Barriers to Combatting Sexual Harassment In and Out of Court and Legislative Responses in the #MeToo Moment

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I. Equal Rights Advocates

A national, non-profit legal organization dedicated to expanding and protecting economic opportunities for women and girls
The Problem

- As many as 85% of women say they have experienced sexual harassment

Yet 75% of those who have experienced it never report it due to:

- Disbelief
- Blame
- Inaction
- Professional retaliation
- Social retaliation

The Problem (cont’d)

- As many as 75% of those who do report sexual harassment experience retaliation.

- Still, in FY2015, harassment claims comprised nearly one-third of charges filed with the EEOC.

H.R. 4924: The Congressional Accountability Act of 1995 Reform Act (Highlights and Condensed) (Applicable to Congress only)

- Extends protections to unpaid staff and includes broader legislative workforce
- Streamlined process for employees
- Members of Congress must reimburse Treasury for any settlements/awards
- Semiannual report publicly available on Office of Congressional Workplace Rights (OCWR) website
- OCWR must conduct climate surveys every 2 years
- New electronic reporting system to initiate and track claims
H.Res. 724: (Applicable to Congress only)

- Each House office must adopt an anti-harassment and anti-discrimination policy;
- Establishes Office of Employee Advocacy to:
  - Provide legal assistance to House employees regarding Congressional Accountability Act of 1995 (CAA) procedures, including those applicable to civil actions;
  - Operate an employee hotline
H.Res. 724

- Requires that 1) House offices certify, on Payroll Authorization Forms, that payroll actions are not connected to settlements or awards related to conduct prohibited by the law; and (2) House Members certify on such forms that Members' Representational Allowance is not being used for CAA awards or settlements.

- Amends House Code of Official Conduct to prohibit: (1) a Member, Delegate, Resident Commissioner, officer, or employee of the House from committing sexual harassment or engaging in unwelcome sexual advances; and (2) sexual relationships between Members and employees (except between married individuals).
Federal Legislation Addressing Private Workforce

**Legislation to increase transparency/reduce secrecy**

- **Ending Secrecy About Workplace Sexual Harassment Act (HR 4729)**
  - Every employer submitting an EEO-1 Report to EEOC must include number of settlements relating to sex discrimination.
- **Ending Forced Arbitration of Sexual Harassment Act (HR 4570/S2203)**
  - Bans predispute arbitration agreements for sex discrimination claims
- **Sunlight in Workplace Harassment Act (S2454/HR5028)**
  - Amends the Securities and Exchange Act of 1934 to require disclosure of settlement payments for sexual abuse & harassment
Legislation to bar tax subsidies/deductions related to sexual harassment

- **Stop Tax Subsidies for Sexual Abusers and Harassers (HR 4514)**
  - Amends Internal Revenue Code (IRC) to prohibit a tax deduction for: 1) any settlement or payment related to sexual harassment or sexual abuse if it is subject to a nondisclosure agreement; or 2) attorney’s fees related to such a settlement or payment.

- **Settlement Tax Deductions are Over for Predators Act (HR 4495)**
  - Amends the IRC to deny a trade or business expense deduction any amount paid or incurred on account of a judgment or settlement originating from, or to require the non-disclosure of or otherwise prevent, a claim or accusation of sexual abuse or sexual harassment.

- **HR 4748**
  - Amends IRC, to deny a trade or business expense deduction for severance payments made to any employee for termination where sexual assault, sexual harassment, or any other sexual misconduct by the employee was a factor.
Federal Legislation Addressing Private Workforce (cont’d)

Legislation to expand protections/coverage & hold employers accountable

- Fair Employment Protection Act of 2017 (HR4152) (supervisory liability)
  - Modifies liability standards set forth by Supreme Court in Vance v. Ball State University, which limited the category of supervisors for whom an employer may be held vicariously liable to those individuals with authority to take tangible employment actions.
  - Amends Title VII of the Civil Rights Act of 1964 and other statutes to clarify appropriate liability standards for Federal antidiscrimination claims: Employers are also liable if the negligence of the employer led to the creation or continuation of the hostile work environment.

- Protecting Independent Contractors from Discrimination Act of 2018
  - Extends antidiscrimination protections of Title VII and other statutes, which apply to employees, to independent contractors:

Legislation to promote prevention

- Federal Contractor Anti-Harassment Training Act of 2018 (HR 5113)
  - Requires sexual harassment training for employees of federal contractors
Overview: Pending State Legislation

- **Reforms in legislature’s own policies and procedures**
  - Training requirements: GA, IL, OK, VA
  - Reporting requirements/public disclosure: TN
  - Limitations on use of public funds to settle claims: CA, IL, MI, MS

- **Recordkeeping and reporting requirements**
  - CA: AB 1867: Would require all employers of 50+ to keep records of sexual harassment complaints for 10 years.

