



WORKPLACE JUSTICE

## THE BE HEARD IN THE WORKPLACE ACT: ADDRESSING HARASSMENT TO ACHIEVE EQUALITY, SAFETY, AND DIGNITY ON THE JOB

Since #MeToo went viral in October 2017,<sup>1</sup> the country has witnessed an unprecedented demand for solutions to ensure accountability for workplace harassment and discrimination and prevent harassment before it happens. We have been reminded, once again, that despite longstanding federal prohibitions against harassment and other forms of discrimination based on sex, race, color, religion, national origin, age, and disability, these reprehensible behaviors continue to infect our workplaces and deny working people, and especially working women, equality, safety, and dignity. Our laws need to be up to the task of shifting workplace culture and providing justice.

**The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act (S.1082, H.R. 2148)** offers a groundbreaking set of reforms and seeks to answer the calls for change that have reverberated across the country. The BE HEARD in the Workplace Act is the first comprehensive federal proposal to address workplace harassment in the #MeToo era. It sets a new marker in laying out a clear vision of what it will take to fully address – and prevent – all forms of unlawful workplace harassment and discrimination, including sexual assault. The BE HEARD in the Workplace Act would extend protections against harassment and other forms of discrimination to all workers; remove barriers to access to justice, such as short statutes of limitations and restrictively interpreted legal standards; promote transparency and accountability; and require and fund efforts to prevent workplace harassment and discrimination.

### Extending protections to all workers

Protections against harassment and other forms of discrimination have not kept pace with changes in our nation's workplaces, and are out of step with our cultural norms and expectations. Too many working people have no federal protections against workplace discrimination and harassment, or unclear coverage under federal protections. Individuals who are not considered "employees," such as independent contractors (including many people working in agriculture, hospitality, and care work, who may be misclassified by employers), unpaid interns, and others who work in nontraditional employment relationships, are generally not protected by federal law's prohibitions on workplace discrimination and harassment. In addition, individuals working in small establishments, with fewer than 15 employees, such as most domestic workers, are excluded from core federal civil rights protections against harassment or discrimination at work.

The BE HEARD in the Workplace Act would close these gaps in existing law, ensuring that all working people have the right to work with safety and dignity, by:

- Extending federal laws against workplace harassment and other forms of discrimination to cover all workers, regardless of the size of their workplace.
- Extending federal laws against workplace harassment and other forms of discrimination to cover independent contractors, interns, fellows, volunteers, and trainees.
- Clarifying that unlawful sex discrimination at work includes harassment and other forms of discrimination based on sexual orientation and gender identity.

### Removing barriers to access justice

While federal law prohibits sexual harassment at work and other forms of harassment based on protected characteristics, it also creates barriers to challenging harassment and obtaining redress for harm, including short periods of time



within which a complaint must be filed with the Equal Employment Opportunity Commission (EEOC), restrictive legal standards that have led to too many workers' claims being dismissed, and limits on remedies for those harmed by unlawful harassment. These barriers have made it difficult for individuals to pursue claims of workplace harassment and discrimination, hold perpetrators of harassment and discrimination and their employers accountable, and be made whole for the harm they have suffered.

The BE HEARD in the Workplace Act would remedy these barriers to justice, by:

- ***Extending the time limit for challenging harassment and other forms of workplace discrimination***

Currently, those working in the private sector or for state or local governments who wish to challenge workplace harassment or discrimination have only 180 days from the date of the harassment or discrimination to file a charge with the EEOC (or 300 days for those living in a state where there is an analogous state law against workplace discrimination); this is the required first step in bringing a workplace harassment or discrimination case.<sup>2</sup> Federal employees have only 45 days from the date of the discriminatory act to initiate a complaint.<sup>3</sup> These extraordinarily short statutes of limitations hamper the ability of individuals to challenge harassment and other forms of discrimination. For those who have experienced sexual assault or other egregious forms of harassment, the trauma of the assault can make it difficult to immediately prepare a legal challenge. The fear of retaliation also makes it difficult for many individuals to take immediate legal action to protect their rights. The BE HEARD in the Workplace Act would extend the statute of limitations for filing a charge to four years and ensure that those working for the federal government have the same amount of time to file a complaint as others.

