



The Strategic EMPLOYER

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

Reminder: Previously-Passed State Legislation Effective 2008

The following California state legislation was passed previously, but is effective on various dates in 2008. This information has been included as a reminder, but has already been reported on in previous editions of THE STRATEGIC EMPLOYER newsletter. On page two of this newsletter are more recently passed state laws, most of which are effective January 1, 2008. Good luck!

Minimum Wage

Once again, the minimum wage is going up. As of January 1, 2008, minimum wage will be \$8.00 per hour.



~INSIDE~

- Previously Passed State Legislation1
- Recently Signed State Legislation2
- Vetoed State Legislation3
- New I-9 Form Issued4
- Proposed No-Match Rules Suspended5
- Court Ruling: Increased Wage Covers Auto Expense.....6
- Court Ruling: FMLA and Holidays6
- Court Ruling: Profit-Based Bonus Plan Upheld.....7
- News Briefs.....7

Remember that this impacts a number of other standards that are tied to minimum wage. Chief among these is that the minimum monthly salary for an exempt employee will rise to \$2,773.33. See the November 2006 issue of THE STRATEGIC EMPLOYER for more information about other issues tied to any increase in the minimum wage.

Paychecks

In 2005, California passed a bill eliminating the requirement that employers include an employee's Social Security Number ("SSN") on the pay stub accompanying each paycheck. The new rules will prohibit putting the SSN on pay stubs or paychecks, starting January 1, 2008. Instead, employers may include only the last four digits of the employee's SSN, or some other employee ID number that is unrelated to the SSN. There was a two-year transition period during which employers could follow the new rules, but as of January 1st, the new rule is mandatory. Take the time now to make sure your payroll processes are updated to ensure compliance with this law by 2008.

Reminder: continued on next page

Route to:

- HR Dept: _____
- Accounting Dept: _____
- Benefits Admin: _____
- Managers: _____
- _____
- _____

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 310 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.



MOST ARE EFFECTIVE JANUARY 1, 2008

Recently Signed State Legislation

Discrimination

AB 14: Sexual orientation is already a protected class in employment law. This new law adds it as a protected class across a number of other current laws prohibiting discrimination in various business practices, such as renting property, etc.

Employee Records

AB 1298: Existing law requires disclosure of any breach of the security of a person's unencrypted computerized data if it contains personal information. This new law adds private medical and healthcare records to the definition of "personal information."

Leaves of Absence

AB 392: Its the only bill in this group that is *not* effective January 1, 2008; instead, it was passed as emergency legislation on October 9, 2007 and was *effective immediately*. Employers with 25 or more employees will be required to permit up to 10

days leave to an employee whose spouse is home on leave from military deployment. Employees who regularly work 20 or more hours per week are eligible. There are notice and other requirements.

Miscellaneous

SB 357: Currently, to establish a "group" life insurance plan, employers must have a minimum group of 10 employees and, if employees pay any portion of the premiums, then 75% of the eligible employees must participate. This new law will allow minimum groups of two and delete the 75% requirement.

SB 650: Starting January 1st, employers will be required to provide all employees with a written notice of their possible right to claim an Earned Income Tax Credit on their federal tax returns. Employers should enclose the required notice with the W-2 form or other annual income notice issued to employees. The text below contains the exact wording for the written notice:

"Based on your annual earnings, you may be eligible to receive the

Earned Income Tax Credit from the federal government. The Earned Income Tax Credit is a refundable federal income tax credit for low-income working individuals and families. The earned income tax credit has no effect on certain welfare benefits. In most cases, earned income tax credit payments will not be used to determine eligibility for medicaid, supplemental security income, food stamps, low-income housing or most temporary assistance for needy families payments. Even if you do not owe federal taxes, you must file a tax return to receive the earned income tax credit. Be sure to fill out the earned income tax credit form in the federal income tax return booklet. For information regarding your eligibility to receive the earned income tax credit, including information on how to obtain the IRS Notice 797 or Form W-5, or any other necessary forms and instructions, contact the Internal Revenue Service by calling 1-800-829-3676 or through its web site at www.irs.gov."

