Labor and Employment Alert: California Expands Employer Liability for Discrimination Under The FEHA

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CLIENT ALERT | 10.19.2018

The third piece of legislation that California recently enacted – Senate Bill 1300 – significantly expands employer liability under California's Fair Employment and Housing Act (FEHA).

Expansive definition of harassment

At the outset, the legislature makes several declarations of intent in Senate Bill 1300 that apply to the laws about harassment. First, the legislature appears to have lowered the burden for establishing a hostile work environment. "The legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when 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." This does not have to a decline in tangible productivity. Rather, it suffices that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.

Second, the legislature declares 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.

Third, the legislature reaffirms its rejection of the "stray remark" doctrine. Therefore, a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination.

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

Finally, according to the legislature, "harassment cases are rarely appropriate for disposition on summary judgment."

Expanded liability for third-party harassment

Employers already face liability for the acts of nonemployees with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer or its supervisors knows or should have known of the conduct and fails to take immediate and appropriate corrective action. The FEHA expands this potential liability to encompass harassment on the basis of any protected category, not just sexual harassment.

Expanded individual liability

California law already makes it unlawful for an employer to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden by the FEHA or because the person has filed a complaint, testified, or assisted in any proceeding under the FEHA. The new law expands this prohibition so that an employee who engages in such retaliatory acts may be held personally liable.

Releases and nondisparagement clauses are prohibited

The FEHA now makes it unlawful for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to:

- Require an employee to sign a release of a claim or right under the FEHA. This includes requiring an individual to execute a statement that he or she does not possess any claim or injury against the employer and the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.
- Require an employee to sign a nondisparagement agreement 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 that contains these prohibited clauses violates public policy and are unenforceable. However, this does not apply to a "negotiated" settlement agreement to resolve an underlying FEHA 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. "Negotiated" means the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

Raising the bar on attorney's fee awards for employers

The FEHA authorizes an award of attorney's fees to a prevailing party – including a defendant employer. Now, however, a court may only award a defendant attorney's fees if the action was frivolous, unreasonable, or groundless when brought or if the plaintiff continued to litigate after it clearly became so.

Employers should review their policies, procedures, and agreements to ensure they comply with the FEHA's new requirements. Contact your Vorys lawyer if you have questions.

At the end of the 2018 legislative session, California enacted several laws that significantly impact employers. This *Labor and Employment Alert* is the final in a three-part series that discusses these new laws and their effect on employers. The first alert highlighted a new law which enacts further restrictions on non-disclosure agreements. The second alert highlighted a bill that extends mandatory sexual harassment training to all employees.