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California Employment Legislation 2004

(Expanded Employee Protections, Benefits and Lawsuits)

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The California Legislature passed significant new employment legislation which Governor Davis signed prior to his leaving office. This legislation presents employers with additional health care costs and increased exposure to employee lawsuits. It includes allowing employees to bring actions to recover penalties and attorneys' fees for wage and hour and other Labor Code violations. The legislation also grants employees additional avenues to redress perceived whistleblower violations and overturns two California Supreme Court cases. These bills will have a substantial impact on large and small employers statewide. Unless otherwise noted, they were effective as of January 1, 2004.

The Private Attorneys General Act of 2004 (SB 796)

The Private Attorneys General Act of 2004 (SB 796) adds Sections 2698 and 2699 to the Labor Code and allows employees to act as "private attorneys general" by bringing civil lawsuits to collect penalties for California Labor Code violations. SB 796 also permits employees to recover attorneys' fees and costs as prevailing parties in these actions.

This expansive bill provides for the recovery of specified *civil penalties* for **any** Labor Code sections that do already impose a penalty, as well as those that do not.

Apparently fueled by a perceived lack of enforcement by the agency charged with overseeing employer Labor Code compliance, the Legislature determined that it was in the public interest to provide that civil penalties may be assessed and collected by "aggrieved" employees, as defined in the statute.[1] The new law establishes penalties for all Labor Code section violations where no penalty amount was previously set. For employers with one or more employees, the initial penalty is $100.00 for each aggrieved employee per pay period and a $200.00 penalty for subsequent or intentional violations for each aggrieved employee per pay period. The aggrieved employees receive 25% of the recovered penalties and the state receives the 75% remainder.

An aggrieved employee may bring suit on behalf of all current and former aggrieved employees. The Act precludes employee actions if the state agency takes action on the "same facts and theories." The Act does not preclude employees from pursuing other state or federal remedies, however.

As always, employers should review their payroll practices and employee handbooks to make sure that the practices in place and the rules provided are sound and legal. It is especially important to do so now, to ensure Labor Code compliance and avoid costly private enforcement actions that may be brought under this new statute.

Domestic Partner Benefit Requirements For Contracts With The State Of California

On October 11, 2003, former Governor Gray Davis signed California State Assembly Bill 17 (AB 17) into law. Effective January 1, 2007, AB 17 will prohibit the state of

California or any state agencies from contracting with certain contractors that do not offer employee benefits to domestic partners of employees that are equivalent to those offered to spouses of employees. AB 17 is chaptered at section 10295.3 of the California Public Contract Code, an addition to the chapter entitled "State Acquisition of Goods and Services."

What does AB 17 require?

Specifically, AB 17 prohibits state agencies from entering into contracts on or after January 1, 2007, for the acquisition of goods or services for $100,000 or more with contractors who discriminate in the benefits offered to employees with spouses and those with domestic partners or who discriminate between the benefits offered to domestic partners and spouses of those employees. This means that employees' domestic partners must be offered the same benefits as employees' spouses. The contractor, however, is not obligated to provide any benefits to domestic partners under AB 17 unless benefits are offered to spouses.

The provisions of AB 17 only apply to contractors who provide goods or services to the State of California or a state agency of the State of California. The goods or services must be provided pursuant to contracts that cumulatively pay at least $100,000 in a fiscal year. Contractors who enter into contracts totaling less than $100,000 per fiscal year are not subject to the requirements of AB 17.

The provisions of AB 17 apply to contracts and contract amendments entered after December 31, 2006. Contracts with terms that extend past January 1, 2008 will be subject to AB 17 on and after January 1, 2008 even if the contract was entered prior to January 1, 2007.

What do contractors have to do to comply with AB 17?

Contractors must provide the same benefits to employees with domestic partners as are provided to employees with spouses. Contractors are not obligated to provide any benefits to either domestic partners or spouses but the benefits provided must be equivalent. In addition, the contractor must keep applications for domestic partner and spousal benefits confidential.

