

EMPLOYMENT SEMINAR - RECENT DEVELOPMENTS

Liability for Harassment/Discrimination

- I) Government Code §12940(j)/ Liability for Conduct of Non-Employees
 - A) Government Code §12940 (j) modified to provide that employers may be held “responsible” for the sexually harassing conduct of nonemployees in the workplace.
 - (1) Liability arises if the employer or its agents or supervisors, knew or should have known of the inappropriate conduct and failed to take immediate and appropriate corrective action.
 - (2) Statute also provides that “the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees” should be considered by a court in deciding whether to hold an employer liable for the conduct of a nonemployee.
 - B) Government Code §12940(j) was modified as a direct rejection of the interpretation of the law given in Salazar v. Diversified Paratransit, where court held that employers are not liable for the sexually harassing conduct of customers or clients.

- II) Government Code §12926 and §12949/ Transgender Employees Protected Under Fair Employment and Housing Act
 - A) Government Code §12926(p) modifies the meaning of “sex” to include a person’s gender. Gender is defined as the person’s actual sex, the perception of the person’s sex or the perception of the person’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the person’s sex at birth.

 - B) Government Code §12949 makes clear that employers may require their employees to adhere to reasonable workplace appearance, grooming and dress standards provided that employees are allowed to appear or dress consistently with their gender identity.

- III) Public Contract Code §10295.3/ Prohibits Discrimination of Domestic Partners in Terms of Benefits
 - A) Prohibits state agencies from contracting for goods or services worth \$100,000 or more with companies who discriminate between employees with a spouse and employees with a domestic partner in terms of benefits provided.
 - (1) One of the two persons needs to have filed a declaration of domestic partnership with the Secretary of State.

 - B) What does not constitute discrimination under this section?
 - (1) Companies may provide benefits on a basis unrelated to an employee’s marital status or domestic partnership status.
 - (2) Companies may decide not to provide benefits to employees based on

their marital status or domestic partnership status or elect not to provide benefits to employees' spouses or domestic partners.

- C) In every contract subject to this section, the company must certify that it does not discriminate on the above-basis. If the company certifies falsely, the contract is void.
- D) Effective? Applies to Contracts amended or entered into after December 31, 2006.

Employers' Duties

- I) Labor Code Section 1400 et seq./Requires Notice Before Any Mass layoffs, Relocations and Terminations
 - A) California has enacted its own version of the WARN Act (Worker Adjustment & Retraining Notification Act) 29 U.S.C. section 2101 et seq.
 - (1) Both are similar but there are certain differences. Employers must comply with.
 - (2) Labor Code §1401: precludes employers of an industrial or commercial facility employing a prescribed number of people from ordering a mass layoff, relocation, or termination without first giving 60 days notice to affected employees.
 - B) Differences:
 - (1) Section 1401 only applies to employers who employ or have employed 75 or more persons within the preceding 12 months.
 - (i) WARN Act: Applies to employers with 100 or more employees (not including part-time) or 100 or more employees including part-time, who in the aggregate work 4000 hours per week.
 - (2) Section 1401 defines Mass layoff as: a layoff of 50 or more employees in any 30-day period.
 - (i) WARN Act: A reduction in force which is not the result of a plant closing and which results in an employment loss during any 30-day period for:
 - > at least 33% of the employees (excluding any part-time employees) and at least 50 employees; **or**
 - > at least 500 employees (excluding any part-time employees).
 - (3) Section 1401 defines termination: the cessation or substantial cessation of the industrial or commercial operations.
 - (i) WARN Act: the shutdown of a facility if it results in an employment loss during any 30-day period of 50 or more

employees excluding any part-time employees.

- (4) Section 1401 defines relocation: the removal of all or substantially all of the industrial or commercial operations to a different location 100 miles or more away.
 - (i) WARN Act: 60 day notice is not required for a closing or lay that is a result of relocation provided that the employee is first offered to transfer pursuant to certain conditions as specified in 29 U.S.C. 2101(b)(2).

II) Labor Code §1102.5 et seq./ Expands Protections for Employees with regards to Whistleblowing

A) Labor Code §1102.5:

- (1) Provides that it is unlawful for an employer to make, adopt, or enforce a policy, rule, or regulation preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or a violation of or noncompliance with a state or federal regulation.
- (2) An employer may not retaliate against an employee for disclosing what he has reasonable cause to believe is a violation.

B) Labor Code §1102.5 Modified to Include:

- (1) Makes it unlawful for an employer to retaliate against an employee for refusing to participate in any activity that would result in a violation of a state or federal statute, rule, or regulation.
- (2) Imposes on employers that are corporations or limited liability companies a new civil penalty of up to \$10,000 per violation.

C) Labor Code §1102.7:

- (1) Directs the California attorney general to establish a “whistleblower hotline” to receive calls from persons who have information regarding possible violations of state or federal statutes, rules, or regulations.

D) Labor Code §1102.8

- (1) Employer must post a list of employee’s rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hot line.

