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Just Getting Started – How Changing Social Norms and New Legislation in the #MeToo Era Will Impact Employment Liability Claims

I. Introduction

Since October 5, 2017, the date on which *The New York Times* first ran its report exposing the numerous sexual harassment and assault allegations made by several women against Hollywood producer Harvey Weinstein, the flood gates have opened on high-profile allegations of sexual harassment in the workplace and beyond. More than 50 prominent men in a wide range of industries, as well as politics, have been publicly accused of sexual harassment or assault. Phone calls to the National Women's Law Center by women seeking information about what constitutes sexual harassment, and how to file a charge with the Equal Employment Opportunity Commission ("EEOC"), have increased five-fold. The EEOC also has reported an increase in the number of visits to the part of its webpage focused on sexual harassment, and just recently announced that charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017.[i] Given the subjective nature of how sexual harassment cases are decided by the courts, coupled with the recent legislative attempts to address this conduct, as well as the amount of conduct that has historically gone unreported, it appears unlikely that the focus on sexual harassment in the workplace will subside anytime soon.

This presentation will focus on some of the traditional barriers to bringing sexual harassment claims and how those continue to crumble as a result of changing social norms and a wave of new legislation. With the increased focus on sexual harassment in the news, the apparent increased willingness by employees to report such behavior, and a climate where state and local governments are stepping up to support the movement, employers (including directors and officers) and insurers should recognize that an increase in sexual harassment claims and lawsuits may be inevitable. In addition, employers and insurers should give due consideration to recent and planned legislation, which has the potential to alter what may be deemed legally actionable conduct and could impact how an employer or insurer evaluates the potential exposure presented by a given claim. As discussed below, these potential claims and legislation will not only impact Employment Practices Liability ("EPL") policies, but also have the potential to affect directors and officers, general liability and other types of insurance policies.

II. The Crumbling Barriers to Bringing Sexual Harassment Claims

A traditional claim of sexual harassment often presented hurdles that were difficult to overcome for a variety of circumstances.

A. Underreporting

Despite large percentages of women who have reported being sexually harassed at work, only a small percentage report claims to their employers for fear of retaliation.[ii] In 2016, the EEOC released a comprehensive study which determined that between 25 percent and 85 percent of women reported being sexually harassed while at work.[iii] One reason for the discrepancy in the number of people who reported experiencing sexual harassment in the workplace is the fear of retaliation. According to at least one reported study, 75 percent of workers who complained of sexual harassment reported experiencing retaliation as a result.[iv] Recognizing that sexual harassment is underreported, the EEOC estimates that one in four *people* (both women and men) experience sexual harassment in the workplace.[v]

B. Subjectivity and Dismissal Rates

With only three to six percent of sexual harassment cases ever making it to trial, some experts have opined that dismissal rates of such cases have an impact on the filing of future claims.[vi] At least part of the reason for the historically high dismissal rate is the fact that sexual harassment claims are evaluated by judges with some level of subjectivity. In 1986 the U.S. Supreme Court in *Meritor Savings Bank v. Vinson* held that, for sexual harassment to be actionable, it must be "unwelcome" and "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[vii] Since the decision in *Meritor*, the U.S. Supreme Court has attempted to further clarify this standard (e.g., later taking a "middle path" beyond "merely offensive," but not necessarily as severe as to cause "tangible psychological injury")[viii] and require that the harassment be "because of sex."[ix] However, in practice, the "severe or pervasive" standard has resulted in a mixed bag of decisions, requiring claimants to compare the facts and circumstances of his or her particular case to other cases found to be actionable.[x]

C. Time Limitations

In addition to the difficulties with defining what constitutes actionable conduct, potential claimants also must comply with a varying array of limitation periods for bringing a sexual harassment claim. The statute of limitations for such claims (including a "quid pro quo" claim, where a superior requests or demands sexual contact in return for benefits or a promotion) can depend on different factors, including the type of company or entity involved and the particular state or jurisdiction where the action is brought. Generally speaking, individuals can pursue a claim under Title VII of the Civil Rights Act by filing a "Charge of Discrimination" with the EEOC within 180 from the date of harassment. This deadline can be extended to 300 calendar days where there is a state or local administrative agency that enforces a similar law. Longer limitations periods may be extended for submitting sexual harassment claims to various state human rights departments, but this may vary by state and the type of claim.

