

## CALIFORNIA LABOR AND EMPLOYMENT LEGISLATIVE UPDATE

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### A Note From The Editor

By Jeffrey A. Berman

Unfortunately for California employers, a significant number of workplace laws sponsored by unions, civil rights groups and plaintiffs' attorneys were among the 1,173 bills signed into law by Governor Gray Davis during the month of September. Fortunately, a number of other bills sponsored by these groups were among the 264 vetoed by the Governor, who seemed to be more sensitive than the Legislature to the problems that would be caused by the imposition of new burdens on California employers given the current economic climate.

With limited exceptions, the new laws will take effect on January 1, 2003. So, what did the Legislature do to California employers?

In addition to the federal WARN Act, California employers undergoing a "mass layoff," "relocation" or "termination" will now have to comply with the even more severe dictates imposed by A.B. 2957. Continuing its past efforts to regulate time off policies, the Legislature passed S.B. 1471, which makes certain absence control policies that allow an employer to discipline employees for excessive absenteeism automatically illegal. In a similar vein, California will become the first state in the nation to provide disability pay to employees who take time off to care for an ill child, spouse, parent, or domestic partner, or for the birth, adoption, or foster care placement of a child.

In a direct repudiation of a decision of the U.S. Supreme Court holding that an undocumented alien laid off because of his union activities was not entitled to back pay, with limited exceptions, illegal immigrants will now receive the full protection of California's labor laws. Similarly, Governor Davis approved A.B. 1599, which was enacted in response to a decision of the California Supreme Court narrowly interpreting the age discrimination prohibitions of the Fair Employment and Housing Act.

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Although it will only impact agricultural employers, S.B. 1156 and A.B. 2596 represent a marked departure from the widely-accepted notion that unions and private employers can resolve their labor problems without government intervention. Under the new laws, if an agricultural employer and a newly-certified union are not able to agree to the terms of their first collective bargaining agreement, a mediator is given the authority to dictate the terms.

On the bright side, Governor Davis did veto bills that would have required California employers to pay severance pay to laid off employees. He also vetoed bills that would have increased penalties for many wage-hour violations and would have created a presumption that an employee who was terminated within 90 days after exercising his rights under the Labor Code was unlawfully terminated.

### **Legislature Clarifies Scope of Background Check Requirements**

California's Investigative Consumer Reporting Agencies Act was further amended by A.B. 1068. The new amendments became effective when the Bill was signed by the Governor on September 28, 2002. Among other things, A.B. 1068 amends and clarifies employers' disclosure obligations under the Act.

Prior to the enactment of A.B. 1068, an employer that requested an investigative consumer report regarding an applicant or employee was required to provide a copy of that report to the applicant or employee. This requirement applied whenever an employer obtained an investigative consumer report, even if the employer took no adverse action based on the report and even where the employer gathered the information itself, rather than using an investigative consumer reporting agency.

A.B. 1068 amended this law in several significant ways. First, instead of being required automatically to send an investigative consumer report to an applicant or employee, an employer is now only required to provide a box on a written form for the applicant or employee to check to indicate that he or she wishes to receive a copy of the report. If the applicant or employee checks the box, the employer must send a copy of the report to that person within three business days of the date that the report is provided to the employer, even if the employer takes no adverse action based on the report.

Second, A.B. 1068 amended the law to limit the information that must be disclosed to an employee or applicant when the employer directly gathers investigative information itself (rather than using an investigative consumer reporting agency). The Bill clarifies that where an employer directly gathers investigative information regarding an applicant or employee, it must only disclose "matters of public record" to the applicant or employee. "Matters of public record" is defined as records "documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment." The Bill provides that where an employer gathers such public records regarding an applicant or employee, the employer must provide those records to the applicant or employee within seven days after the employer's receipt of the record. This requirement applies whether the public record information is received in written or oral form.

Also with respect to investigative information gathered directly, A.B. 1068 allows an employer to obtain a written waiver of an employee's or applicant's right to receive "matters of public record." The new legislation appears to require employers to include a box that can be checked by an employee or applicant for this purpose on "any job application form, or other written form...." Even if the waiver is given, however, the public records must still be provided in the event an employer takes adverse action against the applicant or employee based on such records.

The Bill also includes an important exception where an employer obtains a public record when conducting an investigation in connection with the employer's suspicion of the employee's wrongdoing or misconduct. In such circumstances, the employer may withhold the information from the individual until completion of the investigation.

### **FEHA Amended To Permit Tolling Of Statute Of Limitations**

A.B. 1146, which was signed into law on August 28, 2002, tolls the one-year deadline within which a complainant must file a civil action alleging discrimination under California's Fair Employment and Housing Act ("FEHA") in certain cases. A.B. 1146 adopts the tolling principles set forth in preexisting case law and codifies these principles in the FEHA at Government Code Section 12965.

