November 2002 WAAG AND CO. Employer News

The Strategic EMPLOYER

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New Legislation: Regulations that are Effective Immediately

The current legislative session in California is now closed, and the deadline for action by Governor Davis has passed. Accordingly, we now know the fate of the employment-related bills that were active this past year, and what will (or will not) be the law in California as of January 1, 2003. Also discussed are some bills that did not survive, primarily ones that were vetoed by Governor Davis as he was facing a close re-election campaign. Employers should be alert for many of these failed bills to resurface in some form over the next year or so. Employers will need to *review their personnel policies and practices* to ensure that they will be in compliance with the latest legislative mandates.

State Bills/Regulations that are effective immediately:

☐ **Background Checks and Investigations (AB 1068, AB 2868):** These bills clean up the confusing law that originally went into effect January 2002. Waag and Co. reported on this law earlier this year; see *The Strategic EMPLOYER, March 2002*. The law imposes new obligations on California employers when using outside reporting agencies to check the backgrounds of applicants and employees. Also imposes obligations on employers doing background checks on applicants and employees utilizing in-house personnel. More details regarding the changes made by the new legislation are discussed on page 6 in this newsletter.

☐ **Reference Checking (AB 2868):** California Civil Code §47, which defines defamation and certain "privileges" against defamation, is amended to clarify the applicability of the privilege to employment-related reference checks. Specifically, this bill adds language to the effect that the reference privilege applies where it is provided to "one whom the employer reasonably believes is a prospective employer of the

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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.*☑

California Legislative Machine Churns On

State Laws Effective January 1, 2003

☐ **Business Closures (AB 2957):** Requires notice to employees and government officials at least 60 days prior to a mass layoff, relocation, or termination of a business, as those events are defined in the law. More details regarding the changes made by this new legislation are discussed elsewhere on page 8 of this newsletter.

☐ **Attendance Control (AB 1471):** Prohibits disciplining employees who take time off provided by the "kin care" law to care for a sick child or family member.

Immediately...

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applicant." The bill also authorizes a current or former employer "to answer whether or not the employer would rehire a current or former employee." As with previous amendments to this statute, the existence of a privilege does not do much to reduce the threat of litigation, since questions of privilege generally end up with the jury. The new law does not alter the long-standing recommendation of employment attorneys: *No information should be provided other than dates of employment and last job title.*

☐ **Cal/OSHA Mold Standard:** The California Occupational Safety and Health Standards Board adopted a new regulation requiring employers to take steps to prevent employee exposure to mold. The new regulation requires employers to, at a minimum, correct "exterior water intrusion, leakage from interior water sources, or other uncontrolled accumulation of water" due to the potential for these conditions to cause mold growth. 8 C.C.R. §3362(g). Employers should contact their workers' compensation consultant for more details.

☐ **Employee Records (AB 2412):** Requires employers to furnish payroll records to employees and former employees within 21 days from the date requested and provides a penalty for noncompliance. Employers must allow the current/former employee to review the records or have copies (at actual cost), as the employee elects. Current and former employees already have the right to review their personnel files and receive copies of any documents the person signed in order to obtain or maintain their employment.

☐ **Health Benefits (AB 1401):** Extends continuation of federal COBRA and Cal-COBRA health-benefits coverage to 36 months. Since state law cannot amend the federal COBRA requirements, the law is written so that it affects California insurance carriers dealing with individuals who have exhausted their federal COBRA coverage. If a person has exhausted the federal COBRA coverage, the California insurer must then offer that person the option to extend the continued coverage to 36 months. Under Cal-COBRA, the participant must be offered 36 months at the outset. This new law will apply to participants who *began* receiving continuation coverage on or after January 1, 2003.

☐ **Privacy (AB 700, SB 1386):** Requires employers that maintain electronic files containing personally identifiable data on employees or customers (such as Social Security Numbers) to notify the employees or customers if the security of the data has been violated.

☐ **Undocumented Workers (SB 1818):** Protects the rights of undocumented workers as employees and applicants for employment for the purpose of enforcing state labor, employment, and civil rights laws.