If more than one incident of harassment has occurred, the applicable time limitations for filing a charge with the EEOC or a complaint typically commence at the time of the last incident of harassment.[xi] Different (and potentially longer) statute of limitations may exist for torts that are sometimes brought in connection with sexual harassment claims, such as assault, battery, privacy violations, and infliction of emotional distress.

III. New Legislation Addressing Sexual Harassment

New legislation passed or being considered at the federal, state, and local levels may impact certain of the barriers to bringing sexual harassment claims described above. According to the National Conference of State Legislatures, 32 states have introduced over 125 pieces of legislation aimed at protections against sexual harassment through August 2018 alone.[xii] Depending on what legislation is ultimately passed and how companies respond to such legislation, these statutes could have the potential to impact social norms regarding what constitutes conduct that is sufficiently "severe or pervasive" to alter the conditions of a claimant's employment. Several states, including New York, California, Maryland, Washington, and Vermont, have already passed legislation directed at such conduct. Other states are considering similar legislation.[xiii] To date, this legislation has focused on a few key areas.

A. Confidentiality and Tax Deductibility of Sexual Harassment Settlements

Any publicity in connection with a sexual harassment claim has the potential to lead to future "follow-along" claims being filed. In the past, employers have attempted to quell concerns about such additional claims by requesting or requiring non-disclosure agreements with respect to any settlement. However, an employer's ability to require non-disclosure of such agreements may become significantly more limited going forward, depending on the jurisdiction. This, in turn, could lead to a significant rise in claim rates, especially for employers that have a history of frequently settling sexual harassment claims.

For example, New York state and New York City passed legislation in April and May 2018 that generally prohibits confidentiality provisions in settlement agreements addressing sexual harassment claims. While there is an exception to this provision if it is the "complainant's preference" to include a confidentiality provision, the complainant must be given 21 days to consider the proposed provision, as well as a seven day revocation period after the agreement is executed. A similar law was passed by the California legislature that will be effective January 1, 2019.[xiv]

The new Vermont "Act Relating to the Prevention of Sexual Harassment" does not prohibit nondisclosure provisions; however, it does ban language in employment contracts that could prevent a sexual harassment victim from coming forward.[xv] Additionally, it is the first state statute to prohibit "no rehire" clauses (i.e., clauses that bar employees who settle discrimination cases from ever working for the employer again) in sexual harassment settlements.[xvi] Arizona and Louisiana have also passed laws permitting parties to breach non-disclosure agreements in situations involving criminal activity.[xvii]

Finally, the new Tax Cuts and Jobs Act (the "Act") (Internal Revenue Code Section 162(q)) bans the tax deductibility of settlements and defense costs with respect to sexual harassment claims

after December 22, 2017 that are subject to a settlement with a nondisclosure agreement.[xviii] However, a question remains as to whether the tax deductibility ban applies to insurers who pay for the defense and settlement of these types of claims. If the ban does not apply to payments made by insurers, it could frustrate the intent of the law depending on the type of coverage in place and the size of the potential insurance retention (though guidance on the application of the Act may shed some light on this issue).

B. Mandatory Arbitration and Class Action Waivers

Over the last several years, it has become increasingly common for larger employers to require employees to sign agreements mandating that any dispute that arises during the course of their employment will be resolved via arbitration. These agreements also sometimes attempt to include a waiver of the employee's right to pursue any such action on behalf of a class.

