INTERNATIONAL LAWYERS NETWORK

SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

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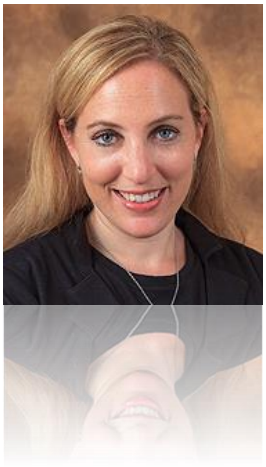
SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: MULTI-STATE COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.



2019 Update

In the wake the of the #MeToo movement, lawmakers have acted to ensure that victims of sexual harassment are not silenced. Several states have mandated employee training and policy requirements, as well as passed laws that limit or prohibit non-disclosure provisions in settlement agreements.

With respect to non-disclosure provisions, the specifics of the laws differ, as set forth below. While several similar federal bills have been introduced, none have gained much traction. However, Congress enacted, as a part of the Tax Cuts and Jobs Act, a provision that prevents employers from taking a tax deduction if they have a sexual harassment or sexual abuse allegation settlement that is subject to a non-disclosure agreement.

Outlined below, we discuss the mandated policy and training requirements in various states, along with updated guidelines on non-disclosure provisions.

California

Mandated Policy and Training Requirements

On September 30, 2018, California passed SB 1343, a bill requiring all California employers with five or more employees to provide sexual harassment prevention training to all employees – both supervisory and non-supervisory – by January 1, 2020 and biannually thereafter. The bill significantly expands existing California law, which previously only required employers with at least 50 employees to provide such training to supervisory employees every two years.

Employer Obligations

By January 1, 2020, California employers with five or more employees must provide:

- at least 2 hours of sexual harassment prevention training to all supervisory employees; and
- at least 1 hour of sexual harassment prevention training to all non-supervisory employees.

This training must also be provided within six months of the employee's assumption of a supervisory or non-supervisory position (including hiring), as applicable. Employers who provide the required training to an employee after January 1, 2019 are not required to provide training again before January 1, 2020. After January 1, 2020, covered employers must provide sexual harassment prevention training to employees once every two years.

The training may be completed by employees individually or as part of a group presentation, and may be completed in shorter segments, as long as the applicable hourly total requirement is met.

Training for Seasonal and Temporary Employees

Beginning on January 1, 2020, California employers with five or more employees also must provide sexual harassment prevention training to seasonal and temporary employees (or any other employee who is hired to work for less than six months) within 30 calendar days of the employee's hire date, or within 100 hours worked for that employer, whichever occurs first. Notably, in the case of a temporary employee engaged through a temporary staffing agency, the bill clarifies that it is the agency – rather than the entity receiving the services – that is responsible for providing the training.

Government Obligations

The bill also imposes certain requirements on the California Department of Fair Employment and Housing (DFEH). Specifically, DFEH must develop or obtain two online sexual harassment prevention training courses – a two-hour course for supervisors and a one-hour course for non-supervisors. Both courses must contain an interactive component that requires viewers to periodically answer questions in order for the course to continue to play. The courses, along with the DFEH's existing poster and information sheet on sexual harassment prevention, must be made available to employers on the DFEH website in English and a variety of other languages (including Spanish, Chinese, Tagalog, Vietnamese, Korean and any other language spoken by a "substantial number of non-English speaking people").

The bill clarifies that an employer may direct its employees to complete the online trainings provided by DFEH on its website or it has an option to develop its own training program, as long as the content of the employer's training includes the following components (established under existing California law but reiterated in the bill):

- Information and practical guidance on federal and state laws prohibiting sexual harassment and remedies available to victims of sexual harassment;
- Practical examples aimed at training employees in the prevention of harassment, discrimination and retaliation;
- Training addressing harassment on the basis of gender identity, gender expression and sexual orientation; and
- Training addressing the prevention of abusive conduct in the workplace.

