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OUTSOURCING CAN TRIGGER WARN ACT REQUIREMENTS

Employers who are considering mass layoffs, plant closings, relocations, or terminations may already be aware that there are both federal and state notice requirements. Employers who fail to provide proper notice may face severe financial repercussions. With current trends in outsourcing, it is important to remember that outsourcing of jobs may also trigger the notice requirements of the following statutes.



Federal WARN Act

The federal Worker Adjustment and Retraining Notification (“WARN”) Act requires covered employers planning a “plant closing” or “mass layoff” to provide affected employees and specific state and local government officials at least 60 days’ written notice. (29 U.S.C. § 2102(a); 20 CFR § 639.2).

An “employer” is defined by the Act as “any business enterprise that employs: (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime).” (29 U.S.C. § 2101(a)(1)).

The Act's notice requirements are triggered by the occurrence of either a plant closing or a mass layoff. (29 U.S.C. §§ 2101(a)(2)-(3); 2102(a)). A "plant closing" under the statute means "the permanent or temporary shutdown of a 'single site of employment' or one or more 'facilities or operating units' within a single site of employment, if the shutdown results in an 'employment loss' during any 30-day period at the single site of employment for 50 or more employees, excluding any part-time employees." (29 U.S.C. § 2101(a)(2)).

A "mass layoff" is a workforce reduction that is not the result of a plant closing and results in an employment loss at a single site of employment during any 30-day period for at least 500 employees or at least 33% of the total employees at the site who comprise at least 50 employees. (29 U.S.C. § 2101(a)(3)). Under this statutory language, layoffs due to outsourcing are clearly covered.

California WARN Act

The California WARN Act (A.B. 2957) went into effect on January 1, 2003. Like the federal Act, the California WARN Act generally requires covered employers to provide at least 60 days' prior notice of a mass layoff, relocation, or termination of a covered establishment.

A "covered establishment" is defined as "any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons." (Lab. Code, § 1400(a).)

A "mass layoff" is a layoff of at least 50 employees during any 30-day period due to lack of work or lack of funds. (Lab. Code § 1400(c), (d)). While there is not yet any case law interpreting the "lack of work" language, jobs that are eliminated due to outsourcing would probably fall under this definition.

"Relocation" means removal of "all or substantially all" of the employer's industrial or commercial operations at a covered establishment to a different location at least 100 miles away. (Lab. Code § 1400(e)).

"Relocation" is not conditioned on employment loss and the employer must still give the requisite notice even if the employer offers continued employment at the new worksite and the employee accepts the offer.

"Termination" means the cessation or substantial cessation of industrial or commercial operations in a covered establishment.



Both the federal and state WARN Acts have specific criteria for how and to whom notice must be given. It is recommended that you seek the advice of counsel well in advance of any mass layoff (including layoffs due to outsourcing), plant closing, relocation, or termination of operations to assure you are in compliance with these statutes.

THE NEW FLSA REGULATIONS ARE HERE!!!



Unless congress acts before then, beginning on August 23, 2004, employers must comply with both the FLSA as recently amended as well as applicable state wage and hour laws. While the new changes will have a significant impact in many states, they will not have a similar impact in California where state wage and hour laws are still generally more

protective of employees than the new federal regulations. Nevertheless, California employers should be aware of the changes, and employers with employees outside of California should pay special attention to these changes. For particular issues or questions regarding compliance, be sure to consult with counsel.

The Revised Regulations: An Overview

The DOL's new regulations reflect several changes from the prior regulations, which include:

- ✓ Increasing the minimum salary level required for the administrative, executive, and professional exemptions (new annual minimum is \$23,660.00);
- ✓ Establishing the salary level required for an employee to be considered exempt because they are "highly compensated"(more than \$100,000 annually);
- ✓ Adopting a single standard duties test for each category of exemption and eliminating the "short" and "long" test framework used in the prior regulations;
- ✓ Clarifying and revising the factors to be considered when determining whether an employee's primary job duties fall within any of the five categories of exemptions;
- ✓ Explicitly stating that police officers, firefighters, paramedics, emergency medical technicians, and similar public safety employees, as well as manual laborers or other blue-collar workers, are entitled to overtime pay; and
- ✓ Streamlining and reorganizing the regulations to make them easier to understand.

Recommended Actions

Because California employers must comply with laws that are more protective than the newly revised FLSA regulations, compliance

with California wage and hour laws will generally ensure compliance with the FLSA. Nevertheless, even if all of your employees are in California, this is an opportune time to perform a review and assessment of existing exemption classifications to ensure that employees are properly classified. Such "self-audits" should be performed with the advice and involvement of counsel to maintain attorney client privilege and insure an accurate assessment.

