New California Law Protects Employees and Employers from Defamation Claims in the Wake of the #MeToo Movement

Labor & Employment Law Update

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In the wake of the #MeToo movement, companies have been reviewing their sexual harassment training and investigation practices, and many states have considered the need for additional legislation offering protection to employees. For example, we previously covered legislation discouraging confidential settlements of sexual harassment claims in Tennessee, Washington, and New York.

Recently, California enacted new legislation that protects employees who report sexual harassment from lawsuits claiming that they defamed the alleged harasser. Assembly Bill No. 2770, signed into law on July 9, 2018, codifies the common law rule that an employee's complaint of sexual harassment, made without malice and based on credible information, is privileged and cannot give rise to liability for libel or slander.

This Act is notable in the protection it offers to employers. Assembly Bill No. 2770 also provides that an employer's truthful reference is privileged when it reveals to a prospective employer that a former employee was involved in sexual misconduct or other harassment. The legislative counsel's digest attached to the bill states that the bill "would authorize an employer to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment."

This bill should assure employers that they will not be held liable for defamation while they conduct investigations into sexual harassment complaints and respond to reference inquiries regarding workplace harassers. This legislation will hopefully benefit employers on both ends of the reference process. The former employer is free to warn other employers about problem employees without fear of liability, and the potential new employer benefits from a more transparent hiring process and gains the knowledge necessary to avoid hiring someone who may victimize other employees in the new workplace.

All employers – both inside and outside of California – should always be careful when providing references. On the one hand, an employer's negative reference may lead to claims for defamation and interference with contract if the former employee claims he was denied other employment because of the reference. On the other hand, an employer who refrains from providing truthful information about an employee who engaged in sexual harassment, sexual misconduct, or violence in the workplace could face a claim for negligent misrepresentation or negligent referral if the former employee is involved in an incident at the new workplace that could have been predicted based on prior behavior.

To reach a balance between these two risks – and in the interest of promoting safe workplaces – employers should provide truthful references through objective and easily verifiable facts. For example, an employer should not provide subjective commentary about an employee terminated for harassment or sexual misconduct, but may report that the employer investigated complaints that the former employee engaged in sexual harassment and disciplined the employee after the investigation corroborated the complaints.