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Arm yourself with strategies and statutes to combat sexual harassment and gender violence

LITIGATION STRATEGIES AND SEVERAL STATUTES THAT PROVIDE THE STRONGEST PROTECTIONS

The #MeToo movement launched a worldwide dialogue about sexual harassment, not only in the entertainment industry, but also in the technology, hotel, and restaurant industries, and including in our own state legislature. In truth, sexual harassment, gender bias, and violence against women have plagued workplaces for decades, with women of color and low income being particularly vulnerable. Across all industries, companies are being exposed for allowing sexual harassment to fester by stifling and silencing employees with non-disparagement and confidentiality agreements, fooling workers into waiving their legal claims with "sneaky releases," and failing to hold abusive individuals accountable. This conduct persists despite employers claiming a zero-tolerance policy against harassment.

More recently, forward-thinking workplaces have recognized that arbitration and non-disclosure ("gag") agreements are incompatible with encouraging a safe and harassment-free workplace. Arbitration is another mechanism for secrecy. Recently, prominent law firms Orrick, Herrington & Sutcliffe LLP and Munger, Tolles & Olson LLP have stopped requiring associates to sign arbitration agreements as a condition of employment.

As more women find their voice and the courage to speak out about harassment, it is imperative that workers' rights advocates seize the opportunity to amplify their voices and bring about lasting change. This article discusses litigation strategies and several statutes that provide the strongest protections and longer statutes of limitation, protect privacy, and most importantly, make positive changes to a culture of sexual harassment and misconduct.

Advantages of FEHA over Title VII

The California Fair Employment and Housing Act (FEHA), and particularly Government Code section 12940(j), provides strong protections and expansive remedies for employees who have survived sexual assault and harassment. FEHA provides for strict liability against employers for sexual harassment attributable to a supervisor, even involving non-employees. (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [employer strictly liable for sexual harassment of a job applicant by an interviewer]; *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 841; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1146; *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 415-416.) FEHA also protects volunteers, independent contractors, and unpaid interns. (Gov. Code, § 12940(c) and (j).)

Title VII of the Civil Rights Act of 1964, as amended in 1991 (42 U.S.C. § 2000e et seq.) is the federal equivalent to FEHA. It prohibits discrimination on the basis of specific protected classes, including gender. Title VII recognizes sexual harassment as a form of gender discrimination. (*Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67.)

In comparing state and federal statutes, FEHA offers greater protections and relief. FEHA applies to employers with five or more employees. However, with respect to harassment, FEHA protects even *one employee* or independent contractor. In contrast, Title VII protection starts with entities regularly employing at least 15 employees. Given that as of 2010, small businesses employed 53 percent of the workforce, FEHA casts a far larger net for protection of employees.

FEHA imposes individual liability for harassment, whereas liability is limited to the employer generally under Title VII. FEHA not only provides unlimited damages for numerous forms of injury, but, unlike Title VII, also provides injunctive relief. Title VII limits emotional distress and punitive damages to $300,000. And, while both statutes provide for prevailing plaintiff attorney's fees, multipliers are routinely awarded under FEHA.

As a prerequisite for filing suit, either under FEHA or Title VII, employees must first exhaust administrative remedies by filing a charge of discrimination, either with the Department of Fair Employment and Housing ("DFEH") or the United States Equal Employment Opportunity Commission ("EEOC"). Under FEHA, a claimant has one year from the last act of harassment within which to file a charge of discrimination, as a prerequisite to filing a civil complaint. (Gov. Code, § 12960(d).) In contrast, Title VII requires that non-federal employees file a charge within 300 days of the last incident. Federal employees may be required to file within 45 days or less. Under Title VII, "the [federal] employee must file any formal complaint within 15 days of receiving notice from the agency of the right to file a formal complaint." (*Symko v. Potter* (D.D.C. 2007) 505 F.Supp.2d 129, 134 (citing 29 C.F.R. § 1614.106(b).)

A "right to sue" notice may be issued instantly upon request or following an investigation by either the DFEH or the EEOC. Under FEHA, the claimant has one year to file a civil lawsuit following receipt of the DFEH right to sue, but only 90 days following issuance of an EEOC right to sue.

