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**NEW EMPLOYMENT LAWS
THAT YOU AND YOUR CLIENTS
NEED TO KNOW**

PRESENTED AT

**THE CALIFORNIA CPA EDUCATION FOUNDATION
MANAGEMENT OF ACCOUNTING PRACTICE CONFERENCE**

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I. Recent Legislative and Regulatory Developments

- ***Sexual Harassment by Non-Employees.*** A recent California Fair Employment and Housing Act amendment (Government Code § 12940(j)(1)) makes employers liable for sexual harassment by non-employees if the employer knows or should have known of the incident and fails to take corrective action. This overturns the California Court of Appeal decision in *Salazar v. Diversified Paratransit*. Employee Handbook updates and workplace training are needed to protect employers.
- ***Federal Wage & Hour Regulations.*** On August 23, 2004, changes to the Fair Labor Standard Act became effective. This is unlikely to be very relevant to day to day operations of California employers with California employees since the California wage and hour laws are almost always more favorable to employees who get the benefit of the most favorable law. The regulations will be relevant to out of state employers. One major change is to raise the outdated threshold for the "salary test" part of the overtime exemption tests under Federal law from \$8,060 to \$23,660 (the amount under California law is currently \$28,080). Other major differences between California and FLSA include that California has "daily" overtime (and the FLSA does not) and that "primary duties" for overtime exemption analysis are more than 50% of the time worked (not the most important functions of the work per the FLSA). www.dol.gov/fairpay.
- ***Paid Family Leave.*** Starting July 1, 2004, California "Paid Family Disability Leave Insurance" will permit employees to receive limited replacement wages for up to six weeks of leave in any 12 month period to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a new child by birth, adoptions or foster care placement. PFL deals only with compensation during the leave; it is not an entitlement to leave. Leave entitlement is still governed by FMLA/CFRA and employer policy/practices. PFL is funded by mandatory employee payroll deductions that started January 1, 2004 administered by the EDD. Employees must apply to the EDD for benefits and employers must give employees a PFL brochure published by the EDD. For information and brochures, call the California PFL information center at "1-877-BE-THERE."

- **Whistleblower Law.** Labor Code Sections 1102.5 - 1102.8, effective January 1, 2004, fortify existing law. Employers are prohibited from: (1) making, adopting, or enforcing a policy that prevents an employee from disclosing violations of a state or federal statute, and (2) retaliating against employees who report such violations or who refuse to participate such violations while working for a current or former employer. The new law establishes a "whistleblower hotline" for the Attorney General to receive reports of violations of state or federal statutes, rules, or regulations and requires employers to post the new law and hotline number in the workplace. A new civil penalty not to exceed \$10,000 per violation may be imposed in addition to exposure to wrongful termination and other claims.
- **“Sue Your Boss... Bounty Hunter” law for Labor Code Violations.** Effective January 1, 2004, the California Private Attorneys General Act of 2004 (Labor Code §§ 2698 and 2699) gave employees and their counsel additional financial incentives to sue employers in superior court. For example, this Act: (1) created new monetary penalties for any section of the Labor Code (that does not already provide penalties) of \$100 per injured employee per pay period for an initial violation and \$200 per injured employee per pay period for each subsequent violation; and (2) A prevailing plaintiff can receive 25% of the penalties, plus any penalties that employees might otherwise recover (e.g., waiting penalty for failure to pay wages due at the end of employment and missed meal/break period penalties) and attorneys fee recovery.
- **Partial Repeal of the “Sue Your Boss... Bounty Hunter” Law..** On August 11, 2004 the Governor signed SB 1809 which amended the California Private Attorneys General Act of 2004 (Labor Code §§ 2698 and 2699). Among the amendments, which all apply retroactively, SB 1809: (1) eliminates claims under the Act for certain *de minimus* Labor Code violations (e.g., workplace posters; (2) eliminates the requirement for employers under Labor code Section 431 to file a copy of their form of job application with the state; (3) before an action can be filed in superior court, an aggrieved employee must first notify the employer and the California Labor Workforce Development Agency (“LWDA”) (and in some cases Cal-OSHA) of the alleged Labor Code violations in writing and the agency must issue a decision adverse to the employee or it fail to investigate at all; (4) for most other Labor Code violations (e.g., non wage/hour or OSHA issues), an employer has 33 days after receiving the employee’s notice to cure the alleged violation and give notice of the cure to the employee and the LWDA – if the employee disputes the cure, he or she must quickly file with the LWDA – if the LWDA decides adverse to the employer or fails to act, the employee can file in superior court; (5) authorizes the Superior Court to reduce the maximum civil penalties if “to do otherwise would result in an award that is unjust, arbitrary, and oppressive, or confiscatory;” (6) requires judicial review of any proposed settlement including penalties; and (7) prohibits retaliation against employees who bring an action under this Act.
- **Penalties for Inadequate Pay Stubs.** Employers have long been required to provide each employee with an itemized statement with the paycheck of gross wages earned, total hours worked, number of piece-rate units earned, all deductions, net wages earned, start and end dates for the pay period, employee name and social security number. Labor Code Section 226(e) adds a new penalty for wage statement violations of (1) the greater of \$50 or actual damages for the initial pay period and (2) \$100 for each subsequent violation, up to a maximum of (3) \$4,000 per employee.

