

# Business Brief

## Business and Client Advisory



### **NEW LEGISLATION REGARDING SEXUAL HARRASSMENT FOR ALL EMPLOYERS WITH 50 OR MORE EMPLOYEES**

Pursuant to Government Code 12950.1, employers with fifty (50) or more employees must provide, by January 1, 2006, at least two (2) hours of classroom or other interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005. After that date, all new supervisory employees must receive training within six (6) months of assuming supervisory positions.

If you have provided this training and education to your supervisory employees after January 1, 2003, you are not required to provide the training again by the January 1, 2006 deadline. However, all supervisory employees must receive such training once every two (2) years.

The training for this legislation must include:

- Information and practical guidance regarding federal and state statutory provisions concerning the prohibition against, and the prevention and correction of, sexual harassment;
- The remedies available to victims of sexual harassment in employment; and
- Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

Such training must be presented by trainers and educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. Vogt & Resnick can help. If you would like information about Vogt & Resnick's sexual harassment prevention training for employees, please contact this office.

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### **ALTERNATIVE WORK WEEKS**

Under California's Wage & Hour laws, employers are required to pay employees time and a half for hours worked in excess of 8 hours a day and 40 hours a week. Even if an employee works less than 8 hours on one day, and then makes up the missing hours the next day, overtime premium is still required for all time worked in excess of 8 hours on the second day.

An exception to this rule is the "alternative work week." A 10 hour per day, 4 day per week alternative work-week (or 12 hour per day, 3 day per week, available only to health care providers) is permitted if approved by a secret ballot election requiring the approval of two-thirds of the employees. Once there is such an election, the alternative work week may not be repealed within the following twelve months. After twelve months, on a petition of one-third of the affected employees, a new secret ballot election must be held, and a two-thirds vote of the affected employees then is required to reverse the alternative work-week schedule. The election to repeal the alternative workweek schedule must be held not more than 30 days after the petition is submitted to the employer.

"Alternative work week" election procedures are quite specific, and the burden is place on the employer to prove full compliance with the law. Accordingly, employers are advised to seek legal counsel to conduct both alternative work week elections, as well as elections to repeal the alternative work week. Vogt & Resnick, LLP has provided such services as part of the comprehensive advice and legal counsel we are able to provide to our many employer clients.

**INNOVATIVE INSURANCE SOLUTIONS**

In recent years, a number of our clients have complained about the increase in the cost of both general liability insurance premiums and workers' compensation insurance premiums. This is especially true for manufacturing and construction industry clients who have watched premiums increase year after year without any apparent relief. Although recent changes to the California workers' compensation law have eliminated some of the most abusive aspects of the system, the expected premium relief has not occurred. A significant factor is the reluctance of insurance companies to reduce premiums despite structural changes to the workers' compensation law. The insurance companies have used this opportunity to leave high premiums in place in order to increase profit. Ultimately, as more insurance carriers return to the California workers' compensation market, premiums will become more competitive. In the meantime, our clients report that the cost for these lines of insurance continues to increase at an unacceptable rate.

As a result of this continuing concern of our clients, Vogt & Resnick has increasingly become involved in helping our clients find innovative insurance solutions for both their general liability, workers' compensation and other insurance requirements. Where feasible, Vogt & Resnick has advised clients concerning the formation of safety groups with other businesses in their industry. The safety group allows the group to obtain purchasing leverage in two ways: (1) through the purchasing power of a larger group, and (2) the introduction of safety guidelines within the group which allows the safety group to obtain discounts from the insurance carrier. The process is more complex, but the general concept results in savings on policy premiums.

The firm also considers the possibility of having industry clients associate together for purposes of forming a risk retention group or risk purchasing group. Both risk retention groups and risk purchasing groups are entities created under federal law for the purposes of obtaining general liability insurance through risk retention or the purchase of general liability insurance as a group. Although there are several advantages to these entities because they were created under federal law, they are also limited to general liability insurance and cannot include workers' compensation coverage.

A recent trend has been for clients to obtain large deductible plans for general liability workers' compensation coverage. Typically, an insurance carrier is only willing to enter into a large deductible arrangement if the client is able to procure a suitable letter of credit as collateral for the large deductible plan. Insurance carriers generally require a letter of credit because the insurance is first dollar coverage and the insurance carrier looks to the client/insured for payment of the deductible. If the client/insured does not pay the deductible, then the insurance carrier is obligated on the claim. Vogt & Resnick has been involved in negotiations with insurance carriers and insurance brokers to obtain the best coverage at the lowest premium price with the lowest collateral requirements.

Finally, Vogt & Resnick has been involved in the alternative risk market for purposes of advising clients that have large premiums that cannot be effectively reduced by other methods. The process may be as simple as placing a part of the coverage in the international market place in order to achieve savings through exposure to a wider carrier base, or as complex as forming an insurance subsidiary that has access to the international marketplace for insurance for purposes of providing insurance to the parent and other subsidiaries. This potential solution envisions a more complex arrangement of operating subsidiaries of brother/sister corporations who obtain their insurance coverage from an insurance subsidiary or third party insurer that may be an international entity or an entity created in another state that has favorable insurance regulations under such arrangements.

