

**2021 PROGRESS
UPDATE:
#METOO
WORKPLACE
REFORMS IN
THE STATES**

NATIONAL WOMEN'S LAW CENTER

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INTRODUCTION

Four years after #MeToo went viral, legislators across the country are still advancing substantive policy change to address harassment in the workplace. Though many states' legislative sessions looked drastically different this year—with legislators meeting and hearing testimony virtually in the wake of the COVID-19 pandemic—community members and state legislators remained interested and enthusiastic about strengthening workplace protections against sex-based harassment and other forms of workplace harassment.

And in many ways, the COVID-19 pandemic and the resulting economic recession have underscored the need for robust workplace anti-discrimination and anti-harassment laws. At the height of the pandemic, workers were more desperate to keep a paycheck at any cost and less willing to report workplace abuses, increasing their vulnerability to harassment, discrimination, exploitation, abuse, and retaliation at work, because of massive unemployment and uncertainty about their chances of finding another job. As a result of the pandemic, the nation's workforce was also presented with unique health and safety concerns that seriously disadvantaged workers, particularly low-wage and front-line workers. A report exploring food service workers' experiences during the pandemic revealed that many of the workers surveyed reported being subjected to significantly more sexual harassment, which was compounded by having to ask customers to comply with COVID-19

safety protocols. A significant portion of sexualized customer comments detailed in the report included requests by male customers that female service workers remove their masks so that customers could judge their appearance to determine how much to tip them.¹

Recognizing the need for stronger protections against harassment in every workplace and industry as a crucial part of the COVID-19 recovery efforts and beyond, legislators in states from **New Jersey**² to **Georgia**³ to **Colorado**⁴ introduced legislation to modernize harassment law and strengthen much needed protections for workers. Some legislatures, such as in **Maryland**⁵ and **Virginia**,⁶ tackled the "severe or pervasive" standard⁷ established by federal courts for determining whether conduct constitutes harassment. That standard has been interpreted in unduly restrictive ways, placing an unreasonably high burden on survivors who have experienced harassment at work. Other states addressed issues such as the ensuring employees working for small employers have legal protection against harassment and extending workplace protections to domestic workers, who have traditionally been excluded from laws prohibiting discrimination, including harassment. Underlying all these reforms is the understanding that state legislatures must address fundamental barriers to justice for survivors of harassment, and that societal attitudes regarding sexual harassment and associated norms have changed since October 2017, when #MeToo went viral. What was once acceptable conduct at work is no longer acceptable, and some states are ensuring

that their laws finally match what most people now understand to be harassing conduct.

This session, state legislators introduced **more than 115 bills** targeted at strengthening protections against workplace harassment, and **five states** enacted new or expanded protections. For example, **Texas** enacted legislation **extending the statute of limitations** for filing a harassment claim and **covering more employees**. **Two states** passed legislation **limiting the use of abusive nondisclosure agreements (NDAs)** in settlement and employment contracts. **New York** continued to lead state efforts to modernize harassment law, introducing a slate of legislation that would expand existing protections by banning “no-rehire” provisions in workplace settlement agreements and extending the statute of limitations from two years to six years in employment discrimination and harassment suits.⁸

Following *Bostock v. Clayton County, Georgia*,⁹ the 2020 Supreme Court decision clarifying that Title VII’s prohibition on sex discrimination prohibits discrimination based on sexual orientation and gender identity, some state legislatures followed suit by adding language in their state anti-discrimination laws to clarify that sex-based discrimination includes sexual orientation and gender identity. In **Colorado**, for example, the legislature included discrimination based on “gender expression” in addition to sexual orientation and gender identity.

In **Ohio**, on the other hand, protections for workers **were actually rolled back**, signaling that there is not only still more work to be done to strengthen and expand harassment laws, there is still a need to defend the protections for working people that have previously been won, especially as corporate interests seek to evade accountability for harassment and other forms of discrimination in the workplace.

