale or use of medical information for any purpose not necessary to provide health care services to the patient, except as otherwise authorized.

The statute amended by this bill also contains provisions imposing obligations on those who receive confidential medical information (which

**New Laws** *continued on next page*



### ~Education~

## Cal Poly Employment Law II—Spring '00

Tuesday evenings (6:30pm-9:10pm) beginning March 28, 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 to reserve your space (course #MDS-94062).

## New Laws 2000...

*Continued from previous page*

often includes employers) to protect the confidentiality of the information and prevent its misuse.

**STRATEGY:** *Ensure that any documents reflecting confidential medical information of employees are maintained under lock-and-key, and that managers understand that they are not to discuss any employee's medical condition except on an absolute need-to-know basis.*

### AB 794: Subpoenas of Personal Records

**EFFECTIVE:** *January 1, 2000*

**APPLIES TO:** *All employers*

Existing law (Code Civ. Proc. §§ 1985.3, 1985.6) provides procedures to subpoena personal records and employment records maintained by a third party witness. The bill expands the definition of *personal records* and *employment records* to include electronic data, and expands the definition of *witness* to include various health care professionals and postsecondary schools.

The bill also deletes the requirement that the date specified on the subpoena for the production of records be not less than fifteen days from the date a party issues the subpoena, but does not specify an alternative time period. The law requires, however, that the person to whom the records relate must receive a copy of the subpoena a specific period in advance of it being served on the custodian of the records, so that the person has an opportunity to object to the subpoena.

Finally, existing law requires any party who subpoenas medical records in a workers' compensation proceeding to send a copy of the subpoena to all parties of record in the proceeding. The bill makes that provision applicable to any records subpoenaed in a workers' compensation proceeding.

**STRATEGY:** *If you receive a subpoena or other request for an employee's records, do not produce any records until after you have consulted with an attorney. If you produce the records*

*before the employee had a chance to object, there could be trouble! Also, certain records may be requested that should not be produced at all.*



## Section E: Miscellaneous New Laws

### AB 1268: Limitation of Labor Union Liability for Unlawful Acts of Individual Members

**EFFECTIVE:** *January 1, 2000*

**APPLIES TO:** *All employers*

This bill contains provisions similar to those already existing under federal law (Norris-LaGuardia Act) limiting a labor union's liability for the unlawful acts of individual members, unless clear proof exists of actual participation in, authorization or ratification of those unlawful acts. The bill also imposes conditions on the authority of California courts to issue temporary and permanent injunctions in labor disputes. In addition, it imposes numerous conditions and delays on injunction hearings, including requirements that the complainant post an undertaking (bond), and present live witness testimony.



# CCPA

CENTRAL COAST PERSONNEL ASSOCIATION

**Susan Waag** served as 1999 President of the Central Coast Personnel Association (CCPA) and continues on its board in Y2K. The CCPA functions as a Human Resources Networking and 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.

### SB 319 & AB 613: Battle Against Underground Economy Extended

**EFFECTIVE:** *January 1, 2000*

**APPLIES TO:** *All employers in targeted industries*

Under existing law, the DLSE operates a program known as the Targeted Industries Partnership Program (TIPP) that focuses on the garment and agricultural industries to enforce state and federal health and safety laws. There is also a Joint Enforcement Strike Force (JESF) that enforces payroll tax laws in many sectors, including the construction and service industries. This bill would require the Division of Industrial Relations to include the janitorial and building maintenance industry within the TIPP commencing in the 1999-2000 fiscal year, and within the JESF commencing in the 2000-01 fiscal year.

**STRATEGY:** *Increased diligence in compliance with labor and health and safety requirements.*

## ~Court Ruling~

### Harassment Victim Can't Sue Co-Worker

Last year, an appellate court held that a victim of sexual harassment by a coworker *can't sue the individual harasser* under the Fair Employment & Housing Act. In December 1999, the State Supreme Court upheld this ruling. This decision comes a year after the Court also barred FEHA suits against individual employees for workplace *discrimination*.

When an employee is harassed by a co-worker, the employer will be liable under the FEHA only if he/she knew or should have known of the harassment and failed to take immediate corrective action. If an employer learns about harassment after the fact, and acts quickly to remedy the problem and prevent a recurrence, then *no matter how severe the harassment, if it's by a co-worker there will be no recourse* under the FEHA, stated the Court.



