



The Strategic *EMPLOYER*

EMPLOYMENT LAW & HR CONSULTING SERVICES ~ WWW.WAAGANDCO.COM

The Definition of Change: Human Resources in California

Interestingly, the current state of Human Resources in California is much like our tax situation: Even though tax rates may be down (good), tax law complexity is up (bad). Similarly, with California's employment regulations, changes under Schwarzenegger are moving away from "job-killer" legislation (good), but compliance is nevertheless growing ever more complicated (bad).

This year's batch of new California legislation is smaller than usual, and actually contains some fixes to problems. The "Bounty Hunter" Law has been reformed, and the prevailing wage law as it relates to volunteers has been "fixed." Though employers are now required to provide sexual harassment training to supervisors, at least this requirement is easily understood, and is helpful in preventing future litigation.

Spurred on by the high-profile presidential election, California voters came out in numbers, and in the process, closed a loophole which allowed abusive lawsuits (Proposition 64 won with 58.9% of the vote), and overturned the mandatory health insurance of SB 2 (Proposition 72). Unfortunately, real solutions to rising medical costs and inadequate health insurance coverage are nowhere in sight.

For complexity, take a gander at the new obligations for employers regarding domestic partnerships on page 9 — it'll make your head spin. Happy reading! ✓

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. ✓



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EFFECTIVE JANUARY 1, 2005 UNLESS NOTED OTHERWISE

California Bills That Were Enacted

Private Attorney General Act: aka "Bounty Hunter Law"

SB 1809: California's infamous "Bounty Hunter" law has been reformed to make it less susceptible to abuse, which is a welcome relief for law-abiding employers. The "Bounty Hunter" law went into effect on January 1, 2004, and provided financial incentives for employees to bring lawsuits against their employers for any infraction of the Labor Code — no matter how trivial the infraction (see "Private Attorney General Act", *The Strategic EMPLOYER*, November 2003, page 3). The new law still allows for Bounty Hunter suits, but the hope is the new law will result in minor problems being resolved by fixing the problems, rather than by bringing lawsuits.

All of this was signed as emergency legislation, making it effective immediately; plus, some of the new measures were also made retroactive to January 1, 2004, which will have a major impact on the Bounty Hunter suits currently on file. See also WAAG AND CO.'S Bulletin entitled "California's Infamous Bounty Hunter Law

Reformed", August, 2004 at WAAGANDCO.COM (click on "News", then click on "Bulletins") for complete details.

Benefits

AB 2028: Payments to an employee in lieu of plant-closing notice pay will not be considered "wages" for determining eligibility for unemployment insurance benefits. Workers can now receive plant closure pay, unemployment insurance benefits and, if any violations, \$500 per day of civil penalties, all for the same day(s).

AB 254: Existing law requires any health care service plan contract or disability insurance policy issued, amended, delivered, or renewed in California on or after January 1, 1999, to offer specified health coverage to former employees who were 60 years old or older on the date of employment termination and to meet certain other requirements (note that this is only if the service plan provides certain benefits under an employer-sponsored group plan for an employer subject to COBRA continuation coverage or under an employer group for which the plan

or insurer is required to offer Cal-COBRA continuation coverage). The coverage applies to the spouses and former spouses of employees or former employees, as specified.

This bill makes these requirements applicable only to an individual who meets the eligibility requirements for continuation coverage prior to January 1, 2005. The bill language **seems to** require offering coverage after expiration of COBRA and Cal COBRA if the ex-employee had 5 years of service and is over age 60 at termination. Coverage will continue for the ex-employee until age 65 (or upon other specified events) and for the spouse up to five years.

Harassment & Discrimination

AB 1825: Mandates supervisor training on sexual harassment issues for most public and private California employers. All employers with 50 or more employees are required to provide at least 2 hours of anti-harassment training for all supervisors. Supervisors employed as of July 1, 2005 would need to be trained not later than December 31, 2005; those hired after that date would need to be trained within 6 months of their hire date. For complete details, see "Sexual Harassment Training Now Mandatory" on page 4 of this newsletter.

~NEW FEDERAL LAW~

New Federal Unemployment Insurance Law

President Bush signed into law the State Unemployment Tax Act ("SUTA") Dumping Prevention Act, a law designed to target employers who abuse the unemployment tax system.

