

# The Strategic EMPLOYER

Employment Law & HR Consulting Services ~ www.WaagAndCo.com

## About This Issue...

For the last few years, employers have been dealing with an environment of rapid changes, both in the human resources landscape, and in dealing with non-stop changes in employment laws. This issue of *The Strategic EMPLOYER* attempts to keep employers up-to-date on new state and federal employment laws, judicial rulings, and proposed changes. Every attempt was made to track the current status of dozens of pending bills; however, by the time you read this, the status of many issues covered here no doubt will have changed.

To keep you informed in this climate of rapid changes, we are moving our newsletter to an online PDF format that will be immediately emailed out to you, as well as available on our web site. *Please complete the enclosed postage-paid card and put it in the mail to be included on our email list. Thank-you.*

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## Part 1: Wage and Hour Law

### A. AB 60 RELATED ISSUES

**Wage Order Now Online.** The Industrial Welfare Commission has completed its revised wage orders. *The wage order applicable to your business must immediately be posted in your workplace.* However, the IWC is waiting for further developments on the pending increase in the minimum wage before printing the new wage orders and distributing them to employers. Meanwhile, the new wage orders are available at the IWC's web site at [www.dir.ca.gov](http://www.dir.ca.gov)

**Meal and Rest Periods.** Penalties may be imposed on employers who fail to provide the required meal and rest periods. The penalty would be one hour of pay for each day the non-exempt employee was denied a break. On-duty meal periods would be allowed only if the employee agreed; however, the employee may revoke such an agreement at any time, regardless of any disruption this could create. Documentation

**Part 1:** *continued on next page*

## Route to:

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- Managers: \_\_\_\_\_
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
## 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 115 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. 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.

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

## Part 1: Wage & Hour

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establishing that employees are taking breaks and any agreements regarding on-duty meal periods is now of great importance.

**Exempt vs. Nonexempt (Part 1)** Exempt employees can no longer “make themselves non-exempt” simply by failing to perform their assigned exempt functions. Now, the employer’s “reasonable expectations and the realistic requirements of the job” will be taken into account. To take advantage of this new standard, it is important to have written, up-to-date job descriptions and to carefully monitor whether exempt employees meet your expectations.

**Exempt vs. Nonexempt (Part 2)** Being exempt in California is now a bit easier. When determining if an employee is “primarily engaged” in exempt work, you can now include nonexempt tasks that are “directly and closely related to the employee’s exempt duties.” It is still unclear how the DLSE will interpret this.

**Healthcare Industry.** The IWC agreed to maintain 12-hour alternative work weeks for the healthcare industry. The panel also voted that in the event of an alternative workweek dispute between an employer and employees, the Labor Commissioner will appoint a neutral mediator.

**Flex Work Schedules.** In an ironic move, legislation to create tax credits linked to flexible work schedules has been introduced. SB 2021 is intended to encourage telecommuting to reduce pollution and traffic congestion in a pilot program in specified counties. An additional tax credit would be available when full-time employees telecommute at least three times per week.

**SB 88,** proposing an overtime exemption for highly paid, hourly computer professionals was signed by Governor Davis on September 21, 2000. This bill is directed at eliminating the “salary basis” requirement for such workers earning at least \$41 per hour. *However, the DLSE is still confused regarding the impact of this on the availability of the “learned profession” exemption for employees in computer-related jobs.*



### B. STOCK OPTIONS

**Calculating OT Pay.** President Clinton signed an amendment to the FLSA that employers need not include profits from certain employee stock options in regular pay rates when calculating overtime pay. The Worker Economic Opportunity Act excludes profits from certain employer-provided stock options, stock appreciation rights, and bona fide stock purchases from overtime pay calculations. The law went into effect August 16, 2000 and provides that no employer shall be liable for any failure to include stock options in overtime calculations, provided certain conditions are met.



