

NEW SEXUAL HARASSMENT LAWS IN 2018

Several laws were enacted in response to the #MeToo movement in 2018.

FEHA Amendments (SB 1300)

SB 1300 amends the Fair Employment and Housing Act (FEHA) as follows: **Settlement Agreements Regarding Claims of Sexual Assault, Sexual Harassment, Gender Discrimination, and Related Retaliation (SB 820)**

The new laws significantly limit employer defenses and lower the claimant's burden of proof. These changes may make it more difficult for employers to obtain summary judgment dismissals of sexual harassment claims under FEHA, which may increase the settlement "value" of those claims. The changes include:

- Narrowing the "severe or pervasive" legal standard for sexual harassment by declaring that even a single incident of harassing conduct could create a triable issue regarding the existence of a hostile environment (i.e., rejecting the "one free grope" concept established by a federal court);
- Confirming that a single discriminatory comment, even if not made in the context of an employment decision and even if uttered by a non-decision-maker, could be relevant evidence of discrimination, depending on the totality of the circumstances;
- Lowering the burden of proof for a plaintiff to establish harassment and declaring as a matter of legislative intent that harassment cases are *rarely* appropriate for resolution by summary judgment;
- Rejecting the notion that different standards for sexual harassment should apply to different kinds of workplaces;
- Extending FEHA protections to employees, applicants, unpaid interns, volunteers, and persons providing services pursuant to a contract from *any* type of harassment by nonemployees—not just sexual harassment as is the case under current law;
- Denying prevailing defendants attorneys' fees and costs awards unless the court finds that a plaintiff's action was frivolous, unreasonable, or groundless
- Enlarging the statute of limitations for sexual assault to ten years after an assault/attempted assault, or three years after the plaintiff discovered, or reasonably should have discovered, that his or her injuries resulted from an assault/attempted assault;
- Authorizing (but not requiring) employers to provide bystander intervention training;
- Expanding upon the types of professional relationships where liability for sexual harassment might arise (e.g., investors, elected officials, lobbyists, directors, and producers); and
- Requiring the State Department of Social Services to develop or identify educational materials about sexual harassment to be made available to In-Home Supportive Services (IHSS) providers and recipients, as well as to propose a data collection method in order to understand the prevalence of sexual harassment in the IHSS program.

Settlement Agreements Regarding Claims of Sexual Assault, Sexual Harassment, Gender Discrimination, and Related Retaliation (SB 820)

For settlement agreements entered into on or after January 1, 2019, SB 820 prohibits provisions that

prevent disclosure of factual information regarding claims of sexual assault, sexual harassment, gender discrimination or related retaliation in civil or administrative actions. SB 820 still allows the parties to agree not to disclose the settlement amount. The claimant may also request that the settlement agreement limit the disclosure of his or her identity or facts that would lead to the discovery of his or her identity.

Limitations on Releases and Non-Disparagement Agreements ([Senate Bill 1300](#))

This new law prohibits employers from doing either of the following in exchange for a raise or bonus or as a condition of employment or continued employment: (i) requiring the execution of a release of a claim under the Fair Employment and Housing Act (FEHA), or (ii) requiring an employee to sign a non-disparagement agreement that seeks to deny the employee the right to disclose information about unlawful acts in the workplace. Any agreement that violates the statute will be void and unenforceable. Notably, these proscriptions do not apply to settlement agreements negotiated to resolve FEHA claims that have been filed by an employee in court, before an administrative agency or alternative dispute resolution forum, or through an employer's internal complaint process.

Sexual Harassment Training for All Employees and Small Employers (SB 1343)

Currently, employers with 50 or more employees are required to provide at least 2 hours of sexual harassment prevention training to all supervisors and managers every 2 years, or within 6 months of an employee becoming a supervisor or manager. SB 1343 expands the requirement to include employers with at least 5 employees. The amendment also requires employers to provide at least one hour of training to non-supervisory employees by January 1, 2020, and once every 2 years thereafter. The DFEH is charged with creating training materials as an option for employers to use.

Freedom to Testify About Criminal Conduct and Sexual Harassment (AB 3109)

AB 3109 invalidates any provision in an agreement (e.g., an employment agreement, an arbitration agreement, or a settlement agreement) that prevents a party to the agreement from testifying about criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding, when that party has been required or requested to testify at the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the Legislature.

Statute of Limitations for Sexual Assault Claims (AB 1619)

AB 1619 adds Section 340.16 to the Code of Civil Procedure establishing the statute of limitations for filing a civil sexual assault action as 10 years after the alleged assault, or 3 years after the plaintiff discovered or reasonably should have discovered that an injury or illness resulted from the alleged assault, whichever is later.