
#TimesUp
SB826

work it

What California Employers Should Know About New Laws for 2019

BY MARK E. TERMAN

As the #MeToo movement gained momentum to right the wrongs of sexual harassment alleged against Hollywood, business and politicians, so too has the California Legislature responded by declaring, in essence, #TimesUp.

Of the nearly 600 bills introduced in 2018 that mention "employer," (compared to 304 bills in 2017) 455 mentioned "sexual harassment," (compared to 347 the prior year). While most of those bills did not pass, and of the ones that did, Gov. Brown did not sign several into law, many of the new laws will have significant impact on our state.

Essential elements of key state assembly bills (AB) and senate bills (SB) that became law affecting private employers, effective Jan. 1, 2019, unless otherwise noted, follow.

Women on Boards of Directors

SB 826 is the nation's first law that mandates female membership on boards of directors. By Dec. 31, 2019, it requires publicly held corporations (domestic or foreign, listed on a major U.S. stock exchange) whose executive offices are located in California (according to the corporation's SEC 10-K form) to have a minimum of one female director on its board of directors. No later than Dec. 31, 2021, the minimum number of required female directors increases to two if the corporation has five directors, or to three if the corporation has six or more directors.

"Female" under this bill means, "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."

By July 1, 2019, the California Secretary of State is required to publish a report on its website documenting the number of corporations that have at least one female director. By March 1, 2020, and annually thereafter, the Secretary of State must publish a report on its website regarding at least the following:

- The number of corporations subject to this section that were in compliance during at least one point of the preceding calendar year;
- The number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year; and
- The number of publicly held corporations that were subject to this section during the preceding year, but are no longer publicly traded.

Finally, SB 826 authorizes the Secretary of State to impose fines for violations as follows:

- $100,000 for failure to timely file board member information with the Secretary of State;

- $100,000 for a first violation; and
- $300,000 for a second or subsequent violation.

This bill adds secs. 301.3 and 2115.5 to the Corporations Code.

Responding to Inquiry of Alleged Past Sexual Harassment

Existing law authorizes an employer to inform a prospective employer whether or not the employer would rehire the employee. This communication is deemed privileged and protected from a lawsuit for defamation under Civil Code Sec. 47 if done without malice.

AB 2770 amends Sec. 47 to add among those privileged communications the following:

- Complaints of sexual harassment by an employee—without malice—to an employer based on credible evidence;
- Communications between the employer and interested persons—without malice—regarding a complaint of sexual harassment; and
- Communications by the employer—without malice—whether the employer's decision to not rehire the employee is based on the employer's determination that the former employee engaged in sexual harassment.

The intended effect of this bill is to protect victims of sexual harassment and employers from defamation claims by an alleged harasser when an employer conducts an internal investigation or a pre-employment background check.

No Contracts to Block Testimony about Sexual Harassment

Adding Sec. 1670.11 to the Civil Code, AB 3109 makes void and unenforceable a provision in a contract or settlement agreement that waives a party's right to testify in an administrative, legislative or judicial proceeding, if required or requested by court order, subpoena or administrative or legislative request, concerning alleged criminal conduct or sexual harassment.

The intended effect of this bill is to limit secrecy that often accompanies settlements of sexual harassment claims as well as ordinary confidentiality agreements that cover personnel matters.

More Prohibition Against Sexual Harassment in Professional Relationships

In addition to employment relationships, California law also prohibits sexual harassment by providers in business, service and professional relationships—such as accountants, doctors, psychotherapists, lawyers, social workers, real estate agents, bankers, builders, trustees, landlords and teachers.

SB 224 amends Civil Code Sec. 51.9 and Government Code secs. 12930 and 12948 to add to the list investors, elected officials, lobbyists, directors and producers, as well as those who hold themselves out as being able to help establish a business, service or professional relationship with another. The bill also makes the Department of Fair Employment and Housing (DFEH) responsible for the enforcement of sexual harassment claims and makes it an unlawful practice to deny or aid, incite or conspire in the denial of rights of persons related to sexual harassment actions.

No Confidentiality in Sexual Harassment Settlements

Adding Code of Civil Procedure Sec. 1001, SB 820 makes a provision in a settlement agreement, entered into on or after Jan. 1, preventing the disclosure of the factual information relating to the following civil and administrative claims, void as a matter of law and against public policy:

- Sexual assault;
- Sexual harassment;
- Workplace harassment or discrimination based on sex;
- Failure to prevent an act of workplace harassment or discrimination based on sex;
- Retaliation against a person for reporting harassment or discrimination based on sex;
- Harassment or discrimination based on sex; or
- Retaliation against a person for reporting harassment or discrimination based on sex.

