LABOR & EMPLOYMENT

THE STATES STEP INTO #METOO

Since the #MeToo movement took hold a year ago, there has been a wave of high-profile sexual harassment claims against companies and a number of prominent figures—many of whom have been removed from their roles as executives and leaders. The ensuing litigation is just beginning to wind its way through the courts, and its full impact is yet to be felt.

"There have been a lot of complaints raised and individuals terminated, but few cases have been fully litigated," says Ellen Moran Dwyer, a partner in Crowell & Moring's Labor & Employment Group and chair of the firm's Executive Committee. "So we haven't seen a real shift in the legal and liability standards that apply in harassment cases—but that may be coming. Over time, the courts will have to grapple with these issues."

In the near term, however, increased litigation risk is coming from another quarter, in the form of state laws enacted over the past year. By August 2018, according to an Associated Press analysis, about half of U.S. states had passed laws related to #MeToo issues—and the trend has continued. Some of these laws have focused largely on state governments themselves—requiring harassment training for statehouse employees, for example, or prohibiting the use of public money to fund harassment settlements. But a growing number of states have also passed #MeToo-related legislation that is focused on private-sector employers—a list that now includes Arizona, California, Delaware, Maryland, New York, Tennessee, Vermont, and Washington.

WHAT'S IN THE LAWS

This new legislation varies from state to state, but some common themes are emerging. Often, says Dwyer, "states are taking up legislation to enhance the transparency of harassment complaints lodged against an employer. In doing so, states are seeking to avoid a situation in which serial harassers are free to victimize multiple employees and move from company to company undetected." New state laws, for example, are limiting the use of non-disclosure agreements (NDAs), which many see as tools that have enabled harassers to silence victims and continue their behavior over the course of years. "New York and California have enacted legislation that prohibits an employer from requiring an employee to agree not to disclose the facts underlying her sexual harassment claim," says Dwyer. "You can have an NDA that prohibits disclosure of the amount of money paid to resolve a claim, but the employee must remain free to disclose the underlying facts."

Dwyer notes that a number of legislatures, perceiving mandatory arbitration as a means to conceal or bury harassment claims, have outlawed provisions in employee handbooks and agreements that mandate the arbitration of sexual harassment claims. Other states have extended the statute of limitations for sexual harassment claims "to afford employees more time to come forward with claims of sexual harassment, recognizing that it often takes time before an employee is comfortable speaking up," she says. California, for example, recently increased its statute of limitations from one to three years.

Meanwhile, at least one state—New York—has addressed third-party victims in its laws, with a statute that makes employers liable for the harassment of contractors and vendors working for them. "The language of the statute is very vague," says Dwyer. "In effect, it says that liability depends on the degree of control the employer has over the alleged harasser. Exactly what degree of control is required and the corresponding bounds of employer liability to non-employees under this new legislation are issues we expect to play out in the courts."

Finally, some state laws have gone further, mandating the disclosure of complaint data to state agencies and directing the

KEY POINTS

#StatesToo

A growing number of states have been passing #MeToo-inspired legislation covering employers.

New Requirements

Laws often include limits to forced arbitration and NDAs and mandate interactive training.

Focus on Prevention

With these multistate, piecemeal changes in the law, employers should update their harassment policies and training.

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agencies to take a more active role in investigating complaints. Signaling the states' interest in monitoring employers' handling of sexual harassment complaints more closely, a new law in Maryland requires businesses with at least 50 employees to provide public reports to the state's civil rights commission that recount details about the company's sexual harassment settlements and confidentiality agreements. And a new Vermont law mandates the creation of an online portal on the attorney general's or the state's human rights commission's website, in addition to a telephone hotline, to facilitate both the reporting of complaints and state agency oversight of investigations.

THE OUNCE OF PREVENTION

Many of these new state laws focus on preventing, rather than remediating, harassment. Some go so far as to spell out specific provisions that companies need to include in their harassment policies—which can get complicated. "As more state and local laws impose these requirements, it becomes increasingly challenging for large companies to develop and implement uniform policies to address harassment in their workplaces," says Dwyer.

Required sexual harassment training is a key component of most of this legislation over the past year. Several laws call for interactive training—either online or in person—to educate employees about the bounds of acceptable workplace conduct and avenues to report harassment. A Delaware law, for example, requires companies with 50 or more employees to provide such training, and goes on to spell out the topics that must be covered, such as the illegal nature of sexual harassment, the use of examples to define it, and the complaint channels through which to report it. Dwyer also points to recent guidance issued by the U.S. Equal Employment Opportunity Commission that not only calls for more robust harassment training but also "shifts the focus from simply defining prohibited conduct to fostering engaged and civil relationships in the workplace." Says Dwyer, "This focus on civility reflects a fresh awareness that workplace cultures built on foundations of civility and respect tend to have many fewer incidents of harassment and sex-based misconduct."

Employers should take state lawmakers' emphasis on prevention to heart—both to head off problems before they start and to support an affirmative defense if they become entangled in litigation. Most mature companies have anti-harassment policies in place, but with the recent enactment of a patchwork of state legislation, those policies should be revised and updated. Employers should likewise double their efforts to understand and enhance the civility and cultures in their organizations as a core part of their risk mitigation strategies in the perilous #MeToo space. Cultivating relationships of trust and respect between leaders and their employees, and confidence in harassment reporting channels and the fairness of employers' remediation efforts, should serve as a powerful prophylactic against harassment and ensuing litigation.

"That's important," Dwyer says, "because in many sophisticated companies, the problem is not so much the overt physical conduct but rather subtle, nuanced behavior." Effective training, she notes, "educates employees about how others experience them and about what makes people uncomfortable. It's really just trying to create a workplace where people understand each other and trust each other." In that kind of culture, she says, "when someone has a complaint, they are more likely to speak up and report it internally—without launching a full, aggressive investigation that can lead to litigation."

PAY EQUITY GOES GLOBAL—AND LOCAL

Over the past year, the issue of gender pay equity continued to gain traction. In the U.K., for example, a movement called #PayMeToo has emerged, and U.K. law now requires companies with more than 250 employees to disclose information about their gender wage gaps annually. "That legislation has triggered similar legislation in other countries," says Crowell & Moring's Ellen Moran Dwyer. "So we're seeing the increased globalization of pay equity concerns and gender pay gap reporting."

In the U.S., Dwyer says, "there is growing interest in this issue from boards of directors and often an interest in more transparency." In addition, a number of states—including California, Massachusetts, New York, New Jersey, and Oregon—have revised their pay equity laws to expand protections around gender pay differences. Typically, these changes have eased wage-comparison criteria to be more employee-friendly or banned salary-history questions in hiring. In the coming year, says Dwyer, "we'll see more litigation, especially class litigation, under these state statutes."