Recent Changes to California Law Potentially Expand Labor Organizations' Liability for Employment-Related Harassment

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In the wake of the #MeToo movement, employers are facing more claims alleging sex-based harassment and discrimination. In California, the movement helped spur passage in late 2018 of a series of statutory amendments to the state's Fair Employment and Housing Act (FEHA), which prohibits covered entities—including labor organizations and apprenticeship training programs—and their employees from engaging in discrimination or harassment based on, among other things, sex or gender. Senate Bill 1300, which went into effect January 1, 2019, addresses the legal standards governing workplace harassment claims, expands covered entities' potential liability for all forms of harassment by employees, and makes it harder for defendants to recover attorneys' fees and costs when they prevail in harassment-related litigation.

While the legal effect of some of these changes remains to be seen, from a practical perspective, litigation of harassment claims in California is likely to grow costlier. Employers may want to review this risk management plans, including their policies in place and additional training, to help mitigate potential losses.

Under pre-existing California law, FEHA declared certain employment practices unlawful. See Cal. Gov't Code § 12940. Under the law, covered entities are broadly prohibited from discriminating against, and are charged with preventing harassment of, individuals on the basis of enumerated protected characteristics, including sex and gender. As non-profit entities, labor organizations are excepted from the definition of "employer," (id. § 12926(d)), but FEHA expressly applies to "labor organizations." Id. § 12926(h) (defining "labor organization" as "any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection." Some of FEHA's prohibitions also explicitly apply to apprenticeship training programs or "any other training program leading to employment." *E.g., id.* § 12940(c).

California Senate Bill 1300 amended FEHA in three significant ways of relevance to union employers:

- **FIRST,** the California legislature expressed an intent to favor plaintiffs asserting harassment claims, although it stopped short of actually amending the law to codify binding legal standards. In a new section of FEHA, the legislature "declare[d] its intent with regard to application of the laws about harassment." These statements of intent include the declaration "that harassment creates a hostile, offensive, oppressive, or intimidating work environment" when the conduct "disrupt[s] the victim's emotional tranquility in the workplace, affect[s] the victim's ability to perform the job as usual, or otherwise interfere[s] with and undermine[s] the victim's personal sense of well-being." Cal. Gov't Code § 12923(a). Adopting a concurring opinion from a 1993 U.S. Supreme Court opinion, "the Legislature affirms its approval of the standard" under which a plaintiff need only prove "that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to make it more difficult to do the job." Id. (internal quotation marks and citation omitted).

  The declarations of intent also provide that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment" if the conduct "has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." Id. § 12923(b). Moreover, "[t]he existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination." Id. § 12923(c). The new code section also declares that "[t]he legal standard for sexual harassment should not vary by type of workplace." Id. § 12923(d). And perhaps most importantly from the perspective of potential defense cost exposure, the legislature declares that "[h]arassment cases are rarely appropriate for disposition on summary judgment." Id. § 12923(e).

As explained in the legislative history, these statements were designed to respond to "significant criticism from legal scholars who believe that" prior judicial decisions requiring plaintiffs to "prove that the sexual harassment that occurs in the workplace must be severe or pervasive enough to alter the conditions of employment" "places an undue burden on plaintiffs to prove that they are the victim of discrimination." Sen. Floor Analysis (Aug. 30, 2018), at 4.

Because the legislature's statement were enacted in the form of statements of intent rather than affirmative changes to statutory requirements, the extent to which courts will deem themselves bound by such statements remains unclear. However, to the extent that courts follow the declarations of intent, they will effectively lower the standard of proof for plaintiffs to prevail on harassment claims, and likely will increase costs and exposures for employers who are unable to prevail at the summary judgment stage.

- **SECOND,** SB 1300 expanded covered entities' liability for harassment committed by nonemployees "if the employer... knows or should have known of the conduct and fails to take immediate and appropriate corrective action." Id. § 12940(j)(1). Under prior law, a covered entity's potential liability for non-employees' harassing conduct was limited to cases of sexual harassment. Such liability now encompasses harassment based on all prohibited basis, not just sexual harassment.

- **THIRD,** SB 1300 imposes a higher burden for prevailing defendants to recover attorneys' fees. Under FEHA, prevailing parties may be awarded their attorneys' fees and costs. However, as amended, "a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." Id. § 12965(b).

In addition, "employers"—which again, excludes non-profit entities—are also prohibited from, in exchange for a raise or bonus or as a condition of employment, requiring employees to release claims or sign non-disclosure agreements regarding sexual harassment or other illegal workplace conduct. Id. § 12964.5.

Given these developments, which will likely create a more difficult litigation climate for covered entities in California facing claims of harassment, labor organizations would be well advised to assess their risks and ensure that they have the necessary plans in place to mitigate their exposures.

5 STEPS TO MANAGING RISK

The changes to California's law serve as reminders that labor organizations face constantly evolving legal and financial risks. Unions and JATCs can proactively mitigate their exposure to accusations of harassment and discrimination in a number of ways. Here are some suggestions for getting started:

1 ADOPT FORMAL POLICIES. Labor organizations can mitigate their legal risk by developing and implementing strong anti-sexual-harassment and anti-discrimination policies. These would include using a standard application for potential employees and conducting thorough background checks. The policies should also establish official methods for employees to report grievances.

Resources such as sample policies and attorney advice are available online for Ullico Casualty Group, LLC policyholders through Ullico Resource Center.

2 REVIEW POLICIES WITH OFFICERS AND STAFF. Just because a labor organization has policies in place doesn't mean it's fully protected. If there's evidence that the policies weren't followed, the use as a defense against claims is limited. It's critical that staff follow the policies. In fact, individuals can be held liable in certain situations, so it's a good idea to engage officers and staff in regular training on what constitutes discrimination and harassment. Despite how frivolous the claim may be, there are still legal costs to defend allegations.

3 DOCUMENT EVERYTHING. Policies should be written down and distributed to all employees in the form of a handbook. Moreover, when individuals receive the employee handbook, require them to acknowledge receipt in writing. This demonstrates a commitment to prudent due diligence and provides a strong support for your defense if there's a claim.

4 SEEK COUNSEL. Labor organizations can mitigate their risk by having an attorney review policies and official documents for legal risks prior to release. Moreover, if a situation arises that's cause for concern, it's wise to engage an attorney early in the process.

5 PURCHASE INSURANCE. Professional liability insurance policies that include Employment Practices Liability, such as Ullico Casualty Group's Union Liability, transfer risk and protect unions by paying for defense and other costs associated with accusations of harassment and discrimination in the workplace.

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