



The Strategic EMPLOYER

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

The Current State of Small Employers in California

With the recession still raging at full strength, the business climate continues to be difficult, to say the least. One benefit of the insanely huge California budget deficit is that our legislators and Governor have held back the normal onslaught of new and onerous employment laws that employers must deal with (see Page 2 of this newsletter for details).

On the federal side, however, there is much activity. President Obama's pledge that, with the passage of the federal stimulus package, national unemployment would peak at 8.2% hasn't played out the way he'd hope. Instead, we have 10.2% unemployment, with the real number believed to be

closer to 17% when taking into account those who have stopped looking for work. This condition has precipitated talk of another federal stimulus, using unspent TARP money this time around. Unfortunately, small employers don't seem to benefit much from what's offered in these big packages.

What this means is that the little guys (and that's most of us) have quickly learned how to fend for ourselves, as we can expect little help from the government or anyone else. This often manifests itself by enacting layoffs and / or furloughs, while trying to take advantage of the few crumbs thrown to us (bonus depreciation, for example) combined with reinventing at least part of the business to bring in more revenue.

This newsletter brings some good news for struggling businesses ("Reduced Workweeks allowed for Exempt Employees", page 5), but mostly it details added complexity and minefields for employers to tip-toe through (almost the rest of the newsletter).

As always, WAAG AND CO. is here to assist you and your business in navigating through the latest quagmire. Good luck in 2010 — you are going to need it!

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 400 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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SMALL CROP DUE TO BUDGET CRISIS DISTRACTION

New California Laws Signed in 2009

Once again this year, due to the distraction of the massive state budget crisis, Governor Schwarzenegger (thankfully!) signed relatively few bills affecting employers in 2009. Of those that the Governor did sign, most were related to state employees, teachers and peace officers. Only a few were of interest to most employers and businesses. Here they are:

AB 23 (Effective Immediately, signed May 12, 2009): This bill was passed in order to tie-in Cal-COBRA (California's insurance continuation law) with the federal changes adopted as part of the U.S. stimulus package. The new law requires employers and health insurers, among others, to provide notice of the availability of health plan premium assistance under the federal stimulus package to individuals eligible for that assistance, and makes other changes to allow those

individuals to receive Cal-COBRA coverage with premium assistance. The bill was marked "urgent," meaning it was effective upon being signed.

SB 313 (Effective Immediately, signed November 2, 2009): Existing law requires the State to issue a "stop order" on any employer who has failed to secure workers' compensation insurance covering every employee. The "stop order" prohibits the employer from using any employee labor until the matter is resolved. Additionally, under existing law, at the time the stop order is issued and served, a penalty is imposed on the employer equal to \$1,000 per employee. If the employer has been uninsured for more than one week, then the penalty is the greater of:

1. Twice the amount the employer would have paid in workers' compensation premiums during the period the employer was uninsured or

2. The sum of \$1,000 per employee employed during the period the employer was uninsured.

The new law increases the penalty assessment to \$1,500 per employee employed during the period the employer was uninsured.

SB 367 (Effective Immediately, signed November 2, 2009): This bill amends the Unruh Civil Rights Act, which prohibits discrimination by businesses in the accommodations, facilities and services they provide. This new law states that any discount or other benefit offered to, or conferred on, a consumer or prospective consumer by a business because the consumer or prospective consumer has suffered the loss or reduction of employment or reduction of wages would not be considered arbitrary discrimination in violation of that act.



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

Vetoed State Bills

The following bills had enough support to be passed by the Legislature and make it to the Governor's desk, but were vetoed. Some of the more significant employment-related bills that were vetoed (but are likely to be back) include:

SB 242: This bill would have made it unlawful for employers to discriminate against an employee based on the employee's primary language, or to ban employees from speaking any language in the workplace, unless there's a business necessity for prohibiting employees from speaking a particular language. Note, however, that while employers can still require employees to speak a particular language in the workplace, discrimination based on ethnicity or national origin remains prohibited.

AB 793: This bill would have amended California antidiscrimination law to mirror the requirements of the

newly enacted federal Fair Pay Act ("FPA"), which increases the amount of time an employee has to file a pay discrimination claim and adds penalties for equal pay violations. In his veto message, the Governor reasoned that a separate California law was unnecessary, since the new FPA covers California employers.

AB 527: This bill would have amended existing law regarding investigations into payroll practices, providing that if the Labor Commissioner found that an employer intentionally falsified an employee's payroll records, the records would be presumed false for that entire pay period and disregarded. Employers should note that falsifying such records already carries numerous, serious consequences.

AB 943: Under current law, an employer can obtain an applicant's or an employee's credit report if the

employer gets written authorization from the applicant / employee ("A/E") and provides the A/E with a copy of the report. This bill would have made it unlawful for an employer to refuse to hire, to fire, or to in any way discriminate against an A/E who refused to provide written authorization to obtain the person's credit report, unless the A/E's credit history was essential to the A/E's job duties. Schwarzenegger vetoed a similar bill in 2008.

AB 335: This bill would have invalidated any provision in an employment contract that stated that the company and a California employee agreed to apply another state's law to any employment disputes. (Multi-state employers often have contracts that provide that the law of the company's home state controls the employment relationship.)



ONGOING NEWS ON THIS HOT TOPIC IN HOSPITALITY

New Developments in Tip-Pooling Policies

WAAG AND CO. has reported on a number of case-law developments on the subject of mandatory tip-pooling policies (see *The Strategic EMPLOYER*, April 2009, page 9, "Mandatory Tip-Pooling Policies").

Tip sharing continues to be a hot topic, with more cases being decided and one moving up to the California Supreme Court. These cases are an interpretation of California Labor Code §351, which requires tips be paid to the employees that the customer intended to tip, and prohibits management (including supervisors) from collecting any portion of tips left for other employees.