Federal law requires states to collect unemployment insurance ("UI") taxes from employers. Employers with low turnover rates generally pay lower UI tax rates than employers with higher turnover. To artificially reduce their rates, some high-turnover businesses (such as temp agencies and construction firms) had purchased or created shell corporations and transferred all of their employees into the shell. This allowed the employer to "dump" the company's higher UI rate. The result for law-abiding employers is higher UI tax rates overall.

The new SUTA Dumping Prevention Act will require states to pass laws that include civil and criminal penalties for employers who engage in dumping or who promote the practice.



Wage & Hour Law

AB 2690: Creates a necessary solution to the problem of prevailing wage requirements that impacted volunteers. Previously, prevailing wage requirements inappropriately applied the laws to volunteer projects if any public sector worker was involved in overseeing the volunteers. Provides that the provisions of existing law dealing with the payment of prevailing wages on public works projects do not apply

California Bills: continued on next page



LOOKING TO THE FUTURE

Pending Federal Legislation

Paid Sick-Leave

SB 2520, HR 4575: The U.S. Senate has introduced the Healthy Families Act, which would require employers to provide seven days of paid sick leave annually for employees working 30 or more hours per week, and a pro rata number of paid sick days for employees working fewer hours. Employees would be entitled to use the time on an hourly basis or in the smallest increment that the employer's payroll system uses. If passed, paid sick leave could be used for the employee's own medical needs or those of the employee's family members.

Genetic Information

S.1053: The bipartisan Genetic Information Nondiscrimination Act passed the Senate by a unanimous vote and is supported by President Bush. If signed into law, it would create a new private cause of action against employers and insurers for discrimination in employment and access to health insurance based on their genetic information. It would also

bar employers from requiring genetic testing and from requesting or disclosing an employee's genetic-related information. California already has a similar law in effect.

Discrimination Law Changes

S.16, S.2088: Two similar Democrat-sponsored bills are pending that would lift the current monetary caps on punitive and compensatory damages in

employment discrimination lawsuits, provide unlimited damage awards under the Equal Pay Act, promote "comparable worth" pay requirements for dissimilar jobs, and bar mandatory arbitration agreements in lieu of litigation of employment discrimination claims. (See, S.16, the "Equal Rights and Equal Dignity for Americans Act", and S.2088, the "Civil Rights Act of 2004"). California law currently provides for unlimited awards in discrimination suits.

~VETOED CALIFORNIA BILLS~

AB 1723: Would have established a new affirmative duty on all California employers to ensure that each and every worker takes each and every meal and rest break permitted under law, and adds a new private right of action to enforce provision. Note that current law already imposes stiff costs for missed breaks.

AB 2832: This bill proposed increases in state minimum wage to \$7.25 in 2005 and to \$7.75 in 2006.

SB 1538: Would have established new payment requirements for piece-rate workers who miss meal and/or rest periods, plus some new reporting requirements on piece rate workers.

AB 2317: Current law already mandates gender pay equity and provides that aggrieved employees "may" recover triple the difference in their pay vis-à-vis the pay received by the other gender. This bill would have specified that employees "shall" recover treble damages, and if the violation is "willful," the employee "shall" recover an additional amount equal to five times the pay differential.

SB 1841: Would have prohibited employers from engaging in electronic monitoring of employees without first providing notice. This would include monitoring through computers. The notice would need to identify the activity being monitored, the form and frequency of the monitoring, and the way the information will be used. Posting a sign at work would be insufficient. Notice would not be required if the employer has reasonable grounds to believe an employee is engaged in unlawful (not merely wrongful) conduct and that the monitoring will likely produce evidence of the unlawful conduct.

AB 2850: Would have provided security guards protected status at a job site following a change in contractors. Specifically, when a new contractor is awarded a contract to provide security services, that new contractor would be required to retain certain categories of guards employed by the preceding contractor for 90 days. Employees who are retained during that 90-day period and perform satisfactorily must then be offered continued employment.

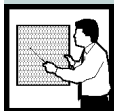
SB 1521: Current law provides janitors and maintenance workers protected status at a job site following a change in ownership of a business or building for 60 days. Workers who are retained during that 60-day period and performed satisfactorily must then be offered continued employment. This bill would have extended that protected period to 90 days.

California Bills

Continued from previous page

to work performed by a volunteer or volunteer coordinator if the volunteer's services are freely offered.

SB 1618: This bill requires an employer, by January 1, 2008, to show no more than the last 4 digits of the employee's Social Security Number or use an existing employee-identification number other than a Social Security Number. Employers may begin complying with the new requirement as early as January 1, 2005. Current law requires that an employee's full Social Security Number appear on the employee's pay stub.