NEW FEDERAL LEGISLATION

Sexual Orientation Discrimination

President Bush signed the new Employment Non-Discrimination Act (*HR 2015*), which will make it a violation of federal law for employers to discriminate against applicants or employees because of sexual orientation.

Not so fast! This law will have no real impact in California, since it has long been illegal under California employment law to engage in discrimination based on sexual orientation.

Reminder

Continued from previous page

Cell Phones & Driving

Last year, the Governor signed a bill that will prohibit all drivers from using cell phones unless used with a hands-free device. This requirement goes into effect *July 1, 2008*. Employers should be mindful that driving while on the phone — even with a hands-free device — is still a significant distraction and should be discouraged in workplace policies. In apparent recognition of this, an add-on measure was passed this year that will prohibit individuals under age 18 from driving while using a cell phone, even with a hands-free device. The add-on

law also bars minors from using any other mobile-service devices, such as pagers, two-way messaging devices, laptops, iPods, or other hand-held devices. There are exceptions if the teen has to make an emergency call to police, fire or ambulance service. The new ban also goes into effect on *July 1, 2008*.



HUGE QUANTITIES OF LEGISLATION DUMPED (FOR NOW!)

Vetoed State Legislation

Discrimination

AB 435: Wage discrimination law would have been amended to require longer retention of wage and classification records (5 years, up from the current 2) and extend the time for filing suit to 4 years (or 5 for willful violations), up from the current 2 years/3 for willful violations. The Governor explained that this bill would have no impact on pay inequity and would only encourage frivolous litigation.

SB 836: "Familial status" would have been added to the list of prohibited bases of discrimination under the Fair Employment and Housing Act. Would protect a person caring for or supporting a family member. The Governor vetoed this bill as too ambiguous.

Employee Records

SB 1707: There are already laws giving an employee the right to inspect his/her personnel file and obtain copies of certain documents. This bill would have required employers to maintain each employee's personnel file for a more specific period of time and to grant a current or former employee's request to inspect a personnel file within 21 days of the request. It would impose a \$750 penalty for not allowing an inspection request. Employer would have been required to provide a copy of the file if the employee requests. Since there are already laws on this, the Governor vetoed this bill saying it was more appropriate to have the Labor Commissioner issue regulations if more details were really needed.

Contractors

AB 377: Farm Labor Contractors would have needed to include on pay stubs the name and address of the entity that secured the services for which the employee is being paid. The

Governor vetoed this bill as not likely to change the behavior of the scofflaws it was aimed at, but just add more burdens on law-abiding employers.

Health and Safety

AB 1045: Cal-OSHA Standards Board would be required to adopt a standard to protect workers from excessive indoor heat exposure. The Governor vetoed, saying OSHA should just handle it.

AB 1467: Would have removed various current exceptions to California's no-smoking prohibition in places of employment; the ban would have been extended to employee break rooms, warehouses, meeting/banquet rooms, hotel lobbies, bars and certain owner-operated businesses. The Governor believed this went too far in controlling businesses and not far enough in helping people stop smoking.

Healthcare Coverage

Note: There were a number of bills proposed to resolve California's health insurance crisis. Only one was passed, and it was vetoed, as noted below. All of the other proposals basically are on hold while the Governor and the Legislature negotiate possible solutions.

AB 8: The Governor vetoed a proposed new versions of the "play or pay" rejected by voters in 2004 (see THE STRATEGIC EMPLOYER, November 2004, page 6). Employers would be required to spend 7.5% of Social Security wages on health insurance for full-time and/or part-time employees *and their dependents*, or to pay a fee into a state purchasing pool. Employees would be required to maintain insurance for themselves and their dependents, and carriers would be required to offer individual plans on a guaranteed-issue basis. Employers would be required to set up Section 125 accounts for each employee's premium payments.

AB 343: Each year, the Department of Health Care Services would submit a report to the Legislature regarding the number of employees enrolled in state-funded public health programs and the cost to the state, identified by each employer of 25 or more employees. The goal would be to pressure employers who do not provide insurance. Employers would not be required to provide information. This bill was vetoed as creating a huge burden with too little potential value.

