



On Your Mark, Get Set, Review! Roundup of 2019 California Sexual Harassment Prevention Related Legislation

10.16.2018

As we look to the year ahead, we have prepared a summary of new laws related to sexual harassment prevention. These **new laws become effective January 1, 2019** unless otherwise noted. Also summarized are several vetoed bills that we anticipate may be reintroduced in the next legislative session.

We're available to help as you review your policies and handbooks in preparation for complying with these new laws.

ENACTED

AB 1619

Sexual assault: statute of limitations.

Summary: Increases the statute of limitations for filing a civil action for damages for sexual assault to 10 years after the alleged assault or three years after the plaintiff discovered or reasonably discovered injury as a result of the assault, whichever is later.

Laws: Adds section 340.16 to the Code of Civil Procedure.

AB 1896

Sexual assault counselor-victim privilege.

Summary: Current law establishes a privilege for a victim of a sexual assault to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault counselor, if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder of the privilege, or the person who was the sexual assault counselor at the time of

the confidential communication, except as specified. This bill includes within the definition of sexual assault counselor for these purposes a person who is engaged in a program on the campus of a public institution of higher education, with the same primary purpose of rendering advice or assistance to victims of sexual assault and the same qualifications.

Laws: Amends section 1035.2 of the Evidence Code. Enacted 7/18/18.

AB 2055

Political Reform Act of 1974: lobbyists: sexual harassment.

Summary: Existing law requires the legislative ethics committees of each house of the Legislature to conduct at least semiannually an orientation course on the relevant ethical issues and law related to lobbying. This bill requires that orientation course to include information on each house of the Legislature's policies against harassment, including sexual harassment, in connection with lobbying activities.

Laws: Amends section 8956 of the Government Code.

AB 2338

Sexual harassment education by talent agencies.

Summary: Requires talent agencies to provide adult artists, parents or legal guardians of minors aged 14-17, and age-eligible minors, within 90 days of retention, educational materials on sexual harassment prevention, retaliation, and reporting resources. For adult model artists only, the talent agency will be required to provide materials on nutrition and eating disorders. Talent agencies will also have to retain, for three years, records showing that those educational materials were provided.

Laws: Adds Article 4 (commencing with Section 1700.50) to Chapter 4 of Part 6 of Division 2 of the Labor Code.

AB 2770

Privileged communications: communications by former employer: sexual harassment.

Summary: This bill adds among those privileged communications complaints of sexual harassment by an employee, made without malice, to an employer based on credible evidence and communications between the employer and interested persons regarding a complaint of sexual harassment and would authorize an employer to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

Laws: Amends sections 47 of the Civil Code. Enacted 7/9/18.

AB 3082

Sexual harassment education for in-home support services.

Summary: Requires the Department of Social Services to develop or identify—and provide a copy and description to the Legislature by September 30, 2019—(1) educational materials addressing sexual harassment of in-home supportive services (IHSS) providers and recipients, and (2) a method to collect data on the prevalence of sexual harassment in the IHSS program.

Laws: Adds section 12318 to the Welfare & Institutions Code.

AB 3109

Banning waivers of right to testify.

Summary: Voids any provision in a contract or settlement agreement entered into on or after January 1, 2019, that waives a party's right to testify in a legal proceeding (if required or requested by court order, subpoena or administrative or legislative request) regarding criminal conduct or sexual harassment on the part of the other contracting party, or the other party's agents or employees.

Laws: Adds section 1670.11 to the Civil Code.

SB 224

Personal rights: sexual harassment.

Summary: Existing law establishes liability for sexual harassment when the plaintiff proves specified elements, including, among other things, that there is a business, service, or professional relationship between the plaintiff and defendant and there is an inability by the plaintiff to easily terminate the relationship. Existing law also states that a relationship may exist between a plaintiff and certain persons, including an attorney, holder of a master's degree in social work, real estate agent, and real estate appraiser.

This bill includes within the elements in a cause of action for sexual harassment when the plaintiff proves, among other things, that the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a 3rd party and eliminates the element that the plaintiff prove there is an inability by the plaintiff to easily terminate the relationship. The bill also expands this protection to apply to relationships with an investor, elected official, lobbyist, director, and producer.

Laws: Amends section 51.9 of the Civil Code, and sections 12930 and 12948 of the Government Code.

