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Background Investigations: New Obligations and Penalties

With the stated goal of curbing the rise of identity theft, the California legislature has amended the California Investigative Consumer Reporting Agencies Act ("ICRA") to require employers to give job applicants and current employees who are the subject of investigations by third-party reporting agencies a copy of any report received. Consequently, as of January 1, 2002, employers who hire firms to run background checks about applicants or employees are required to provide the subjects of the investigations with both a written notice that a background check will be conducted and, upon conclusion of the background check, with a written copy of the report.

In addition, employers may now be required to provide employees or applicants with information that they develop during an in-house background investigation. Under the new law, the

applicant / employee no longer needs to request a copy of the report before the employer must provide it.

Although managers are sure to dread this additional paperwork, employers must comply with the new requirements to avoid substantial penalties. Even with this added administrative burden, it should be noted that there are still many benefits to having an appropriate background check conducted.

What is an Investigative Consumer Report? The term "investigative consumer report" refers to any report that compiles information on the subject's "general reputation, personal characteristics or mode of living." This information may be gathered online, through public records, or through interviews with friends, neighbors, associates, or anyone else who may have information about the consumer. In the employment context, investigative consumer reports typically include such things as criminal records checks, bankruptcy filings, and employment verification checks.

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About 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 150 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 more than 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 Waag and Co. via phone, email or fax. 

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Employers Must Now Notify

Current Employees That a Background Check is Being Conducted: Although background checks are most commonly prepared pre-hire, the scope of the ICRA is not limited to investigations of job applicants. Now, **any** time an investigation is conducted for employment purposes (whether for pre-employment or when deciding promotions for current employees), the employer must notify the subject of the investigation in writing that an investigation is being conducted, and inform the employee of the name and address of the investigating agency.

Additionally, the notification must include the nature and scope of the information being requested as well as a summary of the employee's rights to obtain information from the consumer reporting agency. The employer must provide this notification within three days of requesting the report. The employer must also certify to the investigative consumer reporting agency that it has made these required disclosures to the employee before the reporting agency may release any report.

Employers Do Not Have to Notify Employees of Investigations Involving Suspicion of Misconduct: Previously it was an open question under both state and federal law whether the suspect had to be told that a third party has been hired to investigate suspected misconduct. This could include the hiring of a private investigator to determine if an employee is stealing or hiring a third-party investigator to investigate allegations of harassment or discrimination.

The new California statute creates an exception to the notice requirement where the investigation is sought "based upon the suspicion of wrongdoing by the subject of the investigation." Thus it is now clear under California law that an employer does not have to tell the suspected thief or harasser that the employer is on to

him or her. However, the matter is still unclear under federal law; employers can only hope that the "feds" will follow suit and similarly clarify the Fair Credit Reporting Act.

Employer's Obligation to Furnish

Copies of the Report: The most significant burden created by the new amendments to the ICRA is that employers are now obligated to provide **all** applicants or employees with a copy of the investigative consumer report. This is true even if the applicant is rejected for other reasons or if the applicant is hired. Also, the "misconduct" exception does not pertain to the requirement that the report be provided to the subject employee. The employer must provide this information, along with information on who issued the report and how to contact them, either at the time of the meeting or interview between the subject of the investigation and the employer, or within seven days of the date the employer receives the report—whichever is earlier.

Employers should note that this requirement extends to all applicants or employees who are the subject of a report and not only to those who make a written request for the report or cases where adverse action was taken based on the report.

Employers Must Notify Employees of Investigations Done In-House: In another significant change, the Legislature has extended the scope of the law to cover investigations conducted by an employer's own employees. Previously, the ICRA applied only where an employer hired a third-party consumer reporting agency that charged a fee to provide information. The law now states that where **any** person, presumably including an employer, compiles information in lieu of using a consumer reporting agency, the person must "provide that information to the consumer at the time of the meeting or interview with the consumer, or within seven days of the date the person obtains the information regarding the consumer."