☐ **Employee Discipline (AB 2895):** Prohibits an employer from discharging, disciplining, or otherwise discriminating against an employee who discloses information about wages or working conditions. New law does not, however, permit employees to disclose proprietary or trade-secret information.

☐ **Workers' Compensation (AB 749):** Increases workers' compensation benefits and requires a revised poster and pamphlet for distribution to employees. Employers should contact their workers' compensation carrier representative for these materials.

☐ **Sexual Assault Victims (AB 2195):** Extends to victims of sexual assault employment protections and temporary leave of absence rights currently provided to victims of domestic violence.

☐ **Occupational Safety (AB 2837):** Creates new obligations and penalties for failure to report on a timely basis industrial accidents that resulted in serious injury or death.

☐ **Statute of Limitations (SB 688):** This bill doubles the statute of limitations from one year to two years the time within which a plaintiff may bring a state court action for, among other things, "injury to … a person caused by the wrongful act or neglect of another." While the stated purpose of this bill was to give families of the victims of the 9-11 attacks more time to bring suit in state court, a substantial variety of employment-related claims — having nothing to do with terrorist activities — will fall within this category. This means that employees will now be able to wait up to two years to bring suits for claims such as wrongful termination in violation of public policy, invasion of privacy, intentional infliction of emotional distress, and various federal civil rights claims (many of these "borrow" California's personal-injury limitations period). A more technical bill, AB 1146, also creates some new situations in which a plaintiff may have more time to go to court after receiving a "right to sue letter" from the California Department of Fair Employment & Housing. ☑

Not Effective Until January 1, 2004

California's Paid Family & Medical Leave

California is now the first in the nation to provide "paid family leave" (SB1661). This new program does not go into effect until January 1, 2004, when payroll deductions begin; employees cannot begin to collect benefits for such leave until July 1, 2004.

It is important for employers not to confuse this new program with the existing laws that entitle employees to take off 12 weeks per "leave year" with continued health insurance. Those state and federal laws apply to employers with 50 or more employees. The new program, called Family Temporary Disability Insurance ("FTDI") applies even if you have just a single employee. All employees — whether part-time, temporary, full-time, or just hired — are eligible for up to six weeks of FTDI benefits per "leave year" as soon as they begin working for you.

The FTDI program covers absences for the following purposes: (1) to care for a child of the employee (or child of his/her spouse or domestic partner) who has a serious health condition; (2) to care for the employee's parent, spouse or domestic partner who has a serious health condition; or (3) in connection with the birth, adoption, or placement for foster care, of a child of the employee or his/her spouse or domestic partner. Employees will need to submit a new medical certification form, to be established by the California Employment Development Department ("EDD"), in addition to any certifications other leave laws may require. However, the employee will be ineligible for FTDI benefits if there is another family member available to provide the necessary care.

One very important aspect of this law is that the FTDI program does not create new employee rights to take leave. Instead, it only sets out rules about when an employee who happens to be on such a leave will be eligible for collecting FTDI benefits. These benefits are not paid directly by the employer, but are a partial wage replacement through the EDD. This functions basically the same way as State Disability Insurance ("SDI") now does. And while neither the FTDI nor the SDI programs creates an entitlement to a leave of absence or a right to reinstatement, employers must be cautious to comply with any other applicable laws that may create such entitlements and rights.

The FTDI program will be funded entirely by an increase in the employee-paid portion of every employee's payroll deductions. Eligible workers would receive 55% of their base wages, up to a maximum of $728 per week, after a seven-day waiting period. Employers pay none of this cost (at least not yet).

The worker must use FTDI benefits concurrently with other leave, such as Family & Medical Leave. Employers can require its workers to take up to two weeks of any available, accrued vacation time before receiving FTDI benefits leave. Employers can have the vacation time used to offset the seven-day benefits waiting period.

