Employer Advisory Council of Orange County, Inc.

The Advisor

Volume 31 No. 1 • Winter 2011

WHAT'S INSIDE

Page 2 .... Board Members; President's Message

Page 4 .... The "Stray Remarks" Doctrine Finds No Shelter in California

Page 6 .... Lerner Lines

Page 7 .... California Court Rules Employer Had No Right to Eliminate Reduced Sales Quotas For Senior Agents

Page 10 .... 2011 Certificate Program & Workshops Registration Form

Page 11 . Member-Get-A-Member Contest

Page 17 .... EDD: Helping HP Hire Before the Holidays

Page 18 .... EDD Offices in Orange County

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

2010 Legislative Review

by
Michael Chin Esq., Morrison & Foerster LLP

Introduction

With the 2010 congressional sessions in both Sacramento and Washington, D.C. having come to a close, employers would be wise to take stock of the changes in state and federal legislation that will affect their businesses in the coming years. From a labor and employment law perspective, the past year saw a number of key pieces of legislation up for consideration in California; however, a majority of them were not enacted due to the Governor's veto.

On the federal front, with the Obama Administration focused on hot-button issues such as health care, financial reform, and immigration reform, there were few significant labor and employment legislative developments in 2010. And with the Republican Party re-taking the House, few are predicting significant changes in labor legislation in the coming years. If anything, we can expect the advancement of the President's labor agenda to come by way of the Department of Labor and administrative agencies, rather than through acts of Congress.

California Legislative Retrospective

As in years past, Governor Schwarzenegger vetoed a number of labor and employment bills that were up for consideration this year. Nevertheless, a few significant bills were signed into law. Employers will have to become familiar with new laws governing "serious violations" under the California Occupational Safety and Health Act, meal break periods, and the use of investigative consumer reporting agencies, to name a few.

> > > 3

Is EPLI Coverage a Good Fit For Your Business?

by
Ann Smith, Esq. and Michael Drenan, Esq.
Atkinson, Andelson, Loya, Ruud & Romo, LLP

As an employer, have you considered purchasing Employment Practices Liability Insurance ("EPLI")? We have received inquiries from many employers regarding whether EPLI is a good fit for their business. In this regard, however, it must be emphasized that Atkinson Andelson does not necessarily endorse EPLI for your business, nor do we endorse any particular insurance carrier.

This insurance can be purchased for any size company and can protect

> > > 5

OFFICERS - 2011

Stewart Lerner – President
Lerner & Associates
Brea, California

Nick Teel – Secretary/Treasurer
Moseys' Production Machinists, Inc.
Anaheim, California

BOARD OF DIRECTORS

Jim Hart, Esq. – *Advisor* Editor
Littler Mendelson
Irvine, California

Linda Johnson – Director at Large
Project Independence
Costa Mesa, California

Robert Orozco, Esq. – Program Committee Chair
Meyers Nave
Los Angeles, California

Debbi Peterson – Director at Large
PVP Advanced EO Systems
Tustin, California

Walt Storch – Website Chair
Elkins-Jones Insurance Agency
Irvine, California

EAC-OC OFFICE
EAC-OC/EDD COORDINATOR

EAC-OC Office – Barbara Bivens, Administrator
16033 Bolsa Chica Road #104-615
Huntington Beach, CA 92649
Phone: 714/846-2510 • Fax: 714/844-4779
email: info@eacorangecounty.com

EAC-OC/EDD COORDINATOR – Abner Ivora
EDD Job Service
2450 E. Lincoln Ave., Anaheim, CA 92806-4272
Phone: 714/687-4834 • Fax: 714/518-2391
Email: aivora@edd.ca.gov

President's Message . . .

by Stewart Lerner

As we enter another new year, it seems fitting to, first of all, look back on the events and accomplishments of 2010, and then to look forward to the exciting activities we have planned for 2011.

Last year was a banner year for your EAC. The ten programs that we presented drew some of the best evaluations we have ever received from our membership. My thanks go out to our great speakers and to our program chair, Robert Orozco, who continues to schedule top-level presentations. In the spirit of "giving back," the EAC provided monies to the EDD to use for veteran, youth and employer services as well as for numerous job fairs. We also helped to sponsor a Veteran's Stand Down in the Long Beach area and conducted several clothing and food drives for those in need. At the end of the year, our November program once again included vendor opportunities for our members and a large number of door prizes for all in attendance. All in all, a great year!

But, "what have you done for me lately?" In 2011 we will once again present a slate of ten informative and timely presentations beginning with our New Laws program in January. (See our full program information on Page 10 of this newsletter.) In addition, with a number of important changes pending on the political horizons, we pledge to provide you with timely bulletins and needed information. We will even schedule special workshops should more in-depth information be needed.

Yes, we anticipate another exciting year in 2011. On behalf of my Board of Directors, I want to thank each and every one of you for your continuous support of our organization and wish you a happy, healthy, and prosperous New Year.

California Bills Signed Into Law

California Transparency in Supply Chains Act of 2010 (S.B. 657)

In passing the California Transparency in Supply Chains Act of 2010, the California Legislature has written into law Civil Code section 1714.43. Starting January 1, 2012, California manufacturers and retail sellers with over $100 million in annual worldwide gross receipts will be required to publicly disclose their efforts to eliminate slavery and human trafficking from their direct supply chains for tangible goods for sale.

The public disclosure requirement can be met by the conspicuous posting of a link on a company's Internet home page to certain required information. If the company does not maintain a website, the statute provides that the company shall produce the information to consumers within 30 days of a request. Specifically, a business subject to the statute will have to disclose the extent to which it: (1) "[e]ngages in verification of product supply chains to evaluate and address risks of human trafficking and slavery"; (2) "[c]onducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains"; (3) "[r]equires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business"; (4) "[m]aintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking"; and (5) "[p]rovides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products." The bill further provides that the exclusive remedy for a violation of section 1714.43 shall be an action for injunctive relief to be brought by the Attorney General, who, pursuant to Revenue and Taxation Code section 19547.5, shall be provided with a list by the Franchise Tax Board of businesses that are required to be in compliance.

Meal Break Periods Amendment (A.B. 569)

Prior to its amendment and subject to certain exceptions, Labor Code section 512 prohibited employers from requiring an employee to work more than 5 hours per day without providing the employee with a 30-minute meal break period. A number of employer groups decried the law as impracticable for certain industries and onerous to the extent it resulted in employers having to become meal break monitors/disciplinarians. The same employer groups argued that more flexible solutions to the meal break period issue were already in place under applicable collective bargaining agreements.

