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EMPLOYMENT APPLICATION FEES: A VIABLE BUSINESS PURPOSE OR A DISGUISED FORM OF FRAUD

INTRODUCTION

Melissa Meastas and Elizabeth Dessert both testified at a California Senate Hearing concerning the passage of a bill that would prohibit employment application fees.¹ Elizabeth Dessert testified that

[t]here are many hidden costs when you apply for a job. Charging job application fees would just be one more hidden cost and would act as a deterrent to people searching for work. I certainly couldn't have afforded paying any application fee during my job search. Even a \$10 application fee for a job was too much to pay. That's money I needed to feed my family.²

As a single mother, Elizabeth felt that paying a ten-dollar application fee was unwise because her children depended on her for their food, clothing, and shelter. Melissa Maestas was also once on public assistance, before she was hired by the Child Abuse Prevention Council of Placer County.³ She testified that "[t]his bill is absolutely necessary. I work with moms and families like me everyday. Charging fees to fill out a job application is just another obstacle placed in the way of moms and families trying to move from welfare to work."⁴ Senator Tim Leslie, who initiated S.B. 2173, commented that making the transition from welfare dependence to working independence is hard enough without additional barriers, such as employment application fees.⁵

Applying for any job can be a trying experience as an applicant creates a resume, submits cover and reference letters, takes job-required tests, and fills out countless forms. Every year, thousands of prospective job applicants go through arduous and emotionally trying hurdles just to be *considered* for a job. Now, many employers are adding more barriers by requiring job applicants to pay an employment application fee in order to apply for a

1. This opening narrative refers to the testimony at the Senate Hearing concerning Senate Bill (S.B.) 2173, proposed by Senator Tim Leslie (R)-Tahoe City. See California State Senate, *Senator Leslie's Publications: Job Fee Prohibition Bill Exits Committee*, (visited Feb. 12, 1999) <[http://www.sen.ca.gov/htbin/testbin/memb...ases\]sb2173.txt](http://www.sen.ca.gov/htbin/testbin/memb...ases]sb2173.txt) analysis/analysis*Leslie> [hereinafter *Senator Leslie's Publications*].

2. *Id.*

3. *See id.*

4. *Id.*

5. *See id.*

job.⁶ Some employers have been charging these job application fees for a number of years while others are just starting the practice.⁷ This practice has the potential for serious abuse and fraud and, at the least, raises serious questions about the appropriateness of a fee requirement. At a minimum, is it fair to allow employers to require a job application fee from potential employees? Should an applicant have any rights to receive a fee refund if they do not get the job? Can fees be charged in such a way so as to not discriminate against those applicants who cannot afford the fee? If this practice is left unencumbered, it works directly against the societal ideals of right to work⁸ and freedom to choose where one does work, and the state is forced to take action.⁹

Application fees pose various problems for job applicants, employers, and legislators. Allowing employers to charge application fees without some restrictions can lead to abuse which will prey on the unwary and unwise. Application fees need to be monitored for the benefit of society. A majority of employers who use application fees only do so where and when it is necessary; yet it takes only a few to abuse the practice to the point that we begin to question the right of the employer to charge fees. The employer's current ability to charge application fees needs to be curtailed with adequate safeguards and restrictions to protect job applicants and, at the same time, allow employers autonomy to decide how to meet their hiring needs.

This Comment examines the employer's practice of charging an employment application fee to prospective job applicants, and the ramifications of such a practice. Part I discusses the complex issues dealing with application fees, first from the perspective of the airline industry and then from the perspective of the states and job applicants, to better determine how to reach a viable solution to this issue. Part II discusses how California is dealing with application fees and its recent amendment to the Labor Code to prohibit the practice. Part III explores problems with California Labor Code Section 450 and provides guidelines in an attempt to satisfy the needs of all interested parties.

6. Employment application fees are most prevalent in the airline industry. Northwest Airlines, Inc. began charging application fees for flight attendants and pilots in 1995. See Cathleen Ferraro, *California Fears Ruling May Prompt More Firms to Charge Application Fee*, THE SACRAMENTO BEE, July 23, 1998, at D1.

7. America West Airlines began charging \$50 application fees for pilots in 1997. See Cathleen Ferraro, *3 More Airlines Face Suit Over Job Application Fees*, THE SACRAMENTO BEE, Feb. 14, 1998, at D1.

8. Idaho and Utah have codified this concept. See UTAH CODE ANN. § 34-34-2 (1998); IDAHO CODE § 44-2001 (1998).

9. See generally Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 7 (1988).

I. INTERESTS ASSOCIATED WITH EMPLOYMENT APPLICATION FEES

A. Employers' Interests

Employers charge employment application fees for two main reasons: to ensure applicants have a strong interest in the job, and to shift the costs associated with the application process from the employer to the applicant.¹⁰ It is difficult for many employers to shift valuable and needed company resources to hiring departments if the company does not constantly experience growth to warrant paying salaries to staff who are engaged full time in finding qualified applicants. A company's hiring process does not generate revenue until it finds a satisfactory applicant, who is then hired and trained and then eventually produces a profit. It can take months for an employee to become profitable, and the company bears those expenses until such a level is attained.

1. The Applicant's Lack of Interest in the Job

Employers charge employment application fees to discourage those potential applicants who are either not interested or inadequately qualified.¹¹ Danny Sragow, campaign manager for Al Checchi, who ran for governor for California in 1998 and was also CEO of Northwest Airlines, stated, "Northwest Airlines, along with most of the industry . . . charges applicants for pilot and flight attendants openings a nominal fee of twenty-five dollars to weed out the wackos."¹² Airlines cannot afford to seriously evaluate each employment application they receive. The application fees act as one filter to narrow the field of serious and qualified candidates.

