

#MeToo year 2: Is your organization ready to roll with the changes?

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More than a decade ago, Tarana Burke coined the phrase “me too” as a way of supporting victims of sexual assault and abuse. The “MeToo” hashtag took off in 2017 when, on the heels of a New York Times article recounting decades of alleged sexual misconduct by Harvey Weinstein, actress Alyssa Milano sent a tweet that launched a national conversation: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”

Within days, #MeToo was trending on Facebook, Snapchat and Twitter, to name just a few. It was shared in over 12 million posts and tweeted close to a million times within 48 hours.¹

Over the next year, numerous allegations of sexual misconduct by high-profile men hit the news, creating significant consequences. Advertisers withdrew from “The O’Reilly Factor” amid sexual harassment complaints about Bill O’Reilly; Taylor Swift won a legal battle against a disc jockey who allegedly grabbed her without consent; well-known comedian and U.S. Sen. Al Franken resigned after allegations of inappropriate conduct; Matt Lauer was terminated following allegations that he sexually harassed subordinates; and Steve Wynn resigned from Wynn Resorts following a Wall Street Journal story recounting years of alleged misconduct.

Sexual misconduct allegations even reached the Supreme Court when, during the confirmation process, Brett Kavanaugh was accused of assaulting multiple women.

In addition to its cultural impact, the #MeToo movement has had a significant effect on the legal landscape. In 2018, an unprecedented volume of legislation relating to workplace sexual misconduct was proposed and enacted. This trend may be further bolstered by results of the 2018 midterms, when more women than ever were elected to office.

THE GOVERNMENT TAKES ACTION

Various federal and state statutes protect individuals from rape, assault and other predatory sexual acts. Since the reinvigoration of the #MeToo movement after the Weinstein allegations, both the federal government and state governments have acted to expand, or, at a minimum, require that companies review their sexual harassment and assault protections in the workplace.

THE REGULATOR

The Equal Employment Opportunity Commission enforces federal laws that protect workers from harassment and discrimination based on sex. In October, the commission reported a significant uptick in allegations of workplace sexual harassment.

It noted that, in fiscal year 2018, the number of lawsuits that the EEOC filed challenging sexual harassment increased by more than 50 percent over fiscal year 2017. The number of charges filed with the EEOC also rose by 12 percent from 2017, and twice as many people visited its sexual harassment information page.

As an apparent result of the increased national focus on workplace sexual misconduct, the EEOC conducted additional outreach efforts, reconvened the Select Task Force on the Study of Harassment in the Workplace and launched a new Respectful Workplaces training in October 2017.

It also shared guidance with other government entities, and, for the first time in a decade, convened 2,000 EEOC staff and leaders to develop a new and coordinated approach to discrimination oversight.

THE STATE LEGISLATURES

In the past year, state legislatures introduced over 100 bills to combat sexual harassment and assault in the workplace. The legislative developments detailed below occurred after Milano’s October 2017 tweet and center around five key areas.

First, some states have increased the population of protected individuals by either expanding the definition of “employee” or by lowering the number of employees required to trigger an organization’s protection obligations.

Second, a number of states have imposed new sexual harassment prevention training requirements and now require more visible and uniform anti-harassment policies.

Third, some states now ban confidentiality provisions or nondisclosure agreements relating to workplace misconduct claims, while others states now require affirmative misconduct reporting to government agencies.



Fourth, some states now prohibit binding arbitration provisions. And fifth, several states have expanded the statutes of limitations for bringing either an individual or whistleblower claim relating to workplace sexual misconduct.

EXPANDING THE UNIVERSE OF THOSE WHO CAN SAY '#METOO'

In addition to expanding the protections relating to workplace sexual harassment and misconduct, several states have widened the population covered by such protections.

For example, whereas many existing laws apply only to employees, New York now protects contractors, subcontractors, vendors, consultants and individuals providing other contract-based services from workplace sexual harassment.²

Vermont now affords protections to anyone performing work or services, including independent contractors, volunteers and interns.³ California expanded its definition of "employer" to include anyone who employs even one individual under a contract.⁴

Pennsylvania proposed similar legislation that would extend sexual harassment protections to "one employee and ... to independent contractors, interns and full-time nannies, housekeepers and other domestic workers."⁵ Delaware likewise expanded its definition of "employee" to include state employees, unpaid interns, applicants, joint employees and apprentices.⁶

HARASSMENT TRAINING AND WRITTEN POLICIES

State legislatures have also enacted more affirmative requirements for employers to prevent and respond to workplace sexual misconduct, including policy requirements and mandatory anti-sexual harassment training.

