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How California Lawmakers Responded Legislatively to the #MeToo Movement

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Chris Micheli[*] & Ashley Hoffman[**]

TABLE OF CONTENTS

Throughout 2017 and 2018, women empowered each other to come forward about the culture of sexual harassment that permeated their everyday life. When the New York Times broke the story about sexual harassment allegations against Hollywood mogul Harvey Weinstein, victims took to social media to share their own stories.[1]

Coined as the #MeToo movement, the movement grew rapidly and shed a much-needed spotlight on the pervasiveness of sexual misconduct and misogyny in modern society.[2] Allegations against actors, CEOs, and politicians, including

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1. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news (on file with the *University of the Pacific Law Review*).

2. Dalvin Brown, *19 Million Tweets Later: A Look at #Metoo a Year After the Hashtag Went Viral*, USA

during the confirmation hearing of Supreme Court Justice Brett Kavanaugh, showed just how prevalent misconduct was across the country.[3]

The California Legislature was no exception. In 2014, allegations of corruption resulted in reforms to the Legislature's complaint process that could be utilized both internally and by members of the public. But in 2017, the feeling in Sacramento was that the atmosphere in the Legislature still discouraged people from making complaints, especially women who had faced sexual harassment.[4] Many felt the legislature did not address their complaints or allegations and people retaliated against them for speaking out.

The letter and the nationwide growth of the #MeToo movement aimed to change the conversation in the Legislature about sexual harassment and the rights of victims—and it largely succeeded. It caused a push for legislation to address harassment in the workplace. As a result of the initial legislation in the 2018 Session, California quickly became a leader in legislative changes to address reforms put forth by the #MeToo movement.[5] This article looks at numerous pieces of legislation enacted over the past few years.

I. SB 820 (2018 SESSION)

Prior to 2018, California law prohibited settlement agreements that precluded the disclosure of the factual foundation which established a cause of action for civil damages in the following types of cases:

- "An act that may be prosecuted as a felony sex offense";[6]
- "An act of childhood sexual"[7] abuse
- "An act of sexual exploitation of a minor,"[8] "or conduct prohibited with respect to a minor";[9]

TODAY (Oct. 13, 2018), https://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002/ (on file with the *University of the Pacific Law Review*).

3. Kate Zernike & Emily Steel, *Kavanaugh Battle Shows the Power, and the Limits, of #MeToo Movement*, N.Y. Times (Sept. 29, 2018), https://www.nytimes.com/2018/09/29/us/politics/kavanaugh-blasey-metoo-supreme-court.html (on file with the *University of the Pacific Law Review*).

4. Melanie Mason, *Read the Letter: Women in California Politics Call Out 'Pervasive' Culture of Sexual Harassment*, L.A. TIMES (Oct. 17, 2017), https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-201710-htmlstory.html#read-the-letter-women-in-california-politics-call-out-pervasive-culture-of-sexual-harassment (on file with the *University of the Pacific Law Review*).

5. *See* Mariko Yoshihara, *California Leads with Me Too Reform*, S.F. CHRON. (Dec. 31, 2018), https://www.sfchronicle.com/opinion/article/California-leads-with-MeToo-reforms-13500656.php (on file with the *University of the Pacific Law Review*) (identifying five major reforms enacted by the California legislature).

6. CAL. CIV. PROC. CODE § 1002(a)(1) (West 2022).

7. *See id.* at § 1002(a)(2); CAL. CIV. PROC. CODE § 340.1 ("[A] person who is sexually assaulted and proves it was as the result of a cover up may recover up to treble damages against a defendant who is found to have covered up the sexual assault of a minor, unless prohibited by another law.").

8. CAL. PENAL CODE § 11165.1 (West 2022).

9. CAL. CIV. PROC. CODE § 1002(a)(3); Pursuant to Penal Code Secs. 311.1, 311.5, or 311.6.

- "An act of sexual assault" committed "against an elder or dependent adult."[10]

Existing state law also provides that "it is the policy of the State of California that confidential settlement agreements are disfavored in any civil action in which the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act."[11]

Federal law places a limit on tax deductions for payments and attorney's fees related to confidential settlements or payments.[12] It was enacted on December 22, 2017 and changed the Internal Revenue Code to prohibit tax deductions as an ordinary and necessary business expense for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement."[13] The law also disallows attorney's fees deductions related to the confidential settlement or payment.[14]

The #MeToo movement caused the Legislature to consider whether similar policies should apply to claims under the Fair Employment and Housing Act ("FEHA").[15] Under FEHA, employers can be held liable for workplace sexual harassment of "an employee, applicant, unpaid intern or volunteer, or person providing services pursuant to a contract, by an employee" or non-employee "if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[16]

Employers are liable if the harassment is by a supervisor whether or not the employer was aware of the conduct. In addition, FEHA states that it is an unlawful employment practice for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[17]

State law in FEHA is based on the anti-discrimination provisions contained in federal law.[18] Title VII prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.[19] It generally applies to employers with fifteen or more employees, including federal, state, and local governments.[20] Under Title VII, sexual harassment is considered a form of discrimination on the basis of sex.[21]

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10. CAL. CIV. PROC. CODE § 1002(a)(4) (West 2022); CAL. WELF. & INST. CODE §§ 15610.23, 15610.27, 15610.63(e)(1)–(9) (West 2022).

11. CAL. CIV. PROC. CODE § 2017.310(a) (West 2022).

12. Tax Cuts and Jobs Act of 2018, Pub. L. No. 115-97, § 13077, 131 Stat. Ann. 2054, 2129 (2018).

13. *See* 26 U.S.C.A. § 162(q)(1) (West 2022).

