The Strategic EMPLOYER

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

Uncertain and Recessionary Times Ahead: Be Prepared!

To say that business owners, managers and human resources professionals are facing uncertain times is an understatement. Regardless of "official" designations, there is no doubt that we are now in a recession. Not only is this recession likely to be one of the toughest on record, but the economy will be led, starting in 2009, by a new president whose economic priorities are still unclear. One area that President-Elect Obama is likely to emphasize is increased regulation, enforcement, and liberalization of employment laws — especially those that benefit unions.

In order to help prepare our clients and friends, we have produced a special newsletter that emphasizes problems that are exacerbated during trying economic times. For instance, we are featuring articles on Embezzlement (page 4) and Resume Fraud (page 6), two areas that in our experience increase during a recession. Of course, we are still featuring the new state (page 2) and federal employment laws (page 3) that are likely to affect most employers, plus other important news.

Our best advice to you is to keep a positive outlook in your business and personal lives. Don't stick your head in the sand, but (as painful as it may be), keep up on events as they occur, and be prepared to use them to your best advantage. For instance, another company's layoffs may your chance to pick up a prized employee, or perhaps lowered interest rates may allow you to invest (or refinance) in capital equipment that helps to make your business stronger in the long run.

As always, WAAG AND CO. is here to assist you and your business in any way possible. We wish you a Happy Holidays and Happy New Year! ☑

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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. ☑

SCHWARZENNEGER HOLDS BACK DUE TO BUDGET IMPASSE

New State Laws

Although many workplace-related bills were approved by the Legislature, only a handful made it past the Governor's desk. The historic 85-day delay in passing the state budget, combined with Governor Schwarzenneger's promise not to sign any legislation until the impasse ended, resulted in a record 35% of all bills sent to the Governor being vetoed. Once the budget was passed, the Governor had only ten days to consider the legislation on his desk. He announced that this forced him to prioritize the bills and sign only those that were "the highest priority for California." As a result, only a few new laws confront California employers. The key measures that got signed are as follows:

☐ **A.B. 10** amends the Labor Code to add an annual income restriction for exempt computer software professionals who are paid on salary. Under existing law, to qualify as exempt, computer software pros must be paid at rate of at least $36/hour, on an hourly basis. The amendment also permits exemption where the employee is paid an annual salary of at least $75,000, paid at least monthly, and in a monthly amount of not less than $6,250.

☐ **A.B. 2075** makes it illegal to require an employee, as a condition of being paid, to sign a statement of the hours worked during the pay period if the employer knows the statement to be false.

☐ **A.B. 2181** makes changes to the way that reports of occupational injury or illness are filed. The Division of Workers' Compensation ("DWC") is charged with publishing a new form for this purpose. Employers will be required to report injuries / illnesses on the form, and the insurer (or self-insured employer) will then have to report the information electronically to the DWC.

☐ **A.B. 2654** harmonizes anti-discrimination provisions in a range of state laws — including those dealing with discrimination in contracting, insurance, and workers' compensation — to ensure that the anti-bias protections track those in the Unruh Civil Rights Act and the Fair Employment and Housing Act.

☐ **S.B. 28** expands existing prohibitions on using cell phones while driving to bar text messaging, emailing, and instant messaging while driving.

☐ **S.B. 940** provides that for employees of temporary services employers, as defined, wages shall be paid weekly, or daily if an employee is assigned to a client, as defined, on a day-to-day basis or to a client engaged in a trade dispute. This bill would not apply to employees who are assigned to a client for over 90 consecutive calendar days unless the employer pays the employee weekly in compliance with this bill. ☑

KEY BILLS VETOED, BUT THEY'LL "BE BACK"!

Vetoed State Bills

A number of measures were vetoed by the Governor. Employers can be sure that many of these will remain on the Legislature's agenda, and may appear at the Governor's desk again next year. Some key bills that were vetoed are as follows:

☐ **A.B. 2279** would have created protections from discharge for employees who use medical marijuana prescribed by a physician. The bill was intended to overturn the California Supreme Court's recent ruling that existing laws don't limit an employer's authority to fire workers for violating federal drug laws.

☐ **A.B. 2874** would have wiped out the $150,000 cap on damages that the Fair Employment Housing Commission could award in administrative hearings.

☐ **A.B. 2918** would have narrowed the circumstances under which employers could procure consumer credit reports on applicants and employees.

☐ **A.B. 3063** would have expanded California's background check restrictions to prohibit employers from asking applicants about certain criminal convictions.

☐ **S.B. 840** would have created a single-payer healthcare system in California, funded in part by employer contributions.

☐ **S.B. 1583** would have imposed penalties on non-lawyer consultants who knowingly gave erroneous advice on classifying workers as independent contractors in order to avoid paying them by the hour. In his veto message, the Governor noted that how to properly classify workers is confusing, and employers need to have access to consultants to help them decipher the rules. The current consequences for misclassifying workers are quite severe, and employers should not be hindered in seeking guidance from professionals.

