# State Laws May Lead To Many Revived #MeToo Claims

By **Sara Begley, Dana Feinstein, Ripa Rashid and Laura Sherbin**

New York, New Jersey and California have passed new laws that will make it easier to bring #MeToo claims including revival of previously time-barred claims. In this article, we explore what's at stake and what options are available to employers to respond to and even preempt new claims.

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**What's at Stake**

In October 2017, the #MeToo movement ushered in a new era of accountability and scrutiny of workplace harassment. Many high-profile male leaders were toppled by #MeToo allegations, some decades old. Employers implemented new training programs and ousted problem employees. In 2019, the U.S. Equal Employment Opportunity Commission reported an almost 14% increase in claims of sexual harassment.

Dana Feinstein

The #MeToo movement also generated pressure to address #MeToo claims which were stale from a legal perspective, because of short statutes of limitation. There has also been pressure to eliminate confidential settlements that may have protected perpetrators.

In response, New Jersey, New York and California have recently enacted legislation that provides a form of amnesty to complainants with time-barred claims of sexual harassment and sexual assault. As of Dec. 1, New Jersey complainants will have a two-year window in which to bring time-barred claims of sexual assault or any other prohibited sexual acts or abuse.

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The law also extends the statute of limitations for child victims of sexual abuse, allowing them until age 55 or seven years from the age of discovery — whichever is later — to bring claims. Finally, the law voids all private agreements that settle class claims of sexual abuse as against public policy.

New York's new legislation, which goes into full effect in February 2020, similarly extends the statute of limitations for stale workplace sexual harassment claims. Complainants who previously had one year to bring a claim now have three years. Further, the law requires courts to interpret the New York Human Rights Law liberally, regardless of federal law, and will allow nonemployee complainants of workplace harassment — such as contractors and vendors — equal access to file complaints. Complainants in these states now have a much broader ability to pursue stale claims.

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California, too, recently enacted a law that will extend an individual's deadline to exhaust administrative remedies when bringing a charge of workplace discrimination, harassment and retaliation with the California Department of Fair Employment and Housing, or DFEH. The Stop Harassment and Reporting Extension, or SHARE, Act, effective Jan. 1, 2020, will allow employees three years to bring such claims rather than one year. The SHARE Act also allows claimants one year after lodging a DFEH

charge to file a civil lawsuit, which exposes employers to claims of up to four years old.

New Jersey, New York and California are populous and trend-setting states and other states are likely to follow suit with similar legislation.

In addition, nondisclosure agreements have come under increasing scrutiny. State and federal legislatures have enacted a variety of laws to prohibit or penalize such agreements. For example, a new federal law made payment of settlements that utilized nondisclosure agreements non-tax deductible. Employers are also reviewing and modifying their own policies. When such provisions are eliminated, witnesses may be free to corroborate allegations of sexual harassment.

Employers should be prepared for a high volume of litigation from previously time-barred claims. Two 2018 #MeToo studies indicate the likely scope of potential claims.

One survey of over 3,000 corporate employees found that more than 1 in 3 women reported sexual harassment and 7% of women reported sexual assaults. The study also suggests the potential for latent claims from men. While twice as many women as men reported sexual harassment, men and women reported similar levels of sexual assaults, 5% of men versus 7% of women.

The study also revealed that most witnesses to sexual misconduct took some action, including approximately a quarter who reported the incidents to human resources.[1] This data suggests that there may be corroborating witnesses for many latent claims.

Law firms themselves may be particularly vulnerable to latent #MeToo claims. In a 2018 Working Mother/ABA Journal survey, a whopping 68% of women, mainly lawyers, reported having experienced sexual harassment. Only 30% of them took action at the time. Their primary reasons for not reporting the behavior were that they did not expect complaints to be taken seriously; they were concerned that complaints would negatively impact their jobs; and they thought the behavior was tolerated by their organizations.[2]

**Options for Employers**

Faced with the potential for latent claims and the post-#MeToo demands for greater accountability, employers must reevaluate whether their traditional approaches are adequate.

The most common traditional approach is wait and see who comes forward to make a claim, and then have lawyers investigate and defend each discrete misconduct claim, with support from crisis management and public relations professionals for claims likely to generate media attention or threaten reputational damage.

Several enhancements to a wait-and-see strategy are critical post-#MeToo. Employers must cultivate environments where employees feel safe bringing complaints — whether the incidents occurred last week or 20 years ago.

Next, employers should be prepared to address and remediate any claims that come to light — especially if the accused are high-profile members of the company or are accused of particularly egregious acts. Finally, the employer should make great efforts to address, and remedy if appropriate, claims that were previously resolved and claims that were asserted but never fully resolved. When investigating claims of discrimination and harassment of any kind, an employer should engage outside counsel to work with company employees in order

to benefit from their expertise and maintain attorney-client privilege.

Faced with the threat of latent claims, employers should also consider additional preemptive strategies. In the wake of #MeToo, many employers have already revamped their policies, instituted more sexual harassment training, and declared zero tolerance for sexual misconduct.

To enhance the effectiveness of such interventions and emphasize their seriousness, some employers have gone further and conducted culture audits to uncover gaps in the treatment and experience of their employees. Many HR audits have become commonplace such as wage and hour audits and pay equity audits. In the realm of sexual harassment, culture audits provide new tools to identify and remediate the vulnerabilities in an organization.

Typical goals of a culture audit are to understand how employees perceive their treatment; whether employees are comfortable reporting misconduct to HR, legal or compliance; the responsiveness of the company to complaints; and whether senior executives or high performers are held to a different standard.

Culture audits, often conducted under attorney-client privilege, allow a company to pinpoint vulnerabilities in specific units, manager behaviors and gaps in HR response. The company can then craft corrective initiatives. We have found culture audits to be invaluable to companies in the current post #MeToo climate, both in the wake of specific misconduct allegations and incidents, and when a preemptive audit can map out a baseline of bias and bad behavior.

Culture audits can also be combined with a process for reporting claims of misconduct. Some employers have encouraged employees to participate in both anonymous online focus groups and provided separate hotlines or other claims processes for reporting incidents of misconduct. In some cases, employers have had their hotlines or claims processes administered by an independent third party.

In view of the legislative changes at hand, companies can no longer afford to turn a blind eye to misconduct and adopt a complacent "we've rooted out the bad apple" perspective. One way or another, it is essential for employers to assess their workplace culture and uncover the gaps.

If leadership is not committed to addressing the gaps, they may well become the subject of litigation authorized by the new relaxed statutes of limitation. It is essential for leaders to send the message to employees that management cares and is invested in shaping a speak-up culture where talent can contribute to their fullest and misconduct is not tolerated. Men and women, corporate leaders, and employees all share a stake in confronting and remedying cultural gaps that created the #MeToo crisis.

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[1] https://www.talentinnovation.org/publication.cfm?publication=1620.

[2] https://www.workingmother.com/sites/workingmother.com/files/attachments/2018/07/metoo_snapshot_final_revised_7-18.mb_.pdf.