

 **The Strategic EMPLOYER**

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**New Legislation  
Effective January 1, 2004**

The last legislative session of Governor Gray Davis' regime is now closed. While this year's session began like so many during the Davis Administration — with numerous "job-killer" bills and "paybacks" to contributors and unions — the recall movement had a significant impact on Sacramento. This was most visible in the frenzied pace of lobbyists and the increased reliance on polls and "sound-bites" by the Governor in deciding which bills to sign.

Of the many bills reported in the July 2003 issue of *The Strategic EMPLOYER*, a number of them never reached the Governor's desk, including legislation desperately needed to alleviate some of the pressure on employers. In this newsletter, we will

report on those bills that were signed into law and the surprising group of bills that were vetoed.

There are already actions being taken by a number of groups to overturn some of the already enacted California legislation, including:

- court challenges* (which can take years, even if successful);
- ballot initiatives* (which depend on the unlikely premise that the general public will study the issues in depth and vote against popular-sounding bills such as "free health care"); and
- repeal by the legislature* (not likely, given that the recall does not effect the composition of the legislature itself).

So while the recall of Gray Davis and the election of Arnold Schwarzeneger does support optimism that the Legislature will have a tougher time enacting future "job-killer" bills, employers will still need to brace themselves for compliance with this year's bumper crop. So turn to *page 2* and let the "fun" begin!

**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 200 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](http://www.WaagandCo.com).

 **~INSIDE~**

New Laws for 2004..... 2  
 How *Not* to Calculate a Bonus .....3  
 Exempt Computer Software Employees.....3  
 New IRS Mileage Rate .....3  
 New Law: Family Temp. Disability Insurance.....4  
 New Law: Employer-Paid Universal Health Insurance...5  
 Key to Problem Prevention....6  
 Discipline Leads to Lawsuit ..7

**Route to:**

- HR Dept: \_\_\_\_\_
- Accounting Dept: \_\_\_\_\_
- Benefits Admin: \_\_\_\_\_
- Managers: \_\_\_\_\_
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Effective January 1, 2004

## California Bills That Were Enacted

### Healthcare Coverage

**SB 2 and**  **AB 1528:** These 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. When the employer simply pays to opt out of providing insurance, the money would fund a State-administered health program. This new law would not go into effect until 2006, and is discussed at length in an accompanying article in this issue of *The Strategic EMPLOYER* (see "Employer-Paid Universal Health Insurance" on page 5).

### Wage & Hour Law

**AB 223:** Makes 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 is automatically the "losing party" and would need to pay the employee's attorney's fees. This would be the case regardless of how dramatically the employee's award may have been reduced via the appeal.

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

### Harassment & Discrimination

**AB 76:** This law reverses 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 provides 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.

**Action:** *Employers should ensure that their anti-harassment policies and their training address this new responsibility.*

**AB 196:** The Fair Employment & Housing Act is 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.

**Action:** *Employers with gender-specific dress codes should revise their employee policies to conform to this new law.*

### Workers' Compensation

**AB 227 and**  **SB 228:**

These bills combine to provide some relief from the recent explosion in workers' compensation premiums and uncontrolled systemic costs. Key provisions include:

**1.** a rollback of the maximum rates that can be charged;

**2.** posting comparable-rate information on the Insurance Commissioner's website;

**3.** a medical utilization schedule that caps chiropractic and physical therapy visits;

**4.** requires employers to establish a utilization review program (can be done through insurer);

**5.** repeals the \$16,000 vocational rehabilitation payments for workers injured on or after January 1, 2004, replacing it with a less-costly voucher system;

**6.** shortens times for employers to question rehabilitation payments and to make physician payments, meaning employers and their insurers will need to be extra vigilant to avoid missing deadlines.

### Whistleblowing

**SB 777:** This bill expands whistleblower protections for employees who report state or federal law violations and will require a workplace posting about these rights. This will include protecting employees from retaliation for any whistleblowing done while working for their *prior* employers.