The Legislature does not define what

is meant by "information," nor does the Legislature indicate in what manner this information must be given to the applicant or employee. This provision does not require that the employer prepare a written report containing the "information." The intended purpose of this provision was to require employers who conduct background checks through "do-it-yourself" internet checking services to make the same disclosures to the subject as would be required if the background check were conducted by a consumer reporting agency. Thus, while it is not entirely clear what is required by this provision, given the penalties involved, a cautious approach would be for an employer to provide an applicant or employee with whatever information is developed during the in-house investigation as a matter of course.

The statute does not indicate whether or not an employer may delegate any of its paperwork obligations to the third-party investigator; regardless, even if this were permissible, the employer would still be liable where an employee failed to receive the report.

Substantial Penalties for

Noncompliance: The amendments to the ICRA include substantially increased penalties for noncompliance. Prior to the amendment, penalties for employers who did not comply were attorneys' fees plus the greater of actual damages incurred as the result of nondisclosure or \$2,500. Under the amended statute, the penalty against an employer for failure to comply has jumped from \$2,500 to \$10,000 – and the plaintiff may recover attorneys' fees, too. Additionally, if the court determines that violation of the statute was grossly negligent or willful, the employer may be liable to the subject of the report for punitive damages.

Federal Law Still Applies: In addition to the amended California statute, employers should not forget the applicable federal regulations under the FCRA. Under the FCRA, an employer is

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Half Day Workshop Tuesday March 12, 8am - noon

Workshop: Effective Workplace Investigations

There has been much in the news about the need to investigate claims by employees that they have been victims of discrimination or harassment. In these matters, the courts will conclude that if you did not investigate, then you must have condoned the bad behavior. When it is the employer who is the victim, as in cases of embezzlement or other wrongdoing, there are so many potential traps (such as invasion of privacy, defamation, etc.), that employers are fearful of the ramifications of any investigation.

In response to these concerns, some employers have tried to avoid any problems by simply terminating suspected wrongdoers; however, these alleged wrongdoers can also sue you. If a fired employee can establish an express or implied agreement not to dismiss except for good cause, the employee would have the opportunity to attack whether or not good cause really existed. **After all, if you did not even investigate, then how could you have had good cause?**

Attorney Susan Waag of Waag and Co. will be presenting "Effective Workplace Investigations" in a workshop sponsored by the Central Coast Personnel Association ("CCPA"). In this workshop, you will learn the answers to these and other questions. You will participate in workshop



exercises, see sample documents, and receive other materials so that you will have the tools and the confidence you will need to handle these sensitive matters.

Join the CCPA for a practical and valuable half-day workshop, which will take place on Tuesday March 12 from 8am until noon.

Workshop Information & Registration:

- Reservation:** Reserve your space by faxing or e-mailing Karen Chamberlin at (805) 541-4259 or karen@ypp.com
- Payment:** Payment will be "at the door" on March 12, from 7:30am to 8:00am
- Workshop Hours:** The workshop starts at 8:00 a.m. and will end at noon
- Workshop Includes:** Continental Breakfast plus extensive printed materials from employment law firm Waag and Co.
- Workshop Presenter:** Employment Law Attorney Susan Waag (former

CCPA president and current Board Counsel for the SLO Chamber of Commerce)

- Price:** CCPA Members with reservations: \$30; Non-Members and walk-ins: \$50. Make check payable to CCPA.
- Workshop Location:** The End Of The Line Cafe, 1150 Laurel Lane, San Luis Obispo; (805) 543-3685
- For more information** on this course, go to www.WaagandCo.com, then click on "Services", then click on "Training", then select "HD-04 Conducting Effective Workplace Investigations".

High Level Outline of Course:

1. The Cotran Case: Why a Proper Investigation is So Important
2. Is an Investigation Required?
3. Legal Implications Regarding How the Investigation is Conducted
4. Current Issues Regarding the Investigator
5. The Starting Point: Having Proper Policies and Procedures in Place
6. Planning the Investigation
7. Interim Actions While Investigation Pending
8. Investigating the Complaint
9. Reaching a Conclusion
10. Documenting the Investigation
11. Post-Investigation Issues

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obligated to notify an employee or applicant in writing, separate from the job application itself, that it may be seeking an investigative consumer report. Additionally, the employer is required to obtain written authorization from the applicant or employee before obtaining the report.

