



# The Strategic *EMPLOYER*

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

## Tsunami of Pending California Employment Laws Coming?

Compliance with California's complicated employment laws by human resources professionals and employers has *never* been easy, and has *always* been a thankless job. Judging by the massive wave of pending California employment laws (see pages 3 through 7), the wacky times are far from over.

As always, not all of these pending bills will be signed in to law, but it is likely that at least some of them will be. One can only wonder what our fine legislators had in mind when they proposed **SB 862** (see page 3), demanding that that minimum wage

be increased immediately (as an urgent statute) by an "unspecified amount" — hey, we're not making this stuff up!

At WAAG AND CO., we do our best to keep our clients and friends apprised of the many changes that affect California employers, and to steer you in the right direction (and away from litigation) when the seas get a little rough.

We encourage employers to carefully read the information in our newsletters, as well as the many other sources of information that are available. Regardless of what we may think of the multitude of laws imposed on California employers, we cannot afford to disregard them. Whether or not you are aware of a particular law or how to comply with it, you are required to follow it or face severe liability. The government will not educate employers about these laws, so it is up to the employer to "get it right." *The Strategic EMPLOYER* is an important tool in WAAG AND CO.'S efforts to clarify the changing laws and suggest strategies in how to cope with them. Good luck! ✓

## 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 225 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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- Benefits Admin: \_\_\_\_\_
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LEGISLATION &amp; REGULATIONS THAT HAVE PASSED

## Recently Enacted Federal Legislation

### Shredding Required Starting June 1, 2005

The Fair and Accurate Credit Transactions Act was passed in 2003, but certain identity-theft prevention provisions are just now going into effect. Starting June 1, 2005, all employers — even those with only a single, household employee — will need to properly destroy all material containing sensitive personal information before disposing of it. “Personal information” includes Social Security numbers, credit card numbers and any other consumer information. This means that instead of putting material in the dumpster, businesses must shred, burn or pulverize receipts and any other record to be disposed of. Moreover, shredding must be sufficient to prevent reconstruction of the document; simple straight-cut shredding will “not cut it.” Penalties include fines up to \$2,500 per violation, in addition to liability for any damages caused by the failure to destroy the information.

### Military Leave: New Federal Poster and Benefits Extension

Beginning March 10, 2005, all private and public employers, regardless of size, must post a new notice informing employees of the reemployment and benefit rights surrounding military service. The poster is available at [www.dol.gov/vets/programs/userna/poster.pdf](http://www.dol.gov/vets/programs/userna/poster.pdf).

Under the same law, reservists on leave for more than 30 days are generally entitled to elect COBRA-like insurance continuation for up to 18 months, even if the employer is not covered by COBRA. The new law extends the period for such continuation to 24 months and applies to elections made on or after December 10, 2004.

### Electronic Storage of I-9's

President Bush signed HR 4306, which will permit employers to store their I-9's in electronic formats starting May 1, 2005. This gives employers a variety of storage options, including paper, microfiche, microfilm or electronic form. Employers will also be able to make I-9 attestations using a handwritten or electronic signature. The ability to use an electronic signature or electronically store I-9's does not eliminate the requirement for the employer to personally review original documents presented by the employee to establish authorization to work in the U.S. Employers who opt to use electronic storage should be sure to establish firewalls or other security measures to protect the Social Security numbers and other sensitive information on the I-9 forms.

### Revised Rules for Teen Workers

The U.S. Department of Labor's revised rules governing employment of minors went into effect December 16, 2004. Among the many key changes:

**Driving:** Employees under the age of 17 are prohibited from performing any job-related driving on public roadways. Seventeen-year-old employees may perform occasional, work-related driving on public roadways within a 30-mile radius from the workplace during daylight hours, subject to the following: The vehicle does not exceed 6,000 pounds (including payload); the vehicle has seatbelts that the employee and passengers must use; the minor driver has a valid driver's license for the type of driving involved and has no moving violations when hired.

**Cooking:** Employees 14 and 15 years old are permitted to cook with electric or gas grilles without an open flame, and deep fryers that automatically lower and raise cooking

baskets. Cooking is not permitted with equipment such as rotisseries, broilers, pressurized equipment and devices that operate at extremely high temperatures. It is no longer necessary that permitted cooking duties be performed within plain view of customers.

### On-Line Labor Certifications for Alien Workers

Employers who wish to hire an alien worker must recruit among qualified citizens and / or permanent residents before they may apply with the Department of Labor (“DOL”) for permission to hire an alien worker. Under new regulations effective March 27, 2005, employers may file labor certification applications on-line. The regulations require employers to place a job order with the state workforce agency, run two newspaper ads in Sunday papers, post the job at the worksite, and for professional positions, conduct at least three additional types of recruitment from a specified list. The employer would then be able to file an on-line application with the DOL to recruit an alien worker. The DOL will

*New Federal Leg.: cont'd on next page*

#### ~NEW CALIFORNIA LAW~

### Repeal of Extended Health Benefits

**AB 254:** Signed by the Governor in December 2004 and effective January 1, 2005, this bill repealed earlier legislation that required employers to offer extended health benefits coverage for certain former employees over age 60 and their spouses who were not yet eligible for Medicare. The old law required plans subject to COBRA or Cal-COBRA to offer such employees extended coverage until age 65.