Vogt & Resnick is increasingly called upon by clients to provide information, planning and execution for insurance strategies that provide more unique coverage and which may result in savings to the clients. More importantly, the insurance strategies leave the client more "in control of their destiny" with respect to insurance coverage, rather than leaving them at the mercy of the commercial marketplace without any ability to negotiate the policy terms. This has been particularly true for those clients who have had favorable loss experience with respect to workers' compensation but who have been unable to translate their favorable loss experience into lower insurance premiums. The insurance strategies outlined above have been successfully implemented precisely in order to achieve recognition of favorable loss experience for those clients.

Please contact us should you wish to explore your alternatives.

**VOGT & RESNICK OBTAINS JUDGMENT AGAINST AGENT  
UNDER POWER OF ATTORNEY**

Vogt & Resnick LLP recently obtained a \$4,924,489.25 judgment against a Newport Beach physician, on behalf of Farmers & Merchants Trust Company, the court appointed Administrator of the estate of Joe C.

Joe, who died at the age of 84, had never married and had no children. He worked all his life as a mail-room clerk for a Philadelphia newspaper, living in a one-room, \$125-a-month walk-up apartment. Lacking air conditioning, a stove, or even a working refrigerator. For years, Joe wore only one set of clothes which were conspicuously held together by safety pins. Consequently, everyone who knew him was astounded to learn that Joe had accumulated assets in excess of \$4,000,000 during his lifetime.

After Joe was hospitalized in early 2000, his long lost brother, Dr. C, a Newport Beach physician, was summoned to Philadelphia by Joe's landlord. Within days of his seeing his brother for the first time in decades, Dr. C managed to convince Joe, who was mentally incapacitated, to execute a form general power of attorney from a stationary store, which effectively granted Dr. C power of attorney to manage Joe's financial affairs. Within days, Dr. C began to transfer his brother's assets into his own name. By the time Joe died, just one year later, nearly all of Joe's \$4,000,000 was missing or had been transferred to Dr. C.

After the court rejected Dr. C's efforts to have the court approve the invalid trust which Dr. C had created with his brother's money, Farmers & Merchants was appointed as the Administrator of Joe's estate. Farmers & Merchants thereupon engaged Vogt & Resnick to pursue claims against Dr. C. After almost three years of litigation, and a three-day trial, the Orange County Superior Court found that Dr. C had breached his fiduciary duties as the holder of his brother's power of attorney. Judgment was entered against Dr. C for the misappropriated and missing assets disclosed in the court-ordered accounting, as well as interest, attorneys' fees and costs.

A second phase of the trial is scheduled to take place on a later date, in which Vogt & Resnick will pursue additional remedies against Dr. C. for statutory financial elder abuse and other wrongful acts related to the mismanagement of his brother's assets, including the recovery of additional assets recently discovered which Dr. C. neglected to disclose in the court ordered accounting.

It cannot be stressed enough how important it is to have a lawyer draft your durable power of attorney. First of all, a qualified lawyer will be familiar with the state-specific requirements for your durable power of attorney. Second, a lawyer can draft the durable power of attorney to meet your individual needs. Although pre-printed forms, like that which was used by Dr. C, are available, they are worded broadly and may not succeed in granting or limiting the range of authority you intend. Third, and most importantly, since a durable power of attorney is subject to abuse, as demonstrated above, it is a good idea to meet with a lawyer to make sure both the principal and the proposed attorney-in-fact understand the document and the lawyer is assured of the principal's competency. An adult must be competent in order to execute a durable power of attorney. If there is any question regarding competency, it is a good idea to present your lawyer with a doctor's letter or declaration, to be maintained in the file, regarding the principal's capacity to understand and sign a durable power of attorney at the time the document is executed. In California, you must sign a durable power of attorney in the presence of either two qualified witnesses or a notary public.

Ordinarily, a durable power of attorney is effective as of the date it is executed by the principal, as was the case above. This means even if the principal is competent to make his or her own decisions, his or her designated attorney-in-fact may have the legal right to act on the principal's behalf and immediately engage in financial transactions. By contrast a "springing" durable power of attorney provides that the durable power of attorney only "spring" into effect at the point in which the principal loses capacity, as certified by a physician or other designated individual. Your lawyer may draft your springing durable power of attorney to include the specific criteria by which incapacity of either the principal or the designated agent under the durable power of attorney is established.

For questions about this article or to request assistance with the preparation or review of your durable power of attorney, please contact our offices.

## VOGT & RESNICK ATTENDS ANNUAL LAW EUROPE CONFERENCE

Three attorneys from Vogt & Resnick attended the annual Law Europe conference this year. Barry Resnick, Jeffrey Resnick and Charles McKenna represented the firm at this year's event, which took place from May 11, 2005 – May 14, 2005, in Lisbon, Portugal.

Law Europe is a consortium of law firms that focus primarily on business and commercial law, consisting of over 400 lawyers from around the world, with Member firms extending to Turkey and India. The purpose of Law Europe is to provide the clients of its Members with international counsel via its network of law firms. Vogt & Resnick has been a Member of Law Europe for many years and hosted the organization's annual conference in 1998.

This year's conference in Lisbon focused primarily on commercial property, international debt recovery, mergers and acquisitions, intellectual property and employment law. Another highlight was the election of Barry Resnick, by Law Europe's Committee Members, as one of four Managers of the organization.

In this age of global economy, clients often need local legal advice when conducting international business. Law Europe Members are able to assist by referring their clients to local counsel in dozens of jurisdictions as legal issues arise.

Vogt & Resnick has found its Law Europe connections to be extremely valuable to its international business clients. If you have any international business concerns in which a Member of Law Europe may be of assistance, please contact this office.

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