Contractors have a few options in their compliance with AB 17. First, contractors can charge employees for the cost difference in providing benefits to a spouse or a domestic partner. Second, contractors are excused if they are unable to provide a certain benefit after taking reasonable measures to obtain the benefit.

Will AB 17 be challenged?

One or more contractors who wish to contract with the state of California without providing domestic partner benefits may challenge the validity of AB 17 and claim that it is preempted by the Employees Retirement Income Security Act of 1974 ("ERISA"). The provisions of AB 17 are very similar to the San Francisco Domestic Partner Ordinance ("SF Ordinance") that was challenged in federal court in at least two separate cases.

ERISA regulates the provision of benefits by an employer to an employee and preempts state law to the extent that state laws seek to regulate employee benefit plans. However, exceptions to ERISA's preemption authority may apply.

AB 17 arguably seeks to regulate the provision of employee benefits by requiring contractors to provide benefits for domestic partners that they may not otherwise provide. In *Air Transport Association of America v. City and County of San Francisco,* 992 F. Supp. 1149 (N.D. Cal. 1998), *affd. and remanded in part on other grounds,* 266 F.3d 1064, several airlines claimed that the SF Ordinance was invalid because it was preempted by ERISA and because it violated the federal constitution. The court held that the SF Ordinance was preempted by ERISA but created an exception to ERISA that was not applicable to the facts of the case. The exception is known as the "market participant exception" and states that an ordinance requiring equal benefits is not preempted if the governmental agency is acting as a market participant when it enters the contract and wields no greater power than an ordinary customer when entering the contract. Because the city contracts in the case at issue concerned the airport, the court concluded that the city wielded greater power than an average market participant. The Ninth Circuit Court of Appeals affirmed the district court's ruling on appeal without discussing the ERISA preemption issue.

California is relying upon the market participant exception to the ERISA preemption doctrine. The power and leverage held by the state when entering into contractual arrangements, however, will, no doubt, produce legal challenges to the law. Because AB 17 does not go into effect

until at least January 2007, plenty of time remains for AB 17 to be tested in the courts. Stay tuned: we will provide you with reports on future developments.

❑ ❑ Expanded Whistleblower Protections (SB 777)

Employers already know that it is illegal to retaliate against a "whistleblower"—an employee who voices concerns to a federal or state agency about violations of federal or state statutes or regulations.

Existing California law prohibits employers from making, adopting or enforcing policies that prevent an employee from disclosing violations of a federal or state statute or a violation or non-compliance with a state or federal regulation to a government or law enforcement agency. It also prohibits retaliation against employees who make these disclosures.

SB 777 amends Labor Code Sections 1102.5-1102.7 to expand current whistleblower protections to employees who: (1) **report** a violation of a state or federal rule; or (2) **refuse to participate** in an activity that would result in violation of a state or federal statute or a violation or non-compliance with a state or federal rule or regulation or who exercised these rights during a former employment. In addition, the new law establishes a civil penalty, not exceeding $10,000, for each violation of the section. This penalty applies to corporate and limited liability company employees only.

Notably, to establish a violation employees must show by a preponderance of evidence that the employer's action was motivated at least in part by the employee's protected conduct. After that the employer must prove by "clear and convincing" evidence that the adverse employment action would have occurred for legitimate, independent reasons, even if the employee had not engaged in protected activity. This tough standard of proof will make it more difficult for employers to obtain summary judgment and dispose of whistleblower cases before trial.

Significantly, the bill establishes a hotline with the California Attorney General's office and states that the Attorney General "shall" refer hotline calls to the appropriate agency for review and possible investigation. There is no requirement that the Attorney General notify the employer of the call. Employee conduct that violates the attorney client, physician patient privilege or discloses trade secret information is excluded from the definition of protected conduct. Thus, such conduct cannot form the basis for a whistleblower suit under this law.

Similar to the discrimination and harassment posting requirements, the bill also requires each employer to display a poster that explains employee rights and identifies the Attorney General hotline number.

