



JOB KILLER

FLOOR ALERT

January 9, 2020

TO: Members, California State Assembly

SUBJECT: **AB 628 (BONTA) EMPLOYMENT: VICTIMS OF SEXUAL HARASSMENT: PROTECTIONS OPPOSE – JOB KILLER – AS AMENDED MAY 16, 2019**

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 628 (Bonta)**, which has been labeled a **JOB KILLER**, which would create inconsistent definitions of sexual harassment under the Labor Code and Government Code, permit an unlimited leave of absence on employers for employees and their family members, and create another pathway for costly litigation against employers for issues that are already protected under the Fair Employment and Housing Act (FEHA).

While we fully support efforts to eliminate harassment in the workplace, this bill would create significant challenges for employers to manage their workforce and comply with existing anti-harassment requirements. **AB 628** failed passage on the Assembly Floor on May 29, 2019, and no amendments have been made to the bill since that time.

AB 628 Creates an Inconsistent Definition of Sexual Harassment in the Labor Code Versus the Government Code That Will Create Confusion:

AB 628 amends current law to provide protected leave for employees and family members of “sexual harassment” victims.

FEHA (see Government Code Sections 12900, *et seq.*) currently defines and regulates sexual harassment in the workplace. While sexual harassment is always inappropriate, it is not always unlawful. In order for sexual harassment to be actionable, it must be either *quid pro quo* harassment or harassment that creates a hostile work environment.

Quid pro quo harassment occurs when a supervisor trades a work benefit for sexual favors. Sexual harassment that creates a hostile work environment occurs when the behavior is so severe or pervasive it alters the conditions of the work environment. Sporadic, isolated events are not enough to establish a hostile work environment under FEHA unless sufficiently severe. See *Brennan v. Townsend & O’Leary Enterprises, Inc.*, 199 Cal.App.4th 1336 (2011). What constitutes actionable harassment is determined by the Department of Fair Employment and Housing (DFEH) during its investigation of a claim, or in civil court if DFEH does not make a determination.

Examples of conduct that can lead to sexual harassment include:

Unwanted sexual advances, or visual, verbal, or physical conduct of a sexual nature, including: (A) leering, making sexual gestures, displaying of sexually suggestive objects, pictures, cartoons, or posters; (B) derogatory comments, epithets, slurs, or jokes, verbal abuse of a sexual nature, or graphic verbal commentaries or sexually degrading words used to describe an individual; (C) touching, assault, impeding, or blocking movements; (D) offering employment benefits in exchange for sexual favors; or (E) making or threatening retaliatory action after receiving a negative response to sexual advances.

Instead of simply adopting the standard set forth in FEHA for consistency, **AB 628** only includes the examples of what could be considered sexual harassment, which does not distinguish between actionable harassment versus inappropriate behavior. For example, the bill defines sexual harassment to include leering or the displaying of cartoons. Being shown an inappropriate cartoon on an isolated occasion is inappropriate but does not likely constitute actionable harassment.

Under **AB 628**, this one incident or even an allegation that the incident occurred, would be enough to justify an unlimited leave of absence for the employee and employee’s family members based upon the limited definition of “sexual harassment.” While this behavior is unacceptable, it is not legally actionable and should not provide the basis for an unlimited, protected leave of absence.

Providing an Unlimited Leave to Employees and Family Members Will Create a Significant Burden on all Employers:

AB 628 extends unlimited job protected leave to immediate family members of victims. Immediate family member is broadly defined to include spouse, child, stepchild, foster parent, mother, stepmother, father, or stepfather, registered domestic partner, grandparent, grandchild, or sibling.

This type of leave will create a significant burden on employers to accommodate and is clearly ripe for abuse.

Employees are already entitled to take a leave of absence for the medical needs of a family member under California's Paid Sick Leave law, the California Family Rights Act (CFRA) or the federal Family and Medical Leave Act (FMLA). A victim of actionable sexual harassment, as defined under FEHA, who has a medical condition as a result of the harassment, could take job protected leave for that condition. Expanding an unlimited, mandatory leave of absence for all employees and family members, is simply too high of a burden on employers.

AB 628 Unnecessarily Expands Employer Liability:

As previously discussed, FEHA regulates sexual harassment in the workplace and already provides protections to victims. However, **AB 628** places sexual harassment leave in the Labor Code. This will leave employers with trying to decipher two potentially conflicting statutes and ultimately additional litigation.