Despite the challenges in **Ohio**, several more states took crucial steps to address workplace harassment. While only a fraction of the introduced bills were ultimately enacted, ongoing engagement around the issue itself signals real progress. This supplemental report provides an overview of the progress that has been made in advancing workplace harassment reforms since the [2020 Progress Update](#) in September 2020.¹⁰

REFORMS POST-BOSTOCK:

Though the Supreme Court’s landmark decision in *Bostock* makes clear that sex discrimination includes sexual orientation and gender identity discrimination, some states have passed their own laws adding sexual orientation, gender identity, and gender expression as protected categories entitled to workplace protections against discrimination, including harassment.

Colorado enacted legislation amending the definition of sexual orientation and adding “gender identity” and “gender expression” as protected classes under numerous state anti-discrimination statutes, including employment laws.¹¹

WHAT HAPPENED IN OHIO?

Ohio shortened the statute of limitations for filing a workplace discrimination claim from six years to two years and limited employer liability for hostile work environment claims. In addition, **Ohio** added language requiring the exhaustion of administrative remedies at the Ohio Civil Rights Commission prior to commencing a lawsuit; removing personal liability for managers and supervisors; providing an affirmative defense to harassment claims for employers that take appropriate action to prevent and promptly correct harassing behavior in the workplace; and modifying the process of filing and bringing an age discrimination action.¹²

WORKPLACE POLICY ADVANCEMENTS FROM THE 2021 SESSION

ENSURING ALL WORKING PEOPLE ARE COVERED BY HARASSMENT PROTECTIONS

PROTECTING MORE WORKERS: *Legal protections against harassment extend only to “employees” in most states and under federal law, leaving many people unprotected. States have been working to extend protections against harassment and discrimination to independent contractors, interns, and volunteers.*

VIRGINIA enacted legislation to protect domestic workers from harassment and other forms of discrimination.¹³

COVERING MORE EMPLOYERS: *In many states, harassment laws do not cover smaller employers, and federal law does not reach employers with fewer than 15 employees. Since October 2017, states have been working to extend anti-harassment protections to all employers, regardless of size, and the following states passed legislation on this issue in 2021.*

TEXAS enacted legislation extending protections against sexual harassment to all employees, regardless of the size of the employer’s business. Previously, Texas sexual harassment law only covered government employers and private employers with 15 or more employees.¹⁴

RESTORING WORKER POWER AND INCREASING EMPLOYER TRANSPARENCY AND ACCOUNTABILITY

LIMITING NONDISCLOSURE AGREEMENTS (NDAS): *NDAs can silence individuals who have experienced harassment and empower employers to hide ongoing harassment, rather than undertake the changes needed to end it. Some employers require employees to enter into NDAs when they start a job that prevent them from speaking up about harassment or discrimination. Other times, NDAs are imposed as part of a settlement of a claim. States have been working to limit employer power to impose NDAs in both contexts while still supporting survivors who may want an assurance of confidentiality. The effectiveness of states’ different policy approaches remains to be seen, but in California, at least, several employee rights attorneys report initial positive impacts.*

CALIFORNIA passed the Silenced No More Act, which clarifies that employers may not use nondisparagement agreements or nondisclosure agreements to prevent an employee from discussing factual information related to a claim for workplace harassment or discrimination, whether or not the harassment or discrimination is based on sex.¹⁵

NEVADA limited employers' use of NDAs by enacting legislation to render both contract and settlement provisions void and unenforceable if the provision restricts a party from testifying at a judicial or administrative proceeding related to the other party's commission of a criminal offense, sexual harassment, discrimination, or related retaliation.¹⁶

