LANDEGGER & BARON — A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

EMPLOYMENT AND LABOR LAW
AND RELATED LITIGATION
ON BEHALF OF MANAGEMENT

15760 VENTURA BOULEVARD
SUITE 1200
ENCINO, CALIFORNIA 91436

TELEPHONE (818) 986-7561
FACSIMILE (818) 986-5147

www.Landeggeresq.com

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EMPLOYMENT LAW UPDATE

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(courtesy of : The Law Offices of Tasoff & Tasoff)

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The articles contained herein are for informational purposes only and should not be considered “legal advice.” If you have specific issues and/or concerns, please contact our office at your convenience.

SECTION I.

NEW CALIFORNIA LAWS

1. *PAID FAMILY MEDICAL LEAVE (SB 1661)*:

Last year the Legislature passed SB 1661. This statute provides state disability compensation for any individual unable to work due to the illness of a child, spouse, parent or domestic partner. SB 1661 has not yet become effective and is not in the California Labor Code. It becomes law on July 1, 2004. This law establishes up to "six weeks of wage replacement benefits to workers who take time off to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child." The law also applies to newly placed adopted or foster children. Employee contributions to the State Disability Insurance program will fund payments under SB 1661.

2. *EXTENDED WHISTLEBLOWER PROTECTIONS (SB 777)*:

Governor Davis recently signed SB 777, which provides significant added protection for employee "whistleblowers," Significantly, the law creates new posting requirements for California employers concerning a State hotline to report possible violations of state or federal laws. The bill enhances California Labor Code section 1102.5 by adding new provisions that preclude retaliation against an employee for refusing to participate in any activity that would violate state of federal law. This will give statutory authority for an employee with a reasonable but mistaken belief that a violation has occurred and then refuse to perform certain duties.

3. *DISCUSSING PAY AND WORKING CONDITIONS (AB 2895)*:

AB 2895 adds section 232.5 to the California Labor Code and makes it illegal for employers to prohibit an employee from disclosing information about working conditions, or to discharge or in any other way discriminate against an employee in retaliation for having disclosed information about working conditions. This an extension of existing law, which protects the right of employees to disclose information about wages. Under federal law, an employee's discussion of wages and working conditions may be protected activity under Taft Hartley.

4. *HARASSMENT BY NON-EMPLOYEES (AB 76)*:

This new law will hold employers liable, under the Fair Employment and Housing Act, for harassment of a worker by any person, even non-employees that an employer has no managerial or disciplinary authority to reprimand. This includes clients, customers or other visitors that the employer does not employ. In essence, this new law reverses the decision of the California Court of Appeal in *Salazar v. Diversified Paratransit, Inc.*, 103 Cal. App. 4th 131 (2003), which said an employer is not liable for the harassing acts of a customer. The California Supreme Court has granted review of *Salazar*.

5. *GENDER IDENTITY IS NOW SEXUAL DISCRIMINATION (AB 196)*:

This bill has expanded the prohibition on sexual discrimination and harassment by including gender in the Code's definition of "sex" for discrimination purposes. Essentially, it will prohibit discrimination based on gender identity. Employers would only be able to require employees to comply with reasonable workplace appearance, grooming and dress standards consistent with state and federal law, if the employees are allowed to appear or dress consistently with their gender identity.

6. *GREATER EXPOSURE FOR ATTORNEYS FEES IN WAGE DISPUTES (AB 223)*:

This new law will require employers to pay for an employee's attorney's fees when a court finds for the employee, even if the court recovery is less than the DLSE (Labor Commissioner) award. Notably, this bill overturns the California Supreme Court's decision in *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345 (2002).

7. *INCREASED LABOR CODE FINES (AB 276)*:

This new law Increases fines of 158 different Labor Code misdemeanor violations 500 percent. The maximum amount of the fine for Labor Code violations would increase to $500, and the penalty for the first violation would go up to $100 (from $50), with penalties for subsequent or willful or intentional violations increasing to $200.

