

SWERDIOW FIORENCE
SANCHEZ SWERDIOW & WIMMER
a law corporation

9401 Wilshire Blvd., Suite 828, Beverly Hills, CA 90212 · (310) 201-4700 · Fax:(310) 273-8680
www.swerdlowlaw.com

January 29, 2003

NEW LAWS AFFECTING CALIFORNIA EMPLOYERS

SB 1661 – Family Leave Policy

As the topic of our September 2002 E-Alert, you likely have heard about SB 1661. This law was created to provide limited compensation to employees who are unable to work due to:

- a. The sickness or injury of a family member or domestic partner; or
- b. The birth, adoption or foster care placement of a new child.

Under SB 1661, employees on leave for these reasons are eligible to receive a partial wage replacement of up to 55 percent of their wages for up to six weeks of leave, to a maximum of \$728 per week. This paid leave benefit is funded by employee contributions with a maximum cost of \$70 per year from each employee.

Employers can require employees to use up to two weeks of their accrued vacation before receiving this partial wage replacement. Moreover, there is a one-week waiting period before employees can apply for the program. Although the statute and employee contributions become effective on January 1, 2004, employees must wait until July 1, 2004 to utilize the benefit.

SB 1661 does not contain a requirement for employers to reinstate all employees returning from this leave, so employers are not required to hold open positions for employees on a leave unless required to do so under some other state or federal law, such as the federal Family and Medical Leave Act (“FMLA”) or the California Family Rights Act (“CFRA”). Additionally, this new law will not extend the 12 weeks of unpaid leave available to certain employees under the FMLA or CFRA.

Commencing January 1, 2004, the law requires employers to provide notice about these new rights to each new employee hired on or after January 1, 2004 and to employees leaving work on or after July 1, 2004, because of pregnancy, sickness or

SWERDLOW FLORENCE
SANCHEZ SWERDLOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -2-

dependant care. The Director of Employment Development should provide employers with this notice prior to January 1, 2004.

AB 2509 – Localized Wage And Hour Laws

California used to be able to threaten reduced state funding to localities which created their own wage and hour laws. AB 2509 changes that by allowing cities, counties, districts and agencies to create and enforce their own wage and hour laws, including ones stricter than the State's.

Consequently, employees might get the benefit of a greater overtime multiplier or, as was recently attempted in the City of Santa Monica, a higher minimum wage. Employers already faced with overlapping and sometimes conflicting state and federal wage and hour laws might now encounter a third regulatory scheme.

AB 2412 – Employees' Right To Inspect Payroll Records

Formerly, California law allowed employees to inspect and copy their payroll records, but did not provide a deadline as to when employers must respond to an employee's request and did not provide more than a nominal penalty for noncompliance. AB 2412 mandates that employers comply with an employee's request to inspect and copy their payroll records within 21 days and imposes a \$750 penalty for noncompliance.

To prevent employers from facing an "I told Ed to tell the manager, Melissa, that I wanted to review my records" situation, the new law provides that employers can designate a person who must receive the requests. Consequently, employers should modify their policies, including their Employee Handbooks, to identify a human resources or other appropriate contact person for these requests.

AB 1599 – New Protection For Older Workers

The California Fair Employment and Housing Act ("FEHA") used to only prohibit age discrimination (40 and older) by employers only with respect to hiring,

suspension, demotion and termination of employment. AB 1599 expands the FEHA and renders it unlawful to discriminate against individuals age 40 or over with regard to training opportunities.

AB 2895 – Employers Cannot Prohibit Employees From Talking About Working Conditions

Formerly, the law only stated that employers could not prohibit, discipline or retaliate against employees for discussing their wages. AB 2895 provides employees the same protection for discussing any working condition. Employers should note that this law does not prohibit employers from having and enforcing confidentiality agreements to avoid disclosures of proprietary information, trade secrets or other legally privileged information. It is also important to note that under federal labor laws, non-supervisory employees already have a broad, legally protected right to engage in concerted activities, including those related to discussing wages and other terms and conditions of employment.