☐ **S.B. 1661** would have specified that an individual who quit or was discharged as a result of taking baby-bonding leave under California's paid family leave law would be considered to have left the job with good cause, for purposes of qualifying for unemployment benefits. ☑

Effective on Various Dates

New Federal Laws

ADA Amendments Act

On September 25, 2008, President Bush signed an Act intended to broaden the Americans with Disabilities Act ("ADA") by overturning a number of Supreme Court decisions that had limited its applicability and scope. Specifically, the new law provides that "mitigating measures" are not to be considered when determining whether an employee or applicant is "disabled." The measure also expands the definition of "major bodily functions" affected by disability and authorizes regulations on what kinds of limitations "significantly restrict" such functions in order to be covered by the new ADA. The amendments go into effect on January 1, 2009. The new law will have little impact in California, since California's law protecting against disability discrimination already provides broader protection than even the new amended ADA will provide.

"HEART" Act

The Heroes Earnings Assistance and Relief Tax ("HEART") Act will provide a number of employee benefit-related advantages to military personnel and their families, and was signed by President Bush in June, 2008. The "HEART" Act will impact requirements for retirement plans and benefit calculations, including how the employee is to be treated if he / she cannot return to employment because of a disability or death incurred while performing qualified military service. There are also specific requirements if an employee who has performed qualified military service is rehired and then terminated. The "HEART" Act also defines "differential pay," which is a voluntary payment by an employer of the difference between the employee's military pay and the regular pay they would have received by their employer while they are performing qualified military service; under the act, such compensation (subject to specific criteria) must be treated as compensation for the purpose of qualified retirement plans. Some of the provisions of the "HEART" Act are retroactive, while other provisions will not be fully in effect until 2010. Employers should be sure to contact their benefit plan professional.

Genetic Information Nondiscrimination Act

On May 21, 2008, President Bush signed a bill that would forbid insurers from denying health insurance or setting rates based on genetic factors and would likewise forbid employers from using such data in hiring, firing, and other workplace decisions. The employment-related provisions go into effect on November 21, 2009. The new law also requires employers, employment agencies, and unions that have genetic information about employees to keep it in separate files and to treat it as a confidential medical record. A worker's genetic information can't be disclosed except in very limited circumstances. The bill deals with discrimination based on genetic risk for health problems and allows insurers to only consider disease itself in decisions on enrollment and rates.☑

IRS Code §409A Deferred Compensation

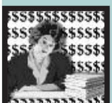
IRS Code §409A was signed into law in October 2004, providing employers with a roughly four-year transition period for full compliance with the new tax treatment for deferred compensation. The deadline for complying is January 1, 2009. Prior to that, employers had to comply, but could say they were still trying to figure it out and do their best to comply. All leniency ends with the close of 2008.

Most employers think that this applies only to CEOs of huge companies; however, §409A is much broader. IRS Code §409A may apply to: Employees with a written employment contract requiring future compensation obligations; an offer letter spelling out how the employee will be paid over time; arrangements to receive future benefits; discretion as to the timing of compensation; severance pay arrangements; an agreement to perform consulting services after employment; a change of control agreement; or post-employment rights to compensation.

Employers should discuss this issue with their professional tax advisors.

Disclaimer:

This entire newsletter is a general overview of the subject matter, and is not meant to provide professional opinions regarding any specific case, matter, or set of facts, or to substitute for the professional advice of WAAG AND CO. *Instead, please contact* SUSAN S. WAAG, ESQ. *for additional information.*



RECESSION ISSUES: PART I

Embezzlement Issues for Employers

Even in normal times, businesses can be vulnerable to theft from insiders. When a recession hits, experts believe that desperate employees can be more inclined to pocket company funds to make up for downturns in their own financial fortunes. Though the employee may still retain their job, they may have an out-of-work spouse at home, or a retirement fund severely depleted by the crashing stock market. Embezzlement may hit a business owner at the time they can least afford it: when their own business is struggling against the numbing downturn of a recession.

Anecdotally, over the past ten years, WAAG AND CO. has assisted clients in catching and/or addressing about two or three cases of embezzlement per year. That is, until this past year, in which this number has increased to about four times more than normal. As the economy becomes worse, this problem is likely to grow. These incidents are normally much more than "nickel and dime" losses, frequently getting into tens (if not hundreds) of thousands of dollars. Employers must be proactive, since it is difficult to recover money once it is stolen. Moreover, if your employees were stealing from your customers, the damage to your business' reputation may be fatally damaged.

Employee theft includes more than just employees pocketing cash or merchandise, but those who engage in "creative accounting" techniques, employees stealing from the business' customers, credit card theft (either from the employer or their customers), and identity theft. CPAs are particularly valuable in helping set up internal controls that can make it far more difficult for theft to occur. There are warning signs and precautions businesses should observe. Often overlooked are the many HR issues that play a huge part in avoiding embezzlement or catching embezzlers in the act.

☐ **Warning Signs:** The first step in preventing embezzlement is keeping dishonest workers out of your workforce. This can be done by performing background and resume checks (*see "Resume Fraud Expected to Increase" on page 6*). After that, learn to watch for signs of embezzlement among existing employees and contractors:

☐ **1.** an employee who is suddenly disgruntled, feeling underappreciated or entitled;

☐ **2.** an employee who is not following normal procedures or implements changes in procedures;

☐ **3.** an employee who rarely takes any vacation (or only very short ones);

☐ **4.** an employee who is reluctant to let go of certain tasks, or let others observe or cover their work;

☐ **5.** trigger points that occur with any employee: personal crises, drug or alcohol addictions, gambling, indications of anger or resentment, living beyond one's means, a spouse / partner with expensive demands.