As a prerequisite to filing a civil action under the FEHA, a complainant generally must file an adminis-

trative charge with, and receive a right-to-sue notice from, the Department of Fair Employment and Housing ("DFEH"). The DFEH's issuance of a right-to-sue notice triggers a one-year statute of limitations within which the complainant must file suit.

Complainants wishing to file a civil action under the federal discrimination laws, such as Title VII, are required to file an administrative charge with the Equal Employment Opportunity Commission ("EEOC") and receive a right-to-sue notice from that agency. Receipt of the EEOC's notice triggers a deadline by which the complainant must file suit.

The stated purpose of A.B. 1146's tolling provision is to allow a complainant to wait for the administrative processing, and possible resolution, of a charge by the EEOC, without being forced to file a FEHA action with similar allegations within the one-year limitations period.

As a result of A.B. 1146, a complainant's one-year deadline for filing a FEHA suit will be tolled until the EEOC completes its administrative processing of the charge, under the following conditions: (1) an administrative charge is timely filed concurrently with the DFEH and the EEOC; (2) the DFEH has deferred to the EEOC for investigation of the charge, or the EEOC has initially deferred to the DFEH but subsequently has undertaken an independent review of the DFEH's determination; and (3) the DFEH has issued a right-to-sue notice regarding the FEHA claim. In effect, A.B. 1146 harmonizes the FEHA limitations period with the federal limitations period in those cases in which the complainant files concurrent state and federal charges involving the same conduct.

### **FEHA Age Discrimination Prohibitions Expanded**

The prohibitions the California Fair Employment and Housing Act ("FEHA") places on discrimination based on age have been extended significantly by A.B. 1599.

Prior to this amendment, the FEHA's prohibition on age discrimination applied only to hiring, termination, demotion, suspension, and reduction. Unlike the more expansive protection afforded against other forms of discrimination, such as discrimination based on race, religion, sex, or physical disability, the FEHA formerly did not prohibit age discrimination in compensation, terms, conditions, or privileges of employment, or selection for or dismissal from training pro-

grams leading to employment. This Bill adds age to the list of protected categories afforded broader protection. The Bill deletes the FEHA's current, more narrow provision on age discrimination, formerly codified at Section 12941 of the Government Code, and adds "age" to the list of protected classes in the broader Section 12940, which prohibits discrimination not only in hiring and discharge, but also in all "terms, conditions, or privileges of employment," including training programs.

The Bill retains the former Section 12941's exceptions for bona fide occupational qualifications and age restrictions found in other laws. Also, like the former Section 12941, the Bill specifies that the amendment does not preclude promotions within existing staff, hiring or promotion based on experience and training, rehiring based on seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools.

A.B. 1599 was enacted in response to the decision of the California Supreme Court in *Esberg v. Union Oil Co.* In *Esberg*, the Court held that an employer may offer benefits to younger workers that it does not offer to older workers. At issue in the *Esberg* case was UNOCAL's tuition reimbursement program. UNOCAL refused to reimburse the 56-year-old plaintiff for the costs of his degree, telling him he was "too old to invest in," but it did reimburse younger workers for their tuition costs. The California Supreme Court found that this did not violate the FEHA, because the FEHA did not prohibit age discrimination in terms, conditions, or privileges of employment. The Bill specifies that it is the Legislature's intent to reject the Supreme Court's decision in *Esberg*.

The Bill also adds age as a protected category in other provisions of the FEHA. Labor unions are now precluded from discriminating on the basis of age in membership, employment, leadership, selection for training or apprenticeship, or otherwise. Also, employers may not print or circulate any publication that expresses, directly or indirectly, any limitation, specification, or discrimination based on age, nor may employers make non-job-related inquiries that express such limitations, specifications, or discrimination. A.B. 1599 does not prohibit employers or employment agencies from inquiring into the age of an applicant or specifying age limitations where compelled or provided by law.

## **Legislature Extends Rights To Victims of Sexual Assault**

As the result of A.B. 2195, victims of sexual assault will now have the same rights to unpaid leave and protections against retaliation and discrimination as currently exist for those employees who are the victims of domestic violence.

Under existing law, Labor Code Section 230 provides that victims of domestic violence may take time off from work to attend to issues arising from such violence, provided they give reasonable notice to the employer and supply appropriate documentation for unforeseen absences. Employers are prohibited from taking adverse actions against employees who take time off for such purposes. In addition, under the current version of Labor Code Section 230.1, which applies only to employers with 25 or more employees, victims of domestic violence may take unpaid leave to seek medical attention and obtain services or counseling to increase safety from future domestic violence.

An employer who violates Section 230 or 230.1 is guilty of a misdemeanor. An aggrieved employee is entitled to reinstatement and reimbursement for lost wages and work benefits resulting from a violation, and may file an administrative claim with the Division of Labor Standards Enforcement within one year of the date of the adverse employment action.