Employee Health Care/Leave/Benefits

I) Labor Code section 2120 et seq./ Mandated Health Coverage

- A) Requires all employers who employ 20 employees or more to provide health insurance to certain of their employees or to pay into a state pool that will purchase such coverage on their behalf.
- B) Employees must:
 - (1) Have worked for at least three months for the same employer and must work at least 100 hours per month.
- C) Employers Responsibilities Depend on the Size of the Company:
 - (1) Employers with 200 or more employees must provide health insurance for **workers and their dependents** by January 1, 2006 **or** contribute an amount to be determined to a state fund.
 - (2) Employers with 50 to 199 employees must provide coverage only to their **employees** by January 1, 2007.
 - (3) Employers with 20 to 49 employees must provide health insurance to employees if the state adopts a tax credit for those employers equal to 20 percent of the net cost of meeting this new obligation.
- D) Separate Unlawful Act if the Employer Changes Employee's Status in order to avoid the requirements of this provision.
 - (1) Can't make an employee an independent contractor or temporary employee.
 - (2) Can't reduce an employee's hours of work.
 - (3) Can't terminate and then rehire an employee.

II) Labor Code §230.2/ Permits Leave For Crime Victims

- A) Requires employers to allow an employee who's a crime victim or certain employees who are closely related to a crime victim to be absent from work in order to attend judicial proceedings related to the crime.
 - (1) Signed into law October 2003.
- B) Crime victim:
 - (1) Victims of felonies.
- C) Closely related:
 - (1) immediate family members, domestic partners, or children of a domestic partner who's a crime victim.
- D) Employee Must:
 - (1) If possible, give employer a copy of the notice of each scheduled proceeding before being absent.
 - (2) If not possible to give advance notice, employer should not take any action against the employee as long as the employee within a reasonable time from the absence provides the employer with documentation evidencing the judicial proceeding.
- E) Employee may:
 - (1) Elect whether to take accrued paid vacation time, personal leave, sick

leave, compensatory time off, or unpaid leave.

- F) Employer:
 - (1) Is required to keep information regarding the leave confidential.
 - (2) Cannot discriminate against the employee in terms of compensation, privileges of employment, loss of seniority, etc., because of the absence.
 - (3) If employee is terminated, threatened with termination, demoted or suspended, or in any way retaliated against for taking time off under this section, the employee may file a complaint against the employer with the Division of Labor Standards Enforcement of the Department of Industrial Relations.

III) Senate Bill 727/ Clarifying Benefits Provided by the Family Temporary Disability Insurance Program

- A) Under existing law, the family temporary disability insurance 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.
- B) Senate Bill 727 amends Labor Code section 4903, 4904 and Unemployment Insurance Code 140.5, 984, 1143, 2601, 2613, 2656, 2676, 2679, 2707.5, 2708, 2708.1, 2709, 2714, 3012, 3253, 3254, 3300, 3301, 3302, 3303, 3305, 3302.1, 3303.1 and 3306.
- C) Unemployment Insurance Code section 2708:
 - (1) Requires that the Employment Development Department develop a certificate that the individual taking leave to care for a family member must file. The certificate must be within the knowledge of the physician or practitioner and be based on a physical examination and documented medical history of the family member.
- D) Unemployment Insurance Code section 3306:
 - (1) Authorizes the director of Employment Development to require the care recipient to submit to reasonable examinations, as provided.
- E) Unemployment Insurance Code section 3301
 - (1) Defines the disability benefit period for purposes of the family temporary disability insurance program and clarifies the amount of benefits an individual is eligible to receive each full day under the program.

Litigation/ Recovery of Penalties, Costs, & Attorneys' Fees

- I) Labor Code § 2699/ Right to Sue
 - A) This allows aggrieved employees to sue for violations of the State's Labor Code that a government agency does not prosecute.

- (1) Employee can sue on behalf of himself/herself and other current or former employees.
 - (2) Employee can sue for alleged violations without even notifying the labor commissioner. If the claim is successful, the worker is entitled to recover his attorneys' fees and costs.
 - (3) Previously, provisions of the labor code were exclusively enforced by the State Labor Commissioner.
- B) Civil Penalties:
- (1) For a first violation, employer assessed a fine of \$100 per employee per pay period.
 - (2) Employer assessed a fine of \$200 per employee per pay period for subsequent violations.
- C) Distribution of Civil Penalties:
- (1) 25% to aggrieved employee
 - (2) 50% to State's general fund
 - (3) 25% to California Training Fund
- D) This section does not limit employees from pursuing other remedies available under state or federal law. Employees may do so separately or concurrently with suits under this section.
- (1) This section does not entitle employees to sue governmental agencies for their failure to act on a violation by an employer. There is no civil penalty.

II) Labor Code § 98.2/Lowers Standard to Recover Costs and Attorneys' Fees in Claims Regarding Unpaid Wages

- A) Labor Code §98.2/ Existing Law:
- (1) If an employee believes an employer has failed to pay wages required by contract or statute, the employee may either file a civil action against the employer or file a wage claim seeking administrative relief. Either party can appeal the decision of the Labor Commissioner to the trial court. If a party appeals and is unsuccessful, the costs and reasonable attorneys' fees are assessed against the party who filed the appeal. A party is unsuccessful unless the court judgment is more favorable to the appealing party than the Labor Commissioner's award.
- B) Labor Code §98.2/ Modified:
- (1) Provides that an employee is successful so long as the employee recovers a judgment in his or her favor.