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Employment, Labor & Workforce Management

ACT NOW ADVISORY

Annual California Employment Law Update: New Laws for 2019 and Beyond Reflect Focus on Curbing Harassment, Increasing Equal Employment Opportunities

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This year, Governor Jerry Brown signed into law a number of bills affecting employers with California operations, many of which pertain to sexual harassment. Among the changes are the imposition of certain restrictions when settling sexual harassment claims, the expansion of anti-harassment training requirements, and a requirement for appointment of female directors on the boards of certain companies. Unless otherwise stated, the laws take effect on January 1, 2019.

In addition to these and other mandates, under the new laws:

- a contract or settlement agreement entered into on or after January 1, 2019, generally may not contain a waiver of the right to testify concerning criminal conduct or sexual harassment;

- employers may generally not require current employees to waive the right to sue for harassment or discrimination or agree not to disclose information about unlawful workplace conduct as part of a release obtained in exchange for a raise or bonus, or as a condition of continued employment;

- employers now expressly may be liable for any type of harassment (not just sexual harassment) committed by *nonemployees*;

- talent agencies must provide educational materials to their artists on sexual harassment prevention and other matters;

- legislative "guidance" significantly relaxes the requirement that harassment be "severe or pervasive" to be unlawful, and instructs courts to view harassment cases as "rarely appropriate" for dismissal before trial;

- provisions of existing laws on "ban the box," salary history inquiries and lactation accommodation are clarified; and

- employees now have the right to receive a copy of their wage records, in addition to their existing right to inspect such records.

SEXUAL HARASSMENT

Sexual harassment prevention training for nonsupervisory employees. Currently, employers with 50 or more employees are required to provide anti-sexual harassment prevention training to their California supervisors every two years. SB 1343 broadly expands these requirements. First, the new law mandates that nonsupervisory employees in California receive such training. Second, the law expands training requirements to now include employers with five or more employees wherever located (including temporary or seasonal employees).

Employers will be required to provide at least two hours of anti-sexual harassment training to all supervisory employees and at least one hour of anti-sexual harassment training to all nonsupervisory employees by January 1, 2020. Initial training must be completed within six months of hire or promotion to a supervisory position, and once every two years thereafter. Starting in 2020, employees hired to work less than six months (for example, seasonal and temporary employees) need to receive training within the first 30 days of hire or before they work 100 hours, whichever occurs first. The California Department of Fair Employment and Housing ("DFEH") will develop a compliant online training program.[1]

Confidentiality clauses in sexual harassment settlements. SB 820 prohibits a provision in a settlement agreement (such as a confidentiality or non-disclosure clause) that prevents the disclosure of factual information related to a civil or administrative action that includes claims of sexual assault, sexual harassment, harassment or discrimination based on sex, the failure to prevent an act of workplace harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex. In accordance with the law, any provision that prevents the disclosure of "factual information related to the claim" is void as a matter of law and against public policy. The law, however, does create an exception for a provision that shields the identity of the claimant, including all facts that could lead to the discovery of his or her identity. Such non-disclosure clauses may be included but only if the claimant requests the provisions. Finally, the law does not prohibit provisions making confidential the amount paid in settlement of a claim.

Waiver of right to testify concerning criminal conduct or sexual harassment. SB 3109 makes any provision in a contract or settlement agreement entered into on or after January 1, 2019, void and unenforceable if it waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment. The law applies only to official or written requests to testify (i.e., by court order, subpoena, or written request from an administrative agency or the legislature).

[1] In addition to offering live in-person compliant training, Epstein Becker Green also offers an online training program called Halting Harassment that fully complies with California's sexual harassment training requirements.

Protection against defamation lawsuits by accused harassers. As we previously discussed here, AB 2770 was signed earlier this year to protect victims of sexual harassment and employers from defamation claims brought by alleged harassers. California Civil Code section 47(c) treats certain communications as privileged and therefore protected from civil action, including certain communications concerning job performance. AB 2770 amends Civil Code section 47(c) to include three types of communications related to sexual harassment in the workplace:

1) A complaint of sexual harassment, based on credible evidence and made without malice, by an employee to an employer;

2) Communications between an employer and "interested persons," made without malice, regarding a complaint of sexual harassment; and

3) An employer's answer, given without malice, to an inquiry about whether or not it would rehire a current or former employee, and whether the decision not to rehire is based on the employer's determination that the former employee engaged in sexual harassment.

