



California Employers To Face Raft Of New #MeToo Laws

Insights

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Wrapping up a whirlwind weekend, California Governor Jerry Brown just signed several pieces of legislation that will create new employer obligations in the areas of sexual harassment and gender discrimination. Specifically, you will no longer be able to enter into non-disclosure agreements involving claims of sexual assault, sexual harassment, or sex discrimination; will be required to significantly increase your sexual harassment prevention training initiatives; and will be restricted in your ability to enter into certain settlement agreements related to harassment and discrimination claims.

Moreover, the governor also signed into law several other workplace law bills that will change the way you do business, including passing a new lactation accommodation law, a statute that will require businesses to install female corporate board members, and a new law that is intended to curtail human trafficking. And while the #MeToo movement dominated employment legislation in California in 2018, the biggest news from this weekend might be the large number of #MeToo movement priority bills that the governor vetoed.

A complete summary of the all of the relevant labor and employment legislation signed—and vetoed—follows.

1. 1. 1. **California Takes a STAND Against Non-Disclosure Agreements**

Governor Brown signed legislation on September 30 that will broadly prohibit non-disclosure clauses in settlement agreements involving sexual assault, sexual harassment, or sex discrimination. Known as the STAND (Stand Together Against Non-Disclosure) Act, the new law will take effect on January 1, 2019—and the provisions of any settlement agreement entered into on or after that date that violates the new prohibitions will be null and void.

Background: The #MeToo Movement Takes Aim At Secrecy

One of the more high-profile targets of the #MeToo movement has been the use of non-disclosure agreements in cases involving sexual harassment. Activists have pointed to examples involving high-profile executives like Harvey Weinstein, where so-called “secret settlements” were utilized. Critics have argued that these types of clauses serve to keep

serious issues secret, which allows the perpetrator of sexual harassment to victimize other individuals.

For the average employer, the use of non-disclosure agreements is more nuanced. Many employers make the decision to settle a case because of business reasons, motivated to preserve resources by settling a case rather than litigating it regardless of whether it believes the case has any merit. Therefore, the mere fact that a claim is settled cannot be seen not an admission of guilt—and accompanying non-disclosure agreements are often negotiated to ensure that there is not a public presumption of guilt merely because a claim has settled. Nevertheless, despite these realities, the use of non-disclosure agreements in sexual harassment cases has been a primary target of the #MeToo movement in 2018.

New California Law Bans Non-Disclosure Agreements In A Wide Category Of Cases

For some time, California law has disfavored non-disclosure agreements in certain types of cases. For example, California law has prohibited confidential settlement provisions in civil cases for acts that could be prosecuted as a felony sex offense or other types of sexual assault since 2006. Confidentiality provisions are also disfavored under California law in elder abuse cases. With Governor Brown's signature on Senate Bill 820, the category of settlement agreements in which non-disclosure provisions are prohibited has now been significantly increased.

SB 820 will soon prohibit any provision in a settlement agreement that prevents the disclosure of factual information related to a claim filed in civil court or complaint filed with an administrative agency regarding any of the following:

- An act of sexual assault not already covered by the existing 2006 law mentioned above;
- An act of sexual harassment prohibited by Civil Code Section 51.9 (prohibiting sexual harassment in certain "business, service or professional" relationships);
- An act of workplace harassment or discrimination based on sex, or failure to prevent an act of such harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination based on sex; and
- Similar acts conducted by an owner of a housing accommodation and prohibited under the housing provisions of the Fair Employment and Housing Act (FEHA).

SB 820 also prohibits a court from entering (by stipulation or otherwise) an order that restricts the disclosure of information in such a manner.

Any provisions contained in a settlement agreement entered into on or after January 1, 2019 that violate these prohibitions will be void as a matter of law and against public policy. Therefore, the new law will not impact settlement agreements entered into prior to this date.