### C. PAYROLL DEDUCTIONS

**Rate Increase.** Effective April 1, 2000, payroll deductions for state disability insurance were increased from 0.5% to 0.68%. The move was to protect the state’s insurance program from insolvency, since weekly benefits were increased effective January 1, 2000 from a maximum of \$336 to \$490.



### D. WAGE PROPOSALS

**Minimum Wage.** There are currently numerous federal bills pending that propose an increase in minimum wage; most propose a \$1 per hour increase to be phased in over 2 or 3 years. One proposes that

such an increase would not apply to employers who, under certain conditions, increase the employer’s contribution to the cost of health insurance coverage. There is also a *proposal* to raise the state minimum wage 50 cents as of January 1, 2001 and another 50 cents on January 1, 2002. A decision on this proposal is expected at the end of October, 2000.

**Jury Duty Pay.** Also floating around Congress is a federal proposal to require employers to continue paying an employee’s full wages (less any jury fees) while the employee serves on any federal jury, unless the employer shows that such payment would result in “significant hardship.” So far, there is little activity on this bill.



**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.

Enclosed with this newsletter is a Management and Employee Training information sheet. For more information, please call Waag and Co.



## Part 2: Legislative Developments

### A. RECENTLY PASSED & VETOED LAWS

□ **New-Hire Reporting.** Beginning January 1, 2001, the EDD's new-hire reporting requirements will be expanded to include the reporting by employers of the hiring of independent contractors.

Information such as the identity of the contractor and the contract's dollar amount must be reported if the payments to any non-employee are, or will be, at least \$600 in any calendar year.

□ **Domestic Violence.** A.B. 2357 gives domestic violence victims up to 30 days' unpaid leave during a 12-month period. This bill was signed by Governor Davis on September 16, 2000, and will apply to employers of 25 or more employees.

□ **Sexual Harassment.** A.B. 1856 would make individual employees, not just supervisors, personally liable for sexual harassment. *Signed into law September 30, 2000.*

□ **Disability.** A.B. 2222 expands and clarifies the definitions of mental and physical disability under the Fair Employment and Housing Act. *Signed into law September 30, 2000.*

□ **Wage and Hour.** A.B. 2509 boosts penalties for certain wage and hour violations and bars employers from deducting credit card fees from employees' tips that were charged by customers. *Signed into law September 28, 2000.*

□ **"Healthy Families" Expanded.** California's "Healthy Families" health insurance program, which assures medical care for children of

low-income families, will now include the *parents* of qualified children. Eligible families would pay monthly premiums of \$4 to \$27, depending on the number of enrolled children. A family earning as much as 2.5 times the federal poverty level would be eligible; for a family of 3, that would be \$35,000 per year.

□ **Anti-Union Campaigns.** AB 1889 makes it illegal for anyone doing business with the state to spend state funds on anti-union organizing activities. Violators will be subject to stiff fines.

□ **Forklift Training.** New Cal OSHA rules for training forklift and other industrial truck operators went into effect July 15, 2000. Agricultural operations are not covered. Every employee hired before July 15, 2000 must complete thorough training by that date; those hired after must receive training before operating an industrial vehicle. There are ongoing training requirements as well.

□ **Expansion of CFRA.** On May 23, 2000, Gov. Davis issued a surprise veto of SB 118, the bill that would have expanded the California Family Rights Act provisions for family medical leave. The bill would have allowed employees who care for grandparents, siblings, adult children, domestic partners and roommates to take up to 12 weeks of leave. Davis said that the measure extended too far, but that he would be willing to sign portions of the bill and would work with the legislature to craft an appropriate measure.

