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We also provide training on other employment issues, including:

- Disability Discrimination and Reasonable Accommodation;
- Disciplining and Terminating Employees; and
- Audits of Exempt Positions and Compliance with Wage and Hour laws

If you are interested in discussing any of these kinds of trainings for your supervisors or your work force, please contact James A. Bowles or Ronald W. Novotny at (213) 620-0460.

Are You Current On Your Harassment Prevention Training?

Most California employers are aware that state law now requires at least two hours in bi-annual training of supervisors and managers of in the prevention of sexual harassment.

What is often forgotten is that the law also requires newly-hired supervisors to be trained in harassment prevention within six months of their hire dates. If this is not done, non-compliance with the training requirement can be used as a basis for arguing that the employer did not effectively prevent

discrimination or harassment in the workplace, if a claim is later made that the supervisor engaged in harassing conduct.

Hill, Farrer & Burrill's Labor & Employment Law Department provides training to employers on the harassment prevention that the state law requires. The training encompasses all forms of prohibited harassment and discrimination in California and also provides definitions of illegal conduct, common harassment situations, and practical examples to assist in understanding this difficult and important area of law. A review is also provided of the different types of liability that can be imposed on the employer and individuals for violating the anti-harassment laws.

Supreme Court Finds "Creative Workplace" Not Unlawful

The California Supreme Court was recently called upon to decide whether an assistant comedy writer in the production of the *Friends* television show could proceed with a "hostile work environment" sexual harassment claim, based on her exposure to sexually coarse and vulgar language and conduct by the writers of the show. In the case of *Lyle v. Warner Bros. Television Productions*, the Court concluded that the writers' assistant could not proceed

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Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advise of the Firm regarding any specific matter.

with such a claim when the sexual language at issue was not aimed at her or other women in the workplace, but was instead a natural byproduct of a “creative workplace” focused on generating scripts for an adult-oriented comedy show featuring sexual themes.

The Court began its discussion by noting that the show revolved around a group of young sexually active adults featuring adult-oriented sexual humor, sexual and anatomical language, and sexual innuendo, wordplay, and physical gestures to convey its humor. The writers’ assistant was told at the time she was hired that the show dealt with sexual matters and that the writers told sexual jokes and engaged in discussions about sex, but she responded that such discussion and jokes did not make her uncomfortable. During her brief four-month period of employment at Warner Bros., the assistant heard the writers regularly discuss their preferences in women and sex in general, describe oral sex experiences and masturbation gestures, hear the writers talk about what they would like to do sexually with different female cast members, and relate their own sexual experiences.

The Court ended up dismissing the claim based in large part on its perception that the sexually-charged discussions were a natural and required part of the “creative process” that was necessary for writing scripts for the show. The Court was very protective of the right of an employer managing a “creative workplace” to have its writing staff brainstorm and discuss

sexually offensive behavior for the purpose of generating shows, even if much of the material was ultimately discarded. The Court stated that “the fact that certain discussions do not lead to specific jokes or dialogue airing on the show merely reflect the creative process at work, and do not serve to convert such conduct into harassment because of sex.”

Even more important, the *Lyle* case reiterated one of the essential requirements for establishing a discrimination or harassment claim: that the conduct complained of must be “based on sex” or some other prohibited characteristic. The Court noted that if members of one sex were not exposed to terms or conditions of employment to which members of the other sex were not exposed, no discrimination claim could be established. Because none of the sexist talk or conduct was aimed at the assistant because of her sex or to make her uncomfortable or self-conscious as the only woman in the workplace, her sexual harassment claim was accordingly dismissed.

Employee Who Could be Terminated “At Any Time” Held At-Will

Until recently, the California appellate courts had struggled with the issue of whether an employment contract providing for termination “at any time” constituted an “at will” employment contract that did not require good cause for termination. In the recent case of *Dore v. Arnold Worldwide Inc.*, the state Supreme Court

resolved this question by concluding that the terms of an offer letter stating that an employee’s employment was “at will” and could be terminated “at any time” was clear and unambiguous, and need not have specifically stated that it could only be terminated “with or without cause” in order to constitute an at-will employment contract.

