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#MeToo Shows 2 Years Of Progress Toward Gender Parity

By **Jen Rubin** (October 2, 2019, 3:58 PM EDT)

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#MeToo turns two this fall and that milestone is a natural time to reflect not only upon the movement's impact on the American workplace, but more importantly on whether and how #MeToo has effectuated change. While the past two years have featured troubling reports of bad workplace behavior, an equally compelling but vastly more encouraging story lies in the positive changes the movement has instigated through legislation and community activism.

Legislation Affecting Sexual Harassment in the Workplace

#MeToo has propelled many states to act upon some of the deficiencies perceived in the employment landscape that may have fostered bad behavior or permitted toxic work environments to persist. The focus of many state legislatures has been on some of the causes of workplace harassment, as well as the procedural mechanisms that may have permitted such behavior to continue without redress.

The National Women's Law Center has recently reported about some of these key state legislative efforts.[1] Many of these legislative efforts focus on some of the systemic legal deficiencies that the movement brought to light.

Key facets of that legislative focus include, for example, laws addressing confidentiality agreements that some claim perpetuated serial harassers' bad behavior by hiding or covering up past settlements concerning sexual harassment claims. Those confidentiality embargoes, include, for example, New Jersey's ban[2] on secret settlements of workplace sexual harassment claims and Oregon's limitation on mandating employee secrecy concerning workplace harassment or sexual assault.[3] Other states, such as Maryland[4] and Vermont[5] statutorily encourage documentation and reporting of such behavior through mandatory reports of harassment and discrimination to state and local agencies.

Some legislation has focused on making past claims of sexual harassment more transparent through limiting mandatory employment arbitration, which is typically private and rarely reported. Some lawmakers have expressed concern that permitting the litigation of sexual harassment claims in a private arbitral forum compounds the secrecy of those disputes, which may prevent others from accessing information about an employers' past litigation experiences as well as particular individuals who are alleged to have engaged in offensive behavior. Those concerns have led some states, such as New York[6] and Washington[7] to prohibit or strictly regulate mandatory arbitration of sexual

harassment claims (subject of course to court views about whether the Federal Arbitration Act preempts state statutory bans).

Making sexual harassment disputes more transparent is not the sole focus of state legislation. Other states have instituted procedural mechanisms intended to ease the making of such claims, such as Connecticut's extension of its statute of limitations[8] or New York's limitation on an employer's ability to defend against sexual harassment claims by relying upon its prior corrective measures.[9]

One significant and proactive area of focus for state legislators is a more rigorous focus on policies, education and training as mechanisms to combat inappropriate workplace behavior. California, for example, previously only required mandatory training for supervisors for employers of 50 or more employees, but commencing in 2021, will require employers with five or more employees to provide training for nonsupervisory personnel as well.[10]

Other jurisdictions, such as Connecticut[11] and New York City,[12] have enacted similar legislation. The New York City municipal regulation makes specific reference to training for bystanders — giving tools to other employees to speak up when they observe inappropriate or objectionable conduct in the workplace.

It remains to be seen if this legislative activism impacts the prevalence of sexual harassment in the workplace, but it is reasonable to expect other states likewise to occupy this legislative arena in the future.

Salary History Bans

As with legislative activity addressing sexual harassment reporting, prevention and litigation, the past several years have featured a state legislative focus on gender equity in the workplace with respect to salary history bans and other laws mandating transparency in compensation practices.

While not directly relevant to the pervasive workplace harassment and misconduct that #MeToo brought to light, sexual harassment and pay inequity are arguably based on a similar premise — that gender and other stereotypes lead naturally to the presumption of an individual's lesser societal value, a building block upon which inequity may be based.

Likewise, many state legislatures have recognized that stereotypical assumptions about females and other protected categories may perpetuate those assumptions through the economic impact of compensation on careers, which itself perpetuates pay inequity.[13] Salary history legislation, however, has also spawned a backlash against such bans — founded in the concept that employers should freely select employees based upon their prospective compensation goals. Toward this end, Michigan and Wisconsin have each declared an important state interest in permitting employers to solicit salary history from prospective employees and have therefore banned salary history restrictions.[14]

Like the legislative focus on workplace harassment matters, it is reasonable to expect additional state legislative activity in the pay transparency arena as legislators require employers to account for systems that perpetuate compensation based on stereotypical presumptions rather than skills, education, experience and other matters that are directly relevant to an individual's ability to do a specific job.