With that said, the bill does allow, at the request of the claimant, settlement agreement provisions that shield disclosure of the amount paid in settlement and the identity of the claimant and facts that could lead to the discovery of his or her identity, including pleadings filed in court, as long as the opposing party is not a government agency or public official.

More Required Anti-sexual Harassment Training

Under the current Fair Employment and Housing Act (FEHA), employers with 50 or more employees must provide at least two hours of training and education regarding sexual harassment to all supervisors and managers every two years or within six months of the employee being promoted to a supervisory position. Four of the bills that impact training include:

SB 1300: Authorizes, but does not require, employers to provide bystander intervention training to their employees, i.e., training that would include information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe these behaviors. More on this bill is discussed later in this article.

SB 1343: Amends Government Code secs. 12950 and 12950.1 to expand, by Jan. 1, 2020, the sexual harassment training requirements to employers who employ five or more employees, including temporary or seasonal employees. By that date, and once every two years thereafter, such employers are required to provide at least two hours of sexual harassment training to all supervisors and managers, and at least one hour of sexual harassment training to all non-supervisory employees.

This bill also requires the DFEH to post on its website one- and two-hour online training courses on the prevention of sexual harassment in the workplace and existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention.

SB 970: Amends the FEHA to require employers in the hotel and motel industry (excluding bed and breakfast inns) to provide at least 20 minutes of training and education regarding human trafficking awareness to employees who are likely to interact or come into contact with victims of human trafficking. The schedule for compliance begins on Jan. 1, 2020, and every two years thereafter.

AB 2338: Adds Labor Code Sec. 1700.50 to require talent agencies to provide to FEHA compliant educational materials to artists (or their guardian for minors) regarding sexual harassment prevention, retaliation and reporting resources to an artist within 90 days of agreeing to representation by the agency or the agency's procurement

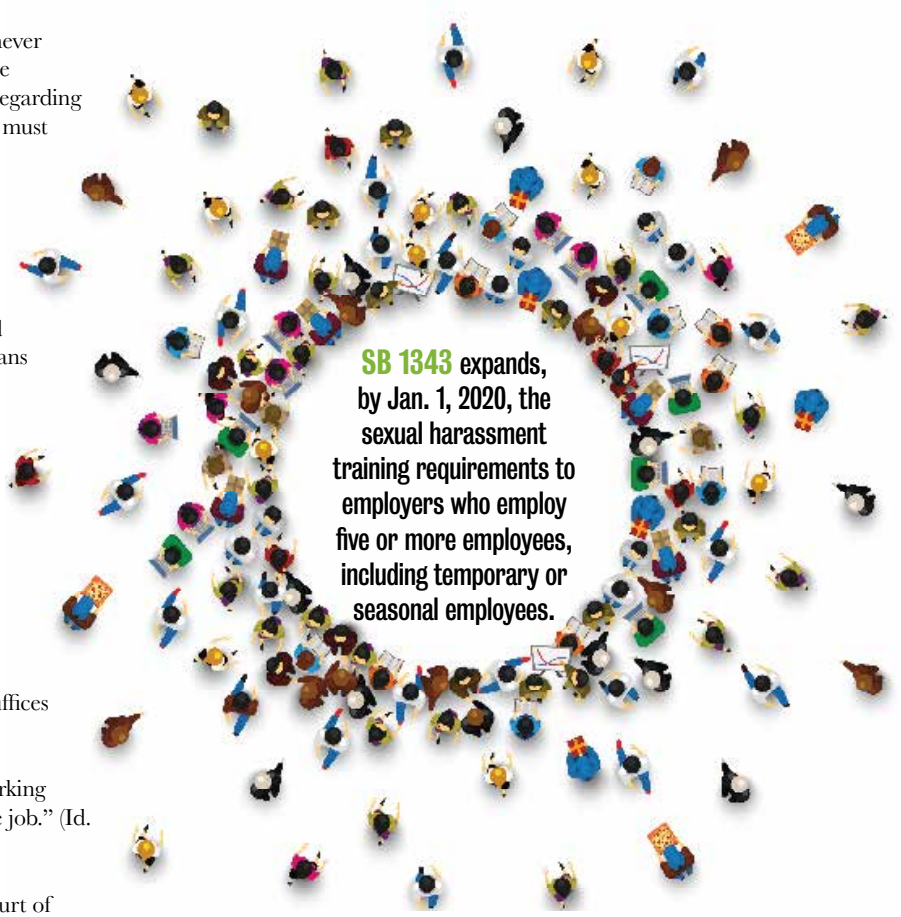
of an engagement, meeting or interview, whichever comes first. Agencies similarly also must provide specified educational materials to adult artists regarding nutrition and eating disorders. And the agency must keep records of its compliance with the bill for three years.

