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EMPLOYMENT AND LABOR LAW
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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 ARTICLES

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TABLE OF CONTENTS

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.

THE EMPLOYMENT PRACTICE LIABILITY INSURANCE CRISES

Fewer Carriers, Higher Deductibles and Increased Premiums

There are significant changes in Employment Practices Liability Insurance coverage. There are fewer carriers willing to offer coverage for wrongful termination, discrimination and related causes of action. Most carriers have increased the premiums and increased the deductible to $25,000.00, $50,000.00 and even $100,000.00.

You May Be Forced to Reimburse Attorneys' Fees and Costs

Many carriers now seek reimbursement from our clients for legal fees and expenses for non-covered causes of action such as intentional infliction of emotional distress, breach of contract and wage claims. Insurance carriers are relying on California case law that allows them to apportion their obligation for defense and indemnity.

You May Be Forced to Use the Attorneys Chosen by the Carrier

Insurance carriers have not done well in writing these type of policies. This is especially true in California where there is an avalanche of employment discrimination claims. Many carriers have reacted by settling the claims quickly because the settlement is less than the cost of defense. Attorneys representing employees could not be happier. Many times, counsel for the carrier has a conflict of interest in representing your company.

You May Have the Right to Independent Counsel Paid for by The Insurance Company

Pursuant to California law, if the insurance carrier issues a reservation of rights letter advising the company that not all damages or causes of action are covered by the policy, your company may have the right to have counsel of your choosing represent you. The insurance carrier may be responsible for your attorneys fees. Any time there is a reservation of rights, there is an inherent conflict of interest. Best procedure is for you to contact our firm immediately upon receipt of a civil action, charge of discrimination or demand letter.

Take Control: Choose Your Carrier Carefully and Insist on Your Right to Choose Counsel When You Buy or Renew the Policy

We think that it is essential that you carefully review with your broker information about the carrier you are selecting to provide this important coverage as well as the terms and conditions of such coverage. We think that choice of counsel is probably the most important single decision that you can make. If you want our firm to represent you in the event of employment litigation, you must make the request during the application process and have our firm pre-approved.

by Alfred J. Landegger

THE TREND IN INTELLECTUAL PROPERTY LAWSUITS CORPORATE GIANTS' CONSENT JUDGMENTS-SHAME ON THEM!

A review of the federal court docket leaves little doubt that an alarming and unfortunate litigation trend has arisen in the arena and sweep of intellectual property ("IP") lawsuits filed against the middle sized retailer to mom and pop sized stores. In particular, the giant computer and cigarette manufacturing companies ("Giants"), have broadened their litigious nets to encompass large scale sweeps against scores of small (and often unrepresented) retailers, alleging trademark infringement and the sale of counterfeit copies of their products. The damages and monetary relief they seek to extract are significant. If you have been served with such a lawsuit and, believing in your suppliers and the authenticity of their product are baffled, you are not alone.

To understand the trend, a snapshot of the corporate environment and litigation backdrop is helpful. Over the past decade, several well known corporate giants have been dealt a swift slap and hefty fines from States Attorneys General around the nation, including in California and New York. These antitrust suits have left a dent in the fiscal soundness of these Giants, as well as to their reputations. So, how do they gain back consumer confidence and market share? It appears that the market plan is to permit and/or turn a blind eye toward second tier vendors selling their products (or virtually indistinguishable look a likes), to retailers for direct sale to the public, at prices more affordable than directly through the Giant's direct distribution chain. The seller pays less in the second tier market for the product, hence, they can compete with larger retailers for the same product and consumers flock toward a relative bargain.