The EDD has until January 1, 2004 to provide employers with updated notices explaining workers' rights under the new law. These will need to be provided to all new employees hired on or after January 1, 2004, and to each employee who takes FTDI leave on or after July 1, 2004. ☑

☑ ~Looking Forward~

Notable Bills that Did Not Make It – This Time

☐ **Automatic Minimum Wage Increase (AB 2242):** Would have imposed annual increases to the State minimum wage (along with the minimum salary levels for exempt status) based on past economic indicators, without any examination of economic projections or other considerations. This bill died before reaching the governor's desk, but is already under discussion.

☐ **Whistle Blower Protection (SB 783):** Would have expanded the protections for employees who report violations of state or federal rules. Also would have required a new notice. Vetoed by the Governor.

☐ **Reporting Requirements (AB 1309):** Would have required filing an annual state report describing workforce composition by gender, ethnicity, and job classification without appropriate protections for confidentiality. Vetoed by the Governor.

☐ **Contracts for Labor (AB 1466):** Would have imposed restrictions on contracts for labor or services in the construction, farm labor, government, and janitorial, or security guard industries. Vetoed by the Governor.

☐ **Employment Arbitration Agreements (SB 1538):** Would have prohibited pre-dispute arbitration agreements for discrimination claims under FEHA. Vetoed by the Governor.

☐ **Labor law compliance penalties (AB 2752):** Would have created new and increased penalties against employers for violating state labor laws.

☐ **Ergonomics (AB 2845):** Would have required new ergonomic standards on or before July 1, 2004.

☐ **Severance Pay (AB 2989):** Would have mandated paying a severance to non-exempt employees of employers that provide it for exempt employees.

☐ **Employee Termination (AB 2990):** Would have created a rebuttable presumption that any adverse action taken against an employee within 90 days after he/she has exercised rights under the Labor Code is unlawful retaliation.

Holiday Parties, Alcohol and Liability:

Party Advice for the Holidays

It is time again for all of those holiday parties or awards banquets. Does your company have a policy about serving alcohol? Serving alcohol at company-sponsored parties and events can have some serious consequences – tragic, if a drunk employee gets into an accident while driving home. Plus, there tends to be a direct correlation between increased alcohol consumption and the number of sexual harassment complaints.

Courts have been expanding the liability of employers for acts of their employees when alcohol is consumed. The basic rule is that employers are not responsible if the event where the alcohol was served was purely social. But if business was involved, the employer may be held accountable. How do you determine if an event is business related, rather than purely social? The courts will consider a variety of factors. Where was the event held? Were employees required to attend? Were spouses invited? Were speeches given or company business discussed? Was the event organized and sponsored by the company or was it independently arranged and paid for by the employees?

One company served alcohol at an annual banquet for employees who had achieved five years of service. While driving home, an employee who had been drinking alcohol struck and injured another motorist. The employer was held liable because the banquet was an official company function that employees were expected to attend. Spouses/families were not invited, there were speeches by the vice president, and seating was arranged by seniority. The court had no trouble concluding that this was a business event, not a social one.

There are a number of things an employer can do to prevent alcohol-related problems (including sexual harassment and auto accidents) and limit liability risks:

☐ **Do not serve alcohol.** This is the simplest solution of all. For those who do not consider this realistic, read on…

☐ **Limit alcohol consumption.** There are a number of ways to do this, such as a no-host bar, or by providing a limited number of drink tickets. Also stay away from sweet, alcoholic punches; these can make it difficult for someone to tell how much alcohol they are consuming – until it is too late.

☐ **Close the bar early.** Stop serving alcohol one or two hours before the end of the event. If possible, continue serving food even after the bar is closed.

☐ **Have the party off-site.** If the party is held at a hotel or restaurant with its own liquor license, and their employees are serving the drinks, you will be less likely to be held liable.

☐ **Establish an alcohol policy.** Let your employees know (in writing) that excessive drinking at company functions will not be tolerated, and that consuming alcohol will not be an excuse for inappropriate behavior. Remind workers about the dangers of drinking and driving.

☐ **Make driving unnecessary.** Offer transportation alternatives, such as taxi vouchers or other company-paid transportation, so that employees will not need to drive themselves home.

