#METOO MOVEMENT INSPIRES AVALANCHE OF NEW LAWS AFFECTING CALIFORNIA EMPLOYERS

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Labor, Employment and Workplace Safety Alert

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On September 30, 2018, Governor Jerry Brown signed several bills that will affect California employers. The following summarizes key aspects of these new laws. Unless otherwise noted, the new laws are effective January 1, 2019.

MAJOR CHANGES TO THE DEFINITION OF "HOSTILE WORK ENVIRONMENT" HARASSMENT

Senate Bill ("SB") 1300 significantly expands the circumstances in which hostile work environment harassment may be found to exist by rejecting the "severe or pervasive" standard developed and refined over several decades by California courts. Harassment is redefined to encompass a broad spectrum of conduct, specifically:

"Harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being."

Government Code Section 12923, which declares the Legislature's intent in enacting the new law, will provide guidance about what types of evidence will be sufficient to establish a harassment claim. It states that employees are no longer required to prove that their productivity has declined as a result of harassment. Now, they only need to show that the harassment made it "more difficult" for them to do their job. Even a "single incident of harassing conduct" is now sufficient to create a triable issue of fact, allowing a case to go to a jury. Furthermore, a single remark made by someone unconnected to a termination decision can be circumstantial evidence of discrimination. Finally, the Legislature made it clear that harassment cases are "rarely" appropriate for dismissal at the summary judgment stage.

Employers can be held liable for all forms of harassment – not just sexual harassment – directed at employees by non-employees, such as clients or vendors. This includes harassment based on race, national origin, religion, and other protected characteristics.

Finally, if an employer wins a sexual harassment lawsuit, it cannot recover attorney's fees and costs unless it can prove that the plaintiff's action was "frivolous, unreasonable, or groundless" either when filed or after it clearly became so.

RESTRICTIONS ON RELEASES AND NON-DISPARAGEMENT AGREEMENTS

SB 1300 also prohibits employers from requiring a release of harassment, discrimination, or retaliation claims or to sign a non-disparagement agreement that purports to prevent disclosure of information about unlawful acts in the workplace, if the release is required to get a job, stay employed, or receive a raise or bonus. This does not apply to a negotiated settlement to resolve a claim filed in court, with government agencies, in arbitration, or through an employer's internal complaint process, provided that the employee has an attorney or an opportunity to retain one.

EXTENDED STATUTE OF LIMITATIONS FOR SEXUAL ASSAULT

The California Legislature lengthened from three years to ten years the statute of limitations for sexual assault claims. Under Assembly Bill ("AB") 1619, a plaintiff may now bring a civil action for sexual assault within the later of "[ten] years from the date of the last act, attempted act, or assault with the intent to commit an act, of sexual assault by the defendant against the plaintiff" or "[w]ithin three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted" from the defendant's act.

RESTRICTIONS ON CONFIDENTIALITY AND TESTIMONY PROVISIONS IN SETTLEMENT AGREEMENTS

SB 820 prohibits settlement agreements that restrict plaintiffs from disclosing factual information about harassment claims in judicial proceedings. The bill does not, however, prohibit settlement provisions restricting disclosure of settlement amounts. Furthermore, a provision that shields the identity of a claimant may be included in a settlement agreement at the request of the claimant, unless a government agency or public official is a party to the agreement.

AB 3109 voids settlements that waive the right to testify regarding criminal conduct or sexual harassment, when the party has been required or requested to attend a proceeding by court order, subpoena, or other government request.

ENHANCED PROTECTION FROM DEFAMATION

AB 2770 enhances protections from defamation claims made against sexual harassment claimants and employers that investigate such complaints. Three types of statements are privileged: 1) employee complaints of sexual harassment made without malice and supported by credible evidence; 2) communications made without malice between an employer and other interested persons regarding a sexual harassment complaint; and 3) answers provided without malice by a current or former employer in response to questions from a prospective employer regarding whether the current or former employer would rehire an employee, and whether the decision not to rehire is based on a determination that the former employee engaged in sexual harassment.

BROADENED DEFINITION OF NON-EMPLOYMENT RELATED HARASSMENT

SB 224 significantly expands sexual harassment claims in business, service, and professional relationships under California Civil Code Section 51.9. Going beyond the prior definition, which applied to physicians, attorneys, trustees, landlords, and other similar relationships, the law now prohibits harassment by individuals who "hold themselves out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party." Examples include investors, elected officials, lobbyists, directors, and producers.