AB 2957 – California’s WARN Statute

In 1989, the federal Worker Adjustment and Retraining Notification Act (“WARN”) became effective. This law provides protection to workers, their families and communities by requiring employers with 100 or more employees to provide notice 60 days in advance of certain specified events that result in large-scale or mass layoffs, such as plant relocations and closures. Under WARN, in order for a layoff to be considered a “mass layoff” it must meet the following two conditions:

- a. At least 50 employees will be laid off; and
- b. One-third of the employer’s workforce will be laid off.

These layoffs must occur within a 30-day period. A “relocation” is when the employer moves 100 or more miles away.

SWERDLOW FLORENCE
SANCHEZ SWERDLOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -4-

AB 2957, which some have called Cal-WARN, creates additional obligations for California employers. First, Cal-WARN applies to employers with 75 or more employees, a change that results in smaller employers now being required to provide 60 days notice when contemplating a large-scale layoff. Moreover, under the new law, notice is required for mass layoffs of 50 employees within a 30-day period, irrespective of whether the layoff impacts one-third of the workforce. Consequently, this new law creates additional obligations for all employers – large and small.

Under AB 2957, employers who fail to give proper notice can be held liable for the back pay and benefits employees would have been entitled to if they had not lost their employment because of the layoff. The employer would only be liable for the time period between when notice should have been given to the time when the employer gives notice, up to a maximum of 60 days or one-half the number of days the employee was employed by the employer, whichever is less. Moreover, local governments and unions can sue on behalf of affected employees and, if successful, can recover attorneys' fees and costs.

Cal-WARN also omits important exceptions available under Federal WARN. Specifically, it does not exclude employers from the notice requirement in the event of mass layoffs conducted in connection with a strike or lockout. Moreover, Cal-WARN does not allow "unforeseeable business circumstances," such as a principal client's sudden and unexpected termination of a major contract with the employer, to function as an exception to the notice requirement.

AB 1401 – Extending Coverage Under COBRA And Cal-COBRA

AB 1401 makes extensive changes to three areas of law affecting employers: continuation coverage of employer-provided insurance benefits, the Major Risk Medical Insurance Pool, and Conversion Coverage.

In 1985, Congress passed the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), which provides that employers with 20 or more employees must allow most employees who are no longer eligible for employer-provided group benefits to continue to receive their group health care benefits — at the employees' own cost — for a specified time period. This process is known as continuation coverage. Commonly

SWERDIOW FLORENCE
SANCHEZ SWERDIOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -5-

referred to as “Cal-COBRA,” the California Continuation Benefits Replacement Act is California’s own version of COBRA that affects employers with two to 19 employees. Under former law, individuals receiving COBRA or Cal-COBRA would typically receive less than 36 months of coverage. AB 1401 affects this time limit for all employees.

With regard to Cal-COBRA, AB 1401 requires covered employers to offer qualified employees continuation coverage for up to a total of 36 months. This only applies to employees who begin receiving their continuation coverage on or after January 1, 2003.

AB 1401 also provides additional rights to individuals who are covered by federal COBRA. Under AB 1401, once an individual exhausts his or her federal COBRA benefits, the individual is entitled to continue to receive coverage under California law. Under this law, individuals who are eligible to receive COBRA benefits will now be entitled to receive continuation coverage under COBRA and California law for a total of 36 months.

Under COBRA, employers are required to provide notice to employees who are soon to lose their COBRA continuation coverage. AB 1401 requires California employers to include information in this notice about their employees’ new right to extended continuation coverage.

This portion of AB 1401 will only affect employees who begin receiving their continuation coverage on or after January 1, 2003. Moreover, employees will not be able to take advantage of the law until September 1, 2003.

