GIBSON DUNN

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WHAT EMPLOYERS NEED TO KNOW ABOUT CALIFORNIA'S NEW #METOO LAWS

To Our Clients and Friends:

On September 30, 2018, Governor Edmund G. Brown signed several new workplace laws, and vetoed others, that arose out of the #MeToo movement. We briefly review the newly signed legislation and also highlight bills that Governor Brown rejected. Unless otherwise indicated, these new laws will take effect on January 1, 2019.

New Requirements for Employers

New Training Requirements

Expanded Requirements for Harassment and Discrimination Training. Most California employers are aware that, under existing California law, employers with 50 or more employees must provide at least two hours of prescribed training regarding sexual harassment within six months of an individual's hiring or promotion to a supervisory position and every two years while an employee remains in a supervisory position. SB 1343 expands this requirement in two critical ways:

- The training requirements now cover all employers ***with five or more employees***, which includes temporary or seasonal employees, meaning that many smaller employers are now subject to California's training requirements.

- All covered employers must now provide at least one hour of sexual harassment trainingto ***non-supervisory employees*** by January 1, 2020, and once every two years thereafter, which may greatly expand the scope of required training for employers with large line-level workforces.

SB 1343 also requires the California Department of Fair Employment and Housing (DFEH) to make available online training courses that employers may use to meet these requirements. However, employers may wish to work with their counsel and Human Resources departments to develop training that is specific to their business and industry, which is generally regarded as more effective than "one size fits all" trainings.

Education and Training for Employees in Entertainment Industry. AB 2338 requires, prior to the issuance of a permit to employ a minor in the entertainment industry, that the minor and the minor's parents or legal guardians receive and complete sexual harassment training. The law also requires that talent agencies ensure that minors have a valid work permit, and that agencies provide adult artists with accessible educational material "regarding sexual harassment prevention, retaliation, and reporting resources," as well as nutrition and eating disorders.

Anti-Harassment Legislation

Restrictions on Non-Disclosure and Confidentiality Agreements and More Rigorous Sexual Harassment Standards. SB 1300 amends California's Fair Employment and Housing Act (FEHA) to prohibit an employer from requiring an employee to agree to a non-disparagement agreement or other document limiting the disclosure of information about unlawful workplace acts in exchange for a raise or bonus, or as a condition of employment or continued employment. Employers are also prohibited from requiring an individual to "execute a statement that he or she does not possess any claim or injury against the employer" or to release "a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity." Under the law, any such agreement is contrary to public policy and unenforceable. (Some of these activities, such as reporting to law enforcement, are already protected, of course.) While negotiated settlement agreements of civil claims supported by valuable consideration are exempted from these prohibitions, employers will want to review their various employee agreement templates to ensure none contain these or other types of prohibited clauses.

SB 1300 also codifies several legal standards that may make it more challenging for employers to prevail on harassment claims before trial. For example, the law provides that a single incident of harassing conduct may create a triable issue of fact in a hostile work environment case; that it is irrelevant to a sexual harassment case that a particular occupation may have been characterized by more sexualized conduct in the past; and that "hostile working environment cases involve issues 'not determinable on paper.'" Employers can expect to see SB 1300 cited in any plaintiff's opposition to summary judgment in a sexual harassment case, and they will need to give serious consideration as to whether and how to seek summary judgment in light of the new law.

Limitations on Confidentiality in Settlement Agreements. SB 820 prohibits provisions in settlement agreements entered into on or after January 1, 2019 that prevent the disclosure of facts related to sexual assault, harassment, and discrimination claims that have been "filed in a civil action or a complaint filed in an administrative action." Note, however, that SB 820 does not prohibit provisions precluding the disclosure of the settlement payment amount, and the law carves out an exception for provisions protecting the identity of the claimant where requested by the claimant.

Expanded Sexual Harassment Liability to Cover Certain Business Relationships. Businesses in the venture capital, entertainment, and similar industries will want to be alert to SB 224, which modifies California Civil Code section 51.9 and would include 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 as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party." The law identifies additional examples of potential defendants under the statute, such as investors, elected officials, lobbyists, directors, and producers.

Limitations on Barring Testimony Related to Criminal Conduct or Sexual Harassment. AB 3109 prohibits waivers of a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment by the other party to a contract, when the party

has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature.

Mandating Gender Diversity on Boards of Directors for Publicly Held Corporations

SB 826 requires a minimum number of female directors on the boards of publicly traded corporations with principal executive offices in California. The location of a corporation's principal executive office will be determined by the Annual Report on Form 10-K.

Under SB 826, a corporation covered by the law must have at least one female member on its board of directors by December 31, 2019, and additional female members by 2021 depending on the size of the board. If the corporation has a board of directors with:

- four members or less, no additional female directors are required;
- five members, the board must have at least two female directors by December 31, 2021; and
- six or more members, at least three female directors are required to be in place by December 31, 2021.

The California Secretary of State can impose fines of $100,000 for a first violation and $300,000 for subsequent violations.

Potential challengers of this law argue that it suffers from numerous legal deficiencies, including that it violates the Commerce Clause and the Equal Protection Clause of the United States Constitution. Indeed, Governor Brown himself acknowledged in his signing statement that this new law has "potential flaws that indeed may provide fatal to its ultimate implementation" and will likely be subject to challenge. For more information on SB 826, please consult our Securities Regulation and Corporate Governance group's analysis, available here.

Bills Vetoed by Governor Brown

Governor Brown also vetoed several bills relating to sexual harassment that could have significantly impacted employers in California, including:

- The closely watched AB 3080, which sought to forbid mandatory arbitration agreements in the workplace.
- AB 1867, which sought to require employers with fifty or more employees to "maintain records of employee complaints alleging sexual harassment" for a period of five years after the last day of employment of either "the complainant or any alleged harasser named in the complaint, whichever is later."
- AB 1870, which sought to extend the deadline in which a complainant may file an administrative charge with the DFEH alleging employment discrimination from one year to three years.

- AB 3081, which sought to require a client employer and a labor contractor to share all "civil legal responsibility and civil liability for harassment" for all workers supplied by that labor contractor and prohibit an employer from shifting its duties or liabilities to a labor contractor.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. We have been engaged by numerous clients recently to conduct investigations of #MeToo complaints; to proactively review sexual harassment policies, practices and procedures for the protection of employees and the promotion of a safe, respectful and professional workplace; to conduct training for executives, managers and employees; and to handle related counseling and litigation. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work or the following Labor and Employment or Securities Regulation and Corporate Governance practice group leaders and members:

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