

# Employment | Bulletin

## NEW LEGISLATIVE DEVELOPMENTS IN EMPLOYMENT LAW

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### CALIFORNIA - FIRST STATE TO LIMIT DISCLOSURE OF AN INDIVIDUAL'S SOCIAL SECURITY NUMBER

Effective, July 1, 2002, California became the first state to limit the disclosure of an individual's Social Security number ("SSN") by enacting Civil Code § 1798.85. Its intent is to stop identity theft and restrain consumer credit reporting agencies that are accessing personal information through SSNs.

The new law prohibits: (a) the public posting or displaying of an individual's SSN; (b) the printing of an individual's SSN on any card required for the individual to access products or services (i.e., insurance cards, employee badges, etc.); (c) transmission over the internet unless the SSN is encrypted; (d) requiring an individual to use his/her SSN to access an internet website unless in conjunction with a password; and (e) printing an individual's SSN on any materials that are mailed to the individual, unless required by state or federal law.

Although the new law does not prevent the collection, use or release of an SSN if required by state or federal law, nor the use of an SSN for internal verification or administrative purposes, the new law will have the greatest impact on employers since many several prior common uses of SSNs by employers are now prohibited such as using SSN on employee ID cards, health benefit information, 401k (quarterly) benefit statements, medical benefit explanations, and employee rosters.

It is suggested that employers make themselves familiar with the new law and consider creating a personal identifier with respect to their employees to substitute for the SSN.

### CALIFORNIA - FIRST STATE TO PROVIDE FOR PAID FAMILY LEAVE LAW

On September 23, 2002, California also became the first state to provide for paid family leave for employees when it enacted SB 1661. SB 1661 provides up to six weeks of paid family leave annually in the form of family temporary disability insurance.

As a practical matter, employers should think of SB 1661 as a separate leave running concurrently with state and federal family leave laws (which provide for unpaid leave) and in addition to any sick and vacation leave provided.

SB 1661 will be funded through mandatory employee contributions conservatively estimated at \$27.00 (.08 percent of wages) per year for the average worker. Employee contributions begin January 1, 2004, and benefits will be paid starting July 1, 2004. SB 1661 replaces 55% of an employee's wages up to a maximum of \$728 per week in 2004.

SB 1661 applies to every employer covered by state disability insurance and eligibility is based on the employee's past contributions to the disability insurance fund.

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Compliance with the new law will be complicated by its ambiguities and will create compliance challenges and potential for misuse in the employment arena since it raises more questions than it answers.

Employers need to become familiar with SB 1661 to ensure proper implementation and compliance.

## **“CLEAN UP” TO THE CONSUMER CREDIT REPORTING AGENCIES ACT**

Before September 28, 2002, California law required employers that check employment references in-house to disclose to the person whose background was checked the source and content of all information gathered, good or bad, whether that person was hired or not, and imposed stiff penalties for failing to do so. AB1068, effective September 28, 2002 which amended Civil Code § 1786.53, now limits the scope of disclosure to matters of “public record” which are defined to only include records documenting an arrest, indictment, conviction, civil action, judicial lien, or outstanding judgment. Thus, employers no longer are required to disclose any “nonpublic” information received by them when conducting reference checks.

Additionally, AB 1068 also amended Civil Code § 1786.16 which changes an employer’s delivery and timing requirements regarding a consumer credit report.

## **PRIVILEGED COMMUNICATIONS - REFERENCE CHECKS**

Also on September 28, 2002, AB 2868 became effective to “clarify” existing law on reference checks. AB 2868 provided that “existing law” [Civil Code § 47] makes privileged, and therefore protected from the threat of civil action, certain publications and communications including those communications regarding job performance and qualifications, as specified.”

AB 2868 amended Civil Code § 47 to add the following language:

“This subdivision authorizes a current or former employer, or the employer’s agent, to answer whether or not the employer would rehire a current or former employee.”

Taking into consideration all the competing factors in deciding what information to disclose in response to a reference check, this clarification and amendment may or may not/should or should not have any impact on your present policy or ability to obtain information regarding prospective employees.

## **AGE DISCRIMINATION AND EMPLOYEE BENEFITS**

On September 13, 2002, AB1599 went into effect, expanding the reach of California’s law prohibiting discrimination in employment to include discrimination based on age in terms of the decision of whether to grant or deny certain employee benefits or privileges.

AB1599 rejects the very recent California Supreme Court decision in *Esberg v. Union Oil Co.*, 28 Cal.4th 262 (2002) holding that California’s Fair Employment and Housing Act (“Act”) did not prohibit employers from considering one’s age with respect to this decision-making process.

Strictly construing the plain language of the Act, the *Esberg* court reasoned that, before AB1599, the Act simply did not prohibit employers from considering age in determining whether to furnish employee benefits to an employee, while it clearly did so with respect to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex and sexual orientation.

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AB1599 can be seen as closing a loophole overlooked by the original drafters of the Act, amending the statute to prohibit employers from considering age when determining whether to hire, discharge, suspend, demote, or furnish employee benefits or privileges such as educational assistance to covered employees.

## **UPDATE ON ARBITRATION AGREEMENTS**

Since our last employment advisory in October, 2002 regarding arbitration agreements, the Ninth Circuit, en banc, has decided to revisit its decision in *EEOC v. Luce Forward, etc.* Stay tuned.

## **CONCLUSION**

Employers should incorporate these recent changes in their employee handbooks, policies and procedures.

## **DISCLAIMER:**

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