AB 1401 also affects California’s Major Risk Medical Insurance Program (“MRMIP”). The MRMIP is the state-run, high-risk pool for “medically uninsurable” individuals, i.e., individuals who have been rejected from at least one private health plan. A rejection is deemed to have occurred if the individual could not have obtained coverage unless he or she was subjected to substantial waivers, limited coverage, or excessive charges. Uninsurable individuals, as defined, can then be enrolled in the MRMIP for major-risk medical health coverage. There is a waiting list for the uninsurable to enter MRMIP, and individuals on the waiting list cannot receive coverage until existing MRMIP members leave. Consequently, AB 1401 makes changes to MRMIP to make it easier for individuals to enter MRMIP and then continue to receive coverage following the end of their enrollment in the program.

SWERDLOW FLORENCE
SANCHEZ SWERDLOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -6-

The changes to this program include limiting the amount of time in the program to 36 months and requiring health plans and insurers to offer a plan that could not reject MRMIP “graduates” so long as these graduates paid a ten percent greater cost than under MRMIP. AB 1401 increases the annual dollar benefit limit for MRMIP individuals from \$75,000 to \$200,000. Other changes include forbidding insurers and health plans from applying MRMIP-provided health care benefits against the individual or lifetime limits and requires shared costs between the state and health plans for MRMIP “graduates.” All these changes to the MRMIP are part of a four-year pilot program beginning September 1, 2003.

The final change instituted by AB 1401 involves conversion coverage. Conversion coverage is a policy that provides minimum benefits for individuals who become ineligible for coverage under a group policy. This part of AB 1401 only applies where an employer’s policy for group health-care coverage was entered into, amended, or renewed on or after September 1, 2003. If an employer terminates an employee’s coverage from a group plan and will not offer comparable coverage within 15 days of the termination, the employer must, within 15 days of the group coverage’s termination, provide the employee notice about the availability, terms, and conditions of their health plan’s government-mandated conversion coverage.

As a result of AB 1401, we recommend that employers change their notice requirements in accord with the new law’s provisions. Smaller employers, with two to 19 employees, should change their Cal-COBRA notice requirements to show a minimum 36 months of continuation coverage. Larger employers should be sure that their COBRA termination notices reflect the employees’ right to ensure continuation coverage for at least a 36 total months.

SB 1386/ AB 700 – Employers Must Disclose Electronic Security Breaches Of Personal Information

Effective on July 1, 2003, SB 1386/AB 700 is a law to combat identity theft. It requires businesses that own, license or possess personal, computerized data to inform affected California residents of any security breach where these residents' unencrypted personal data was, or is reasonably believed to have been, acquired by an unauthorized person.

This notification can be through written or electronic means, with the electronic means required to utilize an electronic "signature." An electronic signature is a unique, individualized signing process controlled by law. If providing notice through these means would exceed a cost of \$250,000, affect 500,000 or more persons, or if the business lacks the necessary contact information, companies have the option of using email (without an electronic signature), notification of the media, or conspicuous posting on their website as substitute notification.

Individuals who are injured as a result of a security breach and who were not given proper notice of the breach may be awarded damages, an injunction, and any other remedies available at law or equity.

SB 1471 – Absence Control Policy That Makes Using Sick Leave To Care For Sick Family Members A Per Se Violation

Last year, the legislature required any employer that provided sick leave for employees to permit an employee to use, in any calendar year, the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months, to attend to an illness of a child, parent, spouse, or domestic partner of the employee. This year, SB 1471 makes it a *per se* violation of the law to have a policy, including the so-called "no fault" attendance policy, which allows absenteeism-oriented discipline for employees who use no more than the sick leave the employee would have accrued in six months for this purpose.

Thus, employers should exercise caution in assuring that their existing policies are not in violation of this law.

AB 2837 – New Penalties For Employer’s Cal-OSHA Notification Failure

Past law required employers to immediately inform the California Division of Occupational Safety and Health (the “Division”) whenever a workplace-related “serious injury or illness” or death occurred. This new law adds teeth to this requirement by imposing a minimum \$5000 fine against any employer who fails to “immediately” notify the Division. “Immediately” means as soon as practically possible, but not later than eight hours after the employer knew or should have known.

