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Expert Q&A on #MeToo-Inspired Employment Laws

Although federal and state laws have prohibited employment-related sexual harassment and sex discrimination for decades, the #MeToo movement inspired several states and local jurisdictions to pass laws targeting sexual harassment in the workplace more directly. The new laws address issues such as mandatory anti-harassment training, workplace policies, confidentiality in settlement agreements, and the arbitrability of sexual harassment claims. However, the specific requirements vary across jurisdictions. Practical Law asked *Robin J. Samuel* and *Meredith L. Kaufman* of *Baker & McKenzie LLP* to share their insights about these legal changes and how multi-jurisdictional employers can best manage compliance challenges.



ROBIN J. SAMUEL
PARTNER
BAKER & MCKENZIE LLP

Robin is a partner in the firm's Employment Practice Group. He focuses his practice on local and cross-border employment issues, including counseling clients on all aspects of the employment relationship and litigating class and collective claims, single plaintiff actions, and other employment disputes. Robin also handles sensitive internal investigations for clients around the world and provides in-house legal training.



MEREDITH L. KAUFMAN
PARTNER
BAKER & MCKENZIE LLP

Meredith is a partner in the firm's Employment & Compensation Practice Group. She has extensive experience handling complex employment litigation, including claims involving discrimination, sexual and other unlawful harassment, and retaliation. Meredith also advises clients on employment law compliance and related strategic issues, drafts employment-related policies, handbooks, and agreements, and conducts anti-harassment and other training for employers and their workforces.

What are the goals of the #MeToo-inspired laws?

The #MeToo-inspired laws share the ultimate goal of combatting sexual harassment in the workplace. The #MeToo movement shed light on the continued prevalence of sexual harassment in the workplace, despite the long-standing prohibitions against this conduct under federal, state, and local laws. While the new laws vary based on jurisdiction, they generally attempt to target harassment more directly by:

- **Expanding the scope of coverage.** Some laws expand the coverage of existing anti-discrimination laws by extending sexual harassment protections to employees working for small companies and expressly including legal protections for certain non-employees, such as independent contractors, interns, and other third parties.
- **Regulating companies' sexual harassment prevention and response efforts through mandatory training and policies.** Certain state and local mandates now require employers to implement anti-harassment training and written policies that explain, among other things, the types of conduct that constitute prohibited sexual harassment, the company's complaint and investigation procedures, supervisor obligations, and external protections and remedies.
- **Increasing transparency by limiting confidentiality and prohibiting mandatory arbitration.** One concern raised by the #MeToo movement was that sexual harassment claims can be swept under the rug through confidential proceedings and settlements, which may allow companies to avoid public scrutiny and protect high-ranking offenders. To foster transparency and disclosure around sexual harassment, some #MeToo-inspired laws restrict:
 - confidentiality provisions in settlement agreements resolving sexual harassment claims;
 - prohibitions on testimony regarding sexual harassment; and
 - the mandatory arbitration of sexual harassment claims, to the extent these restrictions on arbitration are allowed under federal law.

Where have you seen the most significant legislative responses to the #MeToo movement?

New York and California have adopted the most sweeping legislative changes to combat sexual harassment.

In April 2018, New York State enacted several laws, including amendments to the New York State Human Rights Law (NYSHRL). These laws impose new requirements on employers, such as mandatory sexual harassment policies and annual sexual harassment prevention training, and increase protections against harassment for employees and other individuals. New York City followed one month later, imposing additional requirements on employers under the New York City Human Rights Law (NYCHRL).

In October 2018, then-California Governor Jerry Brown signed dozens of new employment-related bills, several of which address sexual harassment in the workplace. Though California

was considered an employee-friendly state long before the #MeToo movement, the new laws substantially expand existing employee protections and impose new requirements on employers.

Arizona, Delaware, Maryland, Tennessee, Vermont, Washington, and the federal government also passed or gave effect to #MeToo-inspired laws in 2018. The trend continues in 2019, with New Jersey's recent enactment of a law that dramatically alters employers' ability to require confidentiality about sexual harassment incidents.

How have these laws expanded the scope of coverage of existing anti-discrimination and anti-harassment laws?

