

## Legal Trends

### Sexual Harassment in the Workplace

Weinstein. O'Reilly. Lauer. Franken. The list of powerful people, mostly men, who have lost their careers and damaged their reputations by engaging in inappropriate workplace behavior continues to grow. The #MeToo movement, fueled by social media, has brought much needed attention to the issue and spurred legislatures around the country to revisit existing laws and/or implement new ones. To date, legislative efforts have focused on the following areas, each of which will require employers to revamp certain policies and procedures.

**Promulgation of Sexual Harassment Policies.** While most employers implement written anti-harassment policies as a "best practice," many are surprised to learn that only three jurisdictions currently mandate them: California, Massachusetts and Vermont. New York just became the fourth state, with its new law becoming effective later this year.

**Required Training.** Prior to 2018, only three states – California, Connecticut and Maine – *required* employers to provide periodic sexual harassment training, and then to only supervisors. New York recently passed a law requiring employers to provide such training to *all* employees. Congress also now mandates sexual harassment training for all members of Congress and their respective staffs.

**Prohibition on Non-Disclosure and Arbitration Agreements.** Many state legislatures, including New Jersey, Pennsylvania and Washington, are considering laws that would prohibit employers from requiring victims of sexual harassment to enter into non-disclosure agreements, as well as forbid employers from requiring employees to arbitrate harassment disputes. New York recently became the first state to actually pass just such a law: New York employers can no longer require non-disclosure unless specially requested and desired by the employee, nor can they require employees to adjudicate sexual harassment claims in arbitration rather than court.

**Modifying Legal Standards.** Under both state and Federal law, sexual harassment claimants historically have had to prove that the complained-of conduct: (1) was based on sex; (2) was both subjectively and objectively offensive; (3) was unwelcome; and (4) was either severe or pervasive. Just this week the Minnesota House of Representatives passed a bill that would eliminate the "severe and pervasive" component. If ultimately enacted, this would be a significant "game changer" for Minnesota employers.

**What's Next?** The #MeToo movement shows no sign of dissipating, and many believe we have only seen the tip of the proverbial iceberg. Moreover, historically certain states



(primarily California, Massachusetts and New York) have led the way in expanding the contours of employment law, and other states typically follow suit. Accordingly, we expect to continue to see changes --both incremental and monumental -- in the coming months and years.

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