Summary: In order to now comply with state and federal laws concerning consumer investigations, the California employer must:

- 1.** Notify an employee or applicant in writing, separate from the job application itself, that the employer may be seeking an investigative consumer report.
- 2.** Obtain written authorization from the applicant or employee before obtaining the report.
- 3.** Within three days of ordering the report, inform the applicant or employee that he will be the subject of a consumer investigation, the name and address of the consumer reporting agency, the nature and scope of the investigation, and a summary of the consumer's rights

under the law (unless the employer has a good faith belief the employee has engaged in misconduct).

- 4.** Provide the employee or applicant with a copy of the report along with the name and address of the investigating agency no later than seven days from the date the employer receives the report.

For more information about related investigation issues, go to www.waagandco.com, click on "News", then click on "Articles", then select "Investigating Employee Complaints."



Court Ruling on Employee Arbitration

Arbitration Agreement Won't Stop EEOC Suit

In February 2002, the U.S. Supreme Court handed down a ruling that permits the federal Equal Employment Opportunity Commission ("EEOC") to sue employers for job discrimination, even if the employee has signed a mandatory arbitration agreement. We'll explain this new ruling and its impact.

Employee Fired After Seizure:

When Eric Baker was hired as a grill operator at a Waffle House restaurant in South Carolina, he was required to sign a job application containing a mandatory arbitration agreement. The arbitration provision stated that any dispute or claim concerning Baker's employment would be settled by binding arbitration.

Sixteen days later, Baker suffered a seizure at work. Soon after, he was fired. Baker never initiated arbitration proceedings. Instead, he filed a charge of discrimination with the EEOC, claiming that his termination violated the federal Americans with Disabilities Act ("ADA").

EEOC Goes After Employer In

Court: The EEOC sued Waffle House on Baker's behalf, although technically Baker was not a party to the lawsuit. The agency asked the court for Baker's reinstatement and damages—including back pay, pain and suffering and punitive damages. Waffle House asked

the court to dismiss the lawsuit and send it to an arbitrator because Baker had signed an arbitration agreement.

Court Says EEOC Can Sue: Now the U.S. Supreme Court has given the EEOC the green light to pursue its lawsuit against Waffle House. The court said that federal anti-discrimination laws give the EEOC the power to sue an employer for illegal discrimination and pursue reinstatement and damages for the employee. And nothing in these anti-bias statutes suggests that the EEOC's enforcement powers are limited because the employer and employee have entered into a private arbitration agreement. According to the court, the agency can't be bound by an agreement it didn't sign. Basically, the EEOC has its own rights and is viewed as enforcing the anti-discrimination laws on behalf of the public. Thus, if the EEOC decides to file an enforcement lawsuit against an employer, a private arbitration agreement between the employer and employee will not restrict the EEOC's action.

Practical Impact: Less than a year ago, the Supreme Court issued a ruling that endorsed mandatory arbitration of employment disputes—and now the new ruling appears to have dealt mandatory arbitration a setback. But the Waffle House case probably won't have

a drastic impact. That's because, due to limited resources, the EEOC only manages to file a couple hundred lawsuits a year out of the 80,000 charges of employment discrimination it receives annually.

There is still some risk that an employer could be hit with an EEOC lawsuit after having already participated in arbitration proceedings with the employee. But, the court pointed out, the EEOC's recovery of damages will be reduced by any damages the employee collects in a private settlement with you or an arbitrator's award. Plus, the court stressed that the EEOC can't recover damages an employee hasn't mitigated, such as if the employee failed to look for a new job. ✓

~Wage & Hour Law~

Update on Computer Software Employee Exemption



California law provides several ways for certain employees to be exempt. One of those, the

Computer Software Employee exemption, provides that certain computer software employees are exempt from overtime requirements if specific criteria are met. One of the criteria in the original statute authorizing this exemption is that the employee be paid an hourly rate not less than \$41 per hour.