New York City and state now require annual training by all employers, regardless of the size of the organization, and the state is developing a model sexual harassment prevention program for employers to use. The required training must address "bystander intervention" as well as the responsibilities of supervisors and managers to address harassment and retaliation.

All employers in the state must also post anti-sexual harassment policies in highly visible locations. Current employees must complete the training by Oct. 9, 2019, and new employees must be trained "as soon as possible," which the New York City law provides must be within 90 days of assuming their role.⁷

Delaware now requires "regular" interactive sexual harassment prevention training for supervisors and employers that specifically addresses preventing and addressing harassment and retaliation.

A new Illinois law requires that all professions with continuing education requirements include at least one hour of sexual harassment prevention training.⁸

In New Jersey, all state agency employees must now take a certified class on sexual harassment prevention within six months of starting employment and a refresher course every two years.⁹

Massachusetts now requires employers with six or more employees to maintain written sexual harassment policies. The policy must provide for notice to employees if sexual harassment occurs and explicit language that retaliation for reporting sexual harassment is unlawful.¹⁰

California previously required that employers with 50 or more employees provide all supervisors with sexual harassment prevention training, but recently amended the law to require a minimum two-hour interactive training for any entity with five employees for all personnel. Employers must complete this training within six months of hire and must participate in training every two years.¹¹

Several related bills are currently pending in other state legislatures. In New Jersey, proposed Assembly Bill 3948 would make it illegal for an employer not to implement policies or take "reasonable" action to prevent sexual harassment. The specific requirements of this bill have yet to be articulated.

On Sept. 27, 2018, New Jersey also replaced a 9-year-old anti-discrimination policy with a more robust policy that specifically provides that race, gender, creed, nationality and religion are protected characteristics.

Pennsylvania's House Bill 2282 would require the state to develop an anti-harassment curriculum that employers could use to design trainings. Employers would be required to provide interactive training to current employees within 60 days of when the bill takes effect and to new employees within 30 days of hiring. A refresher course would also be required for all employees every two years.

The bill seeks to impose a civil penalty for failure to comply, and all employees would have an affirmative obligation to keep a record of trainings they attended for three years.

CONFIDENTIALITY PROVISIONS AND AFFIRMATIVE REPORTING

Several states have either recently restricted or proposed legislation that restricts nondisclosure agreements and confidentiality provisions in sexual assault and harassment settlements.

Maryland has even passed affirmative disclosure requirements relating to sexual harassment allegations, and Vermont now gives the state attorney general and

state human rights commission the right to examine sexual harassment complaint records of state employers.

In the past year:

- California passed the Stand Together Against Non-Disclosures Act, which voids employment agreements or settlement agreements relating to sexual assault, harassment, discrimination or retaliation cases with confidentiality provisions unless the complainant requests nondisclosure. Notably, however, confidentiality cannot be provided even upon a claimant's request if the employer is a federal agency or the accused is a public official.
- Maryland banned employers from including NDAs covering sexual harassment in employee contracts or policies and protects employees against retaliation for refusing to consent to such provisions or policies. The state will also require employers with at least 50 employees to affirmatively disclose data about sexual harassment allegations and settlements to the Maryland Commission on Civil Rights in July 2020 and July 2022, including information about employees facing multiple accusations and whether confidentiality provisions were included in settlements. Employers must also report whether they took disciplinary action against the accused employee. The commission plans to publicize the aggregate information.
- New Jersey introduced a bill that seeks to prohibit an employer from requiring that discrimination, retaliation or harassment claims remain confidential in any employment contract. Massachusetts and Pennsylvania have also proposed legislation that would bar NDAs. All three bills are currently pending.
- New York passed a law providing that an NDA can be used in a sexual harassment settlement only if it was the complainant's preference. Even then, the complainant must be given 21 days to consider whether to include an NDA provision and can withdraw consent to include such a provision up to seven days after the agreement is executed. An agreement with an NDA provision is not enforceable until that seven-day period has passed. Connecticut also passed new legislation that prohibits NDAs in sexual misconduct settlements involving state employees.
- Tennessee made nondisclosure agreements connected to claims of workplace sexual misconduct unenforceable.
- Vermont prohibits employment agreements or settlements that restrict disclosing sexual harassment. The state also requires settlement agreements to state that an employee may report harassment or cooperate