Finally, the bill requires DFEH to provide a method for employees who have completed the required trainings – whether the online program provided by DFEH or the employer's own training module – to electronically save and print a certificate of completion.

Non-Disclosure Provisions

In 2018, California enacted two laws prohibiting non-disclosure provisions – one relating to settlement agreements for sexual harassment claims and one relating to employment agreements for sexual harassment within the workplace.

The first, SB 820, prohibits a provision in a settlement agreement (such as a confidentiality or non-disclosure clause) that prevents the disclosure of factual information related to a civil or administrative action that includes claims of sexual assault, sexual harassment, harassment or discrimination based on

sex, the failure to prevent an act of workplace harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex. In accordance with the law, any provision that prevents the disclosure of "factual information related to the claim" is void as a matter of law and against public policy. The law, however, does create an exception for a provision that shields the identity of the claimant, including all facts that could lead to the discovery of his or her identity. Such non-disclosure clauses may be included but only if the claimant requests the provisions. Unlike the New York law, the California law does not require a 21-day waiting period or a revocation period. Importantly, the law does not prohibit provisions making confidential the amount paid in settlement of a claim.

The second, SB 1300, prohibits employers from requiring the employees sign a non-disparagement agreement or other document that prohibits the employee from disclosing information about unlawful acts in the workplace, including, but not limited to, sexual harassment. These agreements would include any employment contract or continuing employment agreement. However, in a negotiated settlement, an employer may include a non-disclosure and a non-disparagement clause.

New Jersey

Non-Disclosure Provisions

Among the broadest laws passed in the #MeToo era, New Jersey enacted a law on March 18, 2019 that prohibits any non-disclosure provision in a claim of discrimination, retaliation or harassment for any claim under the New Jersey Law Against Discrimination – not just sexual harassment.

The law does not contain any carve-out for including a non-disclosure provision at the complainant's preference, and further requires employers settling a claim of discrimination, retaliation or harassment to include a disclaimer. The disclaimer must be bold and prominently placed, stating:

> **Although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.**

The New Jersey law contains two specific exceptions to the non-disclosure prohibition: (i) non-competition agreements and (ii) confidentiality agreements concerning an employer's proprietary information, which includes only non-public trade secrets, business plans, and customer information.

New York

Mandated Policy and Training Requirements - New York State

On March 30, 2018, New York State passed a $168 million budget deal, which included several provisions governing workplace sexual harassment, responsive to the #MeToo movement.

Mandatory Sexual Harassment Prevention Policy and Training Program

The legislation required the New York State Department of Labor (DOL), in consultation with the Division of Human Rights (DHR), to create and publish a model sexual harassment policy, including at a minimum, the following:

i. prohibiting sexual harassment and providing examples of conduct that would constitute unlawful sexual harassment;

ii. including information concerning the federal and state statutory provisions concerning sexual harassment, the remedies available to harassment victims and a statement that there may be applicable local laws;

iii. including a standard complaint form;

iv. including a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;

v. informing employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

vi. clearly stating that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and

vii. clearly stating that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The new law also mandated that the DOL and DHR produce a model, interactive sexual harassment prevention training program, containing:

i. an explanation of sexual harassment;

ii. examples of conduct that would constitute unlawful harassment;

iii. information on state and federal laws concerning sexual harassment and remedies available to victims; and

iv. information on employees' rights and all available forums for adjudicating complaints administratively and judicially.

On August 23, 2018, New York State released guidance materials for employers, including model sexual harassment prevention documents. The materials were published in draft form and followed by a period of public comment that closed on September 12, 2018. After considering comments from companies and interest groups, New York State issued this week a final set of employer guidance materials on sexual harassment prevention. These policy and training requirements took effect on **October 9, 2018** and impacted every company with employees in New York State. All New York State employers had to implement a new sexual harassment policy compliant with the new law by October 9, 2018, and all New York State employers have to complete State-compliant interactive sexual harassment training for all

employees by October 9, 2019, and annually thereafter. The new law also dictates that employers need to train new employees as soon as possible after commencing employment.

