



Employment LAW BULLETIN

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REMINDER: MANDATORY SEXUAL HARASSMENT TRAINING IN CALIFORNIA

A new California law requires employers of 50 or more employees to provide at least two hours of interactive training and education regarding sexual harassment prevention, identification and correction to all supervisory employees (defined as employees who direct the work of another) within one year of January 1, 2005. New supervisory employees must be trained within six months of promotion to a supervisory position. After January 1, 2006, covered employers must provide sexual harassment training and education to each supervisory employee once every two years.

The training required must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training must also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation, and must be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.

Please contact Simpson, Garrity & Innes if you are interested in exploring in-house training programs for your supervisors by experienced and renowned employment law attorneys.

JURY STINGS EMPLOYER IN SEXUAL HARASSMENT CASE

A jury in San Jose recently awarded Two Million Dollars in punitive damages in a case brought by two female Federal Express employees. The jury concluded that the company failed to do enough to stop a male co-worker's sexual harassment. Both of the women said that they were harassed by a co-worker on an ongoing basis. Both women said they reported their harassment to Federal Express management but their attorney claimed that the company

took insufficient steps to correct the harassing behavior. During closing arguments, the women's attorney said the company needed to be hit with a big damage award to get its attention.

Although Federal Express will be appealing this award, it shows that juries can be very critical of management's inadequate actions to stop harassment. Employers should consult with competent employment law defense counsel to assist in deciding the appropriate action to take against someone who is found after investigation to have harassed others in the workplace.

MEGAN'S LAW WEBSITE— NOT FOR EMPLOYMENT USE

Employers (and their employees) have discovered Megan's Law Website. As a result of a new law, this site provides access to information on more than 63,000 persons required to register in California as sex offenders. Specific home addresses or information is provided by ZIP Code, city, and county. Employers have been informed (usually by web surfing employees with inquiring minds) that one or more of their employees may be listed on the site.

Using the Megan's Law website for employment purposes may cause more problems than it solves. The information may not be used for any purpose relating to health insurance, insurance, loans, credit, **employment**, education, scholarships, fellowships, housing, accommodations, or benefits, privileges, or services provided by any business. Misuse of the information may make the user liable for money damages or an injunction against the misuse.

There are legal ways to engage in due diligence in hiring and retaining employees. Employers should seek legal counsel to ensure that hiring and termination practices meet applicable legal standards.

USING A PEO – WHAT EMPLOYERS NEED TO KNOW

The use of contingent workers by corporate America has increased dramatically in the past few years. Unfortunately, the number of complex legal issues involved in using contingent workers has grown too. An unknowing employer may be unwittingly violating a variety of laws when using contingent workers including: wage and hour laws, workers' compensation, ERISA, employment discrimination protection, tax rules, and other employment law protections. Employers must be aware of the potential risks inherent in the use of such employees. This article addresses the risks involved in the use of a professional employer organization ("PEO") -- a common vehicle by which employers engage the services of contingent workers.

A PEO is a third-party company that enters into a co-employer relationship with a company. In creating a co-employer relationship, both the PEO and the company share and manage many employer-related liabilities and responsibilities. Typically, the co-employment relationship is based on a contract between the PEO and the company. The contract allows the company to transfer to or share with the PEO a wide-range of employer liability and responsibilities. It is important that the PEO agreement state which responsibilities the PEO is responsible for (for example, payroll, benefits administration, leave administration and other HR functions) and which responsibilities the company is responsible for (i.e. day-to-day supervision relating to the company's core business).

For the most part PEO's do not have their own legion of workers whom they reassign and lease to a number of different employers on demand. Instead, a company retains a PEO to handle payroll, administer benefit plans and oversee other personnel issues for an already existing workforce. These workers and those who join after a PEO is in place usually become joint employees of the company and the PEO. Unlike an employee leasing situation, all of the company's employees both core and non-core employees become employees of the PEO and the company.