with an investigation, and that parties agree to provide notice to the state attorney general and human rights commission and provide them with the authority to audit for sexual harassment."¹² New legislation permits the attorney general and commission to examine an organization's sexual harassment complaints, resolutions, policies, procedures and training materials with 48-hour notice. Additionally, any employee who files a sexual harassment claim must notify the attorney general and human rights commission within 14 days of filing.

- Washington state made nondisclosure agreements connected to claims of workplace sexual misconduct unenforceable.

LEGISLATIVE DEVELOPMENTS RELATING TO FORUM SELECTION

Many states have enacted legislation designed to preserve claimants' rights to pursue relief in their chosen forum. For example, Maryland passed a law deeming mandatory arbitration agreements for sex discrimination and retaliation claims null and void.¹³ The law also prohibits retaliation against employees who refuse to enter into an arbitration agreement.

As part of its fiscal budget for 2019, New York passed a similar law.¹⁴ Vermont does not allow agreements that waive employee rights or courses of action after an employee makes a sexual harassment claim.¹⁵

New Jersey passed the Ending Forced Arbitration of Sexual Harassment Act of 2017, which prohibits mandatory arbitration relating to sexual harassment allegations. Massachusetts has a similar bill pending, and proposed legislation in Pennsylvania would include the right to a jury trial in harassment proceedings.¹⁶

However, the Federal Arbitration Act presents serious concerns about whether these laws are enforceable. The FAA preempts state law that outright prohibits the arbitration of a particular type of claim.¹⁷ Accordingly, it appears that the Maryland and New York laws may have limited applicability. Indeed, both laws indicate that their arbitration ban does not apply where enforcement is inconsistent with or prohibited by federal law.

In September then-California Gov. Jerry Brown vetoed a similar bill, AB 3080, that would have banned forced arbitration agreements, stating that the bill "plainly violates federal law."¹⁸

However, while laws that prevent arbitration clauses may be preempted by the FAA, those preventing retaliation for refusing to enter into arbitration agreements may prove to be enforceable.

Even if state legislation banning forced arbitration proves unenforceable, public pressure may nonetheless compel such a ban. For instance, in November thousands of Google employees staged a global walkout, demanding the company discontinue the use of forced arbitration in cases of harassment and discrimination.

Google responded by making forced arbitration optional for individual sexual harassment claims, but employees are making additional demands and using social media to press their concerns.

LAWS PROVIDING MORE TIME TO BRING CLAIMS

Over the past year, there has been significant discussion and debate relating to the frequency of unreported instances of alleged sexual harassment and abuse as well as substantial discussion around the issue of accusers coming forward years after the alleged events took place.

According to the EEOC, “Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33 percent to 75 percent); deny or downplay the gravity of the situation (54 percent to 73 percent); or attempt to ignore, forget or endure the behavior (44 percent to 70 percent).”¹⁹ As a result, a number of states are revisiting statutes of limitation that bar legal claims after relatively short periods of time.

The EEOC requires harassment claims to be reported within 180 days of the incident, which is extended to 300 days if a state or local agency has a law that prohibits discrimination on the same basis. Michigan recently extended its sexual assault statute of limitations for civil cases from three years to 10 years after the offense. New York City extended its limitations period from one year to three years.

On the other hand, in California, Brown last year vetoed a bill to extend the limitations period for filing a harassment or discrimination complaint from one year to three years. California did, however, extend the limitations period for recovering damages for sexual assault to the later of 10 years from the last assault incident or three years from when the plaintiff should have reasonably discovered the harm resulting from assault as opposed to when an assault took place.

Pennsylvania proposed legislation in April 2018 that would extend the amount of time for victims or whistleblowers to file claims from 180 days to two years. The bill did not pass.

The time period for filing a claim is an area to watch — and likely one that will garner more attention as states look to each other for benchmarking.

ACTION IN CONGRESS

While most significant legislative developments in the wake of #MeToo have taken place at the state level, there has been

some federal movement as well. Notably, the 2017 Tax Cuts & Jobs Act was signed into law Dec. 22, 2017.