LOOKING TO THE FUTURE

# Pending State Legislation Keeps Piling Up!

## Wage & Hour

**AB 822:** Would allow employers to pay wages with an electronic pay card. The employer electronically “loads” the card with the employee’s net pay. The employee can use the card much like a debit card, and even use it at ATM’s to obtain cash. This is intended to help employees who have no bank accounts. The employer would not be permitted to pass any costs for such cards / transactions onto the employees.

**AB 48:** Would increase minimum wage to \$7.25 per hour effective January 1, 2006 and to \$7.75 effective January 1, 2007.

**AB 640:** Currently, employers may establish an alternate workweek without overtime costs (such as a 4-day, 10-hours-a-day workweek) only among groups of employees who vote for such arrangements pursuant to strict

procedures. This bill would allow for alternate workweek arrangements with individual workers.

**AB 904:** Presently allowable alternate workweeks must not involve more than 10 hours per day without overtime. This bill would allow manufacturing employers who operate 24/7 to adopt an alternate workweek of up to 12 hours a day without overtime (pursuant to an employee vote and other strict procedures).

**SB 862:** Would increase minimum wage to an “unspecified amount” and would “take effect immediately as an urgency statute.” It is unclear how an “unspecified amount” could be put into effect.

**SB 778:** WAAG AND CO. recently reported on how employees must be able to cash their paychecks without incurring any fees or other costs. See “Bank Fees Could Mean Employer

Liability”, *The Strategic EMPLOYER*, June 2004, page 6. This bill would specify that banks who issue paychecks for business clients must notify such clients regarding this issue. Specifically, that the client must pay any bank fees for cashing paychecks by client employees who do not have an account with the bank.

**SB 285:** Currently, when discharging an employee, the employer must pay the employee’s final wages that day. If the employee has quit without notice, the employer has 72 hours to pay the final wages. This bill would allow a “reasonable time” not to exceed 72 hours for the employer to pay a discharged employee.

**AB 1093:** An employee’s authorization to pay wages through automatic deposit is currently deemed to be terminated immediately when the employee quits or is fired. This bill  
*Pending State Leg.: cont’d on next page*

## New Federal Leg.

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no longer require submission of evidence with the application, but the evidence should be retained. Also, employers can require a foreign language for a job, so long as it is for more than just a convenience for the employer or customers; the language must be necessary based on the nature of the occupation or the need to communicate with a large majority of customers or contractors.

## Final HIPAA Regulations Going Into Effect July 1, 2005

The U.S. Department of Labor, in conjunction with several other agencies, has published final regulations on HIPAA portability provisions. Among

other things, the new rules set limits on preexisting-condition exclusions, require group health plans and group health insurance issuers to offer immediate “special enrollment” upon certain life events and create a new obligation to provide an educational statement on HIPAA rights to individuals who lose coverage. The new rules take effect with plan years starting on or after July 1, 2005.

## Class Action Fairness Act

Signed into law by President Bush on February 18, 2005, this Act is intended to curb the ability of plaintiffs’ attorneys to abuse the class action procedure. According to the President, the Act “will prevent trial lawyers from shopping around for friendly local venues” and will require judges to “consider the real monetary value of

coupons and discounts, so that victims can count on true compensation for their injuries.”

Among other requirements, the Act grants the federal courts jurisdiction over class actions in which the proposed class contains at least 100 members and the total amount in controversy for all plaintiff class members exceeds \$5,000,000. Many class action plaintiffs prefer to avoid bringing their case in federal court due to the widely-held perception that federal judges are less likely to certify a class action and that even those plaintiffs who prevail will obtain a smaller recovery than they would have received in state court. The law is expected to have a modest impact on class action suits against employers.

## Pending State Leg.

*Continued from previous page*

would permit an employer to make final payment of wages through automatic deposit. In a separate matter, this bill would also allow certain highly-compensated, partially-exempt computer professionals to be paid on a salaried basis.

**AB 1172:** Would characterize any advance against commissions not yet earned as “wages.” This would prohibit employers from deducting/offsetting money from a commissioned employee’s paycheck to repay any advances to the employee. The only exception would be a valid assignment of wages by the employee. Of great concern is the bill’s assertion that it is *declaratory of existing law*, rather than a change in the law, despite the fact that numerous courts and enforcement agencies have upheld commission agreements that provide for the offset of advances from paychecks. This bill would declare that all of those currently-presumed-legal agreements have always been against the law, stirring-up significant litigation. See *related court decision on page 7*.

