

Dark Skies and Lame Ducks: How Private Sector Employers Fared in Sacramento and Washington in 2008

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In the last quarter of 2008, both Congress and the California State Legislature concentrated their attention on the rapidly deteriorating National and California economies.

Two days after the November 4 election, California Governor Arnold Schwarzenegger called the Legislature into special session to seek solutions for California's \$11-billion-plus budget shortfall.¹ In his announcement, the Governor said that among his goals to stimulate the economy were "keeping high paying jobs in California by providing overtime exemptions and allowing more flexible work schedules to increase productivity" and "clarifying meal and rest periods to save businesses hundreds of millions of dollars in litigation costs and create less confusion from meal break violations which will mean fewer terminations." However, the November special legislative session did not result in a solution to the state's revenue shortfall, thus "kicking the can down the road" to the incoming Legislature.

Washington, too, struggled in late 2008 to come up with solutions for severe economic maladies on Wall Street, in Detroit, in the housing market, and the in the rest of the American economy.

Before the Sacramento and Washington gatherings of lame duck legislators in November, some new laws had been passed in 2008 taking effect then, or on the first day of 2009.

Sacramento: The Year of the Veto

"...The Legislature should be looking to lessen the confusion surrounding California labor law, not create more. ..."

- From Governor Schwarzenegger's veto message on AB 3063

Governor Schwarzenegger set a four-decade record this year in the proportion of bills he subsequently vetoed – 35 percent. This veto rate compares with rates in the range of 22 to 25 percent during the Governor's previous four years. The Governor's treatment of bills concerning employers' obligations was even rougher. By one estimate, the Governor vetoed 59 percent of all such bills that reached his desk.

What are the important new employment-related state laws of which California private sector employers now need to be aware? In addition to legislation covered by previous Littler ASAP releases², employers with affected employees should note the following new laws, all of which take effect on January 1, 2009, and revise their policies and handbooks as needed to reflect these changes:

- Assembly Bill (AB) 1278 added Section 1670.7 to the Civil Code to provide that any provision of a contract that purports to allow a deduction from a person's wages for the cost of emigrating and transporting that person to the United States would be void as against public policy.
- AB 2075 amended Labor Code section 206.5 by adding a new subsection (b) to forbid an employer from requiring an employee, as a condition of being paid, to execute a statement of the hours the employee worked "which the employer knows to be false." Violation of this prohibition by the employer is a misdemeanor. The legislation was sponsored by California Rural Legal Assistance Foundation, which claimed that many agricultural labor and carwash employers required their employees to sign off on timecards pre-completed by the employer with false hours worked.

As originally introduced, the bill prohibited only a "false statement" of hours worked. The bill was amended in the Assembly to refer to a statement of hours worked "which the employer knows to be false." Thus, California employers will not violate this new law unless they require employees to sign timecards or other affirmations of hours worked if the employer does not know that the timecard or other affirmation is false.

- AB 2232 amended section 7910 of the Public Utilities Code to prohibit any individual, including both employees and independent contractors, from entering upon the premises of a customer on behalf of a telephone corporation, state video franchise holder, or video provider unless he or she has had a background check.
- Senate Bill (SB 28) added section 23123.5 to the Vehicle Code to prohibit a person from driving a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication, except as specified. The tragic September accident of the Metrolink commuter train, in which it was reported that

the train engineer was texting within 22 seconds of the collision that killed dozens and injured scores of commuters, demonstrates the need for this legislation. California employers would be well-advised to remind employees of this prohibition, and that a violation of this new law (as well as any violation of the requirement to use only a hands-free device for telephoning while driving) is against the law and company policy, and that any citations or accidents occurring as a result of the employee's violations will be the sole responsibility of the employee, and not the company.

Among the employer-related bills passed by the Legislature, but vetoed by the Governor, were those to:

- Reject for California state law employment discrimination cases the more restrictive concept of the application of statutes of limitation announced in 2007 by the United States Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*³ (AB 437);
- Extend the meal and rest breaks protections afforded to employees covered by a wage order to stage assistants who are employed by a city, county, or special district, to the extent not in conflict with the provisions of a memorandum of understanding reached between an employer and a recognized employee organization (AB 1666);
- Declare it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person, if the discrimination is based upon the person's status as a qualified patient or a positive drug test for marijuana, except as specified (AB 2279).
- Remove the \$150,000 cap on actual damages that may be assessed by the California Fair Employment and Housing Commission against a respondent who violates the California Civil Rights Act of 2005, as an unlawful practice (AB 2874);
- Prohibit the use of credit reports for employment purposes except under narrow exceptions (AB 2918);
- Prohibit employers from terminating an employee because the employee's wages had been subject to garnishment (AB 3062);
- Prohibit an employer from asking an applicant to disclose criminal conviction information that had been judicially ordered sealed, expunged or eradicated, or similar information concerning a misdemeanor conviction for which probation had been successfully completed or otherwise discharged (AB 3063);
- Require a general acute care hospital to establish a patient protection and health care worker back injury prevention plan, to conduct a needs assessment to identify patients needing lift teams, and lift, repositioning, or transfer devices, and to prohibit, under specified conditions, discipline of employees refusing to lift patients (SB 1151);
- Provide that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor (SB 1583);
- Provide that an individual shall be deemed to have left his or her most recent work with good cause if the individual's discharge or quitting from an employer was the result of the individual taking a leave to bond with a minor child under the family temporary disability insurance program, and the individual is subsequently found eligible for benefits under that program (SB 1661).