- ***Ensuring the law's protections against workplace harassment reflect current understandings of unacceptable harassment at work***

Federal courts have interpreted anti-discrimination law to prohibit workplace harassment when submitting to the conduct becomes a condition of employment or continued employment (for example, when a woman is told she must sleep with her boss to keep her job) or when the harassing conduct is so severe or pervasive as to create an intimidating, hostile, or abusive work environment (typically called "hostile work environment" harassment).<sup>4</sup> Congress intended for anti-discrimination

law to reach a broad range of conduct that harms a worker's ability to do her job. However, a number of lower court decisions have interpreted the hostile work environment standard very narrowly, so that conduct most people would find egregious is not considered "severe or pervasive."<sup>5</sup> For example, courts have found that each of the following incidents did not constitute "severe" or "pervasive" harassment and thus the law did not protect against this harassing behavior:<sup>6</sup> a male co-worker forcing his hand under a female co-worker's sweater and fondling her breast;<sup>7</sup> a worker repeatedly making sexual comments towards another worker and suggesting she be spanked;<sup>8</sup> and a supervisor calling a subordinate the N-word on two separate occasions.<sup>9</sup>

The BE HEARD in the Workplace Act would restore our civil rights laws as tools to prohibit a broad spectrum of egregious harassment, as Congress had intended. It would do so by requiring courts to take into account a number of factors when determining whether illegal harassment has occurred, including: the frequency and duration of the conduct, the location where the conduct occurred, the number of individuals engaged in the conduct, whether the conduct is humiliating, degrading, or threatening, any power differential between the alleged harasser and the person allegedly harassed, and whether the conduct involves stereotypes about the protected class involved.

The Act would ensure our laws are responsive to the lived experiences of workers by clarifying that harassment can take a number of different forms, including physical, verbal, pictorial, or visual conduct, and that it can occur in person or by other means, such as electronically. Additionally, it would make clear that workplace harassment is impermissible regardless of whether the victim acquiesced or otherwise submitted to or participated in the conduct, the complaining party is the target of harassment or instead a witness to harassment, the conduct occurred outside the workplace, or the conduct was additionally experienced by individuals outside the protected class involved. Moreover, the BE HEARD in the Workplace Act would clarify that harassment can harm workers, regardless of whether the conduct caused tangible injury or psychological injury, and regardless of whether the worker was able to continue to do their job.



- ***Clarifying that discrimination or retaliation need not be the decisive factor motivating an employer's conduct for the conduct to be unlawful***

Civil rights laws were intended to ensure that protected characteristics like sex, race, color, national origin, religion, age, and disability are not a basis for employer decision-making. They also prohibit employers from engaging in retaliation—adverse action against a worker for complaining about or opposing prohibited harassment or discrimination. In recent years, the Supreme Court has made it more difficult for workers to bring age discrimination claims<sup>10</sup> and claims for retaliation related to sex, race, color, national origin, religion<sup>11</sup> or disability,<sup>12</sup> requiring workers to show not only that the employer was motivated by discrimination or retaliation, but that discrimination or retaliation was the decisive factor in how their employer treated them on the job.<sup>13</sup>

The BE HEARD in the Workplace Act would provide that those experiencing harassment or other forms of discrimination must only prove that discrimination or retaliation was a motivating factor, rather than the decisive factor, for the employer's conduct, to obtain remedies provided by federal employment discrimination laws. For example, a worker would not have to prove that their complaint about harassment was the decisive factor behind their employer's decision to fire them. Instead, the law would recognize that an employer is liable for discrimination and retaliation if an employment decision was made based on a protected characteristic, even if the employer was also motivated by additional, non-discriminatory reasons.

- ***Restoring strong protections from harassment by supervisors***

Employers have a heightened legal responsibility for harassment by supervisors because such harassment exploits the authority over subordinates that the employer has allowed the supervisor to exercise. As a result of this heightened obligation, workers have had relatively strong protections from supervisor harassment and employers have had strong incentives to prevent supervisor harassment and remedy it when it occurs.

