

Changes in Employment Law

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Governor Gray Davis's Administration has signed into law a number of bills for 2003 which directly impact employers. The following is a summary of these bills:

Notice to Workers Before Mass Layoffs:

This new law is modeled on the Federal Worker Adjustment and Retraining Notification Act ("WARN") that requires notification of workers before a mass layoff. The new law is more broadly worded so that an employer may be covered under its provisions, although not under WARN. The California law prevents employers from initiating a mass layoff, relocation or termination of an industrial or commercial facility employing 75 or more persons within the preceding twelve months, without first giving 60 days notice. A "mass layoff" is defined as a separation from a position for lack of funds or lack of work during any 30-day period of 50 or more employees. Certain conditions must exist before an employer is required to provide notification. Compliance with this new law is important in that a violation results in affected employees recovering back pay, attorneys' fees and a civil penalty of up to \$500.00 for each day of the violation (maximum \$30,000.00).

New Protections Against Age Discrimination:

Prior to 2003, age discrimination was prohibited only in hiring, discipline and termination. This new law is intended to reverse a recent court decision which held that an employer was not barred by California's discrimination law from providing educational benefits to younger workers while denying such benefits to older workers. The new law prohibits age discrimination in the terms and

conditions of employment. Thus, under the new law, if an employer offers specialized training to younger employees, older employees holding comparable positions must also be provided such benefits. The bottom line is if an employer makes any type of adverse employment decision which is arguably motivated by a consideration of age, an age discrimination claim may be lurking around the corner.

Investigative Consumer Agencies Act:

The Governor signed this law to clean up certain issues raised about whether under the California Investigative Consumer Agencies Act, employers were required to disclose internal investigation notes and employee reference checks. The Act governs generally both the use of investigative consumer reporting agencies and background checks by employers pertaining to character, general reputation, personal characteristics and mode of living. Under the Act, certain disclosures must be made to an applicant or employee if the employer wishes to rely upon a background check of the individual in order to make an employment decision. The new law narrows the circumstances in which the employer must disclose background reports. An employer who fails to hire or terminates an individual in violation of the Act is liable for damages for failing to hire/firing of such a person.

Employment References:

There is now a statutory privilege which states that a current or former employer may not be held liable for defamation for answering whether they would rehire a former employee. This situation usually arises when a prospective employer calls an applicant's former employer and inquires about the former employee's work performance. Despite this privilege granted by the legislature, we recommend that employers continue to provide only "name, rank and serial number" to prospective employers making such inquiries. In that the law is new, it is unclear how narrowly the courts will construe the language of the statute. For instance, it is unknown whether the privilege would apply if the employer not only responded

that the former employee would not be rehired, but then went on to explain the details of why the person would not be rehired.

Protections for Disclosure of Wages and Working Conditions:

California law had provided that an employer may not require an employee to refrain from disclosing the amount of his or her wages or require an employee to sign a waiver denying him or her the right to disclose the amount of wages. The law also prohibited an employer from discharging, disciplining, or otherwise discriminating against an employee for a job placement who disclosed the amount of his or her wages. The bill broadens the protections of existing law by eliminating the condition that the adverse employment action be related to an employee's job advancement. As a result, any adverse employment action taken because the employee discloses the amount of wages is illegal. Also, the bill prohibits an employer from requiring employees not to disclose information about the employer's working conditions.

Undocumented Workers:

As a result of a recent court decision, there had been some confusion regarding the extent to which an undocumented worker may sue an employer for employment law violations. The new law states that all protections, rights and remedies available under State law, except as prohibited by Federal law, are available to individuals, regardless of immigration status, who have applied for employment, or who are already employed in this State. No inquiry into a person's immigration status is permitted except when it is shown by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law.