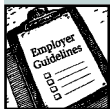
Leaves of Absence

AB 537: The Governor vetoed expansion of the California Family Rights Act to entitle employees to take leave to care for an ill child regardless of age or dependency, parent-in-law, grandparent, grandchild, sibling, or domestic partner. "Parent-in-law" would include the parent of a domestic partner. The Governor said this was too expansive and confusing.

SB 549: Also deemed too expansive and confusing was the bill that would have entitled employees to take up to four days of unpaid bereavement leave for the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner, as well as prohibit discharging or discriminating against an employee who inquires about, requests, or takes bereavement leave.

SB 727: The Governor vetoed expanding list of seriously ill family members covered by the Paid Family Leave Insurance ("PFLI") program to include grandparents, grandchildren, parents-in-law, and siblings. Also, if a leave covered by PFLI were taken within Family Medical Leave Act/California Family Rights Act, then the employee would have been required to take PFLI concurrently. This was also viewed as too expansive and confusing.

Vetoed: *continued on next page*



AFTER DECADES OF DELAY, NEW I-9 FORM ISSUED

Developments in Immigration & Employment

Part I: New Form I-9 Issued

Employers and new-hires rely on the lists of acceptable documents on the back of the I-9 form required upon the hiring of every new employee. After years of issuing statements that various documents on the lists were not acceptable, the U.S. Citizenship and Immigration Service ("USCIS") finally issued a revised Form I-9. Employers may start using the new form now, but must start using it by **December 26, 2007**.

Under the Immigration Reform and Control Act of 1986 ("IRCA"), U.S. employers are required to document on Form I-9 that all citizen and non-citizen employees hired after November 6, 1986, are eligible to work in the U.S. and that their identities match the information on their employment authorization documents.

In 1996, Congress passed an act that reduced the number of documents employers could accept from new-hires to verify employment eligibility. In 1997, the former Immigration and Naturalization Service ("INS") published an interim final rule

eliminating some of the documents the 1996 law slated for removal. However, the I-9 was not updated to reflect the revised List of Acceptable Documents for an *entire decade!* The new I-9 finally complies with the 1996 law and the INS rules.

The most significant change to the revised I-9 is the **elimination** of five documents from List A of the List of Acceptable Documents. These are as follows:

- 1. Certificate of U.S. Citizenship (Form N-560 or N-570)
- 2. Certificate of Naturalization (Form N-550 or N-570)
- 3. Alien Registration Receipt Card (Form I-151)
- 4. Unexpired Reentry Permit (Form I-327)
- 5. Unexpired Refugee Travel Document (Form I-571).

One document was **added** to List A of the List of Acceptable Documents:

- Unexpired Employment Authorization Document (I-766)

Points to note:

- While the revised Form I-9 will become effective on December 26, 2007,

employers are encouraged to start using it *immediately*. After the effective date, employers may incur fines and penalties for failing to use the new Form I-9.

All previous versions of Form I-9 must *not* be used, and all old, blank I-9's should be thrown out, with new blank Form I-9s ready for use.

Employers need to complete the new version of Form I-9 for new employees or if re-verifying employees. Employers do not need to complete new forms for existing employees for whom an I-9 has already been completed.

The employee is not required to provide the Social Security Number in Section 1 of Form I-9, unless the employer participates in E-Verify.

The new Form I-9 is available at the USCIS website, along with the new Handbook for Employers and Instructions for Completing the Form I-9. Go to:

www.uscis.gov/files/form/I-9.pdf for the new Form I-9.

Immigration: continued on next page

Vetoed

Continued from previous page

SB 942: The Governor said this bill would only create new problems and fix nothing. It would have created new requirements for the return to work of employees out for workers' compensation leave. It also would have prohibited employers from requiring new physical duties unless reasonably required to accommodate employee's disability, and created new penalties. There also would have been a new presumption of discrimination if employer denied an employee the right to pre-designate a treating physician.

Miscellaneous

AB 1043: Would void any employment contract provision requiring an employee, as a condition of obtaining or continuing employment, to use a court other than one in California or to agree to a choice of law other than California law to resolve employment-related disputes that arise in California. The Governor said this was a "solution in search of a problem."

