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Legislating Away Harassment? 3 Main Legislative Paths So Far In The #MeToo Era

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William A. Nolan
Partner
Columbus
Managing Partner

As Currents readers know, we have been closely tracking the tremendous buzz that has arisen from several months of high profile sexual harassment (and worse) reports and allegations involving high profile men, and what changes might transpire as a result. While many legal developments that *seem* like big deals when the law is passed or the case is decided ultimately don't significantly change employers' day to day lives, it seems that something more significant is afoot here … exactly what that something is is still a work in progress. On the legislative front, it seems there are three main thrusts so far:

- **Attacking confidentiality provisions in agreements resolving harassment disputes.** As our Jennifer Stocker wrote here , the federal tax law passed in December 2017 curtails the business expense deduction for payments made in resolving a harassment dispute if that resolution is subject to a confidentiality provision. The idea is that confidentiality provisions protect bad actors. Legislation to simply invalidate such provisions (not just take away a tax deduction) is percolating in many states, including California and New York. Whether such measures will actually reduce harassment remains to be seen, but it seems likely that some of these provisions will pass and employers and their lawyers will need to rethink what are customary agreements for many employers when there are related harassment issues.

- **Prohibiting the arbitration of harassment claims.** Some employers, typically larger ones, require employees to enter into agreements to arbitrate rather than litigate disputes arising out of their employment. (Issues around the enforceability of such agreements are a topic under itself , but properly crafted agreements will generally be enforceable.) Legislation including at the federal level and in Massachusetts is designed to prohibit arbitration of harassment claims, again on the theory that arbitration – because it is private in a way that lawsuits are not – protects bad actors and companies that do not address them. Again, I question whether this really moves the needle on preventing harassment and, while confidentiality provisions in settlement agreements of all kinds in the employment world are nearly universal, arbitration is much less so, so the impact is less. But this will be important to some employers, and may shift the balance on the

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judgment of whether to use arbitration agreements for employers considering them.

- **Extending legal protections to independent contractors.** I believe this is the potentially most significant of the three main developments. Generally in employment law, employees have the protections of all of the laws that we talk about, and independent contractors have none of them. So the stakes are high as to which category a worker falls in, and there is much debate and dispute over which category particular individuals or groups fall under. In other words, an independent contractor who is sexually harassed does not have the protections of Title VII and state law counterparts that an employee does. There is legislation in Congress to extend these protections to independent contractors, as well as in certain states. Some of those efforts are specific to industries where independent contractors are common, such as legislation in New York focused on protecting models, and in Tennessee to protect freelance musicians. This is significant not only in that these laws could extend protections to people who literally do not have them and remove the dispute over an individual's employment vs. contractor status for this purpose, but also because it is the first significant move to extend employment laws to the big gray area between employment and independent contractor status.

Certainly there are other legislative initiatives, but these are the three main ones we have gleaned so far. We will continue to watch and report on all of them!