Title VII of the Civil Rights Act of 1964 is the federal law governing sexual harassment and discrimination in private workplaces. However, Title VII only covers employers with 15 or more employees. Many of the #MeToo-inspired laws (and some laws that predate the #MeToo movement) expand coverage of anti-discrimination and anti-harassment laws to virtually all employers and all workers, regardless of the company's size or the worker's status as an independent contractor or employee.

For example, although the NYSHRL and NYCHRL generally apply to employers with four or more employees, the protections against sexual harassment apply to all employers, regardless of the number of employees. The NYSHRL also extends its protections against sexual harassment to independent contractors and other non-employees.

California's Senate Bill 1300 similarly expands an employer's potential liability under the California Fair Employment and Housing Act (FEHA) for acts of non-employees. Before the amendment, a California employer could be held responsible for the sexual harassment of employees by non-employees if the employer knew or should have known of the conduct and failed to take corrective action. Now, this liability has been expanded to other forms of harassment (removing the "sexual" limitation).

What have the #MeToo-inspired laws done to bring sexual harassment claims to the forefront and reduce the secrecy that often surrounded the litigation and settlement of these claims?

The laws seek to promote public discourse and increase accountability for sexual harassment by tackling the secrecy that often surrounds the litigation and settlement of sexual harassment claims. Several laws now prohibit or restrict confidentiality provisions in agreements settling claims of sexual misconduct or harassment. Others address the secrecy issue by attempting to prohibit mandatory arbitration of sexual harassment claims, although arbitration is not necessarily as secretive as is commonly believed.

Until recently, confidentiality provisions were standard in most employment-related settlement agreements, including those resolving sexual harassment claims. However, this practice is likely to change due to:

- The Tax Cuts and Jobs Act (TCJA), which eliminates a tax deduction for certain expenses to settle a sexual harassment claim if the settlement agreement has a confidentiality provision.
- The new state laws, which directly address the secrecy problem by making it harder for employers to demand confidentiality provisions when settling sexual harassment claims. (However, they often allow employees to request confidentiality for some or all of the settlement terms.)

TCJA

One of the first #MeToo-inspired laws was a sparse provision (referred to by some as the Harvey Weinstein provision) buried in the TCJA, the sweeping federal tax reform enacted in December 2017. The law eliminates the tax deduction for either settlement payments or attorneys' fees as ordinary business expenses related to a settlement agreement entered into after December 22, 2017 that both:

- Relates to a claim of sexual harassment or abuse.
- Has a confidentiality provision.

(26 U.S.C. § 162(q).)

This new provision of the tax code arguably applies to both employees and employers. It was added without significant public comment or debate, and may not have had its desired impact because:

- In most cases, the financial impact of losing the tax deduction is not significant for employers.
- The TCJA did not offer any different tax treatment if the employees requested the confidentiality provision.
- The loss of a tax deduction arguably impacts employees more than it does employers, because employees must pay taxes on 100% of the settlement amount, but may no longer deduct the attorneys' fees portion as a miscellaneous deduction (employees may still qualify for an above-the-line deduction of attorneys' fees) (for more information, search [Settlement Payments for Employment-Based Claims: Taxation and Reporting](#) on Practical Law).

State Laws

Several state laws address confidentiality provisions in settlement agreements in various ways, such as by:

- Declaring that certain prohibited terms and conditions in an agreement are void and unenforceable as against public policy.
- Making it an unlawful employment practice for an employer to take adverse action against an employee for refusing to enter into a prohibited agreement.
- Providing that a nondisclosure agreement cannot prohibit an individual from disclosing information in certain criminal, civil, or administrative proceedings involving sexual harassment or assault.
- Providing that an employer that enforces or attempts to enforce a prohibited provision is liable for the employee's attorneys' fees and costs.

New York and California both enacted such laws in 2018, and New Jersey followed in 2019.

