The Law Offices of Douglas F. Walters, APC

The Employment Law Newsletter

Douglas F. Walters, Esq | AttorneyWalters.com | Ryan J. Carlson, Esq

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Cases To Watch

- Bennett v. Rancho CA Water District
- Ward v. United Airlines, Inc.

The Law Offices of
Douglas F. Walters, APC
12626 High Bluff Drive
Suite 330
San Diego, California 92130

Office: (858) 623-5655
Fax: (858) 623-5645

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California's Labor Law Updates & Changes for 2019 By Ryan J. Carlson

Every year we see a host of new changes, updates, revisions, and clarifications to labor and employment laws in California. This year is no different. Some of these changes apply across the board to all employers while some only apply to businesses of certain sizes or in certain industries. This installment of the Employment Law Newsletter will quickly and generally discuss some of the more major updates that, for the most part, apply to employers of any size in any industry.

Minimum Wage

First and foremost, the state minimum wage is going up (again)! This is not exactly the result of a new law however, as this increase takes effect pursuant to a law that was passed back in 2016. As of January 1, 2019, the minimum wage will increase to $11.00/hour for employers with 25 or fewer employees, and $12.00/hour for employers with 26 or more employees. These amounts will continue to increase by $1.00/hour each year until January of 2023, at which point employers of all sizes will be required to pay their employees no less than $15.00/hour.

It important to keep in mind that these minimum wage rates are established by state law and may be higher depending on where in California you live. For example, employers of any size in Berkley and San Francisco are already required to pay at least $15.00/hour. Always be sure to check your local minimum wage ordinance to ensure you are, or your employer is, operating in compliance with local wage and hour laws.

Sexual Harassment

Many other widespread changes to California labor and employment law were inspired by increasing issues related to the #MeToo movement and public outcry for

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sexual harassment reform in the workplace. Not surprisingly, these updates reflect the Legislature's intent to provide additional protections for victims of gender-based workplace harassment, discrimination and wage gaps, and to prevent similar issues in the future.

Privileged Complaints – Assembly Bill 2770

Perhaps the biggest protection afforded to victims of sexual harassment and discrimination derives from the new Assembly Bill ("AB") 2770, which now finds its place in the law under the newly-updated version of Civil Code §47.

Many victims of sexual harassment often decide not to come forward and report the harassment out of fear that they are exposing themselves to a potential defamation lawsuit by their harasser if they are unable to actually prove the harassing conduct. AB 2770 aims to dispel many of these concerns by making a good-faith and credible complaint of sexual harassment a "privileged publication." So, how does this affect an alleged harasser's lawsuit alleging defamation against the victim?

First, some background on Defamation: Defamation is a legal claim and in order for the defendant to be held liable, the plaintiff (i.e. person suing) must generally prove that the defendant: 1) made an *unprivileged* publication, 2) of false facts, 3) that injured the plaintiff's reputation. In the context of defamation, an "unprivileged publication" is a statement or communication that is either written or spoken, which *can* be used to form the basis of a defamation lawsuit.

Prior to AB 2770, complaints by victims of workplace sexual harassment to their employer were not explicitly deemed privileged publications. Thus, those complaints *could* be used by a plaintiff to establish both the "unprivileged publication" element and, if false, the "false facts" element of his/her defamation claim.

AB 2770 clarifies that an employee's complaint of sexual harassment to his/her employer is a privileged publication when the complaint is: 1) made without malice, and 2) based on credible evidence. Thus, if an employee believes in good faith that s/he has been sexually harassed and has credible evidence of the alleged harassment, his/her complaint to his/her employer can no longer form the basis of a defamation lawsuit, *even if it is later found that the complaint could not be substantiated.*

It is important to note that the key words here are "without malice" and "based on credible evidence." Not just any complaint based on just any evidence will meet this standard. The use of these words was the Legislature's way of looking out for the victims of bogus harassment complaints lodged by disgruntled co-workers.