The employee in that case, who moved from another state to take a management position in California, relied on specific parts of the offer letter which stated that he would be provided with a “ninety-day assessment” and “annual review” in support of his claim that he could be terminated only for cause. He also relied on a statement by the hiring officer that the company was in need of a “long-term fix” of certain problems, and that the company had a “family atmosphere” in which many of its employees had worked for long periods of time. The court found that these statements could not override the specific provisions which made the contract one that was “at the will” of the parties, and that the employee had failed to establish that he could only be terminated for cause.

Supreme Court Holds Prop. 64 Applies To Pending Cases

In the long-awaited decision of *Californians for Disability Rights v. Mervyn’s, LLC*, the state Supreme Court recently answered a question that has been heavily litigated since the passage of Proposition 64 in November of 2004: whether its

provisions limiting lawsuits by people who sue under the state's "unfair competition law" apply to cases pending at the time it was passed. The Court found that the provisions of Proposition 64 do apply to all such cases, because it affected the "standing" of the persons who sue under it.

Proposition 64 was designed to curtail the "frivolous unfair competition lawsuits that clog our courts, cost taxpayers, and threaten the survival of small business." The preamble to the proposition stated that the Unfair Competition Law had been misused by some private attorneys who filed frivolous lawsuits as a means to generating attorneys fees but without creating a corresponding public benefit, "filed lawsuits where no client had been injured in fact, filed lawsuits for clients who had not used the defendant's product or service, and filed lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." The intent of California voters in enacting Proposition 64 "was to limit such abuses by prohibiting private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact."

Proposition 64 accomplished the goals by permitting people to sue only if "they have suffered injury in fact and have lost money or property as a result of unfair competition." The Proposition also eliminated the ability of persons filing such lawsuits to proceed with a "representative action" on behalf of all members of the public, if they are unable to

satisfy the more rigorous requirements for a class action suit.

These requirements were not met by the plaintiff organization in the *Mervyn's* case, which sued the department store alleging that the pathways between fixtures and shelves were too close to permit access by persons who use "ability aids" such as wheelchairs, scooters, crutches and walkers. The Supreme Court concluded that because the more exacting standards of Proposition 64 applied to that claim, and because the organization had not actually suffered any injury as a result of the alleged "anti-competitive conduct," it lacked standing to proceed with the case.

Court Invalidates One-Sided Arbitration Agreement

In a case involving another popular television show, "Extreme Makeover," a California appellate court recently refused to enforce an arbitration clause in a contract against several minors, on the ground that it would be "unconscionable" to do so. The minors, who lost their parents and moved in with acquaintances from their church, signed arbitration agreements with the producer of the television show as a condition to the acquaintances' house being remodeled to provide for much larger accommodations. When the minors were later required to leave the premises, they sued the production company and sought to void the arbitration clause in their contracts.

The court invalidated the arbitration agreement on the grounds that it was both "procedurally" and "substantively" unconscionable. It first concluded that the contract was one of "adhesion" because it was a standardized form agreement prepared by the television studio which the minors did not have any realistic opportunity to negotiate. The studio knew that the minors were young and unsophisticated and had recently lost both parents, and that it was their vulnerability that made them so attractive to the television show. The arbitration provision was not highlighted by being printed in bold letters, a larger font, in capitals, and the minors were not required to place their initials in boxes adjacent to the arbitration provision as they were required to do with six other paragraphs of the agreement. In addition, although the first page of the contract advised the minors to read the entire agreement before signing it, and the agreement later acknowledged that the person signing it acknowledged having done so, that language did not defeat the "otherwise strong showing of procedural unconscionability" in the case.

The court then concluded that the arbitration clause was substantively unconscionable because it required arbitration of claims made only by the weaker party, but allowed the production companies the right to proceed to court with any claims that they had. Although the agreement stated that the minors agreed to submit all disputes or controversies arising out of the agreement to final and binding arbitration, it

specifically provided that the television producers had the right to seek injunctive or other equitable relief in a court of law, thus rendering the agreement unenforceable due to its “lack of mutuality” of the obligation to arbitrate.