That rate has been increased as of January 1, 2002 by 4% and is now \$42.64 per hour. Note that a computer software employee is not restricted to this form of exempt status. For example, a computer software employee who meets the criteria for some other exemption (for example, if the employee is a bona fide manager) would only need to be paid a monthly salary of at least twice minimum wage (now \$2,340 per month).



~Education~

Cal Poly Employment Law II—Spring '02

Tuesday evenings (6:30pm-9:10pm) beginning April 9, 2002, 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 \$180 (\$170 if you are in the certificate program); call Cal Poly Extended Education at (805) 756-2053 to reserve your space (course #MDS-94062) or go to www.extendedstudies.calpoly.edu, then click on "Programs", then select "Management Certificate Programs." If you would like more information on the course, please contact Waag and Co. at (805) 783-2300.



State and Federal Cases

Significant Case Law Developments

□ U.S. Supreme Court ADA Ruling:

On January 8, 2002, the U.S. Supreme Court decided *Toyota Motor Manufacturing Kentucky v. Williams*, in which a plaintiff claimed her carpal tunnel syndrome was a protected disability under the Americans with Disabilities Act. The court disagreed, concluding that here impairment was not sufficient to "substantially limit a major life activity."

While any Supreme Court ruling is important, the fact is that this will have **no impact on California employers**, where AB 2222 amended state law. As of January 1, 2000, the definition of a "disability" in California was so greatly broadened that nearly everyone would be deemed "disabled." Accordingly, California employers need to always consider the accommodation process and not attempt to "split hairs" over whether or not an individual's condition meets the legal definition of "disability."

□ More Employers Hit With

Misclassification Disaster: Many employers are having increasing difficulty in determining when an employee can legitimately be classified as exempt from California and federal overtime pay requirements. As a result, the likelihood of an employer facing an expensive wage-and-hour claim has vastly increased. Meanwhile, employees are making sure that they become better educated on the subject. *Employers should review their pay practices and the correctness of the exempt/non-exempt classification of all positions before they are next.*

Following on the heels of the misclassification cases against Farmer's Insurance Exchange, 21st Century Insurance Group, Starbucks Co., and Taco Bell is the **\$35 million settlement** by **Pacific Bell** to resolve claims by approximately 1,500 engineers, who earn as much as \$60,000 per year, who claimed they worked an average of 50 hours per week without overtime pay. The back overtime pay to each engineer will range from about \$100 to \$450 for each week worked since 1993!

The risk of lawsuits due to misclassifying hourly workers as exempt managers or administrators is now one of the greatest litigation risks faced by employers. Give the current notoriety of these awards, employers should carefully examine whether or not each "exempt" employee is properly classified. *Advice of qualified counsel is highly recommended in this analysis, given the current high stakes.*

□ **State Harassment Ruling:** Once again, California law is held to be much tougher on employers than federal law. Under both systems, an employer faces tougher liability where harassment is committed by a supervisor. But as Waag and Co. previously reported (Problem Prevention Bulletin, dated July 1998, "New U.S. Supreme Court Rulings on Sexual Harassment"), the U.S. Supreme Court determined that, under federal law, an employer faced with supervisor liability may, under certain circumstances, mount a defense. Until the recent State Court ruling in *Department of Health Services v. Superior Court*, some thought similar defenses would be available under California law too.

But this decision provides that if there is a finding that a supervisor committed harassment, the employer faces strict liability—i.e. automatic liability with no possible defense. This makes prevention and training extremely critical. If harassment does occur, a prompt and thorough investigation with appropriate corrective action and discipline may help avoid a lawsuit or limit damages.