Malicious statements, i.e., statements motivated by hatred or ill will or where the speaker lacks reasonable grounds for believing the truth of the statement, are not protected.

Sexual harassment education by talent agencies. AB 2338 requires talent agencies to provide educational materials (in a language the artist understands) on sexual harassment prevention, retaliation, and reporting resources, and nutrition and eating disorders to its artists. The information must be provided within 90 days of agreeing to representation by the licensee, or agency procurement of an engagement, meeting, or interview, whichever comes first. The law also requires a talent agency, as part of its application for license renewal, to confirm that it has provided, and will continue to provide, the required educational materials.

Sexual harassment in business, service, or professional relationships. While this bill is not necessarily related directly to the employment relationship, employers, should also be aware that SB 224 amends California Civil Code section 51, which currently prohibits sexual harassment in the context of a business relationship with certain professionals and service providers, including physicians, psychotherapists, dentists, attorneys, real estate agents, accountants, bankers, trustees, landlords, and teachers, among others. SB 224 (1) expands that list to include investors, elected officials, lobbyists, directors, and producers; (2) extends liability to those who hold themselves out as able to help a plaintiff establish such a relationship with the defendant or a third party; and (3) eliminates the previous requirement that the plaintiff prove that the relationship could not be easily terminated.

CHANGES TO THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

SB 1300 makes several adjustments to California's Fair Employment and Housing Act ("FEHA"), the law that, among other things, prohibits the harassment of employees, interns, volunteers, applicants, or persons providing services pursuant to a contract

based on protected categories, including race, religious creed, disability, medical condition, sex, gender, sexual orientation, age, marital status, and military status.[2] The amendments and additions seek to prevent harassment in the workplace, and to provide guidance to California courts on the appropriate legal standard they should apply in workplace harassment cases.

Key Provisions:

1) ***Employer Liability for Any Type of Harassment (Not Just Sexual Harassment) Committed by <u>Nonemployees</u>.*** Under existing law, an employer may be held responsible for *sexual* harassment committed by third parties if the employer knew (or should have known) of the conduct and failed to take immediate and appropriate corrective action. The law previously did not expressly extend liability due to nonemployee harassment based on other protected categories, such as age, disability, or race. SB 1300 expressly extends employer liability for harassment by a nonemployee based on any protected classification, not just sexual harassment, if the employer knew (or should have known) of the conduct and failed to take immediate and appropriate corrective action.

2) ***Limitations on Releases and Nondisparagement Provisions During Employment.*** The new law makes it unlawful for an employer, in exchange for a raise or bonus, or as a condition of continued employment, to require an employee to:

   a) sign a release of any discrimination, harassment, or retaliation claim under FEHA, or sign a statement that the individual will not bring a claim under FEHA, and/or

   b) sign a non-disparagement agreement or other document that prohibits the employee from disclosing information about unlawful acts in the workplace, including, but not limited to, sexual harassment.

   However, such release and nondisparagement agreements are permissible as part of a negotiated settlement agreement to resolve a claim. To qualify for this exception, the settlement agreement must be voluntary, deliberate, and informed and provide consideration of value to the employee, and the employee must be given notice and an opportunity to retain an attorney or be represented by an attorney in the negotiation of the agreement.

3) ***"Legislative Intent" and Guidance to Courts in Harassment Lawsuits.*** In sexual harassment litigation, in order for acts of workplace sexual harassment to be unlawful, the alleged harassment must be "severe or pervasive." AB 1300 weakens the "severe or pervasive" standard in the following ways:

[2] FEHA also prohibits discrimination and retaliation against employees and prospective employees on a number of protected grounds.

a) ***A Single Incident Is Sufficient.*** A single incident of harassing conduct can be enough to create a hostile work environment if the harassing conduct has unreasonably interfered with a plaintiff's work performance or created an intimidating, hostile, or offensive working environment. This is perhaps the most significant modification of the "severe or pervasive" standard.

b) ***A "Stray Remark" May Be Evidence of Harassment.*** A discriminatory remark, even if not made directly in the context of an employment decision, or even if made by an employee who is not responsible for making decisions about a plaintiff's employment, may be relevant, circumstantial evidence of discrimination and harassment.

c) ***An Effect on "Tangible Productivity" Is Not Necessary.*** A plaintiff does not need to prove that his or her tangible work productivity actually declined as a result of the harassment—only that the harassment made it "more difficult to do the job." The law is expressly amended to state that this standard was set forth by the U.S. Supreme Court Justice Ruth Bader Ginsburg, in *Harris v. Forklift Systems*, and that the California Legislature approves of and affirms this standard.

