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NEW LAWS AFFECTING CALIFORNIA EMPLOYERS IN 2005

Governor Schwarzenegger, so far, has lived up to his promise as a pro-business governor. Unlike past years, many of the laws signed in 2004 create minimal new obligations for employers, and some actually assist in reforming past laws that negatively impacted employers. Governor Schwarzenegger vetoed approximately 25% of the 1270 bills that made it to his desk – including every bill designated a “job killer” by the California Chamber of Commerce. The following is a summary of the laws affecting California employers that were signed by the Governor.

SB 1809 – “Sue Your Boss” Reform.

SB 1809 constitutes a major modification to last year’s “Sue Your Boss” law, SB 796.

What Was SB 796?

SB 796 had created a new California Labor Code section and a new cause of action for employees and former employees where they could sue their employer or former employer in state court for any violation of the labor code, no matter how small and no matter if the violation was willful. Formerly, only the state could pursue many of these violations.

SB 796 became known as the “Bounty Hunter” law because it permitted employees to recover a portion of the fines that typically would have gone to the state, as well as providing for attorneys fees and costs in prosecuting the lawsuit.

What Does SB 1809 Change?

As an urgency measure, SB 1809 and its changes immediately went into effect on August 11, 2004. One of the most important changes created by SB 1809 is that it specifically states that it will have retroactive effect on SB 796 lawsuits. Since SB 796’s January 1, 2004 effective date, enterprising plaintiffs have filed SB 796 lawsuits requesting over half-a-billion dollars in damages, often for posting and other minor infractions. SB 1809’s retroactivity will have a large effect on many of these pending lawsuits.

In addition to its retroactivity, SB 1809 also amends five parts of SB 796:

1. Procedural and administrative requirements;
2. Providing courts the discretion to reduce penalties;
3. Requiring courts to review and authorize settlements;
4. Generally permitting only the state to collect penalties for posting or notice requirements; and
5. Adjusting the funds distribution in successful suits.

Procedural And Administrative Requirements

Under last year's SB 798, employees could file a lawsuit immediately after being aggrieved by any violation of the Labor Code. Now, depending on the nature of the alleged violation, SB 1809 creates different, pre-lawsuit procedural requirements under three administrative schemes: general, safety/health, and catch-all. The general scheme affects most labor code violations, including wage and hour provisions.¹ The

¹ The general scheme affects:

- a. Violating wage and hour laws;
- b. Punishing employees for lawful off-duty conduct;
- c. Failing to return employee monies put up as a bond;
- d. Conducting unlawful polygraph examinations;
- e. Violating restrictions on requests for information about applicants' or employees' criminal history;
- f. Unlawfully recording employees;
- g. Compelling employees to patronize the employer;
- h. Violating Licensed State Contractors requirements;
- i. Failing to reasonably accommodate drug and alcohol rehabilitation;
- j. Restricting employee political activity;
- k. Failing to comply with the requirement to keep pay records;
- l. Violating rules on the employment of minors;
- m. Violating farm-laborer rights;
- n. Violating the requirements placed on talent agencies;
- o. Violating the prevailing wage laws;
- p. Improperly requiring industrial homework;

(footnote continued)

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safety/health scheme affects violations of California’s Occupational Safety and Health laws, such as workplace safety standards. The catch-all scheme affects all remaining Labor Code sections not covered in the general and safety/health schemes.

The first step in SB 1809’s administrative process for all schemes requires the employee to provide written notice to the employer and the State about the alleged violation. This notice must identify the specific provisions of the Labor Code allegedly violated, as well as facts and theories supporting the alleged violation.

In the general and safety/health schemes, following the employee’s written notice, the State has an opportunity to determine whether it will investigate and/or cite the employer for the alleged violation. If the State cites the employer, then the employee cannot bring a lawsuit against the employer based on the alleged violation.

If the State determines that it will not cite the employee, then the three schemes diverge in how the employee can pursue a “bounty hunter” lawsuit. First, in the general scheme, if the State has not cited the employer within 158 days following the initial employee notice, the employee can bring his/her “bounty hunter” lawsuit.

