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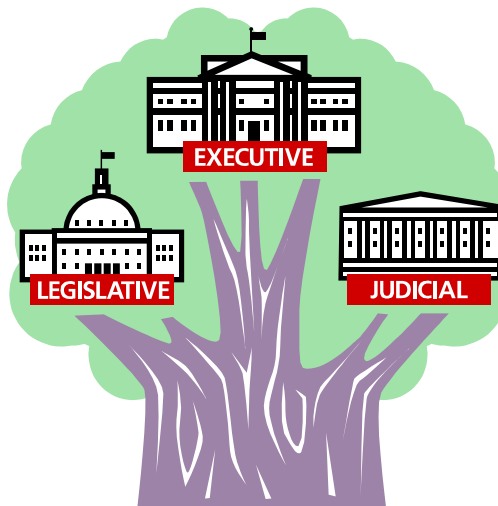
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LEGISLATURE CURBS ABUSES OF PRIVATE ATTORNEY GENERAL ACT

The passage of the Labor Code Private Attorneys General Act of 2004 (the "Act") resulted in a flood of litigation by the plaintiff's bar demanding crippling penalties from California employers for technical infractions of the Labor Code. Employers faced lawsuits for millions of dollars in penalties (\$100 per employee per pay period per violation) for such "egregious" harms as failing to submit their employment application form to the Department of Fair Employment and Housing (DFEH) or failing to post a required notice relating to whistleblower protection. Distribution of imposed substantial penalties were to be shared between the State of California and employees, with plaintiffs' attorneys also receiving a fee award.



In response to a coordinated and successful lobbying effort by California employers, the California Legislature approved Senate Bill 1809, which Governor Arnold Schwarzenegger signed on August 11, 2004. The law takes effect immediately.

SB 1809 repeals Labor Code Section 431, which had set forth the arcane requirement that employers submit their application forms to DFEH. The new law also accomplishes the following:

- It largely excludes from the scope of the Act any violations for posting or notice requirements;
- It vests discretion in the courts with regard to the award of penalties under the Act; and

- It establishes administrative hurdles to filing suit under the Act as to most violations, which include an opportunity for notice and cure of the alleged violation, as well as a safe harbor for an employer who consults with the Labor Commissioner upon receiving a notice.

NEW REQUIREMENT! MANDATORY SEXUAL HARASSMENT TRAINING FOR SUPERVISORS



On September 30, 2004, California Governor Arnold Schwarzenegger signed into law Assembly Bill 1825 (Cal. Govt. Code section 12950.1) requiring certain California employers to provide supervisory employees with training on sexual harassment by January 1, 2006, and every 2 years thereafter.

Covered Employers

Employers regularly employing 50 or more employees or receiving services from 50 or more contractors are covered.

Covered Employees

Employees who exercise independent judgment and have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or have the responsibility to direct them, adjust their grievances or effectively recommend such action, must receive the training mandated by the Act.

Required Training

Two hours of sexual harassment training every two years must be conducted by trainers with expertise in this field and include information and guidance regarding federal and state anti-harassment laws, prevention and correction of harassment, remedies available to victims of harassment and practical examples to prevent harassment, discrimination and retaliation. Training must be fully interactive with the opportunity for questions and answers. Supervisors that have received sexual harassment training since January 1, 2003, need not receive it again before January 1, 2006, but must continue to be retrained every two years.

Penalties

Failure to provide the required training does not establish liability for harassment, nor does compliance bar liability. However, failure to comply may result in DFEH intervention. Furthermore, it is likely that a plaintiff in a harassment suit will attempt to use an employer's failure to comply with the new statute to support a claim for punitive damages.