□ **FMLA Issue to be Reviewed:** The U.S. Supreme Court will be reviewing a major FMLA case this year: *Ragsdale v. Wolverine Worldwide*. This concerns a DOL regulation stating that *FMLA leave does not start until an employer informs the employee that he or she is on FMLA leave*. Employees were going on leave without formal FMLA leave notice from their employer, then returning from the leave and demanding *an additional 12 weeks of FMLA leave*.

In *Ragsdale*, the Eighth Circuit Court ruled that the regulation was invalid because it creates a right the statute did not confer. The statute only requires an employer to provide 12 weeks of unpaid leave, and under the DOL regulations, an employer can be forced to provide many more than 12 weeks. While this case is significant, even if the DOL regulations are invalidated, the impact of such a ruling on California's version of the FMLA is uncertain.

□ Non-Compete Agreements:

California has long held that any agreement restricting a person's right to pursue his / her livelihood is a violation of California's Business and Professions Code. For the most part, this meant that such agreements were merely unenforceable.

In November, 2001, a California Court of Appeal gave the matter more teeth in *Walia v. Aetna, Inc.*, upholding a million dollar punitive damages verdict. In *Walia*, an employee was told

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

Susan Waag served as 1999 President of the Central Coast Personnel Association ("CCPA"). The CCPA functions as a Human Resources Networking and Educational Association. CCPA Professional Development Luncheons are currently held on the 2nd Tuesday of the month from 11:30am to 1pm at the Madonna Inn 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 or go to

www.ccpa-slo.org



Employment News & Information

Injured Workers' Benefits

Increased: Agreeing that California's benefits for injured workers are inadequate, the Legislature passed AB 749 (see www.assembly.ca.gov for details on AB 749), which raises weekly payments by more than \$300 over four years. *After vetoing three previous benefits increases in the last three years as being too costly, Governor Gray Davis indicated he will sign the measure in this election year.* The bill raises California from 49th to 40th in the country in the level of

benefits provided to injured workers. The bill raises maximum benefits from \$490 per week to \$602 in 2003 and \$840 in 2006. After 2006, yearly hikes will be equivalent to the state's average wage increase. The bill also doubles death benefits to a maximum of \$320,000. The increases begin January 1, 2003, and are the first increases since 1996.

State officials estimated that 900,000 claims are filed each year for on-the-job accidents or deaths; under the system, employees are entitled to

compensation in exchange for not suing their employers. The increase is expected to cost employers billions of dollars, without providing much in the way of reform or improved cost-effectiveness.

Worker Productivity Up:

American workers became significantly more productive in the past year even as the economy itself was sinking. The Labor Department

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to sign a non-compete agreement. When the employee refused, she was fired. She sued, claiming that by firing her for refusing to sign an illegal agreement, the company fired her in violation of public policy. The court agreed and upheld her wrongful discharge claim.

Employers should note that, although non-compete agreements are not lawful in California, it is permissible to restrict an employee's ability to raid your workforce, solicit your customers, or use your confidential information for anything other than your benefit. *Such restrictions should be drafted carefully with the assistance of qualified legal counsel.*

FMLA Retaliation Ruling: In a strange ruling, a federal trial court in Kansas has held that a claim for retaliation for exercising FMLA rights can go forward, even though the Court found the employer's reason for termination to be lawful. As you will see, *the case turned on the employer's failure to follow its normal policies for handling leaves of absence.*

In *Connel v. Hallmark Cards*, an employee and her family were active in 4-H and regularly attended their county fair each August. At the beginning of August 2000, she only had four days of

vacation pay remaining and wanted to save that for her daughter's November wedding. Four days before the fair was to start, the employee called in sick. She stated that she had migraines and couldn't even move. She lamented about having to miss the county fair.

Her doctor also submitted a medical certification of her condition and requested FMLA leave from August 2 through 25. The employer approved the request and the employee was paid according to the employer's short-term disability policy.

On August 8th, the employee was spotted and photographed at the county fair by a managerial coworker. The company investigated and found that the employee had camped with her family at the fairgrounds for a week and attended fair activities. On August 15th, the company confirmed with the employee's doctor that she could perform light duty work. The company told the employee she could continue her leave, but her disability payments would end. It also investigated whether or not she had lied about her need to be out during the first 2 weeks of August.

