California Employment Law Update

New California #MeToo Laws

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Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Prohibition of Limitations on Right to Testify

- Any agreement entered into on or after January 1, 2019, that purports to waive a ***party's right to testify*** in an administrative, legislative, or judicial proceeding regarding alleged criminal conduct or sexual harassment by the other party or the other party's agent or employee, will be void and unenforceable.
- (Assembly Bill 3109)

Limitations on Settlement Agreements

- Prohibits the inclusion of nondisclosure provisions in agreements, entered into on or after January 1, 2019 that stem from civil or administrative complaints of sexual assault sexual harassment, and/or workplace harassment or discrimination based on sex, and ***that purport to limit an employee's right to publicly disclose factual information concerning the employee's complaint***.
- Employers may, however, still include nondisclosure provisions that preclude disclosure of the *amount* paid in settlement.
- Unless the opposing party is a government agency or public official, claimants may still seek a nondisclosure provision that precludes disclosure of the claimant's identity and any facts that could reveal his or her identity.
- Any settlement provision that violates the new law will be void and unenforceable.
- (Senate Bill 820)

Limitations on Releases and Non-Disparagement

- Prohibits employers from doing either of the following in exchange for a raise or bonus or as a condition of employment or continued employment:
  - Requiring the execution of a release of a claim under the Fair Employment and Housing Act (FEHA), or
  - Requiring an employee to sign a non-disparagement agreement that seeks to deny the employee the right to disclose information about unlawful acts in the workplace.
- Any agreement that violates the statute will be void and unenforceable.
- This does not apply to settlement agreements negotiated to resolve FEHA claims that have been filed by an employee in court, before an administrative agency or alternative dispute resolution forum, or through an employer's internal complaint process.
- (Senate Bill 1300)

Expansion of Sexual Harassment Prevention Training

- Requires any employer who employs *5 or more* employees—including temporary and seasonal employees—to provide by January 1, 2020, and once every two years thereafter:
  - At least two hours of harassment training to all ***supervisory*** employees *and*
  - At least one hour of harassment training to all ***nonsupervisory*** employees.
- Current law only requires that employers with at *least 50 employees* provide two hours of harassment-prevention training to *supervisors* at prescribed intervals.
- Senate Bill 1343

Quota for Females on Publicly-Held Corporate Boards

- Requires publicly held corporations that have their principal executive offices in California to have at least one female director on their board of directors by the end of 2019.
- The threshold minimum will increase over time for companies with larger boards.
  - If a corporation has five directors, it must have at least two female directors by the end of 2021.
  - If a corporation has six or more directors, it must have at least three female directors by the end of 2021.
- Senate Bill 826

Expansion of Existing Anti-Harassment Provisions in State Law

- The new laws significantly limit employer defenses and lower the claimant's burden of proof.
- The changes may make it more difficult for employers to obtain summary judgment dismissals of sexual harassment claims under FEHA, which may increase the settlement "value" of those claims.
- (Senate Bill 1300, Senate Bill 224, Assembly Bill 1619, and Assembly Bill 3082)

Expansion of Existing Anti-Harassment Provisions in State Law (Continued)

- ***Narrowing the "severe or pervasive" legal standard*** for sexual harassment by declaring that even a single incident of harassing conduct could create a triable issue regarding the existence of a hostile environment (i.e., rejecting the "one free grope" concept established by a federal court).
- Confirming that a ***single discriminatory comment***, even if not made in the context of an employment decision and even if uttered by a non-decision-maker, could be relevant evidence of discrimination, depending on the totality of the circumstances.

Expansion of Existing Anti-Harassment Provisions in State Law (Continued)

- ***Lowering the burden of proof*** for a plaintiff to establish harassment and declaring as a matter of legislative intent that harassment cases are *rarely* appropriate for resolution by summary judgment.
- ***Denying prevailing defendants attorneys' fees and costs*** awards unless the court finds that a plaintiff's action was frivolous, unreasonable, or groundless.
- ***Lengthening the statute of limitations*** for sexual assault to 10 years after an assault/attempted assault, or 3 years after the plaintiff discovered, or reasonably should have discovered, that his or her injuries resulted from an assault/attempted assault.

