Keeping Up with the Legislature: 2019 Brings Changes to the Fair Employment and Housing Act

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In late 2017, #metoo went viral, and allegations of sexual harassment took center stage in the United States. The California Legislature responded by introducing a large number of bills to amend the Fair Employment and Housing Act ("FEHA") to address a variety of harassment-related issues. Governor Brown signed several of these bills into law to take effect on January 1, 2019. Like the remainder of the FEHA, these changes apply to all public employers and most private employers.

SB 1300, or the Omnibus Sexual Harassment Bill, amends the FEHA by adding in Sections 12923, 12964.5 and 12950.2 to the Government Code. It is unclear how courts will apply these changes, so at this early date, it is unclear what practical impact the changes will have on employers. Technically, the new provisions simply state the Legislature's understanding of appropriate legal standards, some of which courts have already articulated as persuasive authority. That means that, in theory, courts could simply reject the changes and proceed with its currently applied jurisprudence. We expect these issues to be heavily litigated. In sum, the changes in SB 1300 will make it easier for plaintiffs to file and litigate harassment claims against employers and make it more difficult for employers to defeat harassment claims on summary judgment.

Declined Tangible Productivity Unnecessary. SB 1300 affirms the standard stated by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems*[1] that the plaintiff does not need to prove declined tangible productivity as a result of the harassment. Instead, the plaintiff need only prove that a reasonable person subjected to the discriminatory conduct would find that the harassment altered working conditions so as to make it more difficult to do the job.

Single Incident Sufficient. Application of SB 1300 expands current law to establish an actionable harassment claim. Currently, the complained of conduct must be sufficiently "severe or pervasive." Generally, this requires either one extremely severe instance or multiple less severe instances. Under SB 1300, a single incident of

harassment that has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment, may be sufficient to create a triable issue regarding the existence of a hostile work environment. Accordingly, a plaintiff will not necessarily need to allege multiple incidents to meet the "severe and pervasive" standard to establish a case of a hostile work environment; one incident of harassing conduct could more easily constitute unlawful "severe and pervasive" harassment. The application of SB 1300 rejects the holding in *Brooks v. City of San Mateo*[2]

"Stray Remarks" Relevant. SB 1300 affirms the current standard set forth in *Reid v. Google*[3]: The existence of a hostile work environment depends on the totality of the circumstances. Therefore, even if a discriminatory remark is made not directly in the context of an employment decision or uttered by a non-decision-maker, a court will still consider the remark as relevant, circumstantial evidence of discrimination.

Industry Culture Irrelevant. SB 1300 disproves the language in *Kelley v. Conco Companies.*[4] Currently, in evaluating whether alleged harassment is triggered by a victim's protected status (*e.g.*, sex or race), a court might consider the general industry culture to determine discriminatory intent. For example, a court might interpret certain sexually explicit statements to not be motivated by gender because vulgar language is commonly used in the entire industry or workplace. SB 1300 disapproves the current standard and declares the legal standard for sexual harassment will not vary by type of workplace. Under the new standard, in determining whether a hostile environment exists, courts should consider the nature of the workplace in a hostile work environment claim only "when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties." Therefore, it is irrelevant that an occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past.

SB 1300 carves out a small exception: the nature of the workplace is considered if witnessing or engaging in sex-related conduct is integral to the job.

Summary Judgement Rarely Appropriate. SB 1300 affirms the observation in *Nazir v. United States, Inc.*[5], that hostile work environment cases involve issues "not determinable on paper." That means that harassment cases will rarely be appropriate for disposition on summary judgment.

Expands Employers' FEHA Liability for Third Parties. Currently, employers are responsible for non-employees' sexual harassment only if the employer knew or should have known about the conduct. Under

SB 1300, an employer is now responsible for harassment by a third party based on any protected status, rather than just sex.

