July 2003 WAAG AND CO. Employer News

The Strategic EMPLOYER

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New Privacy Law Takes Effect

As of July 1, 2003, a new law requires California businesses to inform affected California residents whenever they have a reasonable belief that there has been unauthorized access to their unencrypted personal data. "Personal data" includes a person's first name or initial and last name, in combination with any one or more of the following:

☐ 1. Social Security number;
☐ 2. Driver's license or California I.D. number; or
☐ 3. Account, credit card or debit card number along with any required security code, access code or password.

This law affects all businesses and is not directed just at the workplace. However, businesses need to be aware that outside hackers are not the largest threat; many cases of data and identity theft begin with employees who take their employer's data. This can include not only data on your customers, but also data about your employees, whose Social Security numbers must be kept for payroll purposes.

☐ **Action:** *Businesses should have measures in place for protecting "personal data," for employees to report any possible breaches, and for notifying any victims if a breach occurs.*

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California Employers Bound By Out-of-State Non-Compete Agreements?

As reported over the course of several previous editions of *The Strategic EMPLOYER*, agreements by a person not to compete with his/her former employer are not enforceable in California, except in very limited circumstances. The idea is that California wants people to be free to pursue their livelihoods unfettered by threat of litigation. A recent California Supreme Court ruling means that California businesses cannot always take advantage of this freedom when hiring employees from other states.

Non-Competes: *continued on page 5*

Route to:

☐ HR Dept: ________________________
☐ Accounting Dept:________________
☐ Benefits Admin: _________________
☐ Managers: ______________________
☐ ____________________________
☐ ____________________________

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 195 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. *or see* www.WaagandCo.com. ☑

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Lawmakers Considering Numerous Bills

California Legislative Update

Once again, California's lawmakers are considering a number of bills that would impact employers. The Legislature has until September 12, 2003 to pass these bills, after which, Governor Gray Davis will have until October 12, 2003 to either sign or veto the measures.

This year will be one of the most interesting, politically. Lawmakers are presumably concerned with the current budget crisis; however, few want to sacrifice funding for their pet projects. As a result, higher taxes have already become a reality — such as the substantially-increased vehicle registration fees. Legislators are also tending to favor bills that would require the private sector — specifically employers — to fund and/or provide social benefits that the state either cannot afford or does not have the political will to provide. Good examples of this are some of the health-care measures that crop up each year. Also unique this year is the surprisingly likely prospect faced by Governor Davis this year of a recall election. It is unclear how this will impact his thinking on the bills that will reach his desk.

Many of the bills could make for great "sound-bites" that might appeal to large numbers of voters, despite the possibility that some of those same bills may ultimately have a negative impact on the economy and the number of job available for those voters. Some of the bills that would be most helpful to employers, such as suspending or repealing some of the "job-killer" laws of the past couple years, seem unlikely to pass in the current legislative climate, but are interesting to note. Here are some of the more significant bills pending before the California Legislature:

Wage and Hour

☐ **AB 223:** Would make it harder for employers to recover attorney's fees arising from wage and hour appeals. If the employer appeals an administrative award to the courts and the employee still gets even one cent, the employer would need to pay the employee's attorney's fees.

☐ **AB 244:** This bill would exempt employers with fewer than 25 employees from state overtime pay requirements. Not surprisingly, this bill failed in committee and is currently inactive.

☐ **SB 57:** This is a return of a bill that did not make it last year. It requires that the minimum wage be automatically adjusted annually based on the California Consumer Price Index. Currently, the Industrial Welfare Commission examines various factors, such as the state of the economy, before making any adjustments to the minimum wage.

☐ **AB 1093:** Contractors doing business with the state would be required to pay all workers on such contracts at least a "living wage" that would be increased each year based on the California Consumer Price Index. If passed, on January 1, 2004, this minimum "living wage" would be $10/hour if health insurance is provided or $12/hour without.

☐ **AB 276:** Fines and civil penalties for various Labor Code violations, including the failure to pay wages or minimum wage, would be ***doubled.***

☐ **AB 1133:** In order to push employers to pay awards to employees for unpaid wages, this bill would imposes an ***automatic*** penalty equal to 100 percent of unpaid wages for every six months an employer does not pay such a judgment.