There are a myriad of reasons why employees delay filing a charge of sexual harassment, not the least of which are fear of retaliation, mental distress, confusion over the litigation process or undeserved shame. For this reason, a longer statute of limitations gives plaintiffs sufficient time to summon the courage and resources to file a charge of harassment and a civil lawsuit. Unless your client is a federal employee (which requires Title VII exhaustion), it is strategically advantageous to seek relief under FEHA. Even in diversity actions, FEHA claims should be emphasized.

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Tolling of the DFEH deadline is possible

The one-year deadline for filing a charge of discrimination with the DFEH may be extended for 90 days, *if* the aggrieved person first obtained knowledge of the facts of the unlawful practice more than one year *after* the last unlawful practice occurred. (Gov. Code, § 12960(d)(1).) Late discovery of information that suggests discriminatory animus might come from a newly received personnel file or a former co-worker, for example.

The deadline may also be extended up to one year to allow for substitution of the identity of the actual employer. (Gov. Code, § 12960(d)(1).) Complicated corporate formation or a joint employer relationship can obscure the identity of the responsible parties, for purposes of administrative exhaustion.

For minors, the deadline for filing a charge of discrimination is extended one year from the date the minor reaches majority. (Gov. Code, § 12960(d)(4).) Finally, the administrative filing deadline may also be tolled where the DFEH misleads the complainant about filing obligations, commits errors in processing the complaint, or improperly discourages or prevents the complainant from filing at all. (Cal. Code Regs., tit. 2, § 10018.)

Overlooked statutes that protect survivors of sexual harassment and assault

Witnesses as well as victims are protected by anti-retaliation laws. FEHA makes it illegal for an employer to discharge, expel, or otherwise discriminate against a person who reports harassment, opposes any practice forbidden by FEHA, files a complaint, *testifies, or assists* in any proceedings under the statute. (Gov. Code, § 12940(h).)

When interviewing potential witnesses, inform them that they are protected by FEHA and can file their own claim if they are subjected to retaliation. This may ease their concerns and fears. If the witness then suffers retaliation for assisting you, they will likely return to you with their own retaliation claim.

Always assert a retaliation cause of action when an adverse act is taken against an individual following a report of sexual harassment (i.e., demotion, hours cut, termination). Even if the plaintiff loses her sexual harassment claim (perhaps the claim did not meet the elements of severe or pervasive), the retaliation claim remains viable. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467.)

Employers are obligated to prevent, investigate, and remedy harassment

"Failure to Prevent Discrimination and Harassment in violation of FEHA" is another stand-alone claim in sexual harassment cases. (Gov. Code, § 12940(j)(1).) FEHA requires that employers take all reasonable steps to prevent harassment. Employers must conduct a prompt, unbiased and thorough investigation of reports of sexual harassment or discrimination. "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." (*Mathieu v. Norell Corp*. (2004) 115 Cal.App.4th 1174, 1185.) Virtually every sexual harassment or discrimination complaint should allege this claim, which enables broad discovery regarding an employer's policies and procedures related to its workplace practices, investigations, and remedies undertaken to ensure a hostile-free work environment. It also makes discoverable, prior reports by "me too" witnesses.

The Unruh Civil Rights Act with three-year statute

Discrimination in business, service and professional relationships can be pursued under the Unruh Civil Rights Act, found in California Civil Code sections 51 through 52. The Unruh Act provides protection from discrimination by all California business establishments, including housing and public accommodations. In 1995, Civil Code section 51.9 was added to the Unruh Act to provide protections for sexual harassment outside of the employer-employee relationship.

The statute helpfully provides examples of covered relationships, i.e., persons having a business, service or professional relationship with a doctor, therapist, dentist, attorney, social worker, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner, loan officer, collection service, building contractor, escrow loan officer, executor, trustee, administrator, landlord, property manager, teacher, and anyone else in a substantially similar relationship. Amplifying on Civil Code section 51.9, although not specifically listed, protection would extend to an actress subjected to sexual harassment or assault by a movie producer considering her for a movie role (i.e., Harvey Weinstein). The plaintiff must demonstrate an inability to easily terminate the relationship and economic loss, disadvantage, or personal injury.

Note that while the DFEH has jurisdiction to investigate and prosecute claims under Civil Code sections 51 through 52, unlike FEHA (employment) claims, the Unruh Act has no administrative exhaustion requirement. Plaintiffs can file directly in court, without first obtaining a right to sue notice. Importantly, these victims have three years from the last act of harassment to file suit, two years longer than the statute of limitations under FEHA.

