

California Adopts Bills Addressing Sexual Harassment Disclosures in Job References and Paid Family Leave

The new law applies to disclosures in reference checks and clarifies the use of paid vacation leave in connection with paid family leave.

On July 9, 2018, California Governor Jerry Brown signed AB 2770 and AB 2587.

AB 2770 Enacts Protections for Certain Employer Disclosures of Sexual Harassment Allegations in Reference Checks

AB 2770 amends California Civil Code Section 47(c) to expressly include allegations of sexual harassment within the protection of the common interest privilege.¹

The Common Interest Privilege

Historically, California Civil Code Section 47(c) has provided a limited “common interest privilege” against defamation claims.² It applies to communications made between “interested” persons; however, it requires the communication to be made without “malice.”³ Section 47(c) specifically “includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant.”⁴ Also, Section 47(c) “authorizes a current or former employer, or the employer’s agent, to answer whether or not the employer would rehire a current or former employee.”⁵

Employers often assert this defense if accused of defamation in communications about employee misconduct to other employees or potential employers of the accused. Because Section 47(c) is a defense, the defendant bears the burden of proof that the communication was made to a person with a legitimate interest; however, the plaintiff can overcome that showing by proving the statement was made with malice.

Does AB 2770 Expand the Common Interest Privilege?

AB 2770 becomes effective on January 1, 2019. As amended, Section 47(c) “applies to and includes a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence and communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment.”⁶ Section 47(c) also adds to the privilege concerning rehire eligibility “whether the decision to not rehire is based upon the employer’s determination that the former employee engaged in sexual harassment.”⁷

The practical effect of AB 2770 may be quite limited as, under existing law, reporting a claim of sexual harassment, other than a wholly fabricated claim, was likely to be protected by Section 47(c). Section 47(c) already protected communications concerning job performance to other actual or potential employers, which would have included communications about employee misconduct. The intent of AB 2770, seemingly, is to clarify that application.

However, AB 2770's adoption can also be read to imply additional burdens in asserting the privilege in connection with sexual harassment complaints, and additional limitations on the use of the privilege in connection with other forms of harassment or discrimination. While these outcomes may be contrary to the underlying intent, it appears consistent with the statute as read on its face, applying ordinary rules of statutory construction.

Despite explicitly protecting complaints of sexual harassment under Section 47(c), AB 2770's new language imposes a standard on complaints of sexual harassment — that the allegations not only be made without “malice,” but that they also be based on “credible evidence.” Under the pre-AB 2770 version of the statute, as interpreted by the courts, the plaintiff in a defamation action carried the burden of showing malice. One such basis for this burden would be the absence of reasonable grounds to believe a statement is true, if an employer established a common interest in the first instance. Under AB 2770, the burden of showing malice remains on an employee accused of harassment, but whether an employer bears the burden to prove “credible evidence” supporting a harassment claim, and how that requirement will interact with the requirement that the statement be made without malice remains unclear.

In addition, by focusing exclusively on sexual harassment, AB 2770 may raise a potential negative inference that employees' complaints about other misconduct, and employers' disclosure of complaints to other potential employers, should be subject to a different standard. AB 2770 leaves open for resolution by the courts how or whether the common interest privilege in Section 47(c) should be applied to, for example, claims of discrimination, or complaints of harassment based on categories other than sex.

Recommendations for Employers

Prevention of Claims

Relying on Section 47(c) when providing substantive references has always been risky. Employers can easily incur significant litigation expense in defending a defamation claim, even if that defense is successful, and the “reward” for providing substantive references is ephemeral. Moreover, Section 47(c) places the initial burden of proof on the employer, making an early dismissal of a claim at the pleading stage challenging at best. Consequently, most employers maintain a policy of not providing substantive references. Because AB 2770 does not appear to expand the protection of Section 47(c), the authors recommend that employers continue to limit information provided in response to reference checks. Employers should:

- Adopt or maintain a policy of limiting reference responses to dates of employment and positions held
- Make clear that you do not provide additional information, positive or negative
- Train employees who may be contacted for references to follow the policy
- Enforce the policy and discipline employees who deviate from it

Defense of Claims

As is the case with any new statute, until a number of cases have been decided at the appellate level, the practical impact of the statute is unclear.

- If defending a defamation claim arising out of a complaint of sexual harassment, employers should work with counsel to carefully consider how the “based on credible evidence” requirement of AB 2770 may be interpreted.
- If defending a defamation claim arising out of any employee complaint other than sexual harassment, employers should work with counsel to consider whether AB 2770 limits an employer’s ability to defend the claim based on the common interest privilege.

AB 2587 Removes Paid Family Leave Inconsistency

AB 2587 fixes an anomaly in the “paid family leave” law that resulted from a prior amendment, which went into effect on January 1, 2018.⁸ AB 2587 becomes effective January 1, 2019.

Under existing law, employees may receive wage replacement benefits through the state disability insurance program when they take time off from work to care for a seriously ill family member or to bond with a minor child during the first year after the child’s birth or placement with the employee. Prior to January 1, 2018, an employee could not receive benefits during the first seven days in which the employee was unable to work. In addition, prior to AB 2587’s effective date, the law allowed an employer to require the employee to use up to two weeks paid vacation leave during any 12 month period in which an employee is eligible for state-funded leave benefits before he/she could collect benefits. The first week of vacation pay would be applied to the waiting period. AB 2587 leaves intact the provision that allows employees to require the use of two weeks of vacation pay, but deletes the reference to the waiting period that ceased to exist as of January 1, 2018.⁹

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Endnotes

¹ Assemb. Bill 2770, 2017-2018 Gen. Assemb., ch. 82 (Cal. 2017).

² Cal. Civ. Code § 47(c).

³ As explained in California Civil Jury Instruction No. 1723, under Section 47(c) "malice" means that the speaker made the statement with hatred or ill will toward the plaintiff, showing a willingness to vex, annoy or injure the plaintiff, or the statement was made with no reasonable grounds to believe it was true.

⁴ Cal. Civ. Code § 47(c).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Assemb. Bill 2587, 2017-2018 Gen. Assemb., ch. 80 (Cal. 2017).

⁹ *Id.*