## Missed Breaks

**Proposed Regulations:** In two Bulletins in December 2004, WAAG AND CO. reported on emergency regulations

that would have changed how missed meal and rest breaks would be handled, and how those emergency regulations were withdrawn in order to pursue public comment for the proposed regulations. There have since been several public comment sessions and some revisions to the proposed regulations, with more public comment to follow.

In all versions, the proposed regulations declare that the payments employers must make when an employee misses any breaks has always been a “penalty,” not a “wage.” The impact of this distinction is far reaching. As a “penalty,” an aggrieved employee may file a claim going back only one year instead of three. There can be no other penalties, interest or attorney’s fees imposed on an award of “penalties.” Since missed break payments are penalties, not “wages,” payroll taxes should not be deducted from these payments.”

The proposed regulations also allow for flexibility regarding when an employee must take a meal period. The current statute requiring meal periods states that the employer shall “provide” a meal period for employees working at least 5 hours in the workday. The proposed regulations define “provide” as affording the employee with the opportunity to take the meal period by the end of the 6th hour worked, if the employer has posted the applicable Wage Order and maintained accurate time records. Moreover, if the employee

was “provided” a meal period but declined to take it, the employer would not be required to pay a penalty; this would be much like the current rule where an employee declines to take an available rest break.

There are several other key provisions in the proposed regulations. Based on earlier public comment, the regulations have been revised, with further public comment ending May 25, 2005. After that, if there are no further revisions, the proposed regulations will move on to the remaining steps of the process. Once there is final action on the regulations, WAAG AND CO. will provide a detailed analysis; until then, employers must continue complying with the current, unforgivingly rigid regulations.

**AB 755:** Piece-rate workers in garment and agricultural industries would be paid for missed breaks based on average hourly rates. Employers would not be subject to waiting-time penalties for failure to pay missed-break payments unless such failures occurred more than 5 times in past 12 months. If the above-mentioned proposed regulations become final, these industries could be the only employers subject to waiting time penalties for failure to pay missed-break payments.

**ACR 43:** Resolution in the Assembly that, if passed, declares that the Division of Labor Standards Enforcement (“DLSE”) has no authority to promulgate regulations regarding meal and rest periods; only the Legislature and the Industrial Welfare Commission (“IWC”) have such authority. Also declares that the proposed regulations are inconsistent with long-standing law.

## Discrimination

**SB 855 and**  **AB 20:** These reflect an effort to curb the “drive-by” lawsuits claiming violations of the Americans With Disabilities Act and the analogous State requirements for providing access

*Pending State Leg.: cont’d on next page*

### ~ PENDING FEDERAL LEGISLATION ~

**HR 98:** This bill would increase employer penalties for hiring employees who are not authorized to work in the U.S. The penalties for each offense would be up to \$50,000 and/or 5 years in jail for knowingly hiring an unauthorized worker. The bill would also add an electronic identification strip to Social Security cards, to make forgery of such cards more difficult and to make verification by employers easier.

**S 11:** The “Standing with Our Troops” Act would offer tax breaks to small employers that provide military leave pay to employees who are called to active duty. Employers with 50 or fewer employees who pay the difference between the employee’s regular pay and military pay would be eligible for a tax credit equal to 50% of the actual compensation paid by the employer or \$30,000, whichever is less.



## Failure to Give Proper COBRA Notice

A federal district court in California has ruled that a COBRA qualified beneficiary must pay premiums from the date of the qualifying event, despite not receiving notice of COBRA rights until seven months after his termination. The court, however, also assessed a late-notice penalty on the employer approximating the amount of the retroactive premium. The entire situation was the result of an avoidable communication failure between the employer and its outside COBRA administrator.

Ceridian Benefits Services provided COBRA administrative services for Sun Microsystems. Naren Chaganti changed addresses and provided his new address to Sun. Sun never passed the employee's new address on to Ceridian. Later, in November 2001, when Sun laid

off Mr. Chaganti, Ceridian mailed a notice of COBRA rights to Mr. Chaganti's former address. Mr. Chaganti never received that notice.

In May 2002, Mr. Chaganti contacted Ceridian and in June 2002 he enrolled in Sun's COBRA plan. Mr. Chaganti paid for coverage from November 2001 through June 2002 under protest, claiming he should not have to pay premiums for the period during which he was unaware of his COBRA rights. When he failed to pay his July premium, however, his coverage was cancelled, and the litigation ensued.

Although the Court rejected Mr. Chaganti's claim that his coverage was unlawfully terminated, it did grant a penalty against Sun for failing to give timely notice. Although the Court held that Sun's failure to give notice was

neither deliberate nor in bad faith, it held that Sun was responsible and that Mr. Chaganti had been prejudiced by the lack of timely notice.