The bill was spawned by an apparent concern over corporate misconduct and appears to be a reaction to the recent well-publicized corporate fraud cases. Employers can expect a rise in administrative investigations that could lead to liability. Whistleblower cases are now likely to become more numerous. These whistleblower cases will now present increased litigation risk for employers and will ultimately prove more costly to litigate and resolve. Employers must redouble their efforts to ensure that adverse employment actions are well supported and documented.

❑ ❑ A Move Toward Universal Health Care (SB 2)

SB 2—the Health Insurance Act of 2003—is a determined attempt to provide health care coverage to all California employees.

What does it provide?

Starting January 1, 2006, an entity designated as the Managed Risk Medical Insurance Board ("Managed Risk Board") must arrange health coverage for employees and employee/dependents of employers with 200 or more employees in this State.[2] Beginning January 1, 2007, coverage must be provided for employers with 20 or more employees in this State. Coverage is for each person who

works at least 100 hours/month for a single employer and who has worked for that employer for three months ("covered employees).[3] The Managed Risk Board will buy coverage from HMO's and insurance carriers and will not provide a self-funded program.

The Managed Risk Board will establish deductibles, co-pays, and total out of pocket costs. The Managed Risk Board is directed to consider both the impact on employees receiving health care and the impact on the ability of the employers to pay the fee.

Which employers are covered?

All employers are covered. Employers may comply with the statute in one of two ways: *paying* the required fee so that the Managed Risk Board may arrange coverage or *providing* the coverage themselves.

Paying A Fee

A fee must be paid for each eligible employee (called "enrollees") and dependent of covered employers.[4] The fee is based on the number of enrollees and dependents of the employer. Employers can require employees to pay up to 20% of the fee for the employee and dependents. There are caps on the fees charged to very low wage earners.

There are yet no specifics on the amount of the fee, but it will be based on the "total amount necessary to pay for health care for all enrollees, and . . . their dependents eligible for the program." The fee is collected by the Employment Development Department ("EDD"). But EDD must "waive the fee" of "any employer that is entitled to a credit." The fees also have to cover the costs of administering and enforcing the program. In other words, employers and employees who contribute to the program will bear the entire costs of the program.

Providing "Proof of Coverage"

If an employer can provide sufficient "proof of coverage" for its employees then it is exempt from paying a fee to the state under SB 2. There are a number of ways to provide proof. The major ways are to provide health care coverage from one of the following:

- An employer sponsored group health plan that meets the requirements of ERISA and that provides the minimum benefits required under California's health insurance or HMO laws.
- Any coverage under PERS
- Any collectively bargained health and welfare coverage (including Taft Hartley funds) for enrollees and dependents. There are no minimum benefit requirements here.[5]

What will be SB 2's likely practical effects?

- Substantial increased costs to employers will occur because part time and seasonal employees will be covered; employers often exclude these employees and "Dependents" are defined broadly, including minor children as well as children who are 18 or over (with no school requirement). Dependents also include domestic partners, thus impacting religious organizations, which typically do not provide health benefits to domestic partners.
- For public sector employers, the PERS health care program may become a magnet because that program apparently automatically complies with SB 2. However, the PERS program, which requires that health benefits be provided to retirees, is currently struggling with its own costs.

Some Immediate Implementation Issues about SB 2

The exact coverage requirements to avoid the fee, and the amount of the fee that will be charged, are unknown.

SB 2 does not indicate whether the fee will be a uniform amount, statewide (as PERS) or whether it will be geographically based. If it is uniform, employers in lower cost areas will have a strong incentive to drop out of the program, so the net fee for employers who remain will be high. But if it is not uniform, employers in high cost areas—mainly rural, small population counties—will be hit with a higher cost at the outset. And these employers are often smaller, in counties in difficult economic circumstances.

Implementation probably will be very messy. SB 2 will be challenged quickly in the courts. There is a substantial chance that the courts will rule that SB 2 is preempted by federal law—ERISA.

