



WORKPLACE JUSTICE

# #METOO ONE YEAR LATER: PROGRESS IN CATALYZING CHANGE TO END WORKPLACE HARASSMENT

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*In 2007, gender justice activist Tarana Burke coined the phrase “Me Too” and launched a movement for survivors of sexual violence to find healing and strength in solidarity. In October 2017, following media reports of serial sexual harassment and assault by producer Harvey Weinstein, the actress and activist Alyssa Milano invited survivors to share their experiences of harassment and violence on social media using the hashtag #MeToo. The hashtag quickly went viral worldwide as individuals shared their stories and demanded accountability. The unleashing of the power of their voices has prompted an unprecedented public reckoning with the pervasiveness of harassment, and particularly workplace harassment, that continues today. The power of individuals sharing their stories has changed the way that women are heard and believed, led to important moments of individual accountability, and begun to reshape our institutions, laws, and culture. This report provides an overview of legal and institutional progress addressing workplace harassment in the last year, catalyzed by this movement.*

## STATE LEGISLATIVE ADVANCES

The impact of speaking truth to power on reform is clear: in the past year, state legislators introduced over 100 bills to strengthen protections against workplace harassment, and to date, eleven states and two localities have passed new protections. These new state laws have strengthened workplace protections in critical areas. Five states enacted legislation to prohibit employers from requiring employees to sign nondisclosure agreements as a condition of employment. Four states now prohibit employers from requiring employees to agree to forced arbitration. Four jurisdictions have expanded protections to include independent contractors, interns, or graduate students. Nine states and localities have enacted key prevention measures, including mandatory training and policy requirements for employers. One state successfully passed a measure to gradually raise the minimum wage for tipped workers to match the minimum wage, making it less likely that tipped workers in that state will feel forced to tolerate sexual harassment from customers.

These state-level advances are important first steps towards necessary legal reform and encouraging employers to make critical policy and cultural changes. However, these laws could be strengthened or expanded in multiple ways.<sup>1</sup> For instance, much of the state workplace harassment legislation enacted over the past year addressed only sexual

harassment. But workplace discrimination and harassment based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity, and are no less humiliating—and these forms of harassment and discrimination often intersect in working people's actual experiences. The sexual harassment a Black woman experiences, for example, may include racial slurs and reflect racial hostility. Lawmakers should craft intersectional responses to harassment and discrimination that do not single out or remedy one form while ignoring the others.

## ENSURING ALL WORKING PEOPLE ARE COVERED BY HARASSMENT PROTECTIONS

*Legal protections against harassment extend only to “employees” in most states and under federal law, leaving many people unprotected. This year, some states extended protections against harassment and discrimination for independent contractors, interns, volunteers, and graduate students.*

**Delaware** expanded the definition of “employee” covered under its sexual harassment protections to include state employees, unpaid interns, applicants, joint employees, and apprentices.<sup>2</sup>



**New York** passed legislation to protect contractors, subcontractors, vendors, consultants, and others providing services pursuant to a contract from sexual harassment in the workplace; employers can be held liable if they knew or should have known about the harassment and failed to take immediate and appropriate corrective action.<sup>3</sup>

**New York City** passed a measure to clarify that independent contractors are covered by the city's law against gender-based harassment at work.<sup>4</sup>

**Vermont** passed a law that prohibits sexual harassment of all persons engaged to perform work or services, expanding protections against harassment to independent contractors, volunteers, and interns.<sup>5</sup>

*In many states, sexual harassment laws do not cover very small employers, and federal law does not reach employers with fewer than 15 employees. This year, some jurisdictions extended coverage to very small employers.*

For the purposes of its prohibition on harassment based on protected characteristics, **California** defined "employer" as a person employing at least one person or regularly receiving the services of at least one person pursuant to a contract.<sup>6</sup>

**New York City** amended its Human Rights Law to extend gender-based harassment provisions to all employers, regardless of the number of employees.<sup>7</sup>

## RESTORING WORKER POWER AND LIMITING EMPLOYER-IMPOSED SECRECY

*Nondisclosure agreements (NDAs) can silence individuals who have experienced harassment and empower employers to hide ongoing harassment, rather than undertaking the changes needed to end it. Some employers require employees to enter into NDAs when they start a job that prevent them from speaking up about harassment or discrimination. Other times, NDAs are imposed as part of a settlement of a harassment claim. Many states acted this year to limit employer power to impose NDAs.*

**Arizona** enacted a law to allow an individual who is bound by an NDA to break the NDA if asked about criminal sex offenses by law enforcement or during a criminal proceeding.<sup>8</sup>

### *NDAs as a condition of employment*

**California** prohibited employers from requiring an employee to sign, as a condition of employment or continued employment, or in exchange for a raise or a bonus, a release of a claim or a right, a nondisparagement agreement, or other document that prevents the employee from disclosing information about unlawful acts in the workplace, including sexual harassment.<sup>9</sup> The law clarifies that these provisions do not apply to NDAs or releases in

the context of a settlement agreement that was voluntary, deliberate, and informed, provides consideration of value to the employee, and the employee is given notice and opportunity to retain an attorney or is represented by an attorney.<sup>10</sup>