A job search is very time consuming even when only serious applicants are interested in the job. Adding those applicants who are not serious or qualified to the "pile" of those who appear to be qualified simply increases the burden on the companies' hiring personnel. This burden can be alleviated by hiring other companies to help in the hiring practices, but this solution is not available to all companies; just those who can afford it. USA Backgrounds is one company that helps other companies conduct their job searches. They claim to "take the guess-work out of hiring."¹³ They charge basic fees for criminal checks, credit reports, and drivers' records.¹⁴ The cost

10. See Ferraro, *supra* note 6, at D1.

11. See Ferraro, *Northwest's Job Application Fee Has California Officials Worried. They Fear More Will Start Charging Those Seeking Work*, THE SACRAMENTO BEE, July 27, 1998, at D2.

12. *Id.*

13. USA Backgrounds (visited Mar. 10, 1999) <<http://www.usabackgrounds.com/employ.htm>>.

14. See *id.*

increases when a company requests customized searches.¹⁵ These hiring related expenses can really add up for a company screening hundreds of applicants for only a few positions.

2. Method of Cost Shifting

Conducting a thorough and in-depth job search requires numerous resources to find a suitable candidate to fill a specified job opening.¹⁶ Airline companies believe that charging a fee helps provide needed money to pay employees to sift through applications of those candidates that are qualified versus those that are not.¹⁷ According to Al Becker, spokesman for American Airlines, “[t]he purpose of charging an application fee is to cover administrative costs in evaluating all those applications. We think the fee is fair and proper and reasonable. It’s a very complicated process and we need to be extremely careful about the people we select for training.”¹⁸ In the airline industry, many of the job openings concern areas of public safety.¹⁹ Danny Sragow commented that:

Pilots and flight attendants are responsible for human lives and before being hired are subjected to extensive security checks, which cost the airlines a great deal of money. This fee doesn’t come close to covering the costs of these extensive checks. It is simply used to weed out those people who aren’t serious or who shouldn’t be applying.²⁰

The airlines claim the twenty-five to one hundred dollar fee helps alleviate the cost of extensive background and security checks the company must do in order to determine whether the candidate is worthy of the position because the passenger’s safety in these future employees’ hands.²¹ Air-

15. *See id.*

16. *See Ferraro, supra* note 6, at D1.

17. *See Ferraro, supra* note 7, at D1.

18. *Id.*

19. *See id.*

20. *Id.*

21. *See Ferraro, supra* note 11, at D2. Airlines are always concerned about liability and safety. If the airline lacks a reputation for safety, no one will want to fly with that company. Certain airlines have recently settled for large dollar amounts for fatal plane crashes which always raises the issue of safety. American Eagle settled a case for \$110 million in 1998 for a crash on October 31, 1994. All sixty-eight passengers and crew members died when the plane crashed in Roselawn, Indiana at 450 miles an hour due to ice build-up on the wing. Prior to the plane crash, the pilot was out of the cockpit for five minutes socializing with a flight attendant while the co-pilot tried to warn him of the ice build up. The voice recorder captured the pilot’s response: “Getting’ busy with the ladies back here . . . so if I don’t make it up there within the next, say, 15-20 minutes, you know why.” The settlement determined the fault to be mechanical with no fault being attributed to the crew, however, it appears had the pilot been in the cockpit and discovered the ice buildup in time, some lives might have been saved. Abdon M. Pallasch, *Making a \$110-Million Crash Settlement Fly*, CHICAGO LAWYER, January 1998. Airlines could face severe liability in the millions of dollars should a plane crash and cause death or serious bodily injury to a passenger due to an error of the flight

line companies invest thousands of dollars in background investigations²² to then decide if the candidate is “worthy of being hired.”²³

There are many companies who specialize in doing background checks on an employer’s job applicants. For Background Advantage, the cost of a background check varies from ten dollars for a two-minute screening of basic information to twenty-five dollars for a criminal records check.²⁴ Other fees may apply if the company wants to know specific details about the applicant. This can add up to over one hundred dollars for one background check for a single applicant, but it becomes thousands of dollars when considering multiple applicants.²⁵ The airlines are cautious to find qualified individuals who fit the requirements for the job.²⁶ This can be very costly and requires going over countless applications and resumes, calling references, interviewing and conducting numerous tests.²⁷ Further, if employers are not allowed to charge application fees, they would simply find other ways to pass on the cost of job placement to the consumer, such as through price increases for goods and services.

Our economy benefits from an employment application fee when it helps lower the costs of goods and services. The existence of an employment application fee in a thriving business, such as the airline industry, fosters competition by allowing companies to subsidize its hiring practices through the fee.²⁸ Charging employment application fees saves companies capital, time, wages, and assets which can then be diverted to lower prices and make the goods more attractive to the consumer.²⁹ Application fees help shift a portion of this cost from the company to the applicant, thereby allowing a company to retain profits for other ventures. Because a company can stay more competitive, all consumers benefit by keeping prices low.³⁰ However, application fees can also create a cauldron of problems, which, if boiled over, could create havoc on the economy and employment in general.

crew. The airline industry is very competitive and many airlines struggle to survive. Any suits that result in large verdicts could send an airline out of business or seriously threaten its existence. *See also* (visited Feb. 19, 1999) <<http://www.robles-gonzalez.com/tips/ttplane>>; <<http://www.cliffordlaw.com/cliffordlaw/aviation/articles>>.

22. Telephone interview with Brandon Spackman, Corporate Account Executive for United Airlines (Jan. 15, 1999).

23. *Background Advantage* (visited Mar. 12, 1999) <[http://www.advantageassessment.com/jobfit services/background advantage.htm](http://www.advantageassessment.com/jobfit/services/background%20advantage.htm)>.

24. *See id.*

25. *See id.*

26. *See Ferraro, supra* note 7, at D1.

27. *See id.*

28. *See* ROM J. MARKIN, JR., *CONSUMER BEHAVIOR: A COGNITIVE ORIENTATION* (1974).

29. *See id.*; Ferraro, *supra* note 6, at D1.

30. *See* Markin, *supra* note 28.

