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EMPLOYMENT LAW

Newest CA Sexual Harassment Laws

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The annual schedule of the California Legislature is packed into a tight 8-9 months of activity with a frenzied rush in the final month. Now in his final year as governor, Democrat Jerry Brown continues his past practice of not necessarily signing into law each and every measure passed by the overwhelming blue Senate and Assembly.

Recently, in *New CA Legislature Action Affecting Nonprofits*, we highlighted two of the new laws: (1) AB 2252, which establishes a centralized, online funding portal for all state grants/funding opportunities and (2) landmark legislation to reverse the recent federal elimination of "net neutrality" protections for all internet users in the state. The first bill directly affects and benefits nonprofit organizations; the second affects everyone and every entity in the state including nonprofits. The measure is in the courts for now.

Here, we move onto additional new laws, effective January 1, 2019, that were spurred in large part by the recent #MeToo movement: more than a dozen measures, referred to as the #TakeTheLead bills. They have been characterized by many as the "'boldest' anti-sexual harassment bills in the country." Of course, lawmakers in New York State may take issue with this conclusion; they, too, have just passed wide-ranging new laws on this topic.

CA Sexual Harassment Measures

Like many other laws affecting the employer-employee relationship in the Golden State, the #TakeTheLead rules affect *all* California employers, for-profit and nonprofit alike. Too many recent news stories have underscored that the sexual misconduct/harassment problem is not just a matter affecting business workplaces. It is all too common in philanthropic organizations and foundations as well.

The key measures just enacted are a somewhat confusing glob of tweaks to existing laws – most notably the California Fair Housing and Employment Act (FEHA) – as well as new and amended

provisions in various other California statutory schemes.

Secret Settlements Prohibited

Among the most widely discussed provisions is Senate Bill 820 that now prohibits secret settlements and nondisclosure agreements in harassment cases. "For decades, secret settlements have been used by wealthy and well-connected perpetrators to offend repeatedly with no public accountability," according to SB 820 sponsor, Connie Leyva (D-Chino). "This critical legislation will empower victims and offer them the opportunity to finally say #TimesUp to those that have hurt them."

SB 820 prohibits provisions in settlement agreements that "prevent the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action." Under the new law, any such provision is legally void on the grounds of being against public policy. There is an exception, though, for a provision (available at the request of a claimant) that shields his or her identity and all facts that could lead to its discovery.

It will be unlawful as well for any California employer to require any person to sign a nondisclosure agreement or waive the otherwise available statutory rights to file legal claims. This measure applies if the proffered nondisclosure disclosure is requested or demanded in exchange for a raise or a bonus, or is a requirement of initial or continued employment. "California is stating clearly that we believe and support victims," according to Sen. Hannah-Beth Jackson (D-Santa Barbara), the sponsor of this provision, Senate Bill 1300.

Defamation Privilege

In another measure, Assembly Bill 2770 – Privilege: Sexual Harassment, there is new protection for employers and harassment victims from potential defamation suits. This law was passed unanimously.

Under existing law, there was a limited privilege for employers' "responses to reference checks from prospective employers regarding a former or current employee's job performance or qualifications." There was protection from libel or slander as long as the "communications were made without malice."

Under new Assembly Bill 2770, protection is extended to "complaints of sexual harassment by an employee, without malice, to an employer." Employers are allowed to inform potential employers "during reference checks of an employee's past harassing conduct, including providing information about sexual harassment investigation and findings."

Miscellaneous Provisions

Newly enacted SB 1300 – Unlawful Employment Practices: Discrimination and Harassment amends existing parts of the California Fair Employment and Housing Act to expand and clarify earlier law. For instance, it broadens the existing scope of the California Fair Employment and Housing Act. The definition of "harassment" under this amendment will refer not only to sexual harassment but to "any type of harassment prohibited under FEHA."

Another notable change affects the awarding of attorney fees and costs to a "prevailing defendant" in a FEHA proceeding. Under the new measure, a court may not award fees and costs to a victorious employer-defendant unless there is a finding that the plaintiff-employee's action was "frivolous, unreasonable, or groundless."

California has for more than a decade required training for supervisors in harassment issues. Under the existing FEHA statute, employers with 50 or more employees are required to provide at least 2

hours of prescribed training and education regarding sexual harassment to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years. The new law, Senate Bill 1343, sponsored by Holly Mitchell (D-Los Angeles), expands the biannual sexual harassment training mandate to nearly all California employees and includes "bystander intervention training.

Conclusion

Although Governor Brown signed several important bills that aim to prevent workplace harassment and help victims of sexual misconduct seek justice, he vetoed one of the most high-profile of the pending measures. Assembly Bill 3080, sponsored by Assemblywoman Lorena Gonzalez Fletcher (D-San Diego), sought to ban forced arbitration agreements in harassment cases. Under this controversial practice, workers must sign away their rights to take disputes with their employers to court as a condition of accepting or retaining the job. Critics assert that these agreements "silence vulnerable employees by pushing them into private negotiations with the companies they work for and allow bad behavior to fester behind a curtain of secrecy."

In his veto message, Governor Brown explained that the bill "plainly violates federal law," and pointed to recent Supreme Court decisions that rejected state policies that "unduly impeded arbitration."