NOVEMBER 2006 WAAG AND CO. EMPLOYER NEWS

The Strategic EMPLOYER

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Minimum Wage Increase Grabs Biggest Headline for 2007

Once again, most of the employment-related legislation proposed this year by the California legislature (see *The Strategic EMPLOYER*, June 2006) was hostile to employers and small businesses. Also like last year, many of the bills did not make it out of committee, meaning those bills could see more action in 2007. Given that Governator Arnold has been re-elected, employers still have the protection of his veto pen to hold back the most draconian employment legislation that could otherwise emerge from our California congress.

Only a few of the employment-related bills were signed into law by the Governor; with one major exception, those were mostly "clean-up" legislation. These are important, but will have minimal impact on employers. The one exception is the increase in *California's minimum wage*, which will have a huge impact on every business and individual in the State. For complete details, see the article on page 4 of this newsletter entitled *"Big Increase in Minimum Wage."*

In August, President Bush signed into law major pension-reform legislation; more information is included in this newsletter under the discussion of "New Federal Legislation" on page 3. Otherwise, there was very little activity on the federal front regarding employment, and no meaningful action on the pending bills noted on page 5 of *The Strategic EMPLOYER*, June 2006.

The Fair Employment & Housing Commission ("FEHC") has gone through several revisions of its proposed regulations governing the required anti-harassment training of supervisors at businesses with 50 or more employees. Just since the last edition of *The Strategic EMPLOYER*, there have been three new versions of the proposed regulations. The various drafts have

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VETO PEN RESTRAINS NEW EMPLOYMENT LAWS

Vetoed California State Legislation

Wage & Hour

☐ **AB 2593:** Subject to specific requirements, this bill would have permitted parties in the transportation industry to establish by a collective bargaining agreement an off-duty meal period after 6 hours, and an on-duty meal period, without missed break penalties. In his veto message, the Governor noted that all employers need relief from the rigid burdens of the meal period requirements, not just union employees in a single industry.

☐ **AB 2536:** This bill would have eliminated the overtime exemption currently applicable to personal attendants. It also would have created new litigation incentives for a wide range of household employees. The Governor explained that he vetoed the bill because it would make it prohibitively expensive for individuals and families to hire household help, especially those with the greatest need, such as the elderly and disabled. As a result, such employment might be driven underground, and give rise to frivolous litigation against people who should not be subjected to such risks.

☐ **AB 2327:** Employees must receive a pay stub showing among other things, the name and address of the legal entity that is their employer.

This bill would require an employer who is a farm labor contractor, as defined in the bill, to also disclose the name and address of the legal entity that secured the employer's services.

In his veto message, the Governor explained that this law was intended to address the problem of employers who presently engage in certain illegal activities to defraud their workers. He noted that such employers would be unlikely to comply with a new law designed to help catch them, and accordingly would only be placing a heavy burden on those employers who are already doing right by their workers.

Discrimination & Harassment

☐ **SB 1745:** California's anti-discrimination laws prohibit discrimination or harassment based on any of a large number of enumerated "protected classes," such as race, gender, etc. This bill would add a new protected class: a person's status as a victim of domestic violence, sexual assault, or stalking.

While the Governor expressed his support for assisting victims of such crimes, he recognized the dilemma created by the bill with respect to employers' current duty to prevent workplace violence for *all* of its employees, including the obligation to prevent situations where domestic violence may intrude on the workplace.

The Governor also commented on the necessary invasion of the victim's privacy, since the victimized employee would need to explain and provide documentation regarding his/her personal situation in order to avail him/herself of the law's protections.

☐ **AB 2095:** Existing law prohibits employers from paying employees lower wages than paid to employees of the opposite sex. This bill would have increased the damages for which an employer could be liable and required an employer of 50 or more employees to provide reports to the government and to provide each employee with a written statement setting forth the employee's job title, wage rate, and explanation as to how the employee's wages are calculated. The Governor vetoed the bill, stating that it did nothing new to reduce discrimination, but would only increase litigation.

