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TAKE NOTE! NUMEROUS NEW LAWS AFFECT CALIFORNIA EMPLOYERS IN 2003

During the last session, the legislature sent to the governor several bills changing California employment law. Below are the highlights of those bills that have become law, and those that were vetoed.

Effective Now:

BACKGROUND CHECKS AND INVESTIGATIONS (AB 1068, AB 2868)

More changes have been made to the Investigative Consumer Reporting Agencies Act ("ICRA") in response to protests from California employers following last year's amendments to that statute. The new rules clarify that an **employer need not obtain consent for or give notice of investigations based on suspected wrongdoing or misconduct.**



In all other circumstances, however, employers must obtain written consent from current or prospective employees before requesting investigative consumer reports from a consumer reporting agency ("CRA"). An employer must also disclose the following information to the employee:

- That an investigative consumer report may be obtained;
- The permissible purpose for obtaining the report;
- That the disclosure may include information about the consumer's character, general reputation, personal characteristics, and mode of living;
- The name, address, and telephone number of the agency conducting the investigation;
- The nature and scope of the investigation; and
- A summary of the consumer's right to view the information obtained.

The disclosure/consent form cannot be part of another document, such as an employment application or employee handbook, and the employee must be given the opportunity to indicate his or her desire to obtain a copy of any report that is prepared. Employers can delegate the responsibility for providing copies to the CRA.

These rules also cover in-house investigations (other than those based on suspected wrongdoing or misconduct). If information collected by in-house personnel on a current or prospective employee is a matter of public record, you must provide the individuals with a copy of the information obtained within seven (7) days of receipt, unless the individual expressly waives his or her right to receive it. If any adverse action is taken against the individual, a copy must be provided regardless of waiver.

WORKERS' COMPENSATION REFORM (AB 749)

Among other things, this omnibus bill requires that a revised poster and pamphlet be distributed to employees. The bill also increases benefits which include, but are not limited to, death benefits, temporary disability rates, permanent disability rates and life pension benefits. Contact your workers' compensation carrier for a revised poster and pamphlet. Gordon & Rees has already advised some clients on the specifics of the increases in benefits. Contact us if you would like more information.

ATTENDANCE CONTROL (AB 1471)



Labor Code Section 233, which became effective January 1, 2000, requires employers to permit an employee to use an amount of sick leave he or she would accrue during a 6-month period to attend to the illness of

the employee's child, parent or spouse. Thus, for example, if the employer provides 12 days of paid sick leave each year, the employee is authorized to use up to six days each calendar year to care for the illness of his or her family member.

Effective January 1, 2002, this statute was again amended to provide that employers must permit the use of this "kin care" for employees to attend to an ill domestic partner or child of a domestic partner.

Governor Davis recently signed Senate Bill 1471, effective January 1, 2003, which adds Section 234 to the Labor Code. This section provides that an absence-control policy that counts sick leave taken to attend to the illness of a child, parent, spouse or domestic partner, as an absence that may lead to or result in discipline, discharge, demotion or suspension, is a per se violation of Labor Code section 233. Provisions in the bill allow the employee to sue if this occurs.

Employers should review their absence control and attendance policies to be sure they do not count a kin care absence in any way that could result in an adverse action against the employee. Generally, absences due to family and medical leaves, pregnancy leaves, or workers' compensation leaves of absence, should not be used as a reason to impose discipline, or as a basis for a negative performance evaluation.

AGE DISCRIMINATION (AB 1599)

Persons over the age of 40 are now admitted to the same protections as those in other protected classes in California. Previously, the protections against age discrimination were more limited than those available to members of other protected classes. This amendment to California Fair Employment and Housing Act (FEHA) was enacted to overturn the California Supreme Court's decision in *Esberg v. Union Oil Company* (2001) 87 Cal.App.4th 378. In *Esberg*, the Court held that denying tuition reimbursement or other benefits to a worker based on age does not violate state law.



