RESOLUTION 12-01-2017

DIGEST
Workers Compensation: Payment of Premiums
Amends Labor Code section 3302 to provide that factoring companies be responsible for individual's workers compensation premiums.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 3302 to provide that factoring companies be responsible for individual's workers compensation premiums. This resolution should be approved in principle because it will close a loophole whereby out-of-state factoring companies are incentivized to work with fly-by-night temp agencies that flout California Law.

The Check Sellers, Bill Payers and Proraters Law (the Law) is contained in Division 3 of the California Financial Code, commencing with Section 12000. The regulations are contained in Subchapter 10 of Chapter 3, Title 10 of the California Code of Regulations, commencing with Section 1770 (10 Cal. Code Regs., § 1770, et seq.). The Law, originally named the Check Sellers and Cashers Law, was enacted in 1947. As enacted, it provided for the licensing and regulatory review of companies and individuals who sold checks, cashed checks, or paid bills on behalf of others. General proraters are persons who, for compensation, engage in the business of receiving money or something of value from a debtor for the purpose of distributing the money or something of value among creditors in payment or partial payment of the debtor's obligations.

Currently, payroll factoring companies who finance temporary employment agencies: 1) do not have licenses as "pro-raters" under the Finance Code and resist complying with existing statute; 2) directly operate and conduct business in this state through these temporary employment agencies (either by loaning so much money that cannot possibly be repaid and therefore setting up a situation in which the creditor [the factoring company] becomes the de facto operator of the temporary employment agency business, or by directly controlling the temporary employment agencies' employees because these employees are technically the "collateral" of the payroll factoring company); and 3) as unlicensed pro-raters, earn significant and usuries fees for loaning funds to these temporary employment agencies that would otherwise be unlawful if earned by a licensed pro-rater under the existing statute.

While temp agencies are currently required to have workers compensation policies, employers are not, generally, able to verify compliance. This resolution prevents unlicensed out-of-state factoring companies from taking advantage of employers by financing these shady temp agencies.

This resolution is related to Resolution 11-02-2017.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 3302 to read as follows:

§ 3302

(a) (1) When a licensed contractor or other employer enters an agreement with a temporary employment agency, employment referral service, labor contractor, or other similar entity for the entity to supply the contractor or other employer with an individual to perform acts or contracts for which the contractors license is required under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code and the licensed contractor or other employer is responsible for supervising the employee s work, the temporary employment agency, employment referral service, labor contractor, or other similar entity shall pay workers compensation premiums based on the contractors or other employer's experience modification rating.

(2) The temporary employment agency, employment referral service, labor contractor, or other similar entity described in paragraph (1) shall report to the insurer both of the following:

(A) Its payroll on a monthly basis in sufficient detail to allow the insurer to determine the number of workers provided and the wages paid to these workers during the period the workers were supplied to the licensed contractor or other employer.

(B) The other employer or licensed contractors name, address, and experience modification factor as reported by the licensed contractor.

(C) The workers compensation classifications associated with the payroll reported pursuant to subparagraph (A). Classifications shall be assigned in accordance with the rules set forth in the California Workers Compensation Uniform Statistical Reporting Plan published by the Workers Compensation Insurance Rating Bureau.

(b) The temporary employment agency, employment referral service, labor contractor, or other similar entity supplying the individual under the conditions specified in subdivision (a) shall be solely responsible for the individuals workers compensation, as specified in subdivision (a).A factor, as defined in Civil Code § 2026 et. seq., who purchases, sells, transfers, exchanges, finances, and/or otherwise provides money for the payroll invoices of a temporary employment agency, employment referral service, labor contractor, or other similar entity described in paragraph (1) shall be deemed to be an "employer" under this section and is jointly and severally liable for the individuals' workers' compensation under this subdivision. Any UCC 1 financing statement as defined in Uniform Commercial Code § 9501 et seq., filed by a factor, and recorded in the State of California, against a temporary employment agency, employment referral service, labor contractor, or other similar entity described in paragraph (1) and/or filed against an employer utilizing the services of a temporary employment agency, employment referral service, labor contractor, or other similar entity described in paragraph (1) that does not include payment of workers' compensation premiums under this subdivision is void as against public policy. An injured employee who prevails in an action against a factor to recover workers' compensation benefits under this subdivision is entitled to recover all reasonable attorneys' fees and costs.

(c) Nothing in this section is intended to change existing law in effect on December 31, 2002, as it relates to the sole remedy provisions of this division and the special employer provisions of Section 11663 of the Insurance Code.

(d) A licensed contractor or other employer that is using a temporary worker supplied pursuant to subdivision (a) shall notify the temporary employment agency, employment referral service, labor contractor, or other similar entity that supplied that temporary worker when either of the following occurs:

(1) The temporary worker is being used on a public works project.

(2) The contractor reassigns a temporary worker to a position other than the classification to which the worker was originally assigned.

(e) A temporary employment agency, employment referral service, labor contractor, or other similar entity may pass through to a licensed contractor or other employer any additional costs incurred as a result of this section.

