



The Strategic *EMPLOYER*

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

The Calm Before the Storm...

A great deal of employment-related legislation was proposed this year by the California legislature (see *The Strategic EMPLOYER* newsletter, June 2005, page 3 - 7). Most of this legislation did not make it out of committee; however, such bills are expected to see more action next year.

Of those bills that did get through the legislature and were sent to the Governor's office, nearly all were hostile to employers and small businesses. In particular, note the "Lawsuit Incentive" bills reported on page 3 of this newsletter, all of which passed and were later vetoed by the Governor. Since lawmakers passed those vetoed bills, it is likely that some of those will be modified and brought back next year as

well. Only a few of the employment-related bills were signed into law by the Governor, with minimal direct impact on employers.

On the federal front, there was very little activity regarding employment. A few procedural matters were updated; however, there was no action on the two pending bills noted on page 4 of the June 2005 *The Strategic EMPLOYER* newsletter.

We are still waiting for developments regarding the one matter that would bring substantial change: The proposed regulations for changing employer obligations regarding rest and meal breaks. The proposed regulations promulgated by the Division of Labor Standards Enforcement ("DLSE") have been undergoing repeated rounds of public comment, with each revision made in response to such comment needing to undergo further review and comment.

This process has been going on for nearly a year (see WAAG AND CO.'S December 2004 and January 2005 bulletins), and there is no way of knowing when the new rules may be finalized and put into effect.

There are also a number of court cases pending that address the break-

Storm: cont'd on page 3

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 275 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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LEGISLATION & REGULATIONS THAT WERE SIGNED INTO LAW

Recently Enacted State Legislation

Wage & Hour

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 new law will permit an employer to make payment of final wages through automatic deposit.

In a *separate* matter, this new law will also allow certain highly-compensated, partially-exempt computer professionals to be paid on a salaried basis.

ACR 43: This is a resolution in the Assembly that was passed. As a "resolution," it does not go to the Governor at all and does not carry the force of law; however, it does express the legislature's intent, which will carry weight with the government agencies and the courts. The resolution 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.

It also declares that the proposed regulations are inconsistent with long-standing law. The only certain result of this resolution is that it will spur even more litigation over the new regulations currently being prepared by the DLSE.

Discrimination

AB 124: This new law addresses only *public* California employees, and states that it is intended to make the State (as an employer) the leader in equal employment opportunity. While noting that affirmative action in State programs is unconstitutional, the new law will implement a program that looks a lot like affirmative action.

The new law provides 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 will 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.

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 new law will 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.



CALIFORNIA SUPREME COURT RULING

Pre-Dispute Jury Waivers Unenforceable

Long before there is any kind of dispute, many employers enter into agreements with applicants and employees that would require any disputes to go to arbitration. Some agreements permit actions to go to court, but require that the trial of such future disputes be decided by the judge rather than a jury. The California Supreme Court has ruled that where a waiver of the right to a jury trial was entered into before a dispute arises, that waiver will be unenforceable.

In *Grafton Partners LP v. Superior Court*, Grafton Partners and PriceWaterhouseCoopers ("PWC") entered into an agreement for services, in which both parties agreed to waive their right to a jury, in the event there

was any dispute between them that went to court. Such a dispute occurred, and Grafton demanded a jury trial. PWC objected, citing the signed waiver.

The Court held that the waiver was unenforceable due to a specific statute that governed jury waivers. Code of Civil Procedure §631 provides for six methods by which parties to lawsuits may waive a jury. The Court said that the statute does not provide for a pre-litigation waiver. Once a suit is actually pending, only waivers made by a method listed in §631 can be valid.

The Court noted that this ruling does not impact pre-dispute arbitration agreements. Many other court rulings have addressed arbitration agreements and imposed numerous standards that

must be met before such agreements will be valid.

Recommendation: Employers interested in arbitration agreements should consult qualified employment counsel to determine whether or not an arbitration agreement would be beneficial and, if so, to ensure that it would be legally enforceable.



Recently Vetoed State Legislation

Wage & Hour

AB 48: This bill would have increased minimum wage to \$7.25 per hour effective January 1, 2006 and to \$7.75 effective January 1, 2007. In his veto message, the Governor stated that he favored increasing the minimum wage, but did not like that this bill would have included automatic increases without consideration of inflation or other important factors before increases would go into effect.

