Which California Employment-Related Bills Were Signed Into Law And Which Ones Did Not Make The Cut?

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Well September 30, 2018 has come and gone. As my September 19, 2018 article indicated, that was the deadline for Governor Brown to either sign or veto a large number of employment-related bills passed by the California Legislature during the 2017-2018 Term. Out of the 21 employment-related bills I summarized in my September 19th article, 12 were signed into law, and 9 were vetoed. Below is a discussion of the new laws California employers must comply with, as well as a list of vetoed bills where employers dodged the bullet.

Bills Signed into Law.

1. SB820. **Prohibition on Non-Disclosure Provisions re: Sexual Misconduct & Harassment**.

Section 1001 is added to the California Code of Civil Procedure and prohibits provisions in settlement agreements that prevent the disclosure of factual information relating to claims of sexual assault, sexual harassment, failure to prevent harassment, harassment in a professional relationship, discrimination based on sex, or retaliation, that have been filed in a civil or administrative action. Effective January 1, 2019, such provisions shall be void as a matter of law and against public policy. The law has certain exceptions, including: a) allowing a claimant to seek language in an agreement to shield his/her identity and all facts that could lead to the discovery of his/her identity, provided the party is not a government agency or public official; and b) authorizing provisions that preclude the disclosure of the amount paid in settlement.

Note: As written, the new law does not prohibit non-disclosure or confidentiality clauses in settlement agreements relating to these same sorts of sexual harassment, discrimination, or retaliation claims in pre-litigation settlements (e.g. prior to a DFEH or EEOC complaint or civil lawsuit).

2. AB3109. **Right to Testify re: Sexual Misconduct**.

Section 1670.11 is added to the California Civil Code and, after January 1, 2019 makes a provision in a contract or settlement agreement 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 (or that party's agents or employees), void and unenforceable if the party to testify has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administration agency or the legislature.

3. SB1300. **Significant Revisions and Additions to FEHA; Prohibiting Certain Release and Non-Disparagement Provisions re: FEHA Claims; Expanding Employer's Liability for Harassment by Third-Parties; Authorizing Bystander Training; and Outlining Legislative Declarations re: Litigating Sexual Harassment Claims.**

Sections 12923, 12950.2, and 12964.5 are added to the California Government Code and sections 12490 and 12965 of the Government Code are amended. These Government Code sections are part of California's Fair Employment and Housing Act (FEHA) and, effective January 1, 2019, this bill makes significant changes to FEHA in response to the #MeToo Movement.

- It is unlawful (with certain exceptions) for employers, in exchange for a raise or bonus, or as a condition of employment or continued employment, to require an employee to: a) execute a release of a claim or right under FEHA or; b) sign a non-disparagement 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. Any document in violation of either of these prohibitions is contrary to public policy and is unenforceable. The section does not apply to a negotiated settlement agreement to resolve a FHEA claim that has been filed by the employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process.

- Employers can now be liable for the acts of non-employees (e.g. customers, clients, contractors, vendors, etc.) for any form of actionable harassment against employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace (not just sexual harassment as FEHA previously provided) if the employer (or its agents or supervisors) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

- Employers are authorized to provide bystander intervention training to their employees in addition to any harassment-prevention training they are already required to provide. Bystander intervention training would include 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. The training may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention.

- Finally, the new law sets out certain Legislative declarations in Government Code section 12923 in connection with how harassment cases are to be litigated in California.

  - The Legislature affirms U.S. Supreme Court Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems* that a plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment; merely that the harassment "so altered working conditions as to make it more difficult to do the job."

  - The Legislature rejects the 9th Circuit's opinion in *Brooks v. City of San Mateo* and says that its opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of FEHA. Instead, a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if it has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.

  - The Legislature affirmed the California Supreme Court's decision in *Reid v. Google, Inc.* in which the court rejected the "stray remarks doctrine." The Legislature declares 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, circumstantial evidence of discrimination.

  - The Legislature declared that the legal standard for sexual harassment should not vary by the type of workplace and noted its disapproval of any reasoning or holding in the *Kelly v. Conco Companies* case that may be interpreted to mean otherwise.

  - Finally, the Legislature declared that harassment cases are rarely appropriate for disposition on summary judgment and affirmed the decision in *Nazir v. United Airlines, Inc.* which held that hostile working environment cases involve issues "not determinable on paper."

4. SB1343. **Expansion of Training Requirements re: Sexual Harassment.**

Sections 12950 and 12950.1 of the California Government Code are amended. Currently, California employers with 50+ employees are required to provide at least 2 hours of prescribed

training regarding sexual harassment, abusive conduct, and harassment based upon gender to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years. By January 1, 2020, employers with 5+ employees, including temporary or seasonal employees, will be required to provide at least 2 hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all non-supervisory employees. After January 1, 2020, such training must be provided every 2 years. For seasonal and temporary employees, or any employee that is hired to work for less than six months, beginning January 1, 2020, employers are required to provide training within 30 calendar days after the date of hire or within 100 hours worked, whichever occurs first.

