Timeframe To File Workplace Bias Claims In California Extended By 2 Years

Insights
10.11.19

A big focus of the #MeToo movement over the last several years has been on efforts to increase the statute of limitations for bringing sexual harassment claims. Governor Newsom just signed into law Assembly Bill 9 (Reyes), which will extend the deadline for filing an employment-related administrative complaint with the Department of Fair Employment and Housing (DFEH) by two years. Under existing law, individual employees have one year to file an administrative charge with DFEH (which is an administrative precursor to filing a civil lawsuit in court). AB 9 will extend that administrative filing period to three years, beginning on January 1, 2020. However, while the proposal was couched as a "sexual harassment" bill, it actually extends the statute of limitations for ***all*** employment claims under the Fair Employment and Housing Act (FEHA), not just sexual harassment claims.

A committee analysis set forth the rationale for extending the statute of limitations as follows:

> ***"Among many other things, the #MeToo movement has shed light on the fact that it often takes time, courage, and support for victims of sexual harassment and sexual violence to feel comfortable making public allegations against the perpetrator of their abuse. Voices from the #MeToo movement have articulated a number of reasons for this delay. Some victims need time to process before they fully grasp what has happened to them. Some victims only realize what happened when other victims come forward and a pattern of abusive behavior becomes evident. Some victims immediately know they have been harassed or assaulted, but are not immediately ready to confront their perpetrator. Many victims fear retaliation if they do come forward."***

Employer Concerns With AB 9

Employer representatives raised a number of both policy and practical concerns with extending the FEHA statute of limitations. On the policy side, employers argued that extending the statute of limitations may actually have the opposite effect from that which may have been intended. A one-year statute of limitations ensures that claims are brought forward in a timely manner so that an employer can deal with them promptly. Extending this period to three years potentially limits the employer's ability to eradicate the alleged unlawful behavior in a timely and efficient manner. As opponents of the bill argued, if the employer is not made aware of the harassing or discriminatory conduct, it cannot take the appropriate remedial measures necessary.

conduct, it cannot take the appropriate remedial measures necessary.

On the practical side, AB 9 raises significant concerns about the potential of problems caused by "stale" evidence and unavailable witnesses. Unlike wage and hour claims, which are largely objective and based on objective timekeeping and wage records, employment discrimination claims – particularly sexual harassment claims – can be more subjective in nature, often coming down to the proverbial "he said/she said." The current one-year statute of limitations ensures that claims will be resolved while evidence and witnesses are still available. Extending the statutory period to three years creates potential problems involving stale claims, faded memories, and unavailable witnesses that could make it much more difficult for employers to defend such claims.

Governor Brown Vetoed Prior Version

If this issue sounds familiar to you, it should. Just last year, Governor Brown vetoed identical legislation, AB 1870 (Reyes). In his veto message, Governor Brown stated:

> ***"Employees who have experienced harassment or discrimination in the workplace should have every opportunity to have their complaints investigated. I believe, however, that the current filing deadline – which has been in place since 1963 – not only encourages prompt resolution while memories and evidence are fresh, but also ensures that unwelcome behavior is promptly reported and halted."***

Clearly, Governor Newsom had a different take on this proposal.

Retroactive Effect?

A big question for employers is whether AB 9 applies retroactively to claims arising prior to the bill's effective date of January 1, 2020. AB 9 attempts to resolve this question, but only does so in part.

The bill specifies that it "shall not be interpreted to revive lapsed claims." This appears to address claims that arose prior to the effective date of the bill, but for which the prior one-year statute of limitations had already passed, meaning those claims had lapsed if a complaint was not filed with DFEH.

But what about cases that arose during calendar year 2019? Those claims have not yet "lapsed" because the one-year period for administrative claim filing has not yet closed. On January 1, 2020, are those pending claims subject to the one-year statute of limitations, or will they now be subject to the three-year period?

AB 9 is silent on this subject. The Senate Judiciary Committee analysis, citing California Supreme Court precedent, states that the general rule is that an increased statute of limitations period ordinarily applies prospectively to govern cases that are pending when, or instituted after, the enactment took effect. The committee analysis concluded, "Applying these rules to this bill, it would automatically extend the time to file for incidents that occurred before the effective date of the change in the law, but for which the limitations period had not yet expired on the date of the enactment."

This issue will likely have to be resolved by the courts. But plaintiffs' attorneys are likely to argue that the longer statute of limitations in AB 9 applies to FEHA claims that arose prior to January 1, 2020 but had not yet lapsed. While the committee comments discussed above are not binding on courts, plaintiffs' attorneys will be sure to point to them as indicative of legislative intent on this question.

Next Steps

As noted above, the new law goes into effect on January 1, 2020. In light of the extended statute of limitations period for filing FEHA claims, California employers may need to make changes to their internal processes to preserve potential evidence for the new statutory period, in order to successfully defend and litigate future claims. Employers should consult with counsel to discuss potential ways to ensure that evidence does not become state or potential witnesses are unavailable.

Related People

Benjamin M. Ebbink
Partner
916.210.0400
Email