The Pendulum has Swung: California Passes Harassment Legislation In Wake Of #Metoo Movement

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Recently, California Governor Jerry Brown signed a series of Bills that add additional protections to victims of sexual harassment and may make it more difficult for employers to defend those claims. Specifically, on or before January 1, 2019, the following laws will take effect:

SENATE BILL NO. 1300

Senate Bill 1300 provides the most numerous and far reaching changes to the harassment landscape in California. It adds a number of new provisions to the government code which broaden the definition of harassment and may diminish the ability of an employer to defend itself in court. Specifically, the Bill adds a new Section, 12923, to the Government Code which:

- Substantially broadens the definition of a hostile work environment to include any conduct that "sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victims emotional tranquility in the work place, affect the victims ability to perform the job as usual, or otherwise interfere with and undermine the victims personal sense of wellbeing."

- Indicates that a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.

- Rejects the "stray remark" doctrine and instructs that "the existence of a hostile work environment depends on the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant, circumstantial evidence of discrimination."

- Instructs that the legal standard, except in very limited circumstances, for sexual harassment should not vary by type of workplace.

- Instructs that harassment cases are rarely appropriate for disposition on summary judgment.

In addition, Senate Bill 1300 also:

- Codifies case law that an employer may be responsible for the acts of non-employees with respect to harassment of employees, applicants, unpaid interns, or persons providing services pursuant to a contract in the workplace.

- Adds Section 12964.5 to the Government Code, which restricts the ability of an employer to require an employee to sign a release of a claim or right under certain circumstances. Note a "release of claim or right" includes requiring an individual to execute a statement that he or she does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a
Prohibits an employer from requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. Any agreement or document in violation of this section is contrary to public policy and shall be unenforceable.

Significantly, this section does not apply to a negotiated settlement agreement to resolve an underlying claim that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer’s internal complaint process. Critically, a settlement agreement will only be considered to have been “negotiated” if the employee received notice and an opportunity to retain counsel.

CONFIDENTIALITY OF SETTLEMENT AGREEMENTS

In addition to the restrictions imposed by new Government Code Section 12964.5, Senate Bill 820 adds Section 1001 to the Code of Civil Procedure and relates to the confidentiality of settlement agreements. Specifically, this new section outlaw provisions in a settlement agreement that prevent the disclosure of factual information related to a claim filed in a civil or administrative action regarding sexual harassment or other forms of harassment. However, the prohibition does not apply to the identity of the claimant, if they requested it to be confidential, nor does it prohibit the confidentiality of the amount paid in settlement of a claim. That provision, however, must be read in light of the new federal tax provision that precludes the deductibility of payments in connection with the settlement of sexual harassment or sexual assault claims that are subject to a confidentiality provision.

ASSEMBLY BILL NO. 3109

In keeping with the concerns underlining new Government Code 12964.5 and Code of Civil Procedure Section 1001, Section 1670.11 is added to the Civil Code and makes a provision in a contract or settlement agreement void and unenforceable if it waives a party’s right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.

LESSONS TO BE LEARNED

The California legislature has greatly expanded the protection of employees and other individuals in connection with sexual harassment. As a result of these changes, it is even more imperative for employers to train their employees to recognize and report allegations of sexual harassment and to affirm that they have been trained on these issues and they are not aware of any such circumstances. Additionally, employers need to be careful when requiring an employee to forego legal claims or to restrict their ability to disclose facts relating to sexual harassment by either preventing such disclosure in a settlement agreement or trying to prevent their testimony in an official proceeding.

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