14. *Id.*

15. CAL. GOV'T CODE § 12900 (West 2022).

16. CAL. GOV'T CODE § 12940(j)(1) (West 2022).

17. CAL. GOV'T CODE § 12940(k) (West 2022).

18. Civil Rights Act of 1964, Title XII, 42 U.S.C.A. § 2000e-16 (West 2022).

19. 42 U.S.C.A. § 2000e-16 (West 2022).

20. *Id.*

21. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 57 (1986); Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991).

In addition, the Unruh Civil Rights Act[22] provides that a person is liable for a cause of action for sexual harassment in a business, service, or professional relationship when a plaintiff shows that:

- The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe;[23]
- The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury as a result of the defendant's conduct.[24]

In the 2018 Session, Senate Bill 820 added Section 1001 to the Code of Civil Procedure.[25] First, the statute prohibits "a provision within a settlement agreement that prevents the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action."[26] These provisions are prohibited if they involve any of the following four types of claims.

- "An act of sexual assault that is not governed by" Section 1002(a).[27]
- "An act of sexual harassment";[28]
- "An act of workplace harassment or discrimination" based on sex, or "failure to prevent an act of workplace harassment or discrimination" based on sex, "or an act of retaliation against a person for reporting" harassment or discrimination based on sex;[29]
- "An act of harassment or discrimination" based on sex, "or an act of retaliation against a person for reporting harassment or discrimination" based on sex, "by the owner of a housing accommodation."[30]

In a civil action involving one of these four types of claims, a court is prohibited from entering, "by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts" with the above provision.[31]

22. CAL. CIV. CODE § 51(a) (West 2022).
23. CAL. CIV. CODE § 51.9(a)(2) (West 2022).
24. CAL. CIV. CODE § 51.9(a)(3) (West 2022).
25. CAL. CIV. PROC. CODE § 1001 (enacted by 2018 Stat. Ch. 953).
26. CAL. CIV. PROC. CODE § 1001(a) (West 2022).
27. CAL. CIV. PROC. CODE § 1001(a)(1) (West 2022).
28. CAL. CIV. PROC. CODE § 1001(a)(2) (West 2022); As defined in Civ. Code Sec. 51.9.
29. CAL. CIV. PROC. CODE § 1001(a)(3) (West 2022); *see also* Gov't Code Sec. 12940(h), (i), (j), and (k).
30. CAL. CIV. PROC. CODE § 1001(a)(4) (West 2022).; *see also* Gov't Code Sec. 12955.
31. CAL. CIV. PROC. CODE § 1001(b) (West 2022).

Nonetheless, "a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant."[32] However, this provision of law "does not apply if a government agency or public official is a party to the settlement agreement."[33]

In addition, "a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim" entered into "on or after January 1, 2019 is void as a matter of law and against public policy."[34] "This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim."[35] "A court may consider the pleadings and other papers in the record, or any other findings of the court."[36]

Individuals also have the right to testify about sexual harassment.[37] State law makes any provision in a contract or settlement agreement entered on or after January 1, 2019, void and unenforceable if it "waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment."[38]

During consideration of SB 820 by the Legislature, non-disclosure agreements ("NDAs"), often referred to as "secret settlements" by critics, were specifically highlighted for their perceived role in keeping cases of assault and harassment under wraps and allowing such unlawful conduct to continue.[39]

As noted by the Legislature in 2018, prior state law did not prohibit the use of NDAs from being used in cases of sexual harassment or assault. The effort in 2018 was to prevent the use of NDAs in these types of claims but continue to allow the settlement amount to remain confidential.[40]

Proponents of SB 820 intended to address the concerns about NDAs because they believe that NDAs "keep the details of cases from being revealed and end up silencing victims from speaking about their experiences. Such settlements can be used to allow serial harassers—especially those with significant financial resources—to escape criminal prosecution and continue their behavior unchecked."[41]

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32. CAL. CIV. PROC. CODE § 1001(c) (West 2022).

33. *Id.*

34. *See* CAL. CIV. PROC. CODE § 1001(a), (d) (West 2022).

35. CAL. CIV. PROC. CODE § 1001(e) (West 2022).

36. CAL. CIV. PROC. CODE § 1001(f) (West 2022).

37. CAL. CIV. CODE § 1670.11 (West 2022).

38. *Id.*

39. *See* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 820, at 1 (July 3, 2018) ("Given that secret settlements have repeatedly served as a way to shield perpetrators of sexual assault, sexual harassment and workplace harassment from public scrutiny, should such settlements be prohibited by state law?"

40. *Id.*

41. *Id.*

In particular, while noting the benefits of NDAs,[42]proponents argued that "a strong public policy argument can be made that secret settlements are inappropriate in some cases, specifically in matters of concern to the public that involve particularly vulnerable victims, highly dangerous behavior, or especially egregious conduct that can present an ongoing hazard. For example, secret settlements were heavily critiqued in cases of childhood sexual abuse brought against the Catholic Church in the early 21st century."[43]

The California business community generally opposed SB 820, raising a number of concerns, including:

> "First, settling a case is often a business decision where the employer calculates the amount of time and expense it will take to litigate the case versus the amount of money to settle the case and proceeds with the less costly option. Second, allegations in a complaint are often disputed and up to the trier of fact to ultimately determine merit.
>
> "Settlements are often based upon the risk that either party could lose at trial – not just the employer. Third, employers are often named as a party in any sexual harassment action not just those involving supervisors, regardless of their culpability because the employer has more financial resources or "deeper pockets" from which to extract a settlement."[44]

SB 820 represents a significant departure from prior law in this area. Confidentiality agreements have historically been used successfully to benefit both plaintiffs and defendants. Regardless, they are viewed as one of the most effective means of limiting future bad behavior from those who engage in discrimination or harassment.

