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COMMENT

THE DISCLOSING SEXUAL HARASSMENT IN THE WORKPLACE ACT, MARYLAND'S NEW WORKPLACE HARASSMENT LAW: IS THIS CRAB CAKE ALL FILLER?

By: Sean Keene*

INTRODUCTION

In what appeared to be a sudden eruption across social media, the #MeToo Movement launched a national conversation about the prevalence of sexual violence experienced by women. Over a decade in the making, the #MeToo Movement began as one woman's endeavor to support victims of sexual violence to locate resources and begin the process of healing.¹ This effort remained relatively underground until the now-infamous Harvey Weinstein's sexual victimization of women prompted Alyssa Milano to send the #MeToo message across social media.² As the #MeToo message spread, women increasingly shared experiences and encouraged one another to report incidents of sexual violence.³ Amongst these shared and reported experiences, sexual violence was especially prevalent in the area of employment.⁴ The Equal Employment Opportunity Commission ("EEOC"), charged with protecting employee civil rights,⁵ experienced a 50% increase in workplace sexual harassment claims since the #MeToo Movement began.⁶ With the rise in claims, women began to unite with activist groups to reform the existing employment systems that have failed to respond to workplace

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¹ Sandra Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

² *Id.*

³ *Id.*

⁴ Johnny C. Taylor, *Ask HR: Some Insights on the #MeToo Movement and Harassment in the Workplace*, USA TODAY (Oct. 9, 2018, 6:00 AM), <https://www.usatoday.com/story/money/careers/work-relationships/2018/10/09/ask-hr-insights-metoo-movement-harassment-workplace/1536433002/>.

⁵ *About EEOC*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/index.cfm> (last visited Dec. 20, 2018).

⁶ Pamela Wolf, *Suits Alleging Sexual Harassment Up 50 Percent-Plus in FY2018*, 2018 HUM. RESOURCE COMPLIANCE 45579, WL 4899847.

sexual harassment.⁷ Despite these efforts, only a third of all U.S. employers have responded by taking additional preventative measures to curb sexual harassment.⁸ This inadequate response has led to mounting pressure on state lawmakers to enact greater protections for women in the workplace. Maryland has not been unaffected by the #MeToo movement's call for action and legislators have responded to public pressure by making statutory changes in an effort to quell rising tensions related to the movement. While some of these efforts by lawmakers were effective, one appears to be missing a key ingredient, which is required to make the law effective. As residents seek to avail themselves of this new law, the results may be unappetizing. Just as any local Marylander's natural response to a dissatisfying first bite, Maryland's new sexual harassment law begs the question: is this crab cake all filler?

This comment will discuss Maryland's response to the #MeToo Movement with respect to workplace sexual harassment, focusing on the Disclosing Sexual Harassment in the Workplace Act ("DSHWA"). Part I will examine the progression of the movement within Maryland by discussing the legislature's efforts to address sexual violence within the state and discuss the DSHWA. Part II will examine the DSHWA's development, focusing on statutory changes made to the bill prior to its enactment and omissions in its language. Part III will provide a comparative analysis between the DSHWA and similarly enacted laws by other states, as well as, recommendations for specific changes to the DSHWA in order to establish more comprehensive protections against workplace sexual harassment.

I. #METOO COMES TO MARYLAND

The scourge of sexual violence impacting Maryland women is not a new phenomenon. Reports indicate that from 1992 to 2015, an average of 44% of Maryland women have experienced some form of sexual violence⁹ and from 2015 to 2016, roughly 31.5% have experienced unwanted sexual contact.¹⁰ These staggering statistics in conjunction with the Governor's Office

⁷ *Dismantling Sexual Harassment*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/womens-rights/womens-rights-workplace/dismantling-sexual-harassment> (last visited Dec. 14, 2018).

⁸ Sebastien Malo, *U.S. Employers' Response to #MeToo is 'Ineffective', Poll Finds*, REUTERS (May 15, 2018, 1:36 PM), <https://www.reuters.com/article/us-usa-women-metoo/u-s-employers-response-to-metoo-is-ineffective-poll-finds-idUSKCN1IG2RW>.

⁹ MD. COAL. AGAINST SEXUAL ASSAULT, *Sexual Assault in Maryland* (Mar. 25, 2018), https://mcase.org/assets/files/National_SA_Prevalence_Updated1_10.24.17.pdf.

¹⁰ Governor's Office of Crime Control and Prevention, *Violent Crime & Property Crime Statewide Totals: 1975 to Present* (June 21, 2018), <https://data.maryland.gov/Public-Safety/Violent-Crime-Property-Crime-Statewide-Totals-1975/hyg2-hy98>.

reporting an increase in incidents of rape across a three-year period,¹¹ demonstrate a statewide need for change. In response to the sexual violence facing Maryland women, the #MeToo movement offered the perfect vehicle to spawn change within the state.

A. #MeToo: The Maryland Response

Maryland residents embraced the movement as a catalyst for social change by collaborating with women advocacy groups.¹² Groups, like the Maryland Coalition Against Sexual Violence, suddenly saw an influx of citizen participation and used this momentum to apply pressure to the Maryland legislators.¹³ Representatives, heading the unified demand for change, began investigating and implementing policy objectives to address sexual violence.¹⁴

In the wake of the #MeToo movement, the pressure on lawmakers to address the issue of sexual violence has resulted in several critical legislative efforts. The Women's Caucus of the Maryland General Assembly (MDGA) spearheaded a host of bills to address sexual violence, including: the State Government Harassment and Discrimination Bill, the Repeat Sexual Predator Act, the Rape Survivor Family Protection Act, and the Criminal Procedure-Violation of Conditions of Release Bill, all of which were codified in 2018.¹⁵ In addition to the efforts led by the Women's Caucus, a number of other 2018 laws have been credited to the #MeToo movement's momentum, including Sen. Chris Zirkin's Sextortion and Revenge Porn Bill, Sen. Conway's bill to increase the rights of sexual assault victims in higher education bill, and Del. Atterbeary's bill to facilitate domestic violence victims' ability to obtain

¹¹ SHARON G. SMITH ET AL., Nat'l Ctr. for Injury Prevention and Control of the CDC, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT at 37 (2017).