☐ **SB 586:** Yet another penalty, this bill essentially amounts to a tax on all wage awards to employees. This bill would require employers to pay a 1 percent penalty on all money awarded by the Labor Commissioner, regardless of whether the non-payment of the wages was intentional. So even if an employee fails to record all hours worked and then wins a claim for the employer's failure to pay those hours, the penalty will be applied. This money is to be paid to the State and put into an "Unpaid Wage Penalty Account."

Healthcare Coverage

☐ **AB 1527,** ☐ **AB 1528,** and ☐ **SB 2:** This group of bills combine to create universal healthcare coverage for working Californians. However, the State would place the burden of paying for this on employers by requiring employers to provide health coverage to employees or pay a fee to the State for purposes of providing such universal coverage. One of these bills justifies having employers pay for this by asserting that those employers who presently do not provide health insurance for their employees have an "unfair competitive advantage" over those employers who do. Where the employer simply pays to opt out of providing insurance, the money would fund a State-administered health program. Given the systemic failure of the State's workers' compensation system, the State's ability to successfully run a health program is questionable, and likely to be an excessively expensive experiment. Moreover, the scheme is arguably preempted by federal benefits law ("ERISA").

☐ **AB 293:** This bill would permit small employers to allow full-time employees to work up to five extra hours a week and apply the employee's extra earnings to defray the employees' health coverage contribution amount. These earnings would not be counted in the employee's earnings for California payroll tax purposes. It is unclear if this bill is placing a maximum on an employee's contribution toward insurance premiums, and the entire scheme becomes more complex when compliance with various federal tax and overtime issues are factored in.

California: *continued on next page*

California Supreme Court Ruling

Ex-Employee Allowed to "Spam" Employer

In a widely watched Internet case, the California Supreme Court ruled on June 30, 2003 that an employer cannot use the courts to block bulk email to its employees simply because the employer objects to the messages being sent. The case stems from Intel Corp. suing a former employee who had flooded the company's email system with six waves of bulk messages — "spam" — critical of the company's labor practices. Intel claimed that the more than 35,000 messages constituted "trespass" on Intel's property, i.e., its computer systems. The Court of Appeals agreed, and it was that decision which was overturned by the Supreme Court.

The Supreme Court reasoned that trespass requires that the owner be deprived of use of the property or that there be actual physical damage to the property, not merely tangential effects on workplace morale. Intel's computer system was not damaged, nor was there any evidence that the spam had slowed Intel's email service. Plus, the Court rejected Intel's claim that the spam's negative impact on worker productivity was the kind of injury necessary to support a trespass claim, since such alleged harm is not an injury to the company's interest in its computers.

The decision does not prevent companies from taking internal measures to block unwanted emails. Companies simply cannot obtain court orders on trespass grounds to stop messages that get past such internal filters. Similarly, the decision does not affect a State law that allows for prosecution of companies that send unwanted commercial email even after the recipients state that they do not want such messages. Companies also may still go to court to try to stop emails that defame others or invade personal privacy.

☐ **But wait:** Despite the ruling, the matter is not entirely settled. The former employee has stated that he intends to resume his spamming of Intel. Meanwhile, Intel is carefully studying the Court's opinion so it can be sure of what evidence will be necessary to comply with the ruling in any future efforts to stop the problem. ☑

California

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Leaves of Absence

☐ **AB 1327:** This bill would exempt small businesses (i.e., fewer than 50 employees) from the new Family Temporary Disability Insurance ("FTDI") program. Currently, all employers are covered by the FTDI program, scheduled to go into effect in 2004.

☐ **SB 478:** Employers would be required to allow an employee who is a crime victim, related to a victim, or a "derivative" crime victim time off to attend judicial proceedings related to the crime. A "derivative" crime victim is anyone who suffers a pecuniary loss as the result of death or injury to a direct crime victim.

