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CALIFORNIA LAWMAKERS WERE BUSY IN 2003: NEW LAWS FOR 2004

As we begin the new year, California employers need to be aware of the following new laws which took effect on January 1, 2004. The laws that require immediate action are listed first. As always, please feel free to contact any G&R employment lawyer if you would like more information or have any questions.



New Laws That Require Immediate Attention:

Whistleblowers: SB 777

Existing law prohibits an employer from making, adopting, or enforcing a policy that prevents an employee from disclosing violation of a state or federal statute, or a violation of a state or federal regulation to a government or law enforcement agency, or from retaliating against an employee who makes a disclosure.

This new law strengthens protections by now making it illegal to retaliate against an employee who: 1) discloses any possible state or federal law violation to a government agency; 2) refuses to participate in an activity that would result in a violation of state or federal law; or 3) exercised whistleblower rights at a former job. Violations carry a new civil penalty of up to \$10,000.

Immediate Obligations

- Prominently display a notice detailing employees' rights and employer's responsibilities under the whistleblower law along with the hotline phone number 800-952-5225. The lettering of the notice must be larger than 14 point type. There is no official poster yet available from the attorney general.

Paid Family Leave: SB 1661 and SB 727

Under existing law, the Family Temporary Disability Insurance (FTDI) program provides up to 6 weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child. These benefits are payable for family temporary disability leaves that begin on and after July 1, 2004.

This law changes the name of the FTDI program to the "Paid Family Leave" program. The new law clarifies that "bonding" leave must be taken within one year of the birth, adoption, or placement of the child in foster care. Additionally, an employee will not be eligible for paid family leave in connection with caring for a seriously ill family member for any day that another family member is ready, willing, and able to provide the required care. Finally, employees are eligible for no more than 6 weeks of paid family leave benefits in a 12-month period, which begins on the first day an individual establishes a claim for such benefits.

Immediate Obligations

- Provide all employees with the official pamphlet (2 pages) regarding the Paid Family Leave program and benefits. A copy of the pamphlet may be obtained at <http://www.edd.ca.gov/direp/de2511.pdf>.
- Prominently display the poster which describes the program. A copy of the poster may be downloaded at <http://www.edd.ca.gov/uiirep/de1857a.pdf>.

Leave for Crime Victims and Their Families: SB 478

Under this new law, employees who are the victims of serious crimes, and relatives and registered domestic partners of crime victims, can take unpaid leave from work to attend legal proceedings. The crime must be a violent or serious felony, or a felony theft or embezzlement.

In advance of taking leave, the employee must give the employer a copy of the official notice to the victim of each scheduled proceeding unless prior notice to the employer is not feasible. The employee is allowed a reasonable amount of time

after the absence to provide documentation substantiating that they attended a judicial proceeding.

Any records relating to an absence under the new law must be kept confidential.

Immediate Obligations

- Update your Employee Handbook to set forth the notice and documentation requirements for this new type of leave and provide a notice to all employees.
- Store documents relating to leave requests under this law separately from an employee's personnel file to maintain confidentiality.

Protection for Transgendered Employees: AB 196

This new law broadens the prohibitions of the Fair Employment and Housing Act (FEHA) to include discrimination and harassment on the basis of one's gender (as opposed to one's sex). The law protects cross-dressing in the workplace consistent with gender identity.

The new law allows employers to impose reasonable workplace appearance, grooming, and dress standards so long as employees are allowed to appear or dress consistent with their identity.

Immediate Obligations

- Update your discrimination and anti-harassment policies to reflect that discrimination and harassment against transgendered, transsexual, and transvestite employees and applicants is now illegal.

Liability for Harassment by Non-employees: AB 76

Under existing FEHA provisions, employers are liable for workplace sexual harassment a non-supervisory employee if the employer knows or should have known about the harassment, but did not take immediate corrective action.

The new law holds employers liable for harassment committed by non-employees against employees if the employer knows or should have known about the harassment, but did not take immediate corrective action.

Immediate Obligations

- Update your anti-harassment policies to reflect that discrimination and harassment by non-employees is now illegal under California law (FEHA), and should be reported as provided for in company policies.