The new amendment to the FEHA provides that it is an unlawful employment practice to refuse to select a person for a training program leading to employment, or 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, whether based on that person's age or any other protected category. Therefore, employers will no longer be able to avoid providing employees who are 40 years of age or older with benefits such as training, free college or post-graduate education if those benefits are made available to younger workers.

EMPLOYEE RECORDS (AB 2412)



The assembly amended Labor Code section 226 which now requires employers to make available for copying or inspection records related to payroll, compensation or deductions (as specified by Labor Code section 226(a)) to current employees or former employees within 21 days from the date requested (written or oral request) and provides a \$750 penalty for noncompliance. The amendment also authorized an employee to bring an action for injunctive relief to obtain access to payroll records.

LAYOFF NOTICE (AB 2957)

Similar to the federal Workers' Adjustment and Retraining Notification (WARN) Act, AB 2957 requires employers to provide 60 days notice to affected employees and to certain government officials of a mass layoff, relocation, or termination



of a business, as those events are defined in the law. This new law applies to employers who employ or have employed in the preceding 12 months, 75 or more persons. A "mass layoff" means a layoff (of 50 or more employees) during any 30 day

period. A "relocation" means the removal of all or substantially all industrial or commercial operations to a different location of 100 miles or more away. "Termination" means the cessation or substantial cessation of industrial or commercial operations. Employers who anticipate the need to conduct such layoffs should contact counsel to ensure that they are complying with all aspects of the new law.

HEALTH BENEFITS (AB 1401)

AB 1401 requires a health care service plan and a health insurer to offer specified individuals who (1) begin receiving COBRA coverage on or after January 1, 2003, and who (2) exhaust their continuation coverage under COBRA where



their maximum coverage would have been less than 36 months, an opportunity to extend the term of their coverage to a total of 36 months. This new law pertains only to insured plans, not self-insured plans. In addition, this applies only to medical plans, not stand-alone dental or vision plans.

The extension of coverage only needs to be offered if the original COBRA coverage was less than 36 months. Spouses and dependent children who originally are offered 36 months of COBRA coverage are not eligible for the extension. Maximum coverage period is 36 months from the original COBRA commencement date.

PERSONAL AND IDENTIFYING INFORMATION (AB 700, SB 1386)

These bills respond to growing concern over identity theft. This new legislation requires employers who maintain electronic files containing personally identifiable data on employees or customers (such as Social Security Numbers) to notify the individuals if the security of the data has been violated. A

notice may be provided to individuals through written notice, electronic notice or through the posting of an announcement on the web-site or by notification to major statewide media. Personal and identifying information as used in this bill includes social security numbers, California driver's licenses or identification cards, account numbers, and credit or debit cards in combination with any required security code or pin number.



EMPLOYMENT LAW PROTECTIONS APPLY REGARDLESS OF EMPLOYEE'S IMMIGRATION STATUS (SB 1818)

This bill clarifies that employment protections, rights and remedies available under California law apply without regard to a person's immigration status.

SEXUAL ASSAULT VICTIMS (AB 2195)

This amendment to Sections 230 and 230.1 of the Labor Code prohibits employers from taking adverse employment action against victims of domestic violence or sexual assault who take time off work to attend to issues arising as a result of the domestic violence or sexual assault, as long as the employee complies with certain conditions. Previously, the rights and protections afforded under this statute only applied to victims of domestic violence. Employers who violate these provisions are guilty of a misdemeanor.

OCCUPATIONAL SAFETY (AB 2837)



AB 2837 creates new obligations and penalties for failure to report industrial accidents (that result in serious injury or death) on a timely basis. Specifically, the bill imposes civil penalties

between \$5,000 and \$15,000 against any employer who fails to file a report of serious injury, illness or death. The new law makes it a misdemeanor when an employer, officer, management official or supervisor fails to report a death or knowingly induces another to do so. The penalty is up to one year in jail and/or up to a \$15,000 fine.

AB 2837 also imposes a fine of up to \$150,000 for a limited liability company or a corporation for failing to report a death.

