

The Strategic **EMPLOYER**

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Pace of Change Slows for California Employers

The days of countless new “job-killer” bills and “paybacks” to contributors and unions that became the calling card of the Gray Davis administration appear to be over. With *Arnold the Governor* at the helm to break the gridlock, California appears to be staggering in a direction more manageable for employers.

The new governor’s successes appear to be piling up. California scored a recent victory with Wall Street bond investors, as Moody’s Investors Service recently upgraded California debt, lifting it out of the cellar of state ratings and signaling confidence in Schwarzenegger’s fiscal stewardship, even before the state’s new budget is adopted.

Another big victory was the

California Workers’ Compensation Reform Act (see article on Page 5 of this newsletter), which should gradually reduce employers’ workers’ comp costs over time. The high price of energy, particularly in California, is offsetting the pull of the slowly improving national economy.

Add to California’s uncertain economic outlook the Iraq war and the upcoming presidential election, and the future looks anything but clear. Also, remember that California employers still have to deal with the “old” job-killer bills from the last several years, which haven’t gone away with the regime change.

Just to remind you “the more things change, the more they remain the same,” page 2 of this newsletter gives a preview of possible coming attractions for California employers. Only the most important proposed California employment laws are listed. Waag and Co. will keep you advised of the outcome of these bills.

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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Volume of Bills Diminishes under Arnold

Proposed California Employment Laws

Wage & Hour Law

SB 1917: In response to a controversy generated by paycheck-cashing fees by Bank of America and Wells Fargo (see article on page 6 of this newsletter), this bill would prohibit banks from assessing any charge or fee to cash a paycheck for a person if the paycheck was issued by that bank for one of its business clients, even if the person does not have an account at that bank.

AB 1723: Would establish 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 proposes increases in state minimum wage to \$7.25 in 2005 and to \$7.75 in 2006.

SB 996: Mandates that the state study the benefits of establishing a statewide living wage.

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

Bounty Hunter Law

AB 2181: This bill would repeal the Sue-Your-Boss (aka "Bounty-Hunter") law that went into effect 1/1/04, which gave employees a new private right of action to enforce labor code violations and collect a portion of the fines levied against employers.

SB 1809: Would make minor amendment to the Bounty Hunter law, specifically, would permit a court to award less than the maximum fine

provided by the particular statute violated.

SB 1861: Would make minor amendment to the Bounty Hunter law; specifically, would require an aggrieved employee to file a claim with the appropriate government agency and permit minimal period in which agency could review matter before permitting the employee to file a private enforcement lawsuit.

Harassment & Discrimination

AB 2889: Effective 1/1/04, California employers became liable for acts of sexual harassment of their employees committed by third parties. This bill would extend that liability to any type of harassment by third parties, not just "sexual" harassment.

AB 1229: This bill creates a new basis for harassment lawsuits: Preferential Treatment. It would increase liability for meritless lawsuits for all California employers by permitting other workers to sue under the Fair Employment and Housing Act whenever any employer or supervisor shows favoritism toward a girlfriend or boyfriend in an employment setting.

AB 1825: Mandates new supervisor training on sexual harassment issues for most public and private California employers. All employers with 50 or more employees would be 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.

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 specify 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.

AB 289: Addresses professional employer organizations that enter into human resource management contracts, including employee-leasing arrangements. The bill provides that such arrangements will not have any impact on pre-existing collective-bargaining agreements.

Benefits

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 would make 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

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California Bills

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the ex-employee until age 65 (or upon other specified events) and for the spouse up to five years.

AB 2322: On 1/1/04, all employees began having additional money taken out of their paychecks to pay for California's Paid Family Leave Insurance program. Legislative analysts estimate that for every one person who uses this benefit, 83 others are paying for it. This bill would permit any worker to voluntarily opt-out of the paid family leave benefit program, and not have the extra tax taken from his/her paycheck.

SB 1903: Workers who are "locked-out" from their jobs due to a trade dispute would be eligible for unemployment insurance benefits.

Privacy

SB 1841: Would prohibit 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.

Tax Credits

SB 1523: This bill proposes that for each taxable year beginning on or after January 1, 2005, and before January 1, 2010, there shall be allowed as a credit against the "net tax" to a qualified employer (as defined) for hiring a qualified new employee during the taxable year. The tax credit would be

equal to the total number of hours worked by a qualified employee during each year of employment multiplied by three dollars (\$3).

