Ogletree Deakins

Employment Law Update
October 2018

In late September, California Governor Brown signed a flurry of new employment laws. Featured among them are a number of laws addressing sexual harassment in the workplace. New obligations include prevention training and prohibitions against certain types of confidentiality and non-disclosure agreements. We summarize the new laws below. Be sure to attend my firm's upcoming seminar which will cover the new laws in more detail.

Seminars and Webinars!

For those of you in San Diego, please join me on **October 30, 2018** for our law firm's annual Managing A Workforce conference in La Jolla. (We offer four other locations in California too: Orange County, Los Angeles, San Francisco and Sacramento.) Along with my colleagues, I'll be giving a presentation covering the latest developments in California employment law. *Register now because we are almost sold out*. Details below.

As always, please email your questions and comments. I look forward to hearing from you.

Sincerely,
Chris Olmsted
Christopher.olmsted@ogletree.com

UPCOMING SEMINARS

LAST CHANCE TO REGISTER!

Managing A Workforce

When: Tuesday October 30, 2018
8:30 am to 5:30 am

Where: San Diego Marriot La Jolla
4240 La Jolla Village Drive, La Jolla, CA 92037
(Also available in Orange County, Los Angeles, San Francisco, and Sacramento)

It seems that every year the rules change for California employers, and 2018 has been no exception. Join Ogletree attorneys for a year end update of new California laws and recent key court decisions. We will also provide sessions on commissions, bonuses and other incentive plans, background checks, key wage and hour developments, and managing leaves of absence issues. Breakfast and lunch are included, along with an optional social hour/happy hour at the conclusion of the event.

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Agenda: https://ogletree.com/~/media/ogletree/programs-pdf/managing-a-workforce-in-2019-california-fall-2018.ashx?v=901

Registration: https://ogletree.com/events/2018-10-30-managing-a-workforce-in-2019-san-diego

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Governor Brown Signs Final Round of Employment-Related Legislation

Once again, Governor Jerry Brown ends the legislative year by signing a flurry of employment-related legislation. This year, however, is Governor Brown's last year to do so, and next year we will report about the employment-related legislation that the new governor (whoever that is) undoubtedly will have signed.

This year's legislation includes significant sexual harassment- related and nonsexual harassment related employment legislation. In this article, we address the nonsexual harassment related employment legislation the governor signed. This legislation concerns areas such as government-mandated gender quotas for publicly-traded companies, criminal history inquiries, lactation accommodations, and paid family leave.

Unless otherwise noted, all laws take effect on January 1, 2019.

Female Director Quotas for Public Corporations

Senate Bill (SB) 826 adds Section 301.3 to the California Corporations Code and requires that publicly-held corporations appoint female directors to their boards of directors. The law applies to publicly-traded companies incorporated in any state with principal executive offices in California according to the corporation's SEC 10-K form. More specifically, by the end of 2019, covered corporations must include at least one female on their boards of directors. By the end of 2021, covered corporations with five or more directors on their boards must include at least two female directors, while corporations with six or more directors on their boards must include at least three female directors.

Covered corporations may increase the number of directors on their boards to facilitate compliance. A corporation is in compliance if a female director holds the seat "for at least a portion of the year." The law defines a "female" as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."

The penalties for noncompliance are significant. The law authorizes the California secretary of state to implement regulations that fine noncompliant corporations $100,000 for the first violation and $300,000 for any subsequent violation.

The law also requires the California secretary of state to publish a report revealing the number of covered corporations that have complied with the quota requirement. Interestingly, among other statistics, the secretary of state also must publish the number of corporations that moved their headquarters out of California to another state.
In his signing statement, Governor Brown acknowledged that the law has "potential flaws that indeed may prove fatal to its ultimate implementation." Legal experts have pointed out that gender quotas have been held unconstitutional in other contexts. Moreover, the law may conflict with federal corporate law. Governor Brown nevertheless signed the bill, referring in part to "recent events in Washington, D.C." that "make it crystal clear that many are not getting the message."

Right to Copies of Pay Records

SB 1252 amends California Labor Code Section 226, under which employers must afford current and former employees the right to inspect or copy records. The amended law adds that employees have a right to "receive a copy" of the records.
According to the bill's legislative history, the amendment's purpose is to clarify that employers must provide a copy upon request, rather than requiring the employee to make a copy. The amendment leaves in place the employer's right to charge the employee "the actual cost of reproduction."

