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New Unlawful Workplace Practices in California

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EXECUTIVE SUMMARY

California's Fair Employment and Housing Act ("FEHA") prohibits workplace discrimination and provides California businesses and their employees with guidelines on how to prevent it. Senate Bill 1300 ("SB 1300"), redefining unlawful employment practices, including discrimination and harassment, became effective on January 1, 2019. California employers need to be aware that the new law provides greater protection to the victims of workplace harassment.

SB 1300 made several changes and additions to the employment regulations under FEHA. First, with the exception of negotiated settlement agreements for the purpose of resolving a formal FEHA claim, employers are prohibited from requiring employees, in exchange for a raise or bonus, or as a condition of employment or continued employment, (1) to sign a release pertaining to claims or rights under FEHA; or (2) to sign a nondisparagement agreement or any other document purporting to deny an employee's right to disclose information about unlawful or potentially unlawful acts in the workplace. As a result, employers can no longer enforce any employee agreement to refrain from filing a civil action or complaint for any claim arising under FEHA. Likewise, employees can no longer be required to agree not to disclose any unlawful acts, including sexual harassment, occurring at the workplace.

The next notable addition under SB 1300 is the new legal standard for sexual harassment claims, providing even higher protection to the victims of workplace harassment in civil litigations. In essence, the new law states: (1) in order to prove that decline of work productivity was caused by the alleged harassment, the plaintiff will only need to prove that "a reasonable person subjected to the discriminatory conduct would find" that the harassment altered the plaintiff's working conditions, thereby making it more difficult for the plaintiff to do the job; (2) a single incident of conduct amounting to harassment is sufficient to create a triable issue for proving that hostile work environment existed, if such conduct unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment; (3) in determining the existence of a hostile work environment, the court may even consider discriminatory remarks made by non-decision-makers and co-workers as relevant circumstantial evidence of discrimination; (4) "the legal standard

for sexual harassment should not vary by type of workplace"; and (5) harassment cases may not be simply disposed of through summary judgment. In establishing these new guidelines, the California Legislature specifically reviewed existing court decisions in harassment cases and showed its approval and disapproval of recent trends in the courts. Such review by the California Legislature of existing case law may be seen as an indication that as the number of workplace harassment-related lawsuits has increased in recent years, it was inevitable that the laws would be adjusted to further deter workplace harassment.

Another notable change will prevent a prevailing employer defendant from collecting attorney's fees and costs, including expert fees, unless the court finds the plaintiff's claim(s) frivolous, unreasonable, or groundless at the time of commencing an action or if the plaintiff continued to litigate after it clearly became evident the claims were meritless. Previously, any prevailing party could be awarded fees and costs of the litigation in FEHA disputes, and this change may potentially encourage most defendants to settle in the early stages of the litigation.

In addition, the new law expands employee liability. Existing law makes it unlawful for an entity or a person to discharge, expel, or discriminate against any person because that person filed a complaint, testified, or assisted in any proceeding under FEHA, and an employee who engages in "any harassment" prohibited under FEHA is held "personally liable" regardless of whether the employer knew or should have known of its employee's conduct. The new law reiterates that an employee who actually engaged in acts, which his or her employer is prohibited from engaging in under FEHA, will be held personally liable, regardless of whether the employer subsequently neglected to take the appropriate corrective action.

Lastly, the new law allows employers to provide bystander intervention training which would enable bystanders and witnesses of workplace harassment to recognize potentially problematic behaviors, and possibly motivate bystanders to take action should intervention be appropriate and necessary. Although this provision is only a recommendation, the new law reiterates that it is the responsibility of the employer to prevent workplace harassment.

New anti-harassment regulations are indicative of current societal trends. They should give all businesses and individuals a sense of crisis, counseling that enforcement of anti-harassment training is crucial, and the employers should make it a requirement for all individuals regardless of their status, or even the size of the business. Every business's human resource department should be aware of the new law in order to strengthen the company's harassment prevention efforts.