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Important Legislative Changes for California Employers in the Wake of #MeToo Movement

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#MeToo just passed its first anniversary, and this movement is proving to be more than just a passing fad. Earlier this month, several pieces of key legislation passed which will have a direct impact on businesses of all sizes in the state of California, and their relations with their employees. As the effective date for some of these is just months away, it is time to take note and make sure your business will be compliant.

New Restrictions On Confidentiality Of Sexual Harassment/Discrimination Settlements
Often settlement agreements include a broad scope of confidentiality provisions that often preclude the claimant from discussing the terms of the settlement and the underlying factual basis of the original claim. Senate Bill 820 will limit that practice for settlement agreements entered into on or after January 1, 2019. SB 820 prohibits confidentiality or non-disclosure provisions in settlement agreements that prevent the disclosure of factual information involving allegations of sexual misconduct – unless the party alleging the harm desires confidentiality language to protect his or her identity.

The law does not void confidentiality provisions that prevent disclosure of the amount paid in the settlement of a claim.

New Restrictions Regarding Preventing Future Testimony
Another piece of legislation that requires a critical look at your settlement agreements is Assembly Bill 3109, which applies to a contract or settlement agreement entered into on or after January 1, 2019. AB 3109 adds Section 1670.11 to the Civil Code, which voids provisions in settlements that would prevent someone from testifying about alleged criminal conduct or alleged sexual harassment in an administrative, legislative, or judicial proceeding where the individual is requested to attend the proceeding pursuant to a court order, subpoena or written request from an administrative agency or the legislature.

New Requirements For Sexual Harassment Workplace Training
Senate Bill 1343 radically changes the requirements for workplace sexual harassment prevention training in the #MeToo era. The bill amends California Government Code Section 12950.1 and changes several workplace training requirements, including the following:

Training required by small businesses: Employers with at least five employees are now required to provide training to their employees (the previous threshold being 50 employees);

Training is no longer limited to supervisory employees: Employers are now required to provide sexual harassment prevention training to all employees, including non-supervisory employees. Specifically, one hour of classroom or other effective interactive training and education regarding sexual harassment must be provided to all non-supervisory employees, and two hours of the same to supervisory employees.

Training required within six months of job commencement: Employees are currently required to undergo training within six months of starting their jobs. Seasonal or temporary employees (or any employees that will be employed less than six months) need to undergo training within 30 days or 100 hours, whichever comes first.

The new bill will force many employers to overhaul their current training protocols in light of the new requirements. The bill also directs the DFEH to create online training modules that employees could take to fulfill the new requirements.

These new requirements come into place on January 1, 2020. Employers should use this window to determine how it will implement these training requirements in a way that it is meaningful to their employees. Simply clicking through government-supplied online training may not deliver the right message regarding the employer's commitment to prevent and remedy workplace harassment.

"Hostile Work Environment" Is Redefined; Release/Non Disparagement Agreements as a Condition of Employment or Promotion Are Banned
Another noteworthy change is the rejection of the standard of what constitutes a hostile work environment, a standard that has been in place for almost two decades. Senate Bill 1300 decrees that a single incident of harassing conduct is sufficient to create a triable issue of hostile work environment if the conduct interfered with a plaintiff's work performance or otherwise created an intimidating, hostile, or offensive work environment. The law explicitly rejects the prior standard for hostile work environment set by the 9th Circuit in *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000), an opinion written by former Judge Alex Kozinski who ironically retired from the court in 2017 amidst allegations of improper sexual conduct while on the bench.

SB 1300 also makes it unlawful for an employer to require an individual to sign a release or non-disparagement agreement that purports to deny the employee the right to disclose information about unlawful acts in the workplace in exchange for a raise, bonus, or continued employment (however, it does not apply to settlements where the employee is represented by counsel).

Corporate Boards Are Required To Include Women
By the end of 2019, Senate Bill 826 requires that all California publicly held companies have a minimum of one female on their board of directors; and by the end of 2021 a minimum of two female directors if five total directors, or three female directors if six or more total directors. Failure to comply will result in significant fines.

Talent Agencies Take Note
Aimed at preventing directors and producers from taking advantage of young talent looking for a break, Senate Bill 224 creates a new cause of action for sexual harassment related to these types of businesses and professional relationships where unwelcome sexual advances, solicitations, sexual requests, demands for sexual compliance, or other verbal, visual, or physical conduct of a sexual or hostile nature cause the client injury.

Assembly Bill 2338 requires that a talent agency, as a condition of the requirement that it be licensed with the Labor Commissioner, provide educational materials on sex harassment prevention, retaliation, and reporting resources to its talent (the artists). Failure to comply will result in $100 fines for each violation.

Human Trafficking Awareness Training Required of Certain Employees
Senate Bill 970 requires that employees who are likely to interact or come into contact with victims of human trafficking (e.g., those who have recurring interactions with the public such as receptionists, housekeepers, and drivers) go through 20 minutes of classroom or other interactive training regarding human trafficking awareness.

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Ms. Knepper advises and defends clients in federal and state employment-related lawsuits and agency claims, including actions alleging discrimination, harassment, retaliation, and wrongful termination. Ms. Knepper's experience includes successfully defending employers in both jury and bench trials and in arbitration proceedings. She also draws on her background in commercial litigation to represent employers in cases that involve employee theft of trade secrets, non-compete agreements, defamation, fraud, business interference and violations of the fiduciary duties owed by an employee to his/her employer.