THE GOLDSTEIN LAW FIRM, A.P.C.

Established 1977

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

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March – April 2016 Newsletter

I. Transgender Employees – California Fair Employment & Housing Department Has Adopted Anti-Discrimination Regulations for LGBT Job Applicants and Employees Regarding Restrooms, Applicant Interviews, and Dress Codes.

Restrooms: California law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee's gender identity. An employer who requires a dress code must enforce it in a non -discriminatory manner. This means, for instance, that a transgender woman must be allowed to dress in the same manner as non - transgender

women, and that her compliance with such a dress code cannot be judged more harshly than non - transgender women.

What are the obligations of employers when it comes to bathrooms, showers, and locker rooms? All employees have the right to safe and appropriate restroom and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee's gender identity, regardless of the employee's assigned sex at birth. In addition, where possible, an employer should provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason. A private restroom of this type can also be used by an employee who does not want to share a restroom with a transgender coworker. However, use of a unisex single stall restroom should always be a matter of choice. No employee should be forced to use one either as a matter of policy or due to continuing harassment in a gender-appropriate facility.

Applicant Interviews: When interviewing job applicants, Employers may ask about an employee's employment history, and may ask for personal references, in addition to other non - discriminatory questions. An interviewer should not ask questions designed to detect a person's sexual orientation or gender identity, including asking about his/her marital status, spouse's name, or relation of household members to one another. Employers should not ask questions about a person's body or whether they plan to have surgery because this information is generally protected by the Health Insurance Portability and Accountability Act (HIPAA).

Dress Codes: California law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee's gender identity. An employer who requires a dress code must enforce it in a non-discriminatory manner. This means, for instance, that a transgender woman must be allowed to dress in the same manner as non-transgender women, and that her compliance with such a dress code cannot be judged more harshly than non-transgender women.

Employees who identify as transgender are protected by California's Fair Employment & Housing Act. California law uses the phrases "sex, gender, gender identity and gender expression." "Gender expression" is defined by the law to mean a "person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." A transgender person does not need to complete any particular step in a gender transition in order to be protected by the law. An employer may not condition its treatment or accommodation of a transitioning employee on completion of a particular step in the transition. As a result, California employers should know the rules of the road when it comes to transgender employees and transgender job applicants. **Should your company or organization have any questions regarding potential legal liability for discrimination, contact THE GOLDSTEIN LAW FIRM.**

II. You Do Not Have To Tolerate Marginal Employees in Your Organization:

Every organization has marginal employees who do not want to be held accountable for their performance and blame any work problems (if they even admit they have any problems at all) on a lack of training, some form of discrimination or co-workers whom the marginal employee believes are treated more favorably. Marginal employees are employees who believe that you owe them a job and therefore have a false sense of entitlement. When you try to correct marginal employees, they resist or sabotage your efforts and thwart their managers' and supervisors' attempt to exercise authority over them.

In fact, the marginal employee sees every attempt to hold them accountable as an act of "retaliation" and /or "unjust/unfair" treatment or "unlawful discrimination." Sometimes that marginal employee resorts to claiming health problems when you attempt to hold them accountable because of their distorted perception that claiming health problems will blunt any attempt to discipline and/or terminate them. Finally, the marginal employee attacks their manager and/or supervisor with charges of discrimination, unfairness, and in a union environment with numerous unfounded grievances when being confronted with being held accountable by his or her Employer.

Winning Strategies for Effectively Dealing With, and Removing, Marginal Employees From Your Organization:

1. You have to first decide that your organization will no longer tolerate marginal employees who cost your organization profit, productivity, and a loss of morale because employees who do their jobs are disheartened by the marginal employee who works less and is not being held accountable by management.

2. Establish a measurable, objective, and reasonable performance standard for the marginal employee to meet in a reasonable period of time.

3. Clearly communicate to the marginal employee the performance standard that you want met. This is best done in writing with a witness present.

4. Document all conversations you have with the marginal employee, including poor performance events and/or discipline imposed as a result of the employee's failure to meet the performance standards you have given the marginal employee.

5. If the marginal employee claims to be a whistleblower or charges you with unlawful harassment and/or discrimination, the charges should be impartially investigated in a timely manner, *even if you believe that the employee's claims have no merit*.