□ **"Chau" Case:** This summer, the California Court of Appeals upheld an employer's tip-pooling arrangement in the case of *Chau v. Starbucks* ("Chau"). Here, Starbucks had a policy of allocating money from the tip jar to both the baristas and the shift supervisors. The employees claimed that permitting a shift supervisor to have any share of tips violated Labor Code §351.

The central facts for the Court,

however, were that the shift supervisors spent *most* of their time engaged in the same work as the baristas, and customers would not be able to differentiate between the two. The Court held that §351 does not preclude shift supervisors from receiving their portion of tips left for them based on the service they provided to customers. In other words, the tips were to be "allocated" to the employees that provided the service, even if that happened to be an employee with the title of "shift supervisor."

Some of the critical aspects of the Starbucks policy included the above, plus:

□ 1. Customers left money in a tip jar for a service team that included both baristas and shift supervisors.

□ 2. Starbucks' policy for allocating tips in proportion to the number of hours worked seemed fair.

□ 3. *Actual managers* were prohibited from participating in the tip allocation or tip pool.

□ 4. Baristas did not have to share tips that were handed directly to them

for personal service.

This last element resulted in the Court saying the tip jar was more of a tip-allocation system than a tip-pooling system. Tip pooling is where an employer requires that tips given *directly* to an employee must be shared with other members of a service team.

As reported in the April 2009 edition of *The Strategic EMPLOYER* (see page 9, "Mandatory Tip-Pooling Policies"), the courts have been *expanding* on the circumstances under which tip-pooling is permissible. Since these were all decided at the appellate level, any of them could end up at the California Supreme Court, where their fate would be uncertain. One case (regarding tip-pooling at a casino) has already been accepted for review by the Supreme Court, with reply briefs due December 22, 2009.

□ **Conclusion:** Employers who wish to implement any form of tip sharing (including tip jars, tip-pooling, etc.) should contact qualified employment counsel to ensure that any method used will not violate the Labor Code. ✓



DOT VIEWS POSITIVE DRUG TEST AS UNACCEPTABLE

Medical Marijuana Not OK for Drivers

The U.S. Department of Transportation ("DOT") has chimed in on how it will view the medicinal use of marijuana by regulated drivers: Medicinal use will *not* excuse a positive drug test.

□ **Prosecution of Federal vs. State Laws:** California and several other states have decriminalized the use of marijuana for medical purposes. Federal law, however, continues to list the drug as illegal, regardless of why it is used. That meant medical use of marijuana could not be prosecuted under state law, but could still be prosecuted as a federal offense.

On October 19, 2009, the United States Department of Justice ("DOJ") issued guidelines to federal prosecutors

in states that have legalized medical marijuana, stating that the prosecution of seriously-ill individuals who use medical marijuana pursuant to valid prescriptions and their caregivers "is unlikely to be an efficient use of limited federal resources."

Three days later, in response to inquiries triggered by the DOJ's guidelines, the DOT issued a statement that

"The DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors."

□ **Conclusion:** The DOT's position has been that use of medical marijuana under a state law will not be a valid explanation for a transportation employee's positive drug test result. The DOT concluded that it "remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana." ✓



EVER INCREASING COMPLEXITY OF FMLA REGULATIONS

FMLA News: Military Expansion & More

Another Expansion of FMLA for Military Families

On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act ("NDAA") that included provisions expanding a portion of the Family & Medical Leave Act ("FMLA") that applies to military family leave benefits. The act is effective immediately and applies to employers with 50 or more employees.

□ Background (Exigency Leave and Caregiver Leave): In 2008, the FMLA was expanded to provide two kinds of leave for employees with family members in the military: **□ 1.** "exigency leave," which was available to employees with family in the Reserves or National Guard who were called to active duty; and **□ 2.** "caregiver leave," which allowed an employee up to 26 weeks of leave to care for injured servicemembers, but was available only to care for a family member who is still in the military (for more information, see WAAG AND CO. *Problem Prevention Bulletin - February 2008*, and *The Strategic EMPLOYER*, December 2008, page 10 "Massive New FMLA Regulations Released").

□ FMLA Exigency Leave Expanded: The 2010 NDAA extends FMLA exigency leave coverage to family members of active-duty members of the Armed Forces under the same circumstances as has been available to employees with family in the Reserves or National Guard. A qualifying exigency is defined to include:

□ 1. issues that arise out of short-notice deployment; **□ 2.** military events and related activities; **□ 3.** childcare and school activities; **□ 4.** financial and legal arrangements; **□ 5.** counseling; **□ 6.** a military member's rest and recuperation time; **□ 7.** post-deployment military and related activities; and **□ 8.** any other event that the employee and employer agree should be a qualifying exigency and agree as to the timing of the leave for

that event.

Also, employees will be entitled to qualifying exigency leave when a family member (who is a member of the National Guard or military reserves) is called to active duty in a foreign country. The requirement that service members be called to active duty "in a foreign country" replaces the current requirement that they be called to active duty "in support of a contingency operation." Again, the same change now applies to employees with family who are active-duty members of the Armed Forces.

□ Leave Period Also Expanded: The NDAA also expands the potential period during which FMLA caregiver leave might be provided. Under the new law, eligible employees may take FMLA caregiver leave for up to five years after the veteran ends active duty.

The concern by lawmakers was that the 2008 law failed to account for situations in which the servicemember's injury or illness first manifested itself after the servicemember was already a veteran.

Covered family members are now eligible for 26 weeks of leave to care for veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness and who were members of the Armed Forces (including members of the National Guard or Reserves) at any time during the five years preceding the date of treatment, recuperation or therapy.

□ Recommendation: Covered employers should amend their FMLA policies to reflect these expanded military family leave rights.

