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RETROACTIVITY OF THIRD PARTY HARASSMENT LAW QUESTIONED

In 2003, the California Legislature, in what was described as a "clarification" of existing law, amended Government Code section 12940 to expressly provide that an employer may be liable for the acts of sexual harassment by non-employees. The application of this amendment, however, has resulted in conflicting opinions by two different Appellate Courts, leaving the validity and constitutionality of the retroactive application of this amendment in question.

By way of background, in *Salazar v. Diversified Paratransit, Inc.*, a female employee filed suit against her employer and supervisor alleging sexual harassment by a customer in violation of the California Fair Employment and Housing Act ("FEHA"), Government Code section 12940. On appeal, the Appellate Court held that the FEHA did not create employer liability when a non-employee client or customer sexually harasses an employee. The Supreme Court granted the employee's petition for review.

In response to the ruling in *Salazar v. Diversified Paratransit, Inc.*, the California Legislature in 2003 amended Government Code section 12940, expressly providing that an employer may be liable for the acts of non-employees, with respect to acts of sexual harassment of an employee or applicant where the employer, or its agents or supervisors, knew or should have known of the conduct and failed to take immediate and appropriate corrective action. The California Legislature indicated that the purpose behind the amendment was to "clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Salazar v. Diversified Paratransit, Inc.*"

Following the amendment of Government Code section 12940, the California Supreme Court sent the *Salazar v. Diversified Paratransit, Inc.* case back to the Appellate Court with instructions to reconsider its ruling in light of the California Legislature's amendment to Government Code section 12940. The Appellate Court held that the amendment was a clarification and not a change in existing law, and therefore held that the employer could be held liable for the sexual harassment of an employee by a customer.

Similarly, in *Carter v. California Dept. of Veterans Affairs*, a female nurse filed suit against the Department of Veterans Affairs alleging that the employer was liable under Government Code section 12940 for the harassing conduct of a patient. At trial, a jury found that the employee was subjected to a hostile work environment and that the employer either knew or should have known about the harassment and that the employer failed to take immediate and appropriate steps to correct the situation. The Appellate Court reversed the trial court's judgment on the grounds that Government Code section 12940 did not impose employer liability for non-employee harassment. The California Supreme Court granted plaintiff's request for review, and like *Salazar*, remanded the case to the Appellate Court when the California Legislature amended Government Code section 12940.

Unlike the *Salazar* Court, the Appellate Court in *Carter v. California Dept. of Veterans Affairs*, held that the California Legislature's amendment to Government Code section 12940 was neither expressly retroactive nor merely a clarification of existing law, but rather a substantive change in existing law. The Court held that it was constitutionally objectionable to apply the amendment retroactively. The Appellate Court based its decision on the fact that nothing in the former Government Code section 12940 provided for employer liability for harassment committed by non-employees and that the retroactive application of Government Code section 12940 violates due process by imposing liability on employers before being fairly apprised of the law affecting their conduct.

Ultimately, the California Supreme Court will have to reconcile these conflicting Appellate Court decisions and determine whether the amendment to Government Code section 12940 was a mere clarification of existing law allowing for the retroactive application of the statute, or whether it was a substantive change in the law allowing only for the prospective application of the statute. Regardless of the outcome, however, it is important for all employers to remember that as of January 1, 2004, employers may be held liable for the acts of non-employees, with respect to acts of sexual harassment of an employee, applicant or persons providing services pursuant to a contract where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

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