(Proposed new language underlined; language to be deleted stricken)

PROPONENTS: Joseph A. Goldstein, Jonathan A. Goldstein, Charles H. Goldstein, Charles Wake, Jodi Taksar, Scott Luskin, Robin Bernstein-Lev, Brian Francis Doyle, Barry Ross, James De Sario

STATEMENT OF REASONS

The Problem: Payroll finance companies, many of which are out of state, frequently purchase payroll invoices from in-state temporary employment agencies, many of whom do not have adequate workers' compensation coverage for their existing employees. In other cases, the temporary employment agency may have charged the employer utilizing their services for workers' compensation insurance coverage that was never in fact purchased by the temporary employment agency. This is a significant problem because injured employees current legal recourse is only to file an action against their temporary employment agency employer, many of whom become defunct or change their names. The current statutory framework provides no remedy to these employees. In addition, the employer who hired the temporary employees, who paid workers compensation premiums to the temporary employer, and who is jointly liable for any workers compensation claims filed for injuries sustained on their premises also has no statutory recourse.

The Solution: Would add the following language to Labor Code § 3302, subdivision b, that a factor, as defined in Civil Code § 2026 et. seq., who purchases, sells, transfers, exchanges, finances, and/or otherwise provides money for the payroll invoices of a temporary employment agency, shall also be responsible for the individuals workers compensation under this subdivision. Any financing statement and/or lien recorded in the State of California by a factor, against a temporary employment agency, that does not include adequate payment of workers' compensation premiums under this subdivision is void as against public policy. An injured employee who prevails in an action against a factor to recover workers' compensation benefits under this subdivision is entitled to recover all reasonable attorneys' fees and costs.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Joseph A. Goldstein

RESOLUTION 12-02-2017

DIGEST
Employment: Employees' Right to Use and Possess Marijuana at Work
Amends Health and Safety Code section 11362.45 to create employees' rights to use and consume marijuana in the workplace.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Health and Safety Code section 11362.45 to create employees' rights to use and consume marijuana in the workplace. This resolution should be disapproved because it would hinder an employer's right to maintain a safe and drug free work environment and it would hinder an employer's right to prevent its employees from working while under the influence.

Health and Safety Code section 11362.1 permits persons 21 years of age or older to possess not more than 28.5 grams of marijuana, not in the form of concentrated cannabis, and to consume, process, transport, purchase, obtain, or give away marijuana products. Health and Safety Code section 11362.45 lists activities that are exempt from the liberties of Health and Safety Code section 11362.1. When read together, Health and Safety Code section 11362.1, subdivision (f) presently allows public and private employers to decide whether they will permit the presence and the consumption of marijuana in the workplace, to include its sale, transfer, display and transportation. Health and Safety Code section 11362.1, subdivision (f) also states that nothing in this section will affect an employer's rights ". . . . to have policies prohibiting the use of marijuana by employees and prospective employees, or to prevent employers from complying with state or federal law."

As proposed, this resolution would eliminate employers' right to refuse the use and the presence of recreational marijuana in the workplace under California law, with the exception of the sale and the growth of marijuana. There is no mention of marijuana use or possession for purely medicinal purposes. This approach suggests that marijuana is similar to other non-prescription, non-controlled substances, however, marijuana remains a federal schedule 1 drug whose recreational use and presence in the workplace could be viewed as problematic for employers who seek to maintain a drug-and-alcohol-free work space. There is no reason an employer should be required to allow recreational marijuana in the workplace when the employer is permitted to ban alcohol in the workplace. Although both may be legal, the employer has the right to have a work force that is sober for worker productivity and safety reasons.

While this resolution is well intended, it creates unintended problems, in addition to those above, by removing an employers' right to explicitly deny marijuana consumption use or consumption in the workplace. This directly interferes with an employer's ability to maintain a safe and functional work environment.

The intent of this resolution would be better met by limiting the language to medicinal marijuana rather than broader recreational marijuana use. Alternatively, this resolution could be cured by striking "possession, transfer, display, transportation" of marijuana in the workplace, along with the portion stating, ". . . . or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees," which would allow employees to enjoy the rights of state law while allowing employers the right to have their employees sober while they are on duty.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code section 11362.45 to read as follows:

§ 11362.45

Section 11362.1 does not amend, repeal, affect, restrict, or preempt:

(a) Laws making it unlawful to drive or operate a vehicle, boat, vessel, or aircraft, while smoking, ingesting, or impaired by, marijuana or marijuana products, including, but not limited to, subdivision (e) of Section 23152 of the Vehicle Code, or the penalties prescribed for violating those laws.

(b) Laws prohibiting the sale, administering, furnishing, or giving away of marijuana, marijuana products, or marijuana accessories, or the offering to sell, administer, furnish, or give away marijuana, marijuana products, or marijuana accessories to a person younger than 21 years of age.

(c) Laws prohibiting a person younger than 21 years of age from engaging in any of the actions or conduct otherwise permitted under Section 11362.1.

(d) Laws pertaining to smoking or ingesting marijuana or marijuana products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation or the Division of Juvenile Justice, or on the grounds of, or within, any other facility or institution referenced in Section 4573 of the Penal Code.

(e) Laws providing that it would constitute negligence or professional malpractice to undertake any task while impaired from smoking or ingesting marijuana or marijuana products.

(f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the ~~use, consumption, possession, transfer, display, transportation~~, sale, or growth of marijuana in the workplace, ~~or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees,~~ or prevent employers from complying with state or federal law.

(g) The ability of a state or local government agency to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 within a building owned, leased, or occupied by the state or local government agency.

(h) The ability of an individual or private entity to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 on the individual's or entity's privately owned property.

(i) Laws pertaining to the Compassionate Use Act of 1996.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS:

The Problem: This law treats cannabis use in the same manner as the use of drugs that are illegal under California law and alcohol use. The law does not consider cannabis use for medicinal purposes or the fact that testing for cannabis use does not evidence current impairment in the same manner as does testing for alcohol use.