SB 180: Agriculture workers could become unionized without a secret-ballot vote if the majority of the unit signed union-authorization cards. The Governor vetoed because it would alter the right to a secret ballot election and

would limit opportunities for employees to hear different points of view.

Wage and Hour

AB 448: Would have clarified the discretion of the Labor Commissioner to award liquidated damages for claims of failure to pay minimum wage. The Governor vetoed this as too punitive.

SB 622: Non-exempt employees who are paid on a fixed salary could have collected new penalties if that salary resulted in less pay than if the employee were paid hourly with overtime properly paid. The Governor said that the current laws were sufficient to cover these concerns.

Immigration

Continued from previous page

Part II: Proposed No-Match Rules Suspended

The Bush Administration has decided to suspend its defense of a new rule that would have forced employers to fire workers whose Social Security Number ("SSN") information did not match government records. The rule was intended to crack down on employers who hire unauthorized workers, and has been the subject of litigation.

Background: For more than two decades, every employer has been required to verify the identity and work authorization status of all of its employees by using the I-9 form. Employers are banned from hiring employees who are not authorized to work in the United States, even where the employer only had "constructive knowledge" of the employee's status. On the flip side, employers are not allowed to discriminate against employees on the basis of citizenship or national origin (remember, you do not need to be a citizen to be legally authorized to work in the U.S.).

Mismatched SSNs vs. Constructive Knowledge: On another front, the Social Security Administration ("SSA") has long tried to clear up discrepancies between the names and Social Security Numbers it receives. The SSA routinely sends out "no-match" letters to employers when the SSN information the employer has submitted to the SSA does not match SSA records. Employers then had to wonder if the no-match letter gave rise to "constructive knowledge" that the employee was not legally authorized to work in the U.S.

The SSA has gone out of its way to negate that assumption, since there are many reasons why the SSA's information would not match (such as clerical error by the employer, the employee or the SSA). The no-match letters specifically state that "receipt of a no-match letter by itself does not provide a basis for taking adverse action against an employee, nor is it conclusive evidence that the

individual is not eligible to work in the United States." But employers were still stuck with balancing their duty to "inquire" about the employee's legal status against their duty not to discriminate.

Homeland Security Gets Involved: On August 19, 2007, Department of Homeland Security ("DHS") published a final rule that further complicated matters. The rule, which was to go in effect on September 14, 2007, expanded the definition of "constructive knowledge" of an employee's illegal status to include receipt by an employer of a no-match letter from the SSA. Basically, the rule would require employers to fire workers who cannot clarify an SSA mismatch within 90 days. Employers that do not fire the employees would have risked prosecution for knowingly hiring illegal immigrants.

The proposed rule included "safe harbor" procedures for an employer to follow in order to avoid liability for the knowing employment of unauthorized workers. Those safe harbor procedures include a provision that, "If the no-match is not resolved and the employer cannot verify the employment eligibility and identity of the employee (through completion of a new I-9 form), the employer must choose between terminating the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was unauthorized to work, and is therefore in violation of immigration laws."

Although there are many possible reasons for a no-match letter, including clerical errors and name changes, DHS claims that the no-match letter "may be one of the only indicators to an employer that one of its employees may be an unauthorized alien."

United Opposition by Unions and Employers: In a rare collaboration, the rules were attacked by both labor unions and employer groups, as well as the ACLU and a number of other organizations. On August 31, 2007, a federal court issued a temporary restraining order stopping the rules from going into effect.

The lawsuit claimed that the DHS

and the SSA cannot use wage and tax data to enforce immigration laws. The ACLU emphasized that "The new rule turns the law on its head by using the notoriously incomplete and inaccurate Social Security databases to decide who is authorized to work. This will wreak havoc with workers and businesses and will cause massive discrimination against anyone who looks or sounds foreign. The DHS is trying to hijack the Social Security system for improper immigration enforcement."

Meanwhile, employer groups seek changes that would protect employers from discrimination claims by employees when employers comply with the DHS no-match safe-harbor provisions.

