NIESAR & VESTAL LLP

Law Alert

February 25, 2019

Additional pieces of legislation responding to the #MeToo Movement

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Following our recent law alert regarding the sexual harassment training requirements that now apply to employers of five or more employees, we wanted to bring to your attention that this aspect is only one piece of legislation responding to the #MeToo Movement.

We have summarized below other important pieces of legislation requiring attention or action by employers. The list below is not exhaustive; we focused on pieces of legislation that seem the most relevant to us for your businesses.

These changes took effect at the start of the new year.

Prohibition of confidential settlements of sexual harassment claims

Senate Bill (SB) 820 prevents individuals and companies from entering into secret settlements in sexual harassment cases. It prohibits non-disclosure provisions in settlement agreements related to civil or administrative complaints of sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. Any such confidentiality provisions in settlement agreements, entered into on or after January 1, 2019, are void as a matter of law because they are deemed to be against public policy.

Expansion of liability under the Fair Employment and Housing Act (FEHA)

First, SB 1300 prohibits employers from requiring employees to (i) release harassment or discrimination claims under FEHA in exchange for a raise or a bonus or as a condition of employment or continued employment; and (ii) sign non-disparagement agreements or other documents preventing employees from disclosing information about unlawful acts in the workplace, including sexual harassment.

Second, SB 1300 lowers the burden of proof to establish harassment. For example, the "severe or pervasive" standard is rejected so that a single incident of harassing conduct is now sufficient to create a triable issue of fact regarding the existence of a hostile work environment.

Finally, before SB 1300, courts were authorized under FEHA and California Code of Civil Procedure §998 to award the prevailing party in a lawsuit reasonable attorneys' fees and

costs, including expert witness fees. This is also a provision generally present in employment agreements. SB 1300 now bars a prevailing employer from being awarded attorneys' fees and costs unless the court finds the action was frivolous, unreasonable, or groundless. Although not explicitly indicated in the new law, we assume that it overrules any contractual provisions which would award the prevailing employer in a lawsuit under FEHA reasonable attorneys' fees and costs, if such an action were not frivolous, unreasonable, or groundless.

Protection of complaints and communications regarding sexual harassment

Defamation laws make certain communications privileged, in that they cannot support a slander or libel claim unless they are made with malice. According to AB 2770, those privileged communications include complaints of sexual harassment by an employee to an employer. For this privilege to apply, communications must be made without malice and must be based on credible evidence. The idea behind this new provision is that it might encourage more victims of sexual harassment to speak out.

AB 2770 also provides protection for employers who, without malice, answer questions about whether they would rehire an employee and whether the decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

If you have questions concerning the new pieces of legislation, please feel free to contact Gerald Niesar (gniesar@nvlawllp.com) or John Kelley (jkelley@nvlawllp.com).