Benefits

☐ **AB 1884 and 2209:** These bills would have extended unemployment insurance benefits to employees who are not working because they are locked-out of work as part of a labor dispute, thereby inoculating locked-out workers against some of the impact of being locked-out and enabling them to withstand the lock-out longer — not only subsidizing workers against their employers in a trade dispute, but potentially prolonging the lock-out as well.

AB 2209 also would have invalidated any agreements between an employer and worker in which the worker agrees not to file or appeal a claim for unemployment benefits. This would have negatively impacted any otherwise legitimate settlement agreement in which an employer may require such a waiver in exchange for compensation to the worker. ☑

Biggest Headline

Continued from front page

gone back-and-forth on some important issues, such as how employers track the required training and when that training is due. WAAG AND CO. will report the details on these regulations once they have been finalized.

On a related matter, one of the "clean-up" bills signed into law this session was a clarification that only supervisors within California must be trained regarding harassment issues.

Meanwhile, employers with 50 or more employees (located anywhere, including outside California) need to continue ensuring that their California-based supervisors receive at least two full hours of training every two years, with new supervisors being trained within six months of becoming a supervisor.

For details regarding the statute requiring this training, see page 4 of *The Strategic EMPLOYER*, Nov. 2004.

A MEAGER CROP OF NEW EMPLOYMENT LEGISLATION

New California State Legislation

Wage & Hour

☐ **AB 2095:** Under current law, an employer payment of wages for labor in excess of the normal work period must be made no later than the payday for the next regular payroll period. That means an employee might work some hours in one pay period that are not paid until the payroll for the following pay period.

Existing law *also* requires an employer to furnish each employee with an itemized pay stub accurately showing all hours worked in that pay period. That leaves a potential problem regarding the pay stub if an employee works hours in one pay period that are not paid until the next pay period. This new law provides that an employer will be in compliance if the excess hours worked are itemized on the pay stub accompanying the pay for those hours.

☐ **AB 1835:** Minimum wage will be increased a total of 18.5% in two steps. It will go to $7.50 per hour effective January 1, 2007 and then to $8.00 per hour on January 1, 2008. For complete details, see the article on page 4 of this newsletter entitled *"Big Increase in Minimum Wage."*

☐ **AB 2613:** Currently, teachers are exempt from overtime requirements as "professional" employees under the wage orders; this law clarifies that private school teachers who do not hold a California teaching credential can qualify for the overtime exemption. As with other exemptions, in order to qualify, teachers must perform certain duties and be paid a salary equal to at least two times minimum wage, calculated at a 40-hour workweek.

Discrimination

☐ **AB 2095:** This law clarifies the existing law that requires employers of 50 or more employees to provide all supervisors with training in preventing sexual harassment. This requirement applies even if some of the 50+ employees are outside of California. The new law limits this training requirement to supervisors within California. ☑

~NEWS BRIEFS 1~

IRS Raises Mileage Rates for 2007

☐ The standard mileage reimbursement rate for employees who use their own cars (including vans, pickups or panel trucks) for business purposes will be 48.5 cents per mile in 2007, up from 44.5 cents per mile in 2006. The rate for medical or moving expenses edges up from 18 to 20 cents per mile, and the rate for driving for the benefit of a charitable organization is now 14 cents per mile, up from 12 cents in 2006. The primary reasons for the rate increases for business and medical mileage were higher prices for fuel (surprise, surprise!) and vehicles. The mileage rate for charities is set by statute. Employers who use the IRS standard mileage rate to reimburse employees may deduct the reimbursements as a business expense without documentation of actual vehicle expenses.

Workers' Comp Rate Cut On the Way

☐ California Insurance Commissioner John Garamendi has announced he will likely recommend a further workers' compensation insurance pure premium rate cut of at least 6.3 percent — which would bring the cumulative rate decreases to 58% since reform measures were implemented in 2003.

New Federal Pension Reform Legislation

Congress approved the Pension Protection Act of 2006, which was signed into law by President Bush on August 17, 2006. This bill is the most comprehensive overhaul of pension laws in 30 years and will have a major impact on retirement planning for millions of Americans.