☐ **Avoid company business.** Keep the event as social as possible. Minimize any discussion of business matters and hold the party outside regular business hours.

☐ **Make it a voluntary event.** If you will be serving alcohol, it is wise to make attendance purely voluntary.

☐ **Invite spouses/dates.** Inviting spouses and dates will tend to make the event more of a social occasion and less of a business function.

☐ **Caution: Minors.** The law can come down hard on those who allow minors to drink alcohol. If a significant number of your employees are minors, or if you expect families with minor children to attend events, it would be wise not to serve alcohol at all. If you still decide to serve alcohol, make sure there are strict and effective controls in place to prevent minors from consuming alcohol.

While it is impossible to exercise absolute control over your employees, the key to avoiding legal problems and to keeping your employees safe is to do everything you can to prevent them from becoming intoxicated, losing control of their behavior, or getting behind the wheel when they should not drive. This is possible if you think about these issues before you have your holiday party or other event. Waag and Co. wishes everyone a safe and happy holiday season. ☑

~HR News~

☐ **IRS Mileage Reimbursement Rate has been Decreased!** The IRS has decreased the mileage reimbursement rate commonly used by businesses. Effective January 1, 2003, the new IRS rate will be *reduced* from 36.5 cents per mile to 36.0 cents per mile.

☐ **INS Permanent Residence Cards:** The INS website has been updated to reflect the policy that Permanent Resident Cards (as well as the predecessor Alien Registration Receipt Cards) do not have to be reverified when they expire. This policy clarification streamlines I-9 form employment reverification requirements for employers. You can view this information and obtain INS forms on line at *www.ins.usdoj.gov*

Recent Developments

Wage & Hour Law Update

California's Division of Labor Standards Enforcement ("DLSE") is continuously publishing its opinions about the interpretation of various regulations. There a couple important ones to note:

Latest Regarding Rest & Meal Periods

In nearly every issue of *The Strategic EMPLOYER* in the past two years, Waag and Co. has been reporting on developments regarding the penalty provisions that apply when non-exempt employees fail to get their required rest and/or meal periods. Although the payments are called "penalties" in the regulations, employers must automatically pay employees for missed breaks, and not wait for any claims or findings that one normally thinks of as necessary for imposing a "penalty." Perhaps for this reason, the DLSE has said that, despite the name, these payments are really a premium payment, and not actually a penalty.

Why should this matter; what is in a name? Plenty, according to a DLSE opinion letter. Since these payments are not themselves a "penalty," the DLSE is then free to impose waiting-time penalties on employers who fail to pay the missed-break penalties.

"Waiting-time" penalties apply when an employee leaves employment without receiving all wages when due. If an employee is fired or laid off, the employer must pay all wages (including unused vacation pay) to the departing employee that same day. If the employee quits with less than 72 hours notice, then the employer has 72 hours (*not* 3 business days) in which to deliver the final paycheck. If the quitting employee does give this notice, then the paycheck must be given to the employee on his/her last day. Where an employee fails to provide all final wages on time, the employee can claim "waiting-time" penalties in the amount of one full day of pay for each day the check is late, up to a maximum of 30 days of penalties.

So if an employer, for example, pays the employee on his last day worked for all hours worked through that time, but fails to include any other money owed, such as vacation pay or some overtime, the waiting-time penalties apply. Now, according to the DLSE, waiting-time penalties will apply where the employer failed to pay to the departing employee any missed-break payments that the employer still owes to the employee. This makes it all the more important for employers to ensure their full and timely compliance with California's rest and meal period requirements, including the obligation to pay employees for any "penalties" when they miss any of these breaks. More information is available in numerous newsletters and bulletins of *The Strategic EMPLOYER* beginning in August, 2000.

Pay Days & Pay Stubs

As of January 2001, California law was amended to increase the amount of information that must be included on employee pay stubs. This includes a requirement that each pay stub accurately state the number of hours worked during the period covered by that paycheck and the applicable hourly pay rate(s) in effect for all hours worked. In an opinion letter issued earlier this year, the DLSE has pointed out difficulties this can create for some employers.