A complaint made "without malice" is generally one that is *not* motivated by hatred or ill-will and one that is *not* intentionally false or otherwise made with reckless disregard for (i.e. no reasonable reason to believe) its truth.

The term "credible evidence" however, is a little trickier. It has not been further defined or explained in this specific context by any court or the Legislature, so right now it

is arguably subject to different interpretations. We are hesitant to define it ourselves until that further clarification is provided, but one might say evidence is credible if, viewed objectively, it reasonably substantiates the fact or proposition for which it is being offered.

The result of the foregoing is that an employee's good-faith complaint of sexual harassment that is supported by reasonably verifiable facts is now a privileged publication and, therefore, cannot be used to form the basis of a defamation lawsuit even if it has not been substantiated.

But that is not all! AB 2770 provides additional protection for *employers* too! It explicitly authorizes an employer listed as a reference to "answer, without malice, whether or not the employer would rehire a current or former employee and whether the decision to not hire is based upon the employer's determination that the former employee engaged in sexual harassment."

While employers should be extremely careful and should really consult an attorney before divulging information about a former employee's issues of sexual harassment and/or the basis of their determination that it occurred, this provision enables the employer to help prevent future sexual harassment by the same employee without fear of incurring liability for, among other things, defamation. This is just another way that the Legislature is aiming to address and prevent workplace sexual harassment on a widespread basis.

Prohibition on Confidentiality Provisions – Senate Bill 820

Another way California is cracking down on sexual harassment and/or discrimination and protecting the rights of victims is by prohibiting confidentiality provisions in settlement agreements in cases that involve claims of sexual harassment, assault or discrimination.

Only about 2-3% of lawsuits end up going to trial. The other 97-98% generally result in a settlement between the parties. When a settlement is reached, the terms and conditions of the settlement are almost always reduced to writing in a document that is aptly called a "settlement agreement." The settlement agreement usually states that neither party is accepting responsibility or admitting liability and requires the parties to release or waive any and all potential legal claims they may have against each other. It also very commonly includes what is called a "confidentiality provision" which prevents either side from discussing the details of the lawsuit and/or the settlement agreement with uninvolved third-parties. If you ever ask a friend how their lawsuit ended up and they respond only with "it was resolved," it is very likely that it settled and a confidentiality provision was included in the parties' agreement.

These confidentiality provisions can be a valuable bargaining chip for either side when negotiating the terms of the settlement agreement. For example: if an accuser (plaintiff) does not want to keep the facts and allegations of the lawsuit confidential but the accused (defendant) insists upon doing so, the accuser may be compelled to settle for slightly less then s/he otherwise would have in exchange for *not* including a confidentiality clause. Conversely, if the allegations of sexual harassment are bad enough, the accused may be compelled to settle for slightly more in exchange for keeping everything under wraps.

Senate Bill ("SB") 820, which on January 1, 2019 will appear under Code of Civil Procedure §1001, will generally render unenforceable any provision in a settlement agreement that prevents the disclosure of factual information related to claims of sexual assault, harassment or discrimination. Thus, victims of such conduct can no longer be hushed up by simply paying them off to go away. Moreover, those who have actually engaged in sexual harassment can no longer hide behind the cloak of confidentiality!

To be clear, a confidentiality provision in a settlement agreement reached in an applicable case is *still enforceable to the extent that it does not prevent disclosure of the factual basis for the settled sexual harassment/assault/discrimination lawsuit.* However, as soon as it crosses the line of prohibiting such disclosure, it is deemed a violation of public policy and rendered void as a matter of law.

Depending on the nature of the case and the severity and merit of the claims at issue, it seems that the accused defendants in such cases were just stripped of a very strong bargaining chip. Whatever the case may be, parties and their attorneys in such cases must take this very new law into consideration when negotiating the terms of their agreement.