B. States and Potential Employee Interests For a Fee Prohibition

Many state and local officials contend that the negative impact of job application fees outweighs its intended benefits.³¹ A key problem in this time of welfare reform is that fees act as a form of discrimination against those who cannot afford the fee.³² People who are on welfare may lack the funds to pay any application fee, no matter how small the amount may be.³³ Unemployed job applicants may also be unable to afford the cost of an application fee.³⁴ The application fee limits job applicants to those who can afford the fee.³⁵ Application fees are a screening device that effectively weed out lower income people from applying for jobs.³⁶

Another reason many lawmakers do not approve of application fees is because they often do not include fee waivers, which further discriminates against people on welfare and other forms of governmental assistance. Even when there are waivers, people may be reluctant to request them or be unaware that they even can request a waiver.³⁷

A second more dramatic problem is that of fraud.³⁸ Companies can institute a job application fee for an imaginary job.³⁹ State Senator Leroy Greene, (D)-Sacramento, introduced legislation to halt application fees but it was vetoed by Governor Pete Wilson after passing the Assembly and Senate.⁴⁰ Greene was quoted as saying, "Charging for a job application is an interesting way for a company to derive income for possibly doing nothing.

31. The hearings provided many reasons why application fees are harmful to California residents. *See Senator Leslie's Publications, supra* note 1.

32. *See id.*

33. *See id.*

34. A survey was conducted by the *Sacramento Bee*, asking people at random how they felt about whether employers should be allowed to charge a fee for applications. Many of the opinions are similar to those expressed by state officials after the *Millan* decision which is discussed in Part II of this Comment. A majority of the readers felt the practice was unwarranted and discriminatory. Those readers not opposed to the practice felt businesses should not be regulated in the first place or they simply did not care because they were employed and did not face the prospect of paying a fee in the near future. *See Bee Business Staff, Employment Application Fee Not Popular With Most Readers, THE SACRAMENTO BEE*, Aug. 9, 1998, at E2.

35. *See Senator Leslie's Publications, supra* note 1.

36. *See id.*

37. *See id.*

38. Fraud is defined as:

[d]eceptive conduct designed to manipulate another person to give something of value by (1) lying, (2) by repeating something that is or ought to have been known by the fraudulent party as false or suspect, or (3) by concealing a fact from the other party which may have saved that party from being cheated. The existence of fraud will cause a court to void a contract and can give rise to criminal liability.

Duhaime's Law Dictionary (visited Mar. 19, 1999) <<http://www.lia.org/dict-f.htm#F>>.

39. *See Ferraro, supra* note 6, at D1.

40. *See id.*

What if there is no job in the first place?"⁴¹ Advertising for a job that does not exist and charging a fee for that job is a way for companies to improve their balance sheets with little effort.⁴² Companies in financial trouble may find it hard to resist using this as a source of revenue. They can simply run an advertisement for employment and require a fee be included with the application. The more appealing the job description, the more people who will apply and hence, more profits. The company is not required to hire anyone or even have a job opening and it would be difficult to find out if any job ever existed. Once application fees are permissible, it would be difficult to stop this type of harm since false ads would be indistinguishable from the hundreds of valid job advertisements listed in the newspaper's classified section. If anyone checked on whether the advertised position was filled, the company could hide the deception by claiming a valid business reason for not filling the position, such as company downsizing, lack of growth, or an unstable economy.⁴³ The only way to prevent this is through a bright line rule of no fees.

States have a strong interest in protecting their citizens from harm.⁴⁴ States need to be aware of the perils their citizens face in applying for a job. Application fees present an easy method for companies to lure trusting applicants who will pay a fee to unknowingly receive nothing. Further, application fees might be an indicator of how the company will view potential employer-employee relationships: where the employee is expected to sacrifice for the good of the company before being offered any reward or compensation. Most people seek employment expecting the company to bear the costs associated with gaining employment to a certain degree in exchange for time and labor.

Requiring potential employees to contribute capital to a company, even before they are hired, represents an abuse that is possible because of the unbalanced employer-employee power relationship.⁴⁵ Job applicants are often willing to sacrifice time, energy and money in hopes of increasing their employment potential, especially if they need or really want the job. "Individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment. When there is such economic inequality, the function of the law is to protect the weaker party."⁴⁶

[I]n any modern industrial community, large numbers of unorganized workers are found, still bargaining individually, employed at low wages

41. *Id.*

42. *See id.*

43. *See Senator Leslie's Publications, supra* note 1.

44. *See In re the Appeal in Maricopa County Juvenile Action No. JD-561*, 131 Ariz. 25, 27-28, 638 P.2d 692, 694-95 (1981).

45. *See Summers, supra* note 9, at 7.

46. *Id.*

and apparently unable to make any effective efforts themselves to improve their condition. If they are to be helped toward an equality in bargaining power with the employer, the state must take the initiative.⁴⁷

The employer has superior bargaining power over a potential employee, especially in a tight job market. During a period of high unemployment in New Zealand, a Christchurch cafeteria advertised a job seeking kitchen workers. The job was for experience only with no pay, and seventy-three applicants applied.⁴⁸ When times are hard, workers will do nearly anything to find a way to earn a living. This type of knowledge translates directly into bargaining power to the employer's benefit.⁴⁹ The employer will view the employee as being "desperate" for a job, and, therefore, the employee will be unlikely to negotiate favorable employment terms.⁵⁰ Employees justify their acceptance of the employer's "superior bargaining position" because they often do not recognize other alternatives but to accept the employers terms if they want the job.⁵¹ Many employees do not realize they might be able to negotiate with prospective employers over employment terms. There is a misleading mindset in the job market that employees should be thankful to their employers for providing them with a job and do anything to please the employer at any cost.⁵² This idea must change to prevent problems associated with application fees from arising. Without a change in the marketplace's mentality, the employer will continue to push the employee into sacrificing more for the "good of the company," while receiving little or nothing in return.

