

# KITAGAWA & EBERT, P.C.

## LEGAL ALERT

KITAGAWA & EBERT, P.C.  
8001 Irvine Center Drive, Suite 850  
Irvine, California 92618-2920

*e-mail:*  
kitagawa@japanuslaw.com  
jre@japanuslaw.com

Tel: (949) 727-0290  
Fax: (949) 727-0607  
JAPANUSLAW.COM

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## *New Laws and Proactive Business Planning Ideas*

*This Legal Alert Newsletter is prepared as a service to provide our clients and professionals with new legal developments, important legal concepts and practical information. Our business legal services include experienced and aggressive professional representation, as well as proactive business planning for risk management. This newsletter provides ideas and useful suggestions in Litigation, Corporate, Employment, Contract and Estate Planning/Probate matters. Please call us if you would like our assistance. We always welcome the opportunity to be of service.*

### **CONTENTS**

<b>LITIGATION</b>	<b>1</b>
1) <b>Alternative Dispute Resolution: “Win-Win” Results with Mediation and Arbitration</b>	<b>1</b>
2) <b>Motion for Summary Judgment</b>	<b>2</b>
3) <b>Collections</b>	<b>2</b>
<b>CONTRACTS</b>	<b>2</b>
<b>Distribution Agreements and Sales Representative Agreements</b>	
<b>CORPORATE</b>	<b>2</b>
1) <b>Incorporations, LLCs &amp; State Qualifications</b>	<b>3</b>
2) <b>Mergers / Tax Free Organizations</b>	<b>3</b>
<b>EMPLOYMENT</b>	<b>3</b>
1) <b>2004 Law-Paid Family Leave (CA)</b>	<b>3</b>
2) <b>New Law- Sexual Harassment Training Required (CA)</b>	<b>4</b>
3) <b>New Law- Health Insurance for Domestic Partners (CA)</b>	<b>4</b>
<b>ESTATE PLANNING / PROBATE</b>	<b>4</b>

### **LITIGATION**

We are experienced and aggressive in all aspects of litigation (business, employment & probate), including mediation, arbitration and trials. We have successfully represented clients in complex, difficult and sensitive matters in many states. We do our utmost to obtain successful results for our clients.

#### ***1) Alternative Dispute Resolution: “Win-Win” Results with Mediation and Arbitration***

California law and policy encourage resolution of disputes and litigation through voluntary settlement proceedings. Since the majority of all lawsuits are resolved before trial, mediation or arbitration provides an opportunity for disputes to be resolved efficiently and amicably.

This year, we successfully resolved many major litigation matters at mediation and arbitration in several states, and achieved superior results over that which might have been obtained if the client could have won at a trial. For example, we negotiated the transfer to our client of valuable

**MEDIATION/ARBITRATION (cont'd).**

intellectual property including trademarks in several countries, all without the need for a trial. Similarly, we saved another client millions of dollars in liability on a lease with a favorable settlement for only a small fraction of their exposure.

Since mediation or arbitration is a voluntary settlement, the parties often view it as a “Win-Win” for both sides, with the parties shaking hands at the end of the proceedings, and a final result which neither side will delay with endless appeals. Clients are more satisfied since they get to actively participate in the process and negotiations, rather than being spectators.

**2) Motion for Summary Judgment.**

Prior to mediation, arbitration or trial the preparation and filing of a Motion for Summary Judgment (“MSJ”) will often force the opponent to recognize and admit the weaknesses of their case and will force a settlement. The MSJ has the same legal effect as a trial since the Judge has decided the issues in the MSJ. If a reasonable settlement cannot be reached by the parties, the MSJ will then resolve certain areas and the parties can then again try mediation or proceed to trial.

**3) Collections**

We help our clients turn their accounts receivable into cash. We use attachments, receiverships, foreclosures, and seizures of property and bank accounts. In 2004, we collected millions of dollars for our clients. We foreclosed on office buildings, warehouses, apartments, houses and other property including wage garnishments. Creditors should be aware that legal fees are generally not recoverable unless provided for in a written agreement or by statute.

Creditors should have detailed credit applications (and personal guarantees if necessary) which include the recovery of attorneys fees and costs if

collection action is required. Begin collection actions as soon as possible; creditors generally enjoy more success when they initiate litigation early, rather than waiting too long to take action.

**CONTRACTS****Distribution Agreements and  
Sales Representative Agreements**

We prepare Distribution Agreements and Sales Representative Agreements, which have many varieties and legal and practical consequences.

**Distribution Agreement.** The distributor purchases the goods from the manufacturer and resells them to their customers. Accordingly, the manufacturer expects payment from the distributor. If the distributor asks to receive the goods on credit, the manufacturer should check the distributor’s credit rating and have the distributor complete and sign a credit application agreement. Distribution Agreements can be Exclusive or Non-Exclusive.

**Sales Representative Agreement.** The Sales representative solicits orders from customers and receives a commission from the manufacturer. Problems may arise if the customer does not pay the manufacturer, since the sales representative generally expects payment of the commission upon completion of the sale. The manufacturer should check the credit rating of the customer and have the customer complete and sign a detailed credit agreement.

