PERSPECTIVES

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

New California Laws Addressing Workplace Sexual Harassment In the Wake of the #MeToo Movement

Two new California laws demonstrate the widespread impact of the #MeToo Movement and the focus on putting a stop to sexual harassment in the workplace.

SB 820: Prohibiting "Hush Money" Settlements

Many articles and investigative reports have been published about prominent public figures, politicians and other famous (or infamous) persons with an apparent history of engaging in serial sexual harassment but who were able to hide their past by making sizable settlement payments to their victims. And, through clever lawyering, those harassers conditioned their settlements on powerful confidentiality clauses in settlement agreements. In the process, these perpetrators continued their actions unchecked in some instances for many years.

These types of settlements are commonly referred to as "hush money" payments.

On September 30, 2018, California Governor Jerry Brown approved a bill, SB 820, that prohibits a provision in settlement agreements that prevents the disclosure of information pertaining to sexual harassment and sex discrimination. **The law became effective on January 1, 2019 and has been added as Section 1001 to the California Code of Civil Procedure.** (See Governor Brown Signs Leyva Bill Banning Secret Settlements in Sexual Assault and Harassment Cases, Sept. 30, 2018, https://sd20.senate.ca.gov/news/2018-09-30-governor-brown-signs-leyva-bill-banning-secret-settlements-sexual-assault-and.)

This law significantly impacts California employers who face sexual harassment, discrimination, and retaliation claims that may be without merit. In the past, many of those types of claims may have warranted nuisance-value settlements to avoid the cost, disruption, and uncertainty of litigation. An employer's concern about setting a bad precedent for future claims may now militate toward the need to fight all claims on the merits.

The law does, however, still allow the parties to agree to keep confidential the disclosure of the amount paid to settle the claim, at the request of either party. Since the amount of hush-money paid is often the biggest outward indicator of the perceived merits of the underlying claims made, the overall impact of this law on the percentages of settlements may be limited.

A violation of SB 820 will make any confidentiality provisions void as a matter of public policy and may support an award of civil damages against the offending employer.

This legislation is high stakes and important for all California employers to consider before settling these types of disputes.

SB 1343: Mandatory Workplace Harassment Training for California Employers with Five or More

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Denis Kenny

Employees Working in California

Since 2005, California law has required employers having fifty (50) or more employees to provide at least two hours of sexual harassment training to supervisors every two years.

SB 1343, signed by Governor Brown on October 16, 2018, changes this by requiring employers with **five** or more employees to provide (1) **non-supervisory** employees with at least **one hour** of the training every two years and (2) supervisory employees with at least two hours of such training every two years. **The training must be completed by January 1, 2020** and provided again every two years thereafter.

The new law requires California's Department of Fair Employment and Housing ("**DFEH**") to develop or obtain two online training courses—a two-hour online course for supervisory employees and a one-hour course for non-supervisory employees—and to make them available on the DFEH website. The law specifies that the online training courses shall contain an interactive feature that requires the viewer to respond periodically to questions in order to continue. In addition, the DFEH is required to make the online training videos available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean and any other language spoken by a "substantial number of non-English speaking people."

SB 1343, otherwise, does not change the training content requirements under existing law. Specifically, existing law requires the training and education to include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education must (1) include practical examples aimed at instructing employees in the prevention of harassment, discrimination, and retaliation, and (2) be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. The latter requirement typically equates to the training being provided by experienced employment law attorneys or licensed investigators.

Scherer Smith & Kenny LLP remains available to guide you through these and other nuances in California's dynamic and ever-changing employment law arena. For additional information, please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com).

- Written by Denis Kenny

DC Circuit Court Upholds NLRB's 2015 Browning-Ferris "Indirect" Control Joint Employer Test and Signals Intent to Limit NLRB's Pending Joint Employer "Rulemaking" Process

On December 28, 2018, the United States Circuit Court of Appeals for the District of Columbia (the "DC Circuit") issued its long-awaited opinion concerning the appeal of the National Labor Relation Board's 2015 ruling on the "joint employer" test. (See, https://www.cadc.uscourts.gov/internet/opinions.nsf/A1D3A01EDFAB1B8A852583710055207A/$file/16-1028-1766137.pdf) "Joint employment" in essence occurs when two or more individuals or companies are involved with a worker and both may meet the statutory or common law destitution of an employer for the same worker.

