

Areas of Practice

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Restaurant & Hospitality

Retail

Transportation

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## I.

### **LEGISLATIVE/ADMINISTRATIVE UPDATE**

#### Pending Federal Legislation

Each of the following prospective bills is currently pending in the United States Congress, and if approved, may become law during 2010:

- The Healthy Families Act (H.R. 2460) — This bill would require businesses with 15 or more employees to provide up to seven days (56 hours) of paid sick leave each year to all employees. Employees would be legally permitted to use this paid sick leave to recover from routine illness or care for an ill family member, attend doctor's appointments, obtain other preventative care, or seek help and services for victims of domestic violence, stalking, or sexual assault.
- Family Leave Insurance Act (H.R. 1723) — This bill would establish a Family and Medical Leave Insurance Program at both federal and state levels. The bill would also require employers who are bound by the Family and Medical Leave Act ("FMLA") to join the program or establish voluntary insurance plans. Among other requirements, voluntary plans would be required to provide equal or greater employee rights than the program, and receive the approval of the Secretary of Labor.
- Family and Medical Leave Enhancement Act (H.R. 824) — This bill would amend the FMLA to allow employees to take time off from work to participate in or attend their children's or grandchildren's educational and extracurricular activities, attend regular medical/dental appointments or attend to the needs of an elderly relative.

Each of these laws could become law individually, or as part of the comprehensive family and medical leave legislation known as the Balancing Act of 2009.

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*We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.*

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## II.

### JUDICIAL UPDATE

#### California Supreme Court Upholds Employee Stock Ownership Plan Does Not Violate Labor Code

In *Schachter v. Citigroup, Inc.*, Citigroup (“the Employer”) offered a voluntary employee incentive compensation plan that provided employees with shares of restricted company stock at a reduced price as a portion of that employee’s annual cash compensation. In selecting this voluntary compensation plan, employees agreed in writing that if they resigned or were terminated before the end of the two year period in which the stock ownership vested, the stock would be forfeited.

David Schachter (“the Employee”) was employed as a stockbroker by Smith Barney, Inc., a subsidiary of the Employer. The Employee chose to participate in the Employer’s employee stock ownership plan (“ESOP”), taking five percent of his annual compensation in the form of restricted stock. Sixteen months later the Employee resigned — a mere eight months before his stock was scheduled to vest.

The Employee subsequently filed a class action lawsuit, claiming that the Employer’s ESOP terms violated the California Labor Code. In California, employers are prohibited from retaining any portion of an employee’s earned compensation and must pay resigning employees all earned wages within 72 hours of the employee’s last day of work. Thus, the Employee argued that the ESOP agreement’s forfeiture provision was unlawful.

The California Supreme Court disagreed. Rather, the Court found that because the Employee’s ownership rights to the compensation had not yet vested, and because the Employee voluntarily elected to take part of his compensation as stock (knowing when it would vest), the Employer’s ESOP terms did not violate California law.

#### Court Strikes Down Another Non-Solicitation Agreement

*Dowell et al. v. Biosense Webster, Inc.*, involves a dispute between two competitors in the market for atrial fibrillation products. Biosense demanded that St. Jude cease and desist from hiring away its employees, and pointed to non-competition agreements (“Agreements”) that the employees had signed. Those Agreements included a broad non-competition clause which prevented the employees, for a specified period following their employment with Biosense, from rendering services to any competitor where the services could enhance the use or marketability of a competing product by using confidential information to which the employees had access during their employment. The Agreements also included a broad non-solicitation clause preventing the employees, for a specified period of time, from soliciting any business from, selling to, or rendering any service to any of the customers with whom they had contact during their last 12 months of employment.

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In response to Biosense’s cease and desist demand, Dowell, two other employees who were formerly employed by Biosense, and their new employer (St. Jude), sued Biosense to enjoin it from enforcing the Agreements. In its defense, Biosense argued that the Agreements were tailored to protect trade secrets, and therefore satisfied a common law “trade secret exception” to covenants not to compete. St. Jude argued that the common law trade secret exception no longer exists.

Expressing doubt as to the viability of the “trade secret exception,” the appellate court decided that even if the trade secret exception did exist, it would not apply in this case because the Agreements were not narrowly tailored to protect trade secrets. In fact, some of the information about Biosense’s customers (which would have been covered under the Agreements) was easily identifiable from any number of publicly available sources. The appellate court upheld the trial court’s decision that the agreements were unenforceable and void under Business and Professions Code section 16600, and that their use violated California’s Unfair Competition Law.

Although, Biosense argued that St. Jude used similar agreements to prevent competition by its own former employees, the court stated that St. Jude’s alleged unfair practices with respect to its own employees did not go to the heart of the matter and therefore was irrelevant.

Biosense also cross-complained against St. Jude for “raiding” its employees. The court affirmed summary judgment in favor of St. Jude, holding that there was no evidence of unlawful conduct. For example, there was no evidence that the former employees even possessed confidential information about other Biosense employees, that they disclosed such information to St. Jude, or that St. Jude used the information to solicit other Biosense employees.

St. Jude, however, lost its attempt to enjoin Biosense from enforcing its non-competition agreements against *all* employees in California. The court said that St. Jude had no standing under the Unfair Competition Law to enforce an injunction in favor of individuals not before the court.

This case illustrates the continuing trend of California courts finding non-solicitation agreements void and unenforceable. Absent a clear trade secret violation, such agreements will not be enforced in California simply because a former employee had access to confidential information.

*This is Pettit Kohn Ingrassia & Lutz PC’s monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Robert Hudock, Tyler Theobald, Jenna Leyton, Andrea Kaplan, Vanessa Maync or Christine Mueller at (858) 755-8500 or Eric DeWames or Mark Bloom at (310) 417-1137.*

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