New Law Establishes Several New Protections For Employees Bringing Harassment Claims

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On September 30, 2018, Governor Brown signed SB 1300, the Omnibus Sexual Harassment Bill, into law. The law will take effect on January 1, 2019. Like the remainder of FEHA, these changes will apply to all public employers and most private employers.

SB 1300 amends several provisions of the Fair Employment and Housing Act (FEHA) by adding Sections 12923, 12964.5 and 12950.2 to the Government Code. In addition, in Government Code Section 12923, the Legislature includes its understanding of proper legal standards courts should apply in adjudicating harassment cases.

It is unclear how courts will apply these changes. Technically, the new provisions simply state the Legislature's understanding of appropriate legal standards, some of which courts have already articulated as persuasive authority. That means that, in theory, courts could simply reject the changes and proceed with its currently applied jurisprudence. However, given that courts generally interpret and apply the law as created by the Legislature, complete rejection by the courts seems unlikely. We expect these issues to be heavily litigated and will provide updates to this analysis as additional information becomes available.

These new standards will make it much easier for plaintiffs to file and litigate harassment claims against employers and make it much more difficult for employers to defeat harassment claims on summary judgment.

- Potential Changes to the Legal Standard for Harassment:
  - Single Incident Sufficient— Application of SB 1300 would expand the current law. Currently, to establish an actionable harassment claim, the complained of conduct must be sufficiently "severe or pervasive." Generally, an actionable claim requires either one extremely severe instance, or multiple less severe instances. Under SB 1300, a single incident of harassing conduct that has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment, can be sufficient to create a triable issue regarding the existence of a hostile work

environment. Accordingly, under SB 1300, a plaintiff will not necessarily need to allege multiple incidents to meet the "severe and pervasive" standard to establish a case of a hostile work environment; one incident of harassing conduct could more easily constitute unlawful "severe and pervasive" harassment.

- "Stray Remarks" Relevant— SB 1300 affirms the current standard. The existence of a hostile work environment depends on the totality of the circumstances. Therefore, courts will consider stray remarks as relevant, circumstantial evidence of discrimination, even if the remark is not made directly in the context of an employment decision or is uttered by a non-decision maker.
- Industry Culture Irrelevant—Application of SB 1300 would expand the current law. Currently, in evaluating whether alleged harassment is triggered by a victim's protected status (e.g., sex or race), a court might consider the general industry culture to determine discriminatory intent. For example, a court might interpret certain sexually explicit statements to not be motivated by gender because vulgar language is commonly used in the entire industry or workplace. SB 1300 disapproves the current standard and declares the legal standard for sexual harassment will not vary by type of workplace. Under SB 1300, in determining whether a hostile environment exists, courts should consider the nature of the workplace in a hostile work environment claim only "when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties." Therefore, it is irrelevant that an occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past.
- Declined Tangible Productivity Unnecessary— Application of SB 1300 would expand the current law. Currently, some courts require a Plaintiff bringing a harassment claim to prove his or her tangible productivity has declined as a result of the harassment. SB 1300 declares that Plaintiff need only prove that a reasonable person subjected to the discriminatory conduct would find that the harassment altered working conditions so as to make it more difficult to do the job. Plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.

- Modifies Courts' Ability to Dismiss a Harassment Claim Prior to Trial:
  - Summary Judgement Rarely Appropriate—SB 1300

indicates that hostile work environment cases involve issues "not determinable on paper." That means that harassment cases will rarely be appropriate for disposition on summary judgment.

SB 1300 also expands employers' FEHA responsibilities and liabilities, prohibits employers from compelling employees to waive their FEHA claims as a condition of employment, and discourages employers from requesting attorneys' fees and costs from the non-prevailing plaintiff:

- Expands Employers' FEHA Liability for Third Parties:

Application of SB 1300 would expand the current law. Currently, employers are responsible for nonemployees' sexual harassment if the employer knew or should have known about the conduct. Under SB 1300, an employer is responsible for harassment by a third party based on any protected status, rather than just gender. Limits Release and Non-Disparagement Agreements:

- SB 1300 prohibits employers from requiring an employee to sign, as a condition of employment, continued employment, or in exchange for a raise or bonus: (1) a release of FEHA claims or rights or (2) a non-disparagement agreement prohibiting a disclosure of information about unlawful acts in the workplace, including sexual harassment.
- Exception: this restriction does not apply to negotiated settlement agreements to resolve FEHA claims filed in court, before administrative agencies, alternative dispute resolution or through the employer's internal complaint process—as long as the negotiated settlement agreement is voluntary and supported by valuable consideration.
- Limits Prevailing Employers' Right to Fees and Costs:
  - In a newly added provision, SB 1300 prohibits a prevailing defendant from being awarded attorneys' fees and costs unless the court finds the complaint was frivolous, unreasonable or groundless when filed, or that the plaintiff continued to litigate after it clearly became so.

Assuming the court applies these changes, they will likely result in an increase of sexual harassment claims filed against employers. Employers will likely be required to provide more documentation to demonstrate their harassment prevention and correction efforts to defeat these claims. Accordingly, we recommend that employers review their harassment and discrimination policies, procedures, practices, and trainings to ensure they will comply with these changes. Employers should also ensure that they are providing supervisory and non-supervisory employees sexual harassment interactive/classroom training, based on SB 1343, effective January 1,

2019.