Limits on Use of Social Security Numbers: SB 25

Existing law bars California businesses from printing an individual's Social Security Number (SSN) on anything mailed to that person unless one of the following exceptions applies: 1) the business is required by law to use the SSN, or 2) the mailed document is a form or application, is to establish, amend, terminate an account, contract, or policy, or is to confirm the accuracy of the SSN.

This law provides that even if an SSN is permitted on a mailed document, businesses cannot: 1) print part of the SSN on a postcard or other mailer not requiring an envelope; or 2) have part of the number visible on the envelope or without the envelope's being open.

Immediate Obligations

- Review any mechanisms for mailing documents which routinely reflect SSN numbers to insure compliance with this new law.

Other New Laws:

Equal Benefits for Domestic Partners: AB 17

Under this law, certain state contractors will have to provide the same employee benefits for registered domestic partners as they do for spouses. Generally, state agencies will not be able to have contracts for \$100,000 or more in goods or services with a contractor that provides

employee benefits to employees with spouses but not to employees with domestic partners.

The law applies to both California and out-of-state contractors and will not cover contracts executed or amended before January 1, 2007.

AB 205:

This new state law extends legal rights to domestic partners equal to those of spouses.

Check to make sure that your Employee Handbook informs your employees of their rights in this regard.

Universal Health Coverage: SB 2

This law, also known as the Health Insurance Act of 2003, requires California businesses to either provide health coverage to part and full time employees or pay a fee into a state health coverage fund.

The new requirements will not take effect until 2006. There will be a ballot initiative to appeal this law in November 2004.

Expanded Access to Criminal Records: SB 873

This new law authorizes the State Department of Justice to obtain from the FBI federal criminal history information and juvenile arrest information requested by an employer in connection with an application for employment or volunteer work that would involve work with minors or other vulnerable people, such as the elderly or mentally impaired.

Wage and Hour Appeals: AB 223

This law makes it harder for employers to recover attorney's fees and costs in connection with an employee's appeal from a labor commissioner wage and hour ruling. If the court awards the employee a sum greater than zero in the appeal, the appeal is successful and the employer cannot recover its fees and costs.

Increased Penalties for Labor Code violations: AB 276

This law boosts the penalties for various California labor code violations. Failure to pay wages, including overtime, or for illegally withholding wages doubles to \$100 for a first offense, and to \$200 plus 25% of anything illegally withheld for subsequent violations. The penalty for failing to pay minimum wage increased to \$100 for initial, unintentional violations.

Penalties will increase to \$200 per day of employment for an individual who does not hold a valid state contractor's license but employs workers to perform services that require a license. Additionally, an individual who has a valid state contractor's license will face a penalty of \$200 per person per day for knowingly hiring a contractor to perform services requiring a license if that person doesn't have a license or does not meet the requirements for independent contractor status.

Labor Contracts: SB 179

This law prohibits entering into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor if you know, or should know, the contract agreement does not include enough money for the contractor to comply with all laws or regulations relating to the labor or services. Violations carry damages of up to \$1,000 per employee plus attorney's fees.

Prevailing Wage Violations: AB 1418

Under this law, the labor commissioner must maintain a public list of contractors who have willfully violated prevailing wage laws. The Contractors State License Board must post on the internet information about a contractor's willful or deliberate violation of the labor code. The minimum penalty for prevailing wage violations is increased to \$10 per day, unless the contractor made a good-faith mistake and promptly corrected the underpayment. If the contractor has prior violations, the penalty is \$20 per day. If the violation is willful, the penalty remains unchanged at \$50 per day.

TAX INCENTIVES AND THE AMERICANS WITH DISABILITIES ACT



Did you know that:

- Section 44 of the tax code allows small businesses a tax *credit* for making a business more accessible to disabled customers?
- Section 109 of the tax code provides for a special tax deduction to businesses for removing "barriers" to access for persons with disabilities?
- Section 51 of the Internal Revenue Code provides that some businesses are eligible for credits for hiring certain targeted low income groups including certain classes of disabled workers?
- That your business can use these tax incentives in combination?