On October 1, 2007, the federal court extended the injunction against enforcement of the DHS no-match rules. The court agreed that the rule's negative impact would be "substantial, immediate, and irreparable." The rule would not only place a burden on employers to hire and train employees to understand the new procedures and deadlines, but could also result in termination of employees who may be unjustly targeted because of errors in the SSA's records.

On October 10th, the injunction was extended indefinitely while litigation proceeded. The court noted that the SSA database used to verify workers' status was full of errors, and the rule could lead to the dismissal of many thousands of legal workers.

Bush Gives Up: In late November, the Bush Administration decided to drop its defense of the DHS rule. Instead, the government will revise the rule to try and address the court's concerns. The government did not acknowledge any flaws in the existing rule, but stated it wanted to "prevent the waste of judicial resources."

Recommendation: The DHS anticipates issuing the revised rule by *March 24, 2008*. Since the revised rule will be subject to great scrutiny, employers should make sure it goes into effect before taking any actions pursuant to the rule. WAAG AND CO. will report on any significant developments.



IRS MILEAGE RATE IS USUALLY THE BEST METHOD

Increased Wage OK to Cover Auto Expense

If an employee uses his or her personal vehicle for work, the employee's entire cost of operating that vehicle for work must be reimbursed. This includes not only fuel, but also insurance, maintenance, repairs, depreciation, etc. The IRS has established a per-mile estimated rate for business use of a vehicle that is commonly used for reimbursing employees.

Some employers give employees a flat-rate auto allowance instead. In a recent case, Harte-Hanks Shoppers, Inc. ("HHSI") gave its outside sales employees — who drove personal vehicles for work throughout each day — an increased hourly pay rate in order to cover their vehicle expense. The

employees sued, claiming that reimbursement of expenses had to be separate from an employee's hourly wage or salary. On November 5, 2007, the California Supreme Court ruled that HHSI's method was legally *permissible*.

The Court held that the IRS rate, along with any other *reasonable* estimate of the actual cost, is a legitimate way to reimburse the employee. It is important to note that HHSI did not just use its hourly wage rate as a post-litigation rationalization for failing to reimburse employees. HHSI had a very clear policy about how it would add on to an employee's hourly rate for its outside sales employees. Also, these employees spent the bulk of their time driving to see

customers. The Court found that HHSI's ratio between time worked and time spent driving made sense.

Recommendation: For most employers, having the employee maintain a mileage log and reimbursing based on the IRS rate is the simplest and least-risky approach. Moreover, as reported on page 4 of the July 2007 issue of THE STRATEGIC EMPLOYER, California's enforcement agency has proposed regulations essentially *requiring* employers to use the IRS rate. WAAG AND CO. will keep readers informed of any developments.



FAMILY & MEDICAL LEAVE ACT

Holidays Count Toward Entitlement

The First Circuit Court of Appeals ruled that work holidays falling on days when an employee is out on intermittent Family and Medical Leave Act ("FMLA") leave of one week or more can count toward the employee's statutory twelve-week FMLA leave entitlement. The First Circuit is a federal court whose jurisdiction does *not* include California; nevertheless, the decision may influence other courts.

Case Specifics: The plaintiff employee wanted to take two periods of FMLA leave. The first was from August 4th through October 3rd, and the second was from October 28th through November 18th. These absences, combined, would hit the maximum 12-week entitlement. The employer approved the leave, and told her she had to return to work on November 19th.

On October 24th, the employee sent an email stating that she would return on November 20th. The employee explained that since November 17th was a holiday, she would not hit the maximum leave allotment for one more

day. The employer responded by saying the holiday counted as a day of FMLA leave and that she would not be allowed to exceed the maximum allotment. The employer told her to return on November 19th or her employment would be terminated for failing to return upon the conclusion of her leave. She did not return and she was fired.

Holiday Has No Effect: The Court agreed with the employer and ruled that holidays do not extend the amount of time off an employee may take under the FMLA. The Court cited the regulations interpreting the FMLA, which provides: "For purposes of determining the amount of leave used... the fact that a holiday may occur within the week taken as FMLA leave has no effect." [29 CFR §825.200(f).]