People who use cannabis for medicinal purposes may be subject to employer policies that prevent them from medicating while at work. This unequal treatment causes stress to such employees and creates a stigma around those who choose to treat their conditions using medical cannabis and those that do not. Employees who have been prescribed medical cannabis to treat a medical condition should be afforded the same rights and subject to the same obligations as any other employee who has been prescribed medication. Furthermore, testing for marijuana does not provide information as to intoxication in the same manner that testing for alcohol does. As such, the information gained from testing for cannabis in the context of employment provides little information relevant to an employee's fitness to perform his or her duties as an employee and only services to treat individuals who recreationally use cannabis in line with California law, may be treated differently than their colleagues.

The Solution: This resolution would allow for equal treatment for all individuals regardless of their use of cannabis commensurate with California law.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION:
AB 64 (Cooley, Jones-Sawyer, Lackey, and Wood) 2016 - Cannabis: medical and nonmedical: regulation and advertising – Filed with Secretary of State on December 12, 2016.
AB 266 (Bonta) - 2015- Medical Marijuana - Filed by Secretary of State on October 9, 2015
AB 243 (Wood) - 2015 - Medical Marijuana - Filed with Secretary of State on October 09, 2015.
SB 243 (McGuire) - 2016 Medical Marijuana - Filed with Secretary of State on October 09, 2015

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RESPONSIBLE FLOOR DELEGATE: Meaghan Zore

COUNTERARGUMENTS AND SECTION COMMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

The SDCBA Delegation urges Disapproval of Resolution 12-02-2017. If companies do not want to hire or retain drug users in their employment, they should not have to. This Resolution would prohibit an employer from discovering whether an applicant consumes a drug that impairs motor skills, cognitive function, and judgment thereby posing potential safety hazards to co-employees and members of the public, not to mention increased liability exposure to the employer. This proposal runs in direct opposition to the will of the people as expressed in their rejection of Proposition 19 in 2010 and approval of Proposition 64 in 2016. One reason Proposition 19 failed and Proposition 64 passed was the difference regarding employment policy. Many voters believed Proposition 19 prohibited employers from making hiring decisions based on the employee's marijuana use and voted it down. Proposition 64 righted this mistake and included a stated purpose to "allow public and private employers to enact and enforce workplace policies pertaining to marijuana." (Prop. 64, Nov. 2016 Gen. Elect. § 3(r).)

The resolution takes an incredible leap in suggesting that those who recreationally use marijuana should be a protected class, equating cannabis consumption with race, gender, and sexual orientation when it calls for a solution that "would allow for equal treatment" for those who use it.

Furthermore, if this Resolution were enacted into law, it would likely be struck down because of how it amends a voter-approved proposition. In Section 10 regarding amendments, Proposition 64 stated which parts could be changed to further the intent and purpose of Proposition 64, even allowing the Legislature to add worker protections in different sections. The explicit mention of those articles excludes this one (expressio unis est exclusio alterius). Although it includes a catchall that a 2/3 vote may adopt any amendment that furthers the goals, the resolution here would not. Given the stated purpose of allowing public and private employers to make workplace policies about marijuana, and this proposal would take that power away, it is infirm and would almost certainly be struck down.

RESOLUTION 12-03-2017

DIGEST
Worker Death Prosecutions: Civil Penalty Alternative for Prosecutors.
Adds Labor Code section 6425.1 to allow prosecutors to seek civil penalties for workplace death or serious injury caused by safety violations as an alternative to criminal enforcement actions.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Labor Code section 6425.1 to allow prosecutors to seek civil penalties for workplace death or serious injury caused by safety violations as an alternative to criminal enforcement actions. This resolution should be disapproved because it would allow the district attorney offices throughout the state to seek civil liabilities in addition to, or in lieu of, criminal penalties from companies for workplace deaths and injuries, the same penalties which are already available to, and assessed by, the Department of Industrial Relations Division of Occupational Safety and Health (Division).

This resolution proposes a new civil penalty structure to the Labor Code, determinable in a court of law, which would be incurred only by employers' willful violations of Health and Safety Code section 25910 resulting in death, serious injury or illness of an employee. Currently, the law provides where the Division "believes that an employer has violated Section 25910 of the Health and Safety Code or any standard rule, order, or regulation established pursuant to Chapter 6 . . . . of Division 1 of the Labor Code, or any standard, rule, order, or regulation established pursuant to" Labor Code section 6417, it is required to issue a citation to the employer. (*Vial v. California Occupational Saf. & Health Appeals Bd.* (1977) 75 Cal.App.3d 997, 1005.) The Division is also specifically empowered to impose an administrative penalty against the employer, as provided in Labor Code sections 6423, 6428, and 6429, for willful violations of Health and Safety Code section 25910 prior to referring the case to the district attorney for criminal prosecution. (*People v. Superior Court, (Solus Industrial Innovations, LLC)* (2014) 224 Cal.App.4th 33, 40.) This resolution would allow a district attorney to impose those same civil penalties, under what would become Labor Code section 6425.1, subdivisions (b) and (c), in addition to, or in lieu of criminal prosecution. As proposed, under subdivision (g) of Labor Code section 6425.1, the costs of the investigation by the district attorney would be reimbursed by the Division.