If passed, qualified new employees must be initially hired on or after 7/1/05 and must have been receiving unemployment benefits or CalWorks benefits immediately before hire. The employee must also be paid at least (a) \$10 per hour or (b) \$7 per hour plus at least 70% of cost of health benefits.

The catch: The employer must meet several criteria, such as being located where there is high unemployment, but not within areas already covered by some other programs.

References

AB 1912: Provides legal protection to employers that provide information in good faith regarding an employee to a prospective employer. Will have no real impact on the general advice to

employers, which is to provide nothing beyond dates of employment and job title last held. If sued, employers would still be fighting over issues of "malice" and "good faith," etc., which means employers still risk a jury trial when they give references.

Occupational Safety & Health

AB 3037: This bill would require employers in "high hazard" industries to include an employer-employee committee or liaison to work in conjunction with their existing Injury and Illness Prevention Plan.

Special Job Protection

AB 2402: This bill is to ensure that day laborers and temporary workers are afforded the full protection of and

California Bills: continued on next page

~News Briefs~

Mileage Reimbursement Rates: Although gas prices have dramatically increased, the IRS is not planning any mid-year adjustment to its approved mileage reimbursement rate. The IRS has stated that it will not deviate from its policy of reviewing the rate only once per year, with any new rate going into effect on January 1st. On January 1, 2004, the IRS increased the mileage reimbursement rate from 36 cents to 37.5 cents per mile.

Workplace Postings: Employers may now download or electronically order required California workplace postings such as Wage Orders or Cal/OSHA posters from the Division of Industrial Relation's website at www.dir.ca.gov. Click on "workplace postings" located in the left navigation bar on the DIR's home page. Note that this site is for California postings only; federal and other postings will not be found on this site.

Paid Family Leave Insurance Benefits: Starting July 1, 2004, employees will be eligible to draw on Paid Family Leave Insurance benefits if they are off work due to the serious illness of a parent, child, spouse or domestic partner, or if they are bonding with a new child. The new law does not guarantee the employee's job; however, employers must not discriminate against employees who take advantage of these benefits. The new benefit, which was originally called "Family Temporary Disability Insurance," is explained on page 4 of the November 2003 edition of *The Strategic EMPLOYER*. You can order claim forms, DE 2501F - (Rev. 12-03), from the EDD. Call 1-877-BETHERE for orders of under 25 forms; for more than 25 forms, you may use EDD's Internet Order Form.



Fair and Accurate Credit Transactions Act

New Flexibility in Third-Party Investigations

Effective March 4, 2004, a confusing chapter in the Fair Credit Reporting Act ("FCRA") came to a close with the enactment of the Fair and Accurate Credit Transactions Act ("FACT"). Among other things, the FCRA requires that when an employer uses an outside party to investigate an employee, the employer must first give the employee specific notice and obtain the employee's consent to investigate and receive a report. Afterward, the employer would need to provide the employee with a copy of any report it had.

This fit fine with the paradigm of getting a credit report about an employee or applicant; however, since 1999, the Federal Fair Trade Commission ("FTC") took the position that this also applied when an employer used a third party to investigate a sexual harassment complaint. Under the FTC's interpretation, an employer would not be able to investigate such a complaint unless it first got the harasser's permission. Moreover, witnesses would likely be intimidated (and less than candid) by the knowledge that the alleged harasser would learn who said what.

These concerns were mostly resolved with the enactment of FACT. Now, if the employer suspects misconduct or a violation of law, regulations or pre-existing written policies, it may use a third-party investigator without following the notice, consent and disclosure requirements of the FCRA.

However, there still are some specific requirements that must be followed in order to maintain the confidentiality of the third-party investigation. For example, at the "pre-adverse" stage of the employer's process, communication of the report resulting from the investigation must be limited to the employer or its agent (such as the employer's attorney). That means disclosing the report to the complaining party would take the matter outside of the FACT protection and the normal FCRA requirements would apply.

If the employer does take any "adverse action" as a result of the report, under FACT, the employer would then need to provide the subject employee with a summary of the report. Other specific requirements apply where medical information is involved.

