LAW WATCH
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SPECIAL EDITION: SUMMARY OF CALIFORNIA'S NEW LABOR AND EMPLOYMENT LEGISLATION

In California, the Governor has 30 days to sign or veto legislation passed by the two legislative chambers; and there is always a flurry of Executive Branch action on the last few days of September as all legislation must be acted upon by the Governor by midnight of September 30. Working up to the deadline, California's Governor Davis signed several new pieces of labor and employment legislation that will affect employers with operations in California.

The following is a summary of the most significant new labor and employment legislation that become law in California on September 30:

SB 1661: Paid Benefits During Family Care Leaves

As discussed more fully in Law Watch 02-33, Governor Davis signed SB 1661, which provides for a new fund under the State Disability Insurance program that will provide partial wage replacement for up to six weeks for employees who take a leave of absence to care for an ill family member or due to the birth or adoption, or foster care placement, of a child. Although the program will be funded solely through higher employee contributions to the SDI program, the law is designed to give many more employees the ability to take family care leaves of absence, and it is likely to result in significantly expanded use of employer leave programs.

Executive Summary

Action: *Working up to the deadline of midnight on September 30, California's Governor Davis signed several new pieces of labor and employment legislation that will affect employers with operations in California.*

Impact: *The newly-enacted legislation has a broad impact on all California employers.*

Effective Date: *Except where specifically noted, all provisions will become effective January 1, 2003.*

Effective dates: The increased employee funding levels will start on January 1, 2004, and the paid leave benefits will be available beginning July 1, 2004.

AB 2957: California WARN Act

AB 2957 requires employers to give 60 days notice to employees of plant closings, mass layoffs and relocations. AB 2957 is a more expansive version of the federal Worker Adjustment Retraining and Notification (WARN) Act. The new California legislation will apply to smaller employers (75 employees under AB 2957, rather than the 100-employee threshold of WARN); provides for a broader definition of a mass layoff (employment loss by 50 or more persons under the California act, whereas WARN applies only to a loss of employment for 50 or more employees, excluding part-time employees); and AB 2957 permits affected employees, their unions or government agencies to file actions seeking penalty payments and attorney fees for omitted or inadequate notices.

Effective date: AB 2957 will apply to closures on or after January 1, 2003.

SB 1471: Restrictions on Absence Control Policies

California Labor Code section 233 currently permits an employee to use some of his or her paid sick leave for leave to care for an ill family member. SB 1471 provides that if an employer has an absence control policy, it may NOT count as "occurrences" under that policy any time off the employee takes pursuant to Section 233 to care for a family member.

Effective date: January 1, 2003.

SB 1818: California Employment Law Protections and Remedies Are Available to Undocumented Workers

SB 1818 provides that – unless specifically foreclosed by federal law – all

of the protections AND remedies provided for by California's employment and labor legislation will be available to undocumented workers. The law is designed to overcome the U.S. Supreme Court's ruling in ***Hoffman Plastic Compounds Inc. v. NLRB*** in which the Court ruled that back pay for undocumented workers is not an available remedy for violations of the National Labor Relations Act. Under SB 1818, undocumented employees or applicants for employment who establish violations of the Labor Code or fair employment laws, etc. will be entitled to the full range of damages such as back pay, front pay and punitive damages, even if they would not be entitled to reinstatement due to prohibitions of federal immigration law. The law also provides that parties to litigation cannot normally inquire into a party's immigration status.

Effective date: SB 1818 will be operative on January 1, 2003, although the bill provides specifically that it "is declaratory of existing law" which means that it is likely to be applied retroactively to any pending actions by undocumented workers.

SB 1156 and AB 2596: Terms of Farm Workers' Collective Bargaining Agreements To Be Set By Mediation and the ALRB Following Impasse

In a highly publicized move, Governor Davis signed SB 1156 and AB 2596, which provide for the Agricultural Labor Relations Board to impose the terms and conditions of employment if an employer and a labor organization (union) representing a unit of agricultural employees fail to agree on the terms of a collective bargaining agreement. Under SB 1156, following certification of a union and after negotiations have failed to produce a collective bargaining contract, either party can refer the issues to mediation and ultimately binding resolution by the Agricultural Labor Relations Board. Under AB 2596, the provisions of SB 1156 will exist for only five years, and any one party may submit a maximum of 75 "applications" for mediation under the acts.

