

RESOLUTION 04-01-2018

DIGEST

Protected Leave: Private Right of Action, Including Attorney’s Fees

Amends Labor Code section 230 to create an express private right of action, including the right to recover attorney’s fees, for violation of employees’ statutory rights.

STATEMENT OF REASONS

The Problem: *Rosales v. Moneytree, Inc.* (2015 WL 7721329; see also 2015 Cal. App. Unpub. LEXIS 8694), notes that there is no authority on whether Labor Code section 230 creates a private right of action. That statute already exists to prohibit employers from discharging or otherwise discriminating against an employee for taking time off of work for jury duty, for a crime victim to comply with a subpoena, or for a victim of domestic violence to obtain a TRO or attend other hearings. Without an enforcement mechanism, this statute is useless.

The Solution: This recognizes a private right of action created by the statutes and authorizes payment of attorneys’ fees for the prevailing employee. This language mirrors other statutes found in that Article of the Labor Code. Although there is an enforcement mechanism through the Division of Labor Standards Enforcement, employees are at the mercy of the DLSE deciding whether to pursue a claim. This gives employees the control over his case.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 230 to read as follows:

- 1 § 230
- 2 (a) An employer shall not discharge or in any manner discriminate against an employee
- 3 for taking time off to serve as required by law on an inquest jury or trial jury, if the employee,
- 4 prior to taking the time off, gives reasonable notice to the employer that the employee is required
- 5 to serve.
- 6 (b) An employer shall not discharge or in any manner discriminate or retaliate against an
- 7 employee, including, but not limited to, an employee who is a victim of a crime, for taking time
- 8 off to appear in court to comply with a subpoena or other court order as a witness in any judicial
- 9 proceeding.
- 10 (c) An employer shall not discharge or in any manner discriminate or retaliate against an
- 11 employee who is a victim of domestic violence, sexual assault, or stalking for taking time off
- 12 from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary
- 13 restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or
- 14 welfare of the victim or his or her child.
- 15 (d) (1) As a condition of taking time off for a purpose set forth in subdivision (c), the
- 16 employee shall give the employer reasonable advance notice of the employee’s intention to take
- 17 time off, unless the advance notice is not feasible.
- 18 (2) When an unscheduled absence occurs, the employer shall not take any action against
- 19 the employee if the employee, within a reasonable time after the absence, provides a certification
- 20 to the employer. Certification shall be sufficient in the form of any of the following:

21 (A) A police report indicating that the employee was a victim of domestic violence,
22 sexual assault, or stalking.

23 (B) A court order protecting or separating the employee from the perpetrator of an act of
24 domestic violence, sexual assault, or stalking, or other evidence from the court or prosecuting
25 attorney that the employee has appeared in court.

26 (C) Documentation from a licensed medical professional, domestic violence counselor, as
27 defined in Section 1037.1 of the Evidence Code, a sexual assault counselor, as defined in Section
28 1035.2 of the Evidence Code, licensed health care provider, or counselor that the employee was
29 undergoing treatment for physical or mental injuries or abuse resulting in victimization from an
30 act of domestic violence, sexual assault, or stalking.

31 (3) To the extent allowed by law and consistent with subparagraph (D) of paragraph (7)
32 of subdivision (f), the employer shall maintain the confidentiality of any employee requesting
33 leave under subdivision (c).

34 (e) An employer shall not discharge or in any manner discriminate or retaliate against an
35 employee because of the employee's status as a victim of domestic violence, sexual assault, or
36 stalking, if the victim provides notice to the employer of the status or the employer has actual
37 knowledge of the status.

38 (f) (1) An employer shall provide reasonable accommodations for a victim of domestic
39 violence, sexual assault, or stalking who requests an accommodation for the safety of the victim
40 while at work.

41 (2) For purposes of this subdivision, reasonable accommodations may include the
42 implementation of safety measures, including a transfer, reassignment, modified schedule,
43 changed work telephone, changed work station, installed lock, assistance in documenting
44 domestic violence, sexual assault, or stalking that occurs in the workplace, an implemented
45 safety procedure, or another adjustment to a job structure, workplace facility, or work
46 requirement in response to domestic violence, sexual assault, or stalking, or referral to a victim
47 assistance organization.

48 (3) An employer is not required to provide a reasonable accommodation to an employee
49 who has not disclosed his or her status as a victim of domestic violence, sexual assault, or
50 stalking.

51 (4) The employer shall engage in a timely, good faith, and interactive process with the
52 employee to determine effective reasonable accommodations.

53 (5) In determining whether the accommodation is reasonable, the employer shall consider
54 an exigent circumstance or danger facing the employee.

