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New Sexual Harassment Training Law Goes Into Effect January 2005

Effective New Year's Day, a new law went into effect requiring California employers with at least 50 or more employees to provide periodic training in sexual harassment prevention to their supervisors by January 1, 2006. The new law, AB 1825, amends the state Fair Employment and Housing Act ("FEHA") by requiring such employers to provide sexual harassment training to all supervisory employees within six months of their assumption of a supervisory position. Employers who have provided training and education to supervisory employees since January 1, 2003 are not required to provide training by the January 1, 2006 deadline, but must thereafter provide the training required by the new law to each supervisory employee at least once every two years.

The provisions of the new law, codified at Government Code section 12950, specifically require that the training consist of "at least two hours of classroom or other effective interactive training and education regarding sexual harassment." The training must include "practical examples aimed at instructing supervisors

Firm To Hold Client Breakfast Meeting On February 17

The Firm's Labor and Employment Department will hold a breakfast meeting on Thursday, February 17, 2005 from 8:00 a.m. to 10:00 a.m. at the DoubleTree Hotel located at 100 The City Drive in Orange. The meeting will provide clients and friends of the Firm with an update of recent developments in employment law and new laws going into effect on January 1, 2005.

We will specifically be reviewing the details of new legislation requiring sexual harassment training of supervisors, and will

offer practical tips on how to provide effective training that will both comply with the new law and provide employers with maximum protection against sexual harassment claims.

We will also be providing guidance on how to avoid the thorny problem of being sued for meal and rest period violations, which is one of the most popular and fastest-growing claims made against California employers. New proposed regulations governing meal periods will also be reviewed in detail.

If you are interested in attending, please call Sherry Hill, secretary to Ronald W. Novotny, at (213) 620-0460.

on the prevention of harassment, discrimination, and retaliation," and must be presented by "trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation. The statute also provides that the required training is intended to establish only a "minimum threshold, and should not discourage or relieve" employers from providing "longer, more frequent, or more elaborate training and education regarding workplace harassment . . ."

The new law provides that failing to provide the required training "shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment." It then goes on to state that "conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant."

The New Bounty Hunter Law

As part of the 2004 state budget compromise, Gov. Arnold Schwarzenegger in August signed into law SB 1809, a Labor Code measure also known as the "Private Attorney General's Act of 2004."

The new statute addresses perceived inequities and abuses resulting from the so-called "bounty hunter law" of 2003, which encouraged employees to file lawsuits for minor and technical violations of the Labor Code by providing civil penalties for such violations as well as reasonable attorneys' fees. SB 1809 seeks to correct these deficiencies by, among other

things, instituting a detailed scheme that requires all administrative remedies to be exhausted before a suit can be filed, as well as judicial oversight of the civil penalties assessed.

The prior law, SB 796, authorized suits to recover civil penalties for those provisions of the Labor Code for which a civil penalty was not already provided. It also allocated the distribution of any penalties recovered, with 25 percent going to the aggrieved employee, 25 percent to the Labor Workforce Development Agency (LWDA) and 50 percent to the state general fund. The law was enacted as a result of the Legislature's acknowledgment that government agency enforcement of the state's labor laws "had fallen drastically behind the growth in the labor force and would continue to worsen with the state budget crisis." This measure made it attractive for employees to sue their employers for violations of the state's wage-and-hour and safety laws under the "bounty hunter" provisions.

As employees began filing such suits, however, the potential for abuse quickly became apparent. The assessment of civil penalties created by the statute for previously "non-penalized" violations – set at \$100 for each aggrieved employee per pay period for each initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation – were automatic. No adjustments were made based on either the employer's intent to evade the law or the ultimate effect of the violation on employees. Minor violations such as failing to provide employees with the itemized information required on their paycheck stubs could result

in massive potential liability, with essentially no defense.

For this reason, business groups argued that the new law tipped the balance of labor law protection disproportionately in favor of employees and undermined the governor's efforts to keep and attract new businesses to the state. These arguments in turn led to the enactment of SB 1809, which was specifically intended "to provide relief to some employers who may be adversely affected by frivolous lawsuits" filed under the earlier bounty hunter law.

SB 1809 addresses the perceived inequities in the law in a number of ways. First, the civil penalties that can be collected have been reallocated so that, while 25 percent still goes to the aggrieved employee, the remaining 75 percent is allocated to the LWDA "for the purposes of enforcement and education." Moreover, a court can award a lesser amount than the maximum civil penalty in any lawsuit brought by an employee seeking to recover civil penalties under the statute if, based on the facts and circumstances of the particular case, doing otherwise would result in an award that is "unjust, arbitrary and oppressive, or confiscatory." A trial court is also required to review and approve any penalty sought as part of a proposed settlement agreement reached in such a suit. In addition, no civil action may be brought for any posting, notice, agency reporting or filing requirement violation of the Labor Code under the new statute except when it involves mandatory payroll or workplace injury reporting. Furthermore, section 431 of the Labor Code, which required employers to file a copy of their employment

application forms with the state, has been repealed.