- ***Even More Labor Code Penalties.*** Effective January 1, 2004, Labor Code Section 210 increased the penalties for an employer who unlawfully withholds wages to \$100 for a first violation and \$200 for subsequent or willful violations, plus 25% of the wage due. Minimum wage violations are \$100/\$250.
- ***Contractor "Police."*** Labor Code Section 2810, effective January 1, 2004, requires that if your company contracts for construction, farm labor, garment, janitorial, or security guard labor, and knows or should have known that the contractor does not comply with all applicable labor regulations, the company is jointly liable to the affected employees of the contractor for any injury or labor violation. Liability may be avoided if all the disclosures and information listed in the statute are written into the services contract and then updated for material changes.
- ***Deterrent to Employer Appeals of Labor Board Awards.*** A Labor Commissioner's Award can be appealed to the Superior Court where there is a new trial and the employee is entitled to recover attorneys fees if he or she "prevails." Labor Code Section 98.2(c) now defines "prevail" as any judgment in favor the employee, even if it is less than the Award. Basically, it is now all or nothing for employers on appeal.
- ***Employer Provided Healthcare.*** Starting January 1, 2006 SB2 requires employers with 200+ workers must provide and pay for 80% of the premiums for coverage for employees and provide a coverage option for their dependents. On January 1, 2007, the rules will apply to 50 to 199 employee workplaces. Employers with 20 to 49 workers may be required to provide coverage if certain tax credits are enacted by the Legislature. Smaller employers are exempt. A referendum may put this on future ballots for "repeal." ERISA may preempt the new law.
- ***Domestic Partners.*** Beginning January 1, 2005, registered California Domestic Partners will have all of the rights and responsibilities afforded married persons, and gives California Superior Court jurisdiction over all proceedings to legally separate, nullify, or dissolve a registered domestic partnership, including child custody. Any benefit or policy benefiting employees and their spouses that is provided by employer policy/practice or California law, must be provided to employees and their Domestic Partners.
- ***"Sweatfree Code of Conduct."*** SB 578, effective January 1, 2004, provides new obligations for State contractors who procure or launder apparel, or who procure equipment related to a public works contract, including: (1) that the contractor must certify that no apparel, garments or corresponding accessories, equipment, or supplies furnished to the state pursuant to the contract have been laundered or produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms or child labor or exploitation of children in sweatshop labor, or with the benefit of any of the above types of labor; (2) "*sweatshop labor*" is defined as all work or service extracted from or performed by any person in violation of more than one law governing wages, employee benefits, occupational health, safety, nondiscrimination, or freedom of association of the country of manufacture; and (3) such contractors must abandon their at-will employment policy and adopt a policy not to terminate any employee without "just cause."

- **Independent Contractors; EDD Employment Determination Guide (Form DE38).** <http://www.edd.ca.gov/taxrep/de38.pdf>
- **Military Leave/Return to Work Guidance.** <http://www.dol.gov/vets/whatsnew/uguide.pdf>
See also: <http://www.dol.gov/elaws/userra0.htm>
- **Wage and Hour Orders:** <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>
- **Division of Labor Standards Enforcement Policies and Interpretations Manual.** <http://www.dir.ca.gov/dlse/Manual-Instructions.htm>
- **What is the Status of Pending California Legislation?** Find out at: <http://www.leginfo.ca.gov/>
- **EEO-1 Electronic Filing.** Starting with the September 30, 2003 filing deadline, the EEOC has changed its preference to receive EEO-1 Reports. Access to the new reporting system and EEO filing requirements are at: <http://www.eeoc.gov/eo1survey/> In general, EEO-1 Reports are required of private employers with 100 or more employees, excluding state and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations; federal contractors and first-tier subcontractors with 50 or more employees; and certain other employers.
- **Discussing Pay/Working Conditions.** Labor Code Sections 232 and 232.5 prohibit employers from disciplining, discriminating or retaliating against employees who discuss their pay or working conditions. Employers cannot have policies that discourage discussion of these subjects either. The “working conditions” statute states that it does not permit an employee to disclose trade secrets or matters subject to a legal privilege.
- **Layoffs and Plant Closings.** “WARN” 60 day pay or notice is required by employers with 75 or more employees, who layoff, relocate or terminate 50 or more employees within a 30 day window. Unlike the Federal Act, California triggers WARN obligations on a Company that *relocates* more than 100 miles from its prior location. Stiff damages and penalties for non-compliance apply.
- **Required Workplace Notices and Pamphlets.** These requirements change at least once a year and sometimes more often. For example, as of August 1, 2004, all California employers must: (1) post a new version of a mandatory Worker's Compensation poster in all workplaces that matches up with recent Workers Comp law reforms; (2) distribute a new version of a revised employee pamphlet to all new employees by the end of their first payroll period; and (3) use a revised official Workers Comp claims form. Consider vendors such as the California Chamber of Commerce (e.g., “Required Notices Kit;” See, www.calchamberstore.com).
- **State Enforcement.** SB 1236 created a State *Labor Workforce Development Agency* by consolidating the Department of Industrial Relations, the Employment Development Department, the Agricultural Labor Relations Board, and the Workforce Investment Board. In time, the government ought to become more effective at enforcing employment laws.

