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Weekly Employment Brief

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CALIFORNIA EMPLOYERS SOON TO BE SUBJECT TO NEW LAYOFF AND FAMILY LEAVE OBLIGATIONS!

In the past seven days, Governor Gray Davis has signed two bills that will provide California employers with new obligations to employees facing involuntary layoff or who voluntarily seek family leave time. Although neither law is effective immediately, both require employers to plan now to meet their expanded obligations.

California's New "WARN" Act

Many employers faced with a mass layoff or plant closure have become familiar with the Worker Adjustment and Notification Act or the "WARN Act" under federal law. On September 21, the Governor signed AB 2957, the California state version of the WARN Act. The new law becomes effective January 1, 2003. AB 2957 differs from the WARN Act in several significant ways. First, AB 2957 governs employers who have had as few as 75 or more employees at any commercial facility within the past 12 months, apparently regardless of whether the employer has at least 75 employees at the time of the layoff or the relocation or termination of its business operations. AB 2957 also expands the WARN Act definition of "employee" to include any person who has been employed with the employer for at least six months. Perhaps most significantly, AB 2957 requires an employer to give 60 days' notice to all affected employees and governmental agencies not just for mass layoffs, but also for any termination of business regardless of the number of employees, or for the relocation of the business to a different location 100 or more miles away. California employers planning reductions in force, layoffs or terminations of business should be sure to consult counsel about this new law.

New Employer Obligations To Provide Paid Family Leave Time

On September 23, the Governor signed SB 1661, thus making California the first state in the nation to provide paid family leave to employees who choose to stay home to care for a sick relative, spouse, domestic partner or child. The new law provides eligible employees with 55% of their salary or $728 per week, whichever is greater, for up to six weeks. Under the new law, employees will begin paying into a workers' disability fund on January 1, 2004, through mandatory payroll withholding, and will be eligible to take paid leave starting July 1, 2004. The 10-month delay in employee eligibility will permit employers to revise their employment policies to best navigate the maze of employment laws and employer policies covering employee medical leaves of absence, including the Workers' Compensation Act, the California Family Rights Act, the Family Medical Leave Act, and short- and long-term disability programs. Despite the new burdens on employers, 27 other states are considering paid family leave legislation, which was championed by former President Clinton, during his administration.

Federal Appellate Court Holds Albertson's Can Ban Non-Employee Union Representatives

Many "brick and mortar" employers are often faced with various requests to allow solicitations on their property from local charitable and social organizations to political candidates. The employment law question that arises almost immediately is: "If we allow this, do we have to allow union solicitations, too?" According to a recent decision of the Sixth Circuit Court of Appeals, the answer remains "No." In Albertson's, Inc. v. NLRB, the appeals court overturned the National Labor Relations Board's decision that Albertson's committed an unfair business practice under the National Labor Relations Act by denying non-employee union representatives access to the interior and immediate exterior areas of five of its stores located in Oregon and Washington. The U.S Supreme Court had previously decided that private property rights allow a private employer to bar non-employees from its property unless: (1) union representatives would otherwise be unable to contact potential union members; or (2) there was activity by the private employer concerning union organizing, such as favoring a different union. Because neither exception was present in this case, the appeals court overturned the NLRB's decision.

"Veganism" Not a Religion Under FEHA

In *Freidman v. Southern California Permanente Medical Group,* the California Court of Appeal considered the plight of a job applicant who, the court found, "fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and personal religious tenets." Based on those beliefs, the applicant refused to accept an employment offer conditioned on the applicant receiving a mumps vaccine, because the vaccine is grown in chicken embryos. When the employer would not modify its job requirement, the applicant sued for religious discrimination. The court conducted an exhaustive analysis of a variety of state and federal court decisions that address what constitutes a religion. Ultimately, the court adopted three guidelines that held distinguish between a religion and a "secular belief system": (1) a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters; (2) a religion is comprehensive in nature; and (3) a religion often can be recognized by the presence of certain formal and external signs. Based on those guidelines, the court rejected the applicant's claim for religious discrimination, holding that while the applicant had clearly a personal philosophy based on moral and ethical beliefs, that philosophy was not based in religion.

Employer's Misrepresentations About Its Wage Rates Not Racketeering.

A federal appellate court overturned a nearly $200,000 judgment awarded a janitorial contracting firm for its claims based on a competitor's CEO's false representations. In *Systems Management, Inc. v. Loiselle,* the trial court agreed with Systems Management that Loiselle, the CEO of rival firm Aid Maintenance Co, obtained a janitorial contract at a local community college by committing several acts of mail fraud. Loiselle had sent letters to the college falsely stating that his firm was paying workers at rates that complied with the state prevailing wage statute. The court held that those acts constituted racketeering within the meaning of the federal Racketeer Influenced and Corrupt Organizations Act (RICO). On appeal, the judgment was overturned, because the Loiselle's actions did not constitute a "pattern of racketeering" as required under RICO, since they were all related to a single contract with the college and did not constitute or threaten the type of continued criminal activity that RICO was intended to address. Although Aid Maintenance ultimately prevailed, the initial judgment demonstrates how, in the wake of recent corporate scandals, courts are taking a dim view of any false corporate representations, particularly by corporate executives.

Employee Who Resigned Cashes in on VRRA

Although ADA, FMLA, and FEHA are everyday acronyms for employers, the U.S Court of Appeals for the First Circuit, in *Lapine v Town of Wellesley,* just placed VRRA back on the employment law radar screen. The Veterans' Reemployment Rights Act (VRRA) obligates an employer to reinstate an employee who leaves for military service and then timely requests reinstatement after the period of military service ends. In this case, however, an employee resigned from his job before joining the military and did not assert his rights to reinstatement until after he left the military. Gary Lapine worked for a city police department until he resigned due to his dissatisfaction with the department and "the opportunity to secure other employment." As it turned out, that "other employment" was with the Active Duty Guard Program. Lapine entered the Guard Program and, upon leaving the Guard, three years later, asserted his VRRA rights to reinstatement, the retirement benefits he would have obtained had he remained on the job, and damages for the department's refusal to reinstate him immediately, a total of about $200,000. The court required the town to reinstate him to his old job, salary and seniority, including retirement benefits accrued since his resignation. This decision provides employers with some hard lessons about VRRA: (1) An employee need not tell the employer he is leaving to accept employment with the armed services; (2) an employee generally cannot prospectively waive his rights to reinstatement except under the "most unusual circumstances" and (3) reinstatement under VRRA means placing the employee in the same position, in terms of seniority, status, and pay level, as the employee would have been had he been continuously employed throughout the period of military service, including accrued retirement benefits.