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Texas Legislative Update – Expanded Liability for Workplace Sexual Harassment

Labor & Employment Workforce Watch

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In recent years, and in the wake of the #MeToo movement, several states have moved toward providing enhanced protections to employees subjected to sexual harassment in the workplace, including requiring mandatory sexual harassment training, softening of the test for harassment under federal standards, and banning nondisclosure agreements that could silence sexual harassment victims. Earlier this year, the Texas legislature followed suit, with Governor Abbott signing SB 45 into law on May 30, 2021 and signing HB 21 into law on June 9, 2021. These laws amend Chapter 21 of the Texas Labor Code in three significant respects with regard to sexual harassment in the workplace. These changes go into effect September 1, 2021.

Small Employer and Supervisor Liability for Sexual Harassment Claims.

First, SB 45 expands the definition of employer for the purposes of sexual harassment claims. Currently, employers with fewer than 15 employees are shielded from liability for sexual harassment in the workplace and all other forms of employment harassment and discrimination. However, beginning September 1, 2021, for purposes of sexual harassment claims, the term "employer" includes a person who: (a) employs *one or more* employees; or (2) acts directly in the interest of an employer in relation to an employee. Importantly, under this expanded definition, not only may small employers be subject to liability for sexual harassment claims, but so too can supervisors within the company.

As of yet, it is unclear what factors the courts will consider to determine whether a person has sufficiently acted "in the interest of an employer" in order to impose individual liability. However, regulations governing identical language under the Fair Labor Standards Act and the Family and Medical Leave Act indicate liability can expand to corporate officers who are individually responsible for violations of those laws, and federal courts interpreting that language have utilized various factors indicating a certain level of supervisory control, including the power to hire and fire the employee, to determine the employee's pay rate, and to administrate the employment policy at issue. Likewise, when coupled with the new "immediate and appropriate corrective action" standard, it remains to be determined what actions—or inactions—may lead to individual liability—e.g., failure to report complaints to senior management at the company, failure to take action to prevent continuing sexual harassment about which they know or suspect, or failure to take immediate and appropriate corrective action.

New Standard for Employer Response to Sexual Harassment Claims.

Second, SB 45 creates a new standard for employers to respond to sexual harassment claims. Currently, in sexual harassment cases, an employer is entitled to an affirmative defense if it takes "prompt remedial action" to

stop the alleged sexual harassment. However, the amended statute raises this standard, dictating that an employer commits an “unlawful employment practice,” for the purposes of sexual harassment claims, if the employer or its agents or supervisors: (a) know or should have known that the conduct constituting sexual harassment was occurring and (b) failed to take “immediate and appropriate corrective action.” What constitutes “immediate and appropriate corrective action” is yet to be determined, because the amendment does not define that phrase, nor does it appear that its interpretation has been litigated. Nevertheless, “immediate and appropriate corrective action” is likely a more burdensome standard for employers to meet than the “prompt remedial action” standard currently imposed by Texas and federal law.

Increased Time to File A Charge of Discrimination for Sexual Harassment.

Finally, HB 21 amends the statute of limitations for employees to file a charge of discrimination with the Texas Workforce Commission based on sexual harassment. Previously employees had to file a charge with the TWC within 180 days of the alleged unlawful conduct. HB 21 increases the deadline to file sexual harassment claims to 300 days, mirroring the 300-day statute of limitation for discrimination claims under federal law, but leaving intact the 180 day statute of limitations for all other state law discrimination claims. The amendment is codified in Texas Labor Code §§ 21.201(g) and 201.202(a-1).

Practical Takeaways

Given these changes, all Texas employers, and even Texas supervisors, will face increased potential exposure for sexual harassment claims. All employers should ensure their employee policies and procedures address sexual harassment and that all employees and supervisors are trained on how to address issues related to sexual harassment. Additionally, with the uncertainty regarding what the courts consider to be “immediate and appropriate corrective action,” all employers should act promptly to thoroughly investigate any sexual harassment claims, document such investigation, and take meaningful remedial action in order to best defend against potential claims.

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