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ATTORNEYS AT LAW

**EMPLOYMENT LAW: CALIFORNIA LEGISLATURE
AMENDS DISCRIMINATION STATUTE
TO AVOID RESULT IN *ESBERG V. UNION OIL***

IMPORTANT UPDATE:

As predicted in the article below, the California Legislature acted swiftly to amend the state's discrimination law to avoid the result reached in the California Supreme Court's decision in *Esberg*. AB 1599, signed into law by Governor Davis on September 13, 2002, generally makes it an unlawful employment practice for an employer, based upon a person's age, to refuse to hire or employ the person, to refuse to select the person for a training program leading to employment, or to discriminate against the person in compensation or in the terms, conditions, or privileges of employment. There are limited exceptions, as is true of many laws.

We reprint the following article to assist our clients and other interested persons in understanding the *Esberg* ruling and the Legislature's reaction to it.

OUT WITH THE OLD, IN WITH THE YOUNG?

It seems appropriate that the California Supreme Court picked graduation season to announce that employers can lawfully discriminate under state law against older workers in providing job benefits. A whole new crop of tech savvy and well educated graduates is entering the workforce in competition with older workers who may lack some of that savvy and education yet often command higher pay due to their longevity. If employers can offer lesser benefits to their older workers, some would view such discrimination as the way to encourage the departure of older employees to make way for the new ones and improve the bottom line.

In *Esberg v. Union Oil Company of California*, decided June 24, 2002, the California Supreme Court rejected the claims of age discrimination by Dan Esberg, who sued after his employer rejected his request to pursue a master's degree through the company's educational assistance program. Three years earlier, Esberg had obtained his undergraduate degree under the same program. In response to his request to seek a master's degree, Esberg's immediate supervisor allegedly told him "You're too old to invest in."

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***Esberg*: Employer May Deny Education Benefit Based on Age**

While the court may not have agreed with *Esberg*'s supervisor, it did agree that the company had the right under California law to make such a determination. The California Fair Employment and Housing Act (the FEHA) prohibits an employer from discriminating, amongst other things, in the "terms, conditions, or privileges of employment" on the basis of an employee's race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation. Noticeably absent from the list is age.

On the other hand, FEHA does prohibit an employer from discriminating against workers over the age of 40 in hiring, termination, promotion or suspension. Noticeably absent from this list is the language regarding the "terms, conditions, or privileges of employment." Thus, under state law, employers are free to discriminate against older employees in awarding employee benefits. Although not specifically addressed by the court, the concept of benefits would likely extend to any employee benefit other than wages.

AB 1599 May Change *Esberg* Result

So what does this decision mean to employers? While employers might agree that they don't want to invest in a master's degree for a 56 year old employee, the effect of the court's ruling in *Esberg* could extend way beyond educational assistance programs. Under current state law, an employer could arguably refuse to provide health or life insurance to older employees due to the higher premiums; limit education assistance to those under 35; require older workers to work the night shifts; reduce sick and vacation pay for older workers, or eliminate stock options for older employees.

However, before employers run out and cancel the health insurance provided to their older employees, be aware that a bill has already been introduced (AB 1599) in Sacramento by Assemblywoman Gloria Negrete McLeod (D-Chino) that would make *all* discrimination based upon age of individuals 40 and over in employment unlawful. The bill has already passed the Assembly and is working its way through the Senate. A similar bill passed through the legislature in 1998 only to be vetoed upon landing on then Governor Pete Wilson's desk. At the time it was believed that older workers were already entitled to full protection under state law. In light of the California Supreme Court's recent ruling to the contrary, it is doubtful that Governor Davis would veto the current bill if presented to him.

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Moreover, until AB 1599 is enacted into law employees may still bring age-based discrimination claims under federal law. The Age Discrimination in Employment Act of 1967 prohibits the very same conduct that was ruled permissible in *Esberg*. The reality, however, is that Federal Court is generally a much less favorable forum for employees asserting such claims. The Federal Court in Los Angeles is not as convenient for residents of the Central Coast. Also, there are ceilings on monetary damages and a unanimous jury verdict requirement (California only requires 9 out of 12 jurors to find liability in a civil action).

Until the Legislature Acts

While the *Esberg* case may encourage some employers to treat older workers less favorably in regard to the “terms, conditions or privileges of employment”, the safer course will be to avoid discriminating based on age in awarding benefits to employees. If AB1599 becomes law, which is likely, California employers won’t have a choice.

[Ed. Note: As explained above, AB 1599 has been signed into law, abrogating the *Esberg* decision.]

Please contact Mr. Douglas B. Large if you have questions related to this article.

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