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#MeToo & Equal Pay

Addressing Employment Trends in 2018

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Six Important Harassment Law Trends to Keep in Mind



Trend No. 1: Defamation Protections for Harassment Allegations

- These laws extend “common interest” privilege to shield sexual harassment complaints made to an employer without malice and based upon credible evidence
- They also shields (a) employer communications to “interested persons” during investigation; and (b) post-employment references about whether unwillingness to rehire is based on sexual harassment determination



Trend No. 2: Expanded Sexual Harassment Training

- Numerous states considering mandatory harassment training
- Expanded training for more employers and more employees
- Industry-specific harassment training



Trend No. 3: Targeting Sexual Harassment Settlement Agreements

- Criticism – Sexual harassers protected by so-called non-disclosure agreements meant to silence victims
- Proposed laws prohibit this type of secrecy by:
 - Targeting releases of harassment claims for raises/continued employment
 - Banning non-disparagement/non-disclosure provisions
 - Targeting employer-requested confidentiality provisions in settlement agreements



Trend No. 4: Prohibit Mandatory Arbitration

- Precluding employers from requiring employees, “as a condition of employment” to waive ability to file a civil suit or administrative charge
- Prohibiting retaliation (including termination of application) for applicant or employee who refuses to sign improper waiver
- NOTE: Serious pre-emption issues



Trend No. 5: Extending Statute of Limitations for Harassment Complaints

- Extending statute of limitations from one to three years to file administrative charges with the state agency
- Requiring employers to retain harassment-related complaints



Trend No. 6: Extending Personal Liability for Harassment/Retaliation

- More states are considering making individuals liable for harassment
- Some states also considering individual liability for post-harassment retaliation



Is Your Pay Equal?

Your Employees (and Their Lawyers) May Not Think So



Sample Statute

You shall not pay lower rates for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions except where the wage differential is based **entirely** on one or more of the following factors: (A) a seniority system, (B) a merit system, (C) A system that measures production, or (D) a bona fide factor other than sex.



Changes to “Prior Salary” Rules

1. California Labor Code § 1197.5(a)(3): prior salary history cannot, by itself, justify any disparity in compensation (but new legislation will update this)
2. *Rizo v. Yovino* (9th Cir. 2018): prior salary by itself or combined with any other factors cannot justify any disparity in compensation (and this goes for transfers and promotions, too)
3. 7th Circuit, on the other hand, still allows prior salary history as reason for differential, but this may change



Potential Damages

Including to Company Image



The Case Studies

Learn From Your Peers' Experiences



Privileged Audits

1. Determine scope (no executives, etc.)
2. Use a statistician
3. Use outside counsel
4. Obtain a forward-looking compensation tool



Thank you!

Any questions?

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