OSHA Does About-Face on Recent Inquiry

## Employers Still Responsible for Home Safety

In the first week of Y2K, OSHA issued an opinion letter stating that companies who allow employees to work at home are responsible for federal health and safety violations that occur at the home work site. Per the opinion letter, this obligation would cover all work done at home, even the parent who has to dash out of the office to be with a sick child and finishes a memo at home.

The letter also stated that *employers have an obligation to inspect home work sites*. OSHA stated that this was not a new rule, but merely a declaration of existing policy.

Within two days, the opinion had created so much controversy that U.S. Labor Secretary Alexis Herman *withdrew* the interpretation letter. This withdrawal of the letter does not, however, change OSHA's view of employer responsibilities. Moreover, Cal-OSHA has long held the same standards with respect to the home work site.

The Labor Secretary indicated that the controversy has raised important questions about what protections Americans who work at home can expect from the government. She said

she will convene a conference of business and labor leaders and set up an interagency task force to conduct a wide-ranging study of the issue.

According to Herman, "Employers are responsible for employee safety and health, but we don't know what that means and how that applies to these new work arrangements in the home today."

While hastily withdrawing its opinion letter, OSHA officials insisted that the withdrawal did not constitute a change in government policy and that the agency would take no new action. Neither OSHA nor Cal-OSHA has ever conducted government inspections of home offices. However, since the authority of both state and federal workplace safety law extends to every work site, no matter where the employee toils, the ostensible authority of the government to conduct home office inspections exists.

The real result of the OSHA letter and its *withdrawal* is to raise the issue of how workplace safety rules apply in the home and to assure employees that the government will not drop in for an inspection. However, employers still could be held liable if they know or

should reasonably have known about home workplace hazards and fail to correct them. This would include everything from computers that overload home electrical circuits, to rickety stairs leading to a basement office, to ergonomic safety issues.

Telecommuting is a rapidly growing practice, with estimates of over 19 million Americans working at home. Although employers have long understood that they are responsible for safety whenever and wherever an employee is working, the letter has ignited a fierce debate that is likely to have a chilling effect on the willingness of many employers to allow telecommuting. However, since most telecommuting arrangements are reserved for a company's most trusted employees, with careful planning, such arrangements should still be successful.

□ **STRATEGY:** *It is suggested that companies should train people to set up safe home offices and limit the areas that will be considered the employee's "work space." Employers should also periodically inspect at-home workers' quarters, and obtain the employee's permission to do so when establishing the home work site arrangement.* ✓



Federal and State Court of Appeals Rulings

## Discrimination Damages; Retaliation Clarified

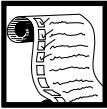
**LIFE INSURANCE PAY-OUT IS PART OF DAMAGES:** An employer who agreed to settle a wrongful termination case under California's Fair Employment and Housing Act (FEHA) must pay the former employee's family the face value of a life insurance policy that would have been in effect at the time of her death, but for her wrongful discharge, the 9th U.S. Circuit Court of Appeals has ruled.

A former employee died after filing a suit under the FEHA for wrongful discharge, and her family continued the suit. The employer eventually agreed that the employee was wrongfully

terminated and entitled to back pay and benefits, which included a company-provided life insurance policy with a double-indemnity provision. The court held that the employer had to pay full benefits—i.e., the face value of the life insurance policy that would have been in effect at the time of her death, but for the wrongful termination.

**RETALIATION AND ADVERSE ACTION:** In another court ruling on January 10, 2000, a California court for the *first time* clarified the requirements of a retaliation claim under the FEHA. Such claims have long required an employee

to show *adverse employment action* by the employer. In *Thomas v. Department of Corrections*, the court held that this means something more than minor changes in working conditions or trivial actions. Instead, a plaintiff must show a materially adverse change in the terms of employment. Noting that workplaces are *rarely idyllic retreats*, the court ruled that the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to an *adverse employment action*, and cannot form the basis for a suit. ✓



Litigation Avoidance

# Problem Prevention Services by WAAG AND CO.

Waag and Co. is an Employment Law and Human Resources Consulting Services firm, working exclusively with employers. Our services focus on these general areas:

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

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

**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.
- INTERNAL INVESTIGATIONS:** State law and recent federal court decisions require that allegations of certain types of misconduct be immediately and appropriately investigated before any action can be taken. This would include allegations of harassment, discrimination, theft, and other wrongdoing. It is important that such an investigation be conducted by someone who understands the legal issues and can conduct an impartial investigation. Waag and Co. has substantial experience in this area, and can assist you with your investigation, or conduct an investigation for you.
- 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.