Court Refuses to Enforce Arbitration Agreement Against Applicants

In the recent case of *Bodalandran v. Labor Ready, Inc.*, a California Court of Appeal denied enforcement of an arbitration agreement as against a group of women who registered through an employment agency and alleged that they were denied referral to an employer based on their sex. The women in that case signed an employment application which stated that:

I agree that any disputes arising out of my employment, including any claims of discrimination, harassment and wrongful termination that I believe I have against Labor Ready and all other employment-related issues . . . be resolved by arbitration as my sole remedy.

The court ruled that because the arbitration clause did not specifically cover claims arising out of the employment application process, and because it further stated that "merely registering availability to work does not constitute employment," the women's claims were not arbitrable.

For employers who require mandatory arbitration of employment claims, this case stresses the importance of including language in either the employment application or arbitration agreement which specifically covers claims for refusal to hire, termination, and

any aspect of the employment relationship.

Supreme Court Refuses To Apply Prevailing Wage Law To Preconstruction Expenses

In the long-awaited case of *City of Long Beach v. Department of Industrial Relations*, the state Supreme Court held that the state's prevailing wage laws did not apply to the construction of an animal shelter merely because the city awarded a grant to an owner/lessee to assist in deferring such "preconstruction" costs as legal fees, insurance premiums, design costs, and project management and surveying fees. The agreement to provide the grant of the money used for preconstruction expenses occurred in 1998, prior to a 2000 amendment to the prevailing wage law which defined "construction" as including "the design and preconstruction phases of construction," including "inspection and land surveying work." The court concluded that because this expanded definition of "construction" constituted a change in the law as opposed to a clarification of the law which existed in 1998, workers on the site were not entitled to receive the wages required by the prevailing wage laws.

Significantly, the Court sidestepped two major issues which it was anticipated to address in that case: (1) whether the project should be deemed a "municipal affair" of a charter city and therefore exempt from the prevailing wage laws, assuming that it was a public work; and (2) whether the prevailing wage law is a matter of

such "state-wide concern" that it would override a charter city's interest in conducting its municipal affairs. These issues, which were very important to charter cities such as Long Beach, will need to await another day to be resolved.

Court Expands Reach Of OSHA Retaliation Law

In a decision of significant importance to California employers, a California appellate court ruled in *Lujan v. Minagar* that the anti-retaliation provisions of the CAL OSHA law extend not only to employment terminations for filing OSHA complaints, but to the termination of employees who the employer believes intend to file such complaints.

In that case, Michelle Minagar's beauty salon in Malibu was inspected and cited for several minor workplace safety violations under CAL OSHA. The inspection came in response to a complaint by a facialist in the salon named Susan Grana. Minagar fired both Grana and a hairstylist, Noelle Dianella, the same day. Later, a salon manager told Dianella that she had been fired because it was believed that she assisted Grana with her complaint.

At trial, Minagar testified that she knew Dianella had not filed the CAL OSHA complaint. Instead, she testified that Dianella had been an incompetent and troublesome employee and that she fired Dianella "because she did too many mistakes in my shop and I was afraid she would be the next one to report me."

Labor Code Section 6310 makes it unlawful to fire or otherwise

retaliate against an employee who makes a workplace safety complaint with government agencies. The court of appeal concluded that the provisions of Section 6310 should be liberally construed to cover an employee such as Dianella, who did not personally report suspected workplace safety violations but was fired because her employer feared she might soon do so. The court reasoned that such a "preemptive termination" violated the law because otherwise, there would exist a "perverse incentive for employers to retaliate against employees who they fear are about to file workplace safety complaints before the employees can do so."

In order to recover damages for the unlawful termination, Dianella was also required to establish that she was an employee as opposed to an independent contractor. The court reiterated that the principal test for determining employee versus independent contractor status is whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the desired results. Dianella was found to be an employee based on the fact that Minagar made up her work schedule, paid her a weekly base salary and a percentage of the money received for her services and product sales, gave Dianella a work station for which she paid no rent, did not charge her for any of the beauty supplies she used, booked all appointments through the salon's front desk, and received payment from the customers directly. It was therefore immaterial that Dianella received a 1099 form instead of a W-2 from the salon, because she did not meet the test of an independent contractor under the law.

NLRB Reverses Itself With Two Important Rulings

The National Labor Relations Board has recently issued two decisions overruling prior positions the agency has taken on issues of major concern to employers covered by the National Labor Relations Act.