A.B. 2195 amends Section 230 by extending these protections to victims of sexual assault. Specifically, an employer may not discharge, discriminate, or retaliate in any manner against employees who are the victims of sexual assault or of domestic violence for taking time off to participate in judicial proceedings to permit them to secure relief for themselves or their children. The requirements that an employee provide reasonable notice to the employer of the need for the leave and documentation for unforeseen absences have been retained, as have employees' rights to use accrued vacation, personal leave, or compensatory time off. Specific remedies are also retained.

A.B. 2195 also amends Labor Code Section 230.1 to extend to victims of sexual assault the rights to unpaid leave held by victims of domestic violence. Specifically, as amended, Section 230.1, which still applies only to employers with 25 or more employees, provides that victims of sexual assault, as well as domestic violence victims, may take unpaid leave to seek medical attention, obtain services from a domestic violence shelter, program or rape crisis

center, obtain psychological counseling, or participate in safety planning and other activities to increase safety from future domestic violence. The existing notice requirements and specified remedies have been retained. Leave taken under this section is still restricted so that it may not exceed the 12 weeks of unpaid leave provided under the federal Family and Medical Leave Act.

## **Employers Face Penalties For Failure to Provide Access to Payroll Records**

Section 226 of the California Labor Code currently requires an employer to permit current and former employees to inspect and copy certain payroll records upon an employee's reasonable request. Section 226 does not specify the time within which the employer must produce or provide the records in response to such requests.

A.B. 2412 amends Section 226 to establish access procedures. Specifically, A.B. 2412 requires an employer to comply with an employee's written or oral request to inspect or copy payroll records within 21 calendar days from the date of the employee's request. It further provides that an employer's failure to timely comply constitutes an infraction, and that a violation of the Section entitles the employee or the Labor Commissioner to recover a penalty in the amount of \$750.00. The Bill also permits an employee to seek injunctive relief to ensure compliance, and in any such action, to recover costs and reasonable attorneys' fees. The Bill does, however, provide that an impossibility of performance by the employer, not caused by a violation of the law, is an affirmative defense in any action alleging violation of the Section. Finally, the Bill explicitly states that no reimbursement is required under the Constitution for a violation by an any local agency or school.

## **Local Jurisdictions May Impose More Stringent Labor Standards**

Labor Code Section 1205 was amended by A.B. 2509 to provide that local government agencies may impose more stringent labor standards for local, state-funded projects than the standards already imposed by state law. Specifically, the Bill provides that when a "local jurisdiction" (defined as "any city, county, district, or agency, or any subdivision or combination thereof") either (1) spends money provided by a "state agency" (defined as any state office, officer, department, division, bureau, board, commis-

sion, or agency, or any subdivision thereof), (2) operates a program that has received assistance from a state agency, or (3) engages in an activity that has received state agency assistance, the local jurisdiction may apply its own more stringent standards regarding wages paid, hours worked, and other conditions of employment. The Bill expressly prohibits state agencies from conditioning funding on the local jurisdiction's refraining from applying its more stringent standards to the project or program.

A.B. 2509 was sponsored by the California Labor Federation and was designed to ensure that state agencies could not prohibit local jurisdictions from applying their living wage ordinances in connection with state-financed projects. Opponents of the Bill argued that A.B. 2509 would harm employers by forcing them to abide by the many different labor standards imposed by local jurisdictions.

A related bill, A.B. 2178, provides that employers subject to local legislation that regulates the minimum hourly wages of employees shall be deemed a "small employer" for purposes of obtaining health insurance coverage under the laws regulating "small employer" access to such coverage. This means that all employers subject to local living wage laws will be able to obtain coverage under the small employer provisions, which previously covered only employers with 2 to 50 eligible employees.

### **Bill Designed To Expand Protections Under Safety Statutes Vetoed**

A.B. 2752, which Governor Davis vetoed, was designed to expand the protections afforded workers who complained about, or participated in proceedings relating to, unsafe working conditions. Had it not been vetoed, the Bill would have stiffened the penalties against employers that take adverse employment actions against employees for exercising rights regarding unsafe working conditions and would have permitted aggrieved employees to bring civil actions in court.

The Bill would have expanded existing protections for employees who raised workplace safety issues by, for example, filing a complaint with the Division of Occupational Safety and Health or their employer.

Also, the Bill would have provided that an employer was guilty of a misdemeanor, punishable by imprisonment not to exceed one year and/or a fine not to exceed \$100,000, where (1) an employee

refused to perform unsafe work or an unsafe working condition was reported to the employer; (2) the employer concealed the unsafe working condition; and (3) the unsafe working condition was likely to, and did, cause death or serious physical harm to an employee.

In his veto message, Governor Davis stated that, in his view, "significant" protections already exist for workers who refuse to perform unsafe work or report dangerous working conditions to their employers or to government agencies.

