

JUNE 26, 2018 | STATE & LOCAL TRENDS

# Novel Legislation: Maryland's Disclosing Sexual Harassment in the Workplace Act of 2018

✘ With the rise of the #MeToo movement, there have been a number of responses from both employers and state legislatures to address workplace harassment. As discussed during the [EEOC Special Task Force Meeting](#) on June 11, 2018, several state legislatures are taking proactive steps to combat workplace sexual harassment. For example, on May 15, 2018, Maryland Governor Larry Hogan signed and ratified the [Maryland Disclosing Sexual Harassment in the Workplace Act of 2018](#) – which passed the Maryland House (46-0) and Senate (136-1) with almost unanimous support.

The Act, which goes into effect on October 1, 2018, applies to Maryland employers with 50 or more employees and contains two major requirements.

## **Restricting Employment Agreement Clauses that Waive Rights or Remedies Related to Future Sexual Harassment Claims**

The Act seeks to restrict employers from including provisions in employment contracts that require employees to waive “a substantive right or remedy” related to future claims of sexual harassment or retaliation for purporting or asserting sexual harassment. The Act declares that as of October 1, 2018, such provisions are null and void as being against the public policy of the State. Furthermore, employers cannot take an adverse action against an employee – which includes discharge, suspension, demotion, discrimination, or retaliation with respect to the terms and conditions of employment – because the employee fails or refuses to enter into an agreement that contains a waiver prohibited under the Act.

Employers that attempt to include such provisions in an employment agreement or enforce an invalid waiver are liable for an employee’s reasonable attorneys’ fees and costs. The Act does not specifically outline a statutory cause of action for violations of the Act. However, given the clear announcement that waivers of a substantive right or remedy related to future claims of sexual harassment are void against public policy, employees would likely be able to bring a wrongful discharge claim in violation of public policy under Maryland law.

## **Mandatory Reporting Requirements and Publication of Employer Data Regarding Settlements of Sexual Harassment Claims**

The Act’s second major requirement is related to mandatory reporting of settlements of sexual harassment claims. Specifically, the Act requires covered employers to submit an electronic survey to the Maryland

Commission on Civil Rights regarding settlements of sexual harassment claims on two separate occasions. The first reporting deadline is on or before July 1, 2020 and the second reporting deadline is on or before July 1, 2022.

The mandatory survey (which has not been created by the Commission yet) will include a number of things, including:

1. the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee;
2. the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and
3. the number of settlement made after an allegation of sexual harassment that included a provision requiring a provision requiring both parties to keep the terms of the settlement confidential.

The Commission will also have a space on the survey for employers to report whether a personnel action was taken against an employee who was the subject of a settlement included in the survey.

Given that Commission will release information that has traditionally been kept confidential, employers are certainly wondering what the Commission will do with that information. First, the Commission will publish and make accessible to the public the aggregate number of responses from employers for each item listed above and the public will be able to obtain a copy of the response from a specific employer regarding the number of settlements included in the survey upon request. Second, the Commission will review a random selection of surveys submitted and create an executive summary – redacting any identifying information for specific employers. The executive summary will be submitted to the Governor, the Senate Finance Committee, and the House Economic Matters Committee for review. The executive summaries will be published twice – on or before December 15, 2020 and on or before December 15, 2022. However, it is unclear how these reports will be used by the Commission or the Legislature and whether the law will be extended beyond the sunset provision stating that the law expires on June 30, 2023.

### **Proactive Steps for Employers**

This legislation is quite novel and a number of questions exist as to its provisions and how they will be interpreted. Specifically, the Act does not indicate whether employers need to report sexual harassment settlements for employees located in Maryland or company-wide. It is unclear whether employers with less than 50 employees can include and enforce the waivers prohibited under the Act in employment agreements. Finally, the Act is silent with respect to an enforcement mechanism for an employer's failure to fill out the mandatory survey. In light of these outstanding issues, it would not be surprising to see additional guidance from the Commission in the near future once it creates and finalizes the survey that employers are required to complete.

Nonetheless, employers should be proactive in preparing for the Act's October 1, 2018 effective date and take several steps to prepare for the reporting requirements. Employers with 50 or more employees in Maryland should carefully review their employment agreements to ensure that they do not violate this new law. An internal audit of employment agreements will allow employers to modify their standard employment agreement language and determine which contracts or agreements will violate the law.

Covered employers should develop methods to track the data that is required to be disclosed in advance of the October 1, 2018 effective date. Although the data will be made publicly available, employers should maintain the data internally within Human Resources, and it should not be shared with employees. Creating an internal recordkeeping system and outlining the roles and responsibilities of the administrators of the data will help ease the burden of this rule and make it easier for covered employers to comply with the reporting deadlines.

Finally, this is a great opportunity for employers to review and revise their harassment policy and reporting procedures. Employers should explicitly address sexual harassment in their anti-harassment policy, clarify how employees are expected to behave and treat their co-workers, and provide examples of the range of prohibited conduct, including gestures and spoken, written, or physical acts.