Other FMLA News

In May 2009, the U.S. Department of Labor ("DOL") released an opinion letter changing its enforcement position regarding how much notice an employee is required to give when requesting leave under the FMLA. The change is good news for covered employers (those with 50 or more employees).

Many employers require an employee

to call into work within a specified period of time if the employee unexpectedly will not be showing up for work. A typical policy used by employers is one that requires the employee to call at least one hour before the start of the shift.

□ Two Day Limit: In 1999, the DOL issued an opinion letter indicating that such a policy could not be applied to employees whose sudden absences were for reasons covered by FMLA. The DOL stated that employees taking FMLA leave had up to two days following the start of a covered absence in which to report the leave to the employer.

□ More Practical Limits Put in Place: The May 2009 opinion letter changed this position. The letter was in response to a complaint that employers believed that the 1999 opinion letter "prevents them from applying internal call-in policies, disciplining employees under no call / no show policies, or disciplining employees who call in late, as long as the employees provide notice within two business days that the leave was FMLA-qualifying, regardless of whether they could have practicably provided notice sooner."

In other words, the 1999 DOL opinion letter meant employers could not penalize employees who failed to follow standard call-in procedures, even where the employee knew about the leave and could have called in prior to the two-day deadline.

The DOL reexamined the 1999 letter and reversed itself. Now, the DOL says that an employer can enforce its stricter, standard call-in procedure in cases where the employee could have followed the procedure. In such cases, the employer could deny the FMLA request. If the employee could not have called in (maybe he / she was in the hospital and unable to communicate), then the employee would have until two days following the start of the unexpected absence in which to call in.

If an employer intends to deny FMLA leave when the requesting

FMLA News: continued on next page



DLSE SIMPLY REVERSES LONG-HELD POSITION!

Reduced Workweeks for Exempt Employees

On August 19, 2009, the California Division of Labor Standards Enforcement (“DLSE”), the agency that enforces the State’s wage-and-hour laws, issued an important opinion letter that will impact companies struggling in this economy. The opinion letter addressed the issue of whether or not an exempt employee will retain exempt status when the employer reduces *both* the hours and pay of that employee. In an absolute reversal of its previous, *long-held* opinion, the DLSE now states that, under certain circumstances, the employee’s exempt status is not impacted.

□ Exempt Employee Restrictions: In order for an employee to be legitimately exempt from rules regarding overtime, breaks, time cards, etc., that employee must not only perform exempt-type work and be paid a minimum salary, the employee must also be paid on a salaried basis. That means the employee must be paid a predetermined, *weekly* salary that is not reduced due to absences occasioned by the employer or by the operating requirements of the business.

FMLA News

Continued from previous page

employee fails to follow the company’s reasonable call-in procedures, the opinion letter notes that the policy must be applied across the board to all employees without exception. The policy also has to be an established one; it must have been published and / or in use before the employee requests a covered leave.

□ Caution: Note that an opinion letter is merely guidance from an agency regarding how it intends to enforce a particular statute or regulation; it does not carry the weight of law and a court might rule differently in any given case.

Accordingly, in a 2002 opinion letter, the DLSE had stated that employers could not cut an exempt employee’s work hours and have a corresponding reduction in pay without reclassifying the employee as hourly and subject to overtime rules.

□ No Partial Unemployment Benefits for Exempt Employees: Moreover, the DLSE has previously stated that exempt employees, by definition, could not participate in the Employment Development Department’s “Work-Share” program, which pays partial unemployment benefits to employees who have a loss of pay due to a cut in hours. The DLSE concluded that signing up for that program meant the employee was not paid on a salaried basis, so the employee could not be exempt and get Work-Share benefits. This is critical to employers who need to cut their labor budgets but do not want to lose trained, valuable workers.

□ Furlough Complications: Instead of straight pay cuts, many employers are turning to “furloughs” in which employees are required to take unpaid time off, typically one unpaid furlough day per week. That way, employees who are getting a 20% pay cut at least get more time off, rather than having to work the same hours for less pay. Plus, the employer is able to retain critical employee resources.

The issue of including exempt employees in such programs has become a major concern. Because of the DLSE’s earlier enforcement position, exempt employees could not be on the furlough plan without losing exempt

status. So, many companies cut exempt employees’ salaries, but specifically required them to keep working their same five-day workweek. This was a double hit for those exempt employees, since they could not sign up for Work-Share benefits (which requires a corresponding cut in hours).

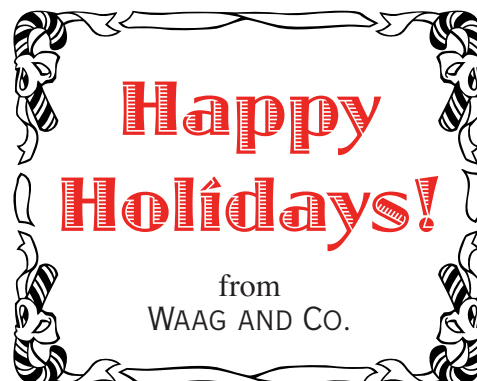
For other companies who were furloughing hourly employees and closing one day a week, there was nothing for exempt employees to do on day five, but it would violate the salaried basis rule to pay the exempt employees less for the shortened workweek. This meant the exempt employees got to work less for the same pay and only the hourly employees were bearing the brunt of the pay cuts. Still other employers utilized more creative (and often disruptive) means of addressing the issue.

□ DLSE Reverses Course: On August 19th, 2009, the DLSE simply reversed its position. An employer requested that the DLSE withdraw its earlier opinion letter and the DLSE pretty much said “okay.” Surprisingly, in its new opinion letter, the DLSE even acknowledged that its earlier opinion was based on court rulings that were “*not persuasive*.”