☐ **6.** Most of all, remember that normally, only the most trusted employee can get away with stealing; don't be blinded by trust.

☐ **Take Precautions:** Company policies and procedures need to be developed and structured to prevent embezzlement. Some of the most critical are:

☐ **1.** establish internal controls and procedures that make theft more difficult, and easier to detect;

☐ **2.** limit access to sensitive information, such as by using passwords on computers and locking up documents;

☐ **3.** dispose of sensitive material only by destroying it — shred only with a cross-cutting machine or better;

☐ **4.** limit when employees may take sensitive material home, and keep track of such occasions;

☐ **5.** monitor access and use of sensitive information and let employees know they are being monitored;

☐ **6.** limit the use of sensitive information — do not put anyone's Social Security Number on any document (including pay stubs/checks) unless absolutely required;

☐ **7.** conduct regular spot-checks of all internal controls and at-risk areas; regularly audit any vulnerable areas;

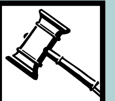
☐ **8.** try to avoid rapid turnover of staff, particularly in financially sensitive positions.

☐ **Obtain Expert Advice, then Investigate:** Unless you are experienced in this area, it is strongly recommended that expert advice be obtained regarding how to conduct a particular investigation. There are many pitfalls to be avoided, and an experienced investigator will know how to do this. For instance, while it may be appropriate to involve law enforcement at some point, having police interview employees will make them less likely to share information. ***Properly handled***, most suspected embezzlers will admit some or all of their misdeeds to their employer. Another example is that while it may seem to make sense to tell the suspect you will not call the police or press charges if they repay / return what was stolen, this constitutes an unlawful threat of criminal prosecution in order to gain a civil advantage.

☐ **What to Do:** If the conclusion is that theft occurred, then appropriate action must be taken, which generally includes termination of employment. Once again, there are many pitfalls in dealing with someone you are convinced has stolen from the company, and consultation with an expert is strongly advised. You should not overlook the theft or treat it lightly, no matter what the employee's explanation, or how much the employee pleads for another chance and swears not to do it again. Consider filing a police report and pressing charges. This is difficult, but highly recommended in most cases.

Common actions to avoid involve defamation after the investigation has determined that it is likely that embezzlement has occurred. Do not engage in a "citizen's arrest" or a "perp walk," which can result in viable claims against you, even if the theft is

Embezzlement: *continued on next page*



CALIFORNIA SUPREME COURT WILL HAVE FINAL WORD

Rest and Meal Period Saga Continues...

This summer, WAAG AND CO. reported on the landmark decision of *Brinker Restaurant Corp. v. Superior Court of San Diego County* (See Problem Prevention Bulletin: *"The Brinker Decision: Good News for Everyone Regarding Missed Rest and Meal Period Law"*, July 31, 2008 - Revised). In the *Brinker* case, the Court of Appeals held that employers did not need to force employees to take their meal breaks, but only make such breaks available.

☐ ***Brinker* Goes to the State Supreme Court:** As anticipated, the plaintiffs petitioned the California Supreme Court to take up the issues on appeal; the Supreme Court has now granted that petition, and will be hearing the case early in 2009. Since a ruling by the Supreme Court will resolve many of the most problematic issues regarding meal periods, a swift ruling would be welcomed by employers, whichever way the Court may rule.

☐ **Let's Make This Perfectly Clear — Please?** On October 23, 2008, one day after the Supreme Court agreed to hear the *Brinker* case, the State Labor Commissioner issued a memorandum to all staff regarding the State's current enforcement position on meal periods, now that *Brinker* was on appeal. This memo specifically withdrew the State's earlier memo saying that the government would follow *Brinker* in all of its enforcement activities. Instead of relying on *Brinker*, the State will rely on its own interpretation of the statutes and court decisions. The memo went on to say that there is "compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken."

However, the memo does state that the first meal period provided by an employer must commence prior to the end of the fifth hour worked — which is contrary to the appellate ruling of *Brinker*, and an issue that may be decided by the Supreme Court when it does rule in the case.

☐ ***Brinker* vs. *Brinkley*!** On October 28, 2008, the Second District Court of Appeals issued a decision in *Brinkley v. Public Storage, Inc.*, another case addressing the employer's obligations to provide meal periods. Like *Brinker*, that case held that employers are only required to make meal periods available, not force employees to take them. The *Brinkley* Court also held that the employer was not required to provide the first meal period within the employee's first five hours worked, but could provide that meal period at any time. This is inconsistent with the Labor Commissioner's October 23rd, 2008, enforcement memo.

☐ **Final Recommendations:** Again, the final word on this matter will be decided by the California Supreme Court when it issues its ruling in the *Brinker* case. Until then, this issue is hotly contested and the State's enforcement position is uncertain. Accordingly, the best course of action for most employers will be to continue complying with the pre-*Brinker* rules governing breaks, just in case the Supreme Court strikes down that ruling. WAAG AND CO. will keep readers informed of any developments. ☑

Embezzlement

Continued from previous page

established. Unless there is a criminal conviction, do not tell anyone that the former employee was fired for theft. Even in the termination letter, theft should not be mentioned, except in rare situations.