In passing A.B. 569, the California Legislature amended section 512 by adding to the list of employees who are exempt from the application of the 5-hour/30-minute rule. Specifically, A.B. 569 provides that the following employees are exempt: (1) employees in a construction occupation; (2) commercial drivers; (3) security officers; and (4) employees of an electrical corporation, a gas corporation, or a local publicly owned electric utility. However, these employees are only exempt if their employment is covered by a collective bargaining agreement that "expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate."

The theory behind the amendment is that certain occupations are unique in character and require a more flexible approach to the meal break period issue. Provided that employers and employees have already resolved the issue in a mutually agreed upon collective bargaining agreement, the state government will respect the parties' decision.

Amendments to the Investigative Consumer Reporting Agencies Act (S.B. 909)

Prior to the passage of S.B. 909, the Investigative Consumer Reporting Agencies Act ("ICRAA") provided that, subject to certain exceptions, any entity seeking to have an investigative consumer report prepared for employment purposes was required to disclose to the subject of the report the name and address of the agency conducting the investigation, the nature and scope of the investigation, and general information regarding consumer

> > > 8

The “Stray Remarks” Doctrine Finds No Shelter in California

by

Dominic J. Messiha, Esq. and Matthew J. Sharbaugh, Esq., Littler Mendelson

“Useless old lady.” “Old fogey.” “This is 1994, haven’t you ever heard of a fax before?” These are just a few examples of comments that have been deemed “stray remarks” by courts in the context of employment discrimination cases. Since the term was coined by Justice Sandra Day O’Connor in *Price Waterhouse v. Hopkins*, the “stray remarks” doctrine has been developed through the federal circuit courts over the past several decades.

In essence, the “stray remarks” doctrine provides that comments made by non-decisionmaking supervisors or coworkers—and that are unrelated to the challenged employment decision—are irrelevant to the question of discriminatory motive or animus, and, thus, insufficient to defeat summary judgment. Although a few California courts have implicitly recognized the doctrine, none had squarely addressed its application to employment discrimination cases under California’s Fair Employment and Housing Law until the California Supreme Court’s decision in *Reid v. Google*.

Factual Background

In *Reid v. Google*, the employer was granted summary judgment in the trial court, in large part, due to the court’s exclusion of a variety of ageist comments deemed “stray remarks,” including: (1) statements that the plaintiff was “slow,” “fuzzy,” “lethargic,” did not “display a sense of urgency,” and “lacked energy;” (2) a statement at or around his termination that he was not a “cultural fit;” and (3) comments by coworkers calling the plaintiff an “old man” and “old fuddy-duddy” and joking that his office placard should be an “LP” instead of a “CD.” The trial court disregarded these comments based on its finding that they were made by “non-decisionmakers,” were “ambiguous” and were “unrelated to the adverse employment decision.”

The Court of Appeal’s Decision

On appeal, however, the California Court of Appeal rejected the notion that the “stray remarks” doctrine should operate to categorically exclude these remarks, and instead considered the comments in combination with all of the other evidence advanced by the plaintiff. The plaintiff introduced evidence of e-mail messages between senior executives discussing strategies to “get [the plaintiff] out,” e-mail messages fearing the possibility of a “judge concluding [it] acted too harshly,” the plaintiff’s demotion to a non-viable position just prior to his termination, changed rationales for the plaintiff’s termination over the course of time, and more. Evaluating the listed “stray remarks” in combination with the plaintiff’s additional evidence of discriminatory animus, the Court of Appeal found that summary judgment should be reversed. The court also pointed out there was some question as to whether the comments even qualified as so-called “stray remarks” in the first instance, as plaintiff presented evidence that the speakers supervised him and were involved in the termination decision.

The California Supreme Court’s Decision

On appeal, the California Supreme Court affirmed the Court of Appeal’s decision in full, rejecting a rigid application of the “stray remarks” doctrine to discrimination cases in California. The court reasoned that a categorical exclusion of “stray remarks” resulted in courts impermissibly “weighing” evidence at the summary judgment stage, rendering otherwise relevant evidence inadmissible. Although the court recognized that a trial court is tasked with assessing the relative strength of all the evidence at summary judgment, it instructed that the practice of viewing “stray remarks” in isolation, and, thus, disregarding any and all comments made by “nondecisionmakers” or “decisionmakers unrelated to the decisional process,” goes too far.

> > > 16

EPLI Coverage *. . . from Page 1*

employers, their employees, and the Board of Directors from claims made by their employees relating to wrongful termination, discrimination, harassment and retaliation. Recently, some insurance carriers have begun to underwrite insurance to provide defense costs only for wage and hour claims.

EPLI has become increasingly popular over the past ten years. With many businesses concerned about litigation costs, employers find that purchasing EPLI provides them peace of mind in a litigious employment environment. Sometimes EPLI is purchased along with Directors and Officers (D & O) insurance. D & O insurance is often obtained by for profit companies or non-profit corporations to protect their Board of Directors from claims. Sometimes, such D & O policies have an EPLI component to provide for the defense of employment-related claims.

The cost of EPLI varies from employer to employer, based upon the size of the employer, industry and litigation history. However, if you decide to shop for EPLI, you should remember a few things when discussing the matter with your insurance broker.

Retention

You should opt for a retention that is realistic for your business. Retention rates can vary from as low as $5,000 up to $200,000 per incident. Average retention rates for EPLI policies are $25,000 for profit companies and $5,000 for non-profits.

Attorney Select Clause

An important aspect in negotiating your EPLI coverage is to request an attorney select clause or ask for a rider or endorsement to the policy to be attached so you can select the attorney and/or law firm who will handle the litigation. This is particularly important when you are responsible for the retention amount. You should be able to select an attorney with whom you are comfortable. Additionally, you want to ensure that you are selecting employment law counsel with the experience and resources to represent you in the litigation. Many of our clients have been upset to learn that once they submit the claim to the insurance carrier, they are prohibited from using their employment law counsel because they did not negotiate this point when purchasing the insurance policy initially.

Notice

Be sure when you secure your new policy you understand how and when you are to notify the insurance company of a claim. A claim can be triggered by something as informal as a letter from the employee or his or her attorney stating that the employee is unhappy and will sue you for damages relating, for example, to his/her termination. It is always wise to put your carrier on notice immediately so you do not lose your coverage based upon failure to timely notify your carrier.

