

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

Professional Liability Litigation

Real Estate Litigation

Restaurant / Hospitality Litigation

Retail Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

Final Harassment Training Regulations Issue

On July 18, 2007, the California Office of Administrative Law approved final regulations relating to AB 1825, which requires that all California employers with 50 or more employees provide bi-annual sexual harassment training for all supervisory employees. The regulations became effective on August 17, 2007 and will be applied prospectively.

The purpose of the regulations is to provide clarity to employers regarding how the sexual harassment training can/must be undertaken. The following will summarize some of the key points set forth therein:

- The training must be “interactive,” and attendees must have the opportunity to ask questions. Although on-line programs are permitted, e-learning programs must provide a link to a trainer or directions on how to contact a trainer. Responses to all questions must be provided “within a reasonable period of time” (no more than two business days) after the question is asked.
- Training programs must incorporate “questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of the content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that the supervisors remain engaged in the training.”
- The 50-employee threshold contemplates employees who do not physically work in California. Thus, any employer with 50 or more employees (regardless of where they reside) must train all California supervisors.
- The term “supervisor” is defined as any individual located in California who has the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, . . . if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

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- Newly-hired supervisors who have received appropriate sexual harassment training from a former employer need not be re-trained until the company next presents its sexual harassment training. The new employer has the burden to establish that the prior training was legally compliant, however.

The next training/compliance period ends on December 31, 2007.

Pending Legislation Progresses Through the California Legislature

AB 392 (Lieu): This bill seeks to require employers with 25 or more employees to permit spouses and certain members of the Armed Forces, National Guard, or Military Reserves deployed during military conflict to take up to ten days of unpaid leave when the service member is home on leave. The bill passed the Assembly and recently passed the Senate Appropriations Committee.

AB 435 (Brownley): This bill seeks to require employers to retain records of their employees' wages for five years. The bill would also expand the statute of limitations for filing a civil action for unequal wages from three years to four years (or five years for actions involving "willful misconduct" of the employer). The bill is currently being considered by the Senate.

SB 549 (Corbett): This bill proposes a new law prohibiting an employer from discharging, disciplining, or discriminating against any employee for inquiring about, requesting, or taking up to four days of "bereavement leave" upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. The leave would be unpaid, but an employee could use vacation, personal leave, or compensatory time off that is otherwise available to him/her. This bill has passed the Senate and is now before the Assembly Appropriations Committee.

SB 622 (Padilla): This bill would penalize employers for the "willful" misclassification of employees as independent contractors. The bill authorizes the assessment of specified civil penalties against persons and employers, and would authorize employees "who suffer actual harm" to bring actions to recover these civil penalties. The civil penalties range from \$5,000 to \$15,000 for each violation; however, employers found to have engaged in a "pattern or practice" of inappropriate behavior would be assessed civil penalties of between \$10,000 and \$25,000 per violation. SB 622 passed the Senate and is now before the Assembly.

II. **JUDICIAL UPDATE**

Ninth Circuit Provides Guidance Regarding When the EEOC Limitations Period Begins to Run

Under Title VII of the Civil Rights Act of 1964 ("Title VII"), once a claimant is provided with a right-to-sue notice from the Equal Employment Opportunity Commission ("EEOC"), the claimant has 90 days in which to file a civil complaint for claims arising under Title VII. The claimant's failure to do so will render the Title VII claims time-barred.^[1]

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^[1] Under California's Fair Employment & Housing Act ("FEHA"), employees have one year from receipt of the right to sue letter in which to file a civil lawsuit.

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In *Payan v. Aramark Management Services Limited Partnership*, the claimant filed her civil complaint 98 days after the EEOC issued its right-to-sue notice. It was unknown, however, when the claimant actually received the right-to-sue notice. After thoroughly analyzing the issue the Ninth Circuit Court of Appeals adopted a three-day mailing presumption to determine when the right-to-sue letter was legally “received” by the claimant. The court opined as follows: “we measure the start of the limitations period from the date on which a right-to-sue notice letter arrived at the claimant’s address of record. Where that date is known, we will deem the claimant to have received notice on that date, regardless of whether the claimant personally saw the right-to-sue letter.” The court added that where the date of actual receipt is unknown, “we adopt the three-day presumption as the governing standard for this circuit.”

Court of Appeals Confirms that Retaliatory Acts of an Employee can be Imputed to His Employer

In *Poland v. Chertoff*, a federal district court (“court”) held an employer liable for violating the Age Discrimination in Employment Act by retaliating against and constructively discharging an employee (“the Employee”) by transferring him to a new location after he filed complaints with the Equal Employment Opportunity Commission (“EEOC”). On appeal, the Ninth Circuit reversed, holding that the employer’s transfer and demotion of the Employee was insufficient to constitute a constructive discharge as a matter of law.

The Ninth Circuit also held, however, that the Employee had properly plead a claim for retaliation. Specifically, the court held that if a subordinate, in response to an employee’s protected activity, sets in motion a proceeding by an independent decision-maker that leads to an adverse employment action, the subordinate’s bias is imputed to the employer if the employee can prove that the biased subordinate influenced or was involved in the adverse employment action. Thus, “if an adverse employment action is the consequence of an entirely independent investigation by an employer, the animus of the retaliating employee is not imputed to the employer.” As such, the Ninth Circuit affirmed the determination that the employer unlawfully retaliated against the Employee for filing EEOC complaints.

Employees Need Not Comply With Class Action Requirements to Pursue Representative Actions Under the Private Attorneys General Act

In *Arias v. The Superior Court of San Joaquin County (Angelo Dairy)*, an employee (“the Plaintiff”) brought an action for overtime wages and meal and rest period violation claims on behalf of himself a group of similarly situated dairy workers. Although the Plaintiff did not style the complaint as a class action, he alleged claims under the California Unfair Competition Law (“UCL”) and the California Private Attorneys General Act (“PAGA”).

The third district court of appeals upheld the trial court’s order granting the employer’s motion to strike the UCL claims, confirming a representative claim under the UCL must comply with the class action provisions of Code of Civil Procedure section 382. The court, however, held that PAGA expressly allows a person to prosecute a representative claim *without* requiring that it be brought as a class action. The court held that, unlike the UCL, “the Labor Code statute authorizing a private enforcement action is an exception to the class action requirement.” Thus, while an aggrieved employee must allege class allegations to assert a representative claim under the UCL, an employee need not do so under the PAGA.

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Employment Law Symposium – REGISTER TODAY

Wednesday, November 7, 2007

*San Diego Marriott Mission Valley
8757 Rio San Diego Drive, San Diego CA 92108*

Join our team of employment law attorneys as we address the changes in employment law over the past year.

Registration will be from 8:00 am – 8:30 am, with continental breakfast offered.

Morning Session

We will be holding a morning session from 8:30 am – 12:30 pm where the following topics will be discussed in detail:

- Wage & Hour Issues
- Discrimination & Harassment
- Retaliation
- Leaves of Absence

(Morning sessions @ \$100/per person, \$115 after November 2, 2007. Morning session attendees may attend the afternoon Sexual Harassment session for free)

Afternoon Session

Our afternoon session will feature Tom Ingrassia as he presents his highly acclaimed Sexual Harassment Prevention Training for supervisors and managers. Registration for the afternoon session will be from 1:30 pm – 2:00 pm.

From 2:00 pm – 4:30 pm, you and your management team can learn important information regarding:

- Quid pro quo harassment
- Hostile work environment harassment
- Supervisor responsibilities once a complaint is received
- Retaliation and how to prevent it
- Other forms of discrimination
- How to create and maintain a culture of mutual respect

(Afternoon session only @ \$60/per person, \$75 after November 2, 2007)

Who should attend: Business Owners, Executives, Human Resource Professionals, Managers and Supervisors.

Attached is our registration form for our Employment Law Symposium with more details. Please contact Janice Bryant at (858) 755-8500 with any questions. We look forward to seeing you there!

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Hilary Vrem or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.

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