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The Year in Review: Employment Law Developments in California

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Agenda

- Trends
- New Legislation
- New Cases

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CLAIM FILING TRENDS AND JURY VERDICT STATISTICS

CALIFORNIA DFEH CHARGE FILING STATISTICS

	July 2002 - June 2003	July 2003 - June 2004	July 2004 - June 2005
Gender/Sex	8,322	6,905	6,983
Mental Disability	929	928	1,000
Physical Disability	4,829	4,320	4,598
Race/Color	4,911	3,849	3,828
National Origin	2,618	1,942	1,869
Age	3,411	3,052	3,112
Retaliation	4,870	4,588	4,515
Totals:	29,890	25,678	25,905
Unemployment Rate	6.80%	6.60%	5.80%

JURY VERDICT STATISTICS

- In 2006, there were 57 reported employment law jury verdicts in California:
 - 34 of the 57 reported verdicts were in favor of Plaintiffs, meaning that Plaintiffs prevailed 60% of the time.
 - The average jury award in cases where Plaintiffs prevailed was approximately \$5,016,444, excluding attorneys' fees.
 - The median jury award in cases where Plaintiffs prevailed was approximately \$548,909, excluding attorney's fees.

LARGEST JURY VERDICT

- \$61,000,000: *Issa, Rizhallah v. Roadway Package System, Inc., FedEx*, docketed in Alameda County Superior Court, verdict rendered on June 6, 2006:
 - Two Lebanese Federal Express drivers brought suit against Federal Express and one of its terminal managers for racial discrimination and harassment under the FEHA. The plaintiffs (who were current employees) claimed the manager used racial epithets toward the drivers over a two-year period.
 - The jury found for the plaintiffs and awarded \$61 million in damages: \$10 million in emotional distress, \$50 million in punitive damages, and \$1 million in compensatory damages against the manager.
 - The company and manager had the same lawyer during the first phase of the trial, but the manager had a different lawyer during the punitive damages phase.
 - Update: On September 5, 2006, a California Superior Court Judge reduced the award to \$12 million, stating the original award was excessive and unsupported by the evidence; an appeal has been filed.

LITIGATION TRENDS

- Reduced Workers' Compensation Benefits Cause More FEHA Disability Claims
- Reduced Pregnancies, But More Pregnancy Discrimination Claims
- More Wage and Hour Cases, Including Those Involving Technology-Related Positions

FIRST TREND

- Reduced Workers' Compensation Benefits Cause More FEHA Claims -

- 2004 workers' compensation reform reduced applicant and attorneys' fees awards.
- Traditional workers' compensation law firms have added civil employment lawyers to their ranks.
- With reduced awards, both applicants and attorneys have focused on failure to accommodate, failure to engage in the interactive process, and disability discrimination claims:

	July 2002 - June 2003	July 2003 - June 2004	July 2004 - June 2005
Mental Disability	929	928	1,000
Physical Disability	4,829	4,320	4,598

WHAT SHOULD EMPLOYERS DO?

- Recognize the workers' compensation/FEHA trend and assume that every workers' compensation claim can turn into a disability-related claim.
- Actively communicate with the employee and the workers' compensation carrier and make sure you are taking steps to avoid failure to accommodate, interactive process, or disability discrimination claims.
- Labor Code Section 3762 prohibits workers' compensation carriers from disclosing medical information to employers unless it is related to the diagnosis or treatment of the injury or necessary to enable the employer to accommodate the employee's injury.
- If workers' compensation and civil litigation exist, make sure your insurance carrier's lawyer and your civil employment lawyer communicate about joint defense strategies.
- If a workers' compensation matter settles, make sure the release, where possible, expressly extends to related FEHA claims.

SECOND TREND

- Reduced Pregnancies, But More Pregnancy Discrimination -

- The EEOC reports a decreased number of pregnancies in the workplace over the past decade.
- Yet, during that same period, pregnancy discrimination claims have increased by 31%, according to David Grinberg, spokesman for the EEOC.
- Reasons: unclear; some believe that today's workers are more familiar with their rights than prior generations, while others believe that the stakes today are higher: high-level female executives claim they have been knocked off the corporate ladder because of maternity issues.

BEST PRACTICES FOR REDUCING THE RISK OF PREGNANCY DISCRIMINATION CLAIMS

- Carefully manage post-pregnancy leave employees.
- Most employers appropriately handle pregnancy leaves; the riskier situation occurs when employees return from leave (i.e., does their performance rating change, do they miss out on promotional opportunities).
- If there is a post-pregnancy adverse employment action, there must be clear and contemporaneous documentation, particularly if the employee was a star performer before leave.
- Do not necessarily wait for an annual review to give performance feedback.