This law also makes it a criminal offense, punishable by fines up to \$150,000 and a one-year jail term, for employers to knowingly fail to report a death to the Division in accordance with these requirements.

Employers contemplating whether they need to report an on-the-job accident should remember that a “serious injury or illness” is defined as any injury or illness occurring in a place of employment or in connection with the employment: 1) which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation; 2) where the employee loses any body member; or 3) in which the employee suffers any serious degree of permanent disfigurement.

AB 2868 – Expansion To Employer’s Qualified Privilege

Past law was unclear on which inquiries employers could answer in regards to reference checks about current and former employees. Typically, employers have a qualified privilege to truthfully answer questions about current and former employees, so long as the answers are made without malice.

This law revised the existing qualified privilege for employers and allows them to answer a very specific question. Specifically, employers now have a qualified privilege to answer whether or not they would rehire the current or former employee.

Unfortunately, there was no additional guidance beyond the ability to answer that specific question.

AB 2195 – Time Off For Victims Of Sexual Assault

Previously, employers only were required to allow victims of domestic violence, or the parents of victims, to take unpaid leave to attend to the issues arising from domestic violence. AB 2195 extends these protections to victims of sexual assaults or the parents of those victims, who can now take time off for court proceedings, medical attention, crisis counseling, psychological counseling and the like. Thus, employers cannot retaliate against employees who take leave for these purposes.

While employees should provide employers advance notice of these appointments, if unscheduled absences occur, the employee must provide certification within a reasonable time. Certification includes: a police report indicating that the employee was a victim of domestic violence or sexual assault; a court's restraining order for a domestic-violence or sexual-assault situation; or documentation from a medical professional or counselor that the individual was undergoing treatment for their victimization.

Federal Trade Act of 2002 – New Cobra Election Period For Foreign-Trade Affected Workers

On August 6, 2002, President Bush signed the Trade Act of 2002 into law. This law contains two important implications for employers' COBRA coverage: a 65% tax credit for employees' COBRA coverage and an additional 60-day COBRA election period. As discussed above, COBRA is a federally created system where employees who lose health-care coverage, typically because of termination, can elect to continue that coverage at the employees' own cost. Please note that the Federal Trade Act of 2002 does not affect Cal-COBRA, California's COBRA analog for small employers.

The tax credit is available to workers who are eligible for Trade Adjustment Assistance ("TAA"). TAA is available for people who lose their jobs because of trade-related reasons, such as overseas business or a reduction-in-force because of foreign

SWERDIOW FLORENCE
SANCHEZ SWERDIOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -10-

imports. Only the U.S. Department of Labor or a designated state agency, like the California Employment Development Department, can certify an individual to be eligible for TAA.

Although primarily affecting employees, the tax credit is important to employers because there is an advance tax credit mechanism that is supposed to be implemented by Treasury Department regulations. Employees could advance the tax credit to the employer and pay only 35 percent of their COBRA premium. The employer would then be forced to obtain the tax credit directly from the government. Unfortunately, there is no regulatory guidance as to how this process works or mechanisms the employer can use to assure it will not advance more than the employee is eligible for.

The second part of the law creates a second COBRA election period, even where the employee did not elect COBRA in the initial 60-day period. For example, an individual could lose her job on January 1, 2003 and decide not to elect COBRA coverage. On May 1, 2003, the California Employment Development Department could determine that she lost her job because of increased foreign imports and is consequently eligible for TAA. Although she did not elect COBRA coverage following her January 1, 2003 layoff, she would have 60 days from May 1, 2003 to elect COBRA coverage. If she accepts this second opportunity for COBRA election, this would not extend the time she would actually receive coverage. In other words, if she would only normally receive 18 months of coverage, that 18 months would still be measured from the date of the COBRA qualifying event, i.e. the January 1, 2003 job loss.