AB 755: This bill would have added additional penalties and payments to piece-rate workers in garment and agricultural industries for missed breaks. The Governor explained that he vetoed the bill because current law already imposed penalties on employers when employees miss rest and meal breaks, and that this would amount to a double penalty. He also noted that this would "impose burdensome accounting requirements and increase frivolous litigation with no discernible benefit to workers."

Benefits & Time Off

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

SB 874: State agencies would have been 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.

Lawsuit Incentives

AB 1310: Employers would have been barred from offering any money or other incentive to induce an employee to quit, unless the employer simultaneously provides a written

disclosure of the financial consequences of resignation, along with a number of other burdensome requirements. This bill would have made 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.

SB 174: Existing law permits employees to bring civil actions on their own behalf for unpaid overtime. This bill would have provided that an employee who is paid less than twice the minimum wage could 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 875: This bill would have established criteria to trigger a State audit of an employer's wage & hour practices and working conditions as part of the purported drive against California's "underground economy."

AB 879: Presently, an employer 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 have provided that if an employer failed to answer a complaint filed with the DLSE or failed to appear at a DLSE hearing, then the employer's right to appeal an adverse DLSE determination would have been limited. The court would have been permitted only to review the DLSE record, and the employer would have had no right to present any evidence to the court.

AB 169: Current law makes it unlawful to pay women lower wages than men for what is essentially the same work. This bill would have added huge civil penalties for these violations, in addition to the payment of damages assessed by the current law.

Storm...

Continued from front page

payment issue (including one case being heard by the Court of Appeals on November 2, 2005), and an Assembly resolution declaring that the DLSE (as an enforcement agency) does not have the authority to promulgate any regulations at all.

This is why it is important for employers to remain vigilant in complying with the current rules regarding breaks, and not get confused or distracted by what is currently merely a *proposal* for how these breaks must be handled.

Despite that, there have been some changes in how the government will be handling wage-and-hour claims, as a result of some internal shifts in agency policies and recent court rulings. Much of this is a result of the political changes flowing from the big switch in the governor's office following the recall last year. While the state legislature still seems to be gunning for employers, our business-friendly Governor seems to be shielding business from the worst of it and taking some small, positive steps forward at the same time.



Vacation Pay Developments

Partial-Day Absences

California law has long been substantially more stringent than federal law in many regards, including the standards that apply to determine which workers may be exempt from overtime requirements. One of these standards is that exempt employees must be paid on a salaried basis. That means the employee receives his / her full salary for any full work-week in which he / she does any work.

One exception is where the employee chooses to take time off for reasons other than illness, (i.e., vacation). In such a case, the employee may be charged vacation pay for the absence, or if the employee has no paid vacation available, the time off can be unpaid (i.e., deducted from the weekly salary). Under State and federal law, an employer cannot deduct from an exempt employee's wages for partial-day absences. Failing to meet the salaried basis test means the employee is not legally exempt from overtime requirements.

Federal law permits an employer to apply vacation pay to cover a partial-day absence for an exempt employee. The reasoning is that the employee is still receiving full pay for that day through a combination of regular salary and vacation pay. California's enforcement agency, however, has long held that only vacation absences in full-day increments may be charged against vacation pay. The reasoning was that vacation pay is statutorily viewed as "wages," and it would be illegal to take away any wages for a partial-day absence. Remember: This rule addresses only exempt / salaried employees.

Recently, the Labor Commissioner has rescinded the State's position and now states that an employer may apply vacation pay to the partial-day absence of an exempt employee. This brings California in line with the federal approach, and makes the rule compatible with some other statutes that permit partial-day use of paid time

off for all employees (e.g., the California Family Rights Act, Family School Partnership Act, the "kin-care" law that permits family sick leave, etc.). Employers need to remain cautious in making any changes, however. The Labor Commissioner's opinion does not carry force of law and will not stop attorneys from bringing suits that challenge the new approach.

However, since the Labor Commissioner's action, a California Court of Appeal addressed this issue in *Conley v. Pacific Gas & Electric Co.* This involved a class action suit by employees who claimed the employer illegally charged exempt employees' vacation for partial-day absences. As a result, the employees would no longer be legally exempt and would be entitled to overtime pay, missed break penalties, etc.