¹² Jean Marbella, *A Year After the Movement Began, #MeToo is Making Strides in Maryland Laws and Workplaces*, BALT. SUN (OCT. 18, 2018), <https://www.baltimoresun.com/features/women-to-watch/bs-fe-me-too-20180907-story.html>.

¹³ See Brittany Lewis & Alexandra Hoskins, *Sexual Harassment is Sexual Violence*, FRONTLINE (Md. Coal. Against Sexual Assault, Silver Spring, Md.), (May 4, 2018), <https://mcasa.org/newsletters/post/frontline-spring-2018-issue> (explaining MeToo movement momentum has increased participation with advocacy groups that has facilitated their ability to achieve policy goals).

¹⁴ *Id.*

¹⁵ Press Release, Women Legislators of Md., Md. Women's Legislative Caucus Flexes Muscle in a Year of the Woman! (Apr. 10, 2018) (on file with author).

protective orders.¹⁶ Maryland's legislative output in 2018 demonstrates just how dynamic the #MeToo movement's influence has been within the state and how Maryland lawmakers are heading the call from Maryland women for change.

B. The Origins of DSHWA

One particular issue that has been elevated by the #MeToo Movement is workplace sexual harassment.¹⁷ Workplace sexual harassment is considered a form of sex-based discrimination and is defined as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁸ Before the #MeToo Movement began, Maryland maintained, as part of its general prohibition against employment-based discrimination, an anti-workplace sexual harassment law.¹⁹ The pre-#MeToo law also prohibited employers from retaliating against employees who have reported or participated in the investigation of workplace discrimination.²⁰ Employees were permitted to register complaints to the Maryland Commission on Civil Rights (MCCR), which acts as the state's regulatory body responsible for enforcing anti-discrimination employment laws.²¹ The MCCR has reported an 80% increase in workplace sexual discrimination since the #MeToo Movement began, with only 115 claims in 2015²² rising to 208 claims in 2017.²³ Additionally, the MCCR reports that complaints of workplace retaliation (adverse action taken by an employer against an employee) have increased by a whopping 115% since the movement began,

¹⁶ Michael Dresser, 'Sextortion' Ban Among Many Md. Laws Taking Effect Today to Protect Women, *BALT. SUN*, (Oct. 1, 2018), at A1.

¹⁷ Julia Horowitz, *Workplace Sexual Harassment Claims Have Spiked in the #MeToo Era*, *CNN BUS.* (Oct. 5, 2018, 8:41 AM), <https://www.cnn.com/2018/10/04/business/eeoc-sexual-harassment-reports/index.html>.

¹⁸ EQUAL EMP'T. OPPORTUNITY COMM'N., *Facts About Sexual Harassment*, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last visited Dec. 16, 2018).

¹⁹ MD. CODE ANN., STATE GOV'T § 20-606 (West 2019).

²⁰ *Id.*

²¹ MD. COMM'N ON C.R., *About MCCR*, <https://mccr.maryland.gov/Pages/About-MCCR.aspx> (last visited Dec. 14, 2018).

²² MD. COMM'N ON C.R., *2015 Annual Report to the Governor & General Assembly of Maryland* 11 (2015), https://mccr.maryland.gov/Documents/publications/Publications_2edb.Final%202015%20Annual%20Report.pdf [hereinafter *2015 Annual Report*].

²³ MD. COMM'N ON C.R., *2017 Annual Report to the Governor & General Assembly of Maryland* 14 (2017), <https://mccr.maryland.gov/AnalyticsReports/2017%20Annual%20Report%20-%20Final.pdf> [hereinafter *2017 Annual Report*].

with claims rising from 142 in 2015²⁴ to 306 in 2017.²⁵ These statewide increases coincide with a national increase in willingness to report such incidents;²⁶ however, workplace sexual harassment is still widely believed to go unreported.²⁷ The EEOC's Select Task Force on the Study of Workplace Harassment investigated this problem and identified "non-disclosure and arbitration agreements and training mandates" as key areas of reform.²⁸ During the 2018 Maryland General Assembly session, Sen. Chris Zucker and Del. Kris Valderrama took on the challenge of combating workplace sexual harassment by addressing these three areas of reform in what came to be known as the Disclosing Sexual Harassment in Workplace Act ("DSHWA").²⁹

The DSHWA began as a collaborative effort between Sen. Zucker and Del. Valderrama, which was credited to the #MeToo movement's success in victim advocacy, for its proposal.³⁰ Its overarching theme was to prevent employers from using contractual agreements to shield themselves from liability for workplace sexual harassment.³¹ The bill sought to address three strategic areas to accomplish this goal: contract waivers of legal rights for sexual harassment claims, prohibited employer actions, and employer reporting requirements.³²

1. Contractual Waivers

The first area DSHWA addressed was employer use of contractual waivers, which refers to embedded provisions within an employment contract

²⁴ 2015 Annual Report, *supra* note 22.

²⁵ 2017 Annual Report, *supra* note 23.

