RMKB EMPLOYMENT LAW ALERT

CALIFORNIA EMPLOYEES MAY SUE EMPLOYERS DIRECTLY FOR LABOR CODE VIOLATIONS

by Clint D. Robison and David A. Bernardoni

On October 12, 2003 California's Governor approved legislation which may eventually be looked upon as the most costly in recent memory for California employers. Known as the Labor Code Private Attorneys General Act of 2004, the law provides that an employee may file suit on behalf of himself or herself *or other current or former employees* directly against his or her employer for Labor Code violations. Such enforcement is currently within the sole purview of the State. The legislation was introduced as Senate Bill 796, which adds Sections 2698 and 2699 to the Labor Code, effective January 1, 2004.

Existing law provides that the Labor and Workforce Development Agency (LWDA) and its various departments and divisions may assess and collect penalties for Labor Code violations. Labor Code Section 2698 will augment that system by allowing a qualifying employee to file a suit directly against his employer on behalf of that employee and all present and former coworkers. No action will be allowed by the employee if a labor law enforcement agency cites the employer for the violation. Any business employing one or more employees will be subject to this law.

The financial impact of the legislation on employers will be dramatic. For example, an employee may sue to collect a $200 civil penalty, *multiplied* by the number of pay periods at issue (52), and *multiplied again* by the number of present and former employees (40). The result would be civil penalties of $416,000. *In addition*, the employee can recover attorneys fees and costs. The legislation has no provision for recovery of attorneys fees and costs in the event that an employer is determined to be the prevailing party. Furthermore, for any violation of the Code for which no civil penalty is presently established, the bill would establish a penalty.

Opponents of the bill have dubbed it 'Son of 17200', noting the operative similarities to California's much-maligned Unfair Competition Law codified in Business and Professions Code Section 17200. The law does not address the potential for cross-over between Section 17200 and the new Labor Code Section 2698. Under the new law, aggrieved employees receive only 25% of the recovery. 50% of the recovery would be applied to the General Fund and 25% to the LWDA. There are no requirements for exhaustion of administrative remedies prior to filing suit.

Proponents of the bill state that their intent is to create adequate financing of labor enforcement to achieve compliance with existing state laws. The resources dedicated to enforcement of labor law in California have not kept pace with the growth of the economy in California.

Once litigation ensues, there will be a number of issues. In order to file suit, one must fall within the statutory definition of an "aggrieved employee". The statute defines such an individual as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." There are no minimum service time requirements. The extent to which the aggrieved employee can file suit for present and past coworkers may present a more difficult issue. Parties will also wrestle with the question of the applicable statute of limitations, which would presumably be one year.

Employers must promptly engage in risk assessment to determine the extent of present Labor Code violations, if any, in order to stem the anticipated tide of litigation. However, this assessment should be carried out in a reasoned manner which is subject to appropriate protections. Regardless of one's perspective, it is certain that employers will face a barrage of suits for Labor Code violations in the near future.

Clint Robison is a partner in the Los Angeles office and a member of the Employment Law Department.
Clint can be reached at crobison@ropers.com or by phone at (213) 312-2024.