As a corollary to signing SB 1156 and AB 2596, the Governor vetoed SB 1736, which was a more expansive measure backed strongly by United Farm Workers that would have called for binding arbitration in the event of an impasse. While the provisions of SB 1156 are not as aggressive as SB 1736, the legislation is very significant as it permits third parties, mediators and the ALRB, to set the wages, working conditions and other terms of employment for unionized workers in California's enormous agricultural industry. In all other situations where collective bargaining is mandated, the unions and employers are left to economic weapons such as strikes, lockouts and picketing, where the parties cannot reach agreement on the terms of the collective bargaining agreement.

Effective date: Both SB 1156 and AB 2596 become effective January 1, 2003, however the acts will apply to unions certified both before and after the effective date of the legislation.

AB 1599: Age Discrimination Provisions of the Fair Employment & Housing Act Strengthened

AB 1599 strengthens the existing age discrimination provisions of the California Fair Employment & Housing Act (FEHA) by declaring that an employer cannot discriminate in the provision of ANY term, condition or benefit of employment on the basis of age. As originally drafted, the age discrimination provisions of the FEHA covered hiring, firing and demotion decisions, but they did not cover other employment decisions such as the provision of fringe benefits. AB 1599 was enacted to overcome the ruling of ***Esberg v. Union Oil Company*** in which the California Supreme Court ruled that the FEHA did not bar differential access to tuition reimbursement benefits on the basis of age. As a result of AB 1599, the age discrimination provisions of FEHA are now in line with all of the other protected classes – race, gender, national origin, sexual orientation, etc. – of the fair employment laws. Also, AB 1599 may now make it illegal to discriminate on the basis of the employee's or applicant's age – whatever that age – rather than protecting only those aged 40 and above, except where differential treatment is required or permitted by laws governing the working conditions of minors. The possible elimination of the 40-year threshold is likely to generate more age related claims.

Effective date: AB 1599 becomes operative January 1, 2003.

AB 2913: Statute of Limitations Extended to December 31, 2005, for Braceros to File Claims For Unpaid Savings Funds

AB 2913 is designed to permit "braceros" and their families to perfect claims for unpaid savings fund allegedly withheld by banks during World War II. Braceros were citizens of Mexico who had work permits allowing them to work in the U.S. from 1942 to 1950 due to labor shortages caused by World War II. Part of the employees' wages were placed in special savings funds that were to be paid to the employees when they returned to Mexico. A class action lawsuit claims that several banks and the governments of Mexico and the United States have failed to pay out the savings funds. Although the federal class action lawsuit has been dismissed, the plaintiffs are appealing the decision. AB 2913 extends the statute of limitations to file claims for the unpaid savings funds.

Effective date: January 1, 2003, but with retroactive application.

AB 1068: Clean Up Legislation Regarding the California Consumer Credit Reporting Agencies Act

The California Consumer Credit Reporting Agencies Act and the Federal Fair Credit and Reporting Act both govern employers' activities in conducting background checks and obtaining criminal records of employees or applicants. Last year, the passage of AB 655 presented several new questions under the California CCRAA dealing with an employer's obligation to obtain consent for and disclose the results of investigations that were never thought to be "consumer reports" – such as routine reference checks. Among other small clarifying measures, AB 1068 resolves some of the more troubling aspects of AB 655, and provides specifically that internal checks – reference checks, investigations of wrongdoing, etc. – do not trigger the provisions of the CCRAA if the employer does not access public records as part of that review/investigation.

Effective date: Immediately.

AB 2195: Victims of Sexual Assault Permitted Time Off To Pursue Legal Remedies

Labor Code 230 currently provides – among other provisions – that victims of domestic violence shall not be disciplined or otherwise suffer adverse employment action when they pursue legal remedies including specifically going to court to obtain restraining orders. AB 2195 adds victims of sexual assault to the coverage of Labor Code Section 230.

Effective date: January 1, 2003.