**Maryland** passed a law to make unlawful NDAs and other waivers of substantive and procedural rights related to sexual harassment or retaliation claims in an employment contract or policy. The law also protects employees from retaliation for refusing to enter into such an agreement.<sup>11</sup>

In **Tennessee**, a new law makes it unlawful to require an employee or prospective employee, as a condition of employment, to execute or renew a NDA regarding sexual harassment. The law protects employees covered by such an NDA from retaliatory discharge for breaking the NDA.<sup>12</sup>

**Vermont's** new law prohibits employers from requiring any employee or prospective employee, as a condition of employment, to sign an agreement that prevents the individual from opposing, disclosing, reporting, or participating in an investigation of sexual harassment.<sup>13</sup>

In **Washington**, new legislation prohibits employers from requiring an employee, as a condition of employment, to sign a NDA, waiver, or other document that prevents the employee from disclosing sexual harassment or assault occurring in the workplace, at work-related events, or between employees, or an employer and an employee, off the employment premises.<sup>14</sup> Washington also passed a separate law providing that NDAs cannot be used to limit a person from producing evidence or testimony related to past instances of sexual harassment or sexual assault by a party to a civil action.<sup>15</sup>

### *NDAs in settlement agreements*

**Arizona's** new law prohibits public officials from using public monies to enter into a settlement with a nondisclosure agreement related to sexual assault or sexual harassment.<sup>16</sup>

**California** enacted legislation to prohibit confidentiality provisions in settlement agreements that prevent the disclosure of factual information related to claims of sexual assault, sexual harassment, or other forms of sex-based workplace harassment, discrimination, and retaliation filed in a civil or administrative action. Claimants retain the option of requesting a confidentiality provision to protect their identity, unless a government agency or public official is a party to the settlement agreement. This prohibition does not apply to confidentiality provisions regarding the amount paid pursuant to a settlement agreement.<sup>17</sup>

In **New York**, a new measure prohibits employers from using NDAs in settlement agreements or other resolutions of a claim that prevent the disclosure of the underlying facts and circumstances of sexual harassment claims, unless the condition of confidentiality is the complainant's preference. The complainant must be given twenty-one days to consider the provision. For a period of at least seven days following



the execution of a settlement agreement that includes an NDA, the complainant may revoke the agreement, and the agreement will not become effective or be enforceable until the revocation period has expired.<sup>18</sup>

**Vermont** now requires that an agreement to settle a claim of sexual harassment explicitly state that it does not prohibit the claimant from: filing a complaint with any state or federal agency; participating in an investigation by a state or federal agency; testifying or complying with discovery requests in a proceeding related to a claim of sexual harassment; or engaging in concerted activities with other employees pursuant to state or federal labor relations laws. The agreement must also state that it does not waive any rights or claims that may arise after the settlement is executed.<sup>19</sup>

In addition, on or before January 15, 2019, the Office of Legislative Council must submit a written report to the state legislature examining the mechanisms for rendering NDAs void and unenforceable if, in relation to a separate claim, a court or tribunal later finds that the alleged harasser engaged in sexual harassment or retaliation.<sup>20</sup> The report must also examine potential mechanisms to provide the Attorney General and the Human Rights Commission with notice of NDAs in settlement agreements related to sexual harassment.<sup>21</sup>

*When employers resolve harassment claims out of public view, the lack of transparency can prevent accountability for broader reform. To remedy this, several states this year passed laws requiring the reporting or inspection of claims, complaints, investigations, resolutions, and/or settlements involving workplace harassment.*

**Illinois** enacted legislation to require reporting of discrimination, harassment, sexual harassment, and retaliation claims involving executive branch employees, and vendors and others doing business with state agencies in the executive branch, as well as claims involving board members and employees of the Regional Transit Boards and all vendors and others doing business with the Regional Transit Boards. The reports must be made publicly available on each office's website.<sup>22</sup> The state also enacted laws regarding reporting of claims involving legislative branch employees.<sup>23</sup>

In **Maryland**, a new measure requires employers with 50 or more employees to complete a survey from the Maryland Commission on Civil Rights on the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee; the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and the number of sexual harassment settlements that included a provision requiring both parties to keep the terms of the settlement confidential. The aggregate number of responses from employers for each category of information will be posted on the Maryland Commission on Civil Rights' website. The number of times a specific employer paid a settlement to resolve a sexual harassment allegation against the same employee over

the past 10 years of employment will be retained for public inspection upon request.<sup>24</sup>

Another new law requires each unit of the executive branch of the state government to submit information about its sexual harassment policies and prevention training and a summary of sexual harassment complaints filed, investigated, resolved, and pending in an annual report to the state Equal Employment Opportunity Coordinator and the Maryland Commission on Civil Rights.<sup>25</sup>

New legislation in **Vermont** authorizes the Attorney General and the State Human Rights Commission<sup>26</sup> to inspect workplaces and examine records upon 48 hours' notice, including records reflecting the number of sexual harassment complaints received and their resolutions, and policies, procedures, and training materials related to the prevention of sexual harassment.<sup>27</sup>

In **New York City**, a new law requires all city agencies, as well as the offices of the Mayor, Borough Presidents, Comptroller, and Public Advocate, to annually report on complaints of workplace sexual harassment to the Department of Citywide Administrative Services.<sup>28</sup> The Department is required to report the number of complaints filed with each agency; the number resolved; the number substantiated and not substantiated; and the number withdrawn by the complainant prior to a final determination. Information from agencies with 10 employees or less will be aggregated together. This information will be reported to the Mayor, the Council and Commission on Human Rights, which shall post it on its website.