Written Policies a Must: It is significant to note that the benefits of

FACT pertain only to when the employer is investigating suspected misconduct, or a violation of law, regulations or "pre-existing written policies." Once again, the importance of having written policies is at center-stage. Not everything an employer will care about can be classified as "misconduct." For example: you suspect an employee is not using expensive machinery in the proper manner, resulting in poor-quality product, slower production, and possible safety problems. Is this really "misconduct?" But if your policies require the proper use of equipment at all times, the employer could more readily take advantage of the FACT process for investigating.

Recommendation: Although written policies cannot address every possible situation, employers should carefully review those matters of greatest concern to them and consider implementing written policies regarding those issues. Any policies should be carefully drafted to ensure that they are flexible, practical and legally-appropriate.

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access to employment and labor laws that ensure workplace dignity and to reduce unfair competitive advantage from firms that abuse day laborers.

AB 2704: Addresses the status of domestic workers referred by employment agencies. The bill does not include providers of services rendered to consumers of In-Home Supportive Services under various sections of the Welfare and Institutions Code. The employment agency would not be the employer of the domestic worker if various, specified elements are present. Also the bill would require a written

contract between the agency and the worker covering specific issues, and written and oral notices from the agency to the worker and/or customer (employer of the domestic worker) regarding certain legal obligations. The agency would need to inform the customer that the worker is the customer's "employee," which involves specific obligations, such as taxes, etc. and provide forms. The customer would need to file new-employee paperwork with EDD, withhold payroll taxes, etc. Each violation could result in fine up to \$2,500.

AB 2850: This bill would provide 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 extend that protected period to 90 days.



Act Must be Integrated with Leave Laws

California Passes Workers' Comp Reform Act

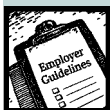
On April 19, 2004, Governor Schwarzenegger signed into law a long-awaited workers' compensation reform package. Already, the Workers' Compensation Insurance Ratings Bureau has proposed a 2.9 percent reduction in the pure premium rate to go into effect July 1, 2004. Among its more significant changes, the reform package:

- Tightens standards for determining impairment ratings by removing subjectivity and requiring doctors to follow nationally recognized standards;
- Permits employers to create a medical provider network to treat injured employees;
- Strengthens an employer's ability to "apportion" liability for injuries by requiring doctors to address "causation" of disabilities or impairments in their reports and employees, upon request, to disclose all previous permanent disabilities or physical impairments;
- Caps temporary disability benefits for most injuries at 2 years;
- Enhances benefits for individuals with the most severe permanent disabilities while lowering benefits for minor permanent injuries;
- Repeals the "presumption of correctness" currently afforded the opinion of an employee's pre-selected treating physician concerning the extent and scope of medical treatment;
- Expressly exempts workers' compensation laws from the new private right of action for penalties known as the "bounty hunter" law;
- Requires that findings of fact made by the Workers' Compensation Appeals Board be made impartially to ensure employees and employers are considered equal under the law;
- Re-authorizes "vocational rehabilitation" benefits for pre-December 31, 2003 injuries; and
- Increases permanent disability payments by 15% when reinstatement is not offered or possible while reducing benefits by 15% when employees receive

reinstatement offers.

At a minimum, employers should re-examine potential return-to-work programs that may help maximize cost savings. In developing such programs, employers should remain mindful of leave laws such as the federal Family and Medical Leave Act and California Family Rights Act, whose requirements must be integrated with the new workers' compensation provisions.

Action: As always, careful tracking and monitoring of workplace absences is critical in order to properly manage any leave of absence and maintaining appropriate control over the workplace issues involved. There are many laws applicable to employee absences, and their interactions are complex. Employers who have limited experience in managing leaves of absence should obtain qualified legal advice as soon as the employee's need for a leave is known.



Status Still uncertain at Press Time

"Final" Federal Overtime Regulations

The U.S. Department of Labor's ("DOL") attempt to issue its "final" regulations updating its rules on who is and is not exempt from federal overtime requirements was met with strong opposition from labor advocates, resulting in the regulations being pulled, and the ultimate details still up in the air. *The Strategic EMPLOYER* will keep readers posted on any significant developments in this process.

Unless the federal regulations are wildly altered, however, the federal regulations that have surfaced thus far will have no real impact on California employers. California's standards for determining who may be exempt from

overtime pay are far more restrictive than anything the DOL has proposed. In other words, workers who would be exempt under federal standards still have a long way to go to qualify as exempt under California's rules.