Unlawful Discrimination and Harassment Clarified and Expanded

SB 1300 deserves a slow read to absorb how it seeks to shape discrimination and sexual (and other) harassment law to "provide all Californians with an equal opportunity to succeed in the workplace." It addresses past court decisions and then modifies the statutes.

The bill affirms, disapproves or rejects several court decisions as follows:

Affirms the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), that in a workplace harassment suit "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." (Id. at 26)



Rejects the decision of the United States Court of Appeals for the Ninth Circuit's opinion in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000), and in doing so, provides that a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile or offensive working environment. The bill also states that *Brooks* is not to be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a FEHA violation.

Affirms the decision in *Reid v. Google, Inc.*, 50 Cal.4th 512 (2010), in its rejection of the "stray remarks doctrine," and in doing so, provides that the existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination.

Provides that the legal standard for sexual harassment should not vary by type of workplace and in so doing, disapproves of any language, reasoning or holding to the contrary in the decision *Kelley v. Conco Companies*, 196 Cal.App.4th 191 (2011).

Affirms the decision in *Nazir v. United Airlines, Inc.*, 178 Cal.App.4th 243 (2009), and its observation that hostile working environment cases involve issues "not determinable on paper." SB 1300 specifically provides that harassment cases are rarely appropriate for disposition on summary judgment.

Next the bill expands the statutes as follows.

By way of background, under FEHA, employers may, among other things, be responsible for the acts of nonemployees, with respect to sexual harassment of employees, and others including applicants, unpaid interns and volunteers, if employers, or their agents or supervisors, knew or should have known of the wrongful conduct and failed to take immediate and appropriate corrective action. Under SB 1300, employers can now be responsible for the acts of nonemployees with respect to any other harassment activity prohibited by FEHA, i.e., harassment based on other protected characteristics including, but not limited to, race, religious creed, color, national origin and ancestry.

This bill also prohibits employers, in exchange for a raise or bonus, or as a condition of employment, from requiring the execution of a release of a claim or right under FEHA or requiring an employee to sign a non-disparagement 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.

Under SB 1300, an agreement or document in violation of either of the prohibitions mentioned above is contrary to public policy and unenforceable. With that said, there is this exception: "This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process."

Finally, SB 1300 provides that a prevailing defendant shall not be awarded recovery of its attorney's fees and costs unless the court finds the lawsuit was frivolous, unreasonable or groundless when brought—or the plaintiff continued to litigate after it clearly became so.

This bill amends secs. 12940 and 12965, and adds Sections 12923, 12950.2 and 12964.5, of the Government Code.

Workplace Lactation Accommodation

Labor Code secs. 1030-31 require employers to make reasonable efforts to provide an employee with the use of a room or other location, other than a toilet stall, in proximity to the employee's work area for the employee to express milk in private for the employee's child. Employers also are required to provide such employees a reasonable amount of break time. The break time shall, if possible, run concurrently with any break time already provided to the employee. Break time for an employee that does not run concurrently with paid rest breaks need not be paid.

AB 1976 amends Labor Code Sec. 1031 to replace the term "toilet stall" with "bathroom." In addition, employers who make a temporary lactation location available to employees shall be deemed to be in compliance *if* all of the following conditions are met:

- They are unable to provide a permanent lactation location because of operational, financial or space limitations;
- The temporary location is private and free from intrusion while an employee expresses milk;
- The temporary location is used only for lactation purposes while an employee expresses milk; and
- The temporary location otherwise meets the requirements of state law concerning lactation accommodation.

Paid Family Leave Enhanced

Paid Family Leave provides benefits to employees who are permitted leave of absence (by law or employer policy) to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse or registered domestic partner. PFL benefits also are available to new parents who need time to bond with a new child entering their lives either by birth, adoption or foster care placement. PFL is state-paid, but funded by employees as part of employment tax payroll withholding.

