

California Protects Communications Linked to Sexual Harassment Complaints

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Last month, following unanimous passage by the California legislature, Governor Jerry Brown signed into law [AB 2770](#), which aims to increase protections for statements made by employers and employees in connection with sexual harassment allegations. The bill amends California Civil Code section 47(c)—a statutory provision that provides a limited “common interest privilege” against defamation claims—to include within the scope of the privilege certain categories of statements made in connection with sexual harassment allegations. The new law takes effect on January 1, 2019.

Generally, defamation law allows individuals to be held liable for false statements that negatively impact another’s reputation. Given that a statement regarding sexual harassment can harm a person’s reputation if such statement is deemed to be false, the speaker may be liable for defamation. As set forth in the Senate’s Bill Analysis, however, testimony received during hearings of the California Senate Judiciary Committee and the Senate Select Committee on Women, Work, and Families revealed that the prospect of facing a defamation claim deters not only false allegations, but also deters truthful communications regarding sexual harassment, particularly in circumstances where evidence to corroborate the veracity of such statements may not be readily available.

In response to these findings, and to encourage truthful communications regarding sexual harassment, the legislation amends existing California defamation law to include explicitly within the common interest privilege three categories of publications and communications related to sexual harassment. Specifically, AB 2770 amends Civil Code section 47(c) to provide explicitly that privileged communications include: (1) complaints of sexual harassment communicated by an employee to an employer based on “credible evidence” (a term that remains undefined), (2) communications between an employer and “interested persons” regarding sexual harassment complaints, and (3) communications, in response to an inquiry, in which a current or former employer tells a prospective employer that the current or former employer would not rehire the current former employee based on its determination that the employee engaged in sexual harassment.

The protection extended to these communications, however, is “qualified,” meaning that to receive the privilege such communications must be made “without malice.” As interpreted by California courts and outlined in the Senate’s Bill Analysis, a malicious communication is one that is either motivated by hatred or ill will, or is made without reasonable grounds for believing that the matter asserted is true. Employers and other persons, therefore, would not be protected for making false allegations out of spite or with reckless disregard for the truth.

AB 2770 is the latest enactment in a growing trend of recent state legislation aimed at eliminating sexual harassment in the workplace and establishing more protections for victims of sexual harassment. These measures have sought to address sexual harassment through a variety of approaches, including by requiring employer training, providing for greater transparency and more support for victims, mandating employer reporting of sexual harassment claims and/or settlements, prohibiting confidential settlements, and extending applicable statutes of limitation. For additional information on such developments, see our previous briefings, [Legislative Trends: “Me Too” Movement and Sexual Harassment Disclosure Laws](#), [New York City Enacts New Employee Protections Against Sexual Harassment](#) and [New York’s Budget Includes Employee Protections Against Sexual Harassment](#). Employers are encouraged to assess how these new laws impact their sexual harassment policies and procedures, including in the area of investigations and employment references, and to make necessary changes to their practices to comport with the ever-evolving legal framework regarding sexual harassment.

If you have questions, please contact any of the Labor and Employment Practice Group attorneys listed below or your usual Winston & Strawn contact.

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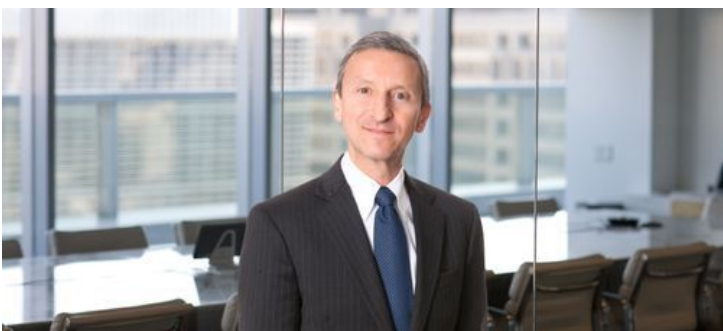
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