SEE PAGE 5 FOR TRAINING INFORMATION

Sexual Harassment Training Now Mandatory

Last year, **AB 76** extended liability to employers for sexual harassment committed by non-employees (see "Harassment & Discrimination: AB 76", *The Strategic EMPLOYER*, November 2003, page 2). In the sexual harassment arena this year we have **AB 1825**, which adds a new section to the Fair Employment & Housing Act ("FEHA"), imposing an obligation on all employers with 50 or more employees to provide two hours of training and education in sexual harassment to all supervisors every two years. Those who are covered will have until January 2006 to comply, but preparations should begin now.

Though harassment training is only required for employers of 50 or more, smaller employers should consider conducting such training, in order to protect against harassment claims (see "New Defense for Harassment in California," *The Strategic EMPLOYER*, June 2004, page 7).

The key requirements of the mandatory harassment training law include:

1. Mandatory training applies to: all public and private employers with 50 or more employees. An employer is anyone regularly employing 50 or more individuals, including independent contractors and temporary service workers.

2. What is a supervisor? The training requirements cover all supervisory employees. Although the new law doesn't define "supervisory employee," the California Fair Employment and Housing Act interprets the term to cover anyone with authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct other employees, adjust grievances, or effectively to recommend that action. This is true as long as the exercise of authority requires independent judgment and isn't just routine or clerical activities.

3. Training Repeated Every Two Years: The law states that covered employers must conduct sexual

harassment training and education every two years for all supervisory employees.

4. Effective date: The initial training must be provided no later than Jan. 1, 2006, for supervisors employed as of July 1, 2005. For all new supervisory employees, they must receive training within six months of their assuming a supervisory position. However, if you have provided such training to supervisory employees since Jan. 1, 2003, you are not subject to the Jan. 1, 2006, deadline; rather, the two-year retraining requirement will be based on that harassment training date after January 1, 2003.

5. Training curriculum: At least two hours of training must be provided, consisting of classroom or other "effective interactive" training and education regarding sexual harassment. The training must offer information and practical guidance on federal and state requirements regarding sexual harassment prohibitions, prevention, correction, and remedies for victims. It must also give practical examples of how to prevent harassment, discrimination, and retaliation.

6. Requirements for trainers: The training must be presented by trainers or educators with knowledge or expertise in harassment prevention.

7. Minimum threshold only: The law merely establishes a minimum threshold for harassment training and doesn't discourage employers from providing longer, more frequent, or more involved training as may be necessary to prevent and correct harassment and discrimination in the workplace.

8. Violations: Failure to conduct appropriate training will not result in automatic liability for an employer, and compliance with the training rules will not insulate an employer from liability. Nevertheless, compliance is likely to be used as evidence in any litigation.

Takes these steps to begin implementation of your harassment training program:

1. Implement the training program: If you do not already have a sexual harassment training program in place, now is the time to start the training. If you are hit with a harassment lawsuit before the January 1, 2006, deadline, whether or not you have done such training will still have a major impact on your liability. Again, this is true even for smaller employers, as noted in the June 2004 edition of *The Strategic EMPLOYER*. Plus, having a harassment-training program can help you avoid harassment problems in the first place.

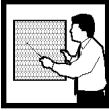
2. Share the Cost: Smaller employers may benefit from getting together to share the cost and convenience of having regularly-scheduled training sessions every six months, so that no supervisory employee will ever miss-out on the required training.

3. Ensure the program meets all requirements: The training should be conducted by a live presenter or via an interactive web program. A video presentation alone, without the opportunity for "Question and Answer" or role-playing, probably will not suffice.

4. Follow a set schedule: Create a written training schedule to ensure that you provide training to each supervisor at least every two years. The schedule should be updated as needed when new supervisors are hired or an employee is promoted to a supervisory position, to ensure that new supervisors receive their training within six months of assuming such a position.

5. Keep detailed documentation: Keep detailed logs of attendees, dates, and times of training sessions, as well as a copy of training materials and outlines used in the presentation. It's wise to maintain presenters' contact information and background information establishing their qualifications to conduct harassment training.

Training: continued on next page



Harassment Prevention for Supervisors

WAAG AND CO. offers a wide range of management and employee training courses to educate and prepare your staff for problem prevention and efficient workplace practices. For each course offered, WAAG AND CO. meets with you in advance to customize the materials to meet your particular needs. The curriculum is presented with overhead slides prepared for your session, along with extensive, printed reference materials for all participants.