Mandatory Training – Senate Bill 1343

With respect to workplace sexual harassment and/or discrimination, the last noteworthy update to California law that we will discuss involves mandatory employee training. As it currently stands, California law requires that employers of 50 persons or more provide two hours of mandatory sexual harassment training to all supervisory employees every two years. Non-supervisory employees are not subject to such a requirement.

Under SB 1343, which takes effect under Government Code §12950.1(a) on January 1, 2019, employers of FIVE persons or more must, within six months of the respective employee's hire, provide two hours of sexual harassment training to all supervisory employees and one hour of such training to all non-supervisory employees. Additionally, each employer is required to provide the same amount of continued sexual harassment training (two hours for supervisory employees, one hour for non-supervisory) at least once every two years.

It is as wise for employers to provide this training as it is for employees to undergo it. This is especially so when you consider that AB 2770 now authorizes former employers to disclose issues of sexual harassment to prospective future employers when asked if any decision not to rehire a given employee was based on those very issues (see above). But, where before it was wise to provide such training, now it is required.

Other Minor-but-Noteworthy Updates and Clarifications

Salary History v. Salary Expectation – Assembly Bill 2292

You may recall that California enacted a law (Labor Code §432.3) on January 1, 2018, that, among other things, prohibits prospective employers from inquiring about the respective salary history of their job applicants. It did not, however, prohibit an applicant

from voluntarily disclosing his/her salary history during the course of an interview. Nor did it explicitly preclude inquiries about what the applicant expects to make. This created somewhat of a grey area in the law. Many prospective employers felt that they were unfairly prevented from asking candidates about their salary *expectations*, as opposed to *history*, because conversation about the former often naturally lends to discussion about the latter. Yet, an outright ban on questions about salary *expectations* was not the intent behind §432.3.

Accordingly, the Legislature provided clarification of its intent by amending §432.3 in one very important way; it added a subsection that reads: "Nothing in this section shall prohibit an employer from asking an applicant about his or her salary expectation for the position being applied for." Pretty straight forward, right? The result is that employers no longer need to walk on eggshells when trying to figure out what their applicants *expect to be* paid, as long as they do not ask the applicants what they *used to be* paid.

The impact of AB 2292 stretches beyond just inquiries about salary expectations. For example, it clarifies when and how during the interview process an applicant is entitled to request that a prospective employer disclose its pay scale to the applicant. It also provides clarification as to certain criteria that may (or may not) be used in determining whether employees of opposite sexes or different races/ethnicities, who perform substantially similar work, are paid equally.

These are just a few examples of the more significant changes resulting from AB 2292's enactment. The bottom line is: this law reflects another way California is making an effort to ensure compensation transparency and uniformity in the workplace.

Lactation Accommodations – Assembly Bill 1976

The final noteworthy update affects mothers who breastfeed at the workplace. Existing law (Labor Code §1031) already generally requires that employers provide breastfeeding employees with a room close to their work area, *other than a toilet stall*, to express their breastmilk in private. AB 1976, which will go into effect on January 1, 2019 under the revised version of Labor Code §1031, now requires that a private space close to the breastfeeding mother's workspace, *other than a bathroom*, be provided. This private space can either be permanent or temporary in nature, meaning a business need not necessarily erect or designate on a permanent basis an actual "lactation area" in their workplace. However, when a lactation area is only offered on a temporary basis, §1031 now sets forth four essential criteria that must all be present in order for the temporary lactation location to be deemed in compliance with the new law. These criteria are not all that straightforward, so employers who offer only temporary lactation areas are strongly encouraged to familiarize themselves with them now, before the law takes effect in January.

There are several other updates and changes that may apply to your business, either as an employer or employee. The ones mentioned above are the more noteworthy ones that apply across the board to just about any employer, and they are equally important for both the employer and employee to know. You should not hesitate to contact us if you have any questions or wish to discuss a more complete rundown of the updates, changes and revisions that will become effective on January 1, 2019. Don't get left behind! Call us now!