Now, according to the DLSE, an employer may “furlough” an exempt employee, cutting the worker’s hours with a corresponding cut in pay, without jeopardizing the employee’s exempt status — so long as certain rules are followed. According to the opinion, those rules include:

□ 1. Any change must be regarding a prospective reduction of future work periods and the corresponding salary rate. The change cannot be made midway through the current payroll period; it can only be implemented starting with an upcoming payroll period/workweek. Also, this means you cannot take a “looking back” approach to adjust salary based on how much the exempt employee worked in the prior workweek.

DLSE Reversal: *continued on next page*





WHEN WILL CONGRESS DECIDE?

COBRA Subsidy Extension Possible

Legislation was introduced in November, 2009 to extend the COBRA subsidy that President Obama signed into law this past February.

Under the current subsidy plan, the federal government pays 65% of COBRA premiums for up to 9 months for employees who were involuntarily terminated between September 1, 2008, and December 31, 2009 (see *The Strategic EMPLOYER*, April 2009, pages 4-5, "COBRA Premiums to be Subsidized").

Note that although the subsidy is

purportedly paid by the federal government, the premium subsidy is actually paid by the employer and then *eventually* recouped by the employer through a payroll tax adjustment.

Second COBRA Subsidy and Increase: Under the proposed new legislation, individuals who are involuntarily terminated between January 1, 2010 and June 30, 2010 would be eligible for the subsidy. Moreover, individuals who lose insurance coverage due to a reduction in hours would also be eligible. The

total allowable time an individual could receive the COBRA subsidy would be extended by another 6 months (from the current 9 months to as much as 15 months). The proposed legislation would also increase the subsidy amount from 65% to 75% of an employee's premium.

Bills are pending in both the Senate and the House, so it seems likely that something will pass, and it is a good bet that President Obama would sign such legislation. WAAG AND CO. will continue to report on developments. ✓

DLSE Reversal

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2. A cut in pay and hours for exempt employees will be appropriate to address significant, but temporary economic difficulties with the expectation that, as soon as business conditions permit, the employer intends to restore the full five-day work schedule and the full salaries of those exempt employees.

3. A fixed reduction in the exempt employee's salary to correspond with a reduction in the employee's normal workweek must not be designed to circumvent the salaried-basis requirement. That means the amount of time off and the corresponding pay cut cannot fluctuate from week to week or other short period of time, since such frequent adjustments might be viewed as a sham. Frequent adjustments to schedules, "furloughs" that are occasional or transitory, or reductions that are made to address "short-term business needs" are not acceptable. The opinion letter did *not* provide clear guidance in that regard.

4. The reduced salary rate must not drop below the minimum dollar amount required for an employee to be exempt. Currently, that amount is \$2,773.33 per month (or \$640 per week), regardless of the number of hours the employee is expected to work.

5. The reduced salary rate must still be administered on a salaried basis. So if the employee is now expected to work four days a week, there can be no deduction of pay because the employee works less than that new schedule.

6. The employee must continue to meet the duty-related standards necessary to be properly classified as "exempt."

Work-Share Program Reversal: Assuming that an exempt employee can have a reduction in pay with a corresponding reduction in hours without jeopardizing exempt status, then that employee's participation in the Work-Share program should likewise have no bearing on the employee's exempt status.

Caution: Employers must remember that an opinion letter is *not binding* on any courts and does not necessarily guarantee how any particular situation will be judged.

Moreover, employers should still tread carefully and obtain advice from qualified employment counsel before adopting any program. If such a program is done improperly, you may inadvertently be converting the affected employees from exempt to hourly status, which would result in the need to pay overtime and missed-break payments, as well as the need to comply with all other rules applicable to non-exempt, hourly employees. ✓

RELATED FURLOUGH NEWS

DOL Investigates California State Employee Furloughs

The U.S. Department of Labor ("DOL") has begun an investigation into whether California's weekly furloughs of state employees is having a negative impact on the availability of unemployment benefits to all unemployed Californians.

This has become a concern because, according to the DOL, at least 80,000 people in California who should have already been receiving benefits have not yet received their first unemployment check. The State must show that its furloughs are not hurting the State's unemployment insurance program by draining the overall amount of available funds. California's unemployment benefits program is partially funded by federal money and subject to various federal requirements.

Among other things, federal law requires that unemployment compensation must be paid in full when due. If there is a violation, the program may lose federal funding, causing even deeper failures in the program.



E-VERIFY, "NO MATCH" RULE, I-9 ENFORCEMENT & MORE!

Issues Regarding Work Authorization

"E-Verify" Goes Into Effect

After much confusion and litigation, the federal government's "E-Verify" law went into effect on September 8, 2009. As the name implies, E-Verify is an internet-based I-9 employment verification system operated by the Department of Homeland Security ("DHS") in partnership with the Social Security Administration ("SSA").

□ Deterring Illegal Immigration: The program covers employers who contract with the federal government or have subcontracts with federal contractors. Employers enter the Social Security numbers of employees and the system "verifies" that the employee is eligible to work in the United States. This is part of a larger effort by the federal government to shift more of the burden of deterring illegal immigration onto employers.

□ E-Verify Parameters: The E-Verify law specifically applies to all prime contractors awarded a new federal government contract exceeding \$100,000 with a period of performance longer than 120 days. Moreover, all subcontracts for services or construction valued at \$3,000 or more are required to include mandatory E-Verify provisions.

Covered employers must use E-Verify to confirm work eligibility of all new hires and existing employees assigned to work on federal contracts. Use of the

program is not limited to new hires. Rather, E-Verify must be used to verify the information provided by *all* employees who work on the covered contract, including existing employees.

□ E-Verify History: Implementation of the E-Verify rules had been delayed four times since the final rule was issued almost a year ago; it was initially supposed to go into effect on January 15, 2009.

Because of political opposition and numerous interest groups raising concerns about how to comply with the rule, the Obama Administration repeatedly delayed implementation until issuing an order that it would finally go into effect on September 8, 2009. The only remaining impediment was the possibility of an injunction as part of a court battle over the new law.

