Ogletree Deakins

California, State Developments

California Employers Take Note: Employees Now Have Two Extra Years to File FEHA Claims

November 1, 2019

Roshni (Chaudhari) Kapoor

San Francisco

Author

Chambord V. Benton-Hayes

Sacramento
San Francisco

Author

Among the numerous worker-protection bills California governor Gavin Newsom signed last month was **Assembly Bill (AB) 9**, which gives employees a **two-year extension** to file Fair Employment and Housing Act (FEHA) claims.

Currently, employees with FEHA claims must first file administrative charges with the California Department of Fair Employment and Housing (DFEH) within one year of the aggrieved conduct. This deadline will change on January 1, 2020, when AB 9 will provide employees up to three years to file FEHA administrative charges. Employees will continue to have, as they do now, one year to file a lawsuit after receiving a right-to-sue letter from the DFEH.

AB 9 will not revive claims that have lapsed before January 1, 2020, under the current one-year rule. AB 9 does not specify whether existing claims that expire after January 1, 2020, will be evaluated under the existing one-year deadline or the newer three-year deadline.

AB 9, which is also known as the Stop Harassment and Reporting Extension (SHARE) Act, was introduced by Assemblymember Eloise Reyes in response to the #MeToo movement. According to Reyes, AB 9 addresses barriers for victims of harassment and discrimination who feel they need time to grasp what happened, understand their rights, and feel comfortable coming forward. One sponsor of the legislation also noted that the extension brings FEHA into alignment with other claims with longer statutes of limitations. Those opposing the bill observed that under AB 9 California will have a statute of limitations six times longer than the federal standard, which arguably reduces the motivation for victims to come forward quickly and thus prevents employers from timely eradicating inappropriate behavior, since they cannot correct what they do not know. Such concerns were reflected in former governor Jerry Brown's veto of a nearly identical bill, AB 1870, last year. In his veto, Governor Brown wrote that the one-year DFEH deadline, in effect since 1963, "encourage[d] prompt resolution of claims while memories [were] fresh, but also ensure[d] that unwelcome behavior [was] promptly reported and halted."

With this new landscape, it is more important now than ever for employers to review their HR-related policies and practices. Employers should consider evaluating their recordkeeping policies and practices to ensure that key information is retained in records for at least four years, as it could be that long before an employer learns of a harassment, discrimination, or retaliation claim. Those records can include employment applications (including applications for promotions), background search

results, equal employment opportunity policies, proof of California-compliant training, complaints, HR investigations and notes, internal emails (even if privileged) relating to decisions made, and the reasons for employer actions such as terminations, layoffs, and demotions.

Still, an employer's document retention is only helpful to the extent that there is a record worth preserving. By the time litigation is underway in FEHA cases, employers may have experienced significant employee turnover and employees' memories may have faded. For that reason, employers may want to stress to HR and management the importance of properly documenting important information. Management may also want to ensure employees are aware of the employer's policies and best practices for creating adequate records, whether they concern employee interviews, significant employment events (such as complaints, transfers, resignations, or performance warnings), investigation reports, or legal advice in the form of privileged communications. Finally, HR and managers may want to remain aware of the employer's document management systems and recordkeeping rules.