II. Recent Court Decisions

- ***No Right to Co-worker in Discipline meeting.*** Reversing its own 2000 Decision, the National Labor Relations Board in a case involving IBM Corp., decided on June 9, 2004 that employees who work in a *non-union* workplace are not entitled to have a co-worker accompany them to an interview with their employer, even if the affected employee reasonably believes that the interview might result in discipline.
- ***Defenses to Damages in California Sexual Harassment Claims.*** In late November 2003, the California Supreme Court established in *McGinnis v. State Department of Health Services* an “avoidable consequences” defense to sex harassment cases where the alleged victim unreasonably fails to complain to stop the misconduct. The case encourages employers to consistently enforce policies against sex harassment, immediately investigate allegations, and take appropriate disciplinary action. Consider additions to your employee handbook to include: “The Firm [or Company] wants you to use these procedures so you can (a) help us put a stop to unlawful harassment and (b) avoid any further harm you may have suffered.... and “Employee confidentiality will be protected to the extent practical for the Firm[or Company] to investigate and take appropriate disciplinary action.” Please see attached article.
- ***Defenses to Federal Sexual Harassment Claims and Constructive Discharge Cases .*** On June 14, 2004, the United States Supreme Court, in an 8-1 decision applying only federal law in *Pennsylvania State Police v. Suders*, held that Employees who are compelled to quit because of an intolerable sexually harassing hostile work environment have a right to sue their employers under a constructive discharge theory. The Court also held that an employer may defend these cases by demonstrating that it exercised reasonable care to prevent and promptly correct the wrongful behavior and that the employee failed to take advantage of preventative or corrective measures. **Background:** In two 1998 decisions, *Faragher v. City of Boca Raton* and *Burlington Industries Inc. v. Ellerth*, the Supreme Court held under federal law that if sexual harassment led to a hostile work environment but did not result in a tangible adverse employment action (e.g., demotion or termination), employers can avoid liability by showing they have an effective anti-harassment policy in place and the employee failed to take advantage of it. **The challenge in Suders** was that the employee alleged that the workplace was so intolerable that she had to quit and the question became whether the employer engaged in tangible adverse employment action that precipitated the employee’s decision to leave. The affirmative defense will not be available if the employee quits “in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation,” the Court stated. Examples would include “a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.” In “adverse action” cases where sexual harassment is proven, the employer would be strictly liable for the supervisor’s conduct.
- ***Ignorance Is Not a Defense.*** On July 29, 2004, the California Court of Appeal in *Reeves v. Safeway Stores* held that that a manager's limited knowledge of underlying facts does not necessarily shield an employer from liability for an unlawful termination. Plaintiff claimed that his discharge was in retaliation for his sexual harassment complaints, Safeway's defense was that the manager who made the decision had no knowledge of prior sexual harassment complaints and therefore could not have terminated Plaintiff for making

them. The Court rejected what it called the "defense of ignorance." It observed that a multi-layered organization cannot protect itself from liability by claiming the final decision maker's action was innocent.

- ***I Would Not Have Taken That Job If You Had Not Lied To Me...*** On July 7, 2004, the California Court of Appeal in *Agosta v. N. Arthur Astor, et.al.*, held that written "at-will" statement does not absolve an employer who induces a candidate to quit a job and accept new employment based on promises the new employer does not intend to keep. On August 24, 2004, the employer asked the California Supreme Court to review this case; the Petition for Review is pending.
- ***You Can be Sued for Inducing a Competitor's At-Will Employees to Quit and Join Your Company.*** On August 12, 2004, the California Supreme Court in *Reeves v. Hanlon* unanimously ruled that a defendant may be held liable for intentional interference with the employment relationship for inducing an at-will employee to quit working for another if the interference is accompanied by an independent act of wrongdoing. The Supreme Court ruled that an employer has the right to induce a competitor's employee to leave; however the new employer cannot use illegal or wrongful methods to do so (i.e., an act that violates some constitutional, statutory, regulatory, common law, or other legal standard). The Court said that allowing such suits: (1) respect "both the right of at-will employees to pursue opportunities for economic betterment and the right of employers to compete for talented workers;" and (2) strike "the proper balance between society's interest in fostering robust competition in the job market and its interest in protecting against unlawful methods of competition." ***Bad facts, ...:*** In this instance, the court found that the defendant lawyers who quit the plaintiff law firm to start their own firm, engaged in an unlawful and unethical campaign to deliberately disrupt plaintiff's business. They deleted and destroyed files, misappropriated confidential information, and improperly solicited clients. The Court found that defendants did more than simply extend offers to at-will employees of another company; they "purposely engaged in unlawful acts that crippled plaintiff's business operations."
- ***Releases of Civil Claims in a Workers Comp Settlement.*** On August 30, 2004, the California Supreme Court in *Claxton v. Waters* held that the standard preprinted release form used in workers' compensation cases cannot constitute release of claims outside workers' compensation system, although employee may release such claims by simultaneously executing a separate agreement.
- ***Officer and Director Liability for Unpaid Wages.*** In late 2003, the California Supreme Court suspended and agreed to review *Reynolds v. Bement* in which the Court of Appeal held that a manager of Earl Scheib, Inc., could not be personally liable for unpaid overtime. The case has been fully briefed; but, oral argument has not yet occurred.
- ***Prelitigation Jury Waiver.*** On April 21, 2004, the California Supreme Court suspended and agreed to review *Grafton Partners LP v. Superior Court* in which the Court of Appeal held that a prelitigation jury trial waiver is not enforceable. The *Grafton* court added that a lawful prelitigation agreement for arbitration is still enforceable; but, that an employee cannot give up the right to a jury if the parties would litigate in court. As to jury waivers, this case conflicts with other cases, including *Trizec Properties, Inc., v. Superior Court*

