

CLIENT ALERT

Legislative Trends: “Me Too” Movement and Sexual Harassment Disclosure Laws

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State and local lawmakers across the country have been busy passing new laws targeting sexual harassment in the workplace. Several states, most recently Maryland and Vermont, have enacted such legislation, continuing the trend of establishing anti-sexual harassment public policies in the wake of the “Me Too” movement. The new legislation aims to reduce sexual harassment in the workplace by prohibiting waiver provisions in employment contracts, preventing non-disclosure and other provisions in sexual harassment settlement agreements, and providing new avenues for employee reporting and disclosure. As additional sexual harassment laws continue to emerge at the state level, employers should pay attention to how these new laws impact their sexual harassment policies, procedures, and training in the workplace, as well as how they might affect efforts to resolve complaints of harassment raised by employees.

Enacted Legislation

MARYLAND

On May 15, 2018 Governor Lawrence J. Hogan of Maryland signed into law the Disclosing Sexual Harassment in the Workplace Act of 2018 (the Act). The law goes into effect on October 1, 2018 and imposes several new requirements on Maryland employers.

Sexual Harassment Waiver Provisions

The Act prohibits employers from including provisions in employment contracts, policies, or agreements that waive rights or remedies to any future claims of sexual harassment or from taking adverse action against any employee who refuses to enter into an agreement with such a waiver. “Adverse action” is defined to include discharge, suspension, demotion, and “any other retaliatory action that results in a change to the terms or conditions of employment that would dissuade a reasonable employee from making a complaint.” The Act further shifts an employee’s attorney’s fees to an employer who attempts to enforce a waiver in violation of this provision.

Survey of Sexual Harassment Settlement Information

The Act also requires employers with 50 or more employees to respond to two surveys and submit to the Maryland Commission of Civil Rights responses containing the following information:

1. The number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee;
2. The number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the prior 10 years;
3. The number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential; and
4. Space to report whether the employer took personnel action against an employee who was the subject of a settlement.

The first survey response must be submitted on or before July 1, 2020 while the second response must be submitted on or before July 1, 2022. The Commission must publish the aggregate number of employer responses for each response category as well as responses from specific employers regarding the number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee.

The Act also charges the Commission with reviewing a random selection of survey responses and creating executive summaries based on those surveys. The Commission must redact any identifying information for specific employers within the executive summaries and submit the final products to the Governor, the Senate Finance Committee, and the House Economic Matters Committee.

The survey portion of the Act includes a sunset provision ending the requirement on June 30, 2023.

Recommendations

Maryland employers should review their employment contracts, policies, and agreements for waivers of rights or remedies to sexual harassment claims and remove existing waiver provisions by October 1, 2018. While the Federal Arbitration Act (FAA) would likely preempt any state law that prohibited outright the arbitration of a particular claim, including sexual harassment claims, see, e.g., *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1423 (2017), Maryland employers should carefully consider what other rights or remedies might be protected by the Act. Maryland employers with 50 or more employees also should prepare to comply with the survey requirements of the Act by gathering internal information on past sexual harassment claims and settlements.

VERMONT

On May 28, 2018, Vermont Governor Phil Scott signed into law an [Act Relating to the Prevention of Sexual Harassment](#) (the Act), which imposes new requirements on Vermont employers. The provisions of the law applying to all employers, employment agencies, and labor organizations in the state of Vermont will go into effect on July 1, 2018.

Sexual Harassment Waiver and Future Employment Provisions

Vermont's new sexual harassment law bars employers from requiring employees or prospective employees to sign an agreement or waiver prohibiting or restricting the employee from opposing, disclosing, reporting, or participating in an investigation of sexual harassment or waiving a substantive or procedural right or remedy available in connection with a sexual harassment claim. Any provision of an agreement that violates these requirements is void and unenforceable.

Mandatory Language in Sexual Harassment Settlement Agreements

The Act also contains restrictions on agreements settling claims of sexual harassment. Such an agreement cannot prevent the employee from working for the employer or the employer's parent company, subsidiary, division, or affiliate. Moreover, the Act identifies certain provisions that must be expressly stated in any agreement settling a claim of sexual harassment, including that the agreement does not prohibit, prevent, or otherwise restrict a harassment complainant from:

1. Submitting a complaint to the Attorney General, the State's Attorney, the Human Rights Commission, the Equal Employment Opportunity Commission, or any other State or federal agency;

2. Testifying, assisting, or participating in any way with a sexual harassment investigation conducted by the Attorney General, the State's Attorney, the Human Rights Commission, the Equal Employment Opportunity Commission, or any other State or federal agency;
3. Complying with valid discovery requests in civil litigation or testifying at a hearing or trial related to sexual harassment claims in a court, arbitration proceeding, or another appropriate tribunal;
4. Exercising State or federal labor relations law rights to engage in concerted activities with other employees for the purposes of collective bargaining or mutual aid and protection.

