

New California Law Extends Defamation Privilege to Communications Related to Sexual Harassment Claims and Investigations

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California Governor Jerry Brown recently signed into law [A.B. 2770](#), creating new protections for employers, witnesses, and complainants from defamation lawsuits related to making, assisting, or discussing good-faith sexual harassment claims and investigations. Effective January 1, 2019, the bill amends California Civil Code section 47, which designates certain communications as “privileged” for purposes of defending defamation claims. A “privileged” designation means a defendant accused of making a defamatory statement about a plaintiff may assert the privilege as a bar to liability.

The three new communication categories protected under the law as privileged are:

- **Current and former employers** – current and former employers that answer whether the decision to not rehire a current or former employee is based on the employer’s determination that the employee engaged in sexual harassment, so long as the statements are made without malice;
- **Complainants** – sexual harassment complaints (written or oral) that employees make without malice, and based upon credible evidence (Note: “credible evidence” is not defined in the statute); and
- **“Interested persons”/witnesses** – witnesses who respond, without malice, to an employer’s sexual harassment investigation questions.

Within the employer-employee relationship, this law is aimed at addressing the concern that employers with knowledge of workplace sexual harassment may not disclose that information in responding to reference checks for fear of being sued for defamation. It also seeks to strike a balance between encouraging individuals to report misconduct while protecting individuals from false accusations made with a complete disregard for the truth, hence the “without malice” condition. “Malice” is defined as a statement that is made with hatred or ill will, tending to show a willingness to injure the plaintiff, or a statement that is knowingly false or made with reckless disregard for its truth.

Though California's Anti-SLAPP statute has long served as a strong deterrent to many potential defamation claims, this law specifically privileges the above-described communications and will strengthen protections for good faith discussions about sexual harassment concerns.

Employers now have an additional defense against defamation claims, but should be cautious in relying on it in pre-litigation decision-making. Employers should make sure that representatives tasked with responding to employment inquiries are aware of the new privileges. Employers should also consider and discuss with their counsel the circumstances under which statements concerning sexual harassment concerns should be divulged to third parties.

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National Law Review, Volume VIII, Number 208

Source URL: <https://natlawreview.com/article/new-california-law-extends-defamation-privilege-to-communications-related-to-sexual>