

It's That Time Again . . . More New Legislation Impacting Employers

The following significant California employment laws will become effective January 1, 2003. In light of the new laws, employers should update their policies and procedures to ensure they are in compliance.

**Paid Family Care Leave (SB 1661)**

SB 1661 creates the family temporary disability insurance (FTDI) benefits fund. This fund will provide employees with wage replacement, similar to SDI, for lost wages for up to six weeks for employees who take time off to care for a family member (including a

domestic partner), or the birth, adoption, or foster care placement of a new child. FTDI will be funded by employee contributions that will begin on January 1, 2004. Funds will become available to employees on July 1, 2004.

**Workplace Protection for Victims of Sexual Assault (AB 2195)**

Sections 230 and 230.1 of the California Labor Code currently provide protections for victims of domestic violence who must take time off work for reasons related to domestic violence, including to seek court relief

and to ensure the safety of the employee or the employee's child. AB 2195 extends the same protections to victims of sexual assault. Violation of this law is a misdemeanor, and may result in the employee filing a complaint with the Division of Labor Standards Enforcement.

**Age Discrimination Protections Enhanced (AB 1599)**

Existing California law makes it an unlawful employment practice for any employer to refuse to hire, employ, discharge, dismiss, suspend, or demote

any individual over the age of 40 on the basis of that individual's age. AB 1599 amends Section 12940 of the Government Code to make it unlawful for an employer on the basis of a person's age to refuse to select the person for a training program leading to employment, to bar or discharge the person from a training program leading to employment, or to discriminate against the person in compensation or in the terms, conditions, or privileges of employment.

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Employers May Be Allowed to Discontinue Paying Health Premiums For Employees on Workers' Compensation Leaves

A recent decision of the California Workers Compensation Appeals Board ("WCAB") may, in limited circumstances, allow an employer to cease paying for the group health benefits of an employee who is out of work for an extended period of time due to an on-the-job injury. Previous WCAB decisions had held that the discontinuance of such payments violates Labor Code Section 132a, which prohibits discrimination against employees who suffer workers' compensation injuries.

In *Navarro v. A & A Farming et al.*, WCAB Case No. 0087934, the WCAB, sitting *en banc*, held that where an injured employee's Labor Code Section 132a claim is premised upon an employer's termination of (or refusal to provide) group health plan benefits to the employee pursuant to the terms of an ERISA plan, the employee's Section 132a claim "relates to" the ERISA plan and, therefore, is preempted by ERISA. 29 U.S.C. § 1144(a). In other words, federal law (ERISA) governs, not state law (Section 132a).

Alonzo Navarro was employed as a working foreman by A&A for nine years. At all times during Navarro's employment, A&A was a participating member employer of the Western Growers Assurance Trust (the "Trust"), a multi-employer trust that provides medical, dental, vision and other benefits to the employees of participating employers. The Trust, which was funded in part by employer contributions, qualified as an "employee welfare benefit plan" within the meaning of ERISA. 29 U.S.C. § 1002(1)(A).

During a period from August 1996 to April 2000, Navarro sustained industrial injuries to his back. As a result of his injuries, he stopped working on April 5, 2000, and had back surgery two days later. With the exception of one partial-day attempt to return to work, he never worked for A&A after April 5, 2000. After Navarro stopped working in April 2000 due to his industrial injuries, A&A made contributions to the Trust on his behalf for the months of May, June and July 2000, in accordance with its contributions policy (under the Trust).

By letter dated August 15, 2000, however, A&A stated that it would only provide medical coverage for disabled employees for a period of 90 days after they commenced leave due to their disability; hence, after this 90-day period, continuation of his health coverage was available under COBRA. Consistent with its letter, A&A terminated Navarro's health coverage despite Navarro's threat that he would file a Section 132a claim. Navarro promptly filed a Section 132a claim. At the trial level, the Workers Compensation Judge concluded that Navarro had failed to establish a violation of Section 132a because A&A's policy of continuing health coverage for a limited period of 90 days applied to all of its employees, not just Navarro, whether the disability was industrial or not.

On appeal, the WCAB did not reach the question of whether the employer's act of discontinuing its contributions to the ERISA plan on Navarro's behalf constituted discrimination under Section 132a. Rather, the WCAB's

decision was premised exclusively on ERISA preemption. In reaching its conclusion, the WCAB relied on several United States Supreme Court cases which establish that ERISA preempts any state law discrimination claim where the existence of, the implementation of, or the specific terms of an employer's ERISA plan are central to that claim.