Check with San Francisco partner Michael Bruno for more information on disability access issues. Michael's email address is mbruno@gordonrees.com.

**A WIN FOR THE EMPLOYER:
DAMAGES LIMITED IN
SUPERVISOR SEXUAL
HARASSMENT CLAIMS UNDER
THE FEHA!**

The California Supreme Court recently addressed two key issues that are critical to an employer's defense to hostile environment sexual harassment claims brought under the California Fair Employment and Housing Act (FEHA). In *State Dept. Health Services v. Superior Ct. (McGinnis)*, the court reaffirmed that an employer is strictly liable for hostile environment sexual harassment by a supervisor. However, the court

held that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove at least a partial defense based on the doctrine of avoidable consequences.



The avoidable consequences defense allows the employer to escape liability for those damages that the employee “more likely than not” could have prevented. The court held that when an employee could with reasonable effort and without undue risk, expense, or humiliation, take advantage of the employer’s internal complaint procedures designed to prevent and eliminate sexual harassment, he was under such a duty.

If an employer provides no sexual harassment complaint procedure, or fails to communicate its procedure to its employees, the employer will not be able to avail itself of the doctrine of this useful decision.

For a more in-depth analysis of the McGinnis decision, please see G&R’s November 24, 2003 *Employment...Matters!*, *News Bulletin* or contact any G&R employment attorney.

SAN FRANCISCO PASSES NEW MINIMUM WAGE LAW

In November, when voters approved Proposition L, San Francisco joined a growing list of cities setting forth higher minimum wages for both city and private employees. **The new law raised the minimum wage in San Francisco to \$8.50 per hour effective February, 2004.** The city minimum wage applies to any employee who works within the boundaries of San Francisco.

Restaurant owners should be aware that there is no exemption in the new ordinance for workers who earn tips. As several of our restaurant clients have reported to us, wait-staff are often very highly compensated, with some waitpersons earning more than \$100,000 per year. Ironically, this new law will increase their wages and probably result in layoffs of non-tipped restaurant workers.

INVESTIGATIONS OF WORKPLACE MISCONDUCT ARE EASIER WITH RECENT CLARIFICATIONS OF THE FAIR CREDIT REPORTING ACT (FCRA)

Although the analogous California law was “clarified” about a year and a half ago, substantial doubt still existed as to whether employers needed to give employees notice under federal law when the employer hired an outside person to investigate the employee’s misconduct. This concern arose from the existence of two 1999 Federal Trade Commission Opinion Letters holding that FCRA was applicable to such investigations. Obviously, notifying an employee that he is under surveillance would allow him to temporarily reform his conduct and thwart the investigation.



This ambiguity has been resolved by President Bush’s signing of the bi-partisan Fair and Accurate Credit Transactions Act of 2003 in December. While many of the provisions are designed to prevent identity theft and provide individuals greater access to their credit reports, the boon for employers is that they may now employ seasoned outside investigators to assist them with employee misconduct investigation without fear of having to comply with FCRA.

GRAY DAVIS GRANTS EMPLOYERS A CRUCIAL VETO



Immediately before he left office, California governor Gray Davis, vetoed SB 1715, passed by both the House and the Senate in September. SB 1715 would have invalidated arbitration agreements that covered potential FEHA claims that were required as a condition of employment. What this would have meant was that employment agreements that provided for mandatory arbitration would have to have been revised in many instances

The death of SB 1715 is welcome news for employers. During Mr. Davis' tenure, the legislature changed or created more than 400 statutory labor rules, generally making it more difficult for employers to do business in the state. Indeed, with the passage of SB796, the so-called "Bounty Hunter Law," which substantially rewards lawyers who raise even trivial or technical violations of the Labor Code, we can expect robust employment litigation in the near term. (See our November 2003 Employment...Matters Bulletin for a more detailed analysis or contact one of the partners in the Employment Group.)