The Supreme Court's 2013 decision in *Vance v. Ball State University*<sup>14</sup> undermined protections for victims of supervisor harassment by essentially reclassifying as co-workers those lower-level supervisors who direct daily work activities, but do not have the power to take concrete employment actions like hiring and firing

workers. Employers are only liable for harassment by co-workers when the employer's negligence has allowed the harassment to occur. But there is a significant practical difference between these lower-level supervisors and mere co-workers: supervisors with the authority to direct daily work activities wield a significant amount of power that they can use to wreak havoc in the lives of their subordinates, particularly in low-wage sectors. In such industries, lower-level supervisors can harass or retaliate against a worker by reducing hours, denying breaks, or assigning a worker to an undesirable shift, for example, which heightens their ability to use supervisory authority to harass their subordinates. The *Vance* decision creates an incentive for employers to concentrate the power to hire and fire in the hands of a few, while still delegating significant day-to-day authority to lower-level supervisors, in order to avoid vicarious liability for supervisor harassment.

The BE HEARD in the Workplace Act would ensure that employers can be held vicariously liable for harassment by supervisors with the authority to undertake or recommend tangible employment actions or with the authority to direct a subordinate's daily work activities, regardless of whether they have the authority to hire and fire.

- ***Allowing workers who experience harassment or other forms of discrimination to be made whole for the harm they have suffered***

When workers win a discrimination lawsuit, they may be able to obtain several forms of relief, including monetary damages. Title VII of the Civil Rights Act of 1964,<sup>15</sup> which prohibits discrimination on the basis of race, color, national origin, sex, or religion, and the Americans with Disabilities Act of 1990,<sup>16</sup> which prohibits discrimination on the basis of disability, provide for the recovery of compensatory and punitive damages.<sup>17</sup> Compensatory damages compensate victims for out-of-pocket expenses caused by the harassment, like the costs of finding a new job and medical expenses, and for any emotional harm, while punitive damages may be awarded to punish an employer who acted maliciously or recklessly when engaging in harassment.

However, the amounts a worker can receive are limited under current federal law based on the size of the employer. For a worker succeeding in a harassment case against an employer with 15-100 employees, for example, the worker can recover no more than \$50,000, no matter how severe the harassment or how culpable the employer.



Even for employers with more than 500 employees, damages are capped at \$300,000.<sup>18</sup> These caps have not been adjusted since they were enacted in 1991, more than a quarter century ago. In other words, even if a worker endured rape on the job and suffered from significant physical and emotional trauma and expense, if her employer had only 75 employees, she would not be permitted to recover more than \$50,000 if she won her Title VII sexual harassment claim. This would be the case regardless of what out-of-pocket costs she had incurred or how profoundly she had been harmed psychologically, physically, and emotionally.

Under other federal laws that protect workers from discrimination, including the Age Discrimination in Employment Act of 1967,<sup>19</sup> which prohibits age discrimination in employment, and the Rehabilitation Act of 1973,<sup>20</sup> which protects federal employees from disability discrimination, it is unclear whether compensatory and punitive damages are available at all.

The BE HEARD in the Workplace Act would eliminate limits on the compensatory and punitive damages workers can recover under federal employment discrimination laws; clarify that both private sector and federal workers can recover damages for age discrimination in violation of the Age Discrimination in Employment Act of 1967; and make clear that federal workers can recover monetary damages for discrimination on the basis of disability under the Rehabilitation Act of 1973.

### **Promoting transparency and accountability**

Harassment and other forms of discrimination thrive in the shadows, and those with the least power at work are the most vulnerable. For too long, working people have been afraid to report violations because they fear jeopardizing their safety, jobs, financial security, and career prospects. Moreover, in many instances, employers prohibit workers from discussing or reporting harassment and discrimination by requiring workers to sign confidentiality provisions in employment contracts or settlement agreements, or force workers to resolve claims through private arbitration, which often includes confidentiality requirements, instead of in court. These practices, coupled with the power disparity between the employer and the individual and the threat of retaliation, have often silenced working people, while allowing many employers and individual offenders to evade accountability.