*Many employers compel their employees to waive their right to go to court to enforce their rights to be free from harassment and other forms of discrimination. They require employees instead to arbitrate any such disputes. Forced arbitration provisions funnel harassment claims into often secret proceedings where the deck is stacked against employees and can prevent employees from coming together as a group to enforce their rights. While federal law limits states' ability to legislate in this area, some states are working to limit employers' ability to force their employees into arbitration: many of these provisions will no doubt be challenged by employers in the courts.*

**Maryland** has rendered null and void as against the public policy of the state, except as prohibited by federal law, any provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy related to a future claim of sexual harassment or retaliation for reporting sexual harassment.<sup>29</sup>

**New York** passed a law prohibiting mandatory arbitration to resolve allegations or claims of sexual harassment.<sup>30</sup>

**Vermont's** new law prohibits employers, except as otherwise permitted by state or federal law, from requiring any employee or prospective employee to sign an agreement or waiver as a condition of employment that purports to waive a substantive or procedural right or remedy available to the employee with respect to a claim of sexual harassment.<sup>31</sup>



In **Washington** state, a new law makes void and unenforceable any provisions requiring an employee to waive their right to publicly pursue a cause of action, or to publicly file a complaint with the appropriate state or federal agencies, pertaining to any cause of action arising under state or federal antidiscrimination laws, as well as any provision that requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.<sup>32</sup>

## REMOVING BARRIERS TO ACCESSING JUSTICE

*Short statutes of limitations can hamper the ability of individuals to bring harassment complaints, especially given the trauma of assault and other forms of harassment, which can impact the ability of individuals to take prompt legal action.*

**California** extended the statute of limitations for civil actions to recover damages for sexual assault to 10 years from the date of the last act of sexual assault by the defendant against the plaintiff, or three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from sexual assault, whichever is later.<sup>33</sup> However, the Governor vetoed a measure that would have extended the statute of limitations for filing an employment discrimination or harassment complaint with the California Department of Fair Employment and Housing from one year to three years.<sup>34</sup>

**New York City** extended the statute of limitations for filing claims of gender-based harassment with the New York City Commission on Human Rights from one year to within three years after the alleged harassing conduct occurred.<sup>35</sup>

## ELIMINATING THE TIPPED MINIMUM WAGE

*Tipped workers are particularly vulnerable to sexual harassment and sexual assault at work because of their typically limited power within the workplace, because of the economic vulnerability that leaves them without a financial cushion if they lose their job, and because of the need to please the customer in order to bring home anything approaching an adequate wage. Tipped workers' reliance on tips to supplement a sub-minimum wage forces them to tolerate sexual harassment and other inappropriate behavior from customers just to make a living, which in turn perpetuates a culture of harassment in tipped industries.*

The **Michigan** legislature voted to eliminate<sup>36</sup> the state's two-tiered, tipped minimum wage system, in an apparent effort to avoid a ballot initiative on the issue.<sup>37</sup> The minimum wage for tipped employees will gradually increase from the current rate of \$3.52 an hour until it matches the \$12 minimum wage for all other workers in 2024.<sup>38</sup> The governor has not indicated whether he will sign the legislation.<sup>39</sup>

In **Washington, D.C.**, voters approved a ballot measure

known as Initiative 77 in June 2018 by a strong majority. The measure was expected to incrementally increase the tipped minimum wage by \$1.50 per year, until it reached \$15 per hour in 2025. However, on October 2, 2018, members of the D.C. Council approved legislation to repeal Initiative 77, ignoring the will of D.C. voters.<sup>40</sup>

## PROMOTING PREVENTION STRATEGIES

*While Title VII has been interpreted to provide employers with an incentive to adopt sexual harassment policies and training, it has created a situation where employers effectively are able to shield themselves from liability by having any anti-harassment policy or training, regardless of quality or efficacy. Employer anti-harassment training and policies have been largely ineffective in preventing harassment in the first instance in part because they are not mandatory, and because they are focused on compliance with the law, instead of preventing harassment.*

*Effective training, especially when tailored to the specific workplace and workforce, can reduce workplace harassment. In the past year, several jurisdictions passed legislation requiring training for employees and in some cases mandating the content.*

**California** enacted legislation expanding its existing sexual harassment training requirements, which required employers with 50 or more employees to provide such training to supervisory employees once every two years. The new legislation requires employers with five or more employees to provide at least two hours of interactive sexual harassment training and education to all supervisory employees, and at least one hour of such training to all nonsupervisory employees in California within six months of their assumption of a position, by January 1, 2020.<sup>41</sup> After January 1, 2020, employers must provide the required training to each employee in California once every two years.<sup>42</sup> Separate new legislation in California authorizes, but does not require, employers to provide bystander intervention training.<sup>43</sup>