The appellate court disagreed with the employees and concluded that there was nothing in California law that precluded an employer from following the federal policy that permitted applying vacation pay to partial-day absences. So long as the employee gets paid for the full day, even if some of it was through their vacation pay, the court did not view it as a deduction from the employee's salary. The Court explained that this was consistent with the statutory classification of vacation pay as wages. Specifically, it noted that the employee is simply *using* accrued vacation pay; the employee is not forfeiting it, nor is the employee prevented from further accruing it. Merely applying the vacation pay is a means of regulating the timing of the employee's absence.

☐ **Caution:** Employers should still use great caution in deciding whether or not to charge vacation pay for the partial-day absences of exempt employees. Note that when the exempt employee runs out of vacation pay, *the partial-day absence must still be paid.*

Also, the *Conley* case involved a policy where exempt employees were charged vacation only if the partial-day

absence was at least four hours long; it is unclear how applying vacation pay to shorter absences may be affected by this ruling. Certainly, where the employee is gone for at least half of the workday, it seems reasonable to charge vacation as the day was mostly a vacation day. Since exempt employees are required to have flexibility in their work hours, a shorter absence (i.e., a day in which the employee just left work a bit early) may not be appropriate for charging vacation pay.

☐ **Recommendation:** It is likely that this decision will be appealed to the California Supreme Court, leaving this issue in limbo until such a ruling is made. Given that the risk of handling such absences incorrectly can be extremely expensive, cautious employers may want to continue charging paid vacation of exempt employees only for full-day absences.

Forced Time Off During Temporary Shut Downs

In the same opinion letter addressing vacation pay, the Labor Commissioner also rescinded an earlier opinion regarding an employer's pay obligations when forcing exempt employees to take time off for a temporary shut down of operations. Many businesses do this each year around the Christmas / New Year holidays, or when production is slow.

This issue also involved the "salaried basis" criteria. Note that if the employer is shut down for the entire payroll workweek and the exempt employee does not work during such workweek, then, under the "salaried basis" test, no salary is due. If the shut down involves any partial payroll workweek, the exempt employee's full salary would be due, without applying any vacation pay.

Problems develop, however, when the employer wants to *require* exempt employees to use their accrued vacation

Vacation Pay: *cont'd on next page*



Business Must Treat Domestic Partner Equally

As reported in the November 2004 issue of *The Strategic EMPLOYER* on page 5, the California Domestic Partner Rights & Responsibilities Act (“DPRRA”) went into full effect January 1, 2005, after a series of incremental laws regarding such rights had been enacted over the preceding few years. This extended the full scope of California’s rights for spouses to domestic partners, while still excluding such relationships from the definition of “marriage.”

The California Supreme Court has ruled in a non-employment case that is expected to have an impact on the workplace. *Koebke v. Bernardo Heights Country Club* involved a woman (Koebke) who bought a country club membership in 1987. Membership benefits at the club were extended to a member’s legal spouse and unmarried children under age 22.

Koebke began a relationship with another woman in 1993; ultimately, the two registered as domestic partners. Koebke asked the club to extend membership privileges to her registered partner and the club refused.

The DPRRA extends protection of all California laws to treat domestic partners the same as spouses. Since California’s Unruh Civil Rights Act forbids businesses from discriminating with respect to accommodations, privileges, services, etc., Koebke sued under the combined effects of the DPRRA and the Unruh Civil Rights Act. The Supreme Court held that State law prohibits discrimination based on marital status, so therefore, discrimination based on one’s status as a registered domestic partner would also be illegal.

While this is not an employment case, employment laws also forbid discrimination based on marital status, and it is likely that a court ruling in an employment case would follow the Supreme Court’s reasoning in *Koebke*. As a result, employers may face liability if they extend any benefits and privileges to spouses, but not to registered domestic partners. The full

scope of this is not clear, however. For example, most employee benefit plans are controlled by federal law to the extent that California law cannot impact the terms of such plans. If the terms of such a federally-regulated plan do not extend to domestic partners, then the DPRRA may not alter such terms. But there are a lot of issues where the DPRRA will arise, including health insurance, relocation benefits, tuition reimbursement, and even attendance at employer-sponsored events.

