

## President's Message

By  
Stewart Lerner

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A Publication of the  
Employer Advisory  
Council of Orange  
County in partnership  
with the Employment  
Development Department,  
State of California

**I**t is always hard for me to believe as we get to October that our program year is nearly over. This month we will complete our Certificate Program once again, this time with our always popular Wage and Hour Update.

Thanks to your support, it has been a good year for the EAC-OC despite the turbulent economic times. In order to help cheer you up, as well as offer a heartfelt "Thank You!" for your continued loyalty, we will be presenting a special program to end the year.

Many of you may be aware that my wife and I, along with several others, are co-authors of a personal development book entitled "Change Your Life with Humor." The book has also formed the basis of a popular program we have developed on "Humor in the Workplace." This program is very interactive with the audience and is guaranteed to provide you at least a few serious chuckles. A number of you had asked me about presenting the program for our group and we had put it on our list of programs for next year. It seemed, however, that some good laughs were really

needed this year. We are planning a few surprises to go along with the program, so watch your email and snail mail for more information as well as the date of the program.

This month will also bring me close to completing my second full year as your President. It has been a great honor to serve you and to meet and talk with so many of you at the various programs. I know my Board joins me in wishing all of you our sincere wishes for a successful end to your business year and a joyous holiday season.

### Message From The Editor

**T**his issue concentrates on two timely topics: The *Lerner Lines* and the first article relate to employers and their ability to cope with the tough financial times currently facing the nation. Next month, an article will discuss various insurance that is available to employers to cover employee-related lawsuits.

In this regard, one article focuses on practical advice on managing employees. Another truncated article on this topic provides some information about the recent federal legislation that attempts to address the economic turbulence.

Finally, this issue includes an article on changes to the ADA given the importance and timeliness of the subject."

As always, your input is valued. If you have any ideas for upcoming editions of *The Advisor*, please feel free to pass them along to me at [Jhart@littler.com](mailto:Jhart@littler.com).



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## ***The Impact of the Credit Crisis on Employers***

By  
**Ariel D. Weindling and Courtney J. Slagle**

**T**he United States is facing arguably the country's worst financial downturn since the Great Depression. The current economic climate has already affected both employers and employees substantially. The purpose of this article is to provide a brief analysis of some of the ways the credit crisis impacts employers.

### **We Are Facing Challenging Economic Times**

The mortgage meltdown and unstable housing market are making many employees nervous about their economic situations. Decreasing access to credit from home equity and credit cards has made expensive goods and services less available. Employees also fear for the safety of their savings and investments as a result of mounting losses in the stock market. In the past 15 months alone, Americans have lost approximately \$2 trillion in retirement savings, meaning that many people will have to delay retirement.<sup>1</sup> It is becoming increasingly difficult to get loans for new homes and automobiles.<sup>2</sup> The costs of food and energy are steadily increasing. The situation for some American employees is truly dire.

For many employers, the outlook is not much better. Tightened access to business loans and loss of sales or revenues means some employers are having trouble paying expenses, including payroll. Layoffs and unemployment are on the rise. Apprehension regarding personal finances and job security can increase the risk of office friction and workplace violence. Employers should bear in mind that these conditions present fertile ground for union organization campaigns.

### **What Can Employers Do, If Anything?**

Employers can take steps to lessen some of the stress employees are experiencing. Financially, employers could consider offering transportation allowances or telecommuting opportunities (working from home), where feasible, to help offset gasoline prices. Employers can provide in-office meals

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# ***The Emergency Economic Stabilization Act of 2008 Extensively Regulates Executive Compensation, but Leaves Many Unanswered Questions***

By  
**Steven J. Friedman and Ellen N. Sueda  
Littler Mendelson**

**T**he Emergency Economic Stabilization Act of 2008 (the “Act”), signed into law by President Bush on October 3, 2008, contains several provisions affecting executive compensation. Ambiguities in the Act, however, create questions as to the scope of the Act’s provisions and permissible avenues of compliance. The Act regulates executive compensation in two separate ways. Under one provision of the Act, institutions that benefit from government aid are directly prohibited from providing certain types of compensation to certain executives. Under another provision, the government uses the Internal Revenue Code of 1986, as amended, to prohibit deductions by these institutions and to tax their employees in the event certain compensation practices are not followed. This legislation is significant because the federal government has rarely strayed into the arena of directly regulating what types or levels of compensation may be paid, as opposed to regulating compensation by imposing tax sanctions or penalties. In this respect, the Act may represent an unprecedented level of activism by the federal government.

