



2023 #METOO WORKPLACE ANTI-HARASSMENT REFORMS

NATIONAL WOMEN'S LAW CENTER

INTRODUCTION

Every year since #MeToo went viral in October 2017, state lawmakers have worked with new energy to reform workplace anti-harassment laws, which the outpouring of stories and experiences had revealed as outdated and ineffective. In 2023, we saw this momentum continue with around 80 bills targeted at strengthening protections against workplace harassment introduced and **9 states** passing meaningful protections. Now six years since #MeToo went viral, **24 states and the District of Columbia** have passed a total of more than **80 workplace anti-harassment bills**, many with bipartisan support.

During the 2023 legislative session, more states worked to fundamentally shift employers' incentives to prevent harassment. For example, **Colorado¹ and Vermont²** tackled the harmful **"severe or pervasive"** standard established by federal courts for determining whether conduct constitutes unlawful harassment. This standard has been interpreted in unduly restrictive ways so that only the most egregious conduct qualifies, which places an unreasonably high burden on survivors who have experienced harassment at work and seek accountability in the courts. Underlying this reform is the understanding that we need to update our laws to ensure they reflect what most people now understand to be harassing and unacceptable conduct at work. With the passage of these two new laws, **5 states and the District of Columbia have updated their definitions of what constitutes illegal workplace harassment since 2017.**

Legislation around [nondisclosure agreements \(NDAs\)](#), contractual agreements or clauses that prevent workers from disclosing specific types of information about the employer and/or workplace conditions, was the other largest state anti-harassment policy trend in 2023—as it has been every year since #MeToo went viral. **Three states (Colorado, Rhode Island, and Virginia)³ passed reforms limiting the abusive use of NDAs, bringing the total number of states that have passed such reforms since #MeToo went viral to 18.** Late in 2022, the federal government, spurred by state reforms, also took action to limit abusive NDAs, through the bipartisan Speak Out Act, which prohibits pre-dispute NDAs and non-disparagement agreements (typically agreements imposed upon workers at the time of hire as a condition of employment, or after hire as a condition of continued employment) to the extent they reach sexual harassment and sexual assault claims. In addition, the National Labor Relations Board ruled in *McLaren Macomb* that severance agreements containing confidentiality and nondisparagement provisions are typically unlawful under the National Labor Relations Act.⁴

While these federal actions begin to address the harm that NDAs cause, they leave out many workers. The NLRB decision is not applicable to severance agreements provided to supervisors except in very limited circumstances, leaving out vast swaths of workers from the ruling.⁵ And the Speak Out Act does not limit the abusive use of NDAs in post-dispute settlements of sexual assault and sexual harassment claims. Moreover, by only providing protection against NDAs as they relate to sexual harassment and sexual assault, the Act leaves behind

many workers who are disproportionately marginalized by harassment. Women of color, for example, who experienced harassment that involved both racial slurs and sexual comments would not be fully protected in speaking out about the full range of their experiences. Women of color and women with disabilities are especially likely to face harassment, and our anti-harassment laws should fully protect against harassment based on race, national origin, and disability, in addition to that based on sex.⁶

States can fill these gaps and are working to do so. In 2023, **Colorado⁷** and **Rhode Island⁸** passed legislation to limit NDAs that silence workers from speaking up about any type of civil rights violations (Rhode Island) or any discriminatory or unfair employment practices (Colorado), not just sexual harassment.

This supplemental report provides an overview of the progress that has been made in advancing workplace harassment reforms since the [#MeToo Five Years Later: Progress & Pitfalls in State Workplace Anti-Harassment Laws](#) report in October 2022.⁹

RESTORING WORKER POWER AND INCREASING EMPLOYER TRANSPARENCY AND ACCOUNTABILITY

LIMITING NONDISCLOSURE AGREEMENTS (NDAS)

NDAs silence individuals who have experienced harassment and embolden employers to hide ongoing harassment, rather than undertake the changes needed to end it.¹⁰ Some employers require employees to enter into NDAs when they start a job that prevent them from speaking up about harassment or discrimination that they might experience at work. 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 from their employers. It is not yet clear which of the states' different policy approaches is the most effective in empowering those who experience workplace abuses, but in California and New Jersey (where relatively strong NDA reforms passed in 2018 and 2019, respectively) several employee rights attorneys suggest these new laws are reducing the number of NDAs in settlements that would silence survivors from speaking about harassment or discrimination.

