



# Corfee Stone & Associates

## Employment Law Alert !

Updates you need to know but in a millisecond...

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### SPRING CLEANING OF YOUR HANDBOOK

With the weight of employment law ever increasing, you should probably be thinking about updating or creating an employee handbook. Corfee Stone & Associates has developed a basic handbook for \$800.00 The price of updating existing ones varies due to the length, type and possible necessary edits/additions.

and be comfortable with maintaining this look while wearing this specific uniform." That policy was applicable to both sexes. There were also gender specific standards for the males and female beverage servers. Female beverage servers were required to wear stockings, colored nail polish, hair that was "teased, pulled and styled." By comparison male beverage servers were prohibited from wearing makeup or colored nail polish and they were required to maintain short hair cuts and neatly trimmed fingernails. A subsequent policy developed which required female beverage servers to wear makeup. The plaintiff was told it was mandatory, and she either had to wear it or give up her position, or apply for a new position that didn't require makeup. She did not wear it and was terminated and therefore sued.

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**"I am dressed for success! Of course, my idea of success may not be exactly the same as yours."**

### DRESSING UP YOUR EMPLOYEE

By: Catherine Corfee

An employer's policy governing its employee's appearance in the workplace is not sex discrimination, so long as both males and females must comply. You may require your female employees to wear make up and your male employees to have short hair and neatly trimmed fingernails.

Recently, a Nevada District Court held that an employer's requirement that women wear makeup did not constitute sex discrimination under Title VII of the federal anti-discrimination law. The female plaintiff argued that the requirement of wearing makeup discriminated against her based on sex when she was a bartender at Harrah's Casino in Reno. She refused to be "dolloed up." Harrah's imposed a specific "appearance standard" policy for employees to be "well groomed, appealing to the eye, be firm and body toned,

Title VII of the Federal Anti Discrimination Act prohibits employers from discriminating against any individual with respect to compensation, conditions, or privileges of employment because of each individuals...sex. 42U.S.C. section2000e-2(a)(1). The plaintiff had to prove that the makeup policy treated her differently because of her sex. The court held that grooming and dress standards are entirely outside the purview of Title VII because Congress only intended Title VII to discrimination based on "immutable characteristics" associated with a workers sex. That means a characteristic that cannot be changed, like ones gender. Grooming and dress standards only regulated "mutable" characteristics such as hair length, etc.

The court stated that to determine whether an appearance policy treated women and men unequally, it would have to determine the actual impact it had on both males and females. The court stated that it must weigh the cost and time necessary for each employee to comply with the policy. The plaintiff could not prove that the burden of wearing make up was more stringent than the "personal best" policy imposed on males (neatly trimmed fingernails, and short hair cuts). She was unable to prove that this makeup policy unequally impacted women more than men.

She tried to argue that wearing makeup was a burden and expensive but she lacked evidence. The fact that men were not required to wear makeup was not enough because employers may apply different appearance standards to each sex along as those standards are equal and do not result in unequal burdens on each sex. For example in one

case where the employer had different weight standards for males and females, the female had to maintain less weight than the men, and that was an unequal burden.

**Lesson Learned:** If you're an employer and you would like to establish a grooming/personal appearance standard, you need to be sure that the standard does not require too stringent a burden for one sex as opposed to the other sex, but you can apply different standards between the sexes. There is no bright line test, so consulting with your employment attorney is probably advisable.

## **PREGNANCY LEAVE ACTS**

By: Catherine Corfee

With the advent of more and more women working, most employers are accommodating women who become pregnant. There is a myriad of laws to consider in understanding your obligations and the rights of a pregnant employee. This article briefly addresses some of the pregnancy leave laws.

- **Pregnancy Disability Leave**

In California, employers who have five or more full or part time employees must provide pregnancy leave for those who are "disabled" or have a related medical condition. There is no length of service required to be eligible for this leave. The employee is entitled to pregnancy/disability leave even if she has worked 1 day. The term "disabled" or having a "related medical condition" means the employee is unable to work and perform her essential functions without undue risk to herself. As an example, morning sickness could be a disability. The employee is eligible for up to 4 months of unpaid pregnancy leave. You are entitled to a Doctor's report substantiating ones disability

- **Federal and California Leave Acts**

Under the Federal Family Medical Leave Act and the California Family Rights Act, a pregnant employee is entitled to up to 12 work weeks of leave in a 12 month leave year. To be eligible, however, the employee must have been employed for at least 12 months, worked 1250 hours before the leave and been employed at a work site where the employer employs 50 or more employees within 75 miles of that work site.