## **Compensation Restrictions in the Event of Direct Purchases by the Government**

Section 111 of the Act sets forth compensation standards applicable where the government purchases troubled assets directly from a financial institution where no bidding process or market prices are available, if the purchase comprises a “meaningful equity or debt position.” The following are some important aspects of such purchases:

- **Compensation Must Exclude Incentives for Unnecessary and Excessive Risks.** First, limits must be in place so that compensation “exclude[s] incentives for executive officers to take unnecessary and excessive risks that threaten the value of the financial institution during the period that the Secretary [of the Treasury] holds an equity

or debt position in the financial institution.” Risk may not be clear until a financial institution has the benefit of hindsight.

- **Required Clawback of Certain Compensation Paid Based on Inaccurate Statements.** In addition, financial institutions must now provide for recovery of any bonus or incentive paid to a Top Five Executive that was based on statements of earnings, gains or other criteria that are later proven to be inaccurate.
- **Prohibition of Golden Parachute Payments.** There is also a provision in section 111(b)(2)(C) of the Act that prohibits financial institutions from making golden parachute payments to Top Five Executives during the period that the Secretary of the Treasury holds an equity or debt position in the institution.
- **Compensation Restrictions in the Event of Auction Purchases by the Government.** If a financial institution sells more than \$300 million of troubled assets to the federal government and at least some of those assets are sold through an auction purchase, there will be a prohibition on the financial institution providing a new employment contract to a senior executive officer that provides for “a golden parachute in the event of an involuntary termination, bankruptcy filing, insolvency or receivership.”
- **Tax Provisions Related to Executive Compensation.** Section 302 of the Act provides for amendments to the Internal Revenue Code in the areas of the general deductibility of compensation and the provision of excess parachute payments.
- **Deduction Limit on Employee Remuneration.** The Act disallows deductions of remuneration of

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## *Credit Crisis . . . from Page 2*

to reduce strain on employee pocketbooks and to increase morale. Team building exercises could also be a cost effective way to maintain a positive outlook.

Employers should emphasize open door policies for discussing concerns and maintain the flow of information to ensure employees remain aware of how the company is performing. Keeping lines of communication open can help reduce uncertainty.

### **Uncertain Economic Times: Always a Fertile Ground for Employment-Law Related Litigation**

Challenging economic times increase employers' risk of employment litigation. A scarcity of alternative employment serves as a catalyst for lawsuits. To put it another way, when times are good, terminated employees find other employment. When times are bad, those former employees find a lawyer. This theory is supported by a formal analysis of case filings. The single largest predictor in the long-term growth trend of case filings is the national unemployment rate.<sup>3</sup> As the unemployment rate increases, it is expected that more employment-related lawsuits will be filed. Out-of-work employees tend to obsess about their perceived mistreatment, which is magnified by their inability to find replacement jobs. Monetary damage awards increase the longer the plaintiffs are unable to find alternative employment. Class actions could also be on the rise; plaintiffs attorneys now probe laid-off employees regarding potential grounds for wage and hour lawsuits, including meal and rest period claims and off-the-clock or overtime issues.

To counteract the increased litigation risk, employers must be vigilant. Wage and hour compliance audits and reviews of human resource departments can help determine the appropriateness of policies under applicable employment laws. When properly drafted to take into account ever-changing legal requirements, separation and release agreements can be an effective tool. Employers should carefully plan downsizing strategies and work closely with human resources. Additionally, it is imperative that employers consult with their employment counsel to remain aware of litigation trends and to ensure compliance with state and federal laws. Such prudent steps can help reduce the likelihood of lawsuits, or can minimize damages in the event one is filed.

## **Not All Gloom and Doom**

While these challenging economic times certainly present many hardships for employers and employees alike, there may be a silver lining for employers. Going through difficult times together often builds strong interpersonal bonds. These bonds between employees and their managers can translate into increased loyalty. Employees may also be more willing to increase their productivity when the future of the company and their jobs are in jeopardy. While employers may not be able to eliminate all adverse consequences for their employees, certain small steps can go a long way in alleviating the increased anxiety many employees are experiencing.

