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Job References in the #MeToo Era: Employers In Some States Now Have Privilege to Say #HimToo

August 29, 2018

Employers seeking to avoid liability often stick to dates of employment and position held when responding to reference requests. But there is a new trend in legislation offering protection to employers who disclose to prospective employers that the candidate was the subject of a sexual harassment investigation.

For example, effective January 1, 2019, California employers will be protected by an additional privilege when providing job references. AB 2770, signed into law last month by California Governor Jerry Brown, amends California law regarding the common interest privilege and specifically protects employers from defamation and tortious interference claims if they advise a prospective employer that the applicant was the subject of a sexual harassment investigation based on credible evidence. California law already protects employers' communications regarding an applicant's job performance and employee misconduct, but AB 2770 makes clear that sexual harassment investigations are included in the privilege. For the privilege to apply, such references must also be provided without malice. The new law also permits California employers to disclose whether or not they would rehire the applicant.

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As long as employers do not provide misleading information, they generally do not have a duty to provide this kind of information about a former employer/applicant during the reference process. Prospective employers, on the other hand, do have a duty to use reasonable care in checking references for applicants. To the extent that this new law causes more employers to disclose that an applicant was terminated as a result of a sexual harassment investigation, prospective employers should consider very carefully the impact of that information on the applicant's candidacy.

If an employer discloses information about a sexual harassment investigation as part of the reference process after January 1, 2019, the employer can assert the privilege as a defense in a defamation or tortious interference action brought by the former employee/applicant. Like all defenses, the defendant (in this case, the employer) has the burden of proof, so the burden is on the employer to show that the communication was made to a person with a legitimate interest, the communication was made without malice and the sexual harassment investigation was based on credible evidence. It may be difficult to make this showing at the motion to dismiss stage, so even with the new law's protection, employers facing such litigation may still have to contend with discovery and summary judgment briefing.

California is not alone in passing legislation as a response to the #MeToo movement. On the federal level, the Tax Cuts and Jobs Act contains a provision that prohibits tax deductions for any payments involving sexual harassment, including settlements, if the payment is subject to confidentiality provisions. Many states have also passed new legislation regarding sexual harassment in the workplace. For example, Maryland recently signed the Disclosing Sexual Harassment in the Workplace Act, which, among other things, requires that employers with 50 or more employees disclose to the Maryland Commission on Civil Rights the

number of sexual harassment settlements entered into, whether the settlements involved the same alleged harasser, and the number of sexual harassment settlements entered into that included confidentiality provisions. Vermont and New York also recently passed legislation regarding sexual harassment in the workplace. Many other states, including Delaware, Maine, New Jersey, North Carolina and Ohio, have introduced legislation to specifically address sexual harassment.

Other states have long offered qualified immunity to employers who respond truthfully to reference requests. For example, in Florida an employer who discloses information in response to a prospective employer's request about a former or current employee is immune from civil liability unless it is shown by clear and convincing evidence that the information disclosed was knowingly false or violated any right protected by the employee under the Florida Civil Rights Act, Florida's fair workplace law prohibiting discrimination and retaliation.

If you have questions about reference requests or any of these new laws and their impact on you, contact your Akerman L&E lawyer.