6. Before seriously disciplining the marginal employee (which includes suspending the

marginal employee without pay and/or terminating the marginal employee), present the marginal employee with a letter of proposed suspension or termination outlining the facts that led you to make the proposed decision to suspend or terminate the marginal employee. At that point, suspend the employee for a brief period of time pending a final decision on the level of discipline up to, and including, termination. At that point, provide the marginal employee with an opportunity to respond in writing, and/or in person, to the facts that led to your proposed decision before making the final decision to impose a suspension and/or termination.

7. When you want to remove a marginal employee from your workplace, you should seek the advice of competent legal counsel to coach you through the process.

III. You Do Not Have To Be Motivated by Animus or Ill Will To Be Guilty of Disability Discrimination:

In *Wallace v. Stanislaus County*, 5th District California Court of Appeal in Case No. FO68068 (Issued February 25, 2016) the Court held that if the substantial motivating factor for the adverse employment action against Sheriff Wallace was his disability, it does not matter that the adverse action was not motivated by animosity or ill will against him.

Sheriff Wallace suffered a work related injury to his left knee and had work limitations since his injury. He was assigned to be a Bailiff in 2010, but was later placed on unpaid modified leave believing that there was no modified or alternative work available to accommodate his work restriction. Even though Wallace believed that he could perform the work, he remained on unpaid leave from January 5, 20111 through January 30, 2013 when he returned to patrol duty. Wallace then filed a disability discrimination lawsuit against the County. At trial, the Court incorrectly instructed the jury that Wallace had to prove that the County was motivated by animosity or ill will against him. The jury decided in favor of the County.

The Court of Appeal reversed the jury's verdict in favor of the County stating that the California Supreme Court addressed the standard regarding an employer's intent or motivation. Under that standard, Wallace could prove the requisite discriminatory intent by showing his actual or perceived disability was the substantial motivating factor/reason for the adverse employment action. Wallace did not need to prove that his employer was motivated by animosity or ill will against him.

The Lessons to Be Learned by Employers from the *Wallace* Case:

1. It is essential that an employer faced with a request by an employee for an accommodation take meaningful steps to determine whether making a reasonable

accommodation is possible.

2. Document all steps you have made to reasonably accommodate employees with disabilities or perceived disabilities.
3. Secure input from organizations for the disabled about reasonable accommodations that might be suggested.
4. Engage in good faith in an interactive process to find a reasonable accommodation for the employee to perform the essential duties of their job or any open, available position for which they are qualified.
5. As a famous writer once said: "The road to hell is paved with good intentions." The *Wallace* case reinforces the fact that an employer with the best intentions of protecting an employee from further injury by not having the employee remain at work; can still be found guilty of disability discrimination.
6. **Contact THE GOLDSTEIN LAW FIRM if your organization has issues of how to deal with accommodating a disabled employee without violating federal and/or state disability discrimination laws.**

IV. Governor Brown Proposes Revisions to the Private Attorney General Act:

Lawsuits against employers alleging violation of The Private Attorney General Act (PAGA) for Wage and Hour Violations are overwhelming the Courts. In PAGA cases the State of California is entitled to receive 75% of the penalties imposed on employers for violations of the Labor Code. Under the present law, an employee seeking to sue his or her employer under PAGA must file a claim to investigate the employer's violation. with The Labor and Workforce Development Agency and the Department of Industrial Relations "DIR" and wait a brief period before filing a private PAGA lawsuit. At present as a practical matter the DIR does not investigate the claim and the case in filed in Superior Court. When PAGA cases are settled DIR that would a recipient of 75% of the penalties that are obtained usually does not participate or approve the settlements.

Therefore, in the new state budget submitted by Governor Brown "The Labor and Workforce Development Agency and the Department of Industrial Relations ("DIR") request 10 positions and $1.6 million in resources from the Labor and Workforce Development Fund for the 2016/17 fiscal year; and $1.5 million ongoing to stabilize and improve the handling of PAGA cases."