### **Temporary Employment Agency Must Pay Workers' Compensation Premiums For Workers Provided By Licensed Contractors**

As a result of A.B. 2816, there will be new requirements under California's workers' compensation scheme. A.B. 2816 requires that when a temporary employment agency (including any employment referral service, labor contractor, or other similar entity) contracts with a licensed contractor to provide the contractor with the services of an individual, and that individual performs acts or contracts that require a contractor's license and is to be supervised by the contractor, the temporary employment agency must pay the workers' compensation premiums for that individual. A.B. 2816 explicitly provides that the temporary employment agency is solely responsible for the workers' compensation insurance of the individual. It also provides that the workers' compensation premiums are to be based upon the licensed contractor's experience modification rating, if any.

Pursuant to A.B. 2816, certain disclosures must be made by the temporary employment agency to the insurer regarding itself and the licensed contractor. These include the agency's monthly payroll, the workers' compensation classifications associated with the agency's payroll, and information regarding the contractor, including its name, address, and experience modification factor, as reported by the contractor. The Bill also requires the licensed contractor to notify the temporary employment agency when the worker is being used on a public works project or when the worker is reassigned to a position other than that to which the worker was originally assigned. Finally, the Bill provides that the temporary employment agency may pass the costs incurred as a result of the Bill through to the contractor.

## Changes Mandated In Investigations Of Serious Injuries And Deaths

Changes in the Division of Occupational Safety and Health's investigation procedures following workplace deaths or serious injuries are mandated by A.B. 2837. The measure enacts a laundry list of reforms, including requirements that:

- local registrars of births and deaths transmit to the State Registrar copies of the certificate of death for all deaths marked as work-related;
- all efforts be undertaken to ensure that persons with limited proficiency in the English language can communicate effectively with the Division, and the Division prepare a progress report respecting the provision of bilingual services and information by July 30, 2004;
- the Division investigate an employment accident resulting in fatality within 24 hours of learning of the accident; and
- the Division notify the proper prosecuting authority of any industrial accident reported to it by a state, county, or local fire or police agency called to the scene in which a death or serious injury or illness occurs.

In addition, the measure:

- imposes a civil penalty of not less than \$5,000 against an employer that fails to file a report of any incident involving serious injury or death;
- imposes criminal punishment of up to one year in jail and/or a maximum \$15,000 fine (\$150,000 for corporations and limited liability companies) for employers, officers, management officials, or supervisors who fail to report a death to the Division or knowingly induce another to fail to do so; and
- permits the Department of Industrial Relations, upon request by a county district attorney, to develop a protocol for the immediate referral of cases that may involve criminal conduct to the appropriate prosecuting authority in lieu of or in cooperation with an investigation by the Bureau of Investigations within the Division.

### Bill Requiring Revision Of Ergonomics Standards Vetoed

If it had been signed by Governor Davis, A.B. 2845 would have required the California

Occupational Safety and Health Standards Board to adopt revised standards for ergonomics in the workplace on or before July 1, 2004. The revised standards were to have been designed to minimize repetitive motion injuries. The California Occupational Safety and Health Act of 1973 was adopted for the purpose of assuring safe and healthful working conditions for California workers by, among other things, authorizing the enforcement of effective standards and assisting and encouraging employers to maintain safe and healthful working conditions. Existing law authorizes the Board to adopt, amend, or repeal occupational safety and health standards and orders.

In 1996, the Board adopted standards relating to repetitive motion injuries. A.B. 2845 was passed by the Legislature because supporters believed that the current standards designed to minimize repetitive motion injuries are inadequate, as partially evidenced by the fact that instances of such injuries have not declined significantly since adoption of the 1996 standards.

According to the Governor's veto message, California is the only state that is successfully enforcing a regulation addressing repetitive motion injuries. He also noted that the Board has received a petition requesting it to amend California's standard on repetitive injuries. In Governor Davis's view, the Board's consideration of the petition will allow for the best evaluation of the existing regulation.

### Legislature Extends Protection To Employers Providing Reference Requests

Among other things, A.B. 2868 amends California Civil Code Section 47 to provide that certain information provided by an individual's current or former employer to a prospective employer of the individual is protected from libel claims as privileged communications. The new changes became effective when signed by the Governor on September 28, 2002.

Civil Code Section 47(c) protects communications that are made without malice to an interested person by a person who: (1) is also interested; (2) "stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent"; or (3) is requested by the interested person to provide the information. A.B. 2868 amends this section to expressly extend this privilege to communications "concerning job performance or qualifications of an applicant for employment, based upon credible evi-

dence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant." Specifically, the Bill provides that such a current or former employer may, if asked, inform a prospective employer whether or not it would rehire an employee. The new protections do not, however, apply to communications concerning speech or activities of an applicant for employment that are constitutionally or otherwise legally protected.

### **Employees May Not Be Prohibited From Disclosing Information About Working Conditions**

Under existing law, an employer may not require its employees to keep the amount of their wages confidential. A.B. 2895 expands this protection, prohibiting employers from requiring their employees to keep information about their working conditions confidential.

Labor Code Section 232, the current law regarding disclosure of wage information, provides that an employer may not require that its employees refrain from disclosing the amount of their wages. It also prohibits an employer from forcing its employees to sign waivers giving up their right to disclose such information, and bars an employer from discharging, disciplining, or otherwise discriminating against, for job advancement, employees who disclose the amount of their wages.