II. EXISTING SITUATION IN CALIFORNIA

Employers, applicants and the state all have interests in the use of application fees. The state plays a vital role in protecting its citizens,⁵³ who compose the work force within the state. Application fees tend to hurt those state citizens who apply for jobs. However, many public as well as private entities in California currently require application fees, placing them in violation of California law.⁵⁴

The issue of application fees recently forced the California legislature to modify California's 100-year-old Labor Code Section 450 to specifically

47. J. COMMONS & J. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 43 (4th rev. ed. 1936).

48. See ELLEN J. DANNIN, *WORKING FREE* 170-71 (1997).

49. See Summers, *supra* note 9, at 7.

50. See *id.*

51. See *id.*

52. See *id.*

53. See *generally id.*

54. Violation of California Labor Code Section 450 is a misdemeanor as prescribed by Section 451 which provides: "Any person, or agent or officer thereof, who violates this article is guilty of a misdemeanor." CAL. LAB. CODE § 451 (West 1998).

prohibit employers from charging a fee for applications.⁵⁵ Prior to the statutory modification, the problem of application fee abuse was so severe that both the California legislative and executive branches authorized the state Labor Commissioner to look into it.⁵⁶ In 1998, the California Labor Commissioner brought suit against Northwest Airlines Inc. for charging application fees to job applicants.⁵⁷ Northwest Airlines is the world's fourth largest commercial airlines with over 51,000 employees worldwide.⁵⁸ The airline serves forty-nine states and the District of Columbia.⁵⁹ This suit placed Northwest's hiring practices in jeopardy. A verdict for the state would open the floodgates, allowing the Labor Commissioner to go after other airlines and other companies with similar practices.

The Labor Commissioner argued that Northwest Airlines violated the labor code because it required job applicants to pay an application fee to apply for a job.⁶⁰ The ruling in *Millan v. Northwest Airlines, Inc.* was based upon the older version of California Labor Code Section 450 which states: "No employer, agent or officer thereof, or other person, shall compel or coerce any employee, or applicant for employment, to patronize his employer, or any other person, in the purchase of anything of value."⁶¹ Northwest contended that the state statute did not specifically mention employment applications and was therefore inapplicable.⁶² Furthermore, it argued, charging an application fee was necessary for Northwest to cover the administrative costs of processing employment applications and to conduct security checks.

During the *Millan* lawsuit, many airlines, including American, Southwest, Northwest, and America West were under investigation by the California Labor Commissioner for charging application fees for flight attendant and pilot positions.⁶³ The fees ranged from \$25 to \$100.⁶⁴

In June 1998, the San Francisco Superior Court ruled the airline's practice of charging a job application fee did not violate California law.⁶⁵ Judge David Garcia ruled in favor of the airlines but declined to state the reasons

55. See Ferraro, *supra* note 7, at D1.

56. See Virginia Ellis, *Holdings Could Be a Burden for Checchi as Governor Politics: Danger is Great for Conflicts of Interest Experts Say*, L.A. TIMES, May 18, 1998, at A1.

57. The Labor Commissioner instituted the suit after two job applicants in Los Angeles complained about the airline's practice of charging fees. See *Millan v. Northwest Airlines Inc.*, No. 992470.

58. See *Northwest Airlines*, (visited Mar. 19, 1999) <<http://www.nwa.com/corpinfo/profi/facts/>>.

59. See *id.*

60. See Ferraro, *supra* note 7, at D1.

61. CAL. LAB. CODE § 450 (West 1997) (amended 1998).

62. See Ferraro, *supra* note 6, at D1.

63. See Ferraro, *supra* note 7, at D1.

64. See Ferraro, *supra* note 6, at D1.

65. Labor Commissioner Millan expected an easy victory and he was shocked by the ruling. See Ferraro, *supra* note 7, at D1.

behind his decision.⁶⁶ The lack of reasons behind the ruling only created further confusion about whether all application fees were permissible under California law. State officials felt the judge applied a narrow reading of the statute because courts are generally hesitant to impose criminal penalties on defendants when the law does not clearly define what specific conduct must occur to place the defendant in violation.⁶⁷ The Labor Commissioner felt Section 450 required a broad interpretation regardless of Section 451 because the language was intended to apply to all employment situations.⁶⁸

Prior to the filing of *Millan v. Northwest Airlines Inc.*, legislation was introduced by Assemblyman Cruz Bustamante, (D)-Fresno, on March 17, 1997, to amend California Labor Code Section 450 to specifically include employment application fees in order to prohibit the practice. Similar legislation was also introduced by Senator Tim Leslie, (R)- Lake Tahoe, on February 20, 1998, but it was not approved.⁶⁹ The *Millan* decision forced the legislature to act because California officials worried that all employers would begin charging application fees as a result of this decision.⁷⁰ State officials did not want the practice of charging employment application fees, largely confined to the airline and film industry, to arise in other industries once word spread that California law could not prohibit the practice.⁷¹ California labor officials felt that if employers were permitted to charge application fees, they would in essence discriminate against those job applicants who could not afford the required fee.⁷²

In the wake of the *Millan* decision, Bustamante's bill, Assembly Bill (A.B.) 1570, was passed and signed into law by Governor Pete Wilson on

66. *See id.*

67. *See* CAL. LAB. CODE § 451 (West 1998).

68. The Labor Commissioner sought a permanent injunction against the use of future employment application fees and also sought reimbursement for all fees paid by job applicants. *See id.*

69. Labor Commissioner Jose Millan assisted Senator Tim Leslie in drafting S.B. 2173. *See* STAR TRIBUNE NEWSPAPER OF THE TWIN CITIES MPLS.-ST. PAUL, Business Section, Jan. 23, 1998. S.B. 2173 states in regards to S.B. 2173:

[It] would prohibit an employer from charging a fee to an *employee or applicant* for processing the employment application of the employee or an applicant. The bill would permit an employee or applicant for employment to report a violation . . . to the Labor Commissioner, and would require the Labor Commissioner to investigate [the] complaints. [I]f the Labor Commissioner determines that an employer has violated this prohibition, the Labor Commissioner is required to (1) direct the employer to cease and desist the violation and (2) assess a penalty of \$100 for an initial violation and \$1,000 for each subsequent violation after the employer has been notified of the initial violation. The . . . Labor Commissioner . . . [can also] bring a civil action against the employer for the amount of the fee, penalty, and costs.