The Private Attorneys General Act ("PAGA") was enacted in 2003 to enable private parties to litigate claims and recover penalties for Labor Code violations that previously could only be pursued by the Labor Commissioner or other divisions within DIR. As amended in

2004, PAGA requires employees or their representatives to initiate a case by sending a written notice to the employer and the LWDA which identifies the alleged violations and the facts and theories supporting the claims. The LWDA then has a short time to decide whether to investigate or cite the employer; and the issuance of a citation will preclude private litigation over the same violation. Current law authorizes private litigants to retain 25 % of the penalties recovered in a PAGA case, with the remainder being deposited into the LWDF.

Governor Brown's proposal, if approved, will create within the DIR a unit to carry out the LWDA's responsibilities under PAGA which would do the following:

1. Review PAGA notices to determine whether to accept cases for investigation or authorize commencement of private litigation since less than 1 % of all PAGA cases are currently reviewed or investigated.

2. Investigate accepted cases and determine whether to: (1) cite the employer for Labor Code violations, and (2) settle claims with the employer.

3. Litigate and manage resolution of cases in which the employer has been cited or has settled. A PAGA Investigation must conclude with a formal citation of the employer in order to foreclose private litigation against the employer over the same violations. The citation may be an administrative citation that is subject to an appeal and litigation by the employer, or it may take the form of an agency lawsuit which charges the employer with the violations, and which must be litigated in superior court.

4. Evaluate and approve proposed settlements of PAGA litigation. Current law authorizes private litigants to retain 25% of the penalties recovered in a PAGA case and to turn over the other 75% to the LWDF. It also requires the superior court to review and approve any settlement involving penalties. However, with the exception of cases involving OSHA violations (in which case the court must also review the adequacy of the safety protections or remedies); there is no requirement to notify or seek agency input on the adequacy of a settlement. Because most judges have no particular expertise in labor law and must rely upon the knowledge and representations of counsel, both of whom are interested in having the settlement approved, there is no assurance that settlements are in fact fair to all the affected employees or the state.

5. Evaluate petitions for amnesty relief arising out of new precedent or legal development and determine time frame and conditions for amnesty relief. If approved, this proposal will also create a mechanism through which the DIR can set up an amnesty plan in situations where an industry-wide practice has been invalidated through a major court decision or other development that creates potentially crippling liabilities under PAGA. The basic goal of such an

amnesty is to induce employers to move quickly to make their employees whole for past violations and bring their practices into conformity with current law in exchange for substantial relief from the penalties and other special damages that would be available in a PAGA case.

This proposal will also make a number of additional revisions to the PAGA statute:

- Require more detail in the PAGA claim notices filed with the LWDA and require that claims for ten (10) or more employees be verified and accompanied by a copy of the proposed complaint.

- Extend the LWDA's time to review PAGA notices from 30 to 60 days, and specify that employers may submit a request for the LWDA to Investigate a PAGA claim.

- Require PAGA notices and employer responses to be submitted online and accompanied by a filing fee.

- Extend the time for the LWDA to investigate an accepted claim from 120 to 180 days.

- Require the Director of Industrial Relations to be served with a copy of the complaint when a PAGA case is filed.

- Require court approval of all PAGA case settlements, and require that the Director of the DIR be provided with notice and an opportunity to object before the court determines whether to approve a settlement.

- Create a separate procedure through which interested parties may ask the Director of the DIR to establish a temporary amnesty and safe harbor program to provide expedited back wage payments to employees and penalty relief to employers following the invalidation of a widespread industry practice.

Some Plaintiff/employee lawyers and special interests claim that Governor Brown has proposed to rein in employees and their lawyers filing PAGA claims. Others contend that Governor Brown's proposals will shift the burden of resolving many of the PAGA claims from the Court to the DIR and permitting the DIR to act as a true stakeholder in any settlement by private parties of PAGA claims in that the DIR is entitled to 75 % of the assessed penalties.

If you receive a Wage and Hour/PAGA Complaint, immediately contact The Goldstein Law Firm.

The Legal Practice Areas of the Goldstein Law Firm

Employment Law, Wage and Hour Law, Labor Law, Shareholder Disputes, Business Litigation, Corporate Law, Appellate Law, Corporate Investigations, Real Estate Law, Wrongful Death, Training & Workshops, Workers Compensation and EDD Appeals

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