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## A Tip For the Employer Already in a Court Case: A Section 998 Settlement Offer May Punish the Unreasonable Plaintiff

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In many employee lawsuits, the employee has the potential to recover his or her attorneys' fees in addition to whatever judgment is obtained. In some cases, this represents significant additional exposure to the employer. Company lawyers cringe at stories of plaintiffs who win \$30,000 from the jury, and then receive a \$100,000 fee award from the judge.

There is a way to limit this risk to employers. In order to encourage settlement, the California legislature enacted Code of Civil Procedure Section 998. This section provides that, if a plaintiff rejects a defendant's settlement offer and the plaintiff later wins less than the settlement offer at trial, then the plaintiff may not be able to recover attorneys' fees for the period of time after he or she rejected the settlement offer. The theory is that the plaintiff wasted the fees spent after the reasonable settlement offer. Section 998 also "punishes" the unreasonable plaintiff by potentially disallowing recovery of court costs and expert witness fees. In fact, the reasonable defendant may even be entitled to recover costs and expert fees from the plaintiff.

However, the Section 998 "punishment" of the plaintiff only applies if the settlement offer was made in the special format prescribed by Section 998. In light of the benefits of Section 998, in employment cases where an attorneys' fee award is possible, making settlement offers in the Section 998 format can be highly beneficial. Imagine the following scenario: Employee sues Employer for age discrimination. Early in the case, Employer offers \$30,000 to settle. Employee rejects this offer. Employee proceeds to trial and receives a jury award of \$25,000. If the \$30,000 settlement offer was in Section 998 format, then it is likely Employee will be entitled to only a small (pre-offer) attorneys' fee award on top of the \$25,000. However, if the \$30,000 settlement offer was not in Section 998 format, then Employee could receive an attorneys' fee award which could triple or quadruple the \$25,000 jury verdict.

The foregoing applies to arbitration as well as court litigation. The key question is whether the plaintiff has potential to recover attorneys' fees. For example, such potential exists in discrimination cases under the California Fair Employment and Housing Act, and in contract cases where the contract provides for recovery of attorneys' fees by the "prevailing party."

One limitation in Section 998 is that the settlement offer must not be a "token." For example, in one case, the defendant offered \$1. The plaintiff later recovered zero. When the defendant tried to recover his expert witness fees from the plaintiff, the court refused, finding that the \$1 offer was not a true settlement offer.

Two important shortcomings of the Section 998 offer are: (1) it must be left open for thirty days, which is sometimes longer than a litigant desires, and (2) the plaintiff has the ability to accept the offer and turn it directly into a public judgment, whereas an employer may prefer a private settlement agreement. However, in most cases, even if the Section 998 offer is accepted, the defendant can negotiate for a private settlement agreement.

It rarely makes sense for a defendant to make a Section 998 offer purely for the sake of making a Section 998 offer. However, if a defendant is going to make a settlement offer anyway, and if the case has attorneys' fees potential, then it will often be beneficial to posture the offer as a Section 998 offer. A further benefit of this offer format is that it will force the plaintiff (and counsel) to think very carefully before rejecting the offer, knowing that they could "win" at trial, but if they do not "win" enough, they could end up paying some of the defendant's costs and fees. ■

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## Recent Court Decision Clarifies "Continuing Violation" Doctrine

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Employees suing for discrimination or harassment often attempt to support their claims by relying on incidents which sometimes occurred many years ago. The Ninth Circuit recently held that, although these incidents from years ago cannot constitute the actual claim, the court will allow the jury to hear about these alleged past violations if the conduct was relevant to the more current acts upon which the claim is based.

In *Lyons v. England*, decided Oct. 9, 2002, African-American military veterans (the "plaintiffs") filed an action alleging that they were subjected to years of discrimination because of their race. Plaintiffs alleged that from 1991 to 1997 they were subjected to a continuous pattern of discrimination in that they were systematically denied promotions and placed in less favorable positions than their white counterparts. Plaintiffs did not file an EEOC charge until 1997. The trial court granted summary judgment holding plaintiffs' pre-limitations period claims were time-barred and plaintiffs could not use these claims as evidence of discrimination.

The Ninth Circuit affirmed in part and reversed in part. Following the U.S. Supreme Court's ruling in *Nat'l R.R. Passenger Corp. v. Morgan*, the Ninth Circuit held that discrete discriminatory acts alleged by plaintiffs were not actionable since they were time-barred, even if they are related to acts alleged in the timely filed charges. Despite plaintiffs alleging a continuous pattern and practice of discrimination, they must pursue their disparate treatment claims based on each discrete discriminatory act within the limitations period. Moreover, unlike harassment claims, the limitations period for each individual discrimination claim starts from the date on which the

underlying act occurs. Therefore, the employer was only liable for any alleged discriminatory act that occurred within the limitations period.