At this point, there is no regulatory guidance as to how, where, or even if an employer is required to notify an affected employee about the extended election period.

SB 1818 – Employment Rights Unaffected By Immigration Status

This law was passed to respond to the U.S. Supreme Court's 2002 ruling in Hoffman Plastic Compounds Inc. v. NLRB. In Hoffman, the Court found that an undocumented worker who could not lawfully work in the United States could not receive back pay. SB 1818 specifically states that for the purposes of enforcing the state's labor, employment, civil rights, and employee housing laws, a person's

immigration status is immaterial in deciding liability. Regardless of immigration status, California employees are still entitled to all remedies, except reinstatement, for violations of the specified state laws.

AB 281 – Temporary Employment Agencies’ Responsibility To Provide Workers’ Compensation Coverage

In the past, only employers were required to get workers’ compensation coverage for their employees. AB 2816 changes this to require temporary employment agencies, employment referral services, labor contractors, or other similar entities (“Agencies”) to pay the workers’ compensation premiums for its referred workers when supplying labor to a licensed general contractor.

Additionally, Agencies must provide the insurer with three additional pieces of information. First, they must provide payroll information sufficient to allow the insurer to determine the number of workers provided to the contractor and the wages paid to those workers during the affected period. Second, Agencies must provide to the insurer contact information for the contractor, including name, address, and the general contractor’s experience modification, which the contractor should provide to the Agency. Lastly, the Agencies must utilize the California Workers’ Compensation Uniform Statistical Reporting plan to determine and report their payroll’s workers’ compensation classification.

Under this new law, licensed general contractors must notify the Agency from whom they have workers whenever a temporary worker is being used on a public-works project or whenever the temporary worker is reassigned to a position other than the classification to which the worker was initially assigned.

Finally, although the Agency must pay the workers’ compensation insurance premiums, the law specifically allows the Agency to pass any additional costs imposed by the new law onto the contractor.

Agencies who work with licensed general contractors, as well as the licensed general contractors themselves, should be aware of these policies and be prepared for the additional associated costs.

SWERDLOW FLORENCE
SANCHEZ SWERDLOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -12-

AB 1146 – Additional Time For Plaintiffs To File FEHA Lawsuits After An EEOC Investigation

In the past, individuals wishing to pursue a discrimination or harassment lawsuit, under California's anti-discrimination law, the Fair Employment and Housing Act ("FEHA"), were required to file suit within one year after they received a right-to-sue notice from the California Department of Fair Employment and Housing ("DFEH"). AB 1146 tolls the limitations period within which a FEHA civil action must be filed in three instances: 1) where the DFEH has deferred its investigation of the individual's complaint to the United States Equal Employment Opportunity Commission ("EEOC"); 2) where the EEOC agrees to perform a review of the DFEH's investigation; or (3) where the EEOC conducts its own investigation.

This law adversely affects employers because it provides plaintiffs additional time to bring discrimination suits where the EEOC is conducting any investigation into the plaintiff's discrimination claim.

Sarbanes-Oxley Act of 2002 – Whistleblower Protection and Enhanced Corporate Accountability

Following in the wake of Enron, Worldcom, and Tyco, Congress passed the Sarbanes-Oxley Act (the "Act") to regulate and enhance corporate accountability. This law contains seven main provisions that affect public corporations, and two of these seven provisions affect private companies.

The first, and main, part of the Act is the inclusion of "whistleblower" protection. No officer, employee, contractor, subcontractor, or agent of a public company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee because the employee reports what he/she reasonably believes was a violation of securities or fraud laws. This section affects private employers because they may be the contractor, subcontractor, or agent of the public company. Prevailing plaintiffs can receive reinstatement, back pay, special damages, attorneys' fees, and costs.