☐ **AB 1397:** Employees are already protected from termination or discipline for taking time off for jury duty. This bill would prohibit an employer from taking any form of adverse action against an employee who is summoned for jury duty. It would also prohibit an employer from requiring an employee to use vacation time, personal leave or compensatory time off to cover otherwise unpaid jury leave. Violating these provisions would be a misdemeanor. The bill also would require the Judicial Council to develop procedures to accommodate the scheduling for a person summoned to jury service who works for an employer with 5 or less full-time employees if another employee is summoned during the same time.

Harassment and Discrimination

☐ **AB 18:** This bill would expand state employers' ability to discipline its employees for harassing other employees or members of the public.

☐ **AB 76:** The Legislature would reverse a recent court ruling that employers are not liable for harassment of employees by clients or customers. See *The Strategic EMPLOYER*, November 2002, page 9. A recent amendment to this bill has provided that, in determining an employer's liability for such harassment, the extent of the employer's control and any other legal responsibility which the employer may have shall be considered.

☐ **AB 196:** The Fair Employment & Housing Act would be amended to prohibit bias and harassment on actual or perceived gender. The bill affirms that gender-specific dress codes are still acceptable (e.g., allowing women to wear earrings, but not men), so long as employees are allowed to appear or dress consistently with their personal gender identity.

☐ **AB 1582:** This bill would prohibits subjecting any employee to any form of abusive conduct, unrelated to whether the employee is in any protected class. The stated purpose is to provide all employees with a remedy for "workplace bullying," and to motivate employers to police the workplace for *unkindness.* Employers would be liable for all conduct, including acts and omissions of its employees, if such conduct creates a hostile workplace. The unhappy employee would have the choice of pursuing remedies through either workers' compensation or through civil litigation.

California: *continued on next page*

California

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☐ **AB 1617:** Here, the Legislature details the “reasonable steps” an employer should take to investigate harassment claims, including using an experienced investigator and taking appropriate corrective action. If an internal employee is used to investigate, then s/he must be impartial. If an outside person is used, then the investigator must be a licensed private investigator with special training and experience in the issues involved in workplace harassment.

Miscellaneous

☐ **AB 1715:** Mandatory arbitration agreements for claims covered by the Fair Employment and Housing Act would be invalidated.

☐ **AB 1060:** This bill would make it a crime for an employer to obtain a life insurance policy on an employee without the employee’s advance written consent. Such consent would need to be “in the employee’s own words,” which raises questions about whether or not an employer could use a form for employee to sign, or if an employer could request an employee to clarify an ambiguously-worded consent.

☐ **AB 1223:** The “Cal-WARN” mass layoff notice law, which took effect Jan. 1, 2003, would be repealed. So far, the bill has failed in committee, but has not yet been entirely killed.

☐ **SBX1 1:** This bill would suspend a variety of recent “job-killer” law until the Governor issues a proclamation that the California economy has fully recovered from the recession that began in 2000. Presently, the measure has stalled in committee.

☐ **SB 595:** Aimed at combating unemployment insurance fraud, the Employment Development Department would be authorized to send more frequent reports to employers about activity in their unemployment accounts. The measure is being held in committee.

Workers’ Compensation and Safety

☐ **AB 1480:** This bill would authorize employers to ask job applicants about previous workers’ comp fraud convictions, and shortens the time period for employers to make payments for medical treatments.

☐ **AB 1215:** Workers’ comp insurers would be given limited access to Employment Development Department quarterly wage and withholding reports to confirm payroll information reported to the insurer for the purpose of calculating premiums.

☐ **AB 1643:** A new category of workers—contract service workers—would be created in addition to the existing categories of employee and independent contractor, for purposes of workers’ compensation. The bill creates a presumption that the contract service workers are not employees.

☐ **SB 354:** This bill would double the fines for workers’ comp fraud committed by anyone, including employers.

☐ **SB 366:** Current law requires an employee to prove that a psychiatric injury is work-related by a “preponderance of the evidence.” This bill would increase the burden of proof to require a showing of “clear and convincing evidence.”

☐ **SB 1010:** This bill was meant to repeal a “job-killer” law enacted last year requiring a temporary agency that supplies workers to a licensed contractor to pay workers’ comp premiums based on the contractor’s experience modification rating. Nearly all of the substantive provisions of this bill have already been deleted by amendments, essentially gutting the bill.