Renewal

Remember that selection of an EPLI/D&O policy is an annual event. Your broker should be able to assist you in determining whether you should remain with your current EPLI carrier or whether to select a new carrier. If you decide to select a new carrier, be sure to consider the same issues discussed above.

Reprinted with permission from Atkinson, Andelson, Loya, Ruud & Romo
all rights reserved. *For more information, please contact asmith@aalrr.com and mdrenan@aalrr.com*

Just a Reminder!

Check out our great 2011 Workshops on Page 10 . . .

The New Year has brought both good news and bad news on the employment front.

GOOD NEWS — the nation's economy added 103,000 jobs in December.

BAD NEWS — The job growth fell short of expectations.

GOOD NEWS — The unemployment rate dropped to 9.4% last month, the lowest level in 19 months.

BAD NEWS — Experts say the drop in unemployment was mainly because workers left the labor market and stopped looking for work.

Lerner Lines

by

Stewart Lerner

Lerner & Associates

Through all of 2010, the nation added 1.1 million jobs, an average of 94,000 jobs a month. During this period there have been twelve straight months of private sector job growth and that is the first time this has happened since 2006. Still, economists remain cautious. Federal Reserve Chairman Ben Bernanke said at a recent Senate Budget Committee hearing that even though the economic recovery was gaining strength in 2011, with consumer spending in particular picking up, "it could take four to five more years for the job market to normalize fully."

In more news of interest, major insurers around the country are reporting that a growing number of small businesses are signing up to give their employees health benefits. Apparently, a tax credit - available to companies with fewer than 25 employees - which will help to offset the cost of providing benefits has been a large incentive. Gary Claxton, who oversees an annual survey of employer health plans for the nonprofit Kaiser Family Foundation, said "We certainly did not expect to see this in this economy. It's surprising."

For insurers, this new market creates a big opportunity. Nationally, only half of companies with three to nine employees and three quarters of businesses with 10 to 24 workers provide health care benefits. By comparison, 99% of firms with more than 200 employees offer benefits.

The U.S Equal Employment Opportunity Commission has remained busy. In its latest major case in December, it filed a complaint against a Chicago school district for refusing to grant a Muslim teacher unpaid leave to go on a Hajj pilgrimage to Saudi Arabia. Attending the annual pilgrimage to the holy city of Mecca once in a lifetime is one of the five central tenets of the Islamic faith. The teacher, Safoorah Khan, applied for an unpaid leave of absence to go on the Hajj, but her request was denied and she was forced to resign her employment.

The complaint was filed in a Chicago federal court alleging that the school district violated the Civil Rights Act of 1964 by refusing Khan's time-off request and failing to accommodate her religious practice. Khan wants her job back, along with back pay and other damages for pain and suffering.

In our final item of interest to employers, the IRS has announced an increase in the standard mileage rates, effective January 1, 2011. Remember that California takes the position that, if an employer pays the IRS maximum rate, that this rate is presumed to fully compensate their employees for use of their personal cars. Employers who do use the IRS rate should increase it to 51cents starting January 1, 2011.

That will do it for this month. Let me close by wishing all of my readers a happy, healthy and prosperous new year!

California Court Rules Employer Had No Right To Eliminate Reduced Sales Quotas for Senior Agents

by
Jackson Lewis, LLP

In a case brought by insurance agents, the California appeals court has ruled that an employer may not unilaterally eliminate certain obligations to employees contained in a policy that did not have an indefinite duration. *McCaskey v. California State Auto. Ass'n*, No. H032186 (Cal. Ct. App. Oct. 29, 2010). Reversing summary judgment for the employer, the Court held that a triable issue of fact existed regarding the duration of the policy and allowed the case to proceed to trial.

The Court said that under California law (*Asmus v. Pacific Bell*, 23 Cal. 4th 1 (Cal. 2000)), an "employer could unilaterally terminate its duty to honor the policy provided certain circumstances were present: 'An employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits.' "

Compensation Plans

Plaintiffs John Mellen, Francis McCaskey, and Charles Luke began working for California State Auto Association ("CSAA") as sales agents in 1969, 1971, and 1976, respectively. They each signed an employment agreement providing that commissions would be paid in accordance with CSAA's compensation plan. The company had reserved the right to modify the plan at any time.

In general, the compensation plan provided for minimum sales quotas. Failure to meet the quotas could result in discipline or termination. When an agent reached age 55 with at least 15 years of service, the sales quotas would be reduced by 15 percent for that agent. The quotas would be reduced by a further 25 percent for agents who reached 60 with 20 years of service. This compensation plan remained in effect through 2000, when the Plaintiffs all qualified for the quota reductions because of their age and years of service.

In early 2001, CSAA adopted a new compensation plan that eliminated the sales quota reductions. Failure to meet the quotas could "lead to corrective action up to and including termination." Declining to sign the plan, the Plaintiffs retained counsel. CSAA ultimately agreed not to terminate the Plaintiffs for failing to sign, and the Plaintiffs agreed that the plan's terms would govern their compensation.

In 2005, CSAA terminated McCaskey for failing to meet his sales quota. Thereafter, CSAA issued a revised compensation plan. Luke and Mellen again refused to sign because it did not include quota reductions for senior agents, and CSAA terminated their employment.

Indefinite Duration?

The Plaintiffs sued CSAA for, among other things, breach of contract. CSAA moved for summary judgment, which the trial court granted. The Plaintiffs appealed.

CSAA argued on appeal that the compensation plan was for an indefinite duration and the company had the right to eliminate it unilaterally under California law established in *Asmus v. Pacific Bell.* The Plaintiffs argued that *Asmus* did not apply here because the compensation plan took effect at a specific time, i.e., when they reached age 55 with 15 years of service, and was not subject to a condition of indefinite duration.

The Court did not find either argument compelling. It said that rather than last for an indefinite duration, as CSAA argued, the plan's terms suggested "an *implied-in-fact* durational term by which CSAA's duty to honor the policy would end, as to a qualifying employee, either (1) at age 65, (2) after 10 years, or (3) upon the employee's retirement." The plan's first reduced quota became effective only after the employee attained age 55 with 15 years of service, and the second became effective five years later. The Court said the second reduction could be interpreted as lasting for five additional years, until the employee attains age 65, the "the usual retirement age." This interpretation would be consistent with the plan's

> > > 17

investigations. Amending Civil Code section 1786.16, S.B. 909 provides that, as of January 1, 2012, the consumer-in-question must also be provided with the Internet website address or telephone number of the agency conducting the investigation "where the consumer may find information about the investigative reporting agency's privacy practices, including whether the consumer's personal information will be sent outside the United States…."

