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NEW LEGISLATION UPDATE

Public Access to Disciplinary Records; Workplace Discrimination and Harassment

By Robert Rabe, Esq.

With the signing of Senate Bill 1421 by Governor Brown, California will join almost every other state and allow, on a limited basis, public access to public safety officer disciplinary records. Effective January 1, 2019, SB 1421 will allow members of the public, (which includes the press), to obtain certain law enforcement agency personnel records that were previously available only through the *Pitchess* procedure, (if at all), by making a request under the California Public Records Act ("CPRA").

With this change in the law, a deluge of CPRA requests is anticipated after the new year. SB 1421 amends *Penal Code* § 832.7 to require disclosure of records and information relating to the following types of incidents in response to a request under the CPRA:

Records relating to an incident in which a *sustained* finding was made by any law enforcement agency that a peace officer or custodial officer engaged in **sexual assault** involving a member of the public. "Sexual assault" is defined for the purposes of §832.7 as the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, or offer of leniency or any other official favor, or under the color of authority. The "propositioning for or commission of any sexual act **while on duty** is considered a sexual assault" - even if the sexual act was found to be consensual.

Records relating to an incident in which a sustained finding of **dishonesty** by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of or investigation of misconduct by another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction of evidence or falsifying or concealing of evidence.

Records relating to the report, investigation, or findings of an incident involving the **discharge of a firearm** at a person by a peace officer or custodial officer. Records relating to the report, investigation or findings of an incident in which the **use of force** by a peace officer or custodial officer against a person results in death or great bodily injury. [Note: The disclosure of such records may occur even if there is no sustained finding of misconduct by any peace officer or custodial officer.]

The records disclosed pursuant to SB 1421 will be redacted only to remove personal data or information, such as a home address, telephone number, or identities of family members, to preserve the anonymity of complainants and witnesses, or to protect confidential medical, financial, or other information in which disclosure would cause an unwarranted invasion of personal privacy, or where there is a specific, particularized reason to believe that disclosure would pose a significant danger to the physical safety of the peace officer, custodial officer, or others.

Harassment and Retaliation Claims under FEHA

Senate Bill 1300 is intended to further protect employees from workplace harassment and retaliation under the Fair Employment and Housing Act (FEHA). In doing so, it creates a new section under FEHA.

It is not just supervisors and management employees who should be concerned about workplace discrimination and harassment. Under the new legislation, **any** discriminatory remark, even if made by a non-decision maker, or not made directly in the context of an employment decision, may be relevant evidence of discrimination in a FEHA claim. In the past, the standard to establish workplace harassment was "severe and pervasive" conduct. Now, a single incident of harassing conduct can be sufficient to prove the existence of a hostile work environment. Additionally, the aggrieved employee may show a "reasonable person" subjected to the alleged discriminatory conduct would find the harassment altered the working conditions so as to make it more difficult to work. These changes, and others, will make it much easier for employees to pursue harassment and discrimination claims in California. It can be expected that employers, including law enforcement agencies, will be more likely to take corrective action when claims of harassment and/or discrimination arise.

Currently, only supervisory employees are required to be trained in the area of sexual harassment in the workplace. But by 2020, employers must provide such training to non-supervisory employees as well. Such training is especially important, now that such claims are easier to prove and liability under FEHA has been expanded.

Stay Safe!

Robert Rabe is Stone Busailah, LLP's writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.