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California, State Developments

New California Sexual Harassment Legislation Will Make It More Difficult for Employers to Resolve Claims

October 4, 2018

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In the waning days of his final term of office and on the last possible day under the legislative calendar, on September 30, 2018, California Governor Jerry Brown signed a trio of bills into law that should have a dramatic effect on the ability of workers to bring claims for harassment and discrimination in the workplace. The new legislation makes it significantly more difficult for employers to resolve such claims, either by way of settlement or by motion for summary judgment, and it also attempts to increase education and training regarding harassment in California's entertainment industry.

Senate Bill No. 820

Under existing law, employers have been free to enter into settlement agreements containing nondisclosure provisions that prevent parties from discussing not only the amount of a settlement being paid but also the factual foundation surrounding claims of workplace sexual harassment. Such provisions have been very much in the news in light of Harvey Weinstein, Bill O'Reilly, and other prominent figures known to have settled prior sexual harassment claims. **Senate Bill No. 820**, effective January 1, 2019, adds a new section to the California Code of Civil Procedure that prohibits public and private employers from entering into settlement agreements that prevent the disclosure of information regarding

- acts of sexual assault
- acts of sexual harassment as defined in **section 51.9** of the Civil Code
- acts of workplace sexual harassment;
- acts of workplace sex discrimination;
- the failure to prevent acts of workplace sexual harassment or sex discrimination; and
- retaliation against a person for reporting sexual harassment or sex discrimination.

However, under this provision parties are still able to enter into agreements preventing the disclosure of claimants' identities and amounts paid in settlement of claims.

While the goal of this statute is to prevent situations in which serial harassers are allowed to continue their unlawful behavior, its effect could be to impede parties from reaching arms-length resolutions of workplace disputes. It may also make it

more difficult for employers to resolve unfounded or weak claims, as accused employees may refuse to cooperate in settlements without the opportunity to clear their names through litigation.

Senate Bill No. 1300

Governor Brown also signed into law **Senate Bill No. 1300 (SB 1300)**, which amends the California Fair Employment and Housing Act (FEHA) to prohibit other nondisclosure agreements related to alleged claims of sexual harassment and overturn prior court rulings that limited harassment lawsuits.

Among other things, SB 1300 prohibits, in exchange for a raise or bonus, or as a condition of employment or continued employment, an employer from requiring the execution of a release of a FEHA claim or the signing of a nondisparagement or nondisclosure agreement related to unlawful acts in the workplace, including sexual harassment. The statute also provides that an employer may be liable for nonemployees' sexual harassment or other unlawful harassment of the employer's employees, applicants, unpaid interns, volunteers, or contractors, if the employer or its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

In addition, the legislation rejects two notable federal court decisions, thereby making it more difficult for employers to obtain summary judgment in harassment claims. For example, it explicitly rejects the application of the majority opinion in the Supreme Court of the United States' decision in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), and instead holds that the FEHA applies the lower standard set forth by Justice Ruth Bader Ginsburg in her concurrence: "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" It also rejects the Ninth Circuit's decision in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000), by confirming that a single incident of harassing conduct is sufficient to create a triable issue of hostile work environment harassment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. Further, the new legislation provides that the legal standard for sexual harassment should not vary by type of workplace and that it is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. As such, it explicitly rejects the California appellate court decision in *Kelley v. The Conco Companies*, 196 Cal. App. 4th 191 (2011).

SB 1300 also explicitly rejects the so-called "stray remarks doctrine" by providing that the existence of a hostile work environment claim depends upon the totality of the circumstances and that a discriminatory remark, even if not made directly or in the context of an employment decision or uttered by a nondecision maker, may be relevant. Accordingly, it explicitly affirms the California Supreme Court's decision on this issue in *Reid v. Google Inc.*, 50 Cal. 4th 512 (2010).

Assembly Bill No. 2338

The third piece of legislation that Governor Brown signed into law, **Assembly Bill No. 2338**, relates to the entertainment industry, one of California's marquee industries. This new legislation requires talent agencies to make educational materials on sexual harassment prevention, retaliation, and reporting resources

available to their clients. The law also requires the state labor commissioner to provide sexual harassment training to minors between the ages of 14 and 17 years old in the entertainment industry, and to their parents or legal guardians. The training and educational materials can be provided online.

In addition to signing these bills, Governor Jerry Brown ended the legislative year by signing a flurry of employment-related legislation. These new California laws covered employee's pay records, criminal history inquiries, lactation accommodations, paid family leave, among other topics. Our recent article, "**Governor Brown Signs Final Round of Employment-Related Legislation**," covers these new laws in detail.