□ **Lie detector tests.** S.B. 1854 requires employers to videotape all polygraph and similar exams. *Vetoed September 28, 2000.*



### B. PENDING LEGISLATION (FEDERAL)

□ **Internal Investigations.** HR 3408 would largely overturn the FTC's conclusion that any internal investigation by an employer that is conducted by a third person would need to comply with the terms of the Fair Credit Reporting Act. (See the February 2000 issue, page 12, of *The Strategic EMPLOYER*.) The bill would exempt reports prepared by an employer's agent solely for the purpose of investigating allegations of drug use or sales, violence, sexual harassment, employment discrimination, job safety or health violations, criminal activity including theft, embezzlement, sabotage, arson, patient or elder abuse, child abuse or other violations of law. Also exempt would be certain reports prepared in connection with litigation, due diligence and other limited circumstances.

□ **H.R. 1924.** The House Judiciary Committee on September 20, 2000 approved a bill that would require federal agencies to follow each federal circuit court's interpretation of laws and regulations and restrict agency attempts to persuade other circuits to adopt the agency's contrary view. The Federal Agency Compliance Act (H.R. 1924), introduced by George W. Gekas (R-Pa.), would affect enforcement agencies including the National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission.

□ **Taxes on Stock Options.** H.R. 3462 would allow workers to defer tax payments on stock options until the shares are sold, and allow

**Part 2:** continued on next page

## Part 2: Legislation

*Continued from previous page*

companies to take a tax deduction when employees exercise their options. Current law generally results in employees being taxed once when options are exercised and again when the shares are sold. The bill provides that the grant of stock options granted under this legislation "may not be directly linked with a systematic reduction" in the employee's regular pay. In order to fall within this law, the stock option program would need to meet specific requirements.

**Parental Discrimination.** S. 1907 would prohibit discrimination against parents in the workplace and provide a private, federal right to sue. On May 2, 2000, President Clinton issued an executive order prohibiting such discrimination against parents employed by the federal government, citing the elimination of the "glass ceiling" for parents.



### C. LEGISLATION TO WATCH OUT FOR

**Personnel Records.** S.B. 1327 would expand employees' rights to inspect their personnel records and would require purging negative material from an employee's file after two years if it had not been used in a disciplinary action.

**Harassment Investigations.** S.B. 1432 would provide that reasonable steps for preventing harassment from occurring would include using licensed private investigators and individuals with specified human resource management qualifications to conduct investigations.

**"Perceived" Gender Bias.** A.B. 2142 would ban employment discrimination based on the victim's actual sex or the perception of that

victim's gender-related identity, appearance or behavior, whether or not different from that traditionally associated with the victim's gender at birth. Employees would be protected from any adverse action based on the belief that they are not sufficiently feminine or masculine, and *would likely protect cross-dressing at work.*

**Employee Computer Records.** S.B. 1822 would outlaw secret monitoring of employee e-mail and personal computer records. Governor Davis vetoed a similar measure last year.

**Independent Contractor Factors.** A.B. 2737 would help clarify the standards for determining who is an independent contractor as opposed to an employee by codifying the IRS "20 factors." Meanwhile, there is also a federal bill pending to simplify rules for classifying independent contractors (H.R. 1525).

**Family Leave.** California's S.B. 1149 is likely to be revived and would extend family leave coverage to employers with as few as 20 employees, instead of the current threshold of 50. Meanwhile, federal proposals would also expand the family leave law to cover employees at worksites with as few as 25 employees and allow time off to participate in children's school activities (already the law for California employers with 25 or more employees) or to accompany a child or elderly relative to routine medical and dental appointments (S 201; HR 91).

**Workers' Compensation.** The increase in benefits vetoed last year by Governor Davis has been tacked on to another pending bill, S.B. 996.

**Arbitration.** A.B. 858, which is currently inactive but likely to be reconsidered, prohibits employers

from requiring employees to agree to submit disputes to arbitration. Also pending is a federal bill that would ban mandatory arbitration of employment discrimination claims (S. 121; H.R. 872).

**Compensatory Time Off.** S. 1241 would allow private sector employees to take compensatory time off in lieu of overtime pay. Current federal law only permits this in the public sector.

