EMPLOYMENT DEFENSE COUNSEL

SAN FRANCISCO
601 Montgomery Street, Suite 1150
San Francisco, CA 94111
tel: 415.603.5000 | fax: 415.840.7210

LOS ANGELES
633 West 5th Street, Suite 3330
Los Angeles, CA 90071
tel: 213.358.2810 | fax: 213.995.6382

SUMMARY OF CALIFORNIA'S NEW EMPLOYMENT LAWS FOR 2019

January 14, 2019

By Tom Geidt

We hope your 2019 is off to a good start. As usual, the California Legislature passed a flurry of employee-friendly laws this year, many of them inspired by the #MeToo movement. Several of these laws are momentous and will require all California employers to change: their training programs, certain documents they require employees to sign, and how they respond to harassment and discrimination complaints, among other things. Each of these laws took effect on January 1, 2019, unless we specify otherwise.

Legislature Dramatically Toughens the Fair Employment & Housing Act's Provisions on Harassment

By far, the most important of the new laws is Senate Bill 1300, which has significantly expanded the scope of the FEHA regarding claims of sexual and other harassment, discrimination, and retaliation. Here are the five key features of S.B. 1300:

1. Expressions of Legislative Intent

S.B. 1300 added a new section of the FEHA specifically to direct courts and enforcement agencies on how they are expected to interpret and enforce the FEHA's provisions relating to sexual harassment in future cases. Among the directives:

- Courts should construe "harassment" more broadly and find the existence of a hostile work environment whenever 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."

- A *single incident* of harassing conduct is sufficient to create a hostile work environment under the FEHA. Therefore, the courts should no longer give a narrow interpretation of the "severe or pervasive" standard for determining what constitutes unlawful harassment.

- A single discriminatory remark in the workplace, even if not made directly in the context of an employment decision or not uttered by a decisionmaker (a so-called "stray remark") may be relevant circumstantial evidence of unlawful harassment.

- The legal standard for sexual harassment should not vary by the type of workplace. Thus, it is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually-related commentary or conduct in the past.

- Harassment cases are "not determinable on paper" and thus are "rarely appropriate for disposition on summary judgment."

2. New Restrictions on Releases and Nondisclosure Clauses

Except as noted below, it is now unlawful to require employees to sign a release in exchange for a raise or bonus, or as a condition of employment or continued employment. "Release" is broadly defined to include not only a traditional release of the right to pursue a court action or administrative complaint against the employer, but also includes a statement that the employee does not possess any claim or injury against the employer.

It also is now generally unlawful to require employees to sign a nondisparagement agreement or other document that purports to deny them the right to disclose information about "unlawful acts in the workplace." "Unlawful acts" includes, but is not limited to, sexual harassment or "*any other unlawful or potentially unlawful conduct*." (Emphasis added.)

As an exception, these prohibitions do not apply to "negotiated settlement agreements" to resolve an underlying claim that is filed in court or before an administrative agency, presented in an ADR forum, or pursued through an employer's internal complaint process. "Negotiated" means the agreement is voluntary, deliberate, and informed; provides consideration of value to the employee; and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

3. Bystander Intervention Training

S.B. 1300 authorizes employers, but does not require them, to provide "bystander intervention" training as part of their mandated sexual harassment training, including "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."

4. Liability for Harassment by Nonemployees

Existing law already makes employers potentially liable when nonemployees sexually harass the employer's employees, applicants, unpaid interns, volunteers, or persons performing unpaid

services pursuant to a contract, if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. S.B. 1300 expands this potential liability to all categories of harassment prohibited by the FEHA, not just sexual harassment.

5. Recovery of Employer's Attorneys' Fees and Costs

S.B. 1300 will make it even harder than before for employers that prevail in a suit under the FEHA to recovers their attorneys' fees and costs, including expert witness fees. Under the new law, a prevailing employer may recover fees and costs only when the court finds the lawsuit was "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." This standard will apply even when the employer previously made an offer to compromise the claim for a specified amount (under Section 998 of the Code of Civil Procedure) and the employee ultimately won a lesser amount, or no amount.

Taken together, the provisions in S.B. 1300 effectively broaden the definition of actionable harassment and will make it more difficult for employers to defeat harassment claims in court.

Employers with Five or More Employees Must Train Employees and Supervisors

Existing law requires employers with 50 or more employees to train *supervisors* on sexual harassment and other prescribed topics within six months after each person is hired into a supervisory position and again every two years. A new law has expanded this requirement to employers with *five* or more employees, and the training must now be provided to all *nonsupervisory* employees, not only supervisors. Covered employers will have until January 1, 2020 (in other words, the end of this year) to complete two hours' training of supervisors and one hour's training of nonsupervisory employees. As before, the training must be given within six months of an employee's hire and repeated every two years. (S.B. 1343, amending Gov't Code §§12950 and 12950.1.)