The California Legislature further decreed the following:

a) ***All Workplaces Should Be Held to the Same Standard.*** The fact that a particular occupation or industry may have been characterized by a greater frequency of sexually related commentary or conduct in the past is irrelevant. The nature of the workplace is only a consideration if it is integral to the performance of the employees' job duties.

b) ***Summary Judgment Is Disfavored.*** SB 1300 declares that "harassment cases are rarely appropriate for disposition on summary judgment" (a motion brought by a party requesting that the court dismiss a case before trial on the ground that, even if all the evidentiary facts supported by the opposing party are true, those facts nevertheless fail to support an actionable claim). This decree will make it even more difficult for employers to obtain summary adjudication of harassment claims.

4) ***Limitation on Fee Awards to Prevailing Defendants.*** Defendants (employers and/or individuals) who prevail in FEHA lawsuits can only recover fees and costs for defending the lawsuit if the court finds that the lawsuit was "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." This bill codifies existing case law.

5) ***Optional Bystander Intervention Training.*** Employers are encouraged to train employees (bystanders) on identifying problematic conduct. An employer may, but is not required to, provide bystander intervention training that includes information and practical guidance on how bystanders can recognize potentially problematic behavior, and to motivate bystanders to take action when they observe problematic behavior.

A related bill that did not pass (SB 1038) would have created individual liability for retaliation by employees accused of harassment.

HIRING & WORKFORCE MANAGEMENT

Criminal history of applicants for employment. SB 1412 modifies California's "ban the box" law to clarify that employers may ask an applicant (or seek information about certain convictions) if (1) the employer is required by law to obtain information regarding the particular conviction, even if it has been expunged, sealed, or dismissed following probation; (2) the applicant would be required to possess or use a firearm in the course of employment; or (3) an individual with a particular conviction is prohibited by law from holding the position sought (or the employer is prohibited by law from hiring such a person) even though the conviction has been expunged, sealed, or dismissed following probation. Further, the statute expressly permits criminal background checks required or authorized pursuant to the rules of a "self-regulatory organization," as defined by the Securities Exchange Act of 1934.

Requesting salary history information from applicants for employment. AB 2282 clarifies California's Fair Pay Act, which requires an employer, upon "reasonable request," to provide the "pay scale" for a position to an "applicant" applying for employment. The law defines (1) "applicant" to exclude current employees, (2) "pay scale" as the salary or hourly wage range (which does not include bonuses or equity ranges), and (3) "reasonable request" as a request made after the applicant has completed an initial interview. The law also makes clear that employers may ask an applicant about his or her "salary expectations" for the position. Finally, the law clarifies that an employer may make compensation decisions based on an employee's current salary, as long as any wage differential resulting from that decision is based on a bona fide factor other than sex, race, or ethnicity.

Lactation accommodation. Current law requires employers to make reasonable efforts to provide an employee with a room or another location, which may include a bathroom (but not a toilet stall) to express breast milk for the employee's infant child. AB 1976 amends existing law to require employers to make reasonable efforts to provide an employee with the use of a room or other location, other than a bathroom, to express breast milk. The law clarifies that employers may make available a temporary lactation location, so long as that location is used only for lactation purposes while the employee expresses milk. A more detailed bill (SB 937) that would have imposed additional requirements, such as a nearby sink and refrigerator, and a flat surface to place a breast pump and personal items, did not pass.

LEAVES OF ABSENCE

Expansion of Paid Family Leave. SB 1123 expands the Paid Family Leave ("PFL") wage replacement benefits provided by the State of California beginning January 1, 2021, to cover otherwise unpaid military-related leaves of absence. Under the amended law, employees will be able to collect PFL benefits if they take time off for "qualifying exigencies" related to the covered active duty status of their spouse, registered domestic partner, child, or parent who is a member of the U.S. Armed Forces, such as military ceremonies, changes to child care, counseling, or spending time with the

covered service member during rest and recuperation leave. Note that PFL is only a wage replacement benefit; it does not provide an employee the independent right to take a leave of absence. Employees must qualify for military exigency leave under the Family and Medical Leave Act or their employer's policy in order to be eligible for these benefits.