The employee returned to work on August 16th. *Significantly*, the company did not require the employee to provide a fitness-for-duty certification from her doctor. After conducting a further investigation and determining that the employee had lied about her need to be

out sick during the fair, the company fired the employee, effective November 16, 2000.

The employee sued, claiming that the company retaliated against her for taking FMLA leave. The court noted that there was no direct evidence of this, and if the company fired her because she misrepresented her need for the FMLA leave, then it did nothing wrong.

However, this "if" was the big factor. The Court found that it was odd that the company did not follow its own policies regarding its decision to stop the disability payments and its normal requirement to obtain a fitness-for-duty certification before allowing an employee to return to work.

For this reason, the Court held that this could be viewed as *indirect evidence* that the employer's decision was not really because of her lies, but instead was in retaliation for her attempt to exercise her FMLA rights.

While this is an unusual case and one that the employer is likely to win at trial, the real problem for the employer is the expense and disruption that the trial will cause—even if they do win their case. The real lesson here is not that employer's must tolerate lies and misuse of FMLA leave, but that *employer's must consistently follow their own policies in all applicable situations.*

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reported that non-farm labor productivity, or output per hour worked, grew at a seasonably adjusted 3.5 percent annual rate during the final three months of 2001 and at a 2.3 percent rate in the nine months from the start of the recession in march 2001.

The aggressive corporate cost-cutting that accelerated after September 11 appears to have helped companies be more productive, though at the expense of more than a million jobs and many work hours. If productivity is rising as robustly as the labor Department's latest report suggests, it means businesses are squeezing more and more output out of fewer workers. Fast productivity growth helps tame inflation by allowing companies to produce more without straining their resources.

□ Reporting Time Pay Clarification:

The DLSE recently provided Waag and Co. with an analysis of obligation to pay reporting time pay when employee is called in, works for less than half his / her scheduled shift, is sent home, and is then called back in again the *same day* to work a full shift. The following 2 examples demonstrate the importance of planning ahead.

□ **Example 1.** If an employee reports for work expecting to work an 8 hour shift, works only 1 hour and is sent home, and then is asked to return later in the workday to work a different 8 hour shift, the employer is required to pay the employee a total of four hours pay at the employee's regular rate of pay (one-half of the employee's regularly scheduled or usual shift) for the first show-up. In addition, the employee is entitled to recover an additional seven hours at straight time and one hour at time and one-half at the employee's regular rate of pay as a result of the eight

hours worked at the second show-up; a grand total of 12 hours. To summarize, the employee would be entitled to eleven hours at the regular rate of pay and one hour at the premium rate of time and one-half. It is noted that three of the four hours paid to the employee for the first show-up would not be counted toward the employer's overtime obligation but would, instead, be considered in the same vein as a penalty.

□ **Example 2.** If an employee reports for work expecting to work an 8 hour shift, is not put to work and is asked to return later in the day to work a different 8 hour shift, the employer is required to pay the employee twelve hours of pay: four hours for the first show-up when he or she was not put to work and eight hours for the second shift when the employee actually was provided with a full shift; a grand total of 12 hours. (*source: DLSE Info 907*).

□ Federal Laws: What You Can Expect From Your Congress in 2002:

Based on several conversations with members in the House and Senate, you can expect their priorities to be as follows:

Top Priority: Homeland and National Security, Fast Track Trade Authority for the President, a new Economic Stimulus Plan (Republicans want tax breaks, the Democrats want more for the unemployed), Energy Plan, Election Reform and passage of a Farm Bill. Additionally, with the Enron Scandal, Pension Reform has been moved to the top of the agenda. Campaign Finance Reform, which had lost all momentum after 9/11, is now back on the "priority" list by a coalition of Republicans and Democrats, but the Republican Leadership would still like to see the issue tabled.

Low Priority: Social Security recipients being able to invest a small portion of their contributions into an Individual Savings Account, Medicare

Reform and passage of a Patients Bill of Rights.

