

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 2143 (Mark Stone)
Version: March 2, 2020
Hearing Date: August 13, 2020
Fiscal: No
Urgency: No
TSG

SUBJECT

Settlement agreements: employment disputes

DIGEST

This bill allows an employer to include a no-rehire clause in a settlement agreement with a worker who filed an official complaint in good faith if, before the worker filed the complaint, the employer made and documented a good faith determination that the worker engaged in sexual harassment, sexual assault, or any criminal conduct.

EXECUTIVE SUMMARY

When resolving workplace legal disputes with their employees, employers often include no-rehire clauses in the settlement agreements. Such clauses ban the worker from ever seeking work with that employer again. While no-rehire provisions assure an employer that they will not have further disputes with the same employee, when no-rehire provisions are used against workers who have raised workplace concerns, they can be highly problematic: they punish the worker for having made a complaint. This can discourage workers from raising legitimate workplace concerns such as, for example, incidents of sexual harassment. Last year, California enacted AB 749 (Stone, Ch. 808, Stats. 2019) to address the problems associated with no-rehire provisions. AB 749 prohibited the use of no-rehire clauses in settlement agreements resolving disputes in which the worker had filed an official complaint against the employer. However, AB 749 contained an exception for situations in which the employer makes a good faith determination that the complaining worker had themselves engaged in sexual harassment or assault. This bill refines and expands upon that exception. It would also allow employers to use no-rehire clauses against any employee when the employer determines the employee engaged in criminal conduct. At the same time, in order for the employer to use a no-rehire clause, the bill requires the employer to have made and documented its determination that the employee engaged in sexual harassment, sexual assault, or any other criminal conduct before the employee files a complaint.

The bill is author-sponsored. Support comes from business associations who appreciate having additional leeway to utilize no-rehire clauses. There is no opposition on file.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Identifies certain types of contracts as unlawful or contrary to public policy and therefore void and unenforceable. (Civ. Code §§ 1667-1670.10.)
- 2) Provides that every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void, except as provided by statute. (Bus. & Prof. Code § 16600.)
- 3) Prohibits and renders void any no-rehire provision in settlement agreements executed after January 1, 2020 that resolve an employment dispute in which the worker filed an official complaint, except where the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault. (Code of Civ. Proc. § 1002.5.)

This bill:

- 1) Allows employers to include a no-rehire provision in a settlement agreement with a worker who filed an official complaint in good faith if, before the worker filed the complaint, the employer made and documented a good faith determination that the worker engaged in sexual harassment, sexual assault, or any criminal conduct.

COMMENTS

1. Impetus for the bill

According to the author, when Governor Newsom signed AB 749 last fall, he asked the author to introduce this bill as a follow up. It makes logical policy sense to do so. AB 749, now codified as Code of Civil Procedure § 1002.5, banned the use of no-rehire clauses in settlement agreements resolving an employment dispute in which the worker made an official complaint. The bill contained an exception, however: employers could use a no-rehire clause in a settlement with a worker who had complained if the employer determined in good faith that the worker committed sexual harassment or assault.

The inclusion of this exception was arguably unnecessary. As the Assembly Judiciary analysis of this bill points out, AB 749's ban on the use of no-rehire clauses never prevented an employer from refusing to rehire an employee for lawful reasons, and engaging in sexual harassment or assault would certainly qualify as a lawful reason. Since the exception was ultimately included in AB 749, however, the present state of the law is a bit awkward: an employer can use a no-rehire clause when it has determined that an employee engaged in sexual harassment or sexual assault, but cannot use a no-

rehire clause when it has determined that the employee did something criminal, such as embezzling, for example. This bill addresses that incongruity.

2. Additional provisions to help ensure the parties' good faith

During legislative deliberations over AB 749, advocates for employees and employers alike expressed concern that the bill's provisions could be exploited by unscrupulous actors. Worker advocates worried that abusive employers would simply conjure a sexual harassment or sexual assault determination against an employee who made a complaint so as to easily evade the bill's intended effect. Employers worried that bad employees would submit unfounded complaints just to bring themselves within the bill's protections. AB 749 partially addressed these concerns. It required the employer to act in "good faith" when determining whether or not the employee had engaged in sexual harassment or sexual assault.

This bill goes further to ensure that its protections apply only to those parties acting in good faith. In regard to employees, the bill would now require workers' complaints to be made in good faith before they would be protected against having to sign a non-rehire clause. On the employers' side, the bill would add further preconditions before an employer could utilize a no-rehire clause. Whereas existing law only requires the employer to make a good faith determination that the employee engaged in inappropriate workplace behavior, this bill would also require that the employer reach and document that conclusion before the employee filed the complaint. These additional nuances should help guard against the possibility that unscrupulous employers or workers might attempt to game AB 749's legal protections.

3. Arguments in support of the bill

According to the author:

AB 749 expressly exempted settlements with employees who engaged in sexual harassment or sexual assault. In response to concerns raised by employers and the Governor's office, I agreed to consider other exemptions. In light of these considerations, AB 2143 now expands upon existing exemptions to include cases where the settling employee has engaged in criminal conduct, as long as the employer documented the misconduct before the employee filed the claim or complaint.

In support, a coalition of ten trade associations led by the California Chamber of Commerce writes:

Last year, [...] AB 749 limited an employer's ability to include a provision in a settlement agreement that prohibited the employee's

ability to seek future employment with the same employer, except with regard to employees who engaged in sexual harassment or sexual assault. We opposed AB 749 on the basis that there are additional reasons other than harassment or assault that justify an employer prohibiting future employment.

AB 2143 recognizes these additional reasons and allows an employer to include a prohibition to future employment for any employee the employer believes in good faith engaged in any criminal conduct. Although we still believe there are additional non-criminal reasons that justify an employer prohibiting reemployment of an individual, we are pleased to see the addition of criminal conduct.

SUPPORT

California Apartment Association
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Chamber of Commerce
California Restaurant Association
California State Association of Counties
North Orange County Chamber of Commerce
Official Police Garages of Los Angeles
Rancho Cordova Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Maria Valley Chamber of Commerce
Southwest California Legislative Council
Western Growers Association

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 749 (Mark Stone, Ch. 808, Stats. 2019) voided no-rehire provisions in settlement agreements that are executed on or after January 1, 2020 and that resolve employment disputes in which the worker filed an official complaint, except where the employer has made a good faith determination that the worker engaged in sexual harassment or sexual assault, as defined.

AB 3109 (Mark Stone, Ch. 949, Stats. 2018) ultimately prohibited settlements from including terms preventing the parties from testifying about the settled dispute in administrative, legislative, or judicial proceedings. An earlier version of AB 3109 would also have restricted the circumstances in which no-rehire clauses could be included in a settlement agreement.

PRIOR VOTES:

Assembly Floor (Ayes 75, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)