New York

New York law currently prohibits confidentiality provisions in settlement agreements involving sexual harassment claims, unless the provision is the complainant's preference (N.Y. Gen. Oblig. Law § 5-336; N.Y. C.P.L.R. 5003-b). Effective July 11, 2018, in any settlement, stipulation, consent, or other agreement resolving a claim where the factual foundation of the claim involves sexual harassment, a provision that prevents the disclosure of the underlying facts and circumstances to the claim or action is only permissible after engaging in a three-step process to demonstrate that confidentiality was the complainant's preference:

- The proposed confidentiality provision must be provided to all parties, and the complainant must have 21 days from the date the provision is provided to consider it. The 21 days cannot be waived or shortened.
- If after 21 days it is the complainant's preference to include the confidentiality provision, that preference must be memorialized in an agreement signed by all parties.
- The complainant must have seven days after executing the settlement agreement with a confidentiality provision to revoke the agreement. The agreement is not effective or enforceable until the revocation period has expired.

Under New York's Combating Sexual Harassment FAQs, it is not enough to provide the complainant with a single agreement containing the proposed confidentiality provision and memorializing the complainant's preference for confidentiality. Rather, New York has taken the position that two separate documents are required:

- An agreement memorializing the complainant's preference for confidentiality, after the 21-day review period has expired.
- A settlement agreement incorporating that provision.

New York law does not expressly require two documents and this requirement in the FAQs may be challenged in the courts. Until then, New York employers settling sexual harassment claims should follow the guidance in the FAQs if they want to ensure that a confidentiality provision is enforceable.

California

Effective January 1, 2019, California Code of Civil Procedure Section 1001 voids any provision in a settlement agreement that restricts the disclosure of factual information regarding certain claims filed in civil or administrative actions, including claims of:

- Sexual assault.
- Sexual harassment.
- Harassment or discrimination based on sex.
- Failure to prevent workplace harassment or discrimination based on sex.
- Retaliation against a person for reporting harassment or discrimination based on sex.

(Cal. Civ. Proc. Code § 1001.)

This prohibition covers more claims than the New York law, but expressly does not apply to settlements reached before a complaint is filed. Section 1001 contains exceptions for confidentiality provisions that:

- Shield the identity of the claimant, including all facts that could lead to the discovery of the claimant's identity.
- Make confidential the amount paid in settlement of a claim.

California also has restricted an employer's ability to require an employee to sign, in exchange for a raise or bonus or as a condition of continued employment:

- A non-disparagement agreement or other document that denies the employee the right to disclose information about unlawful acts in the workplace, including sexual harassment.
- A release of a claim or right under FEHA, which requires:
 - a statement that the individual does not have any claim or injury against the employer; or
 - the release of the individual's right to file and pursue a civil action or complaint with a state agency, court, or other governmental entity.

(Cal. Gov't Code § 12964.5.)

New Jersey

New Jersey Senate Bill 121 passed both houses of the state legislature in January 2019 and Governor Phil Murphy signed it into law on March 18, 2019. This law:

- Renders void and unenforceable a provision in any employment agreement that:
 - waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment; or
 - has the purpose or effect of concealing the details regarding any discrimination, retaliation, or harassment claim.
- Prohibits the prospective waiver of any legal right or remedy, including those under the New Jersey Law Against Discrimination.
- Does not apply to the terms of any collective bargaining agreement.
- Prohibits retaliation for failure to enter into a prohibited agreement.

An employer that enforces or attempts to enforce a provision deemed against public policy and unenforceable under the law will be liable for the employee's reasonable attorneys' fees and costs. New Jersey employers should review their form agreements to comply with the new law, including:

- Employment agreements and offer letters.
- Separation and settlement agreements.
- Confidentiality agreements.



Search [Sexual Harassment Claims in Settlement, Arbitration, and Other Employment Agreements State Laws Chart: Overview](#) for more on state laws that address sexual harassment claims in settlement agreements, arbitration agreements, and other employment agreements, including laws prompted by the #MeToo movement.

Are the laws that purport to ban mandatory arbitration of sexual harassment claims enforceable?

Some #MeToo-inspired laws attempt to guarantee employees access to public forums for the resolution of sexual misconduct claims (and address the purported secrecy of arbitration) by prohibiting employers from requiring employees to agree to arbitrate sexual harassment claims as a condition of employment. Arbitration is somewhat more private than are civil court proceedings because in civil courts, the parties' court filings and judges' rulings are usually a matter of public record, while that is not the case in arbitration.