Moreover, **AB 628** unnecessarily expands employer liability. FEHA already allows victims who prevail in a sexual harassment suit to obtain compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney's fees. If sexual harassment protection is added to the Labor Code, employers are not only exposed to FEHA remedies, but also now lawsuits under the Private Attorneys General Act (PAGA).

PAGA allows an individual to pursue a "representative action" on behalf of similarly aggrieved employees without being subject to the strict filing requirements of a class action. If there are multiple Labor Code violations, penalties are stacked and very quickly add up. In addition, if the employee recovers any dollar amount, the employee is entitled to attorney's fees, which adds another layer of cost onto the employer. Therefore, if addressed at all, sexual harassment leave is more appropriate in the Government Code in order to prevent confusion for employers and unnecessary liability.

AB 628 Potentially Extends the Statute of Limitations for Sexual Harassment Discrimination and Retaliation Related Claims to Potentially Four Years, Which Contradicts the Current Statute of Limitations Under FEHA:

AB 628 contradicts the current statute of limitations prescribed by FEHA for sexual harassment discrimination and retaliation. As expressly stated in Government Code Section 12965(b), for an individual to file a discrimination, harassment or retaliation complaint in civil court, he or she must first exhaust his or her administrative remedy by filing a claim with DFEH. The current statute of limitations for filing a claim with DFEH is three years from the most recent harassing or discriminatory event. See Gov't. Code § 12965(b).

By placing sexual harassment protections in the Labor Code, **AB 628** potentially extends the statute of limitations for sexual harassment related complaints to potentially four years depending on the type of lawsuit filed. See Code Civ. Proc. §§ 335, 338; see *also* Bus. & Prof. Code § 17208. Additionally, as previously discussed, **AB 628** provides the Labor Commissioner with jurisdiction over these complaints. We believe jurisdiction over sexual harassment complaints should remain with DFEH in order to prevent confusion and contradictory regulations.

Employers Cannot Be Required to Guarantee Confidentiality:

AB 628 requires employers to maintain confidentiality of an employee requesting leave under this provision. However, sexual harassment complaints are much different from domestic violence, sexual assault or stalking claims because they often occur in the workplace. When an accusation of sexual harassment is made, employers have a legal duty to conduct an investigation. Investigations must follow certain

parameters to be considered legally adequate and the DFEH has implemented these requirements through regulations. See Cal. Code Reg. tit. 2 § 11023.

Per these regulations, once a complaint of harassment is made, employers must provide a timely response and conduct an impartial and timely investigation by qualified personnel. This means interviewing the victim, the alleged harasser and any potential witnesses. Therefore, an employer cannot ensure confidentiality if they are needing to interview and notify their own employees about what is going on.

Employers Will Be in Violation of FEHA If They Are Prohibited from Conducting an Investigation:

AB 628 requires employers to provide victims of sexual harassment with a leave of absence. However, if an employee is out on leave, the employer may not be able to conduct a timely investigation as required by FEHA. When an employee is on leave, the employee is not permitted to work and the employer is prohibited from requiring the employee to work. A request to interview the employee as a part of an investigation impedes on the employee's rights regarding leave and exposes employers to possible wage and hour lawsuits. **AB 628** does not address this issue and leaves the employer in the position of having to choose between violating FEHA's investigation requirements or violating the proposed sexual harassment protected leave.

For these reasons, we must **OPPOSE AB 628** as a **JOB KILLER**.

Sincerely,



Laura Curtis
California Chamber of Commerce

Brea Chamber of Commerce
California Ambulance Association
California Apartment Association
California Association of Joint Powers
Authorities
California Association of Winegrape Growers
California Attractions and Parks Association
California Farm Bureau Federation
California Landscape Contractors Association
California League of Food Producers
California Manufacturers & Technology
Association
California News Publishers Association
California Professional Association of Specialty
Contractors
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Association of Counties
California State Council for the Society for
Human Resource Management

California Travel Association
Camarillo Chamber of Commerce
Civil Justice Association of California
CSAC Excess Insurance Authority
El Centro Chamber of Commerce
Greater Coachella Valley Chamber of
Commerce
Greater Conejo Valley Chamber of Commerce
League of California Cities
Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business
North Orange County Chamber
Official Police Garages of Los Angeles
Orange County Business Council
Oxnard Chamber of Commerce
Palm Desert Area Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Western Growers Association
Wine Institute

cc: Che Salinas, Office of the Governor
Ellen Cesaretti, Assembly Republican Caucus

LC:ll