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Weekly Employment Brief

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New California Statute Makes Employers Liable For Non-Employee Sexual Harassment Of Workers

As one of his parting acts as governor, Governor Gray Davis signed into law AB 76 that makes employers liable for sexual harassment of a worker by a non-employee. The new law makes an employer liable for the acts of a non-employee who sexually harasses an employee, applicant or contractor "where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action." The employer must take "all reasonable steps" to prevent harassment from occurring. In deciding employer liability, the courts are to consider the "extent of the employer's control" and the employer's "legal responsibility" for the conduct of the non-employee. The new statute reverses the decision of the California Court of Appeal in *Salazar v. Diversified Paratransit Inc.,* which held that the employer of a driver of a vehicle used to transport a mentally disabled client was not liable for the client's sexual harassment of the driver, even though the driver repeatedly complained to the employer about the alleged harassment. The new law, which the Legislature intended to "clarify existing law" is effective immediately. Employers should be on the alert for any occurrence of, for instance, a customer or vendor's sexual harassment of an employee and take immediate steps to stop and prevent such harassment.

Compliments About Jewelry, Clothing And Hairstyle Do Not Amount To Sexual Harassment

Observing that claims of sexual harassment by a woman against another woman "are about as common as a baseball post-season that includes the Cubs and the Red Sox," a federal district court in Rhode Island dismissed a female employee's harassment claim against her female supervisor. In *Mann v. Lima,* Roberta Mann was a customer service representative at Sovereign Bank. According to Mann, her supervisor, Mary Jo Lima, repeatedly complimented her on her choice of jewelry, clothing and hairstyle. In rejecting the claim of hostile work environment based on sex, the court concluded that the alleged harassing comments were not based on sex, and that even if sex-based, the compliments did not amount to "severe or pervasive" conduct as to create a hostile work environment. As this case illustrates, not all employee complaints about "harassment" will amount to a legally cognizable claim. Employers, however, should take all complaints of harassment seriously, investigate and appropriately address the employee's concerns.

Court Enforces Last-Chance Agreement With Employee Terminated For Substance Abuse

The U.S. Eighth Circuit Court of Appeals in Minnesota upheld the termination of an employee for drinking alcohol off work in violation of his last-chance agreement. In *Longen v. Waterous,* Plaintiff Ira Longen had a history of repeated discipline for work-related substance abuse. Finally, Longen's union and the employer negotiated a last-chance agreement providing for Longen's immediate termination if he used any drugs or alcohol in the future. Four years later, Longen was arrested and pleaded guilty to driving under the influence of alcohol while off work. Upon learning of the conviction, the employer terminated Longen's employment. Longen sued alleging that the last-chance agreement, and his termination for off-work conduct, violated the Americans with Disabilities Act ("ADA"). In dismissing the lawsuit, the court held that a last-chance agreement is permitted by the ADA. Also, contrary to Longen's assertion, the court concluded that the ADA does not prohibit a last-chance agreement that bars off-work substance abuse. California employers are cautioned, however, that state law prohibits an employer from disciplining an employee for lawful off-work conduct. (Although even in this case, Longen's drinking and driving under the influence of alcohol was not lawful conduct.)