As with confidentiality agreements, New York legislation is at the forefront in this area. Effective July 11, 2018, New York started banning employers from requiring individuals to arbitrate claims of sexual harassment.[xix] Other states have attempted to enact similar legislation in form of "waiver of rights" provisions, including Maryland, Vermont, and Washington, with other states, including Arizona, California, Louisiana, Massachusetts, New Jersey, South Carolina, and Virginia, considering similar legislation.[xx] Further, there is bipartisan federal legislation being considered that would prohibit arbitration agreements regarding sexual discrimination and harassment claims.[xxi] Without some type of federal legislation, however, it is likely that many of the state statutes will be challenged as being inconsistent with federal law, which allows arbitration via the Federal Arbitration Act. Specifically, in *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court recently held that the waiver of class and collective actions in arbitration agreements are enforceable under federal law in the context of employment wage and hour disputes.[xxii] Nonetheless, arbitration clauses that are the subject of state law could still be challenged. As such, it will be interesting to see how this area develops going forward.

C. Time Limitations

The recent New York City "Stop Sexual Harassment in NYC Act" extends the statute of limitations for filing an administrative complaint involving gender-based harassment with the New York City Commission on Human Rights from one year to three years from the date of the alleged harassment. This makes the New York City ordinance parallel to the state's statute of limitations. Seattle's city council also recently voted in favor of extending its statute of limitations for sexual harassment claims filed with the Office of Civil Rights from 180 days to one year and six months.[xxiii] Connecticut and California have similarly introduced bills to extend such limitations periods for claims filed in those states. While the New York and Seattle amendments are not ground-breaking in that they largely bring local ordinances into line with state law, this is yet another example of how changes in local ordinances are broadening the abilities of aggrieved parties to bring claims.

In addition, several states have passed or are considering legislation extending the applicable statute of limitations for civil and criminal cases involving sexual assault. For example, in Michigan, legislation was passed on June 12, 2018 extending the statute of limitations in certain

types of civil and criminal sexual assault cases, including extending the civil statute of limitations from two to ten years for victims who are adults when the offense is committed.[xxiv]

D. Expanded Protections for Business-Related Non-Employees

Under federal law, an employer may be responsible for sexual harassment of an employee from non-employees in the workplace if certain conditions are met, but there is no federal protection against sexual harassment to non-employees.[xxv] The New York state law extends protections against sexual harassment to non-employees that provide services to employers in the capacity of contractors, subcontractors, vendors, and consultants (New York City already provided such protection). Similarly, Vermont's new law provides sexual harassment protections to all workers, including those not covered under Title VII, such as freelancers, interns, and volunteers.[xxvi] California law already prohibits sexual harassment of non-employees, including job applicants, unpaid interns, volunteers, and any person "providing service pursuant to a contract."[xxvii] Finally, Washington courts have held that the state's anti-discrimination law prohibits sexual harassment against independent contractors in the workplace.[xxviii]

In light of the new legislation in New York and Vermont, and the protections already afforded in California and Washington, it would seem that protections against sexual harassment of non-employee independent contractors, consultants, vendors, and volunteers in the workplace is an area that more state legislatures will start to address.

E. Mandatory Policies and Training

Under the New York City legislation, effective September 6, 2018, employers in New York City are required to post specified information concerning rights and responsibilities with regard to sexual harassment and provide employees with information regarding same when the employee is hired. In addition, effective October 9, 2018, the New York state legislation will require employers to maintain written sexual harassment policies subject to a "model" minimum standard, as well as provide some minimum "interactive" (which has yet to be defined) yearly sexual harassment prevention training. The written policies must address, among other things: (1) a prohibition of sexual harassment and examples of prohibited conduct; (2) information about an employee's rights and remedies to address sexual harassment under state and federal law' (3) a standard complaint form, a procedure for "the timely and confidential investigation of complaints"; (4) a clear statement that sexual harassment is a form of misconduct; and (5) that sanctions will be enforced against individuals who engage in such conduct, and against those supervisors and managers who allow such behavior to continue.

