California's Top 5 New Employment Laws in Response to the #MeToo Movement

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The California Legislature responded to the #MeToo movement with a slate of new legislation and Governor Brown signed multiple bills into law that are designed to address sexual harassment and gender discrimination and remove some underlying structural issues that have enabled this environment to develop and persist in the workplace.

Meyers Nave Principal Camille Pating and Associate Yuki Cruse prepared the summary below of the five most significant new laws and what they mean for California employers. While these laws create new obligations for employers, Meyers Nave's Labor and Employment Law attorneys are helping employers leverage these changes as opportunities to create a more inclusive and civil workplace culture that helps prevent harassment from occurring, and when it does occur, makes it more likely to be reported.

AB 3109 — Bars Prohibition on Testifying About Alleged Sexual Harassment or Criminal Conduct

Prohibits settlement or contract provisions that waive a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged sexual harassment or alleged criminal conduct 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.

SB 820 — Bans Non-Disclosure Provisions and Secret Settlements

Prohibits a non-disclosure provision in a settlement agreement that prevents the disclosure of factual information regarding claims that are filed in a civil or administrative action involving allegations of sexual assault, sexual harassment, or workplace harassment or discrimination based on sex. Applies to settlement agreements signed after January 1, 2019. Exceptions: Provisions may (1) prohibit disclosure of the amount paid in settlement and (2) protect the claimant's identity if the claimant requests anonymity related confidentiality language and the opposing party is not a government agency or public official.

SB 1300 — Limits Non-disparagement Clauses, Expands Employer Liability, Authorizes Bystander Training

- **Non-disparagement** – Prohibits an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, from requiring the release of claims or rights under the Fair Employment and Housing Act. Prohibits an employer 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 work place, including, but not limited to, sexual harassment.

- **Employer Liability** – (1) **Lowers the standard for proving harassment** because plaintiff does not need to show that his/her productivity declined due to the harassment; sufficient to show a reasonable person subjected to the same conduct would find the harassment altered the plaintiff's working conditions to make it more difficult to do the job, (2) **Single incident** of harassing conduct is sufficient to show that the matter should be tried in court (rather than dismissed before trial) if the harassment has unreasonably interfered with the plaintiff's

performance or created an intimidating, hostile or offensive work environment, (3) **Isolated remarks** viewed in light of other circumstances can be relevant and circumstantial evidence of severe and pervasive harassing conduct, (4) **Legislative intent** states that harassment cases are "rarely appropriate for summary judgment," (5) **Expands FEHA protection** to employees from all types of unlawful harassment by nonemployees (i.e., third parties such as customers, contractors and vendors), not only sexual harassment, and (6) **Prevailing defendant cannot be awarded attorney fees and costs** unless the court finds the action was frivolous, unreasonable, or groundless.

- **Optional Bystander Training** – SB 1300 elevates the concept of bystander intervention training by allowing, but not requiring, employers to provide training designed to help bystanders recognize potentially problematic behaviors and motivate them to take action when they observe such behaviors. The goal is to empower individuals to speak up and provide assistance to a victim when they are in the presence of other people and observe unlawful or problematic behaviors.

SB 1343 — Expands Sexual Harassment Prevention Training

Expands the bi-annual sexual harassment prevention training mandate to nearly all California employees. Current law requires employers with 50 or more employees to provide two hours of sexual harassment prevention training only to supervisors. New law requires employers with five or more employees to provide training to supervisory and non-supervisory employees by Jan. 1, 2020. (Does not need to be provided again if the training was provided after Jan. 1, 2019 to an employee.) Training must be provided in multiple languages. Also, starting Jan. 1, 2020 (1) temporary or seasonal employees employed less than six months must be trained within 30 calendar days after hire date or within 100 hours worked, whichever occurs first, and (2) sexual harassment prevention training for migrant and seasonal agricultural workers must be consistent with the same training for non-supervisory employees.

SB 224 — Expands Relationships Subject to Sexual Harassment Claims

Amends California Civil Code by providing additional examples of professional relationships that can be subject to a claim for sexual harassment, including lobbyists, elected officials, directors, producers, and investors. Removes the requirement in current law that an individual who brings a cause of action for sexual harassment must demonstrate that the relationship would not be easy to terminate. Expands Department of Fair Employment and Housing's authority to investigate and prosecute sexual harassment claims where a business relationship exists between plaintiff and defendant. Opens up liability for employers for allegedly "denying, aiding, inciting or conspiring" in the denial of rights of persons related to sexual harassment actions. Note: applies to work relationships where one merely holds him/herself out as being able to help, which means liability for sexual harassment could be found where the business relationship has not officially commenced, but has only been offered.

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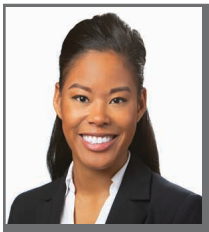
Camille chairs the Workplace Investigations Practice, specializing in investigations involving government officials, employees and executives of public, private and non-profit organizations. She also provides advice and training on numerous labor and employment law matters, including discipline, discharge, harassment, discrimination, whistleblower retaliation, employee privacy, and workplace violence. Camille also helps employers create, enhance and implement Diversity, Equity and Inclusion programs and initiatives.



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Yuki Cruse's labor and employment law experience includes counseling and litigation for employers. She has worked on employment litigation and trial preparation strategies with case management and law and motion teams, and has assisted large municipal departments and labor organizations in labor negotiations and dispute resolution.