No employer expects to face a complaint of harassment. However, recent Supreme Court rulings have heightened awareness among employees (and their lawyers) regarding harassment litigation. Many employers are surprised to learn what constitutes illegal harassment or retaliation. Moreover, employers are increasingly facing suits by both the alleged victim and harasser arising out of the investigation (or lack thereof) of harassment complaints. The best approach to dealing with this issue is prevention, with quality training for both supervisors and non-supervisors as a critical component. Below is the outline for the "Harassment Prevention for Supervisors" course.

1. Why Do We Care About Harassment?
2. What is Harassment?
 - A. What Do You Think It Is?
 - B. What is the Legal Definition of Harassment?

- C. What are the Types of Harassment?
 - D. Who is Involved in Harassment?
3. What is the Employer's Liability for Harassment?
 - A. What is the Employer's Liability for Harassment by a Supervisor?
 - B. What is the Employer's Liability for Harassment by a Fellow Employee?
 - C. What is the Employer's Liability for Harassment by Persons Who are Not Employees?
4. Employer Defenses to a Claim of Harassment
5. Legal Requirements for Minimizing Harassment
6. Practical Suggestions for Minimizing Employer Exposure to Claims of Harassment
7. How Should You Respond to a Complaint of Harassment?
 - A. Examples
 - B. The employer's best response is to promptly and thoroughly investigate the allegations
 - C. Who should conduct the investigation?
 - D. How should you conduct the investigation?
 - E. Consistency and accuracy are critical in any investigation
8. Investigating Harassment Claims: How Should You Deal with the Parties?
 - A. Who should conduct the investigation?

- B. While the investigation is being conducted
 - C. After the investigation is concluded
 - D. Consistency is critical to shielding the employer from liability to complainants and alleged harassers
9. Don't let the "Tail Wag the Dog"

Other Courses Available: WAAG AND CO. offers 13 other management and employee training courses (for more information, go to WAAGANDCO.COM and click on "Services", then click on "Training"). The option is available to mix and match from our Course List to create customized training classes to meet your needs. In addition, other employment-related course topics are available.

Need More Information? WAAG AND CO. would be happy to discuss your training needs. We can deliver sample training materials and pricing information for each course.

Training

Continued from previous page

6. Update your sexual harassment policy: Note in your policy that your organization provides harassment training for all supervisors. Be sure to follow-through with what you state in your policy.

7. If harassment does occur: Know what to do if harassment occurs in your workplace. Generally, the

employer's best response is to promptly and thoroughly investigate the allegations.

8. If an investigation is required: Know how to proceed with a proper harassment investigation. See *The Strategic EMPLOYER*, "Background Investigations: New Obligations and Penalties," March 2002, page 1, and "New Flexibility in Third-Party Investigations," June 2004, page 4.

The Strategic EMPLOYER

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PROPOSITION 72 DEFEATED BY 50.9% OF VOTE

Mandatory Health Insurance Defeated

In 2003, Governor Davis signed SB 2, a law that would require employers with as few as 20 employees to provide specific levels of health insurance coverage to their employees, and for larger employers, provide coverage for dependents as well. Employers would be required to pay not less than 80% of the cost of such coverage; the impact would be that employees would need to pay the remaining 20%, whether they wanted the coverage or not. With the narrow defeat (50.9%) of Proposition 72, this legislation is nullified.

Everybody would pay: As reported previously (see "Employer-Paid Universal Health Insurance", *The Strategic EMPLOYER*, November 2003, page 5), even employers who provided insurance coverage that met the new requirements would need to pay into a state fund and wait for a tax refund of some or all (unclear) of the amount paid. This legislation would have gone into effect starting January 1, 2006, and would have created at least two new, expensive bureaucracies to manage.

The Challenge: The California Chamber of Commerce began to challenge SB 2 on a number of fronts.

The most promising — court action claiming it was unlawful under federal benefits law — would take years to pursue. The Chamber also successfully pursued getting Proposition 72 onto this November's ballot asking the public if they supported the scheme imposed by SB 2. If Proposition 72 were passed, then SB 2 would remain on the books. If the measure were defeated, then SB 2 would be eradicated. Since Proposition 72 was a referendum on SB 2, implementation of SB 2 (such as creating the new agencies) was put on hold while the measure was pending.