**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.

**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. ✓



## ~ FIRM RESUME ~

### Susan S. Waag, Esq.

is a seasoned employment law attorney who works exclusively with businesses and non-profits to prevent and resolve personnel issues. Since 1985, she has provided 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. Susan is also committed to professional community service: most recently, she served as the 1999 President of the Central Coast Personnel Association (CCPA), and was recently elected to the SLO Chamber of Commerce Board of Directors for 2000. In the last seven years, she has provided expert consultation to approximately one-third of the 75 largest employers in San Luis Obispo County.



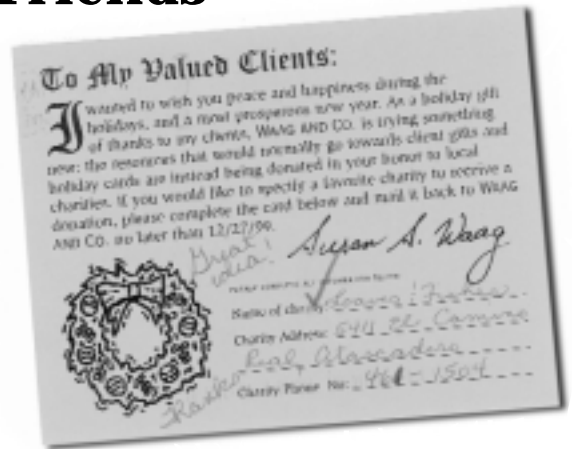
December 31, 1999

**To: My Valued Clients and Friends**  
**From: Waag and Co.**

**T**his year, Waag and Co. tried something different: As a holiday gift of thanks, the resources that would normally go towards client gifts and holiday cards were instead donated in our clients' honor to local charities. We mailed out a green postcard asking our clients to specify a favorite charity that they would like to have receive a donation in their honor. We are delighted to report that we received back 41 postcards specifying the deserving charities listed in the box below. Each of the charities received a donation from Waag and Co. for \$50.

We were so inspired by this diverse list of deserving organizations that we wanted to list them and their phone numbers in this newsletter. Almost every postcard we received back came with a note indicating what a wonderful idea it was. We hope that our method of spreading *Holiday Cheer* catches on with other local companies next year! We wish you all the best for a happy and prosperous year 2000.

*Susan A. Waag*



- Achievement House 543-9383
- Activists for Animal Rights 462-2327
- Aids Support Network 781-3660
- American Cancer Society 543-1481
- American Diabetes Association 1-800-DIABETES
- Big Brothers / Big Sisters of SLO County 781-3226
- Casa / Voices for Children 541-6542
- Central Coast Natural History Museum 772-2694
- CoastLife Church 541-3343
- EOC Homeless Services 544-4355
- Friends of Prado Day Center 542-0952
- Hope Chapel of Hermosa Beach (310) 374-4673
- Hospice of SLO County 434-1164
- Hotline 544-6016
- Loaves and Fishes 461-1504
- Mt. Carmel Lutheran Church Luther League 544-2133
- North County Women's Resources 461-1338
- Pacific Wildlife Care 543-9453
- Paso Robles Youth Arts Foundation 238-2401
- Rape Crisis Center 545-8888
- Shelter Services for Women 963-4458
- SLO Women's Shelter 781-6403
- Toshach Support - River Rock Church
- Transitions-Mental Health Association 541-5144
- International Ministries (800) ABC-3USA x3
- Women's Resource Center 544-9313
- YMCA 543-8235

805 area code unless specified otherwise



Problem Prevention Focus

## Employers Zero In on Virtual Morality

Governor Davis recently vetoed legislation that would have prohibited employers from secretly monitoring the e-mail or other personal computer records generated by an employee and also would have required employers to disclose its workplace privacy and electronic monitoring policies and practices to all employees.