<sup>1</sup> Jennifer Levitz, Workplace Retirement Plans Suffer \$2 Trillion in Losses, Wall. St. J., Oct. 8, 2008, accessed at [http://online.wsj.com/article/SB122342685954113657.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB122342685954113657.html?mod=googlenews_wsj).

<sup>2</sup> Bill Vlasic and Nick Bunkley, With Credit Drying Up, Car Buyers Bring Cash., N.Y. Times., Oct. 7, 2008, accessed at <http://www.nytimes.com/2008/10/08/business/08auto.html?ref=business>

<sup>3</sup> John Donohue and Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. Law. Rev. 983 (1991).



## *Stabilization Act . . . from Page 3*

over \$500,000 paid to covered executives of a financial institution during the first taxable year of an employer in which the aggregate amount of troubled assets acquired by the government, when added to the assets previously acquired, exceeds \$300,000,000, which specifically excludes assets sold through direct purchase from an individual financial institution. Deductions will also be limited to \$500,000 during any subsequent taxable year that includes any portion of such period during which the Act is in effect.

- **What Compensation Is Counted?** Unlike current Internal Revenue Code section 162(m), the Act denies deductions for compensation that is deferred into a later year if such compensation

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would have been nondeductible in the year in which it was earned. This is a departure from the manner in which section 162(m) of the Internal Revenue Code generally treats deferrals; that is, to permit deductions up to the limit applicable in the year in which the compensation is taxable to the executive, irrespective of whether it was deferred in a prior year.

- **Golden Parachute Provisions.** The rules contained in the Internal Revenue Code that prohibit employer tax deductions for payments to certain departing executives after a change in control of an organization have been expanded to prohibit deductions on account of an involuntary severance of employment of a “covered executive” in connection with any bankruptcy, liquidation or receivership of the employer. These rules generally prohibit tax deductions for severance payouts of three times annual pay or greater.

#### **Impact of These Provisions**

It does not appear that the Act will have a long-lasting effect on executive compensation. The Act is limited to financial

institutions currently in distress, but does not contemplate that the same issues that financial institutions currently face may in fact occur in other types of businesses. Even without a current clear mandate from the federal government as to what changes need to be made, each impacted institution will have to inventory the areas that likely will need to be changed in light of the current legislative language. Further guidance will be needed, however, before the full impact of the Act can be assessed and all appropriate changes can be implemented.

*Steven J. Friedman is Chair of Littler Mendelson’s Benefits Practice Group and a Shareholder in the New York office. Ellen N. Sueda is a Shareholder in Littler Mendelson’s San Francisco office.*

## **Americans With Disabilities Act Amendments Expand Protected Disability Status**

By

*Paul S. Fleck, Esq., Joanna L. Blake, Esq.,  
and Tara L. Morgan, Esq.*

of

*Atkinson, Andelson, Loya, Ruud & Romo*

**P**resident Bush signed the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) on September 25, 2008. The ADAAA becomes effective January 1, 2009, and will increase the impact of the Americans With Disabilities Act (“ADA”) on most employers. Whether the ADAAA will have significant impact on California employers who already face heightened disability discrimination standards under the California Fair Employment and Housing Act (“FEHA”), however, is yet to be determined.

Since 1990, the ADA has prohibited employers from discriminating against an employee or applicant on the basis of a protected disability. Over the years, the Supreme Court has limited the scope and protection of the ADA. However Congress, through the ADAAA, has now restored and in some cases broadened the ADA’s original scope and protection. The modifications under the ADAAA include: (1) broadening the coverage under the term “disability,” (2) expanding the term “regarded as” used in determining a protected disability, (3) clarifying impairments that are covered disabilities, (4) allowing the assessment of a disability in the unmitigated state, and (5) expanding the list of “major life activities” a protected disability can impact.

