

TEXAS LEGISLATURE REFORMS WORKPLACE SEXUAL HARASSMENT LAW, EXPANDS EMPLOYER LIABILITY

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Following the Texas Legislature's 2021 Regular Session, Governor Abbott signed two new laws that greatly expand and reshape claims of sexual harassment under the Texas Labor Code. Senate Bill 45 and House Bill 21, which go into effect on Sept. 1, 2021, impact workplace sexual harassment claims in Texas in three key ways:

1. House Bill 21 lengthens the deadline for an employee to file a sexual harassment claim;
2. Senate Bill 45 expands the definition of "employer" and "sexual harassment;" and
3. Senate Bill 45 implements a new (and ambiguous) standard for how employers must respond to workplace sexual harassment.

1. New deadline for employees to file sexual harassment claims.

Signed on June 9, 2021, House Bill 21 amends Section 21.201 (g) of the Texas Labor Code. This amendment lengthens the statute of limitations for an employee to assert a claim of sexual harassment from 180 days to 300 days. Although certain claimants could previously utilize a 300-day deadline under federal law, HB 21 makes that deadline official under state law for the first time. This new 300-day clock begins the date of the alleged sexual harassment. It is important to note that this amendment alters the timeframe only for sexual harassment claims and does not otherwise change the previous 180-day deadlines found in Section 21.

2. New, expansive statutory definitions for "Employer" and "Sexual Harassment."

The most significant expansion of Texas's harassment law involves the employers and individual employees now subject to harassment suits. Senate Bill 45 expands the scope of those liable for harassment by defining an "employer" as a person who:

- Employs one or more employees; or
- Acts directly in the interests of an employer in relation to an employee.

Notably, this expands harassment liability to ***all employers***, regardless of the number of employees. This new definition diverges from federal law (and existing Texas law), which subjects employers to sexual harassment liability if they have more than 15 employees.

Under this definition, the Texas Labor Code also now permits sexual harassment victims to name their supervisors, coworkers, and colleagues as ***individual defendants***. Indeed, given this remarkably expansive definition, anyone acting “directly in the interest of an employer” can be held liable as an “employer” for claims of sexual harassment.

It is presently unclear whether this broad definition will subject independent contractors and vendors to individual liability.

Furthermore, this new law provides a more specific, and perhaps expansive, definition for “sexual harassment”:

“Sexual harassment” means an unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature if:

- submission to the advance, request, or conduct is made a term or condition of an individual's employment, either explicitly or implicitly;
- submission to or rejection of the advance, request, or conduct by an individual is used as the basis for a decision affecting the individual's employment;
- the advance, request, or conduct has the purpose or effect of unreasonably interfering with an individual's work performance; or
- the advance, request, or conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.

3. New, heightened standard for employer response to sexual harassment.

These revisions to the Texas Labor Code arguably muddy the waters for sexual harassment litigation. Under § 21.142, an employer commits an “unlawful employment practice” if sexual harassment of an employee occurs and the employer (or agents/supervisors):

1. know or should have known that the conduct constituting sexual harassment was occurring; and
2. fail to take “***immediate and appropriate*** corrective action.”

Quite unhelpfully, the phrase “immediate and appropriate corrective action” is left undefined. Accordingly, whether an employer’s response to workplace sexual harassment is both *immediate* and *appropriate* will be a fact-intensive, case-by-case, inquiry.

4. Key takeaways for employers.

1. Given the new definition of “employer,” the Texas legislature has now significantly diverged from federal law by opening the door to personal liability for workplace sexual harassment claims. Only time will tell how far Texas courts will be willing to take this admittedly liberal language. Furthermore, employers should anticipate that zealous plaintiffs’ attorneys will attempt to apply this “employer” definition to everyone associated with the victim’s true employer.
2. For now, employers should anticipate that claims of workplace sexual harassment will also be accompanied by claims against the victim’s co-workers, superiors, HR directors, and colleagues.
3. The new law places an increased responsibility on employers to prevent workplace harassment. Employers should continue to rely upon documented policies and procedures to prevent workplace sexual harassment, combined with thorough employee training. Given this change in the law, however, employers should anticipate an uptick in workplace sexual harassment claims. This is especially true for small businesses that will soon fall within the definition of “employer.”
4. Employers should anticipate vigorous litigation on the meaning and interpretation of *“immediate and appropriate corrective action.”* Now, more than ever, Texas employers, general counsels, and HR directors should meticulously document allegations of sexual harassment, thoroughly investigate all such claims, and where appropriate, retain outside counsel to provide strategic guidance. When analyzing an *“immediate and appropriate corrective action,”* Texas courts and arbitrators will focus on the timing and adequacy of an employer’s response to claims of sexual harassment.

If you have any questions regarding these changes in the Texas Labor Code or if we can assist with policies or procedures concerning claims of sexual harassment, our team is ready and available.

Related Practices

Labor and Employment

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