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One year on, what legal changes has #MeToo brought to life?

By Anthony J. Oncidi

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Harvey Weinstein leaves court after a hearing in Manhattan on June 5, 2018.

Just over a year ago on Oct. 5, 2017, the news broke that Harvey Weinstein "paid off sexual harassment accusers for decades." With that, the dam burst and since that day, at least 429 prominent individuals have been publicly accused of sexual misconduct — involving activity ranging from lewd comments and abuse of power to harassment and rape.

Data from Bloomberg show that more than 22 percent of those accused of sexual misconduct in the past year work in government and politics; another 22 percent are in the entertainment field; and 13.5 percent are employed in the field of arts and music. Other sectors affected by the movement include the media, education and research, finance, consumer goods, sports, technology, philanthropy and the medical and publishing industries.

The U.S. Equal Employment Opportunity Commission reports that the number of sexual harassment charges filed with the federal agency increased 12 percent over the preceding fiscal year and that the EEOC filed 50 percent more sexual harassment lawsuits during the past 12 months.

Congress and legislatures around the country have responded with an avalanche of new laws and regulations designed to curb and remedy acts of sexual harassment. California, not surprisingly, leads the way with at least eight new measures that will begin to take effect by Jan. 1, 2019. The new laws fall into several broad categories designed to aid victims and punish harassers.

Confidentiality

In an effort to curb instances of serial harassment, Congress added a denial of deduction provision to the Tax Cuts and Jobs Act that was signed into law late last year. New Section 162(q) of the Internal Revenue Code (effective for amounts paid or incurred after Dec. 22, 2017) denies a federal tax deduction for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement; or attorney fees related to such a settlement or payment."

California's response can be found in a series of newly enacted bills. Senate Bill 820 prohibits confidentiality or non-disclosure provisions in settlement agreements that prevent the disclosure of factual information involving allegations of sexual misconduct – unless the party alleging the harm desires confidentiality in order to protect his or her identity.

SB 820 renders void any provision in a settlement agreement that prevents the disclosure of factual information regarding sexual assault, sexual harassment, workplace harassment or discrimination based on sex, along with failure to prevent, or retaliation for reporting, harassment or discrimination based on sex. The new law does not prevent confidentiality regarding the amount paid in settlement of a claim.

In addition, Assembly Bill 3109 voids provisions in settlement agreements that would prevent someone from testifying about alleged criminal conduct or alleged sexual harassment in an administrative, legislative, or judicial proceeding where the individual is requested to attend the proceeding pursuant to a court order, subpoena or written request from an administrative agency or the legislature.

New Training Requirements

Senate Bill 1343 overhauls the requirements for workplace sexual harassment prevention training that first went into effect in California 14 years ago. The bill amends California Government Code Section 12950.1 and changes several workplace training requirements:

- Employers with at least five employees will be required to provide training to their employees (the bar was lowered significantly from the previous 50-employee threshold);
- Employers will be required to provide sexual harassment prevention training to all employees, including non-supervisory employees.
- Supervisors are currently required to undergo training within six months of starting their jobs. Seasonal or temporary employees (or any employees who will be employed for less than six months) will need to be trained within 30 days or 100 hours, whichever comes first.

Changes to Liability and Affirmative Defenses

Senate Bill 1300 decrees that a single incident of harassing conduct is sufficient to create a triable issue of fact regarding the existence of a hostile work environment if the conduct interfered with a plaintiff's work performance or otherwise created an intimidating, hostile, or offensive work environment.

The law also explicitly rejects the standard for hostile work environment set forth in *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000), an opinion written by retired Judge Alex Kozinski who left the 9th Circuit in 2017 amidst allegations of improper sexual conduct

while on the bench. New Government Code Section 12923 will make it even more difficult for employers to obtain summary judgment in harassment cases by declaring that they are "rarely appropriate for disposition on summary judgment."

SB 1300 also makes it unlawful for an employer to require an individual to sign a release or non-disparagement agreement in exchange for a raise, bonus, or continued employment. The prohibition does not apply to a release or non-disparagement provision in a settlement if the employee is represented by counsel or is given notice and an opportunity to retain counsel.

Senate Bill 224 expands the list of business relationships that can give rise to a sexual harassment lawsuit to include investors, elected officials, lobbyists, directors, and producers. Relatedly, Assembly Bill 2338 requires talent agencies to provide educational materials on sex harassment prevention, retaliation, and reporting resources to their clients.

Assembly Bill 2779 amends Section 47 of the Civil Code by broadening the definition of "privileged publication or broadcast" to include a complaint of sexual harassment by an employee (without malice) made to an employer based upon credible evidence as well as communications between the employer and interested persons (without malice) regarding complaints of sexual harassment.

New Corporate Board Requirements

Senate Bill 826 requires by the end of 2019 that any domestic general corporation or foreign corporation that is publicly held and whose principal executive offices are located in California shall have a minimum of one female on its board of directors; by the end of 2021, a minimum of two or three female directors is required if there are, respectively, five directors or six or more directors on the board. Failure to comply will result in a $100,000 fine for the first violation and $300,000 for subsequent violations.

Conclusion

Although much has changed in the past year, even more change can be anticipated soon. Among other things, we will soon have a new governor who might decide Gov. Jerry Brown did not go far enough insofar as he vetoed bills that would have outlawed arbitration and extended the statute of limitations for such claims.

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