On the flip side, married employees may claim that they are being subjected to discrimination with respect to one area of law: the California Family Rights Act as it interacts with the federal Family & Medical Leave Act.

As explained in the November 2004 issue of *The Strategic EMPLOYER* on page 5, time taken off by an employee under state law to care for a domestic partner cannot be counted against that employee’s entitlements under the

federal law. That employee could take the full 12 weeks off to care for a domestic partner and still have the federally-provided 12 weeks available in the event of his or her own illness or to care for a parent or child. Accordingly, an employee with a domestic partner could end up being entitled to *twice* as much leave and benefits as a married employee.

Recommendation: Employers should review their benefits programs and all other policies and practices with respect to how domestic partners are treated. Qualified employment counsel should be consulted regarding any questions that may arise.

Vacation Pay

Continued from previous page

pay when the business is shut down for the full payroll work week. This raises the question of whether the employer is requiring an illegal forfeiture of earned vacation pay, since the employee has no choice to hold the vacation pay for later use.

In the earlier opinion letter, the Agency wrote that such forced use of vacation was permissible only if the employer had a policy issued at least nine months before the scheduled closure stating that exempt employees had to use vacation during that period.

Now, in a memo withdrawing that opinion letter, the Labor Commissioner explained that there was no legal basis for the nine-month notice requirement. Instead, an employer only must provide “reasonable notice” before forcing exempt employees to use their paid vacation. The Labor Commissioner

stated that this would need to be as far in advance as possible, but generally not less than one full fiscal quarter or 90 days, whichever is longer.

The “forced” vacation use is not an issue if the exempt employees are given the *option* of using vacation pay. On the other hand, employers are not required to let employees elect to use vacation. If an employer prefers to shut down for a full payroll workweek and *not* allow exempt employees to draw on vacation, the employer may do so through its written policies.

Recommendation: Given that the laws regarding compensation are very complex, employers should consult a qualified employment attorney regarding these issues.



FORM STILL HAS NOT BEEN FIXED!

New I-9 Forms Issued without Updates

All employers are required to complete an I-9 form whenever a new employee is hired to establish that the employee is legally authorized to work in the United States. This form was issued by the now defunct Immigration & Naturalization Service, with the most recent version issued in 1991.

Since then, many changes to the I-9 have been called for, but not made. Now, the new Citizenship and Immigration Service ("CIS") has revised the I-9 form — but not made even a single fix. Employers can download a copy of the new version of the form at the CIS's website at: <http://uscis.gov/graphics/formsfee/forms/i-9.htm>.

Despite the fact that the government went to the trouble of issuing a new form, *it did not change or update any of the substance of the form*. Instead, the only changes is the name of the issuing agency. This is unfortunate, since over the years, the government has changed

the rules regarding the list of acceptable documents for verifying employment eligibility. The list on the new form still includes documents that the rules say **cannot be accepted!**

Employers should note the following changes to the list of acceptable documents for the I-9, even though the new form does **not** reflect these changes:

- Form I-766 (Employment Authorization Document), although not listed on the 5/31/05 version of the Form I-9, is an acceptable List A document #10.
- Form I-151 is no longer an acceptable List A document #5. However, Form I-551 remains on acceptable List A document #5.
- The following documents have been removed from the list of acceptable identity and work authorization documents: Certificate of U.S. Citizenship (List A #2), Certificate of Naturalization (List A #3), Unexpired

Reentry Permit (List A #8) and Unexpired Refugee Travel Document (List A #9).

The old form may legally be used until December 31, 2005; after that, the new form must be used. Remember: The form is used when a new employee starts work or when an existing employee's authorization to work in the U.S. expires and needs to be renewed. You do **not** need to re-do the I-9 forms of current employees just because the new form has been issued.

Employers do not file the completed I-9 forms with the government; instead, employers must keep them on file and available for inspection by the U.S. Immigration & Customs Enforcement agency and by the Department of Labor. More detailed information is available in the Department of Homeland Security Handbook for Employers (Form M-274).



CALIFORNIA SUPREME COURT RULING

Coming Soon: "Sexual Favoritism" Claims

The California Supreme Court significantly expanded the scope of sexual harassment litigation in its recent ruling in *Miller v. California Department of Corrections*. There, two female employees claimed that the warden of the prison where they worked was having sexual affairs with several employees, all of whom then received promotions, favorable assignments and other rewards. The Court ruled that the employees not having affairs, who were not the "target" of any sexual advances, could claim sexual harassment based on hostile work environment.