AB 2587 amends Sec. 3303.1 of the Unemployment Insurance Code by eliminating the remnants of a seven-day waiting period for benefits. SB 1123 modifies current law to provide benefits for leave to participate in a qualifying exigency related to 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.

Minimum Wage on the Rise

As part of legislation enacted in 2015, the state minimum wage increased Jan. 1, 2019, to $12 per hour for employers with 26 or more employees, and to $11 per hour for employers of 25 or fewer employees. It will continue to increase annually until $15 per hour is reached by Jan. 1, 2022, for the larger (26-plus employees) employers and by Jan. 1, 2023, for smaller employers.

Changes in state—but not local—minimum wage also affect classification of most exempt workers. In addition to strict "duties tests" for administrative, executive and professional wage and hour exemptions, a salary of at least twice the state minimum wage must be paid to meet the "salary basis test." By Jan. 1, the annualized salary rate that employers with 26 or more employees must pay to meet the exempt salary requirement will advance to $49,920 up from $45,760. For employers with smaller workforces, the exempt salary requirement will move to $45,760 up from $43,680. When the $15 per hour rate is reached, the exempt salary rate will be $62,400.

Each state increase also impacts retailers who rely on the inside-sales exemption, which requires that employees be paid at least 1.5 times the state minimum wage, and at least half of their other earnings be from commissions.

Municipalities continue to create and increase their own minimum wage for companies that have employees working in their jurisdiction. Employers must pay the higher of the state or local minimum wage. Among the increases effective Jan. 1 are Mountain View and Sunnyvale ($15.65); Cupertino, Los Altos, Palo Alto, Richmond, San Jose and Santa Clara ($15); Belmont and Redwood City ($13.50); and Oakland ($13.80). By July 1, 2019, Los Angeles' local minimum wage for employers with 26 or more employees will be $14.25, up from $13.25 per hour. Los Angeles employers with fewer employees must pay at least $13.25 per hour by July 1. Annual incremental increases will continue to $15, by July 1, 2020, for larger companies and 2021 for smaller ones.

The minimum hourly wage for employees in San Francisco, currently $15 per hour, will be adjusted annually starting July 1 based on the annual Consumer Price Index. Employers should monitor the requirements to assure compliance in each municipality they have employees working in. A good starting place is the UC Berkeley Labor Center Inventory of U.S. City and County Minimum Wage Ordinances (laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances).

Overtime Exemption for Some Computer Professionals

Labor Code Sec. 515.5 contains an overtime pay exemption for highly skilled computer professionals who spend more than half of their working time in top-level intellectual or creative work that requires the exercise of discretion and independent judgment, such

as software engineers and programmers, and systems designers and analysts. To qualify for exemption, the employee also must be paid at least a certain amount per hour or, alternatively, a salary equal to that hourly rate. Each year, the California Department of Industrial Relations sets that pay rate based on the California CPI increase. For 2018, the rate is $45.41 per hour or $94,603.25 annual salary (i.e., $7,883.62 monthly).

Employers should review Sec. 515.5 and the actual job functions of their computer professionals to determine whether the duties qualify for exemption and assure that these employees are paid enough to comply with the exemption.

Requests for Wage Statement Information

Labor Code Sec. 226 currently requires that employers make available for inspection and copying to current and former employees their pay statement information. SB 1252 amends Sec. 226 and give employees the right to "receive a copy" of these records.

Expanded Background Checks of Applicants with Convictions

Under existing law, employers are prohibited from, among other things, asking an applicant for employment to disclose or from seeking from any source or from utilizing as a factor in determining any condition of employment, information concerning participating in a pretrial or post-trial diversion program or concerning a conviction that has been judicially dismissed or ordered sealed.

SB 1412, amends Labor Code Sec. 432.7, to allow employers to ask an applicant about, or seek from any source information regarding, a particular conviction of the applicant—regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation—*if*:

- Employers are required by law to obtain information regarding the particular conviction of the applicant;
- The applicant would be required to possess or use a firearm in the course of his or her employment;
- An individual with that particular conviction is prohibited by law from holding the position sought; or
- Employers are prohibited by law from hiring an applicant who has that particular conviction.

What's Next?

Employers should consider how these new laws impact their workplaces, then review and update their personnel policies and practices with the advice of experienced attorneys or human resource professionals. CPA

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