Although well intentioned, this resolution would create a redundant civil penalty imposable by both the Division and the district attorney "based upon *the exact same* violations." (*People v. Superior Court, supra,* 224 Cal.App.4th at p. 45, (emphasis in original.) In addition, after the Division has assessed their penalty and referred the violating employer or managerial employee, the district attorney has charging authority under Labor Code section 6425, subdivision (a), and the district attorney may seek imprisonment up to three years, criminal penalties not to exceed $1,500,000, or a combination of both. By creating a secondary civil penalty mechanism available

to district attorneys, that also reimburses them for investigatory costs, this resolution may lessen a district attorney's decision to pursue criminal prosecution in workplace death incidents and other serious workplace injury or illness circumstances.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Labor Code section 6425.1 to read as follows:

§ 6425.1

(a) In enacting this section, the Legislature declares that there exists a compelling interest in protecting worker's safety and health in the workplace that cannot be addressed by criminal enforcement and administrative actions alone, particularly when serious injury or workplace deaths are involved. The Legislature recognizes that the conduct prohibited by this section is, for the most part, already subject to criminal and administrative penalties pursuant to other provisions of law, and it is not the intent of this section to substantively change the standards governing workplace safety. However, the Legislature finds and declares that the addition of civil monetary penalties which can be assessed by prosecutors in a court of law will provide necessary enforcement flexibility and enhance enforcement of the workplace safety laws to better protect workers. The Legislature, in exercising its plenary authority related to workers' safety, declares that these provisions are both necessary and carefully tailored to deter workplace safety violations and protect employee safety in this state.

(b) Any employer who violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, if that violation is a serious violation and such violation causes any employment accident that is fatal to one or more employee or that results in a serious injury or illness, may be assessed a civil penalty of up to twenty-five thousand dollars ($25,000) for each violation.

(c) Any employer who willfully or repeatedly violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, and such violation causes any employment accident that is fatal to one or more employee or that results in a serious injury or illness, may be assessed a civil penalty of not more than seventy thousand dollars ($70,000) for each violation, but in no case less than five thousand dollars ($5,000) for each willful violation. As used in this section, "willfully" has the same definition as it has in Section 7 of the Penal Code.

(d) The penalties provided for in subdivisions (b) and (c) shall be assessed and recovered in a civil action brought in the name of the people of the State of California by any district attorney or the appropriate prosecuting authority having jurisdiction, in his or her discretion as he or she deems appropriate, following the referral of such action by the bureau of the division pursuant to Labor Code Section 6315, subdivision (g).

(e) In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(f) One-half of the penalties collected pursuant to this section shall be paid into the state treasury to the credit of the General Fund. The Department of Industrial Relations shall account

to the Department of Finance and the State Controller for all moneys so received and furnish proper vouchers therefor. The remaining one-half of the penalty assessed shall be paid to the district attorney or prosecuting authority that brought the complaint.

(g) In any action brought under this Section, the district attorney or prosecuting authority may also seek the reimbursement of the costs of investigation by the California Occupational Safety and Health Agency associated with the action.

(h) Nothing in this section shall be deemed to prohibit any authorized administrative action by the California Occupational Safety and Health Agency or any related criminal action, including any administrative or criminal action set forth in Sections 6423 to 6435, or any other action otherwise authorized by law.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Although the Labor Code already authorizes civil penalties against responsible parties for serious, willful or repeated violations of California's workplace safety laws and regulations (in addition to criminal action), it is currently silent with respect to who has standing to seek such penalties. (Lab. Code, §§ 6423-6436.) After an attempt by prosecutors to seek civil penalties under sections 6428 and 6429 in a worker death case, a recent published decision (*People v. Superior Court [Solus]* (2014) 224 Cal.App.4th 33.) now holds that prosecutors lack standing to seek such penalties unless and until the Legislature expressly grants prosecutorial standing to do so. As such, no one has standing to seek the civil penalties authorized under these statutes in a court of law, and the provisions cannot be enforced as intended -- to punish and deter worker safety violations that cause serious employee harm or death. Administrative civil penalties alone are not sufficient.

While there are criminal sanctions available (including a fine of up to $1.5 million for corporations), there are many cases, particularly against corporate employers, that may be better prosecuted in a civil action. It is thus desirable for prosecutors to have flexibility in exercising their discretion to prosecute these cases in either a criminal or civil forum, whichever is most effective and efficient to secure justice in the particular case. The benefit of this flexibility is not a new concept, and has been recognized and implemented in other areas of the law. (*See, e.g.*, Lab. Code, § 3820 [worker's compensation fraud]; Pen. Code, §§ 370-373a & Civ. Code, §§ 3479-3480 [public nuisance]; Fish & Game Code §§, 5650 & 5650.1 [water pollution].)
Not only would this flexibility improve enforcement efforts, but the criminal defense bar may also benefit from such flexibility. At present, all cases required to be referred to prosecutors must be treated criminally. Yet, criminal actions have substantially more negative unintended impacts on corporations than civil judgments -- including harm to bank covenants and insurance policies -- that can result in unnecessary harms to shareholders and corporate employees if a large criminal fine and judgment is assessed. These unintended harms can be avoided by assessing the exact same fine in the form of civil penalties in a civil action instead. Individual defendants could benefit from a civil judgment by not facing incarceration and not having a criminal record if convicted. The State also has a financial interest in limiting the expenses of

incarceration and the criminal justice system that can be furthered by a policy providing more civil enforcement remedies for prosecutors. In cases where justice can be achieved equally in either a civil or criminal forum, therefore, prosecutorial discretion in these cases could benefit all parties involved.