It is useful to point out a few notable features of the new law. First, it clearly covers a broader category of claims than simply sexual harassment, as the bill also prohibits non-disclosure agreements in settlements involving sex discrimination, failure to prevent, and retaliation. Therefore, SB 820 will have an impact beyond just the #MeToo movement and sexual harassment cases.

Second, the prohibition contained in the new law only applies to “claims filed in a civil action or a complaint filed in an administrative action.” Thus, the new law appears to not prohibit such clauses being used in settlements that occur in the “pre-litigation” phase (such as where a demand letter has been sent but no claim has been filed with an administrative agency or in court). Therefore, there may be a narrow set of circumstances in which such clauses may still be utilized in sexual harassment and other similar cases.

Workers Can Still Insist On Certain Privacy Provisions

Because employees themselves may have legitimate privacy concerns, and a desire to protect themselves from unwanted negative attention, the STAND Act contains an exception aimed at allowing claimants to maintain privacy. Specifically, the new law provides that a provision that shields the identity of the claimant and all facts that could lead to the discovery of their identity may be included within a settlement agreement **at the request of the claimant**. However, this exception does not apply if a government agency or public official is a party to the settlement agreement.

Settlement Agreements Can Still Prohibit Disclosure of the Settlement Amount

Employers are often concerned that if the *amount* of settlement money paid is disclosed, it will lead to a flurry of meritless “copycat” cases filed by other employees or former employees who want to try to cash in on their own. The STAND Act provides some small solace to employers in this regard, specifying that it does not prohibit the enforcement of a provision in a settlement agreement that “precludes the disclosure of the amount paid in settlement of a claim.” Thus, California employers may still be able to insist on clauses the prevent disclosure of the amount of money paid out in a settlement, but not the underlying facts of the case.

What’s Next?

As noted above, the STAND Act only applies to any covered settlement agreements for the enumerated types of claims that are entered into on or after January 1, 2019. For this reason, California employers that are close to the settlement discussion stage of pending cases may wish to consider settling cases with non-disclosure agreements before the effective date of the new law. That’s obviously a complicated question that is best handled by consulting with legal counsel.

2. California Dramatically Expands Sexual Harassment Prevention Training Requirements

Governor Brown also signed legislation that will significantly increase California employers' obligations to provide sexual harassment prevention training—which may result in significant time and expense for California employers. Senate Bill 1343 will soon require employers with five or more employees to provide sexual harassment prevention training to both supervisory and non-supervisory employees by 2020.

Smaller Employers Now Covered

As most California employers know, existing law generally requires employers with 50 or more employees to provide sexual harassment (and similar conduct) prevention training to supervisors once every two years. This training is often referred to as “AB 1825 training” in reference to the legislation that first mandated that training requirement.

However, SB 1343 will greatly expand the number of California employers who are required to provide training. Rather than “50 or more employees,” the law will soon mandate training for employers with five or more employees. Such employers will now generally be required to provide the mandated training by January 1, 2020.

Training Required For Both Supervisors And Non-Supervisors

Perhaps even more significantly, SB 1343 will greatly expand the scope of employees to whom sexual harassment prevention training must be provided. Whereas existing law requires two hours of training for supervisory employees only, SB 1343 extends a new training obligation to all other non-supervisory employees. Under the new law, sexual harassment prevention training must be provided as follows:

- By January 1, 2020, an employer with five or more employees must provide at least **two hours** of training to all **supervisory** employees in California within six months of their assumption of a position.
- By January 1, 2020, an employer with five or more employees must provide at least **one hour** of training to all **non-supervisory** employees in California within six months of their assumption of a position.

After January 1, 2020, covered employers must provide the required training to each employee in California once every two years.

The new law specifies that an employer who has provided the training to an employee after January 1, 2019 is not required to provide training again by the January 1, 2020 deadline. Moreover, the new law specifies that the training may be completed by employees individually or as part of a group presentation, and may even be completed in shorter segments as long as the total hourly requirement is met.