NO RETALIATION FOR DISCUSSING WORKING CONDITIONS (AB 2895)

This bill prohibits an employer from requiring employees to agree not to disclose information about working conditions and prohibits discharging, disciplining, or otherwise discriminating against an employee who discloses information about working conditions.

LABOR BILLS VETOED BY THE GOVERNOR:



Whistle blower protection (SB 783) - Would have expanded protections for employees who report violations of state or federal rules.

Reporting requirements (AB 1309) - Would have required filing of an annual state report describing workforce composition by gender, ethnicity, and job classification.

Contracts for labor (AB 1466) - Would have imposed restrictions on contracts for labor or services in the construction, farm labor, government, janitorial, and security guard industries.

Employment arbitration agreements (SB 1538) - Would have prohibited pre-dispute arbitration agreements for discrimination claims under FEHA.

Labor law compliance penalties (AB 2752) - Would have created new and increased penalties against employers for violating state labor laws.

Ergonomics (AB 2845) - Would have required new ergonomic standards on or before July 1, 2004.

Severance pay (AB 2989) - Would have guaranteed same severance to non-exempt employees as provided to exempt employees.

Employee termination (AB 2990) - Would have created a rebuttable presumption that any adverse action taken against an employee within 90 days after he/she has exercised rights under the Labor Code is unlawful retaliation.

ARE YOU ILLEGALLY RE-CHECKING GREEN CARDS TO KEEP YOUR I-9s UP TO DATE?

You are probably aware that you need to verify an employee's eligibility for employment within three days of hiring. Hopefully, you are already very diligent about completing an I-9 for each new hire and reviewing the appropriate documentation. Remember, you may not request more or specific documents when verifying an employee's eligibility to work. Acceptable documents are listed on the back of the I-9 Form and you should let the employee choose which form(s) of ID they present.



What happens when an employee originally provides you with a green card as one of their forms of ID and then that green card expires? You may be tempted to ask the employee for an updated green card. But, a permanent resident whose green card expires *remains* authorized to work. Re-verifying green cards violates immigration laws because employers are not allowed to ask immigrant employees for more or different work eligibility documents than U.S. Citizens. This same idea holds true for a U.S. Citizen who originally provides you with a passport as evidence of their eligibility to work. If their passport expires it has not changed their eligibility to work so you do not need to recheck documentation.

You should calendar expiration dates for alien employees who were only temporarily authorized to work in the U.S. and re-check their documentation to insure that their status has not changed

The Employment Law Group at Gordon & Rees has extensive experience with these issues. Let us know if you need a review of your current practices with regard to verifying employment eligibility.

EEOC FOCUSES ON ENFORCEMENT OF NATIONAL ORIGIN DISCRIMINATION POST 9/11



The United States Equal Employment Opportunity Commission recently filed several post 9/11 national origin discrimination suits under Title VII of the Civil Rights Act of 1964, and promulgated a new section in its EEOC Compliance Manual, specifically focused on national origin discrimination. These actions were undertaken in an effort to raise attention to potential discrimination in light of the 9/11 tragedy.

The EEOC, Departments of Justice and Labor are focusing on preventing and redressing incidents of harassment and discrimination directed towards people who are Arab, Muslim, Middle Eastern, South Asian or Sikh. "Since the events of 9/11, the EEOC has seen a significant number of charges filed nationwide alleging backlash discrimination based on religion and/or national origin," said Katherine E. Bissell, regional attorney for EEOC's New York District Office.

Title VII Refresher

Employers cannot deny employees equal employment opportunity because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group. Nor can equal employment opportunity be denied because of marriage or association with persons of a national origin group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group. Specifically, Title VII prohibits employers from basing decisions relating to hiring, promotion, transfer, wages and benefits, assignments, leave, training discipline, and layoffs or termination on an employee's national origin. Further, employers may not rely on coworker, customer or client discomfort or preference with respect to the national origin of employees in making employment decisions. Even employment decisions that are motivated in part by an employee's national origin will subject employers to liability under Title VII.

Employers should exercise special care when making any employment decisions in light of the EEOC's post 9/11 increased sensitivity to national origin claims.