PROTECTING THOSE WHO SPEAK UP FROM DEFAMATION LAWSUITS: *When survivors of workplace harassment and assault speak up, they are often not believed and face retaliation. Increasingly, defamation lawsuits have been weaponized by sexual harassers as a retaliatory tactic to silence survivors and others who speak up about harassment. Many states have "anti-SLAPP" (anti-Strategic Lawsuit Against Public Participation) laws to protect individuals who are "slapped" with a meritless defamation lawsuit seeking to silence their exercise of free speech and petition rights regarding matters of public interest. Even where anti-SLAPP laws do not specifically address harassment, such laws often prevent survivors from being penalized for speaking out.*

WASHINGTON enacted the Uniform Public Expression Protection Act (UPEPA) to protect individuals from meritless defamation lawsuits. Washington previously had an anti-SLAPP law, but it was struck down by the state Supreme Court as unconstitutional in 2015.¹⁷ The UPEPA reinstated anti-SLAPP protections in the state, providing immunity from civil liability for individuals' communications during legal or other governmental proceedings; communications on an issue under consideration in legal or other governmental proceedings; or communications on issues of public concern. The new law also allows individuals to file a motion to dismiss the case and stay discovery and all other proceedings involving the complainant and responding party. Individuals who defeat a SLAPP lawsuit are entitled to reasonable attorneys' fees and litigation expenses.¹⁸

EXPANDING ACCESS TO JUSTICE

EXTENDING STATUTES OF LIMITATIONS: *Short statutes of limitations can hamper the ability of individuals to bring harassment complaints, especially given the trauma of assault and other forms of harassment, which can impact the ability of individuals to take prompt legal action.*

TEXAS enacted legislation to extend the statute of limitations for filing workplace sexual harassment complaints with the Texas Workforce Commission from 180 days to 300 days after the alleged sexual harassment occurred.¹⁹

NEVADA enacted legislation to expand protections for employees who report workplace problems internally and to clarify that the filing of a complaint with the Nevada Equal Rights Commission or the Equal Employment Opportunity Commission tolls the limitations periods to bring a lawsuit under Title VII or state law.²⁰

CALIFORNIA updated the Fair Employment and Housing Act (FEHA) to clarify that the time for filing a civil action for a violation of existing anti-discrimination laws is tolled while the Department of Fair Employment and Housing (DFEH) conducts its investigation. The statute of limitations is tolled until DFEH files a related lawsuit or one year after DFEH notifies the complainant that the department has declined to bring suit. The new law also tolls the statute of limitations to file a civil suit during mandatory or voluntary mediation.²¹

EXPANDING LIABILITY FOR HARASSMENT: *Harassment is not limited to employees in supervisory positions. Co-workers, nonsupervisory employees, and even nonemployees can engage in harassing conduct in the workplace.*

TEXAS expanded the definition of a covered "employer" to include any person or entity acting "directly in the interests of an employer in relation to an employee."²² This change broadens who may be liable for harassment, which could potentially include supervisors, co-workers, and others acting on behalf of the employer.

PROMOTING PREVENTION STRATEGIES

REQUIRING ANTI-HARASSMENT TRAINING: *Effective training, especially when tailored to the specific workplace and workforce, can reduce workplace harassment. One state passed legislation requiring training for employees.*

NEVADA passed legislation requiring the state government to develop a policy requiring training for all state executive employees on sex and gender-based harassment. The sexual harassment policy must outline requirements for sex

and gender-based harassment training for employees and managers/supervisors.²³

REQUIRING STRONG ANTI-HARASSMENT POLICIES:

Anti-harassment policies are merely encouraged, not required, by federal law. As a result, many employers lack anti-harassment policies, particularly smaller organizations without the resources to engage legal and human resource experts to develop them. In response, some states have passed legislation requiring public and/or private employers to have anti-harassment policies or directing state agencies to develop model policies for broader use.