The content of the training that is currently required under the law was not changed by this bill. However, the new law requires that the DFEH develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace, and post the courses on the DFEH's website so that it is an available option for employers to use to comply with training requirements. The law also requires the DFEH to make existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention, available to employers and to members of the public in specified alternate languages.

5. AB2338. **Sexual Harassment Training Requirements for Talent Agencies.**

Article 4 (section 1700.50, et. seq.) is added to the California Labor Code and provides that talent agencies provide educational materials on sexual harassment prevention, retaliation, and reporting resources and nutrition and eating disorders to its artists within 90 days of agreeing to represent them. Such materials must be in a language the artist understands, and licensees, as part of the application for license renewal, must confirm with the Labor Commissioner that it has and will continue to provide the relevant educational materials.

Also, prior to the issuance of a permit to employ a minor in the entertainment industry, minors and the minor's parent or legal guardian must receive and complete training in sexual harassment prevention, retaliation, and reporting resources.

6. AB1976. **Acceptable Lactation Locations for Employees.**

Section 1031 of the California Labor Code is amended to provide that an employer shall make reasonable efforts to provide an employee with the use of a room or other location, other than a bathroom, in close proximity to the employee's work area for the employee to express milk in private. Previously, the law required an employer make reasonable efforts to provide the use of a

room or location, other than a toilet stall, and this amendment makes clear that a bathroom is not an acceptable room or location for employers to provide to employees who need to express milk.

The law deems an employer to be in compliance with the requirement of providing a lactation location if the employer makes a temporary lactation location available and all of the following conditions are met: 1) employer is unable to provide a permanent lactation location because of operational, financial, or space limitations; 2) the temporary lactation location is private and free from intrusion while an employee expresses milk; 3) the temporary lactation location is used only for lactation purposes while an employee expresses milk; and 4) the temporary lactation location otherwise meets state lactation accommodation requirements.

Agricultural employers are deemed to be in compliance with the requirement of providing a lactation location if the employer provides 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.

7. SB970. **Required Training of Hotel and Motel Employees re: Human Trafficking.**

Existing law requires specified businesses and other establishments to post a DOJ notice that contains information relating to slavery and human trafficking. This bill adds Section 12950.3 to the California Government Code and requires that hotel and motel employers provide, by January 1, 2020, at least 20 minutes of prescribed training and education regarding human trafficking awareness to employees who are likely to interact or come into contact with victims of human trafficking. Employers must provide such training to covered employees within 6 months of hire and once every two years.

8. AB2034. **Required Training of Mass Transit Employees re: Human Trafficking.**

Existing law requires specified businesses and other establishments to post a DOJ notice that contains information relating to slavery and human trafficking. This adds amends Section 52.6 of the California Civil Code and requires that on or before January 1, 2021, intercity passenger rail, light rail station, and bus station employers provide training to new and existing employees who may interact with, or come into contact with, a victim of human trafficking or who are likely to receive, in the course of their employment, a report from another employee about suspected human trafficking, in recognizing the signs of human trafficking and how to report those signs to the appropriate law enforcement agency.

9. SB224. **Sexual Harassment in the Professional Relationship.**

Existing law provides for a claim of sexual harassment in a professional relationship if the plaintiff proves, among other things, that there is a business, service, or professional relationship between the plaintiff and defendant and there is an inability by the plaintiff to easily terminate the relationship. Professional relationships are said to exist between a plaintiff and certain persons, including an attorney, holder of a master's degree in social work, real estate agent, and real estate appraiser. Among other things, this bill amends Section 51.9 of the California Civil Code and adds the following professions to that list: investor, elected official, lobbyist, director, and producer.

10. SB1123. **Expansion of PFL Wage Replacement Benefits.**

Sections 3301 – 3303.1 of the California Unemployment Insurance Code are amended and Section 3307 is added, to provide that on and after January 1, 2021, employees who take time off to participate in a qualifying exigency related to the covered active duty or call to covered active duty of the individual's spouse, domestic partner, child, or parent in the armed forces of the United States, can apply for partial wage replacement benefits under California's family temporary disability insurance program (or Paid Family Leave program).

11. SB1412. **Clarifications on "Ban the Box" Law re: Criminal History Inquiries of Particular Convictions**.

Section 432.7 of the California Labor Code is amended and clarifies that an employer is not prohibited from asking an applicant about, or seeking from any source information regarding, a "particular conviction" of the applicant if, pursuant to federal law, federal regulation, or state law, (1) the employer is required to obtain information regarding the particular conviction of the applicant, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation, (2) the applicant would be required to possess or use a firearm in the course of his or her employment, (3) an individual with that particular conviction is prohibited by law from holding the position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation, or (4) the employer is prohibited by law from hiring an applicant who has that particular conviction, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

For purposes of the law, "particular conviction" means "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses."