The Federal and California Leave Acts are different with respect to pregnant employees. Under the Federal Leave Act, an employee who is incapacitated due to pregnancy or prenatal care is considered to have a "serious health condition" and therefore qualifies for the federal leave of 12 work weeks. By comparison, the California Act's definition of "serious health condition" excludes pregnancy, child birth, or related medical condition. Instead, it provides an employee with 12 work weeks of "bonding" leave after the birth of a child.

Under the Federal and California Leave Acts, the employer can require that an employee use her accrued

vacation and sick leave. The employer must maintain and pay for any group health care plans as if the employee were still working. However, if the employee was providing a contribution, the employee must continue such. The employee must be reinstated to her job or an identical job. The employer can not treat the employee as having taking a break in service for vesting in eligibility purposes regarding retirement plans.

In sum, if you have 50 or more employees, it is very possible that a pregnant employee may take up to 12 work weeks under the Federal Leave Act for having a serious health condition, have an additional 12 weeks for bonding leave after the baby is born under the California Act, and take up to 4 months of leave if the employee is disabled.

## **WAGE AND HOUR UPDATE: PROPOSED CHANGES TO MEAL AND REST PERIOD REQUIREMENTS**

By Jeet Sen

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**"If I'm creative with my flex time, parental leave, job sharing and sabbaticals, I think I can take the next 30 years off and then retire as a millionaire!"**

The Division of Labor Standards Enforcement ("DLSE") is attempting to clarify employers' responsibilities regarding their employees' meal and rest periods. The DLSE had initially established an emergency regulation with some clarification on December 10, 2004. However, 10 days later, the DLSE withdrew its emergency regulation and replaced it with a proposed regulation under its normal rule making process. This proposed regulation will not become final and effective until after some public comment and approval. Therefore, existing law governs.

The DLSE feels clarification is necessary because of inconsistent interpretation of the meal and rest period requirements that has resulted in confusion as to when and how employers must provide meal and rest periods for their employees. The DLSE believes that this confusion resulted in the imposition of penalties on many employers, an increase of lawsuits regarding meal and rest periods, and employers' use of strict policies that denies employees the flexibility of scheduling meal periods to their satisfaction.

To help cure this confusion, the DLSE "proposed" the following clarifications (**IT IS NOT LAW YET!**).

*Meal Requirement Applicable Before the 6<sup>th</sup> Hour*

Under the current Labor Code section 512(a) and Industrial Welfare Commission (IWC) Orders, employers must give employees at least a 30 minute meal period after 5 hours of work. Previous DLSE opinion letters interpreted the code too strictly and stated that the meal period must start before the beginning of the fifth hour. This resulted in employers being penalized even where an employee's meal period began only five minutes after the fifth hour of the workday. This in turn caused employers to force their employees to take meal periods at times when employees did not want to. It denies employees the flexibility to take meal periods when they feel comfortable. To cure this, the DLSE proposes that the initial meal period in a work day can commence at any time before the start of the 6<sup>th</sup> hour of work.

*Does the Failure to Provide a Meal Period result in a Wage or Penalty?*

Under the existing California Labor Code section 226.7(b), if an employer fails to provide an employee with a meal or rest period as required, the employer must pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the meal or rest period was not provided. The grey issue is whether this additional pay is a wage or a penalty. A clarification is needed because claims for wages have a 3 year statute of limitations, and claims for penalties have a 1 year statute of limitations. The new proposal clarifies this additional payment as a penalty, not a wage.

*Criteria for Meeting the Meal Period Requirements*

The new proposal also establishes a criteria which, if met, would deem the employer to have met the requirements for meal periods. The current law states that an employer cannot allow employees to work more than five hours without providing a meal period. The employer has to prove that it provided the meal period. This caused employers to compel their employees to take meal periods at times when the employees may not have wanted to. The DLSE proposes that an employer will be deemed to have provided a meal period per Labor Code section 512 if the employer does all of the following: (a) "makes the meal period available to the employee and affords the opportunity to take it;" (b) posts the applicable IWC order; and (c) "maintains accurate time records for covered employees." 8 Cal. Code Regs. §13700(b)(1). As an additional precaution, the employer may also inform an employee in writing when a meal period is available and have the employee acknowledge such in writing.

This proposed regulation will be the subject of public hearings throughout February, 2005. For specific dates, visit the DLSE's web page at [www.dir.ca.gov/dlse/MRPRegs.htm](http://www.dir.ca.gov/dlse/MRPRegs.htm). After holding public comment, the regulation may be approved by the Office of Administrative Law to become effective. However, employers should take the following actions now: (1) clearly post the appropriate Wage Order regarding meal periods; (2) maintain accurate time records of when employees are working and when they are on a meal period; and (3) distribute written descriptions of when and how employees can take their meal periods and have them sign an acknowledgment form that they were informed of their meal period rights. As an option, you can provide a statement on their time cards where they acknowledge that they have taken their meal and rest periods which is to be initialed by each employee.

