



Legal Alert

Reminder of Extended Time for Employees to Pursue FEHA Claims

You may recall learning of AB 9, which lengthened the time for employees to pursue common discrimination claims and went into effect January 1, 2020. Employers are now starting to see the effects of the extended time and starting to receive older claims. Employers should be mindful of the extended time and take important steps to address the potential of defending allegations of conduct several years old.

Prior to January 1, 2020, an employee alleging harassment, discrimination, or other claims under the California Fair Employment and Housing Act ("FEHA") had one year from the alleged act to file a complaint with the Department of Fair Employment and Housing ("DFEH"). Filing such a complaint is a prerequisite to filing a civil action. The employee can either request that the DFEH immediately issue a Right to Sue Notice or can opt to have the DFEH investigate the claim, which can take a year or even much longer. The employee will receive a Right to Sue Notice at the conclusion of the DFEH's investigation. The employee has one year to file a lawsuit after a Right to Sue Notice is issued.

AB 9, also known as the Stop Harassment and Reporting Extension (SHARE) Act, extended the one-year deadline to file a DFEH complaint to three years. Because an employee has one year to file a lawsuit after receiving the Right to Suit Notice, employees now have a least four years after any alleged harassing, retaliatory or discriminatory conduct, including any alleged failure to accommodate a disability or violation of the California Family Rights Act ("CFRA"), to file a lawsuit. Given how overburdened the California Courts are, once a civil action is filed it will likely take several more years to fully litigate and get to a trial or final disposition. This means there could

easily be six, seven or even more years between the alleged conduct at issue and a trial, placing employers in a difficult defense position. Employers will find themselves having to piece together documents, evidence, and witness statements long after key witnesses have left, memories have faded, and helpful documents are gone.

The shorter statute of limitations also served to put employers on earlier notice of potential unlawful conduct, which allowed them to remedy the misconduct in a timely manner. Now, employers may not be aware of the alleged conduct until years later.

The AB 9 extension was purportedly designed to protect #MeToo litigants but extends to all forms of discrimination, harassment, and retaliation prohibited by FEHA. Former Governor Jerry Brown had vetoed the same legislation in 2018, reasoning that the one-year statute of limitations “not only encourages prompt resolution while memories and evidence are fresh, but also ensures that unwelcome behavior is promptly reported and halted.”

AB 9 did not revive claims that had already lapsed under the prior one-year rule, nor did it extend the three-year period for conduct that occurred prior to the enactment of AB 9 (e.g., if the alleged conduct took place on December 1, 2019, the individual only had until December 1, 2020, to file a complaint with the DFEH, as opposed to if the underlying conduct took place on January 1, 2020, in which case the individual would have until January 1, 2023, to file a complaint with the DFEH).

Although the general rule is now that employees must file a complaint with the DFEH within three years of alleged unlawful conduct, there is also an exception called the Continuing Violation Doctrine which could extend the statute of limitations even further. Generally, if an employee can prove alleged harassing conduct was part of a pattern of actions similar in kind, conduct outside the normal limitation period may also be actionable.

What You Can Do Given the Continued Increase in Delayed Claims:

- Implement a policy that requires a longer records retention period.
- Back up and retain emails and other data as long as possible.
- Take extensive contemporaneous notes of all employee related issues, knowing that a case could develop later down the road after memories have faded.
- Collect thorough signed witness statements at the time of incidents as witnesses may be long gone by the time the action

is brought.

- Document in greater detail all performance reviews, counselings, write-ups, warnings and disciplinary notices.
- Ensure that all supervisors and employees are properly trained on anti-harassment and discrimination policies, as well as complaint procedures, and that managers understand the potential of delayed claims.

The information in this legal alert was provided by Jackson Lewis.

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