Other states, including California, Maine, Massachusetts, Rhode Island, and Vermont, have similar statutory provisions requiring written sexual harassment policies, although the type of information required in the respective policies can vary by state.[xxix] Likewise, California, Connecticut, and Maine have adopted training requirements on sexual harassment, which can vary by size of the company at issue (and California just expanded the application of its training to companies of only 5 or more employees, including seasonal employees). Other states are considering training requirements or have laws in place directed only to state agencies or otherwise encouraging such training.[xxx]

While "severe and pervasive" will likely remain the standard for establishing a sexual harassment claim, it is possible that these newer state requirements, as well as the type of policies, procedures, and training ultimately implemented by companies, could potentially impact the way courts consider the context of sexual harassment claims. For example, it is foreseeable that claimants will cite examples provided in such required training and policies as a minimum standard of what constitutes sexual harassment. Further, employers will likely be held more accountable than before with regard to adhering to and enforcing the processes that they will be required to set out in writing.

Interestingly, a proposal was made in the Minnesota legislature to add the following to the Minnesota Human Rights Act's definition of sexual harassment: "An intimidating, hostile, or offensive environment does not require the harassing conduct or communication to be severe or pervasive."[xxxi] Such language would directly circumvent the "severe and pervasive" standard set forth by the U.S. Supreme Court in *Meritor*, at least with respect to cases filed in Minnesota under state law. Finally, California recently passed a law allowing workers to sue for single incident of harassment, which challenges previous federal precedent in *Brooks vs. City of San Mateo*, 229 F. 3d 917 (2000).

IV. Insurance Policies Potentially Impacted by Sexual Harassment Claims

While it is no surprise that sexual harassment claims will impact EPL policies, some may be surprised to learn that there are several other types of insurance policies with the potential to be impacted.

A. EPL Policies

Beyond sexual harassment itself, there are several other allegations that could arise out of a sexual harassment claim. For instance, victims of sexual harassment may allege that they were assaulted, battered, or even falsely imprisoned. Additionally, it is common for a claim of sexual harassment to be accompanied by a claim of retaliation. Along those same lines, a claimant may also assert that the insured company failed to enforce its own policies after the harassment was reported, or that the harassment resulted in the deprivation of a career opportunity for the claimant. In this regard, insurers should keep in mind the various new laws requiring companies to adopt written sexual harassment policies and to provide training and should investigate whether these measures are being properly implemented.

A claim of negligent hiring, retention, training or supervision can also be alleged in sexual harassment claims, especially in circumstances where the accused is a serial harasser or repeat offender. Claimants of sexual harassment often make allegations of the infliction of mental anguish, humiliation, as well as intentional or negligent infliction of emotional distress. Moreover, allegations could even include civil rights violations (as is the case of the New York Attorney General lawsuit against Harvey Weinstein).

When analyzing coverage for a sexual harassment claim under an EPL policy, it is important to focus on the specific allegations asserted in the complaint. While most EPL policies affirmatively cover sexual harassment and retaliation, not all EPL policies will provide coverage for assault and battery. Further, the policy may contain an exclusion for intentional acts, as well as any

criminal proceedings. Most often, mental anguish, humiliation and negligent infliction of emotional distress will also be covered. However, a claim of intentional infliction of emotional distress could be excluded.

Additionally, once a sexual harassment incident is reported by the claimant to the insured, that individual may decide to retain outside counsel to initiate an investigation of the incident. Depending on the EPL policy at issue and when coverage is triggered, these external investigation costs may or may not be covered.

The length of time over which the sexual harassment took place, or whether a serial harasser is the offender, could also present coverage issues in connection with a sexual harassment claim. In the case of a serial harasser, it is important to determine whether the insured company had knowledge of the harassment, when that knowledge first arose, and whether any litigation resulted. In such cases, a prior knowledge or related acts exclusion, or a retroactive coverage date or prior and pending litigation date could apply and preclude coverage. In this regard, any new legislation extending statute of limitations for sexual harassment or sexual assault (if it is covered) is also something claims handlers and underwriters will want to keep in mind.