**Delaware** passed a law requiring employers with 50 or more employees in Delaware to provide regular, interactive training and education to employees and supervisors regarding the prevention of sexual harassment. Employers are required to provide additional interactive training for supervisors addressing their specific responsibilities regarding prevention and correction of sexual harassment and retaliation.<sup>44</sup>

In **Illinois**, a new law requires professions that have continuing education requirements to include at least one hour of sexual harassment prevention training in their continuing education requirements.<sup>45</sup>

In **Maryland**, a new law requires the state Ethics Commission to provide a training course for current and prospective regulated lobbyists at least twice each year on the provisions of the Maryland Public Ethics Law, including provisions related to discrimination and harassment, relevant to regulated lobbyists.<sup>46</sup>



**New York** is now required to develop a model sexual harassment prevention training program, and employers in the state must conduct annual interactive training using either the state model or a model compliant with state standards.<sup>47</sup>

**New York City** now requires employers with 15 or more employees to conduct annual anti-sexual harassment interactive trainings for all employees, including supervisory and managerial employees. The training must include information concerning bystander intervention and the specific responsibilities of supervisory and managerial employees in addressing and preventing sexual harassment and retaliation.<sup>48</sup> New York City also now requires all city agencies, the offices of Mayor, Borough Presidents, Comptroller and Public Advocate to conduct annual anti-sexual harassment trainings for all employees.<sup>49</sup>

In **Vermont**, a new measure provides that at the Attorney General or the Human Rights Commission's discretion, an employer may be required, for a period of up to three years, to provide an annual education and training program to all employees or to conduct an annual, anonymous climate survey, or both.<sup>50</sup>

*Antiharassment policies are merely encouraged, not required, by federal law. As a result, many employers lack antiharassment policies, particularly smaller organizations without the resources to engage legal and human resource experts to develop them. In response, several jurisdictions passed legislation requiring public and private employers to have antiharassment policies, or directing state agencies to develop model policies for broader use.*

**Illinois** passed legislation to require companies bidding for state contracts to have a sexual harassment policy.<sup>51</sup> Additionally, individuals and entities required to register under the Lobbyist Registration Act must file a statement confirming that, among other things, they have a sexual harassment policy.<sup>52</sup>

**New York** is now required to create and publish a model sexual harassment prevention guidance document and sexual harassment prevention policy that employers may utilize in their adoption of a sexual harassment prevention policy.<sup>53</sup>

Additionally, new legislation in New York requires bidders on state contracts to certify as part of the bid process that the bidder has implemented a written policy addressing workplace sexual harassment prevention and provides annual sexual harassment prevention training to all of its employees. If a bidder is unable to make this certification, they must provide a signed statement explaining why.<sup>54</sup>

Employers in **Vermont** are now required to provide employees with a written copy of any changes to their sexual harassment policies.<sup>55</sup>

**Washington** established a state women's commission to address several issues, including best practices for sexual harassment policies, training, and recommendations for

state agencies to update their policies.<sup>56</sup> Additionally, the state equal employment opportunity commission is required to convene a working group to develop model policies and best practices to prevent sexual harassment in the workplace, including training, enforcement, and reporting mechanisms.<sup>57</sup>

*A climate survey is a tool used to assess an organization's culture by soliciting employee knowledge, perceptions, and attitudes on various issues. Anonymous climate surveys can help management understand the true nature and scope of harassment and discrimination in the workplace, inform important issues to be included in training, and identify problematic behavior that may be addressed before it leads to formal complaints or lawsuits.*

In **Vermont**, a new measure provides that at the Attorney General or the Human Rights Commission's discretion, an employer may be required, for a period of up to three years, to provide an annual education and training program to all employees or to conduct an annual, anonymous climate survey, or both.<sup>58</sup>

**New York City** now requires all city agencies, as well as the offices of the Mayor, Borough Presidents, Comptroller and the Public Advocate, to conduct climate surveys to assess the general awareness and knowledge of the city's equal employment opportunity policy, including but not limited to sexual harassment policies and prevention at city agencies.<sup>59</sup> Additionally, the new law requires all New York City agencies and the offices of the Mayor, Borough Presidents, Comptroller, and Public Advocate to assess workplace risk factors associated with sexual harassment.<sup>60</sup>

*No workplace antiharassment or antidiscrimination law will be truly effective if working people are unaware of the laws and their protections. The stark power imbalances that often exist between an employee and the employer make it difficult for working people to feel safe and empowered enough to advocate for themselves. Requiring employers to post or otherwise share with employees information about their rights can help employees better assert those rights.*

**California**<sup>61</sup>, **Delaware**<sup>62</sup>, **Illinois**<sup>63</sup>, **New York City**<sup>64</sup>, and **Vermont**<sup>65</sup> have all passed laws requiring employers to post or otherwise share with employees information about employees' rights to be free from sexual harassment. In addition, **Louisiana** enacted a measure requiring establishments that have been licensed by the state to serve or sell alcohol to distribute an informational pamphlet to their employees with information on identifying and responding to sexual harassment and assault.<sup>66</sup>

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## MEASURES TO ADDRESS HARASSMENT WITHIN LEGISLATURES

These state-level advances are important first steps towards necessary legal reform and encouraging employers to make critical policy and cultural changes. Unfortunately, similar progress is absent at the federal level. Although Congress introduced a handful of bills addressing critical workplace harassment issues, it has failed to move them forward.