Arnie not on board: Although Governor Schwarzenegger opposed Proposition 72, he did not include it among the key propositions regarding which he campaigned. The chances for Proposition 72 being defeated seemed rather hopeless, when pitted against a campaign that touted free health care for everybody, and ads about how WalMart was milking California's MediCal system.

Jobs saved: As noted by the slim margin of passage, the measure was barely defeated; but the impact of the defeat is huge. Many employers were

awaiting the outcome of this measure to decide whether or not to leave the state, since the cost of complying with SB 2 would be prohibitive. Many non-profits, who typically operate on a "shoe-string," were concerned about needing to close their doors. And employers in certain industries, such as restaurants, hotels and banks, were considering offering only half-time employment to most new hires, in order to avoid the insurance obligation. In addition to many other potential problems avoided by the defeat of Proposition 72, these concerns alone mean that many jobs and services will now remain in California.

Healthcare still a problem: While health care will remain a top priority for the State Legislature and the Governor, it is unlikely that this Governor will sign any legislation such as SB 2, which was poorly drafted, extremely expensive for both the State and its employers, and unlikely to fix the underlying problems with California's health-care problems.



PROPOSITION 64 WINS WITH 58.9% OF VOTE

Abusive Lawsuits Deterred

Passage of Proposition 64 closes a loophole in California law that allows private lawyers to file lawsuits against businesses, even though they have no client or any evidence that anyone was damaged or misled.

Proposition 64 limits an individual's right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered losses because of an unfair business practice. It also requires private legal claims to comply with the additional requirements applicable to class action lawsuits. Instead of private lawyers, only the California Attorney General or

local government prosecutors can sue on behalf of the general public to enforce unfair business competition laws, with all monetary penalties recovered required to be used for enforcement of consumer protection laws.

California's unfair competition law prohibits any person from engaging in any unlawful or fraudulent business act; examples of actions that are included under the unfair competition law include deceptive or misleading advertising, and violations of state law intended to protect the public well-being, such as health and safety requirements. Prior to the passage of

Proposition 64, a person initiating a lawsuit under the unfair competition laws was not required to show that they suffered injury or monetary or property loss. Now, with the passage of Proposition 64, only the Attorney General or local public prosecutors can bring an unfair competition lawsuit without demonstrating an injury or the loss of money or property of a claimant; however, individuals can still file a lawsuit if they have actual damages.

California is the only state that allowed lawyers to file lawsuits without having a client or having to show any damages caused by the business being

Frivolous Lawsuits: *cont'd on next page*



Employment “Expired” or “Discharged”?

A California Court of Appeals recently ruled that a person employed for a brief, fixed assignment, which by its terms has come to an end, is not “discharged” for purposes of Labor Code sections 201 and 203. Labor Code §201 says that a “discharged” employee must be paid earned wages immediately upon discharge. Labor Code §203 says that an employer who willfully fails to pay in accordance with §201 must pay the employee’s daily wage as a penalty until paid, for a maximum of 30 days (the “waiting time penalty”).

Amanza Smith was recruited by L’Oreal USA, Inc. to be a model at a hair show for which she was to be paid \$500 for one day’s work. After waiting more than two months to be paid, Smith sued for violation of Labor Code §§201 and 203, claiming “wages” at \$500 a day for thirty days as the waiting-time penalty. L’Oreal responded that Smith was not “discharged,” and therefore not entitled to the penalty specified in the law. Both the trial judge and the appeals court agreed.

The appeals court observed that the term “discharge” is not generally defined in the Labor Code or regulations. A “layoff” is covered by Labor Code §201, with an exception for layoffs involving certain seasonal

agricultural employees. “Discharge” does not include resignation or quitting by an employee, to which a separate statute applies.

The appeals court concluded that “discharge” means the affirmative dismissal of an employee by an employer from ongoing employment and does not include the completion of a set period of employment or a specific task. Smith was hired by L’Oreal to work in a one-day hair show. The completion of her modeling work does not constitute a “discharge,” so she is not entitled to a waiting time penalty.

employees who have been hired for a fixed term or assignment at the time the assignment ends.

What Should You Do?

1. While not a requirement, the best practice to avoid litigation is to pay

- 2. Pay involuntarily terminated employees for all compensation due, including accrued vacation pay, at the time of termination.
- 3. Pay employees who voluntarily quit not later than 72 hours after termination, unless the employee has given 72 hours previous notice, in which case all compensation must be paid at termination.
- 4. Document the conditions of employment for a fixed term in writing, signed by both parties.