Further amending the ICRAA, S.B. 909 provides that, as of January 1, 2011, a California consumer reporting agency must conspicuously post on its primary Internet website "information describing its privacy practices with respect to its preparation and processing of investigative consumer reports." Such information shall include, but need not be limited to: (1) a statement indicating whether the consumer's personal information will be transferred "to third parties outside the United States or its territories" and (2) a section that "includes the name, mailing address, e-mail address, and telephone number of the investigative consumer reporting agency representatives who can assist a consumer with additional information regarding the investigative consumer reporting agency's privacy practices or policies in the event of a compromise of his or her information."

Of note, S.B. 909 also provides that a consumer whose personally identifiable information is accessed without authorization, as a result of an investigative consumer reporting agency's negligent preparation or processing of a report outside the U.S., may recover actual damages, plus attorneys' fees and costs by way of an independent civil action.

Occupational Safety and Health – Redefining "Serious Violation" (A.B. 2774)

Heralded by many as the "most significant occupational safety and health bill to come out of Sacramento in several years," A.B. 2774 rewrites the "serious violation" standard set forth in California Labor Code section 6432. Prior to the bill's passage, to prove that an employer had committed a "serious violation," the Division of Occupational Safety and Health had to demonstrate that there existed a substantial probability that death or serious physical harm could result from an employer's violation. In practical terms, the Division faced significant challenges proving serious violations because the phrase "substantial probability" was interpreted by the Cal/ OSHA Board of Appeals to require that there exist at least a 51% likelihood of death or serious injury. As a result, under the previous version of the Code, serious violation citations were often dismissed or downgraded to "general" violations, with greatly reduced monetary penalties.

Rewriting section 6432, A.B. 2774 provides for a rebuttable presumption of a "serious violation" where the Division "demonstrates that there is a"*realistic possibility* that death or serious physical harm could result" from the hazard created by an employer's violation. In short, under this new version of the Code, the hurdle the Division must clear to establish that an employer has committed a serious violation has been significantly lowered. Whereas before, the Division carried the burden of demonstrating a 51% likelihood of death or serious injury, now it must only set forth a "realistic possibility" of such dangers. As indicated, however, the employer may rebut the presumption of a serious violation by demonstrating that it did not or could not have known about the violation through the exercise of reasonable diligence—that it took—"all the steps a reasonable and responsible employer in like circumstances should be expected to take."

The bill further provides that the Division shall make a reasonable attempt to "determine and consider" the following information from an employer prior to issuing a citation for a serious violation: (1) available training relevant to preventing the exposure of employees to hazards; (2) procedures for discovering, limiting access to, and correcting hazards; (3) the supervision of employees exposed to hazards; (4) procedures for communicating an employer's health and safety rules and programs to employees; (5) the employer's explanation of the circumstances leading to the alleged violations; (6) the employer's explanation of why a serious violation, in fact, does not exist; (7) the basis for the employer's belief that it responded reasonably and responsibly to the alleged violative events; and (8) any additional information the employer wishes to provide. Only after the Division investigators have made a reasonable attempt to determine and consider this information, shall they be able to issue a citation for a serious violation. Of note, A.B.

> > > 9

Legislative Review . . . from Page 8

2774 provides that the Division shall satisfy this requirement by sending the employer-in-question a form at least 15 days prior to issuing a serious violation citation that describes the conditions it deems cite-able and requests the information listed above from the employer.

Unemployment Insurance Benefits – Good Cause Exception Expanded (A.B. 2364)

With the passage of A.B. 2364, eligibility for unemployment insurance benefits has been slightly expanded with respect to situations involving domestic violence abuse. Under the previous version of Unemployment Insurance Code section 2364, employees were eligible for unemployment insurance benefits upon leaving employment voluntarily to protect themselves and/or their children from domestic abuse. A.B. 2364 revises the Code to allow for the provision of benefits to employees who leave employment to protect themselves and/or any member of their "family." By expanding the scope of benefits eligibility, A.B. 2364 provides for increased amounts payable from the Unemployment Insurance Fund, thereby effecting an appropriation.

Michelle Maykin Memorial Donation Protection Act (S.B. 1304)

By way of S.B. 1304, the California legislature has enacted Labor Code section 1508 *et seq.* Better known as the Michelle Maykin Memorial Donation Protection Act, S.B. 1304 mandates that private employers permit employees to take paid leaves of absence when making organ or bone marrow donations, even if the donating employees have already exhausted their sick leave quota. In the case of organ donation, employees are entitled to 30 days of paid leave, compared to just 5 days for bone marrow donations.

In addition, the new Labor Code section prohibits employer retaliation against employees exercising their right to paid donation leave and requires that employers return donating employees to their same or an equivalent position upon return from leave. Providing teeth to the new law, S.B. 1304 further authorizes a private right of action for employees seeking to enforce the provisions of the new Labor Code section.

California Bills Vetoed

While a number of pieces legislation received Governor Schwarzenegger's stamp of approval, a far greater number of labor bills were vetoed by the outgoing Republican. Employers would be wise to take note of these bills, as they may resurface either at the federal level or under the administration of recently-elected Democratic Governor Jerry Brown.

Restrictions on Employers' Use of Employee Credit Reports (A.B. 482)

Vetoed this past September, A.B. 482 would have dramatically restricted the circumstances under which an employer could use a credit report for pre-employment screening or other employment purposes. Specifically, the bill provided that use of credit reports would be prohibited for employment purposes unless the job position in question fell into one of the following categories: (1) a managerial position; (2) a law enforcement position; (3) a California Department of Justice position; or (4) a position for which information contained in a credit report is required by law to be disclosed to or obtained by the employer.

Justifying his veto of the bill, Governor Schwarzenegger reasoned that California and federal laws already provide employees with adequate protection against the improper use of credit reports by employers. He further expressed concern that passage of the bill would "significantly increase the exposure for potential litigation over the use of credit checks." For further discussion of the veto of A.B. 482, please see Morrison & Foerster's September 28, 2010 *Client Alert: California Governor Vetoes Bill Restricting Employer Use of Employee Credit Reports*.