The BE HEARD in the Workplace Act would promote transparency and accountability in the workplace by:

- Prohibiting employers from imposing nondisclosure agreements (NDAs) as a condition of employment that prevent workers from speaking about harassment and discrimination.
- Limiting the use of NDAs in post-dispute settlement and separation agreements, while allowing workers to request an NDA in this context to protect their privacy, with safeguards to promote a knowing and voluntary choice.
- Prohibiting forced arbitration of work-related disputes and protecting workers' ability to act collectively to challenge violations of workplace rights in court.
- Requiring companies bidding on federal contracts to comply with workers' rights laws and report any history of violations of these laws.

### **Increasing access to legal services for workers in low-wage jobs and funding efforts by private entities and states to prevent and address employment discrimination**

Many individuals, particularly those working in low-wage jobs, lack access to legal services to help them challenge workplace harassment and other forms of discrimination. The opportunity to consult with an attorney to learn about legal rights and options and to enforce those rights is an essential component of access to justice for those facing harassment and other forms of discrimination on the job.

The BE HEARD in the Workplace Act would address this need by:

- Establishing a grant program to help cover costs for individuals who cannot otherwise afford a lawyer to address civil legal needs related to their employment. These include the costs of hiring a lawyer for help filing an EEOC charge or an anti-discrimination lawsuit in court.
- Funding states to designate and support the activities of an independent, private, non-profit entity in the state to protect and advocate for the rights of workers to be free from unlawful employment discrimination. The entity must be authorized to pursue legal, administrative, and other appropriate remedies to prevent and address employment discrimination, investigate complaints, refer individuals to relevant services, educate policymakers, and gather data about employment discrimination.
- Establishing a competitive grant program run by the Women's Bureau of the Department of Labor for grants for private entities to prevent and address employment discrimination, including harassment, with a focus on



supporting the work of entities that serve workers in industries or geographic areas that are most highly at risk for discrimination and harassment and who demonstrate past and ongoing work to address discrimination and harassment.

### **Preventing harassment and discrimination and changing workplace culture**

Our institutions must be equipped to properly address and remedy workplace harassment once it has occurred, but the ultimate goal of any reform should be to ensure that harassment and discrimination do not occur in the first place. Unfortunately, many prevention efforts to date have focused on compliance, rather than culture change: some employers simply do the bare minimum to try to avoid legal liability, without seeking to make changes to truly ensure safe and equitable work for all. Employers must shift away from this compliance-focused approach towards an evidence-based prevention model that reforms workplace culture.

Additionally, we must address workplace structures that devalue workers. This includes ensuring that all workers are entitled to one fair minimum wage, including tipped workers. The federal tipped minimum cash wage of \$2.13 an hour, which has been frozen since 1991, allows harassment and discrimination to thrive in the service and hospitality industries. Workers in the restaurant industry in particular report that reliance on tips to reach any minimally adequate wage often results in being forced to tolerate sexual and other forms of harassment and inappropriate behavior from customers, which in turn can create a workplace culture that encourages harassment by coworkers and supervisors as well.

The BE HEARD in the Workplace Act would reshape workplace culture and prevent harassment and discrimination, including by:

- Ensuring that tipped workers are entitled to the same minimum wage as all other workers, consistent with the Raise the Wage Act.<sup>21</sup>
- Requiring and funding federal agencies to research harassment in employment, including prevalence, the enforcement of anti-discrimination laws, public health and economic impacts of harassment, and prevention strategies.
- Mandating the creation of an EEOC Task Force that includes worker advocates, researchers, union leaders, and individuals who have experienced workplace harassment, to study and provide recommendations for preventing workplace harassment.

- Requiring employers with 15 or more workers to adopt, disseminate in an accessible format, and periodically review, a comprehensive nondiscrimination policy.
- Requiring the EEOC to determine which categories of employers should be required to administer trainings for their workers. For employers required to implement trainings, these trainings must be interactive and must include a separate, tailored training requirement for supervisors. For employers with fewer than 15 workers, the EEOC must provide customizable prevention resources suited to smaller workplaces.
- Requiring the EEOC to provide a model climate survey to employers, which will assist employers in efforts to learn more about whether workers are facing harassment at work and the particular forms such harassment is taking.
- Establishing an Office of Education and Outreach at the EEOC to educate workers about their rights and how to file a complaint with the EEOC.