COLORADO

Colorado passed the Protecting Opportunities and Workers' Rights (POWR) Act, which voids NDAs that limit the ability of an employee or prospective employee to disclose any discriminatory or unfair employment practices unless certain requirements are met.¹¹ For an NDA to be valid, it must apply

equally to all parties and expressly state that the NDA does not restrain the employee or prospective employee from disclosing the underlying facts of any discriminatory or unfair employment practice or the existence and terms of a settlement agreement to certain individuals like their immediate family members or health providers, to any government agencies, or in response to a legal process. The NDA must also expressly state that disclosing the underlying facts in the situations described above does not constitute disparagement. And if the NDA contains a liquidated damages provision for breaching the NDA, the damages must be reasonable and proportionate to the anticipated actual economic loss for a breach, rather than punitive.

If there is a non-disparagement provision in the NDA and the employer disparages the employee or prospective employee to a third party, the employer cannot seek to enforce the non-disparagement provision or the NDA against the employee or prospective employee. In other words, if the employer disparages the employee, the employee may disparage the employer.

An employer is liable for actual damages and a \$5,000 penalty for each NDA that violates this law.

Colorado enacted another piece of legislation to bar state and local governments from making it a condition of

employment that a public employee enter into an NDA that restricts the employee from disclosing factual circumstances concerning their employment.¹² The legislation voids any agreements that prevent such disclosures. NDAs related to trade secrets, employee identity, and attorney work products are exempt from the law. If the employer tries to enforce an unlawful NDA in court, they must pay for the employee's attorney fees and costs.

RHODE ISLAND

Rhode Island enacted legislation to prohibit employers from requiring as a condition of employment that an employee enter into an NDA or any agreement that prevents the employee from disclosing civil rights violations, including harassment and discrimination.¹³ The legislation also prohibits employers from imposing non-disparagement agreements that prevent employees from disclosing any type of unlawful conduct, including civil rights violations. Any contract provision that violates the bill's prohibitions is void.

VIRGINIA

Virginia amended its existing NDA law to prohibit employers from requiring as a condition of employment that an employee or prospective employee sign or renew an NDA, confidentiality agreement, or non-disparagement agreement that has the purpose or effect of concealing the details relating to a claim of sexual assault or sexual harassment.¹⁴ Previously, Virginia's law only applied to sexual assault claims and did not reach harassment claims that did not include sexual assault allegations. The amended law also explicitly reaches non-disparagement agreements for the first time. While the amendments expanded the scope of the state law slightly, they are duplicative of the protections provided by the federal Speak Out Act.

PROHIBITING NO-REHIRE PROVISIONS No-rehire provisions in settlement agreements between employees and employers bar employees from ever working for the employer again. Especially when dealing with a major employer with many subsidiaries, such provisions may impact the individual's ability to find future work. Employers may include no re-hire clauses for a variety of reasons, but in the context of workplace harassment, these clauses can amount to punishment or retaliation against the worker for speaking up about violations, and chill others from coming forward. To address this problem, states have limited the use of no-rehire provisions.

VERMONT

Vermont enacted a new law to prohibit no-rehire provisions in agreements to settle harassment or discrimination claims.¹⁵ The prohibition reaches provisions that prevent an employee who filed a claim against the employer from working again for the employer or any parent company, subsidiary, division, or affiliate of the employer. Vermont's law previously only prohibited no-rehire provisions in sexual harassment settlements.

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.¹⁶ Increasingly, defamation lawsuits have been weaponized by 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. Anti-SLAPP laws allow courts to quickly dismiss these nuisance lawsuits. Even where anti-SLAPP laws do not specifically address harassment, such laws often protect survivors who are targeted with defamation claims when they speak out. Some states have taken a different tactic by addressing defenses that survivors may use against defamation claims.

While anti-SLAPP laws can protect some survivors from defamation lawsuits, they typically do not protect survivors who speak out in non-governmental settings, such as in an HR complaint or online. This is because anti-SLAPP laws typically protect statements made in non-governmental settings only if they are related to an "issue of public interest," but many courts have held that sex-based harassment is not an "issue of public interest." Anti-SLAPP laws can be greatly strengthened by explicitly stating that harassment and discrimination are an "issue of public interest."

CALIFORNIA

California passed a law to recognize that communications made without malice regarding an incident of sexual assault, harassment, discrimination, or retaliation for reporting or opposing workplace harassment or discrimination are privileged.¹⁷ Once a survivor demonstrates their communication was privileged, they would be able to assert a defense against a defamation suit. Only individuals who have

or had a reasonable basis to file a sexual assault, harassment, or discrimination complaint can claim their communication was privileged. An individual need not have actually filed a complaint to assert this privilege, however. Communication is defined as factual information related to an incident of sexual assault, harassment, or discrimination experienced by the communicator. This bill is awaiting the governor's signature.