²⁶ Chris Opfer, *Sex Harassment Claims on Rise, EEOC Finds*, BLOOMBERG BNA (Sept. 12, 2008), <https://news.bloomberglaw.com/daily-labor-report/sex-harassment-claims-on-rise-eeoc-finds>.

²⁷ Chai R. Feldblum & Victoria A. Lipnic, Equal Emp't Opportunity Comm'n, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686300.

²⁸ Press Release, Equal Emp't Opportunity Comm'n, EEOC Select Task Force on Harassment Hears from Experts on How to Prevent Workplace Harassment (June 11, 2018) (on file with author).

²⁹ Dresser, *supra* note 16.

³⁰ Josh Kurtz, *Hogan Signs Bill Cracking Down on Sexual Harassment in the Workplace*, MARYLAND MATTERS (May 16, 2018), <https://www.marylandmatters.org/2018/05/16/hogan-signs-bill-cracking-down-on-sexual-harassment-in-the-workplace/>.

³¹ *Id.*

³² H.B. 1596, 438th Gen. Assemb., Reg. Sess. (Md. 2018) (as first introduced to Economic Matters Committee, Feb. 25, 2018).

that act to prevent legal disputes from litigation.³³ These provisions often go unnoticed by employees and can take many forms such as arbitration clauses, form contracts, and employee handbooks.³⁴ The original bill took a powerful stance against contractual waivers requiring an employee to waive “any future substantive or procedural right or remedy to a claim of sexual harassment, discrimination, or retaliation” and declared them “null and void as being against the public policy.”³⁵ Additionally, the bill would impose attorney fees on employers that enforce these types of waivers.³⁶ As a result, this provision of the DSHWA sought to broadly prohibit contractual waivers of employee rights and penalize employers who attempted to violate its mandates.

2. Prohibited Employer Action

The DSHWA next sought to address employer action in response to the prohibition against contractual waivers of employees’ rights. Here the bill would act to protect employees by preventing employers from taking retaliatory actions against those who decline to accept contracts with the forbidden waivers.³⁷ In this way, the bill not only protects newly hired staff but also current employees by effectively closing a potential loophole for employers. Absent this provision, it would be possible for employers to shorten initial contracts and incorporate the waiver of rights in subsequent versions. The bill averts employer temptation to silence employees by means of leveraging disciplinary actions if they choose not to agree to a waiver.³⁸

3. Reporting Requirements

One of the most interesting aspects of the bill would be the protection afforded to employees by requiring reports of workplace sexual harassment from employers. The bill directed employers with 50 or more employees to generate reports on their annual number of certain types of settlements.³⁹ The DSHWA focused on settlements entered into after an employee made a sexual harassment claim; settlements paid in response to sexual harassment

³³ Elizabeth Dias & Eliana Dockterman, *The Teeny Tiny Fine Print that Can Allow Sexual Harassment Claims to Go Unheard*, TIMES (Oct. 21, 2016), <http://time.com/4540111/arbitration-clauses-sexual-harassment/>.

³⁴ *Id.*

³⁵ Md. H.B. 1596.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Kevin C. McCormick, *Annapolis Roundup: Only 1 Bill Sent to Governor This Year*, 28 No. 7 Md. Emp. L. Letter 1 (2018).

³⁹ Md. H.B. 1596.

claims, involving the same employee over a 20-year period; and settlements that required the parties to maintain the confidentiality of settlement terms.⁴⁰ These reports were required to be submitted to the MCCR, which would then post them on their website, making them publicly accessible.⁴¹

II. LEGISLATIVE REDUCTION AND STATUTORY LANGUAGE ISSUES

The DSHWA, introduced in the Maryland House of Delegates by Del. Valderrama and in the Maryland Senate by Sen. Zucker, was aimed to “serve as a national model ensuring that Maryland is at the forefront for protecting employees against sexual harassment.”⁴² As the legislation moved through both houses, several significant changes were proposed that could impair its effectiveness against sexual harassment. Advocacy groups, fearing the new law would be eviscerated, clamored to raise awareness against these changes.⁴³ Despite these efforts, many changes were incorporated and the DSHWA’s original protections were reduced with respect to its ability to survive a preemption challenge and the scope of employer reporting requirements. The DSHWA also has been impacted by its statutory language, which is lacking in enforcement capability and definition of terminology.

A. Preemption

One of the first changes made to the DSHWA was addition of the phrase, “[e]xcept as prohibited by federal law,”⁴⁴ which was not included in the original bill.⁴⁵ This clause creates a great deal of uncertainty with respect to the applicability of the DSHWA’s prohibition against contractual waivers of employee rights. Such uncertainty stems from the federal law exception,

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Josh Kurtz, *Hogan Signs Bill Cracking Down on Sexual Harassment in the Workplace*, MARYLAND MATTERS, May 16, 2018, <https://www.marylandmatters.org/2018/05/16/hogan-signs-bill-cracking-down-on-sexual-harassment-in-the-workplace/>.

⁴³ See #MeToo – *Don’t Gut the Disclosing Sexual Harassment in the Workplace Act* (MD. COALITION AGAINST SEXUAL VIOLENCE, Silver Spring, Md.), Apr. 6, 2018, <https://mcase.org/news/post/metoo-dont-gut-the-disclosing-sexual-harassment-in-the-workplace-act> [hereinafter *Don’t Gut the DSHWA*] (demonstrating activist group response to legislative changes to the DSHWA).

⁴⁴ MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018).

