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New Laws Burden Business With Unprecedented Costs

by J. Kevin Lilly

Amid the chaos of the state recall election, Californians might be forgiven for not noticing a bevy of new employment bills working their way towards Governor Gray Davis' desk.

In the closing days of his administration, at least 10 new employment statutes came into effect. Some contain unprecedented expansion of the rights of employees and the tools used by lawyers who represent employees in court. These laws will radically affect the California workplace for years to come.

Perhaps reflecting the state's budget crises, some of these new laws appear to be efforts to shift expensive social costs from government to private employers. Most striking of these is SB2, the Health Insurance Act of 2003.

This new law will require large and medium sized employers to provide health care coverage to their employees and their families and domestic partners. It creates a new state program, called the State Health Purchasing Program, run by the Managed Risk Medical Insurance Board.

The statute requires that all employers with more than 20 employees provide health insurance to their employees. Employers must pay for at least 80 percent of the cost of the coverage. Businesses employing between 20 and 39 employees would be affected only if the Legislature adopts tax credits to offset the program's cost.

Employers who fail to provide the required coverage may be penalized up to 200 percent of the cost of the coverage. The law is scheduled to take effect on Jan. 1, 2004, with its compliance provisions phased in over the following two years.

A less-publicized, but equally dramatic new statute is the Private Attorney's General Act of 2004 (SB796).

Finding that "adequate financing" is necessary to "achieve maximum compliance" with state labor laws, the Legislature has authorized private "bounty hunter" type lawsuits to collect penalties for alleged violations of almost every provision of the California Labor Code. It imposes new penalties of up to $200 "per aggrieved employee."

This potentially annihilating penalty looms over employers already staggering in the face of the current employment-class-action deluge. Half of the penalties collected would be paid to California's general fund, with 25 percent each to a state training fund and the remaining 25 percent to "aggrieved employees."

In a provision that has been welcomed by the employee class action lawyers, SB796 provides for recovery of penalties both individually and "in a civil action filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed."

This procedure presents troubling issues of due process and fairness. Courts have debated whether class action litigation can or should be used to collect massive penalties in the absence of significant actual damages. This new statute would appear to legitimize and encourage this kind of litigation. It is sure to be tested.

The Legislature also addressed the current workers' compensation crisis with SB228. The law includes several measures designed to reduced fraud and waste and to control the spiraling costs of the sys-

tem. It mandates utilization guidelines and studies to evaluate potential future savings.

Because incoming governor Arnold Schwarzenegger has made reform of the workers compensation system a key priority, we can expect to see further bills in this area in the future.

Davis also signed new laws strengthening protections against discrimination and harassment. AB76 was designed to overrule *Salazar v. Diversified Paratransit*, 103 Cal. App.4th 131 (2002), which is now before the California Supreme Court. *Salazar* held that employers were not liable under the California Fair Employment & Housing Act for sexual harassment of employees by non-employees. Employers now will be liable for such harassment if they "know of the incident and fail to take corrective action."

Also, in an effort to outlaw "sexual stereotypes," the Legislature has amended the Fair Employment & Housing Act in AB196 to prohibit discrimination against transgendered employees. California also has outlawed discrimination "in any manner" against employees who take time off work because they are the victim of a crime (SB478).

Finally, the governor acted on three bills that make it easier for state employees to sue or maintain suits against their employers. In AB274, which would have amended the Labor Code to shift the burden of proof in a retaliation case. Under the bill, employees who suffer an adverse employment action within 60 days of "exercising his or her employment rights" under the Labor Code would have benefited from a presumption in litigation that the employer's action was retaliatory.

However, the Legislature has helped employees who litigate wage claims to collect attorney fees. Formerly, an employee appealing a decision by the Labor Commissioner over wages owing could recover his attorney's fees only if he achieved a better result in court than he had achieved before the Labor Commissioner.

Under a new amendment to the Labor Code found in AB223, employees who receive any judgment in their favor will also be entitled to fees, even if a court reduces the Labor Commissioner's award.

The only significant veto was Davis' veto of AB 1715. Like earlier bills he'd vetoed, this bill would have outlawed mandatory arbitration of many employment disputes.

No sooner had the ink dried on the governor's signatures on these new laws than a countermovement to unravel them had begun. Only three days after Davis' signed SB2, the California Chamber of Commerce filed a referendum with the state attorney general to allow California's voters to repeal the law requiring employee health coverage. Legal challenges to these new laws are also being discussed.

Incoming governor Schwarzenegger made reduction of regulation for California Business a central part of his candidacy. It is not yet clear how and if the new governor will support efforts to roll back these latest changes in state employment law.

What is certain is that Schwarzenegger's predecessor left him with a new, and sometimes radically different, balance of the rights between employees and the companies who hire them.