As co-employers the PEO and company usually are both liable under all employment laws, including anti-discrimination, wage and hour, OSHA, FMLA and workers' compensation. As such, in any PEO agreement it is very important to clearly delineate who, for example, will be responsible for conducting investigations, training, and responses when a harassment issues arises. Caveat: Often times, the PEO assumes too much authority in responding to claims of harassment and conducting the investigations leaving the company with little, if any, recourse when the investigation is botched and the company is jointly liable with the PEO. In addition, issues often arise as to whom will pay for legal counsel and whose legal counsel, the PEO's or the company's, will be engaged? Moreover, the company and PEO should also determine at the outset the type of workers' compensation insurance that the PEO and the company will maintain.

The potential FMLA/ADA dilemma: The co-employment arrangement also could obligate your company to laws that cover large employers. For example, if you are a small company with ten employees and you sign-up with a PEO that manages over a 1,000 employees, your small company could be considered to have over a 1,000 plus employees. As such, this aggregation issue could require you to comply with regulations such as the Family and Medical Leave Act (FMLA) and the Americans With Disabilities Act, which do not affect companies with fewer than 50 and 15 employees, respectively. The courts have yet to resolve this issue. However, several of the large PEOs treat all their "employees" as FMLA eligible. In doing so, these PEOs are following the joint employer rules contained in the regulations governing the FMLA.

There is little question that PEO employees count as "employees" under recently enacted Government Code Section 12950.1 (requiring California employers with 50 or more employees to provide to supervisors two hours of anti-sexual harassment training every two years). Thus, the co-employment arrangement could also obligate your company to comply with these training requirements.

If the company desires to offer its employees a 401k plan through the PEO, the company must make sure that the PEO is in compliance with IRS Revenue Procedure 2002-21. IRS Rev. Pro. 2002-21 addresses the question of whether a PEO is permitted, under the Code, to maintain tax-qualified retirement plans providing benefits to individuals who perform services for a number of companies while on the PEO's payroll. The IRS's position is that PEOs may do so, but only if the plan qualifies as a "multiple employer" plan and not a "single qualified employer" plan. Under a PEO "multiple employer" plan, the employees of each company are tested separately under the Code's non-discrimination rules; and, any retirement plan actually maintained by the company must be tested under the non-discrimination rules taking into account the company's employees on the PEO payroll (even though separately covered by the PEO plan). There are at least two significant risks for companies with the IRS ruling: (i) the tax advantages of the entire PEO plan are at risk if even just one company group of

employees does not pass the Code's non-discrimination tests; and (ii) the company's separate plan (for example, covering the owner or key management) generally cannot meet the Code's non-discrimination rules unless it also covers the company's employees covered by the PEO's plan.

If you are considering engaging a PEO you must ensure that the PEO will carry out the company's obligations to collect and remit payroll taxes and operate the benefit plans, the worker compensation systems and similar aspects of the employment relationship appropriately because if the PEO fails to do so, it likely will be the company's responsibility to "make it right," which could include additional penalties and taxes. A way to protect the company is to negotiate a strong indemnification provision into the contract between the PEO and the company. A strong indemnification provision may benefit the company if the PEO fails to perform its responsibilities.

Another issue that a company considering a PEO must take into account is that a PEO, the same as any other business during a down-turn in the economy, may become insolvent. Because the PEO often is responsible contractually for employee contributions to employee benefit plans, and for the collection and payment of employment taxes, each company client of the PEO bears a risk that such funds are not properly handled and/or remitted. In such a case, employees, health care providers and the IRS will certainly look to the company for reimbursement of these funds even though the employer already paid such amounts through its contractual fees with the PEO.

There are many pros and cons when considering whether to join forces with a PEO. It is very important to pick a reputable PEO and to negotiate a contract that fits the needs and desires of your company. Legal counsel should be consulted to evaluate the PEO agreement.

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