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ESSENTIAL EMPLOYMENT LAW

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EMPLOYMENT LAW UPDATE

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Part 1 of this article focuses on the September 1, 2021 amendments to Texas law governing sexual harassment. Part 2 provides a brief summary of a few of the other recent developments of significance to Texas employers.

PART I. AMENDMENTS TO TEXAS SEXUAL HARASSMENT LAW

With very little press or fanfare, on May 30, 2021, Governor Abbott signed Senate Bill 45 amending the Texas Labor Code, Chapter 21, addressing unlawful discrimination in the workplace. Historically, the verbiage of Chapter 21, with few exceptions, has closely mirrored that of federal laws, including Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Civil Rights Act of 1991. The recent amendments, effective September 1, 2021, now create significant differences between Texas law and federal law. This article addresses the new law and how employers with employees in Texas should respond.

1. SCOPE OF AMENDMENTS

The amendments only apply to “sexual harassment,” as defined. The amendments do not apply to other forms of discrimination / harassment, namely age, race, national origin, religion, or disability. The amendments do apply to non-harassment forms of gender discrimination, such as inequitable wage differentials based on gender. Nor do they apply to harassment based on gender if the conduct is not of a “sexual nature,” such as misogynistic comments.

Significantly, the amendments do not apply to claims of unlawful retaliation.

2. EXPANSION TO ALL EMPLOYERS

In general, Chapter 21 of the Texas Labor Code Section 21.002(8)(a), applies to employers, defined as *“a person who is engaged in an industry affecting commerce and who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.”* Now, for purposes of the new provisions relating to sexual harassment, Section 21.141(1)(A) of the Texas Labor Code defines an “Employer” as an individual who: *“(A) employs one or more employees...”*

3. POTENTIAL INDIVIDUAL LIABILITY

Previously, neither federal nor Texas law provided for individual liability for unlawful discrimination / harassment. Importantly, the amendments’ expansion of the definition of “Employer” for purposes of the sexual harassment provisions, also includes an individual who *“acts directly in the interests of an employer in relation to an employee.”* Texas Labor Code Section 21.141(1)(B). This gives rise to potential liability for owners, agents, managers, and supervisors, and arguably could include contractors, human resources representatives, and others. This applies to Texas employers, regardless of size.

4. EXPANSION OF THE STATUTE OF LIMITATIONS

Previously, to sue for sexual harassment under Chapter 21, plaintiffs had to exhaust their administrative remedies by filing a charge of discrimination with the Texas Workforce Commission within 180 days; while to sue under Title VII, a plaintiff had 300 days to file a charge of discrimination with the EEOC or local deferral agency. The amendment to Chapter 21 gives a plaintiff 300 days to file a charge of sexual harassment with the Texas Workforce Commission. Texas Labor Code, Section 21.201(g). Since this additional time applies only to sexual harassment claims, plaintiff attorneys must be cautious not to miss the 180-day deadline if they wish to bring additional types of discrimination claims under state law.

5. SEXUAL HARASSMENT DEFINED

The term “Sexual Harassment” has never been defined in federal (Title VII) or Texas law, but rather has developed over the decades by caselaw. The amendments define the term as follows:

- (2) *“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*
- (A) Submission to the advance, request, or conduct is made a term or condition of an individual’s employment, either explicitly or implicitly;*
 - (B) 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; or*
 - (C) the advance, request, or conduct has the purpose or effect of unreasonably interfering with an individual’s work performance; or*
 - (D) the advance, request, or conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.*

Texas Labor Code Section 21.141(2).

a. Quid Pro Quo Sexual Harassment

Texas Labor Code 21.14 (2)(A) and (B) reflect the traditional concepts of “Quid Pro Quo” harassment. However, unlike

b. Hostile Environment Sexual Harassment

Texas Labor Code 21.14 (2)(C) and (D) is similar to the traditional concepts of “Hostile Environment” harassment. However, there are differences that may prove significant depending upon future court interpretation. For instance, the amendments do not expressly incorporate the court created precedent that hostile environment harassment must be either “severe or pervasive” to be actionable. This will be an issue for the courts to address going forward.

Even more significant is the amended definition’s insertion of the term “purpose.” This may prove quite significant as discussed below. This may result in an argument that a cause of action exists for hostile environment harassment under Texas Law, even if the harassment has no effect, as long as that was the purpose of the conduct.

6. NEW STANDARD FOR EMPLOYER’S RESPONSE

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