#### **Expanded Interpretation of “Disability” and “Regarded As” Having a Disability**

Previously, a disability under the ADA was defined to mean a person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. Starting in January 2009, the ADAAA will require that the term “disability” be construed

***This article has been shortened.  
For the full article, visit  
[www.littler.com](http://www.littler.com)***

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## Lerner Lines - October 2008

By

Stewart Lerner, Lerner & Associates

Anyone who has been following the economic news will not be surprised that the latest unemployment report was dismal. Employers shed 159,000 jobs in September, far more than expected. This was the worst one-month drop in years and brings to 760,000 the number of jobs that have disappeared this year. The unemployment rate was unchanged, remaining at 6.1%, but is expected to continue rising in future months.

“This should remove any lingering doubts that the economy is in a recession,” said Dean Baker, co-director of the Center for Economic and Policy Research. “The rate of job loss is accelerating and the unemployment rate is virtually certain to cross 7% early in 2009.”

Meanwhile, here in California, the governor has completed his review of 1,187 bills sent to his desk. He vetoed 415, well above his roughly 20% rejection rate in previous years. Included in those vetoes was the large majority of business bills labeled as “job killers.”

I only noted two significant bills that were actually signed by the governor. The first, AB 2075, amends Section 206.5 of the Labor Code and makes it unlawful to require an employee, as a condition of being paid, to execute a statement of the hours worked during a pay period which the employer knows to be false. Violation of this section by the employer is a misdemeanor.

The second, AB 10, amends Section 515.5 of the Labor Code and permits employers to pay certain computer software employees either \$36 per hour or an annual salary of \$75,000 to satisfy the compensation component of the overtime exemption.

I would like to spend the balance of this article on the topic of political activities and discussions in the workplace. Clearly, this is an important issue that could be facing employers in the days leading up to the 2008 presidential election.

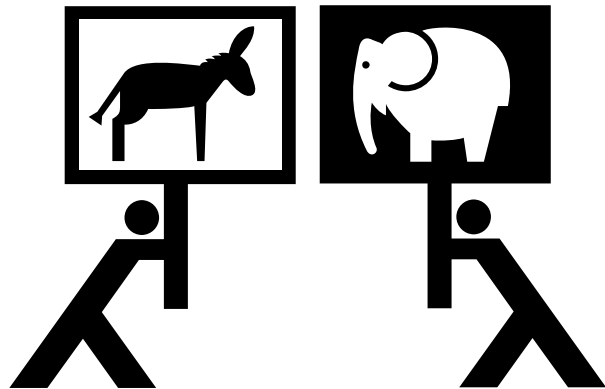
The historic uniqueness of our candidates will make this an unprecedented election. There is a strong possibility of many office discussions concerning the age, race, gender or national origin of the candidates – and there

are likely to be strong feelings on both sides. Obviously, inappropriate employee comments, in addition to angering others, could easily raise issues of discrimination or a hostile work environment. This problem is further complicated by the fact that employers must act very carefully because so much of what employees might do or say could be considered “protected activity.”

Here are some general actions you might want to consider:

First, you might want to issue policies or guidelines on what constitutes appropriate political activity in the workplace:

- This could include whether buttons or shirts with campaign names or slogans would be allowed in your business.
- You might want to limit use of your company bulletin boards or email system to distribute political information.
- You may even want to limit non-work related discussions on work time.



Remember, however, that as a general rule, policies and discipline cannot be restricted to solely political activities but should be applied equally to all other areas of behavior in the workplace.

The purpose of this reminder is to get you thinking about what you might want or need to do before you have a serious problem or issue. However, because this area is so complex and sensitive, I strongly recommend that you discuss any proposed policies, memos or guidelines with your legal council.

## EAC-OC Programs For 2009

By

Robert Orozco, Program Chair

As 2008 draws to a close, we can reflect on the successes of this year's programs but also optimistically look to our 2009 calendar of events. Your EAC-OC prides itself on listening to your suggestions and comments and incorporating them into our activities. As in previous years, the upcoming year's calendar of events will be guided by a unifying theme of seminars geared to not only providing insightful and relevant topics but also enabling you to demonstrate the *benefits* of your participation. The *benefits* of your



membership extends beyond the discounts, employment/labor attorney hotline, or even the quarterly newsletters. In fact, one of the greatest *benefits* you receive is our belief that we are providing you with the tools to apply

your knowledge of employment issues in all aspects of your business operations. Consequently, we have named 2009 the year of the *benefits*.