The **Fair Employment Protection Act**, introduced in the House of Representatives and the Senate, would restore protections against supervisor harassment weakened by the U.S. Supreme Court's 2013 decision in *Vance v. Ball State University*. The bill clarifies that employers can be vicariously liable for harassment by individuals with the authority to undertake or recommend tangible employment actions or with the authority to direct an employee's daily work activities, and leaves undisturbed the negligence standard that applies to coworker harassment and the strict liability standard that applies to supervisor harassment that results in a tangible employment action.<sup>67</sup>

The **Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (EMPOWER) Act** was introduced with bipartisan support in the Senate and the House.<sup>68</sup> The EMPOWER Act would prohibit employers from forcing employees to sign nondisparagement and nondisclosure provisions as a condition of employment. Employers would be permitted to include nondisclosure and nondisparagement provisions in settlement agreements only when mutually agreed upon by the employer and employee and when the provision is mutually beneficial.

The EMPOWER Act would establish a confidential tip line at the Equal Employment Opportunity Commission for reporting violations. It would also require public companies to report to the Securities and Exchange Commission, via form 10-K, information regarding incidents of workplace harassment (including sexual harassment) and retaliation. The company would be required to disclose the number of settlements, judgments or awards; any payments made in connection with a release of claims; the total amount paid for the settlements and judgments; and whether there have been three or more settlements or judgments against the company relating to a particular employee.

Finally, the EMPOWER Act would limit tax deductions for employers for amounts paid or costs for judgments or awards related to workplace harassment. The EMPOWER Act also would limit the tax liability for claimants in cases involving workplace harassment.<sup>69</sup>

The **Arbitration Fairness Act of 2018**, would prohibit employers from requiring arbitration of employment, consumer, antitrust, and civil rights disputes.<sup>70</sup>

The **Ending Forced Arbitration of Sexual Harassment Act** would limit mandatory arbitration of sex discrimination claims – and not other types of claims – in pre-dispute employment agreements. The bill was introduced with bipartisan support in the House and Senate.<sup>71</sup>

Several state legislatures have enacted measures to address workplace harassment within their ranks. These laws mandate regular trainings for state employees,<sup>72</sup> require legislatures to regularly update harassment policies,<sup>73</sup> establish internal processes for investigating harassment claims,<sup>74</sup> and require public reporting of harassment claims.<sup>75</sup>

At the federal level, the Senate passed S. Res. 330, which mandates anti-harassment training for Senators and officers, employees, interns, and detailees.<sup>76</sup> The House passed H. Res. 630, requiring all Members, officers, employees, interns, fellows, and detailees to complete mandatory anti-harassment and anti-discrimination training.<sup>77</sup> The House also passed H. Res. 724,<sup>78</sup> which requires each office in the House to adopt workplace anti-discrimination and anti-harassment policies. The resolution created an Office of Employee Advocacy to provide House employees with free legal assistance and consultation regarding the administrative complaint process, and to provide free legal assistance and representation in administrative and civil legal proceedings. The resolution establishes that sexual harassment, sexual relationships between House members and employees, and unwelcome sexual advances by House members are violations of the House Code of Official Conduct. Other attempts in the House and Senate to further strengthen protections for the legislative workforce have stalled.<sup>79</sup>

## ENHANCING LEGAL ASSISTANCE FOR THOSE CHALLENGING WORKPLACE HARASSMENT

The TIME'S UP Legal Defense Fund, which began operating on January 1, 2018 and is housed at and administered by the National Women's Law Center Fund LLC, connects those who experience sexual misconduct including assault, harassment, abuse and related retaliation in the workplace or in trying to advance their careers with legal and public relations assistance. The TIME'S UP Legal Defense Fund is supported by over \$22 million in donations. The Fund prioritizes cases involving low-wage workers, people of color, LGBTQ people, individuals with disabilities, and people facing legal retaliation because they dared to speak out about sexual harassment. Through funding these cases and storytelling support, the Fund ensures that these workers have the legal and communications support to hold their harassers accountable.

To date, the TIME'S UP Legal Defense Fund has so far provided \$750,000 to 18 organizations with grants to support their advocacy on behalf of workers, and nearly \$4 million in funding for cases and media/storytelling assistance.