☐ **After it is all over:** If the theft involved the release or compromise of sensitive, personal information (i.e., Social Security Numbers, medical information, etc.), then the business must notify all those whose information may have been impacted. In such cases (and where the theft involves your customers), a strategy for dealing with the public-relations fall-out should be implemented. But whatever the situation was, learn from what happened and take additional precautions to prevent future occurrences. ☑

Jump In Litigation Predicted in 2009

About a third of in-house counsel responding to a recent survey are projecting an increase in legal disputes involving their companies for the coming year — and nearly 20 percent predict the need to hire more in-house lawyers to manage the expected increase. The survey of about 360 in-house counsel found that 31 percent of in-house counsel projected an increase in legal disputes, whereas only 22 percent predicted an increase last year.

This expectation of increased litigation seems to be hitting larger companies the hardest. Among in-house counsel who work for companies with more than $1 billion in revenue, 43 percent predicted an increase in new filings, compared to 34 percent who foresaw an increase last year. The numbers were even higher for financial services businesses — half of their in-house counsel projected an increase in legal disputes.

Reasons given for the projected increase included turmoil in the credit markets and subprime-related litigation, as well as trend analysis that demonstrates that as the economy worsens, lawsuits rise. Given that, an increase in the number of employment and business litigation matters is expected to increase.

RECESSION ISSUES: PART II

Resume Fraud Expected to Increase

Most employment litigation can be traced back to poor hiring decisions. Having a careful and appropriate hiring process will prevent litigation, and — just as important — prevent a host of other predicaments that can develop from having problem employees. Applicants lying on resumes is not new; but it is up to employers to detect these false claims. While such vigilance has always been important, an increase in resume fraud is expected to accompany the growing recession and increased unemployment. Attorney SUSAN WAAG has worked with employers for nearly a quarter century and has seen this trend before; employers would be wise to anticipate it and take steps to protect themselves now. Properly conducting background checks, however, requires compliance with a number of laws designed to protect employee privacy; being sure about whom you hire is vital to protecting your business.

☐ **How Bad Is It?** Most surveys over the past several years suggest that about 20% of applicants exaggerate their educational backgrounds; anecdotally, HR professionals indicate a high percentage of resume inaccuracies are detected during background checks. Recently, a spate of high profile cases bounded into the news. For example: Gregory Probert, president of HerbaLife Ltd., lost his job after it was disclosed that his resume listed a fake Master's Degree; and Cabot Microelectronics Corp.'s Chief Information Officer resigned after it was discovered that he claimed a fake Bachelor's Degree. These are just two examples of about a dozen high-profile cases that were publicized this year alone. As the jobless grow more desperate, the motivation to exaggerate grows, thus making it more important to perform a competent and legally-compliant background check.

☐ **Whom Should Be Checked?** Ideally, employers would have the time and resources to do a full background check (including a check of any criminal convictions) of every applicant seriously considered for hire. But since most businesses are unable or unwilling to do this for all positions, they should at least determine what degree of background check should be done for the various responsibility levels. For instance, applicants for positions handling financial transactions should be thoroughly vetted for matters reflecting on their honesty; if a position involves an employee going into customer homes, a criminal check should be done. Even in high-turnover industries, a comprehensive investigation should be mandatory for management and executive-level positions. Studies have shown that the most common lies on a management-level resume include reasons for leaving previous jobs, the scope of past job responsibilities, results and accomplishments, and exaggeration of academic credentials.

☐ **Don't Make Any Assumptions:** Many companies use recruiters or temporary-staffing agencies to staff some or all of their open positions, yet may be unfamiliar with the level of checking done on the candidates. It cannot be assumed that the recruiters have thoroughly vetted the candidate resumes forwarded to the employer, so a frank discussion of what checks are made is essential. Employers bear the ultimate burdens of hiring the wrong person. Before accepting a candidate put forth by a third party, the employer should review the candidate's resume, job application and other qualifications, as well as examining any investigation the third party has done to verify the applicant's background.

☐ **Background-Check Services:** Background checks often can be done efficiently and thoroughly by a professional service. Presumably, such services are well-versed in the applicable laws and have the resources to do cost-effective background checks. Again, the employer is ultimately the one who has to deal with any negative consequences, and the employer should be sure that any service being used really is up on the laws that control the investigation to be done. This includes a number of State and federal laws; a national company

Resume Fraud: *continued on next page*

Susan Waag to give Legal Update for HRACC on January 13, 2009

Attorney SUSAN S. WAAG speaks frequently before business organizations, non-profit groups, and professional associations at breakfast, noon-hour, and evening programs.

Human Resources Association of the Central Coast ("HRACC") will be featuring employment law attorney Susan Waag as their Legal Update speaker. The HRACC regular professional development meetings are held on the 2nd Tuesday of the month. Meetings are from 11:30am - 1:00 pm at: **The Madonna Inn** (unless noted otherwise), located at 100 Madonna Road in San Luis Obispo, CA 93401 (805) 543-3000.

HRACC Meeting Agenda:
11:30am-Noon: Networking and lunch served; Noon-1pm: Professional Development Program

See *www.hracc.net* or email *operations@hracc.net* for more information. Mark your calendars now and plan on attending.

