Labor and Employment Law Alert

HARASSMENT PREVENTION DEVELOPMENTS

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The #MeToo Movement has pushed harassment prevention efforts—and their inadequacies—to the forefront of the nation's social consciousness. The number of sexual harassment charges filed with the EEOC increased more than 12% in 2018, and the number of sexual harassment enforcement suits filed by the EEOC against employers increased more than 50%. Federal and state lawmakers have responded by passing laws in 2018 intended to prevent workplace harassment. The new laws (1) deter confidential settlements, (2) mandate training, (3) alter rules for litigating harassment claims, and (4) ban employment agreements that require victims to arbitrate their claims. Although Oklahoma hasn't passed these laws yet, employers should be aware of these trends that are reshaping the harassment prevention landscape and creating more risk of liability. This Alert summarizes these developments. As the new year begins, employers should resolve to re-evaluate their harassment prevention strategies in light of these trends.

1) The War on Confidential Settlements

Victim advocates contend confidentiality clauses routinely included in agreements settling sexual harassment claims protect harassers and promote sexually hostile workplaces. In 2018, Congress made secret settlements of harassment claims costlier. Employers can no longer take a tax deduction for settlement payments or attorney's fees if a nondisclosure agreement applies. California took a tougher approach. As of January 1, 2019, California law voids any provision in a settlement agreement that prevents disclosure of facts regarding sexual harassment, failure to prevent harassment or sex discrimination, and retaliation. All that can be kept secret is the amount paid and the victim's identity (except in cases not involving a public agency or official).

2) Mandatory Harassment Prevention Training

Federal law encourages, but doesn't require, employers to conduct harassment prevention training; however, several states have mandated it. In 2018, New York and

Delaware joined California, Connecticut, and Maine in mandating that employers provide training. These states not only prescribe the *content* of the training, they also dictate the *delivery* of it: it must be "live" or an interactive internet forum. Merely watching a video isn't enough. The frequency varies by state. New York requires annual training, and California has adopted a biannual requirement.

3) Litigating Sexual Harassment Claims in California

California also made it easier for alleged victims to win sexual harassment claims and harder for employers to defend against them by:

- Broadening the definition of a hostile workplace to one that sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.
- Making a single incident of harassing conduct sufficient for a jury trial if it interfered with the victim's performance or created an intimidating, hostile, or offensive workplace.
- Eliminating the "stray remarks" defense and declaring that stray remarks may be relevant circumstantial evidence of discrimination.
- Declaring that harassment cases should rarely be dismissed at summary judgment.

These changes will make harassment claims much costlier for employers with California operations, thus making prevention efforts vital.

4) Mandatory Arbitration of Sexual Harassment Claims

Federal law favors enforcement of agreements that require confidential arbitration of employment claims, including sexual harassment claims. But mandatory arbitration has come under fire, as it promotes secrecy of harassment claims and guarantees claims will never be heard by juries, which are more likely to award higher compensatory and punitive damages to victims. But in 2018, New York, Washington, and Maryland passed laws that ban or severely restrict mandatory arbitration of sexual harassment claims. The effect of these laws may be limited, though, since the Federal Arbitration Act ("FAA") preempts state laws that restrain or nullify the enforceability of arbitration agreements covered by the FAA. The Supreme Court's recent decision in *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1621 (2018) reinforces the supremacy of the FAA, emphasizing that courts must "rigorously enforce arbitration agreements according to their terms …." *Id.*

In response to the supremacy of the FAA, the National Association of Attorneys General sent a letter to Congress in 201, requesting that the mandatory arbitration of sexual harassment claims be banned. The AGs argued that confidential arbitration keeps other victims from speaking up, and victims should be able to seek justice in open court instead of closed-door arbitrations. Oklahoma's Attorney General Mike Hunter also issued a press release in support of the AG letter. It remains to be seen how the new Congress will respond to the AG letter, but popular support for banning mandatory arbitration of

sexual harassment claims appears to be growing.

How Employers Should Respond

In light of the growing number of harassment claims being filed and the measures being implemented to encourage or require employers to take action to prevent harassment, employers should resolve to re-evaluate their harassment prevention efforts in 2019. Employers should consider the following:

- Update your harassment prevention policies and procedures to include best practices being required by states such as California.
- Provide live harassment prevention training for all managers, supervisors, and non-managerial employees annually.
- Take all complaints of potential harassment seriously and respond promptly.
- Show no tolerance for any harassing behavior.
- Take effective corrective action when responding to complaints of harassing behavior.
- Ensure leaders at the highest level take an active, visible lead in promoting and encouraging harassment prevention efforts.

Chris Thrutchley and David Limekiller are attorneys in GableGotwals' Labor & Employment Practice Group. For help auditing and updating your employment policies practices, including harassment prevention efforts and harassment prevention training, and for defense of labor and employment related claims, contact GableGotwals.

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