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Insights: Alerts

Expansion of Rights for Victims of Workplace Sexual Harassment in California

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On September 30, 2018, Governor Jerry Brown of California signed into law several bills aimed at strengthening the rights of an individual alleging workplace sexual harassment. The most impactful of the new bills is the Stand Together Against Non-Disclosures Act (S.B. 820), which significantly restricts what confidentiality or non-disclosure provisions an employer can include in an agreement to settle a civil or administrative action involving claims of sexual assault, sexual harassment, or harassment or discrimination based on sex (referenced herein as "Covered Claims"). The law bars employers from including in a settlement agreement a provision that would prevent the employee from being able to disclose factual information related to the Covered Claims. The measure does, however, allow the employee who is alleging the Covered Claims to request a provision to conceal his or her identity and facts that could lead to the discovery of his or her identity.

Non-disclosure agreements have historically been an important tool for employers seeking to restrict a suing employee from publicizing the details of his or her claims or settlement. The details of a settlement or its mere existence can have the effect of creating a perception that an employer is guilty. This new statute limits an employer's ability to use a non-disclosure agreement when settling a case involving the Covered Claims. Once the law goes into effect on January 1, 2019, California employers will no longer be able to rely on non-disclosure agreements to ensure that factual details in a case involving the Covered Claims remain confidential. In settling a matter involving Covered Claims, employers should expect that the employee may share the executed settlement agreement and its terms. Employers in California should also anticipate that an employee who settles a Covered Claim will have the freedom to discuss the facts of his or her case openly through social media, with other employees, or even to the press. Note, however, that the new statute does include a carve-out allowing employers to prohibit the disclosure of the amount paid in the settlement through a provision in the settlement agreement. A California employer facing a sexual harassment claim or other Covered Claim should consider the significance of confidentiality to the employer before determining whether to enter into a settlement agreement. Employers must also ensure compliance with this new law when preparing settlement agreements. Failure to comply may result in a court voiding the entire settlement agreement.

Another new California law, S.B. 1300, provides further protections to employees who raise claims of workplace harassment. The measure sets a lower legal standard for establishing when harassing conduct is sufficient to support a hostile environment claim, allowing workers to sue an employer following even a single incident of

sexual harassment. This law ends the previous, more employer-friendly legal standard that sexual harassment had to be “severe or pervasive” in order for an employee to establish a viable claim. S.B. 1300 also prohibits an employer from requiring, in exchange for a raise or bonus, or as a condition of employment or continued employment, the execution of a release of a claim under the California Fair Employment and Housing Act (“FEHA”) or from requiring an employee to sign a non-disparagement agreement that prevents the employee from disclosing information about unlawful acts in the workplace. Such an agreement may be unenforceable. S.B. 1300 also authorizes employers with 50 or more employees to provide “bystander intervention training” in addition to the standard sexual harassment training that is currently required. Bystander intervention training would include information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors in the workplace and to motivate bystanders to take action when they observe problematic behaviors. The training may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention. This statute may result in an increase in the number of sexual harassment cases brought by employees. Employers should review their policies and written agreements to ensure compliance. S.B. 1300 will go into effect on January 1, 2019.

Finally, Governor Brown signed S.B. 1343, which will expand California's existing sexual harassment training requirements to cover employers of five or more workers (including seasonal and temporary workers). This law means that almost all employers in California should plan to provide sexual harassment training that complies with the state's requirements. This law will go into effect on January 1, 2020.

In handling any sexual misconduct claims or lawsuits, California employers should use caution to ensure compliance with the new laws. If you are in need of representation or guidance in navigating sexual harassment workplace claims in the post-“#MeToo” era, please contact our Labor & Employment attorneys or your Kilpatrick Townsend attorney. We would be pleased to assist you as needed.

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