SCHOOLS LEGAL SERVICE

LAW UPDATE
LABOR AND EMPLOYMENT

PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org

September 2020

ASSEMBLY BILL 9
BEGINNING JANUARY 1, 2020, EMPLOYEES NOW HAVE THREE YEARS TO FILE FAIR EMPLOYMENT AND HOUSING ACT CLAIMS

Before an employee can pursue a civil or court action against an employer for harassment, discrimination, or other claim under the Fair Employment and Housing Act (FEHA), the employee must first file an administrative complaint with the California Department of Fair Employment and Housing (DFEH). Prior to January 1, 2020, the employee had one year from the date the allegedly discriminatory conduct occurred to file a DFEH complaint. This one-year limitations period had been in effect since 1963. As former Governor Jerry Brown noted in his veto of nearly identical proposed legislation in 2018 (AB 1870), the one-year DFEH deadline "encourages prompt resolution while memories and evidence are fresh, but also ensures that unwelcome behavior is promptly reported and halted." Take note that Assembly Bill (AB) 9, which was one of numerous worker-protection bills signed by California Governor Gavin Newsom last year, extended the one-year limitations period to **three** years for FEHA claims pursued by employees.

According to the author of AB 9 (and AB 1870), the rationale for extending the limitations period an additional two years was because

> "...the #MeToo movement has brought attention to many of the dynamics related to sexual harassment. In particular, many victims have shared that they needed ample time to fully grasp what happened to them before they felt comfortable coming forward. In addition, the fear of retaliation often prevented victims from being able to report incidents of sexual harassment. These barriers are not limited to sexual harassment. Victims of all forms of discrimination and harassment may be initially unclear about what happened, unaware of their rights, or reluctant to report misconduct to their boss. This bill would address these barriers by extending the deadline to file a complaint involving a violation of the [FEHA] with the [DFEH] from one year from the date of the violation to three years."

It is important to note that while AB 9 was proposed as a "sexual harassment" bill, it extended the limitations period for **all** employment discrimination claims under the FEHA, not just harassment or discrimination based on sex.

AB 9 raises a host of policy and practical concerns for employers. The prior one-year period ensured that employees promptly reported workplace issues to their employer, enabling the employer to then quickly and effectively respond to potentially unlawful or inappropriate behavior. Now witnesses and even the accused, may have moved on and evidence (e.g., email, notes and social media) may be lost, making it much more difficult for an employer to defend a DFEH complaint or lawsuit **years** later. Discrimination policies and procedures should be revised to reflect this new timeline.

Record retention policies and practices should also be reviewed to ensure potential key evidence is not inadvertently destroyed. Proper documentation involving all aspects of the employment relationship, including but not limited to, employee hiring, training, evaluation, discipline, compensation, complaint handling, investigations, layoff, resignation and termination is more critical now than before AB 9 because memories are more likely to fade and more employment relationships end as **years** go by. With the expanded three-year timeline and the additional year or possibly two (e.g., up to one year for DFEH to investigate) before a civil action must be filed, five or more years may have passed since the alleged violation. Document management and retention systems should be in place to account for this expanded time.

Districts should consult with their legal counsel to discuss potential revisions to discrimination policies and procedures that account for this new timeline, as well as the need to preserve evidence to successfully defend against a FEHA lawsuit.

Kelly A. Lazerson