Sexual Harassment Dominates California Legislation in 2018

Insights
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As we discussed back in January, sexual harassment appears to be the hot topic for the California State Legislature's 2018 session. This is certainly not a surprise, as issues related to sexual harassment and the #MeToo movement have dominated discussion across all industries and sectors of business, entertainment, sports, and politics.

Last Friday was the last day to introduce new bills for consideration during the 2018 legislative year. Therefore, we now have a good sense of the types of proposals that will be considered in 2018. The overwhelming majority of these proposals impose new requirements or liability on California businesses, so you will want to keep a close eye on these proposals as the year progresses.

The "Biggies"
Some of the more significant legislative proposals that could impact almost all California employers include the following:

- **AB 3080 (Gonzalez Fletcher) – Arbitration** – Although this bill is just a placeholder for now, Assemblywoman Lorena Gonzalez Fletcher has announced plans to amend the bill to prohibit mandatory arbitration of sexual harassment claims. She also indicated that the bill would prohibit retaliation and would provide whistleblower protections for employees publicly disclosing harassment they endured or witnessed. The issue of whether mandatory arbitration of sexual harassment claims should be prohibited has garnered a lot of attention in the #MeToo discussion, including at the federal level. Just last week, a unanimous block of attorneys general from across the country sent a letter to Congress asking federal lawmakers to prohibit the use of mandatory arbitration agreements related to sexual harassment claims.
- **AB 1870 (Reyes) – Extends Statute of Limitations** – Under current law, employees have one year to file an administrative claim for harassment with the Department of Fair Employment and Housing (DFEH). This bill would extend that period to three years. This bill is not limited to sexual harassment, however, and would extend the statute of limitations to three years for *all* forms of employment and housing discrimination.
- **AB 1867 (Reyes) – Record Retention** – This bill would require employers with 50 or more employees to maintain records of sexual harassment complaints for 10 years.
- **SB 1038 (Leyva) – Personal Liability for Retaliation** – This bill would make an employee personally liable for unlawfully retaliating against a person under the Fair Employment and

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Housing Act (FEHA). Although an individual may be personally liable under FEHA for harassment, the California Supreme Court ruled 10 years ago in the *Jones v. The Lodge at Torrey Pines Partnership* case that personal liability does not extend to retaliation claims.

- **SB 1300 (Jackson)** – **Liability and Release of Claims** – This bill would provide that, in claims alleging the employer failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring, the plaintiff is not required to prove that they endured sexual harassment or discrimination. This bill also prohibits release of claims under FEHA in exchange for a raise or a bonus or as a condition of employment or continued employment.
- **AB 3081 (Gonzalez Fletcher) – Retaliation Presumption** – This bill is just a placeholder, but the author has announced that she will be amending the bill to establish a presumption an employee has been unlawfully retaliated if any negative job action occurs within 90 days of their reporting sexual harassment.

Training Bills

Sexual harassment prevention training is also going to be a big focus of legislative activity in 2018. Under current law, employers with 50 or more employees are required to provide at least two hours of sexual harassment prevention training to supervisory employees every two years. The following bills seek to expand on this requirement:

- **SB 1300 (Jackson)** – In addition to the changes mentioned above, this bill would also require employers of *all* sizes to provide two hours of sexual harassment prevention training to *all* employees (not just supervisors) within six months of hire and once every two years.
- **SB 1343 (Mitchell)** – This bill would require an employer who employs five or more employees to provide at least two hours of sexual harassment training to *all* employees by 2020, and once every two years thereafter. DFEH would be required to make available a two-hour video training course that employers may utilize.
- **AB 3081 (Gonzalez Fletcher)** – This bill is just a placeholder for now. But the author has announced that she will be using this bill to require employers with 25 or more employees to notify workers of their rights regarding sexual harassment and provide prevention training to *all*
- **AB 2338 (Levine)** - This bill is aimed specifically at the modeling industry, and would require talent agencies to provide training and materials on sexual harassment prevention, nutrition, and eating disorders to employees and artists.
- **AB 2079 (Gonzalez Fletcher)** – While just a spot bill for now, the author has indicated her intention to amend this bill to certify *promotoras* and *compadres*, or female and male janitors, to serve as peer educators and provide direct training on sexual harassment prevention to other janitors at worksites throughout the janitorial industry.