Legislative Counsel Digest, Feb. 20, 1998, S.B. 2173 (emphasis added).

70. *See* Ferraro, *supra* note 11, at D2.

71. *See id.*

72. *See id.*

September 13, 1998.⁷³ Senator Leslie stated, “at a time when we are trying to move individuals off of welfare and into work and self sufficiency, I believe that forcing job seekers to pay for the opportunity to look for work would be extremely unfair and counterproductive.”⁷⁴ People trying to get off welfare or who are on a tight budget cannot afford that expense.⁷⁵ Assemblyman Cruz Bustamante stated, “[i]f the practice of charging application fees spreads beyond the airline industry, it would be an impediment to young people and those on welfare, who at least can not afford to pay such a fee.”⁷⁶

During Senate Hearings in the Industrial Relations Committee on S.B. 2173, Senator Leslie said, “We need to send a clear message to any employer currently requiring application fees and any employer thinking about them in the near future. We need to tell them that Californians will not tolerate this egregious practice.”⁷⁷ California’s active response to application fees leaves one to ask: Did they put it to rest too hastily? Application fees appear to be a standard practice for most airlines, which suggests a perceived need for the practice; therefore, a blanket prohibition might be unwarranted.

Al Becker, a spokesman for American Airlines, feels fees are necessary because airlines receive thousands of applications for employment each year.⁷⁸ Many people are attracted by employment possibilities to the airline industry because employment benefits often include free flights and other perks.⁷⁹ It is a way to offset some of the costs associated with hiring new employees.

Judge Garcia’s ruling and the recent legislative changes put an end to the investigations into American, Southwest, and America West.⁸⁰ The Labor Commissioner appealed Judge Garcia’s ruling, but the appellate court did not reverse the ruling and the Labor Commissioner has quit pursuing the issue because of the changes in the law.⁸¹ However, if the airlines continue to charge application fees in violation of the law, it will be interesting to see

73. See Matt Wuerker, *California Laws 1999*, L.A. TIMES, Jan. 1, 1999, at A3.

74. *Senator Leslie’s Publications*, *supra* note 1.

75. See Ferraro, *supra* note 7, at D1.

76. 173 Daily Labor Report (D.L.R.) A-5 (1998), *State Laws: California Lawmakers Adopt Bills on Applicants, Family Leave, Pensions*, Sept. 8, 1998.

77. *Senator Leslie’s Publications*, *supra* note 1.

78. See Ferraro, *supra* note 7, at D1.

79. See *id.* Airline employee perks include unlimited standby flights. The standby flights are ranked as a lower priority standby compared to other passengers, but the priority status increases according to the length of time the employee has worked for the airline. Basically, employees fly for a nominal fee on any flight of their employer so long as there is available seating. It is an attractive perk which leads many applicants to apply for jobs with the airlines. Telephone interview with Brandon Spackman, Corporate Account Executive for United Airlines (Mar. 5, 1999).

80. Telephone interview with Robert Siegel, attorney for the law firm of O’Melveny & Myers. (Feb. 19, 1999).

81. See *id.*

how the airlines attack the statute and whether the statute can withstand such an attack.⁸²

III. PROBLEMS WITH CALIFORNIA LABOR CODE SECTION 450

California Labor Code Section 450 prohibits employers from charging application fees.⁸³ The problems with this statute can be separated into two categories: the statute is overly broad and vague and the statute lacks clear guidelines on how the Labor Commissioner is to provide enforcement since the Labor Commissioner must investigate each reported instance of pre-employment application fees by any employer.⁸⁴

A. *The Statue is Vague and Broad*

The statute is vague because it lacks definitions of key terms and phrases to aid in understanding and application.⁸⁵ Part A of the statute is the identical wording that existed in the statute prior to the *Millan* decision.⁸⁶ Part A is over 100 years old and it simply states that an employer cannot “compel or coerce any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value.”⁸⁷ Part B of the statute defines what compel and coerce means as “the payment of a fee or consideration of any type from an applicant for employment” but then it says that this is not determinative.⁸⁸ The statute is very basic in language and terms. This will indeed create many problems as employers find ways to manipulate the statute. For instance, the statute does not even define what is a “fee” or “consideration of any type.”⁸⁹ Employers can find creative ways to elicit a fee from an applicant and simply not label it a fee or they might find some way to say the fee is being applied to training or required tests and has nothing to do with the overall application process. There is currently no case law concerning the statute or the practice of application fees. The true test of the statute will come about in the courtroom as employers seek to find ways around the statute’s weak, though expansive, reach.

The statute, because it is overly broad and vague, presents the opportunity for loopholes to arise. Once loopholes are discovered, many employers

82. In *Millan v. Northwest Airlines*, the airlines argued the existing law at the time did not expressly forbid the use of application fees in employment. They did not argue whether it was permissible for California to pass legislation banning the practice. *Id.*

83. See CAL. LAB. CODE § 450 (West 1998).

84. See *id.*

85. See *id.*

86. See *id.*

87. *Id.*

88. *Id.*

89. *Id.*

will try to exploit them and escape the law's jurisdiction. Some jobs require specific applicant qualifications, such as verification of a certain typing speed, computer proficiency, or even physical abilities. Many jobs that require extensive computer use or data entry require a typing speed proficiency proved by a typing certificate, which can be obtained by paying a fee to take the test.⁹⁰ Typing tests cost approximately ten dollars and the test measures an applicant's typing ability for speed and exactness. Legal secretaries can be required to present a certificate which certifies they are indeed a legal secretary.⁹¹ Certificates for legal secretaries in California range from one hundred dollars for a Legal Secretaries Incorporated member to one hundred and fifty dollars for a non-member.⁹² These two illustrative practices seem legitimate, fair and not extremely burdensome. People accept these as being a necessary and valid business requirements to find qualified employees for certain jobs. However, it appears this would be a violation of the Labor Code, since in essence, it acts as a fee for employment because it requires "a fee or consideration of any type from an applicant for employment."⁹³