Unruh Act remedies include statutory damages, out of pocket expenses, cease and desist orders, emotional distress and punitive damages, as well as attorney's fees and costs.

Ralph's Civil Rights Act with three-year statute – avoid arbitration

The Ralph's Civil Rights Act is California's "hate" statute. With a penalty provision for enhanced remedies and a longer statute of limitations, Civil Code section 51.7 protects individuals subjected to acts of intimidation or threatened with acts of violence (against them or their property), based on race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age,

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disability, or position in a labor dispute. *Stamps v Superior Court* (2006) 136 Cal.App.4th 1441, 1457, confirms that section 51.7 claims may be brought in employment matters. Remedies include actual damages, punitive damages, attorneys' fees, and a civil penalty of $25,000.

This claim has a three-year statute of limitations from the date of incident, allowing time for the perpetrator to be identified. If the perpetrator is unidentified (e.g., the victim receives an anonymous note, or graffiti threatening violence is found on a locker), the victim has one year from discovering the identity, but no more than three years from the date of the alleged incident, to file suit. (Gov. Code, § 12960(d)(3).)

As an added bonus, section 51.9(b)(1) precludes waiver of any legal right, penalty, remedy, forum, or procedure for a violation of this section. This includes the right to file a civil action or a complaint with the Attorney General, public prosecutor, law enforcement agency, the DFEH, or any court or other government agency. Civil Code section 51.7 can be invoked to avoid arbitration if your sexual harassment claim meets the requirements of this section.

Gender violence with three-year statute

Civil Code section 52.4, subdivisions (a) through (d), provide a civil remedy and damages to victims of gender violence. Gender violence is (1) any act that would constitute a criminal offense under state law that has, as an element, the use or attempted use of violence against a person based, at least in part, on the victim's gender, or (2) a physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not a crime. The cause of action can be pursued against the individual perpetrator, not the employer, unless the employer personally committed the act of gender violence. These claims are viable regardless of the victim's gender, including transgender individuals. Remedies available include actual and punitive damages, injunctive relief, and attorney's fees and costs to the prevailing plaintiff.

The statute of limitations is three years for adults, and eight years after a minor reaches majority (18 in California), or three years after discovery, whichever occurs later.

Sexual battery with three-year statute

Civil Code section 11708.5 provides protection for sexual battery – sexually offensive contact of an intimate part of another or by an intimate part of the actor. Intimate part means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female. Any form of physical touching warrants assertion of this claim. There is no DFEH exhaustion requirement and the statute of limitations is three years, under Code of Civil Procedure section 338(a). An employer can be held liable for the assault or battery of its employees, if it knows or should have known of the perpetrator's propensity, under a negligence theory. (See *Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d. 1420.)

Human trafficking with seven-year statute

The DFEH is empowered to prosecute human trafficking violations under the Trafficking Victim's Protection Act. Civil Code section 52.5 allows a victim of human trafficking to bring a civil action for full damages. Human trafficking is not limited to forcing a victim into commercial sex acts. Penal Code section 236.1 defines human trafficking as (1) depriving or violating a person's personal liberty with intent to obtain forced labor or services; (2) deprivation of personal liberty with the intent to violate California's pimping and pandering law, child pornography laws, extortion and blackmail, or certain other California laws concerning commercial sexual activity and sexual exploitation of children; or (3) persuading or trying to persuade a minor to engage in a commercial sex act. For example, a clothing manufacturer might provide room and board to undocumented immigrants, and pay no wages, but threaten to report them to authorities if they refused to work. Such conduct would subject the manufacturer to prosecution under this section.

Remedies include actual and punitive damages, injunctive relief, and prevailing plaintiff attorney's fees and costs. In addition, the plaintiff may be awarded up to three times the actual damages, or $10,000, whichever is greater.

Adult victims of human trafficking have seven years from being freed from the trafficking circumstances to file a complaint, while minors have 10 years from the date they reach majority. (Civ. Code, § 52.5(c).)

Employers must provide a safe work environment

Labor Code sections 6402 to 6404 require that employers provide a safe work environment. Under FEHA, Government Code section 12940(j)(1), the employer has an affirmative duty to prevent harassment by non-employees of which it knows or should know. Under Code of Civil Procedure section 527.8, an employer may obtain injunctive relief for threats of violence against its employee.