GETTING LAWSUITS DISMISSED EARLY JUST GOT MORE DIFFICULT

Senate Bill 688, effective January 1, 2003, extends the notice required for motions for summary judgment. If the notice is served by mail, the required notice is increased by 5, 10 or 20 days according to the place of address.



What this means for you: Employment related claims and complaints should be thoroughly investigated at the outset, particularly when they appear likely to be headed for litigation. Early development and documentation of supporting facts will assist your counsel in meeting these new deadlines and increase the chances of success in obtaining dismissal of frivolous cases before trial.

CASE NOTES:

EMPLOYEES UNCHAINED FROM EFFECTS OF INEVITABLE DISCLOSURE DOCTRINE IN CALIFORNIA

The inevitable disclosure doctrine is a rule that permits an employer to prevent an employee (or former employee) from actually working in another job where such employment would inevitably lead to the use or disclosure of trade secrets of the former employer. While a majority of jurisdictions apply some form of this rule, the California Court of Appeal has now made it clear that the inevitable disclosure doctrine is not the law of this state.



In *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, a sales executive signed a confidentiality agreement with his employer agreeing not to disclose any of the employer's proprietary information. Significantly, the employee did not sign a covenant not to compete as part of this agreement. Subsequently, the employer's main competitor recruited the sales executive and offered him a position at the competing company. The sales executive accepted the new position, but continued to work for his employer for two weeks, during which time he remained privy to confidential information. When the employee resigned, his former employer sought an injunction to prevent the former employee from working for the competitor, accusing him of violating his employment agreement, stealing proprietary information and refusing to return confidential information.

The California Court of Appeal held that application of the inevitable disclosure doctrine would amount to a covenant not to compete, something that was not agreed to by the former employee. The Court concluded that such a rule was not in line with the strong California public policy favoring employee mobility.

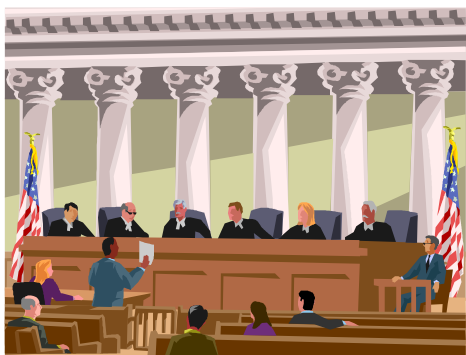


How does this affect you?

To avoid this situation, employers dealing with sensitive information and trade secrets should seek legal notice in drafting employment agreements to address these issues. Absent such a written agreement, employers risk losing valuable trade secrets and proprietary information.

CALIFORNIA’S POLICY AGAINST NONCOMPETITION AGREEMENTS NOT ENFORCEABLE TO ENJOIN LITIGATION OVER ENFORCEMENT OF A NONCOMPETITION AGREEMENT IN ANOTHER STATE

The California Supreme Court recently issued a decision ruling that a California Court is without authority to enjoin a pending parallel action in a sister state court seeking to enforce a noncompetition agreement. See *Advanced Bionics Corp. v. Medronic, Inc.*, 02 C.D.O.S. 12135 (December 19, 2002).



In 1995, Medronic, a Minnesota Corporation manufacturing implantable medical devices and headquartered in Minnesota, hired Mark Stultz to work in Minnesota as a senior product specialist. Stultz signed an employment agreement with Medronic, which included a noncompetition clause prohibiting Stultz from working for Medronic’s competitors for two years after termination of his employment. The agreement included a “choice of law” clause that stated that Minnesota law would govern the contract.

Stultz resigned from Medronic in 2000, and accepted employment with California based Advanced Bionics, a Medronic competitor. Stultz and Advanced Bionics then filed a lawsuit in California state court against Medronic seeking to have the noncompetition clause and choice of law clauses in Stultz’s contract with Medronic declared invalid under California law. Shortly thereafter, Medronic filed its own lawsuit in Minnesota state court seeking to enforce the noncompetition clause under Minnesota law. Significantly, Minnesota recognizes noncompetition clauses, while California, by and large, does not.