The Supreme Court has said that a state statute is more likely to be preempted when (1) it contains provisions that expressly refer to ERISA, (2) it forces an ERISA plan to adopt a "certain scheme of substantive coverage," and (3) it

is more than just a tax that increases the cost of providing benefits to covered employees.[6] The opponents of SB 2 would argue that all of these criteria exist here. They would rely partly on the official summary of SB 2 that it "would require specified health benefits to be provided directly by employers or through the [new] program."

On balance, it appears that SB 2 regulates the content of health plans and thus would be preempted. However, while it is challenged, the Managed Risk Board (and the EDD, which collects the fee and allows the fee waivers) will have to prepare to administer this statute. This could create a huge waste of money at a time of very tight state budgets, if SB 2 is ruled invalid. Furthermore, there is a substantial chance that the courts will not finish their work ruling on the validity of SB 2 before January 1, 2006. What happens then?

❑ ❑ Expanded Liability For Non-Employee Sexual Harassment (AB 76) And "Gender" Discrimination (AB 196)

AB 76—This legislation specifically overturns the *Salazar v. Diversified Paratransit, Inc.,* (2002) 103 Cal. App. 4th 13. It provides that employers may now be liable for sexual harassment caused by non-employees. Based on the principle that employers are obligated to provide a harassment-free workplace, the Legislature determined that employers are now liable for harassment of which they are aware, even when it involves non-employees such as customers, vendors, postal workers, delivery persons or other third-parties. This poses significant challenges for employers. It becomes doubly important for employers to ensure that their managers and supervisors recognize and respond properly to offending third-party behavior. Employer policies should be reviewed as well to ensure that employers understand that harassment by customers and other third-parties is expressly forbidden, particularly in light of the limited defense established by the *McGinnis* case referenced below.

AB 196—In what could be viewed as companion legislation, AB 196, expanded the Fair Employment and Housing Act's (FEHA) prohibition on discrimination and harassment to include "gender" (as described in the Penal Code 422.786) in its definition of "sex." The bill prohibits discrimination and harassment on the basis of a person's "actual sex" or the employer's perception of the person's sex, including the employer's perception of the person's "identity, appearance, or behavior," whether or not that identity, appearance, or behavior is different from that traditionally associated with the person's sex at birth. New Government Code Section 12949 provides that an employer may still "require an employee to adhere to reasonable workplace appearance, grooming, and dress standards," provided that an employer must allow an employee "to appear or dress consistently with the employee's gender identity."

❑ ❑ State Dept. Of Health Services v. Superior Ct. of Sacramento County (McGinnis) 3 C.D.O.S. 14080 (2003)

In the November 24, 2003 *McGinnis* decision, the California Supreme Court reaffirmed that under FEHA an employer is strictly liable for all acts of sexual harassment by supervisors, and established that damages for a violation of the FEHA's prohibition against sexual harassment might be reduced under the "avoidable consequences doctrine." Under that doctrine, a plaintiff's "recoverable damages do not include those damages that the plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation." The High Court held that applying the doctrine to sexual harassment claims furthered the dual purposes of the law: compensation and deterrence.

To invoke the defense, an employer must prove: (1) it took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and, (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.

In emphasizing that the decision affects only damages and not liability, the Court stated, "An employer that has exercised reasonable care nonetheless remains strictly liable for damages a sexually harassed employee could not have avoided through reasonable care." The employer bears the burden of proving the defense.

McGinnis makes it now even more critical for employers to maintain a comprehensive anti-harassment policy with strong enforcement procedures. Employers need well publicized internal complaint procedures appropriately designed to prevent and eliminate harassment. We advise that employers re-examine their policies and revise as nec-

essary to maximize the ability to successfully assert this defense in all litigated cases.