The Giants lay in wait a year or so, until consumers are once again gleefully purchasing their product. Then, the lawsuits begin, with the Giants alleging "counterfeit" claims and infringement violations of all sorts with a view toward forcing the small retailer to purchase directly from their line of authorized vendors, at a steep premium. In doing so, they demand that those sued reveal their supply sources *and* that they also sign, for filing in federal court, Consent Judgments and Permanent Injunctions--against themselves. By the wording of the Consent Judgments, the retailers not only expressly concede liability (guilt), they also grant the Giant the right to entry of Liquidated damages (sums to be paid without proof of actual damages) *and* Attorneys Fees and Costs against the store owner *and* its successors and assigns, should another "tainted" product be found in their store (or the party it is sold to). The Consent Judgment further grants Giant the unfettered right to inspect the store, without notice.

Unconscionable strong arming? It would seem so. No party represented by an adequate attorney would sign such a document. Although the Giant may disappear today if you sign and sing (about the second tier vendors), they will be back tomorrow. And the hurdles tomorrow may be the loss of the family business and/or bankruptcy. Further, sale of the business must necessarily disclose the terms to which the store is bound under the Consent decree. Thus, if the Giant finds another product they allege is counterfit in your store or your successor's store, they simply walk into court with the Consent Judgment and demand their Liquidated damages *i.e.,* your hard earned money. Depending on the amount of allegedly illicit product found, the damages range up to $100,000.00 *for each* recovery *plus* the Giant's attorneys fees and costs. Perhaps, this will be the phase two of the fiscal recoupment process to be brought by the Giants to cover the losses felt in the wake of the antitrust fall-out.

What confuses everyone is that the products look like and may indeed be the real thing. In fact, the complaints served in ALL of these cases allege that the counterfeit product is "either identical or virtually or substantially indistinguishable" from their product. In other words, the retailer and the public are unaware of any possible authenticity issues and even the experienced product vendor cannot differentiate between the products. There are no allegations that the retailers themselves manufactured counterfeit product.

Although trademark infringement is a strict liability offense (if the product is *proven* counterfeit, liability is presumed), the good news is that an "innocent infringer" defense may be available to shield the retailer from paying any monetary damages to Giant, as long as they cease selling the product *proven* to be infringing, which may entail just not buying from a particular source *proven* to have sold the retailer the counterfeit product. Under the Lanham Act, a successful plaintiff in a trademark infringement case is entitled to up to three times (treble damages): 1) defendant (retailer's) profits, 2) any damages sustained by plaintiff, and 3) costs of the action, "*subject to the principles of equity...*" 15 U.S.C. § 1117(a)(b) [*emphasis added*]. Thus, if the defendant retailer qualifies as an innocent infringer, the Court may refrain from awarding any monetary damages. Horwitz § 91.02[1] at 91-8 - 91-10. The Ninth Circuit (our judicial Circuit) has held that a damage "award under § 1117(b) is never automatic and may be limited by equitable considerations" or, simply put, principles of fairness. *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F. 2d 1400, 1409 (9th Cir. 1993). In *Lindy* the Court affirmed a judgment *refusing to award any damages* because the infringement was not intentional.

In light of the foregoing, if a Giant comes knocking at your door alleging infringement and demanding liquidated damages and unannounced inspections, think twice before signing over the family store and its future control. The retailer should at minimum, determine if the product appears genuine and whether or not they can confirm or deny its counterfeit nature. If the product seems authentic, the store owner should consider fending off the IP suit by successful assertion of the innocent infringer defense, with a request that the Court direct the Giant to pay their attorneys fees and costs for doing so and perhaps file a countersuit against the Giant for implied license or permission to sell through the Second Tier market by virtue of Giant's implied consent, custom and industry practice.

by Elizabeth G. Ellis

CONTINUATION OF HEALTH CARE COVERAGE UP TO 36 MONTHS

Under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), employers are required to offer an extension of group health benefits to employees and their dependents who lose coverage under their health plan as a result of certain qualifying events. If an employee loses coverage as a result of termination of employment or reduction of hours, the COBRA payment is 18 months.

