SB 1300 Expands FEHA Litigation, But Employers and Lawyers Should Be Wary of SB 1300's "Guidance" to the Courts

By Laura Curtis and Chris Micheli

Governor Jerry Brown signed Senate Bill 1300 (Jackson) on September 30, 2018 as Chapter 955. Among other provisions, this comprehensive bill makes a number of statutory changes for litigating sexual harassment claims and prohibits employers from requiring employees to sign a release of claims under the Fair Employment and Housing Act in exchange for a raise or as a condition of employment.

Effective January 1, 2019, the bill amends Sections 12940 and 12965 of and adds Sections 12923, 12950.2 and 12964.5 to the Government Code. This article first examines the statutory changes made by SB 1300 and then reviews the legislative intent language adopted.

Part I – Statutory Changes

Existing state law, the California Fair Employment and Housing Act (FEHA), makes it an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment to engage in harassment of an employee or other specified persons. FEHA also makes harassment of those persons by an employee, other than an agent or supervisor, unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.

SB 1300 amends the FEHA statute to specify that an employer may be responsible for the acts of nonemployees with respect to other harassment activity. The bill also expands this liability to cover all forms of harassment, rather than being limited, as it is under current law, to only sexual harassment. The bill strikes the word "sexual" preceding the word "harassment" in Government Code Section 12940(j)(1) to effect this change in the law.

Moreover, with specified exceptions, SB 1300 prohibits an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, from requiring the execution of a release of a claim or right under FEHA or from requiring an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace including, but not limited to, sexual harassment. The bill makes this change in the law by adding Section 12964.5 to the Government Code.

SB 1300 provides that these prohibitions do not apply to "a negotiated settlement agreement to resolve an underlying claim under FEHA that has been filed by an employee in court, before an administrative agency, alternate dispute resolution forum, or through an employer's internal complaint process."

In addition, FEHA requires employers to provide training and education regarding sexual harassment. SB 1300 authorizes an employer to provide bystander intervention training to their employees. However, the law change does not require such training. Guidelines for what constitutes optional bystander intervention training per SB 1300 will most likely be provided by the Fair Employment and Housing Council through its regulatory process.

To provide this bystander training, the bill adds Government Code Section 12950.2 to read: "An employer may also provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention."

Finally, FEHA authorizes a court in certain circumstances and in its discretion to award the prevailing party in a civil action reasonable attorney's fees and costs, including expert witness fees. SB 1300 provides that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

The bill accomplishes this statutory change by adding the following clause to the end of subdivision (b): "…except that, notwithstanding Section 998 of the Code of Civil Procedure, 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."

All of these statutory changes adopted by SB 1300 will make FEHA litigation costlier and more time-consuming for employers in this state. And it will undoubtedly make settling such claims or lawsuits more difficult and costlier.

Part II – Intent Language

In addition to the statutory changes described above, SB 1300 sets forth several statements of "legislative intent" about the application of FEHA in regard to harassment claims. The measure does so in Section One of the bill by adding Section 12923 to the Government Code that sets forth five statements "with regard to application of the laws about harassment contained in this part."

The first declaration concerns the Legislature's views of harassment and specifically that "the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17 that, in a workplace harassment suit, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job'. (Id. at 26)."

The second declaration concerns the Legislature's view about a single harassment incident and specifically that "the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks v. City of San Mateo* (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act."

The third declaration concerns the Legislature's view of remarks made at work and specifically that "the Legislature affirms the decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 in its rejection of the "stray remarks doctrine'."

The fourth declaration concerns the Legislature's view of the legal standard for sexual harassment and specifically that the "Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191."

The fifth declaration concerns the Legislature's view of the use of summary judgment and that "harassment cases are rarely appropriate for disposition on summary judgment" and that "the Legislature affirms the decision in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues "not determinable on paper'."

Employers and lawyers should recall the general rule of statutory construction is to effectuate the intent of the Legislature which basically requires the courts to give the statutory language its usual and ordinary meaning. *California State Restaurant Assoc. v. Witlow* (1976) 58 Cal.3d 340. In this instance, however, SB 1300 did *not* make any statutory changes related to the five statements of "intent."

There is a presumption that a statutory amendment was intended to change the meaning of the statute only when there is a material change contained in the language of the amended act. *Dalton v. Baldwin* (1944) 64 Cal.App.2nd 259. In other words, a statute is changed by a material amendment to the statutory language itself, but not by "legislative intent" language.

Similar results are found in other cases. For example, the amendment of a statute is evidence of an intention to change the rule stated by the court in applying its provisions. *Butcher v. Brouwer* (1942) 21 Cal.2d 354. And the fact that a lawmaking body knew decisions of appellate courts and made a substantial change in phraseology of a subdivision of the statute indicated an intention to effect a change of its meaning. *Thomas v. Driscoll* (1940) 42 Cal.App.2d 23. However, in both instances, there were changes made to the statutory language that was the subject of the legislative intent statements. Again, this was not the case with SB 1300.

In reviewing SB 1300, Section 1, subdivision (e), states, "Harassment cases are rarely appropriate for disposition on summary judgment." However, SB 1300 does not amend Code of Civil Procedure Section 437(c), which sets forth the requirements regarding motions for summary judgment. Summary judgment is already an extremely high legal threshold whereby

the "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact, and that he is entitled to judgment as a matter of law[.]" *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826 (2001).

"While courts should grant motions for summary judgment by defendants sparingly, 'sparingly' does not mean 'seldom if ever,' and although such motions should be denied when they should, *they must be granted when they must*." *Id.* at 852 (emphasis added). The intent language in SB 1300 seeks to restrain the discretion of the courts in their evaluation of the facts before them which is inappropriate because whether or not a case should be summarily adjudicated needs to be left to a judge to decide who knows the specific facts of the case without legislative influence.

Similarly, through the intent language of SB 1300, the bill seeks to lower the legal standard for hostile work environment claims by referring to a single quote by a single justice's *concurring* opinion in the U.S. Supreme Court's 9-0 decision in *Harris v. Forklift Systems* (1993) 510 U.S. 17. However, the author removed from her bill all of the statutory amendments that would have actually changed the legal standard for actionable harassment cases.

As SB 1300 did not change the statutory standards for summary judgment and hostile work environment, the superfluous intent language contained in SB 1300 does not serve to provide guidance regarding either of these standards. *See Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1046–1047. As the U.S. Supreme Court has stated, "We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff* (1993) 507 U.S. 511, 519.

Even the Legislature recognized the limitation of this intent language when it considered the bill. For example, the Assembly Judiciary Committee's analysis that was prepared when SB 1300 was considered by that committee notes: "It is not at all clear what impact the guidance offered in these non-binding findings and declarations will have on how the courts decide cases…"

As a result, including broad "intent" language appears inconsistent with canons of statutory construction and prior court precedent. As such, the intent language of SB 1300 will surely increase employer costs as lawyers attempt to erroneously utilize the "findings and declarations" in SB 1300 to expand FEHA litigation in this state.

Laura Curtis is an attorney and Policy Advocate at the California Chamber of Commerce. Chris Micheli is an attorney and legislative advocate for the Sacramento governmental relations firm of Aprea & Micheli, Inc.