The court essentially upheld the Board's 2015 decision broadly defining the joint employer test as including both an (1) employer's "reserved" right to control and (2) its exercise of "indirect" control over employees' terms and conditions of employment (for example, through a third-party staffing company or other intermediary) as components of a joint employer relationship between one or more hiring entities. Consideration of "indirect" control differs from the proposed standard included in the Board's pending rulemaking process for the joint employer definition. In explaining its rationale, the Court noted: "The Board's conclusion that it need not avert its eyes from indicia of indirect control—including control that is filtered through an intermediary—is consonant with established common law. And that is the only question before this court."

In plain English, this means that the Court "affirmed" the Board's 2015 decision but "remanded" or sent the case back to the Board for further consideration of the appropriate components and features of "indirect" control under the joint employer test.

The implications of this ruling remain unclear for several reasons. Notably, the Board's proposed joint employer rulemaking remains open for public comment until January 28, 2019 (https://www.nlrb.gov/news-outreach/news-story/nlrb-further-extends-time-submitting-comments-

I am a native Californian and a native San Franciscan at that. It seems to me that a lot of people who live in California complain about it. High taxes, poor public schools, potholed highways, horrible traffic. The list goes on and on.

And if you talk to most people from out of state, they will tell you, California is a beautiful place to visit but how could anyone live there!? Common questions from out-of-staters include:

How can you possibly afford to live there?

What about all those earthquakes?

When I hear about or read these types of things about California, I usually just nod my head in affirmation. Because, let's face it, there is truth in all that is negative about our state. But then I usually subconsciously reflect on these thoughts and just about every time I end with the same perspective: I would not want to live anywhere else than where I am right now. As I sit here writing

proposed-joint-employer-1). So, should the Board issue a version of the joint employer doctrine as a result of the rulemaking process which materially differs from the standards articulated in this DC Circuit decision, further litigation will almost certainly occur. We will continue to follow this matter as it unfolds.

Scherer Smith & Kenny LLP remains available to guide you through these and other nuances in California's dynamic and ever-changing employment law arena. For additional information, please contact Denis Kenny at (dsk@sfcounsel.com), Ryan Stahl at (rws@sfcounsel.com), or John Lough, Jr. at (jbl@sfcounsel.com).

- Written by Denis Kenny

MORE ELECTRIC VEHICLES COMING TO A COMMON INTEREST DEVELOPMENT NEAR YOU

1. **New Year, New EV Law**

Lawmakers recently passed Senate Bill 1016, which is a clear statement by the California Legislature that it wants more electric vehicles ("EVs") on the road. The new law went into effect on January 1, 2019, prohibiting common interest developments ("CIDs") – which include condo projects, planned developments, stock co-ops, and community apartment projects – from effectively prohibiting or "unreasonably restricting" the installation or use of electric meters used in connection with EV charging stations ("EV Meters").

You may be asking yourself, "*I know about the EV charging station laws. What's so special about this new law?*"

The answer is that the legislation's author believed that the existing law, found at California Civil Code § 4745 ("Section 4745"), while covering the installation and operation of EV charging stations, did not specifically extend its protections to EV Meters, which are a necessary additional piece of equipment for a efficiently-functioning EV charging station. In addition, the law's proponents believed existing insurance requirements, described below, were onerous and should be abolished due to the lack of available options in the insurance market, which was an obstacle to the installation of EV charging stations.

Thus, this new law amends Section 4745 and adds a new Civil Code section by specifically extending the protections concerning EV charging stations to EV Meters and creating new benefits for owners – and additional oversight obligations for CID boards.

1. **Existing Law**

Existing law voids any part of a CID's governing document that prohibits or unreasonably restricts the installation or use of an EV charging station within an owner's unit or designated parking space, which might either be in the owner's exclusive use common area or an assigned parking space; provided, that CIDs can enact "reasonable restrictions" on EV charging stations that do not greatly increase the cost of the station or decrease its efficiency.

For CIDs that have a process for approval of architectural modification, existing law states that applications for installing an EV charging station must be processed substantially in the same way. It also provides that an application to install an EV charging station that is not denied in writing within 60 days is deemed approved, unless there was a reasonable request for additional information.