NEVADA enacted legislation requiring the state government to develop a policy on sex and gender-based harassment, including a definition of prohibited behavior, training requirements for all state executive employees on sex and gender harassment, training requirements for supervisors, and procedures for filing complaints. The legislation also created

an internal agency responsible for investigating harassment complaints. The executive department must review and update the policy annually to ensure compliance with federal and state law.²⁴

REQUIRING NOTICE OF EMPLOYEE RIGHTS: *No workplace anti-harassment or anti-discrimination law will be truly effective if working people are unaware of the laws and their protections. The stark power imbalances that often exist between an employee and the employer can make it difficult for working people to feel safe enough to come forward with their experiences of workplace abuses. Requiring employers to post or otherwise share with employees information about their rights can help employees better assert those rights.*

NEVADA enacted legislation requiring the state to provide all executive department employees with a copy of the harassment policy at the start of employment and when the policy is updated.²⁵

1 *Take Off Your Mask So I Know How Much to Tip You: Service Workers' Experience of Health & Harassment During COVID-19*, ONE FAIR WAGE et al. (Dec. 2020), https://onefairwage.site/wp-content/uploads/2020/12/OFW_COVID_WorkerExp-1.pdf.

2 S. 3352 (Nj. 2021). If passed, S. 3352 would become one of the strongest workplace harassment laws in the country. For example, the bill requires employers to conduct interactive workplace anti-discrimination and anti-harassment trainings 90 days after hire and every two years; requires employers to have workplace policies on discrimination and harassment; replaces the harmful severe or pervasive standard; extends anti-discrimination protections to interns, independent contractors, and domestic workers; requires employers with 50 or more employees to annually report to the Division on Civil Rights (DCR) data on the number of discrimination, harassment, and retaliation complaints received and whether they were or were not substantiated; extends the statute of limitations for filing a discrimination claim in court; and expands supervisor liability to co-workers, customers, and others engaged in harassment.

3 H.B. 549 (Ga. 2021).

4 S.B. 21-176 (Co. 2021).

5 S.B. 1360, 2021 Special Sess. (Va. 2021).

6 S.B. 834 (Md. 2021).

7 Colorado, Maryland, New Jersey, Oregon, Vermont, and Virginia all introduced legislation to address the harmful severe or pervasive standard.

8 See e.g., S.B. S812A (Ny. 2021) (establishing a tollfree confidential hotline for individuals experiencing workplace sexual harassment); S.B. S776 (Ny. 2021) (workplace settlement agreements that prevent an employee or independent contractor from applying for, accepting, or engaging in future employment with the employer (“no-rehire” provisions) are not enforceable); S.B. S738 (Ny. 2021) (limiting the use of certain non-disclosure agreements in the context of discrimination, harassment, and retaliation claims).

9 140 S. Ct. 1731 (2020).

10 See Andrea Johnson et al., *2020 Progress Update: MeToo Workplace Reforms in the States*, NWLC (Sept. 2020), v1_2020_nwlc2020States_Report.pdf.

11 H.B. 21-1108, 2021 Reg. Sess. (Co. 2021).

12 H.B. 352, 133rd Gen. Assemb. (Oh. 2021).

13 S.B. 1310, 2021 Special Sess. (Va. 2021); H.B. 1864, 2021 Special Sess. (Va. 2021); H.B. 2032, 2021 Special Sess. (Va. 2021).

14 S.B. 45, 87th Leg. (Tx. 2021); see also TEX. LAB. CODE ANN. § 21.002 (West 2009).

15 S.B. 331 (Ca. 2021).

16 A.B. 60, 81st Leg. (Nv. 2021).

17 *Davis v. Cox*, 351 P.3d 862 (Wash. 2015).

18 S.B. 5009, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

19 H.B. 21, 87th Leg. (Tx. 2021).

20 A.B. 222, 81st Leg. (Nv. 2021).

21 S.B. 807 (Ca. 2021).

22 Tex. Lab. Code § 21.141.

23 S.B. 51, 81st Leg. (Nv. 2021).

24 S.B. 51, 81st Leg. (Nv. 2021).

25 S.B. 51, 81st Leg. (Nv. 2021).