8. *PRIVATE ENFORCEMENT OF LABOR CODE VIOLATIONS (SB 796)*:

The new law is called the "Labor Code Private Attorney General Act of 2004," giving workers the ability to bring private rights of action to enforce the wage and hour laws and obtain civil fines and penalties. The Act also establishes new sets of civil fines and penalties for wage and hour law violations. In particular, it allows employees who successfully bring wage and hour violation actions to keep 25% of the civil penalty recovered. In addition, the bill requires that the employer pay the employee's attorneys' fees and costs. Interestingly, the bill does not mention whether a prevailing employer can recover attorneys' fees and costs.

9. *REPORTING IDENTITY THEFT (AB 1386)*:
Became law on 7/1/03 - see Cal. Civ. Code §§ 1798.29, 1798.82):

This became law on July 1, 2003 and is codified in California Civil Code Sections 1798.29 and 1798.82. This bill requires any employer that stores computerized personal information (such as Social Security numbers, account and credit card numbers, drivers licenses, etc.) to immediately provide notice if the security of that information is breached or compromised in any way. For example, if a virus or hacker gets into the computer system the employer uses to store the information or if the employer knows that an employee has taken any of the information. To comply, employers must notify in writing all affected persons in the most "expedient" time-frame possible and "without unreasonable delay." There is an exception for encrypted data.

10. HEALTH CARE (SB 2):

This law becomes effective January 1, 2006 and is similar to the way workers' compensation bills are being handled, several health care bills were recently sent to a Conference Committee. These bills include SB 2, by Senator Burton, which requires employers to provide health care coverage to employees and dependents or pay a user fee to the State to provide such coverage. SB 921 by Senator Kuehl, would implement a State-provided health care system. AB 1527, Frommer, proposed a "pay or play" system like SB 2, and AB 1528, Cohn, calls for employer-provided health care coverage.

THE ONGOING CRISES IN EMPLOYMENT PRACTICES LIABILITY INSURANCE

For many months, our office has been informing our client and friends as to the important role that employment practices liability insurance plays your place of business. Increasingly, there are fewer carriers and higher deductibles. It is no longer unusual to have an insurance policy with a $100,000 deductible. Regretfully, there is also a increase in the number of claims denied by carriers because of the company's failure to disclose actual or potential claims in the application for a new policy or the renewal of an existing policy. Beware if your policy has an "awareness" clause that requires your company to inform the carrier of "circumstances may reasonable give rise to a claim". If you are not careful, you may find that you have no coverage.

We strongly recommend the following:

1. Make certain that you have an insurance broker that understands employment practices liability insurance. There are good insurance carriers and insurance carriers that are more difficult to work with and are more likely to create coverage issues. Who you chose as a carrier will make a difference in the event of a claim or a coverage dispute.

2. Review the policy for coverage or have our office review the policy for coverage. There are many things excluded.

3. When completing the application or the renewal application, you may wish to consult with legal counsel as to how to answer the difficult question "Are you aware of fact, circumstance, or situation that might result in future claims?" If you fail to disclose an employment situation involving a problematic employee, you might find yourself without coverage.

4. When you purchase a policy, make certain that your policy allows you to pick your employment law attorneys who will look out for your best interests.

5. If you receive a threat of litigation, demand letter from an attorney or a civil action, contact our office immediately. Do not submit the claim to the carrier without our advice on how to best proceed with the matter. Remember that you may have a right to designate our firm as counsel (at the expense of the insurance carrier) in the event there is a conflict of interest with the insurance carrier resulting from a coverage dispute.

SECTION II.

This section provided as a courtesy of:

The Law Offices of Tasoff & Tasoff
16255 Ventura Boulevard
Suite 1000
Encino, California 91436-2302
Phone: (818) 788-8900 Fax: (818) 788-5900
Web page: *www.tasoff.com* email: mail@tasoff.com

CLIENT NEWSLETTER

As we enjoy the extended summer in California, much is happening in the world of immigration law in Washington D.C. In Congress there are several bills that will make it harder for an American employer to obtain visas for foreign workers—even foreign workers that are executives of the American employer's foreign parent corporation!