Confidentiality and Settlement Agreements

A major criticism of the #MeToo movement has been the allegation that the use of nondisclosure agreements or confidentiality provisions in settlement agreements keep perpetrators of sexual

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harassment "hidden" and allow them to continue to victimize people. Therefore, there is a major legislative push in 2018 to restrict or prohibit the use of such agreements. Proposals that have been introduced along these lines include:

- **SB 820 (Leyva)** – This bill prohibits any provision in a settlement agreement that prevents disclosure of factual information related to a civil action involving an act of sexual assault or sexual harassment.
- **AB 3057 (Quirk-Silva)** – Like the prior bill, AB 3057 would prohibit a provision in a settlement agreement that prevents the disclosure of factual information related to claims of sexual abuse or harassment.
- **AB 3109 (Stone)** – This bill would provide that a contract or settlement agreement is void if it includes a provision that waives a party's right of petition or free speech in connection with any public issue or restricts a party's right to seek employment or reemployment in any lawful occupation or profession. While this bill may be aimed mainly at high-profile issues such as NFL players "kneeling" during the national anthem, as worded it may apply to situations involving sexual harassment and nondisclosure agreements as well.
- **SB 954 (Wieckowski)** – This proposal would require an attorney representing a party in mediation to inform his or her client of the confidentiality restrictions related to mediation, and to obtain informed written consent that the client understands these restrictions.

Other Significant Sexual Harassment-Related Proposals

- **AB 2366 (Bonta) – Leave of Absence** – This bill prohibits an employer from taking adverse action against an employee who is an immediate family member of a victim of sexual harassment (as well as domestic violence, sexual assault, and stalking) for taking time off work to provide assistance and support to the victim seeking relief. "Immediate family member" includes a spouse, child, stepchild, siblings and stepsiblings, and parents and stepparents.
- **AB 1761 (Muratsuchi) – Hotels** – This bill is aimed specifically at the hotel industry. First, it requires hotels to provide employees with panic buttons. Second, it requires hotels to maintain a list of guests that have been alleges to have committed acts of violence or harassment against employees, and to bar them from service for a period of three years. Third, it requires hotels to post a specified notice on guestroom doors related to sexual harassment and violence. This bill is based primarily on a similar ordinance enacted in Seattle.
- **AB 1750 (McCarty) – Taxpayer Funds for Settlements** – This bill states the intent of the legislature to enact a law that would require an elected official to reimburse a public agency that pays a settlement for sexual harassment by the official.
- **AB 3082 (Gonzalez Fletcher) – In-Home Support Service (IHSS) Workers** – The author has declared her intention to use this bill to provide protections to IHSS workers by creating a uniform statewide protocol for public agencies to follow when IHSS workers encounter harassment, and training for both IHSS workers and clients.

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- **AB 2713 (Rodriguez) – Claims Against State Agencies** – This bill makes a number of changes to how state agencies handle sexual harassment complaints, including recordkeeping and reporting requirements.
- **SB 224 (Jackson) – Civil Code Liability for Sexual Harassment** – The Civil Code establishes liability for sexual harassment that occurs in specified professional relationships (such as doctor-patient or attorney-client relationships). This bill would extend that liability to investors, elected officials, lobbyists, directors, and producers.

At Least There's One for the Employers

At least one proposed bill seeks to assist employers by giving them tools to address sexual harassment in the workplace, rather than increase liability or impose new obligations:

- **AB 2770 (Irwin) – Defamation Claims** – This bill is sponsored by the California Chamber of Commerce and seeks to remedy the unfortunate situation many employers face in trying to avoid defamation claims filed by employees they have disciplined or terminated following claims of defamation. Specifically, this bill would protect as "privileged" complaints of sexual harassment by an employee to an employer based on credible evidence, as well as communications by the employer to interested persons and witnesses during an investigation. The bill would also clarify that an employer that tells a prospective employer whether they would rehire a former employee may indicate that this is based on the employer's determination that the former employee engaged in sexual harassment. It will be interesting to see whether the plaintiffs' attorneys will let this one through, or whether they want to "have their cake and eat it too" in representing both accusers and the accused in employment lawsuits.

But Wait, There's More!

This list doesn't even include the nearly half-dozen bills that deal specifically with the legislature itself and attempt to address issues that have arisen with respect to legislators, staff, and lobbyists. In addition, there are hundreds of "spot" bills that have been introduced that may morph into additional sexual harassment proposals later in the year.

Conclusion

It's clear that no single issue will dominate California legislative deliberations in 2018 quite like sexual harassment. The nearly two dozen bills described above will provide ample opportunity to discuss the proper role for employers and employees in addressing these issues. As can be seen, most of these bills impose new requirements or obligations on employers, or increase their liability or responsibility for sexual harassment that occurs in the workplace. California employers will need to closely follow these bills to properly judge the lay of the land going forward.

But California employers shouldn't wait. You should take proactive measures to identify and address sexual harassment at the worksite. Contact your Fisher Phillips attorneys if you would like advice about how to prevent such situations from occurring, and how to properly deal with them should they do so.

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Related People

Benjamin M. Ebbink
Partner
916.210.0400
Email

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