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RMKB EMPLOYMENT LAW ALERT

EMPLOYERS CAN BE HELD LIABLE UNDER STATE LAW FOR A HARASSMENT BY A NON-EMPLOYEE

by Clint D. Robison and David A. Bernardoni

New Law. An employer of five (5) or more people who knew or should have known of sexual harassment by a nonemployee and fails to take immediate corrective action can now be held liable for that failure under the Fair Employment and Housing Act (FEHA). The new law, which can be found in Section 12940 of the Government Code, was passed by the state's legislature and signed into law as Assembly Bill 76, also known as AB 76.

Background. A quick bit of history may be helpful to illustrate the issues. On October 28, 2002, the California Court of Appeals issued a very interesting decision in *Salazar v. Diversified Paratransit*, 103 Cal. App. 4th 131 (2002). A female bus driver was routinely sexually harassed by a male passenger (e.g. a customer) on her route. The woman sued her employer for sexual harassment in violation California's Fair Employment and Housing Act (FEHA). The Court addressed the issue of whether FEHA created employer liability for sexual harassment of an employee committed by a non-employee client or customer. The Court concluded that the law did not create employer liability and granted the employer's motion to dismiss the case. The California Supreme Court granted review. (*Salazar v. Diversified Paratransit*, 130 Cal. Rptr. 2d 656 (2003)). Less than three months later, before a decision was issued by the state's Supreme Court, the *Salazar* holding prompted the introduction of Assembly Bill 76 which was quickly passed into law. AB 76 expressly invalidated the Court's holding in *Salazar* by amending Section 12940 of the Government Code.

Other Law. In some respects, the amended law does not represent a new concept. Federal law already provides for the type of protection found in AB 76. (*See* 42 U.S.C.S. § 2000e; *see also Vargas v. Gumersindo Colon*, 68 F.Supp.2d 80 (D.P.R. 1999)). However, the state law will be more enticing to plaintiffs for several reasons, including the potential for unlimited compensatory and punitive damages. (*See, e.g., Commodore Home Systems, Inc. v. Superior Court*, 32 Cal. 3d 211 (1982)).

Differing views. Proponents of the amended law opine that employers were not required to protect their employees from illegal harassment by nonemployees, even when they know or should know that their employees are being harmed. According to that point of view, the amended law rectifies that gap in state law.

On the other hand, many employers say it will increase the cost of insurance, expose employers to increased attorney's fees, raise the costs of production, and make California's employers less competitive. Some argue that they can already be held liable for sexual harassment committed by employees, but should not be responsible for the behavior of customers over whom they have no legal control. The term "nonemployee" is not specifically defined in the amended statute, but it would arguably include customers, vendors and other visitors to a place of business. In addition, some forms of sexual harassment can be subtle, such as gestures or eye movements, which will make it difficult for the employer to police its customers and vendors.

Practical issues. The potential application of the "should have known" standard is presently unclear where the employer has little or no history or information regarding the offending nonemployee. Aside from the lack of clarity, the amended law means employers should fully inform their supervisors of the change and the potential issues. In addition, many employers will have to implement specific policies to monitor the contact between employees, clients, customers, vendors or others. The policies will have to be tailored to fit the particular workplace environment as the employer may have varying degrees of control over the third parties.

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