The Ninth Circuit also considered what evidence plaintiffs could introduce at trial regarding the time-barred discriminatory acts in the prosecution of their timely disparate treatment claims. Previously the Ninth Circuit, under the continuing violation doctrine, allowed plaintiffs to introduce evidence of past violations if the unlawful conduct continued into the present so long as the pre-limitations acts were "reasonably related" to acts occurring within the limitations period.

However, in light of *Morgan*, the Ninth Circuit held that plaintiffs may introduce evidence of time-barred claims if the discriminatory acts are "relevant" background evidence in a proceeding in which the status of the current practice is at issue. The term "relevant evidence" is quite broad and can encompass any evidence that has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In the context of a discrimination claim, admissible background evidence will be any evidence that determines the ultimate question of whether the defendant intentionally discriminated against the plaintiffs because of their protected class. Thus, the Ninth Circuit reversed the trial court's order barring the plaintiffs from introducing at trial evidence that the employer failed for years to transfer or promote African-Americans as background evidence of their current discrimination claims. ■

# The Rules Regarding Background Checks Become Even More Complex

The California Investigative Consumer Reporting Agencies Act (California Civil Code § 1786 *et seq.*) (“ICRA”), and the federal Fair Credit Reporting Act (15 U.S.C. § 1681a) (“FCRA”), have long required employers who use third parties (“investigative consumer reporting agencies” or, as referenced below, “third party agencies”) to conduct certain investigations and background checks of applicants/employees to provide notice and disclosures to the applicant/employee.

With the stated purpose of increasing protections against identity theft, the California Legislature passed Assembly Bill 655 (effective January 1, 2002), which amended the ICRA. These amendments impose additional notice and disclosure requirements concerning background investigations. In addition, AB 655 added California Civil Code Section 1786.53, which requires employers who do their own background checks to make similar disclosures to the applicant/employee involved as would be required if an outside agency performed the investigation.

AB 655 brought with it a wave of confusion and questions including whether notice and disclosures were required in connection with employer-conducted reference checks and internal harassment investigations. Many of these questions arose from the separate, yet overlapping notice and disclosure requirements of the ICRA and FCRA. In response to these ambiguities, the California Legislature just recently enacted cleanup legislation in the form of two laws, AB 1068 and AB 2868.

## AB 1068 and AB 2868's key effects are:

- (1) Reference checks conducted by the employer itself are now excluded from the ICRA;
- (2) Employers need not automatically send background reports (obtained from a third party agency) to an applicant/employee. Rather, applicants will have an opportunity to check a box if they want a copy of the background report and have a copy of the report sent directly from the investigative consumer reporting agency;
- (3) If an employer does its own investigation (without using an agency), it must provide a copy of the report; provided, however, that an employer using this procedure may provide a form to the applicant/employee with a box that, if checked, permits the applicant/employee to waive his/her right to receive a copy of the report; and
- (4) Employers will need to complete additional certification to any investigative consumer reporting agency used that they will comply with the laws regarding background checks.

With limited exceptions, the ICRA now imposes on employers the following requirements:

### Authorization

Employers are required to obtain written authorization from applicants/employees approving procurement of a report.

### Notice Requirements

An employer must provide an applicant/employee with the following information in writing within three days after requesting an investigative consumer report from an investigative consumer reporting agency:

- (a) that a background check has been sought concerning the applicant/employee's character, general reputation, personal characteristics, and/or mode of living;
- (b) the name of the investigative consumer reporting agency conducting the background check;
- (c) a summary of the provisions of California Civil Code Section 1786.22; and
- (d) the address of the investigative consumer reporting agency conducting the background check and the nature and scope of the report requested.

### Disclosure Requirements

If the applicant checks the box asking for a copy of the background check or investigative consumer report, and a third party agency is used, the applicant/employee must be provided a copy of the investigative consumer report. Such disclosure must be made regardless of whether the report was obtained on suspicion of employee wrongdoing. Please note that the FCRA may cause this disclosure to be made earlier (or even if the applicant does not check the box asking for the report) if adverse action is intended to be taken in whole or in part on the contents of a report obtained from a third party agency. Where an employer conducts a background check by itself, it must provide the applicant/employee with any public record obtained (*e.g.*, arrest record, indictment, conviction, civil jurisdiction, tax lien, or outstanding judgment) unless the applicant/employee checks a box waiving his/her right to receive a copy of the public record.