**Summary:** Because COBRA can be very complex, many employers outsource this responsibility to a third-party administrator. This can be a good arrangement; however, not if the employer forgets to keep the administrator current on all information necessary to properly carry out these responsibilities. Employers should have a system in place to ensure that the administrator of any benefit plan will receive pertinent information in a timely manner.

### Pending State Leg.

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to goods and services. SB 855 would require claimants to give notice of a perceived violation and an opportunity to cure the defect before suit could be brought. AB 20 would preclude claims for damages based on a *de minimus* violation that has no significant impact on a disabled person's right to the goods and services; instead, the remedy for a technical violation would be an injunction and attorney's fees.

**AB 1669:** Currently, an aggrieved employee has one year from the date of an act of discrimination to file a charge with the Department of Fair Employment & Housing. This bill would extend that time for an employee who is under 18 at the time of the violation to file not later than one year after the employee's 18th birthday.

**AB 124:** California voters banned state agencies from imposing affirmative action programs through Proposition 209

several years ago. This bill, while noting that Prop. 209 makes affirmative action in State programs unconstitutional, would implement a program that looks just like affirmative action. It would provide for the State to "ensure equal access" to State jobs, work assignments, training, etc. by collecting data regarding race, gender, etc. of applicants and employees in all stages of their employment. It would also require broad recruitment efforts and an examination of the validity of all job standards and qualifications with the goal of ensuring access to jobs, etc. for underutilized members of any ethnic group or other group based on race, age, gender, disability, etc.

In 2003, the Legislature passed another bill along the lines of: "If it's not called 'affirmative action,' it must not be affirmative action." AB 703 was signed by Governor Davis in 2003 to ensure that the government took steps to secure "adequate advancement" of minorities and women in State employment and contracting opportunities. In May 2005, a court held that AB 703 was unconstitutional due to Prop. 209.

### Benefits & Time Off

**AB 995:** Very small employers (10 or fewer employees) would be eligible for a tax credit based on paying for their employees' health insurance. The employer must pay at least 75% of the employee's premiums and the employee must work at least 35 hours per week and earn not more than three times minimum wage. The tax credit would be \$100 per month or 50% of what the employer pays for the premiums, whichever is greater. If the employer pays for dependent coverage, then an additional tax credit would be available.

**AB 391:** This bill would extend unemployment insurance benefits to employees who are not working because they are on strike, thereby *subsidizing strikes against businesses*.

**SB 874:** State agencies would be precluded from doing business with any contractor who does not have a written policy of providing at least 10 days of paid jury duty per year.

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## Pending State Leg.

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**SB 300:** California's Family Rights Act ("CFRA") guarantees time off for to care for an ill parent, dependent child, spouse or domestic partner, to bond with a new child, or to tend to the employee's own illness, with the employer continuing to pay its normal share of health insurance premiums. This bill would *extend* this right to include time off to care for an ill sibling, grandparent, parent-in-law and the employee's adult, non-dependent children. To the extent that the CFRA allows leave to care for people not covered under the federal Family & Medical Leave Act, the time off under CFRA cannot count against / run concurrently with the federal time-off entitlements.

## Workers' Compensation

**AB 227:** An employee getting temporary disability payments or medical treatment would forfeit the right to such benefits if s/he left the state for more than 2 weeks without the employer's written authorization. Benefits could be reinstated when the employee returns if the employer gave a written authorization to do so, or if ordered by the Workers' Compensation Appeals Board.

**AB 229:** Currently, an employer with a medical provider network must arrange an initial medical evaluation and start treatment when the employee either notifies the employer of an injury or files a workers' compensation claim. Under this bill, the employer would need to authorize an initial medical

evaluation or treatment within one day of receiving notice or knowledge of an injury. Also, the employer would need to notify the employee of the right to be treated by the employee's pre-designated treating doctor.

**AB 510:** This bill would establish a task force to identify employers without workers' comp insurance in targeted industries. The task force would use pay reports filed by employers with the Employment Development Department to confirm that employers who report having payroll have a corresponding workers' compensation insurance policy. Employers without identifiable insurance would then need to produce proof of insurance.

**AB 613:** An employee claiming a cumulative mental or physical injury or illness would need to prove that employment was the predominant cause of such condition in order to receive benefits.

### ~ HR BRIEFS - PART I ~

*New On-Line EDD System Launched:* The Employment Development Department has launched an on-line system for employers to file required reports, such as the Quarterly Wage & Withholding Report (DE 6), the Report of New Employees (DE 34) and the Report of Independent Contractors (DE 542). More information is at [www.edd.ca.gov/taxrep/taxfaqia.htm](http://www.edd.ca.gov/taxrep/taxfaqia.htm).