NEW JERSEY

New Jersey passed the Uniform Public Expression Protection Act (UPEPA), which will expedite the process of dismissing a SLAPP suit, including defamation claims brought against those who speak out against harassment.¹⁸ This in turn will help lower survivors' legal costs and protect individuals from meritless defamation lawsuits. The UPEPA provides immunity from civil liability for individuals' communications during legal proceedings or other governmental proceedings, communications about an issue under consideration in legal or other governmental proceedings, and communications on issues of public concern. This should protect individuals who speak about harassment in a variety of situations. The legislation also allows an individual to request to pause or "stay", an action or proceeding related to the lawsuit including discovery until the court decides the motion to dismiss the SLAPP suit, with the presumption that the stay will be granted. This protects individuals targeted with SLAPP suits from being stuck with large legal bills and otherwise having to defend themselves in court while the motion to dismiss is being decided. The court must also decide on the motion to dismiss as expeditiously as possible. If they are successful in dismissing the suit, the individual is entitled to attorneys' fees and court costs.

OREGON

Oregon amended its anti-SLAPP law to provide immunity for activities that arise out of exercising the constitutional right of assembly, association, and freedom of the press in connection with an issue of public interest, adding to existing protected activities such as making public oral statements on an issue of public interest.¹⁹ The new protected activities can help survivors organize with others or use the media to bring attention to their experiences and demand accountability from their employers without fear of lawsuits for undertaking those activities. The amendment also specifies certain limited proceedings that courts may hear and rule on during a stay, such as on a motion seeking an injunction to protect against an imminent threat to public health or safety.

UTAH

Like New Jersey, Utah also passed the UPEPA, providing immunity from civil liability for individuals' communications during legal proceedings or other governmental proceedings, communications about an issue under consideration in legal or other governmental proceedings, and communications on issues of public concern.²⁰ Once the individual files to dismiss the SLAPP suit, discovery and other proceedings between the parties and other related lawsuits are paused as the court decides on the individual's motion to dismiss the SLAPP suit. If they are successful in dismissing the suit, the individual is entitled to attorneys' fees and court costs.

EXPANDING ACCESS TO JUSTICE

REVISING THE “SEVERE OR PERVASIVE” STANDARD

The requirement under federal and most state laws that an individual prove the harassment they experienced was “severe or pervasive” has been interpreted by some courts in such an unduly restrictive manner that often only the most egregious conduct qualifies. These interpretations minimize and ignore the impact of harassment and severely undermine harassment victims’ ability to hold employers accountable and obtain relief for the harm they have suffered. Since 2017, five states plus the District of Columbia have passed legislation seeking to address and correct these harmful interpretations, including two states in 2023.

COLORADO

Colorado’s [POWR Act](#) defines harassment as unwelcome conduct that is subjectively offensive to the employee and objectively offensive to a reasonable person who is a member of the same protected class.²¹ The Act expressly provides that to be unlawful, the conduct need not be severe or pervasive if the conduct has the purpose or effect of unreasonably interfering with the individual’s work performance or creating an intimidating, hostile, or offensive working environment. The nature of the work or the frequency of past harassment in the workplace is not relevant to determining whether the conduct is unlawful. This means that an employer cannot defend against a harassment claim by asserting, for

example, that coarse language and behavior are typical in the workplace at issue. Petty slights, minor annoyances, and lack of good manners are not considered to be harassment unless, when taken individually or under the totality of the circumstances, they meet the unwelcome conduct standard. When evaluating whether harassment occurred under the totality of circumstances, courts must consider the frequency of the conduct or communication; number of individuals engaged in the conduct; duration of the conduct; location of the conduct; whether the conduct is threatening; whether any power differential exists between the survivor and the harasser; use of epithets, slurs, or other humiliating or degrading conduct; and whether the conduct reflects stereotypes about a protected class.

VERMONT

[Vermont](#) amended its workplace discrimination law to define harassment as unwelcome conduct that interferes with an employee’s work or creates an intimidating, hostile, or offensive work environment.²² Vermont’s law now explicitly states that harassment or discrimination need not be severe or pervasive to be found unlawful. However, behavior that would be considered to be a petty slight or trivial inconvenience by a reasonable employee with the same protected characteristic would not be considered harassment. Courts must look at the totality of the circumstances to determine whether harassment

occurred, and a single incident may constitute harassment. Incidents that may be harassment will be considered in the aggregate, and varying types of conduct and conduct based on multiple characteristics (e.g., harassing conduct based on race and harassing conduct based on sex) will be viewed in totality rather than in isolation. The new law also provides additional guidance for courts to avoid common analytical pitfalls, including, for example, making clear that conduct may be considered harassment regardless of whether the complaining employee submitted to or participated in the conduct.