Second, in the safety/health scheme, the State has an unspecified amount of time to investigate and cite an employer following the employee’s notice of alleged Labor Code violation. If the State does not cite the employer, the employee can challenge the State’s “no citation” determination by bringing a lawsuit in Superior Court. If the employee brings such a suit, the Superior Court must apply California Occupational Safety and Health Board precedent in determining whether the State should have cited the employer for the safety violation. If the Court determines that the State should have cited the employer, then the Court will enter an order requiring the State to cite the employer. If, instead, the Court agrees that no citation is necessary, the law is unclear about what the employee next can do, if anything. SB 1809 does not specify whether the employee can recover attorneys fees and costs for this lawsuit.

And third, the administrative scheme for catch-all violations permits employers up to 33 days to “cure” the alleged violation. To cure an alleged violation, the employer must take three steps: a) the employer must abate each violation; b) the employer must

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- q. Failing to properly reimburse or indemnify employees;
 - r. Discriminating against employees because of garnishments; and
 - s. Violating apprenticeship rules.



comply with the statutes the employee noticed were being violated; and c) the employer must make the complaining employee “whole.”

If the employer timely cures the alleged violation, the employee may not bring his/her “bounty hunter” lawsuit. If the employer does not cure the alleged violation within 33 days, the employee can bring a SB 796 lawsuit for the violation.

If the employee disputes the employer’s claim that the violation has been cured, then the employee must notify the State and the employer of the dispute and the specific grounds for the dispute. The State must review the employer’s cure and render its decision as to whether the cure was sufficient. If the State determines that the condition has not been cured or fails to timely investigate the cure, the employee then may bring his/her “bounty hunter” lawsuit.

If the State determines that the employer cured the violation, the employee can appeal the determination in Superior Court. As with the safety/health scheme, SB 1809 does not specify whether this appeal is a “bounty hunter” lawsuit with the attendant attorneys’ fees and costs if the employee prevails.

Court Discretion To Reduce Penalties

Under SB 796 suits, the court did not have any discretion to reduce penalties if the employer innocently violated a Labor Code provision. SB 1809 changes this limitation to permit the court to award a lesser amount than the maximum penalty, if the penalty would be “unjust, arbitrary and oppressive, or confiscatory.”

Requiring Court To Authorize And Review Settlements

Under SB 796, plaintiffs’ attorneys could “shake down” employers by sending a demand letter and then pursue a confidential settlement without court involvement. SB 1809 brings these settlements before the court to avoid oppressive actions by unscrupulous plaintiff’s attorneys. Consequently, all “bounty hunter” settlements are subject to court approval.

Violation Of Posting And Notice Requirements

SB 796’s broad scope permitted suits for all types of violations, including petty violations for such things as not posting the proper notices. Generally, SB 1809 now removes employees’ ability to sue for these types of violations. Instead, this enforcement power remains exclusively with the State.



Adjustment Of The Funds Distribution For Successful “Bounty Hunter” Suits

Under SB 796, successful “bounty hunter” suits resulted in a portion of the penalty being diverted from the state’s general fund. Now, SB 1809 sends all of the penalty to the California Labor and Workforce Development Agency.

Employment Applications

SB 1809’s final change involves employment applications. Prior to SB 1809, California law required all employers to send a copy of their employment application to the California Division of Labor Standards Enforcement. SB 1809 abolishes this requirement.

AB 1825 – Mandated Supervisor Training In Sexual-Harassment Avoidance.

Under existing law, an employer – no matter its size – violates California’s Fair Employment and Housing Act (the “FEHA”) if it does not take “all reasonable steps” to prevent workplace sexual harassment. Cal. Gov’t Code § 12940(j)(1) & (k). Accordingly, we long have recommended workplace training for sexual and other types of harassment – even though such training was not specifically required by law.