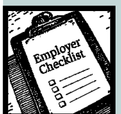
Many employers pay their non-exempt employees semi-monthly, on a salaried basis. In other words, they pay these employees 1/24th their annual salary on each payday. Since the number of days and workdays in each month will vary, it is unlikely that the hours worked in any individual pay period will ever actually equal 1/24th of the annual estimated hours, the equivalent of 86.67 hours per half-month. Yet, most employers have routinely put "86.67 hours" on the pay stub when processing the paycheck, and then either added for any overtime hours or deducted for any vacation time, etc. For some employers, these adjustments for actual hours worked take place in the next paycheck, since a number of companies issue their paychecks the same day as the end of the pay period. For example, a check given to the employee mid-day on the 15th of the month covers work done during the 1st through the 15th. In such cases, the employer has to process the checks before some of the workdays the checks cover have occurred.

As the DLSE pointed out in its opinion letter, pay systems like this cannot comply with the current pay stub requirements for accurately stating the hours actually worked and paid with that paycheck. While acknowledging that it is legal to pay on a semi-monthly basis, the DLSE observed that the practice of issuing paychecks on the last day of the pay period, rather than issuing them after the close of the pay period (within the legally permitted time frame), would make compliance impossible. No paycheck would accurately list the total hours worked, and "adjustments" would be needed in every subsequent check. Under such a system, opined the DLSE, the purpose of the new pay stub law could not be fulfilled; i.e., the employee would not have a record of the hours actually worked and rate(s) in effect to examine whether or not s/he was properly compensated.

Simply stated, the DLSE concluded that the practice of listing 86.67 hours in the itemized wage statement when that is not a precise reflection of the number of hours worked in that pay period is a violation of the Labor Code. The DLSE then commented that, while there is no law against paying employees in advance of the end of a pay period, doing so makes it impossible to comply with the pay stub law, even when the employer is trying to make a more accurate "guess" than defaulting to 86.67 hours.

Another problem under such a system comes when the employer

Wage & Hour: *continued on next page*



Ongoing HR Update

Background Checks and Investigations

In March 2002, Waag and Co. reported on a new statute that imposed burdensome and confusing requirements on employers seeking any information regarding job applicants and employees; see *The Strategic EMPLOYER, March 2002*. Based on the stated goal of combating identity theft, the Investigative Consumer Reporting Agencies Act ("ICRAA"), made huge changes to the law governing investigative consumer reports.

Among other things, the original statute required employers to notify applicants or employees in writing every time an investigative consumer report was being made, along with specific information about who was conducting the investigation and the individual's rights. The law also contained some difficult timing requirements for providing the individual with the notice and with copies of the ultimate report. Moreover, employers were required to provide copies not just of reports from a consumer reporting agency, but a copy of all information from any source, even if it was the employer's own representative who collected it. This even seemed to apply to ordinary reference checks.

With respect to investigations of wrongdoing, the original statute exempted employers from notifying employees that they were the subject of such investigations, but required employers to provide any information gathered through these investigations to the employees. Many employers questioned how these broad disclosure requirements could possibly be squared with the independent legal obligation placed on employers by the anti-discrimination laws and related statutes to conduct appropriate investigations into allegations of employee misconduct.

In response to these and several other serious concerns, urgency legislation has been enacted to modify and clarify the scope and application of the original statute in several significant respects. For the most part, these changes improve the ICRAA and reduce the burdens placed on employers.

Under the new provisions, employers must obtain notice and consent every time an investigative consumer report is obtained. Specifically, the ICRAA now requires that prior to requesting a report, an employer must provide a written disclosure to the consumer containing the following information:

- ☐ The fact that an investigative consumer report may be obtained.
- ☐ Identifying the permissible purpose for obtaining the report, i.e., for employment purposes such as hiring or promotion.
- ☐ Indicating that the report may include information on the consumer's character, general reputation, personal characteristics, and mode of living.
- ☐ Identifying the name, address, and telephone number of the investigative consumer reporting agency conducting the investigation.
- ☐ Notifying the consumer of the specific nature and scope of the investigation requested, and providing the consumer with a summary of his or her right to view the information compiled by the consumer reporting agency.
- ☐ Providing that the consumer must authorize in writing the procurement of the report on the disclosure form.