II. SB 1300 (2018 SESSION)

In the 2018 Session, in addition to SB 820 Governor Jerry Brown signed Senate Bill 1300[45] (Jackson). Among other provisions, this comprehensive bill made a number of statutory changes for litigating sexual harassment claims and prohibits employers from requiring employees to sign a release of claims under FEHA in exchange for a raise or as a condition of employment.[46] The new law was effective on January 1, 2019.[47]

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42. *See id.* at 4 ("As a general rule, settlement agreements are useful tools in civil litigation. They have been called the grease that keeps the wheels of the civil justice system moving.").

43. *Id.*

44. *Id.*

45. CAL. GOV'T. CODE §§ 12940, 12965 (amended by 2018 Stat. Ch. 955); CAL. GOV'T. CODE §§ 12923, 12950.2, 12964.5 (enacted by 2018 Stat. Ch. 955).

46. CAL. GOV'T CODE § 12940 (West 2022).

47. CAL. GOV'T. CODE §§ 12940, 12965 (enacted by SB 1300) (amended by 2018 Stat. Ch. 955); CAL. GOV'T. CODE §§ 12923, 12950.2, 12964.5 (enacted by 2018 Stat. Ch. 955).

Existing state law, FEHA, makes it an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment to engage in harassment of an employee or other specified persons.[48] FEHA also makes harassment of those persons by an employee, other than an agent or supervisor, unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.[49]

An employee may allege either *quid pro quo* harassment or harassment through a hostile work environment. In order for a plaintiff to prove a "hostile work environment" under FEHA, the employee must show that the harassing conduct was "severe or pervasive" enough to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees.[50]

The courts have generally held that what is severe or pervasive under FEHA depends upon the "totality of the circumstances," taking into account a number of "factors." Those factors may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a "merely offensive" utterance; and, perhaps most essentially, whether it unreasonably interferes with an employee's work performance.[51]

SB 1300 amended FEHA to specify that an employer may be responsible for the acts of non-employees with respect to other harassment activity. The bill also expanded this liability to cover all forms of harassment, rather than being limited, as it was under prior law, to only sexual harassment. The bill struck the word "sexual" preceding the word "harassment" to effect this change in the law.[52]

Moreover, with specified exceptions, SB 1300:

> prohibits an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, from requiring the execution of a release of a claim or right under FEHA or from 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.[53]

48. *See, e.g.*, McKenna v. Permanente Med. Group, 894 F. Supp. 2d 1258 (E.D. Cal. 2012); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

49. *Id.*

50. *Id.*

51. *See, e.g.*, Day v. Sears Holding Corp., 930 F. Supp. 2d 1146 (C.D. Cal. 2013); Pinder v. EDD, 227 F. Supp. 3d 1123 (E.D. Cal. 2017); Jones v. Dep't of Corr., 152 Cal. App. 4th 1367 (2007); Robles v. Agreserves, Inc., 158 F. Supp. 3d 952 (E.D. Cal. 2016).

52. CAL. GOV'T CODE § 12940(j)(1).

53. CAL. GOV'T CODE § 12964.5 (enacted by SB 1300).

SB 1300 provides that these prohibitions do not apply to "a negotiated settlement agreement to resolve an underlying claim under FEHA that has been filed by an employee in court, before an administrative agency, alternate dispute resolution forum, or through an employer's internal complaint process."[54]

In addition, FEHA requires employers to provide training and education regarding sexual harassment. SB 1300 authorizes an employer to provide bystander intervention training to their employees if they so choose.[55] The Fair Employment and Housing Council, through its regulatory process, established guidelines for what constitutes optional bystander intervention training per SB 1300.

Finally, FEHA authorizes a court in certain circumstances and in its discretion to award the prevailing party in a civil action "reasonable attorney's fees and costs, including expert witness fees."[56] SB 1300 provides that a prevailing defendant is prohibited from being "awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so."[57] According to the bill's author:

> Beginning in 2017, propelled by movements such as #MeToo and #WeSaidEnough, brave women began coming forward and exposing the prevalence of sexual harassment in the workplace. Along with showcasing how common sexual harassment is across industries and the harm it afflicts on victims' emotional well-being, their careers and earnings, these stories shed light on the complex legal and cultural factors that enable sexual harassment to occur unchallenged in the workplace.
>
> SB 1300 seeks to comprehensively address harassment in the workplace by prohibiting legal tactics that prevent victims from speaking out about abuse and seeking justice; strengthening sexual harassment training; holding employers accountable to their duty to prevent harassment; and providing guidance to the courts to ensure that the "severe or pervasive" legal standard is fairly applied to protect victims.[58]

The purpose of SB 1300 was to enact "several changes to the anti-harassment provisions of FEHA. These changes are designed to prevent workplace harassment from occurring in the first place and to make it easier for victims of harassment to obtain justice."[59]

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54. CAL. GOV'T CODE § 12964.5(c)(1).
55. CAL. GOV'T CODE § 12950.2.
56. CAL. GOV'T CODE § 12965(b).
57. *Id.*
58. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1300, at 1 (June 26, 2018).
59. *Id.*

In addition to the statutory changes described above, SB 1300 sets forth several statements of "legislative intent" about the application of FEHA regarding harassment claims. The measure does so in Section One of the bill[60] by setting forth five statements "with regard to application of the laws about harassment contained in this part."