⁴⁵ See H.B. 1596, 438th Gen. Assemb., Reg. Sess., (Md. 2018) (as first introduced to Economic Matters Committee, Feb. 25, 2018) (showing the original bill did not include the federal preemption clause).

which would include the Federal Arbitration Act (FAA).⁴⁶ This law, established by Congress in 1925, prevented the state's common law from prohibiting arbitration agreements.⁴⁷ Since the FAA was enacted, the Supreme Court has consistently enforced arbitration agreements⁴⁸ and has favored a liberal policy towards its preemptive power.⁴⁹ While the FAA's preemptive challenge creates a substantial hurdle for state lawmakers to craft protective laws in the area of contractual waivers, the DSHWA's exception permits its preemption without a fight.⁵⁰ Contractual waivers have been identified as critical factor in the prevention of sexual harassment reporting.⁵¹ The inclusion of this federal exception undermines one of the key areas of protection afforded by the DSHWA and allows the problem of workplace sexual harassment to continue unabated.

B. Reporting Requirements

As previously mentioned, the original version of the DSHWA required employers to submit an annual report, which included its total number of sexual harassment settlements and additional related information to the MCCR. In the final version of the bill, several major changes were made to the DSHWA's reporting requirements. The first change was to replace the employer annual report requirement with a short survey.⁵² This alteration prevents an employer's name and number of sexual harassment related incidents from being published by the MCCR.⁵³ The second change was to reduce the number of years an employer must account for repeat settlements

⁴⁶ Larry R. Segull & Jill S. Distler, *Maryland's Sexual-Harassment Disclosure Law Takes Effect Soon*, SOC'Y FOR HUM. RESOURCE MGMT. (Sept. 18, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/maryland-sexual-harassment-law-takes-effect-soon-.aspx>.

⁴⁷ Robert Hollis et al., *Is State Law Looking for Trouble?: The Federal Arbitration Act Flexes Its Preemptive Muscle*, 2003 J. DISP. RESOL. 463, 466 (2003).

⁴⁸ Segull & Distler, *supra* note 46.

⁴⁹ *See supra* text accompanying note 48 (highlighting the Supreme Court's favoring of the FAA).

⁵⁰ *See supra* text accompanying note 46 (explaining that the DSHWA permits preemption by the FAA).

⁵¹ Nitasha Tiku, *Supreme Court Rules Against Workers in Arbitration Case*, WIRED (May 21, 2018), <https://www.wired.com/story/supreme-court-rules-against-workers-in-arbitration-case/>.

⁵² *Compare* H.B. 1596, 438th Gen. Assemb., Reg. Sess. (Md. 2018) (as first introduced to Economic Matters Committee, Feb. 25, 2018) and 2018 Md. Laws ch. 739 (replacing annual report with generalized survey).

⁵³ *Don't Gut the DSHWA*, *supra* note 43 (demonstrating activist group response to legislative changes to the DSHWA).

against the same employee, from a period of twenty years to only ten years.⁵⁴ This modification, aptly titled "the Harvey Weinstein provision" seeks to limit the number of years employers will be required to account for incidents of sexual harassment and thereby reduce the negative reputational effects on employers.⁵⁵ The third and most consequential change was that only the total aggregate number of employers' sexual harassment settlements would be published, rather than the original requirement that each clearly identified employer's specific report be publicized.⁵⁶ The current version of the DSHWA does permit the MCCR to retain employer responses to the ten-year repeat settlement question for public review upon request.⁵⁷

C. Statutory Language Problems

1. Employer Accountability

The statutory language used to create DSHWA also generates significant concerns about the protections it offers victims of workplace sexual harassment. Aside from the changes to the original bill, the DSHWA's survey requirement also fails to ensure that employers participate. Furthermore, the law does not penalize employers for either failing to respond or responding with false information.⁵⁸ These changes and omissions have undercut the DSHWA's original purposes of: (1) holding employers accountable⁵⁹ and (2) providing transparency to the public.⁶⁰ As a result, the

⁵⁴ Compare H. B. 1596, 438th Gen. Assemb., Reg. Sess., (Md. 2018) (as first introduced to Economic Matters Committee, Feb. 25, 2018) and 2018 Md. Laws ch. 739 replacing twenty-year employee repeat settlement information requirement with ten-year mandate).

⁵⁵ See *supra* text accompanying note 53 (identifying the "Weinstein provision" and emphasizing its relationship to the reduction in years employers will be required to account for in annual surveys).

⁵⁶ Compare H. B. 1596, 438th Gen. Assemb., Reg. Sess., (Md. 2018) (as first introduced to Economic Matters Committee, Feb. 25, 2018) and 2018 Md. Laws ch. 739 (replacing requirement for MCCR to publish employer specific reports with aggregate response numbers).

⁵⁷ Trevor Coe, *Maryland's #MeToo Bill (H.B. No. 1596) Restricts Employment Contracts*, 23 Md. State Bar Ass'n Sec. of L. and Emp. Law, Summer 2018 Newsletter 18-19, <https://www.msba.org/content/uploads/sites/7/2018/08/Summer-2018-Newsletter-Labor-Employment-Section-MSBA.pdf>.

⁵⁸ Christopher E. Humber, *Full Disclosure: Maryland's New #MeToo Law May Do Little to Expose Workplace Harassment*, OGLETREE DEAKINS (June 6, 2018), <https://ogletree.com/shared-content/content/blog/2018/june/marylands-new-metoo-law-may-do-little-to-expose-workplace-harassment>.

⁵⁹ See H.B. 1596, 438th Gen. Assemb., Reg. Sess., (Md. 2018) (as first introduced to Economic Matters Committee, Feb. 25, 2018) (stating that the MCCR must publish individualized reports of specific employers).

⁶⁰ #MeToo, *supra* note 43.

DSHWA's ability to protect prospective employees and current employees through disclosure requirements of workplace sexual harassment settlements is minimal and warrants change.