The law added a financial incentive for organizations to avoid seeking NDAs or confidentiality provisions when settling sexual misconduct claims. Section 162(q) of the act forbids tax deductions for sexual harassment settlements or related attorney fees if a nondisclosure or confidentiality provision is in place.

In December 2017, Democratic U.S. Rep. Carolyn Maloney of New York introduced the Ending Secrecy About Workplace Harassment Act, which would require greater corporate transparency with respect to discrimination claims. The act proposes annual employer reporting of verbal and physical sex discrimination settlements in their annual EEO-1 form to the EEOC.

It would also require the EEOC to annually report to Congress on all data collected and the resulting enforcement actions. The Government Accountability Office would then take this report and prepare a study on improving transparency about sexual harassment in the workplace.

Also in December 2017, U.S. Sen. Kirsten Gillibrand, also a New York Democrat, introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017, which aimed to ban mandatory arbitration agreements for settling sexual harassment and discrimination claims. Gillibrand’s bill could have a significant impact on the preemption analysis of state laws discussed previously, though outcomes would ultimately depend on the language of the bill and how state laws are applied. Under Republican leadership, both bills died and have not yet been reintroduced.

On Nov. 6, 2018, America elected more women to Congress than ever before. Two hundred and fifty-five women ran for national office, and 3,784 women were on the ballots across the country. In national races, Democratic women won nearly half of their races and Republican women won nearly one fourth. One hundred and two women are now serving in the U.S. House of Representatives, 13 out of 23 female candidates won Senate seats and nine women became governors.

OTHER STEPS TO PREVENT, RESPOND TO WORKPLACE SEXUAL MISCONDUCT

In addition to complying with new legal requirements relating to workplace sexual misconduct, employers should be thinking more broadly about the culture of their organization and whether they are prepared to prevent and respond to sexually inappropriate behavior in the workplace as “complacency is an organization’s worst enemy when crisis looms.”²⁰

In starting conversations about how to combat harassment and sexual assault in the workplace, whether before misconduct has occurred or after a potential issue is exposed,

organizations should bear in mind the following guidance from the EEOC.

First, change starts at the top. Executives should consider completing an internal wellness check. This may include reviewing your organization's sexual harassment written policies, reporting structure procedures and training materials to ensure robust policies and processes to create an environment where employees feel comfortable reporting sexually inappropriate conduct.

Organizations also should revisit prior harassment allegations and review prior files, ethics hotline reports, settlements, and if applicable, exit interviews or employee grievances. This review can provide an opportunity to address conduct that may not have been adequately addressed before, either with the individuals involved or to influence the broader corporate culture. A look back will also allow your organization to prepare to respond more thoughtfully to future allegations of sexual misconduct before crisis hits. Organizations can thoughtfully consider important process points such as the objectivity and independence of the investigator, the approach to attorney-client privilege, and the use of trauma-sensitive investigation techniques.

Second, with a renewed focus on prevention and training, organizations may want to rethink how they deliver sexual harassment training. Has it become a "check the box" exercise, or does it provoke interactive discussion that drives employees to think about behavior above and beyond the minimum standard of conduct set forth by law? Is leadership participating and reinforcing the messages the company wants to send and the values it stands by?

Third, organizations should recognize that a culture that tolerates sexually inappropriate conduct will not be cured solely by implementing policies and conducting training. Top leadership and all levels of management must be held accountable for setting the standard for workplace conduct and responding appropriately when personnel deviate from those standards.

THE ROAD AHEAD

While the passage of significant federal legislation seems unlikely while Republicans continue to control the Senate and White House, we expect to see more bills and thought leadership in this space from the House of Representatives.

This may have a broader impact on the national conversation and response from the states. We expect blue and blue-leaning states to continue to raise the bar for employers to address and prevent sexual misconduct in the workplace.

With all that has changed in the regulatory, legal and corporate landscape in the past year, it is important for employers to stay apprised of federal, state and municipal requirements relating to workplace sexual misconduct.

More importantly, organizations must engage in self-reflection, and, rather than focus on meeting the minimum requirements of legal compliance, strive to establish a workplace environment where employees are treated with respect at all levels.

