AB 1617 – (Cindy Montanez, D-39th AD)
Workplace Harassment Investigation & Employee Discipline
Fact Sheet

(NOTE: AB 1617 DID NOT PASS. Since then however, we have garnered the support of California and National LULAC, League of United Latin American Citizens, in our effort to revive its provisions)

AB 1617 will insure that in-house investigators or licensed investigators who are hired to investigate harassment in the workplace are competent to do the job, independently, and objectively, as mandated by California case law. Whether they are or not will be "considered" in determining whether the employer response to a complaint of harassment was reasonable. Likewise, the law sets forth a variety of employer responses to the remedy of workplace harassment, mandating only that those issues be "considered" when an evaluation of the reasonableness of the response is made.

What AB 1617 does not do:

- There is no employer mandate to hire an outside investigator
- There is no mandate that the employer use any particular type of remedy for harassment (but specific employer remedies will be "considered" in determining the reasonableness of the action)
- There is no mandate that an employer use a competent investigator (but the employer's use of one or non-use of one will be "considered" in determining the reasonableness of the investigation)

Bill Sponsor: San Fernando Valley/Northeast Los Angeles Chapter of N.O.W.
Confirmed Support: Alameda Corridor Jobs Coalition, California NOW, San Gabriel Valley/Whittier Chapter of N.O.W., California Association of Licensed Investigators, Los Angeles South Chapter of N.O.W., Sonoma County Central Committee of the Peace & Freedom Party, League of United Latin American Citizens; Bay Area Chapter 9 to 5; National Center for Lesbian Rights

The Need for Legislation

Existing law [Section 12940(j) Government Code] requires that employers take all "reasonable" steps to prevent harassment in the workplace, but nowhere is there a statutory definition of "reasonable." Irresponsible employers have exploited this lack of definition to do little or nothing, which only leads to a burden on the taxpayers when their failure to stop harassment leads to the filing of charges with the federal EEOC and the California Dept of Fair Employment & Housing. There is an additional burden to the court system when those charges are not administratively rectified and the victim sues. In some cases, the alleged perpetrator sues, contending wrongful termination because of an incompetent or unreasonable investigation or that the remedy imposed was not properly justified.

A body of law has built up both outside and inside California detailing what went wrong with some investigations [See ***Valdez vs. Church's Fried Chicken, Inc.***, 683 F.Supp. 596 (Western District, Texas, 1988), ***Fuller v. City of Oakland***, 47 F 3rd 1523 (9th Circuit, 1995), ***Kestenbaum v. Pennzoil Co***., 108 N.M. 20, 28, 766 P.2d 280, 288 (1988) ***Llewellyn v. Celanese Corp.***, 693 F. Sup. 369 (Western District of North Carolina, 1988). A seminal California Appeals Court case,

Silva v. Lucky Stores, Inc. (1998) 65 Cal.App.4th 256, 76 Cal.Rptr.2d 382 detailed what went right with an investigation and the appropriate remedies taken.

One of the effects of ***Silva*** was to protect responsible employers, like Lucky Stores, who took their responsibilities under law seriously and conducted independent, objective, and fair investigations. The effect of the case on irresponsible employers has been to make them go through the motions of an investigation and then engage in the same kind of remedies that they always used anyway, usually, one of several actions short of actual discipline of a harasser. Typical irresponsible employer responses include transferring the victim to other duties or changing his/her working hours (often disrupting their child care arrangements or reducing their income) or giving the perpetrator a better job to avoid the perpetrator filing a frivolous lawsuit. These are not legally permissible actions because they do not impose actual discipline: ***Intlekofer v. Turnage***, 973 F.2d 773, 777 (9th Cir. 1992) held that the employer "must take some form of disciplinary action" to prevent harassment from occurring.

Another effect of ***Silva*** was for irresponsible employers to rely upon incompetents to perform their investigations. In many cases, a manager with no experience at investigation is used. Since their only concept of how to perform an investigation is usually what the see on television in *NYPD Blue* or *Law & Order*, rather than reasonable fact-finding exercises, these efforts tend to turn into hostile environments for the victim as well as the perpetrator and serve no legitimate purpose.

Silva also spurred a cottage industry of unlicensed Human Resources Consultants masquerading as experienced and competent investigators, especially for sexual harassment investigations. Their haphazard inquiries have lead to an increasing record of fiascoes for the employers themselves and generally have gotten the employers sued. The Bureau of Security & Investigative Services has issued cease and desist orders in a number of such cases for unlicensed investigative activity. Had these been situations of unlicensed people doing a proper job, they never would have come to the attention of the agency in the first place; the agency learned about them only when somebody else who was licensed, experienced and competent had to be brought in by one side or the other to clean up the mess they'd left behind.