Attendees: Non-HRACC members are welcome at these meetings. Reservations should be made by going to the HRACC website at *www.hracc.net*. Meetings with lunch are currently $20 for members with advance reservations; Members with late reservations are $25; Guests of members with lunch are $25; and Non-Members with lunch are $30. Meetings without lunch are currently $10 for members, guests, and non-members.

MAJOR COURT VICTORY FOR EMPLOYERS VS. UNIONS

U.S. Supreme Court Invalidates Calif. Law

This August, the U.S. Supreme Court has struck down a controversial California law that made it nearly impossible for some employers to exercise their First Amendment rights to oppose a union organizing drive.

AB 1889 was passed in 2000 and applied to employers that received more than $10,000 in state grants or funds. The law forbade them from using that money to "assist, promote or deter union organizing," meaning that the employer who intended to oppose a union organizing drive would need to prove that any funds used were segregated from the state money. This presented an unwieldy and unrealistic standard, resulting in a *de facto* prohibition on the employer's right to oppose the union campaign.

☐ **Free Speech Rights Cannot Be Restricted:** The law was challenged in federal court on the grounds that the State law interfered with federal law regulating union issues. The 9th Circuit Court of Appeals upheld the law in 2006. Now, the U.S. Supreme Court has overruled the lower court and invalidated AB 1889. The Court concluded that the spending restrictions in AB 1889 was a "targeted negative restriction on employer speech about unionization." The Court rejected the argument that the law was merely a control on the spending of state funds, saying that "California may not indirectly regulate" an employer's free-speech rights "by imposing spending restrictions on the use of state funds." The Court also noted that the law improperly restricted free speech rights by placing unreasonable burdens on employers to show compliance with the law, such as segregating funds, etc., and by imposing massive and disproportionate penalties on employers for even trivial violations.

☐ **Employer Speech Is Still Not Free:** This case presents a major victory for employers, who need to be free to exercise their federally-guaranteed right to participate in the dialogue over unionization. Employers must remember, however, that this right is still rather limited, since certain types of comments or actions by employers will be deemed coercive and "unfair" under federal law. Saying or doing something that could constitute an "unfair labor practice" can result in steep penalties for an employer, which can even include an order by the federal government requiring the employer to bargain with the union.

☐ **Recommendations:** Employers who are concerned about unionization should contact a qualified labor attorney for information about what you can and cannot legally say or do during a union organizing campaign. ☑

Resume Fraud

Continued from previous page

may not always know the laws of a particular state, so be sure to get information on this. Moreover, such services often have a "menu" of areas to be investigated, not all of which will be legally permissible or advisable for all industries. When entering into a contract with a background-check service, carefully review the provisions about when the service will be responsible for any harm or losses caused by its failure to do its job properly. Many services have contracts that limit such responsibility, leaving the employer holding the bag. Businesses contemplating a hiring process that includes using a background-check service may wish to have their own attorney assist them in putting this into effect. Once a qualified service is in place, they can be very beneficial.

Final Recommendations

☐ **1.** Always be skeptical of resume claims;

☐ **2.** at the start of the process, require all candidates to complete an appropriate job application form, which will provide substantially more information than a resume alone, and analyze the resulting information;

☐ **3.** do not consider applicants who fail to fully complete the application form — they are either trying to hide something or have difficulty following instructions;

☐ **4.** verify academic and job histories, and check for criminal convictions to the extent legally permissible;

☐ **5.** standardize the vetting process for the various levels of job responsibility;

☐ **6.** be familiar with laws governing background checks and privacy, and be sure to comply with them when checking on candidates;

☐ **7.** adopt and enforce a policy specifying the consequences for resume fraud;

☐ **8.** work with experienced consultants and recruiters to prevent problem employees from entering your workforce;

☐ **9.** clearly communicate your background and reference-check policies with all personnel involved in the hiring process;

☐ **10.** review the entire process with a qualified attorney whenever possible. ☑

UNION SUPPORTERS WAITING FOR THEIR REWARD

Possible Scenarios with President Obama

In case you've had your head too buried in the personnel files to notice, the election of Barack Obama and a higher proportion of Democrats in Congress means a new agenda in Washington, with many employment-related matters ranking high on the list. In typical fashion, the Democrat agenda is whatever is being pushed by organized labor and the trial attorneys — the goals being to create more unionized workplaces and to generate more litigation. While proponents of these bills will tell you they are "pro-worker" and will help the economy, they seem to forget what may happen when you kill the "goose that lays the golden eggs" and destroy the businesses that provide jobs for the workers.

Let there be no doubt about the pressures that will be on Mr. Obama once he is sworn in: in a recent interview, Service Employees International Union President Andy Stern stated that his members will "hold [Obama] accountable" for meeting his union's agenda. Politicians are very aware of the amounts of money unions contribute to their campaigns and the number of voters they control; they are also aware that unions maintain multi-million dollar war chests for helping get people *un*-elected, as well. As Mr. Stern said, the SEIU wants to make sure that when politicians "do not live up to their word, there should be consequences."

