

Beyond the Weinstein Effect: It's More Than Just Training

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In light of the many high-profile news stories involving sexual harassment, employers are cognizant of the need to update policies, improve investigation procedures, and conduct training. However, there is more going on than meets the eye. Several states have proposed legislation that creates a path for victims to come forward. In addition, the new federal tax law also impacts how an employer will evaluate sexual harassment claims.

In New York and South Carolina, proposed bills would prevent employers from requiring employees to bring sexual-harassment complaints to binding arbitration. The bills aim to prevent employees from having to use a typically confidential arbitration process. Another bill was introduced in New York that prevents harassment settlements from including a nondisclosure provision – stripping employers of the ability to keep issues confidential between the employer and employee. Other proposed state legislation include:

- New Jersey – A bill seeks to prevent employees from executing a release that waives the right to discuss workplace discrimination or harassment.
- California – A bill proposes that would prevent nondisclosure agreements from being included in sexual harassment and sex discrimination settlements.
- Pennsylvania – A bill would render unenforceable contracts barring victims from reporting harassment or naming a harasser.

Finally, the new federal Tax Cut and Jobs Act adds another layer onto an employer's sexual harassment settlement considerations. Under the new law, any settlement or payment attributable to sexual harassment or sexual abuse – as well as the attorney fees related to such settlement or payment – are not deductible if the settlement is subject to a nondisclosure agreement. An employer now must choose between a nondisclosure clause and tax deductibility when negotiating settlements of a sexual harassment or sexual abuse claims. By putting pressure on employers to avoid nondisclosure clauses, Congress hopes that fewer claims will be kept silent thereby encouraging additional claims to be asserted. And, this brings us back to where we started – increased awareness and training is critical.

National Law Review, Volume VIII, Number 23

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