Among other things, the new law will require employers to fully fund pensions, with time limits for funding shortfalls. Some commentators believe that this will cause many employers to *discontinue* their pension plans, rather than providing more security in them for workers. Single-employer plans that are fully funded will be required to pay variable-rate premiums to the Pension Benefit Guaranty Corporation.

The law will also encourage employers to automatically enroll employees in 401(k) plans, so that employees will need to take action if they prefer to opt-out, with the goal of broader participation in such plans. The bill also increases 401(k) contribution limits.

EFFECTIVE JANUARY 1, 2007— ANOTHER BOOST COMING IN 2008

Big Increase in California Minimum Wage

Effective January 1, 2007, California's minimum wage will go up to $7.50 per hour, from its current level of $6.75 per hour. On January 1, 2008, minimum wage will increase again, to $8.00 per hour, an 18.5% increase over the current rate.

☐ **Greater Impact:** Employers need to keep in mind that this increase will affect more than just their minimum-wage staff, since many obligations are tied to minimum wage.

In order to be lawfully exempt from overtime requirements as an administrative, professional or executive employee, an employee must not only be exempt in terms of the duties he/she performs, but must also be paid a monthly salary not less than twice minimum wage (currently $2,340 per month). That means the minimum monthly salary for an exempt employee will be $2,600 as of January 1, 2007, and then $2,773.33 starting January 1, 2008.

The increase also impacts the minimum pay a commissioned employee must receive in order to be exempt (along with other requirements), split-shift premiums, meal and lodging credits, uniform maintenance requirements, and other matters tied to minimum wage.

☐ **The Ripple Effect:** As a practical matter, there is also a "ripple effect" among the lower pay levels in an organization. The employee who is presently paid $7.50 an hour is currently being paid 11% more than the company's minimum wage workers; as of January 1, 2007, that employee will be a minimum wage worker. Although that pay rate will comply with the law, that employee has effectively been bumped back to the bottom of the ladder, unless he/she receives some sort of raise.

There is likely to be significant resentment by workers who previously were 10% or 20% above minimum wage, but suddenly find themselves back at the minimum wage level. Employees whose jobs include any challenges or responsibility may be harder to retain, given that they could get paid about the same amount for holding an easier job, such as holding a placard on a street corner or taking tickets at the movies.

☐ **Reconsideration of Pay Rates:** Accordingly, such a large increase in minimum wage warrants broad reconsideration of pay rates, at least among the lower tiers of the workforce. Employers must also remember to post the new minimum wage posters as each increase goes into effect.

☐ **No Automatic Increase:** All summer long, Governor Schwarzenegger and the Legislature had been wrangling over how to increase California's minimum wage. (See *The Strategic EMPLOYER*, June 2006, page 9.) The Governor agreed that the minimum wage should be increased; however, every bill the Legislature was willing to consider included an *automatic increase* in minimum wage each year, tied to inflation. There would be no consideration of the impact on business or the direction of California's economy in such increases.

The Governor objected to the automatic-increase idea and stated that he would veto any bill with such a provision. In August 2006, he struck a deal with the Legislature to pass a bill that would not contain any automatic increase, in exchange for which, the Governor agreed to a much larger increase than any of the other bills provided. This bill, AB 1835 was signed by the Governor on September 12, 2006.

☐ **Election Impact on Federal Minimum Wage:** In related news, the federal government has been debating an increase in the federal minimum wage, which is currently $5.15 per hour. None of the proposed increases would exceed the minimum wage required in California, making those proposals irrelevant within this State. No agreement on any of the federal wage legislation has yet been reached, though the recent Democrat take-over of both houses of Congress will increase that likelihood. ☑

~NEWS BRIEFS 2~

Cell Phone Safety Law Signed

☐ Governor Schwarzenegger recently signed a new law that will make it illegal to drive while using a wireless phone unless a hands-free device is used. **S.B. 1613**, known as the California Wireless Telephone Automobile Safety Act, permits driving while phoning only if the phone allows hands-free listening and talking, and the hands-free setting is used while driving. Violations carry a fine of $20 for the first offense and $50 for each subsequent offense. The law will take effect on July 1, 2008. Employers who permit employees to drive in violation of the law may be responsible for the fines as well as any damage or injuries the driver may cause.