AB 2895: Strengthens Prohibitions Against Curtailing Discussions of Wages

Labor Code section 232 provides that employers cannot preclude employees from disclosing their wages or discussing compensation, and employers cannot discipline, for purposes of job advancement, employees for engaging in such discussions. AB 2895 clarifies that ANY discipline – in terms of job advancement, hiring or demotion – is impermissible if it is related to disclosing or discussing wages.

Effective date: January 1, 2003.

AB 2509: Local Jurisdictions Can Impose Greater Wage Provisions In Public Works Contracts.

AB 2509 permits local jurisdictions including cities, counties and special districts to enact local ordinances that require payment of greater wages or benefits by contractors paid with state funds performing work for the locality. The law applies only to the local laws that deal with the localities' "purchasing power" and does not give local governments or agencies the right to set higher minimum wages or other terms and conditions of employment for all private employers simply because they perform work in the locality. The law is designed to permit the enactment of "living wage" ordinances by localities that require entities that contract with the cities or other agencies to pay higher rates or provide specific benefits as part of the entity's contract with the local agency.

Effective date: January 1, 2003.

AB 1146: Statute of Limitations For Filing FEHA Claims Tolled During Investigations By the EEOC

Under the provisions of the FEHA, complainants must file any civil law claim asserting a violation of the FEHA within one year of receipt of their "right to sue" letter from the Department of Fair Employment & Housing (DFEH). AB 1146 provides that where a complainant has filed with both the DFEH and the Federal Equal Employment Opportunity Commission (EEOC), the one-year period to file the FEHA civil claim will be suspended for the period that the same claim is being processed by the EEOC. The law does not significantly alter existing law, as most courts have applied a judicially-created rule of equitable tolling to these situations even without such a statute.

Effective date: January 1, 2003 (but the policy is likely to be applied retroactively to any pending claims).

Laws Also Vetoed

Governor Davis also **vetoed** several labor and employment laws, including the following:

AB 2989, which would have required employers to provide severance pay to laid off employees at the rate of one week's pay for each year of service with the employer;

AB 2990, which would have created a rebuttable presumption that an adverse employment action such as termination or demotion was retaliatory if the adverse act occurs within 90 days after an employee exercises a right provided by labor and employment laws;

AB 2189, which would have provided 60 days of job protection for contract employees of public transit systems when the employer changes contractors;

SB 1538, which would have invalidated pre-employment mandatory arbitration provisions as they apply to claims of discrimination and harassment, etc. under the FEHA;

AB 2771, which would have stopped the Employment Development Department from enforcing its policy that requires unemployed temporary workers to return to their temporary employment agencies and look for work prior to qualifying for unemployment insurance;

SB 1466, which would have provided that contractors supplying labor would be liable for unpaid (or underpaid) wages where the supplier knew or should have known that the amount of the contract was insufficient to pay wages in compliance with all of the controlling labor laws applicable to the contract;

AB 2845, which would have required CalOSHA to adopt ergonomic standards by July 1, 2004;

SB 783, which would have provided enhanced civil penalties ($10,000 per violation) for retaliation against whistleblowers and establish a State "whistleblower hotline;" and

AB 1309, which would have required employers with 100 or more employees to file annual reports with the Department of Fair Employment & Housing that specify the gender and ethnicity of the employer's workforce by job classification.

If you would like a copy of any of these new laws, have questions about their applicability to your operations, or have questions about other California labor and employment legislation, please contact **Gail Blanchard-Saiger** or **Bob Wenbourne** in our Sacramento office, **Rick Albert** or **Muira Mishra** in our Los Angeles office, **Lynn Goodfellow**, **Darrell Pugh** or **Jim Godes** in our San Diego South office, **Kevin Woodall**, **Stephen Parrish** or **Greg McClune** in our San Francisco office, or the member of the firm who normally handles your legal matters.

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This *Law Watch* was authored by Robert J. Wenbourne of the Sacramento office. *Law Watch* is a review of recent legal developments prepared by the law offices of Foley & Lardner. The information reported should not be construed as legal advice, nor utilized to resolve legal problems. Recent issues of *Law Watch* are also available on our web site at:
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