As for claims involving civil rights violations, some EPL policies will affirmatively provide coverage. Other policies may not affirmatively exclude coverage for civil rights claims, so coverage would depend on the allegations and the specific policy wording.

Regarding confidentiality of settlements, given that some EPL policies are underwritten to larger corporations with higher retentions (where insureds resolve a good deal of claims on their own below the retention), insurers should consider asking questions about how the prospective insured intends to handle the confidentiality of sexual harassment settlements. This will also help insurers understand whether prospective insureds are adhering to the new laws addressing confidentiality and tax deductions, as discussed above. Such information could be beneficial in terms of understanding the potential for future claims in the current environment.

Finally, given the recent changes in the law and the potential for further changes with regard to sexual harassment of non-employees in the workplace, insurers should carefully evaluate and understand how their policies address coverage with respect to such claims. In light of the fact that more and more companies are using independent contractors, it is increasingly important to understand the extent to which vendors, contractors, volunteers, and other non-employees can seek redress against the insured company with regard to sexual harassment claims.

B. Other Policies with the Potential to be Impacted by Sexual Harassment Claims

Beyond EPL policies, several other policies have the potential to be triggered by sexual harassment claims. One such policy that was triggered as a result of the sexual harassment claims made against 21st Century Fox, Roger Ailes, and Bill O'Reilly was the 21st Century Fox Directors & Officers ("D&O") Liability policy. Although the action settled pre-suit, the shareholders of 21st Century Fox alleged a breach of fiduciary duties against the D&Os of the company, including Rupert Murdoch and his son, Lachlan, who serve as co-executive chairmen. The case settled for $90 million and was reportedly largely paid by insurance.[xxxii] In light of the recently passed and the currently pending legislation requiring the disclosure of sexual

harassment settlements, as well as the implementation of certain policies, training, and procedures to address sexual harassment in the workplace, it is foreseeable that any failure to meet such requirements could be cited, at least in part, as a basis for a potential derivative action if a company resolves sexual harassment claims for a significant amount.

In addition to derivative actions, securities class action lawsuits may also be brought against a company arising out of sexual harassment lawsuits. This was the case involving Signet Jewellers in March 2017 after a sexual harassment claim was publicly disclosed. Specifically, the stock price of that company declined after previously sealed arbitration records became unsealed and the media began reporting on the claim, which included allegations that senior management tolerated and participated in not just sexual harassment, but sexual assault as well. Upon such reports the company's stock price declined, and shareholders filed a securities class action lawsuit against the company and its D&Os.

That said, there may be exclusions that can be raised as defenses to coverage for sexual harassment claims brought against D&Os, if a D&O is the alleged harasser. D&O policies often contain an exclusion for criminal conduct. To the extent the harassment rises to the level of assault or battery, the criminal conduct exclusion could apply to bar coverage for the claim. Additionally, if both the harasser and the victim of the harassment constitute insureds under the D&O policy, the Insured v. Insured exclusion could preclude or limit coverage. A personal injury or bodily injury exclusion may also apply, depending on the allegations.

General Liability ("GL") policies, which provide coverage for claims alleging bodily injury, may also be impacted by sexual harassment claims. However, insurers likely have a number of defenses to coverage for such claims under GL policies. First, a sexual harassment claim arguably does not constitute an "occurrence" as that term is generally defined. Additionally, GL policies almost always contain an exclusion for intentional acts, which most sexual harassment claims involve. GL policies also sometimes include sexual molestation exclusions, which could apply depending on the specific allegations being made. As such, even if a sexual harassment claim is tendered to a GL carrier, coverage is likely to be limited, if not excluded altogether. Nonetheless, a negligence claim against a company or entity arising out of allegations regarding the failure to adequately protect against sexual assault might arguably trigger a GL policy, depending on the wording at issue. In this regard, GL insurers should take note of the recent extensions to statute of limitations with respect to civil lawsuits alleging sexual assault.