❑ ❑ Legislature Doubles Penalties For Wage And Hour Violations (AB 276)

AB 276 essentially doubles an employer's penalties for wage and hour violations such as failing to timely pay wages, unlawfully withholding wages, and paying less than the minimum wage. Prior law provided a $50 penalty for the first violation and $100 for every violation thereafter. Under AB 276, the first violation is increased to $100 and increased to $200 for each subsequent willful violation.

❑ ❑ Legislature Overturns the California Supreme Court and Expands Employee Recovery of Attorneys' Fees And Costs On Labor Commissioner Award Appeals (AB 223)

Earlier this year, the California Supreme Court in *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, limited the award of attorneys' fees in appeals from Labor Commissioner wage awards. *Smith* construed Labor Code section 98.2(c) to provide that the appealing party will be liable for the other party's fees and costs, unless the resulting trial court judgment is *more favorable* to the appealing party than was the underlying administrative award. According to the Court, the legislative history of section 98.2(c) confirmed that the purpose of the fee-shifting provision is to promote commissioner award finality. The statute discourages unmeritorious appeals to the courts by requiring that the unsuccessful appellant shoulder respondent's costs in defending the appeal. The Court thus limited fee awards to (1) employer judgments that resulted in reductions of the award, and (2) employee judgments, which resulted in an award for more money than the administrative order.

AB 223 overturns *Smith* by providing that an employee *shall* recover attorneys' fees on the employer appeal if he or she recovers *any* monetary award, even if in the same amount or less than awarded by the Labor Commissioner. Section 98 (c), as amended, now provides that an employee is "successful" if he or she receives a judgment "greater than zero," thereby rejecting the High Court's legislative history interpretation. Thus, employers now face increased exposure to fee awards by requesting a trial *de novo* review of adverse labor commissioner awards.

❑ ❑ Amended Labor Code Section 3201.7 Labor-Management Carve-Out Agreements For Workers' Compensation (SB 228)[7]

In the wake of the many changes in the workers' compensation laws, a little known amendment was made to the Labor Code that may provide relief to employers with unionized workforces.

SB 228 adds Labor Code section 3201.7, to permit labor-management carve-out agreements—thus exempting certain employers from various Workers' Compensation Act provisions. The new law permits carve-out agreements for any employer or groups of employers that meet certain requirements. This law gives labor and management considerable flexibility to establish a system tailored to their specific workers' compensation needs.

Which employers may take advantage of this program?

To utilize this system an employer must meet one of three criteria: (1) those employing at least 50 employees with a projected annual workers' compensation insurance premium of $50,000 or more; (2) groups of employers engaged in a workers' compensation safety group with projected annual workers' compensation insurance premiums of $500,000 or more; or (3) self-insured employers that satisfy the other criteria of sections (1) or (2).

What can be included?

The labor-management carve-out agreement is negotiated separately from a collective bargaining agreement, and may cover a myriad of issues, including:

- Creation of an alternative dispute resolution "ADR" system governing disputes between employers and employees. The ADR system may include arbitration, mediation, an ombudsperson, or any combination thereof. The ADR system must include a provision that any decision is subject to review by the Workers' Compensation Appeals Board;
- An agreed list of providers to be the exclusive source of medical treatment for work-related injuries;

- An agreed, limited list of qualified medical evaluators and agreed medical evaluators;
- Joint labor-management safety committees;
- Light-duty, modified-duty, or return-to-work programs; or
- Vocational rehabilitation or retraining programs.

What about Section 132a claims?

According to the Commission on Health and Safety and Workers' Compensation (CHSWC), the labor-management carve-out agreements can include Section 132a claims (claims of discrimination toward injured workers) as part of the alternative dispute resolution process provided that both parties agree.

This is a new area for employers to explore as a possible means of minimizing and controlling costs related to workers' compensation injuries and claims. Employers that wish to explore the requirements and potential advantages of this new system should contact labor counsel to assess how the new law may apply to and be implemented by them.