Effective September 1, 2003, a new California insurance law known as "Cal-COBRA" requires employers to offer certain California employees and their covered dependents an opportunity to continue their coverage in the group health plan for an additional 18 months, for a total of 36 months. The new California law (Assembly Bill 1401) requires that employers, who maintain insured health plans (including HMOs), offer to employees who exhaust COBRA coverage prior to completion of 36 months, the opportunity to extend their coverage period up to a total of 36 months. It is noteworthy that this extension does not apply to those who lose their COBRA continuation for reasons other than the exhaustion of the COBRA period, such as failure to pay premiums or obtaining coverage under another group health plan.

Although this new law becomes effective September 1, 2003, it applies to individuals (employees and their covered spouses and dependents) who begin receiving COBRA coverage on or after January 1, 2003. Practically, employers will not need to provide the California COBRA extension until at least July 2004, assuming that the 18-month COBRA period started January 1, 2003.

Employers should consider the effect of this new law on their existing COBRA procedures. Affected employers should revise their written COBRA procedures, COBRA notices (including notices distributed at the onset and termination of COBRA coverage), and plan documents to reflect the new California requirements.

by Rebecca L. Gombos

TRAVEL TIME UNDER CALIFORNIA LAW

Under California law, as described in all of the industrial occupational orders adopted by the California Industrial Welfare Commission (IWC), "hours worked" means the time during which an employee is "subject to the control" of an employer. Thus, under California law it is only necessary that the employee be subject to the control of the employer in order to be entitled to compensation. Both the California Supreme Court and the Division of Labor Standards Enforcement (DSLE) have applied this definition in analyzing whether or not an employee should be compensated for his travel time. The DSLE interpretations can be summarized as follows:

Ordinary Commute Time:

Generally, travel time to and from an assigned work place or the employer's business premises does not constitute "hours worked." This is true whether the employee resides a short distance or far away from the assigned work place, since the employee has control over his ordinary commute time.

Travel in a Day's Work:

California law requires that employers pay their employees wages for all hours an employee is engaged in travel, other than ordinary commute time. If an employee is required to report to a regular assigned work place but he/she is then required to travel during the workday, such as travel from one job site to another, then that travel time must be counted as hours worked. If an employee must report to work to a distant work place, he must be compensated for the difference between the time it normally takes the employee to travel from his home to his normally assigned work place, and the time it takes the employee to travel from his home to the distant work site. It should be noted that this calculation is expressed in "time" and not distance. This is because traffic patterns vary from location to location and travel times for the same distance would likewise vary.

Travel Out of Town:

If an employer requires an employee to attend an out-of-town business meeting, training session, or any other event, all the time the employee spends traveling constitutes "hours worked" and must be compensated. The DLSE has determined that any time spent traveling out-of-town when attendance is "compelled" must be compensated, because the employee is subject to the control of the employer. This includes the time spent driving, or as a passenger on an airplane, train, car, or other mode of transportation, and time spent waiting to purchase a ticket, check baggage, or to get on board. On the other hand, time spent taking a break from travel in order to eat a meal, sleep, or engage in strictly personal pursuits not connected with traveling or making necessary travel connections(e.g., such as visiting a museum) is not compensable. In addition, an employee's hours worked do not have to include the equivalent time that would normally be spent traveling from the employee's residence to his regular place of employment.

Significantly, non-exempt employees must be paid for any travel time that occurs during overtime hours. Thus, hours worked in excess of 8 in one day or 40 in a week must be compensated at the applicable overtime rate. However, an employer may establish a lower rate of pay for travel time for

hourly employees provided that the rate of pay is at least minimum wage. This lower travel rate must also be established by the employer before the travel occurs, preferably in writing. It appears that the lower rate of pay for travel time does not apply to salaried, non-exempt employees. Thus, employers that employ salaried, non-exempt employees who travel out of town should consider converting these employees from a salary to an hourly basis for compensation purposes.

by Roxana E. Verano

LEGAL ISSUES FOR EMPLOYERS RAISED BY THE SARS HEALTH CRISIS

The world recently faced an international health crisis because of Severe Acute Respiratory Syndrome ("SARS"). Although the threat of SARS appears to have diminished dramatically, a variety of legal issues remain to challenge employers. In a world where jet travel allows communicable diseases to leap continents with terrifying speed, it is highly likely that the SARS situation may not be a unique one. An employer's actions and policies in the face of such a crisis implicate many legal issues, including potential claims of discrimination (disability or national origin/race), concerns about confidentiality and privacy, leave rights, and wage-and-hour obligations.