**Discrimination.** S. 1276 and H.R. 2355 would prohibit employment discrimination on the basis of sexual orientation.

**Temporary Workers.** H.R. 2298 and H.R. 2299 would bar discrimination against temps in wages, hours and benefits.



### D. OTHER LEGISLATIVE NEWS

**Family Leave.** The federal Department of Labor recently issued a proposed rule that would permit states to use surplus unemployment benefits to pay employees who take time off to care for newborn or newly adopted children. The DOL expects to enact a final rule later this year. And the California EDD has a report due to the state legislature on whether it's feasible to extend state disability benefits to employees who take family and medical leave, even if the employer isn't covered by the state family and medical leave law.

**Wage Bias Law Enforcement.** The EEOC has unveiled a new initiative to boost enforcement of the wage bias laws. The agency will create a new task force to help EEOC investigators analyze equal pay issues when employees file charges. In another development, the EEOC says it will focus enforcement efforts on disability bias against contingent workers—

**Part 2:** *continued on next page*



## Part 3: Significant Case Law Developments

### A. POLICY & AT-WILL ISSUES

□ **Asmus v. Pacific Bell.** In June 2000, the California Supreme Court held that a guarantee of job security pursuant to an employer's policies can be unilaterally rescinded by the employer, even if the specific condition needed to terminate the "contract" provision is not met.

In 1986, Pacific Bell adopted a management security policy that would "be maintained so long as there is no change that will materially alter Pacific Bell's business plan achievement." Citing a need for greater flexibility, Pacific Bell cancelled the policy in 1992.

The Court held that new consideration is not required for the employer to unilaterally terminate a

policy that contains a specified condition so long as: the condition is one of indefinite duration, the employer effects the change after the policy had been in effect for a reasonable time, the employer gives reasonable advance notice of the change, and the change is implemented without interfering with the employees' vested benefits.

□ **Epilepsy Foundation of N. E. Ohio.** In a ruling that could complicate investigations into harassment and other workplace misconduct in non-union companies, the National Labor Relations Board held that non-union workers have the same right as unionized workers to have a fellow employee accompany them to a meeting they believe may have disciplinary consequences. In expanding this right to non-union workers, the NLRB noted the principle that all workers are entitled to engage in concerted activities for the purpose of mutual aid.

□ **NLRB v. Main Street Terrace Care Center.** A federal appellate court ruled that an employer cannot forbid employees from discussing their compensation with their colleagues, since such discussions are essential to the right to engage in concerted activity. California Labor Code § 232 provides similar protection.

□ **Guz v. Bechtel National, Inc..** On October 5, 2000, the California Supreme Court overturned an appellate-court decision which held that the lack of any agreements for continuous employment alone did not establish that Mr. Guz was an at-will employee when the employer selected him for layoff. The lower

court had held that the employer's personnel policies, assurances to employees, and the longevity of Mr. Guz's employment combined to create the possibility of an implied contract not to terminate at-will. The lower court also held that a "downturn" was not a sufficient non-discriminatory reason for Mr. Guz's layoff.

The Supreme Court held that, although Mr. Guz might raise a triable question regarding implied contract rights, neither the employer's policies nor any other evidence suggested a contractual restriction on the employer's right to eliminate a work unit. The court also held that the employer's failure to follow its own policy and the retention of younger employees were not sufficient to establish age discrimination.

□ **E-Mail.** Civil courts have generally ruled in privacy suits that since employers own the computer system, they can regulate its use as they see fit. But under the NLRA, it is unlawful to discipline a non-supervisory employee for engaging in "protected concerted activity," which may include discussions with other employees about wages, hours and working conditions.

Among the things that may be challenged by the NLRB are company rules limiting employee use of computers and e-mail to company business. The NLRB has stated that if two employees have an interactive e-mail "conversation" regarding union organizing or some grievance, when both employees are not on work time, this cannot be distinguished from any other verbal solicitation and must be allowed.