SB 419

Legislative sexual harassment retaliation prevention act.

Summary: This bill provides that neither house of the Legislature may retaliate against a legislative advocate or employee, as defined, because that person has opposed any forbidden practices, or filed a complaint, testified, or assisted in any proceeding relating to a complaint of harassment under these provisions. This bill imposes civil liability for a violation of that prohibition. This bill also requires each house of the Legislature to maintain a record of each harassment complaint made to that house for a period of at least 12 years after the complaint is made.

Laws: Adds Article 12 (commencing with Section 9149.38) to Chapter 1.5 of Part 1 of Division 2 of Title 2 of the Government Code, relating to the Legislature, and declaring the urgency thereof, to take effect immediately.

SB 820

Settlement agreements: confidentiality.

Summary: Prohibits/voids a provision in a settlement agreement that prevents the disclosure of factual information relating to claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action. The bill authorizes provisions that (1) preclude the disclosure of the amount paid in settlement and (2) protect the claimant's identity and any fact that could reveal the identity, so long as the claimant has requested anonymity and the opposing party is not a government agency or public official.

Laws: Adds section 1001 to the Code of Civil Procedure.

SB 826

Women on boards.

Summary: SB 826 requires California-based publicly held corporations to have on their board of directors at least one female—defined as people who self-identify as women, regardless of their designated sex at birth. The deadline for compliance is December 31, 2019. The bill imposes minimum seat requirements that must be filled by women, proportional to the total number of seats, by December 31, 2021. For each director’s seat not held by a female during at least a portion of the calendar year—when by law it should have been—the corporation will be subject to a \$100,000 fine for the first violation and a \$300,000 fine for further violations. Corporations that fail to timely file board member information with the Secretary of State will also be subject to a \$100,000 fine.

Laws: Adds sections 301.3 and 2115.5 to the Corporations Code.

SB 954

Mediation: confidentiality.

Summary: Except in the case of a class or representative action, requires an attorney representing a person participating in a mediation or a mediation consultation to inform his or her client with a printed disclosure containing the confidentiality restrictions related to mediation, as specified, and to obtain a printed acknowledgment signed by the client stating he or she understands the restrictions.

Laws: Amends section 1122 and adds section 1129 to the Evidence Code.

SB 970

Human trafficking awareness.

Summary: Requires hotel and motel employers (excluding bed and breakfast inns), to provide—by January 1, 2020, and once every two years thereafter—at least 20 minutes of interactive human trafficking awareness training to employees likely to interact with human trafficking victims. The Department of Fair Employment and Housing can seek an order requiring an employer comply with these requirements.

Laws: Adds section 12950.3 to the Government Code.

SB 1300

Unlawful employment practices: discrimination and harassment.

Summary: Expands an employer’s potential liability for acts of nonemployees to all forms of unlawful harassment (not limited to sex).

Prohibits an employer, as a condition of a raise, bonus, or employment, from requiring the execution of a release of a claim or right under FEHA or to require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.

Also introduces bystander intervention training – training to address the bystander effect during which individuals tend to remain silent and refrain from providing assistance to victims in their presence. Under the new legislation, employers may provide such training, including information and practical guidance to help bystanders recognize and act on problematic behavior. This provision, however, is merely permissive; employers are not required to provide such training.

Affirms the following judicial standards: (1) *Harris v. Forklift Systems*: 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; (2) *Reid v. Google, Inc.*: rejection of the stray remarks doctrine defense, because the existence of a hostile work environment depends on the totality of the circumstances and a discriminatory remark, even if made not directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination; and (3) *Nazir v. United Airlines, Inc.*: hostile working environment cases involve issues ‘not determinable on paper.’

Rejects the following: (1) *Brooks v. City of San Mateo*: to determine what conduct is sufficiently severe or pervasive to constitute actionable harassment under FEHA; (2) *Kelley v. Conco Companies*: to rely upon different standards for hostile work environment harassment depending on the type of workplace.

Prohibits a prevailing defendant from being awarded attorneys’ fees and costs unless the court finds the action frivolous, unreasonable, or groundless when brought or continued once clearly becomes so.

Laws: Amends Government Code sections 12940 and 12965 and adds sections 12923, 12950.2, and 12964.5.

SB 1343

Sexual harassment prevention training.

