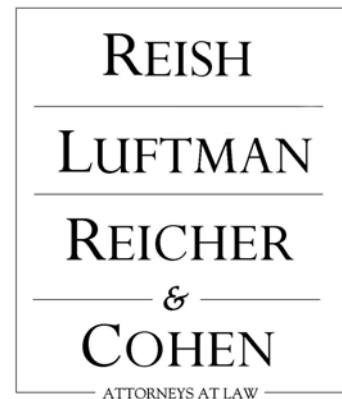


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**NEW EMPLOYMENT LAWS
THAT YOU AND YOUR CLIENTS
NEED TO KNOW FOR 2004**

PRESENTED AT

PROFESSIONALS NETWORK GROUP

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I. Recent Legislative and Regulatory Developments

- **Sexual Harassment.** SB 76 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.
- **Gender Identity Discrimination.** AB 196 outlaws gender identity discrimination as a form of sexual discrimination. "Gender" now also means the employer's perception of the employee's actual gender or behavior normally associated with birth gender. Employers are required to permit transgendered employees to appear and dress consistently with their declared identity.
- **Whistleblower Law.** SB 777 fortifies 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 bill requires that employers defend with "clear and convincing evidence" once plaintiff has shown employer misconduct by a "preponderance of the evidence." The bill 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.
- **Bounty for Labor Code Violations.** SB 796 gives employees and their counsel additional financial incentives to sue employers by: (1) creating 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 will receive 25% of the penalty, plus any penalties that employees might otherwise recover (e.g. waiting penalty for

failure to pay wages due at the end of employment) and attorneys fee recovery. Examples of possible application of the law: (1) Labor Code §§232 and 232.5 which prohibit employers from disciplining, discriminating or retaliating against employees who discuss their pay or working conditions; and (2) Labor Code sections requiring that Wage & Hour, Workers Comp, Whistleblower Hotline, and other notices be posted in the workplace.

- **More Labor Code Penalties.** AB 276 increases the penalty 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.
- **Even More Labor Code Penalties.** 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. AB 276 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 \$4,000 per employee.
- **Contractor “Police.”** SB 179 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.
- **Labor Board Appeals.** A Labor Commissioner 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.” AB 223 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.
- **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 will be funded by mandatory employee payroll deductions starting 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.”
- **Crime Victim Leave.** SB 478 permits employees who are victims of crime, and employees who are closely related to a crime victim, to take time off from work to attend related judicial proceedings. Employers cannot discharge, retaliate or discriminate against any employees who ask for or take the leave. The law does not limit the amount of leave, nor does it require minimum employee notice of the need for the time off.

- ***Employer Provided Healthcare.*** SB2 Starting January 1, 2006 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. In 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 the March 2004 ballot for “repeal” and 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, must be provided to employees and their Domestic Partners.
- ***"Sweatfree Code of Conduct."*** SB 578 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."
- ***Racial Discrimination Is Defined*** by AB 703 as, "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment of exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." The California Constitution proscribes racial discrimination but there had been no uniform definition of it. AB 703 also states that, "[S]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."
- ***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.

- **Database Security.** Effective July 1, 2003, SB 1386 requires companies and state agencies with own or license "personal information" on their computers to notify those affected of unauthorized access to such unencrypted information. Personal information is defined as someone's first name (or first initial) and last name combined with any of the following: social security number; driver's license or California Identification Card Number; or account number, credit or debit card number combined with any required security code, access code or password. The law also requires anyone who becomes aware of a security breach to notify the owner or licensee of the information immediately.
- **Privacy of Social Security Numbers.** AB 763 prohibits companies from publicly posting or displaying social security numbers (SSN), printing an individual's SSN on a card that the individual is required to show to access products or services or on materials mailed to the individual (unless state or federal law requires it), or requiring the individual to use their SSN on the internet unless it is encrypted, secure, and some other form of authentication is also required. Some prior uses are OK if the use is continuous and the individual is informed they have the right to stop this use. SSNs cannot be embedded in a chip, or other media contained on a card or document. Financial institutions must remove such SSNs by July 1, 2004.
- **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/>

II. Recent Court Decisions

- **Sexual Harassment.** 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 such as: "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."
- **Proof of Discrimination.** "Mixed-motive" discrimination cases have evidence that both lawful, good faith business reasons (e.g., the employee is always at odds with, and ruining

the morale and productivity of, her coworkers and supervisors) and unlawful factors (e.g., gender or other protected class factor) were considered in the decision to fire. On June 9, 2003, the United States Supreme Court ruled in *Desert Palace, Inc., dba Caesars Palace Hotel and Casino v. Costa*, that a Plaintiff need not present “direct evidence” of discrimination (e.g., an admission such as an e-mail or testimony of a decision maker) in order to obtain a “mixed motive” jury instruction. This now permits a jury to find in favor of a Plaintiff even if the employer also had non-discriminatory reasons for its actions. BUT, a Plaintiff will still not recover money damages if the jury finds that the same disciplinary action would have been taken in the absence of the illegal factors.

- **High Standard to Prove Direct Threat.** On July 23, 2003, the Ninth Circuit Court of Appeals in *Echazabal v. Chevron USA, Inc.*, ruled that the ADA requires an “individualized assessment,” and not just “the advice of a generalist and an expert in preventative medicine,” before an employer can conclude that an employee’s medical condition poses a direct threat to the safety or health of himself or others in the workplace. Medical and safety experts will be needed to support these terminations or relocations.
- **Officer and Director Liability for Unpaid Wages.** On July 23, 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.
- **Arbitration.** In many of the latest pre-dispute mandatory arbitration agreement cases interpreting *Armendariz v. Foundation Health Psychcare Services Inc.*, the 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., *O’Hare v. Municipal Resource Consultants; Ingle v. Circuit City Stores, Inc.*). > In *Little v. Auto Steigler, Inc.*, 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.
- **Arbitration.** The Ninth Circuit in *EEOC v. Luce Forward* validated a pre-dispute arbitration agreement that included Federal discrimination claims. This effectively shot down the EEOC’s enforcement policy that prohibited arbitration of Federal discrimination claims.
- **Are the Owners Employees?** The United States Supreme Court in *Clackamas Gastroenterology Associates, P.C. v Wells* held that the determination of whether employed medical practice shareholders were to be counted the 15 employee threshold for ADA applicability depended on the shareholders’ right to control the business. Here, the employer was trying to avoid ADA application and liability. > The Court followed six factors created by the EEOC: (1) Can the organization hire or fire the individual or set the rules and regulations for his/her work; (2) The extent to which

the organization supervises his/her work; (3) Does he/she report to someone higher in the organization; (4) How much influence is he/she able to exert over the organization; (5) What relationship is intended as expressed in oral or written agreements; and (6) Does he/she share in the profits, losses, and liabilities of the organization. > Basically, the more control over the organization, the less likely the shareholder is an "employee" for this purpose. > Enforcement agencies and courts might use these factors to determine whether shareholders, directors, officers, or partners in a small business are to be treated as employees for law applicability purposes.

- ***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.
- ***Retail Worker Uniforms.*** Both the IWC Wage Orders and Labor Code §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.

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