

RESOLUTION 04-02-2018

DIGEST

Domestic Violence Victim Leave: Private Right of Action Including Attorney’s Fees
Amends Labor Code section 230.1 to create an express private right of action, and to allow recovery of attorney’s fees, for violating an employee’s statutory rights.

STATEMENT OF REASONS

The Problem: Rosales v. Moneytree, Inc. (2015 WL 7721329) notes that there is no authority on whether Labor Code Section 230.1 creates a private right of action. That statute already exists to prohibit employers from discharging or otherwise discriminating against an employee who is a victim of domestic violence for taking time off of work to receive medical attention, counseling or other services related to the domestic violence.

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 230.1 to read as follows:

- 1 § 230.1
- 2 (a) In addition to the requirements and prohibitions imposed on employees pursuant to
- 3 Section 230, an employer with 25 or more employees shall not discharge, or in any manner
- 4 discriminate or retaliate against, an employee who is a victim of domestic violence, sexual
- 5 assault, or stalking for taking time off from work for any of the following purposes:
- 6 (1) To seek medical attention for injuries caused by domestic violence, sexual assault, or
- 7 stalking.
- 8 (2) To obtain services from a domestic violence shelter, program, or rape crisis center as
- 9 a result of domestic violence, sexual assault, or stalking.
- 10 (3) To obtain psychological counseling related to an experience of domestic violence,
- 11 sexual assault, or stalking.
- 12 (4) To participate in safety planning and take other actions to increase safety from future
- 13 domestic violence, sexual assault, or stalking, including temporary or permanent relocation.
- 14 (b) (1) As a condition of taking time off for a purpose set forth in subdivision (a), the
- 15 employee shall give the employer reasonable advance notice of the employee’s intention to take
- 16 time off, unless the advance notice is not feasible.
- 17 (2) When an unscheduled absence occurs, the employer shall not take any action against
- 18 the employee if the employee, within a reasonable time after the absence, provides a certification
- 19 to the employer. Certification shall be sufficient in the form of any of the categories described in
- 20 paragraph (2) of subdivision (d) of Section 230.
- 21 (3) To the extent allowed by law and consistent with subparagraph (D) of paragraph (7)

22 of subdivision (f) of Section 230, employers shall maintain the confidentiality of any employee
23 requesting leave under subdivision (a).

24 (c) An employee who is discharged, threatened with discharge, demoted, suspended, or in
25 any other manner discriminated or retaliated against in the terms and conditions of employment
26 by his or her employer because the employee has taken time off for a purpose set forth in
27 subdivision (a) is entitled to reinstatement and reimbursement for lost wages and work benefits
28 caused by the acts of the employer, as well as appropriate equitable relief. An employer who
29 willfully refuses to rehire, promote, or otherwise restore an employee or former employee who
30 has been determined to be eligible for rehiring or promotion by a grievance procedure or hearing
31 authorized by law is guilty of a misdemeanor.

32 (d) (1) An employee who is discharged, threatened with discharge, demoted, suspended,
33 or in any other manner discriminated or retaliated against in the terms and conditions of
34 employment by his or her employer because the employee has exercised his or her rights as set
35 forth in subdivision (a) may file a complaint with the Division of Labor Standards Enforcement
36 of the Department of Industrial Relations pursuant to Section 98.7. Alternatively, an aggrieved
37 employee may bring a civil action in a court of competent jurisdiction against the employer or
38 other person violating this article. If the employee prevails, the court may award reasonable
39 attorneys' fees.

40 (2) Notwithstanding any time limitation in Section 98.7, an employee may file a
41 complaint with the division based upon a violation of subdivision (a) within one year from the
42 date of occurrence of the violation.

43 (e) An employee may use vacation, personal leave, or compensatory time off that is
44 otherwise available to the employee under the applicable terms of employment, unless otherwise
45 provided by a collective bargaining agreement, for time taken off for a purpose specified in
46 subdivision (a). The entitlement of any employee under this section shall not be diminished by
47 any term or condition of a collective bargaining agreement.

48 (f) This section does not create a right for an employee to take unpaid leave that exceeds
49 the unpaid leave time allowed under, or is in addition to the unpaid leave time permitted by, the
50 federal Family and Medical Leave Act of 1993 (29 U.S.C. Sec. 2601 et seq.).

51 (g) For purposes of this section:

52 (1) "Domestic violence" means any of the types of abuse set forth in Section 6211 of the
53 Family Code, as amended.

54 (2) "Sexual assault" means any of the crimes set forth in Section 261, 261.5, 262, 265,
55 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, or 311.4 of
56 the Penal Code, as amended.

57 (3) "Stalking" means a crime set forth in Section 646.9 of the Penal Code or Section
58 1708.7 of the Civil Code.

59 (h) (1) Employers shall inform each employee of his or her rights established under this
60 section and subdivisions (c), (e), and (f) of Section 230 in writing. The information shall be
61 provided to new employees upon hire and to other employees upon request.

62 (2) The Labor Commissioner shall develop a form that an employer may use to comply
63 with the notice requirements in paragraph (1). The form shall set forth the rights and duties of
64 employers and employees under this section in clear and concise language. The Labor
65 Commissioner shall post the form on the commissioner's Internet Web site to make it available
66 to employers who are required to comply with this section. If an employer elects not to use the
67 form developed by the Labor Commissioner, the notice provided by the employer to the

68 employees shall be substantially similar in content and clarity to the form developed by the
69 Labor Commissioner. The Labor Commissioner shall develop the form and post it in accordance
70 with this paragraph on or before July 1, 2017.

71 (3) Employers shall not be required to comply with paragraph (1) until the Labor
72 Commissioner posts the form on the commissioner's Internet Web site in accordance with
73 paragraph (2).

(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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