The authorization form must be separate from other documents, and cannot be contained in the application or handbook. Thus, employers must now have a single form that not only provides information to the consumer, but also requires the consumer to acknowledge, on that form, their consent to having the report made.

The original statute created ambiguity regarding whether notice was required for investigations into suspected employee misconduct, such as theft or sexual harassment. These provisions have been clarified by a new provision specifically indicating that the notice and consent requirements *do not apply* to investigations into any suspected employee misconduct or wrongdoing. Thus the law can now be

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Wage & Hour

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overpays the employee for the pay period. Suppose an employee misses work on the 15th, but the paycheck assuming s/he was at work that day has already been processed. The DLSE states that the employer cannot legally recover that overpayment from the next paycheck, unless the employee voluntarily agrees in writing to let the employer deduct the overpayment.

The penalties for failing to comply with the current pay stub laws are measured per employee who did not get a proper pay stub. Each employee would be able to recover up to $50 for the initial pay period in which a violation occurs, and $100 for each subsequent violation, with a maximum aggregate penalty of $4,000. This means, for example, that an employer with 10 employees would face a maximum penalty of $40,000. The employee is also entitled to recover costs and reasonable attorney's fees.

Employers should review their pay practices in view of the current pay stub law and the DLSE's recent opinion letter. Any questions should be discussed with qualified employment law counsel, particularly if there is a potential need to change either your pay periods or your pay days in order to comply with these laws. ☑

Court Overturns "Direct Threat" Ruling

U.S. Supreme Court Decides Disability Case

Late last year, Waag and Co. reported that the U.S. Supreme Court agreed to review the Ninth Circuit's decision in *Echazabal v. Chevron USA, Inc.* see *The Strategic EMPLOYER, November 2000.* In this case, an applicant was offered a position in Chevron's refinery that would have necessarily exposed him to certain chemicals. His pre-employment medical exam revealed a medical condition that would have caused him to suffer severe liver damage if he were exposed to the workplace chemicals. Because of this imminent threat of serious harm to the applicant if he were placed in the job, Chevron withdrew the job offer.

The applicant sued for disability discrimination. Chevron contended that the Americans with Disabilities Act did not require placing a person into a position that posed a direct threat to a person's safety. A "direct threat" would be where there was a significant risk of grave injury or death. The Ninth Circuit held that this exception only applied where there was a direct threat to the safety of third persons – not to the individual with the disability. The Court's concern was that employers should not be paternalistic and assume that individuals with disabilities cannot decide personal risks for themselves.

Recently, the U.S. Supreme Court unanimously agreed that you may refuse to hire disabled individuals if the work would pose a "direct threat" to that individual's own health or safety. The Court commented that Chevron's reasons for its actions were legitimate: "Moral concerns aside, it wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state law, and the risk of violating [OSHA]." Previously, the Court had also expressed concern about placing employers in the position of having to choose between an expensive lawsuit or placing a person into a job knowing that the person is likely to suffer grave harm.

Keep in mind that an employer would need very clear and individualized evidence that a specific job would pose a "direct threat" to the person before any adverse action could be taken. An employer who acts on mere assumptions about a particular disability or about how the definition of "direct threat" pertains, may find themselves in violation of the anti-discrimination laws. Employers should always obtain advice of qualified employment law counsel before taking such actions. ☑

Investigations...

Continued from previous page

read broadly to exempt any investigation by an outside entity into employee misconduct or wrongdoing from the notice and, more significantly, the consent requirements of the ICRAA. It should be noted that there is still some dispute regarding whether the notice and consent requirement under the analogous federal law applies to investigations into misconduct such as sexual harassment. Under the new clarifications, employers are not required to provide employees suspected of misconduct with a copy of the investigation report.