The Solution: This Resolution adds a new code section authorizing prosecutorial standing to seek civil penalties as an alternative to taking criminal action against culpable employers that violate worker safety laws and cause death or serious harm to their employees.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Kelly A. Ernby

RESOLUTION 12-04-2017

DIGEST
Equal Pay Act: Clarification of Accrual of Cause of Action
Amends Labor Code section 1197.5 to make the statute of limitations on state and federal wage discrimination claims consistent, so that the claim accrues with each discriminatory paycheck instead of when the wages are initially established or the discriminatory practice is first adopted.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 1197.5 to make the statute of limitations on state and federal wage discrimination claims consistent, so that the claim accrues with each discriminatory paycheck instead of when the wages are initially established or the discriminatory practice is first adopted. This resolution should be approved in principle because it assures that an employee who has been subjected to continuing wage discrimination does not lose the right to recover for harm that occurred outside the limitations period.

In *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618, the United States Supreme Court held that the statute of limitations for filing an equal-pay lawsuit before the Equal Employment Opportunity Commission (EEOC) began to run at the date the pay was agreed upon, rather than the date of the subsequent paychecks. One provision of the Lilly Ledbetter Fair Pay Act of 2009 (Pub. L. No. 111-2) overturned that decision, providing that the act is violated: (1) when a discriminatory compensation decision or other practice is adopted; (2) when a person becomes subject to a discriminatory compensation decision or other practice; or (3) when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid. (29 U.S.C. § 626(d)(3).)

This resolution brings the application of the limitations period under California's Equal Pay Act into conformity with the federal law and allows an injured employee to recover damages for discriminatory pay practices that occurred even if the discriminatory pay rate began before the limitations period.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1197.5 to read as follows:

§ 1197.5

(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than race or ethnicity, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a race- or ethnicity-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

(c) Any employer who violates subdivision (a) or (b) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages.

(d) The Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a) or (b). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (h).

(e) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years.

(f) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a) or (b) or that the employer is in violation of subdivision (k). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a), (b), or (k) until the division establishes the validity of the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(g) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages under subdivision (a) or (b), and in addition shall be entitled to recover costs of suit. The consent of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (h) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(h) An employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

(i) A civil action to recover wages under subdivision (a) or (b) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs. For purposes of this section, a cause of action to recover wages under subdivision (a) or (b) occurs when a wage decision or other practice which violates subdivision (a) or (b) is adopted, when an employee becomes subject to a wage decision or other practice which violates subdivision (a) or (b), or when an employee is affected by application of a wage decision or other practice which violates subdivision (a) or (b), including each time wages are paid, resulting in whole or in part from such a decision or other practice. An aggrieved employee may obtain relief as provided in subsections (g) and (h), where the wage decision or other practice which violates subdivision (a) or (b) that has occurred during the charge filing period is similar or related to unlawful employment practices with regard to the wage decision or other practice which violates subdivision (a) or (b) that occurred outside the time for filing a charge.

(j) If an employee recovers amounts due the employee under subdivision (c), and also files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (c), or the amounts recovered under federal law, whichever is less.

(k) (1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another

employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problems: The current law requires equal pay for employees who perform substantially similar work, when viewed as a composite of skill, effort, and responsibility. An aggrieved employee may commence action "two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs." *Labor Code section 1197.5*

California's Equal Pay Act has existed for decades. However, in 2009, The Lilly Ledbetter Fair Pay Act was signed into federal law, which reset the statute of limitations for filing an equal pay claim against an employer to reflect each time that an employee receives a paycheck, benefits or "other compensation." *42 U.S. 2000 §706 et.seq.*

Commencing January 1, 2016, California's Equal Pay Act was amended in order to provide more stringent protections for employees. However, the provision regarding the statute of limitations was never amended to reflect the principle that the statute of limitations should run from the time the employee receives their final paycheck, not from the time the discriminatory paycheck is issued. Other provisions of California law which protect employees from gender- and race-based pay differentials, such as the Fair Employment and Housing Act ("FEHA") adhere to the principals of the continuing violations doctrine, which provides that an employee claiming gender or racial discrimination can commence action outside of the statute of limitations period if the employee can show that the employer performed acts outside the limitations period that are sufficiently linked to unlawful conduct within the limitations period. *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031 at 1042.

As a result, it can be confusing for both employees and employers regarding their rights and record keeping responsibilities. Thus, Labor Code section 1197.5 should reflect the same provisions that are currently provided for under FEHA and the federal law.

The Solution: Amend Labor Code section 1197.5(i) to mirror 42 U.S. 2000 §706 (3)(A) and (B) which states:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

This amendment would bring the law in congruence with FEHA and the Lilly Ledbetter Fair Pay Act, and make clear that discriminatory claims under section 1197.5 "accrue" whenever an employee receives a discriminatory paycheck, as well as, when a practice or decision is adopted, or when a person becomes subject to or is otherwise affected by, the practice or decision. In effect, each discriminatory paycheck "resets" the relevant time limit for filing a claim.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule, other than those identified above.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Suzanne V. Chamberlain, Esq. and Melissa A. Petrofsky, Esq.

RESOLUTION 12-05-2017

DIGEST
Attorney's Fees: Awards for Employee in Whistleblower Action
Amends Labor Code section 1102.5 to provide that an employee who prevails in any whistleblower action against an employer (or person acting on behalf of the employer), shall be entitled to reasonable attorney's fees and costs, including expert witness fees.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
This resolution is similar to Resolution 03-05-2012, which was approved as amended, and to Resolution 09-02-2014, which was disapproved.

