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OPINION

# 2019 ushers in new sex harassment laws

**By Jonathan Light**

This The big focus this year among the 100-plus new employment laws is, not surprisingly, sexual harassment. There are at least eight new laws on that topic, the most critical of which is AB 1343. Beginning in 2019, employers with at least five employees must conduct sexual harassment avoidance training for one hour at least every two years for all employees. Currently, only supervisors must be trained, and only those who work at companies with at least 50 employees. That law remains in effect. The state's Fair Employment and Housing Commission is charged with creating on-line resources for the training, although I've found that online training is less effective. And there must be someone available to answer questions in tandem with the training.

It's the job for human resources departments to implement the new law. In addition, there are several other new laws that address sexually charged workplace claims that will impact businesses.

Perspective

AB 1300 affirmed and rejected the holdings of five significant sexual harassment cases decided in California and nationally. It states that a single instance of harassment may be sufficiently severe to warrant liability; a "relaxed" or traditionally coarse work environment is no longer a factor to diminish or excuse bad behavior; cases will almost exclusively be heard by juries (making arbitration agreements even more critical so you're not in front of a jury); victims need not show that their productivity has declined as a result of the harassment; and stray remarks by non-supervisors or others not in the employment decision-making chain may still be relevant in a harassment case.

AB 1300 allows non-employees to bring claims under the state harassment laws. Potential claimants now include unpaid interns, volunteers and independent contractors. Companies will be liable if a supervisor "knows or should have known" about harassing conduct and failed to take "immediate and appropriate corrective action."

Similarly, SB 224 adds language to the Civil Code making persons in fiduciary relationships responsible for their behavior, such as real estate agents, attorneys, social workers, directors, producers, investors, elected officials and physicians. Also, victims will no longer be required to demonstrate an inability to easily end the relationship as a condition of recovering damages.

AB 1300 also prohibits companies from requiring an employee to sign a release denying prior harassment claims in exchange for a raise or bonus. This doesn't apply to a negotiated settlement administered after a filed lawsuit, administrative claim or through a dispute resolution process. Those categories don't include the rather typical situation these days in which a case is settled after a demand letter is sent and no formal proceeding ensues.

Settling sexual harassment claims is more complicated for a few other reasons. Settlement agreements can still prevent disclosure of the amounts paid and the identity of the victim, but agreements cannot prevent discussion about "factual allegations," meaning a true confidentiality provision in the settlement agreement is no longer allowed. The statute is vague as to what constitutes a "factual allegation." What happens if the employer denies entirely that any harassing conduct took place? A court may opine on what is a "factual allegation," but what if there is no filed lawsuit or mediator involved?

AB 2770 permits a former employer to tell a prospective employer that an employee is not eligible for rehire based on the employer's determination that the employee engaged in sexual harassment so long as the statement is made in good faith without malice. There's always risk in making such a disclosure, however.

AB 3109 prevents a settlement agreement from creating a fine or forfeiture of settlement funds if a victim testifies about harassment or alleged criminal conduct after being summoned by a court or administrative order.

Among a few other new laws, a federal statute prevents a business expense tax deduction for the settlement proceeds and related attorney fees in a sexual harassment case if the facts are kept confidential. When there are multiple claims asserted along with sexual harassment, employers will now want to segregate the value of the payment and attorney fees applicable solely to the harassment claim so that the balance of the proceeds are tax deductible; assuming it is kept confidential (which will almost always no longer be allowed).

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