□ Litigation is Ongoing: On August 26, the U.S. District Court held in *Chamber of Commerce v. Napolitano* that contracting with the federal government is optional and that the DHS may therefore legally mandate use of the E-Verify program. With the Court's ruling, as of September 8, 2009, compliance is mandatory. The ruling does not affect contracts signed prior to September 8, 2009.

Because the plaintiffs in the litigation have appealed the decision, the drama is not yet over. However, the Court denied a request to suspend enforcement of the law while the appeal is pending; that means covered employers with contracts signed on September 8, 2009 or later must comply despite the fact that the legal wrangling goes on. Given the low dollar numbers for being covered as a subcontractor, plus the large reach of the federal government into so many industries, most large companies and many small ones will be affected.

□ E-Verify Obligations and Compliance: Employers wondering if they are subject to the requirement should look at their existing government agreements and their agreements with government contractors. If they refer to

the "Federal Acquisition Regulation" ("FAR"), involve a period of performance of at least 120 days, and are not for "commercial off-the-shelf" ("COTS") items, they will probably be amended to include the E-Verify requirement after September 8.

□ E-Verify Exclusions: Regulations have clarified that grants are not covered, most agricultural products are exempt COTS items, and financial agency agreements do not normally cause banks to be covered. Hotels rarely have a government contract with a performance period lasting at least 120 days. Note that it only takes one covered contract to trigger the E-Verify requirement for an entire institution.

□ Implementation Complexities: The most problematic part involves verification of *existing* employees. Employers may choose to limit E-Verify queries for existing employees to those who are actually working on the government contract or subcontract (excluding administrative support).

However, many employers utilize employees across a variety of projects and may not be able to track which employees are assigned to covered projects at any point in time. For that reason, covered employers may instead choose to run E-Verify for all existing employees.

Using the I-9's that existing employees completed when initially hired may present some "false negatives," since an employee's profile may have changed between the time he/she was hired and the time the employer runs the E-Verify check. Adding to the confusion is the fact that the U.S. Citizenship & Immigration Service has yet to provide any instructions for employers.

□ Caution: It is critical that there be good communication between a company's contracting staff and its Human Resources ("HR") staff; if HR has no idea there is a new government contract, then HR cannot take steps to ensure compliance.

Work Authorization: *Cont'd on next page*

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.

Work Authorization

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Purchasing Must Get in the Act:

Also, the purchasing officers of all covered contractors and subcontractors must be careful to insert the "E-Verify" clause into relevant subcontracts as soon as an upstream contract includes the E-Verify clause.

Recommendations: Employers who are or may soon become covered by the E-Verify requirements should immediately obtain qualified advice regarding how to handle their I-9's and the E-Verify procedures, and plan for how they will implement the new rules.

"No-Match" Rule Dropped

The U.S. Department of Homeland Security has officially dropped its controversial "no-match" rule, opposition to which was one of the rare areas of common ground between employer groups and unions.

Rule Deemed Extreme: The rule required employers to fire workers if there were any discrepancy between a worker's reported Social Security Number ("SSN") and official government records. Such discrepancies were often noticed when Social Security Administration ("SSA") records indicated the SSN reported by the employer did not match the SSA's records regarding who belonged to a particular SSN.

The SSA would send a "no-match" letter to the employer, who had to fire the worker or immediately (and adequately) explain the discrepancy, or else suffer financial penalties. The problem was that many "legal" employees could lose their jobs because of inaccurate and outdated government record databases.

Emphasis Shifts from Employees to Employers: The DHS has emphasized that dropping the "no-match" rule does not mean it is going soft on enforcement. In fact, the DHS has been ramping up the number of inspectors and auditors in Immigration & Customs Enforcement ("ICE") to

investigate illegal workers. Without relying on the SSA database, the DHS will shift its focus from catching unauthorized workers to cracking-down on employers who hire them.

I-9 Enforcement Is Up

The DHS has issued some stern warnings to employers during 2009, indicating that its new emphasis in dealing with illegal immigration will be to catch and prosecute employers. On April 30, 2009, the DHS announced: "Effective immediately, ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers."

By early July, ICE issued a Notice of Inspection ("NOI") to more than 650 employers to audit their I-9 compliance; that is more than the number of audits ICE conducted in the entire previous fiscal year.

Many such audits also now include subpoenas for payroll records and other documents that might reveal possible use of unauthorized workers. And where there are no unauthorized workers or "criminal" violations, merely failing to properly manage the I-9 recordkeeping requirements can result in stiff civil fines.

So far, ICE has fined 61 employers a total of about \$2.3 million, with only a bit more than half the first round of audits completed. On November 19, 2009, ICE announced that it is sending out a new round of NOIs to an additional 1,000 employers.

Even the most well-meaning, law-abiding employers have frequently paid very little attention to whether or not they are hiring only legally-authorized workers, let alone whether they are properly filling out I-9 forms. In 2008, more than 6,000 arrests were made related to immigration employment violations. Of those arrested, 135 were managers, supervisors or human resources staff, who were charged with criminal violations including harboring or knowingly hiring illegal aliens.

Given the DHS' announcement that it intends to increase criminal prosecution of employers and the likelihood that steep penalties will be

assessed for mere paperwork violations, it is critical that employers take steps to ensure their compliance.

Responding to a Freedom of Information Act request by the American Immigration Lawyers Association, ICE disclosed its factors for assessing fines when it finds I-9 violations. In the past, ICE had calculated fines within the legal limits (up to \$1,000 for the first offense and \$2,500 for a knowing violation) based on five factors: business size, good faith, seriousness of violations, employment of unauthorized aliens, and history of compliance.

