BIG CHANGES IN CALIFORNIA SEXUAL HARASSMENT LAW

BY DAVID M. FOX

BIG CHANGES HAVE COME TO CALIFORNIA'S WORKPLACE HARASSMENT LAWS IN THE WAKE OF THE #METOO MOVEMENT.

These new laws apply to employers in every industry in California – including grocers – and have been effect since January 2019. It is essential for grocers to become familiar with them and update their handbooks accordingly.

Settlement Agreements Can Not Bar Employees from Disclosing the Facts Concerning Sexual Harassment or Sexual Discrimination Claims

Senate Bill 820 goes to the heart of employer settlements of sexual harassment complaints. Under SB 820, employers may not use settlement agreements to prevent employees from disclosing facts concerning claims for sexual assault, sexual harassment, and sex discrimination if the employee has filed a civil lawsuit or administrative action.

However, the law allows employees to request that their identity and any facts that may lead one to discover their identity be kept confidential and employers to keep the number of monetary settlements confidential.

Senate Bill 820 applies to settlement agreements entered into on or after Jan. 1, 2019. Thus, pre-2019 agreements with non-disclosure provisions are not affected by the new law.

Employers Cannot Require Employees to Sign a Release of Harassment Claims

Senate Bill 1300 prohibits employers from requiring employees to sign a release of harassment claims or requiring employees to refrain from discussing harassment as a condition of employment or in exchange for a raise or bonus. However, consistent with SB 820, this provision does not prevent employers from requiring employees to keep any amount of a settlement confidential.

The Definition of "Harassment" and Employers' Obligation to Prevent It Have Broadened

Senate Bill 1300 also expanded the definition of "harassment" and employers' obligations to prevent it. As of Jan. 1, 2019, 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 employee's work performance or "created an intimidating, hostile, or offensive working environment." This language makes it harder for employers to avoid a trial by pointing to a low number of harassing incidents.

Senate Bill 1300 also expands employers' liability for a non-employee's harassment of an employee. Before the new law, employers were liable only for a non-employee's sexual harassment of an employee.

As of Jan. 1, 2019, the scope of liability expanded to include harassment based upon all characteristics protected by the Fair Employment and Housing Act: "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." This new law will require grocers to be more vigilant and proactive regarding the actions of non-employees.

Employers with More Than Five Employees Must Train All Employees in Sexual Harassment Prevention

Senate Bill 1343 dramatically expands the scope of employers' requirement to train their employees on sexual harassment prevention. Now, all California employers – including grocers – with at least five employees must provide sexual harassment prevention to all of their employees by Jan. 1, 2020. Before SB 1343, only employers with at least 50 employees were required to provide the training, and even then, only to personnel in supervisory positions.

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"THIS NEW LAW WILL REQUIRE GROCERS TO BE MORE VIGILANT AND PROACTIVE REGARDING THE ACTIONS OF NON-EMPLOYEES."

Now, employers with at least five employees must provide two hours of training to all employees – including temporary or seasonal employees. This training must be completed by Jan. 1, 2020. From that point, training must be provided once every two years. Law firms such Downey Brand LLP partner with employers to assist them in delivering trainings.

Assembly Bill 2770 Protects Employees and Employers from Defamation Suits Arising Out of a Sexual Harassment Complaint

Assembly Bill 2770 protects employees who complain of sexual harassment and their employers from being sued for defamation by alleged harassers. The State Legislature unanimously passed AB 2770 because alleged harassers were suing victims and their employers for defamation. These lawsuits put employers in a difficult situation due to employers' affirmative obligation to prevent harassment.

The bill protects employees and employers from being sued for defamation by establishing that certain communications relating to harassment complaints are "privileged" – meaning they cannot form the basis of a cause of action for defamation. First, the law shields "[c]omplaints of sexual harassment made by an employee, without malice, to an employer based on credible evidence."

This strikes a balance between protecting employee complaints filed in good faith while leaving a safeguard to alleged harassers where a plaintiff makes a malicious complaint – i.e., a clearly baseless or frivolous complaint filed to injure the reputation of the accused.

Second, the law protects "[c]ommunications between the employer and interested persons, without malice, regarding a complaint of sexual harassment," allowing employers to share information regarding a harassment investigation with complainants and witnesses without such communications forming the basis of a defamation lawsuit.

Finally, AB 2770 protects employers from defamation suits arising out of communications to an alleged harasser's prospective employer relating to alleged harassment. This allows employers to be truthful with prospective employers without fear that such honesty will leave them exposed to defamation claims also helps prevent prospective employers from unknowingly hiring alleged harassers.

Tip for Grocers: Time to Update the Employee Handbook and Settlement Agreements

Grocers should take this as an opportunity to update their employee handbooks to reflect the new state of law. Specifically, the expanded definition of "harassment," the new protections surrounding information sharing, and notice of the new training requirements should be included.

Additionally, in the unfortunate event that a grocer finds itself as a defendant in a civil or administrative action for sexual harassment or discrimination, grocers should be cognizant that any settlement agreement cannot be used to bar an employee from disclosing facts concerning the employee's claims, though the agreement may still require that payment amounts be kept confidential. ▪

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