## CORPORATE POLICY REFORMS

In December 2017, **Microsoft** announced it was ending its policy of forced arbitration for sexual harassment claims.<sup>80</sup> In the wake of horrific allegations of widespread sexual harassment and assault against customers<sup>81</sup> and employees,<sup>82</sup> **Uber** ended its policy of forcing its employees who are sexually harassed or assaulted to arbitrate their individual claims, as opposed to go to court. Additionally, Uber no longer mandates confidentiality in settlement agreements related to sexual harassment or assault and will publish a safety transparency report detailing the numbers of sexual assaults that take place by way of its platform. **Lyft** followed suit and ended its practice of requiring Lyft passengers, drivers, and employers to arbitrate their individual sexual harassment and assault cases.<sup>83</sup> Unfortunately, neither Uber nor Lyft changed their forced arbitration policies as to class-action lawsuits, meaning that employees who want to join together to challenge harassment will still be forced out of court and into arbitration.

Earlier this year, two law firms, **Munger, Tolles, & Olson** and **Orrick, Herrington & Sutcliffe** announced they would no longer force incoming employees to sign forced arbitration clauses in employment agreements. **Skadden Arps Slate Meagher & Flom** ended the use forced arbitration clauses in employment agreements with respect to nonpartners, although it is not clear if this is limited to attorneys.<sup>84</sup>

While these policy changes are important and necessary first steps, they fall short because they address only sexual harassment and assault claims. Any changes to end the use of oppressive contract provisions, such as mandatory nondisclosure agreements and forced arbitration, must include all types of harassment, discrimination, and employment disputes. These violations are often interconnected and many individuals experience multiple forms of harassment and other violations simultaneously. Beyond the elimination of forced arbitration and class action waivers, there are many additional critical steps companies can and should take to not only effectively respond to workplace harassment, but also to prevent it.<sup>85</sup>

## THE FIGHT FOR JUSTICE AND ACCOUNTABILITY IS FAR FROM OVER

As the Me Too movement has made clear, the laws and systems in place designed to address harassment have been inadequate. As a result, victims of harassment are still frequently exposed to devastating economic, physical, and psychological consequences, while serial harassers and predators are protected. While much progress has been made in the last year, policymakers and companies must continue to strengthen protections and fill gaps in existing law and policy to better protect working people, promote accountability, and prevent harassment.<sup>86</sup>

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1. See NAT'L WOMEN'S LAW CTR., *State Playbook for Gender Equity, Advance Workplace Equality in Your State* (July 2018), <https://nwlc.org/resources/advance-workplace-equality-in-your-state>.
2. H. Substitute No. 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018). "Joint employee" was defined in the original version of the bill but was not defined in the final bill.
3. S.B. 7507C, § 296-d, subpart F, 2017-2018 Leg. Sess. (N.Y. 2018).
4. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No. 657-A. (2018).
5. VERMONT ACT 183, H.707, Sec. 1, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
6. S.B. 1300, Sec. 2 (j), 2017-2018 Reg. Sess. (Cal. 2018). California's Fair Employment and Housing Act subjects employers with five or more employees to its anti-discrimination provisions. Cal. Gov't Code § 12926(d). The newly enacted provision lowers the threshold to any employer with at least one employee for harassment claims only.
7. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No. 657-A (2018).
8. H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).
9. S.B. 1300, Sec. 4 (a), 2017-2018 Reg. Sess. (Cal. 2018).
10. *Id.* at Sec. 4 (c).
11. DISCLOSING SEXUAL HARASSMENT IN THE WORKPLACE ACT OF 2018, S.B. 1010, Sec. 1, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
12. H.B. 2613, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).
13. VERMONT ACT 183, H.707, Sec. 1, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
14. S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
15. S.B. 6068, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
16. H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).
17. S.B. 820, 2017-2018 Reg. Sess. (Cal. 2018).
18. N.Y. C.P.L.R. 5003-b (McKinney).
19. Additionally, Vermont's new law prohibits "no-rehire clauses" that prevent an employee from working again for the employer, or any parent company, subsidiary, division, or affiliate of the employer as part of settlement agreements in harassment matters. VERMONT



