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Workplace Conduct Still Needs Improvement After #MeToo

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While the #MeToo movement has prompted several positive legislative efforts and better sexual harassment prevention training, Proskauer Rose attorneys say EEOC statistics indicate not much has changed in the past five years.

Five years ago, Hollywood actresses, Olympic gymnasts, and women across a variety of sectors sparked the #MeToo movement with allegations of sexual harassment against entertainment, sports, and business leaders. The movement launched robust national and state legislative efforts to reduce workplace harassment and perceived efforts by employers and accused harassers to keep claims hidden from public view.

As a result of #MeToo, many employers now provide more intensive training to prevent workplace harassment, immediately investigate claims of harassment, and have implemented “zero tolerance” policies toward offenders. Employers in many states have changed their employment contracts and settlement agreements to comply with prohibitions on employer non-disparagement clauses and bans on confidentiality regarding harassment claims.

However, while much has changed for employers over the past five years, it is not clear that efforts to address sexual harassment have significantly improved workplace conduct.

Spotlight on Training

One of the #MeToo movement’s significant accomplishments is increased employer focus on effective sexual harassment prevention training. While anti-harassment training has been mandatory for most California employers since 2005, New York employers beginning in 2018 have also been required to provide training on lawful workplace conduct and mitigating the risks of sexual harassment in the workplace.

Anecdotally, many employers now prefer in-person training despite advances in technology, online training options, and trends toward hybrid remote work models. Many employers now seek industry-specific training designed to educate their workforce about appropriate workplace conduct and consequences of non-compliance.

Bump in Legislation

#MeToo also resulted in a flood of federal and state laws designed to increase transparency, including bans on pre-dispute arbitration agreements—a private dispute resolution process without a jury—and prohibitions on confidentiality and non-disparagement clauses in certain employment related contracts and settlement agreements.

In 2019, New York became the first state to enact laws prohibiting employers from including confidentiality provisions in settlement agreements, as these clauses were seen as muzzling aggrieved employees. Since then, at least 15 states, including California, have enacted some form of prohibition on the inclusion of confidentiality provisions in settlement, separation, or other type of employment-related agreements.

These laws aim to prevent purportedly “secret settlements” that were perceived as enabling accused harassers rather than deterring.

President Joe Biden’s Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 represents perhaps the most significant legislative effort to differentiate sexual harassment claims from other workplace discrimination and misconduct. The act prohibits employers nationwide from enforcing pre-dispute arbitration agreements and class or collective-action waivers for sexual assault and harassment claims. And the US Senate on Sept. 29 passed the SPEAK Out Act, which invalidates pre-dispute nondisclosure and non-disparagement agreements.

Claims Outlook

Both laws set sexual assault/harassment claims apart from other types of claims by shielding them from arbitration and non-disclosure agreements—processes that can be used for other non-gender-based harassment and discrimination claims.

And yet, notwithstanding significant corporate and legislative efforts, statistics from the Equal Employment Opportunity Commission suggest that instances and severity of workplace sexual harassment have not dramatically changed in the last five years.

In 2017, 12,428 sex-based harassment claims were filed with the EEOC. In 2018, the number jumped to 13,055, but then decreased to 10,035 in 2021. The Covid-19 pandemic may account for decreased sexual harassment claims, as allegations of age, race, and religious discrimination have similarly decreased since the onset of the pandemic.

Overall recoveries for sexual harassment claims have increased since the #MeToo movement began. For example, in 2021, the EEOC indicated $61.6 million was recovered, compared to $46.3 million in 2017. Moreover, sexual harassment charges accounted for 27.7% of all harassment charges from 2018-2021, compared to 24.7% of harassment charges from 2014-2017.

Employee sentiment about workplace conduct seems to paint a consistent picture. In 2020, the Hollywood Commission conducted a survey of 10,000 entertainment industry workers, revealing 65% of workers did not believe a powerful individual would be held accountable for harassing someone with less power, with 28% having reported an incident of gender harassment, unwanted sexual attention, or sexual coercion to a supervisor or manager.

Other surveys suggest these sentiments persist outside the entertainment industry. A 2022 survey of STEM professionals, conducted through multiple-choice questions, essays, and interviews, revealed 62% of respondents experienced workplace sexual harassment, with only 29% of those women filing formal complaints.

Comparatively, in 2021, 57% claimed experiencing workplace sexual harassment.

In September 2022, the federal judiciary announced it would examine the extent of sexual harassment in the workplace by conducting a survey of its 30,000 employees.

Widespread legislation and increased public scrutiny clearly have forced employers to make significant changes to training, policies, and dispute resolution. Five years post-#MeToo, national and state legislative responses have heightened awareness of sexual harassment in the workplace and, absent the agreement of the accuser, have left no place for employers and perpetrators to “hide” these claims from public scrutiny.

However, based on the EEOC’s reports and workplace surveys, it remains to be seen whether these significant impacts of the #MeToo movement and the legislative efforts it galvanized will ultimately deter harassing conduct throughout the workforce.

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