NOTES

¹ More than 12M "Me Too" Facebook posts, comments, reactions in 24 hours, CBS NEWS (Oct. 17, 2017, 6:26 PM), <https://cbsn.ws/2ypyCET>.

² S.B. 7507C, § 296-d, Subpart F, 2017-2018 Leg. Sess. (N.Y. 2018); New York, N.Y., Stop Sexual Harassment In NYC Act, Int. No. 657-A. (2018).

³ Vermont Act 183, H.707, Sec. 1, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

⁴ S.B. 1300, Sec. 2 (j), 2017-2018 Reg. Sess. (Cal. 2018); Cal. Gov't Code § 12926(d).

⁵ Tom Wolf, Gov. Wolf, Legislative Democrats Announce Sexual Harassment and Discrimination Protections for Worker, Pennsylvania Commission on Crime and Delinquency, April 5, 2018, <https://bit.ly/2Sn8joM>

⁶ H. Substitute No. 1 to H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018).

⁷ S.B. 7507C § 296-d, Subpart E, 2017-2018 Leg. Sess. (N.Y. 2018); Yuki Noguchi & Shane McKeon, *Amid #MeToo, New York Employers Face Strict New Sexual Harassment Laws*, NPR, Oct. 9, 2018, 4:38 PM ET, <https://n.pr/2CaTFMK>; New York, N.Y., Stop Sexual Harassment In NYC Act, Int. 632-A, and 612-A (2018).

⁸ H.B. 4953, 100th Gen. Assemb., Reg. Sess. (Ill. 2018).

⁹ *New Jersey Sexual Harassment Training Requirements*, <https://bit.ly/2NwpTGe> (last visited Feb. 2, 2018).

¹⁰ *About Sexual Harassment in the Workplace*, Massachusetts Commission Against Discrimination, <https://bit.ly/2SqPBwx> (last visited Oct. 22, 2018).

¹¹ Employers: sexual harassment training: requirements, SB-1343, 2017-18 Sess. (Cal. Oct. 1, 2018), <https://bit.ly/2COgp5L>

¹² Vermont now requires that sexual harassment settlements explicitly state that claimants are not barred from "filing a complaint with any state or federal agency; participating in an investigation by a state or federal agency; testifying or complying with discovery requests in a proceeding related to a claim of sexual harassment; or engaging in concerted activities with other employees pursuant to state or federal labor relations laws," or "waiving other post settlement rights." Vermont Act 183, H.707, Sec. 1(h), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018); Vermont Act 183, H.707, Sec. 10, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018), <https://bit.ly/2T8Ppqj>.

¹³ Disclosing Sexual Harassment in the Workplace Act of 2018, H.B. 1596, 2018 Sess. (Md. 2018), <https://bit.ly/2ViJIDL>.

¹⁴ *Combating Sexual Harassment: Frequently Asked Questions*, New York State, <https://on.ny.gov/2NuOonc> (last accessed Oct. 22, 2018).

¹⁵ Jeffrey M. Landes et al., *Vermont Enacts Sweeping Sexual Harassment Prevention Law, Retail Labor and Employment Law*, Epstein Becker & Green (June 8, 2018), <https://bit.ly/2ThylhE>.

¹⁶ Smith Eibeler LLC, "New Jersey Seeks to End Confidentiality of Sexual Harassment Lawsuits," Smith Eibeler LLC New Jersey Employment Lawyers Blog, Aug. 13, 2018, <https://bit.ly/2SqPLE9>; Chris Cassidy, *Massachusetts bill takes aim at non-disclosure agreements, "silencing tactics,"* BOSTON HERALD, Feb. 19, 2018, <https://bit.ly/2Ed3p8U>; <https://bit.ly/2Nq4qP9>.

¹⁷ *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

¹⁸ Alexei Koseff, *California bans secret settlements in sexual harassment cases*, SACRAMENTO BEE, Sept. 30, 2018, 2:05 PM, <https://bit.ly/2y01b9L>.

¹⁹ Chai R. Feldblum & Victoria A. Lipnic, "Select Task Force on the Study of Harassment in the Workplace," U.S. Equal Employment Opportunity Commission, <https://bit.ly/28lwmK5>.

²⁰ Jade Lambert, *Internal investigations need rethinking in the #MeToo era*, ABA Journal (Apr. 10, 2018, 7:00 AM CDT), <https://bit.ly/2EXYw1N>.

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