An employer may be excused from the notice requirements under the ICRA when the employer obtains an investigative consumer report from an investigative consumer reporting agency based on a good faith belief that the employee was engaged in criminal activity likely to result in loss to the employer or suspicion of wrongdoing, *i.e.*, sexual harassment or workplace violence. However, this latter exception may be of little practical use because the FCRA does not provide a similar exception to its notice requirements under these circumstances. In any event, because the FCRA only applies to third-party conducted interviews, advance notice of an internally conducted investigation is not required under either California or federal law.

### Penalties

Penalties for noncompliance with the ICRA are severe – \$10,000 per employee or applicant (or the amount of actual damages, if greater). Cal. Civ. Code § 1786.50. In addition, employers are subject to costs, attorneys' fees, and – if found grossly negligent or willfully negligent in violation of the statute – punitive damages.

### Recommendations

Employers should review their current notice and disclosure background check forms and revise them accordingly to conform with the ICRA, as amended, and the FCRA. In addition, because of the complicated rules, employers should ensure that proper procedures are followed once the background check information is obtained. ■

## Workers' Compensation (continued from page 1)

In its holding, the WCAB cautioned that an employer cannot “don the mantle of ERISA preemption simply by including workers' compensation benefits in its welfare benefit plan and thereby escape the requirements of state law.” (Citations omitted.) The WCAB stated, however, that caveat does not mean that ERISA cannot preempt a state

workers' compensation law that relates to an ERISA plan which provides, for example, group health benefits outside of any workers' compensation scheme.

In the face of Section 132a, it has long been ill advised for employers to terminate the health insurance benefits of a worker out of work for an extended period due to an industrial injury.

However, in light of *Navarro*, employers will want to examine their existing health insurance plans to determine whether they constitute an “employee welfare benefit plan” within the meaning of ERISA. If the plan, such as the Trust in *Navarro*, falls under ERISA, an employer may now have the right to terminate the health benefits of an

employee on an industrial leave on the same basis that it chooses to terminate such benefits for all other types of leaves. Of course, the *Navarro* decision only addresses the Section 132a issue, and employers need to still comply with any obligations imposed by family medical leave laws or company policies. ■

AB 1599 overturns the California Supreme Court decision in *Esberg v. Union Oil Co.*, wherein the court had held it was lawful to deny tuition reimbursement to an older worker.

**Employee's Right to Inspect Payroll Records (AB 2412)**

AB 2412 requires an employer to permit a current or former employee to inspect the employee's payroll records within twenty-one (21) days of receiving the employee's written or oral request for such inspection. Failure to comply with this law may result in a \$750 penalty, a civil action, or a \$250 fine under the Penal Code.

**Employees Now Have the Right to Disclose Information About Working Conditions (AB 2895)**

AB 2895 bars an employer from requiring an employee to refrain in any way from disclosing working conditions, and makes it unlawful for an employer to discharge, discipline, or discriminate against an employee who makes any such disclosure.

**Sick Leave (SB 1471)**

SB 1471 prohibits an employer from using an absence-control policy to discipline or discharge an employee for taking sick leave to care for an ill child, parent, spouse or domestic partner.

**Undocumented Workers (SB 1818)**

Although a prior United States Supreme Court decision held that undocumented workers may not sue for wages, SB 1818 provides undocumented workers with "all protections, rights, and remedies available under state law . . . regardless of immigration status."

**More Time to Sue (SB 688)**

Existing law provides that an employee can sue within one year for actions for assault, battery, or injury or death caused by a wrongful or negligent act of another. This bill increases the statute of limitations for such actions to two years. Thus, for example, an employee who brings a cause of action for intentional or negligent infliction of emotional distress now has an extra year to bring his or her claim.

**State WARN Statute (AB 2957)**

Currently, under federal law, the Worker Adjustment and Retraining Notification Act (WARN) requires an employer with 100 or more employees to provide written notice 60 days in advance of a layoff involving 50 or more employees. California law currently does not require this same or any similar notification.

AB 2957 will now require an employer with more than 75 employees to provide the same WARN-type notice before a mass layoff, relocation or termination of operations. An employer's failure to provide the requisite notice could subject the employer to civil penalties, backpay, attorneys' fees and payment for lost benefits. However, any such penalty may be reduced if there is a finding that the employer acted in good faith in believing its conduct did not violate the law.

**Local Jurisdictions Can Make Laws (AB 2509)**

Currently, California law provides that state law provisions regulating wages, hours and working conditions for employees do not restrict the exercise of local police powers over those matters in a more stringent manner. The new law will allow local jurisdictions, such as cities, counties, districts or agencies, which receive funds from a state agency, to establish their own labor standards so long as those standards do not directly conflict with state law. Thus, employers may see local jurisdictions become much more active in enacting living wage ordinances, first source hiring programs, and other employment-related programs which can impose significant obligations upon employers. ■

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