2. Historical Waiver of Claims

The bill's forward-looking approach to the problem of contractual waivers and its lack of clearly defined terms, again, inhibits its overall intent. The initial version of the DSHWA has not changed with respect to historical and future waiver of claims. Both versions indicate that the law, which took effect on Oct. 1, 2018, covers any employment contract that attempts to require an employee to waive their rights to future sexual harassment claims.⁶¹ So, although future employees may have increased protection, current employees, who filed claims prior to the bills enactment do not benefit from the same protections. In this regard, both sexual harassment and employer retaliation claims that occurred prior to enactment would not be in violation of the law.⁶²

The statutory language of the DSHWA fails to identify who is an employee that is protected under the law.⁶³ The word "employee" can apply to a variety of people and depends on a statutory definition to provide it with purpose.⁶⁴ The ambiguity over who constitutes an employee under the law leads to questions about whether an at-will employee,⁶⁵ independent contractor, or a vendor⁶⁶ would be included. This failure to define who is being protected under the DSHWA severely weakens any protection it may have sought to provide potential victims of workplace sexual harassment.

⁶¹ See H.B. 1596, 438th Gen. Assemb., Reg. Sess., (Md. 2018) (as first introduced to Economic Matters Committee, Feb. 25, 2018); MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018) (current law).

⁶² Segull & Distler, *supra* note 46.

⁶³ *Id.*

⁶⁴ Jeanne Frazier Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEV. ST. L. REV. 999, 1007 (2013).

⁶⁵ *Id.*

⁶⁶ Humber, *supra* note 58.

III. COMPARATIVE ANALYSIS AND RECOMMENDATIONS

A. Comparative Analysis

The #MeToo Movement has invigorated several states to enact new legislation aimed at combating workplace sexual harassment.⁶⁷ These laws attempt to counteract the problem in a variety of ways, which when compared to one another, serve to highlight effective strategies for dealing with workplace sexual harassment. This comparison will help to generate recommendations for improving the DSHWA and proceed to look beyond existing laws for further guidance.

1. Contractual Provision Approach

Of the states that have attempted to address workplace sexual harassment, several unique approaches have been taken. The first approach, like that of Maryland, has explicitly sought to deal with the problem by prohibiting contractual provisions that allow sexual harassment in the workplace to thrive.⁶⁸ The method a state chooses to prohibit contractual provisions is important because it can be determinative of whether the law will be subject to federal preemption challenges.⁶⁹ Maryland's method, through the DSHWA, was to generally ban all contracts that require employees to waive their rights to report future claims of sexual harassment.⁷⁰ Other states, like Arizona and Tennessee, created laws that specifically banned non-disclosure agreements.⁷¹ Vermont's new law prohibits the inclusion of provisions in settlement agreements for sexual harassment that prevent victims from continuing their employment or being rehired by the same employer.⁷² The

⁶⁷ Porter Wells, *States Take up #MeToo Mantle in Year after Weinstein*, BLOOMBERG LAW (Oct. 3, 2018, 6:13 AM), <https://news.bloomberglaw.com/daily-labor-report/states-take-up-metoo-mantle-in-year-after-weinstein>.

⁶⁸ *Id.* (explaining that contractual provisions, including NDA's and mandatory arbitration agreements, permit workplace sexual violence).

⁶⁹ *Id.*

⁷⁰ MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018). Another recently passed Maryland law prohibits non-competition agreements for low wage workers, which is not covered in this article. *See* MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2019).

⁷¹ Suzanne Hultin, *National Conference of State Legislatures Memo*, EQUAL EMP'T OPPORTUNITY COMM'N (June, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/upload/hultin-Workplace-Sexual-Harassment-Legislation-2018-6-6-18.pdf.

⁷² April McCullum, *How Vermont's new Sexual Harassment Law will Change the Workplace*, BURLINGTON FREE PRESS (June 5, 2018, 7:23AM), <https://www.burlingtonfreepress.com/story/news/local/vermont/2018/06/05/how-vts-new-sexual-harassment-law-work/669706002/>.

distinction between the DSHWA and the laws of these three states is a matter of targeting. The three states took a localized approach, which was specifically aimed at contractual provisions that would not subject their laws to a preemption challenge. Maryland legislators chose to generally ban agreements waiving rights to future sexual harassment claims. The key difference being that the DSHWA is effectively banning mandatory arbitration agreements, which opens the law up to preemption challenges under the FAA and could render the law unenforceable. Therefore, the laws of Arizona, Tennessee, and Vermont, despite providing a more narrow scope of protections against workplace sexual harassment, generate reliable outcomes that avoid unnecessary litigation. The DSHWA's potential exposure to FAA preemption challenges will inhibit effectiveness of the law, a result that is both regrettable and preventable had the state taken a more specific legislative approach.

2. Holistic Approach

A second approach tackled workplace sexual harassment with a holistic approach by including prohibitions on certain contractual provisions, tracking the number of complaints, and incorporating mandatory trainings for employees.⁷³ New York, for example, has taken this approach and enacted rigorous new workplace sexual harassment laws.⁷⁴ Amongst them is the requirement that employers provide employees with sexual harassment prevention training and copies of their sexual harassment policy, thus ensuring employees understand the reporting process.⁷⁵ Included in the legislation are definitions for the words "employee" and "sexual" harassment,⁷⁶ which designates who is afforded the protections and what acts are forbidden. California also adopted this approach by requiring employers with five or more employees to provide sexual harassment training.⁷⁷ In addition to the training requirements adopted by New York and California, both states have signed into law restrictions on non-disclosure agreements in their employment contracts.⁷⁸ New York did pass a prohibition against

⁷³ Humber, *supra* note 54.