(*Thomas Partners*), a case decided in 1991 by the Second District Court of Appeal (which covers the Los Angeles area).

- **Arbitration.** In many of the “pre-dispute mandatory arbitration agreement” cases interpreting *Armendariz v. Foundation Health Psychcare Services Inc.*, most courts seem to prefer to compel arbitration and to strike-out parts that only favor the employer as long as the clause is not so one sided as to make any enforcement “unconscionable.” In one case, the court struck out the portion of an arbitration clause that permitted appeals only if an award exceeded \$50,000; the Court found that provision one-sided because an Employer rarely has a claim against an employee in the range of \$50,000. Other cases, however, continue to find arbitration agreements unenforceable where the agreements, for example, preclude discovery, required costs to be shared, and certain court remedies are reserved for the employer only (e.g., *Abramson v. Juniper Networks*; *O’Hare v. Municipal Resource Consultants*; *Ingle v. Circuit City Stores, Inc.*). In *Little v. Auto Steigler, Inc.*, however, the Court held that in cases where the arbitration agreement is silent as to costs, the agreement can be enforced and the employer must pay the costs.
- **Undocumented Workers Can Sue.** In *Singh v. Jutla & C.D. & R Oil, Inc.*, the United States District Court said that allowing an undocumented worker to bring a retaliation claim under the FLSA supports national immigration policies. It removes an economic incentive for employers to seek out and knowingly hire illegal workers.
- **After-Acquired Evidence Does Not Bar Agency Liability for Unlawful Discrimination.** In On April 21, 2004, in *Williams v. Department of Veterans Affairs*, the EEOC affirmed an EEOC Administrative Judge's (AJ's) finding that complainant was subjected to disability discrimination when he was not selected for employment. On appeal, the agency did not dispute the AJ's findings and conclusions, but rather argued that complainant was not a U.S. citizen, and therefore was not qualified for the position for which he had applied. The Commission noted that complainant's status as a non-citizen was after-acquired evidence, which did not relieve the agency of liability. Further, the Commission stated that the agency failed to establish that an exception would not have been made in complainant's case, given that two individuals had turned down the position, that it remained unfilled for a full year, and that complainant had previously been employed by the agency. EEOC ordered the agency to offer complainant the position, with back pay, pay complainant compensatory damages, and pay attorney's fees.
- **Retail Worker Uniforms.** Both the California IWC Wage Orders and Labor Code Section 450 prohibit requiring employees to purchase employer required uniforms. Abercrombie & Fitch, Ralph Lauren have paid millions of dollars to current and former employees whom they required to buy and wear the retailer's apparel at work.

III. Overtime Pay

Please see the attached article: *Sorting it Out: Missing the Mark on Employee Classification Can Cost You.* (Reprinted with permission of *California CPA Magazine*).

IV. Employment Law Basics

A. At-Will Employment

1. Statutory presumption *California Labor Code § 2922*.
2. Employee may be terminated for any reason or no reason; "good cause" not required

B. Exceptions To At-Will Employment

1. Express contract – *e.g.*, not to terminate or demote without "good cause." *Cal. Labor Code § 2924* (defining cause as "willful breach of duty, habitual neglect of duty, or continued incapacity to perform").
 - a. Written promises
 - i. express employment agreement
 - ii. offer letter and other correspondence
 - iii. employment handbook, personnel policies, other writings
 - iv. collective bargaining agreement
 - b. Oral promises – assurances of continued employment absent "good cause"
2. Implied contract
 - a. Examine "totality of circumstances," including written and oral statements
 - b. Factors may include duration of employment, performance evaluations, employee's practices, promotions, oral statements and written materials
3. Public Policy Exceptions – Examples
 - a. Anti-discrimination statutes – California and federal law: *e.g.*, race, sex national origin, religion, age, disability
 - b. Discharge, discipline or retaliation for asserting legal right
 - i. filing claim of discrimination, or acting as witness in support of claim.
 - ii. filing workers' compensation claim, or acting as witness in support of claim.
 - iii. union activity
 - iv. filing for bankruptcy
 - v. making bona fide complaint regarding safety or health violation, or hazard
 - vi. missing work to attend school disciplinary meeting for child required by Education Code or, after reasonable notice and for limited hours, to attend school activities of a K-12 child
 - vii. jury duty
 - viii. military service

