

Top Ten New Employment Laws for 2003

Of the record 1,168 new laws passed in California in 2002, the following are the most important for employers:

1. Investigative Consumer Reporting Agencies Act. This law went into effect immediately upon its passage in September 2002. The new law, concerning an employer's duties when conducting background checks on employees and applicants, was covered in *First Wednesday* on September 4, 2002. Since then, the law has been clarified in several respects. Most importantly, employers do not have to provide the employee or applicant with non-public information gathered during routine reference checks or investigations of suspected misconduct (such as investigations of alleged sexual harassment or employee-on-employee violence). Certain public information, if obtained by the employer from "public records," as defined in the statute, must still be disclosed to the employee or applicant.

2. Privilege for Employment References. The California Civil Code, section 47, has been amended to specifically allow a current or former employer, or the employer's agent, to answer (for a prospective new employer) whether or not a current or former employee would be rehired.

3. Age Discrimination. New legislation extends protections against age discrimination to the terms, conditions and privileges of employment, including job benefits such as compensation and education and training programs. This legislation was a reaction to last year's California Supreme Court holding in *Esberg v. UNOCAL*, in which the Court held that existing California law did not prevent UNOCAL from offering paid tuition benefits to younger workers while denying them to workers over age 40. Under then-existing state law, protection to workers over 40 was limited to hiring, firing,

suspension and demotion – but did not extend to employee benefits. Now, however, the Legislature has amended the statute to preclude discrimination on the basis of age in offering company benefits.

4. Mass Layoffs, Plant Relocations and Plant Closures. California now has its own version of the federal Worker Adjustment and Retraining Notification Act (WARN). WARN generally requires that employers give 60 days' notice before ordering a mass layoff or plant closure. The notice must be given to all affected employees and certain government agencies. California's version is broader in scope than the federal law, applies to more situations and will affect more employers. The California law applies to any entity that has employed 75 full- or part-time workers within the preceding 12 months. "Mass layoff" is defined to mean a layoff during any 30-day period of 50 or more employees. This differs from WARN, which is not triggered unless the layoff of 50 or more includes at least 33% of the workers at the job site. The terms "relocation" and "cessation or substantial cessation" of operations also work to broaden the scope of situations triggering California's 60-day notice requirement. The California law has no exception for "unforeseeable business circumstances" as in WARN.

In summary, the effect in California is that 60 days' notice is required in smaller layoffs. The federal WARN Act only applies to layoffs affecting at least 500 workers or at least 50 people making up one-third of the workforce. Now, California employers will need to give 60 days' notice whenever: (1) 50 or more people are laid off from one location, (2) business operations are relocated to at least 100 miles away, or (3) a plant is closed (or "substantially" closed).

5. Sick Leave or "Kin Care" Lawsuits. This law prohibits employers from maintaining any absence control policy that penalizes workers for using sick leave to care for an ill child, parent, spouse or domestic partner. Any such policy, including policies for discipline, demotion, discharge or suspension, is considered a violation of the law. Unlike family leave, kin care applies even to small employers and does not require that the person have a serious illness.

6. Retaliation for Discussing Working Conditions. Under this law, employers cannot retaliate against employees for discussing working conditions, including wages.

Nor may employers require that employees agree not to disclose information about their working conditions. However, this law is not intended to allow employees to disclose the company's proprietary or trade secret information, or information that is otherwise subject to a legal privilege, without the employer's consent.

7. Privacy. This law requires employers who maintain electronic files containing personally identifiable data on employees or customers (including social security numbers) to notify them if the security of the data has been violated.

8. Personal Income Tax. This law requires employers, under some circumstances, to withhold a different amount of California personal income tax on bonuses and stock options given to employees; however, this only applies to stock options that are considered wages subject to withholding. If the employer gives the bonus or stock option to the employee at the same time as the employee's regular wages, the employer must treat the sum of the payments as regular wages and withhold taxes based on the regular payroll period. If the employer does not give the bonus or stock option to the employee at the same time as the employee's regular wages, the employer has several options. For details, see the Employment Development Department website at www.edd.ca.gov for a fact sheet on stock options as wages.

9. Statute of Limitations. The statute of limitations on all new personal injury claims has been extended from one to two years. The legislation was first introduced to help September 11 victims by allowing them more time to file lawsuits, but the final statute was not limited to September 11 victims (except for the retroactive provision). The law applies retroactively to claims arising from the September 11 terrorist attacks; for all other personal injury claims, the law becomes effective January 1, 2003. Since various employment-related claims can be categorized as personal injury claims, such as defamation and emotional distress, the law has the effect of extending the time within which to file these claims in court from one to two years.

10. Family Temporary Disability Insurance. Probably the most publicized new law passed last year will not go into effect until 2004. California's paid family leave program will provide up to six weeks of paid time off for an employee taking family leave to care for a family member with a serious health condition, or bond with a new child.

Generally, all employees at companies who are covered by State Disability Insurance will become eligible for partial reimbursement of their pay for up to six weeks during any twelve-month period while on qualified leave. The program will be funded by employee tax contributions, beginning January 1, 2004. However, benefits will only be payable for qualifying absences beginning on or after July 1, 2004.

CONCLUSION

This summarizes what I consider to be the most significant legislative changes for California employers going into 2003. If you have questions about these or any other of the myriad employment laws on the books, please direct them to me. Best wishes for a healthy and prosperous New Year!

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