

CHANGES TO TEXAS SEXUAL HARASSMENT LAW SHOULD PROMPT EMPLOYERS TO TAKE IMMEDIATE ACTION

Insights
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Given Texas's historically employer-friendly posture when it comes to workplace law, recent amendments to the Texas Labor Code that expanded protections to employees might be particularly surprising. Indeed, the changes take took effect September 1, 2021 now expand the rights of those who assert claims of sexual harassment even beyond protections traditionally provided by federal law. And while the amended provisions provide several limitations that may not make this as sweeping of a change as some had hoped or feared, they still will require Texas employers to make some immediate changes to policies and practices.

What Actually Changed?

The new provisions of the Texas Labor Code do three basic things:

- expand the definition of "employer";
- change an employer's duty to investigate and remedy claims of sexual harassment in the workplace; and
- extend the deadline within which an employee must file a charge of discrimination alleging sexual harassment with the Texas Workforce Commission.

Importantly, these expanded protections only apply to an employee's claims of sexual harassment *discrimination*. They do not apply when it comes to claims of sexual harassment *retaliation* or discrimination alleged under any other protected characteristic.

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Expansion of “Employer”

The amendments to the statute expanded the definition of employer to include those which employ one or more employees or those which act directly in the interests of an employee in relations to an employee. Tex. Lab. Code. § 21.141. The former Texas statute excluded smaller employers who had less than 15 employees. Now, however, even employers who have typically been out of the reach of sexual harassment claims may see themselves facing such claims in court as virtually all Texas employers could be held liable.

The good news for employers is that the revised statute does not change the company-size limits for compensatory and punitive damages awards. Therefore, claims for such damages against employers with fewer than 101 employees continue to be limited to a maximum of \$50,000. Tex. Lab. Code. § 21.2585.

The revised statute also expands liability to include individuals that act “directly in the interests of the employer.” Tex. Lab. Code § 21.141. This means that individual defendants – such as supervisors, managers, agents, or the like – may now find themselves as named defendants in workplace sexual harassment suits. You can expect plaintiffs’ attorneys in Texas to follow the lead of their peers in other states and name such individuals as defendants in an effort to defeat diversity jurisdiction removal to federal court and keep litigation in what they may consider to be more favorable state tribunals.

Although the amendments do not define the phrase “in the interests of,” Texas courts may look to similar phrasing under the FLSA and FMLA to interpret the statute and situation at hand. If so, individual defendants may need to have more than supervisory authority over the aggrieved employee to face liability under the revised Texas law, as both federal statutes provide a narrow view of that phrase. This is one area that will need to be sculpted by decisions from Texas courts before we can feel comfortable understand its parameters.

Increased Employer Duties

The previous Texas statute required employers to take “prompt remedial action” where they knew or should’ve known of sexual harassment in the workplace. The revised

statute appears to increase that duty by now requiring employers to take "*immediate and appropriate* corrective action" once they know, or should have known, of sexual harassment. Tex. Lab. Code § 21.142 (emphasis added).

The statute does not provide a definition for this revised wording or even provide further guidance as to what this amendment attempted to resolve. The temporal difference between "prompt" and "immediate" under new Texas law will certainly be another subject of litigation – as will what is considered "appropriate" under the facts of each specific case.

Extended Deadlines for Employees

Finally, the revised statute extends the period within which employees must file charges of discrimination based on sexual harassment with the Texas Workforce Commission from 180 days to 300 days. In practice, however, this may actually present problems for employees who wait to bring various claims based on the same underlying facts. Tex. Lab. Code § 21.201(g). Notably, this extension applies *only* to claims of sexual harassment discrimination, *not* to claims of retaliation based on complaints about a sexual harassment or claims regarding any other protected characteristic.

As employees often bring all applicable claims based on the same underlying facts in a single filing, relying on the extended deadline may cause them to miss the deadline to bring forth claims beyond sexual harassment discrimination to the Texas Workforce Commission. For this reason, claims of sexual harassment retaliation or based on other protected characteristics may be subject to dismissal for the failure to exhaust administrative remedies – and you should be prepared to attack such claims on these grounds.

What Should Employers Do?

All Texas employers should review harassment policies and procedures to consider any revisions necessary to comply with these new statutory changes. Particularly, smaller employees who may have not have been previously subject to such claims and may not currently have specific policies for reporting and investigating sexual harassment complaints would be well advised to create and communicate such procedures.

Additionally, as employers are now required to act “immediately” and take “appropriate” remedial actions, employers should consider providing additional training to managerial employees and emphasize the prospect of individual liability to underscore the importance of acting swiftly in response to sexual harassment complaints.

Finally, you should be prepared to scrutinize claims before the Texas Workforce Commission to determine whether applicable deadlines have been blown as we expect to see some confusion over the new application of the law.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in [our Texas offices](#).

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