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THE CLOCK IS TICKING . . . IS YOUR COMPANY IN COMPLIANCE WITH CALIFORNIA'S MANDATED SEXUAL HARASSMENT TRAINING?

On September 30, 2004, Governor Schwarzenegger signed Assembly Bill 1825 (now Government Code section 12950.1) into law. The new State law requires California employers who have 50 or more employees, or who regularly receive the services of 50 or more persons on a contract basis, to provide sexual harassment training to all their supervisors by January 1, 2006, and every two years thereafter.

Which Employers Does the New Law Apply to?

- Ø All employers doing business within the state of California who have 50 or more employees.
- Ø Independent contractors, part-time employees and temporary workers are counted towards a company's total number of employees.
- Ø The law applies to private and public companies, non-profit organizations, as well as state and local government entities.
- Ø The Law may apply even if some employees live or work outside of California.

Who Must Be Trained?

- Ø All "supervisors."
- Ø Any person with the authority to:
 - Hire, fire, transfer, suspend, lay off, recall, promote, discipline, or reward other employees.
 - Direct employee activities or adjust employee grievances.
 - Effectively recommend any of the above actions, even if their recommendation must be approved by another individual.

What Type of Training is Required?

- Ø At least two hours of classroom or other effective interactive training regarding sexual harassment, discrimination and retaliation.
- Ø Training must include practical guidance and examples illustrating state and federal laws prohibiting harassment.
- Ø Training must include information regarding remedies available to harassment victims.
- Ø Training must include practical examples aimed at the prevention

of future harassment, discrimination and retaliation.

- Ø Training must be “interactive,” including discussions, role playing, and question and answer sessions, among other things.
- Ø Training must be given by a person with knowledge and expertise in the prevention of harassment, discrimination and retaliation.

When Must the Training Be Completed?

- Ø All Supervisors employed as of July 1, 2005, must be trained before January 1, 2006, unless the supervisor has received training from his/her same employer since January 1, 2003.
- Ø Supervisors hired or promoted into a supervisory position after July 1, 2005, must complete training within six months of their hire or promotion.
- Ø All supervisors must be re-trained every two years.

What if a Supervisor is Not Trained?

- Ø The Fair Employment & Housing Commission may issue an order directing a company to conduct the training.
- Ø If a supervisor is later accused of sexual harassment, or fails to properly respond to a sexual harassment issue, a lack of training may expose the employer to potential liability and/or punitive damages.
- Ø No automatic liability or penalty if training is not conducted in a timely manner.
- Ø An employer’s compliance with the new training requirements does not insulate it from civil liability for sexual harassment.

What Should You Do?

- Provide mandated training to all supervisors before January 1, 2006.
- Consider additional training for supervisors on other types of unlawful harassment, discrimination and retaliation, as well as recommended management practices (including proper hiring, discipline, and firing practices).
- Consider providing training to non-supervisory employees about prevention of harassment in the workplace.
- Create a record keeping system to monitor who has been trained and ensure that subsequent

training is provided in a timely manner.

- Include training costs in your 2006 budget.
- Review and update written policies and procedures to comply with the new regulations.



NEED HELP MEETING THE REQUIREMENT? GORDON & REES CAN HELP!

The attorneys in the Employment Group at Gordon & Rees are experts in the prevention of harassment, discrimination and retaliation. We can create a customized training program specifically for your industry and personnel. Our typical programs include role playing, break-out sessions, and interactive question and answer periods. All participants receive a certification of compliance documenting that the AB 1825 requirements have been met.

EMPLOYER CONTROL OVER EMPLOYEE “BLOGGING”

“January 7, 2005 – Yesterday, our new product line was unveiled at the convention in Colorado to a bunch of potential buyers. Little do they know the products are totally defective. They don’t even work! And I should know because I was on the front line trying to come up with some fancy new technical design. This place is going down. My co-workers are crazy and I think my boss is pocketing company funds. If Squealy, Inc., is not careful – this place is going to turn into another Enron!”

Imagine that you are the CEO or HR director of Squealy, Inc., and you just came across this blog entry which was posted on the internet by one of your employees. Would you fire this employee? Would you sue this employee? Would you hit “reply” and post your own blog for damage control? These are just a few of the many questions employers are asking themselves in response to disparaging

comments and leaks of confidential information made by employees who blog.

A blog (or technically referred to as a Web log) is an online publication that contains editorial comments on a personal website. According to the American Management Association and the ePolicy Institute, nearly 8.5 million Americans have created their own blogs. As a result, employee blogging is becoming the fastest growing source of legal and personnel problems for employers nationwide.