Although many employers would consider the proposed e-mail privacy legislation *unwanted*, privacy is a major issue, and it is still a good idea to let your employees know where they stand with use of company e-mail, internet access and computer usage.

The explosion of the internet into the workplace has empowered millions of employees, in a matter of keystrokes, to quietly commandeer company property for personal use. Ethical questions are mushrooming well beyond the propriety of workers frittering away a morning shopping online or secretly viewing pornographic web sites.

Cautionary tales are piling up—from United Parcel Service of America Inc., which caught one employee using a UPS computer to run a personal business, to Lockheed Martin Corp., where a single holiday e-mail sent to 60,000 employees disabled company networks for more than six hours.

This is a new spin on the old nuisance of employees making personal phone calls at work, but with *greatly magnified possibilities*. Having an internet usage policy in place helps companies face the unexpected twists in the world of virtual morality.

**LET'S MAKE A DEAL:** Consider some of these situations:  **DAYTRADING:** With the surge in day trading, is it OK for employees to log-on to make a quick stock deal?  **POLITICS:** How about sending out e-mails from work supporting a politician?  **JOB SEARCH:** Using office computers to hunt for a new job?  **EXCESSIVE?** If any of this is permissible occasionally, just when does it cross into excess?

How do you prevent the seductive pull of the web from sucking productive

hours out of your employees?

Remember that when your employees visit questionable web sites, they are leaving behind an electronic trail with your company's name on it—a source of potential embarrassment later. Also, unlike phone calls, electronic messages are often retrievable months or years later, and can be used as evidence in litigation against companies or individual employees.

Many companies find themselves caught off guard by the geometric growth of such issues, and are taking a variety of approaches to deal with it:

- THE "MONITORING" APPROACH:** Install sophisticated software that monitors when, how and why workers are using the internet, and which sites can be accessed. Controversy can erupt when determining whether to go beyond pornography and limit access to such areas as sports, gambling, and financial web sites.
- THE "USAGE WITHIN LIMITS" APPROACH:** Accept the inevitable. Specifically allow employees to use faxes, e-mail and the Internet for personal reasons, but set guidelines: use has to be of reasonable duration and frequency and must not be potentially embarrassing to the company. Certain usage is not allowed, such as chain letters, obscenities, harassment, and solicitations.
- THE "NO PRIVACY" APPROACH:** Even if allowing more permissive use, inform employees not to expect *privacy*. Sometimes it is necessary for authorized personnel to access and review what is on an employee's system. Also, the company may be required to publicly disclose e-mail messages, even if marked private.
- THE "LOG-ON WARNING" APPROACH:** Before employees can log on to their computers, they must click "OK" to a message warning them against misuse of e-mail and the internet, and alerting them that their actions are subject to monitoring.

**THE "MISCONDUCT TRIGGER" APPROACH:** Provide for some privacy by checking e-mail only after a worker is suspected of misconduct; just because the company owns the bathrooms doesn't mean they should place them under surveillance.

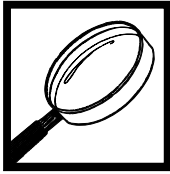
**THE "ZERO TOLERANCE" APPROACH:** Prohibit all personal use of company equipment. Computers and other company equipment are to be used only to provide service to customers and for other business purposes. This ensures that employees are focused on serving customers.

**JUST THE FACTS:** 27% of large U.S. firms have begun checking employee e-mail, a huge jump from 15% in 1997. Some routinely do this to search for obscene language or images, which could give rise to sexual harassment suits.

**CAREFUL WHAT YOU WISH FOR:** Even when a manager is within legal rights to monitor employee e-mail, the virtual morality issue *still* rears its ugly head. For instance, what's an employer to do if such a search reveals that an employee has an undisclosed drug problem or is looking for another job? Also, while a monitoring program may be well worth it, be prepared to *devote potentially significant resources to investigating possible abuses*.

**STRATEGY 1:** Companies are advised to have written policies; alert employees that online activities will be monitored and that they can be disciplined for violations. Such warnings make it difficult for employees to win any suit asserting that they expected their communications to be private—already an uphill claim given that the equipment belongs to the company in the first place.

**STRATEGY 2:** Waag and Co. has prepared written internet access, e-mail and computer usage policies for many clients, and can provide your company with customized policies and procedures for a reasonable fee.