In the *Oakwood Care Center* case, the Board ruled that a temporary employment agency and "user employer" which the agency supplied with employees must consent before the Board will allow a representation election in a bargaining unit consisting of both jointly employed temporary workers and the regular workers employed solely by the user employer. The Board reasoned that in such circumstances, the temporary agency and user employer constitute a "multi-employer unit" which, under established Board law, must consent to bargain jointly before being required to do so under the Act. In issuing its decision, the Board overruled its prior decision in 2000 in *M.B. Sturgis*, which held that a unit combining both jointly employed temporary workers and a user employer's sole employees was appropriate for bargaining.

In the *Oakwood Care Center* case, the Service Employees International Union filed a petition seeking to represent the unit consisting of both the employees of a nursing home and the employees jointly employed by the nursing home and a temporary staffing agency. In finding such a unit to be inappropriate absent the consent of both the nursing home and staffing agency, the Board decided the fragmented nature of any bargaining that would

ultimately take place by the employers if the union was certified as the bargaining representative – and the inherent conflict of interest between the sole employer and the staffing agency in determining the wages, benefits and other terms of conditions of employment they would have to jointly negotiate – was fatal to the petition. Because the two employers did not jointly consent to a multi-employer unit in that case, the Board therefore ended up dismissing the petition for representation.

Three members of the five-member Board issued the majority decision, with two members dissenting. The dissenting members bemoaned the decision because they believed it essentially disenfranchises temporary employees who work in "alternative work arrangements" from being able to effectively organize their employers. In the dissenters' view, the *Oakwood Care* decision will enable user employers to retain veto power over such employees' right to effectively petition for a Board-conducted election, and will allow such employers to continue to use contingent labor to "pursue a low wage, low skill, high turnover path to profit making."

In another decision also overruling a prior Board decision issued in 2000, the Board held in the *Crown Bolt* case that an employer's threat to close its facility if employees voted for union representation will not be presumed to have been disseminated throughout the bargaining unit, and that direct proof of such dissemination will now be required. The Board reasoned that such a presumption is not necessary because if the dissemination of any plant closure threat sufficient to

overturn an election is "all but inevitable" proof of that fact should be easy to establish. However, because the Board's decision constituted an abrupt change in the law, it decided to apply the new rule only prospectively, and set aside an election in the *Crown Bolt* case even though there was no evidence that a plant closing threat had been widely disseminated.

At-Will Employee Allowed To Sue For Fraudulent Inducement

In the recent case of *Agosta v. Astor*, a California appellate court held that a claim for fraudulent inducement causing damages unrelated to an employee's discharge can be unlawful regardless of the employee's at-will status.

The case arose out of the hiring of a Clear Channel Communications account executive by an owner of two radio stations in San Diego. The plaintiff, Len Agosta, was hired as a General Manager of the two stations based on a compensation package that included a base salary and bonus structure but did not address the length of his employment. Agosta was terminated several weeks after he changed jobs, after the owner altered his compensation package to exclude overrides and sales commissions and made his right to an equity position contingent on meeting sales projections.

Agosta sued for fraudulent inducement to enter into the employment contract. The court held that Agosta could not rely on any promise of long-term employment because of the at-

will provision. However, it also noted that he could rely on the written promises regarding his compensation terms in making a fraudulent inducement claim. According to the court, a jury could reasonably infer that Agosta was promised a compensation package in order to be lured into changing jobs, and that the station owner never intended to live up to that agreement.

FMLA Update

A store was found to have not violated the FMLA by terminating an assistant store manager who did not know that her doctor had failed to submit medical certification for her request for leave following bilateral carpal tunnel surgery. Although the FMLA regulations require an employer to advise the employee that a submitted medical certification is incomplete or otherwise deficient, that provision does not apply when an employee completely fails to submit any certification at all. The court reasoned that otherwise an employer could never set a real deadline for the return of such certification required for an FMLA leave. (*Urban v. Dolgen Corp. of Texas, Inc.* 5th Circuit).

In another case decided by the Fifth Circuit Court of Appeals in Texas, a human relations employee failed to prove that she was constructively discharged in violation of the FMLA when she alleged that she was treated in a hostile manner after returning from her FMLA leave and learning that management had considered eliminating her job while she was on leave. The H.R. employee took an eight-week leave of absence for stress and anxiety, and was given a memo upon her return warning

her that she would be discharged if she did not correct certain performance deficiencies. Because there was no evidence that such deficiencies did not actually exist, the court rejected her FMLA retaliation claim, even though a plant manager stated that he was not happy that the employee took a medical leave and had considered eliminating her job. (*Hayley v. Alliance Compressor, LLC*, 5th Circuit).

Although the employers prevailed in these two cases, they point out the danger of taking any action affecting the employment of an employee who has recently returned from FMLA leave, based on the inference that the action was taken due to the leave. Employers should have documentation supporting their decisions to terminate employees, or eliminating their positions, in these circumstances in order to maximize their chances of prevailing on such claims.

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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