⁷⁴ Aaron Warshaw Et AL., *New York Issues Final Guidance on Sexual Harassment Policies*, SOC'Y FOR HUM. RESOURCE MGMT. (Oct. 10, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-york-issues-final-guidance-on-sexual-harassment-policies.aspx>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Laura Mahoney, *Only Claimants can Seek NDAs in Calif. Harassment Settlements*, BLOOMBERG LAW (Sept. 30, 2018, 6:16 PM), <https://news.bloomberglaw.com/daily-labor-report/only-claimants-can-seek-ndas-in-calif-harassment-settlements-1>.

⁷⁸ Humber, *supra* note 54.

mandatory arbitration agreements, which was similar to Maryland's; however, it was crafted as a separate law and not combined with the law barring non-disclosure agreements.⁷⁹

This approach differs from Maryland's DSHWA in several respects. First, it provides employees with education about workplace sexual harassment by mandating compliance with stringent training requirements.⁸⁰ Second, it clearly distinguishes whom the law protects and what acts constitute sexual harassment.⁸¹ Lastly, it ensures that victims will not be silenced by non-disclosure agreements by passing bills that are specific to this type of action and not subject to FAA preemption. It is important to note that the California and New York laws may negatively impact employers by creating an additional cost associated with the required trainings. Despite this potential drawback, these laws provide a clear advantage over the DSHWA by ensuring employer accountability of preventative training, clear statutory definitions, and non-exposure to preemption.

3. Novel Approach

Other states are attempting completely novel approaches to sexual harassment in the workplace. Vermont now permits its state civil rights attorneys to examine employer sexual harassment records and mandate employer sexual harassment trainings.⁸² Indiana has established a sexual harassment hotline, which allows employees to directly contact its Dept. of Human Rights.⁸³ Either approach carries the possibility of increasing state budget expenditures; however, these innovative efforts demonstrate successful alternatives to the DSHWA's wholesale attack on arbitration agreements or contract regulation at all for that matter. Contrary to the

⁷⁹ Andrew J. Lauria ET AL., *New York Response to #MeToo: New Laws Target Sexual Harassment*, PILLSBURY (May 15, 2001), <https://www.pillsburylaw.com/en/news-and-insights/new-york-metoo-laws.html>.

⁸⁰ Yuki Noguchi & Shane Mckeeon, *Amid #MeToo, New York Employers Face Strict New Sexual Harassment Laws*, NPR (Oct. 9, 2018, 4:38 PM), <https://www.npr.org/2018/10/09/654537942/amid-metoo-new-york-employers-face-strict-new-sexual-harassment-laws>.

⁸¹ Kathryn Barcroft, *New York, New York! Taking the Lead to Combat Sexual Harassment in the Workplace*, N.Y. L.J. (Oct. 17, 2018), <https://www.law.com/newyorklawjournal/2018/10/17/new-york-new-york-taking-the-lead-to-combat-sexual-harassment-in-the-workplace/>.

⁸² McCullum, *supra* note 68.

⁸³ Jon Griffin, *#METOO Movement has Lawmakers Looking for Ways to Halt Harassment in the Statehouse*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 17, 2018), <http://www.ncsl.org/research/about-state-legislatures/legislatures-move-quickly-to-address-sexual-harassment.aspx>.

DSHWA, these methods deliver a functional means to combat workplace sexual harassment and provide insight into how it could be improved.

B. Recommendations

The DSHWA focuses on an employee's ability to disclose workplace sexual harassment but the law misses the mark in several respects. In the areas where the law is deficient there are several strategies that could be employed to achieve its stated purpose. The three key problem areas previously discussed offer the greatest inroads to resolving the DSHWA's inadequacies. The following will provide recommended solutions for the preemption, reporting requirement, and statutory language problems, as well as, offer additional strategies for improving upon the DSHWA in its current state.

1. Solving DSHWA's Preemption Predicament

The current version of the DSHWA quixotically seeks to prohibit employment contract provisions that prevent sexual harassment reporting, while simultaneously creating an exception that acknowledges federal preemption and undermines the law's utility. Provided the exception was not included, the DSHWA would most likely still face preemption challenges. Therefore, several legislative steps need to be taken to ensure it is operating as intended.

The first step would be to remove the DSHWA's exception for preemption by federal law. While this would not prevent the DSHWA from facing preemption challenges under the FAA, it does leave the matter open for the courts to decide. The FAA contains a clause that provides when "such grounds as exist at law or in equity for the revocation of any contract" arbitration clauses may be invalidated,⁸⁴ which could be sufficient to prevent the DSHWA from being held facially invalid. The legislature based the DSHWA's prohibition against certain contractual provisions as being against Maryland's public policy.⁸⁵ Most courts have held that a state's public policy is insufficient grounds to invalidate an arbitration clause,⁸⁶ which opens the DSHWA up for a preemption challenge. The FAA preempts state law that

⁸⁴ David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1273 (2013).

⁸⁵ MD. CODE ANN., LAB. & EMPL. § 3-715 (West).

⁸⁶ Horton, *supra* note 84.

seeks to invalidate arbitration agreements but does not interfere with state laws governing contract defenses.⁸⁷

Step two would therefore be to supplement the existing language of the DSHWA by adding a contractual defense element. New York took this approach in their version of DSHWA, which prohibits the same type of contractual provisions but labels them as “unconscionable”,⁸⁸ thus potentially escaping the FAA preemption problem. Adding this language only guarantees that the law may stand a chance when confronted with an FAA preemption challenge.

