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EMPLOYMENT LAW

How One Hashtag Transformed the Law

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It has been nearly two years since the viral #MeToo tweet that sparked a national debate about sexual harassment in the workplace. While #MeToo has not changed the legal standard by which sexual harassment is defined in New Jersey, it has had a dramatic impact on the way sexual harassment is perceived and tolerated in our culture. Perhaps the movement's biggest impact can be seen in the passage of both federal and state legislation aimed at providing greater protections to victims of workplace sexual harassment. This article takes a closer look at these legislative initiatives as well as potential changes on the horizon.

Federal Legislation

2017 Tax Cuts & Jobs Act

Employers have historically relied upon Internal Revenue Code §162 to deduct certain business expenses, including settlement payments to employees to resolve employment-related claims, as well as the costs of defending these claims. To avoid any adverse publicity associated with these settlements, employers routinely included nondisclosure provisions in settlement agreements to assure the alleged victim could not communicate any circumstances surrounding the claim to the press or other third parties. However, shortly after #MeToo gained national attention, §162 was modified to prohibit deductions for "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorneys' fees related to such a settlement or payment." The changes are intended to disincentivize employers from shielding wrongdoers under the protections afforded by nondisclosure agreements.

Despite its good intentions, the amendment leaves certain questions unanswered. First, the law fails to define the terms "sexual harassment," "sexual abuse," or what is considered "related to" these claims. It also fails to address how tax deductions are applied to settlements that include more than just sexual harassment claims. Despite the lack of clear legislative guidance, employers settling sexual harassment claims must weigh the benefits of the §162 deduction against the loss of a negotiated nondisclosure agreement.

State Legislation

Equal Pay Protections

One of the biggest legislative initiatives coming out of #MeToo is New Jersey's Diane B. Allen Equal Pay Act, which was passed on March 27, 2018. While principally aimed at eliminating the gender gap in the workplace, New Jersey's pay equity amendments apply to *all* protected classes, not just gender, thereby paving the way for disparate wage claims on the basis of race, age and any other status protected by the New Jersey Law Against Discrimination (NJLAD).

In addition, the Act enables an employee in any one of the classes protected by NJLAD to bring a wage claim alleging he/she is being paid at a lower rate than a counterpart *outside* the protected class who is engaged in "substantially similar" work, a deviation from the more stringent "equal pay for equal work" standard applied by most state and federal laws. Although there are presently no regulations interpreting this phrase, the Act states that "substantially similar work" will be viewed "in light of the employees' skills, effort and responsibility." Given this ambiguity, employers must look beyond mere job title to all aspects and responsibilities of every position within its organization to identify what positions, if any, involve "substantially similar work." While the Act does not specifically address employers with branches in multiple states or geographic locations, arguably this analysis should include a comparison of wage rates across all operations and facilities. In the event a wage discrepancy is found, employers are precluded from lowering the compensation of any individual to correct the wage disparity, but instead must raise the compensation of the underpaid employee.

The Act provides a few narrow exceptions to the new "substantially similar work" standard. Specifically, the Act allows for pay disparities based on a seniority or merit system, or any legitimate bona fide factor, such as training, education or experience, or the quality/quantity of production. If this factor is met, the employer must go on to show: i) the factor is not based upon or perpetuates a differential in compensation based upon the protected characteristic; ii) that each factor is reasonably applied; iii) that one or more of the factors accounts for the entire wage differential; and iv) that the factors are job-related and based on a legitimate business necessity, and there are no alternative business practices that would serve the same business purpose without producing the wage differential. These added requirements make the "any other factor" exception under New Jersey's Equal Pay Act far narrower than its federal counterpart.

Pay differentials by New Jersey employers can have serious consequences, as the Act mandates the award of treble damages. In light of this exposure, employers should undergo a comprehensive review of their current pay practices and policies to identify the existence of any troubling disparities, then take those steps necessary to remedy disparities that could be attributed to protected status.

Prohibitions Against Arbitration Clauses and Non-Disclosure Agreements

Another trend among various states is the enactment of legislation banning mandatory arbitration clauses and confidentiality provisions in settlement agreements involving sexual harassment claims. Proponents argue that victims of workplace sexual harassment should not be forced to waive their rights to litigate their claims in court, nor should they be silenced from exposing the actions of a harasser through non-disclosure provisions. New Jersey has not only followed suit, but it has gone further than other jurisdictions by amending the NJLAD to prohibit employers from including mandatory arbitration clauses and nondisclosure provisions in any settlement agreement or employment contract involving *any* claims of discrimination, retaliation or harassment, not just those concerning sexual harassment.

S121, passed on March 18, 2019, contains two primary sections. First, S121 renders unenforceable any "provision in any employment

contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment." It further prohibits the waiver of any "right or remedy under the 'Law Against Discrimination' or any other statute or case law." While not explicitly defined, this section is seemingly aimed at banning employers from including mandatory arbitration clauses that necessarily waive an employee's substantive right to a trial in any settlement agreement or employment contract. As written, however, this aspect of the amendment clearly runs afoul of the Federal Arbitration Act (FAA) which preempts state laws that prohibit the "outright arbitration of a particular type of claim." In response to a challenge to a comparable statute enacted by the New York legislature, the court ruled that the legislature's effort to prohibit arbitration was preempted by the FAA. *See Latif v. Morgan Stanley & Co.*, No. 18 cv 11528 (June 26, 2019). Members of the New Jersey judiciary are likely to look to this holding for guidance when facing preemption challenges to this amendment.

The second section of S121 renders unenforceable against the employee any nondisclosure provision in an employment or settlement agreement that has the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." While the law allows the parties to mutually agree to a NDA, any such agreement must then also include a "prominently placed notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable." While this language is aimed at preventing victims of sexual harassment from being silenced, legislators overlooked the negative impact these new restrictions will likely have on early settlements. In the past, employers may have been willing to settle cases, even those involving frivolous or highly defensible claims, in order to avoid litigation in exchange for the assurance that the terms of such agreement would remain confidential. With this recent enactment, employers are no longer incentivized to do so.

Additional Initiatives

Anti-Harassment Training

New Jersey recently proposed A4831, which would require restaurants to adopt an anti-harassment training policy and provide anti-sexual harassment training to all employees. As currently written, training would be required within 90 days of employment and every five years thereafter. If passed, this bill could signal a movement in New Jersey toward mandating all private sector employers to conduct regular anti-harassment training, reflecting a burgeoning trend across other states.

Female-Mandated Corporate Boards

Also pending before the New Jersey legislature is a bill that would require many public companies to have at least three women on corporate boards by 2021. The obvious purpose of the bill is to equalize opportunities for women to hold positions of power in the corporate world. If passed, it is estimated that approximately 42% of New Jersey companies would have to change the composition of their boards.

Given these sweeping changes in legislation, employers must be proactive in educating employees not only about changes in the law, but also about the wide array of unlawful behaviors that are prohibited in the workplace. Now more than ever, employers want to demonstrate their commitment to eliminating any unlawful behaviors in the workplace and to fostering an environment that equally supports and respects all employees.

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