Final New York State Sexual Harassment Prevention Documents

The final materials issued by New York State relating to employer policies included Minimum Standards for Sexual Harassment Prevention Policies, Model Sexual Harassment Prevention Policy, Model Complaint Form, and an optional Policy Notice/Poster.

The final materials relating to mandatory annual employee training included Minimum Standards for Sexual Harassment Prevention Training, Sexual Harassment Prevention Model Training (along with Training Presentation Slides and Sexual Harassment Prevention Training Case Studies).

For employers that prefer to update their own existing policies and training programs to comply with New York law, rather than adopting the state's model materials, the state has published an Employer Toolkit. This toolkit contains "minimum standards checklists" to ensure that company policies and training materials meet or exceed minimum legal requirements.

New York State also issued FAQs that provide additional guidance for implementation of policies and training.

Extension of Protections to Third Parties

Notably, in addition to the new policy and training requirements under the new law, the law also extends employers' liability for sexual harassment to *non-employees*. An employer can be held liable for sexual harassment of independent contractors, subcontractors, vendors, consultants, "or any other person providing services pursuant to a contract in the workplace" or the employees of any such person. Liability may apply when the employer, its agents or its supervisors knew or should have known that a non-employee was subjected to sexual harassment in the employer's workplace and failed to take immediate and appropriate corrective action.

Non-Disclosure Provisions

Effective July 11, 2018, non-disclosure provisions in settlements, agreements, or other resolutions of sexual harassment claims in New York State are prohibited, unless inclusion of the clause is the complainant's preference.

Prior to including a non-disclosure clause in a settlement agreement, the complainant must be provided with the non-disclosure term or condition provision in writing, and he or she will have 21 days to consider it. Then, the complainant will have seven days to revoke his or her decision. Only then can the agreed-upon provision be included in the larger settlement agreement.

This 21-day period cannot be waived, shortened, or calculated to overlap with the seven-day revocation period. Unlike the federal provisions for waiving age discrimination claims (which also include a 21-day review period and seven-day revocation period), the non-disclosure provision requires a separate agreement to be executed after the expiration of the 21-day consideration period and the seven-day

revocation period before the employer is authorized to include confidentiality language in a proposed resolution.

Mandated Policy and Training Requirements - New York City

Beginning September 6, 2018, New York City employers were required to post a mandatory anti-sexual harassment rights and responsibilities poster and provide an information sheet to all new hires under the Stop Sexual Harassment in New York City Act (the "NYC Act").

The poster can be found and downloaded in English and Spanish on the website of the New York City Commission on Human Rights (the "Commission"). This poster must be conspicuously displayed "in employee breakrooms or other common areas". The poster must be sized to 8.5 x 14 inches with 12-point font at a minimum and every employer is required to display the poster in both English and Spanish.

Beginning September 6, 2018, the employee information sheet, which can be found and downloaded here, also has to be provided to all new employees at the time of hire. Alternatively, the information sheet may be included in an employee handbook given to new hires.

In addition to the posting and information sheet requirements, the NYC Act also contains mandatory employee training requirements that went into effect this month, on April 1, 2019.

Under the NYC Act, all private employers with fifteen (15) or more employees in New York City must provide anti-sexual harassment training to employees on an annual basis. This training requirement covers all employees, including interns, who work at least 80 hours in a calendar year. New employees must also be trained after 90 days of initial hire. However, employees who received training within the required training cycle at a prior employer are not required to receive additional training at their new employer until the next training cycle.

Similar to New York State's recently enacted sexual harassment prevention legislation, the NYC Act requires "interactive" annual training. The law defines interactive training as participatory teaching where employees are engaged in "trainer-trainee interaction." This may include the use of audio-visuals, computer, or online training programs or other participatory forms of teaching. However, the training does not have to be live or facilitated by an in-person instructor.

