



Employment Auditor's Notepad

NEW PROTECTIONS FOR WHISTLEBLOWERS

The American Recovery and Reinvestment Act of 2009, signed into law by President Obama is the largest economic stimulus bill since the Great Depression. Among its provisions are additional whistleblower protections that apply to any "contractor, subcontractor, grantee, or recipient" of stimulus funds and any "person acting directly or indirectly in the interest of an employer receiving covered funds," and any contractor or subcontractor of the state or local government receiving stimulus funds.

The act prohibits retaliation against any employee who reports "gross mismanagement," "gross waste," or an "abuse of authority." The employee concerns covered by the Act are vague and have yet to be further defined by caselaw, leaving much room for argument and lawsuits. Disclosures of such concerns to law enforcement or regulatory agencies, Congress, courts, grand juries, an inspector general, and even the employee's supervisor are covered.

Employers covered by the Act need to expand their procedures for investigations of employee complaints of discrimination and sexual harassment and ensuring non-retaliation to broader issues of mismanagement.

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A Single Failure to Provide Reasonable Accommodation Subjects Employer to Liability

THE CALIFORNIA COURT OF APPEAL REQUIRES A PERFECT RECORD
The California Court of Appeals recently upheld a judgment against the Albertsons' grocery chain for failing, on a single occasion, to provide a reasonable accommodation to a store employee. The judgment was confirmed despite Albertsons' history of providing reasonable accommodations to that employee. The plaintiff, a grocery clerk, suffered from chronic dry mouth, and had to drink water constantly. This in turn required her to urinate frequently—sometimes as often as every 45 minutes. Under California's Fair Employment and Housing Act ("FEHA"), when an employee has a disability or medical condition, the employer must make "reasonable accommodations" for that employee so that he or she may continue to work. Here, Albertsons accommodated the clerk by allowing her to have a drink at her check stand, and covering her stand whenever she needed to use the bathroom. When the clerk needed to use the bathroom, she was to call her supervisor and the supervisor would cover for her. Albertsons had granted the clerk extra breaks as an accommodation, and had implemented a system for the clerk to obtain the accommodation.

On one occasion, the clerk and her supervisor were the only employees in the store during a night shift. The clerk requested a restroom break, and the supervisor asked her to wait while the supervisor helped unload a delivery truck. The clerk agreed to wait. Sometime later, the clerk again asked for a break, but the supervisor informed her that the truck was still being unloaded and the delivered merchandise could not be left unattended. The clerk eventually urinated on herself while standing at the cash register. When her supervisor returned, the clerk left the store and went home. She never returned to work for Albertsons.

The Court of Appeal held that this single failure of the supervisor constituted a denial of reasonable accommodation and upheld a jury verdict of \$200,000 for this incident, rejecting Albertsons' argument that this single failure to accommodate was "trivial."

This case emphasizes the need for employers to realistically evaluate reasonable accommodations and provide managers with training regarding implementation of agreed-upon accommodations.