Enhanced Security Breach Notification (S.B. 1166)

Under current California security breach notification law, Civil Code section 1798.82, businesses that own or license "computerized data which includes 'personal information'" are required to notify California residents "whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person" by way of a security breach.

Had it not been vetoed, S.B. 1166 would have amended section 1798.82 to require that security breach notices

> > > 12

E-Z FORM 2011 Workshops

General Workshops

5 Per Year • 1 Location per Workshop

The General Workshops are open to all members, nonmembers and guests. They are normally held on the third Thursday of each **ODD** month at the Hyatt Regency, 11999 Harbor Blvd, Garden Grove, CA. The only exceptions are July and December, when no workshops are held. Reservations can be made in advance, at a discounted rate, or for each specific workshop individually.

New Laws for 2011 – January 20
Dress Codes and Related Issues – March 17
OSHA – May 19
HR Solutions • Let's Role Play – September 15
HR Hotline – November 17

Questions?
Please call Barbara Bivens at the EAC office at 714-846-2510 or email info@eacorangecounty.com

Certificate Workshops

5 Per Year • 2 Locations per Workshop

The Certificate Workshops are held twice on the **EVEN** months, once in Garden Grove and once in San Juan Capistrano. The only exceptions are July and December, when no workshops are held.

Healthcare Update – February 17 and 22
Creative Motivation – April 14 and 19
Innovative Strategies for Your HR Department – June 16 and 21
Internal Audits – August 18 and 23
Unemployment & Disability Insurance Updates – October 20 and 25

These programs have been approved for 2.75 recertification credit hours through the HR Certification Institute. For more information about certification or recertification, please visit the HR Certification Institute home page at www.hrci.org. The use of this seal is not an endorsement by HRCI of the quality of the program. It means that this program has met HRCI's criteria to be pre-approved for recertification credit.

Registration Form

Location: Please check date and location on above.
Times: 7:15 to 8:00 am: check-in and breakfast • 8:00 to 11:30 am: Workshop with a 15-minute break
Costs: $65 per workshop per person; for non-members $85 per workshop per person

Registrant Name ____________________

Company ____________________

Contact Phone ____________________ **Contact Email** ____________________

Pay by Check: EAC-OC, 16033 Bolsa Chica Rd. #104-615, Huntington Beach, CA 92649
Pay by FAX: 714-844-4779 **Pay by Email:** info@eacorangecounty.com
Credit Card Information: ____________________

Name on Card ____________________ Authorized Signature ____________________
Credit Card # ____________________ Exp ________/________ Security # ____________________
Billing Zip Code ____________________

EMPLOYER ADVISORY COUNCIL ORANGE COUNTY "MEMBER GET A MEMBER" CONTEST

Beginning January 1, 2011 EAC is starting a Membership Contest. If you refer a prospective member who later joins the EAC, you will receive a $10 Starbucks gift certificate via mail. In addition, for every new member referred, your name will be added into a drawing for a Grand Prize at the November 2011 workshop. For Example - refer 10 new members and you get 10 ten dollar gift certificates from Starbucks plus your name in the November drawing 10 times. Questions??? Please call the EAC OC office at 714-846-2510.

EAC OC MEMBERSHIP APPLICATION

Company______________________________
Contact Name__________________________
Title_________________________________
Address_______________________________
City _______________ Zip ________________
Phone (_____)_______________
Email: _______________________@ _______
# of employees ____ # of years in business ___
Industry ________________________
DUES: $95.00 Method of payment: __Check enclosed __MC __Visa __AX

Dues are paid annually in January. Your second year dues will be pro-rated based on the month you join and you will receive an invoice in November so you can pay either this year or next year.

Name on Card__________________________
Card #_______________________________
Expiration date_______________ Last 3 numbers on back of card ________ #4 numbers AX _________
Billing Address

____
City________________________ Zip________
Signature ______________________________

Please return this application to:

EAC OC
16033 Bolsa Chica #104-615
Huntington Beach, CA 92649
Or Fax to: 714-844-4770
Or Email to: info@eacorangecounty.com
Or online at: www.eacorangecounty.com

EAC OC COMMITMENT TO MEMBERS

- To provide the employer with quality education and training on topics such as:
  - Employment Trends
  - Labor Law
  - Legislation
  - Workers' Compensation
- To help employers stay in compliance with the law through the HR Hotline
- To act as advisors to the Employment Development Department and help promote services they provide to the employer

WHAT OUR MEMBERS SAY

New Laws & Emerging Issues - January 2010
The speakers were exceptional. I appreciate this annual presentation - how else would we know about all these laws? Thank you. Linda Lange, OC Association of Realtors

Workplace Violence - May 2010
Exceptional seminar – very informative and really brought a new light to workplace violence. Thank you. Eliz Parra, West Coast Arborists

Hiring & Firing Workshop - June 2010
This workshop had to the best and most valuable information needed in the relevant cultural and distressed economy. The speakers were very personable and the handouts were very detailed. Joy Lindstrom, TLC Pre School.

THIS MEMBER IS REFERRED BY:
Name ________________________________
Company _____________________________

Legislative Review . . . from Page 9

"be written in plain language." In addition, notices would have been required to include: (1) a list of the categories of "personal information" affected by the breach; (2) the actual or estimated date of the breach; (3) the nature of the breach; (4) contact information for the entity reporting the breach; (5) contact information for the major credit reporting agencies; (6) and an indication of whether the notice was delayed as a result of a law enforcement investigation. Furthermore, had S.B. 1166 been enacted, businesses suffering from a personal information security breach would have been required to notify the California Attorney General of the breach.

In vetoing the bill, the Governor took the same position he advocated one year earlier when he vetoed a similar piece of legislation, S.B. 20. Specifically, the Governor noted that the additional restrictions of S.B. 1166 were "unnecessary" because "there is no evidence that there is a problem with the information provided to consumers under California's existing data breach laws." For further discussion of the veto of S.B. 1166, please see Morrison & Foerster's October 1, 2010 *Client Alert: California Governor Vetoes Enhanced Security Breach Notification Bill.*

Agricultural Union Certification Due to Employer Election Misconduct (S.B 1474)

Also receiving a veto, S.B. 1474 would have modified existing California law regarding what actions the Agricultural Labor Relations Board may take in response to employer misconduct during a secret ballot election to certify a labor union as the representative of agricultural workers. Currently, Labor Code section 1156.3 provides that the Board may set aside the results of the election and a new election may be held the following year. Provided that at least fifty percent of the potential bargaining unit had already presented valid authorization cards, S.B. 1474 would have mandated that the Board certify a labor union in response to such employer misconduct. Explaining his veto decision, the Governor noted that S.B. 1474 would create an imbalance in favor of the union without providing for an equivalent consequential measure in the case of union misconduct.

