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ACT NOW ADVISORY

AB 9 Extends Employees' Statute of Limitations to File Discrimination Charges in California to Three Years—Employers, This Affects You!

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On October 10, 2019, California Governor Gavin Newsom signed AB 9 into law, which, effective January 1, 2020, will extend the time an employee has to file a charge of discrimination with the Department of Fair Employment and Housing ("DFEH") to three years. At first glance, employers may not realize the impact this legislation will have. But it is sure to be a game changer, and it could hamper employers' abilities to defend claims against them.

Under existing law, before an employee can file a lawsuit alleging claims under the Fair Employment and Housing Act ("FEHA"), he or she must first file a charge with the DFEH. He or she has one year from termination (or from the end of the alleged discriminatory conduct) to file the charge. After getting a right-to-sue letter from the DFEH, he or she has one more year to file the lawsuit.

AB 9, which amends FEHA, extends the time employees have to file their charge to three years. This is three times as long as the original state standard and six times longer than the federal requirement.

The AB 9 extension was purportedly designed to protect #MeToo litigants, who may process incidents of sexual harassment or assault more slowly than other forms of discrimination. However, the law extends not just to claims of sexual harassment, but to all forms of discrimination, harassment, and retaliation prohibited by FEHA. Former Governor Jerry Brown vetoed the same legislation last year, reasoning that the one-year statute of limitations has been in place since 1963, and that it "not only encourages prompt resolution while memories and evidence are fresh, but also ensures that unwelcome behavior is promptly reported and halted." However, as we have previously reported (see the Epstein Becker Green *Act Now* Advisories on AB 5 and AB 51), Governor Newsom's first legislative session pushes California's already employer-hostile landscape even further, with the signing of these and a number of other laws pushed by labor unions and the plaintiff's bar.

Extending the statute of limitations means that a lawsuit could be filed four years after the comment, conduct, or action an employee (or former employee) alleges was harassing or discriminatory. Given the overburdened state of California's courts—such litigation already takes up to five years to get to trial—now employers face a gap of up to nine years between an employee's alleged harassment or discrimination and trial.

This change will put employers in a difficult position. The reason that limitations periods for the filing of discrimination complaints were relatively short was to put employers on notice so they could preserve evidence. Now, employers will find themselves having to piece together documents, evidence, and witness statements long after key witnesses have left, memories have faded, and helpful documents (such as emails) are long gone. This could have a devastating effect on employers' ability to defend the claims against them.

Further, if employees take more time to come forward with complaints, employers may not receive notice that unlawful conduct is occurring, which could hinder their abilities to remedy the misconduct in a timely manner.

While the new AB 9 extension will not revive claims that otherwise already lapsed under the current one-year rule, it appears that claims that were set to expire in the coming months may have an extended life (though there is obviously no binding authority yet on whether claims that arise in 2019 will expire in 2020 or will be given the new three-year extension). Regardless, California employers would do well to take steps now to protect themselves from claims that they may not get notice of for years to come.

What California Employers Should Do Now

To put themselves in the best position to defend future claims, California employers should do the following:

- Update internal document preservation policies, including any auto-delete functions on email systems, and save everything for at least four years.

- If you rely on hard copy files, consider upgrading to electronic document management systems, and keep backups of as much data as is feasible.

- Heavily document all counselings, write-ups, performance reviews, and documents pertaining to employees' termination of employment. This may include taking (and preserving) witness statements regarding complaints and employee terminations.

- Consider revisions to employee complaint and investigation processes and procedures, including documentation. This is especially important with respect to collecting witness statements as many witnesses may not be available at the time needed to defend any subsequent claim.

- Maintain an open-door policy and communicate it to employees, to encourage them to come forward with any complaints.

- Ensure that all supervisors *and* employees are adequately trained on anti-harassment and discrimination policies and complaint procedures.

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