The law also reduces the burden to establish a claim, removing the previous requirement that a plaintiff establish that he or she was "unable to easily terminate the relationship." The law also allows the California Department of Fair Employment and Housing ("DFEH") to prosecute non-employment based sexual harassment claims, and makes it unlawful to "deny or aid, incite, or conspire in the denial of rights of persons related to sexual harassment actions."

EXPANDED ANTI-HARASSMENT TRAINING

Under existing law, employers with fifty or more employees were required to provide two hours of anti-harassment training to supervisory employees every two years. Under SB 1343, any employer with five or more employees, including temporary and seasonal workers, must provide two hours of anti-harassment training to supervisors and one hour of training to non-supervisors by January 1, 2020, and then once every two years thereafter. The bill also requires the DFEH to develop these courses and to post them online.

CORPORATE BOARDS OF PUBLICLY HELD CORPORATIONS MUST INCLUDE FEMALE REPRESENTATIVES

SB 826 requires all publicly-held domestic and foreign corporations with principal executive offices in California to have at least one female on their boards by the end of 2019. By the end of 2021, the minimum increases to one female for boards with four or fewer members, two females for boards with five members, and three females for boards with six or more members. "Female" refers to an individual's gender identification, not designated sex at birth.

The bill directs the Secretary of State to publish online reports documenting compliance. In addition, the Secretary of State may issue fines of $100,000 for failure to file board member information, $100,000 for the first violation of the member requirement, and $300,000 for subsequent violations. Each position not appropriately filled constitutes a separate violation.

SALARY HISTORY BAN AND PAY SCALE DISCLOSURE GUIDANCE

Labor Code Section 432.3, enacted in January 2018, requires employers to provide applicants, upon request, with the pay scale for a position. It also prohibits employers from asking about or relying on prior salary in hiring or compensation.

An amendment to this bill enacted in July 2018 provides some necessary clarifications. It defines "pay scale" as a "salary or hourly wage range," and it clarifies that the salary history ban and pay scale requirement do not apply to current employees. It also explains that employers are not required to provide pay scale information until after the initial interview. Employers are also allowed to ask about salary expectations. Finally, it allows employers to make compensation decisions based on existing salaries, so long as any differential is justified by a bona-fide factor such as seniority or merit.

LIMITATIONS ON CRIMINAL HISTORY INQUIRIES

Existing law restricts employers from considering applicants' and employees' judicially dismissed or sealed convictions or participation in pretrial or post-trial diversion programs. SB 1412 narrows the scope of an exception

to this general rule. The bill permits employers to seek information from the applicant or other sources only about an applicant's "particular conviction," rather than a "conviction" generally.

An employer may inquire about a "particular" conviction only if: 1) the employer is legally required to obtain information regarding the conviction; 2) the applicant would be required to possess or use a firearm; 3) an individual with that conviction is legally prohibited from holding the position; or 4) the employer is legally prohibited from hiring an applicant with that conviction.

The employer may inquire about the particular conviction under these circumstances even if it has been expunged, sealed, statutorily eradicated, or judicially dismissed. The law further states that it does not prohibit an employer from conducting criminal background checks or restricting employment based on criminal history when legally required to do so.

PAID FAMILY LEAVE FOR ACTIVE DUTY FAMILIES

SB 1123 extends California's paid family leave program to families with members on active duty in the armed forces. Beginning on January 1, 2021, an individual may take up to six weeks of paid family leave a year when participating in a qualifying exigency related to the covered active duty or call to covered active duty of the individual's spouse, domestic partner, child, or parent.

EMPLOYMENT RECORD INSPECTION RIGHTS

SB 1252 provides guidance regarding requests to inspect employment records. Employees have a right to receive a copy of their records, not merely inspect or copy them. An employer must deliver a copy within 21 days, and may charge the cost of reproduction to the employee. An employer who fails to provide an employee with a copy of his or her employment records within the 21-day time period will be subject to a $750 fine.