Combining the employer obligations under these code sections, the employer might be leveraged into taking affirmative action to protect its employee from harm. For example, if an employee was sexually assaulted on the job by an outside vendor's employee (e.g., a security guard or janitor), the employer could seek a TRO and an injunction on behalf of its employee if the third-party employer failed to take corrective action against the perpetrator.

Victims of sexual assault, stalking, or domestic violence are protected

Labor Code section 230(c) provides protections for victims of domestic violence, sexual assault, or stalking. Even though these issues typically occur in a person's private life, the person is often helpless in preventing these issues from spilling over into his or her professional life. Labor Code section 230(c) provides that an employer (with 25 or more employees) shall not discharge, or in *any manner* discriminate or retaliate against an employee who is a victim of domestic violence, sexual assault, or stalking, for taking time off from work to obtain or attempt to obtain any relief, including, but

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not limited to, TRO, restraining order, or other injunctive relief to ensure the health, safety, or welfare of the victim or his/her child.

Victims of sexual assault or domestic violence are also entitled to job-protected leave in order to seek medical treatment, obtain services from a domestic violence shelter or rape crisis center, obtain psychological counseling or participate in safety planning and other actions to ensure safety. (Lab. Code, § 230.1.) Protected leave time must be granted to appear in court or for related meetings with the district attorney. (Lab. Code, § 230.5.)

Protect client privacy and fight attempts to humiliate

In litigation, defendants often try to discover or introduce evidence to humiliate or intimidate. There are several statutes that help protect client privacy in these circumstances.

Evidence of a plaintiff's sexual conduct is not discoverable in sexual harassment and sexual assault cases. (Gov. Code, § 11440.40.) Reputation or opinion evidence regarding the plaintiff's sexual behavior is inadmissible for any purpose. Likewise, plaintiff's sexual conduct with individuals, other than the perpetrator, is presumed inadmissible.

Code of Civil Procedure section 2017.220 prevents discovery of plaintiff's sexual conduct in a sexual assault, sexual battery, or sexual harassment civil action. Absent a defense showing of good cause on noticed motion (not by ex parte application) that the information sought will lead directly to admissible evidence, such information is not discoverable. The non-prevailing party may be sanctioned.

Evidence Code section 782 prohibits introduction of plaintiff's sexual conduct to attack her credibility, absent the filing of a written motion and affidavit under seal. In contrast, defendant's conduct with others may be introduced through Evidence Code section 1101, as indicia of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Secret settlements are prohibited for felony conduct

Confidential settlements of claims that constitute a sexual felony violate public policy. Code of Civil Procedure section 1002 prohibits settlement agreements that prevent disclosure of factual information, which would give rise to a cause of action for civil damages, arising from an act (1) that may be prosecuted as a felony sex offense, (2) of childhood sexual abuse, (3) of sexual exploitation of a minor, or (4) of sexual assault. An attorney's complicity in allowing inclusion of a gag order provision in a settlement agreement, or as a condition of settlement, may subject the attorney to a California State Bar investigation and professional discipline.

Partner with the Department of Fair Employment and Housing

The Department of Fair Employment and Housing is the largest civil rights agency in the nation, with a mission of protecting California employees from unlawful discrimination and harassment. California's various civil rights laws give the DFEH broad authority and responsibility, to fulfill its mission to provide training and technical assistance to employers and engage in public outreach. Most importantly, the DFEH investigates complaints of harassment and discrimination, provides free mediation, and enforces discrimination laws by prosecuting violations in civil court.

Consideration should be given to partnering with the DFEH, in righteous cases of harassment that affect numerous employees. Instead of requesting an immediate "right-to-sue" notice, assist the client in filing a complaint for investigation and remain involved in the process throughout. Prepare the client for her DFEH interview, provide corroborating witnesses and evidence to the investigator, and demonstrate that the case should be recommended to the DFEH litigation division for prosecution.

If the DFEH division accepts the case for prosecution, a mandatory mediation takes place before the DFEH files a Director's Complaint against the defendant. Filing a Director's Complaint does not prevent participation of private counsel. A complaint in intervention can be filed representing the "Real Party in Interest," allowing plaintiff's counsel to co-prosecute the case with the DFEH. Advantages gained by partnering with the DFEH, include (1) avoiding arbitration clauses (the DFEH is *not* bound by arbitration agreements, as a non-signatory to the agreement); (2) garnering the investigative power of the DFEH; (3) enhanced credibility of the case in civil court; (4) shared costs with the DFEH; and (5) mandatory free mediation before litigation commences.