AB 1825 now mandates workplace-harassment training for all supervisors of every California employer employing 50 or more persons. This training must consist of no less than two hours of “classroom or other effective interactive training” and must include the following features:

- Information and practical guidance regarding federal and California law on:
 - The prohibition against sexual harassment;
 - The prevention of sexual harassment;
 - The correction of sexual harassment in the workplace; and
 - The remedies available to victims of sexual harassment.
- Practical examples “aimed at instructing supervisors” in the prevention of:
 - Harassment;
 - Discrimination; and
 - Retaliation.

The training must be conducted by trainers or educators “with knowledge and expertise” in the prevention of “harassment, discrimination, and retaliation.” Such trainers would include outside specialists, such as attorneys or human resources

consultants, or experienced human resources staff with the requisite knowledge and expertise to conduct the workplace sexual-harassment training.

Employers must conduct the training for all supervisors by January 1, 2006. If a supervisor completed training in compliance with this law's requirements after January 1, 2003, the supervisor need not repeat the training by the January 1, 2006 deadline. Newly hired or newly promoted supervisors must complete sexual-harassment training no later than six months after their hire or promotion date.

AB 1825 also creates a continuing obligation whereby each supervisor must undergo training no less than every two years. Thus, if an employer completes training for all its supervisors by the January 1, 2006 deadline, the supervisors must renew their training no later than January 1, 2008.

While there is no penalty associated with the failure to comply with AB 1825, non-complying employers are subject to an order by the California Fair Employment and Housing Commission requiring compliance. Moreover, although AB 1825 states that the failure to conduct this training does not, "in and of itself," make an employer liable for a violation of California's FEHA, it will constitute evidence that the employer was not taking "all reasonable steps" to prevent workplace sexual harassment.

AB 205 – 2003 Law Affecting Domestic Partners

In 2003, Governor Davis signed AB 205 – a law giving registered domestic partners rights that are almost in parity with opposite-sex spouses. This law went into effect on January 1, 2005. Registered domestic partners now have the same rights, protections, benefits, and obligations as spouses. The primary concern for employers under this law is in regard to leaves of absence. Because AB 205 permits employees to take leave under the California Family Rights Act ("CFRA") for domestic partners, leave taken to care for a registered domestic partner will not count against an employee's annual entitlement for leave under the federal Family and Medical Leave Act ("FMLA"). As such, an employee can take 12 weeks of leave under CFRA to care for a domestic partner and then take another 12 weeks of leave under FMLA due to the employee's own illness.

SB 1618 – Paycheck Stubs Without Social Security Numbers.

Under existing law, all California employers must provide their employees with a paycheck stub or other itemized statement that displays, among other things, the employees' names and social security numbers. SB 1618 attempts to enhance employees' protection from identity theft by requiring, no later than January 1, 2008, that

this paycheck stub or itemized statement include a number other than the employees' full social security numbers. In place of the full social security numbers, employers have the option of using: a) no more than the last four digits of the employees' social security numbers; or b) an existing employee identification number other than a social security number.

AB 1706 – Wage-Assignment Orders.

Existing law prohibits employers from refusing to hire an applicant, discharging an employee, or disciplining an employee for having a wage-assignment order (*i.e.* if the applicant's or employee's wages were garnished). AB 1706 clarifies existing law by also forbidding employers from denying a promotion to, or "taking any other action adversely affecting the terms and conditions of," an applicant or employee whose wages are subject to a wage-assignment order. Effective January 1, 2005, employers with work rules prohibiting an employee from having two or more unrelated writs or garnishments (as SFSSW formerly had in the handbooks it created) must delete this work rule.

AB 1950 – Increased Privacy Protection For Records.

Existing law 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. AB 1950 expands on these protections by requiring all businesses that "own or license" personal information, computerized or not, about California residents, to provide "reasonable security" for that information. AB 1950 defines personal information as any information that contains a person's first name or first initial and person's last name and a "data element." However, the combination of the name and data element only meet the definition of personal information where the data element, the name element, or both are unencrypted or redacted. Data elements are limited to:

- a. social security numbers,
- b. driver's license or California identification card numbers;
- c. account numbers, credit card numbers, or debit card numbers, where maintained in combination with the PIN number to access the account numbers, credit cards, or debit cards; or
- d. Individually identifiable medical information regarding an individual's medical history, treatment, or diagnosis.