- Act 183, H.707, Sec. 1(h), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
20. VERMONT ACT 183, H.707, Sec. 10, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  21. *Id.*
  22. H.B. 138, 100th Gen. Assemb., 2nd Reg. Sess. (Ill. 2018); see also State Officials and Employees Ethics Act, 5 Ill. Comp. Stat. Ann. 430/20-10(c) (Ill. 2003).
  23. See *infra* Measures to Address Harassment Within Legislatures.
  24. DISCLOSING SEXUAL HARASSMENT IN THE WORKPLACE ACT OF 2018, S.B. 1010, Sec. 2, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
  25. H.B. 1228, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
  26. Additionally, every person who files a claim of sexual harassment must notify the Attorney General and the Human Rights Commission of the action within 14 days of filing the complaint. VERMONT ACT 183, H. 707, Sec. 7(a), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  27. VERMONT ACT 183, H. 707, Sec. 1 (i)(1)(A); 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  28. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No.653-A (2018).
  29. DISCLOSING SEXUAL HARASSMENT IN THE WORKPLACE ACT OF 2018, S.B. 1010, Sec. 1(A), 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
  30. S.B. 7507C § 296-d, subpart B, 2017-2018 Leg. Sess. (N.Y. 2018).
  31. VERMONT ACT 183, H. 707, Sec. 1(g), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  32. S.B. 6313, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
  33. A.B. 1619, 2017-2018 Reg. Sess. (Cal. 2018).
  34. A.B. 1870, 2017-2018 Reg. Sess. (Cal. 2018).
  35. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No. 663-A (2018).
  36. Advocates in Michigan are concerned, however, that the legislature has cleared a path to repeal the measure because the legislature signed the proposal into law, rather than allowing the initiative to go to the ballot. This decision allows lawmakers to repeal the initiative by a simple majority vote, whereas had the measure passed as a ballot measure, a repeal would require a three-fourths majority vote of the legislature. Jeff Stein, 'They have taken away our vote': Michigan approves minimum-wage hike and paid sick leave, setting up clash, WASH. POST, Sept. 10, 2018, [https://www.washingtonpost.com/business/2018/09/10/they-have-taken-away-our-vote-michigan-approves-minimum-wage-hike-paid-sick-leave-setting-up-clash/?utm\\_term=.632cb469421a](https://www.washingtonpost.com/business/2018/09/10/they-have-taken-away-our-vote-michigan-approves-minimum-wage-hike-paid-sick-leave-setting-up-clash/?utm_term=.632cb469421a).
  37. ONE FAIR WAGE, *Breaking: Michigan Approves One Fair Wage*, Sept. 6, 2018, <http://onefairwage.com/in-the-news/breaking-michigan-approves-one-fair-wage/>; The Associated Press, WTOP, *Michigan Legislature OKs Minimum Wage, Sick Time Initiatives*, Sept. 5, 2018, <https://wtop.com/national/2018/09/michigan-legislature-oks-minimum-wage-sick-time-initiatives>.
  38. The Associated Press, WTOP, *Michigan Legislature OKs Minimum Wage, Sick Time Initiatives*, Sept. 5, 2018, <https://wtop.com/national/2018/09/michigan-legislature-oks-minimum-wage-sick-time-initiatives>.
  39. *Id.*
  40. ONE FAIR WAGE DC, <https://www.onefairwagedc.com/> (last visited Oct. 6, 2018); Fenit Nirappil, *D.C. Council overturns wage hike for bartenders, servers — four months after voters approved it*, WASH. POST, Oct. 2, 2018, [https://www.washingtonpost.com/local/dc-politics/dc-council-takes-initial-vote-to-overturn-initiative-77-four-months-after-voters-approved-it/2018/10/02/da906320-c651-11e8-b1ed-1d2d65b86d0c\\_story.html?utm\\_term=.a2331738d842](https://www.washingtonpost.com/local/dc-politics/dc-council-takes-initial-vote-to-overturn-initiative-77-four-months-after-voters-approved-it/2018/10/02/da906320-c651-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.a2331738d842).
  41. The California Department of Fair Employment and Housing must develop or obtain two online, interactive training courses on the prevention of sexual harassment in the workplace and make them available on the Department's website. S.B. 1343, 2017-2018 Reg. Sess. (Cal. 2018).
  42. S.B. 1343, 2017-2018 Reg. Sess. (Cal. 2018).
  43. S.B. 1300, Sec. 3, 2017-2018 Reg. Sess. (Cal. 2018).
  44. H. Substitute No. 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018).
  45. H.B. 4953, 100th Gen. Assemb., Reg. Sess. (Ill. 2018).
  46. H.B. 1342, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
  47. S.B. 7507C § 296-d, subpart E, 2017-2018 Leg. Sess. (N.Y. 2018).
  48. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. 632-A (2018).
  49. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. 612-A (2018).
  50. VERMONT ACT 183, H.707, Sec. 1 (i)(2), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  51. S.B. 405, 100th Gen. Assemb., Reg. Sess. (Ill. 2018).
  52. S.B. 402, Sec. 20, 100th Gen. Assemb., Reg. Sess. (Ill. 2017). The policy must be made available to any individual within two business days upon written request. Additionally, any person may contact the authorized agent of the registrant to report allegations of sexual harassment, and that the registrant recognizes the Inspector General has jurisdiction to review any allegations of sexual harassment alleged against the registrant or lobbyists hired by the registrant. *Id.*
  53. S.B. 7507C § 296-d, subpart E, 2017-2018 Leg. Sess. (N.Y. 2018).
  54. S.B. 7507C § 296-d, subpart A, 2017-2018 Leg. Sess. (N.Y. 2018).
  55. VERMONT ACT 183, H.707, Sec. 1 (c)(2), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  56. H.B. 2759, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
  57. S.B. 6471, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
  58. VERMONT ACT 183, H.707, Sec. 1 (i)(2), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  59. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No.664-A (2018).
  60. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No.613-A (2018).
  61. S.B. 1343, Sec. 1(a)(1), 2017-2018 Reg. Sess. (Cal. 2018).
  62. H. Substitute No. 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018).
  63. 2018 Ill. Legis. Serv. P.A. 100-588 (H.B. 138).
  64. NEW YORK, N.Y., STOP SEXUAL HARASSMENT IN NYC ACT, Int. No. 614-A. (2018).
  65. VERMONT ACT 183, H.707, Sec. 5(a), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
  66. LA. ACT 706, H.B. 899, 2018 Reg. Sess. (La. 2018).
  67. THE FAIR EMPLOYMENT PROTECTION ACT, S. 2019, H.R. 4152, 115th Cong. (2017-2018); NAT'L WOMEN'S LAW CTR., *The Fair Employment Protection Act: Restoring Protections from Workplace Harassment* (Feb. 2018), <https://nwlc.org/resources/fair-employment->



[protection-act-restoring-protections-workplace-harassment](#).