Moreover, claims that include allegations of invasion of privacy or defamation have the potential to trigger coverage under some cyber liability policies, as do claims where the harasser uses social media in carrying out the harassment. However, the policy and coverage defenses raised above and in regard to GL policies are also commonly available under a cyber liability policy.

Insurers may also be able to raise a public policy argument to preclude coverage for claims asserting sexual harassment, especially involving claims that rise to the level of criminal conduct. Many states prohibit the payment of insurance for claims that include criminal or intentional wrongful conduct. However, an argument that public policy prohibits an insurer from covering a claim will likely be successful in only the most extreme cases, as most courts will want to

enforce the insurance contract for which the insured bargained and provide the protection purchased.

V. Conclusions

The legislative response to the #MeToo movement is just getting started. Such legislation is addressing many of the areas seen as traditional barriers to bringing sexual harassment claims and requiring the implementation of policies, procedures, and training that could serve to lower and make more uniform standards for evaluating what constitutes actionable conduct. Companies and insurers alike will want to be mindful of these new initiatives as they could impact the exposure presented by individual claims as well as the frequency of claims going forward. Moreover, these initiatives have the potential to impact the exposure presented not only to EPL policies, but to GL, D&O, and other types of policies, as well.

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[i] Wendy Lee, *Lawsuits charging harassment in workplace on the increase*, SAN FRANCISCO CHRONICLE (Updated Dec. 12, 2017 2:38PM), https://www.sfchronicle.com/business/article/Lawsuits-charging-sex-based-harassment-in-12423033.php (noting that federal civil lawsuits related to harassment in the workplace increased from 3,288 in 2016 to 3,505 in 2017); EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm.

[ii] Tara Golsham, *Study finds 75 percent of workplace harassment victims experienced retaliation when they spoke up*, Vox (Oct. 15, 2017 9:00AM), http://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts.

[iii] *Id.*

[iv] *Id.*

[v] *Id.*

[vi] *See* Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017 7:28AM), https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts.

[vii] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67-68 (1986).

[viii] Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

[ix] Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75 (1998).

[x] *See e.g.*, Rebecca White, *Title VIII and the #MeToo Movement*, 68 Emory L.J. Online, p. 6, fn 27 (2018) (summarizing cases wherein conduct such as sexual touching, sexual slurs and comments, showing pornographic videos, and attempted kisses were not sufficiently severe or pervasive to be actionable).

[xi] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002) ("Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability").

[xii] *2018 Legislation on Sexual Harassment In The Legislature*, NATIONAL CONFERENCE OF STATE LEGISLATURE (Jun. 6, 2018), http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx.

[xiii] Aviv Grumet-Morris, *Legislative Trends: "Me Too" Movement and Sexual Harassment Disclosure Laws*, WINSTON & STRAWN LLP: LABOR & EMPLOYMENT (June 2018), https://www.winston.com/images/content/1/4/v2/140691/Labor-MeToo-JUN2018.pdf

[xiv] S.B. 820, 2017-2018 Reg. Sess. (Cal. 2018).

[xv] Molly Enking, *In a move to empower victims of sexual harassment, Vermont law takes aim at common legal practice*, PBS NEWS Hour (Jul. 22, 2018 1:30PM),

https://www.pbs.org/newshour/nation/vermont-sexual-harassment-no-rehire-clause-law.

[xvi] *Id.* (noting that "[c]ritics say this kind of clause hurts the victim and disincentives people from coming forward when they experience harassment or discrimination").

[xvii] Susan Sholinksy, *#MeToo's Impact on Sexual Harassment Law Just Beginning*, LAW 360 (Jul. 11, 2018 2:15PM), https://www.law360.com/articles/1061044.