A sexual harassment settlement agreement must also expressly state that it does not waive any rights or claims arising after the date the agreement is signed. Any provisions in sexual harassment settlement agreements that do not comply with the above proscriptions and requirements are void and unenforceable as to the individual who lodged the harassment complaint.

Inspection by the Attorney General

In addition, to ensure compliance with the Act and on 48 hours' notice, the Attorney General or his or her designee may inspect any private place of business or employment, question any person authorized by the employer to receive or investigate complaints of sexual harassment, and examine any records, policies, procedures, and training materials related to sexual harassment or requirements of the Act. The records that the Attorney General may inspect include de-identified data on the number of sexual harassment complaints received and the resolution of each complaint. The Attorney General will notify the employer of the results of the inspection, including any issues or deficiencies, provide resources related to practices and procedures designed to prevent sexual harassment, and identify any technical assistance that the Attorney General may be able to provide to address any issues or deficiencies. The Attorney General can also require an employer, for a period of up to three years, to provide an annual education and training program for employees, supervisors, and managers; and to conduct an annual anonymous survey of the work environment; or both.

Recommendations

Similar to Maryland employers, Vermont employers should review their employment contracts, policies, and agreements to ensure compliance with the Act by July 1, 2018. While outright restrictions on arbitration would likely be preempted under the Federal Arbitration Act, *see supra*, Vermont employers should carefully consider what other rights or remedies might be protected by the Act. In addition, employers in this state should be aware of the provisions governing the contents of agreements settling complaints of sexual harassment, and ensure that such agreements contain the required express statements and do not include the prohibited provisions. Vermont employers should also be aware of the Attorney General's broad power to investigate sexual harassment claims in the workplace and should be prepared to promptly comply with any requests by the Attorney General to investigate the workplace. Employers should educate and train their employees, managers, and supervisors on their sexual harassment discrimination policies and procedures in addition to keeping records of when such trainings were provided, the content of the trainings, and who attended and completed the trainings, all of which may be inspected by the Attorney General or by his or her designee.

Sexual Harassment Legislation and Proposed Legislation in Other States

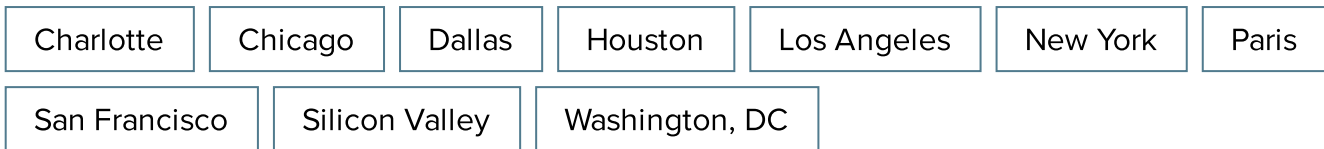
Prior to Maryland and Vermont's enactment of anti-harassment laws, in May of 2018, New York passed the Stop Sexual Harassment in NYC Act. The New York State budget for 2018-2019 also contains provisions aimed at promoting anti-sexual harassment measures. Also in May, Washington State enacted legislation intended to prevent workplace sexual harassment and assault, encourage disclosure of such incidents, and protect victims of sexual harassment and sexual assault in the workplace. Notably, Washington S.B. 6313 makes void and unenforceable any provision in an employment contract or agreement requiring an employee to waive his or her right to publicly file a cause of action under state or federal antidiscrimination laws, or to publicly file a complaint with state or federal antidiscrimination agencies. The law further prohibits provisions mandating resolution of discrimination claims in confidential dispute resolution processes.

Several other states, including Maine, North Carolina, and Ohio, have introduced legislation to address sexual harassment specifically in state legislatures. Most recently, the New Jersey Senate introduced a bill that would eliminate and make unenforceable provisions in private employer employment contracts or settlement agreements

prohibiting current or former employees from disclosing details of discrimination, retaliation, or harassment claims. The legislation in New Jersey remains pending, but we will continue to monitor the bill and advise clients on any requirements that may result from its enactment.

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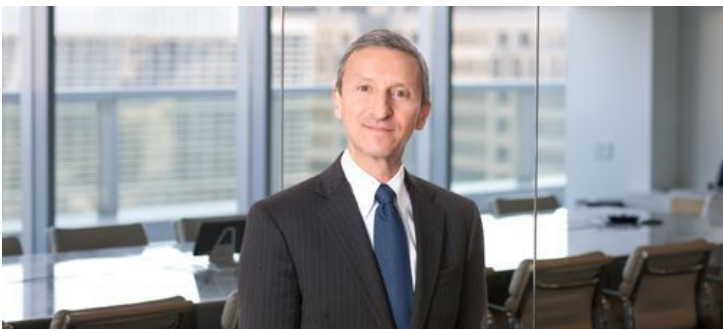
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