Misdemeanor Penalty for Employers Who Willfully Fail to Pay Wages (A.B. 2187)

A.B. 2187 would have created a criminal penalty for employers who willfully failed to pay departing employees all wages to which they were entitled within 90 days of when the wages should have been paid. Per A.B. 2187, violating employers would have been subjected to fines of up to $10,000 and six months in jail. Striking down the proposed legislation, the Governor explained that waiting time penalties and enforcement mechanisms already exist in California law and further statutory regulation is unnecessary.

Expanding an Employee's Right to Bereavement Leave (A.B. 2340)

With A.B. 2340, the California legislature sought to enact Labor Code section 230.5. Under the terms of this section, employees would have had the right to inquire about, request, and take 3 days of unpaid bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. The proposed Code section would have further provided aggrieved employees with two alternatives for enforcement of their rights: (1) the ability to file a complaint with the Division of Labor Standards Enforcement and (2) the ability to bring a civil action for the recovery of damages, including attorneys' fees. Vetoing the bill, the Governor stated that, in these difficult economic times, he did not wish to expose employers to new sources of potential liability.

Increased Liquidated Damages for Failure to Pay Minimum Wage (A.B. 1881)

Existing law sets a minimum wage for all employees in California, with limited exceptions, and prohibits employers from paying less than that wage. Should an employer fail to pay the minimum wage to an entitled employee, existing law provides that the aggrieved employee may sue his or her employer for liquidated damages in an amount equal to the wages unlawfully unpaid, plus 10% interest. Had it not received Governor Schwarzenegger's veto, A.B. 1881 would have increased the aggrieved employee's liquidated damages award to two times the wages unlawfully unpaid, plus interest.

> > > 13

Legislative Review *. . . from Page 12*

Employers' Ability to Advertise as "Mother-Friendly" Worksites (A.B. 2468)

Had it received the Governor's approval, A.B. 2468 would have made it permissible for an employer to refer to itself as a "Mother-Friendly worksite" in advertisements and promotional materials, provided that the employer's workplace breast-feeding policy had been submitted to and approved by the Labor Commissioner. Vetoing the bill, the Governor noted that existing law already provides lactating mothers with ample protection and there is no need to create additional requirements and potential liability.

Right to Attorneys' Fees for FEHA Claimants (A.B. 2773)

As interpreted by the California Supreme Court in *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010), California Code of Civil Procedure section 1033(a) provides that when a prevailing plaintiff brings a claim under the California Fair Employment and Housing Act ("FEHA") in a court of unlimited jurisdiction, but recovers less than the jurisdictional minimum ($25,000.00), the trial court has the discretion to deny the plaintiff its attorneys' fees.

In proposing A.B. 2773, the legislature sought to amend the Code to provide that section 1033(a) did not apply to FEHA claims. The theory behind the bill was two-fold: (1) the defense of civil rights is so important that the Code should not create barriers against their protection; and (2) FEHA claims are generally of such a complex nature that the discovery restrictions inherent in limited jurisdiction matters are inappropriate. Exercising his veto power, the Governor suggested that A.B. 2773 encouraged frivolous litigation and sought to improperly infringe upon the judiciary's authority to exercise discretion in the awarding of attorneys' fees.

FEDERAL LEGISLATIVE RETROSPECTIVE

As indicated above, with the Obama Administration's political and legislative agendas focused elsewhere in 2010, federal labor and employment law developments were few and far between. Nevertheless, against the backdrop of a power-shift in Washington, a number of pieces of proposed labor legislation warrant mention.

Proposed Federal Legislation

The Fair Playing Field Act of 2010 (H.R. 6128/S. 3768)

With the intent of closing the federal tax "loophole" provided by Section 530 of the Revenue Act of 1978, this past September, Representative Jim McDermott (D-Wash.) and Senator John Kerry (D-Mass.) presented their respective chambers of Congress with H.R. 6128/S. 3786 – the Fair Playing Field Act of 2010.

Under Section 530, businesses are permitted to classify workers as independent contractors for employment tax purposes as long as they have a reasonable basis for the classification and have met certain other conditions. The authors of the Fair Playing Field Act contend that employers have abused this "safe harbor" provision and have engaged in the practice of intentionally misclassifying workers' employment status, so as to avoid paying certain federal taxes and other benefits. If enacted, the Fair Playing Field Act would take a number of steps towards curtailing this practice: (1) the Secretary of the Treasury would be permitted to issue guidance in an attempt to clarify the employment status of individuals for purposes of taxes and withholdings; (2) penalties for failing to properly classify an employee and for failing to withhold the proper amount of federal income and FICA taxes would be increased; (3) companies utilizing independent contractors in their workforce would be required to provide them with information regarding their classification status and how they may challenge their classification; and (4) the IRS would be permitted to issue guidance on worker misclassification.

The Paycheck Fairness Act (H.R. 12/S. 3772)

Proponents of H.R. 12/S. 3772, better known as the Paycheck Fairness Act, sought to amend the Equal Pay Act ("EPA") by adding employer non-retaliation requirements to the EPA, increasing penalties for EPA violations, and authorizing the Department of Labor Secretary to seek additional compensatory or punitive damages against employers that violate the EPA. Furthermore, under the proposed legislation, employers seeking to justify an unequal pay situation would bear the burden of proving that the decision to pay unequally was job-related and consistent with business needs.

> > > 14

Detractors of the bill argued that the EP already contains adequate safeguards to protect against unwarranted, gender-based disparities in pay. They further argued that the proposed legislation is sure to open the door to increased employer liability, an unwelcome possibility, especially in light of the current economic climate. On November 17, 2010, the detractors won the day. In a 58-41 vote in favor of the bill, the Senate failed to achieve the 60 votes necessary to proceed to a floor debate on the Paycheck Fairness Act and avoid a filibuster. As such, the proposed legislation is probably dead for the foreseeable future.