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## Part 2: Legislation

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especially abuses by the temporary staffing industry.

### □ **Respirator Regulations.**

Cal/OSHA has issued an updated fact sheet outlining changes in its respirator regulations. The rules apply to all workplace respirator use except for tuberculosis protection. The fact sheet outlines the specific elements of a comprehensive, written program for respirator use that must be implemented by employers. As spelled out in the fact sheet, such a program must include employee medical evaluations and annual training. See

[http://www.dir.ca.gov/DOSH/dosh\\_publications/newrespira.pdf](http://www.dir.ca.gov/DOSH/dosh_publications/newrespira.pdf) for a copy of the fact sheet.

## Part 3: Case Law

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### B. COMPENSATION & BENEFITS

□ **Maraviov v. Tenet Health Systems.** The WCAB has ruled that it's illegal to terminate an injured worker's health benefits unless you can show a good business reason for doing so. Several lower courts have begun to follow this holding, even though some workers' comp insurers erroneously advise their policyholders that it's OK to stop the health benefits of an injured worker so long as the same rules apply to employees whose medical leave is not work-related. Applicant's attorneys are just starting to pick up on this trend, which could have a significant impact on employers and their willingness to provide health insurance. The California Compensation Institute has reported that 43% of California's workers' comp cases are still open after 3.5 years, with some remaining open even longer.

□ **Morillion v. Royal Packing Co.** The California Supreme Court ruled that an employer had to compensate workers for their travel time to and from work when they were required to report to a company lot and take the employer's buses to the worksite. The Court noted that employers may provide free transportation without having to pay travel time, provided that the workers have the option to get to work on their own.

□ **Pang v. Beverly Hospital.** A California Court of Appeal has ruled that an employer didn't violate the state family leave law by terminating a physical therapist who missed work to help her seriously ill mother move to a new apartment.

Marjorie Pang claimed her time off was protected because she was providing psychological care for a family member with a serious health condition. But the court threw out Pang's lawsuit, ruling that she wasn't providing or participating in medical care for her mother. Pang's mother wasn't moving due to a change in her medical treatment, such as to a skilled nursing facility, but only so that she could continue to live unassisted without medical care.



### C. DISABILITY DISCRIMINATION

□ **Harris v. Harris & Hart, Inc.** A 9th Circuit decision addresses ADA limits on when you can make pre-offer medical inquiries. Sheet metal worker Roosevelt Harris had two separate stints at Harris & Hart. During the second, he filed a union grievance relating to his carpal tunnel syndrome and resigned. Two more times, the union hiring hall sent Mr. Harris to H&H for an assignment. H&H requested a medical release based on its policy requiring injured employees to provide one to return to work. Harris was rejected when he refused to submit a release. Harris sued, this time arguing that the refusal to hire him without the release violated the ADA's prohibition on pre-offer medical inquiries. The Court sided with the employer, noting that an employer should not be forced to ignore a known disability and may attempt to determine what accommodation, if any, may be required and to request a medical release from the worker's treating physician.

□ **Echazabal v. Chevron USA, Inc.** The U.S. Court of Appeals for the 9th Circuit held that an employer cannot refuse to hire or otherwise

discriminate against a qualified individual with a disability on the grounds that the work would pose a direct threat to the individual's own health or safety. The Court ruled that the "direct threat" defense applies only to protect the health and safety of other persons likely to be injured by placing the disabled individual in the job.

In this case, a pre-employment exam revealed that Mr. Echazabal had a condition that could cause him liver damage when he would be exposed to the chemicals in his worksite. Performing the essential functions of his job would necessarily result in such exposure. For this reason, Chevron rescinded its employment offer. The Court held that Chevron must allow the disabled individual to make his own choices about personal risks, and that the ADA does not permit employers to take a paternalistic approach to managing disabled workers.

