Sex Harassment Settlements

A new scarlet letter for employers?

How the movement to abolish NDAs and confidential settlements could produce unintended consequences.

By Antone Melton-Meaux

Recent efforts by the media and advocacy groups to shine a light on (and, in some instances, to shame) organizations that have entered in to confidentiality or non-disclosure agreements with workers as part of a larger sex harassment settlement are bringing unexpected visibility to disputes that employers believed to be resolved outside of the public eye. Not to be outdone, governments at every level are engaged in concerted efforts to prevent employers from using settlement agreements to "silence" workers who may have been subject to sex harassment or other gender-related misconduct—or at least create disincentives for them. How will this confluence of social and legal change affect workers and employers who may be considering a sex harassment settlement as a means of resolving their dispute?

Prelude to a stigma

Nathaniel Hawthorne's ageless novel *The Scarlet Letter* has surprising relevance to the current #MeToo/TimesUp movement. Hawthorne paints the story of Hester Prynne, a beautiful young woman presumed to be guilty of having a child while engaged in an extramarital affair. Hester's acts are considered serious social and legal offenses in this 17th century Bostonian community rooted in Puritan values—so significant that they result in her imprisonment. Not satisfied with incarceration as the only form of punishment, the community requires Hester, upon her release from prison, to wear a brilliant red embroidered **A** on her breast as an enduring symbol of public shame for her immoral acts and her refusal to identify her child's father. For the rest of her life, Hester strives valiantly to find normalcy and rehabilitate her tattered reputation in the community without divulging the details of her past.

#MeToo/TimesUp is bringing its own unique form of public reckoning by demanding that organizations of all stripes rethink their approach to sexual harassment and gender-related workplace conduct. However, there could be a powerful unintended consequence. Is #MeToo/TimesUp turning sex harassment settlements into a modern day scarlet letter **H** for employers?

The role of non-disclosures and confidentiality in employment settlements

Until recently, it has been common practice for settlement agreements in employment disputes to contain confidentiality and non-disclosure clauses. The importance of these provisions to the parties is significant. For the employer, these clauses protect the brand and reputation of the organization by preventing negative publicity and the prospect of further exposure in a lengthy public trial. In addition, maintaining confidentiality and preventing disclosure of the terms of the settlement minimizes any "slippery slope" perception that the employer is an easy target for additional claims.

Some employers have taken the additional step of incorporating arbitration clauses—which often include class act ion waivers—in their standard employment agreement, thereby requiring employees to arbitrate any employment dispute, including sex harassment claims. For the employer, one of the critical benefits of arbitration is that the proceedings are private and the results of the process are often confidential. Mandatory arbitration clauses in employment agreements are not without controversy. Counsel representing employees, state attorneys general, and the National Labor Relations Board have challenged these provisions. But the Supreme Court recently affirmed that mandatory arbitration clauses are typically enforceable.[1]

For an employee, there are also benefits to confidentiality and non-disclosure clauses. In some instances, an employee simply does not want his or her grievances or the terms of the settlement to be known to the public. Instead, an employee may wish to move on with life without being subjected to public scrutiny about the workplace incident. At times, employees even negotiate mutual non-disclosure or non-disparagement obligations to protect their personal reputations and future job prospects. Similarly, an employee may negotiate to receive a positive reference letter from the employer in exchange for agreeing to confidentiality and non-disclosure.

The Weinstein effect

The seismic impact of the Harvey Weinstein revelations in 2017 and the follow-up reporting from revered news sources such as the New York Times cannot be overstated. This reporting, and the social media response, are part of a larger and much overdue conversation on the systemic mistreatment of women in the workplace. In addition, the questions of how organizations proactively identify and resolve claims of sexual harassment are being openly challenged. News reports that organizations—including, but not limited to, Fox News and 21st Century Fox—have entered into multiple settlements with women to resolve claims of sexual harassment fueled the narrative that these organizations, and presumably many others, are utilizing non-disclosures and confidentiality clauses in settlement agreements to silence victims and protect perpetrators. As a result, companies that have been outed as using confidentiality and non-disclosure clauses in sex harassment settlements have come under intense fire and unexpected public scrutiny.