The NYC Act provides that annual training must cover the following topics at a minimum:

1. An explanation of sexual harassment as a form of unlawful discrimination under New York City law;
2. A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
3. A description of what sexual harassment is, using examples;
4. Any internal complaint process available to employees through their employer to address sexual harassment claims;
5. The complaint process available through the Commission, the New York State Division of Human Rights and the U.S. Equal Employment Opportunity Commission, including contact information;

6. The prohibition of retaliation under New York City law, including examples of retaliation;
7. Information concerning bystander intervention, including resources that explain how to engage in bystander intervention;
8. The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation and measures that supervisors and managers may take to appropriately address sexual harassment complaints.

The Commission has developed a training module, which can be found here: https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page. This training module may be utilized by employers for their workforce as long as employees are informed of the employer's internal complaint process that is available to address sexual harassment claims.

Employers are required to maintain records of employee training for at least three years, including signed employee acknowledgements of attendance. These records may be maintained in electronic form.

Extended Statute of Limitations under the new NYC Law

Significantly, the NYC Act has also extended the statute of limitations for bringing gender-based harassment claims with the Commission from one year to three years. And, the New York City Human Rights Law prohibition on gender-based harassment claims also now applies to employers with fewer than four employees.

Vermont

Non-Disclosure Provisions

Effective July 1, 2018, Vermont employers have new requirements for settlement agreements relating to sexual harassment claims. Any such settlement agreement must expressly state in settlement agreements of sexual harassment claims that the agreement does not prohibit or restrict the claimant from:

- Testifying, assisting, or participating in an investigation of a sexual harassment claim conducted by any state or federal agency;
- Complying with a discovery request or testifying in a proceeding concerning a claim of sexual harassment; and
- Exercising "any right" the claimant has under State or federal labor relations laws "to engage in concerted activities with other employees for the purposes of collective bargaining or mutual aid and protection."

The statement also must make clear that the claimant "does not waive any rights or claims that may arise after the date the settlement agreement is executed."

Additionally, the law mandates that a sexual harassment settlement agreement may *not* prohibit the claimant-party from working for the employer "or any parent company, subsidiary, division, or affiliate of the employer."

Washington

Non-Disclosure Provisions

Effective June 7, 2018, Washington State prohibits employers from requiring as a condition of employment that employees sign a non-disclosure agreement preventing them from discussing workplace sexual harassment or sexual assault.

In addition to sexual offenses in the workplace, the Washington law covers such incidents that occur at work-related events "coordinated by or through the employer," or between employees, or between an employer and an employee off the employment premises. The new law also prevents employers from retaliating against employees who disclose workplace sexual harassment or sexual assault.

Notably, however, this law *does not* prohibit an employer from including confidentiality provisions in a settlement agreement with an employee regarding sexual harassment allegations. Further, the law provides exceptions for human resources, supervisory, and managerial staff who are expected to maintain confidentiality as part of their jobs. It also excludes employees who participate in an "open and ongoing" sexual harassment investigation and are requested to maintain confidentiality during that investigation.

Under the Washington law, "sexual harassment" is defined broadly to mean unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if submission to that conduct or communication is, among other things, used as a factor in decisions affecting that individual's employment or creates a hostile environment. "Sexual assault" is similarly defined as any type of sexual contact or behavior that occurs without the explicit consent of the recipient.

Other States with Mandatory and/or Encouraged Training Requirements

Pre-dating the #MeToo movement, California, Connecticut, Delaware and Maine already mandated employee anti-harassment and discrimination trainings, and Colorado, Massachusetts, Rhode Island, and Vermont strongly encouraged such trainings (though they are not mandated). Each state has specific requirements. Employers in these locations should engage with counsel to ensure compliance.

Mandatory Arbitration Prohibitions

New York and Maryland have enacted laws that explicitly prohibit employers from requiring the mandatory arbitration of sexual harassment claims, subject to certain requirements. The laws may, however, be preempted by the Federal Arbitration Act, and we await further developments in this regard.

