

May 9, 2008

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Bossing Employers Around

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"No man's life, liberty or property are safe while the Legislature is in session" is a classic political phrase that popularly began with a New York Court decision in 1866. While originated in New York, the phrase can aptly be applied to the California Legislature. Indeed, while employees generally dread the April 15 tax-filing deadline, most employers have an anxious eye on the Sept. 30 deadline for the governor to approve or veto proposed legislation. Unfortunately, this is when employers usually first learn about new employment-related mandates, or learn of the costly bullets they just dodged, often only because of a governor's veto.

Given the economic stakes involved, one would expect employers to participate in the legislative process to at least the same degree as employee-friendly groups or the plaintiff's bar. This has not always been the case. While some business groups have been heavily involved, most employers have seemingly relied on either legislative restraint or on the governor to veto the more troublesome legislation, rather than actively voice their concerns.

The unfortunate reality is most legislators have very little real-world business experience, and even

fewer still have meaningful human resources experience. As a result, the Legislature has frequently enacted employment laws imposing costly employer mandates (sometimes referred to as "job killer" bills) or that considerably curtail employer and employee discretion; believing that a paternalistic "we know what's good for you" approach is better than allowing employees and employers to work out job-related issues. For instance, in 2000, California enacted the inaptly named Workplace Flexibility Act, a wide-reaching bill that effectively eliminated workplace flexibility by imposing stringent overtime and scheduling rules, including when, where and how an employee needs to take a 10-minute break and a 30-minute meal period.

Legislators also often lack legal expertise, with the number of lawyers serving as legislators at or near an all-time low. It's no surprise, then, that the Legislature has frequently enacted ambiguous employment rules requiring costly litigation to clarify. For instance, Labor Code Section 512 requires meal periods be "provided," but fails to clarify exactly when or how these meal periods must be "provided," thus prompting the current tsunami of class action suits, which by all accounts have been a money-making proposition for the plaintiff's

bar, but have changed little in the way of fundamental business operations, other than to deprive employees of flexible scheduling.

Senate Bill 1539 intended to clarify several long-standing issues concerning meal-period requirements. For instance, it would clarify that meal periods based on working more than five hours need only be provided before the employee completes six hours of work. The bill also sought to clarify that employers are only required to provide an employee an opportunity to take an offered meal period, and are not required to force the employee to eat. The bill made it out of committee on April 9, but was substantially amended on April 15, to the point of making it meaningless. Senate Bill 1539 now clarifies nothing and instead merely states: "SECTION 1. It is the intent of the Legislature to enact legislation to address issues related to meal periods in employment." What? That's like saying that the Legislature agrees that there is a need for a bill about meal periods,

but it's not going to do anything about it. With little fanfare, the bill has now been withdrawn.

California's Legislative Process

Although it is often said there are two things you do not want to see being made - sausage and legislation, the California legislative process is fairly straightforward. Each legislative bill is introduced in either the Assembly or Senate and then referred to a particular committee with subject matter expertise. If approved by committee, it proceeds for a full floor vote in that chamber and if passed, forwarded to the other chamber where the process is repeated (i.e., committee vote followed by full chamber vote).

Employment



A bill with identical provisions that passes both legislative chambers proceeds to the governor for enactment or veto.

This entire process must be completed within fairly short statutorily enumerated deadlines. For instance, May 30 is the last day for any bill to be passed out of the originating chamber, and Aug. 31 is the last day for any bill to be passed by both chambers. The governor must sign or veto any bills by Sept. 30.

Getting Involved

Given technological advancements, employers no longer need remain in the dark concerning any particular legislative item. There are several online bill-tracking portals, including www.legislature.ca.gov and www.leginfo.ca.gov (the official California legislative site), where employers can obtain the complete legislative text, review committee analyses and track key votes and deadlines.

Once an employer identifies a particular bill, there are multiple mechanisms for voicing support or opposition. Although the term "lobbying" has become a four-letter word during recent election cycles, most legislators genuinely appreciate this direct input that is often lacking. This is because each employer is not only a constituent (i.e., a vote), but also may provide previously missing human resources or business expertise, as well as anecdotal evidence regarding a particular bill's potential impact.

In addition to letters and e-mails, a frequently overlooked but very effective technique is arranging an office visit to personally meet with

the legislator or staff. Although busy, most legislators enjoy meeting actual constituents outside the rubber chicken dinner circuit, and these visits are easily arranged simply by contacting the legislator's capitol or local office.

Pending Employment Bills

Every year, California employers appear to be blindsided by the new laws that affect the workplace. While not an exhaustive list, in order to provide a preview of possible things to come, the Legislature is currently considering the following employment-related bills employers might want to weigh in on before Sept. 30:

Alternative Workweek Schedules for Small Employers (AB 2127): Labor Code Section 511 generally requires overtime compensation for any hours worked beyond eight hours in a day and 40 hours in a week. This bill would authorize individual employees employed by an employer with 25 or fewer employees to request a work schedule up to 10 hours per day within a 40-hour workweek without overtime compensation.

Paid Sick Leave (AB 2716): This bill would expand San Francisco's paid sick leave ordinance statewide, and require employers to provide paid sick leave to employees who work more than seven days in any calendar year. Employees would accrue paid sick time at a rate of no less than one hour for every 30 hours worked, and would be entitled to use accrued sick time beginning on the 90th calendar day of employment.

Payment of Final Wages (SB 1283): Final wages currently must

be paid immediately to discharged employees, regardless of whether the discharge occurs when the accounting/payroll department is closed. This bill would permit employers who discharge an employee when the accounting/payroll department is closed to make final wages available no later than six hours after the start of the department's next regular workday, or if offsite, no later than 24 hours after the department's next regular workday.

Individual Liability for Independent Contractor Misclassification (SB 1583): Labor Code Section 1021.5 imposes a \$200 penalty per person misclassified upon any entity who knowingly enters into a services contract requiring an independent contractor's license. This bill specifies that any person (other than an attorney) who advises anyone to treat someone as an independent contractor shall be jointly and severally liable for this penalty.

Employment Protection for Medical Marijuana Usage (AB 2279): Earlier this year, the California Supreme Court held employers are not required to accommodate an employee's marijuana usage, even if the usage was prescribed by a physician under California's Compassionate Use Act. This bill would prevent employers from discriminating against, including disciplining employees, for medicinal marijuana usage provided the usage occurred away from work.

New WARN-Act Notice Requirements (AB 1989): This bill proposes a number of changes to California's version of the federal

WARN Act, which requires employers provide advance notice of "mass layoffs." For instance, this bill would require employers to provide advance notice of an "offshoring," which is defined as the removal of an employer's operations to a location outside the United States, and increase the layoff notice period from 60 to 90 days. This bill would also amend the definition of "mass layoff" from 50 people within a 30-day period, to 25 people within a 90-day period and would increase the civil penalties for WARN Act violations.

Limits on Consumer Credit Reports for Employment Purposes (AB 2918): California's Consumer Credit Reporting Agencies Act specifies procedures employers must follow to obtain a consumer credit report in the employment context. This bill would prohibit the potential user of a consumer credit report from obtaining a report for employment purposes unless the information is substantially job-related and the employer's reasons for using the information are disclosed in writing, or required by law.

If any of these proposed bills look like they could impact your business, contact your local legislator and provide input.

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