Legal Update Article

Washington State Enacts New Laws Addressing Sexual Harassment in the Workplace

By Michael A. Griffin

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Responding to the national "#MeToo" movement, Washington has enacted four new workplace laws intended primarily to protect victims of sexual harassment and assault in the workplace.

The first new law relates to protection for victims of domestic violence and was discussed in our article, Washington Expands Employment Discrimination Protections for Victims of Domestic Violence.

The second new law bars employers from requiring employees, as a condition of employment to enter into nondisclosure agreements or other contracts that would limit an employee's ability to report sexual harassment or sexual assault.

The third new law purports to ban employers from requiring employees to resolve workplace disputes (including sexual harassment claims) through mandatory, private dispute resolution, such as arbitration.

The fourth new law relates to the development of model anti-harassment policies by the Washington State Human Rights Commission.

Disclosure and Discussion of Sexual Harassment and Assault (S.B. 5996)

This new law encourages "the disclosure and discussion of sexual harassment and sexual assault in the workplace" (S.B. 5996). It takes effect on June 7, 2018.

S.B. 5996 prohibits employers from requiring employees to "sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace" as a condition of employment.

Under this new law, employers may not prevent employees from publicly disclosing or discussing sexual harassment or sexual assault occurring:

- At work;
- At work-related events coordinated by or through the employer, or between employees; or
- Between an employer and an employee, off the employment worksite.

Any restrictions, nondisclosure agreements, waivers, or other documents signed by an employee as a condition of employment that prevent the above violates public policy and is void and unenforceable. Importantly, this law does not prohibit employees and employer from entering into a settlement agreement to resolve claims of sexual harassment, and such agreements may include confidentiality provisions.

Law Barring Mandatory Private Dispute Resolution (S.B. 6313)

This new law is aimed at "preserving an employee's right to file a complaint or cause of action for sexual harassment or sexual assault" publicly (S.B. 6313). It will also take effect

on June 7, 2018.

This law provides that an employment contract or agreement is against public policy and is void and unenforceable if it requires an employee to waive rights to:

- Publicly pursue a cause of action under the Washington State Law Against Discrimination (WLAD);
- Pursue a cause of action under federal discrimination laws; or
- Publicly file a complaint with the appropriate state or federal agencies.

This law thus purports to bar any agreement that requires an employee to resolve claims of discrimination in a confidential dispute resolution process. It seems likely it may be preempted by the Federal Arbitration Act, as interpreted by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011).

Model Policies (S.B. 6471)

Finally, the fourth new law relates to "developing model policies to create workplaces that are safe from sexual harassment" (S.B. 6471). This law will also take effect on June 7, 2018.

The Washington legislature recognized that between 25 percent and 85 percent of women have experienced sexual harassment in the workplace. This law is intended to encourage employers to adopt and implement policies to ensure safer working environments for women to report concerns about sexual harassment, without fear of retaliation or loss of status or opportunities.

The law directs the Washington State Human Rights Commission to create a "work group" to develop model policies and best practices for employers and employees to keep the workplace free from sexual harassment. The Commission must post the model policies and best practices prominently on its website for the public to access by January 1, 2019. The new law further requires the Washington State Department of Labor and Industries to post the Commission's model policies and best practices on its website for public access within 30 days of the Commission's adoption.

The following groups must be represented in the work group:

- Representatives from the business community;
- Human Resource Professionals;
- Groups advocating for survivors of sexual harassment;
- Labor organizations;
- Representatives of farmworkers or groups advocating for farm workers;
- Representatives from agricultural industries; and
- Subject matter experts as deemed necessary by the commission.

The legislation includes many considerations the work group may review when developing best practices in the workplace, such as:

- How workplace leaders can signal commitment to stopping sexual harassment;
- How to create and protect anonymous reporting channels to allow employees to raise concerns about workplace misconduct and to share ideas with leadership without worrying about being identified;
- How to ensure human resource departments are accountable for enforcing sexual harassment policies, aiding victims of sexual harassment, and encouraging victims to

speak up;
- How to protect against retaliation for complainants and observers;
- The use of employee engagement surveys that contain questions regarding sexual harassment prevention; or
- Requiring training for all employees in a classroom environment.

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Employers should consult with employment counsel to determine whether and how their particular policies and practices are affected by the new laws. Jackson Lewis attorneys are available to assist employers with this and other workplace issues.