**CORPORATE****Corporate/Mergers/Tax Free Reorganizations**

For more detailed information regarding incorporations, please refer to the article under the caption “Preliminary Considerations for a New Corporation” in the “FAQ” section of our website JAPANUSLAW.COM

**CORPORATE (cont'd).****1) Incorporations, LLCs & State Qualifications**

We provide experienced business legal services for incorporations and the formation of Limited Liability Companies ("LLC"). We provide guidance regarding the most favorable structure, strategy, and administration regarding tax considerations. We have incorporated companies in many states (including California, Delaware, Nevada, etc.). We also assist clients with qualification applications to do business with branch offices in other states. We prepare and file the required documents with various government offices.

We recommend incorporating your business if it is not already incorporated. A corporation is a separate legal entity with advantages that include tax benefits and limitation of liability. A foreign corporation, doing business directly in the U.S., without incorporating a U.S. subsidiary, risks exposure of the foreign corporation's assets to a judgment in the U.S. and IRS tax issues. In another example, a foreign corporation continued to do business in the U.S. directly without a U.S. subsidiary corporation, and the foreign corporation is now sued in California and all of their parent corporation's assets are exposed and at risk.

**2) Mergers / Tax Free Reorganization**

Our corporate legal services include assisting our clients with corporate mergers and tax-free reorganizations. We have assisted our clients with saving substantial taxes in the U.S. and in Japan. Contact us regarding your current and future U.S. corporate structure and activities.

**EMPLOYMENT****1) 2004 Law - Paid Family Leave Law (CA)**

Effective 1/1/04, the California Paid Family Leave ("PFL") program allows workers to get partial reimbursement of their pay for up to six (6) weeks during any 12-month period to care for an ill family member or to bond with a new child. Employees began to collect the family leave pay benefits on 7/1/04.

Under PFL, employers are not required to hold a job open for a worker on leave, but employers must continue to comply with reinstatement obligations under other leave laws that apply to them, including the Family Medical Leave Act (FMLA), California Family Rights Act (CFRA) and pregnancy leave laws. PFL applies even if employers have just one or more employees.

PFL covers absences for the following reasons: 1) to care for a child of the employee (or a child of the employee's spouse or domestic partner) who has a serious health condition; 2) to care for the employee's parent, spouse or domestic partner who has a serious health condition; 3) for the birth of a child of the employee or the employee's domestic partner; or 4) in connection with the adoption or foster care placement of a child by the employee or their domestic partner. However, an employee will be ineligible for PFL if another family member is available to provide the required care.

All California employers should have updated their Employee Handbooks to include PFL. Please contact us if you would like our assistance in preparing a PFL policy.

**EMPLOYMENT (cont'd).**

**2) New Law - Sexual Harassment Training Required by All Employers with 50 or More Employees.**

On 9/30/04, Governor Schwarzenegger signed into law Government Code Section 12950.1, which requires all employers with 50 or more employees to provide at least two (2) hours of sexual harassment (SH) training to all supervisory employees before 1/1/06. After 1/1/06, training must be provided at least once every two years. These requirements must be met in addition to the employer's duty to provide employees with sexual harassment policy in an employee handbook, or by distributing a pamphlet published by the Department of Fair Employment and Housing.

We recommend that all California employers provide SH training and harassment training, and confirm that the Employee Handbook has policies and detailed internal complaint and appeal procedures.

**3) New Law- Health Insurance for Registered Domestic Partners.**

Effective 1/1/05, if a company provides group health insurance benefits, this new law requires insurance companies to provide domestic partner coverage under the same terms and conditions as spousal coverage. They must be registered domestic partners (same sex couples or opposite sex couples if one person if over 62 yrs. old). You should revise your policies on California Family Rights Act (California version of Family Medical Leave Act) and Cal-COBRA.

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**ESTATE PLANNING/PROBATE**

We are experienced in all aspects of Estate Planning and Probate. James R. Ebert is a Certified Public Accountant (CPA) as well as a lawyer and is knowledgeable in international tax issues. He has many years of experience in assisting clients with complex estates with property in both the U.S. and Japan. If a person has died without a trust, probate is required. We are experienced with the probate process and enjoy an excellent reputation with the probate courts.

Our clients have been pleased with the positive results we have obtained for them in Probate Court. Sometimes it is beneficial to the recipients to file a probate. In cases where an heir has been excluded from the estate, by filing for probate, the Court issues an Order transferring the estate to the recipients, who now have the comfort that the person excluded cannot sue them in the future.

To minimize substantial inheritance taxes and avoid probate, we assist clients with the preparation of living trusts, life insurance trusts and charitable remainder trusts. Please also contact us for assistance if probate is required.

**KITAGAWA & EBERT, P.C.**  
**8001 Irvine Center Drive, Suite 850**  
**Irvine, CA 92618-2920**  
**TEL: (949) 727-0290**  
**FAX: (949)727-0607**  
**JAPANUSLAW.COM**

*e-mail:*  
**[kitagawa@japanuslaw.com](mailto:kitagawa@japanuslaw.com)**  
**[jre@japanuslaw.com](mailto:jre@japanuslaw.com)**