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As a country, we have long owed working people cultural and institutional change to ensure that everyone can thrive in safe and respectful workplaces. For many years, survivors and advocates have been calling for such change. The momentum created by #MeToo has provided a unique opportunity to deliver powerful and lasting reform to meet the courage of the individuals who have spoken out about the harassment they have experienced.

The BE HEARD in the Workplace Act is a bold solution and a direct response to many of the concerns highlighted by the voices of workers - including the need to extend existing federal civil rights protections to all workers; reform short statutes of limitations, limits on recovery, and narrowly interpreted legal standards that prevented workers from seeking justice; end the culture of secrecy around harassment and discrimination that protected serial harassers; and invest in legal services and robust prevention efforts.

Each of these reforms is essential to creating the better world we seek, where every individual may work with equality, safety, and dignity.



- 1 In 2006, gender justice activist Tarana Burke coined the phrase “Me Too” and launched a movement for survivors of sexual violence to find healing and strength in solidarity. In October 2017, following media reports of serial sexual harassment and assault by film producer Harvey Weinstein, the actress and activist Alyssa Milano invited survivors to share their experiences of harassment and violence on social media using the hashtag #MeToo. The hashtag quickly went viral worldwide as individuals shared their stories and demanded accountability. The unleashing of the power of their voices has prompted an unprecedented public reckoning with the pervasiveness of harassment, and particularly workplace harassment, that continues today.
- 2 29 C.F.R. § 1601.13.
- 3 29 C.F.R. § 1614.105.
- 4 *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (establishing quid pro quo and hostile environment harassment frameworks); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n. 1 (1998) (explaining that quid pro quo and hostile environment frameworks can be applied to racial discrimination cases); EQUAL EMPLOYMENT OPPORTUNITY COMM’N, TYPES OF DISCRIMINATION: HARRASMENT, <https://www.eeoc.gov/laws/types/harassment.cfm>.
- 5 Some courts have misstated the standard established in *Meritor*, *supra* note 4 at 67, as requiring harassment to be both severe and pervasive, rather than one or the other. In these cases, it is especially difficult for workers who have experienced harassment to obtain relief. See, e.g., *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1249 (11th Cir. 2014).
- 6 *Adams*, *supra* note 5 at 1254-55.
- 7 *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).
- 8 *Singleton v. Dep’t of Corr. Educ.*, 115 F. App’x 119 (4th Cir. 2004).
- 9 *Roberts v. Fairfax Cty. Pub. Sch.*, 858 F. Supp. 2d 605, 611 (E.D. Va. 2012).
- 10 *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).
- 11 *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).
- 12 *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015) (citing cases that applied a but-for causation framework to Americans with Disabilities Act (ADA) employment discrimination retaliation cases — *Feist v. La., Dep’t of Justice, Office of Att’y Gen.*, 730 F.3d 450, 454 (5th Cir.2013); *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 767 (6th Cir.2015) (en banc); *Staley v. Gruenberg*, 575 Fed. Appx. 153, 155 (4th Cir.2014); *Gallagher v. San Diego Unified Port Dist.*, 14 F.Supp.3d 1380, 1390–91 (S.D.Cal.2014) — and applying the but-for causation framework from *Nassar*, *supra* note 11, to an ADA public accommodations retaliation claim).
- 13 *Supra* notes 10-12.
- 14 *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013).
- 15 42 U.S.C. § 2000e et seq.
- 16 42 U.S.C. § 12101 et seq.
- 17 42 U.S. C. § 1981a.
- 18 42 U.S.C. § 1981a(b)(3).
- 19 29 U.S.C. § 621 et seq.
- 20 29 U.S.C. § 791 et seq.
- 21 NAT’L WOMEN’S LAW CTR., THE RAISE THE WAGE ACT: BOOSTING WOMEN’S PAYCHECKS AND ADVANCING EQUAL PAY (Mar. 2019), <https://nwlc.org/resources/the-raise-the-wage-act-boosting-womens-paychecks-and-advancing-equal-pay/>.