Because of the "sound-bite" publicity this case received, the case is expected to open the floodgates for claims of harassment based on favoritism shown toward a paramour. However, the ruling was very clear that such a claim will not arise simply from an isolated instance of favoritism granted to an employee with whom a supervisor has a consensual sexual relationship. The focus in *Miller*

was that extensive sexual favoritism in a workplace can create a hostile work environment. This is because such favoritism involving multiple affairs / rewards creates a workplace where employees can reasonably conclude that management views them as "sexual playthings" or that they must engage in sexual conduct with their supervisors if they are to receive any sort of favorable consideration.

While the ruling in this case might suggest that a boss having a single, consensual affair with one employee would not support a lawsuit, the case turned on some very specific facts that were present. Where a case turns on a factual determination, such as whether or not something created a hostile work environment, such a case normally cannot be decided by presenting arguments to a judge. That means an employee could still claim that her workplace was tainted by the single affair and a court may allow such a

claim to go to a jury. Nevertheless, even if that particular claim could not be made, an "isolated" situation is likely to result in significant discord and other workplace problems that should always be avoided.

Harassment continues to be a major workplace issue, commanding the attention of the courts, the legislature and plaintiff's attorneys. Employers are reminded to have a strong policy against harassment and to communicate it to all employees. By law, this policy should include an effective procedure for employees to raise complaints. All employees (not just supervisors) should receive periodic training regarding harassment; this helps reduce the likelihood of problems. As reported in previous issues of *The Strategic EMPLOYER*, remember that employers with 50 or more employees are required by law to train their supervisors regarding harassment issues.



NINTH CIRCUIT COURT OF APPEALS RULING

Employees May Sue Over “Mean Boss”

Normally, if an employee sues her employer for hostile-environment sexual harassment by her boss, the employee needs to show that her work environment was hostile, offensive or intimidating because of her gender. This might include allegations that the boss made offensive comments to the employee.

In past cases, if an employer showed that the alleged comments were not gender related and that the boss treated everyone the same way, the case could not proceed. Employers often refer to this as the “Equal Opportunity Jerk” or the “Mean Boss.” In other words, the law does not guarantee you a nice boss; just one that is non-discriminatory.

Recently, in *Christopher v. National Education Association*, the Ninth Circuit Court, which is the federal Court of Appeals that covers California, ruled that a woman could claim sexual harassment arising out of the “Mean Boss” situation. There, a woman claimed that her boss shouted at employees in a loud, profane and hostile manner for little or no reason. She offered evidence that the boss also showed signs of physical aggression, such as lunging across tables, shaking his fists at people, and grabbing employees by the shoulders while yelling at them. None of this conduct included any sexist comments or other indications that the employees were targeted because of their gender.

The Court noted that the boss did not intend to discriminate against women or to treat them differently from the men. Even if the boss treated the men in the same way, the Court decided that the focus should be on the impact of the conduct. In other words, whether a reasonable woman would find this conduct to be hostile, offensive or intimidating. The Court noted that because this impact would reasonably be more severe for women than men, this situation could create a hostile environment due to the victim’s gender.

One issue raised by this ruling is the role of gender stereotypes in legal

determinations. The Court in *Christopher* clearly based its decision primarily on the gender stereotype that women are more sensitive than men. Was the Court suggesting that reasonable men would not be disturbed by the hostile and degrading conduct at issue in *Christopher*?

This decision broadens the definition of “sexual harassment” to a point where any employee who works under an ill-mannered boss who subjects everyone (regardless of gender) to the same gender-neutral hostility might establish a claim for gender-based harassment or discrimination.

The same analysis would apply to employees of a particular race, age, disability or other protected class who may claim that their particular “class” of people would be more sensitive to otherwise neutral conduct than would others.

Whether or not this ruling is appealed to the Supreme Court, this case reflects the current thinking of the federal courts covering California.

Although dealing with federal anti-discrimination law, the State courts generally follow the lead of the federal courts on these issues.

Even if this case had gone the other way, it is not appropriate for a supervisor to yell at employees or otherwise behave as the boss in this case did. Not only might other claims be asserted, but employers will lose their best workers; only the weakest performers who cannot expect to easily find other jobs are unlikely to quit.

