



The Strategic *EMPLOYER*

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Why Employment Laws are so Confusing - and Getting Worse!

Sometimes, the labor laws are so confusing that employers do not realize they are breaking the law. Unfortunately, it is only getting worse. But we don't need to tell employers — you already know that. In most years, California state employment laws are more extreme (and more complicated) than their federal counterparts. That's beginning to change.

The reason for more employment law complexity is similar to the reason that taxes get more complicated: politicians want to reward or penalize certain employment (or tax) situations, and aren't necessarily concerned with the impact on the system as a whole. Moreover, given the added complexity,

and the fact that they are *political* professionals (rather than employment lawyers or CPAs), they may not fully appreciate or anticipate the impact of their legislative decisions.

It doesn't help, of course, that the legislation is so voluminous that they don't even have time to read it before voting on it. However, that does give them an excuse in case the new law backfires: "Hey, don't blame me, they didn't even give me time to read it!"

Now we have a new administration, and a recession without an end in sight, and that accelerates even more complex legislation that employers must comply with or face stiff penalties.

This newsletter has perhaps been the most difficult to produce of all the employment newsletters that Susan has created in the last 25 years (yes, she wrote and distributed employment law newsletters at her previous two law firms as well). This is due to the ever-increasing complexity, as well as the rate of change and rescheduling of activation dates by our elected officials.

As always, WAAG AND CO. is here to assist you and your business in navigating through the added complexity.

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 375 different employers with great success. These include companies engaged in industrial, high-tech, medical, dental, legal, non-profit, service, retail, wholesale, service, construction, engineering, government, hospitality, agriculture, ranch, communications, and media industries.

SUSAN WAAG has substantial experience as an employment law attorney and human resources consultant. Since 1985, she has devoted her practice exclusively to serving employers. MS. WAAG has provided expert consultation to more than one-third of the 75 largest employers in San Luis Obispo County.

WAAG AND CO. provides a variety of problem prevention services, including: Supervisor and Employee Training, Internal Investigations, Personnel Policy Manuals, Employment Relations Audits, Human Resources Consulting Services and Employment Contracts. Our services cover a broad range of expertise in the matters most important to employers.

For more information or additional printed materials on the services we provide, please contact WAAG AND CO. or see WWW.WAAGANDCO.COM.



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PLENTY OF GOODIES FOR TRIAL ATTORNEYS, TOO!

Obama Issues Pro-Union Executive Orders

Amid claims of bipartisan desire, it is well understood in the business community that the Democrat agenda is whatever is being pushed by organized labor and the trial attorneys — the goals apparently being to create more unionized workplaces and to generate more litigation. The four Executive Orders issued by President Obama on January 30, 2009 and February 6, 2009 tend to prove this theory.

While proponents of these Executive Orders 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. Or to put it another way, as stated by an old saying that has recently become popular: “The problem with socialism is that eventually you run out of other people’s money.” With this in mind, let’s take a look at the four Executive Orders issued by President Obama in the span of only one week, just after taking office.

EXECUTIVE ORDER 1:

Notification of Employee Rights under Federal Labor Laws

Issued: January 30, 2009

Applies to: Federal contractors, and their subcontractors.

Effective: Immediately, although the key language and requirements necessary to comply with this new Executive Order are not yet available.

This order revokes one signed by President Bush requiring all qualifying federal contractors to post a notice advising non-union employees of certain rights. Included in the Bush-ordered posting were the right not to join a union and the right to “opt out” of paying that portion of dues used by unions for political contributions or other activity not related to administration of a collective bargaining agreement.

In its place is a new Executive Order,

requiring federal contractors to post a yet-to-be-released notice advising employees of their rights to bargain collectively and to be protected in the exercise of their right to association, self-organization and designation of representatives for purposes of negotiating terms and conditions of employment.

The Executive Order declares that within 120 days, the Secretary of Labor will commence rulemaking to establish the required posting language for this Executive Order. Despite this delay, the contract provision requirements are effective immediately and apply to all contracts resulting from solicitations issued on or after the January 30, 2009 effective date. The Executive Order also specifies several other new contract clauses that must be included in all qualifying government contracts and resulting subcontracts.

Importantly, the Executive Order also requires that prime contractors include the new contract clauses in “every” subcontract and puts the burden on prime contractors to enforce these requirements on their subcontractors. Contractors who fail to comply with the notice obligations or related rules may have their contract cancelled and could be barred from future federal contracts.

EXECUTIVE ORDER 2:

Nondisplacement of Qualified Workers under Service Contracts

Issued: January 30, 2009

Applies to: Successor Federal Service Contract Employers

Effective: Immediately, although the key language and requirements necessary to comply with this new Executive Order are not yet available.

This Executive Order imposes new obligations for successor employers under federal service contracts to hire their predecessors’ employees, rather than to hire the best qualified

employees based upon non-discriminatory reasons.

Recognizing that government service contracts are frequently transferred, allegedly resulting in employee turnover and the possibility of loss in productivity and efficiency, President Obama has changed the rules for many non-union government contractors involved in federal service contracts. Under the new Executive Order, employers taking over a government service contract must offer their predecessor’s employees the right of first refusal in positions for which they are qualified. The right of first refusal must extend for at least 10 days, only after which may a successor contractor announce position openings to a wider applicant pool.