THIRD TREND

More Wage & Hour Litigation,
Including Claims Involving
Technology Positions

RECENTLY SETTLED WAGE & HOUR CLASS ACTIONS INVOLVING TECHNOLOGY POSITIONS

- *Giannetto v. Computer Science Corp.* Central District of California, March 2005 (\$24 million to settle alleged misclassification of some 30,000 technical support workers).
- *Kirschenbaum v. Electronic Arts, Inc.* San Mateo Superior Court, October 2005 (\$15.6 million to settle alleged misclassification of some 618 animators, modelers, and artists involved in installing, producing, or copying images for EA computer games).
- *Lin v. Siebel Systems, Inc.* San Mateo Superior Court, November 16, 2006 (\$27.5 million to settle alleged misclassification of some 800 software engineers).
- *Rosenburg v. IBM* Northern District of California, November 22, 2006 (\$65 million to settle alleged misclassification of some 32,000 current and former systems administrators, network technicians, and other technical staff nationwide).

PENDING CASES

INVOLVING TECHNOLOGY POSITIONS

- Network Engineers
 - Key issues include whether these engineers exercise independent judgment and discretion, whether their work is nonmanual or manual, and whether their duties relate directly to management policies or general business operations.
- Software Developers
 - Key issues include whether these developers are paid in accordance with the California computer professional exemption, whether they exercise independent judgment and discretion, and whether they are learned professionals.
- Technical Writers
 - Key issues include whether these writers satisfy the computer professional exemption or learned profession exemption.

HOW DO YOU MINIMIZE RISK?

- Be sure the job descriptions, duties, and compensation of your computer professionals comply with Labor Code Section 515.5:
 - The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.
 - The employee is primarily engaged in duties that consist of one or more of the following: the application of systems analysis techniques and procedures; the design, development, documentation, analysis, creation, testing, or modification of computer systems/programs.
 - The employee is highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems, programming, and software engineering.
 - The employee's hourly rate is not less than \$49.77 beginning Jan. 2007. The annualized full-time equivalent comes to at least \$103,521.60 ($\$49.77 \times 2,080 = \text{straight-time salary} + \text{additional hours worked}$).
- If your computer professionals do not satisfy Section 515.5, determine whether any other exemption applies (administrative, professional, or executive).
- Best Practice: If in doubt, conduct a privileged audit of the position in question.

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NEW LEGISLATION

SEXUAL HARASSMENT TRAINING REGULATIONS

- On November 14, 2006, the Fair Employment and Housing Commission ("FEHC") adopted final regulations for California's mandatory harassment training law (A.B. 1825); they became final January 14, 2007.
 - FOUR rounds of draft regulations (December 16, 2005, June 20, 2006, August 29, 2006 and October 2, 2006.)
- Final regulations at:
http://www.fehc.ca.gov/pub/pdf/11-14-06_reg.pdf

KEY POINTS

1. Who is a covered Employer?

- All 50 Employees do NOT need to reside in California.
- 50 or more employees for each working day in any twenty consecutive weeks in the current calendar year or preceding calendar year.

2. What supervisors need to be trained?

- Only supervisors resident in California.
- What if supervisor supervises employees in California?
- Attending harassment training does not create an inference that an employee is a supervisor, or that a contractor is an employee or a supervisor.

KEY POINTS (cont'd)

3. Three types of training: Live, E-Learning, Webinars.

- All three methods, INTERACTIVE is the key.
- E-Learning
 - Supervisors must have the opportunity to ask questions during and after the training.
 - No more than two business days after a post-training question is asked, it must be answered by someone able to “provide guidance and assistance of harassment training issues.”

KEY POINTS (cont'd)

3. Types of training (cont'd):

- **Webinars:**
 - Must be able to "document and demonstrate" that each supervisor not physically present in the same room as the trainer
 - **attended the entire training, and**
 - **actively participated with the training's interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities" (No tuning out!)**
 - Supervisors must have the opportunity to ask questions during and after the training (like E-learning).

KEY POINTS (cont'd)

4. What does “Two Hours” mean?

- Live: two hours, not less than 30-minute increments
- Webinar: two hours, not less than 30-minute increments
- E-learning: No less than two hours to complete, can be less than 30-minute increments

KEY POINTS (cont'd)

5. Tracking

- Individual Tracking
 - Measure two years from the date of last training completed.
 - Example: Sue was trained on July 6, 2005. She must be retrained no later than July 6, 2007.
- Training Year Tracking
 - Designate a "training year" to train part or all supervisors and retrain same supervisors by the end of the year, two years later.
 - The first training deadline was December 31, 2005; therefore, 2007 is a training year for most employers.

KEY POINTS (cont'd)

5. Tracking. (cont'd)

- Example of Training Year Tracking: ABC Corp designates 2005, 2007 and 2009 as "training years."
 - Sue completes first training on July 6, 2005. She must be retrained by December 31, 2007.
 - Sue could be trained significantly later than she would under Individual Tracking.
 - Dave was hired on February 1, 2006. He must trained by July 31, 2006.
 - Dave's retraining must be completed by December 31, 2007, which is earlier than he would under Individual Tracking.
 - His next retraining would need to be completed by December 31, 2009.

KEY POINTS (cont'd)

6. Credit for Training at Prior Employment?

- If trained within the two years prior to the assumption of the supervisory position, the employee need not be trained within six months. The individual must, however, be provided a copy of the employer's harassment policy, and be required to read and acknowledge it within the six-month time frame.
- Employers have the "burden of establishing that the prior training was legally compliant."
- Buyers beware!

MINIMUM WAGE

- A.B. 1835
 - January 1, 2007 minimum wage increased to \$7.50 per hour
 - January 1, 2008 minimum wage will increase to \$8.00 per hour
 - Impact on California White Collar and Inside Sales Exemptions
 - For more information, please see our LawFlash under the Publications section on www.morganlewis.com

MEASURE F (SAN FRANCISCO)

- Measure F - More than 60% of San Francisco residents voted in favor of Effective February 5, 2007
- Employers must provide **paid** sick-time benefits to those
 - “Employed” within San Francisco
 - “Working” within San Francisco
- For more information, please see our LawFlash under the Publications section on www.morganlewis.com

SAN FRANCISCO HEALTH ACCESS PLAN (SF HAP)

- Passed by SF Board of Supervisors.
 - A comprehensive medical care program for uninsured San Francisco residents, regardless of employment or immigration status.
 - First phase of implementation in 2007
- Financed through a combination of employer, individual, the City and County of San Francisco contributions and other public sources.
- Currently being challenged by Golden Gate Restaurant Association

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HIRING ISSUES

HIRING ISSUES

- Can an employee bring a claim based on false promises of long-term employment after signing an at-will employment agreement?
 - No, under *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384 (2006).
 - In *Dore*, the plaintiff claimed that, during the hiring process, he was told that: (1) AWI needed someone to handle a new account on a "long-term basis"; (2) AWI was looking for a "long-term fix, not a Band-Aid"; and (3) AWI employees were treated like family.
 - Later, AWI sent him an offer letter that, among other things, informed him that his employment with AWI would be at will. When AWI terminated the plaintiff's employment two years later, he sued for breach of implied contract requiring good cause for his termination and for fraud.

HIRING ISSUES

- As to the contract claim, the Court held: "[F]or the parties to specify – indeed to emphasize – that Dore's employment was at will (explaining that it could be terminated at any time) would make no sense if their true meaning was that his employment could be terminated only for cause."
- As to the fraud claim the Court held: "[W]e agree with the trial court that Dore's admission he signed AWI's letter stating his employment was at will and terminable at any time as a matter of law defeats any contention that he reasonably understood AWI to have promised him long-term employment."

BEST PRACTICES FOLLOWING *DORE*

- Make sure your offer letter contains clear at-will language.
- Make sure the at-will language is integrated.
- Make sure that any modifications to the at-will term must be in writing.

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HARASSMENT/DISCRIMINATION

SEXUAL HARASSMENT

- *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006) (aka "The Friends Case"). Summary judgment affirmed. No sexual harassment even though coarse and vulgar language and conduct occurred in the workplace – court emphasized context and that language was not aimed at plaintiff or women in general, and that employee was on notice.
 - Does this case make summary judgment easier in sexual harassment cases?
 - What should you do if your employees are exposed to sexually explicit material as part of their job duties?

SEX DISCRIMINATION

- Can an employer require employees to adhere to gender-specific grooming standards?
 - Yes. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006). Gender-specific grooming standards are permissible where no greater burden is placed on either male or female employees.

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RETALIATION

WHAT CONSTITUTES “ADVERSE ACTION”

- California Standard for the FEHA claims:
 - *Yanowitz v. L’Oreal USA, Inc.* (California Supreme Court, August 11, 2005).
 - **Materiality Standard**
 - That which "materially affects the terms and conditions of employment."
- Federal Standard for Title VII claims:
 - *Burlington Northern & Santa Fe Railway Company v. White*, 126 S. Ct. 2405 (2006).
 - **Deterrence Standard**
 - That which "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

EXAMPLES OF “ADVERSE ACTION” UNDER CALIFORNIA LAW

– Materiality Standard (California)

- Stripping supervisory authority, threatening to terminate the employee’s 4/10 work schedule, barring employee from completing supervisory certification courses, exchanging important assignment for unimportant ones, and denying employee a promotion. *Taylor v. Los Angeles Department of Water and Power* (2006 Cal. App. LEXIS 1812).
- Transferring the employee, initiating an investigation related to the employee’s job responsibility failures, and disciplining the employee for a job responsibility failure, all unrelated and done by different actors. *McRae v. Dep’t of Corrections*, 142 Cal. App. 4th 377 (Cal. Ct. App. 2006).

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DISABILITY

FILLING THE POSITION OF AN EMPLOYEE WHO HAS BEEN OUT ON A DISABILITY LEAVE FOR A LONG TIME

- *Williams v. Genentech, Inc.*, 139 Cal. App. 4th 357 (2006). An employee who is "totally disabled," and therefore unable to perform the essential functions of his or her job at the time the decision is made to fill the position, may be replaced. (The California Supreme Court granted review of *Williams* on August 23, 2006.)

DISABILITY DISCRIMINATION / FAILURE TO ACCOMMODATE

- Does the FEHA require that employers engage in a formal, interactive process with an employee it regards as physically disabled, even if the employee is not actually disabled?
 - Yes. *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34 (2006). The California Court of Appeal held that employer's withdrawal of its offer of a new position to Plaintiff because it perceived him as suffering from a disabling physical injury was the "functional equivalent of an admission that the company withdrew the offer because it "regarded" Plaintiff as limited in his ability to work.

DISABILITY DISCRIMINATION / FAILURE TO ACCOMMODATE (cont'd)

- Does an employer who assigns an employee to a light-duty position in an effort to accommodate the employee's disability have a duty to make such an assignment available indefinitely if the employee's temporary disability becomes permanent?
 - No, according to *Raine v. City of Burbank*, 135 Cal. App. 4th 1215 (2006). Reclassification of a light-duty position to a permanent position is not required as a reasonable accommodation of an employee's disability, if doing so would at least result in the creation of a new position.
 - But consider the risks of allowing employees with workers' compensation injuries to return to work in light-duty assignments.
 - Importance of engaging in the interactive process.

WAGES

- Can you require employees to repay commissions advanced to the employee?
 - Yes, if the Commission Plan clearly allows it. *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313 (2006). To this extent, commissions are not wages and can be charged back to the employee until all conditions for the earning of the commission are met.



ARBITRATION ISSUES

ARBITRATION CASES

- Can an arbitration agreement prohibit the arbitration of class actions?
 - Split in authority:
 - *Discover Bank v. Superior Court of Los Angeles (Boehr)*, 36 Cal. 4th 148 (2005) (nonemployment case): Discover Bank prohibited classwide arbitration for disputes involving its credit card accounts. The California Supreme Court held that class action waivers in consumer adhesion contracts are unconscionable and unenforceable.
 - *Gentry v. Superior Court (Circuit City)*, 135 Cal. App. 4th 944 (2006) (employment case): Gentry sued his employer in a putative class action alleging wage and hour claims including misclassification. Gentry had signed an arbitration agreement with his employer, which waived his right to pursue a class action. The Court concluded that the class action waiver was enforceable because it was neither procedurally nor substantively unconscionable. The Court ordered Gentry to proceed with his case on an individual basis.
 - The California Supreme Court has granted review of the *Gentry* case.

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WARN ACT

Termination

- Are employees who transfer to another employer entitled to notice under the Cal-WARN Act?
 - No, so long as they retain their “position.” In *MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.*, 134 Cal. App. 4th 1076 (2005), the employer sold its business. Per the asset purchase agreement, the Buyer offered employment to all of the Seller’s employees at the same pay rates, using the same equipment, driving their same routes, working the same schedules, retaining their same seniority, and receiving equivalent benefits. All accepted the offer except one employee. The court held that because there was “no loss of position” for a requisite number of employees, Cal-WARN was not triggered.

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