New Developments in Employment Law

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EAC Update

California Propels the #Metoo Movement Forward Passing Laws Protecting Victims/Employers From Defamation
By Ann K. Smith

In yet another nod to the #MeToo Movement, Governor Brown signed AB 2770 on July 9, 2018 to protect sexual harassment victims and employers from being sued for libel, slander, or defamation by alleged harassers. The bill passed the legislature with unanimous, bipartisan support and expanded the definition of "privileged publication or broadcast," as defined in Civil Code Section 47(c). The definition now includes the following as privileged communications: (1) a complaint of sexual harassment by an employee, without malice, to an employer based on credible evidence and (2) communications between the employer and interested persons regarding a complaint of sexual harassment. AB 2770 also authorizes an employer to answer, without malice, whether the employer would rehire an employee and whether a decision not to rehire is based on the employer's determination that the former employee engaged in sexual harassment.

Employers have been reticent to divulge such information about previous employees when asked in the past. It is likely that even with this legislation, disclosing such information will pose risks to employers, as the protection only attaches to a complaint of sexual harassment based on credible evidence. This distinction will, undoubtedly, lead to further litigation.

Prior to AB 2770, the fear of defamation, libel, and/or slander silenced many sexual harassment victims. Now, victims may be inspired to come forward due to the protections afforded them by AB 2770.

Beyond serving as a symbol, the #MeToo movement has not only propelled men and women to come forward with their complaints, but legislators have responded with sweeping proposals to change the law. AB 2770 is only one example.

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Another example is a bill passed by the California Legislature that requires certain employers to provide in-person sexual violence and harassment prevention training every two years. The fact that the legislature is now requiring that the training be in-person is yet another example of how far the pendulum has swung in correcting sexual harassment in the workplace:

> •**California Property Service Workers Act**: Any business that provides janitorial services or that contracts for such services must provide all covered workers a copy of the Department of Fair Employment and Housing pamphlet DFEH-185, *Sexual Harassment* starting July 1, 2018. Starting January 1, 2019, covered employers will be required to provide **in-person** "sexual violence and harassment prevention training" every two years.

The proposed bills listed below are being considered by the California Legislature and will greatly affect employers if enacted:

> •**S.B. 820, THE STAND TOGETHER AGAINST NON-DISCLOSURE ACT**: Seeks to eliminate non-disclosure agreements in sexual harassment settlements altogether unless the victim requests such a provision.
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> •**A.B. 1867, ON RECORDKEEPING**: Proposes requiring public and private employers of more than 50 employees to maintain records of all employee sexual harassment complaints for at least 10 years.
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> •**A.B. 1870, THE STOP THE HARASSMENT AND REPORTING EXTENSION ACT**: Seeks to extend the statute of limitations from 1 to 3 years for filing *any* type of claim with the Department of Fair Employment and Housing.

Other measures that have been enacted in the last year throughout the nation in response to the #MeToo movement include:

> •**"Promising Practices for Preventing Harassment" by the Equal Employment Opportunity Commission ("EEOC")**: In response to the #MeToo movement, the EEOC published new informal guidelines regarding harassment in November 2017. While this publication does not have the force of formal regulations or rules, the EEOC makes a number of novel suggestions for harassment prevention that employers may consider adopting as best practices.

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•**Tax Cuts and Jobs Act (IRC Section 162q)**: In response to the #MeToo movement, a new Internal Revenue Code section was added on December 22, 2017. This new law was enacted out of a concern that confidentiality provisions could potentially protect sexual predators and enable them to offend again. This new law is extremely broad in that it prohibits an employer from taking a deduction for certain settlements or payments, including attorneys' fees related to such settlements or payments, in defending sexual harassment/abuse claims if the payments are subject to a nondisclosure agreement. Employers settling lawsuits or threatened lawsuits involving sexual harassment or sexual abuse are now faced with a decision—settle the claim without a confidentiality provision and retain the ability to take the deduction for the settlement and related attorneys' fee, or include a confidentiality provision in the settlement agreement and lose the deduction.

Operating in this environment of heightened awareness requires employers to ensure that their policies and procedures relating to workplace harassment are in compliance with the ever changing laws. Given the tide of the #MeToo movement, businesses would be wise to explore enhanced preventative measures to combat the climate.

For more information concerning sexual harassment training obligations, updates to policies and forms, and preventative measures, consult with your usual counsel or the author of this article, Ann K. Smith at (562) 653-3200 or asmith@aalrr.com.

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