NEW EMPLOYER LIABILITY FOR CUSTOMER HARASSMENT OF EMPLOYEES

AB 76, signed into law by Governor Gray Davis on October 3, 2003, imposes liability on employers under state law for sexual harassment committed by customers or clients. While employers are already potentially liable for such harassment under federal law, plaintiffs have largely avoided suing under federal law so as to prevent a defendant-employer from removing the action to federal court to take advantage of court procedures perceived by many as being more employer-friendly (e.g. shorter notice periods for summary judgment motions, unanimous jury verdict requirements, etc.). Under the new law, employers may now be liable under state law for sexual harassment by customers or clients if employers -- or their agents or supervisors -- knew or should have known of the harassment and failed to take immediate action to stop it.

The new law is a direct response to a recent decision by the California Court of Appeal holding that employers are not liable for harassing conduct of clients or customers. The case, Salazar v. Diversified Paratransit, Inc., 103 Cal. App. 4th 131 (2002), involved a bus driver who sued her employer under the California Fair Employment and Housing Act ("FEHA") after a developmentally disabled passenger exposed himself to her. The Salazar Court found that the FEHA did not apply to harassment by customers and clients. The California Supreme Court granted review of the decision; however, the legislature acted to change the law before the Supreme Court acted.

The new law states that "the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees shall be considered" when determining whether an employer has taken "all reasonable steps to prevent harassment from occurring." Unfortunately, this gives employers little guidance on what they should do to comply with the law.

For example, if a food server complains to her supervisor that a customer stared at her "in a sexual way" or commented that she was "sexy" and made her feel uncomfortable, is this actionable harassment or simply bad manners? If this is actionable harassment, what is the employer to do? Must the employer track down the customer and get his or her version of events? If the employer determines that the customer did in fact harass the employee, must the employer bar the customer from the premises or is it reasonable to simply warn the customer not to repeat the behavior? If the customer denies harassing the employee what must the employer do to avoid liability?
Additionally, employers who act decisively to prevent real or perceived harassment by customers may potentially be liable to customers for their actions. California law prohibits business establishments from discriminating against, boycotting, blacklisting, or refusing to buy from, contract with, sell to or trade with a person based on the person's race, creed, religion, color, national origin, sex, disability or medical condition. For illustration, assume that the customer in the example above has a physical or mental disability or another protected characteristic. If the employer bars the customer from returning to the restaurant for the alleged misconduct, the customer may well perceive that he is being denied access to the business establishment not because of his conduct, but because of his disability or other protected characteristic.

Although it may be some time before there is guidance from the courts on this new law, employers should review their policies and procedures to insure that they have a clear anti-harassment policy in place and employees are aware of the procedure for making complaints about potential harassment. Additionally, employers should ensure that managers are aware of their new expanded duties to respond to complaints of harassment of employees by customers.

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For more information about this issue, please contact a member of the Labor and Employment Practice Group in one of our offices.