The statute makes legitimate practices illegal, although it is doubtful the Labor Commissioner would investigate such practices unless a complaint was filed and it was determined to indeed be a fraudulent practice. Even if the practice is necessary and legal, it could still be a technical violation of the statute. However, most job applicants would not contemplate lodging a complaint. Many employers can set up their own testing facilities and charge a fee to take the test or to become "certified" in a particular field. Is this not what the statute forbids? There are many ways employers can manipulate their hiring practices to hide under the guise of necessary tests and legitimate practices, when in essence, they are basically charging an application fee.

B. Problems with Enforcement

Potentially, the Labor Commissioner is faced with the problem of trying to enforce and investigate violations in every sphere of employment because the statute does not specify any limits of the Labor Commissioner's jurisdiction.⁹⁴ The Labor Commissioner will be pulled in multiple directions because any job applicant can file complaints thinking their employer has

90. Typically, typing tests can be taken at most junior or community colleges and high schools.

91. This organization seeks to govern, control and regulate the legal secretary profession to help distinguish quality legal secretaries from those who are not. *See* Legal Secretaries Incorporated, (visited Mar. 12, 1999) <<http://www.lsi.org/cc/lsapplication.htm>>.

92. The fees include a registration fee and an examination fee. Late applications are assessed a twenty-five dollar late fee. *See id.*

93. CAL. LAB. CODE § 450 (West 1998).

94. *See id.*

somehow charged them a “fee.”⁹⁵ This will potentially cost vast taxpayer resources to investigate each reported violation no matter how nominal the fee may have been.⁹⁶ Taxpayers do not want tax money spent looking over the shoulder of every employer who seeks to hire an employee. Enforcement of the statute could chill hiring practices and make employers skeptical when deciding who they will hire.

The Labor Commissioner is empowered to investigate and halt those practices that are unfair and harmful to the public and its investigative powers are subject to broad discretion as to what and how to pursue. The Labor Commissioner will need to determine which practices meet the required “fee” definition⁹⁷ and whether it falls under the realm of an employment application. However, the Labor Commissioner is not in the proper position to decide what hiring practices an industry should follow. The industry itself, through its own experience, is best able to decide how to find capable employees. Even though occasional fraud and abuse will occur, it is better to let the practice exist because the enforcement measures lack any credible means to stop the practice and the resulting harms. Leaving the statute on the books in its current form is like putting a band-aid on a severed limb; it appears the wound has been bandaged but a closer inspection will reveal that nothing could be further from the truth.

Another potential concern with the California statute is that employers could begin charging fees after an applicant has been hired.⁹⁸ The statute only specifies that an employer can not collect or require a fee to “receive, obtain, complete . . . submit, provide, accept, or process an application for employment.”⁹⁹ Employers can set up systems where fees are paid after the application has been received and processed without fear of investigation. This will present problems for the Labor Commissioner, who must potentially monitor companies’ practices before and after they hire someone. But, the question arises: How will the Labor Commissioner halt practices that are clearly outside the statute? Setting up fee payments outside the statute has the same detrimental effect as paying a fee before being hired because it forces employees to pay money before the company pays them. For example, companies can deduct an employee’s wages on account of training received after being hired. Paying for training essentially acts as “payment of a fee or consideration of any type”¹⁰⁰ because the employee is paying money to the company in order to keep a job. It should not matter whether the charge is before or after being hired. The employee still gives the employer

95. *Id.*

96. The statute does not specify a fee amount to trigger the statute. Therefore, it appears that even a one-dollar fee would violate the statute causing the Labor Commissioner to investigate at taxpayer expense for charging merely an insignificant sum. *See id.*

97. *See id.*

98. *See id.*

99. *Id.*

100. *Id.*

some “consideration”¹⁰¹ now to receive the benefits of a job later. The statute ought to address these “fees”¹⁰² before abusive employer behavior results. Many construction companies require workers to purchase their own tools before beginning or shortly after starting work because employee turnover rates are high and the employer cannot afford to replace tools with each new employee.¹⁰³ Having employees purchase their own tools in the construction industry now appears to fall under the statute because the purchase of a tool can be interpreted as “payment of a fee or consideration of any type from an applicant for employment.”¹⁰⁴ However, employers can find simple ways around the law, such as spreading the cost of the tools over weekly paychecks where it looks more like a deduction or draw than a fee.

Another problem with the statute is determining where and when to apply it. For example, many students provide “free” labor¹⁰⁵ to companies in exchange for working in the selected industry and gaining experience. This appears to violate the Fair Labor Standards Act,¹⁰⁶ by not being paid a minimum wage.¹⁰⁷ This also presents a problem of where to enforce the wrong, through Section 450 or through the Fair Labor Standards Act or both. Student interns are trying to prove to the company that they can do the work and hence deserve a job offer. This is a great deal for the employer who receives free labor, and also avoids other costs such as taxes and benefits. Student interning is a practice that has existed for years. It provides many students an opportunity to obtain positions with companies that otherwise might not hire them. If this practice is investigated and prohibited, many students will lack valuable experience that they depend on to further their careers upon graduation. In many professions and industries, instances arise where it appears the employer is requiring an employment fee from a potential employee. Enforcing these practices as “fees”¹⁰⁸ under Section 450 would eliminate the practice. The idea of interning for free has evolved over time to create a situation that is beneficial for both the employer and the prospective employee. Eliminating long-standing industrial practices would injure the employer and the potential employee, who is often willing to “pay the price” to get the job they want.