Gender Parity in the Boardroom

While not a direct result from #MeToo, statutory gender parity received a willing audience in California when last year then-Gov. Jerry Brown signed into law the landmark legislation mandating gender balance on California-based publicly held corporate boards.[15] The California law was based upon data demonstrating that gender-diverse boards (and management teams) have a salutary impact on professional and civil behavior in workplaces, which in turn naturally impacts harassment and other sexually based workplace behaviors.

California's law has inspired other states (Illinois, New York and New Jersey) to consider comparable legislation. These initiatives have gained further momentum to effectuate legislative and nonlegislative change through 2020 Women on Boards, a national nonprofit organization devoted to research, awareness and promotion of gender representation on corporate boards.[16]

Community Initiatives and Certification Programs

#MeToo's impact is not limited to legislative activism. The movement has also inspired a robust community response aimed at bettering the American work experience.

In addition to the 2020 Women on Boards initiative, The Purple Campaign, a national organization, has coalesced around the support of Amazon.com Inc., Airbnb Inc. and other influential employers to focus on providing resources and research to employers to develop and implement effective corporate policies to create change within the workplace.[17] Another initiative, San Diego's Workplace Equity & Civility Initiative,[18] is a community collaboration focused on obtaining the commitment from regional employers to certain fundamental workplace civility goals, and to provide professionally designed bystander training to their workforce in order to implement that commitment.

These organizations and many others like them focus on collaboration between employers and employees not only to self-police against bad behavior in the workplace but to focus on positive preventative mechanisms to ensure that behavior is unwelcome in adopting workplaces.

Diversity Lab's Mansfield Rule

Diversity Lab,[19] which focuses on diversity and inclusion in the legal profession, has sponsored the Mansfield Rule (named after Arabella Mansfield, the first woman admitted to practice law in the United States when she was admitted to the Iowa bar in 1869), a rule that requires law firms (and now law departments) affirmatively to consider at least 30% women and attorneys of color for leadership and governance roles and equity partner promotions.

The goal of the Mansfield Rule is to promote a better representation of diverse lawyers in law firm leadership by broadening the pool of candidates who are actively considered for these opportunities. The theory underlying this premises is that the simple expansion of the pool of those being considered for significant leadership positions will naturally result in the promotion of individuals who may not have previously been in a position for such consideration.

A Common Thread — Progress Toward Parity

While it remains to be seen if the legislative response will effectively combat (or even reduce) instances of sexual harassment in the workforce, the grassroots community collaborations that focus on preventive measures, such as training and external certifications, are fruitful areas for future development. At a minimum, #MeToo has provided a form of community therapy — but focused on

restoring civility in the workplace which itself is based on human dignity. The promise of parity will only mature upon the robust collaboration among legislators, business leaders, employers, employees and others committed to bettering the American workplace.

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Disclosure: Rubin is co-chair of the Lawyers Club of San Diego's Workplace Equity & Civility Initiative and a member of the San Diego 2020 Women on Boards Host Committee.

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[1] https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf.

[2] https://www.njleg.state.nj.us/2018/Bills/PL19/39_.PDF.

[3] https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB726/Enrolled.

[4] http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_739_sb1010e.pdf.

[5] https://legislature.vermont.gov/Documents/2018/Docs/ACTS/ACT183/ACT183%20As%20Enacted.pdf.

[6] https://www.nysenate.gov/legislation/bills/2019/a8421.

[7] http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/6313-S.PL.pdf.

[8] https://www.cga.ct.gov/2019/ACT/pa/pdf/2019PA-00016-R00SB-00003-PA.pdf.

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[10] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1343, the compliance date for which has been delayed for an additional year to Jan. 1, 2021. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB778.

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[12] https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354925&GUID=D9986F4A-C3A9-4299-BAA8-5A1B1A1AD31E.

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[14] http://docs.legis.wisconsin.gov/2017/related/acts/327.pdf; http://www.legislature.mi.gov/(S(fjbg5ukendvpkdm4s0b4u3to))/mileg.aspx?.page=getObject&objectName=mcl-123-1384.

[15] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826.

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[17] https://www.purplecampaign.org/.

[18] https://sites.google.com/view/weci/about-weci.

[19] https://www.diversitylab.com/.