CLOSING A LOOPHOLE IN EMPLOYER LIABILITY

Under federal law and many state laws, employers can avoid liability for a supervisor's harassment of subordinates if the employer can show that it took steps to prevent and address the harassment and that the employee did not take advantage of the employer's available corrective measures, such as the employer's process for reporting harassment. In practice, this means that employers can sometimes evade liability by showing little more than they provide training on harassment or have a harassment policy on the books, regardless of quality or efficacy. States have been working to close this judicially created loophole that is blocking harassment victims from obtaining justice.

COLORADO

Colorado's [POWR Act](#) limits when employers can avoid liability for a supervisor's harassment.²³ In order to avoid liability for harassment by a supervisor, an employer must show that it established a program reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment and that it has communicated the existence and details of the program to their employees. To show it has established such a program, the employer must show that it has taken prompt, reasonable action to investigate or address harassment. In order to avoid liability for a supervisor's harassment, the employer must also show that the employee unreasonably did not take advantage of the program.

REDRESSING HARM TO VICTIMS OF HARASSMENT

Compensatory damages can compensate victims of harassment for out-of-pocket expenses and physical and emotional harm caused by harassment, while punitive damages awarded to victims punish employers who acted maliciously or recklessly in engaging in harassment. However, compensatory and punitive damages are capped in harassment and other discrimination cases under federal law and many state laws; in some states, they are not available at all. Limiting the availability of damages means that individuals who have experienced egregious sexual harassment may not be fully compensated for the losses and harms they have experienced, and employers are less incentivized to prevent harassment before it happens.

DELAWARE

[Delaware](#) enacted a new law increasing the dollar amounts of compensatory and punitive damages that victims of discrimination may receive when they win their case.²⁴ The legislation also clarifies that the court may order back pay, along with interest on back pay, and front pay, in addition to damages. The court may also order the same equitable relief as under Title VII, such as reinstatement. Previously, Delaware's law followed caps on damages under federal law. For example, if an employer had 15-100 employees, the maximum an employee could receive in damages was \$50,000, no matter how extreme the harassment was or how significant the costs that the employee experienced as a result of the harassment. Now, if an employer has 4-14 employees, the successful employment discrimination plaintiff could receive a maximum of \$50,000 in damages; an employer with 15-100 employees could be liable for damages up to \$75,000; and an employer with 101-200 employees could be liable for damages up to \$100,000.

While it is important for states to increase damages available to victims, damages caps should ultimately be eliminated so that victims are allowed to receive damages calculated based on the full range of the harm they have suffered and so punitive damages can be awarded to ensure employers take preventing and addressing harassment seriously.

PROMOTING PREVENTION STRATEGIES

TAKING STEPS TO PREVENT HARASSMENT

WASHINGTON

In 2020, Washington passed a law requiring postsecondary educational institutions employers to request a statement from job applicants in regard to whether the job applicant had been the subject of any substantiated findings of sexual misconduct in the applicant's previous or current employers. It also required employers to request any information around any substantiated findings of sexual misconduct from the job applicant's previous and current employers. In 2023, [Washington](#) expanded this law to require postsecondary educational institutions to also request job applicants to sign a statement declaring whether the job applicant had been the subject of any substantiated findings of sexual misconduct by any scholarly or professional association or is currently undergoing an investigation by a scholarly or professional association for sexual misconduct.²⁵ The statement also authorizes the associations to which the applicant belongs to disclose to the employer any sexual misconduct the job applicant committed. If the applicant discloses that an association has made such a finding, the institution must also request the association to provide information related to the finding of sexual misconduct committed by the job applicant.

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 [oppose](#) workplace abuses. Requiring employers to post or otherwise share with employees information about their rights can help employees better assert those rights.

CALIFORNIA

[California](#) currently requires employers to provide a notice of workers' rights to their employees. In 2023, California expanded this law to require that employers with farmworkers under the H-2A agricultural visa program share certain additional workers' rights with their farmworkers, including the right to be protected from sexual harassment.²⁶ The federal H-2A agricultural visa program allows employers to bring temporary or seasonal farmworkers from other countries. The notice must be provided in Spanish, although the employee may request the notice in English. The bill is awaiting the governor's signature.