The *new* ICE factors will focus on:

- "Knowingly hire or continuing to employ" vs. paperwork violations;
- First, second, or third offense;

Work Authorization: *Cont'd on next page*

IRS Mileage Rate Lowered for 2010

The Internal Revenue Service has issued the standard-mileage-reimbursement rate for 2010. The standard-mile rate for business miles driven will be 50 cents per mile in 2010, down from 55 cents per mile in 2009 and from 58.5 cents in the second half of 2008.

The mileage rates for 2010 reflects lower transportation costs compared to a year ago. The standard mileage rate for business is based on an annual study of the fixed and variable costs of operating an automobile.

Beginning on January 1, 2010, the other standard mileage rates will be 16.5 cents per mile driven for medical or moving purposes, and 14 cents per mile driven in service of charitable organizations

The optional business standard mileage rate is used to compute the deductible costs of operating an automobile for business use in lieu of tracking actual costs. This rate is also used by the federal government and many businesses to reimburse their employees for mileage.



EMPLOYER LOSES LITIGATION AGAINST EMPLOYEE

Lack of Policy Cost Employer Sensitive Data

A residential treatment facility run by LVRC Holdings (“LVRC”) hired Christopher Brekka to do its marketing. This included working with LVRC’s outside computer / website consultant, so LVRC gave Brekka password-access to all files on the company’s servers. LVRC did not have a policy limiting employee use or transfer of company files and electronic information.

LVRC and Brekka were in negotiations for Brekka to purchase part of LVRC’s operations. When those negotiations fell apart, Brekka gave notice of his resignation. Prior to his last day at work, Brekka emailed a large number of sensitive, company files to his personal email account and to his wife. These files included LVRC’s financial information, vendor information and patient information. Even after he left employment, Brekka continued to access LVRC’s computer servers remotely, using his still-active password.

Several months later, an outside computer consultant was performing a survey of LVRC’s systems and noticed

Brekka’s computer activities. LVRC sued Brekka for violating the federal Computer Fraud and Abuse Act (“CFAA”), contending that his transfer of the company’s files was unauthorized.

Unfortunately for LVRC, both the trial court and the federal appeals court held that Brekka did not violate the CFAA. Because LVRC did not maintain a policy prohibiting employees from copying company files for personal use or emailing them to personal email accounts, Brekka did not violate any policy or rule regarding how he could access or use company data.

Moreover, because LVRC never revoked Brekka’s password, his authorization to access the company’s servers was not revoked; accordingly, there was not even any unauthorized access to the servers.

LVRC made a number of mistakes that were easily avoidable. The chief among these was assuming that written policies do not have much value and are not worth implementing. The dollars they may have saved by not

adopting a quality policy manual was only a fraction of the value of the sensitive information taken by Brekka (not to mention the cost of litigation). Employers can protect their sensitive information by taking a few simple precautions:

- 1. Have a written policy limiting employee use and transfer of electronic files. This may not stop theft of files, but a properly drafted policy will help employers obtain any appropriate relief.
- 2. Make sure employees are given password access only as far as needed to do their jobs.
- 3. Have physical limits in place to limit access to paper documents or other materials / information not necessarily on the computer systems.
- 4. Disable the passwords of all departing employees as soon as they leave.
- 5. Regularly check on computer / email activity. A written policy diminishing employees’ expectation of privacy in their use of company systems is necessary for most monitoring activity.

Work Authorization

Continued from previous page

Percentage of total reviewed I-9s that have violations; Business size, good faith, presence of unauthorized aliens, seriousness and history of violations

ICE even provided some examples of how it would set employer fines using these factors: Large Employer with 25% of I-9s containing paperwork violations and no previously fined violations, would be fined \$440 per violation. This would be adjusted up 5% for being a large employer and down 10% for showing good faith with a good history, for a net of \$418 per violation. Small Employer with 5% of I-9s reflecting knowing employment of unauthorized workers (including “constructive knowledge”) might only be fined about \$300 per violation.

Employers should first conduct an

audit of their current I-9 compliance. Using a knowledgeable attorney for this may be particularly beneficial, because attorney / client privilege will attach to all communications with and advice from the attorney. This way, you can address issues of possibly unauthorized workers and flawed I-9’s before you are audited. Employers should also organize their I-9’s in a way that will put them in a better position to deal with any government audit. Additionally, employers should also be sure to train whoever handles new-hire intake regarding proper I-9 procedures; a huge portion of the people responsible for an employer’s I-9 process have never even read the instruction sheets that accompany the form. Also, it is best to limit the number of people you have handling this task, since you will be more likely to have consistent compliance.

If you receive an “NOI” from ICE,

you must act quickly; the NOI will normally require the employer to turn over all I-9’s within *three business days*. You should immediately select one point-person to communicate with ICE, in order to avoid inconsistencies in information given to ICE or misunderstandings about what must be done. Usually, that person should also request an extension of time in which to provide documents, not only so you can be careful and thorough in preparing what you send, but so you can obtain qualified advice regarding this process. Make sure all applicable records are immediately secured; any missing documents could be viewed as tampering with evidence. Ideally, the employer will avoid any detailed discussion with ICE regarding their I-9 process and any company documents; the assistance of a qualified immigration attorney is highly recommended.



DECISIONS THAT AFFECT EMPLOYERS

Important U. S. Supreme Court Decisions

The U.S. Supreme Court issued a number of important decisions this year impacting employers. Some of the more significant ones include:

Reverse Discrimination: *Ricci v. DeStefano*

[Case decision: June 29, 2009] In 2003, the City of New Haven, Connecticut administered written examinations in an effort to fill vacant leadership positions in its fire department. In preparing the examination, the City went to significant lengths to ensure that minority fire department officials had input and found the test questions fair.