A.B. 2895 extends the same protections to the disclosure of working conditions, such as hours, uniforms, and occupational safety. Under new Labor Code Section 232.5, an employer may not require that information about working conditions be kept confidential, nor can it discharge, discipline, or otherwise discriminate against an employee who discloses such information. As with wage information, an employer cannot require employees to sign waivers of the right to disclose information about working conditions. The new law does not apply to proprietary or trade secret information or information that is subject to a legal privilege against disclosure. An employer can still require that such information be kept confidential.

The Bill also deletes the phrase "for job advancement" from Section 232's prohibition against employer retaliation. Section 232 now prohibits all retaliatory discipline and discrimination, not just discipline and discrimination relating to job advancement.

## **PERB Rules Modified**

Despite opposition from public employers, the State Legislature modified various provisions of the Meyers-Milias-Brown Act ("MMBA"), one of the State collective bargaining laws applicable to local public agencies. As a result of A.B. 2908, it will not be an unfair labor practice for a union to violate a local rule adopted by a local agency if the local rule violates the MMBA. The amendments will allow a party aggrieved by a final decision or order of the Public Employment Relations Board ("PERB"), the State agency that administers the MMBA, to petition for a writ of extraordinary relief in the Court of Appeal. If the time to petition for review has expired, PERB can seek enforcement of the final decision or order by applying to either the Court of Appeal or Superior Court.

A.B. 2908 was portrayed by its union supporters as a "clean-up" measure to S.B. 739, which went into effect last year and which transferred jurisdiction for the resolution of unfair labor practice charges and representation disputes under the MMBA to PERB. Previously, the MMBA provided for the resolution of labor-management disputes through procedures adopted through local collective bargaining.

### **State Legislature Enacts Its Own Version Of Federal Layoff Notification Law**

By way of A.B. 2957, California now has its own version of the federal Worker Adjustment and Retraining Notification Act, more commonly known as the "WARN Act." As is often the case in California, however, A.B. 2957 differs from and is significantly broader than federal law in a number of respects.

Much like the WARN Act, A.B. 2957 requires all covered employers to give 60 days' advance notice to employees affected by any "Mass Layoff," "Relocation," or "Termination." Covered employers include anyone "who directly owns and operates" an "industrial or commercial facility...that employs, or has employed within the preceding 12 months, 75 or more persons." Notably, this means that parent companies of covered subsidiaries will be considered employers subject to the legislation. Because of this, and because the 75-employee threshold is 25 employees less than the 100-employee standard in the federal statute, the scope of A.B. 2957 is potentially much broader than the WARN Act.

"Mass layoff," "relocation," and "termination" are

all specially defined terms in the statute. A "mass layoff" is defined as a layoff of 50 or more employees during any 30-day period due to a lack of funds or a lack of work. "Relocation" is defined as "the removal of all or substantially all of the industrial or commercial operations in a covered establishment" to another location 100 or more miles away. Finally, "termination" is defined as "the cessation or substantial cessation of industrial or commercial operations in a covered establishment." The definitions of "mass layoff" and "termination" are significantly broader than the equivalent definitions in the WARN Act, and there is no equivalent to "relocation" in the federal statute.

A.B. 2957 contains several notable carve-outs. The statute does not apply to closings or layoffs resulting from the completion of projects in the broadcasting, motion picture, construction, drilling, logging, or mining industries. In addition, employees who are hired with the understanding that their employment is seasonal or temporary are not covered. Finally, an employer is not required to give notice if, in addition to meeting other related criteria, it was actively seeking capital or business which would have enabled the employer to avoid or postpone the relocation or termination.

In the event of a violation, the legislation expressly provides a private right of action for back pay and the value of any employee benefits lost, up to a maximum of 60 days, as damages. Employers are also subject to a civil penalty in the amount of \$500 for each day of violation. The statute allows representative actions brought on behalf of "persons similarly situated" and further provides for an award of attorneys' fees in the court's discretion to plaintiffs who are successful in litigation.

### **Increase In Civil Penalties And Criminal Fines For Labor Law Violations Vetoed**

A.B. 2987 would have increased the civil penalties and criminal fines imposed upon employers for certain violations of the California Labor Code. With respect to criminal fines, existing law provides that, where an amount is not specifically prescribed, the maximum authorized fine for specified misdemeanors is \$1,000. A.B. 2987 would have increased the maximum authorized fine to \$5,000.

A.B. 2987 would also have increased civil penalties for various labor law violations. For example, the civil penalties for a failure to pay wages or an unlaw-

ful withholding of wages would have increased, for any initial violation, from \$50 to \$100 for each failure to pay each employee, and for each subsequent violation or for any willful or intentional violation, from \$100 to \$200 for each failure to pay each employee.

