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Potential Liability for Sexual Harassment Extended to Consensual Romantic Relationships in the Workplace

On July 18, 2005, the California Supreme Court held that an employee may file a sexual harassment claim against his or her employer even when no specific instances of sexual advancements were made to that employee.¹ The Supreme Court found that a supervisor's consensual, sexual relationships with three female employees may have created an environment where the plaintiff could have felt like she had to have similar relations with the supervisor in order to be promoted. The Supreme Court held that creating such an environment could amount to sexual harassment. Thus employers must not allow widespread instances of favoritism based upon sexual relations to occur.

At the same time, employers need to be careful when meddling in the sexual relationships of an employee. Employees still have their rights of privacy, and employers are generally prohibited from interfering in the activities of an employee outside of the workplace during non-working hours. Because of the fine line that employers must walk, employers should seek counsel prior to taking actions in response to intimate relationships among co-workers.

Employers Are Only Liable for Meal and Rest Period Penalties Going Back One Year

Section 226.7 of the California Labor Code provides that an employer must pay an employee “an additional hour of pay” for each work day that a meal or rest period is earned but not provided. Until the release of a recent precedential decision by the Labor Commissioner, it was unclear whether the “additional hour of pay” was a penalty or a wage—the importance to the employer being that an employee may obtain unpaid wages going back three years while claims for penalties may only be made for actions occurring within the last year. The Labor Commissioner recently held that the “additional hour of pay” is a penalty as opposed to a wage. Thus, employers may operate and assess their potential liability risks regarding meal and rest periods with the knowledge that they are only liable for violations occurring during the preceding 12 months.

Partial Day Deductions Allowed for Exempt Employees

The California Labor Commissioner recently withdrew an opinion letter that had stated that employers could not deduct from vacation time or other paid leave when an exempt employee missed part of a working day.² Even more recently, a California appellate court held that an employer could deduct from the vacation time of an exempt employee when he or she missed four or more hours of any given work day.³ These actions mark a significant change in California law—bringing California law more in line with federal law (the Fair Labor Standards Act) by allowing such deductions. Employers should, however, be aware that the vacation deductions allowed in *Conley* were limited to employees who missed four or more hours in a work day, thus they may want to forego partial day deductions for an employee missing less than four hours until further guidance is given.

FMLA Does Not Give Employees the Right to be Let Alone

A recent unpublished Third Circuit decision⁴ (one having no precedential value) reaffirms that an employer may continue to enforce its policies on individuals taking FMLA leave so long as the policies do not take away or conflict with any rights granted by the FMLA. The Third Circuit specifically rejected the employee’s assertion that he had the right to be let alone while on FMLA leave. In that case, the employer was permitted to enforce its sick leave policy which required the employee to call in when leaving home during working hours while on sick leave. When the employer discovered the employee was not at home, and it suspended the employee effective upon return from leave.

We believe this case illustrates a common misconception among some employees (and their attorneys!) regarding an employee's rights under the FMLA. Simply put, they believe that an employee on FMLA leave must not be disturbed or bothered in any way. The case is also informative to employers regarding the limits to which they may enforce their own policies when FMLA rights are involved. The employers policies may be enforced so long as they do not interfere with a right or protection granted by the FMLA. An employer that wishes to continue to enforce its policies on an employee taking FMLA leave must *take special care* to ensure that its policies do not conflict with any of the rights the employee may be granted under the FMLA.

Employers Have a Duty to Assist Employees and Guests in Danger

Under a new California Supreme Court decision, employers have a duty to protect those who are invited onto their premises.⁵ The Court recently held that an employer may be liable when its employees fail to offer reasonable assistance to a person in danger of harm on the employer's premises. In that case, three of the restaurant's employees failed to render any assistance to a person whom they saw being attacked with a knife in the restaurant's parking lot. The Supreme Court held that the employees were obligated to render aid that was "appropriate and reasonable under the circumstances." Thus, employers should train their employees to respond appropriately when another employee or invited person needs assistance. For example, the Supreme Court suggested that immediately calling 911 may have been sufficient in this particular instance given the fact that the perpetrator was wielding a knife.



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^[1] *Miller v. Department of Corrections*, (2005) 115 P.3d 77.

^[2] The withdrawn letter was dated August of 2002, No. 2002.08.30.

^[3] *Conley v. Pacific Gas and Elec. Co.*, No A105832 (Cal. 1st App. Dist. July 21, 2005).

^[4] *Callison v. City of Philadelphia* (3rd Cir. 2005) 128 Fed.Appx. 897.

^[5] *Morris v. De La Torre* (2005) 36 Cal.4th 260.