**The question is not if your understanding of employment law will be tested - it's when.**

Our 2009 seminars will provide you with additional tools to identify the benefits of being a learned

practitioner of the labor & employment arts. Our seminars, commencing with our traditional January "New Laws Update" through other diverse topics as "Internal Investigation" to "Managing Leaves of Absence" and "Workers' Compensation Update" will demonstrate the *benefits* of having an experienced individual who can identify, tackle, and solve the myriad of issues that typically accompany these topics. Similarly, for those of you who are new to the field, our 2009 calendar of seminars will *benefit* you by introducing you to experts in each field who can help you develop your expertise.

2009 also sees the return of Prof. Bonni Stachowiak who will lead a very informative and interactive seminar on the actual *benefits* a human resources department presents for any company. Clearly, having a renown academic demonstrate the *benefits* of those companies who have a human resources department versus those companies that do not only *benefits* you. Today - more than ever - your ability to navigate through the maze of various issues, legal and otherwise, that dominate any company is an essential management skill. But your EAC is confident that our 2009 seminar calendar will enable you to handle those key responsibilities. Simply but, the *benefits* of membership and our 2009 calendar are critical *benefits* that you cannot live without.

Check out our EAC-OC WEBSITE at  
[www.eacorangelcounty.com](http://www.eacorangelcounty.com)



### A Little Sign-of-the-Times Humor . . .

For all of you with any money left, be aware of the next expected mergers so that you can get in on the ground floor and make some BIG bucks. Watch for these consolidations in 2009:

- 3M will merge with Goodyear and become: MMMGood.
- ZippoManufacturing, AudiMotors, Dofasco, and Dakota Mining will merge and become: ZipAudiDoDa.
- FedEx is expected to join its competitor, UPS, and become: FedUP.

in “favor of broad coverage for individuals.” Although there is no clear explanation as to how far the definition should extend, it is clear that interpretations of the ADAAA that limit the definition of disability will be disfavored.

In addition, the ADAAA refines the definition of “regarded as having a disability.” An individual who is subjected to disability discrimination based on an actual or perceived impairment, whether or not that impairment limits a major life activity, will be regarded as having the impairment for purposes of enforcement of the ADAAA.

### **Broader Definition of “Impairment”**

The ADAAA broadens the definition of “impairment.” Under the ADA, an impairment must have “substantially limited one or more major life activities.” In recent years, however, the United States Supreme Court had strictly construed that definition. In *Sutton v. United Air Lines, Inc.*, the Supreme Court required that the determination of whether an impairment substantially limits a major life activity be balanced against “mitigation measures” such as medication or medical devices. Further, in its *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* ruling, the Supreme Court held that the terms “substantially limited” and “major life activities” must be strictly construed when determining the existence of a qualifying disability. The *Williams* Court also held that an individual must show that such a protected disability prevents or severely restricts him/her from “doing activities that are of central importance to most people’s lives.” By passage of the ADAAA, Congress specifically cast aside the *Sutton* and *Williams* rulings. The ADAAA returns the protected “disability” standard to one which “substantially limits one or more major life activities” and directs that covered disabilities will be determined based on whether the impairment substantially impairs a major life activity in its unmitigated state. This significantly broadens ADA coverage.

Further, individuals who suffer episodic or temporary impairments will be covered by the ADAAA if the impairment substantially limits one or more major life activities while the individual experiences an episode or the temporary impairment is active. Again, this extends the original language of the ADA.

### **Expanded List of “Major Life Activities”**

Finally, the ADAAA lengthens the list of “major life activities.” Over the years, the Supreme Court has narrowly interpreted the original definition of “major life activity” and Congress, through the ADAAA, has rejected those decisions. The ADAAA expands the non-exhaustive list of protected activities to include physical tasks, mental tasks, and overall body functions. Some of the enumerated tasks are: walking, standing, lifting, learning, reading, and thinking. The list of body functions now includes immune system function and reproductive function.

### **Impact on California Employers**

The ADAAA’s impact on California employers is not yet certain. The FEHA has generally provided broader protection against disability discrimination than its federal counterpart, the ADA. For example, the FEHA definition of “disability” requires an employee to have an impairment that merely “limits” a major life activity rather than “substantially limits” the activity.