It will also establish a "whistleblower hotline" in the Attorney General's office and require employers to post this number. Employers will 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.

The new law also imposes a higher burden of proof on employers defending suits under this law. A similar bill last year was vetoed by Governor Davis.

**Action:** *Employers should review their personnel policies to ensure that nothing could be construed as intimidating their employees in this regard.*

### Leaves of Absence

**SB 478:** Employers would be required to allow an employee who is a crime victim or related to a crime victim time off to attend judicial proceedings related to the crime.

An employee is considered "related" to a crime victim who is an "immediate family member," which includes the employee's spouse, parent, child and sibling (including comparable "step" relations), a registered domestic partner, and the registered domestic partner's children.

Employers must allow employees to use either available vacation or sick time to cover such absences (previous laws on this subject only require employers to permit use of vacation time).

*California: continued on next page*



## How Not to Calculate a Bonus

On October 23, 2003, the California Court of Appeals issued a unique decision interpreting the legality of an employer's "bonus" program. Ralphs Grocery Company had a program in which employees earned a bonus that was calculated as a percentage of their department's profits. The calculation took into account various overhead expenses, such as ordinary cash shortages, breakage, and damages (i.e., not caused by the willful or dishonest acts or gross negligence of the specific employee), as well as the employer's workers' compensation costs. The Court held that, with one partial exception, such a calculation was *illegal*.

California's Labor Code and the pertinent case law forbid an employer from deducting cash and inventory shortages, breakage and other such losses from a non-exempt employee's wages. The only exception would be when the losses were caused by the willful or dishonest acts or gross negligence of the specific employee. Similarly, an employer cannot deduct merchandise returns from an employee's sales commission unless the item returned can be identified as

originally sold by that employee. In a separate provision, the Labor Code also forbids an employer from imposing any of its workers' compensation costs on any employee, whether exempt or non-exempt.

The Court noted that even though the non-exempt employees were guaranteed their hourly pay, the "bonus" plan was still compensation to the employee and therefore "wages" that could not be subject to any of the above-described deductions. Ralphs argued that it was not deducting costs from the regular wages otherwise due to the employee; deducting expenses was merely part of the formula for calculating the amount of bonus the employee would get in addition to regular wages. The Court equated the bonus with "wages" based on the statutory definitions, and noted that the statute did not make any distinction between "regular" and other wages.

While the law forbids placing the burden of any workers' compensation costs on any employees, the Court did agree that some of the deductions that were prohibited vis-à-vis non-exempt employees could be taken against the

bonus calculations of management employees. Specifically, the rule against deducting for shortages, breakage, etc. states that "management" should bear the burden of such costs. Citing this language, the Court noted that management employees have the ability to impact such costs and that it is appropriate for employers to motivate managers to do so. Accordingly, the Court held that an employer may include such (non-workers' compensation) costs in calculating a bonus for an *exempt* employee.

**Action:** Any bonus based on a percentage of "profits" may be deemed in violation of the Court's decision. Employers should review any commission or bonus plans with qualified employment counsel in view of this new ruling.

### California

*Continued from previous page*

**Action:** Employers should update their employee policies to reflect this new statute.

### Private Attorney General Act:

**SB 796:** This is the so-called "bounty hunter" law. Presently, various agencies have the authority to bring actions against employers to enforce particular laws and collect fines that will go to the agency. This law allows any "aggrieved employee" to bring a civil action to recover such fines if the agency does

not do so on its own. The "aggrieved employee" would also receive attorney's fees and costs in some cases.

An "aggrieved employee" is defined as any person who was employed by an alleged violator and against whom one or more of the alleged violations was committed. The law provides that 25% of the fines recovered will go to the "aggrieved employee," unless the defendant employer does not employ at least one person. The law does not explain how someone could be the "aggrieved employee" of someone who does not employ anyone.