There are a variety of legitimate reasons why some industries must re-

101. *Id.*

102. *Id.*

103. Construction companies would lose several thousand dollars each year if they gave each new employee the tools required for the job when they started. Some inexpensive tools are provided while the more expensive tools are sold to the employee, which is deducted over several weeks from the employee’s paycheck. Telephone interview with Dale Nelson, Construction Manager of Intermountain West Insulation. (Jan. 2, 1999).

104. CAL. LAB. CODE § 450 (West 1998).

105. *See generally* Fair Labor Standards Act of 1938 § 206, 29 U.S.C. § 201 (1998).

106. *See id.*

107. Violation of the Fair Labor Standards Act is not an issue being discussed in this article.

108. *See* CAL. LAB. CODE § 450 (West 1998).

quire new employees to pay a fee or provide some type of consideration¹⁰⁹ in exchange for employment. It allows employers to screen for serious applicants, it allows employees who are willing and able to pay a fee to gain valuable experience, and it allows employers to cover costs associated with hiring new employees through background tests, screenings and interviews. Yet, charging a fee can discriminate against employees who cannot afford the fee. Companies can also raise money through fees for jobs that do not exist, and it opens the door to various types of fraud and deception. A statute dealing with application fees must resolve these differences in reasoning. A law that is easy to bypass because it is too vague, broad and general, becomes a law that is not effective. Ineffective laws permit corruption and fraud to enter the market. The California statute's envisioned reach does not provide a workable solution for society.

C. Solutions for California

Drafting a workable statute that benefits everyone is nearly unattainable, but it is not impossible. The California statute, which bans application fees, appears realistic and plausible at an idealist's level, but the practical application is troublesome. In order to improve Section 450, employers' legitimate interests, employees' interests, and societies/states' interests must be assessed and accommodated. Many other states, such as Arizona, Maine, Rhode Island and Utah¹¹⁰ have statutes similar to California's statute.¹¹¹ These broad statutes must be tailored to satisfy the specific needs of society and the economy. It is possible to create a narrow and enforceable statute to benefit the employer, employee, and the state, while also avoiding the pitfalls associated with application fees.

Many states have and will continue to pass legislation dealing with all manner of employment application fees. It is just a matter of how restrictive and encompassing the legislation will be. Some of the questions that need to be addressed are: Who is potentially harmed by application fees? How can the harms be avoided or minimized? Is it possible for certain industries to charge application fees, while others do not? Each industry needs to be individually examined by experts to arrive at a workable solution that will not impede the industry or job seekers. It is also useful to consider the legislation in other states to answer many of these questions based upon their experiences.

To revise the California statute banning all employment application fees, lawmakers must familiarize themselves with issues and parties' interests that have not been considered. This will enable them to better under-

109. *See id.*

110. *See* ARIZ. REV. STAT. § 23-202 (1998); CAL. LAB. CODE § 450 (West 1998); ME. REV. STAT. ANN. tit. 26, § 592, 594 (West 1989); R.I. GEN. LAWS § 28-6.3-1 (1984); UTAH CODE ANN. § 34-34-10 (1998).

111. *See* CAL. LAB. CODE § 450 (West 1998).

stand what it is they hope to accomplish, and it will create some basic groundwork to draft a “model statute.” For instance, the statute could specify that only private companies can charge a fee and public employers may not. Legislators need to conduct or authorize studies pertaining to specific industries to see if application fees are beneficial. This concept has yet to be adopted in any state statute, but many states have come close.¹¹² Under Ohio’s statute Section 4171.04, a person must pay a registration fee of twenty-five dollars to the Division of Industrial Compliance before being allowed to operate a skating rink.¹¹³ Once the fee and other qualifications are satisfied, the state issues a certificate of registration.¹¹⁴ This system in Ohio is set up to ensure that skating rinks are operating safely according to the standards put forth by the state. It is a clear example of selecting a specific industry and setting up a fee that must be paid in order to enter a particular trade. Idaho’s statute Section 31-7-351, requires nursing homes to check the criminal history on nurses who apply for employment.¹¹⁵ The nursing homes can require the nurse to pay a fee for the criminal history check, but the fee “shall be no greater than the actual cost of processing the request.”¹¹⁶ Kansas has a similar statute concerning the sale of hearing aids.¹¹⁷ The state requires a license be obtained in order to sell hearing aids.¹¹⁸ A fee must be paid to process the application.¹¹⁹ Once again, this is an example where a state selects certain jobs or trades and finds a method where a fee can exist. However, each state is also very selective on how the fee applies, making it relatively easy to monitor, which tends to fend off the opportunity for fraud.

When drafting a statute, another point to consider is inclusion of a fee waiver or reimbursements to lessen discrimination based upon income.¹²⁰ Limits can be set on fee amounts¹²¹ and also guidelines can be established to specify when fees can be required, such as at a second interview stage or final testing rounds. Ohio has set the fee amount of twenty-five dollars for a

112. Ohio, Connecticut, Idaho, and Kansas have all banned fees for certain industries. See OHIO REV. CODE ANN. § 4171.04 (West 1996); CONN. GEN. STAT. § 31-73 (1998); IDAHO CODE § 31-7-351 (1998); KAN. STAT. ANN. § 74-5811 (1985).

113. OHIO REV. CODE ANN. § 4171.04 (West 1996).

114. *See id.*

115. *See* IDAHO CODE § 31-7-351 (1998).

116. *Id.*

117. *See* KAN. STAT. ANN. § 74-5811 (1985).

118. *See id.*

119. *See id.*

120. Indianapolis city council failed to pass the fee proposals for fire and police department applicants. However, if those proposals would have passed, they would have included fee waivers for indigent applicants. E-mail letter from Bruce Henry, Recruiting Officer, Indianapolis Police Department, to T. Dean Moody, Editor in Chief, *California Western Law Review* (Mar. 18, 1999); E-mail letter from Sullen Hart, Clerk of the Council, Indianapolis City Council, to T. Dean Moody, Editor in Chief, *California Western Law Review* (Mar. 18, 1999), E-mail letter from Kristin Harrison, Personnel Director, Indianapolis Fire Department, to T. Dean Moody, Editor in Chief, *California Western Law Review* (Mar. 18, 1999).