Disability Discrimination:

The federal American with Disabilities Act ("ADA")[1] and the California Fair Employment and Housing Act ("FEHA")[2] prohibit discrimination against employees with actual or perceived physical or mental disabilities. Employees infected, or suspected of having been infected with SARS, may qualify for protection under these disability discrimination laws.

How do you know if an employee poses a health risk? Both the ADA and FEHA prohibit employers from requiring medical examinations of employees, unless such examinations are shown to be "job-related" and "consistent with business necessity."[3] Courts and regulations interpreting ADA and FEHA have held that protecting the health and safety of employees, or shielding them from significant risks of communicating infectious diseases, may constitute a defense against alleged violation of these laws.[4] Arguably, the risk of SARS contagion endangers the health and safety of employees, and identification of infected employees may constitute a "business necessity." However, courts have held that mere fear and unsubstantiated suspicion of infectious disease will not suffice as a defense to a claim of ADA and FEHA violations.[5]

Even without conclusive proof that an employee is infected with SARS, the prohibitions against discriminating against employees "regarded as disabled" applies to employees who have been exposed to SARS or have traveled to SARS-affected countries. Employers are not required to allow contagious employees to continue working, unless the employee is otherwise fit for duty and a reasonable accommodation such as telecommuting is available. However, an employer may neither fire an employee because of their illness, nor discriminate against an employee who has recovered from SARS.

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[1] 42 U.S.C. §12101 et seq.

[2] Gov't Code §12940 et seq.

[3] 42 U.S.C. §12112(d)(4)(A); Gov't Code §12940(f)(1)&(2).

[4] See, e.g., Yin v. State of California (9th Cir. 1996) 95 F.3d 864; 2 Cal. Code Reg §7294.0(b)(3).

[5] See, e.g., Raytheon v. Fair Employment and Housing Commission (1989) 212 Cal.App.3d 1242.

Accordingly, an employer must allow a noncontagious employee who has recovered from SARS to return to work and cannot treat that employee differently from any other employee once he or she returns.

National Origin/Race Discrimination:

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex or national origin. Under Title VII, requiring an employee or a prospective employee to take or pass a physical examination may constitute an unlawful practice, unless it can be shown that physical requirements are job related.[6] Potential Title VII claims may arise if mandatory physical examinations discriminate against certain classes of persons because they disclose physical infirmities more prevalent in one race than another, or because they affect only those employees of a certain race, national origin, or sex.[7] For example, if employees of Asian descent travel to countries affected by the SARS disease more frequently, or live in predominately Asian neighborhoods, subjecting them to physical examinations could expose an employer to Title VII liability in the absence of the kind of business necessity discussed above. Therefore, employers should consider testing an employee only when there is an objective reason to believe that his or her presence in the workplace may cause a health hazard for others.

Confidentiality and Privacy Concerns:

The California Medical Information Act ("CMIA") provides statutory protection for confidentiality of medical information of all persons and restricts the dissemination and use of such information.[8] The Act covers all medical information, which is defined as "any individually identifiable information, . . . in possession of or derived from a provider of health care, . . . regarding a patient's medical history, mental or physical condition, or treatment."[9] Compensatory and punitive damages (up to $3,000) and attorneys' fees (up to $1,000) may be awarded for unauthorized disclosure or use of information obtained about the employee's medical history or mental or physical condition.[10]

Under the CMIA, employers are required to establish "appropriate procedures" for guaranteeing the confidentiality of any information obtained about the employee's medical history or mental or physical condition.[11] At a minimum, medical information protected under the CMIA must not be kept in employees' personnel files.