Step three separates the DSHWA into two different pieces of legislation; one law barring non-disclosure agreements related to workplace sexual harassment and another law addressing contractual waivers generally. In this way, the DSHWA will follow states like Arizona and Tennessee, which disentangled the issue of reporting sexual harassment claims from that of mandatory arbitration agreements. These two states bypassed the FAA preemption issue by strategically targeting non-disclosure agreements rather than attempting to generally ban arbitration agreements.⁸⁹ The result would afford employees the protections intended by the DSHWA, while leaving the courts to resolve the arbitration issue.

2. Reinforcing DSHWA's Reporting Requirements

As you will recall, the DSHWA's reporting requirements underwent the most significant overhaul during the legislative process. The DSHWA, in its current form, requires employers to submit an annual survey indicating the total number of sexual harassment settlements and for the MCCR to publish the aggregate totals on their website.⁹⁰ The original language, requiring the MCCR to identify and make publicly available the specific employers' numbers of these incidents, was removed. In addition, the current law carries no penalty for non-compliance or falsification of survey data. The DSHWA could be significantly improved by amending the law to include the original reporting requirements and adding language that would enforce compliance with the reports.

The original reporting requirements would allow the DSHWA to make employers publicly accountable for workplace sexual harassment, while also providing employers with the option of identifying their corrective measures

⁸⁷ Robert Hollis ET AL., *Is State Law Looking for Trouble?: The Federal Arbitration Act Flexes Its Preemptive Muscle*, 2003 J. DISP. RESOL. 463, 483 (2003).

⁸⁸ Hultin, *supra* note 71.

⁸⁹ *Id.*

⁹⁰ MD. CODE ANN., LAB. & EMPL. § 3-715 (West).

taken against harassers.⁹¹ Since the #MeToo Movement began, public accountability for workplace sexual harassment has been highly influential on employer behavior.⁹² The possibility of a negative public reaction to an employer's reported numbers could motivate enhanced protections for employees. Additionally, frequent negative reports of sexual harassment could adversely impact an employer's ability to hire or keep talented employees.⁹³ The obvious negative with this solution are the problems it could create for employers. The DSHWA's original language addresses this complication by permitting employer remedial action to be included in reports. This in turn could mitigate negative public perception and show an ability to address sexual harassment issues when they arise.

The DSHWA, whether returned to its original form or as it currently requires, needs a mechanism to ensure compliance with the reporting requirements. The DSHWA's ability to provide information about workplace sexual harassment depends on the accuracy of the reports submitted and some strategy for motivating compliance should be incorporated. As with any attempt at behavior modification, reinforcement can play an important role in guiding people to the correct path and employers are no different.⁹⁴ The strategy of only negatively reinforcing non-compliant employers by means of penalty, while effective, could find enhanced cooperation if positive reinforcement were also implemented.⁹⁵ The state could offer employer incentives, such as a tax credit, for compliance. The addition of positive economic consequences could bolster employer cooperation and the penalties imposed for non-compliance could pay for the tax credit, thus reducing the financial impact on the state.

3. Improving DSHWA's Statutory Language

The DSHWA's lack of statutory definition for whom the law protects and what it protects against have severely obstructed its purpose. The definitions ascribed by lawmakers to legislative terminology "establish[es] a public

⁹¹ *Don't Gut the DSHWA*, *supra* note 43 (demonstrating activist group response to legislative changes to the DSHWA).

⁹² Ross Kerber, *#MeToo Movement Puts Pressure on U.S. Banks to Disclose Diversity Data*, REUTERS (Jan. 30, 2018), <https://www.reuters.com/article/us-usa-financials-diversity/metoo-movement-puts-pressure-on-u-s-banks-to-disclose-diversity-data-idUSKBN1FJ2WF>.

⁹³ David W. Garland & Nathaniel M. Glasser, *The #MeToo Movement: Implications for Employers*, 2018 WL 988148.

⁹⁴ Camilla Martinsson ET AL., *What Incentives Influence Employers to Engage in Workplace Health Interventions?*, 16 BMC PUBLIC HEALTH, 1, 6 (2016).

⁹⁵ *Id.* at 5-6.

meaning for a term.”⁹⁶ A clear definition permits the public to know what rights and obligations have been assigned under the law.⁹⁷ In some cases it is preferable to leave legislative terminology ambiguous, such as when terms retain a largely conventional meaning with limited room for interpretation.⁹⁸ In its current form, the DSHWA does not meet this criteria and its lack of definition for the terms “employee” or “sexual harassment”, could lead to significant problems for both employees and employers alike.

These terms, without clarity, can take on a variety of meanings and therefore require definition. When considering who qualifies as an employee, absent a clear definition, the law may not afford protection to those who lawmakers intended to be covered by the law. Equally detrimental, employers may unintentionally find themselves in violation of the law for disregarding a class of employees that fall outside of the traditional definition of the word. Another, more ominous result, would be the intentional misinterpretation of these terms. In its current state, the DSHWA’s lack of definition opens the door for either employers or employees to take legal action against the other by claiming to be operating under the law. The term “sexual harassment” is also not limited to a single type of conduct and the imprecise language of the DSHWA permits a loophole for certain types of actions⁹⁹ that fall outside of the commonplace definition. The ambiguity created by the DSHWA does provide one reliable result, the eventual litigation over the meaning of these terms. The obvious solution to this dilemma is to amend the existing law and include clearly defined terms.

There is one potential benefit to the DSHWA’s definitional oversight; lawmakers have a powerful opportunity to enhance the protective capability of the DSHWA. New York, for example, expanded its law’s safeguards by defining the term “employee” to include “contractors, subcontractors, vendors, and consultants.”¹⁰⁰ In doing so, the law broadened its protective capability by allotting its remedies to a previously excluded class of workers.¹⁰¹ Following New York’s lead, legislators could take advantage of the DSHWA’s deficient language and expand its class of protected employees.

