CLIENT NEWS BRIEF

#MeToo Movement Leads to Increased Harassment Prevention Training and Related Requirements for California Employers

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Effective January 1, 2019, California employers, including public agencies, will be required to comply with new requirements aimed at preventing sexual harassment in the workplace as a result of the #MeToo movement that began in 2017. On September 30, 2018, Governor Jerry Brown approved Senate Bill (SB) 1300 and SB 1343, which both make significant changes to the California Fair Employment and Housing Act (FEHA).

Background

Under FEHA, it is unlawful to harass persons based on their sex or other protected characteristics in the workplace, and employers must take immediate and appropriate corrective action when such harassment occurs. An employer's liability for sexual harassment under FEHA extends to the conduct of non-employees towards its employees, applicants, unpaid interns, volunteers, and certain contractors. In addition, employers with 50 or more employees are required to provide at least two hours of training and education regarding sexual harassment, abusive conduct, and harassment based on gender identity, gender expression, and sexual orientation, to all its supervisors every two years.

Summary of Changes to FEHA

SB 1300 and SB 1343 make the following changes to FEHA:

- ***Supervisor Training.*** Now, employers with 5 or more employees, including temporary or seasonal employees, must provide two hours of specific training and education regarding sexual harassment, abusive conduct, and harassment based on gender identity, gender expression, and sexual orientation, to all its supervisors. The training must occur within six months of initial employment in a supervisory position and every two years thereafter.

- ***Nonsupervisory Employee Training.*** Employers must also provide one hour of training to all nonsupervisory employees. Employers have until January 1, 2020 to provide the required training. The Department of Fair Employment and Housing (DFEH), which enforces the FEHA, is required to develop online training courses on the prevention of sexual harassment and post them on its website, as well as develop related resources. Again, the training must occur within six months of initial employment and every two years thereafter.

- ***Bystander Training.*** Further, an employer may, but is not required to, provide "bystander intervention training" that includes information and practical guidance to help bystanders recognize potentially problematic behaviors and to motivate them to take action.

- ***Release and Non-Disparagement Agreements***. An employer cannot require an employee to release his or her claims under the FEHA or

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sign a document that limits the employee from disclosing information about unlawful acts in the workplace, including, but not limited to sexual harassment, as a condition for a raise, bonus, employment, or continued employment. However, this new part of the law does not apply to a settlement agreement resolving a claim an employee has already filed in court or before an administrative agency, or is being resolved or handled through alternative dispute resolution or through an employer's internal complaint process. The settlement agreement must be voluntary, deliberate, and informed, and it must provide consideration of value to the employee. The employee must be given notice and an opportunity to retain an attorney.

- ***Heightened Legal Standards.*** The California Legislature approved of three court decisions regarding harassment in the workplace that ruled as follows. First, an employee does not have to prove his or her productivity declined as a result of harassment, but rather, the harassment made it more difficult for an employee to do his or her job. Second, a discriminatory remark, even if it was not made by a decision maker or directly in the context of an employment decision, may still be relevant, circumstantial evidence of discrimination. Third, it is "rarely appropriate" to dispose of harassment cases at the summary judgment stage of litigation. The Legislature also rejected two court decisions to the extent they decided a single incident of harassing conduct could not establish the existence of a hostile working environment and that the legal standard for sexual harassment may vary by the type of workplace.

- ***Conduct of Non-Employees.*** Employers are now liable for the unlawful harassment of its employees, applicants, unpaid interns, volunteers, and certain contractors by non-employees. An employer's liability for such conduct of non-employees is no longer limited to "sexual" harassment but can include any basis of unlawful harassment such as race, ethnicity, disability, etc.

These changes to FEHA serve as a reminder that taking steps to prevent sexual harassment in the workplace is critical. These steps include, but are not limited to, implementing effective trainings and policies and promptly addressing any inappropriate conduct in the workplace. Employers should consult with an attorney before entering into any agreement with an employee that may waive their rights and claims under FEHA.

For more information about SB 1300, SB 1343, or best practices related to the prevention of and addressing sexual harassment in general, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also visit our website, follow us on Facebook or Twitter or download our Client News Brief App.