*EDD Post Office Boxes Eliminated:* The EDD's Post Office boxes in Los Angeles and San Diego for DE 88 and payroll tax deposits have been eliminated. All DE 88s and checks need to go to the EDD at Post Office Box 826276, Sacramento, CA 94230-6276.

*Family Leave Benefits Subject to Tax:* The IRS has determined that Paid Family Leave Insurance benefits paid out by the EDD are subject to federal income tax. The benefits are not currently subject to State income tax.

*Employee Stock Options Now an Expense:* The Financial Accounting Standards Board has announced that companies must begin deducting as an expense the value of employee stock options from profits. The SEC recently eased the deadlines for compliance with the new standards. Under the amended compliance dates, public companies will be required to start showing the deduction at the beginning of their next fiscal year. Therefore, a company with a calendar fiscal year would not need to expense the options until filing its interim financial statements for the first quarter of 2006. But for companies (other than small business issuers) that operate with a June 30th year-end, compliance would be required when their interim financial statements for the quarter beginning July 1, 2005 are filed with the SEC. *This is expected to deter many companies from offering their employees stock options; meanwhile, it will likely have a drastically negative impact on profits reported to investors.*

## Lawsuit Incentives

**SB 174:** Existing law permits employees to bring civil actions on their own behalf for unpaid overtime. This bill would provide that where the employee who is paid less than twice the minimum wage the employee may bring a civil action to recover unpaid overtime not only for his own interests, but also on behalf of other current and former employees who were also paid less than twice the state minimum wage at the time of the violation.

**AB 1310:** This bill would make it dangerous for an employer to request that an employee resign or to offer that option instead of termination. It would also make it difficult even to discuss a possible settlement agreement with a quitting employee. Employers would not be permitted to offer any money or other incentive to induce an employee to quit, unless the employer simultaneously provides a written disclosure of the financial consequences

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STEINHEBEL V. LOS ANGELES TIMES

## Deductions for Advances on Future Commissions

A California appellate court has ruled in *Steinhebel v. Los Angeles Times* that an employer may lawfully deduct unearned commissions from future compensation advances.

The Los Angeles Times employed commissioned sales people to solicit subscriptions to the newspaper. Their pay plan provided for advance commissions, based on sales attributable to the preceding pay period. The commission itself, however, was not earned until the sale was approved by the Times or the customer maintained the subscription for at least 28 days. If the Times rejected the subscription or the customer cancelled within 28 days, the commission would be deducted against future advances. Employees agreed to this plan in writing, which included an agreement authorizing the deductions.

A group of employees sued, alleging among other things, that the charge-backs of commissions for cancelled subscriptions were illegal deductions from their pay. The appellate court held that an employer may legally advance commissions to its employees prior to completion of all conditions that must be satisfied before the commissions are actually earned. It may then charge back any excess advances against future advances.

Under the Times' plan, certain conditions had to be met before the commissions were earned, as set forth in the agreements the employees signed. Therefore, the commissions were not earned until all conditions were met, and deducting unearned commissions was not an unlawful deduction from or "kickback" of earned wages. Moreover, since the commissions

were not yet earned if a subscription was cancelled, the deduction for the cancelled subscription was not an instance of the employer illegally passing on its business costs to the employee.

The Chief Counsel to the Division of Labor Standards Enforcement has noted that the compensation package in the Times case included each employee being paid minimum wage for each hour worked, with the commissions in addition to that wage. If there were to be a charge-back for commissions that were advanced but not earned, the deduction would only be from the next advance on commissions. In other words, the employees still got their minimum wage payment and there were no deductions made from the employees' hourly wages.

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of resignation. The disclosure must calculate the impact of such consequences as taxes, earnings, health care benefits, retirement benefits, etc., and show the resulting losses if the employee had stayed employed another 5, 10 and 15 years. The employee who agrees to such a deal must then be permitted 21 days to reconsider; presumably regardless of whether the employee has already left and been replaced. Even if the employee is happy with the deal, the employer would be subject to penalties of \$100 per day between the date the employee is offered the deal and the date the employer provides the required disclosure.

**AB 879:** Presently, employers may appeal any adverse determination by the Division of Labor Standards Enforcement ("DLSE") to a civil court, which would hear all evidence and make a determination as though there had been no administrative determination. This

bill would provide that if an employer fails to answer a complaint filed with the DLSE or fails to appear at a DLSE hearing, then the employer's right to appeal an adverse DLSE determination would be limited. The court would be permitted only to review the DLSE record, and the employer would have no right to present any evidence to the court.

**AB 875:** This bill would establish criteria that would trigger a state audit of an employer's wage and hour practices and working conditions as part of the purported drive against California's "underground economy."