❑ ❑ Contracts For Labor Or Services—New Requirements (SB 179)

SB 179 adds Labor Code Section 2810. Section 2810(a) precludes contracts for construction, farm labor, garment, janitorial or security guard services when the contracting entity knew or should have known that the contract does not provide funds sufficient to allow the contractor to comply with all labor laws.

Section 2810(b) establishes a rebuttable presumption affecting the burden of proof that there has been a violation of the section by a contractor if the contract meets a number of specific requirements. Section 2810(d) sets forth ten specific written contract requirements to invoke a rebuttable presumption of compliance. The most notable provisions include the following: (1) description of the labor or services are to be commenced and completed; (2) the employer tax identification number of the service provider; (3) the workers' compensation insurance policy number of the insurance carrier of the service provider; (4) the address of any real property to be used to house workers in connection with the contract; (5) the total number of workers to be employed under the contract; and, (6) the total amount of all wages to be paid.

The new legislation contains tough enforcement measures. An employee aggrieved by violation may file an action for damages to recover the greater of his or her actual damages or $250 per employee per violation for an initial violation and $1,000 per employee for each subsequent violation. A prevailing employee may also recover costs and reasonable attorneys' fees. In addition, an injunction can be issued against noncompliance along with an award of reasonable attorneys' fees recovered.

Finally, SB 179 exempts employers who execute a collective bargaining agreement covering the workers employed under the contract or agreement from coverage under Section 2810.

In light of this new law, all persons or entities contracting for labor services with construction, farm labor, janitorial or security guard contractors need to revise their contract forms to ensure that they will be able to assert the rebuttable presumption set forth in the statute. In addition, it is important that such contracting entities ensure that the contractor for services complies with the applicable labor laws.

❑ ❑ A Reminder—Family Temporary Disability Insurance Leave

Let's not forget that starting January 1, 2004, the first part of the paid Family Temporary Disability Insurance Law takes effect. We wrote extensively about the law in last year's update. Here is a quick recap:

- Employees may take up to six weeks of paid leave to care for a sick parent, spouse, domestic partner or child, or to bond with a new child due to adoption, birth or foster care placement;
- To fund the pay portion of this leave, employees will pay into a State Fund beginning January 1, 2004;
- Family leave will be available after July 1, 2004;
- Employees will receive 55% of wages up to a maximum of $728 per week.

The mandatory notice of rights provided to all new employees and all employees taking a leave of absence must

be implemented. The California Chamber of Commerce has Family Leave pamphlets available.

❑ ❑ And Finally . . . Does Governor Schwarzenegger's Executive Order Stop Any Of These New Laws?

No. On November 17, 2003 Governor Schwarzenegger signed Executive Order S-2-03 which provides that each agency shall cease processing *any* regulatory action for a period of 180 days and suspend or postpone the effective date of any regulation adopted, amended or repealed that is published but not yet effective.

Governor Schwarzenegger's Executive Order halts implementing regulations, not the laws themselves. It does not modify or repeal legislation passed this year, or relieve employers of the responsibility of complying with these new laws.

❑ ❑ ENDNOTES

[1] Labor Code Section 2699 defines "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more alleged violations was committed."

[2] SB 2 is not wholly clear on this date and for these employees, but this is the most logical reading of SB 2.

[3] There is no guidance on whether this is three consecutive months or any three months.

[4] Dependents are defined more broadly than most existing health care insurance defined dependents because there is no upper age limit for children.

[5] Of course, the obvious question is what about non-bargaining unit employees? It is possible that they would be treated as covered by this exemption if their benefits are the same as those of union employees.

[6] De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997).

[7] Several notable workers' compensation changes set forth in AB 227 are not covered in this newsletter. For example, AB 227 does away with the treating physician presumption; amends Labor Code section 4604.5(d) by placing a limitation on physical therapy visits and chiropractic visits to 24 per claim.

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More Information

If you would like to pursue the subject of this newsletter or other labor and employment matters, please contact Diane O'Malley, Raymond Lynch or any Hanson Bridgett attorney with whom you have an existing relationship.

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