Limits Release and Non-Disparagement Agreements. SB 1300 prohibits employers from requiring an employee to sign, as a condition of employment, continued employment, or in exchange for a raise or bonus: (1) a release of FEHA claims or rights or (2) a non-disparagement agreement prohibiting a disclosure of information about unlawful acts in the workplace, including sexual harassment.

SB 1300 creates an exception: this restriction does not apply to negotiated settlement agreements to resolve FEHA claims filed in court, before administrative agencies, alternative dispute resolution or through the employer's internal complaint process. The settlement agreement just has to be negotiated, voluntary, and supported by valuable consideration.

Limits Prevailing Employers' Right to Fees and Costs. SB 1300 prohibits a prevailing defendant from being awarded attorneys' fees and costs unless the court finds the complaint was frivolous, unreasonable, or groundless when filed; or that the plaintiff continued to litigate after it clearly became so. SB 1300 explicitly states that this provision does not apply to section 998 settlement offers.

Authorizes Bystander Intervention Training. SB 1300 also authorizes, but does not require, employers to provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors.

SB 1343 increases the number of employers that will have to provide sexual harassment prevention training and mandates training for non-supervisory employees. Currently, all public employers and private employers with 50 or more employees have to provide sexual harassment training. Now, by January 1, 2020, employers with 5 or more employees (including temporary and seasonal employees) will have to provide such training. This training must be interactive and must be provided to all employees, not just supervisors. Supervisors will be required to complete two hours of training while non-supervisors will be required to complete one hour.

Training for non-supervisory employees must be completed by January 1, 2020. Thereafter, training must be completed within six months of hire and every two years thereafter. The Department of Fair Employment and Housing has been directed to develop courses that meet this requirement and make them available for employers. The Authority has long-recommended harassment prevention training for all employees, not just supervisors, and non-supervisory employee training is currently available to all Authority members.

Beginning on January 1, 2020, employers must provide this training within 30 calendar days of the hire date, or within 100 hours work (whichever occurs first) for seasonal and temporary employees that are hired to work for less than six months. If the temporary employee is employed by a temporary service employer, as defined in the California Labor Code, to provide services for a client, the training must be provided by the temporary service employer, not the client.

SB 820 extends the California Code of Civil Procedure ("CCP") and applies to both public and private employers as well as both civil and administrative actions. CCP §1002 currently prohibits provisions in settlement agreements that prevent disclosure of acts that can be prosecuted as felony sex offenses and certain sex offenses against children. SB 820 adds CCP §1001 to prohibit nondisclosure provisions in settlements involving sexual misconduct. If a settlement agreement after January 1, 2019, includes such nondisclosure provision, that provision will be void as a matter of public policy. SB 820 creates two exceptions: (1) either party can prevent the nondisclosure of the amount paid, and (2) the claimant can prevent nondisclosure of facts that would protect his or her identity, as long as a government agency or public official is not a party to the action.

AB 3109 bars settlement provisions that prevent an individual from testifying about criminal conduct or sexual harassment in court or legislative proceeding. AB 3109 makes such provision void and unenforceable.

SB 419 prohibits the Legislature from firing or discriminating against an employee or lobbyist who files a harassment complaint. SB 419 also requires the Senate and Assembly to maintain records of harassment complaints for at least 12 years. Complaints made at the request of a legislative employee and complaints made against a non-employee in specified circumstances are also "protected disclosure" under this law.

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[1] (1993) 510 U.S. 17.
[2] (2000) 229 F.3d 917 (holding that a single instance of offensive conduct did not rise to the level of harassment under Title VII).
[3] (2010) 50 Cal. 4th 512 (holding that discriminatory comments by coworkers and non-decision-makers and comments unrelated to the employment case should be considered with the rest of the evidence in the record).
[4] (2011) 196 Cal.App.4th 191 (taking into consideration the workplace environment in determining that sexually taunting comments made by employees and supervisors was not harassment severe and pervasive enough to amount to an action under FEHA).
[5] (2009) 178 Cal.App.4th 243.