

## New Year's Resolutions for California Employers

By Karen L. Gabler



**F**or California employers, the new year always brings with it new employment laws to burden the workplace. The year 2011 is no exception; employers should consider new legislation decided for 2011 as well as case law decided in 2010 to guide their employment practices going forward. Some examples of new laws and cases impacting the workplace in 2011 include:

**Donor Leave Law.** Effective October 1, 2010, the Michelle Maykin Memorial Donation Protection Act went into effect (Labor Code section 1508) and applies to employers with 15 or more employees. The law permits employees who are organ or bone marrow donors to take a leave of absence with pay. The leave may be up to 30 days for an organ donor and up to 5 days for a bone marrow donor in any one-year period. The leave can be taken in one or more periods. The employee must provide a written notice and the employer may require the employee to use up to 5 days of earned sick or of vacation leave for bone marrow and up to two weeks for organ donation. You must continue your employee's medical insurance coverage, and the employee's position is protected during the leave.

**Electronic Discovery.** When employees send demand letters, file administrative or litigation claims, or otherwise allege they've been wronged, employers are required to preserve all possible

electronic evidence pending resolution of any claim (whether or not that claim has yet been asserted). This includes cell phones, smart phones, pagers, PDAs, laptops, desktops, voicemail, e-mail or other electronic storage and communication devices and sources. It is not sufficient to claim that the information was destroyed as part of a regular document destruction policy, nor is it acceptable to claim that information was inadvertently destroyed. Employers must prepare backup tapes or disks and must take active steps to protect the loss of data. Failure to do so will result in heavy penalties.

**Arbitration Agreements.** Arbitration agreements can provide cost-savings and efficiency by requiring employees to arbitrate claims against their employers rather than pursuing civil actions. The courts have been active each year in opining upon the enforceability of arbitration agreements, and 2010 was no exception. If your arbitration agreement contains a clause permitting the employer to seek injunctive relief against the employee (to prevent the employee from soliciting or competing using your trade secrets, or stealing

company information, for example), the agreement may be held to be unenforceable. Clauses permitting the parties to pursue injunctive relief outside of arbitration should be removed from the agreement.

**Confidentiality/Non-Solicitation Agreements.** Most employers are aware that non-compete agreements are unenforceable in California. Overly-broad non-solicitation or confidentiality agreements are now unenforceable as well. If your non-solicitation agreement states that employees may not solicit your customers by using your confidential information, the agreement may be unenforceable. Rather, the agreement must state that employees may not solicit your customers by use of your "trade secrets," as that term is defined in the California Uniform Trade Secret Act.

For assistance with donor leave or electronic discovery policies, arbitration and confidentiality agreements, or other employment law questions, contact Karen Gabler at [kgabler@nchc.com](mailto:kgabler@nchc.com) or (805) 988-8366.

*Karen L. Gabler is a partner in the Employment Law Group at Nordman Cormany Hair & Compton LLP in Ventura County. She specializes in the representation of management clients to implement proactive strategies for employment law compliance and defend against employee claims.* 