Client Alert | Employment, Compensation & Benefits

California Employers Should Take Note of New State Employment Laws

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Authors: **Jeffrey Ii**, **Tal Marnin**, **Henrik Patel**

California Governor Jerry Brown signed into law several new employment laws providing enhanced protection to employees, each applying as of January 1, 2019, and expanding the existing requirements for California employers to provide harassment prevention training to employees, with such expanded training to be provided by January 1, 2020.

Confidentiality Provisions in Settlement Agreements (SB 820)

California law currently prohibits, in any civil action seeking damages for certain types of sexual assault crimes (e.g., felony sex offense or sexual abuse of a minor or an elder or dependent adult), a provision within a settlement agreement that prevents the disclosure of factual information related to the action—but permitting provisions that prevent the disclosure of medical information, personal identifying information or information revealing the nature of the relationship between the parties.

SB 820 expands the above prohibition to provide that any provision within a settlement agreement that prevents the disclosure of factual information related to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex (including retaliation for reporting harassment) that have been filed in a civil action or a complaint filed in an administrative action, is void as a matter of law and against public policy. SB 820 permits the parties to include a provision which shields the identity of the claimant (as well as facts that could lead to the discovery of his or her identity), unless a government agency or public official is a party to the settlement agreement. SB 820 also expressly permits the parties to include a provision that precludes the disclosure of the amount paid in settlement of a claim. The restrictions contained in SB 820 apply to settlement agreements entered into on or after January 1, 2019. This legislation may incentivize parties to settle claims of sexual harassment, among other things, prior to filing such claims in a civil action or administrative action, so that the parties can agree to keep the facts regarding the underlying claims confidential. Employers should also remember that effective for amounts paid or incurred after December 22, 2017, Section 162(q) of the Internal Revenue Code of 1986, as amended, prohibits the deduction of (i) any settlement or payment related to sexual harassment or sexual abuse if it is subject to a non-disclosure agreement, and (ii) attorneys' fees related to such a settlement or payment.

Waiver of Right to Testify (AB 3109)

For contracts or settlement agreements entered into on or after January 1, 2019, AB 3109 prohibits provisions that waive a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment on the part of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party, when the party has been required or

requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature.

Non-Disparagement Clauses and Releases, and Responsibility for Harassment by Non-Employees (SB 1300)

SB 1300, which is effective as of January 1, 2019, includes, among other things, the following:

Prohibition on Non-Disparagement Clauses and Releases as Condition of Employment. First, SB 1300 prohibits an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, from requiring an employee to sign (1) a release of a claim or right under the California Fair Employment and Housing Act, or (2) a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.

However, this new rule does not apply to a "negotiated" settlement agreement to resolve an underlying claim that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or the employer's internal complaint process. For purposes of this exception, "negotiated" means that the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and the employee is given notice and an opportunity to retain an attorney (or is represented by an attorney). An employer who settles a claim with a continuing employee might consider adding specific language in the release agreement that makes clear it is a negotiated settlement and is not in exchange for a raise or bonus or as a condition of continued employment.

Expanded Responsibility for Prohibited Harassment by Non-Employees. California law currently provides that employers may be held responsible if a non-employee sexually harasses employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer (or its agents or supervisors) (1) knows or should have known of the conduct, and (2) fails to take immediate and appropriate corrective action. SB 1300 expands the scope of liability for non-employee harassment to include all bases of harassment prohibited by the California Fair Employment and Housing Act.

Standard of Proof. SB 1300 provides that a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment, provided that the harassing conduct unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. In addition, SB 1300 adds a new section to the Government Code (Section 12923(e)), which specifies that harassment cases are rarely appropriate for disposition on summary judgment. As a practical matter, this provision makes it more likely that employers will become mired in litigation without having summary judgment available.

Bystander Training is Encouraged (But Not Required). SB 1300 encourages (but does not require) employers to provide bystander intervention training, to allow bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe such problematic behaviors.

Enhanced Workplace Training Requirements (SB 1343)

The California Fair Employment and Housing Act previously required employers with 50 or more employees to provide at least two (2) hours of prescribed training and education regarding the prevention of sexual harassment, abusive conduct, and gender-based harassment to all supervisory employees within six (6) months of their assumption of a supervisory position and once every two (2) years.

SB 1343 expands the requirement to:

- apply to employers with five (5) or more employees, including temporary or seasonal employees, and
- require such employers to provide, by January 1, 2020, at least two (2) hours of sexual harassment prevention training to all supervisory employees **and at least one (1) hour of sexual harassment training to**

all non-supervisory employees (within (6) six months of their assumption of either a supervisory or non-supervisory position).

The training may be completed by employees individually (including through an online training course developed by the employer or by the California Department of Fair Employment and Housing) or as part of a group presentation, and may be completed in shorter segments, as long as the applicable hourly total requirement is satisfied. This training must initially be provided by January 1, 2020, and once every two (2) years thereafter.

Beginning January 1, 2020, for seasonal and temporary employees, or any employee that is hired to work for less than six (6) months, the employer must provide training within thirty (30) calendar days after the hire date or within one hundred (100) hours worked, whichever occurs first. For a temporary employee employed by a temporary services employer, the temporary services employer, not the client, is required to provide the training.

SB 1343 also requires the California Department of Fair Employment and Housing to:

- develop or obtain one (1)-hour (for non-supervisory employees) and two (2)-hour (for supervisory employees) online training courses on the prevention of sexual harassment in the workplace, as specified, which must include an interactive feature to require viewers to respond to a question periodically to enable the online course to continue to play, and to post the courses on the Department's website; and
- make existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention, available to employers and to members of the public in specified alternate languages on the Department's website.

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States

T +1 212 819 8200