Finally, SB 1343 requires the Department of Fair Employment and Housing (DFEH) to provide a method for employees who have completed the training to electronically save and print a certificate of completion.

Special Rules For Seasonal, Temporary And Agricultural Employees

SB 1343 has some special provisions that apply to seasonal, temporary and certain agricultural employers and employees. The new law specifies that, beginning January 1, 2020, for seasonal and temporary employees, or any employee that is hired to work for less than six months, employers shall provide the required training within 30 calendar days after the date of hire, or within 100 hours worked, whichever occurs first. In the case of a temporary employee employed by a temporary services provider to perform services for clients, SB 1343 specifies that the training shall be provided by the temporary services employer, not the client.

In addition, existing law already requires licensed farm labor contractors to provide specified sexual harassment prevention training to non-supervisory employees. Therefore, to avoid duplicative requirements, SB 1343 states that training for migrant and seasonal agricultural workers (as defined under federal law) shall be trained in accordance with the provisions already applicable to farm labor contractors.

DFEH Video Training Option

The new law requires DFEH to develop or obtain two online training courses—a two-hour online course for supervisory employees and a one-hour course for non-supervisory employees—and to make them available on the DFEH website. The law specifies that the online training courses shall contain an interactive feature that requires the viewer to respond periodically to questions in order to continue. In addition, DFEH is required to make the online training videos available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean and any other language spoken by a “substantial number of non-English speaking people.”

You are not necessarily required to utilize the online DFEH training videos. SB 1343 specifically states that an employer may develop its own training or may direct employees to view the online DFEH training videos. However, the bill provides that any questions resulting from the online training course shall be directed to the employer’s human resources department or equally qualified professional, not to DFEH.

Obviously, until DFEH develops the required online courses, their effectiveness cannot really be evaluated; therefore, it is difficult at this time to predict whether the DFEH online video will truly be a viable option for California employers.

Training Content Has Not Changed

SB 1343 otherwise does not change the training content requirements under existing law. Specifically, existing law requires the training and education to include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing employees in the

education shall also include practical examples aimed at instructing employees in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.

In addition, employers should keep in mind that, in recent years, the mandated sexual harassment prevention training has been expanded to include abusive conduct and harassment based on gender identity, gender expression, and sexual orientation. These additional elements should continue to be included in any training provided to supervisory and non-supervisory employees.

Next Steps

For most California employers, complying with the requirements of SB 1343 by January 1, 2020 will be a large undertaking. This is particularly true for employers who do not currently provide sexual harassment prevention training for their non-supervisory employees, or did not previously provide training to supervisors because they fell under the 50-employee threshold.

Fisher Phillips provides cost-effective training that complies with these requirements. To learn more, or if you have questions about this new law, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices.

3. California Enacts The “Mother Of All #MeToo Bills”

When Governor Brown signed Senate Bill 1300 (Jackson) into law yesterday, he activated one of the more comprehensive and far-reaching pieces of legislation to emerge from the #MeToo movement. SB 1300 contains a number of sweeping provisions that will change the way sexual harassment claims are litigated in California once the law takes effect on January 1, 2019.

Limitations On Release Of Claims And Non-Disparagement Agreements

First, SB 1300 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 FEHA. Similarly, the new law prohibits an employer from, under the same conditions (raise, bonus, employment or continued employment) requiring an employee to sign a nondisparagement 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.

SB 1300 specifies that these prohibition do not apply to a “negotiated settlement agreement to resolve an underlying claim under [FEHA] that has been filed by an employee in court, before an administrative agency, alternate dispute resolution forum, or through an employer’s internal complaint process.” Therefore, SB 1300 appears to exclude bona fide settlement agreements from the prohibition on release of claims.