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[6] 42 U.S.C. §2000e-2.

[7] See Norman-Bloodsaw v. Lawrence Berkeley Lab (9th Cir. 1998) 135 F.3d 1260, 1273-1274 [plaintiff's allegation that blacks and women were singled out for additional nonconsensual testing was clearly actionable under Title VII].

[8] Civil Code §56 et seq.

[9] Civil Code §56.05(f).

[10] Civil Code §56.35.

[11] Civil Code §56.20(a).

Additionally, employers are required to obtain specific authorization from employees in order to obtain and/or use medical information. If an employee refuses to execute such authorization, the CMIA prohibits employers from discriminating against the employee in terms or conditions of employment on the basis of that refusal.[12]

In addition to employment discrimination and confidentiality laws, employers should be aware of employees' privacy rights against mandatory examinations or inquiries about their physical or mental condition. In California, for example, individuals have a constitutional right to privacy against intrusions by both state and private actors.[13] This is another reason employers should require medical tests only where there is a demonstrable business necessity for them.

Family and Medical Leave Act Rights:

The Family and Medical Leave Act ("FMLA") and comparable state laws (e.g. California's Family Rights Act) require employers of more than 50 employees to provide their employees with 12 weeks of unpaid leave per year for their own serious health condition or the serious health condition of a close relative.[14]

To be eligible for the protected leave, an employee must have been employed for at least 12 months, have worked at least 1,250 hours in the prior 12 months and work at a work site that is within a 75-mile radius of 50 employees.[15]

SARS most likely qualifies as a serious health condition. Consequently, employers must allow eligible employees to take unpaid leave if they are suffering from SARS or caring for close relatives (a child, spouse or parent) with SARS.

In addition, California employers who provide paid sick leave to their employees generally are required to allow their employees to use half of that paid leave to care for a sick child, spouse, parent, domestic partner or child of a domestic partner.[16]

Wage and Hour Issues:

Some employers have directed employees returning from SARS-affected areas, such as China and Singapore, to stay at home for periods of time that they believe correspond to the incubation period for SARS (typically 10 days).

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[12] Civil Code §56.20(b).

[13] See, e.g., Loder v. City of Glendale (1997) 14 Cal.4th 846, 896; Pettus v. Cole (1996) 49 Cal.4th 402, 446.

[14] 29 U.S.C. §2601 et seq.; Gov't Code §12945.2.

[15] 29 U.S.C. §2611(2).

[16] Labor Code §233.

As stated above, employees who are "regarded as" potentially SARS-infected are arguably protected by the ADA and FEHA. Consequently, such quarantines present potential disability discrimination issues.

Employers should also be aware of wage-and-hour issues presented by such quarantine. If nonexempt employees, for example, are quarantined while traveling on business (so that arguably, they are on duty for the duration of the quarantine), then they must be paid for much of the time spent in quarantine, including overtime.[17] Exempt employees who are otherwise ready and able to work arguably must be paid their normal salary while in quarantine, regardless of whether they are at home or traveling.[18]

Conclusion:

Whether it is the SARS crisis, or the next international communicable disease, employers should remember that although these situations are frightening, they are manageable on legal terms. Employers will benefit both their employees and their own business interests by proactively creating a thoughtful policy that anticipates and manages the issues raised above.

by Laura S. Withrow

[17] 20 C.F.R. §778.223.

[18] 20 C.F.R. §541.118(a)(1).

WORKERS' COMPENSATION REVISIONS

On July 8, 2003, Senator Richard Alarcon (D-Van Nuys), chairman of the Senate Labor and Industrial Relations Committee, announced that California lawmakers will convene a two-house committee to draft legislation to respond to the skyrocketing workers' compensation insurance costs. The recent increases in workers' compensation premiums have been blamed on, among other things, lack of adequate medical fee schedules, worker and employer fraud, an increase in patient visits to health care providers, and efforts by insurers to make up for income lost in price wars and in a slumping investment market.