**AB 169:** Current law makes it unlawful to pay women lower wages than paid to men for what is essentially the same work. This bill would create civil penalties for violations, in addition to current liability to the aggrieved worker. Penalties would be measured by the difference in the wages paid to the women versus the men. The standard penalty would be double this difference; the penalty for an intentional violation

would be four times this difference. One-quarter of the penalty would be paid to the aggrieved employee, while the remainder would go to the Division of Labor Standards Enforcement.

### Miscellaneous

**AB 1302:** Regulators would be required to identify the impact regulations would have on small businesses.

**AB 1124:** For Employment Development Department ("EDD") purposes only, a "safe harbor" would be created for claiming a worker is properly classified as an independent contractor rather than as an employee. The EDD would also need to provide information regarding the safe harbor prior to commencing an audit related to this issue.

**AB 1709:** This bill would consolidate and simplify the posters required in the workplace.



U.S. SUPREME COURT RULING

## “Disparate Impact” in Age Discrimination

On March 30, 2005, the U.S. Supreme Court ruled in *Smith v. City of Jackson* that workers age 40 and older may prove discrimination under the Age Discrimination in Employment Act (“ADEA”) using a “disparate impact” theory. Disparate impact is where an employer uses a neutral business practice (not motivated by discriminatory intent) that has an adverse impact on people age 40 and over. The claimant need not establish that the employer intended to discriminate. Prior to this holding, a claimant could only recover under the ADEA by claiming that an adverse employment decision was motivated by an intent to discriminate against the claimant because s/he was at least 40 years of age.

A claimant can establish disparate impact through statistical data showing that people in the protected class (i.e., age 40 or older) are more negatively impacted by the neutral business practice than are people outside the protected class. The employer may still

win this claim by showing that the otherwise neutral business practice serves a legitimate business purpose and is based on reasonable factors other than age, such as seniority. This was the situation in the *Smith* case.

In *Smith*, the plaintiffs were police and public safety officers employed by the City of Jackson (“City”). In order to attract and retain qualified people (a legitimate business purpose), the City adopted a new plan for granting pay raises. Specifically, all police officers and police dispatchers with less than five years of service received proportionately higher raises than those with more seniority. Most officers who were over the age of 40 had more than five years of service, and a group of older officers filed suit under the ADEA claiming that they were adversely affected by the plan because of their age (“disparate impact claim”). While allowing other claims to continue, the lower court dismissed the disparate impact claim, concluding that the ADEA did not authorize recovery for disparate impact claims.

The U.S. Supreme Court reversed the finding that the ADEA did not authorize disparate impact claims. Despite finding that such a theory was viable, the Court nevertheless held that the plaintiffs had not shown that they were disparately impacted by the City’s policies. The Court said that it was not enough for a plaintiff simply to allege that there is a disparate impact on workers or point to a generalized policy that leads to such an impact. The employee is “responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” The Court noted that if the plaintiffs could recover without identifying specific practices that had a discriminatory impact, employers could be held liable for a “myriad of innocent causes that may lead to statistical imbalances.” The Court concluded that the City’s decision to grant raises based on seniority and position was

unquestionably reasonable given the City’s goal of raising employees’ salaries to match those in surrounding communities.

The Court’s decision presents an opportunity for plaintiffs’ attorneys to bring more class actions under the ADEA. An employer’s business practice, as opposed to, for example, a discrete decision to terminate a single employee, will likely affect several employees. Thus, one should expect the number of class action lawsuits to increase.

California employers need to remember that the *Smith* case was decided under the ADEA, a federal law. In California, the decision is less significant in light of state laws that provide a more narrow employer defense. Most California plaintiffs will file under state law, rather than federal, to take advantage of the more generous laws and pro-worker standards.

Under a disparate impact claim, plaintiffs generally allege that a facially-neutral practice or program (e.g., a decision to eliminate higher-salaried positions) has a discriminatory effect, or “impact,” on a protected class of employees. By necessity, therefore, proving such an effect involves the use of statistical analyses.

**Recommendations:** As a precaution, employers should think carefully about doing such a statistical analysis for employees age 40 and over when effectuating changes to a compensation or benefits structure, effecting layoffs or other broad-ranging decisions. As always, employers need to ensure that they can articulate and provide evidence that their policies and decisions are based on reasonable non-discriminatory factors. Employers should take the time now to review their current policies to ensure that there is no disparate statistical impact on workers age 40 and over. ✓

### ~ UPCOMING CASE ~

#### Bonus Based on Profit Calculation

The California Supreme Court has agreed to decide whether an employee bonus plan based on a profit figure reduced by the employer’s expenses violates state law. At issue is whether employer “expenses” can include the costs for workers’ compensation, as well as for cash and inventory losses. The case, *Prachasaisoradej v. Ralphs Grocery Co.*, adopts the reasoning of an earlier case (*Ralphs Grocery Co. v. Superior Court - Swanson*) in holding that workers’ compensation expenses cannot be included in bonus calculations (for details on the prior decision, see *The Strategic EMPLOYER*, June 2004, page 8, “How Not to Calculate a Bonus - Again”).