Criminal History Inquiries

SB 1412 amends California Labor Code Section 432.7, which limits the information an employer may ask a job applicant about his or her criminal history.
The current law prohibits an employer from asking a job applicant to disclose information concerning arrests that did not result in a conviction (with exceptions), referrals to pretrial or posttrial diversion programs, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law. The law makes exceptions for employers in certain circumstances, including when an employer is required by law to inquire about a conviction or is prohibited by law from hiring an applicant who has been convicted of a crime.

The amended law limits those exceptions to circumstances where the employer is required to inquire into a particular category of criminal offenses or criminal conduct, or where the employer is prohibited from hiring an individual with a particular conviction. "Particular conviction" means a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses. Also, the amendment clarifies that in such instances, the employer may inquire about convictions that have been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

Expansion of Paid Family Leave

SB 1123 amends the California Family Temporary Disability Insurance Program, also known as the paid family leave program, by adding another leave category eligible for state wage replacement benefits.

Currently, the California Employment Development Department (EDD) provides wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement.
The bill adds Section 3302.1 to the California Unemployment Insurance Code. The addition provides that beginning on January 1, 2021, the EDD also will pay benefits for time off "to participate in a qualifying exigency related to the covered active duty, or call to covered active duty of the individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States."

The law defines "covered active duty" to include deployment to a foreign country. A "qualifying exigency" includes activities undertaken by the employee within a week of the call to duty, attendance at military events such as ceremonies or briefings, arranging for or providing child care or other family care, and other similar events specified in the law.

Lactation Accommodation

Assembly Bill (AB) 1976 amends California Labor Code Section 1031, which requires that employers provide lactating employees with breaks and rooms other than a toilet stall to express breast milk. Under the law as amended, employers must provide rooms other than a *bathroom* to express milk. An employer may comply with amended Section 1031 by providing a temporary lactation location if the employer is unable to provide a permanent lactation location because of operational, financial, or space limitations. The temporary location must be private, free from intrusion when in use, and not used for other purposes when in use. The amended law provides a limited undue hardship exception to some of these requirements and specifies lactation accommodations required for agricultural employees.

Industry-Specific Laws

PAGA Carve Out for Unionized Construction Workers

AB 1654 provides a limited exception to Private Attorneys General Act (PAGA) liability for certain construction industry employers that have entered into collective bargaining agreements that include specified provisions.

The exception applies to collective bargaining agreements entered into before January 1, 2025, that contain provisions, such as a regular hourly wage rate that is at least 30 percent higher than the state minimum wage rate, an express waiver of PAGA, and a

grievance and binding arbitration procedure that authorizes arbitrators to award remedies available under PAGA.

The law includes a January 1, 2028, sunset clause.

Safety-Sensitive Positions at Petroleum Facilities

AB 2605 exempts unionized employees who hold safety-sensitive positions at petroleum facilities from the rest and recovery period requirements found in the California Labor Code. Employers can require covered employees to carry and monitor a radio, pager, or other communication device; respond to emergencies; and remain on the employer's premises during breaks. When breaks are interrupted, employers must provide another rest period "reasonably promptly." If circumstances do not so allow employers must pay a one-hour rest break premium. The new law is effective immediately and includes a January 1, 2021, sunset clause.

Human Trafficking Training for Hotel Operators

SB 970 requires hotel and motel operators to provide 20 minutes of human trafficking awareness training to "employees who are likely to interact or come into contact with victims of human trafficking." Such employees include employees who work in reception areas, "perform housekeeping duties, help customers in moving their possessions, or drive[] customers." Employers must satisfy the training obligations by January 1, 2020, and must provide the relevant training to covered employees every two years thereafter.

Joint Liability for Customers Using Port Drayage Motor Carriers

SB 1402 provides that customers that use a port drayage motor carrier shall be jointly liable with the motor carrier employer for the full amount of any unpaid wages, unreimbursed expenses, damages, and penalties owed to truck drivers. The law does not apply to customers that hire a motor carrier with unionized workers under a collective bargaining agreement with specified terms.