121. *See* OHIO REV. CODE ANN. § 4171.04 (West 1996).

roller skating rink operation permit.¹²² Idaho uses an innovative approach by setting the fee amount for nurses receiving criminal history checks to be no greater than the cost to process the report.¹²³ However, abuse might result if not monitored closely since companies that process the criminal history reports could increase their prices knowing nurses are required to have the check done and the statute permits a fee to be charged.¹²⁴ Additional requirements can be set on those companies that want to charge fees, such as disclosing how many people are going to be hired, the number of applicants sought, opening and closing dates for consideration of employment, essential qualifications with disclaimers that lacking any qualifications can disqualify the applicant. Requirements will communicate the unknown to the employees while also helping companies better evaluate how many employees they hire, who they are, and how qualified they are.

Alaska's statute sets forth an alternative route to deal with the spin-off problems associated with application fees, namely fraud and deception.¹²⁵ This statute prohibits the use of fraud and false representations to "lure" employees to Alaska.¹²⁶ Currently, there are many companies that find and bring employees to Alaska.¹²⁷ Alaska Employment Information Services is a company, that advertises "a personalized employment advisory service to the general public at nominal rates."¹²⁸ Further, the company states, "We are not an employment agency! Nor, are we a scam operation that promises everything and delivers nothing! AEIS is staffed by individuals who care about you, and care about Alaska! We will not provide you with a false hope or blue sky images of job opportunities."¹²⁹ Companies such as this may be pushing the bounds of the statute, but the statute is a creative way to deal with application fees. Alaska has vast natural resources and Alaskan companies¹³⁰ are always seeking employees to do the work. Many employees are college students who come to Alaska during the summer to work on fishing

122. See IDAHO CODE § 31-7-351 (1998).

123. See *id.*

124. See *id.*

125. See ALASKA STAT. § 23.10.015.

126. ALASKA STAT. § 23.10.015 states:

A person doing business in this state may not personally or through an agent induce an individual to change from one place to another in this state, or bring an individual into this state to work as an employee in this state, by means of *false or deceptive representations, false advertising, or false pretenses* concerning the kind and character of the work to be done, or the amount and character of the compensation to be paid for the work, or the sanitary or other conditions of employment.

Id. (emphasis added).

127. See *Alaska Employment Information Services*, (visited May 27, 1999) <<http://www.alaskaemployment.com/index.htm>>.

128. *Id.*

129. *Id.*

130. See *id.*

boats, oil pipelines, and in the national parks.¹³¹ The state legislature, being familiar with the needs of the state, passed the statute¹³² to block abusive behavior aimed at unsuspecting employees seeking work in Alaska. Now, should employees fall victim to fraud or false representations, they have a statute¹³³ in place to provide them with a remedy against the offending party.

Legislators need to be flexible and creative in developing statutes that reach the goals of the state, while being realistic and enforceable. Each state must determine what route they wish to pursue. There are many factors that need to be discussed when attempting to draft a statute that can adequately cover this area. An important goal for lawmakers to keep in mind is not to severely burden employers and employees, but at the same time deny the entry of fraud into the market under the banner of legitimate fees.

CONCLUSION

Applying for a job seems as fundamental as the right to vote. Job applicants should have a right to apply for a job without being hampered by unnecessary application fees. Everyone has a fundamental right and duty to work.¹³⁴ Work is one of the oldest concepts known to mankind.¹³⁵ Since the beginning of mankind's existence, work has been an integral part of our survival.¹³⁶ Work even existed before Adam and Eve were removed from the Garden of Eden since God worked to create the Heavens and the Earth and on the seventh day he rested from his labors.¹³⁷ Our work and profession defines our identities, shapes our growth, and creates our future. Perhaps there is something wrong with this notion, but it is reality. States have a right to ensure their citizens are free from fraud and deception.¹³⁸ Every citizen deserves an equal opportunity to earn a living.¹³⁹

A decision must be reached in deciding how to deal with application fees. Abuse and harm will result if employers retain unconstrained capabilities to charge application fees. It will open up a Pandora's Box of future problems. Once employers can charge applications fees of job applicants, people will be taken advantage of and other fraudulent schemes will develop. The question will then arise: Where do we draw the line? Next, employers will try to charge a fee for using the restroom or going to the drinking fountain since they will justify these costs as paying for service,

131. *See id.*

132. *See id.*

133. *See* ALASKA STAT. § 23.10.015.

134. Idaho and Utah have each codified this concept. *See* UTAH CODE ANN. § 34-34-2 (1998); IDAHO CODE § 44-2001 (1998).

135. *See Genesis* 3:17-19, 23.

136. *See id.*

137. *See id.* at 1:1, 2:2-3.

138. *See Summers, supra* note 9.

139. *See id.*

maintenance, and cleaning. Once the dam is broken, the floodwaters will cover the land and we will be helpless to stop it. Employers and legislators must reach a compromise on how this process can be controlled to protect the job applicants, while also protecting the industrial interests of charging a fee in the first place.

Many states and cities have taken action to deal with this issue, but it does not mean a successful solution has been resolved. This issue must be carefully examined according to the various interests involved while considering possible abuses that can result. A careful balance of these considerations will not only prevent the current harms, but also provide a means for dealing with unforeseen future catastrophes. Once safeguards are in place, growth and progress will not be halted, and at the same time, unfair practices and fraud will be barred as much as possible. All sides involved can participate and benefit from a full discussion of the issue, anticipating future problems, while posing creative ways to solve them. Nobody knows what the future holds in the next century, but one thing is certain: work will persist as we struggle to find our own particular niche in an ever-changing economy.

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