CALIFORNIA APPEALS COURT RULING

# Big Penalty for Wrong Workers' Comp Carrier

A California appeals court has upheld a stiff penalty against an employer that had unwittingly obtained workers' compensation insurance through an insurer not admitted to write such insurance in California. As a result, Starving Students had to stop all of its employees from working until it obtained proper insurance, and had to pay a penalty of \$100,000.

California law requires all employers to obtain workers' compensation insurance coverage either through an insurer authorized to write compensation insurance in California or through an approved self-insurance program. If an employer doesn't secure such insurance, the labor commissioner must issue a "stop order" preventing the employer from using employee labor until the employer complies with the insurance law. The Labor Commissioner also must assess a \$1,000 penalty per employee employed, up to a maximum of \$100,000. Note that if an employee is injured and it turns out the employer doesn't have insurance, the penalties can be as much as \$10,000 per employee.

Starving Students hired a leasing firm to arrange for workers' comp insurance and administer other HR matters. The firm obtained a workers' comp policy for Starving Students through an insurance company for a monthly premium of \$75,000. This worked well until a Deputy Labor Commissioner with the Division of Labor Standards Enforcement ("DLSE") visited their office to review its workers' comp policy. It was then that Starving Students found out that their carrier wasn't authorized to write workers' comp insurance in California. The DLSE Commissioner assessed Starving Students a \$100,000 penalty for failure to carry workers' comp insurance from an authorized California insurer and ordered it to stop work until it presented a valid policy.

Starving Students immediately arranged for new insurance. The new monthly premiums were a hefty \$175,000. Starving Students unsuccessfully appealed the penalty. The

appeals court explained that the DLSE could only withdraw the penalty if the employer actually did have proper insurance at the time the order was issued. Here, the evidence was clear that Starving Students was not properly insured at the time of the stop order. The court also held that the \$100,000 penalty was not excessive, noting that Starving Students saved \$200,000 in premiums over several months by obtaining insurance through an unauthorized carrier — and the penalty was only half that amount.

**Recommendations:** Employers should be careful to check that any insurer they use for workers' compensation insurance is authorized to write such insurance. The California Department of Insurance maintains a list of California-authorized carriers on its website at [www.insurance](http://www.insurance).

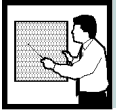
[ca.gov/docs/FS-Licensestatus.htm](http://ca.gov/docs/FS-Licensestatus.htm).

Employers should do this even if they are relying on a leasing agency to handle HR matters, know others who use the carrier or have read about the carrier. The court in this case pointed out that the insurance carrier was incorrectly listed in a well-known insurance industry publication as an authorized California insurer, and it did not help Starving Students that it was relying on a "professional" HR service provider.

Employers should also watch out for "bargains." Anything that seems too good to be true usually is. Although Starving Students had the "bad" insurance long enough that its savings on premiums offset the penalty, if there had been an injury or if the DLSE had audited sooner, this would not have been the result.

## ~ HR BRIEFS - PART II ~

- Worker's Comp Rates to Drop July 1, 2005:* The California Workers' Compensation Insurance Rating Bureau has recommended to the Insurance Commissioner a 10.4% drop in the pure premium rates for workers' compensation insurance, to be effective July 1, 2005. The recommendation, which must be approved by the Insurance Commissioner, follows prior rate cuts of 7% on July 1, 2004 and 2.9% on January 1, 2005. The Bureau's recommendation is based on data confirming a drop in the cost and frequency of claims, driven by recent reforms to the workers' compensation system.
- Software Professionals Exempt Rate Increased:* Certain non-salaried computer software professionals are exempt from overtime if they meet specific conditions, one of which is a minimum hourly pay rate. That minimum statutory rate is raised each year, as reported in the Strategic Employer. Effective January 1, 2005, the minimum pay rate for this exemption increased to \$45.84 per hour (up from \$44.63 in 2004).
- More Time Given to Spend Flexible Spending Account ("FSA") Funds:* Under a new rule issued by the federal government, employers may now extend the deadline for reimbursement of health and dependent care expenses in employees' flexible spending accounts (FSAs) to up to 2.5 months after the end of the plan year. Previously, employees were required to "use-or-lose" FSA funds by the end of the year. Under the old rules, any unspent funds at year's end would be forfeited. FSAs allow employees to pay for uncovered or unreimbursed medical costs with pre-tax funds. FSAs are different than Health Savings Accounts (HSAs), which allow individuals and families with high-deductible health care plans to set pre-tax money aside for health expenses. Unlike an FSA, which must be spent within a certain period of time, HSAs can be rolled over from one year to the next.