INTERESTING FMLA FACT

Did you know that if FMLA leave is taken due to the birth or placement of a child for adoption or foster care, an employee may take FMLA leave intermittently or on a reduced schedule *only* if the employer agrees to such a schedule? Contrast this rule to the rule that medical necessity dictates the timing and amount of intermittent or reduced time leave when an employee suffers from a serious health condition or has to care for a family member with one. Note also that FMLA leave to care for a newborn, newly adopted or newly placed child must be completed within one year of the qualifying event, and may be taken in two week increments if the employee so chooses.

PUNITIVE DAMAGES GET A REALITY CHECK FROM THE US SUPREME COURT



Without question, one of the 2003's highlights in employment law comes from a case that had nothing to do with employment law. The guidance handed down by the U.S. Supreme court's ruling in *Campbell v. State Farm* (2003) 538 U.S. 408 will be a great benefit in challenging overly aggressive plaintiffs' lawyers in employment litigation. In *Campbell*, the high court set forth clear and previously unpronounced guidelines concerning the appropriate measures of excessiveness of punitive awards. The reprehensibility of the defendant's conduct, the disparity between the damages awarded and civil penalties, and a common-sense comparison between the damage award and the punitive damage award are now the emphasized factors in determining if the award is unconstitutional.

For employers and civil defendants generally, the wealth of the defendant has been relegated to a third tier consideration, making discovery of a defendant's wealth even more difficult to obtain than it is today. Aggressive pretrial and motion in limine practice should be able to ameliorate not only punitive damage risks in all but the most egregious cases, but will also save employers and supervisors accused of wrongdoing the headaches and emotional upheaval associated with disclosure of their finances.

While the practical effects of this ruling undoubtedly will be debated for years, one thing is certain: the plaintiffs' bar's hammer of punitive damages will be a much less prominent feature during trial, and consequently, during settlement negotiations.

G&R'S EMPLOYMENT GROUP CONTINUES ITS EXPANSION

Introducing...

SAN FRANCISCO



Dan Berkley

Daniel Berkley has specialized in labor and employment law and personnel management for over thirty years. Dan represents diverse clients in a variety of strategic industries, including health care, family and child care service agency, hospitality, food sales and distribution, restaurants, publishing, education, transportation, auto dealers, parking, construction, manufacturing, technology and aerospace.

Dan's over 25 years of hands-on collective bargaining negotiations in the health care, hospitality, transportation, auto dealer and parking service, and numerous service and manufacturing industries has focused the Service Employees International Union, the Teamsters Union, and a variety of other service labor organizations. He counsels management clients on resolving challenging employee/employer dilemmas in both union and union-free environments. He also advises clients on sexual harassment and discrimination prevention, policies and training.

Dan regularly presents seminars on the leading topics and developments in the field, while supplementing the literature on compelling and relevant subjects with frequent articles and commentaries.

Dan served five years as a field attorney for the National Labor Relations Board, followed by more than 12 years in private practice as a California partner for an East Coast-based national law firm. At the conclusion of the national affiliation, he founded The Berkley Law Group, P.C. Born in

Detroit, Michigan, he has a B.A. from Wayne State University and a J.D. degree from Boalt Hall School of Law, University of California, Berkeley (1971).



Carol C. Copsy

Carol Copsy has specialized in all aspects of labor and employment law, representing management for over fifteen years. Carol has extensive litigation and alternative dispute resolution forums experience. She has trained management and employees in a variety of topics and also counseled in employment compliance and planning.

Carol has spoken in seminars in a variety of settings to attorneys, is a published author, and is a member of the bar in California, Nevada and the District of Columbia. Carol has her J.D., from McGeorge School of Law, With Distinction (1983) and received her undergraduate degree, B.A., in Liberal Arts (1979). She is active in women's bar organizations, and is a Past President of California Women Lawyers.



Alyson S. Cabrera

Alyson Cabrera joined Gordon & Rees as a Summer Associate in 2001. She maintains a practice in the area of employment litigation.

From August 2002 to September 2003, Alyson served as Law Clerk to the Honorable Maria-Elena James, United States Magistrate Judge for the Northern District of California.

Alyson received her J.D. in 2002 from UC Hastings College of the Law, and her undergraduate degree, B.A. in Sociology, from UC Berkeley.