Employers with employees in more than one state should be extra cautious to ensure they are in compliance with both the federal regulations and the particular wage and hour laws that apply in their state. Some states who followed the old FLSA regulations have not yet, and may not, adopt the new regulations into their state wage and hour laws.

Employers may want to contact counsel to assist with the following recommended actions:

- ✓ Determine whether exempt employees are earning the requisite salary to qualify as exempt.
- ✓ Ensure that employees classified under the executive, administrative, and executive exemptions meet the tests for exemption.
- ✓ Examine existing job descriptions to determine whether job, as described, is exempt and whether any revisions are necessary.
- ✓ Ensure that employees are actually performing the job as described in the job description.
- ✓ Revise and/or implement written policies as necessary.
- ✓ Ensure employee manual reflects policy on improper pay deductions, referencing the types of deductions that may be made, and articulates a clear complaint reporting procedure.

NON-SOLICITATION AGREEMENTS UNENFORCEABLE IF NOT LIMITED TO PROTECTED TRADE SECRETS

Daniel Thompson worked for a company called Pac-West Labels. When Pac-West was purchased by Impaxx, Thompson was asked to sign an agreement which included a covenant prohibiting him, for a period of one year following his termination, from calling on, soliciting, or taking away any of the company's customers or potential customers with whom he had any dealings during his employment. When he refused to sign the Non-Solicitation Agreement, he was terminated. Thompson then sued for wrongful termination in violation of public policy.



Notably, the complaint filed by Thompson alleged that the identity of the company's customers and potential customers were **not** trade secrets and that the company made no effort to keep the names of customers and potential customers secret. Nevertheless, the company argued that the Non-Solicitation Agreement was enforceable and moved for judgment on the pleadings, which was granted by the trial court.

On appeal filed by Thompson, the company argued that the Non-Solicitation Agreement did not violate Business and Professions Code § 16600 because it was not a "true" covenant not to compete, but a mere limited

restrictive covenant not to solicit customers. The company further argued that the Non-Solicitation provision did not prevent Thompson from continuing in his profession or trade, or from working for a competitor or former customer, or from accepting the business of former customers if they contacted him.

Although the Appellate Court agreed with the company that the subject Non-Solicitation provision was less restrictive and less anti-competitive than the broad, traditional anti-competitive clauses, the Court stated that "[I]t is nevertheless anti-competitive – why else would they ask employees to sign it? More to the point, 'anti-solicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets.'" (*Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1426, citing the earlier case of *Moss, Adams & Co. v. Shilling* (1986) 179 Cal.App.3d 124, 129.)

In summary, the Court of Appeal held that, "in the absence of a protectable trade secret, the right to compete fairly outweighs the employer's right to protect clients against competition from former employees." (Citing *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal.App.3d 622, 634.) The court was forced to assume as correct the allegation that the identity of the company's customers was not confidential, and thus not a trade secret. Whether or not this allegation was true was left for the trial court to determine on remand.

Reminder:

In order to ensure that Non-Solicitation Agreements with employees are enforceable, employers must take all reasonable precaution to maintain the trade secret status of whatever information they want to protect. This would include having written policies which require employees to maintain the confidentiality of the identity and information about customers and further require them to

sign Confidentiality and Non-Disclosure Agreements. In addition, employers must implement security policies which ensure that all files and documents containing trade secrets and proprietary information are protected from dissemination to those outside the company.

CALIFORNIA LEGISLATURE RESPONDS TO EMPLOYER CONCERNS ABOUT OUR WORKERS' COMPENSATION



Employers feeling frustrated and overwhelmed by the rapidly increasing claims made by injured workers and the attendant costs associated with such claims may be heartened to learn that changes to California's workers' compensation system became effective on April 19, 2004 with the Legislature's passage of Senate Bill 899.

While the changes are several, and many of them significant, the following provides a few highlights of the new law:

Return to Work Incentives for Employers

SB 889 promotes return to work programs by providing incentives to employers of *50 or more employees* who return disabled employees to work. For example, it allows a 15% reduction in permanent disability payments if an employer offers return to work at the same position or within the definition of modified and alternative work.

It also provides private employers of *49 or less employees* with subsidies for workplace modifications and special equipment. This

program will reimburse up to \$1,250 of such expenses to accommodate a temporarily disabled worker or up to \$2,500 to accommodate a permanently disabled worker.

Medical Treatment and Guidelines

SB 899 requires that the employer immediately authorize and provide medical treatment to a worker after a workers' compensation claim form is filed and until the claim is accepted or rejected. However, it also establishes a \$10,000 limit on liability before a claim has been accepted or rejected.

It imposes, for injuries occurring on or after January 1, 2004, a limit of 24 visits on occupational therapy, along with 24 chiropractic and 24 physical therapy visits, unless the employer authorizes additional visits.

It limits temporary disability (TD) payments for most injuries to 24 months from the first payment.