Maryland

Effective October 1, 2018, Maryland prohibits employers from mandating arbitration of sexual harassment or related retaliation claims. This prohibition applies to employment contracts, policies, and agreements, including collective bargaining agreements. Under the act, prohibited mandatory arbitration clauses in employment contracts will be rendered null and void. How a court might interpret

a contract that has such a provision, however, will depend on the other terms within the contract, including whether a "severability" clause exists.

New York

Effective July 11, 2018, New York employers with four or more employees are prohibited from incorporating mandatory pre-dispute arbitration clauses in written employment contracts requiring the resolution of allegations or claims of an unlawful discrimination practice of sexual harassment. This prohibition applies only to contracts entered into *after* the effective date of this law. A "mandatory arbitration clause" includes a term or provision requiring the parties to submit any matter thereafter arising under such contract to arbitration prior to the commencement of any legal action, which also further provides language to the effect that the facts found or determination made by the arbitrator or panel of arbitrators, in its application to a party alleging an unlawful discriminatory practice based on sexual harassment, shall be final and not subject to independent court review.

If a contract entered into after the effective date of the law contains a prohibited mandatory arbitration clause, the clause will be rendered null and void without affecting the enforceability of any other provision in the contract.

This law only addresses claims related to sexual harassment. The law also contain a carve-out for employees subject to a collective bargaining agreement.

Prohibition on a "Waiver of Rights"

Several states have passed laws that prohibit in an employment contract (or some in any agreement affecting the employment relationship, including arbitration agreements) a waiver of substantive or procedural rights. There is some debate as to whether these laws will impact only current employment agreements, or arbitration agreements, as well.

California

California's SB1300 makes it unlawful for an employer, in exchange for a raise or bonus, or as a condition of continued employment, to require an employee to sign a release of any discrimination, harassment, or retaliation claim under Fair Employment and Housing Act (FEHA), or sign a statement that the individual will not bring a claim under FEHA,

However, such release agreements are permissible as part of a negotiated settlement agreement to resolve a claim. To qualify for this exception, the settlement agreement must be voluntary, deliberate, and informed and provide consideration of value to the employee, and the employee must be given notice and an opportunity to retain an attorney or be represented by an attorney in the negotiation of the agreement.

Maryland

Maryland law prohibits employers from requiring employees to enter into an employment contract, policy, or agreement (including collective bargaining agreements) that waives substantive or procedural rights to bring claims of sexual harassment. (e.g., a jury trial waiver). Further, the law voids any provision contained in an employment contract, policy, or agreement waiving an employee's substantive or

procedural rights to make a future sexual harassment or related retaliation claim. Employers may not take adverse action against an employee who fails or refuses to enter into an agreement containing an impermissible waiver. Any employer who attempts to enforce any such waiver will be liable for the employee's attorneys' fees. Unlike the other laws, employers must provide data on the number of sexual harassment settlements to the Maryland Commission on Civil Rights.

New Jersey

The New Jersey law prohibits any provision in an employment contract that waives an employee's substantive or procedural right or remedy relating to a discrimination, retaliation, or harassment claim under the Law Against Discrimination or any other statute or case law. This prohibition potentially includes prospective class action waivers and jury trial waivers.

Vermont

Vermont law prohibits employers from requiring any employee or prospective employee, as a condition of employment, to sign an agreement that waives "a substantive or procedural right or remedy available to the employee with respect to a claim of sexual harassment."

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2018 Edition: Sexual Harassment in the Workplace: What US: Missouri Companies Need to Know

What constitutes sexual harassment?

Epstein Becker & Green (EBG): United States law has designated sexual harassment into two categories (1) quid quo pro and (2) hostile work environment. Quid pro quo occurs where the employer or agent of the employer grants favors or advantages or makes threats in return for sexual acts. Hostile work environment occurs when the employer or agent of the employer permits or engages in severe or pervasive sexual or sex-based conduct affecting the terms and conditions of the victims' employment.