A.B. 2987 would have also increased the initial civil penalty for a failure to comply with the minimum wage laws. For any initial violation that was intentionally committed, the penalty would have increased from \$50 to \$100 for each underpaid employee for each pay period in which the employee was underpaid.

Civil penalties for violations of licensing laws would have also increased as a result of A.B. 2987. Specifically, any person who did not hold a valid state contractor's license and who employed any worker to perform services for which such a license was required, would have been subject to a civil penalty of \$200, rather than \$100, per employee for each day of such employment. Similarly, any person who knowingly entered into a contract with an independent contractor to perform services for which a license was required, and the contractor did not hold a valid license, would have been subject to a civil penalty of \$200 per contractor for each day of the contract.

### **New Severance Pay Law Vetoed**

Had Governor Davis not vetoed A.B. 2989, under specified circumstances, California employers would have had to pay severance pay to employees who lost their jobs as a result of a relocation or termination of a business or who were laid off.

The new law would have applied to employers with 100 or more employees and would have required the payment of one week of severance pay for each full year of service if the employer provided severance pay or bonuses and (1) the employer relocated a covered establishment 100 or more miles from the original location or terminated a covered establishment; and/or (2) except in the case of a normal seasonal layoff, laid off employees. A.B. 2989 contained several exceptions to its severance pay requirements.

Governor Davis vetoed the Bill as he thought that its enactment "at this juncture would prove to be counterproductive to achieving the broader goal of a full recovery of California's economic health."

## **Governor Vetoes Bill Creating Rebuttable Presumption Of Retaliation**

Governor Davis vetoed A.B. 2990, which would have created a rebuttable presumption that certain personnel actions were retaliatory.

Under existing law, an employer may not discriminate against an applicant or employee because the applicant or employee exercised rights under the Labor Code, instituted proceedings with the Labor Commissioner relating to those rights, or testified (or is about to testify) before the Labor Commissioner. An employer who subjects an employee or applicant to adverse employment action because the employee or applicant exercised rights under the Labor Code must hire the applicant or reinstate the employee, with payment of lost pay and work benefits.

A.B. 2990 would have created a rebuttable presumption that an employer violated the law if the employer discharged, demoted, suspended, or reduced the pay or work hours of an employee within 90 days after the employee exercised his rights under the Labor Code. This presumption would not have applied in situations involving bona fide seasonal layoffs or reductions in force affecting a majority of the employer's employees.

In vetoing the Bill, Governor Davis stated that it "would only aggravate a practice by some employees, who, upon learning they are being investigated for misconduct, report groundless allegations of misconduct by their supervisors or co-workers."

## **Statute Of Limitations For Personal Injury Actions Doubled And Summary Judgment Rules Altered**

On September 10, 2002, in a move many defense lawyers are bemoaning as a significant win for the plaintiffs' bar, Governor Davis signed S.B. 688. The measure, sponsored by Senate President pro tem John Burton and written by the Consumer Attorneys of California, increases from one year to two years the time within which to bring causes of action for "assault, battery, or injury to, or for the death of, a person caused by the wrongful act or neglect of another."

S.B. 688 also makes significant changes respecting service deadlines, continuance procedures and appellate review for motions for summary judgment. These changes will make it even more difficult for

employers involved in litigation to obtain summary judgment, the consequence of which likely will be to increase the number of cases that are settled or proceed to trial.

The new law requires that a moving party give notice 75 days prior to a hearing on a motion for summary judgment, as opposed to 28 days under current law. In addition, the measure changes existing law in several other ways. First, a respondent's application to continue the hearing on a motion for summary judgment in order to obtain additional discovery may be made by ex parte application at any time before the opposition to the motion is due. Second, if, following an initial continuance to permit discovery, the court determines that the party moving for summary judgment has "unreasonably failed to allow discovery to be conducted," the court "shall grant a continuance to permit discovery to go forward or deny the motion for summary judgment or summary adjudication." Third, before a reviewing court may affirm an order granting summary judgment or summary adjudication on grounds not relied upon by the trial court, the reviewing court must permit supplemental briefing in order to afford the parties an opportunity to present their views on the issues. In the supplemental briefing, counsel may argue, among other things, that additional evidence exists as to the ground at issue, but the party had not had adequate opportunity to present the evidence or conduct discovery on the issue.

## **Legislation To Expand Whistleblower Protections Vetoed**

It is unlawful under the current "whistleblower" statute, Labor Code Section 1102.5, to make, adopt, or enforce a policy preventing an employee from disclosing to a government or law enforcement agency violations of a state or federal statute or noncompliance with a state or federal regulation. It also is unlawful to retaliate against an employee for making any such disclosure. Existing law makes such action a violation punishable as a misdemeanor.

S.B. 783 was designed to expand the coverage of Section 1102.5 by extending the "whistleblower" protections to employees who (1) refused to participate in an activity that would result in a violation of a state or federal statute or a violation of or noncompliance with a state or federal rule or regulation; or (2) exercised these rights in former employment. The amendment also prohibited employers from retaliating against employees who exercise such rights and

added an additional civil penalty of \$10,000 for each violation.