Reasons:
This resolution amends Labor Code section 1102.5 to provide that an employee who prevails in any whistleblower action against an employer (or person acting on behalf of the employer), shall be entitled to reasonable attorney's fees and costs, including expert witness fees. This resolution should be disapproved because it conflicts with current law and creates rights that already exist.

There are multiple problems with this resolution. First, it grants a private right of action that already exists under Labor Code section 1105 because that statute currently permits a private right of action based on employer's retaliation against employees who report the employer's illegal activities. Second, this resolution awards costs only to a prevailing plaintiff. This conflicts with Code of Civil Procedure section 1032 which awards costs to the prevailing party as a matter of right. Third, as the proponent points out, prevailing plaintiffs are already entitled to an award of attorney's fees for whistleblower claims under the Private Attorneys General Act (PAGA). Thus, there is no need to create an additional claim for attorney's fees.

This resolution does not explain, or cite to any authority to support why whistleblowers should be entitled to the same remedies as plaintiffs who bring Fair Employment and Housing Act (FEHA) discrimination claims given the difference between whistleblower and discrimination claims. The strong public policies against discrimination and harassment have been recognized, in part, by permitting the prevailing plaintiff to recover attorney's fees. (Gov. Code, § 12965, subd. (b).) However, Labor Code section 1102.5 is much broader because it protects not only retaliation when the whistleblower reports serious violations of state and federal law (such as dumping toxic chemicals in a lake), but also a violation of any local ordinance or regulation regardless of how minor the regulation is. When the complained-of violation is not a matter of public importance, the whistleblower has the right to recover all of her or his damages under Labor Code section 1102.5, but every complaint is not a matter of public importance that would merit recovery of attorney's fees.

Finally, a plaintiff with a whistleblower claim may choose either to pursue it as a civil lawsuit, or via the Labor Commissioner. There is no right to attorney's fees for proceedings before the Labor Commissioner. Were a plaintiff able to seek attorney's fees in court for whistleblower

retaliation claims without being allowed to do so, by bringing the same claims before the Labor Commissioner, the law would incentivize the filing of a lawsuit in our over-burdened courts over the more efficient administrative proceeding.

This resolution is related to Resolution 12-06-2017.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1102.5 to read as follows:

§ 1102.5

(a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950) of, or the physician-patient privilege of

Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

(h) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.

(i) For purposes of this section, "employer" or "a person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(j) An employee may bring a private action against an employer, or a person acting on behalf of the employer, for violations of this provision. Where liability has been established, the employee shall also be entitled to reasonable attorney's fees and costs, including expert witness fees.

(Proposed new language underlined; language to be deleted stricken)

PROPONENTS: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Labor Code section 1102.5 provides "whistle-blower" protections for employees disclosing a violation of a state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. This statute reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts, without fear of retaliation. (See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76-77.) However, the statute does not provide for attorney's fees for a prevailing plaintiff. The cost of bringing a civil action thus discourages whistle-blowing.

The Solution: This resolution would amend Labor Code section 1102.5 to add subdivision (j) to provide that an employee bringing a civil action against an employer (or person acting on behalf of the employer), shall, upon establishing liability, be entitled to reasonable attorney's fees and costs, including expert witness fees. This change is necessary to encourage employees to make disclosures of what they reasonably believe to be violation of state or federal statute, or violation of or noncompliance with a local, state, or federal rule or regulation.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Matthew A. Mallet

RESOLUTION 12-06-2017

DIGEST
Attorneys' Fees: Awards in Whistleblower Cases
Amends Labor Code section 1105 to authorize recovery of attorneys' fees by the prevailing employee in whistleblower retaliation lawsuits.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
This resolution is similar to Resolution 03-05-2012, which was approved as amended, and to Resolution 09-02-2014, which was disapproved.

Reasons:
This resolution amends Labor Code section 1105 to authorize recovery of attorneys' fees by the prevailing employee in whistleblower retaliation lawsuits. This resolution should be disapproved because it conflicts with current law and creates rights that already exist.

There are multiple problems with this resolution. First, it creates a private right of action that duplicates rights that already exist under Labor Code section 1105, which currently permits a private right of action based on employer's retaliation against employees who report the employer's illegal activities. Second, this resolution awards costs only to a prevailing plaintiff. This conflicts with Code of Civil Procedure section 1032 which awards costs to the prevailing party as a matter of right. Third, as the proponent points out, prevailing plaintiffs are already entitled to an award of attorney's fees for whistleblower claims under the Private Attorneys General Act (PAGA).

This resolution does not explain, or cite to any authority to support why whistleblowers should be entitled to the same remedies as plaintiffs who bring Fair Employment and Housing Act (FEHA) discrimination claims given the difference between whistleblower and discrimination claims. The strong public policies against discrimination and harassment have been recognized, in part, by permitting the prevailing plaintiff to recover attorney's fees. (Gov. Code, § 12965, subd. (b).) However, Labor Code section 1102.5 is much broader because it protects not only retaliation when the whistleblower reports serious violations of state and federal law (such as dumping toxic chemicals in a lake), but also a violation of any local ordinance or regulation regardless of how minor the regulation is. When the complained-of violation is not a matter of public importance, the whistleblower has the right to recover all of her or his damages under Labor Code section 1102.5, but every complaint is not a matter of public importance that would merit recovery of attorney's fees.

