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## What the Google Walkout Means For Employers

By Steven J. Pearlman and Danielle J. Moss

A new byproduct of the #MeToo movement has afforded employees significant leverage: employee walkouts. Google just experienced this, and responded with some substantial changes in its practices.

In October, the *New York Times* published an article detailing how, over the past decade, three Google executives were paid millions of dollars to quietly exit the company following sexual harassment accusations. Daisuke Wakabayashi and Katie Benner, "How Google Protected Andy Rubin, the 'Father of Android,'" <https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html>. According to the article, one senior vice president was awarded a stock grant valued at \$150 million in the middle of an investigation into his alleged sexual assault of a subordinate. The article further noted that this executive received \$90 million in cash after the harassment allegation was deemed credible. This precipitated a headline-grabbing employee walkout.

The Google walkout came together in less than a week, facilitated by the organizers' use of the company's platform and resources. It united 20,000 workers, starting in Tokyo and spreading across



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Singapore, London, Dublin and the United States. Participants' levels of employment varied widely, ranging from software developers and engineers, to lower level employees and contractors. Kate Conger and Daisuke Wakabayashi, "Google, After Employee Walkout, Overhauls Sexual Misconduct Policy," <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html>.

The walkout participants presented a number of demands, such as: elimination of mandatory arbitration for sexual misconduct claims; employee representation on the board of directors; greater transparency regarding sexual

harassment complaints; and the elimination of non-disclosure agreements. *Id.*; Alexia Fernandez Campbell, "Google Announces Changes to Sexual Harassment Policies after Global Employee Walkout," *Vox*. <https://www.vox.com/2018/11/8/18075840/google-ceo-announces-sexual-harassment-policy>.

Google took these demands seriously, likely appreciating that the costs and risks attendant to the walkout and continued employee discord range from lost productivity, attrition, and private and government-initiated litigation, to decreased employee morale, inability to attract talent, and

reputational harm. The walkout also raises labor and employment law questions, such as whether employers must pay employees for time spent protesting and whether discipline is appropriate for not working as scheduled.

Google responded swiftly and decisively: It agreed to end mandatory arbitration of sexual misconduct claims; committed to provide more transparency with respect to sexual harassment complaints and the outcome of investigations; and agreed to centralize reporting channels to one dedicated website with live support and services (e.g., counseling and career coaching).

But Google did not accede to the demands that it add an employee representative to its parent company's board, or eliminate the use of non-disclosure agreements.

It behooves employers to proactively consider their options knowing that such demands could be made.

**1. Eliminate Mandatory Arbitration?** Critics argue it unfairly deprives aggrieved employees of access to the courts and media, which has led states (e.g., New York) to pass legislation proscribing arbitration of sexual harassment claims. Such laws may be preempted by the Federal Arbitration Act. Moreover, there are many significant benefits to arbitration, ranging from confidentiality, expediency and cost efficiency, to avoiding the risk of runaway juries. Google's decision to forgo these substantial benefits underscores the unique circumstances of the walkout and the leverage it afforded employees. Most employers understandably remain steadfast in their use of mandatory arbitration, particularly given the

U.S. Supreme Court's *Epic Systems Corp. v. Lewis* decision upholding such agreements.

**2. Appoint an Employee Representative to Board of Directors?** In this #MeToo era, many employers care as much about prevailing in the court of public opinion as prevailing on issues of liability. Advocates for employee representatives on boards of directors believe this will prevent decisions that undermine employee interests. But Google apparently considered this to be an unorthodox demand which has not gained traction in response to the #MeToo movement. Employers may consider alternatives such as taking steps to ensure that sexual harassment complaints are directly reported to the board.

**3. Expand Anti-Harassment Policies and Procedures?** The #MeToo movement has led to employees seeking greater transparency about sexual harassment complaints and the outcome of investigations, and companies have generally taken such demands seriously. Google agreed to report the number of substantiated complaints over time, trends, disciplinary actions taken and descriptions of offenses warranting termination. However, there are a number of factors that limit such transparency, such as complainants requesting confidentiality, privacy issues, and companies' need to minimize the risk of defamation claims. Employers would benefit from educating their workforces on these limitations to manage expectations.

**4. Do Away With Non-Disclosure Agreements?** There is an increasingly negative public perception that companies

protect alleged harassers by keeping sexual misconduct allegations confidential. But these agreements protect against reputational risks and, without them, employers may have a greater interest in enduring protracted litigation in hopes of setting the record straight. Such considerations may have influenced Google's decision to continue to use non-disclosure agreements. Also, there are many instances where employees welcome non-disclosure agreements, desiring to keep their allegations confidential.

Employers in the technology industry have reacted to the walkout, with some already changing their practices. Given the results employees achieved through the walkout, workforces at other companies may follow suit. Now more than ever, employers would be well served to heed the Google walkout's warning shot by getting ahead of these issues to avoid becoming the next headline.

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