

California's New Candor: Disclosing Rehiring Ineligibility for Employees Terminated for Harassment

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Your company did the right thing: One of your employees reported a violation of your company's sexual harassment policy, HR did an investigation and found the report credible, and the alleged harasser's employment was terminated. The employee is gone, but what do you do if the terminated employee's potential new employer calls for a reference check and asks if the employee is eligible for rehire? You do not want to inflict a serial harasser on another company's employees, but what can you say without risking potential exposure for claims of defamation?

A new California law, recently signed by the governor and effective January 1, 2019 ([AB 2770](#)), gives employers some additional leeway in speaking truthfully about sexual harassment investigations, but the topic must still be approached with great caution. The law was enacted in response to the #MeToo movement, as well as lawsuits by alleged harassers against companies, victims, and witnesses, usually in an attempt to silence them. The new law states that employees who report sexual harassment to their employer are not liable for any resulting injury to the alleged harasser's reputation, so long as the communication is made based on credible evidence and "without malice." Likewise, communications made between an employer and "interested persons" such as the complainant, witnesses, or investigatory bodies are immune from defamation claims, if made without malice. Finally, and most importantly, the law also protects former employers who indicate in response to inquiries from prospective employers that they would not rehire the former employee based on a determination that the former employee engaged in conduct that violated the employer's policy prohibiting sexual harassment, again so long as the statement is made without malice.

But what does it mean that the communications in each instance must be made "without malice" in order to be protected? A "malicious communication" as interpreted by the courts means one that is (1) either motivated by hatred or ill will, or (2) is made without reasonable grounds for believing that the matter asserted is true. This "without malice" condition is meant to strike a policy balance between encouraging people to truthfully report misbehavior and discourage serial harassers on the one hand, and on the other hand, not protecting false accusations made out of spite or in complete disregard for the truth in order to deliberately ruin someone's reputation, perhaps rendering them unemployable.

For victims and employers, the law is a step in the right direction, but employers should still be cautious in what they say to whom. An accusation of malice is easily made, and the possibility that it

may be alleged underscores the need for a prompt, thorough, and impartial investigation whenever a claim of harassment is made.

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National Law Review, Volume VIII, Number 194

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