⁹⁶ Price, *supra* note 64, at 1038.

⁹⁷ See *id.* at 1042(explaining that the role of a statutory definition is to communicate legislative intent through the assignment of rights and duties).

⁹⁸ Price, *supra* note 64, at 1008-09.

⁹⁹ Seegull & Distler, *supra* note 44.

¹⁰⁰ Warsaw Et AL., *supra* note 73.

¹⁰¹ *Id.*

Employers would most likely resist such an expansion, as it could expose them to greater liability.¹⁰² In order to limit liability for an expanded class of employees, an employer must follow the same general practices required for those currently protected by law.¹⁰³ The DSHWA, by expanding its class of protected employees, furthers its intended purpose by allowing a greater number of victims to securely report workplace sexual harassment. Even if Maryland decides against expanding its class of protected employees, it is imperative that those currently undefined terms are given proper definitions in order to affect the purpose of the DSHWA. Legislators have a duty to establish clear statutory definitions¹⁰⁴ that provide parties with the knowledge of their rights and obligations under the law.

C. Additional Recommendations

There are two additional ways in which the DSHWA could be improved to better protect victims of sexual harassment. First, the legislature could empower the MCCR by building on the existing reporting requirements already maintained by the law. Second, the DSHWA could empower victims by expanding employee understanding of the sexual harassment reporting process. These recommendations serve to further the DSHWA's principal goal of supporting victims of sexual harassment to report their claims.

1. Recommendation 1: Empower the MCCR

The DSHWA's reporting requirements, even in their existing form, would allow the MCCR to track reported numbers of sexual harassment related claims. The law does not provide the MCCR with the ability to do anything with these numbers, aside from tallying them up and posting them online. The DSHWA could be improved if it enabled the MCCR to take some form of investigatory or corrective action. Looking at Vermont's law as an example, the Attorney General was allowed to investigate employers and if a sexual harassment issue was identified, require additional trainings.¹⁰⁵ The

¹⁰² See Brendan L. Smith, *What it Really Takes to Stop Sexual Harassment*, APA MONITOR ON PSYCHOL., February 2018, at 36. (explaining that employers generally view sexual harassment claims as a hinderance that raises costs).

¹⁰³ Charles H. Fleischer, *Employment Law 101: Employer Liability for Sexual Harassment*, SOC'Y FOR HUM. RESOURCE MGMT. (Aug. 22, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/business-acumen/pages/employer-liability-for-sexual-harassment.aspx> (explaining employers can invoke an affirmative defense against claims by simply "having and enforcing" a sexual harassment policy).

¹⁰⁴ MD. CONST. art. 3 § 29 (West, Westlaw through 2020 Reg. Sess.).

¹⁰⁵ McCullum, *supra* note 68.

MCCR's tracking of the reported numbers allows the organization to identify employers that demonstrate an inability to deal with sexual harassment claims. If the reports indicated an employer was unable to manage the problem, the DSHWA could empower the MCCR to investigate the employer's current sexual harassment training methods and potentially mandate additional training requirements. This would provide employers with an opportunity to address sexual harassment without government interference and only when incapable of demonstrating successful management of the problem would government intervene. There undoubtedly would be costs associated with increasing governmental oversight over employers. Additionally, employers would be subjected to government intrusion during investigations. In either case, employers maintain the power to prevent these situations from occurring and strict adherence to sexual harassment policies would become elevated priority.

2. Recommendation 2: Empower Victims

The DSHWA's goal of supporting victims of sexual harassment to report their claims, relies on their ability to understand the reporting process. The manner in which an employer handles these claims is often unknown by the employee and leads to a lack of confidence the issue will be addressed.¹⁰⁶ This can impact an employee's willingness to come forward with claims¹⁰⁷ and reduce the accuracy of the reports generated by the MCCR. If the DSHWA were to include a provision requiring employers to explain their sexual harassment reporting process, employees would be empowered by this knowledge to report their claims¹⁰⁸. This, in turn, would permit the MCCR to produce a more accurate picture of workplace sexual harassment because more employees would be capable and confident to report their claims.

CONCLUSION

The true test of a social movement is whether it is capable of producing real change in a society. The #MeToo Movement's success is still being determined but lawmakers have the opportunity to play a pivotal role in this assessment. In Maryland, supporters of the DSHWA believed this piece of

¹⁰⁶ Feldblum & Lipnic, *supra* note 26 at 34.

¹⁰⁷ Christina Lewis & Lisa Zaccaderelli, *Addressing Anti-Harassment in the Workplace in the Wake of the #MeToo Movement*, 23 THE WOMAN ADVOCATE 9, 10 (2018) (discussing how lack of training on how to report reduces the number of reports).

¹⁰⁸ Daniel J. Harmelink, *Employer Sexual Harassment Policies: The Forgotten Key to the Prevention of Supervisor Hostile Environment Harassment*, 84 IOWA L. REV. 561, 603 (1999) (explaining that employee knowledge of sexual harassment reporting).

legislation could serve as a model response to resolving one of the most challenging aspects of workplace sexual harassment, victim reporting. The current law still has that potential but will require thoughtful reconsideration in order to provide a national standard. At the very least, a good faith effort should be made by Maryland legislators to ensure the DSHWA provides the protection it originally sought to confer. This presents a test for Maryland lawmakers, which will determine whether the #MeToo Movement's cry for social change produces tangible results or, conversely, a kneejerk reaction of minimal consequence that is all filler.