☐ **AB 572:** Workers who complain about safety violations would have stronger protections and increased penalties for retaliation would be imposed.

Whistleblowing

☐ **SB 777:** This bill would expand whistleblower protections for employees who report state or federal law violations and require a workplace posting about these rights. This would include protecting employees from retaliation for any whistleblowing done while working for their prior employers. It would also establish a “whistleblower hotline” in the Attorney General’s office and require employers to post this number. Employers would also be prohibited from having policies that might prevent employees from disclosing information to the government where the employee has reasonable cause to believe the information discloses a violation of law. A similar bill last year was vetoed by the Governor.

☐ **AB 274:** Under this proposed law, an employer would be presumed guilty of retaliation if it takes any adverse action within 90 days after the employee exercises any rights under the Labor Code. The employer would then have the burden to prove its innocence. A similar bill last year failed to pass the Legislature. ☑

The Strategic EMPLOYER

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Proposed Workplace Legislation

Federal Legislative Update

The economy and national security are primary concerns at the federal level. Although the federal government traditionally has fewer workplace measures on its agenda, there are some very interesting federal developments so far this year. Some of the more significant bills currently before the federal Legislatures are as follows:

Leaves of Absence

☐ **S 18** and ☐ **S 304:** These measures would extend the Family & Medical Leave Act ("FMLA") to cover employers with at least 25 employees (down from the current 50). The bills also would allow FMLA leave for employees who must address the effects of domestic violence where the employee or where the employee is caring for his/her parent or child who is addressing domestic violence. The bills would also set up a grant program to state or local entities to provide a mechanism for full or partial wage replacement for employees on FMLA leave. Such grants would need to supplement any existing programs, such as California's impending Family Temporary Disability Insurance program. The bills would also protect time off for employees to participate in their children's school activities, something already addressed by California law.

☐ **HR 35** and ☐ **S 320:** There has been much debate over "short-term" illnesses that trigger the protections of the FMLA. This bill would exclude protection for short-term illnesses and injuries and permit employers to require that leave be taken in minimum increments of a half workday. Employers who provide some form of paid sick time could also require that employees choose between the paid absence and unpaid FMLA leave. Once again, these provisions would need to be coordinated with California law.

☐ **HR 349,** ☐ **HR 350,** ☐ **HR 454** and ☐ **S 393:** These bills would provide a business tax credit to employers for the value of the services not performed by employees who are away on duty as members of the Ready Reserve or the National Guard. There would also be a tax credit to employers whose employees participate in the military reserves.

Wage & Hour

☐ **HR 965,** ☐ **S 20,** ☐ **S 224** and ☐ **S 495:** These bills collectively would increase the federal minimum wage to \$5.90 per hour starting on the 60th day after enactment, with an increase to \$6.65 per hour 12 months later. There would also be a clarification of the exemption from overtime for certain computer professionals. These measures will have no real impact in California, since the State's minimum wage is already \$6.75 per hour, and California's standards for exemption for certain computer professionals is stricter.

☐ **HR 1119** and ☐ **S 317:** Under current federal law, employers cannot provide

Federal *continued on next page*

Non-Competes

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When Mark Stultz started working for Medtronic Inc. in Minnesota, he signed an agreement not to work for any of Medtronic's competitors for two years after his employment ended. When Stultz eventually left Medtronic, he immediately went to work in California for Advanced Bionics Corp., a competitor of Medtronic. In an effort to head-off any problems, Advanced Bionics asked a California court to rule that the non-compete Stultz had signed was unenforceable in California. In response, Medtronic filed suit in Minnesota trying to stop Stultz from working for Advanced Bionics. The California court issued an order to stop the Minnesota lawsuit, which Medtronic appealed. The California appellate court held that since the California action was filed first, the California courts had the right to decide the dispute and apply California laws.