However, opponents raised concerns that this language could also prohibit severance packages (especially where a claim has not been filed) that contain standard releases or nondisparagement agreements. On the one hand, because severance agreements are often negotiated during the employment relationship and often define the terms under which the employment relationship will end, they arguably are related to “conditions of employment or continued employment.” On the other hand, one could argue that because a severance package is awarded only after the employment relationship has ended, it therefore by definition does not involve employment or continued employment. These are questions that will likely lead to litigation and will need to be resolved by the courts.

Limitations On A Prevailing Employer’s Right To Fees And Costs

Second, SB 1300 states that a prevailing defendant in a FEHA action will only be entitled to attorneys’ fees and costs if the court finds that the plaintiff’s action was “frivolous, unreasonable, or totally without foundation when brought or the plaintiff continued to litigate after it clearly became so.”

Perhaps even more importantly, SB 1300 says that this standard applies “notwithstanding” Section 998 of the Code of Civil Procedure. That provision generally provides that if a plaintiff rejects a settlement offer and then fails to obtain a more favorable judgment at trial, the plaintiff is not entitled to post-offer fees and costs and must pay the post-offer fees and costs of the defendant.

As a result, under this new law, if a plaintiff rejects an offer and then fails to obtain a more favorable judgment, the employer would not be allowed to recover post-offer fees and costs unless the court finds that the action was frivolous, unreasonable or without merit, or that the plaintiff continued to litigate the case after the settlement offer was made even though it had become apparent that the case was without merit. These changes may impact an employer’s calculus regarding litigating or settling FEHA claims.

Expanded Harassment Liability For Third Parties

Third, the new law will expand sexual harassment liability for third parties. Existing law provides that an employer may only be held responsible for sexual harassment committed by nonemployees—such as customers, vendors, and other third parties—if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action. SB 1300 eliminates the limitation of this potential liability for claims of “sexual” harassment, meaning an employer could be liable for all forms of unlawful harassment committed by nonemployees.

Optional “Bystander Intervention” Training

Fourth, the new law introduces the concept of “bystander intervention training” to workplaces across California. This type of training has increased in popularity and is designed to address what is known as the “bystander effect”—the tendency for individuals

to remain silent and refrain from providing assistance to a victim when they are in the presence of other people.

SB 1300 provides that an employer, in addition other legally mandated training, “may” also provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. This type of training, which has been used in the military and on college campuses, is designed to empower individuals to aid others and speak up about unlawful or problematic behaviors.

Again, this provision of the law is permissive and merely authorizes, but does not require, an employer to provide such training.

Legislative Guidance To The Courts?

Finally, SB 1300 also contains some unusual (and largely unprecedented) legislative “intent” language with respect to a number of issues related to the application of workplace harassment law by the courts. These include the following:

- **“Tangible Productivity”** – The law contains language affirming U.S. Supreme Court Justice Ginsburg’s concurrence in *Harris v. Forklift Systems* that, in a workplace harassment suit, “the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find...that the harassment so altered working conditions as to make it more difficult to do the job.”
- **Single Incident Sufficient** – The new law declares that a “single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment.”
- **Rejection Of “Stray Remarks Doctrine”** – The new law also affirms that the existence of a hostile work environment claims depends on the totality of the circumstances, and that 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 and circumstantial evidence of discrimination.
- **Legal Standard For Sexual Harassment** – A provision of the new law affirms that the standard for what constitutes a valid claim for sexual harassment does not vary by the type of workplace.
- **Summary Judgment “Rarely Appropriate”** – Finally, SB 1300 declares legislative intent that harassment cases are “rarely appropriate for summary judgment” (a pretrial motion aimed at winning a case well before a jury trial).

It will be interesting to see how the courts respond to this unusual “intent” language contained in SB 1300. Legislative findings and declarations such as this are generally not

binding on the courts and are usually of limited value. Even the Assembly Judiciary Committee analysis of SB 1300 stated:

It is not at all clear what impact the guidance offered in these non-binding findings and declarations will have on how the courts decide cases, but it does at least put forward the Legislature's understanding of appropriate legal standards.