The first declaration concerns the Legislature's views of harassment and specifically that:

> the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems*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.[61]

The second declaration concerns the Legislature's view about a single harassment incident and specifically that:

> [T]he Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks v. City of San Mateo*and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.[62]

The third declaration concerns the Legislature's view of remarks made at work and specifically that "the Legislature affirms the decision in *Reid v. Google, Inc.* in its rejection of the 'stray remarks doctrine.'"[63]

The fourth declaration concerns the Legislature's view of the legal standard for sexual harassment and specifically that the "Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision *Kelley v. Conco Companies*."[64]

The fifth declaration concerns the Legislature's view of the use of summary judgment and that "harassment cases are rarely appropriate for disposition on summary judgment" and that "the Legislature affirms the decision in *Nazir v.*

60. CAL. GOV'T CODE § 129623 (enacted by SB 1300).
61. CAL. GOV'T CODE § 12923(a) (citations omitted).
62. CAL. GOV'T CODE § 12923(b) (citation omitted).
63. CAL. GOV'T CODE § 12923(c) (citation omitted).
64. CAL. GOV'T CODE § 12923(d) (citation omitted).

United Airlines, Inc. and its observation that hostile working environment cases involve issues 'not determinable on paper.'"[65]

It is, however, important to note that courts are unlikely to give much credence to this intent language. The general rule of statutory construction is to effectuate the intent of the Legislature, which basically requires the courts to give the statutory language its usual and ordinary meaning.[66] In this instance, however, SB 1300 did *not* make any statutory changes related to the five statements of "intent."[67]

There is a presumption that the Legislature intended a statutory amendment to change the meaning of the statute only when there is a material change contained in the language of the amended act.[68] In other words, the Legislature changes a statute by a material amendment to the statutory language itself, but not by "legislative intent" language.

Similar results are found in other cases. For example, "the amendment of a statute is evidence of an intention to change the rule" stated by the court "in applying its provisions."[69] And the fact that a lawmaking body knew decisions of appellate courts and "made a substantial change" in phraseology of a subdivision of the statute "indicated an intention to effect a change of its meaning."[70] However, in both instances, there were changes made to the statutory language that was the subject of the legislative intent statements. Again, this was not the case with SB 1300.

In another example, the bill states, "Harassment cases are rarely appropriate for disposition on summary judgment."[71] However, SB 1300 does not amend Code of Civil Procedure Section 437(c), which sets forth the requirements regarding motions for summary judgment. Summary judgment is already ahigh legal threshold whereby "the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law."[72]

While "courts should grant motions for summary judgment by defendants sparingly[,] . . . [sparingly] does not mean 'seldom if ever.' Hence, although such motions should be denied when they should, *they must be granted when they must*."[73] The intent language in SB 1300 seeks to restrain the discretion of the courts in their evaluation of the facts before them, which is inappropriate because whether or not a case should be summarily adjudicated needs to be left to a judge to decide who knows the specific facts of the case without legislative influence.

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65. CAL. GOV'T CODE § 12923(e) (citation omitted).
66. Cal. State Restaurant Ass'n v. Whitlow, 58 Cal. App. 3d 340, 344, 347 (1976).
67. *See* SB 1300, 2018 Leg., 2018–2019 Sess. § 1 (Cal. 2018) (as amended on Aug. 30, 2018).
68. Dalton v. Baldwin, 64 Cal. App. 2d 259 (1944).
69. Butcher v. Brouwer, 21 Cal. 2d 354, 358 (1942).
70. Thomas v. Driscoll, 42 Cal. App. 2d 23, 28-29 (1940).
71. *See* SB 1300, 2018 Leg., 2018–2019 Sess. § 1(e) (Cal. 2018) (as amended on Aug. 30, 2018).
72. Aguilar v. Atl. Richfield Co., 25 Cal. 4th 826, 850 (2001).
73. *Id.* at 852 (emphasis added).

Similarly, through the intent language of SB 1300, the bill seeks to lower the legal standard for hostile work environment claims by referring to a single quote by a single justice's *concurring* opinion in the U.S. Supreme Court's 9-0 decision in *Harris v. Forklift Systems.*[74] However, the author removed from her bill all the statutory amendments that would have actually changed the legal standard for actionable harassment cases.

As SB 1300 did not change the statutory standards for summary judgment and hostile work environment, the superfluous intent language contained in SB 1300 does not serve to provide guidance regarding either of these standards.[75] As the U.S. Supreme Court has stated, "We are governed by laws, not by the intentions of legislators."[76]

Even the Legislature recognized the limitation of this intent language when it considered the bill. For example, the Assembly Judiciary Committee noted when considering SB 1300 and preparing its analysis:

> ***Legislative guidance to the courts.*** At least partly in response to the decisions like the one in *Brooks,* this bill's findings and declarations seek to provide guidance to the courts by identifying a number of cases that the Legislature finds to be either appropriately or inappropriately decided. For starters, the findings and declarations assert the Legislature's rejection of *Brooks* and states that "the decision shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of FEHA." The findings and declarations also declare that the Legislature affirms the following rulings: Justice Ginsburg's concurrence in *Harris v. Forklift Systems*, holding that a plaintiff need not show that her productivity has declined as a result of harassment; the ruling in *Reid v. Google* (2010) 50 Cal.4th 512, rejecting the "stray remarks doctrine" and thereby allowing a court to consider "stray remarks" uttered by a non-decisionmaker; and the ruling in *Nazir v. United Airlines* (2009) 178 Cal.App.4th 191, holding that harassment cases are rarely appropriate for disposition on summary judgment. *It is not at all clear what impact the guidance offered in these non-binding findings and declarations will have on how the courts decide cases*, but it does at least put forward the Legislature's understanding of appropriate legal standards.[77]

74. 510 U.S. 17 (1993).

75. *See* Diamond Multimedia Sys., Inc. v. Superior Ct., 19 Cal. 4th 1036, 1046–1047 (1999).

76. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993).

77. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1300, at 6 (June 26, 2018).