### ~Effective 2004~

**Hourly Rates:** Computer software employees who earn a minimum threshold hourly rate of pay and meet several other criteria may be paid on an *hourly* (i.e., not salary) basis and still be exempt from overtime premiums. Beginning January 1, 2004, that minimum hourly rate is \$44.63. This is a 2.4% increase over 2003. Similarly, *licensed physicians and surgeons* may be paid on an hourly basis and still be exempt from overtime premiums if they meet certain criteria, including a minimum hourly rate. Effective January 1, 2004, that rate is also increased by 2.4% to \$57.56 per hour.

**New Mileage Reimbursement Rate:** The IRS has announced its standard mileage reimbursement for use of a personal car will be 37.5 cents per mile for all business miles driven. This rate will be effective beginning January 1, 2004, up from 36 cents per mile



Previously Enacted Law Effective in 2004

## Family Temporary Disability Insurance

In 2002, California passed a bill creating "paid family leave" in the State, to go into effect 2004. See *The Strategic EMPLOYER*, November 2002, page 3.

Beginning January 1, 2004, employers will need to withhold an additional amount from every employee's paycheck to pay for this new, state-administered benefit — Family Temporary Disability Insurance ("FTDI").

This program will be managed similar to the State Disability Insurance ("SDI") program. In other words, when an employee is eligible for the benefit, s/he will need to submit a claim to the State Employment Development Department ("EDD"), which will either grant or deny the claim; any payments come from the EDD, not the employer. Employees will not be able to collect any FTDI benefits until July 1, 2004, to allow time for some funds to accumulate in the program.

**FTDI Availability:** FTDI will be available to employees who need to care for a new child or a seriously-ill family member (parent, child, spouse or domestic partner). This benefit is available to all employees, regardless of the size of their employer or how long the employee has been employed.

**Another Form of SDI:** Coverage under the Family and Medical Leave Act or the California Family Rights Act ("CFRA") are different from FTDI. Moreover, FTDI does not carry a guaranty of reinstatement to the employee's job; however, an employer cannot discriminate against an employee because they took such a leave or applied for FTDI benefits. Remember: FTDI is like another form of SDI.

**Waiting Period & Vacation Usage:** An eligible employee will have a seven-day waiting period before s/he can begin to collect FTDI benefits. Also, the employer may require

employees to use up to two weeks of available vacation pay before the employee can get FTDI benefits; one such week is used to cover the waiting period. After the employee uses the employer-set requirement, the employee may elect to use any additional available vacation pay.

**Coordinate PTO:** Employers will want to consider whether or not to "coordinate" the use of any paid time off with the FTDI benefits the employee receives. If you coordinate benefits for SDI, you would probably want to do the same for FTDI.

**Require Vacation Usage Decision:** The use of vacation pay leaves the employer with an important policy decision: Should the employer require employees to use up to two weeks of vacation? If the employer does not require the use of any vacation pay, some employees will want to elect to use it any way. The others will want to save their vacation pay for other purposes; it is this group whose behavior will be shaped by the employer's decision about requiring vacation use.

Most likely, if the employer requires the use of vacation time, employees who would rather hoard vacation will likely be discouraged from taking FTDI-type leaves unless really necessary. On the other hand, it may be kinder to allow employees the option to hold on to vacation time for real vacations, rather than family emergencies.

One compromise would be to require employees to use just one week of any available vacation pay, which would cover the waiting period; after that, the choice to use any remaining vacation pay would be up to the employee.

**Future Employer Funding?** As of this time, only the employees will contribute to this program; however, there is speculation that this could change. The government estimates that

for every one person who collects FTDI benefits, there will be 83 employees paying into the system who will not. If the usage of FTDI benefits turns out to be higher, however, the system may crash. If that happens, it is very likely that employers will be required to contribute to the system as well.

Moreover, many view the creation of the FTDI system as a step toward expanding the CFRA to include domestic partners and to apply to smaller employers. Waag and Co. will keep readers advised of developments in this regard.