While there are many more proposed laws on the Democrats' anti-employer agenda, here are a few that are most significant (be sure to note the last one on this list, which will have a huge impact on non-union employers):

☐ **Employee Free Choice Act ("EFCA" aka "Card Check"):** Top on every union's agenda is the grossly-misnamed "Employee Free Choice Act." Currently, where there is sufficient interest by workers in having a union, the National Labor Relations Board ("NLRB") holds a secret-ballot election. One trigger of an election is when at least 30 percent of a company's employees sign authorization cards. However, EFCA would do away with the secret ballot voting process *entirely* — if 50 percent or more of your workers sign those cards, that's it: You're unionized. No more campaigns, no more voting — signatures alone will be enough to turn a company into a union shop. Also, EFCA would give federal arbitrators the brand-new authority to impose labor contracts in your workplace if you fail to reach agreement with union locals within 120 days of the union's formation.

The Democrats in Congress, along with Senator Obama, have made the EFCA a top priority and are quickly gathering support for its passage, though there is no "free choice" in this bill. Without a secret ballot, workers who were intimidated or coerced into signing authorization cards would *not* have the ability to change their vote in private. If anything, the intimidation factor for signing a card (regardless of the workers' true feelings on unionization) would be increased, since the workers' "vote" is *made public* to the employer, union organizers and coworkers, as everyone will be able to know who has and has not signed a card.

Though some would have the public think otherwise, the deck is already stacked against employers in union elections. Promoters of EFCA would have the public believe that outspoken pro-union employees are regularly fired for opposing management in union elections, and that other unfair subterfuges are put in the way of electing a union workforce.

The reality out in the trenches is that union elections are highly regulated by the federal government, and that the occasional employer violation is swiftly and severely punished by existing laws. Plus, the secret ballot process helps enable employees who are intimidated by either their employer or the union to say one thing to the persons inflicting intimidation, while still being free to vote their conscience in the actual balloting.

Union organizers, on the other hand, experience limited regulation, are allowed to repeatedly visit workers at their homes, and are otherwise given free reign to persuade workers to their side, frequently with "facts" that are unable to be substantiated. By allowing unions to be certified with nothing more than a card-check would also make it extremely difficult for employers to retain any meaningful free-speech rights they have to combat a union organizing drive, since it could be over before the employer has a chance to say anything.

☐ **Re-empowerment of Skilled and Professional Employees and Construction Tradesworkers Act ("RESPECT Act"):** Also high on organized labor's top legislative priorities is the RESPECT Act that was introduced in the 110th Congress in March 2008, and is believed to be supported by President-Elect Obama. This Act would change the National Labor Relations Act ("NLRA") definition of a supervisor to specify that a supervisor must "hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees" for a "majority of the individual's work time." This new definition would likely make *virtually all employees* non-supervisors for NLRA purposes. This would allow unions to have supervisors as members (and collect dues from them), open the door to new litigation, and harm businesses, which need supervisors without conflicting responsibilities in order to operate effectively. Under the present NLRA definition, supervisors are considered a part of a company's management team, and unions cannot organize management.

This legislation was proposed in reaction to a recent National Labor Relations Board ("NLRB") ruling that clarified the definition of a supervisor and *slightly* increased the number of workers considered supervisors. Although that ruling dealt specifically with the health-care industry, the ramifications of the RESPECT Act would affect all industries.

Obama: *continued on next page*

Obama

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☐ **Patriot Employer Act:** On the campaign trail, President-Elect Obama repeatedly voiced his intention to end the tax breaks for companies who ship jobs overseas, and will give those breaks to companies who create good jobs with decent wages "right here in America." Senator Obama introduced the Patriot Employer Act of 2007 with Senators Richard Durbin (D-IL) and Sherrod Brown (D-OH) to reward companies that are deemed "patriotic" and punish those that are not.

The legislation takes four pages to define "patriotic" companies as those that: pay at least 60 percent of each employee's health care premiums; have a position of neutrality in employee union organizing drives; maintain or increase the number of full-time workers in the United States relative to the number of full-time workers outside of the United States; pay a salary to each employee not less than an amount equal to the federal poverty level; and provide a pension plan.

The Act defines "neutrality" in any union organizing effort to mean that virtually no company campaigning is allowed, should a union file a petition for an election; of course, there would be no similar restrictions on union organizers. That means employees being solicited to join unions would hear only one side of the issue, making non-union "patriotic" companies hot targets for union efforts, with the unionization of such workplaces virtually assured. (*See related article on page 7, "U.S. Supreme Court Invalidates Calif. Law."*)

The "patriotic" employers would qualify for a 1% tax credit on their profits that would be funded by forcing the apparently "*un*-patriotic" U.S. companies to pay the U.S. corporate tax on profits they earn *overseas*, instead of just the usually lower corporate tax of the host country. Since the U.S. corporate tax rate is 35%, while most of the world has a lower rate, this amounts to a big tax increase on earnings by U.S. companies abroad.

☐ **Working Families Flexibility Act ("WFFA"):** Even if you are not at all worried about unions knocking on your door, the incoming President and Congress will still give you plenty of heartburn. One of the most troublesome bills being championed is the WFFA. Although introduced in the U.S. House of Representatives way back on December 6, 2007, the WFFA is sponsored by Senator Edward Kennedy (D-MA) and Representative Carolyn Maloney (D-NY), and is co-sponsored by Barak Obama (D-IL), as well as Hillary Clinton (D-NY), Christopher Dodd (D-CT), and Richard Durbin (D-IL) — a formidable crowd with overwhelming political muscle.