III. AB 3109 (2018 SESSION)

In the 2018 Session, the Legislature enacted AB 3109[78] to address limitations on testimony in cases alleging criminal conduct or alleged sexual harassment. This bill added Section 1670.11 to the Civil Code. The law applies to contracts or settlement agreements entered into on or after January 1, 2019.[79]

AB 3109 makes "a provision 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 alleged sexual harassment on the part of the other party to the contract or settlement agreement [. . .] void and unenforceable."[80] As a result, going forward, these types of limitations can no longer be included in contracts or settlement agreements.

This provision also applies to the "agents or employees of the other party" and these types of limitations cannot be used "when the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the Legislature."[81] In essence, the purpose of this bill is to preclude any contractual limitation on an individual from participating in any type of official hearing on claims of criminal conduct of sexual harassment.

During the 2018 Legislative Session, there were a number of bills that attempted to curb the use of non-disclosure agreements while still allowing their use in appropriate circumstances. According to the Senate Floor Analysis, "[This bill] permits non-disclosure agreements so long as the parties are always able to speak as to the matters covered by the settlement if they are ordered or asked to do so in some official context: judicial, administrative, or legislative."[82]

IV. SB 1343 (2018 SESSION)

SB 1343 reduces the sexual harassment training requirement threshold from employers with fifty or more employees to employers with five or more employees, including non-supervisorial employees in the training.[83] The Assembly made amendments to this bill to clarify that non-supervisorial employees must attend at least one hour of sexual harassment training, and the Assembly provided distinct requirements for temporary employees.

Existing law had required employers "with 50 or more employees to provide at least two hours of prescribed training and education regarding sexual

78. CAL. CIV. CODE § 1670.11 (enacted by 2018 Stat. Ch. 949).

79. CAL. CIV. CODE § 1670.11.

80. *Id.*

81. *Id.*

82. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 3109, at 5 (Aug. 1, 2018).

83. CAL. GOV'T CODE § 12950.1 (West 2022) (amending CAL. GOV'T CODE § 12950.1 (2018)).

harassment [,]" abusive conduct, and harassment based upon gender to all supervisory employees within six months of their assumption of a supervisory position and then once every two years.[84]

The Legislature enacted SB 1343[85] to expand the use of sexual harassment training by employers in this state by amending two statutes in the Fair Employment and Housing Act.[86] Section One of the bill makes technical changes to the statute to specify the Department of Fair Employment and Housing, rather than simply the "department."

Section Two of the bill amends the law to require compliance with the sexual harassment training requirement in existence a year earlier.[87] Specifically, SB 1343 changed January 1, 2021, to January 1, 2020, for the two hours of required classroom or interactive training and education regarding sexual harassment for all supervisory employees.[88] This requirement applies with employers who have five or more employees.[89]

In addition, the Legislature changed the requirement for the training to be within six months of the employee's assumption of a position.[90] After January 1, 2020, the Legislature requires each employer with five or more employees to provide sexual harassment training and education to each of its employees in this state once every two years.[91]

The employer can provide this required training with other training of employees and the employees can complete this required training individually or as part of a group presentation. They can also complete the training in shorter segments as long as they reach the total hourly requirement.

Moreover, beginning January 1, 2020, the employer must provide training for seasonal and temporary employees, or any employee who is hired to work for fewer than six months within 30 calendars days after they hire the employee or when the employee works 100 hours, whichever is first.[92]

In addition, the law requires DFEH to develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace, and to post the courses on the DFEH website.[93] The law also requires the DFEH to make existing informational posters and fact sheets-—as well as the online

84. *Id.*
85. CAL. GOV. CODE §§ 12950, 12950.1 (West 2022) (enacted by 2018 Stat. Ch. 956).
86. CAL. GOV'T CODE §§ 12950, 12950.1 (West 2022).
87. *See* CAL. GOV'T CODE § 12950.1 (West 2022).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* § 12950.1(h)(1).
93. *Id.* § 12950.1(j)–(k).

training courses—-available to employers and to members of the public in specified alternate languages on the department's website.[94]

DFEH is also required to "make the poster, fact sheet, and online training courses available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean, and any other language that is spoken by a 'substantial number of non-English-speaking people[.]'"[95] DFEH must "make versions of the online training courses with subtitles in each language and shall orally dub the online training courses into each language[.]"[96] The 'poster, fact sheet, and online training courses" must be made "available to employers and to the public through its internet website."[97]

The new law allows an employer to develop its own training module or direct employees to review the online training course required by the DFEH.

Finally, SB 1343 repealed existing law related to "employers that employ workers pursuant to a multiemployer collective bargaining agreement in the construction industry" and apprenticeship programs.[98]

V. AB 2770 (2018 SESSION)

The Legislature enacted AB 2770[99] to address certain types of privileged communications. This bill expands existing law concerning privileged communications to include a limited one by former employers dealing with former employees and claims of sexual harassment.[100]

While existing state law authorizes an employer "to answer whether or not that employer would rehire" an employee, there has been concern over lawsuits being filed by former employees for remarks made to prospective employers about prior employees.[101] In some instances, civil actions are brought by these former employees when information is provided regarding job performance or qualifications of an applicant for employment.