The Employee Free Choice Act(H.R. 1409/S. 560)
Had it been enacted, the Employee Free Choice Act ("EFCA") would have amended the National Labor Relations Act to provide for unionization upon a majority of a target employee population signing union authorization cards. Such a rule would have effectively done away with the secret ballot election process that currently dictates whether workers may unionize. The proposed legislation also provided for the Federal Mediation and Conciliation Service to mediate and arbitrate first collective bargaining agreements, should parties find themselves unable to compromise.

Furthermore, the EFCA would have imposed stiffer penalties for unfair labor practices committed by employers during a union organization campaign or during the bargaining process for an initial contract. As with the Fair Playing Field Act and the Paycheck Fairness Act, given the recent shift in power in Congress, the EFCA is unlikely to reach the President's desk over the next few years.

The Employment Non-Discrimination Act (H.R. 3017/S. 1584)
Another piece of labor legislation that probably has little chance of passage is the Employment Non-Discrimination Act ("ENDA"). ENDA seeks to make it illegal for employers with more than 15 employees to terminate, refuse to hire, or otherwise discriminate against an employee on the basis of his or her perceived or actual sexual orientation or gender identity. Proponents argue that discrimination in the workplace on the basis of sexual orientation and gender identity should be just as readily prohibited as discrimination on the basis of sex, race, religion, age, national origin, or disability. Detractors, however, have thus far successfully argued that the 1964 Civil Rights Act provides the individuals-inquestion with adequate protection and that passage of the proposed legislation would only serve to increase employer liability with no corresponding benefit to employees.

The Working Families Flexibility Act (H.R. 1274/S. 3840)
Introduced in the Senate in late September 2010, the Working Families Flexibility Act would provide employees with a statutory right to request flexible work terms and conditions, specifically with respect to "(1) the number of hours the employee is required to work; (2) the times when the employee is required to work; or (3) where the employee is required to work." In response to such a request, employers would be required to meet with the employee within 14 days of the request and then provide the employee with a written decision within 14 days of the meeting. Should the employer ultimately decide to reject the employee's application for more flexible work terms and conditions, the employer would be required to state the basis for the decision in compliance with regulations issued by the Secretary of Labor. This bill failed to make it out of committee before the close of the legislative term and is unlikely to do so in 2011.

Federal Administrative & Regulatory Issues
The Department of Labor and Secretary of Labor Hilda Solis worked earnestly in 2010 to advance a pro-labor agenda. Among other notable moves, the Department of Labor transitioned from issuing "Opinion Letters" to "Administrator Interpretations" and set forth its new approach to the enforcement of regulatory compliance: Plan/Prevent/Protect.

Wage and Hour Division Administrator Interpretations
To date, the Wage and Hour Division of the Department of Labor has only issued three Administrator Interpretations. The first, issued on March 24, 2010, addressed the application of the administrative exemption under Section 13(a)(1) of the Fair Labor Standards Act ("FLSA") to employees who perform the typical duties of a mortgage loan officer. Likening them more to sales representatives than managers exercising "discretion and independent judgment with respect to matters of significance," the Interpretation found that mortgage loan

> > > 15

***Legislative Review** . . . from Page 14*

officers are entitled to overtime pay. In doing so, the Division overturned two Bush Administration opinion letters that deemed such employees exempt.

The second Administrator Interpretation issued in 2010 narrowed the definition of "changing clothes" under section 3 of the FLSA. Per that section, the time an employee spends changing clothes or washing at the beginning of work each day should not be included in compensable time. However, on June 16, 2010, the Division issued an Interpretation stating that the process of changing into and out of protective equipment necessary for the performance of one's job does count as compensable time.

The final Administrator Interpretation issued in 2010 clarified the definition of "son or daughter" under section 101 of the Family and Medical Leave Act. Under that section, eligible employees are entitled to take up to 12 weeks of unpaid leave to tend to the birth of a""son or daughter" with a serious health condition. Redefining the operative phrase, the June 22, 2010 Interpretation held that section 101 also applies to an employee standing "in loco parentis" to a child. Thus, as long as the employee either provides day-to-day care for the child or is financially responsible for the child, it would appear under this new definition that such an employee is entitled to 12 weeks of unpaid leave.

The Three Ps: Plan/Prevent/Protect

With the stated goal of replacing employers "catch me if you can" attitudes with a "find and fix" culture of compliance, the Department of Labor memorialized its Plan/Prevent/Protect system in its "Spring 2010 Regulatory Agenda." Under the "Plan" mantle, the Department intends to "propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations and other risks to workers in the workplace. Such plans are to be made available to workers so that they can fully understand and comply with them. To effectively "Prevent" noncompliance, the Department of Labor plans on proposing "a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations." Finally, to ensure compliance and effectively "Protect" workers, the Department of Labor intends to "propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis." While the regulations necessary to provide teeth to the Plan/Prevent/Protect program have yet to be published or finalized into rules, employers with an eye to the horizon would be well-advised to begin taking stock of their present compliance programs in anticipation of further developments.

The National Labor Relations Board

Another labor agency that bears watching this coming year is the NLRB. With recess appointments having cemented a pro labor majority on the Board and labor law reform stymied in Congress, many believe that 2011 will be the year promises made to labor in the 2008 election will be kept or at least start to be kept. The Board is poised not only to reverse Bush era Board decisions despised by labor but also to possibly engage in rulemaking that might lead to changes in election procedures that are part of the now dead Employee Free Choice Act. Rulemaking of this nature would no doubt engender a battle with Congress.

Conclusion – What to Expect in 2011

The November 2010 elections produced mixed results with respect to what labor and employment law developments employers can expect in the coming years. Locally, in California, Democrat Jerry Brown is set to replace outgoing Republican Governor Schwarzenegger; and the expectation is that labor reform efforts in Sacramento will once again gain steam. On the federal level, however, the prospects are quite different.

With Republicans now holding the House of Representatives by a strong majority and with Democrats having lost substantial ground in the Senate, it is unlikely that any significant labor legislation will come out of the 112th Congress. As a result, the Obama Administration will have to turn toward the Department of Labor and federal labor agencies to fulfill the President's promises of reform. At the same time, the Obama Administration may be concerned that sweeping administrative or regulatory change could hurt the President's election chances in 2012. As such, many will be closely monitoring the activity of these entities over the coming months, paying careful attention to what steps, if any, they may take on the regulatory front.