Presumptions and Liberal Construction

SB 899 provides that the burden of proof by preponderance of evidence applies equally to all parties and lien claimants, changing the law so that it no longer favors employees.

It eliminates the primary treating physician presumption of correctness.

Apportionment

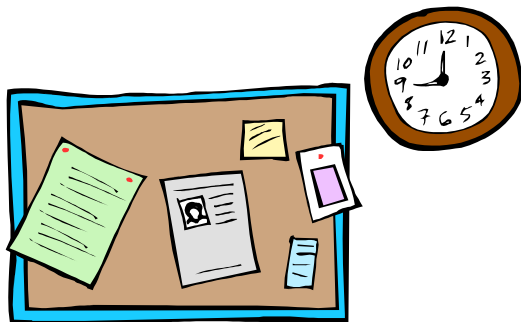
SBB 899 requires that the causes of an injury or illness be specifically classified as either work related or not work related for the purposes of determining disability. Physicians are now required to address causation in medical reports and must determine the percentage of disability caused by the injury and by other factors.

It prohibits permanent disability awards in excess of 100% for any one region of the body.

It mandates that an injured employee must disclose previous disabilities or impairments upon request.

EMPLOYERS SHOULD ACT NOW!

Keep your current 2004 Workers' Compensation poster on display and continue to use your current workers' compensation forms until revised material is available to you.



Provide immediate treatment for any injured worker. This is necessary even if you delay accepting the claim pending investigation.

Develop an effective return to work program for injured workers with both temporary and permanent disabilities.

Contact an attorney experienced in labor and employment issues if you have any questions about the recently reformed workers' compensation scheme.

NLRB ONCE AGAIN LIMITS WEINGARTEN RIGHTS AVAILABLE TO NON-UNIONIZED EMPLOYEES

In *IBM Corporation*, 341 NLRB No. 148, decided June 9, 2004, the National Labor Relations Board overruled recent precedent, and held that employees who are not represented by a Union are not entitled to have a co-worker or other witness present during an investigatory interview conducted by their Employer which could result in discipline.

In *IBM*, the Company received a letter from an attorney representing a former IBM contract employee which set out allegations of harassment by two of the employee's former co-workers, who were still employed by IBM. The Company investigated the allegations pursuant to its internal harassment investigation-and-response policy, and scheduled interviews with the two employees who were alleged to have engaged in misconduct. Both employees, who were not represented by a Union, eventually requested to have a co-worker or other representative present during their respective interviews. This request was denied by IBM, citing among other issues, the confidentiality provisions of its harassment-investigation policy.



This denial was alleged to have violated the National Labor Relations Act pursuant to the Board's holding in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), which extended the right of an employee to have a witness present during an investigatory interview (the so-called *Weingarten* right) to non-Union employees.

The Board ultimately dismissed the allegations, and held that non-Union employees do not have the right to have a witness present during investigatory interviews which could result in discipline. While the Board acknowledged that the Supreme Court's holding in *NLRB v. J.*

Weingarten, 420 U.S. 251 (1975), could be reasonably interpreted to cover both Union and non-Union employees, it ultimately found that the realities of the modern workplace, including the need to conduct confidential employee interviews in response to allegations of harassment, as well as the rationale of the pre-*Epilepsy Foundation* NLRB precedent, favored limiting the *Weingarten* right to non-Union employees once again.

While the Board's decision in *IBM* is certainly good news for non-Union Employers, all Employers should be aware that the NLRB has changed its position on this issue at least four times in the past 23 years. It is therefore advisable for all employers to have a procedure in place to deal with an employee who attempts to invoke his or her *Weingarten* rights, as it is quite possible that the Board could once again extend this right to non-Union employees in the coming years.

G&R'S EMPLOYMENT GROUP CONTINUES ITS EXPANSION

Introducing...



Michelle Dicks

Michelle Dicks is a new associate in the firm's San Diego office. Her practice focuses on employment litigation representing management in employment disputes, professional liability defense for health care providers, and insurance litigation representing insurers in bad faith disputes.

Michelle earned her Juris Doctor from the University of California, Hastings College of the Law, where she was Managing Editor of the Hastings Constitutional Law Quarterly Journal. She attended Cornell Law School, Institute of International and Comparative Law in the summer of 2000, and was presented with an Achievement Award by the Hastings 1066 Foundation Trustees. She received a B.A. in Political Science from Stanford University, and was recognized with an Outstanding Achievement Award from the Stanford Associates.

Prior to joining Gordon & Rees, Ms. Dicks was an associate with the firm of Shea, Stokes & Carter. She also worked as an extern for Justice Huffman with the California Court of Appeal, Fourth District, Division One.

GORDON & REES' LOS ANGELES OFFICE MOVES

Effective Monday, July 12, 2004, Gordon & Rees' Los Angeles office will have a new address. The new address is:

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