AB 2770 includes among existing privileged communications any complaints of sexual harassment by an employee, so long as the communication is made without malice, and the communications are based upon credible evidence regarding a complaint of sexual harassment.[102] Moreover, the bill authorizes an employer to answer without malice whether that employer would

94. *Id.*
95. CAL. GOV'T CODE § 12950(d) (West 2022).
96. *Id.*
97. *Id.* at § 12950(e).
98. *Id.*
99. CAL. CIV. CODE § 47 (West 2022) (amended by 2018 Stat. Ch. 82).
100. AB 2770, 2018 Leg., 2018–2019 Sess. (Cal. 2018).
101. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2770, at 7 (Aug. 1, 2018).
102. AB 2770, 2018 Leg., 2018–2019 Sess. (Cal. 2018).

rehire the employee based upon "the employer's determination that the former employee engaged in sexual harassment."[103]

AB 2770 amends Civil Code Section 47(c) in two specific clauses.[104] First, it adds a sentence that this particular subdivision "applies to and includes a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence and communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment."[105]

Second, its amends existing provisions to state that this particular subdivision authorizes a current or former employer, or the employer's agent, to "answer, without malice," whether or not the employer would rehire a current or former "employee and whether the decision to not rehire is based upon the employer's determination that the former employee engaged in sexual harassment."[106]

According to the Senate Floor Analysis;

> This bill would allow former employers to inform potential employers about whether a decision to terminate or not rehire an individual is based upon the employer's determination that the former employee engaged in sexual harassment. This bill does not provide an absolute privilege to these types of communications, but a conditional privilege whereby the statements made by the former employer cannot be made with malice.

This bill would also protect the victims of sexual harassment from defamation lawsuits that arise when the victim makes a credible harassment complaint. A victim of sexual harassment should not be further deterred to file a sexual harassment complaint because of the threat of a lawsuit by the harasser. This bill not only protects the victims, but also protects future victims from repeat sexual harassment offenders who can currently go from job to job undetected.

The California Chamber of Commerce sponsored this bill. In support of the bill, thirty-five groups wrote "AB 2770 codifies case law to ensure victims of sexual harassment and employers are not sued for defamation by the alleged harasser when a complaint of sexual harassment is made. California's public policy protects employees from harassment and AB 2770 furthers this public interest."[107]

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2770, at 7 (Aug. 1, 2018).

VI. AB 1619 (2018 SESSION)

The Legislature enacted AB 1619[108] to add a new section of law[109] dealing with civil actions. First, the new law applies to civil actions for the "recovery of damages suffered as a result of sexual assault" when that "assault occurred on or after the plaintiff's 18thbirthday."[110]

Second, it extended the time for commencement of such a civil action to be the later of either "ten years from the date of the last act" of alleged "sexual assault against the plaintiff [,]"[111] or "within 3 years from the date the plaintiff discovers or reasonably should have discovered that" the injury or illness was a result of the alleged sexual assault.[112]

Third, it defines "sexual assault" to mean any specified crimes described in certain Penal Code Sections, as well as assault with the intent to commit any of those crimes or an attempt to commit any of those crimes.[113] Finally, this new law applies to any of these civil actions that was "commenced on or after January 1, 2019."[114]

AB 1619 sets the time for commencement of any civil action for the plaintiff to recover damages they suffered as a result of sexual assault that occurred on or after the plaintiff's eighteenth birthday. A plaintiff can commence an action within ten years from the date of the defendant's last act, attempted act, or assault with intent to commit sexual assault. Alternatively, plaintiff can bring an action within three years from the date the plaintiff discovers, or reasonably should have discovered, that an injury or illness resulted from defendant's actions.

According to the bill's author:

> The Legislature has a long history of increasing protections for sexual assault survivors, including extending the statute of limitations for civil damages for child sexual abuse and felony offenses such as rape. AB 1619 would necessarily extend to 10 years the statute of limitations for sexual assault survivors to recover damages that result from a sexual assault. The current two-year statute of limitations simply does not provide sexual assault survivors adequate time to heal from the physical and emotional trauma of a sexual assault and prepare for a civil case.[115]

108. CAL. CIV. PROC. CODE § 340.16 (West 2022) (enacted by 2018 Stat. Ch. 939).
109. *Id.*
110. *Id.* at § 340.16(a).
111. *Id.* at § 340.16(a)(1).
112. *Id.* at § 340.16(a)(2).
113. *See* CAL. PENAL CODE §§ 243.4, 261, 262, 264.1, 286, 288(a), 289 (West 2022).
114. CAL. CIV. PROC. CODE § 340.16(c) (West 2022).
115. *Hearing on AB 1619 Before the S. R. Comm.*, 2018 Leg., 2018–2019 Sess. (Cal. 2018).

VII. SB 224 (2018 SESSION)

The Legislature enacted SB 224 to expand the reach of the Unruh Civil Rights Act and the Fair Employment and Housing Act.[116] First, "the bill would eliminate the element that the plaintiff prove there is an inability by the plaintiff to easily terminate the relationship."[117] Second, the bill includes an "investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment."[118] Third, this bill makes the DFEH "responsible for the enforcement of sexual harassment claims."[119] Fourth, the bill makes it "an unlawful practice to deny or aid, incite, or conspire in the denial of rights of persons related to sexual harassment actions."[120]

Specifically, the bill makes the following statutory amendments. Section One of the bill amends the Civil Code dealing with the liability of a person in a cause of action for sexual harassment in cases where there is a business, service, or professional relationship existing between the plaintiff and defendant.[121] SB 224 adds "investor,"[122] "elected official,"[123] "lobbyist,"[124] and "director or producer,"[125] to existing law.

Section Two of the bill amends existing law specifying the powers and duties of the Department of Fair Employment and Housing ("DFEH") by repealing the provision dealing with complaints alleging practices made unlawful under Labor Code Section 1197.5,[126] and the provision allowing DFEH to bring civil actions under Title VII of the federal Civil Rights Act of 1964,[127] the federal Americans with Disabilities Act of 1990,[128] or the federal Fair Housing Act.[129]

According to the Senate Floor Analysis of the bill, this bill is declaratory of existing law because the current list of examples is not exclusive.[130] "Nonetheless, it serves to highlight that investors, elected officials, lobbyists,

116. *See* CAL. GOV'T CODE § 12930 (West 2022); CAL. CIV. CODE § 51.9 (West 2022) (amended by 2018 Stat. Ch. 951).