Mandatory Arbitration Agreements

☐ The challenges to employer-imposed arbitration agreements continue unabated. This summer, the National Labor Relations Board ("NLRB") ruled that an arbitration agreement will be invalid if it fails to state that the parties do not have to arbitrate charges brought pursuant to the National Labor Relations Act ("NLRA"). This ruling applies to non-union employers as well as unionized workplaces, since even non-union workers have rights under the NLRA.

THE IMPORTANCE OF WRITTEN BONUS PLANS HIGHLIGHTED

Court Ruling on FMLA and Bonuses

The Third Circuit Court of Appeals has issued a ruling that provides guidance for when an employer may legally prorate an employee's bonus because the employee had been out on a leave of absence protected under the Family & Medical Leave Act ("FMLA"). While the Third Circuit does not have jurisdiction or authority over cases that may arise in California, its ruling is instructive.

Generally, an employer cannot use an employee's FMLA-protected absence as a basis for making any negative employment decision, including a loss of pay. In *Sommer v. Vanguard Group*, the Court held that the employer did not violate the FMLA when it reduced a former employee's annual bonus payment based on the employee's eight-week leave under the FMLA.

Most important was the distinction the Court drew between two types of bonuses when reviewing the loss of any bonus money because of FMLA leave: one type would be an unlawful loss of pay and the other would simply be a failure to earn the pay.

☐ **Perfect Attendance Bonus vs. Production Bonus:** The Department of Labor has issued guidance interpreting the FMLA to contemplate two varieties of bonus programs: an "absence of occurrence bonus" (e.g., a bonus for perfect attendance) and a "production bonus" (e.g., a bonus based on hours worked, the number of items manufactured, or some other measure of productivity). Generally, a "production bonus" requires some positive effort on the employee's part at the workplace, while an "absence of occurrence bonus" merely rewards an employee for "compliance with the rules."

Based on the Department of Labor guidance, the Court of Appeals in *Sommer* concluded that an employer may not reduce an "absence of occurrence bonus" if the employee would have been otherwise qualified for the bonus had it not been for the taking of FMLA leave. However, an employer may prorate a "production bonus" by the amount of any lost production — be it hours or other quantifiable measure of productivity — caused by the FMLA leave.

☐ **Written Bonus Plans:** This ruling highlights the importance of having written bonus plans. Even if the employer is not subject to the FMLA, there is much litigation by employees who are dissatisfied with how bonuses are determined; employers without clearly written bonus plans usually have difficulty establishing what they really intended. Such situations can end up costing the employer thousands of dollars in bonus payments that the employer never meant to award.

With respect to the FMLA issue, because the characterization of an employee incentive as a "production bonus" or an "absence of occurrence bonus" can have a determinative effect on an employer's right to prorate a bonus based on an employee's absence, employers should be conscious of this critical distinction when formulating a written bonus program.

It is also crucial that a bonus program establish clearly the goal that it intends to reward in order to maximize the likelihood that it will be interpreted consistent with the employer's intent.

☐ ***Sommer* Case Details:** Employers also should clearly define the categories of leave that will result in a production bonus being prorated. In *Sommer,* the employer's production bonus rewarded employees for meeting an annual goal for hours worked. The bonus program defined "hours worked" as the actual hours for which an employee is paid or entitled to be paid by the employer for the performance of duties or for vacation, holidays or sick time.

However, the policy explicitly excluded from the definition of "hours worked" leaves of absence under the employer's short or long-term disability programs. Similarly, the employer had a practice of prorating the bonus based on absences due to workers compensation and personal leave.