Finally, a plaintiff with a whistleblower claim for violation of statutes protecting payment of wages may choose either to pursue it as a civil lawsuit, or via the Labor Commissioner. There is no right to attorney's fees for proceedings before the Labor Commissioner. Were a plaintiff able to seek attorney's fees in court for whistleblower retaliation claims without being allowed to do

so, by bringing the same claims before the Labor Commissioner, the law would incentivize the filing of a lawsuit in our over-burdened courts over the more efficient administrative proceeding.

This resolution is related to Resolution 12-05-2017.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1105 to read as follows:

§ 1105

Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter. In civil action brought for violations of this chapter, the court shall award reasonable attorneys fees and costs to the prevailing party if any party to the action requests attorneys fee and costs upon initiation of the action. However, if the prevailing party in the court action is not an employee, attorneys fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: This is the whistleblower law, which prohibits employers from retaliating against an employee for disclosing any violation of the law against the employer. This statutory scheme provides for a private right of action, but there is no basis for the employee to recover their attorneys' fees. The employee then has to expend a significant amount of personal funds to challenge the illegal acts of their employer, or hire a contingency attorney who will take a significant cut of their damages, which is a disincentive to pursing this type of claim.

The Solution: This resolution authorizes the recovery of attorneys by the prevailing party. That recovery is mandatory, in the case of the employee, and is allowed for prevailing employers if the action is brought in bad faith, mirroring the language in Labor Code section 218.5, subdivision (a), which authorizes recovery of attorneys fees in action for nonpayment of wages.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 12-07-2017

DIGEST
FEHA: Change of Definition of Employer Under the Fair Employment and Housing Act
Amends Government Code section 12926 to change the definition of an employer under the Fair Employment and Housing Act to exclude a majority owner.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 12926 to change the definition of an employer under the Fair Employment and Housing Act to exclude a majority owner. This resolution should be disapproved because it does not change the definition of an employee as the proponent intended, but instead needlessly removes the majority owner of a business from the definition of employer.

Government Code section 12926, subdivision (d), provides the definition for employer under the Fair Employment and Housing Act. Specifically, subdivision (d) defines "employer" as "any person regularly employing five or more persons . . . . " While this resolution is well intended by seeking to remove the majority owner of a business from those counted as employees of said employer for the purposes of the Fair Employment and Housing Act, this resolution would instead exempt the majority owner from the definition of employer. There is no reasonable need to exclude a majority owner from the definition of employer because it would effectively eliminate many business owners from the definition of employer and would thus reduce the protections employees enjoy under the Fair Employment and Housing Act.

The desired change may be effected by adding part of the proposed language from this resolution to Government Code section 12926, subdivision (c), instead. This is the subdivision that lists parties exempt from the definition of "employee" for the purposes for the Fair Employment and Housing Act.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12926 to read as follows:

§ 12926

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of

notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached his or her 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by his or her parents, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, excluding any individual who owns more than fifty percent (50%) of the ownership interest in the employer, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:
"Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g) (1) "Genetic information" means, with respect to any individual, information about any of the following:

(A) The individual's genetic tests.

(B) The genetic tests of family members of the individual.

(C) The manifestation of a disease or disorder in family members of the individual.

(2) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(3) "Genetic information" does not include information about the sex or age of any individual.

(h) “Labor organization” includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(i) “Medical condition” means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, “genetic characteristics” means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(j) “Mental disability” includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) “Limits” shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) “Major life activities” shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

“Mental disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(k) “Military and veteran status” means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

(l) “On the bases enumerated in this part” means or refers to discrimination on the basis

of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status.

(m) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of "disability" used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(p) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by,

individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(q) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed. "Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.

(r) (1) "Sex" includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(s) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

(t) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(u) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(v) "National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: The Fair Employment Housing Act (FEHA) applies to employers with 5 or more employees, but is silent as to the application of FEHA if one of those 5 employees is the owner of the business. This results in uncertainly as to the application of FEHA where a business has four employees plus an owner who is also on payroll.

The Solution: This resolution would exclude a majority owner of the business (who is likely making the hiring and firing decisions anyway) as an employee for purposes of determining if FEHA applies. Since the definition of majority owner would be more than fifty percent, it could only exclude one employee from the count, but would provide guidance to small businesses in which the owner may be deemed an employee for purposes of FEHA.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION:
None known.

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RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 12-08-2017

DIGEST
Accrued Vacations: Employers Cannot Force Employees to Use
Amends Labor Code section 227.3 to prohibit employers from forcing an employee to use accrued vacation time.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 227.3 to prohibit employers from forcing an employee to use accrued vacation time. This resolution should be approved in principle because it prevents employers from circumventing prohibitions on "use it or lose it" vacation policies by forcing employees to use paid vacation time that they have earned.

California Labor Code section 227.3 was written broadly to ensure that all vested vacation time counts as "wages" earned by an employee, and all vacation time must be paid to an employee upon termination. (*People v. Bishop* (1976) 56 Cal.App.3d Supp. 8, 11-12.) Because accrued vacation time counts as wages earned, policies where an employee must use their vacation time by a certain date or forfeit vacation days, sometimes known as "use it or lose it" policies, are illegal in California as wage theft under Labor Code section 227.3.

This resolution closes a gap where employers can skirt Labor Code section 227.3 by forcing employees to use their vacation days against their will or by pre-scheduling an employee's vacation time. While there is a real benefit to an employer controlling the number of accrued vacation days amongst employees in order to prevent ballooning, and unexpected costs should layoffs be required, this practice prevents employees from saving vacation days for use when they see fit. In effect, this amounts to an employer having broad control over the wages of their employees, particularly managing when an employee may use them.