Warning: The cost of incorrectly classifying employees can be high, so California employers need to "look before they leap" into changing workers to exempt status based on new federal standards. Even if the change meets all applicable state and federal standards, other factors still need to be taken into account, such as how the workforce will react to being deprived of overtime pay.

Conclusion: With few exceptions (such as state employees), California employers need to focus on and comply with California wage-and-hour requirements. Since California's requirements are complex and the cost of making mistakes is so high, employers should seek qualified legal assistance in auditing and achieving their compliance with wage-and-hour laws.



Problem Highlighted in San Francisco Chronicle

Bank Fees Could Mean Employer Liability

A recent article by the San Francisco Chronicle about the various fees charged by Bank of America ("B of A") caught the attention of the California Department of Industrial Relations ("DIR"). The DIR oversees, among other things, enforcement of California's Labor Code and wage and hour laws.

The DIR noted that B of A charged non-account holders a \$5 fee for cashing their paychecks. Since many employees do not have their own bank accounts, or may want to cash their paychecks without waiting for them to clear in their own account, they will go to their employer's bank, where the checks are drawn, to cash them. If an employer paycheck is drawn at a B of A account, and the employee does *not* have an account at B of A, then B of A would charge a \$5 fee to cash their paycheck.

This caught the DIR's attention because of Labor Code §212, which provides that paychecks must be negotiable at full value at an established place of business in the state, with the name and address for doing so on the check. If the check is drawn at a bank, the bank's address does not need to appear on the check so long as it can be cashed at any branch of that bank at full value. So unless the employer will cash the paychecks themselves (a rare situation), or provide some other means

for cashing checks at full value (with the address for doing so appearing on the check), employers whose paychecks are drawn at B of A may be in violation of Labor Code §212. Note that Wells Fargo reportedly introduced a similar fee in April 2004.

The DIR has requested a written opinion from the Attorney General to clarify two questions: (1) whether a bank is an agent of the employer, such that a bank that charges a paycheck-cashing fee would be independently liable under Labor Code §212; and (2) whether a federal rule authorizing banks to charge fees would preempt such an application of Labor Code §212. If the answer to either question is no, the banks may be off the hook; these questions only address the Bank's liability. It appears that no matter how the Attorney General answers, the employer will still be liable under Labor Code §212.

The penalties for violating Labor Code §212 can include up to \$100 per paycheck plus 25% of the fee charged by the bank. When viewed in the context of California's "bounty-hunter" law (see *The Strategic EMPLOYER*, November 2003, page 3) and the 3-year statute of limitations, the costs to an employer could be astronomical.

☐ **Action 1:** Employers can protect themselves (and benefit their

employees) by ensuring their paycheck practices comply with Labor Code § 212. If you are not sure about the fees imposed by your paycheck bank, call immediately and find out if they charge anything to your employees who cash their paychecks at your bank. If they do, see if they are willing to waive them on your account; some banks will negotiate dropping certain fees. If not, see if they can arrange for you to pay the fees yourself, with the employees who cash paychecks at the bank receiving full value for their checks. If any special arrangements are valid only at your branch, be sure that the name and address of that branch appears on the paychecks.

☐ **Action 2:** If your bank is unwilling to do any of this, you may want to consider changing banks; there are many who will appreciate your business that do not charge such fees. It would also be wise to determine if your bank has charged such fees in the past, even if the bank no longer charges them. If there were past fees, you should consult an attorney to discuss the best way to correct any past problems. ☑



Company Funds Used to Buy Alcohol

Employer May Be Liable in Wreck

A recent accident in San Luis Obispo County reminds employers to be cautious when dealing with company-sponsored parties and alcohol. Business co-owners were celebrating an employee's birthday by drinking beer and shots of hard alcohol at an off-site bar. Company funds were allegedly used to buy drinks for those present. Afterwards, one owner drove away from the bar while legally intoxicated, and struck and killed a pedestrian on the side of the road.

The victim's family filed a wrongful death suit shortly afterward, seeking unspecified damages from the business. The attorney for the family is relying on case law that says if drinking is part of a business' event, then the business is responsible for the consequences. The owner is currently serving one year in county jail after pleading no contest to gross vehicular manslaughter in this same case.

Plaintiffs try to tie businesses to lawsuits like these because companies

usually carry more generous insurance policies: plaintiffs know where the deep pockets are. Serving alcohol at company-sponsored parties and events can have serious consequences, such as in this case. Waag and Co. has addressed this issue numerous times; for the most recent reference, see *The Strategic EMPLOYER*, November 2002, page 4 "Holiday Parties, Alcohol and Liability: Party Advice for the Holidays." ☑



Only Meaningful Defense for Employers

New Defense for Harassment in California

Both California and federal law prohibit workplace harassment. Although the laws are similar, there are some key differences in how an employer may defend against such claims when the harasser is a supervisor. In such cases, California law has always imposed "strict liability," which means the company cannot avoid liability by showing its lack of knowledge or that it took appropriate action, etc.

Under federal law, an employer may be able to raise a defense showing the "victim" could have avoided the harm; if so, the employer would be found not liable. A recent California Supreme Court decision applied the same standards, but with a slightly different result: the employer would still be liable, but where the victim could have avoided the harm, any award will be limited.

This new "defense" in supervisor harassment cases is similar to a ruling by the U.S. Supreme Court a few years ago. In 1998, the U.S. Supreme Court held that where the victimized employee suffered no loss of tangible job benefits, companies will be permitted to present a two-prong affirmative defense (see *The Strategic EMPLOYER*, July 1998 Bulletin). Accordingly, an employer in a federal suit would entirely avoid liability if it could show:

- (1) The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (2) That the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities.

California's Supreme Court recently approved applying this doctrine of "avoidable consequences" to

California claims, noting that employers would be encouraged to prevent and correct supervisor harassment. However, raising this defense in California cases will not eliminate liability; rather the amount of damages the victim could recover would be reduced based on the harm the victim could have avoided. Accordingly, the California employer would also need to show that "reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."

To establish that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, an employer would need to prove that it informed all employees of their right to raise the issue of harassment and how to raise the issue.

This should include an effective complaint procedure that encourages victims to come forward without having to complain first to the offending supervisor. The employer would also need to prove that it had the ability to investigate and appropriately resolve all such complaints in a prompt and effective manner. California law already requires employers to do this.

The second prong of the defense places an obligation on the complaining employee, who must to use such means as are reasonable under the circumstances to avoid or minimize harm. This means that if the employer has a proven, effective mechanism for reporting and resolving such complaints, and the victim unreasonably fails to take advantage of this, then the plaintiff will not be entitled to recover for damages that her own actions could have avoided.

Once again, the Courts are sending a clear message that merely paying

"lip service" to anti-harassment policies will get an employer nowhere. At the same time, employers who have strong anti-harassment programs may find themselves able to prevent harassment, avoid lawsuits, or at the least, reduce the damages that might result.

Action 1: Employers need to review their harassment policies carefully to be sure that they meet the current legal requirements. A complaint procedure should be established that encourages employees to raise their concerns to someone who is trained and prepared to respond to such complaints appropriately.

Action 2: The policies should be disseminated to all employees.

Action 3: Supervisors should be trained regarding their responsibilities regarding a harassment-free environment, and how to properly handle any complaints brought to their attention.

Action 4: All non-supervisory employees should receive training about the harassment policy and complaint procedures, so that none can claim ignorance or intimidation about seeking relief within the company.

Conclusion: Any employer who fails to be proactive regarding harassment may find itself stripped of the only meaningful defense the California Supreme Court has offered to date regarding claims of supervisory sexual harassment.



Update and Related Issue

How Not to Calculate a Bonus - Again

Part 1: "Profit" Cannot Subtract All Expenses

As reported in *The Strategic EMPLOYER* (November 2003, page 3), a California Court of Appeal ruled that it was unlawful to calculate an employee's bonus based on the company's profits. The California Supreme Court has refused to hear the appeal of this case, meaning the ruling will stand.

The case involved Ralphs Grocery Company's program of giving employees a bonus equal to a percentage of their departments profits; "profit" was determined by taking all revenues and subtracting all expenses, including overhead, labor costs and losses. The Court held that when calculating "profit" for non-manager bonuses, losses due to breakage, missing cash, and inventory shortages could not be taken into account. For both managers and non-manager bonuses, the court held that it was unlawful to deduct the expense of workers' compensation in determining "profit".

Regardless of whether the math for deducting such items came directly out of the bonus or out of the number on which the bonus would then be based, the Court held that the employee's compensation was being reduced because of such expenses.