# Investigating Employee Complaints: New Ruling Influences Employer Approach

When someone needs to have assets tracked or a person followed, they may call a licensed, private investigator. But when an employer is wondering how to investigate an employee's complaint of sexual harassment, race discrimination or some form of employee misconduct, whom should they call?

Most *private investigators* do not understand the sensitive legal issues involved in handling a situation that could result in litigation. Instead, employers and their attorneys will often engage an *independent human resources (HR) consultant* to investigate a workplace complaint. While such consultants may have the expertise necessary to do an excellent job, there may be some hidden legal problems.

**PRIVATE INVESTIGATOR'S ACT:** The California Department of Consumer Affairs (DCA) requires that anyone who investigates alleged misconduct or makes determinations of credibility for the benefit of an employer must obtain a private investigator's license. The Act does not apply to investigations conducted by a bona fide *employee* of the employer or to an *attorney at law*.

**CONSULTANT-LED INVESTIGATION:** Although HR consultants who conduct investigations without a private investigator's license may be fined by the DCA, the law does not impose any specific penalty on the *employer* who hires the unlicensed investigator.

Of potentially greater significance, however, an employee fired for misconduct may be able to challenge the validity of a harassment or discrimination investigation that was not conducted by a legally qualified investigator. This makes any actions or decisions by the employer based on the investigation vulnerable to attack.

**ATTORNEY-LED INVESTIGATION:** The employer could avoid this problem by having a licensed attorney conduct the investigation. However, even assuming that the attorney is sufficiently comfortable with employment law issues to do this, the issue of attorney-client privilege is an important concern. If the situation is ever the subject of litigation, the employer will almost certainly need

to present all or part of the investigation as evidence at trial. If the investigating attorney is also advising the employer as to what actions to take as a result of the investigation, the attorney may also be forced to testify about privileged matters. Even if the privileged matters could be compartmentalized, as a witness in the case, the attorney would be precluded from representing the employer at trial.

**FAIR CREDIT REPORTING ACT:** The federal Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.) requires disclosures to employees before an employer can obtain or use a consumer report or an investigative consumer report obtained through the use of a third party.

**NEW TWIST:** In 1999, the Federal Trade Commission published an opinion letter concluding that a sexual harassment investigation conducted by a third party is an *investigative consumer report*, and compliance with the Act is required.

The opinion says that the report must be provided to the employee in unredacted form if it is used in any employment decisions. Several other notice and disclosure requirements would also apply, including a requirement to inform the subject of the investigation of the intent to gather information. The employer must also obtain the employee's advance authorization to gather the information.

**APPLICABILITY TO CALIFORNIA EMPLOYERS:** This is an opinion of the FTC's counsel, and is not binding on the FTC. The letter's applicability to California employers is *uncertain*.

However, such an application of the Fair Credit Reporting Act would give rise to numerous concerns that could hamper legitimate investigations (e.g., workplace violence risk assessment; undercover theft investigations; chilling effect on witness cooperation; intimidating harassment victims from complaining).

**SO, WHAT SHOULD AN EMPLOYER DO IF IT NEEDS TO CONDUCT AN INVESTIGATION?**

There are a few choices.  1. Find a licensed investigator who has specific expertise in workplace harassment and discrimination issues;  2. Identify an employee who could conduct the investigation (with the close and privileged advice of qualified employment counsel); or  3. Find an independent employment attorney who can conduct the investigation with the understanding that his/her activities may be subject to litigation discovery.

**EMPLOYERS SHOULD ALSO CONSIDER HAVING ALL EMPLOYEES SIGN AN AUTHORIZATION** to investigate any issues of misconduct; this could be done in a handbook receipt. Any third party used to conduct an investigation should be familiar with the FCRA requirements. Since the employee being investigated may be entitled to receive a copy of the third-party's report, the investigator should be careful about how much detail is included. The amount of information in the report should balance the ability of the accused person to meaningfully respond to any accusations with the need to protect witnesses against intimidation. The investigator must know how to navigate in an area that presents a legal minefield.

WAAG AND CO.

## The Strategic *EMPLOYER*

February 2000 ~ Susan S. Waag, Esq. ~ (805) 783-2300

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