Senator Alarcon stated that 20 bills dealing with various aspects of the workers' compensation problem will be sent to a conference committee. He characterized the move as a way to protect the bills against opposition by "special-interest groups" and allow lawmakers to look at the full scope of the problem.

"We must take the appropriate steps to ensure that we can respond to this crisis with strong legislation," he said. "This method will ensure that all ideas are heard and that the best possible solutions are found."

Alarcon said that the committee will begin meeting within two weeks, and is expected to pare the 20 bills down to 5 or 10 measures and give everyone involved a stake in the outcome.

We will keep you posted on any legislation to come out of the committee's efforts.

by Laura S. Withrow

MISUSE OF FAMILY LEAVE MAY JUSTIFY TERMINATION

Administering a company's medical leave of absence's obligations is a daunting task. For those companies with more than 50 employees, leaves of absences are regulated by federal and state law such as the Family and Medical Leave Act of 1991 (FMLA) and California Family Rights Act (CFRA). Depending on the employee's need for leave, the American with Disabilities Act (ADA) and Workers' Compensation laws may also inject additional requirements. For these reasons, employers are faced with difficult situations in providing the proper notice to employees, as well as determining which law may apply, if at all.

To compound the issue of proper administration, we have seen an increase in claims made by employees under one (or more) of these laws when the company fails to dot an "i" or cross a "t". In addition, some labor organizations encourage an employee's use of FMLA/CFRA leave as much as possible to the extent that it may be considered abuse. There are even publications available that identify how employees could manipulate medical leave laws to their benefit with specious or unclear claims that require "intermittent" leaves.

Although a recent case does not make the administration task easier for the human resource professional, it does articulate a good faith defense if an employer takes action against the employee if the employer believes that the employee is misusing family leave. On June 10, 2003, the California Court of Appeal issued its decision in McDaneld v. Eastern Municipal Water District Board. In this case, Ronald McDaneld (yes, his actual name) requested and was granted a leave of absence to care for his father during and after ankle surgery from January 23 to January 30. His employer monitored McDaneld during his leave and determined that McDaneld had ceased caring for his father on Thursday, January 29. It was also determined that during the week, McDaneld also played golf on one day and worked intermittently on his sprinkler system between Wednesday and Friday. McDaneld claimed that on Friday (the last day of his leave) he had to care for his pregnant wife who had hurt her back. McDaneld was terminated by his employer for failing to report to work after the need for leave ended, thus misusing his medical leave rights. He brought an action against his employer alleging that he was retaliated against for exercising his rights for family and medical leave as provided by state and federal law.

In his defense, McDaneld argued that he was not advised by his employer that he should have returned to work after he stopped caring for his father. Further, he believed that there was still a need for leave due to his wife's health condition.

The court accepted as fact that McDaneld had played golf, worked on his sprinklers and was not entirely truthful about his wife's injury. Thus, the critical issue on review was whether the employer maintained a good faith, reasonable belief that McDaneld had abused his leave. The Court held that an honest mistake may excuse a trivial misuse of family leave. But, even if McDaneld was mistaken about when he should return to work, the employer's justifiable conclusion that he had misused leave in other ways and was untruthful allowed the employer to terminate him.

Although this case is relatively new, and perhaps subject to further review by the California Supreme Court, it may play, at least a temporary, lesson to employers. When granting leave to an employee, the employer may want to include language to the extent that the employee should return to work if the need for leave is no longer present. Further, if there is a strong suspicion of abuse of leave, the employer may wish to investigate further. However, employers are strongly cautioned to consult legal counsel prior to conducting a surreptitious investigation of an employee or making an employment determination with any incident surrounding use of state or federal leave and/or disability laws.

by Michael S. Lavenant