

Recent Reforms Leave "Sue Your Boss" Intact

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As a condition of the budget compromise this past summer, Governor Schwarzenegger won minor revisions to the "Sue Your Boss" law. However, employers can take little comfort in these revisions. Apparently, it will take an entirely new legislature to restore the balance to California labor law.

Provisions of the Original "Sue Your Boss" Law

As initially passed in 2002, the "Sue Your Boss" law allowed any aggrieved employee to sue his employer for any technical violation of any provision in the Labor Code. If a violation is established, and if the Code provides no other penalty, the "Sue Your Boss" law provides for penalties of \$100 per aggrieved employee per pay period for the initial violation and \$200 per aggrieved employee per pay period for later violations, as well as attorney's fees for the employee if any violation is established. The only bar to a "Sue Your Boss" claim is when an agency cites an employer for the violation.

"Sue Your Boss" expresses a lack of confidence in the administrative agencies enforcing California's labor laws, and turns enforcement over to plaintiff's lawyers, called "Private Attorneys General." That label simply doesn't fit. Plaintiff's attorneys work for their own profit, not the public interest. Labor law requires neutral administrative bodies to enforce the law in the public interest.

2004 Amendments

On August 11, 2004 the Governor signed SB 1809 which amends "Sue Your Boss." It breaks down Labor Code violations into three categories. For all three classes of violations, employees must give written notice to the employer and the LWDA before filing suit. If

the LWDA issues a citation on the complaint, the employee may not sue under the "Sue Your Boss" law. If LWDA does not issue a citation, the employees can file suit nonetheless, and keep 25 percent of any penalties won in the litigation.

The first class specifies over a hundred sections of the Labor Code, including the requirements for meal and break periods, most other wage and hour provisions, the provision of the Agricultural Labor Relations Acts barring discrimination based on union activity, and a variety of other Labor Code violations. In these cases, the employee may bring suit unless the LWDA issues a citation within 120 days of the employee's notice. The employer may not avoid suit by curing the violation.

Alleged OSHA violations in the second class must first be presented to the employer and Cal-OSHA. If Cal-OSHA issues a citation, the employee may not file suit. If Cal-OSHA does not issue a citation, the employee may proceed directly to sue the employer. Again, the employer may not avoid suit by curing the violation.

The third class is violations of the Labor Code not found in the first two classes. In this class, the employer has 33 days after written notice to cure the alleged violation. To certify that correction, the employer must give written notice describing the actions taken. If the employee disputes the employer's notice, he must give another notice to the employer and the agency, which shall decide within 17 calendar days whether or not the employer has corrected the violation. If the employee disputes that decision, he can file a lawsuit against the employer.

To correct the most extreme provisions of "Sue Your Boss": SB 1809 provides that employees may not sue for violations of posting, agency reporting, notice or filing requirements aside from mandatory reports of on-the-job injuries and mandatory payroll reporting.

Retroactivity

SB 1809 expressly applies the amendments to all pending and new actions under "Sue Your Boss." For pending actions under "Sue Your Boss," employees must give notice to the employer and agency, and then amend their complaints to allege such notices.

SB 1809 and Unfair Labor Practices

"Sue Your Boss" continues to distort California labor law and expose employers to excessive risks. For example, a decision by the ALRB's General Counsel not to prosecute an unfair labor practice charge used to be the end of the matter. No longer. Even after the General Counsel finds no cause to prosecute an unfair labor practice, individual employees, whether or not sponsored by labor unions, may file suit on the charge. Unlike ALRB prosecutions, employee suits for the same charges can win attorney's fees. In the first weeks after the Governor signed SB 1809, a plaintiff's attorney brought suit in Monterey County Superior Court on an unfair labor practice charge. The Court stayed the lawsuit while the General Counsel investigates, but if the General Counsel dismisses the charge, the suit will proceed in Superior Court.

Employers have no comparable right to bring suit against labor unions when the General Counsel declines to prosecute the union for an unfair labor practice.

"Sue Your Boss" destroys the finality of administrative proceedings and tilts the playing field further in favor of employees. In spite of the recent amendments, it appears "Sue Your Boss" will continue to allow plaintiff's lawyers to hijack California labor law for their private purposes. ■