Actions Employers Should Take

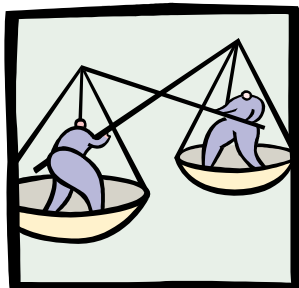
As a result of AB 1825, employers should:

1. Develop and implement adequate anti-harassment training programs.
2. Establish necessary recordkeeping to ensuring compliance with the statute.
3. Confirm that company management is investing adequate time and resources into required training.
4. Integrate mandated training requirements into company employment policies and procedures.

HOW TO COLLECT APPLICANT DATA WITHOUT INVITING A DISCRIMINATION CLAIM

Both state and federal law require employers with one hundred (100) or more employees to collect and maintain data concerning the race, national origin and gender of each applicant and the title of the position for which he/she applied. The information must be collected on a separate and detachable

form and the substance of the data may not be used for any discriminatory purpose. Employers are required to submit an annual report to federal and state agencies. The data must be maintained for two years in a separate location from the personnel files of employees and, if any relevant complaint is filed, it must be maintained until the dispute is resolved.



The purpose of the data collection requirement is to assist the government in assessing the statistical validity of any claim or grievance. It is important, however, for employers to comply with these obligations in a manner that will not itself create evidence supporting a claim of discrimination. The form should clearly state in bold type in large font that furnishing the statistical data is voluntary and whether or not the applicant completes the form and the substance of his/her responses will not impact the applicant's chances of being hired. The form should also emphasize that the information collected will be maintained separately from the application and, if the applicant is hired, separately from the personnel file.

REMINDER! PAID FAMILY LEAVE ACT

The Paid Family Leave Act (Cal. Unemployment Insurance Code sections 3300, *et seq.*) is in effect. Employee contributions began on January 1, 2004, and benefits are now available for claims on or after July 1, 2004. The program is entirely funded by employees.

- **Who Qualifies?** Employees may file claims to:
 - ◆ Care for a seriously ill child, spouse, parent, or domestic partner;
 - ◆ Bond with a new child; or
 - ◆ Bond with a minor child in connection with adoption, or foster care placement of that child.

- **Amount of Benefits:** An employee can recover benefits equal to one-seventh of his or her weekly benefit amount on any day in which he or she is unable to perform his or her regular or customary work.
- **Certificate required:** An employee seeking benefits for the care of a seriously ill family member must file a certificate. The certificate must contain a physician's declaration describing the family member's condition and when the physician believes the person receiving care will improve.



- **Who doesn't qualify?** Employees who are receiving SDI, unemployment insurance, or workers' compensation benefits cannot receive Paid Family Leave benefits. Employees are not eligible if another family member is able and available for the same period for which the employee seeks benefits.
- **Waiting Period:** There is a seven-day waiting period before benefits are paid. The employer may also require the employee to use two weeks vacation time before receiving benefits. The first week of vacation will be applied to the seven-day waiting period.

RETROACTIVE LIABILITY FOR HARASSMENT BY NON-EMPLOYEES?

A Split in Authority

In 2003, the California legislature amended an existing provision of Government Code section 12940(j)(1), which provides that an employer is liable for harassment of its employees by co-employees, to also provide that employers are liable for harassment by *non*-employees that they either

knew about or should have known about, but failed to take immediate and appropriate corrective action (for example, when an employer knows that a customer continually harasses a waitperson, but fails to attempt to stop the conduct). So far, the California appeals courts are split on whether the amended statute applies retroactively.



The normal rule with statutory enactments is that they can only be applied prospectively, not retroactively. However, there is an exception to this rule if the amendment simply “clarifies” existing law, in which case the “clarification” is not considered to be a new law, but rather just an explanation of the legislature’s original intent and can apply retroactively. The Legislature indicated that, with regard to the amendment to section 12940(j)(1), it was merely clarifying the law to more clearly explain that it applied to harassing acts by non-employees, as well the employers’ own employees.

The California Court of Appeals, 2nd Appellate District, held on March 30, 2004, in *Salazar v. Diversified Paratransit, Inc.*, that since the Legislature simply “clarified” existing law, the provision concerning employer liability for non-employees’ actions was therefore applicable to cases and actions that took place prior to the 2003 amendment.