Last year's legislation placed the burden on the employer to promptly provide the subject of the report with a copy. This burden has been somewhat reduced. Now the employer must provide a "check box" which permits the consumer to affirmatively indicate that s/he wants to receive a copy of the report. This check box can be included on the disclosure and consent form, or as a separate document. More importantly, the Legislature has clarified that this duty is delegable. It is advisable for an employer to agree with its consumer reporting agency that the consumer reporting agency will send a copy of the report directly to any consumer indicating a desire to receive the report at the same time that the report is sent to the employer. However, even where the consumer has not affirmatively requested to receive a copy of the report, the employer is required to provide a copy to the consumer whenever it takes any adverse employment action based in whole or in part on the contents of the report. The employer must also provide the consumer with the name and address of the consumer reporting agency.

Rather than having to provide applicants or employees with a copy of all information obtained in-house, an employer now only has an obligation to disclose information obtained directly by the employer "that is a matter of public record." Public records are defined as "records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment." Where an employer receives such information, it must provide the consumer with a copy within seven days. Further, the consumer can waive their right to receive these reports by a "check box" on the job application or any other written form. However, even where the consumer has waived his or her right to receive this information, it must be provided if the employer takes adverse action based upon the information obtained from these public records.

Finally, a new section was specifically added indicating that the ICRAA does not alter the ability of employers to exclude reference information from personnel files, as provided by California Labor Code §1198.5, and that the ICRAA is not intended to force the disclosure of information protected by the attorney-client privilege and attorney work-product doctrine. ☑

California Layoff Notice Requirements

California Adopts Its Own "WARN" Act

Governor Davis has signed into law California's own layoff notice requirements. The new law is similar to the requirements of the federal WARN Act, *but will apply to more employers and in more situations.* Employers covered by both the state and federal laws will need to comply with both. Because the new law is California's "spin" on the federal WARN Act, the new law is being referred to as "Cal/WARN."

The federal WARN Act applies to employers with 100 or more workers, and is triggered only by (1) a plant shutdown displacing 50 or more employees; (2) a "mass layoff" involving at least 50 employees and 33% of the workforce; or (3) a "mass layoff" involving at least 500 employees. The statute contains several definitions, time frames and standards that must be followed. When triggered, the employer must provide 60 days' written notice of the beginning of the layoffs to employees (or their union), and local and state officials.

Effective January 1, 2003, Cal/WARN will require industrial or commercial facilities employing 75 or more workers within the past 12 months to provide 60 days' written notice to employees in the event of a "mass layoff," a "relocation," or a "termination" of operations. A "mass layoff" is defined as a "layoff during any 30-day period of 50 or more employees at a covered establishment." A "relocation" is defined as the "removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away." A "termination" is defined as a "cessation or substantial cessation of industrial or commercial operations in a covered establishment."

This is one of the most significant differences between federal WARN and Cal/WARN. Under federal WARN, the layoff (as opposed to a "shut down") of 50 employees would not trigger a notice requirement if it did not constitute at least 33% of the workers at the work site. Under Cal/WARN, a "relocation" and "termination" is not tied to a specific number of affected workers. Rather, Cal/WARN is triggered if either of these events affect all, or "substantially all" of the employees at the covered establishment — terms that are not defined. As a result, there will be situations where California's notice requirements apply, but WARN is not implicated.

Both laws require 60 days' written notice, however, Cal/WARN requires giving notice to more entities. Under WARN, notice must be given to the affected employees (or if they are covered by a collective bargaining agreement, to the affected employees' union representative), the state dislocated workers unit (the EDD in California), and the chief elected officer of the city or county where the action takes place, depending on which public entity receives higher tax payments from the employer. Cal/WARN specifically provides that the notice be given to each affected employee, without any mention of his/her union representative. In addition, it requires that notice be given to the local workforce investment board and requires that notice be given to the chief elected officer of both the city and county government where the mass layoff, relocation, or termination occurs. The notice requirements do not apply if the mass layoff, relocation, or termination is the result of a "physical calamity or act of war." These exceptions are very similar to those that exist under WARN.