~ HR BRIEFS ~

Federal Overtime Regulations: The long-awaited and debated revised federal overtime rules have been finalized, effective August 23, 2004. Further information on the proposed regulations was reported on page 5 of the June 2004 edition of *The Strategic EMPLOYER*. No one really knows the affect it will have on workers, but the numbers have political overtones: the administration’s Labor Department says no more than 107,000 workers will lose overtime eligibility from the changes, but about 1.3 million will gain it. The Bush administration and business groups believe the old regulations were out-of-date and confusing, and were propagating multi-million dollar lawsuits. But as noted in *The Strategic EMPLOYER*, the new regulations will have no impact on California’s *private-sector* employees, since the applicable state laws already impose obligations far more stringent than the new federal rules.

IWC Gone; Wage Orders Still Here: As part of a cost-cutting measure, funding was pulled for the California Industrial Welfare Commission. The IWC was responsible for determining wages, hours and working conditions of employees by creating the State’s Wage Orders, which contain instructions for paying wages of non-exempt employees. The 17 different Wage Orders remain in effect, however, and the agency charged with enforcing the Wage Orders (the Division of Labor Standards Enforcement) is still as active as ever.

New Workers’ Compensation Posters and Forms: California law requires employers to post all kinds of information and provide numerous forms to employees. Effective August 1, 2004, employers are required to use a new claim form (DWC Form 1) for reporting injuries, regardless of the date of injury. The required poster giving notice of workers’ compensation rights has also been revised, as has the notice employers are required to give all new employees regarding their rights. The new poster and other new information is available for download at: <http://www.dir.ca.gov/dwc/forms.html>

Frivolous Lawsuits

Continued from previous page

sued. Due to the high cost of defending a lawsuit, small business owners receiving an attorney’s demand letter would often pay the demand amount rather than defend themselves, even if the claims were without merit. In addition, monetary damages collected in these cases would be kept by the lawyers or their front groups. Closing this loophole in California law is expected to strengthen California’s business climate and overall economic health.



VACATION SUBJECT TO TECHNICAL REQUIREMENTS

Vacation Accrual Hours on Pay Stubs?

On November 6, 2004, Ann Stevason, the Chief General Counsel for the Division of Labor Standards Enforcement (“DLSE”) spoke on a panel at the California State Bar’s Annual Meeting of employment attorneys. At that meeting, Ms. Stevason was discussing the statutory requirements that all “wages” earned in a pay period be shown on the employee’s pay stub for that pay period.

Careful what you ask: She was asked whether or not the number of vacation hours an employee accrues during the pay period must also be shown on the pay stub. Based on Labor Code §227.3 and certain court rulings, accrued vacation is considered as “wages” earned during each pay period. Ms. Stevason commented that she had not seen anything specifically on the subject, but that she thought employers would probably be required to show the employee’s vacation accrual on the pay stub.

Ms. Stevason’s opinion does not carry the weight of law or regulation; however, she is the chief interpreter of the wage-and-hour provisions for the

agency handling enforcement of those provisions. As a result, if a claim were brought before the DLSE on this issue, her thinking reflects the likely rulings of the DLSE. Unless an employer then appealed such a ruling to the courts, employers would need to meet that requirement.

How best to meet this requirement is unclear. Certainly, with regular wages, the employer can show the number of dollars earned during the pay period and then for the year-to-date. Vacation pay is not accrued in terms of dollars, but in terms of “hours” on the books. Moreover, vacation pay is not “cashed out” each pay period, and if cashed out, the value would be based on the rate in effect when paid out, not when earned. For these reasons, it seems appropriate to show the amount of vacation earned in terms of hours earned during the pay period. It is beneficial to show the balance of earned vacation available; since this will fluctuate depending on whether or not any vacation time is used, employers need to be very careful in accurately tracking vacation.

Vacation advances a bad idea:

This situation also reinforces the advice NOT to allow any advances of paid vacation. Since vacation is treated as “wages,” any advance of paid vacation must be handled in the same manner as an advance of pay. The employer cannot deduct the repayment from an employee’s paycheck without the employee’s written authorization. While the employer can allow the employee to go into deficit on vacation and then just earn it back, problems can arise when the employee goes too far into deficit, or when the employee leaves employment without having “repaid” the advance.

Recommendation: Employers should remember that vacation is subject to many technical requirements. Employers may wish to review their vacation pay policies and practices with qualified employment counsel to ensure proper compliance and cost-effective methods. WAAG AND CO. will continue to monitor the status of this potential pay stub requirement. ✓



DOCTORS TO MAKE MEDICAL DECISIONS!

New Workers' Comp Regulations Approved

Earlier this year, Governor Schwarzenegger pushed through a comprehensive workers’ compensation reform bill, **SB 899**. This law fundamentally changes the workers’ compensation system for determining the level of injury, the amount of disability assigned to an injury and creates a new medical network for employers to control. An important set of regulations implementing the new Medical Provider Networks (“MPNs”) as created by SB 899 were approved and went into effect on November 1, 2004.

These new regulations will guide employers and insurers as they establish MPNs. An MPN is a group of providers set up by an insurer or self-insured

employer and approved by the Department of Workers’ Compensation administrative director to treat workers injured on the job. MPNs are expected to be an important tool to manage medical costs in the workers’ compensation system, while still ensuring quality of care and choice to workers injured on the job. Each MPN must include a mix of doctors specializing in work-related injuries and having expertise in general areas of medicine. MPNs are required to meet access standards to care for common occupational injuries and work-related illness.

Employees will be allowed a choice of provider(s) in the network provided

and must also be allowed the opportunity for a second and third opinion if the employee disagrees with the diagnosis or treatment offered by the treating physician.

MPNs will help bring the widely accepted principles of managed care, similar to HMOs and PPOs, to the workers’ compensation system. Additional regulations providing for independent medical reviews are nearing adoption. Those rules coupled with the MPN regulations are hoped to reduce litigation by having doctors, not lawyers, make medical decisions. ✓



A B 205 : D O M E S T I C P A R T N E R S H I P S

New Employment Rights & Obligations

Over the past several years, California has recognized domestic partnerships and incrementally increased the rights accorded to domestic partners. Before launching into the new AB 205, let's recap recent changes in the domestic partner arena to get us up-to-date first.

In 2002, California entitled employees to use sick leave to care for a domestic partner or the child of a domestic partner, required health care insurers to sell domestic-partner coverage to employers, exempted domestic partner benefits from state taxation, and extended unemployment benefits to an employee who quits to accompany or join a domestic partner at a new location. See "AB 25: Domestic Partner Benefits", *The Strategic EMPLOYER*, July 2001, page 4.

California also included domestic partners in its paid family leave insurance program that started July 1, 2004 (see "California's Paid Family & Medical Leave", *The Strategic EMPLOYER*, November 2002, page 3).

This brings us to **AB 205**, enacted in 2003 and effective January 1, 2005, which greatly expand the rights of domestic partners. AB 205 extends to domestic partners nearly all of the same rights and duties associated with marriage. It creates new employment-based rights for domestic partners, most significantly the right to family and medical leave to care for a domestic partner. Those provisions of AB 205 are effective January 1, 2005, and as explained below, present the most complicated consequences of AB 205.

New Definitions:

AB 205 requires that domestic partners be treated the same as spouses under California law. New Family Code section 297.5 provides: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from

statutes, administrative regulations, court rules, government policies, common law, or any other provision or sources of law, as are granted to and imposed upon spouses." This provision is sweeping. Nevertheless, "domestic partnership" is not a marriage; it is an alternative to marriage. California does not authorize same-sex marriage (or recognize such marriages from other jurisdictions). In fact, the law defines a domestic partnership as specifically excluding marriage.

AB 205 applies only to domestic partnerships registered with the California Secretary of State. While many localities in California offer domestic partnership registration, local registration alone is not sufficient to trigger the domestic partnership provisions in State law. A same-sex marriage license issued in California or another jurisdiction is not a domestic partnership registration. Registration with the Secretary of State is limited to opposite-sex couples in which at least one the individuals is over age 62, or same-sex couples.

No Benefits Mandated:

While AB 205 protects domestic partners from employment-based discrimination, it does not specifically require employers to extend benefits to domestic partners. The FEHA does not mandate benefits for spouses, so in turn AB 205 does not itself mandate any benefits for domestic partners. Because AB 205 (through the FEHA) forbids discrimination against employees because they have a domestic partner, it follows that employers would need to extend any spousal benefits to domestic partners; however, AB 205 does not expressly address the issue. Most likely, the federal Employee Retirement and Income Security Act ("ERISA") would preempt California from mandating benefits under an ERISA-regulated plan (such as a retirement plan or self-insured health plan), but there are presently no court rulings on this issue.