**Action 1:** Employers need to revise their personnel policies to reflect the FTDI program, and specifically consider whether they will coordinate benefits, and whether they will require employees to use up to two weeks of available vacation pay. Employers should also be sure to educate both managers and employees about what is and is not required under the new FTDI program. Specifically, that there is no guaranty of reinstatement, there must be no discrimination against any employee because of his/her FTDI situation.

**Action 2:** Starting January 1, 2004, all employers will need to distribute an EDD-provided notice to all existing employees and to all new hires. Any employee going on PDL or on leave to care for a family member must also be given the notice. Employers should add this notice to their new-hire checklists.

**Action 3:** As with many new laws, there will likely be some confusion and a high number of claims in the initial stages; employers should consult with qualified employment counsel when FTDI situations arise, to ensure proper management of these high-profile situations.



Leading the Nation in Job Killer Legislation

## Employer-Paid Universal Health Insurance

In a September 2003 bulletin, Waag and Co. reported on the passage of SB2, which requires “medium and large” employers to either provide specified health insurance for its part- and full-time employees or pay a fee into a state-run health insurance fund.

### □ **Future Already in Doubt?**

Already, several challenges to this “pay or play” insurance system have been mounted, and it will be a race to see if any such challenges kill this new program before it first goes into effect on January 1, 2006. Waag and Co. will keep readers apprised of any developments; however, since any challenges will take time — possibly years — to be resolved, employers should begin preparing for compliance with the new requirements.

### □ **Defining Medium and Large:**

“Large” employers are those with at least 200 employees in California. Large employers will be subject to the “pay or play” plan starting January 1, 2006, and will need to cover both employees and their dependents. “Medium” employers are those with at least 20 employees in California and must “pay or play” starting January 1, 2007. However, employers with at least 20 but not more than 49 employees will not be subject to the law unless a specified, and very small, tax credit is enacted (only 20% of the employer’s “net cost” — i.e., the fee the employer pays minus a number of items).

### □ **A Bureaucracy is Born:**

Employers who do not provide employees with their own insurance program will need to pay a fee into the newly-created “State Health Purchasing Program” that will be administered by the newly-created “Managed Risk Medical Insurance Board” — two new bureaucracies with just one bill! The State will

engage in some complex calculations to determine how much each employer will need to pay into the fund for the coming year and send that information to the employer. This calculation will be based in part on information provided by the employer. The employer will then need to pay this fee or face massive penalties.

□ **Pay, Play or Both:** Publicity for the measure describes how covered employers can avoid paying into the State program if they provide a sufficient health insurance benefit for their employees. This is why the law has been nick-named “pay or play;” however, employers who provide such health insurance, will receive a “credit” against the fee. Thus, it seems that even employers who provide sufficient insurance benefits will still need to pay the fee and then wait for the tax credit — creating a potentially serious cash-flow issue for many employers. Perhaps the Act is better referred to as “pay or pay *and* play.”

□ **Unintended Consequences of Pay and Play:** This fact may encourage employers to entirely stop providing their own health insurance benefits for California employees, since many businesses will perceive this as having to pay twice. If this occurs, most working Californians will find themselves with no choice but a government-administered health insurance plan — which may not be very desirable for employees, considering how well the State has handled California’ workers’ compensation system. As a side issue, such a result is likely to have a severely negative impact on the health insurance-brokerage industry.

### □ **Health Plan Requirements:**

While the details are yet to be established, in order to receive the

credit against the fee, an employer-sponsored health plan will have to meet specific coverage requirements. Nevertheless, the statute provides that one requirement is that employees be required to pay not more than 20% of the cost of the employer-provided plan (not counting deductibles, co-pays or other out-of-pocket expenses). However, the allowable contribution by “low-wage earners” will be capped at 5%. Employees will be eligible if they worked for the employer at least 100 hours per month (about 23 hours per week) for at least three months. Large employers will also need to cover “dependents” which includes the employee’s spouse, domestic partner and children.