In situations involving a "relocation" or "termination" but not a "mass layoff," the Cal/WARN notice requirements do not apply, or may be reduced, if the EDD determines that all of the following conditions exist: (1) at the time notice would have been required, the company was actively seeking capital or business, (2) had the capital or business been obtained, the company could have avoided or postponed the relocation or termination, and (3) employer reasonably and in good faith believed that giving the notice required would have precluded it from obtaining the needed capital or business. The EDD may not determine that the employer was actively seeking capital or business unless the employer provides the EDD with both of the following: "(1) a written record consisting of all documents relevant to the determination of whether the employer was actively seeking capital or business, as specified by the department, and (2) an affidavit verifying the contents of the documents contained in the record."

This exception is different from WARN, due to the documentation requirements and because Cal/WARN does not include an "unforeseeable business circumstance" exception. Under federal WARN, notice times may be reduced if the plant closing or mass layoff is caused by business circumstances that were not reasonably foreseeable 60 days prior to the mass layoff or plant closing.

Cal/WARN will apply to employers not previously covered by the federal WARN Act, and both laws carry substantial costs, damages and penalties to employers who trigger the statute but fail to comply. Any employer who is even remotely contemplating a possible mass layoff, relocation or plant closing should contact qualified employment law counsel at the earliest stages of decision-making. This will enable employers to determine whether or not they will trigger either of these statutes, how they might legitimately avoid triggering them, or if they will trigger, how to properly comply with all of the requirements. ☑

Law Preempted by the federal NLRA

California Union-Support Law Struck Down

A federal trial Court in California struck down portions of a state law directed at helping unions organize workers. Effective since January 1, 2000, California employers were prohibited from using any state funds to assist, promote or deter union organizing. Since the unions usually are the ones paying to assist or promote union organizing, this meant that any employer who received state money through contracts, grants or otherwise, would violate the law if they used such funds in opposing union organizing.

The law outlawed a wide range of activities, such as normal, non-threatening communications with workers about unions, supervisory training on union-organizing issues, and even obtaining legal advice on the employer's rights in such matters. Unless the employer could prove that only money from entirely private sources was used for such activities, the statute effectively barred employers who received any state funds from resisting any unionizing effort.

The Court held that this law was preempted by the federal National Labor Relations Act ("NLRA"), which specifically provides that employers have the right to express their views or opinions on union issues. The Court stated that the California law "regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate" under the NLRA. The court rejected the argument that it was merely controlling the use of state funds and acting as a "market participant." ☑

California Appeals Court Ruling

Employer Not Liable For Client Harassment

A California appeals court has ruled that the Fair Employment and Housing Act (FEHA) does not hold employers responsible for sexual harassment of an employee by a non-employee client or customer, where the employer did not have the ability to exercise control over the non-employee.

The case involved a claim by a bus driver, Salazar, against her employer, Diversified Paratransit Inc. (DPI), an organization that transported developmentally disabled adults. A regular male passenger on her bus repeatedly engaged in misconduct, including two incidents during which he physically assaulted Salazar and exposed himself.

Salazar quit her job and sued DPI for sexual harassment, claiming that DPI failed to take all reasonable steps to prevent harassment by the passenger. The court concluded that an employer's obligation to take all reasonable steps to prevent harassment applied only to acts by individuals over whom it could effectively exercise control.

An employer may be responsible for sexual harassment of its employees by non-employees where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action, with consideration of the extent of the employer's control over such non-employees. Courts will normally find some ability to control; for example, a restaurant can tell an unruly customer to leave and still continue to operate. On the other hand, DPI was required to serve all qualifying clients as a condition of its funding, and would not have the ability to remove the clients from the employee's work environment.

Employers need to take all reasonable steps to ensure that employees are not subjected to harassment by anyone, whether or not the harasser is an employee. Employers should consult qualified employment law counsel for immediate assistance with any harassment situation. ☑

☑ The Strategic *EMPLOYER*

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