□ **Ward v. Massachusetts Health Research Institute, Inc.** A federal appeals court ruled that an employer may be required to reasonably accommodate an employee who has difficulty arriving to work on time due to his arthritis. Here, the employer already had a policy of allowing flexible schedules for employees; workers could choose to start work any time between 7:00 and 9:00 a.m. and complete an 8 hour work day. Mr. Ward was not always able to arrive by 9:00 a.m. and ultimately was fired for failing to maintain reliable and predictable attendance. Given the employer's flexible schedule policy, the court found that sticking to a precise start time was not an essential function of the job. While this court does not have jurisdiction in California, it raises an important flag that employers should note.

**Part 3:** *continued on next page*

## Part 3: Case Law

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### D. OTHER DISCRIMINATION CASES

□ **Kimel v. Florida Board of Regents.** The U.S. Supreme Court ruled that state employers were not subject to the federal Age Discrimination in Employment Act. The Court held that age was not a "suspect class" protected under the 14th Amendment. Accordingly, the federal government could not infringe on the states' sovereign immunity in this regard.

□ **Murray v. Oceanside Unified School District.** Effective January 1, 2000, the FEHA was amended to include sexual orientation as a protected class. Previously, this was protected under the Labor Code, with less effective remedies than are available under the FEHA. In this case, a California appellate court held that a victim of alleged harassment on the basis of sexual orientation that occurred before this year could amend her lawsuit to state a claim under the FEHA and benefit from its remedies. The court permitted this seemingly retroactive application of the amended FEHA by viewing the amendments as a clarification of existing law.



### E. LIABILITY ISSUES

□ **Armendariz v. Foundation Health Psychcare Services, Inc.** The California Supreme Court upheld the state-law enforceability of arbitration agreements signed as a condition of employment. The Court identified the minimum requirements for such agreements to be valid: neutrality of the arbitrator; provision of adequate discovery; a written decision that will permit judicial review; and limitations on the employee's cost of arbitration.

□ **Camargo v. Tjaarda Dairy.** A California Court of Appeal ruled that when you hire an independent contractor to perform a potentially dangerous job for you, you can be sued if the contractor's employee is injured while performing the work — unless you've taken steps to ensure the contractor is competent to do the job.

The Dairy needed to remove six-foot-high mounds of manure from its corrals and decided the piles were too slippery after a wet winter to do the work itself. The dairy made a deal with Golden Cal Trucking to handle the job. During the project, Golden Cal employee Alberto Camargo attempted to drive a Golden Cal tractor over a manure pile. The tractor went out of control and rolled over, killing Camargo. The Court held the Dairy liable. It explained that you generally can't be held liable for injuries to a contractor's employee that result from the contractor's negligence. But this rule doesn't preclude a lawsuit against you for your own negligence, in this case, failing to exercise reasonable care in selecting a competent contractor.

□ **Jacobus v. Krambo Corp.** A California Court of Appeal ruling says that in addition to its own fees, an employer may also be on the hook for the accused harasser's legal bills if they hire their own lawyer. Jacobus and Krambo were sued for sexual harassment by secretary Rosie Vera-Aviles, who first complained about being harassed after getting a negative performance review. Krambo refused to pay for an attorney for Jacobus, and ultimately settled with Vera-Aviles, but Jacobus retained his own lawyer and ultimately won in court.

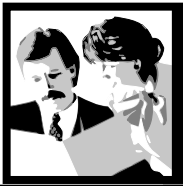
The jury found that he and Vera-Aviles had a friendly relationship that involved consensual sexual

bantering and sharing erotic stories which, it ruled, did not amount to sexual harassment. Jacobus then took Krambo to court to get reimbursed for the \$82,000 in legal fees. Krambo refused because the misconduct was personal and unrelated to his employment. The court disagreed, saying that social interactions in the workplace, even if they involve sharing private, personal matters may be within the course and scope of employment, requiring the employer to indemnify the employee. The court confirmed, however, that actual sexual harassment is outside the scope of employment, and would not require indemnification.