Personal information specifically excludes publicly available information that is lawfully available from federal, state, or local government records.

Employers who maintain reasonable security procedures to safeguard employees' personal information should be in compliance with this law, although AB 1950 does not define what is meant by "reasonable security." Nevertheless, we recommend a review of your company's current record-keeping policies and access rights to employee files in order to ensure that your company is taking the appropriate security steps.

The second part of AB 1950 affects contractual arrangements for the disclosure of personal information. If, due to a contractual arrangement with another entity, a business needs to disclose personal information about a California resident, the disclosing business must contractually obligate the entity receiving the information to maintain reasonable security procedures to protect the personal information from unauthorized access, destruction, use, modification, or disclosure.

It is unclear whether this law requires modification of existing contracts to ensure employees' privacy with regard to personal information. However, a conservative reading of this law would require employers who contractually release employees' and/or employees' beneficiaries' personal information (for example, where the company's Human Resources, benefits administration, or background checking functions are outsourced) to ensure that the outsourced contract has reasonable security protections for such personal information.

AB 2900 – Standardization Of Protected Classes And Discrimination In Existing Law.

Under existing law, various state laws prohibit discrimination, but are inconsistent in defining what constitutes discrimination. AB 2900 attempts to create consistency among many of these statutes by using the protected classes described by the California Fair Employment and Housing Act ("FEHA") as the benchmark for what constitutes discrimination. While most areas of this law affect public/government employers, certain sections do affect private employers. Specifically:

- a. Labor unions (agricultural and otherwise) cannot discriminate against persons for their apprenticeships based on the protected classes listed by FEHA; and
- b. Employees are justified in quitting their jobs and may be eligible for unemployment benefits if the employees quit because the employer violated the FEHA.

AB 664 – Penalizing Unemployment Insurance Shirkers.

AB 664 changes existing unemployment law relating to employer contributions. AB 664 was passed in response to companies using creative accounting techniques, such as buyouts by sister companies and “sweetheart” acquisition deals, to avoid paying the proper contribution to the unemployment insurance fund. AB 664 penalizes these evading companies by charging them extremely high contribution rates or combining the companies’ reserve accounts to require higher contributions. Employers who have not sought to avoid unemployment insurance contributions through these and similar techniques generally will be unaffected by AB 664.

AB 254 – Elimination Of California’s Older Workers’ COBRA Extension Benefit.

Under existing law, California employees over 60 years of age and meeting other requirements have the ability to continue their COBRA benefits for a longer period of time than a younger employee. This extension covers former employees who: (i) are at least sixty (60) years old on the date their employment ended; (ii) had worked for the employer for at least the five (5) prior years; (iii) were entitled to COBRA continuation coverage; (iv) had elected that coverage; and (v) had exhausted COBRA continuation coverage. However, the state law creating this special extension passed prior to the federal Health Insurance Portability and Accountability Act (“HIPAA”), a law intended to ensure that individuals moving from job to job, or from employment to unemployment, are not denied coverage because of a pre-existing condition. Under HIPAA, if an insurance company offers individual health-insurance policies, that company must offer a HIPAA policy to anyone who has not gone more than 63 days without coverage, regardless of the individual’s health status. To be eligible for this privately provided HIPAA coverage, however, the former employees needed to exhaust all COBRA continuation coverage, including the above-described special California extension.

In evaluating the comparability, benefits, and costs of the California COBRA extension and the private HIPAA coverage, the California legislature determined that HIPAA coverage is a more affordable option for many persons over 60 years of age. Accordingly, because California’s special COBRA extension precluded these persons from obtaining HIPAA coverage, AB 254 eliminates this COBRA extension effective January 1, 2005. Thus, only those persons over 60 years of age who meet the special COBRA eligibility requirements prior to January 1, 2005, are eligible for the California COBRA extension; all others, upon the expiration of their COBRA coverage, are now eligible for HIPAA coverage.

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We encourage you, should you have any questions, to call your SFSSW attorney at (310) 288-3980 to discuss these laws and their impact on your Company's operations.

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