However, there is nothing inherently confidential about arbitration. The employment arbitration rules for the two major US arbitration providers do not impose confidentiality requirements on the parties to the proceeding, and many arbitration agreements omit nondisclosure provisions. Regardless of contractual obligations, the purported confidentiality of arbitration proceedings remains somewhat of a misnomer because some states require arbitration service providers to publicly report the results of all employment arbitrations, including the names of the parties, the claims asserted, and the outcome of the proceeding. Arbitration awards also are often confirmed in court, and therefore publicly filed, after the arbitration hearing concludes.

States that have restricted employers from requiring mandatory arbitration of sexual harassment claims include Maryland, New Jersey (through Senate Bill 121), New York, and Vermont. Kentucky (in legislation unrelated to the #MeToo movement) enacted a general ban on mandatory arbitration in 2018 (though legislation has been proposed to reverse this), and the governor of Washington issued an executive order discouraging state and local governmental entities from doing business with employers that require employees to arbitrate sexual harassment claims.

The state laws that directly limit arbitration agreements are likely preempted by the Federal Arbitration Act (FAA). The FAA expresses a strong legislative preference for arbitration and requires arbitration agreements to be treated on equal footing with any other type of agreement, preempting any state law that stands as an impediment to arbitration (*Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (FAA preempts any state rule discriminating on its face against arbitration); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.")). Recent US Supreme Court rulings have reaffirmed the FAA's strong public policy in favor of arbitration, including in the employment context (see, for example, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622-24, 1632 (2018); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019)).

Recognizing the FAA preemption issues, several of these new laws provide a carve-out, stating that the laws apply except where inconsistent with federal law (see, for example, N.Y. C.P.L.R. 7515(b)(1)). Therefore, if a sexual harassment claim is not covered by the FAA and is subject to New York law, a New York court likely would find mandatory arbitration of the claim to

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be impermissible under the law. However, it is rare that an employment relationship or dispute would not be subject to the FAA. Until the issue is further clarified by the courts, employers should consult with employment counsel about the practical impact these prohibitions may have when drafting employment arbitration agreements.

Apart from legislative efforts, there is public momentum toward eliminating mandatory arbitration of sexual harassment (and other employment-related) claims. Some prominent companies, including Google, Facebook, Airbnb, Uber, and Lyft, have announced that they have voluntarily eliminated mandatory arbitration of sexual harassment claims. Employee advocacy groups continue to push back against mandatory arbitration, and we therefore expect this trend may continue.



Search [Employment Arbitration Agreements \(US\)](#) for more on mandatory arbitration of employment disputes, including state-level #MeToo-inspired laws restricting mandatory arbitration of sexual harassment claims.

Search [Mandatory Arbitration of Employment-Related Claims \(US\)](#) for a model clause that private employers can incorporate into an employment agreement, with explanatory notes and drafting tips.

In addition to confidentiality and arbitration provisions, some #MeToo-inspired laws restrict other employment-related terms or conditions. For example:

- Arizona voids agreements that restrict employees from participating in criminal proceedings relating to their abuse.
- Vermont prohibits no-rehire provisions in certain sexual harassment settlements.
- Washington prohibits employers from requiring as a condition of employment that employees sign nondisclosure agreements (but does not restrict nondisclosure provisions in the settlement context).

Is there any federal legislation addressing these issues?

In 2017, the Ending Forced Arbitration of Sexual Harassment Act of 2017 (S. 2203) was introduced in Congress. This bill would have outlawed pre-dispute arbitration agreements covering sex discrimination or sexual harassment disputes, but it did not advance beyond committee review.

In late 2018, companion bills entitled the Restoring Justice for Workers Act were introduced in the Senate and the House (S. 3615; H.R. 7109). If enacted, these bills would prohibit forced arbitration in all employment disputes, not just sexual harassment claims. However, given the current political divide in Congress, it is unlikely that these bills will become law in the near term.

There also have been legislative efforts to address congressional policies and dispute resolution procedures on sexual harassment. A recent amendment to the Congressional Accountability Act of 1995 holds lawmakers personally liable for harassment and retaliation settlements. There is no cap on the amount for which a legislator may be held liable. (Pub. L. No. 115-397, 132 Stat. 5297 (2018).)

