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Employers Successful In Revising California's So-Called "Sue Your Boss" Law

In a victory for businesses throughout California, the Legislature passed a major overhaul of SB 796, officially titled as the Labor Code Private Attorneys General Act of 2004, but more commonly known as the "Sue Your Boss" law. It is expected that Governor Schwarzenegger will sign the revised version into law shortly.

SB 796, codified as Labor Code section 2699, has been a target of employer groups since it was signed into law by former Governor Davis after his recall defeat. SB 796 allows aggrieved current or former employees, on behalf of themselves and all other aggrieved employees, to sue their employer for a violation of essentially any provision of the Labor Code. Where penalties are not already specified, the law imposes a \$100 penalty for each aggrieved employee for the initial violation, and a \$200 penalty for each aggrieved employee per pay period for each subsequent violation. These penalties, in turn, are distributed 50% to the General Fund, 25% to the Labor and Workplace Development Agency, and 25% to the aggrieved employees. In addition, a successful plaintiff may recover reasonable attorneys' fees and costs.

The "Sue Your Boss" law drew the ire of businesses because of its nearly unlimited scope and the overwhelming incentive for frivolous lawsuits regarding trivial infractions of the Labor Code. Under intense pressure, the California Legislature last week passed significant revisions to the law.

The revised version mandates compliance with prescribed pre-lawsuit procedures. The applicable procedure depends on the alleged violation.

Serious Violations. The new law sets forth a comprehensive list of every Labor Code provision that qualifies as a "serious" violation. If an aggrieved employee wishes to file suit based on a "serious" violation, the employee must first provide written notice of the violation to the Labor and Workforce Development Agency ("Labor Agency") and the employer. The Labor Agency then has the opportunity to conduct its own investigation and issue a citation, if appropriate. Only if the Labor Agency fails to act or issue a citation may the aggrieved employee file a civil lawsuit.

Other Labor Code Violations. For all Labor Code provisions not specifically enumerated in the new law, an aggrieved employee wishing to bring suit under SB 796 must first give written notice to the Labor Agency and the employer. The employer then has 33 days to "cure" the alleged violation. If the violation is cured, no civil action pursuant to SB 796 may commence. If the violation is not timely cured, the aggrieved employee may commence a

civil action. If the aggrieved employee disputes the employer's contention that the violation was cured, the employee may appeal first to the Labor Agency and later to the superior court. An employer may only avail itself of the Notice and Cure provisions a maximum of three times in a 12-month period for the same violation or violations. Unfortunately, because of the comprehensive nature of the "serious" violations, the impact of the Notice and Cure provisions will likely be minimal.

Health and Safety Violations. The new law sets forth a separate procedure for alleged violations of Labor Code provisions pertaining to occupational safety and health (Cal-OSHA), other than those provisions already enumerated as being "serious." The aggrieved employee must first give written notice to the Division of Occupational Safety and Health (DOSH) and the employer. DOSH must investigate the alleged violation. If DOSH issues a citation, no civil action pursuant may commence. If DOSH fails to issue a citation and the employee disputes that decision, the employee may challenge the decision in the superior court. If DOSH fails to timely investigate the alleged violation, the Notice and Cure provisions outlined above apply. Lastly, the new law requires superior court review of any proposed settlement of alleged safety violations.

In addition to the notice procedures set forth above, the revised version of the law institutes several other significant changes. A civil court judge is now expressly permitted to award less than the prescribed penalty amounts if, based on the facts of the case, to do otherwise would result in an award that is "unjust, arbitrary and oppressive, or confiscatory." The superior court must also now review and approve any penalties sought as part of a proposed settlement agreement regarding claims under this law.

The new law also removes one of the major concerns voiced by employers, namely, liability for certain posting and filing requirements under the Labor Code. The new law expressly states that no action may be brought under the law for any violation of a posting, notice, agency reporting, or filing requirement of the Labor Code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting. In addition, the new law repeals Labor Code section 431, which, unbeknownst to many employers, requires employers to file with the Division of Labor Standards Enforcement a blank copy of any job application that employees or applicants are required to sign.

Lastly, the new law revises the distribution of penalties so that now 75% goes to the Labor and Workforce Development Agency and 25% goes to the aggrieved employees.

While the revised version of the "Sue Your Boss" law addresses some of the original law's shortcomings, it does not go far enough. Of most concern is the exclusion of "serious" violations from the Notice and Cure procedures. These "serious" violations include nearly every Labor Code provision that is regularly invoked by employees. Thus, in most instances, an employee will simply have to wait a prescribed period of time to see if the Labor Agency will investigate and issue a citation. If it does not, the employee will be able to sue. Employers must also be careful about complying with the varied deadlines imposed by the statute. Because these deadlines are somewhat complicated, employers are urged to familiarize themselves with the text of the new statute.

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