Another new statute requires that hotel and motel employers conduct at least 20 minutes of training and education on human trafficking awareness to employees who are likely to interact or come into contact with victims of human trafficking. This training must be given by January 1, 2020. Thereafter, it must be given within six months of an employee's hire and repeated every two years. (S.B. 970, adding new Gov't Code §12950.3.)

New Restrictions on Nondisclosure Clauses in Settlement Agreements and Other Documents

A new law prohibits the parties to a settlement agreement from inserting a confidentiality clause that prevents the disclosure of factual information relating to certain types of claims, including sexual or other workplace harassment, sex discrimination, and retaliation for reporting harassment or sex discrimination. Such clauses are void and contrary to public policy. This applies only to settlements reached after a court action or administrative complaint have been filed. At the claimant's request, however, a settlement agreement may include a provision that would shield the disclosure of the claimant's identity. Also, the parties to a

settlement agreement may still agree to a clause that forbids disclosure of the settlement *amount* paid to the claimant. (S.B. 820, adding new Code of Civil Procedure §1001.)

A separate law makes a provision in a settlement agreement or other contract, entered into on or after January 1, 2019, void and unenforceable if it purports to waive a party's right to testify in an administrative, legislative or judicial proceeding concerning alleged sexual harassment or alleged criminal conduct on the part of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party. (A.B. 3109, adding new Civil Code §1670.11.)

Clampdown on Sexual Harassment in Business or Professional Relationships

This bill expands existing protections against sexual harassment for persons who enter into a business, service, or professional relationship with a third party, such as an attorney, physician, real estate agent, landlord, or teacher. The new law adds investors, lobbyists, directors, producers, and elected officials to the categories of persons who can be sued for sexual harassment, as well as anyone who "holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party." The new law eliminates the former requirement that, to sustain a harassment claim, a plaintiff must prove an inability to easily terminate the relationship. Under the new law, the California Department of Fair Employment & Housing will be empowered to investigate and enforce sexual harassment claims brought in these business or professional settings. (S.B. 224, amending Civil Code §51.9.)

Sexual Harassment Complaints Are Protected Against Defamation Claims

The Legislature also has made it harder for someone accused of sexual harassment to sue the complainant or the accused's employer for defamation. The statutory "privilege" that generally protects against defamation suits now expressly covers an employee's complaint of sexual harassment, without malice, to an employer based upon credible evidence, as well as communications between an employer and other interested persons, without malice, regarding a complaint of sexual harassment. Also, the privilege applies to an employer's non-malicious statements to a prospective employer, in response to a reference request, that it would not rehire the former employee and that its decision not to do so is based on the employer's determination that the former employee engaged in sexual harassment. (A.B. 2770, amending Civil Code §47.)

Lactation Accommodation Law Strengthened

Existing California law requires employers to provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child, and requires an employer to make reasonable efforts to provide the employee with the use of a room or other location, *other than a toilet stall*, near the employee's work area to express breast milk in private. The new law amends this to require a room or other location *other than a bathroom* for lactation purposes. An employer that makes a temporary lactation location

available to an employee will be deemed to be in compliance with the law if (1) the employer is unable to provide a permanent lactation location because of operational, financial, or space limitations; (2) the temporary location is private and free from intrusion while an employee expresses milk; (3) the temporary location is used only for lactation purposes while an employee expresses milk; and (4) the temporary location otherwise meets the requirements of state law concerning lactation accommodation. (A.B. 1976, amending Labor Code §1031.)

Mediation Confidentiality Bolstered

Another new law adds teeth to the requirement that communications made in connection with a mediation be treated as confidential and be inadmissible for use in court. Among other things, the law requires that the attorneys for each party must provide written notice to their clients of the confidentiality requirements and obtain the clients' signed acknowledgment of the confidentiality restrictions *before* a party agrees to participate in a mediation, other than a class or representative action. (S.B. 954, amending Evidence Code §1122 and adding new §1129.)

Employees Are Entitled to Receive Copies of Payroll Records

California's pay stub law has long permitted current and former employees, upon request, to "inspect or copy" their wage statements or equivalent payroll records within 21 calendar days of the request. This bill clarifies that the right to copy the pay records means the right to "receive a copy" of the records. In other words, an employer cannot require employees to do the photocopying themselves; instead, the employer must do the copying and furnish the records to the requesting individual. (S.B. 1252, amending Labor Code §226.)

Salary History Laws Clarified

This bill, which was signed into law in July 2018 and took effect immediately, made minor clarifying amendments to last year's law that bans inquiries about a job applicant's current salary or salary history, and also requires an employer to provide the pay scale for the position sought upon the applicant's reasonable request. The new law defines "pay scale" as a salary or hourly wage range, "reasonable request" as a request made after an applicant has completed an initial interview, and "applicant" as an individual who is seeking employment with the employer and is not currently employed with the employer in any capacity.