Medtronic appealed to the California Supreme Court, which overturned the appellate decision. The Court rejected the "first-filed" rule, saying that the rule only applies when the two courts involved are in the same State, which was not the case here. The Supreme Court also stated that California's public policy against non-compete agreements did not outweigh the need for judicial restraint, which made it inappropriate for a California court to stop proceedings in another State's court. As a result, *litigation can proceed in both States.* Since the agreement would be valid under Minnesota law, the issue will ultimately be a matter of whether Advanced Bionics can convince the California courts that an agreement which is valid in Minnesota cannot be enforced in California, or if Medtronic can convince the California courts that the inevitable Minnesota ruling must be applied and upheld in California.

☐ **Action:** The immediate impact of this ruling for California employers is to ☐ 1. use caution when hiring employees from another State, in order to avoid becoming the target of a competitor's lawsuit to enforce a non-compete agreement. ☐ 2. Before hiring a competitor's employee, it is important to ask the person for signed verification that they do not have any contracts with other entities that could affect your business, such as a non-compete, confidentiality, or no-solicitation agreements. ☐ 3. If such agreements do exist, be sure to review them carefully with a qualified attorney so you know the potential problems you could be facing and how you might deal with them. ☑

California supreme Court Takes On Case

Employer Discriminates on "Attractiveness"?

The California Supreme Court has agreed to review a case involving sales manager who was fired because she refused a male executive's order to fire another woman based on physical attractiveness. The appellate court had ruled that the sales manager's termination violated California's anti-discrimination statute.

Elysa Yanowitz received high performance ratings throughout her 10 years at L'Oreal USA Inc., working her way up to being a sales manager. The Company's General Manager allegedly told Yanowitz to fire a well-performing female sales associate at a Macy's store because she was "not good-looking enough" and that Yanowitz should get him "somebody hot." Additional, similar comments were allegedly made as the order to fire the associate went unfulfilled. When Yanowitz refused to terminate the sales associate, she was then subjected to unusual, heightened scrutiny and hostility. She went out on stress leave and was replaced.

Yanowitz sued, claiming retaliation because she opposed sex discrimination. L'Oreal argued that the law does not protect against discrimination based on physical appearance, so the refusal to carry out the order was not protected. The Court of Appeals ruled in favor of Yanowitz. Although the Court agreed that physical attractiveness is not a protected category under California law, the Court ruled that having one "attractiveness" standard for men and another for women could amount to sex discrimination. It is this aspect that the California Supreme Court will need to clarify. Waag and Co. will keep readers informed of the Supreme Court's decision. ☑

Federal...

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employees with paid, compensatory time off ("CTO") in lieu of paying directly for overtime work. These bills would permit private-sector employers to offer CTO and allow employees to accrue up to 160 hours of CTO. Each January, employers would need to pay out unused CTO from the previous year. Employers would be allowed to offer CTO only to employees who have worked at least 1000 hours for the employer in the preceding 12 months. California permits CTO, provided specific requirements and procedures are fulfilled. If passed, employers will need to be sure they understand all of the rules and requirements of both the federal and State laws before implementing any form of CTO program.

Benefits

☐ **HR 660** and ☐ **S 545:** These measures would authorize federally certified Association Health Plans to allow small businesses to band together to purchase group health insurance. This approach is intended to increase the purchasing power and efficiently pool the costs for small businesses. Currently, such plans are not permitted under California law; however, the bills specifically would preempt such State laws and California employers could take advantage of this program.

☐ **S 39:** Grants would be provided for the development of healthcare purchasing cooperatives by two or more employers.

☐ **HR 450, S 53 & S 86:** Tax credits and other incentives would be established for small-business employers to provide health insurance to their employees.

☐ **S 100:** This bill would give small-business tax credits for employee health insurance expenses and provide grants for health insurance purchasing groups, information dissemination and access innovation.

☐ **HR 176:** This measure would allow up to $2,000 that is unused from health flexible spending accounts to be carried over for use in subsequent plan years.

☐ **S 9** and ☐ **HR 1000:** ERISA and the tax code would be amended to add new worker protections for defined contribution plans, such as 401(k)s. Plan assets would need to be adequately diversified and employees would need to receive more information, along with increased detail, about their accounts and retirement plans.