Davis & Gilbert (D&G): Employers must also be mindful of governing laws in their local jurisdictions, such as New York City, which can have more stringent definitions than under federal law.

What body of law governs sexual harassment in your jurisdiction?

EBG: Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating on the basis of sex. In two cases, *Meritor Savings Bank v. Vinson* (1986) and *Harris v. Forklift Systems* (1993), the Supreme Court held that sexual harassment was sex-based discrimination and actionable under Title VII. Sexual harassment law is rooted in Title VII, but has developed through the common law system.

For employers with fewer than 15 employees, state anti-discrimination or harassment law will govern.

What actions constitute sexual harassment?

EBG & D&G: Sexual harassment can take many forms, including:

- Unwelcome sexual advances; requests for sexual favors; and all other verbal and physical conduct of a sexual or otherwise offensive nature, especially where:

- Submission to such conduct is made explicitly or implicitly a term or condition of employment;
- Submission to or rejection of such conduct is used as the basis for decisions affecting an individual's employment;
- Such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment.

Examples of such conduct include:

- Telling or otherwise sharing sexually explicit or demeaning jokes or using innuendo;
- Suggestive comments about appearance or dress;
- Suggestive, insulting or obscene comments;
- Repeated requests for a date with someone who is not interested, even in jest;
- Discussion about sexual thoughts, fantasies or activities;
- Leering or catcalls at someone or sexual gestures with hands or body;
- Love letters or phone calls;
- Unwelcome physical touching such as shoulder or arm rubbing or squeezing;
- Standing or sitting too close to someone, following an employee or blocking his or her way;
- Displaying sexually explicit magazines or cartoons, or calendars showing individuals in bathing suits or underwear; and
- Posting sexually offensive content on social media sites.

Can sexual harassment occur between two members of the same sex?

EBG: Yes. A federal court case, *Oncale v. Sundowner* (1998), held that sexual harassment can be perpetrated by members of the same sex, holding that Title VII bars harassment regardless of sexual desire if the harassment is "because of sex."

Are employers required to provide sexual harassment training for their employees?

EBG & D&G: Some states and localities require some form of sexual harassment training for private employers: California, Connecticut, Maine, New York and New York City. Most states do not require such training, but courts of law tend to look favorably on employers who mandate sexual harassment trainings.

What are the liabilities and damages for sexual harassment and where do they fall?

EBG: Employees seeking damages for sexual harassment may be entitled to back pay, front pay, compensatory and punitive damages, and attorney's fees. Contingent on the size of the employer, compensatory and punitive damages are limited under Title VII.

For employers with 15-100 employees, the limit is $50,000.

For employers with 101-200 employees, the limit is $100,000.

For employers with 201-500 employees, the limit is $200,000.

For employers with more than 500 employees, the limit is $300,000.

Damages sought under state and local harassment laws may be significantly higher.

D&G: Managers who engage in workplace harassment may also be subject to individual liability under state and local laws. See below the question about the difference between supervisor and co-worker harassment.

What does an employee who believes they've been sexually harassed have to prove for a successful claim against the employer?

EBG & D&G: Under Title VII, employees who believe that they have been sexually harassed based on the *hostile work environment* theory of liability must show that (1) he or she was subject to unwelcome sexual harassment; (2) the harassment was based on the individual's sex; (3) the sexual harassment was so severe or pervasive that it affected the terms or conditions of employment; and (4) that the employer knew or should have known about the harassment and failed to take prompt remedial action. Employees who believe that they have been sexually harassed based on the *quid pro quo* theory of liability must show that (1) he or she was subject to unwelcome sexual harassment and (2) submission to or rejection of such conduct by an individual is used as the basis for employment decision(s).

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

EBG: When an employee alleges sexual harassment against a supervisor, the company is liable for his/her behavior. If the employee alleges sexual harassment against a co-worker, the employee will also have to show that the employer knew or should have known about the harassing conduct and failed to take appropriate remedial action. Certain state and local sexual harassment laws hold individuals personally liable for claims of harassment.

What are the potential defenses employers have against sexual harassment claims?

EBG & D&G: In two federal cases, *Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998), the Supreme Court held that employers are always subject to vicarious liability for unlawful harassment by supervisors if the conduct culminates in a tangible employment action. If there is no tangible employment action, the employer may avoid liability by establishing an affirmative defense (the Faragher-Ellerth defense) consisting of the following two elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In cases where the employee is subject to a tangible employment action, the employer may not raise the affirmative defense. For such cases, the employer must produce evidence of a non-discriminatory

reason for the tangible employment action, and a determination must be made whether the explanation is pretext designed to hide the discriminatory motive. In some state and local jurisdictions, affirmative defenses may not be available, but the existence of actions taken by the employer to prevent harassment and discrimination, such as conducting regular trainings, can factor into the amount of damages that may be awarded.

Who qualifies as a supervisor?

EBG: In *Vance v. Ball State University* (2013), the Supreme Court held that a supervisor, in cases involving harassment claims, is someone who has the power to hire, fire, demote, promote, transfer, or discipline the individual who is being harassed. This explicitly excluded some managers who only have the authority to make or change schedules or direct an employee's daily activities.

How can employers protect themselves from sexual harassment claims?

EBG & D&G: Employers should conduct mandatory sexual harassment training. Employers should provide all employees with a copy of a sexual harassment policy and implement accessible complaint procedures for employees who believe they are being subject to or witness sexual harassment. Per the above, training is now mandated in several states and localities, including California, New York, New York City, Connecticut and Maine.

Does sexual harassment cover harassment because of pregnancy?

EBG: Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under Title VII as well as under state and local laws.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

EBG: Federal courts are divided on whether harassment on the basis of sexual orientation or gender identity are covered under Title VII's protections against sex-based harassment. Several states and cities expressly prohibit harassment on the basis of sexual orientation and/or gender identity.

What is prohibited retaliation?

EBG: Employers may not take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim. A claim for retaliation may be made even if the underlying complaint of harassment is unfounded.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

EBG: While not prohibited, a consensual relationship can be considered sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

EBG: Yes.

What is the #MeToo movement?

EBG: #MeToo was been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally

on social media platforms. This powerful movement has put sexual harassment and abuse in the spotlight and has encouraged survivors of sexual misconduct, including workplace misconduct, to step forward and take action against their alleged harassers.

How is the #MeToo movement impacting the law in your jurisdiction?

EBG & D&G: The #MeToo movement has had a large impact on the depth of awareness of the issues of sexual harassment in the workplace. It remains unclear whether the movement will result in an increased number of sexual harassment claims, but more employers are requiring sexual harassment trainings and are looking for ways to make them more effective.

While there have been no substantive or procedural changes to federal sexual harassment law, the recently enacted tax reform, The Tax Cut and Jobs Act (2017), includes a provision that now expressly denies taxpayers the ability to deduct as a business expense (1) any settlement or payment related to sexual harassment or sexual abuse, or (2) any attorney's fees related to any settlement or payment if such settlement or payment is subject to a nondisclosure agreement. Congress has further mandated that all lawmakers, staff, interns and fellows are required to attend sexual harassment prevention trainings.

Many states and cities have reacted to the #MeToo movement. For example, both New York State and New York City have enacted legislation which requires most private employers to provide sexual harassment training to their workers on an annual basis and also prohibit employers from including confidentiality provisions in settlement agreements involving claims of sexual harassment unless the complaining employee specifically consents.

For more information, contact Bill Milani (wjmilani@ebglaw.com) and Nancy Gunzenhauser Popper (npopper@ebglaw.com) at ILN member, Epstein Becker & Green, and Jessica Golden Cortes (jcortes@dglaw.com) at ILN member, Davis & Gilbert LLP.