□ **The Bottom Line:** Some estimates put the cost of SB 2 at about \$5.7 billion per year. The law makes it illegal to reduce an employee’s work hours or to terminate-and-rehire an employee in order to avoid the obligations under the Act.

□ **Action:** *Since the Act does not go into effect until 2006 for large employers and 2007 for medium employers, it is likely that many employers will consider reducing the hours of any employees who are close to 100 hours per month before that time, and/or resist creating jobs with more than 20 hours per week. Employers considering such actions should consult with qualified employment or benefits counsel before making such changes.*

□ **Conclusion:** The negative impact of SB 2 on job creation seems apparent to all but California’s legislators! ✓



Problem Prevention Services from Waag and Co.

## Employee Handbook: Key to Problem Prevention

An employee handbook is not just a nice benefit to offer employees — it is a necessity in today's workplace. A good employee policy guide can:

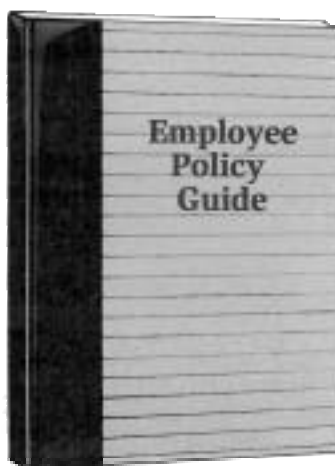
- Promote morale and efficiency by letting employees know what to expect and what is expected of them.
- Establish the parameters of the employment relationship.
- Limit a company's liability.
- Convey to employees the company culture and history that has been so carefully crafted by company founders and current management.
- Eliminate or resolve unnecessary disputes or misunderstandings.
- Convey information to all employees in an organized, consistent and coherent manner.
- Answer many employee questions about company policy and obligations, employee rights and obligations, benefits, discipline, and termination of employment.
- Establish a coherent, unified approach to many employment situations that arise in the workplace.
- Number One Asset:** An employer's workforce represents one of its most significant assets. As a result, each employer has an obvious interest in maximizing productivity and promoting positive employee relations. Many employers wisely establish programs and policies to enhance employee morale and facilitate performance. Employee discontent can lead to union organizing efforts, diminished productivity, lawsuits, and more.
- The Employee Handbook Tool:** A well-drafted employee handbook is among the most important and

effective tools available to an employer to promote good employee relations and prevent and defend lawsuits.

A handbook does this while providing the flexibility needed to respond to different situations. For example, an employer facing a layoff without a written layoff policy will often be met with a hostile workforce claiming unfairness. Employees will react strongly to any layoff selection criteria used (i.e., seniority, merit, job transfers, bumping, etc.) This situation is one of the most common triggers of union organizing drives, and one that is easily avoided by adopting a layoff policy before any layoffs are needed.

**Maintain At-Will Status:** Most employers strive to maintain the "at-will" status of their work force, which requires very specific language throughout their handbook. Although this approach is under constant attack by plaintiffs' lawyers, it is still generally considered the best approach by most employment lawyers, allowing the employer greater flexibility to manage their workforce. Extremely careful drafting of this type of handbook is essential.

**New Laws and Court Rulings:** There is a continuous stream of new or modified state and federal laws that virtually require a company to have policies on various subjects. To see this one needs to look no further than page 2 of this newsletter ("California Bills that were Enacted") which lists numerous new state legislation necessitating new or updated employer policies. Other things may be required for particular industries; for example,



transportation and government contractors are required to have substance abuse programs. Changes in harassment laws, the ADA, new protected classes such as sexual preference and HIV status, Family Medical Leave, and other recent legal developments make regular handbook updates a necessity.

**Additional Policies:**

In addition to required policies, employers should have additional written policies to protect them; failing to address issues such as layoffs, vacation, grievance procedures, disciplinary actions, and benefits may yield unintended results. In many cases, an out-of-date or poorly-drafted handbook may be *worse than none at all*.