However, the California Court of Appeals, 4th Appellate District, recently held on August 17, 2004, in *Carter v. California Department of Veterans Affairs*, that the amendment to the law was too fundamental to be considered merely a “clarification” of preexisting law. After considering the ruling in the *Salazar* case, the court reached a contrary conclusion, explaining that it was unconstitutional for the Legislature to apply the amendment retroactively to conduct that took place prior to its enactment.

Given this clear split in authority, the California Supreme Court will likely have the last word.

What Employers Can Do Now:

There’s no need to wait for the Supreme Court. Even the potential for liability for harassment by non-employees is reason enough for employers to make sure that anti-harassment policies are reviewed for compliance with new laws and published to employees and to encourage employees to promptly report suspected harassment of any kind by any one.

GUV VETOES MINIMUM WAGE INCREASE

In September, Governor Schwarzenegger vetoed AB 2832, the minimum wage bill that would have raised California’s minimum wage from \$6.75 to \$7.25 on January 1 2005, and to \$7.75 on January 1, 2006. It was believed that this bill would have resulted in increased costs to California employers by as much as \$4.4 billion. In his veto message, the Governor said the bill would have increased what he believes is the already high cost of doing business in California, and would lead to a reversal of the state’s economic recovery. As a result of the veto, the Governor hoped to encourage employers to stay in California, expand in California, and create more jobs in the state.

EMPLOYER LIABILITY FOR RETALIATORY DISCHARGE



Reeves v. Safeway Stores, Inc.

In *Reeves v. Safeway Stores, Inc.*, the California Court of Appeals addressed issues arising from an employee’s claim of retaliatory discharge. The employee contended that, after making complaints of sexual harassment to his supervisor, the supervisor retaliated by initiating disciplinary proceedings against the employee, claiming that the employee had violated company policy and procedure. As a result, the employee was

terminated. The twist is that the employee was not terminated, but rather by a high level manager who had no knowledge of the employee's complaints.

The court held that the employer cannot avoid liability by having a higher level manager who lacked knowledge of the employee's complaints make the termination decision if the supervisor initiated the termination process for retaliatory reasons. As long as the supervisor's retaliatory motive was an actuating, "but-for" cause of the employee's termination, the employer may be liable for retaliatory discharge.

Based on this decision, if any decision-maker or motivating actor in a termination process has a retaliatory motive, the question of liability will likely go to a jury, no matter how lawful the ultimate decision-maker's motive may be.

G&R'S EMPLOYMENT GROUP CONTINUES ITS EXPANSION

Introducing...



Josh Wagner

Josh Wagner is a new associate in the Firm's Los Angeles office. His practice focuses on employment litigation representing management in employment disputes and healthcare litigation representing facilities against claims of elder abuse. Mr. Wagner earned his J.D. from Stanford Law School in 1998, where he was an editor of the Law Review. Prior to graduation, he was a Fulbright Fellow in Japan at the Hokkaido University Graduate School of Law. Mr. Wagner graduated magna cum laude from the University of California, San Diego in 1994 with a B.A. in East Asian Studies.

Prior to joining Gordon & Rees, Mr. Wagner was an associate with the firm of Herzog Fisher Grayson & Wolfe in Beverly Hills.



Dennis Hyun

Dennis Hyun is a new associate in the Firm's Los Angeles office. Dennis graduated from UC Riverside with a B.A. in English and minor in Creative Writing. Dennis graduated from Loyola Law School in 2002. While at Loyola, Dennis served as editor for the International and Comparative Law Review, interned at the U.S. Attorney's Office, U.S. District Court and at a law firm. After graduation, Dennis worked as a research attorney for the Los Angeles Superior Court for two years.

To obtain additional copies of *Employment...Matters!*, to enroll others or to recommend colleagues as subscribers to future issues of *Employment...Matters!*, please e-mail Susan Roe at sroe@gordonrees.com.

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