The bill would make the federal government a "model employer" by adopting flexible work schedules, and then require all but the very smallest of employers to go along for the ride with them. The WFFA is said to be modeled after similar long-standing laws in effect in the European Union, which has experienced stagnant economic growth (relative to the U.S.), double-digit unemployment, and stifling employment laws.

The WFFA would add a massive new layer of bureaucracy to an already rule-laden workplace; to wit: Once per year, an employee may request to modify his or her: (1) number of hours required to work; (2) time of day required to arrive / depart work; and / or (3) location where they are required to work. The employee and employer will then be required to engage in an "interactive process" to discuss the employee's needs and how to address them. Within 14 days of that meeting, should the employer be so bold as to deny the request, the employer would have to provide the employee with a written decision regarding the requested modification, stating the grounds for any denial and any proposed alternative modifications. This denial must address specific areas of concern, as delineated in the proposed statute, suggesting that denial for any non-listed reason would be invalid. Moreover, employers in states such as California, which has extremely rigid rules regarding hours worked, will have an even more complicated situation.

If the employee is dissatisfied with the employer's decision, the employee would be allowed to request a reconsideration of the decision and require that the employer and the employee meet *again* to discuss the request. The WFFA also would make it unlawful for an employer to interfere with an employee's attempt to exercise his or her rights under the Act or to retaliate against an employee. Employees would also be able to file a complaint with the U.S. Department of Labor ("DOL") for any perceived violations of their WFFA rights. The Act provides for the investigation and assessment of civil penalties or the award of relief for alleged violations, including the review in federal courts of appeal of DOL orders; violations could result in civil fines of up to $5,000 per violation and equitable relief such as reinstatement, promotion, back pay, and changes to terms and conditions of employment.

Under the WFFA, it is conceivable that each time an employee's request is rejected, they will have free reign to claim retaliation to the DOL, creating a litigation nightmare. The WFFA also requires the DOL to carry out a research, education, and technical assistance program for employers, labor organizations, and the general public regarding compliance with this Act. The WFFA would cover employees who work at least 20 hours per week and 1,000 hours per year, and employers with 15 or more employees.

☐ **That's All for Now, Folks!** It will remain to be seen whether President-Elect Obama will govern from the center, as he has said more recently, or from the left, where he ran his political campaign on his way to the highest office in the land. You can be sure, whatever happens, that his left-leaning constituents, including the union and the Democrat-controlled houses of Congress, will do all they can to hold his feet to the fire and make him live up to his pro-union campaign promises. WAAG AND CO. will keep readers informed of any developments. ☑

NEW REGULATIONS TO TAKE EFFECT JANUARY 16, 2009

Massive New FMLA Regulations Released

The lengthy and convoluted new regulations applicable to the federal Family & Medical Leave Act ("FMLA") were just released. The new regulations — at 762 pages long — are nearly double the length of the originally proposed, already bloated draft, and will take effect on January 16, 2009. Some of the key changes employers will need to cope with are:

☐ **1.** Supervisors will no longer be allowed to contact an employee's health care provider for medical information when a medical certification is needed.

☐ **2.** Employees will be required to comply with an employer's rules for requesting leave in advance, "absent unusual circumstances."

☐ **3.** Employers will be allowed to request "fitness for duty" certifications for certain employees returning from leave necessitated by their own serious health conditions, if safety concerns exist.

☐ **4.** Employers may disqualify employees from bonuses for hours worked, products sold, perfect attendance, or the like if the employee has not met the goal due to taking FMLA leave, unless these bonuses are paid to employees on equivalent, non-FMLA leave.

☐ **5.** Employees are currently eligible for FMLA leave only if they have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave. The proposed rule stated that, although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. The final rule amends the proposed rule to allow up to seven years' gap in service.

☐ **6.** An employee who voluntarily returns to a light duty position retains the right to job restoration to the same position, or an equivalent one, until the end of the 12-month period that the employer uses to calculate FMLA leave.

☐ **Other FMLA Changes:** Additionally, the new regulations provided clarification about how to handle FMLA leaves related to military service (*also, see* WAAG AND CO. *Problem Prevention Bulletin: "FMLA Amended: Up to 6 Months Leave to Certain Employees with Family Members in the Military", February 2008*.) Earlier this year, the FMLA was amended to create two new types of leave: a new type called "qualifying exigency" leave, under which eligible employees may take up to 12 weeks of FMLA leave for reasons related to the call to active duty of covered servicemember spouses, children, or parents, plus a second entitlement of up to 26 weeks of leave in a single 12-month period to care for a seriously injured or ill covered servicemember.

☐ **Qualifying Exigency:** The statute provided no indication of what would be a "qualifying exigency." Fortunately, this was clarified by the newly issued regulations. The regulations provide that, "qualifying exigency" leave generally applies only to families of National Guard members and Reservists. Families of servicemembers on active duty in the regular armed services are not eligible because, presumably, they are used to the upheaval military service sometimes causes.