68. ENDING THE MONOPOLY OF POWER OVER WORKPLACE HARASSMENT THROUGH EDUCATION AND REPORTING ACT (“EMPOWER Act”), S.2994, 115th Cong. (2017-2018), introduced by Senators Kamala Harris (D-CA) and Lisa Murkowski (R-AK). Representative Lois Frankel and Rep. Ted Poe introduced the bill in the House of Representatives with bipartisan co-sponsors (H.R. 6406).
69. THE TAX CUTS AND JOB ACT OF 2017 prohibits deductions for settlements or payments related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or attorney’s fees related to such a settlement or payment. H.R. 1, Public Law 115-97, Sec. 13307(a), 115th Cong. (2017-2018). The text of the Act could be read to apply to complainants as well as employers. The EMPOWER Act would prohibit tax deductions for amounts paid or incurred by the taxpayer pursuant to any judgment or award in litigation related to workplace harassment; for expenses and attorney’s fees in connection with the litigation resulting in the judgment or award; or for insurance covering the defense or liability of the underlying claims in the litigation.
70. ARBITRATION FAIRNESS ACT, S. 2591, H.R. 1374, 115th Cong. (2017-2018).
71. ENDING FORCED ARBITRATION OF SEXUAL HARASSMENT ACT, S.2203, H.R. 4570, H.R. 4734, 115th Cong. (2017-2018).
72. See, e.g., H.B. 371, 2018 Leg. Sess. (Va. 2018); Me. Public Law ch. 443, S.P. 695, L.D. 1842, 128th Leg., 2nd Special Sess. (Me. 2018); UTAH LAWS CH. 390, H.B. 383, 2018 Gen. Sess. (Utah 2018).
73. H.B. 1342, 2018 Reg. Sess. (Md. 2018).
74. S.B. 867, 2017-2018 Reg. Sess. (Cal. 2018).
75. H.B. 138, 100th Gen. Assemb., 2nd Reg. Sess. (Ill. 2018); see also State Officials and Employees Ethics Act, 5 Ill. Comp. Stat. Ann. 430/25-85 (Ill. 2018).
76. S. Res. 330, 115th Cong. (2017-2018).
77. H. Res. 630, 115th Cong. (2017-2018).
78. H. Res. 724, 115th Cong. (2017-2018).
79. See CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 REFORM ACT, H.R. 4924, S. 2952, 115th Cong. (2017-2018).
80. Samantha Cooney, TIME, *Microsoft Won’t Make Women Settle Sexual Harassment Claims Privately Anymore. Here is Why That Matters*, Dec. 19, 2017, <http://time.com/5071726/microsoft-sexual-harassment-forced-arbitration>.
81. Sara Ashley O’Brien, CNN, *Uber Will No Longer Force Victims of Sexual Assault into Arbitration*, May 15, 2018, <https://money.cnn.com/2018/05/15/technology/uber-eliminates-forced-arbitration/index.html>.
82. Eric Newcomer, BLOOMBERG, *Uber Fires More Than 20 Employees in Harassment Probe*, June 6, 2017, <https://www.bloomberg.com/news/articles/2017-06-06/uber-said-to-fire-more-than-20-employees-in-harassment-probe>.
83. Greg Bensinger, WALL STREET JOURNAL, *Uber Ends Mandatory Arbitration Clauses for Sexual Harassment Claims*, May 15, 2018, <https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400>; see also Mike Snider, USA TODAY, *Uber, Lyft End Forced Arbitration for Sexual Assault Claims by Passengers or Employees*, May 15, 2018, <https://www.usatoday.com/story/tech/news/2018/05/15/uber-ends-arbitration-sex-assault-claims-passengers-employees/610616002>.
84. Angela Morris, ABA JOURNAL, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, June 2018, [http://www.abajournal.com/magazine/article/biglaw\\_mandatory\\_arbitration\\_clauses](http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses).
85. NAT’L WOMEN’S LAW CTR., *10 Ways Your Company Can Help Prevent Harassment in the Workplace*, Jan. 2018, <https://nwlc.org/resources/10-ways-your-company-can-help-prevent-harassment-in-the-workplace>; NAT’L WOMEN’S LAW CTR., *Sexual Harassment Prevention Strategies For Employers*, Jan. 2018, <https://nwlc.org/resources/sexual-harassment-prevention-strategies-for-employers>.
86. Maya Raghu & JoAnna Suriani, NAT’L WOMEN’S LAW CTR., *#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability*, Dec. 2017, <https://nwlc.org/resources/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability>.