117. SB 224, 2018 Leg., 2017–2018 Sess. (Cal. 2018).

118. *Id.*

119. *Id.*

120. *Id.*

121. CAL. CIV. CODE § 51(a)(1) (West 2022).

122. *Id.* at § 51.9(a)(1)(B).

123. *Id.* at § 51.9(a)(1)(F).

124. *Id.* at § 51.9(a)(1)(G).

125. *Id.* at § (a)(1)(H).

126. SB 224, 2018 Leg., 2017–2018 Sess. (Cal. 2018).

127. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 705, 706, 78 Stat. 241, 258–260 (creating the Equal Employment Opportunity Commission to assist with state charges of unlawful employment practices).

128. *See* American with Disabilities Act of 1990, Pub. L. No. 101-336, § 12117, 104 Stat. 327, 336–337 ("The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 shall be the powers, remedies, and procedures this title provides to the Commission").

129. 42 U.S.C. § 3604.

130. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSES OF SB 224, at 1 (Jan. 9, 2018).

directors, and producers can be subject to liability if they engage in sexual harassment."

While the bill was in the other house, the Assembly extended potential liability to those who hold themselves out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. The Assembly amendments authorize DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging a violation related to Civil Code Section 51.9.

In addition, the Assembly amendments added Civil Code Section 51.9 to the list of statutes in the FEHA that create rights which, if a person were to "deny or to aid, incite, or conspire in the denial of those rights[,]" are an unlawful practice under FEHA.[131]

Prior law "establishes liability for sexual harassment when the plaintiff proves specified elements including, among other things, that there is a business, service, or professional relationship between the plaintiff and defendant and there is an inability by the plaintiff to easily terminate the relationship."[132] Prior law stated that a "relationship may exist between a plaintiff and certain persons including an attorney, holder of a master's degree in social work, real estate agent, and real estate appraiser."[133]

VIII. AB 9 (2019 SESSION)

The Legislature enacted AB 9 to change the statute of limitations for certain claims made by the Fair Employment and Housing Act.[134] Section One of the bill makes several changes to FEHA.[135] First, it defines the term "filing a complaint" means filing an intake form with the Department of Fair Employment and Housing.[136] Second, it specifies that the "operative date of the verified complaint relates back to the filing of the intake form."[137]

In addition, it clarifies that certain Civil Code[138] complaints are not to be filed under this section of law after the expiration of the one-year statute of limitations.[139] In addition, a complaint alleging violations of Article 1 of FEHA

131. SB 224, 2018 Leg., 2017–2018 Sess. (Cal. 2018).

132. *Id.*

133. *Id.*

134. CAL. GOV'T CODE §§ 12960, 12965 (West 2022) (amended by Chapter 709).

135. AB 9, 2019 Leg., 2019–2020 Sess. (Cal. 2019).

136. *See* CAL. GOV'T CODE § 12960 (West 2022).

137. *Id.*

138. *See* CAL. GOV'T CODE § 12960(e)(1) (West 2022) ("A complaint alleging a violation of Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code shall not be filed pursuant to this article after the expiration of one year from the date that the alleged unlawful practice or refusal to cooperate occurred.").

139. AB 9, 2019 Leg., 2019–2020 Sess. (Cal. 2019).

must be filed no later than "three years from the date upon which the unlawful practice or refusal to cooperate occurred."[140]

And the filing period may be extended for "a period of time not to exceed 90 days following the applicable filing deadline, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice during the 90 days following the expiration of the applicable filing deadline."[141]

Section Two of the bill adds the phrase, "For purposes of this section, filing a complaint means filing a verified complaint" to FEHA dealing with complaints treated by the Director of DFEH as a group or class complaint.[142] Section Three of the bill provides that "this act shall not be interpreted to revive lapsed claims."[143]

This bill extends the statute of limitations for complaints alleging employment discrimination to three years. It specifies the "operative date of the verified complaint is the date that the intake form was filed with the Labor Commissioner."[144]

The bill also makes conforming changes to current provisions that grant a person allegedly aggrieved by an unlawful practice who first obtains knowledge of the facts of the alleged unlawful practice after the expiration of the limitations period.

IX. AB 749 (2019 SESSION)

The Legislature enacted AB 749to address employment dispute agreements.[145] The bill adds a new chapter to the Code of Civil Procedure[146] and titles it "Agreements Settling Employment Disputes."

This new law prohibits an agreement to settle an employment dispute from containing "a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer."[147] Moreover, "[A] provision in an agreement entered into on or after January 1,

140. CAL. GOV'T CODE § 12960(d) (West 2022).

141. CAL. GOV'T CODE § 12960(d)(1) (West 2022).

142. AB 9, 2019 Leg., 2019–2020 Sess. (Cal. 2019).

143. *Id.*

144. *See* CAL. GOV'T CODE § 12960(b) (West 2022) ("For purposes of this section, filing a complaint means filing an intake form with the department and the operative date of the verified complaint relates back to the filing of the intake form.").

