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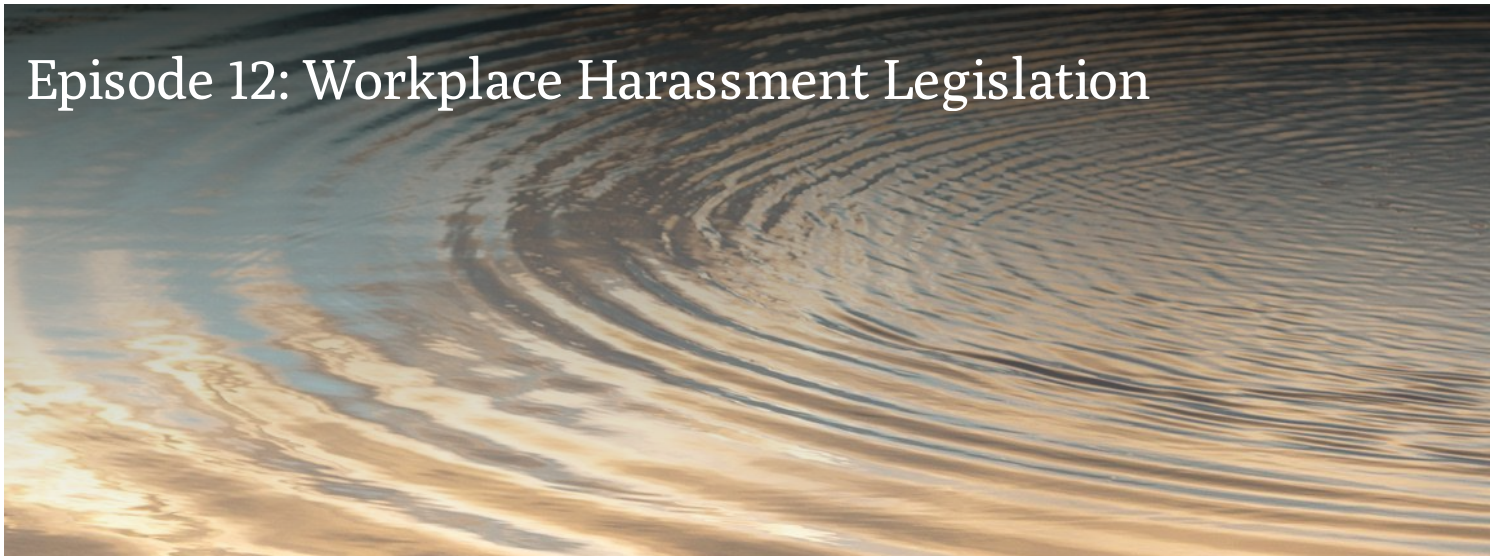

Episode 12: Workplace Harassment Legislation

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11:06

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Audio Transcript:
Steve Flores: Welcome to another episode of Winston and Strawn's Benefits Blast podcast. I'm Steve Flores and I'm delighted to be joined today by my partner Cardelle Spangler. Cardelle has spent over 20 years of her career as an employment litigator and advisor. Cardelle concentrates her practice on employment relations litigation and counseling matters here at Winston.

Steve Flores: During this episode we'll be talking about some of the legislations that states have enacted to combat workplace sexual harassment in light of the Me Too movement. So obviously this has been a huge development for employers; for the country as a whole. So we're excited to have you on the podcast to share some of the things that you're seeing. I guess to get us started, just thinking in the absence of federal legislation or federal action in this space, it seems like states have enacted a variety of different laws in order to combat workplace sexual harassment, and it seems like they're attacking it in a variety of different ways. So Cardelle I'm hoping you can share with our listeners based on what you're seeing, what some of these laws look like and how they're impacting employers.

Cardelle Spangler: Sure. Well first, thank you for having me, Steve. It's a pleasure to be here. You're absolutely right. States have been attacking what they view as this issue of sexual harassment in the workplace in a variety of ways, and we've really seen it in I would say five different ways. One is banning or restricting mandatory arbitration agreements. We'll talk about that a little bit more. Prohibiting a certain nondisclosure provisions in separation or settlement agreements of sexual harassment claims. Requiring, or at least giving some more guidance around what policies should look like in the sexual harassment arena. Requiring certain training requirements of employers, sometimes yearly, sometimes every other year depending on the state and expanding the definition of sexual harassment.

Steve Flores: All right. So that's a lot to unpack. So maybe let's start with arbitration. So what are you seeing in the arbitration space?

Cardelle Spangler: Well for many years there's been a tug of war between employers and employees in terms of the propriety of requiring employees to sign mandatory arbitration agreements, which requires them to take any claims related to their employment to an arbitrator rather than to a court or a judge or a jury, right, to have them decide that claim. And for many years employers have really enjoyed the freedom to require their employees to sign these agreements. Recently, states have tried to take up this mantle in the absence of any congressional action to try to say, listen, we don't think that this is really fair for employees and so we're going to try to do something more here to require employers to let employees go to court, go to a judge, go to a jury.