Expansion of Existing Anti-Harassment Provisions in State Law (Continued)

- Rejecting the notion that ***different standards*** for sexual harassment should apply to different kinds of workplaces.
- Expanding upon the ***types of professional relationships*** where liability for sexual harassment might arise (e.g., investors, elected officials, lobbyists, directors, and producers).
- ***Extending FEHA protections*** to employees, applicants, unpaid interns, volunteers, and persons providing services pursuant to a contract from *any* type of harassment by nonemployees—not just sexual harassment as is the case under current law.

So What Now? Some Practical Guidance

- Modify settlement agreement and severance agreement templates to ensure that they do not run afoul of the new laws proscribing the inclusion of nondisclosure and non-disparagement provisions or an employee's waiver of the right to testify in an administrative, legislative, or judicial proceeding.
- Review bonus documents and other incentive documents to ensure that they do not require the release of FEHA claims.
- Dismissing or inexpensively settling harassment claims will likely be more difficult in the future. Employers—large and small—should consider ways to make the anti-harassment training they are required to provide meaningful and effective for all employees from the top down, and not simply an exercise in "check the box."
- Review their internal complaint procedures to make sure there are multiple, well-publicized and readily accessible avenues for raising concerns, as well as protocols for the investigation of harassment and discrimination complaints that will ensure such investigations are thorough and fair. Doing so will help avoid litigation, improve employee relations, encourage the use of internal complaint resolution processes, and provide compelling evidence of employer good-faith commitment to prevent harassment.

Tips to Avoid Harassment

- **1. Make a respectful workplace part of your company culture.** How about a strong statement from the very top of the organization emphasizing a respectful work environment for all and the fact that harassment will not be tolerated? And, make sure the anti-harassment policy makes clear that even sexual innuendo at work is off limits. It is impossible to tell when inappropriate behavior is "welcome" vs. "grinning and bearing it," and inappropriate is on the path to unlawful. You may need to “press the reset button” to get this done.

- **2. Make it easy to report harassment and potential harassment.** Do not require that complaints be presented in writing or as a “formal complaint,” and impose no impediment to speedy resolution. Lack of a “formal complaint” is not a defense, nor is “he told me not to do anything” or “she made me promise not to tell anyone.”

- **3. Promptly investigate every single claim.** The law requires you to investigate and promptly take any appropriate corrective action. Prompt action that eliminates the problem is a complete defense (i.e., no liability), except for what your managers do. Be sure the investigator is neutral and competent, and circle back to the employee to let him or her know what you did or found.

- **4. Remove the “quid pro quo” risk.** If management personnel are not engaging in sexual relationships (or attempted sexual relationships) with other employees, the risk of claims (and unwanted publicity) from demoted or discharged employees alleging retaliation for refusing to have sex is remote. Adopt a dating/socializing policy that forbids management from dating and hanging out off-duty with non-management. You may have strict liability for your managers’ on and off-duty interactions with your employees. If a romantic relationship develops in the workplace, make sure there is no reporting relationship and consider a “love contract.”

Tips to Avoid Harassment (Continued)

- **5. Even if you do not forbid dating, tell your managers why they should not consider the staff their personal dating pool.** Explain the risk of personal liability for harassment, life after break-ups, risk of claims of favoritism, unfairness, retaliation, and damaged reputation. Juries sometimes make the perpetrator pay along with the employer.
- **6. Eliminate horseplay -- especially if it involves body contact.** Jokes and gestures often result in claims, especially when they are repeated and part of the culture.
- **7. Train your assistant managers and others *before* you promote them.** They must understand they are no longer one of the gang. If you have multiple locations, transfer employees promoted into management for the first time to help ease the transition.

Tips to Avoid Harassment (Continued)

- **8. Slip training about inappropriate behavior at work into other meetings or training that you already do, and institutionalize the practice.** Train in person whenever possible because employees do not learn all that much from pointing and clicking.
- **9. If you provide alcohol at company events, consider limiting quantities with drink tickets.** If "happy hour" is part of your company's culture, encourage managers and supervisors to have one drink and exit – alone – because you have liability for managers' off-duty conduct with your employees.
- **10. Give HR executives a seat at the senior management table.** Let them know that they do not have to handle everything themselves if a situation requires outside intervention or assistance. Make it clear to them and to everyone that they are as important and as respected as any other C-suite executive.

Questions?

Thank you for attending today's presentation. Any questions?

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