Had it not been vetoed, the Bill also would have added a new section to the Labor Code establishing a "whistleblower" hotline in the office of the state Attorney General to receive telephone reports of an employer's violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company. The Bill required the Attorney General to refer calls received on this hotline to the appropriate government authority.

In addition, S.B. 783 would have imposed civil monetary penalties of up to \$100,000 on certain corporations and limited liability companies, as well as officers, directors, or managers of such corporations, or members of such limited liability companies for false reporting of various listed categories of financial information.

While Governor Davis believed that the vast majority of the provisions of the Bill had merit, he wanted to focus on punishing wrongdoers and encouraging reporting of wrongdoing. Thus, in his veto message, Governor Davis indicated he would sign legislation next year that had this focus, but that he was concerned about the provisions of S.B. 783 that would place liability on individuals who did not actually commit the wrongful act themselves.

### **Agricultural Labor Disputes Subject To Binding Mediation**

As the result of a significant addition to the Agricultural Labor Relations Act, agricultural employers and certified unions will be subject to new procedures for the resolution of contract disputes. S.B. 1156 provides that at any time following 90 days after certification of the labor organization, an agricultural employer or the certified union may file a declaration that the parties have failed to reach a collective bargaining agreement and request that the Agricultural Labor Relations Board ("ALRB") issue an order directing mandatory mediation and conciliation of their issues. This provision applies only to agricultural employers that have employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of the declaration.

The newly enacted Labor Code Section 1164 establishes procedures for the selection of the mediator and the manner in which mediation is to pro-

ceed. If the parties do not resolve the issues to their mutual satisfaction, the mediator is to issue a report in which the mediator resolves the remaining issues and establishes the final terms of a collective bargaining agreement. Either party may petition the ALRB for review of the report under detailed procedures. However, the standard of review is extremely narrow. The ALRB's final order may be enforced in Superior Court. It also is subject to review in the Court of Appeal or the California Supreme Court. Again, the standard of review is extremely narrow.

The Legislature also passed a companion Bill, A.B. 2596, which affects S.B. 1156 in several respects. First, it provides that the mediation procedures added by S.B. 1156 remain in effect only until January 1, 2008 and are repealed as of that date unless extended by the Legislature. Second, it limits the periods during which a declaration can be filed, as well as the circumstances under which this can be done. Finally, A.B. 2596 provides that a party may not file a total of more than 75 declarations.

Governor Davis did not sign a third agricultural labor relations law, S.B. 1736. This Bill was in direct competition with the two Bills signed by the Governor, but contained a number of limitations that he did not favor.

### **No New Obligations For Employers Who Subcontract For Labor Or Services**

Finding that he had signed several bills over the last four years designed to protect California's "most vulnerable workers," including those employed in the garment and agricultural industries, Governor Gray Davis vetoed S.B. 1466.

S.B. 1466 would have prohibited contracts or agreements for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knew or should have known that the contract or agreement did not include funds sufficient to allow the contractor to comply with applicable local, state, or federal laws or regulations. This prohibition would not, however, have applied to a person or entity who executed a collective bargaining agreement, or to a person who entered into a contract or agreement for labor or services to be performed in the residence in which a family member has lived for at least part of the year.

An employee aggrieved by a violation of the Labor Code section that was to have been created by S.B. 1466 would have been allowed to file an

action for damages to recover the greater of actual damages or specified monetary penalties, and attorneys' fees and costs. Injunctive relief also could have been obtained.

### **Absence Control Policies Unlawful If Applied To Sick Leave Taken To Care For Family Members**

Under existing law, an employer that provides its employees with sick leave must allow employees to use a portion of that sick leave to attend to an illness of the employee's child, parent, spouse, or domestic partner. Labor Code Section 233 states that, in any calendar year, an employee is entitled to use not less than the amount of sick leave the employee would accrue in a six-month period to care for a sick family member. An employer that denies an employee the right to use sick leave to care for a family member or retaliates against an employee for doing so or attempting to do so faces legal and equitable penalties. An employee aggrieved by an employer's violation of Section 233 is entitled to reinstatement and actual damages or one day's pay, whichever is greater, plus attorneys' fees.

S.B. 1471, which adds Section 234 to the Labor Code, makes certain absence control policies that allow an employer to discipline employees for excessive absenteeism automatically illegal. If an absence control policy counts sick days taken to care for a sick family member as absences that may lead to discipline, demotion, discharge, or suspension, the policy is a per se violation of the law. An employee working under such a policy would be entitled to legal and equitable relief under Section 233.

Governor Davis vetoed the same bill last year, stating that the provisions of Section 233 "should be given time to work."