It is likely that some of these vetoed bills will rise from the 2008 legislative graveyard and be reintroduced for the 2009-2010 legislative session.

Washington: The Lull Before the Storm

The fall legislative scene in Washington this year was tumultuous. One commentator, reviewing the House of Representatives' initial rejection of the Wall Street bailout bill, in a veiled reference to the saying that "laws are like sausages; it is best not to see them being made," commented: "This crowd can't even make sausage."

However, before the first of the bailout bills came before Congress, Congress passed and President Bush signed the following bills enacting policy changes for private sector employers.

- The Genetic Information Nondiscrimination Act of 2008.⁴
- The Consumer Product Safety Improvement Act of 2008, which expands responsibilities for the manufacturers and retailers of consumer products.⁵
- Amendments to the Americans With Disabilities Act (ADA).⁶
- The Emergency Economic Stabilization Act of 2008 which, among other things, requires expanded mental health benefits in private health group benefit plans,⁷ and added requirements concerning executive compensation.⁸

The federal agencies in 2008 issued new or revised regulations implementing:

- The Family and Medical Leave Act (FMLA)⁹ (including those FMLA regulations affecting military leave¹⁰);
- Electronic verification of employment eligibility for employees of some federal contractors;¹¹
- Social Security number "no-match" rules¹²; and
- More stringent drug testing rules for some transportation employees¹³.

Among relevant nonstatutory, nonregulatory actions, the EEOC in July issued a revised portion of its compliance manual updating its advice on addressing religious discrimination in the workplace.¹⁴

Going Forward

With the election of Democrat Barack Obama as President and an increase in the Democratic Party majorities in the Senate and House following the November elections, employers can expect to see more employee- and union-responsive legislative proposals.¹⁵ Foremost among the expected legislative initiatives will be the reconsideration of the Employee Free Choice Act which, if enacted in its most recent iteration, would be one of the most significant changes in union recognition in the United States in decades.¹⁶

In Sacramento, the Legislature remains controlled by Democrats, with virtually no changes in partisan lineup, due in significant part to a bipartisan gerrymander in 2001. With Mr. Schwarzenegger remaining Governor through 2010, year 2009 may see some incremental changes in the laws affecting California private sector employers – but the real action will be in Washington next year.¹⁷

Employers are advised to review their employee handbooks and any applicable forms to ensure that both conform with any new laws mentioned here.¹⁸

¹ Governor Schwarzenegger Announces Plan to Address Budget Emergency, Stimulate California's Economy, available at <http://gov.ca.gov/press-release/10966/>. One month later, the Governor upped the projection to a \$14 billion projected revenue shortfall for the state's \$101 billion budget.

² See Littler ASAP: [Legislative Swiftware On Software Engineers: AB 10 Creates an Alternative Overtime Pay Exemption For Some California Computer Software Engineers](#), Oct. 2008, (law effective September 30, 2008, as an urgency statute); see also Littler ASAP: [San Francisco Commuter Ordinance – Sounds Like A Good Idea? Maybe?](#), Dec. 2008 (applies to all non-governmental employers with 20 or more employees in San Francisco, effective January 19, 2009).

³ Littler ASAP: [The Real Lessons of Ledbetter v. Goodyear Tire & Rubber Co., Inc.](#), May 2007.

⁴ Littler ASAP: [Genetic Antidiscrimination Law Creates New Compliance Challenges for Employers](#), May 2008.

⁵ Littler ASAP: [Consumer Product Safety Improvement Act of 2008](#), Oct. 2008.

⁶ Littler ASAP: [Congress Tells the Courts How to Interpret the ADA](#), Sept. 2008.

⁷ Littler ASAP: [Equal Mental Health and Substance Use Benefits Realized](#), Oct. 2008.

⁸ Littler ASAP: [The Emergency Economic Stabilization Act of 2008 Extensively Regulates Executive Compensation, but Leaves Many Unanswered Questions](#), Oct. 2008.

⁹ Littler ASAP: [Relief in Sight? DOL Issues Final FMLA Regulations](#), Nov. 2008.

¹⁰ Littler ASAP: [Department of Labor Clarifies FMLA Amendments Related to Servicemember Care and Other Military-Related Exigencies](#), Nov. 2008.

¹¹ Littler ASAP: [E-Verify Rule for Federal Contractors Published](#), Nov. 2008.

¹² Littler ASAP: [DHS to Publish Final Supplemental No-Match Rule](#) Oct. 2008.

¹³ Littler ASAP: [Transportation Workers In All Industries Face Tougher Drug Testing Procedures: Observed Collections Designed to Thwart Abuses](#), Aug. 2008.

¹⁴ Littler ASAP: [EEOC Issues New Compliance Assistance on Religious Discrimination](#), Aug. 2008.

¹⁵ See Littler Report: [Transition To A New \(Work\) Day: An Initial Look at Workplace Change in the Obama Era](#), Nov. 2008.

¹⁶ Littler Report: [The Employee Free Choice Act: A Critical Analysis](#), July 2008; Littler ASAP: [Obama Presidential Election Victory Could Lead to Dramatic Increase in Unionization of Employers in the U.S.](#), Nov. 2008.

¹⁷ See Littler's Washington, D.C. Employment Law Update Blog at <http://www.dcmplemploymentlawupdate.com/>.

¹⁸ For advice on possible reductions in force, see Littler Insight: [And You Thought the Bailout Was Bad: Employment Law Risks in the Current Financial Crisis](#), Oct. 2008.

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