ASAP™

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With the end of the 2004 California legislative session, Governor Schwarzenegger has left his mark on the employment law landscape in California. In contrast to years past, only a few of the legislature's changes will have a major impact on employers in California.

California Edition

A Littler Mendelson California-specific Newsletter

BACK TO THE CENTER?:

The Governator Puts His Stamp — and the Brakes — on California's Employment Legislation in 2004

By Christopher E. Cobey

With the recall of Democratic Governor Gray Davis, and the installation of Arnold Schwarzenegger as his successor late last year, employers expected a change in approach to Sacramento's ever-increasing legislation of the workplace in the Golden State. The employers' expectations have been met — and how!

Governor Schwarzenegger has put his imprimatur on public policy in California employment law by a series of bills which he has signed or vetoed, mostly at the end of the just-concluded legislative session. Of the 1,270 bills which passed both houses of the Legislature in 2004, the Governor vetoed nearly a quarter of them. Schwarzenegger's veto rate of the Legislature's bills was the highest of any California Governor, except for one year, going back to 1967. His end-of-the-legislative session vetoes included all ten bills designated "job killers" by the California Chamber of Commerce.

A signal of the change in attitude was the Governor's brokering the drafting and passage, and signing, of Senate Bill (S.B.) 1809. The bill was the vehicle for the compromise to pass the state budget, which in California requires a two-thirds vote of the Legislature.

As part of that compromise, the scope of one of the most pro-employee bills passed by last year's Legislature (the Private Attorney General Act; California Labor Code section 2699 et seq.) was whittled back, and some of the reductions to the Act's scope were made retroactive in application — an unusual step by a legislative body. The effect of the bill was to eviscerate the more marginal court cases brought under the PAG Act in 2004. S.B. 1809, designated as one of two urgency statutes affecting employers this year, took effect on August 4, 2004.

Other Legislation Signed Into Law

Besides S.B. 1809, the other urgency measure affecting employers (A.B. 1127), effective September 27, 2004, requires that the lettering of the list of employees' rights and responsibilities under the whistleblower laws required to be posted under Labor Code section 1102.5 be larger than size 14 point type. Previously, the list employers were required to prominently display had to be larger than size 14 pica type.

Among the more significant new laws for employers effective January 1, 2005 include:

- Requiring employers with 50 or more employees to provide two hours of training and education to all supervisory employees, within one year of January 1, 2005, unless the employer has provided sexual harassment training and education to employees after January 1, 2003. The statute requires each employer to provide sexual harassment training and education to each supervisory employee once every two years, after January 1, 2006. (A.B. 1825). Littler recently published an ASAP on this subject, *Sexual Harassment Prevention Training Now Mandatory for California Employers.*
- Requiring all California employers, by January 1, 2008, to furnish each employee with an accurate itemized statement, at the time of the payment of wages, showing no more than the last four digits of the employee's social security number or an existing employee identification number other than a social security number. (S.B. 1618)
- Amending miscellaneous code provisions of existing law which prohibit discrimination in employment on different bases,

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including the race, color, sex, religion, and marital status of a person, to instead prohibit discrimination on the same bases as in the Fair Employment and Housing Act. Those bases are race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation. (A.B. 2900)

- Authorizing the Fair Employment and Housing Commission (FEHC) to conduct mediations upon the request of the Department of Fair Employment and Housing (DFEH); for the FEHC to either develop its own procedural regulations or to use the provisions of the Administrative Procedure Act (APA) as a default procedures; declaring the non-liability of the FEHC for the attorney's fees of an administrative adjudication; and making other less substantive changes. (A.B. 2870)
- Clarifying an existing statute to prohibit an employer from using an assignment order as grounds for denying a promotion to an employee or for taking any other action adversely affecting the employee's terms and conditions of employment. (A.B. 1706)
- Requiring a business, other than specified entities, that owns or licenses personal information about a California resident to implement and maintain reasonable security procedures and practices to protect personal information from unauthorized access, destruction, use, modification, or disclosure. The statute requires a business that discloses personal information to a nonaffiliated third party, to require by contract that those entities maintain reasonable security procedures, as specified. The statute provides that a business that is subject to other laws providing greater protection to personal information in regard to subjects regulated by this statute shall be deemed in compliance with the statute's requirements, as specified. (A.B. 1950)

Other enacted legislation affected less than all California employers or employees, such as Lake County minors working in agricultural packing plants (S.B. 1134), applicants for employment by public utility and cable companies (S.B. 1388), denying promotions or taking other adverse action against an employee on the basis of the existence of a support order (A.B. 1706), employers of horse racing backstretch workers (A.B. 2276), the Alameda County Hospital Authority's employment agreements (A.B. 2630), the use of cell phones by school bus or transit vehicle drivers (A.B. 2785), the access of employees on work furlough to driver's license and credit card information (A.B. 2861), and the definition of sexual offenses of persons applying for work at a school (A.B. 891).

Vetoes

A state's chief executive makes policy, too, with the legislation he does not allow to become law. Governor Schwarzenegger's veto pen spoke loud and clear this year.

In perhaps his most prominent veto, the Governor bade "Hasta la vista, baby" to a bill (A.B. 2832) which would have raised California's minimum wage for the first time in three years, to make it the highest state minimum wage in the United States. In his veto message, Schwarzenegger stated that the proposal exemplified "the high cost of doing business in California" which "has driven away jobs, businesses and opportunity." "Now is not the time to create barriers to an economic recovery or to reverse the momentum we have generated."

Likewise, Governor Schwarzenegger vetoed bills which would have:

- Required employers to provide notice to employees of employer monitoring of employees' workplace electronic communications. (S.B. 1841) This was the third consecutive year such a proposal had passed the Legislature and been vetoed by the Governor.
- Expanded the rights of hotel room attendants (A.B. 606), janitorial service contractors (A.B. 2213), and displaced janitors. (S.B. 1521)
- Expanded the liability of employers for failing to provide safe workplaces for employees (A.B. 2545)
- Increased damages available to employees against employers in gender equity lawsuits. (A.B. 2317)
- Required California employers contracting with a customer sales call center or a customer service telephone bank, to include a provision in the contract that would have required a customer service employee to disclose his or her location upon the request of a California resident. (A.B. 2715)
- Increased legal authority for employer's payment of employees' rest period time. (S.B. 1538)
- Affected employment policies relating to "offshoring" of California jobs by: requiring employers to report information on a California employer's in-state, out-of-state, and outside the United States employees. (A.B. 3021); requiring health care providers to disclose and obtain consent for allowing confidential medical information to be transmitted outside the United States (S.B. 1492), prohibiting a state agency or local government from allocating or expending state funds for employment training for employees located in foreign countries and prohibiting a state agency, or a local government in expending funds provided by a state agency, from contracting for services with a contractor or subcontractor unless that contractor or subcontractor certifies under penalty of perjury in his or her bid for the contract that the contract, and any subcontract performed under that contract, will be performed solely with workers within the United States (A.B. 1829); and, prohibiting employment of employees working on information essential to homeland security at a location outside the United States. (S.B. 888)

In summary, California employers can breathe a sigh of relief that the onslaught of significant new statutes affecting the workplace in recent years substantially abated in the election year of 2004.

Coming up for decision at the California general election on November 2, 2004, are several controversial ballot propositions. The propositions most directly affecting employers are Proposition 64, which would substantially cut back lawsuits under Business and Professions Code section 17200 (unfair business practices), and Proposition 72 which if passed would enact the comprehensive health insurance plan passed by the Legislature in 2003 as S.B. 2. (See October 2003 ASAP: *California Enacts "Pay or Play" Employer-Financed Health Care*.)

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