USA JOBS PROTECTION ACT OF 2003 INTRODUCED IN HOUSE AND SENATE

On July 24 Representative Nancy Johnson (D-CT) and Senator Chris Dodd (D-CT) introduced parallel bills, H.R. 2849 and S. 1452 respectively, which would substantially alter the L-1 visa and H-1B visa programs. The visa allows multi-national companies to bring managers, executives (L-1A) and employees with "special knowledge" (L-1B) to the U.S. to work at a subsidiary or affiliated company. The petitioning company does not have to establish that the employee will be paid the prevailing wage in the industry, nor does that company have to show that there are qualified U.S. workers that could be recruited.

The H-1 visa allows an employer to bring over foreign workers with college degrees or equivalent experience to perform "professional level" work, (ex.: engineers, programmers, teachers, scientists, accountants, etc.) The petitioning company must establish that the foreign worker will be paid the prevailing wage for the position, and employing the foreign worker will not adversely impact U.S. workers. There is no requirement that the company recruit qualified U.S. workers. There are additional, burdensome requirements for companies that have been found to violate the rules previously or who have large percentages of H-1 workers already on their payroll.

Specifically, the bills would make the following changes to the visa programs:

L visa program:

- Require employers to file an attestation with the Department of Labor (DOL) stating the following:
    - The L-1 employee will not perform duties at the worksite of another employer where there are indicia of an employment relationship.

  - The L-1 employer will provide wages that are the greater of the actual wage or the prevailing wage.
  - The employer did not displace US workers for 180 before or after the filing of the L-1 petition.

- Provide for an annual review of blanket petition procedures by Department of Homeland Security (DHS) and DOL.
- Increase the work experience requirement with the foreign employer from one year to two years.
- Limit the duration of the L-1A visa to 5 years and the L-1B visa to three years.
- For L-1B petitions, require the employer to file an application stating that the employer has taken good faith steps to recruit US workers for the position.
- Direct the DOL to impose a fee on employers for L-1 petitions.

H visa program:

- Strike the definition of H-1B dependent employer and makes H-1B dependent provisions applicable to all H-1B employers. (Bad news.)
- Add the H-1B dependent provisions to the DOL attestation requirements, including:
  - The employer did not displace an American worker 90 days before or after the filing of the visa petition.
  - The employer will not place the H-1B at a third party worksite where there are indicia of an employment relationship unless there is not displacement of a U.S. worker at the worksite for 180 days before and after the H-1B visa holder is placed at the third party worksite.
- Make the temporary $1,000 fee permanent (the total fee would be $1,130 for most applications with an additional $1,000 for premium processing of the application by the DHS.

Study of the Act:

- Mandate that no later than one year after the enactment of the Act, the GAO will investigate the Act's implementation and impact and will make recommendations on changes to existing law.

And this bill is only one of several that would place more restrictions on obtaining visas for professionals and multi-national transfers. Remember, were talking professionals and executives. One bill that was introduced would eliminate the H-1 visa entirely.

MORE BAD NEWS FOR H-1 VISAS—THE GOVERNMENT WILL SOON RUN OUT

Last fiscal year (October 1, 2002 to September 30, 2003) the number of H-1 visas that were available to professional foreign workers applying for the first time was 195,000. This year the number has been reduced by operation of law to 65,000. A small number of these visas are reserved for special classes of foreign workers. A large number of these visas will be issued to foreign workers whose petitions are already in line to be processed. Our estimation is that by February or March of 2004, there will be no more visas available for foreign workers applying for their first H-1 visa.

If your business has a foreign student working on "practical training" you may wish to quickly discuss with him or her, their desire to continue employment with your company in H-1 status. Petition's for foreign students that you wish to keep should be filed immediately. HR departments may also want to review their recruitment timetables.