What is certain is that plaintiffs' attorneys will attempt to use this legislative intent language to influence how courts rule on particular issues, especially in order to defeat motions for summary judgment in sexual harassment cases.

Next Steps

Like all other measures inspired by the #MeToo movement, SB 1300 will raise the stakes for employers when it comes to harassment cases once the law takes effect on January 1, 2019. Having good policies, procedures, systems and training in place is more critical now than ever before.

4. Governor Signs Lactation Accommodation Bill

Lactation accommodation was a hot issue this year, and two bills expanding employer obligations made it to the governor's desk. This weekend, he vetoed SB 937 (Weiner), a measure based on the San Francisco lactation accommodation statute that would have significantly expanded requirements regarding lactation rooms and break periods. However, the governor did sign AB 1976 (Limón), which makes a number of changes to existing law.

Bathrooms Will No Longer Cut It

Under prior state law, employers are required to make reasonable efforts to provide employees with the use of a room or location **other than a toilet stall** in close proximity to the employee's work area, for the employee to express breast milk in private. However, AB 1976 changes the law to instead specify that employers have to make reasonable efforts to provide a room "**other than a bathroom**" to accommodate such employees.

Temporary Lactation Rooms Authorized Under Certain Conditions

AB 1976 also authorizes employers to make temporary lactation locations available to employees, as long as each of the following conditions are met:

- The employer is unable to provide a permanent lactation location because of operational, financial, or space limitations;
- The temporary lactation location is private and free from intrusion while an employee expresses milk; and
- The temporary location is used only for lactation purposes while an employee expresses milk.

Agricultural Employer Accommodation

AB 1976 makes special accommodation for agricultural employers. As one can imagine, providing lactation space in the fields may present logistical challenges. Therefore, AB 1976 states that an agricultural employer shall be deemed in compliance with the law if they provide an employee wanting to express milk with a private, enclosed, and shaded space, including, but not limited to, an air-conditioned cab of a truck or tractor.

Limited Undue Hardship Exemption

Finally, AB 1976 provides for some relief (albeit limited) for employers who can demonstrate an undue hardship. If an employer can demonstrate to the California Department of Industrial Relations that the lactation room requirement would impose an undue hardship when considered in relation to the size, nature, or structure of its business, the employer must instead make reasonable efforts to provide the employee with a room, other than a toilet stall (but not necessarily other than a bathroom).

Next Steps

AB 1976 goes into effect on January 1, 2019. Employers should carefully review their procedures for providing lactation accommodation in accord with the requirements of AB 1976. For some employers, this may require making physical changes to the workplace in order to comply with the new requirements.

5. California Now Mandates Female Corporate Board Members

Governor Brown also signed into law SB 826 (Jackson) over the weekend. This high-profile bill mandates that all California-based publicly traded corporations must have at least one female director on their board of directors by the end of 2019. In 2021, this requirement increases depending on the total number of directors on the board.

6. New Human Trafficking Training Requirements For Certain Industries

Human trafficking awareness and training continue to be areas of legislative activity, and this year Governor Brown signed two measures to impose training requirements on specific industries. First, SB 970 (Atkins) requires a hotel or motel employer, by 2020, to provide 20 minutes of training to employees that are likely to come into contact with victims of human trafficking. Thereafter, training shall be provided once every two years.

A second measure, AB 2034 (Kalra) requires operators of mass transit intercity passenger rail systems, light rail systems, and bus stations by 2021 to provide employees who may interact with human trafficking victims with 20 minutes of training on recognizing the signs of human trafficking and similar matters.

7. New Law Bars Settlement Agreement Provisions That Prevent Testifying In Legal Or Legislative Proceedings

Assembly Bill 3109 (Stone) was inspired by the recent well-publicized case of Olympic gymnast McKayla Maroney. According to media reports, Maroney's settlement agreement with USA Gymnastics subjected her to a \$100,000 fine for testifying in a criminal trial against the team doctor that was alleged to have sexually abused her and many other gymnasts.