The response of the government

In response to the media and public outcry for more transparency and accountability, governments at the federal and state level have engaged in a fast and furious effort to enact or propose legislation. The following is a brief synopsis of recent efforts.

■ In the 2017 Tax Cuts and Jobs Act, Congress eliminated the tax deductibility of settlements and associated legal fees for sex harassment claims with non-disclosure provisions.[2] This legislation reduces the employer's incentive to engage in sex harassment dispute resolution when there may be no cost savings from a tax perspective.

■ In February 2018, the state attorneys general in all 50 states, the District of Columbia, and U.S. territories wrote a letter to Congressional leadership seeking the elimination of arbitration clauses in employment agreements for sex harassment claims.[3] In large part, the state AGs objected to the "veil of secrecy" created by arbitration, which prevents similarly situated individuals from learning about the harassment claims, thereby precluding them from also seeking relief. This letter dovetails with the introduction of the "Ending Forced Arbitration of Sexual Harassment Act of 2017" in the U.S. Senate.[4] This legislation would prohibit the enforcement of an arbitration clause for claims based on sex under Title VII of the Civil Rights Act.

■ Currently, in the states of Arizona, California, New Jersey, Pennsylvania, South Carolina, and Virginia, the respective legislatures are considering curtailing, or banning outright, the use of non-disclosure agreements to resolve sex harassment claims.

■ The New York legislature recently passed a law that prohibits non-disclosure agreements involving sex harassment settlements (in all judicial and non-judicial settings) unless the employee makes a specific request for the settlement to be confidential and the employee does not change his or her mind during the course of 21-day review and seven-day revocation periods.[5] The law also bans employers from requiring employees to enter into mandatory arbitration of sexual harassment claims. It is unclear whether the prohibition of mandatory arbitration is preempted by the Federal Arbitration Act.[6]

Workers, employers, and the practical impact of the H stigma

For now, parties can continue to engage in settlement agreements with confidentiality and non-disclosure clauses with confidence (short of a media exposé) that privacy will prevail and the clauses will be enforceable. But it is undeniable that employers and workers must be prepared for difficult decisions ahead. The recently enacted federal tax law preventing tax write-offs for sex harassment settlements and legal fees when non-disclosure provisions are involved is one current example. If the proposed legislation and continued media pressure are harbingers of the future, there could soon be a day when employees and employers will no longer have the option of keeping a sex harassment settlement confidential under any circumstance.

While transparency and accountability are laudable goals, the inability of parties to engage in private and confidential settlements may have unintended and negative results. Employers will be forced to make decisions with unappealing outcomes. If employers decide to settle a sex harassment claim, they expose their organization to the likelihood that it will be branded by the public and media as a harasser, the stain of which will be hard to remove. Instead of enduring the stigma of the scarlet letter **H**, employers may take more risks and continue litigation to verdict. The decision by employers to extend litigation would certainly raise the costs of sex harassment claims and impose an additional burden on the judicial system.

In addition, counsel who represent employees may react by being more cautious in deciding which sex harassment case to take given the increased costs and reduced prospects of settlement. As a result, only employees with compelling, easily proven, or high-value sex harassment claims may receive legal representation.

Certainly, this is not the desired outcome of the #MeToo/TimesUp movement or of governments, but it may be the most likely result if employers make a business and reputational decision to aggressively defend against being labeled with a scarlet ***H*** and becoming modern-day Hester Prynnes. ▲

Notes

[1] *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015).
[2] Tax Cuts and Jobs Act, Pub. L No. 115-97 (2017).
[3] Letter from National Association of Attorney General, to Congressional Leadership, (February 12, 2018) (on file with author).
[4] S. 2203, 115th Cong. (2017-2018).
[5] N.Y. Legis. Senate Bill S7507-C (2018).
[6] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

***ANTONE MELTON-MEAUX** is the founder and CEO of Work Resolve Mediation, which provides employment mediation and dispute resolution services dedicated to settling disputes between workers and employers in the Twin Cities community. Prior to Work Resolve, Antone led the global labor and employment practice at St. Jude Medical, was an HR Leader for St. Jude Medical and Abbott Laboratories, and was a partner in the Minneapolis office of Jackson Lewis. He can be reached at 612-337-9009.*

ANTONE@WORK-RESOLVE.COM