WAAG AND CO. OFFERS HARASSMENT TRAINING

## Harassment Training Deadline Approaching

A new section was added to the Fair Employment & Housing Act (“FEHA”) by **AB 1825**, which imposes 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. (see “Sexual Harassment Training Now Mandatory”, *The Strategic EMPLOYER*, November 2004, page 4). Those who are covered have until January 2006 to comply, but preparations should begin now.

*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.

**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. ✓

## Megan's Law

*Continued from page 11*

this evaluation considering all the facts and circumstances concerning the employee's work history at the company and the working environment. For example, if the employee works with or near children, or is an in-home service provider, an employer *might* be able to take action and be exempt from the statute's restrictions on use based upon the statute's provision permitting use of the website's information “to protect a person at risk.” The purpose of the Megan's Law website would arguably be negated if employers could not take such action to protect children and other individuals who truly may be at risk.

**What you can do (part 2):** It may also be appropriate for the employer to

meet with the employee privately to inquire as to when the conviction occurred, the circumstances surrounding the conviction, and if and to what extent the employee participated in a rehabilitation program. This information will help the employer to assess any risk the employee may present, and to determine if further action needs be taken. Employers should recognize that it is not clear from the plain language of the statute whether such a line of inquiry from an employer, prompted by information disclosed on the Megan's Law website, is permissible.

However, the primary purpose of the website is to provide the public information to assess risks, and making an inquiry to assess a potential risk would *seem* appropriate. It seems

unreasonable that a court would conclude an employer was compelled to do absolutely nothing when confronted with a potential risk to his or her employees and customers; however, there is no case law on this point.

**Conclusion:** Employers should make diligent efforts to know who they are considering hiring and risk factors associated with current employees, while still following the complex sets of laws established to protect their privacy. Employers facing dilemmas regarding what information to pursue and how to use it should consult a qualified employment attorney. ✓



EMPLOYERS SCRATCHING THEIR HEADS

## Megan's Law Website: Not Available to You

On December 15, 2004, California's new Megan's Law website was unveiled, allowing anyone with internet access to easily search California's database of the more than 63,000 registered sex-offenders living in the State. The website was launched to help Californians better protect their families by becoming aware of the whereabouts of convicted sex offenders living in their communities.

However, California law expressly prohibits the use of the state's sex offender registry information for employment purposes, except as otherwise provided by statute or to "protect a person at risk." Misuse of registry information is actionable and may expose the user to actual and exemplary damages, attorney's fees and a civil fine.

**Caution:** California employers are therefore cautioned to not make precipitous employment decisions based upon information obtained about a job applicant or current employee through California's Megan's Law website. A hasty decision to terminate an employee whose name is found on the Megan's Law website could lead to a claim for damages, a civil fine, and costly litigation expenses.

**Confusion:** California employers

may understandably find themselves scratching their heads as to why the usage rules regarding the Megan's Law website has the practical effect of making convicted sex offenders in certain respects a "protected class" of employees in California. While no court has interpreted these provisions, a review of the legislative findings of California's Megan's Law statute states:

*"This policy of authorizing the release of necessary and relevant information about serious and high-risk sex offenders to members of the general public is a means of assuring public protection and shall not be construed as punitive... The Legislature also declares, however, that in making information available about certain sex offenders to the public, it does not intend that the information be used to inflict retribution or additional punishment on any such person convicted of a sexual offense."*

**Additional punishment not legal:** The California legislature was concerned with increasing community awareness about the whereabouts of convicted sex offenders, not precipitating additional public retribution or punishment beyond the sex offender's prison sentence. Had the

statute been deemed a "punishment," it likely would have run afoul of state and federal constitutional prohibitions against laws that inflict a punishment retroactively.

**What you can do (part 1):**

Employers' hands are not, however, completely tied. The new statute does not prohibit employers from taking employment action based upon properly obtained criminal background checks and self-disclosed criminal history information. Thus, employers may make hiring decisions based on court records documenting a sex offense conviction or conviction information self-disclosed by an applicant during the hiring process.

Conviction records are typically obtained by employers through a background-check company. The distinction between using such a company and using the Megan's Law website is highly material. When using a background-check company, employers must comply with the fair credit reporting laws (e.g., obtain advance consent from the applicant, follow the prescribed "adverse action" procedures, etc.).

Perhaps more importantly, background-check companies in California may *not* report records of conviction (even felony convictions) that, from the date of disposition, release or parole, antedate the background-check report by more than seven years.

As a practical matter, this may lead to the bizarre result that an employer may not learn of an old sex-offense conviction through the background check process, even though the name of the individual in question appears on the sex-offender registry.

**What if the employer finds out that an employee is listed on the Megan's Law Website?**

An employer may learn of this information from the website directly or indirectly (i.e., the employer is notified by someone who accessed the website). This situation presents a *risk-tolerance* issue for the employer. The employer should make

*Megan's Law: cont'd on previous page*

## The Strategic EMPLOYER

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