☐ **Recommendations:** Employers are encouraged to review any existing written bonus programs to maximize the likelihood that any bonus be considered a "production bonus." If the employer has an *unwritten* bonus program, the program should be put into writing, paying careful attention to how the program's details will motivate employees to accomplish what the employer intended.

It is also important to ensure that terms are clearly defined; any ambiguity can result in costly disputes over earnings.

☐ **Unintended Consequences:** Employers should also be conscious of the payment of production bonuses as it affects the employee's "regular rate" of pay for the purposes of calculating overtime. Non-discretionary bonuses (i.e. anything that is related to performance, effort, attendance, productivity, etc.) must be included in the "regular rate."

Therefore, if the employee's attainment of any given productivity threshold entitles them to a bonus, such bonus must be factored into his or her "regular rate" of pay. Given the complexity in drafting a clear and effective bonus program, employers should consider getting assistance from qualified employment counsel. ☑

PARTIALLY STATE-FUNDED COMPANIES VULNERABLE

Employers Restricted in Opposing Unions

In September 2000, then-Governor Gray Davis signed AB 1889, sponsored by the AFL-CIO and affecting all employers who receive any state money. The law prohibits companies from using state funds to "assist, promote, or deter union organizing." Cal. Govt. Code § 16645(a). The law covers a broad array of employers, including:

1. all state contractors who receive reimbursement from the state;
2. all recipients of state grants;
3. all state contractors performing services pursuant to a state service contract, including a public works contract;
4. all state contractors receiving over $50,000 in state funds pursuant to a state contract;
5. all employers conducting business on state property;
6. all public employers receiving state funds; and
7. all employers who receive over $10,000 from any state program.

☐ **Make Up Your Mind!** Interestingly, Governor Davis had previously vetoed nearly identical legislation as unreasonably burdensome and likely to lead to increased litigation. By the following year, Governor Davis was apparently no longer conflicted over such concerns.

The law effectively mandates that employers who receive any state money remain "neutral" when facing union organizing — meaning they are not allowed to express any opinion on the subject, nor even refute false and misleading statements the union might make.

The statutory restrictions apply to virtually *any* expense related to union organizing, including the "salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out" any activity to influence employees about whether to support a union. The statute also covers funds spent consulting with attorneys regarding the myriad of restrictions governing communications with employees during organizing drives.

☐ **Legal Counsel is Critical:** Given the complexity of the laws controlling what can and cannot legally be said or done during an organizing drive, access to counsel is critical, even to "neutral" employers who simply want to make sure they comply with the law. The statute sweeps across the spectrum of reasonable and necessary expenditures, from paying employees while they receive instruction regarding how to legally deal with a union organizing drive, to the cost of paper used for any written material distributed to employees.

☐ **State and Private Funds Must Be Segregated in Advance:** Employers partially dependent on state funds may feel the greatest impact of the statutory restrictions in the presumption of non-compliance imposed by the law when any state funds are commingled with funds derived from other sources.

The presumption is irrefutable and a violation automatically occurs unless state and private funds are segregated before a union campaign begins, regardless of whether any state funds were actually spent.

☐ **Separate Accounting Systems Required:** To defeat this commingling presumption, employers are required by AB 1889 to maintain a separate accounting system for expenditures ranging from the salary paid to supervisors during instructional union-organizing sessions to the cost of outside consultants and attorneys. Those records, which can become a rallying point for unions during organizing campaigns, must be provided to the California Attorney General upon request and to the unions during private enforcement actions.

☐ **The Law's Rocky History Continues:** The law has previously been challenged as violating federal rules that control unionization. Twice, the Ninth Circuit Court, which hears appeals of federal cases arising in California, had struck down the law on that basis. However, on September 21, 2006, the Ninth Circuit reversed its two prior decisions and ruled that the law is enforceable. An appeal to the U.S. Supreme Court (where the Ninth Circuit is overruled more than any other appellate court) is planned.

☐ **Develop a Strategy Now:** Meanwhile, covered employers wishing to communicate with employees during a union organizing campaign should develop a compliance strategy *before* union organizing begins.