The California trial court issued a restraining order blocking the Minnesota suit, and requiring that the matter be litigated in California. When the California Court of Appeal upheld the restraining order, Medronic appealed to the California Supreme Court.

The California Supreme Court dissolved the restraining order, stating that it was not proper for a California court to issue a restraining order prohibiting the concurrent action in Minnesota. The Court went on to state that the principles of judicial restraint and comity (i.e., recognition and respect to courts of Minnesota) outweigh California’s strong public policy against noncompetition agreements.



What should you do?

California employers recruiting prospective employees from competitors outside of California should be aware that California law and public policy against noncompetition clauses may not necessarily apply simply because the new hire will work in California. Employers should make a practice of inquiring whether any prospective hire is subject to an employment agreement. If so, pay particular attention to any noncompetition and/or choice of law clauses, prior to making a hiring decision. If you ultimately decide to hire candidates from outside of California who have entered such agreements, you should seek legal advice as to the effect of the agreements.

INTRODUCING ...

MARK A. SAXON



Partner Mark Saxon is a valued addition to the San Diego office of Gordon & Rees LLP. He is a member of the Employment Law Group and provides pro-active advice to companies of all sizes on topics ranging from employee handbooks to wage and hour issues and from Family and Medical Leave to avoiding claims of wrongful termination.

In addition, Mr. Saxon regularly defends employers and supervisors in both state and federal court, as well as in arbitration proceedings, against claims of sexual harassment, discrimination, wrongful termination, defamation, violation of privacy rights, and unfair business practices. He was the lead attorney in both the trial and appellate courts in the landmark 1984 CUMIS case. That case held that when there is a conflict of interest with an insurance company, the employer has the absolute right to select counsel of its own choice, to defend its interests, with all expenses paid by the insurer.

Mr. Saxon recently served as Vice President-Legislation and as a member of the Board of Directors of the Society for Human Resource Management, San Diego Chapter. Mr. Saxon also served on the Legislative Task Force of The Employers Group and is an active member of the Greater San Diego Employers Association.



TRUTH A. FISHER

Truth Fisher also recently joined the San Diego office of Gordon & Rees. Her practice focuses on employment litigation and business litigation. Her employment litigation practice includes defending non-profit and for-profit corporations in a variety of legal claims including wrongful termination, breach of contract, and other related issues. Her business litigation practice includes representing clients in the following areas: patent infringement, legal malpractice claims, antitrust issues, and securities violations.



JASON R. DAWSON

Jason Dawson recently joined the San Diego office of Gordon & Rees. His practice focuses on employment law with particular emphasis on advising and defending employers in matters of wrongful termination, harassment, discrimination, wage and hour, and employee classification issues. Mr. Dawson also practices in the areas of environmental/toxic tort law, products liability, business litigation, and personal injury defense.



**BANKRUPTCY GROUP –
JEREMY W. KATZ**

Jeremy W. Katz heads Gordon & Rees' bankruptcy group, and has specialized in bankruptcy law for 15 years. He represents companies, whether they are creditors or debtors, in chapter 11 reorganization and chapter 7 liquidation cases. He counsels companies in workout situations. He also counsels companies as to the effect of collective bargaining agreements on efforts to reorganize.

Mr. Katz was one of the attorneys representing Willig Freight Lines, a \$100 million company, in its reorganization during the mid-1990's.

Mr. Katz can be reached by phone at (415) 986-5900, or by e-mail at jkatz@gordonrees.com.

GORDON & REES IN LAS VEGAS!



In response to the needs of existing clients, Gordon & Rees has opened an office in Las Vegas. The Gordon & Rees Las Vegas office will mirror the full-service defense litigation practice of its California offices and will be fully staffed to handle a variety of litigation matters involving health care, construction, insurance, environmental and toxic tort issues. Based on present work and initial reactions to the opening of this office, Gordon & Rees anticipates that the office will grow quickly and match the rapid expansion seen in other offices such as San Diego and Los Angeles.

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