Article Source: Law Offices of Mike Stoker, 2/11/02, (805) 937-6790, MikeStoker@aol.com.

□ **State Laws: What You Can Expect From Sacramento in 2002:** The three E's (The Economy, Energy and Environment) will predominate California politics in 2002. Political insiders indicate that Gov. Davis has made some agreements with key figures in the field of organized labor and the environment to push their agenda in 2002 in exchange for enthusiastic support in the Governor's race.

Since becoming Governor, Davis has played to the mainstream in both the environmental and labor arena. Expect that to change in 2002. For instance, the Worker's Compensation legislation that has been vetoed three times is, according to its proponents, is going to get Gov. Davis' support this time. SB 71, which the Governor vetoed, would have increased worker's compensation costs to business by an estimated \$3.6 billion per year.

However, the status of California's budget will most likely be the focus of debate in our state capitol. In 12 months, Gov. Davis has seen the state budget go from almost a 12 billion dollar surplus and what is now expected to be a 14 to 20 billion dollar deficit by June 2002. You can count on the budget to be the focal point in the legislature as well as the campaign trail between Davis and whoever becomes the Republican nominee.

Article Source: Law Offices of Mike Stoker, 2/11/02, (805) 937-6790, MikeStoker@aol.com.

□ **Labor Board Looks Ahead:** The National Labor Relations ("NLRB") is now GOP-led for the first time in years. They will undoubtedly reverse some of the previous positions of the

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Effective January 1, 2002

Employers Must Keep New OSHA Log 300

Employers covered by OSHA's record-keeping obligations must maintain Cal/OSHA Log 300 forms and comply with the new record-keeping requirement, effective January 1, 2002.

The Log of Work-Related Injuries and Illnesses (Form 300) classifies work-related injuries and illnesses, notes the extent and severity of each case and records specific details about what happened. An injury or illness is considered work-related if an event or exposure in the workplace caused or contributed to the condition or significantly aggravated a pre-existing condition.

There are two principal exemptions to the Log 300 requirement: small employers (10 or fewer employees) and employers

with certain industrial classifications (private employers with a Standard Industry Classification of 52- 89, **except** 52-55, 57, 70, 75, 76, 781, 79 and 80).

Employers must record work-related injuries and illnesses that result in death; loss of consciousness; days away from work; restricted work activity or job transfer; and medical treatment beyond first aid.

Employers also are required to record work-related injuries and illnesses that are significant or meet the following criteria: any needle-stick injury or cut from a sharp object that is contaminated with another person's blood or other potentially infectious material; any case requiring an employee to be

medically removed under the requirements of an OSHA standard; any Standard Threshold Shift (STS) in hearing; and tuberculosis infection.

Employers must keep a log for each establishment or site. Employers with more than one establishment must keep a separate log and summary for each physical location expected to be in operation for one year or longer.

Note that every February, employers still must post the familiar Cal/OSHA Forms 101 and 200 (also known as Log 200). However, as of January 1, 2002, injuries and illnesses must be noted on the new Form 300.

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Democrat-controlled Board. Clinton-era positions that could be targeted include rulings that: allow non-union workers to bring co-worker representatives into pre-disciplinary meetings; lump contingent workers into bargaining units with full-timers; and require employers to hold elections before withdrawing union recognition.

The new Board is expected to be more understanding of business issues and the pressure businesses face; however, until and unless new rulings are issued, the Clinton-era rulings remain in effect.

Harassment at Work: Many women continue to confront sexual harassment at work. A recent study of 1,000 Americans by the Employment Law Alliance found that 21 percent of

female respondents said they have encountered sexual harassment on the job, compared with 7 percent of males. The poll results confirm the fact that sexual harassment is still very much a fact of life in the American workplace.

Still, it's significant that 85 percent of those polled said they have not been sexually harassed at work, suggesting that U.S. employers may be doing a much better job at curtailing the behavior.