☐ **Supervisor Training**

Recommended: Unfortunately, many supervisors do not know how to use their authority in a positive manner, and assume being the “boss” means they need to push people around. But this development makes it even more important than ever to ensure that all supervisors have solid training — not only regarding anti-harassment responsibilities, but also as to general management skills, professionalism and appropriate supervisory techniques. ✓



~NEWS BRIEFS~

☐ **Mileage Reimbursement Rate**

Increase: In recognition of the huge increase in gas prices, the IRS has raised its standard rate for mileage reimbursement to 48.5 cents per mile. The new rate is effective from September 1, 2005 through December 31, 2005.

☐ **DLSE Increases Enforcement**

Activity: The Division of Labor Standards Enforcement (“DLSE”) will be increasing its staff by another 64 positions. The goal is to increase its enforcement activity, including its participation in several joint-agency enforcement “sweeps” planned to target low-wage industries, such as restaurants, agriculture and garment manufacturing. The DLSE enforces California’s overtime and other wage-and-hour laws. Employers should take

steps to ensure their compliance with these laws before they get an unexpected DLSE visit.

☐ **Senate Rejects Boost in Federal Minimum Wage:**

Measures to raise the federal minimum wage to \$6.25 per hour, up from the current \$5.15 per hour, failed in the Senate in October, 2005. One measure, introduced by Senator Edward Kennedy (D-Mass) as an amendment to a spending bill, was rejected in a 51-47 vote, and a similar GOP-introduced bill went down in a 57-42 vote. The federal minimum wage hasn’t seen an increase since the current rate was set in 1997. Note that California’s minimum wage is already \$6.75 per hour — higher than the federal proposal that got shot down.



9TH CIRCUIT COURT OF APPEAL RULING

Racially Motivated Nickname Discriminates

Employers should watch for any signs of discrimination, even in seemingly benign conduct. In *El-Hakem v. BJY, Inc.*, an employer found out the hard way that the use of what it perceived to be a “culturally acceptable” nickname did indeed constitute discrimination.

Mamdouh El-Hakem, who is of Arabic heritage, sued his former employer, BJY, Inc. and his boss, Greg Young, for employment discrimination under federal law. His claims arose from Young’s repeated references to El-Hakem as “Manny,” a non-Arabic name, despite El-Hakem’s objections. Young expressed the belief that a “western” name would be more acceptable to BJY’s clientele. A jury ruled that Young discriminated on account of race and created a hostile work environment, and awarded El-Hakem \$30,000.

The company appealed, arguing that no racial discrimination occurred because the name Manny is not a racial

epithet. The federal Ninth Circuit Court of Appeals (which has jurisdiction over California) rejected the argument, stating that Young’s repeated use of the nickname violated El-Hakem’s protection from race discrimination based on ancestry or ethnic characteristics.

The appeals court also rejected the argument that Young’s conduct did not create a hostile work environment. Although Young’s conduct may not have been especially severe, its frequency and pervasiveness were enough for a jury to conclude that it altered the conditions of El-Hakem’s employment and created a work environment that was racially hostile to a reasonable Arab.

Action: This decision clearly demonstrates the importance of taking steps to prevent workplace harassment based on race and national origin, and the need to promptly respond to correct

a harassment situation. Employers should clearly communicate to employees that harassment based on race, national origin, or any other protected status will not be tolerated and that anyone who harasses will be disciplined. This case has made it clear that statements not related to an employee’s race or national origin, such as an Americanized version of a person’s name, are considered harassment in the workplace.

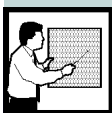
~CREDITABLE COVERAGE~

Medicare Part D Notices due by November 15, 2005

If an employer or its group health plan offers prescription drug coverage to active employees and retirees who are eligible for Medicare, then they must provide these individuals and their dependents with a notice indicating whether the plan’s coverage is “creditable coverage” under Medicare Part D. The notice must be provided regardless of whether the prescription drug coverage is primary or secondary to Medicare.

After the Nov. 15, 2005 notice deadline, the notice must be issued annually, as well as upon the occurrence of certain other events. Note that November 15 is also the date on which the Medicare Part D initial enrollment period opens.