- 1 Colorado S.B. 23-172 (2023 Session), https://leg.colorado.gov/sites/default/files/2023a_172_signed.pdf
- 2 Vermont S. 103 (2023 Session), <https://legislature.vermont.gov/Documents/2024/Docs/ACTS/ACT080/ACT080%20As%20Enacted.pdf>
- 3 Colorado S.B. 23-053 (2023 Session), https://leg.colorado.gov/sites/default/files/2023a_053_signed.pdf; S.B. 23-172 (2023 Session), https://leg.colorado.gov/sites/default/files/2023a_172_signed.pdf; Rhode Island S. 0342 (2023 Session), <http://webserver.rilegislature.gov/BillText/BillText23/SenateText23/S0342aa.pdf>; Virginia H. 1895 (2023 Session), <https://lis.virginia.gov/cgi-bin/legp604.exe?231+ful+CHAP0511>
- 4 See National Labor Relations Board, *Board Rules that Employers May Not Offer Severance Agreements Requiring Employees to Broadly Waive Labor Law Rights*, (February 21, 2023), <https://www.nlr.gov/news-outreach/news-story/board-rules-that-employers-may-not-offer-severance-agreements-requiring#:-:text=Today%2C%20the%20Board%20issued%20a,the%20National%20Labor%20Relations%20Act>.
- 5 See National Labor Relations Board, *NLRB General Counsel Issues Memo with Guidance to Regions on Severance Agreements* (March 22, 2023), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-with-guidance-to-regions-on-severance>
- 6 See National Women's Law Center, *The Speak Out Act Is a Step Forward, But Congress Must Act to Provide Full Protection to All Workers* (November 16, 2022), <https://nwlc.org/press-release/the-speak-out-act-is-a-step-forward-but-congress-must-act-to-provide-full-protection-to-all-workers/>
- 7 Colorado S.B. 23-053 (2023 Session), https://leg.colorado.gov/sites/default/files/2023a_053_signed.pdf; S.B. 23-172 (2023 Session), https://leg.colorado.gov/sites/default/files/2023a_172_signed.pdf
- 8 Rhode Island S. 0342 (2023 Session), <http://webserver.rilegislature.gov/BillText/BillText23/SenateText23/S0342aa.pdf>
- 9 See Andrea Johnson et al., *#MeToo Five Years Later: Progress & Pitfalls in State Workplace Anti-Harassment Laws*, (October 2022), https://nwlc.org/wp-content/uploads/2022/10/final_2022_nwlcMeToo_Report-MM-edit-10.27.22.pdf
- 10 National Women's Law Center, *Limiting Nondisclosure and Nondisparagement Agreements That Silence Workers: Policy Recommendations* (April 2020), <https://nwlc.org/wp-content/uploads/2020/04/NDA-Factsheet-4.27.pdf>
- 11 Colorado S.B. 23-172 (2023 Session), https://leg.colorado.gov/sites/default/files/2023a_172_signed.pdf
- 12 Colorado S.B. 23-053 (2023 Session), https://leg.colorado.gov/sites/default/files/2023a_053_signed.pdf
- 13 Rhode Island S. 0342 (2023 Session), <http://webserver.rilegislature.gov/BillText/BillText23/SenateText23/S0342aa.pdf>
- 14 Virginia H. 1895 (2023 Session), <https://lis.virginia.gov/cgi-bin/legp604.exe?231+ful+CHAP0511>
- 15 Vermont S. 103 (2023 Session), <https://legislature.vermont.gov/Documents/2024/Docs/ACTS/ACT080/ACT080%20As%20Enacted.pdf>
- 16 See National Women's Law Center, *Survivors Speaking Out: A Toolkit About Defamation Lawsuits and Other Retaliation By and For People Speaking Out About Sex-Based Harassment* (August 2023), <https://nwlc.org/wp-content/uploads/2023/08/Survivors-Speaking-Out-Toolkit-PDF.pdf>
- 17 California A.B. 933 (2023-2024 Session), https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240AB933&showamends=false
- 18 New Jersey S. 2802 (2022-2023 Session), https://pub.njleg.state.nj.us/Bills/2022/S3000/2802_R1.PDF
- 19 Oregon S.B. 305 (2023 Session), <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/SB305/Enrolled>
- 20 Utah S.B. 18 (2023 Session), <https://le.utah.gov/-2023/bills/static/SB0018.html>
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- 22 Vermont S. 103 (2023 Session), <https://legislature.vermont.gov/Documents/2024/Docs/ACTS/ACT080/ACT080%20As%20Enacted.pdf>
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- 24 Delaware S.B. 145 (2023 Session), <https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocumentEngrossment?engrossmentId=35952&docTypeId=6>
- 25 Washington H.B. 1522 (2023 Session), <https://lawfilesexxt.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/House/1522-S2.SL.pdf?q=20230803170555>
- 26 California A.B. 636 (2023-2024 Session), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB636