RESOLUTION 04-01-2018

DIGEST
Protected Leave: Private Right of Action, Including Attorney's Fees
Amends Labor Code section 230 to create an express private right of action, including the right to recover attorney's fees, for violation of employees' statutory rights.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 230 to create an express private right of action, including the right to recover attorney's fees, for violation of employees' statutory rights. This resolution should be disapproved because this private right of action already exists, the one-way attorney fee recovery is not consistent with other similar rights, and it creates an unfair risk that attorney's fees will be imposed for violation of unclear and poorly-defined statutory rights.

Currently, Labor Code section 230 protects employees' rights to time off for jury duty, for a victim of crime to appear in court, and for a victim of domestic violence to obtain relief or protection. This statute also requires the employer to provide a reasonable accommodation to assure the safety of an employee who is a victim of domestic violence, sexual assault, or stalking. Employees whose statutory rights are violated may obtain reinstatement, lost wages and benefits, and appropriate equitable relief. (Lab. Code, § 230, subd. (g)(2).) In addition, Labor Code section 230 subdivision (h)(1), allows the injured employee to file a complaint with the Department of Industrial Relations (Lab. Code, §§ 230, subd. (h)(1), and 98.7.)

Courts have permitted employees to bring civil actions for violation of Labor Code section 230. (*Deschane v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 42.) Courts have recognized that the rights and remedies provided by Labor Code section 98.7 "do not preclude an employee from pursuing any other rights and remedies under any other law." (*Sheridan v. Touchstone Television Productions, LLC,* (2015) 241 Cal.App.4th 508, 517.)

In addition, the resolution's one-way right to recover attorney's fees provides a separate reason for disapproval. The recovery of attorney's fees is inconsistent with related statutes that provide employees with rights to time off. (See, e.g., Lab. Code, § 230.3 (right to time off for service as emergency responder) and Lab. Code, § 230.8 (right to time off to participate in child's school activities).) While some leave statutes carry the right to recover attorney's fees if the leave is denied or the employer retaliates, those statutes have more defined obligations and objective, third-party verification of the need for leave. (See e.g. Gov. Code, §§ 12940 through 12996.)

In contrast, the employer's obligations under Labor Code section 230 are broad and include a variety of vague obligations. The employer should not be exposed to a claim for attorney's fees for the violation of broad, vague obligations.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 230 to read as follows:

§ 230

(a) An employer shall not discharge or in any manner discriminate against an employee for taking time off to serve as required by law on an inquest jury or trial jury, if the employee, prior to taking the time off, gives reasonable notice to the employer that the employee is required to serve.

(b) An employer shall not discharge or in any manner discriminate or retaliate against an employee, including, but not limited to, an employee who is a victim of a crime, for taking time off to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding.

(c) An employer shall not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child.

(d) (1) As a condition of taking time off for a purpose set forth in subdivision (c), the employee shall give the employer reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible.

(2) When an unscheduled absence occurs, the employer shall not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Certification shall be sufficient in the form of any of the following:

(A) A police report indicating that the employee was a victim of domestic violence, sexual assault, or stalking.

(B) A court order protecting or separating the employee from the perpetrator of an act of domestic violence, sexual assault, or stalking, or other evidence from the court or prosecuting attorney that the employee has appeared in court.

(C) Documentation from a licensed medical professional, domestic violence counselor, as defined in Section 1037.1 of the Evidence Code, a sexual assault counselor, as defined in Section 1035.2 of the Evidence Code, licensed health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence, sexual assault, or stalking.

(3) To the extent allowed by law and consistent with subparagraph (D) of paragraph (7) of subdivision (f), the employer shall maintain the confidentiality of any employee requesting leave under subdivision (c).

(e) An employer shall not discharge or in any manner discriminate or retaliate against an employee because of the employee's status as a victim of domestic violence, sexual assault, or stalking, if the victim provides notice to the employer of the status or the employer has actual knowledge of the status.

(f) (1) An employer shall provide reasonable accommodations for a victim of domestic violence, sexual assault, or stalking who requests an accommodation for the safety of the victim while at work.

(2) For purposes of this subdivision, reasonable accommodations may include the

implementation of safety measures, including a transfer, reassignment, modified schedule, changed work telephone, changed work station, installed lock, assistance in documenting domestic violence, sexual assault, or stalking that occurs in the workplace, an implemented safety procedure, or another adjustment to a job structure, workplace facility, or work requirement in response to domestic violence, sexual assault, or stalking, or referral to a victim assistance organization.

(3) An employer is not required to provide a reasonable accommodation to an employee who has not disclosed his or her status as a victim of domestic violence, sexual assault, or stalking.

(4) The employer shall engage in a timely, good faith, and interactive process with the employee to determine effective reasonable accommodations.

(5) In determining whether the accommodation is reasonable, the employer shall consider an exigent circumstance or danger facing the employee.

(6) This subdivision does not require the employer to undertake an action that constitutes an undue hardship on the employer's business operations, as defined by Section 12926 of the Government Code. For the purposes of this subdivision, an undue hardship also includes an action that would violate an employer's duty to furnish and maintain a place of employment that is safe and healthful for all employees as required by Section 6400 of the Labor Code.

(7) (A) Upon the request of an employer, an employee requesting a reasonable accommodation pursuant to this subdivision shall provide the employer a written statement signed by the employee or an individual acting on the employee's behalf, certifying that the accommodation is for a purpose authorized under this subdivision.

(B) The employer may also request certification from an employee requesting an accommodation pursuant to this subdivision demonstrating the employee's status as a victim of domestic violence, sexual assault, or stalking. Certification shall be sufficient in the form of any of the categories described in paragraph (2) of subdivision (d).

(C) An employer who requests certification pursuant to subparagraph (B) may request recertification of an employee's status as a victim of domestic violence, sexual assault, or stalking every six months after the date of the previous certification.

(D) Any verbal or written statement, police or court record, or other documentation provided to an employer identifying an employee as a victim of domestic violence, sexual assault, or stalking shall be maintained as confidential by the employer and shall not be disclosed by the employer except as required by federal or state law or as necessary to protect the employee's safety in the workplace. The employee shall be given notice before any authorized disclosure.

(E) (i) If circumstances change and an employee needs a new accommodation, the employee shall request a new accommodation from the employer.

(ii) Upon receiving the request, the employer shall engage in a timely, good faith, and interactive process with the employee to determine effective reasonable accommodations.

(F) If an employee no longer needs an accommodation, the employee shall notify the employer that the accommodation is no longer needed.

(8) An employer shall not retaliate against a victim of domestic violence, sexual assault, or stalking for requesting a reasonable accommodation, regardless of whether the request was granted.

(g) (1) An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of

employment by his or her employer because the employee has taken time off for a purpose set forth in subdivision (a) or (b) shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

(2) An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer for reasons prohibited in subdivision (c) or (e), or because the employee has requested or received a reasonable accommodation as set forth in subdivision (f), shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, as well as appropriate equitable relief.

(3) An employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure or hearing authorized by law is guilty of a misdemeanor.

(h) (1) An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has exercised his or her rights as set forth in subdivision (a), (b), (c), (e), or (f) may file a complaint with the Division of Labor Standards Enforcement of the Department of Industrial Relations pursuant to Section 98.7. Alternatively, an aggrieved employee may bring a civil action in a court of competent jurisdiction against the employer or other person violating this article. If the employee prevails, the court may award reasonable attorneys' fees.

(2) Notwithstanding any time limitation in Section 98.7, an employee may file a complaint with the division based upon a violation of subdivision (c), (e), or (f) within one year from the date of occurrence of the violation.

(i) An employee may use vacation, personal leave, or compensatory time off that is otherwise available to the employee under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement, for time taken off for a purpose specified in subdivision (a), (b), or (c). The entitlement of any employee under this section shall not be diminished by any collective bargaining agreement term or condition.

(j) For purposes of this section:

(1) "Domestic violence" means any of the types of abuse set forth in Section 6211 of the Family Code, as amended.

(2) "Sexual assault" means any of the crimes set forth in Section 261, 261.5, 262, 265, 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, or 311.4 of the Penal Code, as amended.

(3) "Stalking" means a crime set forth in Section 646.9 of the Penal Code or Section 1708.7 of the Civil Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: *Rosales v. Moneytree, Inc.* (2015 WL 7721329; see also 2015 Cal. App. Unpub. LEXIS 8694), notes that there is no authority on whether Labor Code section 230 creates a private right of action. That statute already exists to prohibit employers from discharging or

otherwise discriminating against an employee for taking time off of work for jury duty, for a crime victim to comply with a subpoena, or for a victim of domestic violence to obtain a TRO or attend other hearings. Without an enforcement mechanism, this statute is useless.

The Solution: This recognizes a private right of action created by the statutes and authorizes payment of attorneys' fees for the prevailing employee. This language mirrors other statutes found in that Article of the Labor Code. Although there is an enforcement mechanism through the Division of Labor Standards Enforcement, employees are at the mercy of the DLSE deciding whether to pursue a claim. This gives employees the control over his case.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090, bustarde@mayfieldbustarde.com

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde

RESOLUTION 04-02-2018

DIGEST
Domestic Violence Victim Leave: Private Right of Action Including Attorney's Fees
Amends Labor Code section 230.1 to create an express private right of action, and to allow recovery of attorney's fees, for violating an employee's statutory rights.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 230.1 to create an express private right of action, and to allow recovery of attorney's fees, for violating an employee's statutory rights. This resolution should be disapproved because a private right of action already exists, and the one-way attorney fee recovery is not consistent with other, similar rights to time off.

An employee who is the victim of domestic violence, sexual assault, or stalking currently has the right to take time off to obtain legal relief, counseling, or to engage in safety planning. (Lab. Code, § 230.1.) In addition, employees whose statutory rights are violated may obtain reinstatement, lost wages and benefits, and appropriate equitable relief (Lab. Code, § 230.1, subd. (c)), and injured employees have the right to file a complaint with the Department of Industrial Relations pursuant to Labor Code section 98.7. (Lab. Code, § 230.1, subd. (d)(1).)

Courts have permitted employees to bring civil actions for violation of Labor Code section 230. (*Deschane v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 42-42.) Courts have recognized that the rights and remedies provided by Labor Code section 98.7 "do not preclude an employee from pursuing any other rights and remedies under any other law." (*Sheridan v. Touchstone Television Productions, LLC,* (2015) 241 Cal.App.4th 508, 517.)

In addition, the resolution's one-way right to recover attorney's fees provides a separate reason for disapproval. The recovery of attorney's fees is inconsistent with related statutes that provide employees with rights to time off. (See, e.g., Lab. Code, § 230.3 (right to time off for service as emergency responder) and Lab. Code, § 230.8 (right to time off to participate in child's school activities).) While some leave statutes carry the right to recover attorney's fees if the leave is denied or the employer retaliates, those statutes have more defined obligations and objective, third-party verification of the need for leave. (See e.g. Gov. Code, §§ 12940 through 12996.)

In contrast, the employer's obligations under Labor Code section 230 are broad and include a variety of vague obligations. The employer should not be exposed to a claim for attorney's fees for the violation of broad, vague obligations.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 230.1 to read as follows:

§ 230.1

(a) In addition to the requirements and prohibitions imposed on employees pursuant to Section 230, an employer with 25 or more employees shall not discharge, or in any manner discriminate or retaliate against, an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work for any of the following purposes:

(1) To seek medical attention for injuries caused by domestic violence, sexual assault, or stalking.

(2) To obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence, sexual assault, or stalking.

(3) To obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking.

(4) To participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, including temporary or permanent relocation.

(b) (1) As a condition of taking time off for a purpose set forth in subdivision (a), the employee shall give the employer reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible.

(2) When an unscheduled absence occurs, the employer shall not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Certification shall be sufficient in the form of any of the categories described in paragraph (2) of subdivision (d) of Section 230.

(3) To the extent allowed by law and consistent with subparagraph (D) of paragraph (7) of subdivision (f) of Section 230, employers shall maintain the confidentiality of any employee requesting leave under subdivision (a).

(c) An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has taken time off for a purpose set forth in subdivision (a) is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, as well as appropriate equitable relief. An employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure or hearing authorized by law is guilty of a misdemeanor.

(d) (1) An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has exercised his or her rights as set forth in subdivision (a) may file a complaint with the Division of Labor Standards Enforcement of the Department of Industrial Relations pursuant to Section 98.7. <u>Alternatively, an aggrieved employee may bring a civil action in a court of competent jurisdiction against the employer or other person violating this article. If the employee prevails, the court may award reasonable attorneys' fees.</u>

(2) Notwithstanding any time limitation in Section 98.7, an employee may file a complaint with the division based upon a violation of subdivision (a) within one year from the

date of occurrence of the violation.

(e) An employee may use vacation, personal leave, or compensatory time off that is otherwise available to the employee under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement, for time taken off for a purpose specified in subdivision (a). The entitlement of any employee under this section shall not be diminished by any term or condition of a collective bargaining agreement.

(f) This section does not create a right for an employee to take unpaid leave that exceeds the unpaid leave time allowed under, or is in addition to the unpaid leave time permitted by, the federal Family and Medical Leave Act of 1993 (29 U.S.C. Sec. 2601 et seq.).

(g) For purposes of this section:

(1) "Domestic violence" means any of the types of abuse set forth in Section 6211 of the Family Code, as amended.

(2) "Sexual assault" means any of the crimes set forth in Section 261, 261.5, 262, 265, 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, or 311.4 of the Penal Code, as amended.

(3) "Stalking" means a crime set forth in Section 646.9 of the Penal Code or Section 1708.7 of the Civil Code.

(h) (1) Employers shall inform each employee of his or her rights established under this section and subdivisions (c), (e), and (f) of Section 230 in writing. The information shall be provided to new employees upon hire and to other employees upon request.

(2) The Labor Commissioner shall develop a form that an employer may use to comply with the notice requirements in paragraph (1). The form shall set forth the rights and duties of employers and employees under this section in clear and concise language. The Labor Commissioner shall post the form on the commissioner's Internet Web site to make it available to employers who are required to comply with this section. If an employer elects not to use the form developed by the Labor Commissioner, the notice provided by the employer to the employees shall be substantially similar in content and clarity to the form developed by the Labor Commissioner. The Labor Commissioner shall develop the form and post it in accordance with this paragraph on or before July 1, 2017.

(3) Employers shall not be required to comply with paragraph (1) until the Labor Commissioner posts the form on the commissioner's Internet Web site in accordance with paragraph (2).

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Rosales v. Moneytree, Inc. (2015 WL 7721329) notes that there is no authority on whether Labor Code Section 230.1 creates a private right of action. That statute already exists to prohibit employers from discharging or otherwise discriminating against an employee who is a victim of domestic violence for taking time off of work to receive medical attention, counseling or other services related to the domestic violence.

The Solution: This recognizes a private right of action created by the statutes and authorizes payment of attorneys' fees for the prevailing employee. This language mirrors other statutes found in that Article of the Labor Code. Although there is an enforcement mechanism through the Division of Labor Standards Enforcement, employees are at the mercy of the DLSE deciding whether to pursue a claim. This gives employees the control over his case.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090, bustarde@mayfieldbustarde.com

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde

RESOLUTION 04-03-2018

DIGEST
Non-Disclosure Agreements: Void When Claim Based on Sexual Harassment
Adds Labor Code section 926 to provide that non-disclosure clauses in the context of claims made for workplace harassment, assault, and discrimination based on sex are void.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution adds Labor Code section 926 to provide that nondisclosure clauses in the context of claims made for workplace harassment, assault, and discrimination based on sex are void. This resolution should be approved in principle because it makes clear that confidentiality clauses in employment contracts and other employer/employee agreements that prohibit an employee or ex-employee from speaking about sexual harassment and other workplace misconduct are against public policy and therefore void.

A bill working through the California Senate (Sen. Bill No. 820), declares void provisions in settlement agreements that prevent disclosure of factual information related to a civil action alleging sexual assault, sexual harassment or sex-based discrimination, unless requested by the claimant. If that legislation passes, the resolution would be unnecessary in the context of settlement agreements. However, recent events have shown that even without litigation and settlement, employees feel bound by non-disclosure clauses in employment agreements. For example, it has been revealed the Weinstein Company routinely required employees to sign broad waivers forbidding them from making critical comments that could harm the reputation of the business or any employee, thus discouraging employees from reporting or discussing incidents of sexual harassment and assault.

While non-disclosure clauses in employment contracts are generally considered to violate federal labor law, California has been less hostile to confidentiality agreements. However, most such cases arise in the context of trade secrets, where confidentiality protects a company's innovative edge. The resolution would create a clear prohibition by declaring such contractual provisions to be against public policy. Under the resolution, employers would be prohibited from requiring an employee, as a condition of employment, to sign a non-disclosure agreement preventing disclosure of sexual harassment, discrimination, or assault occurring in the workplace. Any such language would be void in any employer/employee agreement, whether entered into prior to, during, or after the employment so long as the disclosure is related to the employment.

The resolution could be strengthened by including not only workplace misconduct, but also misconduct at work-related events or off the employment premises.

The aforementioned Sen. Bill No. 820 (Senators Leyva, Beall, and Hernandez), was amended by the authors and referred back to the Judiciary Committee.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Labor Code section 926 to read as follows:

§ 926

Every provision in an agreement made after January 1, 2019 between any employee and his or her employer that provides for non-disclosure of claims of workplace discrimination, sexual harassment, assault, and/or abuse is contrary to public policy.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Permitting non-disclosure agreements shields abusers from accountability and ultimately harms all California employees.

The Solution: Legislation providing that non-disclosure agreements that seek to shield employers who harass, abuse, and discriminate against employees are void as against public policy.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
SB 820 - Proposes to add Section 1001 of the Code of Civil Procedure, to provide that a settlement agreement that prevents the disclosure of factual information related to the action is prohibited when the pleadings state a cause of action for sexual harassment, discrimination based on sex, etc.

AUTHOR AND/OR PERMANENT CONTACT: Co-authors: Diana Passadori, Passadori Family Law & Mediation , PC1390 Market Street, Suite 200, San Francisco, CA 94102, (628) 200-3065, diana@passadoriflm.com and Michelene Insalaco, Sucherman Insalaco LLP, 101 Mission Street, Suite 1640, San Francisco, CA 94102, (415) 357-5050, mi@sucherman-insalaco.com

RESPONSIBLE FLOOR DELEGATE: Diana Passadori and Michelene Insalaco

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCATION

This resolution would harm employees victimized by sexual discrimination and harassment. Employee victims would have only limited ability to settle their claims. As a result, many employees will be discouraged from filing their claims and the wrongdoings will never come to light.

California has a strong public policy favoring confidentiality provisions in settlement agreements. The privacy of a settlement "is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality." *Hinshaw, et al. v. Super. Ct.* (1996) 51 Cal. App. 4th 233, 241; *Philippine Exp. & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal. App. 3d 1058, 1076, *reh'g denied and opinion modified (Apr. 13, 1990)* (The law of contract favors enforcement of valid bargains between private parties, and the law of settlements favors private resolution of disputes. All relevant policies favor enforcement of the private bargain, dispute resolution by agreement of the parties, and finality of judgments, over trial on the merits.

Employers insist on settlement confidentiality. The reason for this insistence has little to do with trying to sweep discrimination and harassment under the rug. By the time a victim complains, they have often retained an attorney who has already interviewed a parcel of witnesses within the company before even filing a complaint. Once a complaint is filed, the facts are a matter of public record. The fact that a victim was harassed is rarely, if ever, a secret. The Confidentiality provisions do little more than protect the employer from disclosing the amount of the settlement, or that the matter settled at all. Employers are concerned that other employees will discover the settlement proceeds and assume that the employer is admitting fault or that there will be unmeritorious copycat claims. For this reason, employers will not agree to settle claims if a confidentiality provision is prohibited.

Without the ability to negotiate a confidential settlement agreement, an aggrieved employee will have only a limited ability to settle his/her claim. The victim will be forced to incur significant costs and pursue the case through trial. This is an exceptionally risky proposition. Some of these cases have little proof, other than the victim’s testimony. Some victims have a history of sexual abuse that all come to the forefront in a lawsuit. By limiting a victim’s ability to settle, they will be forced to have their lives and trauma on display, debated in deposition for days on end, and then again in trial. Traumatized harassment victims should not be forced to re-live their abuse for years in litigation, taking significant risk of personal and pecuniary loss, to satisfy the need of others to discover the information. Even if there is concern that future victims will be prohibited from eliciting testimony from others who have signed confidential settlement agreements, the law already provides that confidentiality provisions do not usurp a subpoena. Therefore, this resolution will only result in strain to the victim, employers, and to judicial economy without any benefit to the public.

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 04-03-2018. The sentiment and intentions behind Resolution 04-03-2018 are laudable and praiseworthy. The problem is not the principle but the practical impact. Sexual harassment is a great evil and those who commit it should pay to compensate victims and even endure shame. The problem with prohibiting non-disclosure agreements (NDA's) in settlements of sexual harassment claims is that it will result in far fewer defendants being willing to settle. More cases will go to trial where the plaintiff runs the risk of receiving nothing and the defendant claiming vindication. Forcing a plaintiff to trial where he or she may be publicly humiliated and embarrassed in the process will likely cause more plaintiffs to drop meritorious cases rather than face a public trial.

Precluding NDAs will also increase pressure on employers to require arbitration provisions in employment contracts as a means of maintaining confidentiality eliminated by the preclusion of NDAs. Many studies suggest employees receive less compensation and have less favorable outcomes in arbitration.

Right now, if a defendant wants an NDA in a settlement, the plaintiff is free to counter it. If the plaintiff would rather risk it all at trial than settle with an NDA, the plaintiff is free to do that now. If they would prefer to settle with an NDA, how can anyone justify taking that option away from them? It is a hard choice and should be made based on their priorities, situation, and principles. This resolution takes that choice away from them. The ones who would be hurt the most by that are survivors with limited resources or evidence who face a defendant unwilling to settle because NDA's are no longer an option.

RESOLUTION 04-04-2018

DIGEST
Whistleblower Protection: Preventing Overbroad Non-Disclosure Agreements
Amends Labor Code section 1102.5 to strengthen the Whistleblower Protection Act by precluding use of contractual provisions mandating non-disclosure, and assuring confidentiality of disclosures made by an employee to government or law enforcement.

RESOLUTIONS COMMITTEE RECOMMENDATION:
APPROVE IN PRINCIPLE

History:
Similar to Resolution 02-02-2016, which was withdrawn.

Reasons:
This resolution amends Labor Code section 1102.5 to strengthen the Whistleblower Protection Act by precluding use of contractual provisions mandating non-disclosure, and assuring confidentiality of disclosures made by an employee to government or law enforcement. This resolution should be approved in principle because it properly precludes an employer from concealing illegal conduct and foster confidentiality of an employee's disclosure to government or law enforcement regarding apparent violations of law.

California's Whistleblower Protection Act forbids employers from "making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency" concerning an unlawful act. (Lab. Code, § 1102.5, subd. (a).) Currently this prohibition does not extend to employer-imposed contracts that would require a would-be whistleblower to reveal communications made to law enforcement or governmental agencies. Nor does the current enactment prevent an employer from exacting a nondisclosure agreement from the employee, with the effect of covering-up illegal conduct and keeping the identity of perpetrators a secret. Use of these loopholes undermines meaningful scrutiny, law enforcement, and effectively stemming illegal conduct.

The resolution strengthens California's Whistleblower Protection Act and public policy by prohibiting the commonplace use of contractual provisions, calculated at deterring reports to government or law enforcement of illegal activity by the employer through threat of a retaliatory lawsuit seeking monetary damages. The resolution removes the lingering barriers to an employee coming forward in order to meaningfully end through government intervention or public scrutiny, past, pervasive or ongoing illegal practices by industry or certain actors. It does so by enhancing employee protection and forbids adhesive contractual terms, inimical to public policy, preventing an employer from reporting wrongdoing, and requiring the employee to disclose confidential information made to government or law enforcement.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1102.5 to read as follows:

§ 1102.5

(a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, ~~or~~ policy, or contractual provision preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, or impairing the confidentiality of a disclosure made to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950) of, or the physician-patient privilege of Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

(h) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.

(i) For purposes of this section, "employer" or "a person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Michael Fern, Shaun Dabby Jacobs, Ujvala Singh, Nick Stewart-Oaten, Lisa Miller, Darin Wessel, Jack Osborn, Duncan Crabtree-Ireland, Alicia Gámez, Kim Tran

STATEMENT OF REASONS

The Problem: Overbroad nondisclosure agreements (NDAs) have recently come under scrutiny for contributing to a culture of sexual harassment in the workplace: "*The New York Times* journalists who broke the Weinstein story said former employees felt constrained from reporting abuse because of the NDAs they signed when they were hired. Former Uber engineer Susan Fowler said nondisclosure and nondisparagement agreements had silenced complaints about sexual harassment at Uber." (Tiku, *How to Pierce the Secrecy Around Sexual Harassment Cases* (Dec. 4, 2017), WIRED https://www.wired.com/story/how-to-pierce-the-secrecy-around-sexual-harassment-cases.) Similarly, overbroad NDAs have been used in the financial industry to discourage employees from blowing the whistle on fraud and insider trading. (See Gandel, *In the wake of financial crimes, are more Wall Street firms 'gagging' their employees?* (May, 20, 2015), Fortune http://fortune.com/2015/05/20/wall-street-whistleblowers-silenced.)

California's Whistleblower Protection Act forbids employers from "making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency" concerning an unlawful act. (Lab. Code, § 1102.5(a).) But this protection does not extend to contracts with NDAs. Additionally, employers can deter whistleblowing by instituting policies that undermine the confidentiality of any report and could lead to interference with an ongoing investigation. For example, an employer can require employees to disclose any report made to a government or law enforcement agency and waive any right to confidentiality.

The Solution: This resolution would strengthen California's Whistleblower Protection Act by including contractual provisions within its ambit and specifically protecting an employee's right to report regulatory and criminal violations to a government or law enforcement agency in a confidential manner.

IMPACT STATEMENT
The resolution does not affect laws, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Michael Fern, Los Angeles County District Attorney's Office, 211 W. Temple St., Ste. 1000, Los Angeles, CA 90012, (213) 537-4529, sclawyer@gmail.com

RESPONSIBLE FLOOR DELEGATE: Michael Fern

RESOLUTION 04-05-2018

DIGEST
Employment Arbitration: Require Employers to Pay for Arbitration Fees
Amends Code of Civil Procedure section 1284.2 to require employers to pay for an arbitrator, and to allow the employee to file a court case if the employer refuses.

RESOLUTIONS COMMITTEE RECOMMENDATION:
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 1284.2 to require employers to pay for an arbitrator, and to allow the employee to file a court case if the employer refuses. This resolution should be approved in principle because it is fair to require an employer, who required the employee to agree to arbitrate disputes, to pay for the arbitrator and related costs, and if the employer fails to pay the arbitrator, then the employee should have the option of filing the case in court.

In *Armendariz v. Foundation Health Pscycare Services Inc.* (2000) 24 Cal.4th 83, the California Supreme Court concluded, among other things, "that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Id*. at 110-111.) By requiring the employer to pay the arbitrator's fees and costs imposed by the arbitrator, the resolution would codify the existing law and practice.

Arbitration provisions generally appear in employment agreements that are crafted by the employer. If the employer fails to pay the fees and expenses associated with an arbitration dispute involving the employee, and the neutral arbitrator declines to proceed with the arbitration because of that failure or refusal by the employer, that is a material breach. The employee should be freed from the arbitration provisions and allowed to re-file his or her case and proceed in court. The resolution acknowledges that right.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1284.2 to read as follows:

§ 1284.2

(a) Except as provided by subsection (b), unless ~~Unless~~ the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel

fees or witness fees or other expenses incurred by a party for his own benefit.

(b) In employment cases that are subject to arbitration, the employer shall pay for the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator. Counsel fees or witness fees may be awarded to the prevailing party in accordance with the underlying statutory or case law. If an employer does not pay the fees and the arbitrator declines to proceed with the case, then the employee may re-file the case in a court having jurisdiction over the matter.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Case law makes clear that where an employee is forced to sign an arbitration agreement in many employment actions (such as discrimination under FEHA or wage claims), the employee only needs to pay the arbitration fee to the extent the employee would have had to pay filing fees if he filed in court. However, the problem arises where the employer, who was the one who required the employee to agree to arbitration, fails to pay the arbitration fees, either initially or as the case progresses.

The Solution: This clarifies underlying case law that the employer is required to pay the arbitration fees and provides consequences for failing to do so. An injured employee is entitled to have his claims adjudicated and an employer who cannot bear the cost of the arbitration, which can bring the arbitration to a halt, should not be punished for a forum selection that the employee likely had no choice over in the first place. This gives the employee the right to pursue his claims in court if the arbitration does not proceed due to nonpayment.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090, bustarde@mayfieldbustarde.com

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde

RESOLUTION 04-06-2018

DIGEST
Wage Deduction: Limited to the Amount of Work Time Actually Lost
Amends Labor Code section 2928 to prohibit employers from deducting wages in excess of the amount of work time actually lost.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 2928 to prohibit employers from deducting wages in excess of the amount of work time actually lost. This resolution should be approved in principle because it will help keep businesses appropriately staffed and ensure that employees receive appropriate wages for their time worked.

Under the current law, if an employee arrives a minute or two late to their scheduled shift, the employer may deduct a full half hour's wage from that employee's paycheck. Consequently, an employee who is running late has little incentive to begin work before that half hour elapses. As a result, the employer will be understaffed, or will have to pay overtime to other employees for that half hour. This situation does not benefit the employer or the employee.

The resolution provides that if an employee is late to work, then the employer may still deduct the employee's wages, but in an amount proportionate to the time, and work, actually lost by the late arrival. This will encourage employees who are running late to arrive at work as soon as possible, and help limit an employer's unexpected understaffing from such circumstances.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 2928 as follows:

§ 2928

No deduction from the wages of an employee on account of his or her coming late to work shall be made in excess of the proportionate wage which would have been earned during the time actually lost~~, but for a loss of time less than thirty minutes, a half hour's wage may be deducted~~.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: California law currently permits an employer to dock an employee that shows up less than thirty minutes late to work for a full half hour's wage. This is problematic because even if an employee arrives to his or her employer before the first thirty minutes has elapsed, the employer can deduct the employee's pay for the full first half hour. Since employers may deduct for a full thirty minutes even if the employee is a couple of minutes late, employees who are late have no incentive to begin work before thirty minutes have lapsed.

For example: Jane starts work at her employer at 8:00 AM. Jane arrives to her employer at 8:10 AM. Jane's employer docks their employees their full half hour's wage whenever their employees arrive less than thirty minutes late to work. Since Jane knows that her employer will dock her for the full first thirty minutes, she decides to wait in her car until 8:30 AM. As a result, Jane's employer operated without Jane present for an additional twenty minutes because Jane knew she was not going to be paid for twenty minutes of her time worked.

The Solution: Labor Code section 2928 does not allow for an employer to deduct an employee in excess of the proportionate wage that would have been earned during the time actually lost, for any time worked after the first thirty minutes. This resolution will ensure that even during the first thirty minutes of an employee's shift, the employee is docked only for the actual time of work missed. In other words, this resolution will guarantee that an employee earns the proportionate wage for any time actually worked.

Further, this resolution can help employers avoid the possibility of being understaffed for the full first thirty minutes of their employees' shift. Employees that are going to be late may intentionally avoid showing up to work until the full first thirty minutes of their shift has elapsed because they know that they will not be paid for their actual time worked until after the first thirty minutes of their shift.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Jack B. Osborn, Partner at Brown White & Osborn, 300 E. State Street, Suite 300, Redlands, California 92373, 909-798-6179, josborn@brownwhitelaw.com. Matthew B. Neufeld, Law Clerk at Brown White & Osborn, 300 E. State Street, Suite 300, Redlands, California 92373, 909-798-6179, mneufeld@brownwhitelaw.com.

RESPONSIBLE FLOOR DELEGATE: Jack Osborn and Matthew Neufeld

RESOLUTION 04-07-2018

DIGEST

Workplace Harassment: Prohibit Workplace Harassment Unrelated to Protected Class
Adds Labor Code section 235 to make workplace harassment unlawful, without regard to the employee's or independent contractor's inclusion in a protected class.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Labor Code section 235 to make workplace harassment unlawful, without regard to the employee's or independent contractor's inclusion in a protected class. This resolution should be disapproved because the prohibited action is ill defined and could include legitimate disciplinary actions.

While the purpose of this resolution appears to be prohibiting an employer from bullying employees, applicants, interns, volunteers, and independent contractors, it is overbroad. The resolution is not limited to actions that are motivated by a person's race, sex, gender identity, religion, or belonging to a statutorily protected class. Instead, the resolution prohibits workplace conduct that is "subjectively abusive to the person affected and objectively severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive." This broad prohibition could prohibit legitimate disciplinary actions. For example, an employee who is not performing her or his job, and who is repeatedly disciplined and ultimately threatened with job loss if she or he does not improve, may find the disciplinary action subjectively abusive and a reasonable person may find the threat of job loss to be objectively hostile.

In other aspects, the resolution tracks existing California statutes, regulations, and decisions that define and prohibit harassment on the basis of membership in a protected class. Government Code section 12940 provides that harassment on the basis of membership in a protected class is an unlawful employment practice. It protects employees, job applicants, unpaid interns, volunteers, and independent contractors, and imposes individual liability against the harasser.

An appropriate limitation of workplace behavior that is similar to harassment, but not related to membership in a protected class is contained in Government Code section 12950.1. That section defines workplace "abusive conduct," but includes important limitations not found in the resolution. Under Government Code section 12950.1, malice is required to establish "abusive conduct." In addition, to constitute "abusive conduct," the conduct must be unrelated to an employer's legitimate interests. (*Id*.) This resolution may benefit from replacing the term "harassment" with "abusive conduct" and incorporating the definition of "abusive conduct" from Government Code section 12950.1.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommend that legislation be sponsored to add Labor Code section 235 to read as follows:

§ 235: Workplace Harassment Definition: Prohibition

(a) Notwithstanding Government Code section 12940(j), it is an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(1) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(b) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Government Code, § 12926 applies to all provisions of this section other than this subdivision.

(c) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(1) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(2) The person is customarily engaged in an independently established business.

(3) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(d) Notwithstanding Government Code, § 12940(h), it shall be an unlawful employment practice for an employer or other entity covered by this part, to, in addition to the employee protections provided pursuant to Subdivision I, retaliate or otherwise discriminate against the person who has complained regarding workplace harassment, as defined herein.

(e) The conduct must be subjectively abusive to the person affected and objectively severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive.

(f) Management must take immediate and appropriate corrective action to investigate

and eliminate any harassing conduct.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sarah Nowels, Alan Crivaro, Richard Jallins, Elaine Alston, Fred Quiel, John Mulvana, Melissa Petrovsky, Evan Burge, Robby Robinson, Michael Kirschbaum

STATEMENT OF REASONS

The Problem: Existing law prohibits harassment by employers against employees where a substantial motivating reason for the harassment is the employee's status, i.e. being a member of a protected class (e.g., age, race, disability, sexual preference, etc.) (Govt. Code §12940(j)). Such workplace harassment may constitute an adverse action sufficient to warrant a claim for retaliation. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028.)

Workplace harassment not tethered to a protected status or activity, may cause psychological harm to an employee equal to harassment motivated by the employee's protected status or activity. A common term for such harassment is "workplace bullying," where the supervisor targets the employee for unjust and debilitating treatment for corrupt motives unrelated to any of the protected statuses. In such cases, the employee has no effective recourse when complaints to management "fall on deaf ears" due to the inability of the employee to identify an unlawful motivation on the part of the supervisor or co-employees. "Cronyism," as well as the unwillingness of management to investigate or take remedial action on behalf of lower level personnel perceived to be "less worthy," also tends to inhibit accountability of supervisors.

The Solution: This resolution would encourage management to demand professionalism and to provide proper training of supervisory employees with respect to the rights of employees and to insist on integrity as the guiding policy in the organization. Absent such a commitment on the part of management, employees who can demonstrate such harassment should be able to pursue legal action allowing compensatory and punitive damages and attorneys' fees. This proposed statute addresses this problem by affording legal recourse of the kind currently available to victims of harassment based on the protected statuses as set forth in the Fair Employment and Housing Act.

The language of the proposed legislation tracks the language in Government Code section 12940, subdivision (j). To avail himself or herself of the statute's protection, an employee would be required to establish the elements recognized under state and federal law to demonstrate such harassment, as well as the elements necessary for punitive damages to be imposed against the employer as required by Civil Code section 3295. Also, the "severe or pervasive" standard would need to be met in order to establish workplace harassment.

IMPACT STATEMENT
The resolution does not affect laws, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: William M. Crosby, 13522 Newport Avenue, Suite 201, Tustin, CA 92780; (714) 544-2493; fax (714) 544-2497; wcrosby@wcrosbylaw.com

RESPONSIBLE FLOOR DELEGATE: William M. Crosby

RESOLUTION 04-08-2018

DIGEST
Employment: Department of Fair Employment and Housing Complaint and Right-to-Sue Notice
Amends Government Code section 12962 to allow an employee to avoid serving the verified complaint alleging employment discrimination if the Department of Fair Employment and Housing issues an immediate right to sue notice.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 12962 to allow an employee to avoid serving the verified complaint alleging employment discrimination if the Department of Fair Employment and Housing issues an immediate right to sue notice. This resolution should be disapproved because defendants' important right to receive a copy of the verified complaint filed with the Department of Fair Employment and Housing should not be taken away.

Current law requires that a person who has an employment discrimination claim against an employer or co-worker must exhaust administrative remedies before filing a civil lawsuit. For this, the complainant must file a verified complaint with the Department of Fair Employment and Housing ("DFEH"). If the DFEH declines to investigate the claims, or concludes that it lacks sufficient information to adjudicate the claims, the DFEH issues a 'right to sue' notice to the employee. Upon receiving this notice, the employee may pursue the claims in a civil lawsuit. If the DFEH conducts an investigation, the employee will receive the right to sue letter upon the conclusion of the investigation. (See e.g., *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 492 (citing Gov. Code, §§ 12960, 12965, subd. (b)).) The employee may also request that the DFEH issue an immediate right to sue notice without conducting any investigation. (Cal. Code Regs., tit. 2, § 10005.)

The resolution only addresses the situation where an employee files a verified complaint with the DFEH and requests an immediate right to sue notice. It would allow the employee to pursue a civil action without serving the DFEH verified complaint on the defendants. This will put the defendants at a disadvantage because they will have to conduct discovery to obtain the sworn statements and identity of other defendants contained in the DFEH verified complaint. Under currrent law, defedants have the right to receive this information before the lawsuit is filed.

Also under current law, the DFEH verified complaint contains the basis for the Fair Employment and Housing Act ("FEHA") claim, because the FEHA lawsuit is limited to the type of discrimination, retaliation or harassment set forth in the DFEH complaint. (See e.g., *Okoli v. Lockheed Techical Operations Co.* (1995) 36 Cal.App.4th 1607.) For example, if the DFEH complaint alleges race discrimination, the lawsuit cannot allege disability discrimination. Thus, the DFEH complaint is necessary to evaluate whether the lawsuit states a cause of action.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12962 to read as follows:

§ 12962

(a) The department shall cause any verified complaint filed for investigation under the provisions of this part to be served, either personally or by certified mail with return receipt requested, upon the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of.

(b) Notwithstanding subdivision (a), where a person claiming to be aggrieved by an alleged unlawful practice hires or retains private counsel for purposes of representation of the claim, the private counsel, and not the department, shall cause the verified complaint filed under the provisions of this part to be served, either personally or by certified mail with return receipt requested, upon the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice.

(c) Service shall be made at the time of initial contact with the person, employer, labor organization, or employment agency or the agents thereof, or within 60 days, whichever first occurs. At the discretion of the director, the complaint may not contain the name of the complaining party unless the complaint is filed by the director or the director's authorized representative.

(d) The foregoing service requirements shall not apply if the person claiming to be aggrieved files, in conjunction with his or her verified complaint, an immediate right-to-sue notice pursuant to Government Code §12965 and a right-to-sue notice is issued to the person claiming to be aggrieved.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: For employment discrimination claims, an employee must exhaust his administrative remedies before proceeding to court. This is done by filing a complaint with the Department of Fair Employment and Housing (DFEH) and obtaining a "right-to-sue" notice. Employees often request an immediate right-to-sue notice, without having the DFEH investigate their claims and the DFEH routinely issues the right-to-sue notices. However, Section 12962 still requires service of the complaint (which is filed to obtain the right-to-sue notice) on all parties, either personally or by certified mail. This step is unnecessary when an immediate right-to-sue notice is issued.

The Solution: This eliminates the need to serve the filed complaint on the employee or employer when an immediate right-to-sue notice is issued by the DFEH.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090, bustarde@mayfieldbustarde.com

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde