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Unintended consequences: How legislative responses to #MeToo may harm harassment victims

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FEBRUARY 27, 2018

We live in very reactionary times. Ever since the first media reports of alleged sexual misconduct by Harvey Weinstein surfaced last October, it seems no day goes by without a headline identifying another high-profile individual who is being accused of sexual misconduct.

In response to this onslaught of public claims of sexual misconduct, state and federal governments have reacted swiftly in ways that could lead to some very serious unintended consequences.

On Oct. 19, 2017, Massachusetts started what has become a trend of proposing and supporting legislation intended to punish alleged harassers, punish companies that try to hide harassment and harassment claims, and provide a voice to the alleged victims.

> The prohibition on nondisclosure agreements could deny access to justice for individuals who need it.

Since then, nearly 30 additional pieces of legislation have been proposed in 14 states — Arizona, California, Florida, Indiana, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia and Washington — not including proposed federal legislation.

Unfortunately, these reactionary pieces of legislation, while no doubt well-intentioned, may cause more harm than good.

To the extent various proposed legislation imposes new or strengthened training or education requirements, there can be nothing but positive results. However, because these proposals apply to education and training regarding only sexual harassment in the workplace, they are creating a double standard by deeming sexual misconduct somehow more deserving of protection than other types of misconduct.

Indeed, these state- or federally mandated requirements should be extended to inappropriate workplace behavior beyond sexual harassment. What about training regarding the detection and prevention of other inappropriate workplace conduct, such as misconduct relating to race, disability, age, religion or national origin?

Of greater concern are the legislative proposals that bar nondisclosure agreements in sexual harassment cases and prohibit arbitration of sexual harassment claims.

By far, the most predominant — and disconcerting — feature of these proposals is the preclusion of non-disclosure agreements in settlements.

One of the most noteworthy pieces of news related to Harvey Weinstein was the number of women he "paid off." Victims came out of the woodwork asserting that they had not previously gone public because they had executed NDAs.

As a result, much of the proposed legislation prohibits NDAs in agreements settling claims involving sexual harassment, abuse or misconduct. While the intent of "outing" alleged harassers may be a laudable one, the propriety of prohibiting NDAs in settlement agreements crafted to resolve employment disputes is dubious, at best.

Picture this scenario: An employee finds a lawyer who prepares a lawsuit or a demand letter against a current (or more frequently, former) employer, and contained in that communication are allegations of sexual harassment.

Oftentimes, the intent is to put the employer on notice of the inappropriate behavior and extract some type of settlement. The employee wants the matter to end, and does not want to have to go through tortuous depositions and the potential of public humiliation. The employee's lawyer, who frequently takes cases like these on a contingency basis, wants to get paid.

If the employer also wants the matter to end quickly, a confidential settlement is reached. If it is reached before a lawsuit is filed, there is no public record of any of the allegations. If it is reached after suit is filed, the suit's allegations are buried in one of millions of publicly filed lawsuits, the lawsuit is dismissed, and the reason for the dismissal is confidential.

While settlement confidentiality in these types of cases seems morally repugnant in this post-Weinstein era, it serves a very important function — it allows employment cases such as these to settle without the need for full-blown litigation.

While many of the high-profile women who have come forward have done so in order to be heard, most individuals who file sexual harassment claims against an employer have no interest in telling their story to the public.

They typically do not want to be deposed, or to tell their story in open court. They do not want to be examined by a psychologist (who typically is retained to determine the validity of any emotional distress damages claim). And they do not want to be asked about their own workplace conduct (which employers often do in an attempt to show that the accuser welcomed the alleged inappropriate conduct).

While some workplace harassment victims may choose to go through some portion of the litigation process, and some take their cases all the way to trial, that is not the norm.

If employers are not allowed to keep settlements confidential, and the employee receiving the settlement or their counsel are allowed to take the money and run to the media, internet, etc., most accused employers simply will not agree to settle cases.

Accused employers will not pay any money to resolve such claims until they are forced to, which would be after a jury finds against them. Even after a public jury verdict, depending on the verdict, the matter could be brought before appellate courts, and even possibly the state's highest court — all before the employee (or the employee's attorney) is paid.

This scenario could have disastrous — and unintended — results, particularly for the people the legislation is trying to protect.

Preliminarily, because many employers simply would not settle the claims, it would likely be more difficult for employees making allegations to find lawyers to represent them. Most of these cases are handled on a contingency-fee basis. Thus, the employee's lawyer will not be paid unless there is a verdict that is upheld following the appeal process.

Alternatively, lawyers representing aggrieved employees may elect to charge hourly fees, which many individuals cannot afford to pay. While many states permit prevailing parties to recover attorney fees separately from any judgment, there still needs to be a judgment, and a fee award, before the employee's lawyers are paid.

This relatively long road to fee recovery will impact aggrieved individuals, as it very well may prevent such individuals from finding a lawyer who is willing to pursue their case. The prohibition on NDAs could deny access to justice for individuals who need it.

Even if justice is not denied, it invariably will be delayed. Already over-burdened courtrooms will see their dockets strained even further. Cases that could be settled and resolved within a year may take several years to get through the arduous discovery and trial process.

Another provision that appears in much of the proposed legislation is a ban on mandatory arbitration of sexual harassment claims. Many employers throughout the country have implemented mandatory arbitration of employment claims. Oftentimes, employees can opt out of the arbitration requirement upon commencement of employment.

Employers implement mandatory arbitration for several reasons, but cost savings is not one of them. In fact, arbitration costs more than litigation. In arbitration, the employer pays the arbitrator fees, significant administrative fees and the typical costs and fees that are also inherent in any litigation.

That said, one reason employers prefer arbitrating claims is that arbitration reduces the risk of an unfairly large award by taking the case out of the hands of a jury. This is true even though arbitrators, like juries, can award significant damages.

Without arbitration as an option, the already-burdened court system may simply function to further delay — and sometimes deny — justice.

Employers also like arbitration because it is a much more expeditious process than litigation. While all parties are allowed the same discovery as they would be afforded were the matter litigated in court, arbitrators select firm dates for the arbitration, and the matter is resolved more quickly.

Typically, a case can be set for arbitration within a year to 18 months of filing. Once the arbitration occurs, the matter is done. Absent true error, there is no appeal. Hence, the aggrieved party typically enjoys a relatively swift resolution.

For all of the reasons detailed above, and particularly if NDAs are prohibited, a swift arbitration might be the only way for aggrieved parties to get justice. Lawyers may be willing to take cases that cannot be settled on a contingency if they know there will be a quick resolution.

Without arbitration as an option, the already-burdened court system may simply function to further delay — and sometimes deny — justice.

The delay, coupled with the sensitive nature of these claims, may ultimately chill people from raising valid claims. If employers are forced to litigate claims in a public forum, many victims may simply elect not to raise the claim at all.

They may elect not to put their private life on trial. They may not want to meet with psychiatrists, or be deposed, or testify in open court. They may only want someone at the employer to hear them, take them seriously, and then settle their claims. Employers, in most situations, will not settle claims unless the settlement agreement preserves confidentiality.

One final unintended consequence has nothing to do with sexual harassment or sexual abuse cases. As a woman, I find it morally reprehensible that there are men in the workplace who sexually harass women. Without a doubt, such conduct is actionable, and if such conduct occurs, employers should be punished.

That said, is this moral reprehensibility any worse than if African-Americans are in a workplace where they are forced to endure managers calling them the N-word and leaving nooses on their desks? What if an employer fires an employee because she prayed on her break and wore a hijab? Or if a disabled veteran in the workplace is called names, paid less and not included in workplace events because he is in a wheelchair?

Unlike workplace victims of sexual harassment, employees who are subjected to other forms of workplace harassment will be able to settle cases with NDAs or go to arbitration to obtain swift justice — without encountering the above-described barriers to justice that sexual harassment victims may face.

One alternative is to prohibit NDAs from agreements settling any type of harassment claim. Several states, including Florida, Missouri and New Jersey, have pending legislation containing such language.

If these types of blanket prohibitions are enacted, the unintended consequences discussed in this commentary will result. Such a development would produce a complete sea change in both the practice of employment law and in the judicial system.

However, the vast majority of the proposed legislation instead creates two standards for workplace discrimination and harassment claims — a higher standard for sexual harassment claims, and a lower one for the remaining forms of workplace harassment.

The heightened awareness of sexual harassment that has occurred over the past several months is vitally important. Individuals need to know that this type of conduct in the workplace is inappropriate and will not be tolerated, and individuals and employers found to have engaged in sexual harassment in the workplace need to be punished in ways that ensure the conduct is not repeated.

However, the reactionary legislation that has been proposed is just that — reactionary — and creates a risk of far too many unintended consequences.

This article first appeared in the February 27, 2018, edition of Westlaw Journal Employment.

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