Requiring an in-house investigator to be competent is not an unreasonable burden on a responsible employer. As one example of training available at a modest cost, the Department of Fair Employment & Housing in partnership with the non-profit Southern California Employers Roundtable (SCERT) conducted a seminar in sexual harassment investigation at the very reasonable fee of $35.00 which also included extensive reference materials. AB 1617 also requires consideration of whether the in-house or a contracted licensed investigator adhered to privacy and honesty standards which already apply to licensed investigators. The only conceivable argument against such criteria is that the employer wants to get sued.

The experience of the Bill's sponsor and other supporting organizations is that the smaller the organization, the less likely for on-the-job harassment to be a problem that involves formal investigation. Such complaints rarely come to the attention of the Bill's sponsor (in fact, the Bill's sponsor, SFV/NELA NOW, knows of only one such complaint, which involved a small subsidiary office of an out-of-state corporation, in Tulare County). Every complaint ever received and processed by SFV/NELA NOW has involved a major employer for whom conduct proper investigation and remedy would not have imposed any significant economic burden.

For further information:
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MODEL ANTI-HARASSMENT POLICY
(Based upon AB 1617 [2003-2004 Legislative Session])

SECTION 1. It is the policy of (employer or government entity) that:

(a) Employees who, in good faith, complain about harassment in the workplace should not be penalized for complaining.

(b) Employees who harass others in the workplace should not be rewarded for their misconduct.

(c) Remedies for harassment in the workplace should be effective and serve as a deterrent to future acts of misconduct.

(d) An employee's status as spouse of an employer, supervisor, or manager should not affect the right of that employee to a workplace free from a hostile working environment; entering into a contract of marriage does not mean that a person gives up his or her right to be free from harassment and/or discrimination in the workplace or to oppose unlawful practices pursuant to California Government Code Section 12940(h).

SECTION 2. The reasonable steps required by Section 12940(j) of the Government Code to prevent workplace harassment from occuring shall include but not be limited to the following:

In determining whether an supervisory employees have taken all reasonable steps to prevent harassment from occurring, the following shall be considered:

(A) Whether management personnel acted in good faith in making employment-related decisions.

(B) Whether management employees undertook an investigation that was reasonable and appropriate under the circumstances, including a consideration of the following issues:

(i) If the investigator was an employee of _____, whether the investigator was sufficiently unbiased to conduct a fair, objective, and truthful investigation and whether the investigator implemented adequate safeguards to insure employee privacy.

(ii) If the investigator was an independent contractor hired by _____, whether the investigator was a licensed private investigator pursuant to Article 3 (commencing with Section 7520) of Chapter 11.3 of Division 3 of the Business and Professions Code and complied with subdivisions (a) and (b) of Section 7539 of the Business and Professions Code.

(iii) Whether the background, education, training, and experience of the investigator complied with industry standards of competence for the investigation of harassment.

(iv) Whether allegations of prior misconduct by the alleged perpetrator were investigated.

(C) Whether, after the investigation and prior to taking corrective action, managers had a good faith, reasonable belief that an employee engaged in misconduct and took corrective action based on reasonable conclusions supported by substantial evidence that was not trivial, arbitrary, capricious, or pretextual.

(D) Whether the corrective action taken by management was reasonable under the circumstances, including a consideration of the following issues:

(i) Whether actual discipline was imposed on the perpetrator of harassment, and not merely a change in the perpetrator's duties or working hours.

(ii) Whether the supervisor changed the duties or working hours of the perpetrator or the victim.

(iii) Whether, if the supervisor changed the victim's duties or working hours, the change was satisfactory to, and did not cause annoyance or hardship to, the victim.

(iv) Whether, if the supervisor changed the duties or working hours of the perpetrator, the change was, in fact, corrective action that the perpetrator did not welcome.

(v) Whether the corrective action was reasonable in light of any past misconduct.

(vi) Whether any prior corrective action had been ineffective in deterring the current misconduct.

(vii) Whether an alternative to the action taken by the supervisor would have imposed a significant economic burden on _____.

(E) The provisions of (D) shall not be construed to prohibit, prevent, or interfere with a supervisor’s decision to take interim measures, pending the outcome of an investigation conducted with all deliberate speed, in order to separate the person alleging harassment from the alleged perpetrator of harassment.