AB 3109 is extremely brief, and in its entirety states the following:

Notwithstanding any other law, a provision in a contract or settlement agreement entered into on or after January 1, 2019, that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment on the part of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party, when the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature, is void and unenforceable.

While the new law may have been intended to address cases involving sexual assault or sexual harassment, it could be interpreted to have a broader effect. The bill prohibits clauses that waive a party's right to testify concerning "alleged criminal conduct." Many violations of the Labor Code technically constitute misdemeanors (even if they are rarely prosecuted as crimes). Therefore, the prohibition contained in AB 3109 could extend well beyond merely cases involving sexual assault or sexual harassment.

Next Steps

California employers that enter into settlement agreements on or after January 1, 2019 should not include provisions that waive a plaintiff's right to testify concerning alleged criminal conduct or alleged sexual harassment when requested by a judicial or legislative body. The use of such provisions may be rare, so for many employers this new law will not change the current language they utilize in settlement agreements. However, it is wise to review all settlement agreement provisions with counsel to ensure compliance with these new requirements.

#MeToo Movement Not Spared

Although there are a slew of new laws that will soon go into effect, many motivated by the #MeToo movement, there were also several high-profile measures vetoed by Governor Brown that were also aimed at curtailing potential harassment and discrimination. Among the more significant pieces of legislation vetoed by the governor were:

- **AB 3080 (Gonzalez Fletcher) – Arbitration** – This bill would have prevented employers from requiring employees to sign arbitration agreements as a condition of employment.
- **AB 1870 (Reyes) – FEHA Claims** – This bill would have extended the statute of limitations on FEHA claims from one year to three years.

- **AB 1867 (Reyes) – Record Retention** – This bill would have required employers to retain records about complaints of sexual harassment for five years after an employee’s termination of employment.
- **AB 3081 (Gonzalez Fletcher) – Joint Liability** – This bill would have established joint liability for sexual harassment for client employers and labor contractors, and would have created a rebuttable presumption of retaliation.
- **AB 2079 (Gonzalez Fletcher) – Janitorial Employees** – This bill would have created a peer training requirement for janitorial employees regarding sexual harassment prevention.

Previously Signed Measures

While much attention will be spent on the bills signed by the governor over the weekend, don’t forget that he previously signed these significant measures into law:

- **AB 2334 (Thurmond) – OSHA** – This bill provides that, if federal OSHA eliminates the proposed Improve Tracking of Workplace Injuries and Illnesses rule, Cal/OSHA shall convene an advisory committee to evaluate how to implement the changes at the state level. This bill also provides that an “occurrence” for purpose of recordkeeping requirements continues until it is corrected, Cal/OSHA discovers the violation, or the duty to comply ceases to exist. Read our complete analysis of AB 2334 [here](#).
- **SB 1402 (Lara) – Joint Liability for “Customer” and Port Trucking Companies** – This bill establishes joint and several liability for customers who contract with port drayage motor carriers who have unsatisfied judgments regarding unpaid wages, damages, expenses, penalties and workers’ compensation liability. Read more about this bill in our recent blog post [here](#).
- **AB 1654 (Rubio) – PAGA Exemption for Unionized Construction Employers** - Establishes a collective bargaining agreement exemption for PAGA claims filed by employees in the construction industry. Read more about this bill [here](#).
- **AB 2605 (Gipson) – Rest Period Relief for Unionized Petroleum Facilities** – This bill establishes an exemption from the “relieved of all duty” rest period requirements of the recent *Augustus* case for employees in safety sensitive positions in petroleum facilities covered by a valid collective bargaining agreement. Read our complete analysis of AB 2605 [here](#).

For more information about these new laws, please contact your Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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This article provides an overview of specific state law changes. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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