Prescription drug coverage is considered *creditable* only if its value meets or exceeds the value of the Medicare prescription drug benefit. More information about the notice requirements, including model notices in English and Spanish, is available on the Centers for Medicaid and Medicare Services website at www.cms.hhs.gov/medicarerereform/credcovrg.asp.



UPCOMING CALENDAR

Susan Waag Speaks...

Employment law attorney Susan Waag is available on a limited basis to speak before community groups; call her office at (805) 783-2300 for more information. Calendar of Susan’s upcoming speaking engagements:

Wednesday, November 9, 2005 from 4pm to 6:30pm; Morgan Stanley: A Symposium for the Small Business Owner; Keynote Speaker: Susan Waag, Attorney at Law; Topic: What Employers Need to Know for 2006; Location: Paso Robles Library Conference Room; 1000 Spring Street, Paso Robles; Seating is limited; Call Michelle for reservations at (805) 239-0920 or via email to michele.muse@morganstanley.com

Tuesday, November 29, 2005 at 7:30am; Tri-County Chamber of Commerce; Topic: New Employment

Laws for 2006; For more information, contact Executive Director Rebecca McMurray at (805) 773-4382

Friday, January 13, 2006 at Noon; Mission Community Services Group; New Employment Laws for 2006; Location: Creekside Career Center; 4111 Broad Street, Suite A, San Luis Obispo, CA 93401; For more information, see www.mcscorp.org or phone (805) 595-1357

Wednesday, February 15, 2006 from Noon to 1:30pm; Rotary Club of Atascadero; Hot Topics in Employment Law; For more information, contact John Joyner at (805) 610-8060 or johnj@thecoopercompany.com or see www.goodprograms.com



FIRING OF WORKER UPHELD

Drug Testing and Medical Marijuana Use

A California appeals court has just thrown out a wrongful termination and disability discrimination lawsuit. In *Ross v. Ragingwire Telecommunications, Inc.*, a worker sued after he was fired when his preemployment drug test came back positive for marijuana — even though the employee had medical authorization to use the marijuana for chronic back pain.

According to the court, even though the employee had a physician's recommendation for marijuana in compliance with California's Compassionate Use Act, nothing in the state prohibits an employer from firing or refusing to hire a person who uses an illegal drug. And, because the

possession and use of marijuana — including medical marijuana — remains illegal under federal law, a court has no authority to require an employer to accommodate an employee's marijuana use, even if it is for medical purposes and otherwise legal under California law. The state law simply permits a person to use marijuana for medicinal purposes in California without incurring state criminal law sanctions — but the law says nothing about protecting the employment rights of those who do so.

Recommendations: Employers who are concerned about drug use among their workforce should have carefully-drafted policies regarding this particular issue. Such policies should

explain the employer's concerns and whether it has a zero-tolerance approach. If the employer has a policy of drug testing, the circumstances and procedures need to be spelled out to employees in writing. Employers also need to be careful before taking any action against an applicant or employee regarding drug issues; many legal landmines exist, including laws protecting the person's privacy, disabilities, and rights to rehabilitation.



LAW APPLIES TO PRIVATE EMPLOYERS ONLY

Government Exempt from Uniform Expense

A new ruling from a California appeals court says state and local government employers are generally off the hook for uniform reimbursement, although private employers in California are still required by law to pay for their workers' uniforms.

The appeals court rejected class-action challenges brought against various public employers alleging that the employers' failure to fully compensate the employees for the actual cost of purchasing, replacing, cleaning, and maintaining required work uniforms violated Labor Code section 2802. That provision requires an employer to indemnify employees for all necessary expenditures or losses they incur as a consequence of performing their job duties.

The problems with the employees' argument depended on whether the challenged employer was a city or county, the state itself, or the University of California. Local governments have the legal responsibility to determine compensation for their employees. And because uniform reimbursement falls

under the category of compensation, said the court, the issue is solely within the local governments' domain.

With respect to state agencies, there is a separate law (Government Code section 19850.1) requiring state employees to buy their own uniforms, although the state must provide an

annual allowance for replacement only. The court said that the University of California is authorized to manage its own internal affairs, including uniform reimbursement.

The Strategic **EMPLOYER**

November 2005 ~ Susan S. Waag, Esq. ~ (805) 783-2300

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