This case provides an important lesson for employers who seek to compel arbitration of employment-related claims. Although it was not decided in the employment setting, it reconfirmed the courts’ reluctance to enforce arbitration agreements requiring employees to arbitrate all of the claims they may have, while “carving out” the right of employers to seek injunctive or other kind of relief in a court of law. These kinds of clauses are therefore potentially fatal to ensuring that the arbitration agreement can be enforced.

State and Federal Courts Issue Broad Rulings on Disability Discrimination

The California anti-discrimination law, the state Fair Employment Housing Act (FEHA), requires that employers engage in an informal, interactive process with employees to determine whether any reasonable accommodations of disability are possible, and to provide reasonable accommodations to disabled employees. In the case of *Gelfo v. Lockheed Martin Corp.*, a California appellate court recently held that these obligations apply not only to employees who are actually disabled, but also to those who are “regarded as” disabled by an employer.

The case involved an employee in Lockheed’s manufacturing plant who injured his lower back, filed a worker’s compensation claim, and was later restricted from heavy lifting, bending or stooping and given a restriction on repetitive lifting of items over 50 pounds. He was later declared “permanent and stationary” and determined permanently disabled from performing “heavy work,” and was determined to have difficulty sitting or standing for any great length of time. The employee later participated in a number of strenuous physical activities which led him to conclude that he was not impeded by his back injury, and was offered retraining by Lockheed in a new position. However, after reviewing his file, the company revoked a job offer it had given to him because it revealed medical restrictions that were incompatible with the physical demands of the new position.

The court concluded that the employee could proceed with a disability discrimination claim against Lockheed in these circumstances, even though he may not actually have been disabled, based on Lockheed’s alleged failure to engage in the “interactive process” with him and to reasonably accommodate him under circumstances in which it “regarded him” as disabled. The court specifically faulted Lockheed for relying on the workers’ compensation doctor’s generalized opinions about his inability to perform certain tasks, without engaging in the “individualized assessment” of the employee’s ability to perform the essential functions of a job with or without an

accommodation that the law requires. Although the court acknowledged that federal courts interpreting the Americans with Disabilities Act (ADA) have held that employees who were not actually disabled are not entitled to reasonable accommodation, it noted that the state law is broader than the ADA and stated that “being perceived as disabled may prove just as disabling.”

In another recent case decided by the U.S. Ninth Circuit Court of Appeals which interpreted the ADA, an epileptic heavy equipment operator for a county road department was allowed to proceed with a disability discrimination claim, even when he suffered a seizure and fell unconscious while driving a county pickup truck. The employee in that case, *Dark v. Curry County*, admitted that he experienced a physical manifestation called an “aura” shortly before he suffered the seizure, and that he knew that condition often preceded a seizure. The County terminated his employment because it believed he posed a direct threat to the safety of his fellow employees, who (like the plaintiff) were required to operate heavy equipment such as construction vehicles.

The Ninth Circuit concluded that the County’s “direct threat” defense could not even be reached before it could show that that qualification standards for the job were incapable of modification by a reasonable accommodation that would permit the disabled employee to meet these standards. The court discounted the fact that the employee’s abrupt seizure

following his experience of an aura constituted grounds for discharge, holding that “conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.” The court also noted that there were six separate accidents for which other road department workers went undisciplined, and that following his accident the plaintiff was released to work by two physicians with minimal or no restrictions after they changed his medication. The County was also faulted for not initially considering or responding to the plaintiff’s proposed accommodations, which included a temporary change in his job duties, a reassignment to a new position, or the use of accumulated sick leave or medical leave without pay.

Both of these cases demonstrate the severe dangers that employers are now subject to based on the very strict and overly technical requirements of the disability discrimination laws. The purpose of those laws, through the requirements of the interactive process and reasonable accommodation, is to enable the parties to come to a decision between themselves as to how the employee’s condition can be accommodated in the workplace. However, if no such agreement can be reached, qualified employment counsel should be consulted before any unilateral action is taken in order to attempt to minimize the chances of a potential disability discrimination claim from being made.