Be advocates for positive change with settlement agreements

Taking cases to trial is effective in publicly holding harassers accountable, along with the companies that enable them. However, when settlement is in the best interest of the client, negotiate a settlement agreement that advances positive change in the workplace for others. For example, negotiate company agreement to providing sexual harassment training and prevention, beyond that legally required under Government Code section 12950.1. Request implementation of policies and procedures that improve the reporting and investigation of sexual harassment claims. Require a deadline for policy implementation and require the defendant to report its completion to the DFEH.

Reject oppressive provisions in settlement agreement as "standard." These include non-disclosure, no-rehire, non-disparagement, and no-cooperation provisions. These provisions are repugnant and should be rejected, or at least severely limited until legislation outlaws them.

Non-disclosure and non-disparagement provisions enable and perpetuate sexual misconduct, by preventing victims from speaking their truth against the perpetrators or defending themselves against

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ridicule and distrust. Agreeing to gag provisions in settlement agreements harms the public and endangers future victims. Hush agreements prevent non-victims from being armed with knowledge of the danger posed by the perpetrator. All these provisions enable the Weinsteins of the world.

Resignation and no-rehire provisions serve to further punish the plaintiff for having filed a claim against the employer. Expansive, overreaching provisions often prevent the plaintiff from ever working at the company and any of its "affiliates or related entities." Some provisions require the plaintiff's subsequent resignation if her new employer is acquired by the defendant in the future. Arguably, these provisions constitute illegal non-compete clauses, which violate public policy and are unenforceable. "No rehire" provisions can effectively bar a plaintiff from an industry and should be rejected as deal breakers or at least severely limited (e.g., by scope, locale, or time).

Non-disparagement provisions are overbroad and violate free speech rights, and unreasonably prohibit the victim from speaking publicly and privately about her treatment. Expression of a mere opinion on social media, or even privately to a friend, would trigger a violation. Such provisions prohibit women from joining in the current national dialogue in this #MeToo era. Non-cooperation provisions are likewise oppressive, by prohibiting victims from assisting others as "me too" witnesses.

Until legislation passes to prevent these offensive provisions, workers' rights attorneys must act collectively to reject these so-called "standard" provisions, or severely limit their scope. If these provisions cannot be outright rejected, defendants should be required to pay a significant premium as additional consideration for future economic losses.

Pending legislation inspired by the #MeToo movement

The #MeToo movement has inspired several bills at the State Capitol, including the following:

• AB 1870 (Reyes, Friedman, Waldron) extends the statute of limitations for filing FEHA claims from one to three years. (California Employment Lawyers Association (CELA)-sponsored)

• SB 1038 (Leyva) clarifies that individuals may be held jointly and severally liable for retaliation under FEHA. (CELA-sponsored)

• SB 1300 (Jackson) provides statutory guidance on the "severe or pervasive" standard in sexual harassment cases, strengthens sexual harassment training requirements so all employees are trained on prevention, intervention, and reporting of sexual harassment; prohibits non-disparagement agreements; and prohibits requiring employees to release sexual harassment and other discrimination claims as a condition of employment, or for an employment benefit, e.g., a raise or bonus. (CELA-sponsored)

• SB 224 (Jackson) clarifies that sexual harassment by investors, elected officials, lobbyists, directors, and producers is prohibited under the Unruh Civil Rights Act. (CELA-sponsored)

• AB 1750 (Assembly Member McCarty) requires elected officials to repay the state for sexual harassment settlements.

• AB 3080 (Gonzalez Fletcher) Prohibits employers from (1) requiring workers to sign arbitration agreements as a condition of employment and (2) retaliating against workers who refuse to sign arbitration agreements. (California Labor Federation-sponsored)

• AB 3109 (Stone) prohibits "no rehire" clauses. Limits secret settlements of sexual harassment claims. Prohibits restricting a party's right to seek employment or reemployment in any lawful occupation.

• SB 820 (Leyva) prohibits secret settlements of sexual harassment agreements, absent the plaintiff's agreement to include such a provision. (CAOC and California Women's Law Center-sponsored)

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