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Kirkland Alert

## California Strengthens Sexual Harassment Laws in Wake of #MeToo

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On January 1, 2019, new California laws took effect that seek to prevent sexual harassment in the workplace. Employers should be aware of changes in the law, including new requirements for compliance training and corporate board composition, among others. The following *Alert* discusses potential effects of the new laws.

### Enhances Sexual Harassment Prevention Training Requirements

The California Fair Employment and Housing Act (“FEHA”) previously required employers with 50 or more employees to provide at least two hours of sexual harassment training to supervisors within six months of hire and once every two years thereafter.

As amended, the FEHA mandate now applies to employers with five or more employees and additionally requires that employers [provide at least one hour of training \(made available in multiple languages\) to all nonsupervisory employees](#) by January 1, 2020.

### Shuffles Corporate Boards to Require Inclusion of Women

Each publicly held corporation whose principal executive offices are located in California [must have at least one female director](#) on its board by the end of 2019. By the end of 2021, at least two directors must be female on five-member boards, and boards with six or more directors must include three or more women. Penalties for failing to comply range from \$100,000 for a first violation to \$300,000 for a second or subsequent violation.

# Lowers the Burden of Proof to Establish Harassment

The California legislature has made several declarations that lower the [burden of proof necessary to establish sexual harassment violations in court](#) under the FEHA.

Specifically, the California legislature declared that:

- a single incident of sexual harassment *is* now sufficient to create 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 (rejecting a Ninth Circuit decision to the contrary);
- sexual harassment cases are *rarely* appropriate for summary judgment disposition;
- the "stray remarks" doctrine (which previously found that a stray remark by a non-decision-maker did not constitute sexual harassment) is rejected; and
- this lower legal standard for sexual harassment claims should *not* vary by the type of workplace.

# Restricts the Use of Confidentiality Provisions in Settlement Agreements

[Provisions in settlement agreements that prevent disclosure of information](#) related to a civil or administrative claim of sexual assault, sexual harassment, workplace harassment or failure to prevent sex discrimination are void as a matter of law and against public policy.

However, confidentiality provisions may still require parties to keep confidential the amount of the settlement. Confidentiality provisions also may require parties to keep confidential any facts that would reveal identity when the claimant requests anonymity, except where a government agency or public official is party to the agreement.

Confidentiality provisions are still lawful when the employee has only filed an internal complaint or sent a demand letter. This new law may put pressure on employers to settle matters prior to a current or former employee filing a federal or state discrimination charge, so that the employer can require a confidentiality provision.

# Prohibits Contractual Provisions that Waive the Right to Testify

Moving forward, California law renders void and unenforceable [any provision in a contract or settlement agreement that waives a person's right to testify](#) in an administrative, legal or judicial proceeding concerning alleged criminal conduct or sexual harassment.

## Expands Personal Liability for Sexual Harassment Claims

California has added "investors, elected officials, lobbyists, directors and producers" to the list of occupations where an individual who has engaged in wrongful conduct can be held personally liable for sexual harassment claims in "business, service or professional" fields.

## Bars Certain Release of Claims and Limits the Use of Non-Disparagement Agreements

It is now unlawful for a California employer to [require an employee to release FEHA claims in exchange for a raise, bonus, or as a condition of employment or continued employment](#). Employers are also prohibited from requiring an employee to sign a non-disparagement agreement or other document that denies the employee the right to disclose information about unlawful acts in the workplace.

These limitations do not apply to settlements negotiated to resolve an underlying claim filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or within the employer's internal complaint mechanism.

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