55 (6) This subdivision does not require the employer to undertake an action that constitutes
56 an undue hardship on the employer's business operations, as defined by Section 12926 of the
57 Government Code. For the purposes of this subdivision, an undue hardship also includes an
58 action that would violate an employer's duty to furnish and maintain a place of employment that
59 is safe and healthful for all employees as required by Section 6400 of the Labor Code.

60 (7) (A) Upon the request of an employer, an employee requesting a reasonable
61 accommodation pursuant to this subdivision shall provide the employer a written statement
62 signed by the employee or an individual acting on the employee's behalf, certifying that the
63 accommodation is for a purpose authorized under this subdivision.

64 (B) The employer may also request certification from an employee requesting an
65 accommodation pursuant to this subdivision demonstrating the employee's status as a victim of
66 domestic violence, sexual assault, or stalking. Certification shall be sufficient in the form of any

67 of the categories described in paragraph (2) of subdivision (d).

68 (C) An employer who requests certification pursuant to subparagraph (B) may request
69 recertification of an employee's status as a victim of domestic violence, sexual assault, or
70 stalking every six months after the date of the previous certification.

71 (D) Any verbal or written statement, police or court record, or other documentation
72 provided to an employer identifying an employee as a victim of domestic violence, sexual
73 assault, or stalking shall be maintained as confidential by the employer and shall not be disclosed
74 by the employer except as required by federal or state law or as necessary to protect the
75 employee's safety in the workplace. The employee shall be given notice before any authorized
76 disclosure.

77 (E) (i) If circumstances change and an employee needs a new accommodation, the
78 employee shall request a new accommodation from the employer.

79 (ii) Upon receiving the request, the employer shall engage in a timely, good faith, and interactive
80 process with the employee to determine effective reasonable accommodations.

81 (F) If an employee no longer needs an accommodation, the employee shall notify the
82 employer that the accommodation is no longer needed.

83 (8) An employer shall not retaliate against a victim of domestic violence, sexual assault,
84 or stalking for requesting a reasonable accommodation, regardless of whether the request was
85 granted.

86 (g) (1) An employee who is discharged, threatened with discharge, demoted, suspended,
87 or in any other manner discriminated or retaliated against in the terms and conditions of
88 employment by his or her employer because the employee has taken time off for a purpose set
89 forth in subdivision (a) or (b) shall be entitled to reinstatement and reimbursement for lost wages
90 and work benefits caused by the acts of the employer.

91 (2) An employee who is discharged, threatened with discharge, demoted, suspended, or in
92 any other manner discriminated or retaliated against in the terms and conditions of employment
93 by his or her employer for reasons prohibited in subdivision (c) or (e), or because the employee
94 has requested or received a reasonable accommodation as set forth in subdivision (f), shall be
95 entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts
96 of the employer, as well as appropriate equitable relief.

97 (3) An employer who willfully refuses to rehire, promote, or otherwise restore an
98 employee or former employee who has been determined to be eligible for rehiring or promotion
99 by a grievance procedure or hearing authorized by law is guilty of a misdemeanor.

100 (h) (1) An employee who is discharged, threatened with discharge, demoted, suspended,
101 or in any other manner discriminated or retaliated against in the terms and conditions of
102 employment by his or her employer because the employee has exercised his or her rights as set
103 forth in subdivision (a), (b), (c), (e), or (f) may file a complaint with the Division of Labor
104 Standards Enforcement of the Department of Industrial Relations pursuant to Section 98.7.
105 Alternatively, an aggrieved employee may bring a civil action in a court of competent
106 jurisdiction against the employer or other person violating this article. If the employee prevails,
107 the court may award reasonable attorneys' fees.

108 (2) Notwithstanding any time limitation in Section 98.7, an employee may file a
109 complaint with the division based upon a violation of subdivision (c), (e), or (f) within one year
110 from the date of occurrence of the violation.

111 (i) An employee may use vacation, personal leave, or compensatory time off that is
112 otherwise available to the employee under the applicable terms of employment, unless otherwise

113 provided by a collective bargaining agreement, for time taken off for a purpose specified in
114 subdivision (a), (b), or (c). The entitlement of any employee under this section shall not be
115 diminished by any collective bargaining agreement term or condition.

116 (j) For purposes of this section:

117 (1) “Domestic violence” means any of the types of abuse set forth in Section 6211 of the
118 Family Code, as amended.

119 (2) “Sexual assault” means any of the crimes set forth in Section 261, 261.5, 262, 265,
120 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, or 311.4 of
121 the Penal Code, as amended.

122 (3) “Stalking” means a crime set forth in Section 646.9 of the Penal Code or Section
123 1708.7 of the Civil Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION

None known.

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