Summary: Requires an employer who employs 5 or more employees to provide at least 2 hours of sexual harassment prevention training to all supervisory employees and at least 1 hour of sexual harassment prevention training to all nonsupervisory employees by January 1, 2020, and once every 2 years after that, as specified. The Department of Fair Employment and Housing is required to make available a one-hour and two-hour online training course for employers to use for the prevention of sexual harassment in the workplace along with informational posters and fact sheets, in specified alternate languages on the department’s Internet Web site.

Laws: Amend sections 12950 and 12950.1 of the Government Code.

VETOED

AB 1867

Maintenance of records.

Summary: Would have required employers with 50 or more employees to maintain records of complaints alleging sexual harassment for at least five years after the last date of employment of the complainant or alleged harasser, whichever is later.

Laws: An act to add Section 12950.5 to the Government Code.

AB 1870

Employment discrimination: unlawful employment practices.

Summary: The California Fair Employment and Housing Act makes specified employment and housing practices unlawful, including discrimination against or harassment of employees and tenants, among others. Existing law authorizes a person claiming to be aggrieved by an alleged unlawful practice to file a complaint

with the Department of Fair Employment and Housing within one year from the date upon which the unlawful practice occurred, unless otherwise specified. This bill would have extended this period to 3 years for complaints alleging employment discrimination, as specified.

Laws: An act to amend Section 12960 of the Government Code.

AB 2713

Public employment: sexual harassment tracking.

Summary: Would have required the equal employment officer of each state agency to, by July 1, 2019, and annually on that date thereafter, submit a report to the Department of Human Resources that contains specified information relating to sexual harassment complaints received by, or filed with, that agency within a specified time period, and information related to any judgment or settlement paid or received by the agency relating to sexual harassment. The bill would require the Department of Human Resources to, by January 1, 2020, and annually on that date thereafter, submit a report to the Legislature, and post the report on its website.

Laws: An act to add Article 4 (commencing with Section 18730) to Chapter 2 of Part 2 of Division 5 of Title 2 of the Government Code.

AB 3080

Employment discrimination: enforcement.

Summary: Would have prohibited businesses from requiring, as a condition of employment, employment benefit, or contract (1) that a job applicant or employee waive any right, forum, or procedure (e.g., arbitration) for a violation of FEHA or the Labor Code, and (2) that a job applicant, employee, or independent contractor not disclose instances of sexual harassment suffered, witnessed, or discovered in the work place or in performance of the contract, opposing unlawful practices, or participating in harassment and discrimination related investigations or proceedings.

Laws: An act to add Section 12953 to the Government Code, and to add Sections 432.4 and 432.6 to the Labor Code.

AB 3081

Employment: sexual harassment.

Summary: Would have amended the FEHA and Labor Code to (1) add status as a sexual harassment victim to existing prohibitions on discrimination against employees who are victims of domestic violence, sexual assault, or stalking, (2) create a rebuttable presumption of unlawful retaliation if an employer—within 30 days of notice of the victim's status—discharges or threatens to discharge, demotes, suspends, or otherwise discriminates against a victim employee, (3) make a business jointly liable for harassment of workers supplied by the business's labor contractor (existing law similarly extends liability for the contractor's failure to pay wages and obtain valid workers' compensation coverage), (4) prohibit businesses from shifting to their labor contractors duties or liabilities under the Labor Code workers' compensation insurance provisions.

Laws: An act to amend Sections 230, 230.1, and 2810.3 of, and to add Chapter 4.7 (commencing with Section 1080) to Part 3 of Division 2 of the Labor Code, relating to employment.

How Nossaman Can Help

Nossaman provides client-focused, high caliber, legal services that exceed our clients' expectations while staying within their budgets. Our employment attorneys provide litigation, counseling, advice, and training services to private and public companies and public entities throughout California, as well as meeting their out-of-state-needs. Within the scope of our representation, we counsel employers in developing and implementing legally compliant harassment and discrimination policies and practices. We are qualified and experienced trainers for State mandated sexual harassment prevention training. Our counseling and training services help employers avoid or mitigate costly administrative proceedings and litigation by proactively reviewing and establishing policies and procedures to be consistently applied in the workplace. Our training workshops and seminars empower our clients to better comply with and navigate the complex labyrinth of employment issues like those associated with harassment and discrimination