WAGE & HOUR

Inspection and copying of wage records. SB 1252 provides that employees have the right to receive a copy of their wage records. (The law previously gave employees only the right to inspect their wage records.)

BOARDS OF DIRECTORS OF CERTAIN PUBLICLY HELD CORPORATIONS

Female members on boards of directors. SB 826 requires that a foreign or domestic publicly held corporation whose principal executive offices are located in California have a minimum number of female board members. Specifically, by the end of 2019, California-based corporations are required to have at least one female director. By the end of 2021, corporations with five directors must have at least two female members, and corporations with six or more directors must have at least three female members. Corporations are specifically permitted to increase the number of board members in order to achieve this goal. The law permits the California Secretary of State to fine corporations found in violation of the law $100,000 for an initial violation and $300,000 for subsequent violations.

Governor Brown's signing message noted that "serious legal concerns have been raised" to the law, which "may prove fatal to its implementation. Nevertheless, recent events in Washington, D.C. – and beyond – make it crystal clear that many are not getting the message."

WHAT EMPLOYERS SHOULD DO NOW[3]

California's new laws affect a wide range of policies and procedures throughout the employment relationship. Accordingly, employers with a California workforce should do the following:

- Review your hiring processes and train supervisors on how to handle pay scale requests and how to question applicants properly concerning their salary expectations.

[3] In addition to the new laws that are identified in this Advisory, Governor Brown signed a number of other laws that are relevant to employers in certain industries. These laws include SB 224, which expands consumer sexual harassment liability to elected officials, lobbyists, investors, directors, and producers; AB 403, which protects whistleblowers who report violations by legislators and legislative staffers; SB 1402 and AB 1565, which address joint liability for port trucking companies and general construction contractors, respectively; and certain wage and hour industry carve outs affecting the construction industry (AB 1654), workers at petroleum facilities (AB 2605), and feed truck drivers (AB 2610). Two laws relating to training on human trafficking in the public transit (AB 2034) and hospitality (SB 970) industries were also passed and will take effect in 2021 and 2020, respectively.

- Review, and revise if applicable, any separation or other agreements that purport to require employees to waive their rights to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment. Consider including a provision affirmatively advising employees that nothing in the agreement would preclude such testimony.

- Review your employment applications and processes to ensure compliance with California's "ban the box" law.

- Gear up to ensure that nonsupervisory employees will receive one hour of sexual harassment training by January 1, 2020.

- Consider adding education on bystander intervention to supervisory and non-supervisory anti-sexual harassment training.

- Ensure harassment training accurately reflects newly enacted legal standards regarding sexual harassment, e.g., explains that single acts and single remarks can be harassing and that sexually harassing behavior that makes it difficult for an individual to do his or her job can rise to the level of illegal harassment.

- When applicable, ensure that there is a room or another location, other than a bathroom, for an employee to express breast milk for the employee's infant child.

- Review your new-hire packets, severance agreements, and other personnel forms to ensure that they do not contain release and nondisparagement agreements prohibited by law, and revise agreements and forms to delete any prohibited release and nondisparagement provisions.

- Review and revise, if necessary, your employee handbooks to ensure that they are up to date and not in conflict with any of the new laws.

- For foreign and domestic publicly held corporations whose principal executive offices are located in California, ensure that board recruitment, selection, and appointment processes encourage diversity and guarantee that the corporation will have at least the minimum number of required female board members.

Additionally, going into 2019, California employers should do the following:

- Ensure compliance with applicable state and local minimum wage laws. The state minimum wage goes up to $12 an hour for employers with 26 or more employees ($11 an hour for employers with fewer than 26 employees). Local minimum wages may be higher.

- Consider implementing or revising arbitration agreements. The U.S. Supreme Court ruled this year in *Epic Systems Corp. v. Lewis* that employers may include class action waivers in arbitration agreements. Such agreements should be drafted carefully to comply with California and federal law.

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