Marcie S. Norton

Marcie Norton is an associate in the San Francisco office of Gordon & Rees. She was a Summer Associate at Gordon & Rees in 2002, where she focused on employment litigation in federal and state courts, as well as administrative agencies.

Prior to joining the firm, Ms. Norton was a judicial extern for the Honorable Phyllis J. Hamilton in the United States District Court, Northern District of California.

Ms. Norton earned her BA in 1999 from Northwestern University where she graduated with departmental honors and double majored in Political Science and International Studies. She earned her JD in 2003 from the University of California Hastings College of the Law.

SAN DIEGO



Jessica Cook

Jessica Cook has recently joined Gordon & Rees as an associate in the firm's San Diego office. Her employment litigation practice focuses on matters such as wrongful termination, discrimination, unlawful harassment, retaliation, workers' compensation claims and other related issues. Jessica, who worked as a summer

associate at Gordon & Rees in 2002, received her J.D. in 2003 from the University of San Diego School of Law, where she graduated *cum laude* and *Order of the Coif*. She received her B.A. in 1998 from Duke University, where she majored in Public Policy Studies.

LOS ANGELES



Shirley D. Deutsch

Shirley Deutsch has joined the Los Angeles office as a partner. Shirley has tried numerous cases to verdict and has successfully handled civil appeals in the State and federal courts. She has specialized in employment law since 1988. In addition to her active litigation practice, Ms. Deutsch counsels private employers in developing and applying effective employment practices, investigating and resolving employee disputes, and preventing workplace violence.

Prior to joining Gordon & Rees, Ms. Deutsch was a shareholder in the Los Angeles office of Littler Mendelson. Before entering private practice she served as an Associate Adjunct Professor at the University of Southern California Law School. Ms. Deutsch earned her J.D. degree from Stanford University Law School, and her B.A., *summa cum laude*, from the University of California at Los Angeles.



Robert W. Feinstein

Robert Feinstein, a partner in the Los Angeles office, has been engaged exclusively in the practice of employment law since 1976. His practice includes extensive experience in

counseling and representing employers in a wide range of matters including discrimination, wrongful termination, whistleblower, harassment, wage and hour, ERISA, workplace violence, reductions in force, and employee terminations and discipline. He has litigated cases, including class actions, in state and federal trial and appellate courts, and before administrative agencies.

Prior to joining Gordon & Rees, Mr. Feinstein had been elevated to shareholder status at Littler Mendelson, where he had practiced since 1985. Mr. Feinstein earned a J.D. from the Washington University School of Law and received his B.A. *cum laude* from the University of Rochester. He is admitted to practice in California, Pennsylvania and New Jersey.



Theresa Kristovich

Theresa Kristovich graduated from Stanford University, The Boalt Hall School of Law and Oxford. She clerked for the California Supreme Court and in the U.S. Attorney's office where she tried 40 jury trials (civil and criminal) including three defense verdict employment jury trials. Theresa counsels employers as well as conducts employment litigation in a wide range of business areas. She also practices in the First Amendment, business and white collar fields.

SACRAMENTO



Mark Posard

Mark Posard an associate in the Sacramento office, represents employers involved in claims of employment discrimination, wrongful termination, work-place harassment, compensation issues, and other issues related to employment litigation

and counseling. In addition to his employment law practice, Mark has considerable experience in general business and corporate litigation and transactional work, tort and product liability defense, residential and commercial real estate matters, civil rights, transportation law and construction.

HOUSTON



Donna S. Cude

Donna Cude's practice focuses on the representation of management in labor and employment matters before state and federal courts and agencies. Her practice primarily involves defending employers before agencies and state and federal courts, and in providing day-to-day counsel and advice to management on all manner of labor and employment issues.

Donna earned her B.S. from Pennsylvania State University, and her J.D. , magna cum laude, from South Texas College of Law. She is board certified by the Texas Board of Legal Specialization in Labor and Employment Law, and has a Mediation Certification from the University of Houston A.A. White Dispute Resolution Institute.

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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