The Court rejected the employee's argument that another section of the regulations would require a different result. Section 825.205(a) of the regulations states: "If an employee takes leave on an intermittent or reduced leave schedule, only the amount of

leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled." The Court explained, "[T]he provision's purpose is to ensure that an employer does not claim that an employee who takes off one day during a five-day week has taken off the entire week, or that an employee who works half days under a reduced work schedule has taken off more than a half day."

How to Ensure Compliance: Properly administering FMLA leaves can be complex, particularly in California where the Family Rights Act entitlements differ in a variety of respects, such as related to pregnancy disability leave and registered domestic partners. Combine this with a number of other state and federal laws that impact leave of absence entitlements, and it can be tricky to ensure compliance when employees need time off. It is a good idea to check with qualified employment counsel regarding the correct handling of leave situations.



PROFIT IS STILL REVENUE MINUS EXPENSES!

Court Upholds Profit-Based Bonus Plans

Many employers seek to motivate their employees by offering bonuses in addition to the employees' set wages. While this would seem like a good thing, some employees of Ralphs Grocery Co. were apparently dissatisfied with this concept.

Definition of Expenses: Ralphs offered employees a bonus based on the profitability of the employee's specific departments and the store overall. In calculating "profit," Ralphs simply looked at income minus expenses. The problem was that "expenses" included the store's cost for workers' compensation insurance, cash shortages and damaged products. These expenses cannot legally be deducted from an employee's wages.

Some Ralphs employees thought that the bonus was indirectly making such deductions, so they sued. After much litigation, the California Supreme Court has ruled that such a profit-based bonus does not violate the law regarding improper deduction from wages.

Case History: In 2003, the Court of Appeal in *Ralphs Grocery Co. v. Superior Court* (2003) 112 Cal.App.4th 1090 held that the profit-based bonus plan was invalid insofar as it factored workers' compensation costs, cash shortages and merchandise damage and loss into the profit calculation. By doing so, the Court reasoned, the bonus plan shifted such costs to employees.

This set off a panic among informed employers, who wanted to reward employees for performance, but were afraid to base rewards on profitability. Such employers either made their bonus plans more complex in order to avoid the problems faced by Ralphs, or dumped them altogether. Neither approach really benefited anyone.

The case ricocheted around the court system as higher courts ordered lower courts to retry issues, and the parties then appealed again. Finally, on July 23, 2007, the California Supreme Court issued a final ruling on the legitimacy of profit-based bonuses: They were legal. The Supreme Court noted that Ralphs

paid all of its costs, including workers' compensation, cash and merchandise losses, utility bills and everything else. The Court held that the bonus plan was not illegal simply because Ralphs followed normal concepts of determining a store's profitability to come up with a number on which to base a supplementary payment to employees.

No Unauthorized Deductions: Most importantly, the employees got their full, normal pay — the dollar wage they were promised and expected as compensation for carrying out their individual jobs — regardless of the store's performance.

The bonus plan was extremely clear that the staff's collective entitlement to any bonus payments, and the amounts thereof, arose only under a formula that compared the store's actual profit (as defined in the plan), if any, with target figures previously set by the company. Once the amount of an employee's bonus was calculated under this formula, Ralphs did not reduce it by taking unauthorized deductions, contributions, or charges against the employee's wages or commissions.

Conclusion: The Court concluded that, by calculating profit as income minus expenses, and then rewarding employees based on the resulting

number, Ralphs did not illegally shift those expenses to employees. After fully absorbing the expenses at issue, Ralphs simply determined what remained as profits to share with its eligible employees in addition to their normal wages.

News Briefs

Cal/OSHA Form 300A: Do not forget that employers must post an annual summary of work-related injuries and illnesses each year, from February 1st through April 30th. The summary must be posted using Cal/OSHA form 300A, which is available from Cal/OSHA. More information should also be available from your workers' compensation carrier.

IRS Mileage Rate Increase: In response to rising gasoline prices, the Internal Revenue Service has taken the step of boosting the standard mileage rate by 2 cents to 50.5 cents per mile, starting *January 1, 2008*. This is the rate employers commonly use to reimburse employees for business driving.

The Strategic EMPLOYER

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