Organizing campaigns can be a "rough and tumble" experience, with moment-to-moment developments. Employers often need to refute union misstatements and rhetoric with little or no notice. Employers simply do not have the time it may take to establish a compliant accounting system after they find out the union has knocked on the door.

Moreover, the co-mingling presumption created by AB 1889 likely applies to resources spent to set up the structure; creating an automatic violation for any employer who reacts *after* organizing begins.

Unions, being fully aware of this dilemma for employers (after all, the AFL-CIO wrote this law) and the disruption caused by litigation, will certainly pursue enforcement actions as part of their standard campaign tactics.

Any covered employer who is concerned about possible unionization of their workforce should consult with qualified labor counsel now, before any union activity occurs. ☑

HOLIDAY SEASON IS ONCE AGAIN UPON US

Holiday Parties: Look Before You Leap!

It is time again for all of those holiday parties or awards banquets. Does your company have a policy about serving alcohol? Serving alcohol at company-sponsored parties and events can have some serious consequences — tragic, if a drunk employee gets into an accident while driving home. Plus, there tends to be a strong correlation between increased alcohol consumption and the number of sexual harassment complaints.

Courts have been expanding the liability of employers for their employees' actions when alcohol is consumed. The basic rule is that employers are not responsible if the event where the alcohol was served was purely social. But if business was involved, the employer may be held accountable.

☐ **How do you determine if an event is business related, rather than purely social?** The courts will consider a variety of factors. Where was the event held? Were employees required to attend? Were spouses invited? Were speeches given or company business discussed? Was the event organized and sponsored by the company or was it independently arranged and paid for by the employees?

One company served alcohol at an annual banquet for employees who had achieved five years of service. While driving home, an employee who had been drinking alcohol struck and injured another motorist. The employer was held liable because the banquet was an official company function that employees were expected to attend. Spouses/families were not invited, there were speeches by the vice president, and seating was arranged by seniority. The court had no trouble concluding that this was a business event, not a social one.

There are a number of things an employer can do to prevent alcohol-related problems (including sexual harassment and auto accidents) and limit liability risks:

☐ **Do Not Serve Alcohol:** This is the simplest solution of all. For those who do not consider this realistic, read on…

☐ **Limit Alcohol Consumption:** There are a number of ways to do this, such as a no-host bar, or by providing a limited number of drink tickets. Also stay away from sweet, alcoholic punches; these can make it difficult for someone to tell how much alcohol they are consuming — until it is too late.

☐ **Close the Bar Early:** Stop serving alcohol one or two hours before the end of the event. If possible, continue serving food even after the bar is closed.

☐ **Have the Party Off-Site:** If the party is held at a hotel or restaurant with its own liquor license, and their employees are serving the drinks, you will be less likely to be held liable.

☐ **Establish an Alcohol Policy:** Let your employees know (in writing) that excessive drinking at company functions will not be tolerated, and that consuming alcohol will not be an excuse for inappropriate behavior. Remind workers about the dangers of drinking and driving.

☐ **Make Driving Unnecessary:** Offer transportation alternatives, such as taxi vouchers or other company-paid transportation, so that employees will not need to drive themselves home.

☐ **Avoid Company Business:** Keep the event as social as possible. Minimize any discussion of business matters and hold the party outside regular business hours.

☐ **Make the Party an Optional Event:** If you will be serving alcohol, it is wise to make attendance purely voluntary.

☐ **Invite Spouses / Dates:** Inviting spouses and dates will tend to make the event more of a social occasion and less of a business function.

☐ **Will Minors be in Attendance?** The law can come down hard on those who allow minors to drink alcohol. If a significant number of your employees are minors, or if you expect families with minor children to attend events, it would be wise not to serve alcohol at all. If you still decide to serve alcohol, make sure there are strict and effective controls in place to prevent minors from consuming alcohol.