Further, the FEHA specifically requires employers to engage an employee in an interactive process when the employer believes the employee may have a disability which inhibits the employee’s ability to perform his or her essential job functions. This interaction between employer and employee is to assist in a determination of what reasonable accommodations may be possible.

Finally, the FEHA already requires that an individual’s disability status be determined without regard to “mitigating factors.” The ADAAA expansion of the ADA now more closely tracks to the FEHA. Thus, California’s broad definition of impairment or disability increases the burden on employers to work with employees regarding a much broader range of impairments or disabilities.

For the time being, it is likely that employees and applicants in California will continue to bring their disability discrimination claims under the broad protection of the FEHA. However, employers should recognize that California state courts often look to ADA definitions for guidance and interpretation of specific terms. Thus, until the ADAAA is interpreted in the courts, it remains unclear exactly how the ADAAA will impact California employers.

## “Put Your Talent To Work” Expo and Resource Job Fair

By Abner Ivora, EAC-OC/EDD Coordinator



The “Put Your Talent to Work” Expo and Resource Job Fair was held on Wednesday, September 17th, at the Anaheim Downtown Community Center.

The Job Fair was an initiative of Governor Arnold Schwarzenegger, sponsored by California’s Employment Development Department (EDD) in partnership with the Anaheim Workforce Investment Board, the Department of Industrial Relations’ Division of Apprenticeship Standards, the Orange County Workforce Investment Board, the Santa Ana WORK Center, and various other federal, state, local and private organizations.

The purpose of the job fair was to help the unusually high number of unemployed workers in Orange County in the construction, financial services, and mortgage industries find jobs in other fields of work.

There were 38 exhibitors in the Resource Expo consisting of 33 employers, one school and four unions.

Among the job seekers in attendance:

- 218 from the Mortgage industry
- 125 from the Construction trades
- 46 from the Financial industry
- 111 from other varied career paths such as, administrative, retail, IT, property management, and insurance
- 46 from the U.S. Veterans from various industries listed above.



The job seekers who participated in the Job Fair were given many useful tips to assist them in preparing résumés and referrals to Résumé Writing Fundamental’s workshops held in the local One-Stop and Workforce service centers.

The Expo was a huge success, as approximately 500 people attended. Many attendees stated they have upcoming interviews, others obtained great leads, and one appreciative job seeker said, “I’ve been to many job fairs, but this event has the best diversity and most job opportunities I have seen yet.”

*This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or expert assistance is required, the service of a competent professional person should be sought.*

**EMPLOYMENT DEVELOPMENT DEPARTMENT (EDD)**  
**Orange County Locations**

<b>OFFICE</b>	<b>ADDRESS</b>	<b>PHONE</b>
Anaheim Job Service .....	2450 E. Lincoln Ave. .... Anaheim, CA 92806	714-518-2315
Anaheim Workforce Center .....	50 S. Anaheim Blvd. .... Anaheim, CA 92805	714-765-4350
Irvine One-Stop Center .....	125 Technology Drive #200 ..... Irvine, CA 92618	949-341-8000
Westminster One-Stop Center .....	5405 Garden Grove Blvd. .... Westminster, CA 92863	714-241-4900
Santa Ana W.O.R.K. Center .....	1000 E. Santa Ana Blvd., Ste. 220 ..... Santa Ana, CA 92701 (At the train station)	714-565-2610
Orange County Call Center .....	N/A .....	714-736-3000
Orange County Adjudication Center .....	N/A .....	714-687-4400
Santa Ana Disability Insurance .....	605 W. Santa Ana Blvd, Bldg. 28, Rm 735 ..... Santa Ana, CA 92701	800-480-3287
Employment Tax Audit Area Office .....	2099 So St College Blvd., Ste. 401 ..... Anaheim, CA 92816-6014	714-935-2920
EDD Labor Market Information .....	South County ..... North County .....	949-341-8051 714-687-4816

The relationship between the California Employment Development Department (EDD) and the Employer Advisory Council (EAC) is defined as a partnership. "The partnership's commitment to both the employer and the worker is to improve EDD services, increase cooperation and communication among EDD and the private sector, and to increase employer's knowledge of EDD programs and services."