Qualifying exigency leave must fit into the following categories: ☐ **1.** When the servicemember has received a week or less notice of deployment; ☐ **2.** For military events and related activities; ☐ **3.** For urgent (as opposed to recurring and routine) child-care and school activities; ☐ **4.** For financial and legal tasks to deal with a family member's active duty; ☐ **5.** For counseling for the employee or child who is not already covered by FMLA; ☐ **6.** To spend time with the covered servicemember on rest and recuperation breaks during deployment; ☐ **7.** For post-deployment activities; and ☐ **8.** For other purposes arising out of the call to duty, as agreed upon by the employee and employer.

Under military caregiver leave, an eligible employee may take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember. The employee may be a spouse, parent, child, or next of kin of a service member, who can be in the regular armed forces, Reserves, Guard, or anyone in those categories on a temporary disability retired list ("TDRL"). The service member must have a serious illness or injury incurred in the line of duty on active duty, as determined by the Department of Defense ("DOD"), that may render him medically unfit to perform the duties of his office, grade, rank, or rating and for which he is undergoing medical treatment, recuperation, therapy, or outpatient treatment or is on TDRL.

There is a separate "FMLA year" for military caregiver purposes, beginning with the first date of caregiver leave and ending 12 months later. The 26 weeks of caregiver leave may be taken in a single block or intermittently. The military caregiver entitlement is determined per servicemember, and per injury.

For example, an employee may take 26 weeks of military caregiver leave for a spouse's qualifying leg injury in year one, and take additional military caregiver leave in year two for a child's qualifying injury or for the spouse's second, unrelated illness or injury. The 26-week entitlement may not be carried over from year to year.

☐ **Conclusion:** Handling any leave of absence in California can be complex, since the FMLA and the State version are not the only time-off entitlements employees have. Employers should be sure to check regarding all possible entitlements any time an employee asks for time off. ☑

NEW IRS MILEAGE RATE, BIKE COMMUTING & MORE!

News Briefs Keep You Up-to-Date

☐ **2009 IRS Mileage Rate to Decrease:** The new IRS standard mileage reimbursement rate, used by many employers to reimburse employees for private auto travel for company business, will be 55 cents per mile for 2009. This normally isn't a newsworthy rate announcement, but in light of the steady increase in gas prices since 2004, followed by the price per gallon's precipitous plunge in the last half of 2008, the new rate actually represents a *decrease* from the rate of 58.5 cents a mile that was in effect in the second half of 2008. The IRS had made a special adjustment for the second half of 2008 in response to the aforementioned spike in gasoline prices. The rate in effect for the first six months of 2008 was a mere 50.5 cents per mile. Other mileage reimbursement rates: 24 cents per mile driven for medical or moving purposes, and 14 cents per mile driven in service of charitable organizations.

☐ **New I-9 Form:** The U.S. Citizenship & Immigration Services has released a new version of the I-9 form, with an expiration date of "06/30/09" in the upper right corner. There have not been any significant changes to the form, but it is now the only acceptable one for employers to use when doing a new I-9. Employers may access the new form at *www.uscis.gov/i-9*.

☐ **E-Verify:** Federal contractors and subcontractors will be required to begin using the U.S. Citizenship and Immigration Services' "E-Verify" system starting January 15, 2009, to verify their employees' eligibility to legally work in the United States. The new rule implements Executive Order 12989, as amended by President Bush on June 6, 2008, directing federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council amended the Federal Acquisition Regulation ("FAR") to reflect this change.

☐ **Bike Commuting Reimbursement:** Effective January 1, 2009, employer reimbursement for bicycle-related employee commuting expenses will be on the list of qualified transportation fringe benefits. Up to $20 per month can be reimbursed for reasonable bike commuting expenses. As often happens with government gifts, the government takes away as well: if the employee receives another transportation fringe benefit in the same month, the bike reimbursement amount is not tax deductible!☑

PAYROLL ON AN ATM CARD!

DLSE Approves Debit Cards

The Division of Labor Standards Enforcement ("DLSE") issued an opinion letter approving the use of payroll debit cards as an alternate method for paying employees. Note that an opinion letter is not an official regulation and is merely advisory.

In its opinion letter, the DLSE addressed the use of a "payroll debit card," which is defined as a prepaid card which contains or represents a dollar amount that is "loaded" onto the card. The value on the card is then accessible to the employee at various outlets, such as ATM's. The DLSE listed five requirements for payment via debit card to be legitimate:

☐ **1.** The employee's participation in a payroll debit card program must be voluntary and optional, and must specifically authorize the deposit of the employee's wages into a specified account.

☐ **2.** The dollar amount of the wages loaded onto the card each payday must be immediately available to the employee as cash accessible through financial institutions and ATM's throughout the State, just as a paycheck would be.

☐ **3.** The employee must have the ability to withdraw the full amount of the wages due and payable without any transaction fee or other cost at least once per pay period.

☐ **4.** The funds loaded onto the employees payroll debit card account must be held for at least thirty days.

☐ **5.** An itemized wage statement (i.e. a pay stub) must be given to the employee on payday reflecting the wages loaded onto the debit card for that payday, with all deductions taken and all other information required on a pay stub.☑

☑ The Strategic *EMPLOYER*

December 2008 ~ Susan S. Waag, Esq. ~ (805) 783-2300

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