12. SB826. **Females on Board of Directors of Publicly Held Corporations.**

Section 301.3 is added to the California Corporations Code and provides that no later than the close of the 2019 calendar year, domestic general corporations or foreign corporations that are publicly held corporations, whose principal executive offices, according to the corporation's SEC 10-K form, are located in California must have a minimum of one female on their board of directors. For purposes of the bill, "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. The law provides that no later than the close of the 2021 calendar year, the required number of females will be increased to: 2 female directors if the corporation has 5 directors or to 3 female directors if the corporation has 6 or more directors. On or before specified dates, the Secretary of State is required to publish various reports on its website documenting, among other things, the number of corporations in compliance with these provisions. The Secretary of State also has the authority to impose fines on covered corporations for violations of the law.

Vetoed Bills.

1. AB3080. [**Prohibition on Non-Disclosures re: Sexual Harassment & Prohibition on Mandatory Arbitration Agreements re: FEHA claims**]. This bill would have prohibited an employer from requiring, as a condition of employment, receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, that an applicant, employee, or independent contractor agree not to disclose issues of sexual harassment. The bill would also have prohibited employers from requiring applicants or employees to waive any right, forum, or procedure for a violation of any provision of FEHA (e.g. by requiring they sign a mandatory arbitration agreement).

2. AB1867. [**Records of Sexual Harassment Complaints**]. This bill would have required an employer with 50+ employees to maintain internal complaint records of employee complaints alleging sexual harassment for a minimum of 5 years after the last day of employment of the complainant or any alleged harasser named in the complaint, whichever is later.

3. AB1870. [**Extension of FEHA Statute of Limitations**]. Under existing law, a person claiming to be aggrieved by an alleged unlawful practice under FEHA to file his/her complaint with the DFEH within one year from the date upon which the unlawful

practice occurred, unless otherwise specified. This bill would have extended the one year period to three years for complaints alleging violations of the employment-provisions of the FEHA – e.g. employment discrimination, harassment, and retaliation.

4. AB3081. [**Rebuttable Presumption of Retaliation against Sexual Harassment Complainant**]. Among other things, this bill would have prohibited an employer from discharging or in any manner discriminating or retaliating against an employee because of the employee's status as a victim of sexual harassment, as defined by FEHA. The bill would have also established a rebuttable presumption of unlawful retaliation based on the employee's status as a victim of domestic violence, sexual assault, sexual harassment, or stalking if an employer takes specific actions within 30 days following the date that the victim provides notice to the employer or the employer has actual knowledge of the status.

5. AB2079. [**Sexual Harassment Trainer Qualifications for Janitorial Workers**]. Existing law establishes certain protections for janitorial workers, including a biennial in-person sexual violence and harassment prevention training. The bill would have prescribed certain minimum qualifications and requirements for qualified organizations and peer trainers that employers would be required to use to provide the biennial training. The bill would also have required the Director of the DLSE to develop, maintain, and update as prescribed a list of qualified organizations and qualified peer trainers.

6. SB937. [**Acceptable Lactation Locations for Employees**]. This bill would have required an employer to provide a lactation location that includes prescribed features and would require an employer, among other things, to provide access to a sink and refrigerator in close proximity to the employee's workspace. Among other things, this bill would also require an employer to develop and implement a policy regarding lactation accommodation and make it available to employees. The bill would also require an employer to maintain records of requests for lactation accommodation for 3 years and to give the Labor Commission access to those records.

7. SB1223. [**Harassment & Discrimination Prevention Policy & Training in Construction Industry**]. Existing law authorizes the DLSE to investigate violations of, and to enforce the provisions of, the Labor Code that are not specifically vested in any other officer, board, or commission. This bill would have required that the DLSE develop recommendations for an industry-specific harassment and discrimination prevention policy and training standard for use by employers in the construction industry.

8. AB2496. [**Rebuttable Presumption of Employment Status for Janitorial Workers**]. Existing law requires property service employers to register with the DLSE and to provide, among other things, recordkeeping and training for their employees, as specified. This bill would have provided that a property service employer would be

subject to the rebuttable presumption provisions that its workers are employees rather than independent contractors.

9. AB2732. [**Immigration Documents & "Workers Bill of Rights"**]. This bill would have made it unlawful for an employer to knowingly destroy, conceal, remove, confiscate, or possess any actual or purported passport or other immigration document, or any other actual or purported government identification document of another person in the course of committing, or with the intent to commit, trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice. The bill would have also required an employer to post a "workers bill of rights" notice created by the DLSE.

Takeaway: California employers should evaluate the new employment laws discussed above as well as others that were passed, and take necessary steps to ensure compliance. The employment attorneys at Weintraub Tobin are happy to discuss the new laws and assist employers in complying with their legal obligations.