Cardelle Spangler: The Supreme Court has not been cooperative in that regard though. The Supreme Court has for many years reiterated that the Federal Arbitration Act has a very strong federal policy favoring arbitration agreements. And that if an employer and employee choose to enter into what the Supreme Court really views as a contract like any other to arbitrate employment claims, then that contract should stand on equal footing to any other contract. And so we've actually seen this play out because a number of states, including, for example, New York. New York itself passed a law saying any arbitration agreement that mandates arbitration of sexual harassment claims is unenforceable. That law actually got challenged and a federal court in New York struck it down as unenforceable and said that because that contract was actually grounded in the federal arbitration act, the FAA, the FAA preempts this field. And so you cannot have a state law that bans mandatory arbitration in light of the FAA and in light of Supreme Court authority.

Steve Flores: Oh, interesting. So I guess one of the other areas that we've seen are restrictions on nondisclosure agreements and some of the remedies associated with that. Can you speak a little bit about that?

Cardelle Spangler: Yes, happy to. So it is not unusual for employers and employees to come to an amicable resolution with respect to claims of sexual harassment, whether those claims are only made to the employer without court or agency intervention or if they are actually made with court or agency intervention. Right? And many of those agreements have provisions in them that prevent the employee from discussing or disclosing anything about the agreement, the facts of the agreement, any of the underlying circumstances that gave rise to the agreement. Those are very common provisions in separation agreements and settlement agreements. And so what states have done New York, for example, California has some limitations. Washington, Oregon, Nevada, New Jersey, a bunch of different states have started to enact legislation that says you can't prohibit an employee or even a former employee if that's the situation, from agreeing to a settlement that involves nondisclosure of a sexual harassment claim, unless the claimant's preference is to agree to that. And so what we're seeing is... And in fact I'll just back up for a second. That that piece is really important because the early drafts of some of this legislation actually had no exception. So in other words, it was a blanket prohibition on these types of nondisclosure provisions.

Steve Flores: And what's the policy consideration on the carve out?

Cardelle Spangler: Yeah. Well, so what happened was the plaintiff's bar actually pushed back on that because there are some, this typically affects women. Men can be affected as well, but it is more widely an issue for women. And they did not actually think that for a number of their clients that it would help them to have their agreements out there in the public sphere. That maybe this was something that they do want to keep private. And so states have given employees the option, if this is what you want to do, that's okay, that's fine. But then they say, well why don't you do something like the OWBPA waiver. In the age discrimination context, you have to give employees 21 days to consider an agreement and seven days to revoke if they're being asked to waive an age discrimination claim. So we're seeing those kinds of provisions now come in the sexual harassment context as well and in the past that was not there. So now in some states you need to give an employee who's waiving such a claim 21 days to consider, seven days to revoke.

Steve Flores: So you also discussed a little bit about employers kind of going above and beyond and changing their internal practices in light of the Me Too movement. Can you speak a little bit about what you're seeing there, employers kind of running with this?

Cardelle Spangler: Sure. Yeah. What I've seen is really a wave of internal investigations related to these types of claims and the claims are really widespread. I mean some dating back 10 years or more, some that involve no touching of any kind, but just behavior that made employees feel uncomfortable, all the way to some more serious conduct. And what I have seen is that employers have been taking these allegations very seriously. There's really

no... There isn't necessarily an obligation to investigate something that happened 10 years ago that really can't be sued upon now. But that's a fairly narrow way to look at this. Employers are really trying to look at the entire work environment and making sure that the environment itself is one that is conducive and safe for all employees. And so they're going back really and looking at these claims, investigating them to the extent that they can and trying to come to conclusions and really coming up with appropriate remedial measures to the extent that they're finding anything. So we have seen a real uptick in those kinds of investigations.

Steve Flores: Those going back to prior periods?

Cardelle Spangler: Yeah. Right. And I would say, I mean, the Me Too movement is almost like two years old now. And so some of that has slowed, I would say pretty dramatically. A year ago, 18 months ago, there were just a rash of these kinds of investigations because I think employees were really hearing what was going on in the news and kind of saying, "Well, wait a minute. As I think back, maybe some things happened to me that I wasn't happy with and maybe they were old, but I'm going to bring them forward anyway." And so there was sort of that big movement. I'm not seeing that quite as much now, but I do think that there is still more of an uptick in terms of people being willing to come forward with even current allegations and saying, this is what I think has happened and not sure if it violates any policies, but just to be on the safe side, I want to report it and see what can be done and employers are taking those very seriously.

Steve Flores: Yeah, that makes perfect sense. Okay, well I think that probably closes us out, but thank you so much for joining us on this podcast. Thank you for sharing your expertise in this area and thank you to our listeners for listening to another edition of our Benefits Blast podcast. You can subscribe to the Benefits Blast podcast via Apple, iTunes or Google Play, or by visiting the Winston and Strawn website for more insights on the latest legislative, regulatory, and practical developments concerning employee benefits and executive compensation, and in this case, labor and employment.

Cardelle Spangler: Thank you, Steve.

Speaker

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