Across the country, employers are finding themselves publicly victimized by employees who are damaging their reputations, images, and competitive advantages. For example, last year, Delta Airlines fired a flight attendant for posting suggestive photos of herself aboard an empty plane on her blog, on the grounds that her photos were harmful to the company's image. In a recent blog case at Google, the company fired a product manager just two weeks after his start date because the employee wrote comments about potential new products and life at Google in his Web log.

Still worse, employers are finding themselves dragged into lawsuits filed by co-workers and subordinates of employee bloggers. Several cases have popped up in which employers are named as defendants in sexual harassment and race discrimination suits by employees who were the target of demeaning and derogatory insults posted about them by a fellow co-worker and/or supervisor on a Web log. The rationale for naming the employer as a defendant (aside from being the obvious deep pocket) is that management had no policies to control abusive blogging and, therefore, should be deemed responsible for its employees' harmful actions.

Taking preventive measures to control "bad-mouthing bloggers" not only can reduce an employer's risk of potential liability, but also can make for a more productive workplace. The following are some steps that can be taken to effectively manage and protect company resources

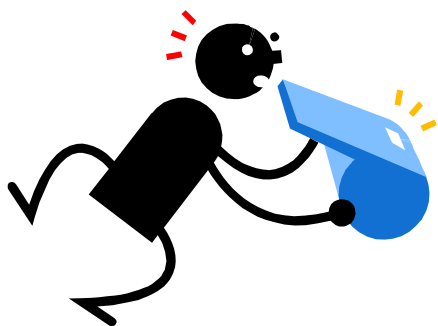
against potentially derisive blogging:

- **Establish written blogging policies and guidelines.** Only a handful of companies have developed and published written blogging guidelines; however, establishing a written policy addressing the company's rules about what should not be posted in a Web log can save the company time, money, and human capital. Written blogging policies and guidelines should set forth clear rules prohibiting the use of derogatory and offensive language and the disclosure of sensitive, financial and other confidential and proprietary information. Additionally, such written policies and guidelines should be consistent with the employer's non-harassment and discrimination policies already in place.
- **Consider establishing a company-approved corporate blog.** Not all Web logs are detrimental to employers. Indeed, corporate blogs can serve as an instrumental tool in keeping customers and potential customers updated about new developments in the company. Corporate blogs can also provide a valuable source for feedback and constructive criticism to which management can respond and, perhaps, implement new ideas in to a company's business practices.
- **Designate a member of management to oversee and enforce the company's blogging rules and expectations.** As blogging becomes increasingly popular, many employees still are unaware of the dos and don'ts of blogging and the potential legal implications that may arise from what an employee posts on a blog about his or her company. Instruct employees to consult with a designated member of management if they are unsure of what constitutes confidential and proprietary information. Keeping employees informed of the company's expectations – and the potential ramifications for failing to adhere to company policy – can help reduce the risk of serious problems later on.
- **Hire employees that will agree not to disparage and/or damage the company.** We no longer live in a world where idle gossip around the water cooler creates nothing more than hurt feelings in the workplace. Today, employee blogging creates an actual publication for millions of people to read. The expansive reach of the Internet allows for potentially

damaging information about a company to reach a critical mass that could impact a company's bottom line. Incorporating non-disparagement and confidentiality provisions specific to blogging in employment agreements is a way to address the company's concerns upfront during the hiring process.

WHISTLE BLOWERS CAN BRING RETALIATION CLAIMS, EVEN WHEN THEY DO NOT "BLOW THE WHISTLE"

The California Supreme Court recently handed down a decision with serious implications about retaliation claims. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028.) The Court held that an employer could be liable for retaliation even when the employee never informed her supervisor or her employer that she believed she was opposing discrimination or being retaliated against. The case also held that courts must look to the totality of the circumstances to determine whether a series of events, taken together, could arise to the level of "adverse action" supporting a claim for retaliation.



Yanowitz, a regional sales manager, was instructed by her supervisor to terminate a female sales associate for not being sufficiently "attractive" or "sexy" and replace the associate with someone who was "hot." Yanowitz refused the direction more than once, and replied that her supervisor needed to provide her with "adequate justification" for the termination. Though she never informed her supervisor or any other L'Oreal managerial or Human Resources employee, Yanowitz claimed to believe the request was discriminatory because she had never been asked to do the same with any of her male associates. Yanowitz contended that she was subjected to heightened scrutiny, negative performance evaluations, and public criticism before her associates, all of which caused her severe emotional distress requiring her to leave her position.

The *Yanowitz* Court made three important rulings. First, employees who reasonably believe that they are "opposing unlawful discrimination" need not report their intent to oppose or the belief that they are being retaliated against. So long as their employers have reason to know of their beliefs (such as through actions like Yanowitz's demand for adequate justification), the opposition itself is sufficient. Many prior cases required that an employee actually report discrimination or retaliation. *Yanowitz* essentially protects whistleblowers who do not even blow the whistle.