### **Governor Vetoes Legislation To Ban Mandatory Pre-Dispute Arbitration of FEHA Claims**

As hoped for by the employer community, Governor Davis vetoed S.B. 1538, the latest in a series of yearly attempts by the California

Legislature to prohibit mandatory arbitration agreements in employment. However, unlike in prior years, the Legislature had limited the scope of the prohibition to the waiver and arbitration of rights under the California Fair Employment & Housing Act ("FEHA"), California's primary anti-discrimination law.

S.B. 1538 would have made it an unlawful employment practice to require an employee or potential employee to waive rights or procedures provided for in the FEHA as a condition of employment or continued employment. Such rights and procedures included filing and pursuing a complaint with the Department of Fair Employment and Housing, and filing a civil action pursuant to the FEHA. S.B. 1538 also would have made it an unlawful employment practice for an employer to take any adverse employment action against an employee or potential employee because of a refusal to waive rights under the Bill. Any waiver that violated the Bill, including an agreement to arbitrate a FEHA claim, that was made as a condition of employment or continued employment was deemed void, unconscionable, against public policy and unenforceable by S.B. 1538.

Notably, S.B. 1538 did not completely ban waivers of rights or arbitration under the FEHA. Such waivers and agreements to arbitrate FEHA claims could still have been enforced, provided that they were knowing and voluntary and not a condition of employment or continued employment. S.B. 1538, however, placed the burden of proving the foregoing on the employer. Waivers of and agreements to arbitrate contract, tort and other non-FEHA claims were not subject to S.B. 1538's prohibitions.

The Bill was vetoed because Governor Davis believed that, in these difficult economic times, it was not appropriate to place additional burdens on employers by preventing them from requesting alternative dispute resolution of employment claims.

### **Employees To Receive Disability Pay While Caring For Sick Family Members**

S.B. 1661 makes California the first state in the nation to provide disability pay to employees who take time off to care for an ill child, spouse, parent,

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or domestic partner, or for the birth, adoption, or foster care placement of a child.

Existing law under the federal Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA") requires employers with 50 or more workers to provide up to 12 weeks of unpaid family leave in a 12-month period. S.B. 1661 establishes a new Family Temporary Disability Insurance program that expands the existing law in two significant respects. First, S.B. 1661 applies to all employers, irrespective of the number of workers they employ. Second, it provides that employees are entitled to six weeks of "family temporary disability insurance benefits" in any 12-month period for family care leave. The amount of these benefits is equivalent to the disability pay available to individuals for their own sickness or injury under existing law.

There are some limitations on the availability of family temporary disability insurance benefits. Employees are not eligible to receive the benefits with respect to any day they receive unemployment compensation benefits, state disability insurance benefits, or certain other cash benefits from the State. Employees are also ineligible to take leave on any day that another family member is able and available to provide the required family care.

In addition, employers may require their employees to use up to two weeks of accrued, unused vacation prior to receiving family temporary disability insurance benefits. Further, an employee who is entitled to leave under the FMLA and the CFRA must take such leave concurrently with the leave available under the Family Temporary Disability Insurance program.

An employee seeking to obtain benefits under the program must satisfy certain medical certification requirements. S.B. 1661 imposes penalties on an employee for falsely certifying the medical condition of any person in order to obtain benefits in an amount equal to 25 percent of the benefits paid as a result of the false certification.

The new Family Temporary Disability Insurance program will be paid through additional payroll deductions and employee contributions. Benefits are payable for leaves that begin on and after July 1, 2004.

### **Immigration Status No Bar To Enforcement Of State Law Rights**

S.B. 1818 amends the California Civil, Government, Health and Safety, and Labor Codes to make clear that the protections, rights, and remedies

afforded under state law are available and applicable to all persons, regardless of their immigration status, who have applied for employment or been employed in California. The Bill excludes any reinstatement remedy prohibited by federal law. S.B. 1818 provides that, for purposes of enforcing state labor, employment, civil rights, and employee housing laws, an individual's immigration status is irrelevant to the issue of liability. The Bill also prohibits any inquiry into a person's immigration status in discovery or proceedings brought to enforce state laws, except where the party seeking to make the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration laws.

The Bill was introduced to nullify the United States Supreme Court's decision earlier this year in *Hoffman Plastic Compounds, Inc. v. NLRB*, in which the Court held that an undocumented alien who was laid off because of his union activities in violation of the National Labor Relations Act was not entitled to the back pay awarded to him by the National Labor Relations Board ("NLRB"). The employee in *Hoffman* had testified before the NLRB that he had never been authorized to work in the United States and that he had provided his employer with fraudulent documents in order to obtain employment. The Court found that awarding backpay in such a situation would condone future violations of the immigration laws.

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#### SIDLEY AUSTIN BROWN & WOOD LLP LOS ANGELES LABOR & EMPLOYMENT GROUP

*Jeffrey A. Berman*

*Johnny Darnell Griggs*

*Linda S. Peterson*

*Jonathan M. Brenner*

*Joan E. Smiles*

*Daron Watts*

*Sonya Sud*

*Robyn A. Babcock*

*Kerry M. McCoy*

*Kiran Aftab Seldon*