A successor employer may be forced to bargain with a union that represented its predecessor’s employees, even though the union has not been certified as its own employees’ representative, if:

- 1. the new employer draws a majority of its workforce from the bargaining unit which the union previously represented;
- 2. the new employer is engaged in the same general business as its predecessor; and
- 3. the bargaining unit has not been changed dramatically.

Therefore, when the successor employer is required to hire its

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Newsletter 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.

Executive Orders

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predecessor's employees, and those employees are unionized, the successor employer will likely find itself with a unionized staff with which it must bargain.

The Secretary of Labor is responsible for enforcing these new successorship hiring standards. Violations will be remedied by a procedure other than that set forth under the National Labor Relations Act ("NLRB") and can result in a three-year debarment for the contractor, its responsible officers, and any firm in which the contractor has a substantial interest. The debarment provisions grant the Secretary wide latitude to sidestep the NLRA.

EXECUTIVE ORDER 3 :

Economy in Government Contracting

Issued: January 30, 2009

Applies to: Federal contractors

Effective: Immediately

Government contracts increasingly are awarded on a cost-reimbursement basis. Critics, including President Obama, argue that they give contractors no incentive to control costs.

Contractors, on the other hand, insist these contracts are appropriate when the total expenditure over the life of a contract is uncertain. This Executive Order makes union avoidance costs disallowed expenses, meaning such costs must be separate from any overhead or other expenses that may otherwise be attributed to the contract.

Effective for all federal contracts resulting from solicitations issued on or after the effective date, contractors may not seek reimbursement for any expense undertaken to persuade employees whether or not to join a union. Covered expenses include, but are not limited to, the cost of preparing materials, the hiring of legal counsel or consultants, holding meetings (including the cost of salaries for attendees) and planning or conducting a persuasive activity.

These new prohibitions introduce a

significant hurdle for non-union contractors on cost reimbursement contracts who are seeking to remain union free. New accounting procedures may be needed to segregate out these unallowable costs. While the Executive Order does not establish a new penalty structure, unwary contractors risk being denied reimbursement for substantial costs related to common employer activities; in many settings, such as defense contracting, seeking reimbursement of unallowable costs can result in a 200% liquidated damage penalty.

EXECUTIVE ORDER 4 :

Mandatory Project Labor Agreements

Issued: February 6, 2009

Applies to: Federal contractors and subcontractors on construction projects

Effective: Immediately

This Executive Order authorizes executive agencies of the federal government to require every contractor or subcontractor on a large-scale construction project to negotiate or become a party to a Project Labor Agreement ("PLA") with one or more labor organizations. A PLA is a pre-hire collective bargaining agreement between contractors and one or more unions that establishes the terms and conditions of employment for a specific construction project. The stated rationale for this Order is that a PLA can promote the "efficient and expeditious completion of Federal construction contracts" by ensuring a "steady supply of labor" and the avoidance of "labor disputes" which can delay the project.

Specifically, the Order applies to government-funded projects providing for "construction, rehabilitation, alteration, conversion, extension, repair or improvement of buildings, highways or other real property" where the total cost to the federal government is \$25 million or more. The Order has a broad sweep. It provides that the contracting government agency may mandate a contractor to use a PLA if use of such agreement is consistent with law and "will advance the Federal Government's interest in achieving economy and

efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters."

The National Labor Relations Act generally prohibits any legislative or executive regulatory action prohibiting or mandating an employer from becoming party to an agreement with a labor organization. However, the Supreme Court has recognized an exception to this principle when the government is acting as a "proprietor" and interacting with private participants in the marketplace. So where the government is the "customer," it can insist on whatever contract provisions the contractor is willing to accept. In other words, if a contractor does not like the idea of a PLA, that contractor can simply not pursue any federal contracts.

Given the current drop in construction work available other than what may be coming out of the new federally-funded stimulus package, most contractors may feel unable to forego pursuing such work. This effectively forces more employers to become unionized: Once their employees are represented by a union on a PLA, those workers may insist on being represented on other work. In fact, many unions who currently favor PLAs attempt to include language that will automatically extend the terms of the agreement to all other operations of the employer.

Currently, even where a bargaining obligation exists, federal law does not require an employer to make any specific concession to a union's bargaining demands. This Order does not purport to change the nature of an employer's obligation to bargain in good faith. But under this Order, these employers could be told that their agreements are not with the "appropriate" union or unions, or that the terms of those agreements are inadequate for a particular PLA. Before bidding on contracts subject to a government-mandated PLA, such employers need to understand the

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STRUGGLING EMPLOYERS TO FRONT THE COST!

COBRA Premiums to be Subsidized

The new “American Recovery and Reinvestment Act of 2009” — commonly known as the “Stimulus Package” — was signed into law on February 17, 2009 and includes provisions aimed at helping unemployed workers hold onto their health insurance benefits. The new law will require employers to track-down any employees who were involuntarily terminated since September 1, 2008, as well as their eligible dependents.

COBRA Background: Since 1986, employees (and other insurance plan participants) who would otherwise lose health insurance coverage due to any one of a list of “qualifying events” had the right to elect to continue their health insurance coverage by paying the full

cost of the applicable premiums under a law known as “COBRA.” One of these qualifying events is the loss of employment.