Second, courts must look to the totality of the circumstances and their overall affect on an employee's working conditions to determine whether the employee suffered an "adverse employment action." Even if comprised of several individually non-actionable incidents, a pattern of retaliation can constitute adverse action.

Third, if part of an ongoing pattern of related conduct, prior incidents (even those that are too old to litigate) can be included in reviewing the totality of the circumstances. When collective conduct results in adverse action, the clock begins to run on an employee's claim once the adverse action has reached a level of permanence or finality and not before.

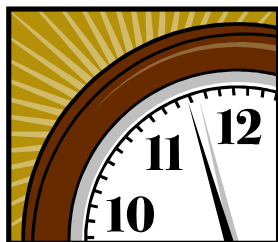
Avoiding Liability for Retaliation

- Ø Carefully evaluate the circumstances when employees question or refuse to engage in activities or to follow directives – their reluctance might be evidence that they believe they are opposing illegal discrimination.
- Ø Understand that any disciplinary action (including older discipline) could be viewed as part of a pattern of retaliation.
- Ø Be sure to timely and properly document the reasons for employee discipline.
- Ø Thoroughly train your managers and supervisors about the changing requirements of California discrimination laws.

The *Yanowitz* case constitutes another cautionary decision for employer's trying to avoid discrimination liability and underscores the importance of properly training supervisors to identify when an employee might be taking steps they believe are in opposition to discrimination.

PARTIAL DAY EXEMPTIONS FROM EXEMPT EMPLOYEES' VACATION LEAVE PERMITTED

The California Court of Appeals recently concluded that nothing in California law precludes an employer from following the established federal policy permitting employers to deduct from exempt employees' vacation leave, when available, on account of partial-day absences from work. (*Conley v. Pacific Gas & Electric Co.* (2005) 131 Cal.App. 4th 260.)



Prior to the court's decision in *Conley*, the issue of debiting leave banks for partial day absences had not been addressed by California courts. However, the California Division of Labor Standards Enforcement ("DLSE") had previously issued several advisory opinion letters on the subject. In those letters, the DLSE expressed the view that debiting vacation and PTO leave banks to cover partial day absences was unlawful in California because of the "special" and non-forfeitable status of vacation pay under California Labor Code section 227.3 and the California Supreme Court's decision in *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774.

In rejecting the DLSE's views, the Court reasoned that although the federal salary basis test may require an employer to give exempt employees *additional* time off for partial-day absences after they exhaust their vacation leave banks, under this employer's (PG&E) vacation leave policy, the employer's exempt employees do in fact *receive* all of the paid time off they have earned--they must simply use that accrued vacation time to make up for partial-day absences. In other words, because the deductions made from vacation leave banks of exempt employees represented days on which those employees did, in fact, take at least four hours off work, "PG&E's vacation leave policy neither imposes a forfeiture nor operates to prevent vacation pay from vesting as it is earned." The Court further pointed out, "all it does do is regulate the *timing* of exempt employees' use of their vacation time, by requiring them to use it when they

want or need to be absent from work for four or more hours in a single day." The Court concluded that "this is entirely consistent with *Suastez*, in which the Supreme Court expressly noted that "[s]ection 227.3 ... does not purport to limit an employer's right to control the *scheduling* of its employees' vacations. [Citations.]" (*Id.* at pp. 778-779, fn. 7, italics added.)

Given the previous DLSE opinion letters on this subject, many advisors had warned employers that they should not deduct for partial day absences under these circumstances for fear of creating significant overtime exposure. While this decision purports to provide clarity on an issue favorable to employers, the decision is surely to be challenged either in the courts or in the legislature. Further, several issues remain open; namely, whether employers may establish vacation bank deficits based upon partial-day absences and to what extent may California employers regulate or mandate their employees' vacation schedules.

FAVORITISM MAY PROVIDE BASIS FOR SEXUAL HARASSMENT CLAIM

The California Supreme Court recently addressed a long running dispute concerning the legal effect of favoritism shown by a supervisor to an employee with whom the supervisor has a consensual sexual relationship. (*Miller v Department of Corrections* (2005) 34 Cal.4th. 446.) Previously, there had been a split of opinion as to whether or not such favoritism constituted sexual discrimination or harassment against other employees in violation of California law.



The California Supreme Court put that issue to rest (somewhat) by ruling that employees can sue for sexual harassment, even when they are not the targets of unwanted sexual advances, if a supervisor's relationships with other employees create an environment filled with sexual favoritism.

The plaintiffs in this case, Miller and Mackey, both

alleged that the correctional facilities where they worked subjected them to a hostile work environment. Specifically, the women claimed that Kuykendall, the chief deputy warden at one women's prison and later the warden at another, had sexual affairs with female women employees who had moved from the first to the second prison. According to the allegations, all three women received either special treatment or promotions resulting from their relationship with Kuykendall, including one who was promoted over Miller even though the woman allegedly had less experience and fewer qualifications than Miller.