□ **Circuit City Stores, Inc. v. Adams.** The U.S. Supreme Court agreed to review the controversial 9th Circuit decision that the Federal Arbitration Act, which requires enforcement of valid arbitration agreements, does not apply to employment contracts. The 9th Circuit relied on FAA language that the Act shall not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The court reasoned that the FAA applied only to commercial contracts and was never intended to cover labor contracts of any sort. All other federal appeals courts to address this issue have ruled that the FAA applies to employment contracts except those covering employees directly engaged in the movement of goods in interstate commerce. ✓

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has recently been updated and includes detailed information on all services provided by Waag and Co., as well as late-breaking employment law news.



# Negligent Hiring: An Employer's Duty to Protect Everyone

An employer has a duty to protect its employees, customers, clients, and visitors from injury caused by their employees who the employer knows, or should know, pose a risk of harm to others. When an employer violates that duty, it may be liable for damages under the tort of negligent hiring, negligent retention, or negligent supervision.

Balanced against the state and federal provisions protecting employee privacy are the increasing demands upon employers to be responsible for the actions of their employees. Current case law establishes that an employer has a duty to exercise reasonable care in hiring persons who, because of the nature of the employment, could present a threat of injury to members of the public.

In a recent case, a nursing home named Manor Park hired a janitor who, as it turns out, was using a different name and a fictitious date of birth and Social Security number. Consequently, Manor Park discovered that the person it hired had five prior felonies on his record only after he had raped an 84-year-old nursing home resident suffering from Alzheimer's.

The victim's family sued,

contending Manor Park was negligent in its hiring practices, starting with its failure to detect that the janitor applied for a job under a false identity. A jury agreed and awarded \$1.1 million in damages.

According to the attorney who represented the rape victim's family, Manor Park's human resources department ran a criminal background check on the janitor, but because he was using a false Social Security number, his criminal record didn't turn up.

The attorney argued that Manor Park's HR department overlooked many critical prehire steps and red flags that should have triggered closer scrutiny of the applicant.

**1. Carefully check a picture ID and complete INS forms.** Manor Park didn't obtain all of the documentation required for the INS I-9 form. Each time company officials asked the janitor for a driver's license or other picture ID, he said he would bring it later, but he never did.

**2. Verify the accuracy of Social Security numbers.** The Social Security Administration operates a free verification service that employers can use to confirm a prospective employee's Social Security number. You can check up to five numbers at once by calling (800) 772-6270 (make sure you have the

employee's date of birth, as well as your Employer ID Number when you make the call).

**3. Ask about every gap in employment history.** Breaks in the janitor's employment history should have raised questions that could have led the nursing home to discover he had served several prison terms.

**4. Carefully check references.** The HR staff didn't talk to any of the janitor's work references or check his personal references.

**5. Question educational records.** Had Manor Park checked, it would have found that the college the janitor claimed to have attended had no record of him under his assumed name. Although he was applying for a janitorial job, he claimed to be a college graduate, which should have led to inquiries about his educational background.

**Conclusion:** With record low unemployment rates, employers are feeling the pressure to hire any candidate that appears qualified right when they walk through the door. However, this case illustrates the importance of taking the time to check every aspect of an applicant's background. Even if you hire a vendor to perform these critical steps, you must verify that they are taking all the steps necessary for a proper background check.

## On Election Day, Nov. 7

you're required to let employees take paid time off to vote if they don't have sufficient time outside of work hours. Polling places are open from 7:00 a.m. to 8:00 p.m. You don't have to pay workers for more than two hours off and you can require that they go at the beginning or end of their work shift. Employees must give you two working days' notice if they need time off, *but only if you post a notice about employee voting rights for at least 10 days before the election.*

**WAAG AND CO.**

## The Strategic **EMPLOYER**

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

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