Survey Released Regarding California's Anti-Business Climate: The California Chamber of Commerce and the California Business Roundtable recently published results of a survey they conducted among 400 business leaders in our state. One area that this survey focused on was how the California business climate compared to other states. *The results were not good.* Business leaders cited a number of areas where our state is

at a competitive disadvantage to other states. *Here are some examples:*

- 81% say that Housing costs in California are much more expensive than other states. High housing costs and the subsequent lack of affordable housing impact employees of all California businesses.
- 74% say that Energy costs in California are significantly higher than other states.
- 71% say that Employee costs such as worker's compensation and insurance make it difficult to operate in California.
- 2/3rds of respondents listed Taxes and Regulations as other areas where California costs more than other states.



California Supreme Court Opinion

Liability for Injuries to Contractor's Employees

Last summer, Waag and Co. reported *Lon Camargo v. Tjaarda Dairy*, in which the California Supreme Court held that an employee of a contractor injured on the job may not sue the hirer of the contractor based on a theory that the hirer was negligent in selecting a contractor who was not qualified to do the work safely. See *The Strategic EMPLOYER* newsletter, July 2001.

On January 31, 2002, the California Supreme Court issued two more opinions regarding when the hirer of an independent contractor might be liable for the injuries caused to the contractor's employees. In both cases, the question of the hirer's liability depended on *whether or not the hirer actually and affirmatively exercised control that contributed to the cause of injury.*

In *Hooker v. Department of Transportation*, Paul Hooker was a crane operator killed on the job. He was employed by an independent contractor that was hired by Cal Trans to construct an overpass.

Mr. Hooker engaged in unsafe practices that led to his death, all with the knowledge of Cal Trans. His widow noted that Cal Trans officially had responsibility and control for the safety of the site, and therefore was directly responsible for the accident.

Nevertheless, the Court held against the claim. Specifically, the Court ruled that the hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at the work site.

Rather, such a hirer would be liable only insofar as the hirer's exercise of retained control affirmatively contributed to the employee's injuries. The Court noted that Cal Trans did not direct Mr. Hooker to engage in the unsafe practices, but merely failed to exercise affirmative control to prevent the injuries.

In a companion case issued the same day, the Court addressed a slightly different issue and found liability on the

part of the hirer. In *McKnown v. Wal-Mart Stores, Inc.*, Brian McKnown, the employee of an independent contractor, was injured when he used a Wal-Mart-provided forklift. Wal-Mart requested that McKnown's employer use Wal-Mart's equipment whenever possible; all understood that this was not a directive.

McKnown needed to stand on a platform positioned on a forklift, and knew that the platform and other elements needed to be secured together in order for this to be done safely. He also knew that Wal-Mart's forklift was not capable of being safely secured and decided to use the forklift anyway, resulting in his injury.

A jury found that Wal-Mart negligently supplied unsafe equipment and was partially liable for the injuries. The California Supreme Court upheld this verdict, and noted that, unlike the *Hooker* case, Wal-Mart did not simply fail to get involved; here, the Court held that *the hirer who provides unsafe equipment has affirmatively taken actions that contributed to the injury of the contractor's employee.*

For this reason, Wal-Mart was held liable for its own direct actions that contributed to McKnown's injuries.

Abilities Fair

Friday, March 8, 2002

9am - 4pm

San Luis Obispo, California

Veterans' Memorial Bldg., 801 Grand Avenue

Free Admission!

You are invited to attend the 5th Annual Central Coast Abilities Fair, presented by SLOCO Access and MCI Global Relay. The event will show assistive products and services that allow individuals of all abilities to live more independent and productive lives. Exhibitors include: High Tech Equipment, Ergonomic Products, Telecommunications, Education and Training, Vehicle Modification, Sports & Recreation, Employment Services, Human Services Agencies, Products for Home and Office, Vision-Hearing-Mobility Aids and more! For more information, call SLOCO Access at (805) 543-3627. The event sponsors include Waag and Co.

The Strategic EMPLOYER

March 2002 ~ Susan S. Waag, Esq. ~ (805) 783-2300
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