Section 4745, as it existed before the start of 2019, placed the following financial obligations on owners of EV charging stations:

- costs of electricity used by their EV charging station;
- costs for damage caused by the installation, lack of maintenance and repair, etc. of the EV charging station;
- ongoing costs of maintaining and repairing the EV charging station itself until it is removed; and
- costs of maintaining liability coverage of at least one million dollars ($1,000,000).

CIDs have the following potential financial obligations:

- Any CID that intentionally violated Section 4745 were potentially liable to the applicant for costs incurred by the applicant by such violation and payment to the applicant of up to $1,000 in penalties.
- Also, if the applicant pursued legal action to enforce Section 4745, the CID potentially would be

this, I am waiting for the start of my son's high school rugby game at California Maritime Academy. The car shows a cool, and breezy 46 degrees, but the sun is out and the high is forecast to be in the 60's. Not only that, but I am looking at a view of the Bay.

Last weekend I took the family on a quick trip to the mountains for a great day of skiing all in a span of 24 hours.

There are few, if any, places in the United States, where you can live so close to so many diverse geographic locations, climates and opportunities for recreational activities.

Of course, weather, geography and topography are hardly what makes a place somewhere you want to live and raise a family. But I can't help but look at my weather app from time to time for Shakopee, Minnesota, where the youngest of my three brothers lives: current temperature at Noon is -2 with forecast high temperatures

liable for the applicant's legal fees.

- **How It Is Now**

In order to remove what the new law's author saw as an obstacle to more EVs garaged in CID lots, SB 1016 made some changes to Section 4745 and added a new Civil Code section – Civil Code Section 4745.1 ("Section 4745.1") – which specifically extended Section 4745's protections to EV Meters.

The amendment to Section 4745 with potentially the biggest impact is the removal of the heavy insurance requirements, including the required million dollars of insurance coverage. Instead, EV charging station owners are merely required to provide their HOA with proof of insurance covering the charging station. Section 4745 was also amended to clarify that EV charging station owners would be responsible for the costs associated with the installation of their charging station, as opposed to just the electricity used by the charging station. The remaining financial obligations found in Section 4745, as outlined above, remain intact.

New Section 4745.1 mirrors many of the charging station protections and is intended to prevent CIDs from distinguishing between the EV charging stations, which must in most cases be permitted, and the accompanying EV Meter, which, while impliedly covered within Section 4745, was not specifically covered.

Thus, new Section 4745.1 makes any provision in a CID's governing document that effectively prohibits or unreasonably restricts the installation or use of EV Meters unenforceable, but permits CIDs to make reasonable restrictions on the installation of the EV Meters based on space, aesthetics, structural integrity, and equal access for all homeowners.

In sum, your CID board must generally attempt to find a reasonable way to accommodate the installation request.

In addition, an owner who desires to place an EV Meter in common area or exclusive use common area must coordinate and pay for the utility company and a licensed contractor to install needed wiring. The other financial obligations of the owner recited above have been extended to costs associated with the EV Meter – of course, with the noted exception of the insurance coverage minimum.

1. **What Does This Mean for Associations and Boards?**

This new law means that boards should take a look at their governing documents and ask themselves a few questions:

- Do our governing documents have rules that would apply to EV charging stations or EV Meters?
- Do any of our rules prohibit or unreasonably restrict EV charging stations or EV Meters?
- Do any of our restrictions on EV charging stations significantly increase the cost of a station or significantly decrease its use?
- Are any of our restrictions on EV Meters based upon space, aesthetics, structural integrity, and equal access to those services for all homeowners?
- Do our governing documents provide a process for review and approval for architectural modification, alteration, etc.?
- Does our process require that an application be reviewed and approved/denied, in writing, within 60 days from the receipt of the application?

1. **Conclusion**

As more EVs hit the road, they will need to be parked – and charged – somewhere. If your board receives an application from an owner asking to install or use an EV charging station or a dedicated electric meter, check with your association's attorney to confirm that your process is in compliance.

If you have further questions regarding this case or what you can do to ensure you are properly operating your LLC or partnership, please contact Louis J. Sarmiento, Jr., Esq. (ljs@sfcounsel.com) or William M. Scherer, Esq. (wms@sfcounsel.com).

- Written by Bill Scherer

for the next three days at -1, -8 and -11.

There are many great places in the world to visit. But there is no place like home and, for me, that is California.

- Written by Denis Kenny

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