☐ **Conclusion:** While it is impossible to exercise absolute control over your employees, the key to avoiding legal problems and to keeping your employees safe is to do everything you can to prevent them from becoming intoxicated, losing control of their behavior, or getting behind the wheel when they should not drive. This is possible if you think about these issues before you have your holiday party or other event. WAAG AND CO. wishes everyone a safe and happy holiday party season! ☑

Implications of Revoked Contractor's License

A new law aimed at construction safety makes it harder for a contractor whose license has been revoked to simply turn around and work under the license of another contractor. Effective January 1, 2007, A.B. 2897 prevents any individual who was a member, officer, director, owner or partner of a firm where a contractor's license was revoked (under specific criteria) to perform acts regulated by law on behalf of a licensee, except as a bona fide nonsupervising employee.

The law requires such individuals to notify prospective employers of the license revocation prior to becoming employed by the entity that is subject to licensure by the Board. What's more, a licensee is prohibited from knowingly hiring such individuals, except as a bona fide nonsupervising employee. Violations carry fines of up to $4,500 and/or up to one year in jail.

HAVE YOU PROPERLY PAID YOUR EMPLOYEES?

Court Rules on Commissioned Sales People

One of the biggest threats facing employers is litigation over whether or not they have properly paid their employees. Many such suits involve payment of sales commissions, usually because there is nothing in writing that makes clear all the tasks the employee must complete before the commission is earned. This problem is compounded when the employer pays advances on commissions.

A recent court decision addressed when an employer may "charge back" a commission previously paid to an employee. In *Koehl v. Verio Inc.*, the employer paid commissions on orders as soon as the orders were "booked." The company's written commission agreement, signed by every salesperson, stated that the commission was not earned at that time, but merely paid in advance; per the agreement, commissions were not earned until the employee fulfilled a number of other post-booking responsibilities, such as servicing the account and answering customer questions. The agreement also provided that any commissions advanced at the booking stage would be "charged back" against the employee's other commissions if the customer cancelled the order within a certain time period.

Labor Code Section 221 makes it illegal for an employer to take back any wages from an employee once they are earned. In *Koehl,* the court held that the commission agreement was clear that a commission is not earned when an order is booked. Therefore, it ruled that the employer did not violate the Labor Code when it charged back a commission from a cancelled order in accordance with the written agreement. If not for the carefully prepared written agreement, the employer would have had a difficult, if not impossible, legal fight.

☐ **Recommendations:** Employers who pay employees *any* form of commission should carefully set forth in writing all terms and conditions for earning the commission, how commissions are paid, when they are due, and what happens if the employee makes a sale before employment ends, but the money comes in afterward. This is especially important if the company wishes to pay advances of commissions. Such agreements should be prepared by qualified employment counsel to ensure their effectiveness and legality. ☑

Proper Billing for Medical Insurance

When your employee has a new baby, the general rule is that the baby is automatically covered as a dependent for the first thirty days. When the baby is born after the first of the calendar month, it is the policy of most HMO's and PPO's not to charge premiums for covering the baby until the first of the next month. In other words, the baby is covered for free for the balance of the calendar month in which the baby is born (the "birth-month").

However, it appears that insurance companies have been charging premiums for that partial "birth-month" on the invoices sent to employers. Employers who call their insurance company and ask to have this corrected normally are successful at having the extra premiums removed; however, this may need to be done every time one of your employees has a new baby.

☐ **Recommendation:** Employers should make it a practice to carefully review their insurance invoices and not be shy about speaking up if a mistake is found. ☑

Hours-Worked Settlement

Sears, Roebuck & Co. recently agreed to pay $15 million to settle a class-action claim involving the question of when does an employee start work. Sears had a number of home-service technicians who checked their home computers before heading out each day to their first job assignment. Sears did not pay for the time the technicians spent driving to that first assignment, since the long-standing rule is that employers do not pay for an employee's normal commute time, but must pay for all time the employee spends traveling between job locations once he or she starts the workday. The employees successfully claimed their workday started at their homes, since they were performing work there before going to their next job site. ☑

☑ The Strategic *EMPLOYER*

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