Reprinted with permission from Morrison & Foerster LLP, all rights reserved. For more information, please contact MChin@mofo.com

"Stray Remarks" . . . from Page 5

Notwithstanding Reid's ultimate holding, the court did not completely foreclose the practice of evaluating "stray remarks" in the proper context. The court reiterated that "a slur, in and of itself, does not prove actionable discrimination." It emphasized that "[a] stray remark alone may not create a triable issue of age discrimination," but clarified that, in conjunction with other evidence of pretext, a "stray remark" could be part of a broader showing sufficient to defeat summary judgment. While "stray remarks" may not be automatically disregarded, characteristics inherent to "stray remarks" remain pivotal in assessing the significance to be afforded to any such comments. As the court stated, "who made the comments, when they were made in relation to the adverse employment action, and in what context they were made are all factors that should be considered." Thus, although the "stray remarks" doctrine may no longer exist in name in California, in practice, its framework remains viable such that courts can, and should, evaluate the significance of comments on a case-by-case basis.

The survival of the "stray remarks" framework is evident in the court's analysis of the few California Court of Appeal cases that previously evaluated "stray remarks" and ultimately granted summary judgment to the defendant employer. In each of those cases, the "stray remarks" doctrine was not explicitly applied to exclude the questionable remarks, but rather, the comments were considered in totality with the other evidence offered by the plaintiff. In *Gibbs v. Consolidated Services*, a supervisor's comment that the plaintiff was "getting too old" was insufficient to overcome the employer's evidence that the plaintiff lacked computer and management skills necessary for the company's reorganization. In *Slatkin v. University of Redlands*, the plaintiff's religious discrimination claim failed because the allegation of anti-Semitic animus rested entirely on an "isolated remark by someone removed from the adverse employment decision." Finally, in *Horn v. Cushman and Wakefield*, the employer secured dismissal because the plaintiff's only evidence of ageist animus was a non-decisionmaking manager's remark, "haven't you ever heard of a fax before?" These decisions remain examples of correct application of the "stray remark" principle.

Thus, although "stray remarks" are no longer per se irrelevant in assessing the existence of a triable issue of fact at the summary judgment stage in employment discrimination cases, a plaintiff still will have difficultly pointing to isolated comments as a means of defeating summary judgment. The California Supreme Court noted:

> There are certainly cases that in the context of the evidence as a whole, the remarks at issue provide such weak evidence that a verdict resting on them cannot be sustained. But such judgments must be made on a case-by-case basis in light of the entire record, and on summary judgment the sole question is whether they support an inference that the employer's action was motivated by discriminatory animus.

Impact of the Decision

While at first blush this decision may appear to have a significant impact on the ability of employers to succeed in obtaining summary judgment in discrimination cases, on balance, it is important not to elevate form over substance. Although the California Supreme Court rejected a rigid, intractable use of the "stray remarks" doctrine in every case, Reid's holding suggests the doctrine's underlying principles remain intact, and a plaintiff cannot rely solely upon isolated comments unrelated to the termination decision to demonstrate discriminatory animus.

During litigation, employers can still seek to minimize the significance and impact of purportedly discriminatory comments by showing they were made, if at all, completely outside of the context of the challenged termination (or other adverse employment action). Employers can also still try to undercut the impact of remarks that were made by individuals with no supervisory responsibility over the plaintiff and/or played no role in the adverse employment decision. However, of course, the best approach is to eliminate such remarks in the first instance through the development and implementation of strong anti-discrimination and anti-harassment policies, consistent and prompt enforcement of those policies, and comprehensive training of both managers and employees alike on these issues.

Reprinted with permission from Littler Mendelson,
all rights reserved. For more information, please contact
DMessiha@littler.com and MSharbaugh@littler.com

Helping HP Hire Before the Holidays

by
Nicole Gregory, EDD

On December 8th and 9th, the City of Santa Ana and the Employment Development Department hosted a targeted Hewlett-Packard Job Fair event at the Santa Ana W/O/R/K Center. Over the course of two days, the event brought 330 specialized job seekers into contact with key HP recruiters from the HP Corporate Office who were on-site in Santa Ana to interview the pre-selected, skilled, Orange County UI claimants. The HP recruiters found the number of skilled, qualified candidates irresistible for the 54-plus positions that they were recruiting for, and due to the enormous response, the recruiters were quoted as saying, "this is the best use of our interview time" and "this is one of the most successful job fairs that we've ever participated in – much more successful than corporate job fairs." The head of the HP team, Temple Peets, was so pleased with the outcome of the job fair that she scheduled a return trip for another Southern California region at the beginning of the year, and back to the Santa Ana W/O/R/K Center in the spring of 2011. The staff and managers that quickly identified and recruited skilled unemployment insurance claimant recipients were invaluable in making the December 2010 Hewlett-Packard Job Fair a successful recruitment event. It is through the hard work, commitment, and dedication of the employees of the Employment Development Department Workforce Services and the Santa Ana W/O/R/K Center that events like this are possible. Making a difference in the lives of Californians by conducting labor exchange activities that bring employment hopefuls together with Orange County employers is the mission that EDD staff is committed to. Thank you to everyone who participated.

Reduced Sales Quotas . . . *from Page 7*

apparent underlying purpose of retaining loyal employees to the ends of their working lives, the Court declared.

The Court said, "[T]he structure of the benefit, coupled with its purpose, would readily yield a finding that the policy was to be honored at least until the agent qualifying for it reached 65. This possibility, if borne out at trial, will take the case outside the rule of "*Asmus*, which applies only where there is no basis to determine the parties" *actual intent* as to duration."

Moreover, under California law, "a contract of 'indefinite duration' is 'terminable after a reasonable time on reasonable notice,'" the Court said. Thus, even if *Asmus* applied in this case because the policy was found to be one for an indefinite duration, CSAA must demonstrate that it sought to terminate the policy after a "reasonable time." This, the Court observed, CSAA thus far has failed to do. The Court saw "no basis to conclude that CSAA had honored the policy for a reasonable time." Therefore, the Court concluded that summary judgment was improperly granted on the basis of *Asmus*.

* * *

The California appeals court's decision may limit an employer's ability to modify its policies, even though it may have expressly reserved the right to do so. Employers should review their policies with counsel to determine whether potential modifications can enhance enforceability.

Reprinted with permission from Jackson Lewis LLP, all rights reserved. For more information, please contact AskanasM@jacksonlewis.com

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

OFFICE	ADDRESS	PHONE
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
Santa Ana Disability Insurance	P.O. Box 1466 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	949-341-8051
	North County	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.”