#MeToo Legal Developments: No Signs of Slowing

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by Jade R. Lambert and Abigail N. Bortnick

Anyone who has not heard of the #MeToo movement may well be living under a rock. A national conversation around workplace sexual misconduct took off in October 2017 following publication of allegations against Harvey Weinstein. Since then, countless high-profile allegations of workplace sexual misconduct have been publicized.

In 2018, an unprecedented volume of new legislation was proposed and enacted, expanding legal protections relating to workplace sexual misconduct, and requiring that companies improve their internal policies and practices relating to it. In an article earlier this year (PDF: 417 KB), we detailed many of these new laws. For example, some states expanded the population of protected individuals by either broadening the definition of "employee" or by lowering the number of employees required to trigger an organization's obligations. Other states passed laws eliminating confidentiality requirements and mandatory arbitration provisions in settlement agreements arising from sexual misconduct allegations. And quite a few laws imposed new sexual harassment prevention training requirements. New York City and State now require annual trainings by all employers, regardless of the size of the organization. New York City has provided a training module on its website that can be used to satisfy the legal requirement.

Beyond beefed up policies and training requirements, many states are also taking a harder look at what happens once an allegation of workplace sexual misconduct or discrimination is raised. Maryland (PDF: 176 KB) is requiring affirmative misconduct reporting to government agencies. A law passed in Vermont last year gives the state attorney general and the human rights commission the right to examine sexual harassment complaint records of state employers.

Perhaps because of the adage that a strong corporate culture depends on the "tone at the top," California passed a law last year requiring that women comprise a certain

percentage of the members of the boards of directors of publicly held corporations headquartered in California. Despite constitutional challenges to the California law, other states like Michigan and New Jersey are considering similar legislation. It will be interesting to see how legal challenges to such board composition laws fare, and whether other states follow California's lead.

In 2019, we have seen even more sweeping changes. New York passed more legislation this year that further expanded the rights of individuals reporting workplace sexual harassment. Perhaps most significantly, the law makes it easier to prove claims of sexual harassment by: (1) removing the requirement that the harassment was severe or pervasive; (2) eliminating the need to provide so-called "comparator" evidence (*i.e.*, evidence relating to a similarly situated individual who is not a member of the protected class and was treated differently from the plaintiff); and (3) defining unlawful harassment as any activity that "subjects an individual to inferior terms, conditions or privileges of employment" because of the person's sex. Most of these changes will take effect on October 11, 2019.

Illinois also passed comprehensive new legislation this year. The recently-enacted law, Public Act 101-0221, requires all employers with employees working in Illinois to provide an annual interactive sexual harassment training. It also restricts the use of mandatory arbitration agreements and non-disclosure clauses in employment contracts and settlement agreements, and it goes even further than most states' laws by extending job-protected leave to victims of gender violence (defined as: "one or more acts of violence or aggression" committed, at least in part, on the basis of the victim's "actual or perceived sex or gender," or "a physical intrusion or physical invasion of a sexual nature under coercive conditions," where the conduct constitutes a crime under Illinois state law (even if not charged or prosecuted); or a threat of any such conduct). The new Illinois law also permits individuals to bring discrimination and harassment claims based on actual *and perceived* sex, race, or other protected status.

A new Connecticut law not only imposes a requirement that employers with three or more employees provide two hours of sexual harassment training to all employees, but also expands the time frame for potentially wronged employees to file a complaint and expands the possible damages allowed if the employee in fact has been wronged.

Other legal developments are making it easier for employees to file and pursue legal claims. Several states are expanding the statutes of limitations for bringing either an individual or whistleblower claim relating to workplace sexual misconduct (for example, from one year to three in New York). Effective August 2019, employees in New York are no longer required to make an internal complaint before filing suit (PDF: 27.6 KB). And organizations like Time's Up Legal Defense Fund are helping potential claimants with legal fees, costs, and publicity.

While states and cities continue to roll out new legislation, legal eagles are keeping a close eye on a Supreme Court case that could impact the validity of state laws prohibiting arbitration provisions (including New York and New Jersey, among others). Specifically, the *Winston & Strawn v. Ramos* case may address whether state laws or policies prohibiting mandatory arbitration are preempted by federal law. Along the same lines, a New York federal court held earlier this summer that New York's law banning employment arbitration was preempted by the Federal Arbitration Act. Commentators have been suggesting that laws prohibiting mandatory arbitration might run afoul of the Federal Arbitration Act.

In light of the quickly evolving and increasingly stringent legal requirements relating to workplace sexual misconduct, it is critical for organizations to stay apprised of these developments. In addition to being a potential legal liability, outdated policies and practices could be indicative of an organization that is ill-prepared to prevent and respond to sexually inappropriate behavior.

To combat harassment and sexual assault in the workplace, organizations should bear in mind that, as the EEOC emphasizes, change starts at the top. Top level executives should message their expectations of appropriate workplace conduct, and they should be supportive of efforts to identify and correct issues, including through review of an organization's sexual harassment policies, reporting structures and procedures, training materials, and historical issues. Executives must take the lead in creating an environment in which employees feel comfortable reporting sexually inappropriate conduct. After all, the laws set only the minimum standards of conduct. Each organization must work to cultivate a culture that neither tolerates nor facilitates workplace sexual misconduct.

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