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Governor Brown Signs New Sexual Harassment Laws

The 2018 legislative session has come to an end. This year, over 100 new bills were signed which affect the labor and employment laws in California. The so-called #MeToo Movement influenced the Legislature, with twelve sexual harassment and retaliation-related measures making their way to Governor Brown's desk. Five of these bills were signed, all of which will go into effect in January 2019.

The bill making the most widespread impact is SB 1343, especially smaller employers. It requires all employers with five or more employees, including temporary or seasonal employees, to provide at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every two years thereafter. Previously, training of supervisory was only required for larger employers with 50 or more employees and there was no requirement to train nonsupervisory workers. On a positive note, this law will provide employers with training materials for these new training requirements as it tasks the Department of Fair Employment and Housing to develop online training courses that meet the requirements.

AB 3109 will affect every settlement agreement and contract signed after January 1st. It voids any provision which waives a party's right to testify regarding criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding if the person is called pursuant to a subpoena, court order or written request. In other words, a person who signed a settlement agreement requiring confidentiality would not be free to breach that confidentiality by voluntarily showing up and speaking at a public hearing. The testimony must be in response to a subpoena or a written request.

In response to the number of defamation lawsuits that have been filed by individuals who have been accused of sexual harassment in the workplace, AB 2770 protects both accusers and employers. This bill creates a qualified privilege in three categories: (1) complaints of sexual harassment made by an employee to an employer, based on credible evidence and made without malice; (2) communications between an employer and "interested persons," such as witnesses, regarding complaint of sexual harassment (i.e., communications made in an investigation), made without malice; and (3) responses by an employer to a reference check as to whether the employer would rehire an employee, and, if not, whether that decision is based on the employer's determination that the former employee engaged in sexual harassment, so long as the statement is made without malice. It is important to note that this statute does not address communications regarding harassment, such as, harassment based on race, age, gender, religion, national origin, etc.

SB 820 concerns non-disclosure agreements that are related to claims of sexual assault and sexual harassment – including workplace harassment, discrimination and retaliation. Beginning in 2019, courts will no longer enter any order that restricts the disclosure of the factual information related to the claim. The limitation does not include non-disclosure requirements pertaining to the amount paid in settlement of a claim. Additionally, a plaintiff can request a provision that shields his or her identity and all identifying facts.

Finally, SB 1300 prohibits an employer, in exchange for a raise or bonus, or as a condition of employment continued employment, from requiring the execution of a release of a claim or right under FEHA or from requiring an employee to sign a non-disparagement agreement or other document that would limit the employee's right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. Additionally, the bill mentions (but does not require) bystander intervention training which would enable bystanders to recognize potentially problematic behaviors and to motivate them to take action. Finally, this bill makes legislative findings and declarations, including (1) that a single incident can constitute harassment, and (2) that harassment cases are rarely appropriate for summary judgment.

What This Means for Employers:

Based on the multiple changes regarding releases, employers should review their standard contracts, settlement agreements and non-disclosure agreements to ensure that they do not contain provisions that are now prohibited. We also recommend that employers, especially smaller companies, create a method of tracking completion of sexual harassment training. Consider revising policies on job references concerning former employees who were found to have engaged in sexually harassing conduct so as to warn potential employers about the former employee's conduct without the threat of a defamation lawsuit. Maintaining compliance with labor and employment laws is a challenge for California employers. Things change rapidly and employers who do not keep up open themselves up to costly claims and penalties. Contact Barsamian & Moody to ensure your business is up to date with these and the other new laws that will be taking effect next year.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360, for individual responses to questions or concerns regarding any given situation.