145. CAL. CIV. PROC. CODE § 1002.5 (West 2022) (enacted by 2018 Stat. Ch. 808).

146. CAL. CIV. PROC. CODE § 1002.5 (West 2022) (commencing Chapter 3.6 of the Code of Civil Procedure).

147. CAL. CIV. PROC. CODE § 1002.5(a) (West 2022).

2020, that violates this section is void as a matter of law and against public policy."[148]

Nonetheless, the law does not preclude an employer and aggrieved person from making an agreement to either "[e]nd a current employment relationship"[149] or prohibit or restrict the "aggrieved person from obtaining future employment with the" employer.[150] This second exception only applies "if the employer has made and documented a good faith determination [. . .] that the person engaged in sexual harassment [or] sexual assault."[151]

In addition, an employer is not required "to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person."[152]

Finally, the new law defines the terms "aggrieved person,"[153] "sexual assault,"[154] and "sexual harassment."[155]

X. SB 331 (2021 SESSION)

In the 2021 Session, Governor Gavin Newsom signed SB 331 into law (Leyva), which expands existing law on settlement and non-disparagement agreements.[156] The bill expands the prohibition on non-disclosure agreements contained in existing law "to include acts of workplace harassment or discrimination not based on sex and an act of harassment or discrimination not based on sex by the owner of a housing accommodation."[157]

SB 331 amends existing law to specify that any non-disclosure provisions that "prevent or restrict" (by adding the term restrict) "the disclosure of factual information" is prohibited.[158] It also strikes the limitation on "discrimination based on sex" and applies to all discrimination cases.[159]

148. *Id.*

149. *Id.* at § 1002.5(b)(1)(A) (West 2022).

150. *Id.* at § 1002.5(b)(1)(B) (West 2022).

151. *Id.*

152. *Id.* at § 1002.5(b)(2) (West 2022).

153. *See* CAL. CIV. PROC. § 1002.5(c)(1) (West 2022) ("'Aggrieved person' means a person who, in good faith, has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.").

154. *See id.* at § 1002.5(c)(2) (West 2022) ("'Sexual assault' means conduct that would constitute a crime under Section 243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.").

155. *See id.* at § 1002.5(c)(3) (West 2022) ("'Sexual harassment' has the same meaning as in subdivision (j) of Section 12940 of the Government Code.").

156. CAL. CIV. PROC. CODE § 1001 (amended by 2021 Stat. Ch. 638).

157. *See* SB 331, 2021 Leg., 2021–2022 Sess. (Cal. 2021) (amending section 1001 of the Code of Civil Procedure).

158. CAL. CIV. PROC. CODE § 1001(a) (West 2022).

159. *Id.* at §§ 1001(a)(3)–(4).

The new law clarifies that these amendments "apply only to agreements entered into on or after January 1, 2022."[160] However, other amendments made "shall not to be construed as substantive changes, but instead as merely clarifying existing law."[161]

Section Two of the bill amends Government Code Section 12964.5 regarding severance agreements to prevent an employer from requiring an employee to sign an agreement or document "to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace."[162]

Moreover

> [A] nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace must include, in substantial form, the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.[163]

In addition, FEHA was amended to provide that, "[i]t is an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace."[164]

The Legislature defines the phrase "information about unlawful acts in the workplace" to include "information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful."[165] The law is also clarified that it "does not prohibit the inclusion of a general release or waiver of all claims in an agreement related to an employee's separation from employment, provided that the release or waiver is otherwise lawful and valid."[166]

Moreover, "an employer offering an employee or former employee an agreement related to that employee's separation from employment [. . .] shall notify the employee that the employee has a right to consult an attorney regarding the agreement[.]"[167] The employer must also "provide the employee

160. *Id.* at § 1001(g).
161. *Id.*
162. SB 331, 2021 Leg., 2021–2022 Sess. (Cal. 2021).
163. *Id.* at § 12964.5(a)(1)(B)(ii).
164. *Id.* at § 12964.5(b)(1)(A).
165. *Id.* at § 12964.5(c).
166. *Id.* at § 12964.5(b)(3).
167. *Id.* at § 12964.5(b)(4).

with a reasonable time period of not less than five business days in which to do so[,]" although exceptions are permitted.[168]

Finally, this section does not "prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in a severance agreement[,]"[169] and "[t]his section does not prohibit an employer from protecting the employer's trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace."[170]

SB 331 is intended to expand existing law's prohibition on settlement agreements preventing the disclosure of factual information related to a claim of workplace harassment or discrimination including a claim based on any protected characteristic, and that a severance agreement with any provision prohibiting the disclosure of information about unlawful acts in the workplace constitutes an unlawful employment practice.[171]

According to the author, SB 331:

> [W]ill prevent workers from being forced to sign non-disclosure and non-disparagement agreements that would limit their ability to "speak out about harassment and discrimination in the workplace." [. . .] [i]t is unacceptable for any employer to try to silence a worker because he or she was a victim of any type of harassment or discrimination—whether due to race, sexual orientation, religion, age, or any other characteristic. The bill will empower survivors to speak out—if they so wish—so they can hold perpetrators accountable and hopefully prevent abusers from continuing to torment and abuse other workers.[172]

This bill represents an extension of SB 820 from 2018 because it removes the limitations when the confidentiality statute was put on the books. Beginning January 1, 2022, confidentiality agreements will essentially be eliminated in harassment and discrimination cases. Broadening the scope of this statute will truly test both sides of the argument. Will it lead to more public settlements and therefore expose more cases to public scrutiny? Or will it instead reduce the number of cases that are settled?

XI. CONCLUSION

These changes to California law are a significant response to the #MeToo movement in California. From changing statutes of limitations to eliminating so-called "secret settlements," the California Legislature enacted numerous law

168. CAL. GOV'T CODE § 12964.5(b)(4) (West 2022).

169. *Id.* at § 12964.5(e).

170. *Id.* at § 12964.5(f).

171. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS ON SB 331, at 3 (June 8, 2021).

172. *Id.*

changes to allow aggrieved individuals to bring actions against perpetrators and allow more opportunities to enforce civil laws against sexual harassment and discrimination.

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