

# State Regulations Update

## ***Antibullying Legislation—A Growing National Trend in the New Workplace***

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In the past five years, advocates in states across the United States have been pushing for workplace antibullying legislation, modeled after the Healthy Workplace Bill (HWB).<sup>1</sup> From 2003 through 2008, 13 states have proposed some form of workplace antibullying legislation that would make it an unlawful employment practice to subject an employee to an abusive work environment. Employers would be held vicariously liable for violations of the law by their employees. Depending on the circumstances, remedies could include reinstatement, removal of the offending employee, lost wages, emotional-distress damages, and punitive damages.

Opponents of workplace antibullying laws fear such legislation will open the floodgates and increase employment litigation, generating additional costs for employers in an already fragile economy. Proponents of workplace antibullying laws, on the other hand, generally argue that the high costs of employee turnover and the decreased productivity when bullying on the job persists make these laws worthwhile.

Although no state has passed legislation yet, employers and counsel should understand what the laws, if enacted in their states, provide. Lawmakers continue to pursue the passage of workplace antibullying legislation, and enactment may be just around the corner in some jurisdictions.

### **FEDERAL ANTIBULLYING LAW**

Federal law clearly prohibits workplace harassment when it is based on a legally protected category, such as, for example, race or sex.<sup>2</sup> Indeed, employers are already required to take

prompt, corrective action when employees are subjected to unwelcomed behavior based on a protected status. Generic harassment, however, does not command the same legal obligations of employers. There are no specific federal laws that prohibit general workplace bullying. In fact, the Supreme Court has warned us that Title VII does not set forth a general civility code for the American workplace.<sup>3</sup>

## STATE ANTIBULLYING EFFORTS

Obviously, states may enact their own laws regarding employees' working conditions, including laws that afford workers more extensive rights than those provided under federal law. As a result, 13 states have made efforts to prohibit general workplace bullying and to hold employers liable when it occurs.

Most of the proposed legislation mirrors the HWB. To date, California, Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon, Vermont, and Washington have all proposed legislation to make bullying in the workplace unlawful.

### California

In 2003, California was the first state to introduce antibullying legislation.<sup>4</sup> California's bill mirrored the HWB and made it unlawful to subject an employee to an "abusive work environment," defined as a workplace where an employee is subjected to abusive conduct so severe that it causes physical or psychological harm. "Abusive conduct" is defined as conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Employers would be vicariously liable for acts of employees. Retaliation against an employee who opposes prohibited conduct would be prohibited.

Under the bill, employers would be entitled to affirmative defenses—namely, that (1) the employer exercised reasonable care to prevent and promptly correct the abusive conduct and the injured employee unreasonably failed to take advantage of the employer's preventative/corrective measures<sup>5</sup>; (2) a negative employment decision was made pursuant to legitimate business interests; and (3) the complaint is based on the employer's reasonable investigation of potentially illegal or unethical activity.<sup>6</sup>

Under the proposed bill, in the absence of a negative employment action, the employer's liability is limited to \$25,000 in emotional distress damages. Also, punitive damages would not be available.<sup>7</sup> If there is a negative employment action, an employee could get reinstatement, back pay, front

pay, removal of the offending employee, punitive damages, medical expenses, and/or emotional-distress damages from the employer.

The statute of limitations would be one year after the last act.<sup>8</sup>

## Connecticut

Connecticut was the twelfth state to introduce antibullying legislation. In 2007, Senate Bill 371 was introduced, followed by Senate Bill 60 in 2008. As with California's proposed legislation, the gist of the bill is to create a private cause of action for workplace bullying. Connecticut's bill differs from the California bill in that it does not limit liability to \$25,000 in emotional-distress damages when there has been no negative employment action.<sup>9</sup> Employers are broadly defined as "any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, the state, any political subdivision of the state, any governmental agency, or any other entity that employs persons."

The statute of limitations is also one year from the date of the last act.

## Hawaii

Hawaii was the third state to introduce workplace-bullying legislation.<sup>10</sup> Nonetheless, there has been activity on this front just in the past year. The latest language generally follows the HWB, making it unlawful to subject an employee to an "abusive work environment" and allowing employers to be held vicariously liable for the actions of other employees.<sup>11</sup> Employers are afforded several affirmative defenses, including that it made reasonable efforts to prevent and correct abusive conduct and that the employee unreasonably failed to take advantage of these efforts. In cases in which the employer took no adverse employment action, liability would be limited to \$25,000.

Unlike legislation in other states, however, Hawaii's bill allows for a three-year statute of limitations.

## Kansas

In 2006, Kansas was the eighth state to introduce a bill. Its provisions are similar to the legislation introduced in California.<sup>12</sup> The proposed legislation in Kansas creates a private right of action for employees who have been subjected to abusive conduct at work. Abusive conduct is defined as "conduct . . . in the workplace, with malice, that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests."

All remedies provided for by the bill are in addition to those provided under

the state's workers' compensation act. However, the law clarifies that an employee who elects to pursue his or her workers' compensation remedies may not later bring an action under the antibullying legislation for the same underlying behavior.

## **Massachusetts**

Massachusetts became the sixth state to address the issue of workplace bullying.<sup>13</sup> In 2005, it introduced legislation instructing the state division of occupational health to study the effects of workplace bullying. That legislation also instructed the division to develop a program requiring employers with 50 or more employees to establish a policy defining "psychological harassment" and preventing its occurrence.