- **Mandatory training**
  - Standards to ensure more than just “file cabinet” compliance: CA, VA

- **Removal of artificial barriers to justice**
  - Limitations or prohibitions on NDAs in in settlements re: sexual harassment and/or assault: AZ, CA
  - Limitations or prohibitions on non-disclosure agreements as condition of employment: CA, FL, IN, VT, VA, MD, MO
  - Limitations or prohibitions on forced arbitration of sexual harassment claims: CA, SC, VA
Overview: Pending State Legislation (cont’d)

- **Expansion of substantive law**
  - No (or lower) minimum number of employees: MD
  - Cover independent contractors, interns, volunteers: TN (independent contractors);
  - Eliminate or raise damages caps
  - Extend the statute of limitations: CA
  - Modify/eliminate “severe or pervasive” standard: CA
  - Expand definition of sex discrimination/harassment to include sex-based hostility and gender identity/expression, sexual orientation
  - Automatic liability for supervisor harassment (overturn Faragher/Ellerth)
  - Expanded definition of “supervisor” (overturn Vance)
Examples: CA Pending Legislation

- **Expansion of substantive law**
  - **AB 1870**: Extend statute of limitations for administrative complaints from 1-3 years.
  - **SB 1300**: Strengthen training requirements; prohibit requirement of signing NDAs or waiver of claims as condition of employment or for an bonus; provide guidance on “severe or pervasive” standard.
  - **SB 1038**: Clarify that individual liability for retaliation.
  - **SB 224**: Strengthen Unruh Civil Rights Act prohibiting sexual harassment in professional relationships
Example: PA Pending Legislation

- PA House Bill 1965
  - Would create uniform policies/procedures re: sexual harassment in PA General Assembly.
  - Prohibits sexual harassment and retaliation by employees of legislative agencies.
  - Creates independent Office of Compliance to receive, investigate and resolve complaints, establish policies and procedures, develop training programs, and post information.
  - No time limit for filing complaints but requires follow up on complaints within 60 days.
  - Prohibits NDAs as a condition of invoking complaint process, but does not prevent voluntary agreements including NDAs in settlement of complaint or civil action.
  - However, no benefit of NDA for elected officials if subject of a complaint found credible.
  - Requires repayment by a legislator if the legislator paid a settlement out of a legislative agency account.
  - Requires regular reporting of information about settlements of complaints.
Examples: Pending State Legislation: Sexual Harassment Education for Students

- **California**: AB 2601 – The CA Healthy Youth Act in Charter Schools (Weber):
  - Extend comprehensive sexual health education requirements (required for public middle and high school students) to charter schools.
  - Mandated instruction includes a discussion of gender and negative gender stereotypes, information about sexual harassment and assault, and local resources for accessing services.

- **Illinois**: House Bill 5148: Would require statewide curriculum changes to discuss harassment and the concept of sexual consent during sex education courses.
Recently Passed State Legislation in Response to #MeToo

- **Reforms in legislature’s own policies and procedures**
  - (Feb. 2018) CA: Legislative Employee Whistleblower Protection (AB 403): Extends whistleblower protections to legislative employees
  - (April 2018) NY: Reimbursement of state funds paid to victims
Recently Passed State Legislation in Response to #MeToo (cont’d)

- Mandatory training and Model Policy

  - (April 2018) NY: Requires annual sexual harassment training and adoption of model policy on sexual harassment
Recently Passed State Legislation In Response to #MeToo (cont’d)

- **Removal of barriers to justice**
  - (April 2018) NY:
    - Bans NDAs in settlements involving sexual harassment, except at the election of complainant
      - 21 Days to consider NDA
      - 7 Day Revocation Period of NDA
    - Bars mandatory arbitration clauses for sexual harassment claims
Recently Passed State Legislation In Response to #MeToo (cont’d)

- **Removal of barriers to justice**
  - (April 2018) NY: Expanded Sexual Harassment Protections for Non-Employees
    - Public and private employers with four+ employees liable for SH of non-employees in workplace
    - Includes “non-employees” who are contractors, subcontractors, vendors, consultants, or employees of the above groups.
Recently Passed State Legislation in Response to #MeToo (cont’d)

- **Removal of barriers to justice**
  - (April 2018) WA: Disclosure and Discussion of Sexual Harassment and Assault (S.B. 5996): prohibits employers from requiring employees to sign NDA or waiver, as a condition of employment, that prevents employee from publicly disclosing or discussing sexual harassment or sexual assault occurring in the workplace.
Recently Passed State Legislation In Response to #MeToo (cont’d)

- **Removal of barriers to justice**
  - (April 2018) WA: Law Barring Mandatory Private Dispute Resolution (S.B. 6313): Employment contract or agreement is void and unenforceable if it requires an employee to waive rights to:
    - Publicly pursue a cause of action under the Washington State Law Against Discrimination (WLAD);
    - Pursue a cause of action under federal discrimination laws; or
    - Publicly file a complaint with the appropriate state or federal agencies