Supreme Court Broadens Test for Retaliation Claims

In *Burlington Northern Santa Fe Railway Company v. White*, the U.S. Supreme Court was recently called upon to clarify the standard that an employee must meet in order to proceed with a retaliation claim under Title VII of the Civil Rights Act, the federal anti-discrimination law. The case involved the claim of a “maintenance of way” worker, Sheila White, that she was retaliated against for complaining about sexual harassment. The retaliation took the form of a transfer from a forklift operator position to the more “arduous and dirtier” duties of a track laborer (even though they were within her job description) and on a 37-day suspension without pay for being insubordinate. Although she filed a union grievance over the suspension and was later reinstated with full back pay, she claimed she experienced emotional distress based on the fact that she had “no income and no money” during her suspension and experienced “the worst Christmas” she ever had.

In a surprising ruling that extended the reach of the law, the Court concluded that the law’s anti-retaliation provision extends beyond workplace-related conduct or employment-related retaliatory acts and harm, and can even be based on conduct occurring outside the workplace. Even more significantly, the Court affirmed that a challenged action upon which a retaliation claim can be based must be

“materially adverse” – but defined that term as meaning conduct which “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Based on the breadth of this language, and the Court’s determination that the change in the plaintiff’s job duties and unpaid suspension may well have persuaded a reasonable employee from making complaints of discrimination or harassment in the workplace, the Court upheld a finding that the plaintiff had been unlawfully retaliated against in that case.

Ninth Circuit Rejects Challenge to Dress Code

In *Jespersen v. Harrah’s Operating Company, Inc.*, the Ninth Circuit Court of Appeals held that a casino’s workplace appearance policy and grooming standards for all bartenders did not constitute unlawful sex discrimination against a female bartender who refused to comply with the requirement that she wear makeup. The female bartender in that case had worked for Harrah’s for 20 years, but refused to comply with the grooming standard requiring the use of some makeup because she felt “degraded and demeaned” by that requirement and felt that it “affected her self-dignity and took away her credibility as an individual and as a person.” Harrah’s argued that its appearance policy applied to both male and female bartenders, and was aimed at

creating a professional and very similar look for all of them.

The court dismissed the sex discrimination claim in that case because the grooming standards on their face did not appear to be discriminatory, but left open future challenges to such standards if a member of either sex could establish that the time and cost required to comply with the standards were substantially greater for members of that sex. The court also noted that this was not a case where the dress or appearance requirements were intended to be sexually provocative and tended to stereotype women as sex objects, which could have resulted in a finding of unlawful "sex stereotyping."

Wage and Hour Law Notes

- Employees who are terminated from their employment are entitled up to 30 days of waiting time pay under California Labor Code § 203 if they are not paid all wages due and owing at the time of their termination. Does the same rule apply to employees who are not paid at the end of specific job assignments or time durations for which they were hired? Yes, the state Supreme Court said in *Smith v. Superior Court*, in a case involving a hair model who was not paid the \$500 she earned for one day's work until after two months later.
- Does an employee lose their exempt status if by having their pay docked or being required to reimburse their employer for damaged items? Yes, the U.S.

Department of Labor said in an Opinion Letter dated March 10, 2006, because the employees' salary would not be guaranteed or paid "free and clear" as required by the federal regulations in those circumstances, and impermissible deductions would be made to due to the "quality of the work performed" by the employee. An employer's policy of imposing a fine on exempt employees who damage equipment they use in performing their jobs, such as cellular telephones and laptop computers, was accordingly viewed as a basis for finding that the employees could not be treated as exempt.

- In another Opinion Letter issued the same day, the DOL stated that an employer may require exempt employees to make up work time lost due to personal absences of less than a day. The DOL confirmed that an employer may require an exempt employee to do such things as record and track hours and to work a specified schedule without affecting the employee's exempt status.
- In a case filed in federal court in New Jersey, *Sears, Roebuck & Co.* agreed to pay \$15 million to settle a class action in four states brought on behalf of in-home service technicians who alleged the company was not properly compensating them for commuting time after they began their work day by checking computers. The employees contended that they were owed commuting time to their first jobs because their work days began at home. Although no ruling in the case was made, the settlement demonstrates the potential

exposure that employers can have when they require employees to start their work days from home before their initial commute begins.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP -- we're here to help.

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