[xviii] Paul S. Drizner & Michael D. Fleischer, *Sexual Harassment Legal Settlements: What Employers Need to Know About the New Tax Act*, SEYFARTH SHAW LLP: EMPLOYMENT LAW LOOKOUT (Feb. 6, 2018), https://www.laborandemploymentlawcounsel.com/2018/02/sexual-harassment-legal-settlements-what-employers-need-to-know-about-the-new-tax-act/.

[xix] Emily J. Bordens & Ann Marie Effingham, *New Laws Affect How New York Employers Navigate Sexual Harassment Claims*, BRESSLER AMERY ROSS: LABOR AND EMPLOYMENT ALERT (Aug. 2, 2018), https://www.bressler.com/new-laws-effect-how-new-york-employers-navigate-sexual-harassment-claims.

[xx] Sholinksy, *supra* note xviii.

[xxi] Robert G. Brody & Lindsay M. Rinehart *New Bill Would Prohibit Arbitration Agreements Covering Sexual Harassment, Gender Discrimination*, CONNECTICUT LAW TRIBUNE (Mar. 21, 2018), https://www.law.com/ctlawtribune/2018/03/21/new-bill-would-prohibit-arbitration-agreements-covering-sexual-harassment-gender-discrimination/?slreturn=20180720114028.

[xxii] Epic Systems v. Lewis, 584 U.S. ___ (2018).

[xxiii] Hayat Norimine, *Council Extends the City's Statute of Limitations for Harassment Claims*, SEATTLE MET (May 7, 2018 4:53PM), https://www.seattlemet.com/articles/2018/5/7/council-extends-the-city-s-statute-of-limitations-for-reporting-sexual-harassment.

[xxiv] Scott Anderson, *Statute of limitation on sexual assault extended under new Michigan laws*, WXYZ DETROIT (Updated Jun. 12, 2018 8:13PM), https://www.wxyz.com/news/statute-of-limitation-on-sexual-assault-extended-under-new-michigan-laws.

[xxv] *See, e.g.*, Summa v. Hofstra University, 708 F.3d 115, 129-31 (2d Cir. 2013) (adopting the "well-reasoned" rules of the EEOC in "imputing employer liability for harassment by non-employees according to the same standards for non-supervisory co-workers," with the qualification that the court would consider the extent of the employer's control over the conduct of the non-employees).

[xxvi] Enking, *supra* note xvi.

[xxvii] Cal. Gov Code § 12940(j)(1).

[xxviii] Marquis v. City of Spokane, 130 Wash. 2d 97 (1996); Currier v. Northland Servs., Inc. 743 P.3d 1006 (2014).

[xxix] Sholinksy, *supra* note xviii.

[xxx] For a good list of the current legislative requirements on a state-by-state basis, *See* Dana Rosen, *Sexual Harassment Training Requirements by State*, OPEN SESAME (Jun. 24, 2015), https://www.opensesame.com/blog/sexual-harassment-training-by-state. In fact, courts have also strongly encouraged the implementation of policies, procedures and training with respect to sexual harassment. For example, in Gaines v. Bellino, 173 N.J. 301, 313 (2002), the New Jersey Supreme Court noted that the existence of formal policies and procedures in the workplace (including training) was a factor relevant to evaluating an employer's negligence and liability for workplace harassment by supervisors.

[xxxi] Briana Bierschbach, *Lawmakers unveil proposal to redefine what sexual harassment means in Minnesota*, MINN POST (Apr. 20, 2018), https://www.minnpost.com/politics-policy/2018/04/lawmakers-unveil-proposal-redefine-what-sexual-harassment-means-minnesota.

[xxxii] Kevin LaCroix, *Massive Derivative Suit Settlement for Alleged Failure to Prevent Sexual Misconduct*, THE D&O DIARY (Nov. 21, 2017),

https://www.dandodiary.com/2017/11/articles/shareholders-derivative-litigation/massive-derivative-suit-settlement-alleged-management-failure-prevent-sexual-misconduct/.