Sexual Harassment Legislation

Harassment Prevention Training

SB 1343 amends the California Fair Employment and Housing Act by expanding both which employers must provide supervisor sexual harassment training and to whom they must provide it. Under current law, supervisors with 50 or more employees must provide at least two hours of sexual harassment training to supervisors every two years or within six months of an employee becoming a supervisor.

SB 1343 expands that mandate to employers with five or more employees. Moreover, covered employers must provide at least one hour of training to nonsupervisory employees as well. Employers must complete this training by January 1, 2020.

The legislation tries to alleviate employers' burdens somewhat by instructing the Department of Fair Employment and Housing to prepare and make publicly available two- and one-hour harassment prevention training videos and written materials in various languages.

Settlement Agreements

Under existing law, employers have been free to enter into settlement agreements containing nondisclosure provisions that prevent parties from discussing not only the amount of a settlement being paid but also the factual foundation surrounding claims of workplace sexual harassment. Such provisions have been very much in the news in light of Harvey Weinstein, Bill O'Reilly, and other prominent figures known to have settled prior sexual harassment claims. Senate Bill No. 820, effective January 1, 2019, adds a new section to the California Code of Civil Procedure that prohibits public and private employers from entering into settlement agreements that prevent the disclosure of information regarding:

> acts of sexual assault

> acts of sexual harassment as defined in section 51.9 of the Civil Code

> acts of workplace sexual harassment;

> acts of workplace sex discrimination;

> the failure to prevent acts of workplace sexual harassment or sex discrimination; and

> retaliation against a person for reporting sexual harassment or sex discrimination.

However, under this provision parties are still able to enter into agreements preventing the disclosure of claimants' identities and amounts paid in settlement of claims. While the goal of this statute is to prevent situations in which serial harassers are allowed to continue their unlawful behavior, its effect could be to impede parties from reaching arms-length resolutions of workplace disputes. It may also make it more difficult for employers to resolve unfounded or weak claims, as accused employees may refuse to cooperate in settlements without the opportunity to clear their names through litigation.

Non-Disclosure Agreements

Governor Brown also signed into law Senate Bill No. 1300 (SB 1300), which amends the California Fair Employment and Housing Act (FEHA) to prohibit other nondisclosure agreements related to alleged claims of sexual harassment and overturn prior court rulings that limited harassment lawsuits.

Among other things, SB 1300 prohibits, in exchange for a raise or bonus, or as a condition of employment or continued employment, an employer from requiring the execution of a release of a FEHA claim or the signing of a nondisparagement or nondisclosure agreement related to unlawful acts in the workplace, including sexual harassment. The statute also provides that an employer may be liable for nonemployees' sexual harassment or other unlawful harassment of the employer's employees, applicants, unpaid interns, volunteers, or contractors, if the employer or its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

In addition, the legislation rejects two notable federal court decisions, thereby making it more difficult for employers to obtain summary judgment in harassment claims. For example, it explicitly rejects the application of the majority opinion in the Supreme Court of the United States' decision in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), and instead holds that the FEHA applies the lower standard set forth by Justice Ruth Bader Ginsburg in her concurrence: "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" It also rejects the Ninth Circuit's decision in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000), by confirming that a single incident of harassing conduct is sufficient to create a triable issue of hostile work environment harassment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. Further, the new legislation provides that the legal standard for sexual harassment should not vary by type of workplace and that it is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. As such, it explicitly rejects the California appellate court decision in *Kelley v. The Conco Companies*, 196 Cal. App. 4th 191 (2011).

SB 1300 also explicitly rejects the so-called "stray remarks doctrine" by providing that the existence of a hostile work environment claim depends upon the totality of the circumstances and that a discriminatory remark, even if not made directly or in the context of an employment decision or uttered by a nondecision maker, may be relevant. Accordingly, it explicitly affirms the California Supreme Court's decision on this issue in *Reid v. Google Inc.*, 50 Cal. 4th 512 (2010).

Entertainment Industry

The third piece of legislation that Governor Brown signed into law, Assembly Bill No. 2338, relates to the entertainment industry, one of California's marquee industries. This new legislation requires talent agencies to make educational materials on sexual harassment prevention, retaliation, and reporting resources available to their clients. The law also requires the state labor commissioner to provide sexual harassment training to minors between the ages of 14 and 17 years old in the entertainment industry,

and to their parents or legal guardians. The training and educational materials can be provided online.

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