Has the EEOC increased enforcement efforts for sexual harassment claims in response to #MeToo?

The US Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing most federal workplace anti-discrimination laws. In its Performance and Accountability Report for Fiscal Year (FY) 2018, the EEOC reported an uptick in enforcement actions and recoveries generally.

The EEOC also highlighted its efforts with regard to the #MeToo movement, noting that it filed 66 harassment lawsuits in FY 2018, including 41 that included allegations of sexual harassment. This represents 50% growth in the number of lawsuits over FY 2017. Charges filed with the EEOC alleging sexual harassment jumped more than 13% over the prior fiscal year, and the EEOC recovered almost \$70 million for the victims of sexual harassment in FY 2018, up from \$47.5 million in FY 2017. The EEOC almost certainly will continue to accelerate its efforts in 2019.

What recommendations do you have for employers subject to mandatory anti-harassment training requirements?

Most large employers already conduct some form of anti-harassment and anti-discrimination training and have done so for years. California has required employers with 50 or more employees to provide supervisors with two hours of sexual harassment prevention training every two years since 2005.

An increasing number of states now require employers to conduct sexual harassment prevention training. Certain jurisdictions have enacted or revised their laws on sexual harassment prevention training following the #MeToo movement, for example, by:

- Placing affirmative training obligations on employers where there had previously been no training mandate (for example, New York).
- Expanding coverage and training requirements under existing laws (for example, California).
- Expressly encouraging, without requiring, that employers conduct sexual harassment prevention training (for example, Colorado and Vermont).

The state and local laws that impose mandatory training requirements vary in detail, but typically address:

- Which employers must provide training, based on the size of the employer's workforce. For example:
 - the NYSHRL requires all employers, regardless of size, to conduct training, while the NYCHRL requires employers with 15 or more employees to conduct training;
 - Connecticut and Delaware only require mandatory training by employers with 50 or more employees; and
 - Maine requires mandatory training by employers with 15 or more employees.
- How often employers must conduct training. For example, employers must conduct training:
 - every year in New York State (including New York City); and
 - every two years in California.
- Which employees must receive training (for example, all employees or only supervisors and managers).
- Format and content requirements.
- When the employer must conduct initial training and the frequency of the training obligations.

State and local laws sometimes include additional provisions, such as trainer qualifications, recordkeeping requirements, and penalties for noncompliance.

Employers should understand that these laws set minimum standards for training requirements. Once they are conducting training sessions, most employers use the opportunity to cover harassment and discrimination more broadly, and not just sexual harassment and sex discrimination. Multi-jurisdictional employers must be prepared to tailor their training by jurisdiction because some laws, such as the NYSHRL and NYCHRL, require employers to cover state-specific definitions or include specific information about how to report harassment to the applicable state or local administrative agencies.

Employers should consider creating different training modules for their workforce to address the issues most relevant to various employee populations. For example, employers may want to create different training programs for supervisors and non-supervisors, or for different sectors of their workforce, such as:

- Front-of-house versus back-of-house employees for hospitality employers.
- Plant workers versus administrative employees for manufacturing employers.

Employers also must determine how to deliver the training to meet state and local law requirements without making the program a check-the-box exercise. Most laws require that mandatory training programs be interactive and some require that employees receive training within a certain time period after being hired. While live, in-person training is often the most interactive and effective, it may not be feasible in all circumstances. Companies should evaluate their needs and may want to combine methods, for example, by providing online training for new hires and live training annually for all employees.

Employers should maintain records of all training, even if not expressly required by applicable law. This may benefit employers by:

- Preserving the potential availability of a federal Faragher-Ellerth defense (or similar defense under state law), which is an affirmative defense against hostile work environment claims involving supervisors if certain criteria are met (for example, the employer taking reasonable care to prevent and correct harassing behavior) (for more information, search [Faragher-Ellerth Defense Standard Language for Summary Judgment Brief](#) on Practical Law).
- Demonstrating compliance with laws that may be enacted in the future.



Search [Sexual Harassment Prevention Training State and Local Laws Chart: Overview](#) for more on training requirements.