When New Haven officials analyzed the written test results, they found that the pass rate for African American candidates was significantly lower than the pass rate of Caucasian candidates. The City's Civil Service Board heard evidence regarding the test results' disparate and adverse impact on African American applicants. Based partly on the fear of a discrimination lawsuit by African-American firefighters if it used a test that was possibly racially-biased, the Board did *not* certify the results.

Frank Ricci and other Caucasian and Hispanic firefighters filed suit under Title VII seeking to force the Board to certify the results. The district court dismissed the suit, and the court of appeals affirmed that decision. The Supreme Court reversed the lower courts and held that employers can take race-conscious steps to remedy a perceived "disparate impact" only where there is "strong evidence" that inaction would lead to unlawful discrimination. In other words, an employer with a policy that adversely impacts minorities — like the exam in *Ricci* — cannot simply ignore that policy to the benefit of the minority group because it fears a lawsuit. There must be "strong evidence" that the policy is, in fact, illegal. Absent such strong evidence, the policy, once in place, must be followed even if it potentially might yield

litigation by adversely affected minorities.

Ricci illustrates how employers can be put between a rock and a hard place in trying to achieve a diversified workforce while refraining from "reverse discrimination" against non-minorities. In deciding not to certify the exam results, New Haven arguably was trying to avoid a potential discrimination suit from African American firefighters who *may* have alleged that they had been denied promotions based on a test that had a disparate impact.

However, New Haven ended up in a no-win situation: while its decision not to certify a list of eligible candidates allowed it to avoid a potential lawsuit from African American firefighters, the same decision opened it up to a reverse discrimination lawsuit from the other candidates who, but for New Haven's decision, might have been promoted.

□ **Recommendations:** The *Ricci* decision makes it doubly important for employers to carefully examine hiring, promotion and other screening policies in advance in an attempt to ensure they do not violate anti-discrimination laws, since the employer will risk a "reverse discrimination" lawsuit if it attempts to undo the policy once the results are clear.

Discriminatory Motives: *Gross v. FBL Financial Services, Inc.*

[Case decision: June 18, 2009] Generally, a plaintiff alleging discrimination only needs to show that unlawful discrimination was a "motivating factor" in an employment action in order to prevail on a claim; the plaintiff does not need to show that unlawful discrimination was the only reason for the action. In other words, even where the employer had a "mixed motive" for the adverse employment action, with only part of the motive being discriminatory, the employer will still be guilty of discrimination. This is true even if the discriminatory part of

the motive was not the "but for" cause of the adverse action (meaning that "but for" the discriminatory reason, the adverse action would not have been taken.)

This has been made clear in Title VII, which is the federal anti-discrimination law covering discrimination on the basis of race, gender, national origin and many other characteristics. Years ago, that statute was amended to specifically make it illegal discrimination where only part of the motive for the decision was due to discrimination. However, protection against discrimination on the basis of age is set forth in a different statute, specifically, the Age Discrimination in Employment Act ("ADEA").

Most courts believed that the same standards would apply to the ADEA regarding "mixed motive" as were applied in Title VII cases. In the lower courts, the parties in *Gross* believed that a "mixed motive" was sufficient to violate the ADEA, but they disagreed as to how much proof was necessary, with the matter going all the way to the Supreme Court.

To the surprise of most everyone, the Supreme Court held that showing a "mixed motive" is not enough to win an age discrimination claim under the ADEA. Instead, federal age discrimination claimants must prove that they would not have been subject to the action — such as termination, denial of promotion, etc. — "but for" their age. As a result, ADEA plaintiffs now have a significantly more difficult burden of proof than Title VII plaintiffs.

Some in Congress already have put forth a bill to amend the ADEA in much the same way Title VII was amended, to permit "mixed motive" claims to be brought. However, given how arcane an issue this is, and the other priorities Congress has currently set for itself, it remains to be seen whether such legislation will gain any traction.

□ **Conclusion:** The ADEA is a federal law, and the ruling applies only to ADEA claims. Under California's anti-

Supreme Court: *Cont'd on next page*



DECISION THAT AFFECT CALIFORNIA EMPLOYERS

“Michelle’s Law” Goes Into Effect

On October 8, 2008, then-President Bush signed HR 2851, which was scheduled to go into effect on October 9, 2009. The new law, also known as “Michelle’s Law,” addresses when a dependent child can remain covered as a dependent under a group health plan.

The law is named for Michelle Morse, a New Hampshire college student with cancer who continued with a full course load against her doctor’s advice in order to maintain health benefits as a dependent under her parents’ health plan. The parents’ employer-sponsored group health plan only covered dependent children who were enrolled in school on a full-time basis, and would have discontinued coverage if Michelle had taken a medical leave of absence from school or reduced her course-load in order to undergo treatment. The family could not afford the COBRA premiums if she were to lose coverage as a dependent.

Under “Michelle’s Law,” which applies in California, all group health plans are required to continue dependent coverage of an otherwise eligible employee’s child where:

- 1. the child qualifies as a dependent under the plan’s terms; and
- 2. the child is enrolled in the plan on the basis of attending a postsecondary educational institution **before** the first day that the medically-necessary leave is needed.

Additionally, the child’s medical leave from school must:

- 1. commence while the child is suffering from serious illness or injury;
- 2. be medically necessary, as certified by the child’s treating physician; and
- 3. cause the child to lose student status for purposes of coverage under the terms of the plan or coverage.

It is important for employers to understand that this is not an extension

of COBRA. COBRA applies when a covered plan participant loses coverage and elects to self-pay the full premiums to continue coverage. “Michelle’s Law” applies to prevent the loss of coverage. By remaining covered as an active participant in the plan, the child retains the benefit of any employer contribution to dependent premiums as well as any discounted rates for covering the entire family.

Recommendations: The new law requires health plans and insurers to provide notice of this new right to continued coverage for medically-necessary school leaves of absence, along with other information regarding documentation and instructions to covered participants. Employers should amend plan documents, summary plan descriptions and other employee communications to ensure notice of and compliance with this new law.