## **Missouri**

In 2006, Missouri became the seventh state to introduce workplace-bullying legislation.<sup>14</sup> Its language follows that of Kansas and the other states that have mirrored the HWB.

## **Montana**

Montana introduced antibullying legislation in 2007,<sup>15</sup> becoming the eleventh state to do so. Its statute generally mirrors the HWB with one exception: it places an affirmative duty on employers to investigate if an employee provides notice that a third party is engaging in repeated acts of malice toward the employee while the employee is performing work-related duties. Malice is defined as "the desire to see another person suffer physical, psychological, or economic harm," without justification. If the investigation indicates that the third party has indeed acted with malice toward the employee, the employer is required to take action.

## **New Jersey**

In 2006, New Jersey became the tenth state to introduce legislation.<sup>16</sup> Its legislation is also modeled on the Healthy Workplace Bill, making it an unlawful employment practice for an employer to subject an employee to abusive conduct or to permit an abusive work environment. One major difference between the New Jersey bill and the other state bills is that an employer who knowingly and willingly violates the bill will be liable for no more than \$25,000—regardless of whether a negative employment action was taken.

## **New York**

New York became the ninth state to craft workplace antibullying legislation.<sup>17</sup> Introduced in 2006, New York's bill generally mirrors the Healthy Workplace Bill proposed in other states. Accordingly, the bill makes it unlawful to subject an employee to an abusive work environment.

## **Oklahoma**

In 2004, Oklahoma became the seventh state to introduce a bill.<sup>18</sup> Antibullying legislation was again introduced in 2007.<sup>19</sup> The legislation was titled the "Abusive Work Environment Act" and mirrors the legislation introduced by California.<sup>20</sup> Like most of the other introducing states, it arms employers with several affirmative defenses and, when no adverse employment action has been taken, limits an employer's liability for emotional-distress damages to \$25,000.

## **Oregon**

Oregon became the fifth state to introduce a bill in 2005,<sup>21</sup> with subsequent legislation introduced in 2007.<sup>22</sup> Oregon's legislation differs from that introduced in most other states in that it would make it unlawful to "subject an employee or permit an employee to be subjected to harassment, intimidation or bullying in the workplace."<sup>23</sup> These terms are defined to mean "any persistent verbal or physical act of an employer or employee, unrelated to the employer's legitimate business interests, that a reasonable person would find threatening, intimidating, humiliating, hostile or offensive."<sup>24</sup> The act provides no specific affirmative defenses.<sup>25</sup>

## **Vermont**

In 2008, Vermont became the thirteenth state to propose antibullying legislation.<sup>26</sup> The bill would make it unlawful to subject an employee to an abusive work environment. Like Oregon's, however, Vermont's bill contains no affirmative defenses specific to the antibullying provision.

## **Washington**

In 2005, Washington became the fourth state to introduce a workplace antibullying law.<sup>27</sup> Washington's bill is largely identical to that proposed in California and several other states. However, a recent version of the bill,

introduced in 2008, requires a plaintiff to exhaust all administrative remedies before filing suit.<sup>28</sup>

## CONCLUSION

Employers must be mindful of possible upcoming obligations to provide a bully-free workplace and what that entails. Staying ahead of the curve is wise. As always, the safest way to avoid any harassment lawsuit involving bullying is to train supervisors and managers regarding workplace behavior and provide examples of what is considered inappropriate. Another important measure employers can take is revising their policies to include prohibitions against harassment and bullying of any kind. Employers should then take appropriate corrective action to end misbehavior when it occurs, regardless of whether a legally protected status is the cause.

## NOTES

1. The Healthy Workplace Bill, drafted by David Yamada, a professor at Suffolk University Law School, was created as a model for use by the Workplace Bullying Institute-Legislative Campaign.
2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), et seq.
3. *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 1998 (1998).
4. G.A. 1582, 2003-04 Reg. Sess. (Ca. 2003).
5. *Id.* This defense would not be available, however, if the abusive conduct culminates in a negative employment action.
6. *Id.*
7. *Id.* This limitation on liability applies to the employer only. It would not, for example, limit the offending employee's liability.
8. *Id.*
9. S. 60, Feb. Sess. (Conn. 2008).
10. S. 2353, 22d Leg. (Haw. 2004).
11. H.R. 1806, 24th Leg. (Haw. 2007).
12. H.R. 2990, 2006 Sess. (Kan. 2006).
13. H.R. 3809, 184th Leg. (Mass. 2005).
14. H.R. 1187, 93d Leg., 2d Reg. Sess. (Mo. 2005).
15. H.R. 0213.01., 60th Leg. (Mont. 2007).
16. G.A. 3590, 212th Leg. (N.J. 2006).
17. G.A. 11565, 228th Leg. Sess. (N.Y. 2006).
18. H.R. 2467, 49th Leg., 2d Sess. (Okla. 2004).
19. H.R. 1467, 51st Leg., 1st Sess. (Okla. 2007).
20. *Id.*
21. H.R. 2639, 73d Leg. (Or. 2005).
22. S. 1035, 74th Leg. (Or. 2007).

23. Id.
24. Id.
25. Id.
26. S. 312 (Vt. 2008).
27. H.R. 1968, 59th Leg., 2005 Reg. Sess. (Wash. 2005).
28. H.R. Substitute 2142, 60th Leg., 2008 Reg. Sess. (Wash. 2008).

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