The California Supreme Court found that a hostile work environment can be created even if the plaintiffs are never subjected to sexual advances, so long as the work atmosphere created by these affairs is demeaning to women and creates the implication that the way to advance within the company is to sleep with your boss.

It should be noted that the Court did not overrule prior cases which found that an individual relationship in which the manager favored a subordinate because of their sexual relationship did not violate the FEHA or Title VII. In fact, the Court specifically stated that it was not holding that such relationships and favoritism constituted a violation of the FEHA's prohibition against discrimination; thus, a private consensual sexual relationship between a supervisor and an employee, even though the employee receives certain work related benefits from that relationship, will not, by itself, be a violation of the sexual harassment rules of the FEHA.

However, if the consensual romantic relationship between a supervisor and his/her subordinate is conducted in public and in such a manner whereby other employees may reasonably believe that engaging in sexual conduct with the supervisor will result in promotions and other favors, then a jury may conclude that a hostile work environment was created in violation of the FEHA. Employers should take increased responsibility to monitor the manner in which managers and supervisors relate to their subordinates and the "public" knowledge and perception of those relationships. To the extent these relationships do, in fact, become public knowledge and other employees perceive that acquiescence in sexual relations is necessary in order to be promoted, such conduct must be addressed immediately.

RECENT CASE IMPOSES TOUGHER BURDEN ON EMPLOYERS DEFENDING CALIFORNIA DISABILITY DISCRIMINATION CLAIMS

A recent California appellate court decision makes it more difficult for employers to defend state law disability discrimination claims. (See, *Green v. State of California* (2005) 132 Cal App. 4th 97). The *Green* decision is significant in that it shifts the burden of proof concerning an employee's ability to perform their job.



Prior to *Green*, California and Federal courts typically required an employee bringing a Fair Employment and Housing ("FEHA") disability discrimination claim to prove that the employee: (1) is disabled; (2) is able, with or without accommodation, to perform the essential job functions of the position; and (3) suffered an adverse employment action on the basis of that disability. If the employee established these elements, the employer then had an opportunity to prove that the adverse action was for non-discriminatory reasons, which the employee could attempt to refute with a showing that such stated reasons were pretextual. This approach was consistent with Federal disability discrimination law under the Americans with Disabilities Act ("ADA").

The *Green* decision changes who bears the burden of proof on the issue of ability to perform. Instead of requiring the employee to prove that he or she is able to perform, the employer must now prove that the employee cannot perform the essential functions of the position in order to defend a disability discrimination claim. The *Green* court reasoned that because an inability to perform is regarded as a defense in California, the employer should have the burden of proof. The decision acknowledged that this approach provided greater protection to employees than under Federal disability law.

The precise effect of the *Green* decision may take

time to develop. However, it is clear that shifting the burden of proof could make it more difficult to defend disability claims unless care is taken to document that an employee is unable to perform his or her essential job functions.

Tips to Avoid Disability Discrimination Liability

- Ø Recognize that the employer bears the burden of proving that an employee cannot perform the essential job functions, with or without reasonable accommodation.
- Ø Be careful not to discriminate against disabled employees or applicants who may be able to perform the essential job functions of a position, and do not presume that their disability disqualifies them.
- Ø Investigate the scope of the employee's disability and the scope of the essential job functions for available positions before making decisions.
- Ø Remember that California law offers greater protections than Federal law to disabled employees and applicants.
- Ø Learn the requirements and train your staff accordingly.

NEW UNIFORMED SERVICE MEMBER REQUIREMENTS

Recent amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA) require employers to review their policies and procedures to ensure compliance.

First and foremost, employers are required to provide to all employees a notice of the rights and benefits afforded under USERRA to individuals who qualify under the Act. Employers may provide the notice "Your Rights Under USERRA" by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail).

The most recent version of the poster created by the U.S. Department of Labor (DOL) can be downloaded at the website <http://www.dol.gov/vets/programs/userra/poster.pdf>. A copy of the poster may also be requested by calling the DOL hotline 1-888-487-2365.

The poster explains employee reemployment rights:

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- you ensure that your employer receives advance written or verbal notice of your service;
- you have five years or less of cumulative service in the uniformed service while with that particular employer;
- you return to work or apply for reemployment in a timely manner after conclusion of service; and
- you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service, or, in some cases, a comparable job.

In addition to notifying employees of their right to be free from discrimination and retaliation for uniformed service, and informing employees of their right to seek enforcement by the DOL, the new poster also modifies employee health insurance protection:

- If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health coverage for you and your dependents for up to 24 months while in the military (**Note: increased from 18 months.**)
- Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

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