

New Texas Law Expands Liability for Sexual Harassment Claims

by Gabrielle Wirth

Beginning September 1, 2021, claims for sexual harassment can be made against a broader group of employers in Texas. The Texas Legislature passed two significant amendments, SB 45 and HB 21, to the Texas Labor Code, which were signed into law by Governor Abbott. The changes will go into effect on September 1, 2021.

Currently, under Texas law, employees at companies with 14 or fewer employees cannot file a sexual harassment claim with the Texas Workforce Commission (“TWC”). Under the new law, employers with as few as one employee can be sued. Further, the current statute of limitations for sexual harassment claims requires an employee to file within 180 days of the harassment. The new statute of limitations will climb from 180 days to 300 days. The new amendments will also now allow employees to file sexual harassment lawsuits against supervisors, coworkers, and other individuals can also be held personally liable for sexual harassment.

These changes have practical implications for employers:

- While employees have always had 300 days to file sexual harassment claims with the Equal Employment Opportunity Commission under *federal* law, this new change allows employees to file those claims with the TWC for up to 300 days. Employers can now be on the hook for state law claims for longer periods of time. The extension of the statute of limitation, however, only applies to alleged harassment that took place on or after September 1, 2021.
- The most significant change is that all employers that have at least *one employee* are now subject to sexual harassment lawsuits. This amendment will substantially increase the number of employers that can be sued for sexual harassment in Texas.
- Finally, the exposure to individual liability has expanded. Prior to this new amendment, employees could sue only their employer for sexual harassment. An individual supervisor could not be sued in his/her individual capacity for sexual harassment; although, claims for assault could be brought against the alleged harasser based on the conduct alleged to support a sexual harassment claim against the employer. That is no longer the case. Starting September 1, 2021, employees can sue their employer *and* anyone who “acts directly in the interests of an employer in relation to an employee.” Presumably, this includes managers, supervisors, and

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coworkers because they often act for their employers. It remains unclear whether non-employees (independent contractors, vendors, or volunteers) can be held personally liable if they are acting in the interest of the employer, although the law appears to cover those individuals as well.

The new law only applies to claims of sexual harassment, the old rules apply to all other forms of discrimination, harassment and retaliation.

Do not fear – the Texas amendments are not all bad news for employers. The new amendments apply only if the employer (or agents) knew or should have known the conduct constituting harassment was occurring *and* failed to take immediate and appropriate corrective action. A defense to these claims currently exists with similar requirements; however, the new law places the burden on the employee to prove those allegations, which is helpful to employers. However, the Legislature chose to require “immediate” and appropriate corrective action, arguably a higher standard than “prompt” action as required under current law.

It is unclear how Texas courts will interpret the new amendments, but there are changes that Texas employers should institute in light of the amendments. Employers of all sizes, should create and disseminate an employee handbook (or a specific policy) detailing what constitutes harassment, a prohibition on harassment, and the steps an employee should take if they experience sexual harassment in the workplace. Similarly, if such policies are in place, employers should conduct a substantive review of current policies to ensure compliance with the new amendments and current state of the law on harassment and to ensure an adequate reporting system exists. Finally, employers should conduct periodic (at least annually) trainings for employees and supervisors on sexual harassment and reporting.

We have significant experience reviewing handbooks and policies and ensuring they are in compliance with state specific laws, as well as conducting trainings for employees and supervisors. We are happy to help.