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## **NEWS BULLETIN - EMPLOYMENT LAW CHANGES IN 2004**

by [Leonard Brazil, Esq.](#)

Anyone who runs a business knows that keeping up with the regulations and changes in California Employment Law is no easy task. The following briefly summarizes some of the more significant changes in 2004 of which employers should be aware:

1. **"Bounty Hunter" Law:** Senate Bill 796 has been referred to as the "bounty hunter" law and states that every violation of a Labor Code statute shall result in a monetary penalty against the employer. (Previously, some Labor Code violations did not result in any monetary penalty.) What makes the new law such a looming threat to employers is that an employee can file suit not only on his own behalf, but also on behalf of other employees whose rights were also violated (even if those other employees have not consented to participate in the action). The expansive right to sue on behalf of other employees makes it similar to a class action type suit. Of equal concern is that a prevailing employee may recover attorneys' fees from the employer. The practical effect is that contingency fee lawyers will have a tremendous incentive to seek out employees willing to sue employers for even minor Labor Code violations, such as the failure to file with the Department of Labor Standards Enforcement the form of employment application used if the applicant is required to sign it. (Hence, the name "bounty hunter" law.)

**What You Should Do:** In that even minor non-compliance with the Labor Code could trigger a class action type lawsuit and a claim for attorneys' fees, employers should conduct employment law audits as soon as possible to ensure that their employment practices and procedures are in legal compliance. Employers should also be sure that their Employee Manuals are up to date.

2. **Increased Liability For Sexual Harassment:** Assembly Bill 76 was passed in response to a Court of Appeals case that held employers were not liable under the California Fair Employment and Housing Act when an employee is subjected to sexual harassment by a non-employee. As a result of this new legislation, an employer may be held liable to an employee for sexual harassment by a third party, such as a customer, vendor or, arguably, any third party if the employer knew or should have known of the harassment and failed to take reasonable steps to prevent it.

**What You Should Do:** Employee Manuals should be modified to make clear that the company also does not tolerate sexual harassment of its employees by non-employees and that the company will take action to enforce that policy. Consideration should also be given to posting such a policy statement in an area of the workplace where it can be seen by vendors, delivery personnel, customers and other third parties. In that the law would arguably require employers to take reasonable action to prevent sexual harassment of its employees by customers

of the company, consideration should also be given to adding a non-harassment policy in contracts and purchase orders, although one would have to approach that in a delicate manner.

3. **New Employer Defense Available:** The California Supreme Court recently held that employers who have strong policies to prohibit and prevent sexual harassment may limit damages recoverable by an employee who fails to report the harassment until he/she has suffered damages. (This defense may also apply to discrimination claims.)

**What You Should Do:** Employee Manuals should have a written policy prohibiting sexual harassment (and discrimination) and detail what steps should be taken by an employee who has been subject to harassment. Additionally, employers should be sure to train supervisors in the importance of immediately reporting to upper management any complaint of harassment, or observation of such conduct. (Also, maintain a record of the training or instruction provided to supervisors in that regard.) It may be advisable for an employer to conduct an anonymous written survey of employees regarding how they view the company's complaint procedure and whether employees would feel comfortable in reporting illegal activities. The existence of such a survey conducted by an employer would be helpful in defending against a harassment action by demonstrating the company is proactive in attempting to investigate complaints. However, it is strongly advised that such a survey only be conducted with the guidance of legal counsel.

4. **Intimate Supervisor-Subordinate Relationships:** A difficult issue is whether an employer should have any policy against co-workers maintaining intimate relationships. The Court of Appeal recently provided some guidance in that area. Some employers have written policies prohibiting such fraternization between a supervisor and a subordinate. The issue which must be considered is whether such a policy invades an employee's constitutional right of privacy. The court recognized that an employer has a legitimate interest in avoiding conflicts of interest and that there may be circumstances where a supervisor has no reasonable expectation of privacy in pursuing an intimate relationship with a subordinate. The court recognized that a managerial - subordinate relationship presents issues of potential sexual harassment. As a result, the court concluded that the employer had a legitimate interest in prohibiting a managerial - subordinate relationship which created a potential conflict of interest. In reaching its decision to allow the employer to prohibit the managerial - subordinate relationship in question, the court took note that the company had an expressed written policy regarding fraternization between supervisors and subordinates.

**What You Should Do:** If you wish to restrict the right of supervisors and subordinates to maintain an intimate relationship, it is important to have a carefully drafted written policy addressing the subject. Whether a particular relationship could be prohibited by management would depend upon a variety of factors, such as whether there was direct reporting between the subordinate and supervisor and whether one of them could be reassigned within the company to avoid such direct reporting. The courts have at least shed some light on how to proceed when faced with such a situation.

5. **Gender Identity Protection:** Transsexuals and employees who identify with the opposite sex are now protected from discrimination and harassment by the Fair Employment and Housing Act. Similarly, employers cannot prohibit employees who identify with the opposite sex from grooming or wearing clothing that is consistent with the sex the employee identifies with, although an employer may require grooming and dress which is "business appropriate."

**What You Should Do:** Employee Manuals should state that gender identification is a protected category. It is also recommend that a separate written policy regarding gender identification be included in the Manual. Any written policy regarding dress or grooming should also be modified. This new law raises some interesting issues, such as what if a male employee undergoes a sex change operation and wishes to utilize the woman's restroom?

6. **Domestic Partners:** Effective January 1, 2005, registered domestic partners will have the same rights, protections and benefits under state law that spouses do. Among other things, the new law will expand rights under family-leave laws and laws prohibiting discrimination based on marital status.

**What You Should Do:** Many aspects of company policies which refer to spouses will need to include domestic partners on an equal basis.

There are other changes which have been made for 2004, but the foregoing provides a summary of the more significant changes. Most employment law risks can be minimized or entirely eliminated by seeking prompt legal advice. While no one wants to pay attorney's fees to seek the advice of counsel, doing so is dramatically less expensive than defending against a lawsuit, particularly if you also have to pay the employee's attorney's fees.

For additional information about changes in employment law contact [Leonard Brazil](#).

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