**Summary:** In short, employee handbooks can be a valuable tool in managing a company's most significant resource — its employees. However, unless your handbook has been revised within the last six months, chances are that your policies are out-of-date. Employers who do not have a handbook should consider developing one; employers who do have one should review it now, rather than wait for a plaintiff's lawyer or government official to point out any problems.

**Action:** Waag and Co. recommends that an employer's policies be reviewed at least annually by qualified employment counsel. This is particularly true now that a number of dramatic changes in the law will be going into effect on January 1, 2004.



California Court of Appeal Ruling

## Approach to Discipline Leads to Lawsuit

Ordinarily, an employee who suffers work-related stress is limited to bringing a claim within the workers' compensation system. The only exception is when the employee's "injury" is caused by something not within the normal risk of the employment relationship. This is one reason why employees can sue for matters such as illegal harassment; violation of such statutes is considered outside the normal risk of the employment relationship.

Recently, however, a California Court of Appeal ruled that an employee's stress caused by a supervisor's invasion of privacy can be redressed in the civil courts. Accordingly, the employee's privacy claim was not restricted to the workers' compensation system. While there have been other court cases involving employees' invasion of privacy claims, this case is particularly instructive regarding how *not* to discipline an employee.

**The Facts:** Sylvia Johnson disciplined Bonita Vinson in a staff meeting in the presence of many other employees. Johnson announced at the meeting that Vinson would be reprimanded and directed Vinson to write her own letter of reprimand. The other employees who attended the meeting had no legitimate interest in the disciplinary matter, which meant there were no statutory privileges that might attach.

Afterward, Johnson distributed minutes from the meeting to an even larger group of employees and highlighted the disciplinary action in bold letters. Vinson sued for invasion of privacy causing emotional distress and won. The employer appealed, arguing that Vinson's only remedy for her workplace "injuries" was within the workers' compensation system.

The Court of Appeal affirmed the jury verdict, explaining that a worker is not limited to worker's compensation if the employer's conduct is not considered a normal risk of the employment relationship. Although reprimands are considered a normal employment risk, here, the matter was handled in the

presence of others and then disseminated further in writing – all to people without any need to know about the matter. The Court concluded that this action exceeded an employee's normal workplace risks, and that Vinson could pursue a court action for violation of the privacy rights granted in California's Constitution.

**Avoiding the Problem:** While the workers' compensation issue is of interest, the real issue of practical importance is how the employer should have avoided this claim altogether, regardless of forum. A surprising number of managers mistakenly think that "public discipline" is a valuable tool, believing that such humiliation may deter an employee from breaking the rules, and

that it will serve as a lesson to the other employees regarding what is expected. Such beliefs are misguided, as the Court's decision illustrates.

**Action:** This ruling illustrates how important it is for employers to train their supervisors in proper approaches to disciplinary actions. It also serves to remind managers about the need to fully understand a company's employee-privacy obligations, including the need to secure sensitive personnel information where people without a need-to-know cannot stumble upon it. *Supervisor training in these and other subjects is available from Waag and Co.; for more information, go to [www.WaagandCo.com](http://www.WaagandCo.com), click on "Services" & then "Training."*



~ Dodge Ball! ~

### California Bills That Were Vetoed

**AB 1093:** Contractors doing business with the state would have been 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 have been \$10/hour if health insurance is provided or \$12/hour without.

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

**AB 1133:** In order to push employers to pay awards to employees for unpaid wages, this bill would have

imposed an automatic penalty equal to 100 percent of unpaid wages for every six months an employer does not pay such a judgment.

**AB 274:** Under this bill, an employer would have been presumed guilty of retaliation if it took any adverse action within 90 days after the employee exercised 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.

**AB 331:** This would have waived the waiting period to collect unemployment insurance benefits for union workers who are unemployed due to a lockout.



### The Strategic **EMPLOYER**

November 2003 ~ Susan S. Waag, Esq. ~ (805) 783-2300  
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