

#MeToo Spurs New California Workplace Harassment Protections and Gender Equality on Corporate Boards

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Employment

California Governor Jerry Brown recently signed into law a number of landmark bills aimed at strengthening sexual harassment protections in the workplace and boosting gender equality in the boardroom. Here is an overview of the new statutes; unless otherwise specified, they take effect on January 1, 2019.

New Harassment Protections

Senate Bill 1300, the Sexual Harassment Omnibus Bill, makes several key changes to the California Fair Employment and Housing Act (“FEHA”), including:

- restricting the use of, when required as a condition of employment, raises, or bonuses, FEHA releases and non-disparagement provisions that prevent employees from disclosing unlawful acts in the workplace, including sexual harassment, except that certain negotiated settlements of FEHA claims are exempted;
- stating the legislature’s “intent” regarding the standards courts should apply to harassment issues, including specifying that a single incident of harassment can be sufficient to create a triable issue regarding the existence of a hostile work environment, and that “[h]arassment cases are rarely appropriate for summary judgment”;
- expanding employer liability for any type of harassment (not just sexual harassment) committed by non-employees such as customers and vendors; and
- encouraging (but not requiring) employers to provide workers with “bystander intervention” training, which guides employee-bystanders on how to recognize potentially problematic behaviors in the workplace and how to take action.

Senate Bill 1343 expands existing sexual harassment prevention training requirements that require two hours of training every two years for supervisors. Under the new law, more businesses in the state will now be covered, as the threshold for providing harassment prevention training is lowered to employers with five or more employees, from the current threshold of 50 employees. All covered employers will also be required to provide one hour of harassment prevention training to all non-supervisory employees by Jan. 1, 2020, and every two years thereafter. Furthermore, beginning in 2020, employers must train temporary and seasonal employees within 30 days after hire or within 100 hours worked, whichever occurs first.

Senate Bill 820 prohibits any provision in a settlement agreement that prevents disclosure of facts related to sexual assault, sexual harassment, or discrimination, unless the claimant requests privacy. The law does not restrict provisions prohibiting disclosure of the settlement amount. The measure was inspired by reports that Hollywood producer Harvey Weinstein used “secret” settlements to resolve harassment complaints.

Assembly Bill 3109 prohibits including any term in a contract or settlement agreement that waives a party’s right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.

As a result of these new laws, employers with operations in California will need to take prompt steps to prepare. This should include a thorough review of employment, confidentiality, separation, and settlement agreements to ensure compliance with the new provisions regarding confidentiality around sexual harassment, and making plans to implement or expand a workplace harassment prevention training program.

California Mandates Gender Equality on Boards

With the passage of Senate Bill 826, California is the first state to require corporations to include women on their boards of directors. The new law requires publicly held domestic or foreign corporations listed on a major U.S. stock exchange with principal executive offices located in California to have at least one female director on their board by the end of 2019. Furthermore, by the end of 2021, boards with five board members must have at least two female directors, and boards with six or more board members must have at least three female directors. Companies will also be required to report their board composition to the California secretary of state. The new law defines “female” as an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

Violations of the new law carry fines of \$100,000 for first offenses and \$300,000 for subsequent offenses. Companies may increase the number of directors on their board in order to comply.

Notably, many European countries, including Norway, Spain, Belgium, Italy, France, and Germany, already impose a mandate on corporations to fill at least a certain percentage of board seats (mostly in the 30-40% range) with women. As a result, the number of women directors on company boards in several European nations, including France, Italy, and Germany, has tripled and, in some cases, quadrupled in recent years as corporations are forced to take action to stay legally compliant.

Business groups in California have questioned the legality of the state government’s reach if the new law is enforced against corporations incorporated outside of California solely due to headquarters being located in California. There are also opposition coalitions that argue the new law violates existing law and constitutional rights at both the state and federal levels because it will displace existing members or appoint new members to the board of directors solely on the basis of gender. “I don’t minimize the potential flaws that indeed may prove fatal to its ultimate implementation,” Governor Brown wrote in a signing statement. “Nevertheless, recent events in Washington, D.C. -- and beyond -- make it crystal clear that many are not getting the message.”

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