October 23, 2003

NEW EMPLOYER LIABILITY FOR CUSTOMER HARASSMENT OF EMPLOYEES

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

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

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

For example, if a food server complains to her supervisor that a customer stared at her "in a sexual way" or commented that she was "sexy" and made her feel uncomfortable, is this actionable harassment or simply bad manners? If this is actionable harassment, what is the employer to do? Must the employer track down the customer and get his or her version of events? If the employer determines that the customer did in fact harass the employee, must the employer bar the customer from the premises or is it reasonable to simply warn the customer not to repeat the behavior? If the customer denies harassing the employee what must the employer do to avoid liability?

Additionally, employers who act decisively to prevent real or perceived harassment by customers may potentially be liable to customers for their actions. California law prohibits business establishments from discriminating against, boycotting, blacklisting, or refusing to buy from, contract with, sell to or trade with a person based on the person's race, creed, religion, color, national origin, sex, disability or medical condition. For illustration, assume that the customer in the example above has a physical or mental disability or another protected characteristic. If the employer bars the customer from returning to the restaurant for the alleged misconduct, the customer may well perceive that he is being denied access to the business establishment not because of his conduct, but because of his disability or other protected characteristic.

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

* * *

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

Los Angeles		**San Diego**		**San Francisco**	
Charles F. Barker	(213) 617.4168	Terry J. Chapko	(619) 338.6616	Douglas J. Farmer	(415) 774.2906
Elicia N. Bernstein	617.5582	David B. Chidlaw	338.6614	Rachelle Hong	774.2980
Geoffrey D. DeBoskey	617.5547	John D. Collins	338.6613	Lara Hutner	774.2903
David Fishman	617.4118	Julie A. Dunne	338.6510	Otis McGee, Jr.	774.3249
Jason R. Gasper	617.5499	John A. English	338.6533	Krista L. Mitzel	774.2997
Travis M. Gemoets	617.5468	Guy N. Halgren	338.6605	Raymond J. Ramsey	774.2972
Douglas R. Hart	617.5497	Samantha D. Hardy	338.6640	Kevin D. Reese	774.2989
Derek R. Havel	617.5424	Stacey E. James	338.6581	Michael K. Scarborough	774.2963
Kelly L. Hensley	617.5441	A. Andrew Peterson	338.6624	Amy K. Skryja	774.2993
Tracey A. Kennedy	617.4249	Mary P. Snyder	338.6503	Julie A. Wilkinson	774.2992
Melissa P. Lopez	617.4290	William V. Whelan	338.6588		
Richard L. Lotts	617.4119	Tara L. Wilcox	338.6608	**Del Mar Heights**	
Daniel McQueen	617.4270			Richard M. Freeman	(858) 720.8909
Kristine Moon	617.5523	**Orange County**		Matthew S. McConnell	720.8928
Sean Shahabi	830.2010	Greg S. Labate	(714) 424.2823	Carole M. Ross	720.8925
Richard J. Simmons	617.5518	Mary E. Lynch	424.2826		
Dianne Baquet Smith	617.4265	Ryan D. McCortney	424.2830		
Beth S. Sonnenklar	617.4187				
Brandyn Stedfield	617.5514	**Santa Barbara**			
Keith R. Thorell	617.5544	Jeffrey Dinkin	(805) 879.1828		
Natalie C. Trask	617.4229	Deborah Martin	879.1838		
Jennifer B. Zargarof	617.4243				

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

LOS ANGELES (213) 620-1780
SAN FRANCISCO (415) 434-9100
ORANGE COUNTY (714) 513-5100
SAN DIEGO (619) 338-6500
SANTA BARBARA (805) 568-1151
WASHINGTON, D.C. (202) 218-0000
WEST LOS ANGELES (310) 824-0097
DEL MAR HEIGHTS (858) 720-8900

WWW.SHEPPARDMULLIN.COM