Action: California law forbids passing on any part of the expense for workers' compensation insurance to any worker, and forbids passing on the cost of miscellaneous losses to non-managerial employees. Employers should carefully review their bonus plans with qualified legal counsel.

Part 2: Passing Expenses on to Contractors

In a related issue, a California Court ruled that companies cannot pass the cost of workers' compensation insurance to their independent contractors. Even though the workers' compensation system is designed to protect employees, companies may

obtain workers' compensation coverage for their independent contractors under certain circumstances, without altering the person's independent-contractor status.

The Court ruled, however, that if a company covers an independent contractor, then the parties are both subject to all the legal provisions of the workers' compensation law – including the prohibition against imposing any of the cost of such insurance on the worker. This case arose after a freight transportation company offered workers' compensation coverage to truckers who were independent contractors and then charged the truckers for the insurance costs.



Recent U.S. Supreme Court Ruling

No Federal Case for Reverse Age Discrimination

The U.S. Supreme Court recently decided that the federal Age Discrimination in Employment Act ("ADEA") does not preclude employers from favoring older employees. The ADEA prohibits employers from discriminating against workers who are 40 years old or older.

General Dynamics had a retiree health benefit plan that was limited to employees who retired after 30 years on the job and who were at least 50 years old by July 1, 1997. Workers who were over 40 but under 50 objected and claimed the plan violated the ADEA. The appellate court held that the ADEA protected everyone over 40 against age-based determinations, even if the worker suffering from the

discrimination was younger than the favored worker.

The U.S. Supreme Court reversed, saying that the ADEA's purpose was to prevent employers from favoring younger workers at the expense of older workers. The Court held that there was nothing in the legislative history, language, etc., to suggest that the ADEA was intended to prevent an employer from favoring older workers.

Action: Despite this ruling, employers should still take care not to base decisions on age-related criteria. Certain benefit plans typically take age-related criteria into account; however, such plans should be set up carefully to ensure there is no adverse impact against older workers.

Caution: While the U.S. Supreme Court's decision will have *persuasive value* in California, the California courts could consider the different wording and history of the state's anti-discrimination provisions regarding age and come to a different conclusion.



Honesty is the Best Policy

No matter how eagerly you want to hire that great new employee, be very careful not to make any misleading statements. One manager found this out the hard way.

Doug Cheppo of Fluor Enterprises in California wanted to hire Robert Blitz for a new project. Cheppo told Blitz the project would last about 2 or 3 years. Blitz had been working in New Jersey over the past 12 years for Raytheon and told Cheppo he did not want to relocate and leave a stable job for something project-based.

Cheppo told Blitz that long-term employment was approved and he would remain employed even after the project ended. Under pressure from Cheppo, Blitz orally accepted the job and resigned from Raytheon. It was only then that Cheppo presented Blitz with a written employment agreement stating that Blitz's employment would be "at will." Blitz protested and asked to have the agreement changed to reflect the long-term employment promise. The company refused. Still, Cheppo orally assured him the at-will provision would never be enforced. Since he had already resigned from Raytheon, Blitz felt he had no choice but to sign the agreement and take his chances at Fluor.

About 2 years later, the project began to wind down and Blitz was laid off. Blitz sued Fluor for fraud. He also alleged that Fluor violated California Labor Code §970, which makes it a crime to induce someone to relocate by misrepresenting the length of employment, type of work, compensation, housing, or other aspects of the job. Penalties for violating Labor Code §970 include doubling the employee's damages, plus a fine and jail time. Fluor acknowledged Cheppo's promise, but argued that because Blitz later signed the at-will agreement, no earlier promises were valid. While the Court agreed that such would normally be the case, here, Blitz relied on the promise to his detriment (e.g., he quit his job at Raytheon) in direct reliance

on the oral promise of long-term employment before he knew he would be asked to sign the at-will agreement. Accordingly, the case will be sent to trial before a jury.

Action: Companies need to be very careful to avoid inflating promises to snag a good job candidate. Even where there is a Human Resources Department handling the process, the hiring managers might still say

"whatever it takes" to get the best person. By the time HR sends out the offer letter or contract — offering at-will employment — it is too late.

Management Training: Training managers regarding the legal impact of what they do in the hiring process will protect them and the company from claims of fraud as well as discrimination and many other types of claims.

Management and Employee Training

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.

- 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
- Workplace Investigations

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