The “New and Improved” Stimulus Package COBRA: The Stimulus Package amended COBRA in a way that will affect every employer that sponsors an employee group health plan and has terminated or laid off an employee on or after September 1, 2008. These amendments create additional COBRA notice requirements and affect payroll tax administration in order to administer a temporary federal subsidy of COBRA premiums.

Employers will have to act quickly to implement the new requirements, which will include locating certain former

employees (and their eligible dependents) and provide them with a special notice of their new COBRA rights.

Assistance Eligible Individuals Pay Only 35%: Under the new law, for COBRA coverage periods beginning on or after February 17, 2009, “assistance eligible individuals” will be required to pay only 35% of the applicable COBRA premium. Employers that provide group health coverage through insurance will need to cover the remaining 65% of the premiums until reimbursement can be requested from the federal government. Employers that provide coverage through insurance or self-insurance will be able to obtain reimbursement of the **COBRA Changes:** *continued on next page*

Executive Orders

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implications it might have for their current relationships and agreements.

What Should Employers Do Now

Take Stock of Your Government Contractor Status: What You Don't Know Can Hurt You. An employer can be a “government contractor” under some laws but not others, even though the employer clearly holds government contracts. This is so because under certain laws, government contractor obligations “kick in” only after the employer reaches a certain size and derives a specified amount of revenue from its government contracts.

Making “contractor status” even more complex, many government contractor obligations apply equally to “subcontractors” who have no direct dealings with the federal government, but who provide goods or services necessary to the performance of the prime contract.

Prudent employers should inventory their government contracts and

subcontracts completely to determine which contracts are current and their dollar value. Then they should consider consulting counsel familiar with government contractor obligations to determine which obligations apply to them and how they can best ensure compliance.

Inventory Your Employee Postings and Contracts to Ensure Compliance: With the new Executive Orders requiring a new posting about employee rights and new contract obligations, it is a good time to review all workplace postings and required contract clauses to ensure you are complying with your obligations. Employers also should check on their compliance with other general employment laws that may require postings and other obligations.

Scrutinize Your Process for Requesting Cost Reimbursements under Government Contracts: As noted above, new Executive Order, “Economy in Government Contracting,” will prohibit reimbursement under government contracts for “disallowable expenses” broadly related to educating employees about union representation. The Executive Order, however, expressly states that it “does not restrict the

manner in which recipients of Federal funds may expend those funds.” This can get very confusing, and how disbursement requests are framed — and whether to build the costs for such activities into the upfront fees negotiated with the government agency — may determine whether they will be covered. Contractors should scrutinize the procedures they use to seek reimbursement for activities under contracts, and the language used to characterize those activities.

Be Mindful of Potential Successorship Obligations When Negotiating Government Contracts: The Executive Order regarding successor hiring substantially imposes a “right of first refusal” hiring requirement for the predecessor’s employees. While the successor employer has the right to negotiate new contract terms, this right of first refusal in hiring for (often unionized) employees increases the likelihood that the successor will need to deal with the same union its predecessor dealt with. This may make it more difficult for the successor employer to achieve any labor cost efficiencies.

COBRA Changes

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65% premium subsidy as a credit against their quarterly federal employment tax filings.

Subsidy Only for 9 Months (or Sooner): The language of the Act suggests the subsidy would apply regardless of the level of coverage (single, single plus one, family, etc.). The subsidy would be available for up to 9 months; however, the subsidy can end sooner, such as when the maximum continuation period under COBRA expires, or when COBRA coverage otherwise would end.

California COBRA Strikes with Only 2 Employees: Even though *Federal COBRA* does not apply to small health plans (i.e., the employer sponsoring the plan has fewer than 20 employees), California has its own version of COBRA that extends COBRA rights to employers with as few as two employees in its group plan. The new federal subsidy would be available with respect to such plans, and employers will need to assist their insurance carriers in identifying eligible individuals.

Involuntary Termination Defined: Individuals who are or were otherwise eligible for COBRA continuation coverage, and who lost coverage under their employer-sponsored group health plan due to an involuntary termination of employment between September 1, 2008 and December 31, 2009, and who elect COBRA continuation coverage, are "assistance eligible individuals."

The new law does not discuss what constitutes an involuntary termination. However, the IRS has issued guidance indicating that pretty much any type of involuntary termination (and even some resignations) will qualify for the subsidy, including an involuntary termination for cause, unless it amounts to a COBRA "gross misconduct" situation.

More Disputes Over "Gross Misconduct" Expected: Most employers previously have not worried too much about classifying a termination as being for "gross misconduct," since the ex-

employee paid all of the COBRA premiums anyway, so why worry about fighting over the ex-employee's right to elect COBRA? Now, with the employer having to front 65% of the premiums, such fights are more likely to occur.

Expecting more disputes like this, the Stimulus Package requires the U.S. Department of Labor ("DOL") to provide for expedited review of any situations where an individual requests treatment as an assistance eligible individual and the group health plan denies that treatment. Under this provision, the DOL is required to make its determination within 15 business days of the date it receives the individual's application for review.

New Election Period to Begin February 17, 2009: Congress recognized that many recently-terminated individuals may have declined COBRA coverage because of its cost. Accordingly, the new law includes a special election opportunity for assistance eligible individuals who were eligible to elect COBRA coverage when they were terminated from employment, but did not so elect. These individuals are entitled to a new election period that begins on February 17, 2009, and ends no sooner than 60 days after an extended election notice is provided to the individuals.

Because of this new extended election period, employers must locate former employees who previously declined COBRA and provide notice of the right to COBRA coverage with the government subsidy. If an eligible individual elects COBRA continuation coverage during the special extended election period, COBRA coverage will commence with the first period of coverage beginning on or after February 17, 2009.

Date of "Qualifying Event" Critical: However, for purposes of determining the maximum COBRA coverage period, the date of the individual's involuntary termination of employment (or the date of the loss of coverage resulting from such termination, if applicable) will continue to be treated as the "qualifying event." This means that the COBRA continuation coverage period available

to an individual who makes an election during the extended election period will be determined based on the date of the qualifying event as described above.

For example, an assistance eligible individual terminated on September 30, 2008, who makes a timely election during the extended election period, generally will be entitled to COBRA continuation coverage prospectively beginning March 1, 2009, though the 18-month maximum coverage period is measured from October 1, 2008.

Assistance eligible individuals who already elected and paid for COBRA are entitled to reimbursement from the employer for the 65% to be subsidized, or a credit of that amount against future COBRA premium payments. The credit is permissible depending on whether it is reasonable to expect the individual to use it within 180 days of the full premium payment.

Employer Reimbursement through Payroll Tax System: Because the federal COBRA premium subsidy is reimbursed to employers through the federal quarterly payroll tax reporting system, employers must advance the premium subsidies until the employer's payments can be recouped through reduced federal payroll tax payments. Employers will have to determine the total amount of the subsidy with respect to premiums received during the federal payroll tax reporting period from assistance eligible individuals that have elected COBRA continuation coverage.

The employer may use this amount as an offset to its federal payroll tax liability. For purposes of the new law, "payroll taxes" includes amounts to be withheld for federal income tax and the employer and employee portions of FICA, Social Security and Medicare taxes.

To the extent that such amount exceeds the amount of the employer's liability for these federal payroll taxes, the Internal Revenue Service will reimburse the employer for the excess directly. If an employer claims too much in reimbursement, it will be treated as an underpayment of federal payroll taxes to be assessed and collected accordingly.

COBRA Changes: *continued on next page*



OVERTURNS LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

President Signs “Lilly Ledbetter” Law

The first bill signed into law by President Obama was the “Lilly Ledbetter Fair Pay Act” on January 29, 2009. The law overturns the 2007 ruling in the case of *Ledbetter v. Goodyear Tire and Rubber Company*, in which the U.S. Supreme Court ruled that Ledbetter was no longer entitled to file a wage discrimination claim because she had failed to do so within 180 days of the initial discriminatory wage decision.

Every New Paycheck a New Violation: She had alleged that she was paid less than her male counterparts because of her gender. The Court rejected her argument that, although the initial discriminatory pay decision was made years earlier, every new paycheck (and pension check) was tainted by discrimination and constituted a new violation.

The Act amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act to

declare that an unlawful employment practice occurs not only upon adoption of a discriminatory compensation decision or practice but also when the individual becomes subject to the decision or practice, as well as each additional application of the decision or practice.

Backpay Awards Limited to Two Years, but Record Retention an Issue:

In other words, the 180-day statute of limitations will now be extended on every occurrence of a discriminatory employment practice, including issuance of paychecks. The new law does retain some limits on employer liability by restricting back-pay awards to two years, but employer questions and concerns will still arise, particularly with regard to record retention requirements (more on this later).

Is Every Pension Check a New Violation? Even more far-reaching is the fact that the Ledbetter law’s

“discriminatory impact” would also extend to the impact of old pay practices on current pension payments. Presumably, if you were paid less because of your sex or race thirty years ago, you would be receiving less money in your pension checks now, making each pension payment a new violation.

Rounding Up Witnesses from Previous Decades a Challenge: That means employers could be required to prove why a plaintiff’s pay rate was non-discriminatory when it was set decades before. This would require proof of facts such as the relative qualifications, skill levels and negotiating prowess of other employees.

Aside from the unlikelihood of finding any witnesses who could testify as to such facts, this raises serious questions about the types of records prudent employers should retain and for how long. While certain pay data might be retained indefinitely to ensure accurate pension calculations, an employer may need to permanently retain information about why each person’s wages were set as they were.

Consult Your Lawyer: There is little doubt that in Ledbetter cases, employers will be hard-pressed to find proof of the reasons for decades-old pay decisions. In the present, employers need to carefully draft policies and procedures for data retention regarding how pay scales are established and pay rates are set. Additional data to consider for long-term record retention include economic factors (for example, the current recession and the existence of a “buyer’s market” for labor) that may have resulted in the hiring of a new employee at a pay rate significantly lower than the rate paid to a new hire just a year or so ago.

A more troubling issue for employers is whether to expend effort now to unearth their ancient compensation records in anticipation of the increased litigation expected to be brought on by Ledbetter.

COBRA Changes

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Temporary COBRA Notification Requirements: Employers will need to amend their current COBRA election notices temporarily to include general information about the availability of the premium subsidy and, if applicable, the option to enroll in different coverage. Specifically, the notices must include:

- 1. The forms necessary for establishing eligibility for the premium subsidy;
- 2. Contact information of the plan administrator and any other person with information regarding the premium subsidy;
- 3. A description of the extended election opportunity for those who previously declined COBRA continuation coverage;
- 4. A description of an assistance eligible individual’s obligation to

notify the plan when he or she becomes eligible for coverage that would cause eligibility for the subsidy to cease and the penalty for the failure to do so;

- 5. A prominent description of the qualified beneficiary’s right to the COBRA subsidy and any conditions on such right; and
- 6. A description of the option to enroll in different coverage under the health plan, if applicable.

This information must be included in the COBRA election notices provided to persons who become eligible for COBRA continuation coverage on February 17, 2009 or later. For assistance eligible individuals who became eligible for COBRA continuation coverage prior to February 17, 2009, a similar notice must be provided not later than April 18, 2009. The Department of Labor has issued sample notice forms, which can be found at <http://www.dol.gov/ebsa/COBRAModelnotice.html>



EMPLOYERS AND EMPLOYEES DIVE INTO THE GOODIES

Stimulus Package Creates More Changes

In addition to the new and expensive changes to COBRA, the “American Recovery and Reinvestment Act of 2009”, otherwise known as *The Stimulus Package*, also made some changes that employers will need to handle. Here are some key changes:

□ **1. New Tax Withholding Tables to “Make Work Pay”:** The “Making Work Pay” tax credit means less federal income tax withheld from workers’ pay, which should have been started no later than April 1, 2009. Employers also need to know that the IRS has issued updated withholding tables to help you implement the withholding adjustments required by the new stimulus law.

The average American worker will see about \$13 more per weekly paycheck in 2009, and about \$9 more in 2010. The credit, which amounts to 6.2% of earned income up to \$400 for single taxpayers (\$800 for married taxpayers) begins phasing out at \$75,000 (\$150,000 for married taxpayers). Only employees with valid Social Security Numbers qualify for this credit. *Warning:* It is not clear how companies should handle new hires that may have already received a portion of the credit from a previous employer.

□ **2. New COBRA reporting duties on Form 941 for Payroll:** Any COBRA subsidies paid by the employer must be reported on an updated Form 941 that is now available on the IRS website at www.irs.gov. In the new Form 941, the credit is claimed on Line 12a which reads “COBRA premium assistance payments.” The employer may provide the subsidy — and take the credit on its employment tax return — only after it has received the 35 percent premium payment from the individual (for additional information, see “COBRA Premiums to be Subsidized”, page 4 of this newsletter.)

□ **3. Work Opportunity Tax Credit:** Under the new stimulus law, the Work Opportunity Tax Credit (“WOTC”) is available for employers hiring individuals from one or more of nine targeted groups, including welfare

recipients, food stamp recipients (age 18-39), poor and disabled veterans, youth from disadvantaged geographic areas, Supplemental Security Income recipients, and qualified ex-felons. An individual is not treated as a member of the target group unless she or he received a certification from a designated local agency before starting work or the employer completed a request for certification within four weeks of hiring the employee.

The credit is determined by the amount of qualified wages paid by the employer. Certified employees must work a minimum of 120 hours. Generally, the subsidy level is 40 percent (25 percent for employment of 400 hours or less) of qualified first-year wages up to \$6,000, resulting in a maximum subsidy of \$2,400 per qualified worker. Additional complications apply (of course), so consult with appropriate compensation professionals.

□ **4. Tax-Free Transit Benefits for Employees and/or Employers:** The stimulus package also features a significant change in IRS code 132(f) regarding employer-provided commuter benefits. Prior to the new law, employees were eligible to set aside up to \$120 on a pretax basis to pay for transit and vanpool commuting costs and \$230 to pay for work-related parking. Employers could also provide a tax-free subsidy or fringe benefit for the same amount. Thanks to the stimulus package, the transit/vanpool benefit cap has been increased to \$230, rectifying an imbalance with parking savings that dates back to the earliest days of commuter benefits.

A commuter spending more than \$200 on his or her monthly transit commute can save up to \$1,000 per year if he or she enrolls in a commuter benefits program, which will give many families important financial relief. Additionally, this cap increase helps offset the many looming fare increases that commuters have been facing across the nation.

Employers will benefit from this historic change as well; companies offering the benefit could save up to an additional \$100 per employee per year in payroll taxes. According to a recent survey by BusinessWeek Research and TransitCenter, commuter benefits plans are a growing trend among the nation’s corporations.

The new cap increase also promises a significant environmental impact if it has the predicted effect of causing more employees to take advantage of transit commuting by switching from driving to work and using transit more often.

□ **5. Earned Income Tax Credit Increase:** In 2009 and 2010, the Stimulus Package increases the Earned Income Tax Credit for working families with *three or more children* to 45% of the family’s first \$12,570 of earned income. It also increases the start point of the phase-out for married couples filing jointly by \$1,880. As a result of these changes, more workers may submit Forms W-5 to receive the credit. Look for revised Advance Earned Income Tax Credit tables in Publication 15, Circular E.

□ **6. W-4 Withholding:** Other employees may need to fill out a new Form W-4 to adjust their withholding in light of changes to federal income tax withholding (e.g., the AMT patch) and other tax credits (e.g., first-time home buyer credit). Look for revised withholding tables and additional guidance.

□ **7. “Employ American Workers Act”:** Employers who receive funding under the Troubled Assets Relief Program (“TARP”) are barred from hiring additional H1-B foreign workers unless the employer has complied with the H1-B “dependent employer” rules. Employers receiving TARP funding will have to attest that no U.S. worker in an equivalent position has been laid off during the 90-day period prior to filing an H1-B petition to hire a foreign worker.

Stimulus Package: cont’d on next page



DLSE OPINION AND REQUIREMENTS ISSUED

Wage Overpayment Deductions Revisited

The California Division of Labor Standards Enforcement (“DLSE”) recently issued an opinion letter regarding whether an employer may deduct an overpayment made in one paycheck from the employee’s next paycheck. On its face, it may appear to be a simple problem with an obvious solution, but as with many aspects of California employment law, that is definitely not the case.

The opinion letter addressed the *specific situation* in which the employer’s regular pay practices resulted in the overpayment:

“Where the employer’s payroll system automatically prepares checks for non-exempt employees based on the number of hours each employee is expected to work; the employee then submits a timesheet showing fewer hours worked than anticipated, but the check has already been issued.”

The DLSE opined that, subject to certain restrictions, the employer may be able to deduct the overpayment from the next check.

□ How Convoluted Can This Process Be? The DLSE stated that, in its opinion, periodic deductions from wages authorized in writing by an employee to recoup *predictable, expected overpayments* that occur as a result of the employer’s payroll practices would not violate California law. [Editorial comment: *one wonders how to recoup an overpayment if it were a one-time, unpredictable error, as is hopefully the case?*] However, the DLSE stressed the following requirements for this to be permissible:

□ Requirement 1. Written Authorization is Required: The employer cannot claim that the employee tacitly agreed to its policy to deduct overpayments merely by submitting a time record. The authorization must be in writing, and must expressly and voluntarily

authorize a specific, prospective deduction. Naturally, this carefully worded agreement should be drafted by an employment attorney, and voluntarily executed by the employee.

□ Requirement 2. Prohibition of Deducting from Wages Previously Paid: The deduction must not violate Labor Code Section 221, which prohibits the unlawful collection of wages previously paid. The DLSE opined that the deduction of an overpayment as described in this scenario did not violate this provision. This is because the deductions were not an illegal “kickback” or rebate; the employer is simply recouping an overpayment of an ascertainable amount for hours not worked in the prior pay period. The DLSE noted that the employee is still receiving full pay for the wages owed for the time actually worked.

□ Requirement 3. Maintain Minimum Wage: The DLSE emphasized that a deduction to recover an overpayment must not reduce the employee’s paycheck to less than minimum wage for that paycheck. So where an overpayment in one paycheck is enough that deducting it from the next paycheck means that second check will equal less than minimum wage for the hours worked in the period covered by that second check, the deduction would violate minimum wage requirements. In such circumstances, the employer might need to negotiate a payment plan (outside of their payroll system), or take the employee to small claims court.

□ Requirement 4. Final paycheck rule: Labor Code Section 203 requires full payment of all wages when an employee is terminated or resigns. According to the DLSE, deductions from a final paycheck for prior overpayments would violate this law. The only deductions permitted from a final paycheck would be for legally-

required payroll taxes and other deductions specifically authorized by law.

□ Recommendations: Employers should take steps to prevent inadvertent overpayment of wages. The best way to prevent this is to ensure that you leave sufficient time for adding up the hours on the actual employee timesheets between the employees’ submission of time records and the issuance of paychecks. If you need to change the payday to make this happen, then the employer should consult an expert before taking such a sensitive and technically critical action.

Of course, an employer could request that employees sign an authorization for the deductions of future overpayments — this would meet requirement 1 of the 4 requirements detailed by the DLSE. Care would need to be taken, however, that requirements 2, 3 and 4 be precisely followed. ✓

Stimulus Package

Continued from previous page

□ 8. Increased “Whistleblower” Protection: Non-federal employers who receive stimulus funds may not retaliate against an employee for providing information that the employee reasonably believes to be evidence of:

- 1. gross mismanagement of a contract related to covered funds;
- 2. gross waste of covered funds;
- 3. dangers to public health or safety related to the use of public funds;
- 4. an abuse of authority related to the use of covered funds; or
- 5. a violation of a law, rule, or regulation related to a contract or grant related to covered funds.

Non-federal employers include all private employers as well as state and municipal employers. ✓



ETHERIDGE CASE DECIDED MARCH 27, 2009

Mandatory Tip-Pooling Policies

The first calendar quarter of 2009 produced several Appellate Court rulings about the legitimacy of mandatory tip-pooling policies. Such policies are fairly common in restaurants and require that all tips be pooled and shared among a variety of employees, and not be treated as belonging only to the server responsible for the particular guest who left the tip. In each of these new cases, the Court held that the employer could lawfully impose the mandatory tip-pooling arrangements at issue.

□ **Tip Pooling for Direct Table Service Workers Only at Issue:** The most recent, and most expansive, of the new cases is *Etheridge v. Reins International, California, Inc.* (“*Etheridge*”), which was decided by the Court of Appeals on March 27, 2009. In that case, the Court upheld the arrangement requiring that the tips be shared among servers, bussers, bartenders, kitchen staff and dish-washers. The servers were required to share their tips as a condition of their employment. The servers did not contest the requirement that bussers share in the tip pool, but challenged the inclusion of employees who do not provide “direct table service.”

□ **Making it up as they go:** Although no statute specifically addresses tip-pooling, California Labor Code Section 351 states that no employer or agent shall take or receive any part of a gratuity that is paid to, given to or left for an employee by a patron. This has long been held as prohibiting the *owners* or *managers* of a business from sharing in tips left for workers.

But if the tip belongs to the employee, then can an employer require the employee to share such tips? Would that not be the same as the employer taking away tips, even though the tips are then given to other non-managerial employees?

□ **Searching for Clarity:** In 1990, the Court in the case of *Leighton v. Old Heidelberg, Ltd.* (“*Leighton*”) held that

tip-pooling was permissible. The *Leighton* Court noted that Labor Code Section 351 did not address tip-pooling — it addressed owners and managers who might be tempted to steal tips meant for the workers. Since the tips were not going to management or owners, the pooling did not violate Section 351.

The Court noted that Section 351 also states that “Every gratuity is hereby declared to be the sole property of the employee or *employees* to whom it was paid, given or left for.” This meant that a tip *could be* intended to benefit more than a single employee.

The Court in *Leighton* noted that what controlled was the *intent of the patron*, meaning that there was little reason to assume that the tip belonged exclusively to the server in the first place. After all, the patron does not consciously decide who gets the tip. Assumedly, they tip based on the entire experience; great service from the busser can result in a generous tip even if the server was inattentive. The Court concluded that a tip-pool that equitably distributes the tip does not constitute a taking of employee property.

□ **Direct Table Service Employees Win in Leighton:** Along these lines, the Court in *Leighton* mentioned that “the average diner has little or no idea and does not really care who benefits from the gratuity he leaves, as long as the employer does not pocket it, because he rewards good service, no matter which one of the employees *directly* servicing the table render it.”

As a result of this comment, the enforcement agencies have operated on the basis that only employees involved in “direct table service” are permitted to be included in tip-pooling arrangements. The only exception would be where there was some *direct* proof that the customer intended others to share in a particular tip. *This has been the controlling standard for nearly two decades.*

□ **Direct Table Service Employees Lose in Etheridge:** In *Etheridge* the

Court *rejected* the requirement that only employees engaged in “direct table service” could be included in mandatory tip-pooling arrangements. The *Etheridge* Court first noted how no statute mentions “direct table service.” It then seized upon the *Leighton* Court’s comment about patrons tipping based on the entire experience, and noted that good service depends on more than the server and busser.

The *Etheridge* Court cited the other, recently-decided cases that approved tip-pooling. Tip-pooling among employees in the “chain of service” was held to be legal, and consistent with the Supreme Court’s holding in *Leighton* in which tips could be pooled among those who “contributed” to a patron’s service.

Finally, the *Etheridge* Court held that the tip-pooling policy must be fair in terms of the amounts being shared. In *Etheridge*, there was confusion over the employer’s policy, which said, for example, that servers must “tip-out” 7% of their drink sales to the bartender and 7% of their food sales to the kitchen.

In a concurring opinion, one of the judges noted that 14% of the total underlying sales would result in nearly all of the tip going to the bartender and kitchen, and would not be consistent with industry standards. Since this was not part of the main opinion, this did not alter the outcome of the case; however, it does suggest that the equitable distribution of tips through mandatory tip-pooling policies will be the next battleground.

□ **What this means:** Mandatory tip-pooling may legally be imposed by an employer, so long as the employer or its agents (managers, supervisors, etc.) do not share in the pool. It is legal to include any employees the employer wishes to include, where the included employees contribute to the quality of the patron’s service.

The tip-pooling policy should be very clear about how the tips are to be distributed (i.e., based on percentage of

Tip Pooling: *continued on next page*



EMPLOYMENT APPLICATION FORM LANDMINE!

California Marijuana Protection Continues

The California Courts continued to support the State's love affair with marijuana in a recent decision regarding the law that prohibits employers from asking job applicants about most marijuana-related convictions that are more than two years old.

A new California appeals court decision, *Starbucks v. Superior Court (Lords)*, highlights the fact that employers must be extremely clear with applicants that they are not seeking this barred information.

Employment Applications a

Source of Litigation: The case arose out of some boiler-plate language Starbucks had in its employment application form. The form asked applicants whether or not they had been convicted of a crime in the past 7 years. Much later in the form, *very separate from this question*,

the form set forth a disclaimer for California applicants regarding information that should be omitted from the answer to the criminal-convictions question, including any information about convictions for "possession of marijuana (except for convictions for the possessions of marijuana on school grounds or possession of concentrated cannabis) that are more than two years old, and any information concerning a referral to, and participation in, any pretrial or post trial diversion program.

Location, Location, Location:

The court had no problem with the actual language of the disclaimer, but had serious concerns about its location on the form. The court held that the disclaimer would have been fine if it had immediately followed the question about convictions. Instead, the

disclaimer was in the middle of a large paragraph, in the same chunk of text as other disclaimers. Even though the disclaimer was in a boldface font, so was just about everything else in that section, which the court noted would negate any value to be gained by such emphasis.

Conclusion: This case illustrates the importance of a carefully crafted job application form. Not only must the form not request information that could be viewed as discriminatory based on factors such as age, gender, race, disability, etc., there are many other laws that impact how otherwise legitimate questions must be posed. Employers should have their current application forms reviewed by an experienced employment-law attorney to avoid such preventable problems.



FURTHER DELAYS ARE STILL POSSIBLE!

New I-9 Form and E-Verify Delayed

New I-9 Form

The U.S. Citizenship and Immigration Services ("USCIS") recently announced a 60-day delay in implementing the new Form I-9 for employment eligibility verification for new hires. The new I-9 forms were to take effect February 2, but will now take effect on April 3, 2009.

The most significant changes in the new form are:

- 1. Only unexpired documents will be acceptable to verify identity;
- 2. Several new documents have been added to List A (Documents which prove identity and employment authorization) including:
 - Passport Cards (a U.S. alternative to the traditional passport, which the State Department began issuing in mid-2008);
 - Passports issued by foreign countries which contain a permanent residence notation printed on a machine-readable immigrant visa;
 - Passports from the Federated States of Micronesia ("FSM") or the Republic of the Marshall Islands ("RMI") with Form I-94 or Form I-94A.
- 3. The following are no longer acceptable documents for verifying identity and work authorization:
 - Obsolete versions of the Employment Authorization Document ("EAD") Forms I-688,

I-688A and I-688B.

Note that the current version of the EAD (I-766) is still an acceptable List A document. A copy of the new I-9 forms can be downloaded from the USCIS at <http://www.uscis.gov/i-9>.

E-Verify Delayed

The federal government has decided to postpone until June 30, 2009, implementation of the E-Verify requirement for federal contractors and subcontractors, marking the third delay since the final rule was issued six months ago. The final rule applies to prime federal contracts with a period of performance longer than 120 days and valued above \$100,000 and to subcontracts for services or construction valued at \$3,000 or more.

The Federal Acquisitions Regulatory Council further extended the E-Verify rule to June 30, 2009, in order to permit the new Administration an adequate opportunity to review the rule.

Tip Pooling

Continued from previous page

the total tips, job category, etc.) and the proportions being distributed must fairly and reasonably reflect the relative contribution of those in the pool. Careful drafting and implementation of mandatory tip-pooling policies is essential to avoiding the next wave of attacks on such practices.



ALTERNATE WORKWEEK & PREVAILING WAGE

Two New California State Laws

Alternate Workweeks

During the second emergency session of the California Legislature, lawmakers passed ABX2 5, which provides greater flexibility in alternative workweek arrangements. The new rules go into effect May 21, 2009.

The (Soon-To-Be) Old Law:

Existing law allows employees of an identifiable work unit to adopt a regularly-scheduled alternative workweek, providing it is approved by two-thirds of the employees in a secret ballot election. Note that other rules also apply when seeking an alternate workweek. The alternative workweek schedule cannot authorize employees to work longer than 10 hours per day in a 40-hour workweek without overtime pay.

Under the current law, at least one day of the weekly alternate schedule had to be other than 8 hours. Current law also permits an employee, with the approval of the employer, to move from one alternative workweek menu scheduling option to another, but does not specify how frequently this can be done by the employee.

The (Soon-To-Be) New Law: The new alternate workweek regulations specify that the menu of alternative workweek schedule options may include a regular schedule for five day, 8-hour days ("5x8"), and that the employee can move from one alternative workweek schedule to another on a *weekly* basis. This means employees as a unit may vote for the alternate schedule but still have the flexibility to work a regular 5x8 if and when they choose (assuming the employer approves).

The new law clearly provides more flexibility with the result being that, depending on how the work unit votes, the alternate workweek could become an occasional option, rather than the regular schedule.

The new law also clarifies the definition of a readily identifiable "work unit" to include, for the purposes of an alternative workweek election, a division, department, job classification, shift, separate physical location, or a recognized subdivision. Note that the new law also states that an otherwise appropriate work unit will not be disallowed solely because it is composed of a single worker.

Prevailing Wage

Also signed into law during the second emergency session of the California Legislature was ABX2 9, which is an attempt to state the intent of the legislature regarding some hotly-contested issues in prevailing wage law.

Talk About Confusing! There has been and continues to be litigation over the Legislature's constitutional authority to impose prevailing wage obligations on municipal projects of charter cities. This new law acknowledges this litigation. Further, if the legislation is found to lack constitutional authority (to impose prevailing wage obligations on municipal projects), then the new law's additional provisions will kick in. Those additional provisions state that the mere expansion of a charter city's water, sewer, or storm drain systems into a disadvantaged community will not (by itself) subject further work on those systems within the charter city's boundaries to prevailing wage obligations.

The Strategic *EMPLOYER*

April 2009 ~ Susan S. Waag, Esq. ~ (805) 783-2300

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Susan Waag to give Legal Update Tues. April 28, 2009

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

Ms. Waag will be speaking on "What's New in Employment Law" on April 28, 2009 from noon to 1pm, for the Los Osos / Baywood Park Chamber of Commerce. The meeting will take place at the La Palapa Restaurant, located at 1346 2nd Street in Baywood Park.

For more information, contact the chamber at (805) 528-4884 or chamber@fix.net or www.lososobaywoodpark.org/chamber