Impact on Discrimination Laws & Family Leave:

As a result of AB 205, the Fair Employment and Housing Act ("FEHA") will protect domestic partners to the same extent as spouses. Thus, it is possible that the FEHA's protection against "marital status" might be extended to protect an individual based on his or her domestic partnership status.

Significantly, AB 205 includes domestic partners within the California Family Rights Act's ("CFRA") family and medical leave provisions. The CFRA applies to employers of 50 or more employees. That law currently allows an employee to take up to 12 weeks of unpaid leave a year to care for a "spouse who has a serious health condition." Considering Family Code section 297.5 and the CFRA together, the CFRA will entitle an employee to take family and medical leave to care for a domestic partner.

While that may seem simple, the real complication arises when you factor in the federal Family & Medical Leave Act ("FMLA"). That law is substantially similar to the CFRA — however, it does not provide employees with the right to take leave to care for a domestic partner. The FMLA only provides an entitlement for time off to care for the employee's own illness or that of the employee's parent, child or spouse. Employers with 50 or more employees will need to comply with both the CFRA and the FMLA, and ensure employees' rights under both. And where the leave of absence is covered by both laws, the time off will concurrently draw on the entitlement of both laws, as the obligations under both laws are simultaneously being met. In other words, the employee who is caring for a sick parent has a total of 12 weeks available under both laws combined.

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The tricky part is that an employer cannot count time an employee takes off for other purposes against the employee's 12-week FMLA entitlement. This happens under California law with pregnancy disability; the time off for pregnancy disability is not counted against the CFRA's time-off entitlement. Once the employee is no longer disabled by pregnancy, she still has 12 weeks of CFRA available. (Note: *The full interplay between CFRA, FMLA and pregnancy disability is extremely complicated and beyond the scope of this article.*)

Only purposes covered by the statute can be counted against the entitlements. So, if an employee takes two weeks off to care for a sick neighbor, that employee has not used up any of his/her FMLA or CFRA entitlement. The entire 12 weeks of CFRA/FMLA is still available in the event the employee has a qualifying need for time off.

This is where it becomes important that AB 205 is not defining "marriage" as including "domestic partnership." A "domestic partner" is not a "spouse." So the entitlements under the CFRA and the FMLA now differ in this regard. The employee with a domestic partner has the right to take a leave of up to 12

weeks to care for his/her domestic partner under the CFRA; however, that time off cannot be counted against that same employee's entitlements under the FMLA. That employee would still be entitled to take another 12 weeks off in the same leave year in the event he/she then had an ill parent or child or suffered his/her own illness. Of course, if the employee has already otherwise used up all of his/her CFRA/FMLA leave before the domestic partner becomes ill (for example, if the employee first had an ill child...), then there would be no more CFRA time available if the domestic partner then became ill in the same leave year.

The net effect is that employees with domestic partners will potentially have as much as 24 weeks of combined CFRA and FMLA leave available, whereas employees with spouses will have only 12 weeks total. As a result, AB 205 does not exactly result in the "equality" between employees with spouses and those with domestic partners.

What Should Employers Do?

Regardless of how the courts decide on same-sex marriage, compliance with these new domestic partnership laws will continue to be of

concern to employers in California and other states that recognize such partnerships or civil unions. Employers need to understand that employees with domestic partners need to be treated as though they have spouses. If you do not demand to see an employee's marriage certificate, you should not demand to see an employee's domestic partner registration certificate. If an employer has questions in this regard, they should contact their insurance broker or qualified legal counsel before taking action.

Summary: Although there is the possibility of court challenges to this issue, employers who do not wish to be the one leading the charge into the courtroom should extend to employees' registered domestic partners the same health insurance benefits presently offered to spouses. Employers must also be aware that where an employee is eligible for CFRA/FMLA and has not already used up his/her entitlements, they must grant that employee time off to care for an ill domestic partner — without counting it against any remaining FMLA entitlement. Like most leave of absence situations, this can get complicated, and employers should consult qualified legal counsel to ensure they understand their leave of absence obligations.

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Unscheduled Absences Hit Five-Year High

The rate of unscheduled absenteeism for 2004 rose to 2.4 percent, a five-year high, according to the annual CCH "Unscheduled Absence Survey." The study found that the rate was up 1.9 percent from last year and that the last-minute absences cost employers an average of \$610 per employee annually.

An employee's own illness accounted for 38% of unscheduled absences, followed by family issues (23%), personal needs (18%), stress (11%) and "entitlement mentality" (10%).