EXPANDED LACTATION ACCOMMODATION REQUIREMENTS

AB 1976 expands the existing lactation accommodation standards to now require that employers create a permanent lactation location in an area other than a bathroom. Before this change, employers were required to provide only an area other than a toilet stall. Employers may create a temporary location if they can demonstrate: 1) an inability to provide a permanent location due to operational, financial, or spatial constraints; 2) the temporary location is private and free from intrusion when needed for lactation; 3) the temporary location is only for lactation purposes when needed for that purpose; and 4) the temporary location otherwise meets state law requirements. If the requirements would create an "undue hardship", however, the employer must make "reasonable efforts" to provide the employee with an area other than a toilet stall that is in close proximity to the employee's work area where the employee can express milk in private.

CALIFORNIA CONSTRUCTION EMPLOYERS TEMPORARILY PROTECTED FROM PAGA SUITS

California construction workers will no longer be able to bring suit against their employers under the Private Attorneys General Act of 2004 ("PAGA") if they work under a collective bargaining agreement that meets certain requirements provided in AB 1654. To qualify, the agreement must: 1) provide for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for employees to

receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage rate; 2) provide for a grievance and binding arbitration procedure to redress labor code violations; 3) expressly waive PAGA's requirements in clear and unambiguous terms; and 4) authorize the arbitrator to award any and all remedies available under law. This exception expires on the earlier of the collective bargaining agreement's expiration date or the statute's repeal date of January 1, 2028.

PETROLEUM INDUSTRY EMPLOYEE REST BREAKS MAY BE INTERRUPTED

Although California law prohibits employers from requiring employees to work during their meal, rest, or recovery periods, AB 2605 creates an exception for certain workers in the petroleum industry who are covered by a qualifying collective bargaining agreement. Under this provision, employers may interrupt rest breaks taken by employees who hold safety-sensitive positions at petroleum facilities from their duties, to the extent the employee is required to carry and monitor a communication device and respond to emergencies or is required to remain on employer premises to monitor the premises and respond to emergencies. If a rest break is interrupted, an employer must promptly provide an additional rest break. If a rest break cannot be provided, the employer must pay the employee an hour of pay. This bill became effective immediately when it was signed by Governor Brown on September 20, 2018, and it will remain effective until the section is repealed in January 1, 2021.

SUGGESTED ACTIONS

In light of these changes, California employers should consider taking the following actions:

- Train managers, recruiters, human resource professionals, and other relevant staff regarding these new requirements and restrictions.
- Educate all employees, especially supervisory employees, about laws prohibiting harassment, including SB 1300's expanded definition of harassment, and train employees on how to appropriately respond to complaints of harassment.
- Update policies, procedures, and agreements in light of SB 1300's new restrictions on non-disparagement agreements and releases and SB 820's and AB 3109's restrictions on confidentiality provisions in settlement agreements.
- Update training policies, procedures, and materials to comply with SB 1343's expanded requirements for sexual harassment training for all employees.
- Consider updating procedures and policies regarding employment references to third parties to permit disclosures regarding eligibility for rehire. Employers should designate a single person or a human resources professional to provide references in order to ensure that disclosures fall within AB 2770's defamation privilege.
- Begin planning for SB 826's requirements for female representation on corporate boards.
- Ensure that application forms, candidate questionnaires, interview outlines and scripts, and other screening and hiring materials omit inquiries regarding salary history and inquiries regarding criminal history, consistent with applicable law.

- Prepare policies and procedures for complying with the salary history ban's pay scale disclosure requirements. Such policies and procedures should comply with the requirements described above.
- Consider asking applicants about their salary expectations, rather than salary history. If an employee voluntarily offers salary information, contemporaneously document that the employee introduced the information into the discussion.
- Review criminal history screening policies, procedures, and forms to ensure compliance with the restrictions on criminal history inquiries. Prepare policies for dealing with criminal history to avoid ad hoc decision-making by managers and consider involving human resource professionals.
- Contemporaneously document any individualized assessments regarding an applicant's suitability for employment based on criminal history information.
- Update written policies regarding qualifying exigencies related to military service.
- Ensure policies for responding to employee requests for records; permit employees to obtain copies of such records.
- Ensure that there is an available space for lactation in the workplace that complies with the new requirements.
- Reach out to us if you have any questions, concerns, or need guidance with respect to these new laws or your company's obligations to comply with them.

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