- ix. political affiliation
 - x. complaining about workplace safety
 - xi. disclosing his or her wage information
 - xii. whistleblower statutes
- c. Employee's refusal to commit unlawful act – *e.g.*, cannot discharge employee for refusing to violate anti-trust laws, or for complaining about other illegal activities

V. Conducting Effective Performance Evaluations

A. Why Performance Appraisals Are Critical To Your Organization's Continued Success

1. Increase employee/company productivity
2. Impact employees' opportunities within the organization
3. Risk management

B. Preparation Of Performance Appraisals

1. Do your homework
 - a. Create a file for each employee
 - b. Document performance over the course of the review period
 - c. Be fact specific - Record what the employee is doing, not just your opinions
 - d. Review documentation periodically to ensure the file records achievements and problems
 - e. Avoid surprises
 - f. Consider obtaining input from coworkers, subordinates, other managers - 360° review
2. Be honest
 - a. Be up front about employee's shortcomings
 - b. Don't let friendship/animosity get in the way
 - c. Risks in not being honest
 - i. mislead employees
 - ii. promote mediocrity
 - iii. insulate poor performers
 - iv. damage productivity
3. Solicit employee input

- a. Requires employee to identify issues and/or accomplishments important to him/her
 - b. Reinforces the concept that employees are responsible for their own successes
 - c. Employee acknowledges areas of needed improvement
 - d. Gain insight into employee's expectations/aspirations
4. Good housekeeping
- a. Be neat/legible
 - b. Be specific
 - c. Remember who your audience might be (judge, jury, arbitrator)

C. Delivery Of The Review

- 1. Engage in a dialogue
 - a. Don't just talk at the employee
 - b. Open-ended questions
 - c. Spend more time listening than talking
 - d. Allow employee to respond
 - i. Verbally
 - ii. in writing
- 2. Steps can be taken to avoid emotional fallout
 - a. Coach and encourage employees
 - b. Identify successes and deficiencies
 - c. Establish plans of improvement
 - d. Set goals
- 3. Create a road map for future success
 - a. Establish realistic goals
 - b. Development of action plans
 - c. Promise to be accessible

VI. Discipline And Termination

A. Pre-Discipline Considerations

- 1. Practice progressive discipline.
- 2. Investigate before taking action.
- 3. Apply company standards and policies uniformly.
- 4. Exercise discipline consistently throughout workforce.

5. Discipline commensurate with the problem.
6. Patience is usually a virtue.
7. Act quickly with “zero tolerance” conduct.
8. Document all of the foregoing.
9. Consider contractual obstacles.
10. Consider statutory obstacles.

B. Disciplinary Action

1. Progressive steps may help a valuable employee whose performance is deficient or warn a problem employee whose actions have been found to violate the company’s standards of conduct.
2. Severity of the action will depend on the nature of the violation and the employee’s previous record.
3. Can the company deviate from the outlined discipline procedures?
4. Progressive Steps
 - a. Counseling and coaching
 - b. Verbal warning
 - c. Written warning
 - d. Discretionary Performance Review
 - e. Suspension
 - f. Termination
5. Do not alter or modify the “at-will” employment policy.

C. Employee Separations

1. Resignation
 - a. Employee notice vs. at-will
 - b. Arrange for an exit interview
 - c. “Failure to report to work for three (3) consecutive, scheduled workdays without notice to or approval by an employee’s supervisor or manager shall be considered to be a voluntary termination of employment with the Company.”
2. Termination/Discharge
 - a. Where lesser disciplinary actions are not sufficient and termination is appropriate
 - b. At-will employment
 - c. Violations of standards of conduct or unsatisfactory job performance
3. Layoff

4. Medical Termination
5. Retirement

D. Exit Interview

1. Schedule as soon as a final workday has been established.
2. Opportunity for the employee to discuss the reason(s) for separating from the company, and to give constructive feedback to Human Resources regarding relationships with management and employees, company policies, departmental procedures and other issues impacting company performance.
3. Opportunity to discuss such issues as employee benefits, unused vacation.
4. Opportunity to learn of and plan to resolve employee claims.
5. Last paycheck – resignation vs. involuntary termination.
6. Company keys, equipment, passwords, documents, building access cards, ID badges and any other company property are to be returned.

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Prudent Practices Help Prevent Lawsuits for Sexual Harassment

By Mark E. Terman

Year after year, sexual harassment seems to be the most frequently filed employment-litigation and jury-verdict risk. Some cases involve real and severe misconduct by the defendants. Some cases are gross exaggerations by the plaintiff. Regardless, why is it that some employers are less likely to be sued for sexual harassment and, if they are, have a good chance of defeating the lawsuit?

Good business and employment practices are an answer.

Well-managed companies tend to meet business and legal issues head-on to operate a workplace where employees want to work and which has reduced legal risks. Those employers do not wait to be sued to learn their lesson. Those employers demonstrate to their employees that they have no tolerance for workplace sexual harassment.

Strong written policies against sexual harassment are published in the employee handbook and are distributed periodically to all personnel.

Department of Fair Employment and Housing and other agency anti-discrimination and harassment posters are visible in the workplace.

Employees and supervisors are trained to spot actual or potential harassment problems and know who in management should be informed immediately.

When a potential problem or internal complaint is identified, those employers immediately and fairly investigate and take corrective action. They get their labor lawyer involved early to help them take the right steps and document them.

The employer does not retaliate against the employee who made the complaint or those who corroborated it. Unless it turns out that a deliberately false internal complaint was made, the complainant is thanked by the employer for coming forward.

The results of the investigation and corrective action are communicated to those involved, and while not everyone in the work-

place knows the details, everyone knows that the employer put a stop to the misconduct and that misconduct has consequences.

But what happens if, despite good employer practices, a sexual-harassment lawsuit is filed, anyway?

In sexual-harassment litigation, the evidence often shows that the plaintiff did not complain to the employer about the alleged harassment when it occurred. Frequently, the first time an employer hears about the alleged harassment is after the plaintiff is fired, demoted or transferred or has been the target of some other adverse employment action.

Plaintiffs' explanations for their failure to complain and for why they continued to endure harassment include claims that the employee did not know whom to complain to, was psychologically unable to complain, feared job loss or other retaliation, believed that a complaint would have been meaningless because the employer has a history of failing to act on employee complaints, or believed that the supervisors themselves saw or participated in the harassment.

Sometimes these explanations are credible, and sometimes they are not.

The state Supreme Court recently gave employers a way to combat the latent-complainer case with a further legal incentive to establish and follow effective practices of workplace harassment prevention and elimination. *McGinnis v. State Department of Health Services*, 31 Cal.4th 1026 (2003), provides an "avoidable consequences" defense to sexual-harassment damages where the alleged victim unreasonably fails to complain to stop the misconduct.

"[A]n employer, no matter how conscientious, cannot take action to stop improper conduct without some reason to suspect that sexual harassment is occurring," the court wrote.

This defense has three elements. First, the employer took reasonable steps to prevent and correct workplace sexual harassment. Second, the employee unreasonably failed to avail herself or himself of those preventative

and corrective measures provided by the employer. Third, the reasonable use of the employer's procedures would have prevented some or all of the harm allegedly suffered by the employee.

The employer can "escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment," the court wrote.

The *McGinnis* court was careful to describe the avoidable-consequences defense as a limit on damages, particularly because sexual harassment by a supervisor imposes strict employer liability under state law. A plaintiff with a meritorious claim could, for example, recover provable damages caused by the harassment that occurred before the internal complaint, even if the employer put a stop to the harassment immediately.

Employers do need to talk about how to prevent sexual harassment and eliminate it. The starting place is the employee handbook. It should, among other things, define sexual harassment, spell out how to make an internal complaint and list multiple people (including women) to whom complaints can be made. In light of *McGinnis*, consider adding to the anti-harassment policy, "The firm [or company] wants you to use these procedures so you can (a) help us put a stop to unlawful harassment and (b) avoid any further harm you may have suffered ... [and] Employee confidentiality will be protected to the extent practical for the firm [or company] to investigate and take appropriate disciplinary action."

Supervisors need to be trained to spot potential harassment and what to do about it.

The Supreme Court reminds us that the best-laid plans can be worthless if not executed. If the "employer has failed to investigate harassment complaints [or] act on findings, or, worse still, retaliated against complainants, future victims will have a strong



argument that the policy and grievance procedure did not provide a 'reasonable avenue' for their complaints," the court wrote. By contrast, the employer will want to be in a position to put on evidence of how it consistently and firmly has enforced its anti-harassment policy.

The goal is to chill the potential for workplace sexual harassment proactively rather than in response to a lawsuit. Good employer practices increase the chances of having anti-harassment policies consistently applied if its supervisors and managers know what they are. Employees who see their employer pro-

tect and deal fairly with them tend to have better morale and less absenteeism and be more productive. Employees who are afforded this confidence by their employer no longer have an excuse for failing to talk to their employer about alleged sexual harassment in the workplace.

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Sort it Out

MISSING THE MARK ON EMPLOYEE CLASSIFICATION OR COMPENSATION WILL COST YOU

By

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PERSONAL BANKERS for Bank of America's wealthiest clients settled for \$22 million. Farmers Insurance Exchange claims adjusters were awarded more than \$90 million. Starbucks, PacBell and RadioShack "working" managers are poised to receive millions.

To what do employees owe these sizable awards? Their employers failed to properly classify them as exempt or nonexempt from overtime pay. As a result, the employers find themselves saddled with costs that include up to four years of unpaid wages—plus interest, statutory penalties and attorney fees.

Employer misclassifications of employees can quickly erupt into class action lawsuits sparked by just one disgruntled former or current employee. California and federal laws are onerous in this area, and both permit personal liability upon the officers and managers who controlled the decision not to pay overtime.

CONSIDER YOURSELF WARNED

Employers who look to others in their industry and rationalize, "They don't comply, so I won't either" or "Our industry is too important to the state to be a target" should beware.

Over the past several years, California's Department of Industrial Relations, the federal Department of Labor and employee-side class action law firms have targeted working managers in a variety of industries—and it's not letting up.

The legal profession once perceived the work performed by paralegals to be exempt. Yet in 1998, the DOL said that paralegals more appropriately fit into the category of nonexempt employees who apply particular skills and knowledge in carrying out assignments, but do not regularly exercise independent judgment or discretion.

The lesson learned is that this is a risk employers can't ignore. Dealing with this risk means employers must analyze and satisfy two basic tests to determine whether or not an

employee is exempt. The tests, among other wage and hour rules, can be found in the California Industrial Welfare Commission wage orders posted at www.dir.ca.gov/IWC/WageOrderIndustries.htm.

Employers are required to conspicuously post applicable wage orders in the workplace. Wage Order 1, for example, applies to manufacturing companies. Wage Order 7 applies to mercantile businesses. Wage Order 4 applies to professional, technical, mechanical and clerical occupations, including professional service firms. The focus of this article is on the essence of Wage Order 4's overtime and exemption rules.

THE SALARY BASIS TEST

To satisfy the first test, the "salary basis" test, the employee, whether full or part time, must be paid at least a \$2,340 per month salary. This is based on the rule's twice minimum wage requirement. The salary amount cannot be deducted from or added to because of actual hours worked.

THE DUTIES TEST: THE ROOT OF MANY PROBLEMS

The duties test requires that employees routinely spend more than 50 percent of their working time performing exempt duties. Most of the overtime litigation is borne from this more difficult test.

Keep in mind that the law and the California Department of Industrial Relations state that job titles, large salaries and highly skilled work are not determinative. Instead, employers must analyze the work performed by each employee under professional, administrative and executive exemptions.

EXEMPT DUTIES UNDER THE PROFESSIONAL EXEMPTION

To be considered exempt from overtime pay under the professional exemption, employees must be:

- Licensed in California and spend more than 50 percent of their time engaged in the practice

of law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting; or primarily engaged in an occupation commonly recognized as a learned or artistic profession as defined in Wage Order 4; and

- Customarily and regularly exercising discretion and independent judgment when performing that work.

Unlicensed professionals typically must satisfy one of the other exemptions.

EXEMPT DUTIES UNDER THE ADMINISTRATIVE EXEMPTION

For the administrative exemption, employees must spend more than 50 percent of their time performing the following duties:

- Office or non-manual work directly related to management policies or general business operations of the employer or its customers;
- Regularly exercise discretion and independent judgment; and
- Regularly and directly assists a proprietor, other executive or administrator; or perform, under only general supervision, specialized work requiring specialized training, experience or knowledge; or executes, under only general supervision, special assignments and tasks.

EXEMPT DUTIES UNDER THE EXECUTIVE EXEMPTION

The executive exemption applies to employees who spend more than 50 percent of their time performing the following duties:

- Managing a unit, department or enterprise of the employer;
- Directing or supervising the work of at least two full-time employees;
- Exercising authority to hire, fire, promote or change the status of other employees or their recommendations for such changes are given deference; and
- Customarily and regularly exercising discretion and independent judgment.

ANALYSIS OF THE DUTIES TESTS

Let's take a typical office-based business. The officers, department heads, certain licensed professionals and even the office manager probably are exempt. The receptionist and file clerks are clearly nonexempt. The secretarial, payroll, payables and receivables employees are typically nonexempt. But what about everyone in the middle, including those who may be called "managers" and have a high job responsibility and skills?

Determining if these employees are exempt is not easy. Job titles alone, the employee's stated desire to be treated as exempt and what others in your profession do have been made nearly irrelevant in overtime exemption litigation.

A helpful starting place in exemption analysis is to list, for all employees, how much of their working time is spent:

- Administering business affairs of the company or producing the goods or services that the company is in business to produce;
- Using their head more than their hands;
- Innovating or directing innovation more than merely applying sophisticated skills to technical work;
- Making the company's rules and policies more than following them;

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- Exercising authority to act outside the rules and policies rather than being disciplined for doing so;

- Supervising others and making supervisory decisions more than personally doing the work; and

- Being the trusted adviser to the client rather than just doing the client's work proficiently.

Do the five or six most important "exempt" job functions exceed 50 percent of the employee's time? Test your preliminary conclusions by asking: Do the five or six least important "nonexempt" job functions take more than 50 percent of the employee's time?

ALTERNATIVES TO LIMIT OVERTIME PAY

Since you always have nonexempt

employees, you have four primary ways to limit overtime pay exposure:

1. LIMITING OT

Manage your business so that employees do not work more, or much more, than the eight-hour-a-day threshold for daily overtime pay entitlement. For employers with seasonal workloads, this is easier said than done. During busy season, overtime is a given and layoffs during slow times may frustrate the ability to recruit and retain skilled employees.

2. MAKE-UP TIME

Make-up time exists under California law to encourage employers to permit employees to work up to three hours extra in one day to make up for work they missed because of a personal obligation in the same week.