SWERDLOW FLORENCE
SANCHEZ SWERDLOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -13-

Moreover, the law also provides for criminal punishment where a person intends to retaliate against any other person for providing truthful information to a law enforcement officer about the commission or possible commission of any Federal crime. This criminal punishment, carrying a fine and sentence up to ten years, is applicable to employees of both private and public companies.

The second part of the Act basically eliminates the ability of public companies to provide personal loans to executives. The Act does not provide guidance on what is encompassed by the term loan, however, it is our opinion that advancement for business travel expenses, use of a company car, and other such issues, are still lawful so long as there is only limited ancillary personal use and any required reimbursement must be settled within a reasonable period.

The third part of the Act requires executives to reimburse their public companies in the event of misconduct. If a company must prepare an accounting restatement due to material noncompliance as a result of misconduct, the CEO and CFO must reimburse the company for any bonus or equity-based compensation they received from the previous 12 months and must reimburse any profits they made by the sale of company securities within that same 12-month period.

The fourth part of the Act grants the SEC the power to declare an officer or director of a public company unfit to serve, and thus bar such person from performing his or her duties. This declaration can be conditional or unconditional, and permanent or temporary.

In a direct response to Anderson's behavior in the wake of the Enron scandal, the fifth part of the Act makes it a criminal offense, subject to up to 20 years imprisonment for anyone, including employees of both public and private companies, to knowingly alter, destroy, mutilate, or conceal a record or document, or attempt to do so, with the intent to impair or influence the investigation, proper administration, or official proceeding of any matter within the jurisdiction of any department or agency of the United States.

The sixth provision of the Act prohibits any registered public accounting firm from performing any audit service for a public company whose CEO, controller, CFO, CAO or individual in an equivalent position was previously employed by that

SWERDLOW FLORENCE
SANCHEZ SWERDLOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -14-

accounting firm and participated, in any way, in the company's audit in the one year period before the audit's initiation date.

The Act's final provision requires the SEC to issue rules that require public companies to disclose in annual reports and other required reports whether or not the company has adopted a code of ethics for senior financial officers. Companies that have not adopted a code of ethics will be required to disclose the reason for their failure to do so. This provision is currently a proposed rule, but the final rule is expected January 26, 2003.

AB 2868/ AB 1068 – New Provisions Affect Employer And Outside Investigations

On January 1, 2002, AB 655 went into effect, changing California's Investigative Consumer Reporting Act ("ICRA") and the way employers and other third parties perform workplace investigations. Following employer backlash over certain provisions in 2002's AB 655, both AB 2868 and AB 1068 were passed to provide some relief to employers. While some provisions went into effect almost immediately in 2002, most of these changes are new for this year. In a shortly following E-Alert, we will be providing additional information about these changes and revised forms for you to consider using.

If you are conducting a workplace investigation, require the services of a workplace investigator, or utilize an SFSSW-created employment application, we recommend that you contact your SFSSW attorney for updated forms and additional information.

* * *

SWERDLOW FLORENCE
SANCHEZ SWERDLOW & WIMMER
a law corporation

New Laws Affecting California Employers

January 29, 2003

Page -15-

We encourage you to call your SFSSW attorney at (310) 201-4700 or email them at the addresses listed below to discuss any of the issues from this letter and their impact on your Company's operations.

Sy Swerdlow

sswerdlow@swerdlowlaw.com

Millicent N. Sanchez

msanchez@swerdlowlaw.com

Janet I. Swerdlow

jswerdlow@swerdlowlaw.com

David A. Wimmer

dwimmer@swerdlowlaw.com

Brian L. Rexon

brexon@swerdlowlaw.com

Sandy K. Rathbun

srathbun@swerdlowlaw.com

Lori M. Yankelvetis

lyankelevits@swerdlowlaw.com

Karen E. Rhodes

krhodes@swerdlowlaw.com

Gregg A. Fisch

gfisch@swerdlowlaw.com

Jeffrey W. Mayes

jmayes@swerdlowlaw.com