The law also clarifies that employers will not be in violation of the state's pay equity law if they make a compensation decision based on an employee's current salary, as long as any resulting wage differential is justified by one or more specified factors, including a seniority or merit system. (A.B. 2282, amending Labor Code §§432.2 and 1197.5.)

No Discrimination against Members of Military Reserve

This bill expands California's existing anti-discrimination protections for members of the military by making it unlawful to terminate or otherwise discriminate against employees

because of their membership or participation in the California National Guard, State Military Reserve or federal reserve components of the U.S. Armed Forces. (S.B. 1500, amending Military & Veterans Code §394.)

Permissible Inquiries About Past Criminal Convictions Narrowed

Existing law generally prohibits employers from asking applicants about expunged convictions, but allows an exception where the employer is required by law to conduct criminal background checks for employment purposes. This new law is designed to tighten that exception, due to a perceived problem that background check reports often list *all* expunged criminal convictions, including ones that are irrelevant to the job. The law clarifies that an employer may ask an applicant only about "particular convictions," where conviction of a crime would legally prohibit someone from holding that job. "Particular conviction" is defined as "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses." The law does not otherwise restrict employers from conducting criminal background checks in accordance with applicable federal, state, or local laws. (S.B. 1412, amending Labor Code §432.7.)

PAGA Exemption Allowed for Employers in Construction Industry

This bill gives construction industry employers an exemption from the requirements of the Private Attorneys General Act (PAGA), if their employees are covered by collective bargaining agreements that contain certain specified provisions, including an express waiver of PAGA's requirements and the right to pursue the alleged violations in arbitration. (A.B. 1654, adding new Labor Code §2699.6.)

Rest Break Exemption Granted for Unionized Petroleum Facilities

Safety-sensitive employees at certain petroleum facilities can now be required to remain on premises and "on call" during their rest breaks, in case of emergencies, so long as they are covered by a CBA that contains specified provisions. Employees who are interrupted by a rest break must still be allowed another uninterrupted break or else be paid a rest break premium. (A.B. 2605, adding new Labor Code §226.75.)

Paid Family Leave Will Cover Qualifying Military Exigencies

California's family temporary disability insurance program, also known as Paid Family Leave, currently allows eligible employees to receive up to six weeks per year of partial wage replacement, funded through State payroll deductions, to bond with a new child or to attend to the serious illnesses of certain family members. A new law will allow employees, beginning on January 1, 2021, to use Paid Family Leave to participate 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 in the armed forces of the United States. (S.B. 1123, amending, repealing or adding Unemployment Ins. Code §§3300 *et. seq.*)

MINIMUM WAGE INCREASES AND OTHER CHANGES

- ***California minimum wage***: The California minimum wage increased on January 1, 2019 from $11.00 to $12.00 for employers with 26 or more employees. The minimum wage for small employers increased from $10.50 to $11.00.

- ***Minimum wage in California cities***: Many California cities have minimum wages that exceed the State's minimum wage. In some cities, the minimum wage increased as of January 1, 2019. The minimum wage for other cities will increase on July 1, 2019, or at other times. For example, San Francisco's minimum wage, currently $15 for most employers, will be adjusted to a new indexed rate as of July 1, 2019, to be announced later. Employers should check the websites of the cities where they operate to stay up to date on the applicable requirements.

- ***Minimum salary for exempt status***: The minimum salary threshold for exempt status under the California administrative, executive and professional exemptions increased on January 1 from $45,760 to $49,920 for large employers ($4,160 per month). This is because the exempt status threshold is tied to the California minimum wage.

- ***Computer professional pay minimum***: The California overtime exemption for computer professionals increased by 4.2% on January 1, from $90,790.07 to $94,603.25 for salaried workers and from $43.58 to $45.41 for those who are paid by the hour.

- ***New pay minimum to qualify for "CBA exemption"***: Several Labor Code provisions, such as the overtime and paid sick leave laws, provide exemptions for employers whose collective bargaining agreements meet certain criteria, one of which is that the covered employees be paid at least 30% above the California minimum wage. As of January 1, 2019, this pay threshold for large employers increased from $14.30 to $15.60 per hour.

* * * * *

All California employers should familiarize themselves with these new laws and take the necessary steps to comply with them. The biggest take-away for employers is to place renewed emphasis on preventing and properly responding to complaints of sexual and other harassment. We can expect a significant increase in the filing of harassment complaints.

If you have questions about any of these developments, please feel free to contact me or any other GBG attorney.

Good luck and happy new year!

Tom Geidt
Telephone: (415) 603-5003
Email: tomgeidt@gbgllp.com