This resolution also creates balance for employers by specifically allowing all employers to "adopt policies that require an employee to use vested vacation during an unpaid leave of absence," and it specifically allows an employer to deny requests for vacation due to business necessity. Because this resolution protects the accrued vacation time, and therefore the wages, of employees while giving reasonable protections to employers, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 227.3 to read as follows:

§ 227.3

Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, an employer may not compel an employee to use vested vacation days, except that an employer may adopt policies that require an employee to use vested vacation during an unpaid leave of absence. Nothing herein prohibits the employer from denying requests for vacation on a specific date due to business necessity and offering alternative dates for the vacation request or limiting the amount of vacation that may be taken at any particular time. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: "Use it or lose it" vacation policies, where an employer offers paid vacation and then forfeits that vacation time if it is not used by a specific date, are illegal. Employers are trying to get around this prohibition created by case law and the Department of Labor Standards Enforcement, by forcing employees to take vacation time and "pre-scheduling" employee vacation time against the employees will so that all vacation is used before the anniversary date, regardless of whether the employee wants to take vacation or not.

The Solution: This resolution prohibits employers from forcing employees to take their accrued vacation against their will. Employers will still retain the right to deny vacation requests due to business necessity and offer alternative dates, as long as the employer does not compel the employee to take vacation time. In addition, employers may still provide, via policy, that employees have to use vested vacation time during an unpaid leave of absence (such as a medical leave), which is a common practice.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 12-09-2017

DIGEST
Employment Law: Misrepresentations to Prospective Employers
Amends Labor Code section 1050 to clarify that only intentional misrepresentations by a former employer are punishable.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 1050 to clarify that only intentional misrepresentations by a former employer are punishable. This resolution should be disapproved because the overarching thrust of the Labor Code is to assess strict liability for any violations of the Code, whether intentional or negligent.

The proponent states that the statute as written is ambiguous because it has been interpreted to apply to both intentional and negligent false representations. But it does not follow from this fact that the statute is ambiguous. The plain language of the existing statute applies to both intentional and negligent misrepresentations, and presumably the Legislature intended it be so.

The proponent argues that because the punishment for violation of section 1050 includes the sort of damages normally associated only with intentional acts, the statute should be amended to punish only intentionally false representations about a former employee. But numerous other sections of the Labor Code impose quasi-criminal penalties for actions that may not have been intentional by the employer. (See, e.g., Lab. Code, §§ 201, 202, 203, 204, relating to non-payment of wages.) Notable too is the fact that when the Legislature intended to punish only a willful or intentional act, it specifically so stated in the statute. (See, e.g., id., at § 210.) There is, therefore, nothing unusual about the fact that this section imposes quasi-criminal penalties for negligently false representations, especially considering the potentially serious consequences of such actions on the livelihood of the employee. Finally, limiting the application of the statute to only intentionally false representations will leave the employee with no remedy under the Labor Code. The employee's only recourse would be a general negligence action, which would render the current language of the statute redundant.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1050 to read as follows:

§ 1050

Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any ~~misrepresentation~~ knowingly false representation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: California law recognizes liability for two types of misrepresentations: intentional and negligent. The main differences between these two causes of action are the intent element (i.e., scienter) and damages. Intentional misrepresentation requires knowledge of falsity, whereas negligent misrepresentation requires only the lack of a reasonable ground for believing a statement to be true, even if the defendant honestly believed the representation to be true. (See, Civ. Code, §1710; cf. CACI 1900 and 1903.) Punitive damages and/or civil penalties are available for intentional misconduct but not for negligent misconduct. (See, e.g., *Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, 799.) Furthermore, in the absence of actual physical injury, emotional distress damages are not available in negligent misrepresentation actions. (*Id.*, 6 Cal.App.4th at 800.)

Labor Code section 1050 does not state whether liability under the statute requires a showing of intent. Accordingly, courts have allowed causes of action under the statute to proceed upon pleading and proof of only negligent conduct. However, the penalties for violations of section 1050 suggest that a showing of intent is required.

The Solution: Labor Code section 1050 is ambiguous and should be amended to clarify that liability under the statute requires intent, as implied by the punitive remedies provided under Sections 1050 and 1054. A violation of Section 1050 is a misdemeanor. For an action to have criminal liability, there must be mens rea, or intent, even if implied. Treble damages under Labor Code section 1054 are also a statutory remedy for violations of Section 1050. The primary purpose of treble damages under section 1054 is punitive. (See, *Marshall v. Brown* (1983) 141 Cal.App.3d 408, 419 (holding that a successful plaintiff under section 1050 must choose between punitive damages and treble damages under section 1054 because the primary purpose under both is the same).)

Such a clarification would also bring Section 1050 into alignment with other similar statutes and California Civil Jury Instructions (CACI). For example, Section 1050 is similar in its remedy to Labor Code section 970, which awards double damages as a remedy for "knowingly false representations" made to induce someone to relocate to accept employment. Section 970, which has a lower civil remedy (double damages) than Section 1050 (treble damages), has an express statutory intent requirement. Also, CACI No. 2711 provides that two elements of a cause of action under Section 1050 are knowledge of falsity at the time the representation was made and that the representation was made with the intent of preventing the plaintiff from obtaining employment. Though the "Directions for Use" indicate that it is unclear whether these two elements are necessary to this cause of action, they were likely included in the jury instruction because of the punitive remedies provided for violation of the statute and its similarity to other statutes with express intent requirements, such as section 970.

IMPACT STATEMENT
The resolution does not affect any other law, statute, or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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