Supreme Court

Continued from previous page

discrimination statute, employees can bring mixed-motive age-bias claims, meaning that state-law claims will be viable even when age bias only partially motivated a negative employment decision. As always, employers should still be careful not to allow any discriminatory motives to play even a small role in employment decisions.

Retaliation:

Crawford v. Metropolitan Government of Nashville & Davidson County, Tenn.

[Case decision: January 26, 2009].

This unanimous decision is another in a series of cases in which the Court has broadly construed anti-retaliation provisions in Title VII, the federal anti-discrimination law. The California courts would look to such a ruling for guidance regarding lawsuits brought

under State anti-discrimination laws.

In the *Crawford* case, an employer was investigating rumors of sexual harassment by a supervisor. The plaintiff, Vicky Crawford, was asked whether she had witnessed any inappropriate behavior. Not only had she witnessed such behavior, she proceeded to tell the employer how she had personally been the target of a series of harassing acts by that supervisor.

The employer did nothing to discipline the supervisor and, instead, fired Crawford and two other employees who also reported being harassed by the supervisor. Crawford filed suit under Title VII’s anti-retaliation provision, which prohibits an employer from terminating a worker because she “has opposed any practice” that is unlawful under Title VII.

The question before the Supreme Court was whether simply disclosing an act of harassment in answer to a supervisor’s question is enough to constitute “opposition” to an unlawful

practice. The Court unanimously held that the ordinary meaning of “oppose” includes giving a “disapproving account” of unlawful behavior, even if the employee takes no further action on her own seeking to stop or remedy the conduct. Accordingly, the Court held that Crawford could state a claim under Title VII’s anti-retaliation provisions.

Anti-Retaliation Scope Expanding: The decision in *Crawford* represents the continued *expansion* of the scope of federal anti-retaliation provisions. In addition to being careful not to do anything that could be viewed as retaliatory toward employees who have actually complained of discrimination, employers must take similar care with all employees who are questioned or otherwise involved in any investigation of possible discriminatory acts.



Increased Payroll Taxes: As of November 1, 2009, California has imposed a 10% mandatory increase on employee payroll withholdings, over and above what previously appeared on the tax tables. The new law also imposed a 0.6% increase in supplemental wage withholding (new rate of 6.6%) and a 1.20% increase on wage stock options and bonus payments (new rate of 10.23%).

Minimum Wage: As of July 24, 2009 the federal minimum wage increased from \$6.55 per hour to \$7.25 per hour. California employers, however, must pay a minimum wage of \$8.00 per hour. San Francisco has its own minimum wage ordinance at \$9.72 per hour.

New Posters: New workplace posters are required for January 1, 2010, as there have been many changes regarding both state and federal law. One important change is the inclusion

of information about genetic information discrimination in the new federal poster - available at www1.eeoc.gov/employers/poster.cfm.

Most employers purchase an "All-In-One," laminated poster that covers both federal and state requirements. These can be purchased from many outlets, including the California Chamber of Commerce. Employers should note that there are blank portions left on the poster for the employer to complete, which include identifying the employer's workers' compensation carrier and related information, as well as stating the employer's pay periods and payday information. There are several other posters that are specific to a limited number of employers that are not included on such a general poster. Also, each employer must post the Wage Order applicable to its specific industry, which is available from the Labor Commissioner's Office, or can be accessed at www.WaagandCo.com by clicking on "links."

New I-9 Form: After many years of neglecting to update the I-9, the government has now entered a phase in which it is frequently updating the form. One of the most significant changes this last go-around is the requirement that all documents presented by the employee to complete the I-9 form must not be *expired*. Previously, employees could use certain expired documents, such as a passport or driver's license. Employers must

always use the current form when processing a new-hire. Employers should check the U.S. Citizenship & Immigration Service website for the most current version of the form, which is available at: www.uscis.gov/i-9.

Brinker Update: The California Supreme Court is still moving glacially to decide the fate of meal and rest breaks in California in the *Brinker* case. WAAG AND CO. has reported on this case in numerous bulletins and newsletters over the past couple years, and will continue to report on all pertinent developments.

Cal/OSHA Posting: Get ready to post your Cal/OSHA Form 300A, which is the annual summary log of workplace injuries and illnesses that occurred during 2009. Most employers are required to post this log from February 1 through April 30 of each year. The Form 300A must be posted in a conspicuous place, where other employee notices are normally posted. Employers are required to ensure that no one removes, covers or defaces the notice.

Inspections of H-1B Visas: The U.S. Citizenship & Immigration Service has just started a series of surprise inspections of H-1B visas, reportedly planning to hit 25,000 employers. Employers who employ workers pursuant to H-1B visas should contact qualified counsel for advice regarding how to prepare for a surprise visit from the government.

Susan Waag to Give Legal Updates

Trends in Sexual Harassment Issues; Panel: Susan Waag, Dave Warren (plaintiff's attorney) and Susan Whalen (COO of RRM Design); Women Lawyers Association ("WLA"); Jan. 7, 2010 from 12:00p.m. - 1:30 p.m. at Pacific Capital Wealth Management, 997 Monterey Street, Third Floor, SLO; Topic: Cost: Program: \$10 for WLA members; \$15 for non-members. Lunch is \$12; RSVP to esperow@calpoly.edu by Jan. 5, 2010.

Topic: What Employers Need To Know For 2010; Speaker: Susan Waag; Employer Advisory Council, in partnership with the California EDD; January 20, 2010 from 8:00 a.m. - 11:30 a.m.; Paso Robles Inn, Matador Banquet Room, 1103 Spring Street, Paso Robles; Cost: \$25; for more information and to RSVP, contact Carole Cardamone at carole.cardamone@edd.ca.gov (805) 788-2680.

The Strategic EMPLOYER

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