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***Kudos to Catherine Corfee  
for successfully defending a Labor Code  
132a Workers Compensation Claim at  
trial this month.  
Victory is in the success!***

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**Workers Compensation Alert**

Many times an employee will file a claim within the workers compensation system alleging psychological injury due to harassment. While many workers compensation claims are settled, some attorneys attempt to require the employee to dismiss any and all separate actions, including civil actions. Recently, the Supreme Court in Claxton v. Waters, 34 Cal 4th 376 (2004) held that the workers compensation judge has no power or scope to release claims outside of the workers compensation system,. Therefore a compromise and release form completed by the parties which dismisses separate civil actions will not be enforceable in the future. The court specifically said its new decision was not retroactive.

***Lesson Learned:*** In the future, when settling your workers compensation case, and there is a claim of harassment or discrimination, the parties should execute a separate agreement between themselves concerning the waiver of right to file and prosecute a separate civil action. The employee should be provided consideration (compensation) separate and apart from the compromise and release to ensure that the waiver is enforceable. It is best to put some of the compromise and release money into releasing the workers compensation claims, but reserving some of that money to apply to a separate contract between the parties waiving future claims.

## HARASSMENT TRAINING REQUIRED FOR 50 OR MORE EMPLOYEES

By Catherine Corfee

Now in 2005, employers with 50 or more employees are required to train supervisors and management on harassment prevention for at least 2 hours every 2 years per Government Code section 12950.1. The standards that you must include cover State and Federal Anti Harassment law. You can train in hours or hire an expert. Our firm is providing such training.

### HOW DO YOU TRAIN MANAGEMENT?

We recommend some of the following topics.

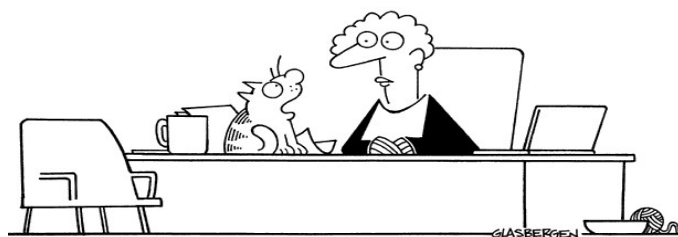
1. Teach management and supervisors the distinction between harassment and discrimination. Discrimination involves making an adverse employment decision such as termination, failure to promote, disciplining and/or lack of wage increases. By comparison, harassment is inappropriate touching, comments, actions, drawings because of an individual's gender that creates a hostile work environment. It could be inappropriate e-mails, jokes and cartoons, foul language, and/or sexual comments.
2. Let supervisors know they can be personally liable, which means their assets can be attached.
3. Have a policy or show the supervisors your written policy against harassment. There should be a chain of command for an employee regarding a complaint procedure. In other words, if the direct supervisor is harassing the employee, that employee should have an opportunity to complain to someone other than the harassing supervisor.
4. Management must immediately respond to harassment complaints even if the complaining employee does not want an investigation. The code requires a "prompt" investigation. Being too busy is no excuse, including during the holidays.
5. The investigation must be "thorough." This means that the employee and the alleged perpetrator must be interviewed. Each person should be asked what witnesses they think you should talk to and what, if any, documents need to be looked at to make the investigation thorough and prompt. Then the investigator should actually do what was asked of them.
6. Once the investigator comes to a conclusion, a decision needs to be made as to whether illegal sexual harassment occurred or more isolated inappropriate conduct occurred. If it is believed to be

harassment, supervisors and management need to consider actions to end it including but not limited to disciplinary action, termination, separating the parties, etc.

7. Management should diary their calendars to follow up with the alleged harassed employee, depending on the outcome of the investigation, to see how things are going. You need to make sure the offensive conduct has ended and the employee is not experiencing a hostile work environment.

Our firm is providing harassment prevention training at a minimal cost. Handouts are provided. If you are interested please contact Ms. Corfee at (916) 487-5441.

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"I don't mind the affectionate baby talk at home,  
but in the office it could be misinterpreted  
as sexual harassment!"

Catherine M. Corfee is a principal owner of  
Corfee Stone & Associates,  
a firm which exclusively represents employers in all  
facets of employment matters, businesses regarding  
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