Discrimination

☐ **S 76:** Remedies for violating the Equal Pay Act would be increased to include compensatory and punitive damages. The Act prohibits sex discrimination in wages.

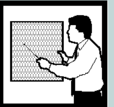
☐ **HR 214:** This measure would prohibit employment discrimination based on sexual orientation. California law already has this protection.

Miscellaneous

☐ **HR 540:** Employers would be barred from requiring an employee to arbitrate any dispute as a condition of employment.

☐ **HR 637:** Businesses would be prohibited from displaying Social Security numbers without the consent of the individual.

☐ **HR 439:** This bill would direct the Federal Trade Commission to make rules to assure that businesses perform background checks on employees they send into people's homes. Violations of the rules would carry a penalty of up to $1 million. Given the complex and competing privacy laws in California, businesses that send employees into people's homes will need to navigate the various laws very carefully to avoid liability. ☑



Training Could Have Prevented the Problem

Supervisor Inaction Results in Liability

A supervisor's failure to take action within less than one week of receiving a harassment complaint resulted in liability for one employer. Tina Sheffield received a call at home one Thursday night from Bertra Thompson, a female coworker at the Los Angeles Department of Social Services, asking Sheffield if she was interested in a romantic relationship. Sheffield said no, and hung up.

The next day, she reported the call to her supervisor and said she was scared and wanted their employer to tell Thompson to leave her alone. Later that day, Thompson repeatedly called Sheffield at her work station. Sheffield complained to her supervisor three more times that day. The supervisor did nothing, preferring to wait until their manager returned in about a week. This delay proved to be a massive mistake.

By Monday, Thompson had become angry and hostile in contacting Sheffield. Sheffield later gave Thompson a letter saying she was not attracted to women and wanted Thompson to leave her alone. She also left a copy of the letter in her supervisor's in-box. On Tuesday, when Thompson saw Sheffield in the hallway, she made a fist and slammed it into her other palm. Sheffield reported this to her supervisor as well.

That day, the supervisor discussed Sheffield's letter with her own manager, who directed the supervisor to ask Sheffield if she wanted them to do anything. Sheffield responded that she wanted them to tell Thompson to leave her alone. Again, the supervisor did nothing. On Thursday, Thompson came by Sheffield's desk and made threats to "get her." When Sheffield said to leave her alone, Thompson began hitting her. The police were called and Thompson was fired for the assault. Sheffield sued for sexual harassment.

The County argued that it was not liable because Thompson's behavior did not create a hostile work environment, since the behavior occurred over too short a period. Moreover, the County argued that it was not liable for the co-worker harassment. The Court of Appeal disagreed.

The court acknowledged that ordinarily a meaningful amount of time is required for a hostile environment to evolve; however, here, the incidents were substantially severe, including threats of physical violence and ultimately actual violence during that week.

Accordingly, Sheffield's employment conditions had changed and become hostile. Moreover, the court held that the County did not take reasonable steps to prevent the harassment once it learned of Thompson's implied threats. As soon as Sheffield told her supervisor of the problem, the County was on notice and its obligation to act was in effect. Sheffield had complained to her supervisor numerous times, but no action was taken until Sheffield was actually assaulted. Although the events happened quickly, the County had plenty of time to act between the first complaint and the assault.

Both the assault and the County's liability probably could have been avoided if certain simple steps had been taken. ☐ **1.** Every employer is required to have a written policy against harassment that provides employees with more than one avenue for reporting problems. The policy is required to be distributed to all employees, normally upon being hired. That way, the process will not be grid-locked by one untrained supervisor.
☐ **2.** Moreover, all supervisors should be trained to ***immediately*** report all complaints to a high-level individual designated to handle such matters.
☐ **3.** They should also be trained in what they should and should not say when an employee brings the matter to their attention; too often, the line supervisors say something inappropriate that will nullify all of the appropriate actions then undertaken by Human Resources. In this case, the supervisor did not even know to call the County's Human Resources department, instead waiting until she could talk to her manager about what to do – someone who also seemed to have no real idea.

☐ **Action:** This case illustrates how only a few days of inaction by untrained supervisory staff had severe, yet avoidable, physical and legal consequences. Preventative management training could have avoided this costly and painful experience. ☑

☑ ~Looking Forward~

Training and Problem Prevention

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

☐ Managing Performance, Minimizing Risk; ☐ Harassment Prevention for Supervisors; ☐ Harassment Prevention for Non-Supervisors; ☐ Quality Performance Evaluations; ☐ Effective Employee Documentation; ☐ Hot Topics in Wage and Hour Law; ☐ Protecting Confidential Business Information; ☐ Understanding Leaves of Absence; ☐ Issues in Workplace Privacy; ☐ Issues in CyberSpace: E-Mail and Internet Access; ☐ Recruiting and Hiring Employees; ☐ Employee Discipline and Terminations; ☐ Effective Handling of Employee Problems.

For more information on these courses, go to www.WaagandCo.com, *click on "Services" & then "Training."*

California Court of Appeal Ruling

Employer Liable for Commuter Car Accident

Minimed, Inc. hired a pest-control company to spray pesticide overnight to eliminate fleas in its office. The next morning, employee Irma Hernandez noticed the pesticide odor and within a few hours was suffering from headache, nausea and tightness in her chest.

She told her supervisors she felt ill from the pesticide and wanted to go home. They asked if she wanted to see the Company doctor; she said no. They asked her if she needed a ride home, and she assured them she was could drive herself. On her way home, she rear-ended another car. She told the officer at the scene that she had felt light-headed and dizzy before leaving work.

The driver of the car Hernandez hit sued Minimed for the damages to her car and for her injuries. She claimed that Minimed was liable because Hernandez was within the course and scope of her employment when she drove home ill from the pesticide exposure at work. Normally, an employer is not liable for injuries caused by employees while they are on their commute to and from work (the "going-and-coming" rule).

The California Court of Appeal ruled against Minimed. It held that an employer could be held liable where an employee injures someone as a result of a risk related to work, provided the employer could have foreseen the risk.

Here, the Court said, Minimed should have foreseen that Hernandez was unfit to drive due to the pesticide exposure, creating a risk of an accident. Regardless, the Court said that even if Minimed was not negligent, it was still liable if the accident was connected to a work-related event.

This case dealt with the limited situation in which an employee becomes unfit to drive as a result of a work-related exposure or other incident. Because the cause of the unfitness was work-related, the resulting accident during the employee's commute home was likewise work-related, giving rise to the employer's liability.

However, the courts have applied similar exceptions to the going-and-coming rule. Most of these cases dealt with accidents caused by employees after leaving work-related events when intoxicated. See The Strategic EMPLOYER, November 2002, page 4. These problems are most easily avoided by not serving alcoholic beverages at work-related events, and to remind managers of these guidelines.

☐ **Action:** Regardless of the cause, whenever an employee is too incapacitated to work, s/he is likely to be too incapacitated to drive safely. Employers should protect their employees, the public and themselves in such situations by arranging alternative transportation home for the employee. ☑

Payment Increases Were Too Steep

State Unemployment Fund Out of Money

If you work, your employer pays into a state fund that covers the cost of unemployment benefits in case you lose your job. Now that fund is running out of money at a time when businesses are being asked to pay more.

Currently, employers pay about $219 a year for every worker into the unemployment insurance fund. That amount will go up to an average of $380 next year. Business leaders are asking the legislature to hold off on the hike slated for January.

Until recently, California's unemployment insurance benefits were among the lowest in the nation. Two years ago the legislature enacted increases to help workers who lose their jobs, but some argue the increases are too steep.

"Starting in 2004, we are very worried that California will become even a less desirable place to have a business because California employers are going to be paying the highest unemployment insurance tax rate in the entire country," said Julianne Broyles of the California Chamber of Commerce.

Like all businesses, Lofings Lighting pays into the state's unemployment insurance fund, but the owners says there's only so much businesses can absorb. "I'm sure we'll have to raise the prices to the consumer on the products and services which in the end everyone's paying twice," said Wendy Lofing. *Article source: California Chamber of Commerce.*

☑ The **Strategic *EMPLOYER***

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