These make-up hours are paid at straight time and not at the time and a half overtime rate if some basic rules are followed:

- The employee must request the time off and the make-up time in writing in advance and the employer may grant the request in its discretion;
- Make-up time must be taken in the same week in which the time off was taken;
- The employer cannot solicit employees to ask for make-up time to avoid overtime pay; and
- The employer pays overtime on hours worked in a week in excess of 40 anyway.

3. ALTERNATIVE WORK SCHEDULES

On a two-thirds secret vote of employees in a work unit, an alternate work schedule (AWS) can be adopted that permits employees to work longer days at straight time pay in exchange for fewer days in a work week. For AWS purposes, "work unit" means employees in a readily identifiable group, such as a division, a department, a job classification, a shift, a separate physical location or a recognized subdivision of one of those groups. An AWS must have a straight time maximum of 10 hours in one day and 40 in one week.

Among several AWS rules contained in the wage orders, the employer must:

- Report results to the Department of Industrial Relations within 30 days of the vote;
- Provide reasonable accommodation to employees who are unable to work the AWS;
- Conduct a secret repeal vote on petition of one-third of affected employees and then repeal the AWS if two-thirds of the employees vote to repeal;
- Pay daily overtime in any day that the employer requires an employee to work less hours than the AWS, but more than eight hours; and
- Not reduce the regular rate of pay as a result of adoption, repeal or nullification of an AWS.

In addition, employers are permitted to give new employees who are unable to work the AWS an eight-hour schedule. Finally, certain AWS in effect July 1, 1999 are exempt from some of these rules if the work schedule complied with prior wage orders.

4. COMP TIME-OFF

A make-up time program can help employers manage overtime exposure in a given week. An AWS basically recasts work week hours to possibly improve work efficiency and morale, while protecting against overtime exposure. Yet, neither of these methods give employers the flexibility to limit overtime pay, normalize payroll expense over the course of a year, and have employees available or on paid time off depending on seasonal workloads.

In lieu of overtime pay, some employers use statutory compensatory time off (CTO) programs to “bank” extra hours worked during busy times, while paid time off is given during slower times. However, the Legislature intended CTO law to be difficult to comply with because CTO is a form of compensation deferral that is inconsistent with basic labor rules that require employers to pay employees for work in regular payrolls when or shortly after the work is done.

Both California and stricter federal rules apply. Some say that it is nearly impossible to leap through all the required flaming compliance hoops and not get burned.

The Federal Fair Labor Standards Act (FLSA) essentially bans CTO for nonexempt employees who do not work for the government, although in some cases the FLSA permits CTO accrual and use within a two-week period. The FLSA applies to:

- Employees who are engaged in commerce or the production of goods for commerce; and
- Employers with at least \$500,000 annual revenue and have employees engaged in commerce or in the production of goods for commerce, or who handle, sell or work on goods or materials that have been moved in or produced for commerce.

The interstate commerce analysis is easier for vessel and marine equipment builders, electrical power suppliers and companies that ship their products or provide services across state lines. They are typically FLSA governed.

The analysis can be tricky for others since “commerce” includes trade, transportation, transmission and communication directed outside the state. “Goods” includes tangible products, as well as written materials, such as brochures, newsletters and lawyers’ briefs that move in interstate or foreign commerce.

For example, a provider of professional services from a single California office who does little or no work for out-of-state clients and who does little or no out-of-state marketing may not be FLSA governed, while a provider with offices in multiple states probably is FLSA governed.

If the FLSA does not apply, California law permits CTO for nonexempt employees if all of the following conditions are met:

- The employer is not covered by one of five wage orders (i.e. manufacturing; canning, freezing, and preserving; public house-keeping; amusement and recreation; and agricultural, farm product preparation and post-harvest product handling);
- The employer and employee must sign a written agreement, or be subject to a collective bargaining agreement, permitting CTO before the work is performed;
- The employee can accrue a 240-hour maximum of CTO and overtime pay must be paid each payroll period after that;

- The employee requests CTO in writing in lieu of overtime pay; and
- The employee must be regularly scheduled to work no less than a 40-hour week.

Among the numerous rules affecting CTO program operation that employers frequently neglect is that CTO must be granted at the applicable overtime rate (i.e., 1.5 or two times hourly wage) of each overtime hour worked. For example, an employee who works two hours of overtime in a day must be credited three CTO hours.

The employer also must keep records of all CTO accrual and use. Employees

must be permitted to use CTO within a reasonable period after making a request to their employers as long as the CTO does not unduly disrupt the employer’s operations. If requested by the employee, the employer must pay overtime compensation in lieu of CTO that has accrued in the last two payroll periods. On termination of employment, unused CTO must be paid in full at the higher of the final wage or the employee’s average wage rate for the last three years.

CTO seems like an attractive option to manage OT pay and retain great employees. Yet, an employer needs an asbestos coat to avoid getting burned by all the rules that it may be breaking.

EVERYONE’S DOING IT IS NOT A DEFENSE

Anyone who ignores these rules or thinks they are easily applied is asking to be a defendant. If you are taken to court or the labor board on overtime issues, the employer has, what litigators call, the “burden of proof.”

Employers need experienced labor counsel or human resource professionals to effectively deal with these risks. 

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