



WORKPLACE JUSTICE

#METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY

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Employees are protected from workplace sexual harassment—a form of sex discrimination defined as unwelcome attention or behavior that workers experience because of their sex¹—by Title VII of the Civil Rights Act of 1964, the federal law prohibiting discrimination in the workplace.² Almost every state also has some form of workplace antidiscrimination law providing protections. Yet sexual harassment remains a widespread problem, affecting workers in every state, in every kind of workplace setting and industry, and at every level of employment.³ In Federal Fiscal Year 2016, nearly 30,000 harassment charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC);⁴ nearly one-quarter of those charges alleged sexual harassment, and 83.4 percent of sexual harassment charges were brought by women.⁵ But the charge statistics do not even begin to represent the extent of sexual harassment in the workplace, given that a survey found that 70 percent of workers who experience sexual harassment say they have never reported it.⁶ Whether suffering harassment from supervisors, coworkers, or third parties, such as customers, most victims of harassment are suffering in silence.

Sexual harassment is an expression of power. It is used to reinforce cultural norms about appropriate roles, behavior, and work for women and men, and to exert control over people with less power and status in society, and in the workplace—particularly women, women of color, immigrants, and LGBTQ people.⁷ Indeed, women are the majority of those who are sexually harassed; at least 25 percent, and as many as 85 percent, of women surveyed report having experienced

sexual harassment at work.⁸ The sexual or sex-based element of the workplace harassment these individuals experience, including demands for sexual favors, or denigrating and humiliating comments, is a way of enforcing and perpetuating gender inequality at work.

No occupation is immune from sexual harassment, but the incidence of harassment appears to be higher in workplaces with stark power imbalances between workers and employers, and is exacerbated by the devaluation of work performed by women. Women, and particularly women of color and immigrant women, are overrepresented in low-wage jobs, which often lack legal protections and critical supports like higher wages, fair and predictable schedules, access to health insurance, and paid time off,⁹ leaving workers vulnerable to exploitation. Accordingly, industries with a high proportion of low-wage jobs, such as food service, hospitality, and agriculture, have high incidences of sexual harassment.¹⁰ High rates of sexual harassment are also present in workplaces that have traditionally excluded women, including both blue collar jobs like construction, and white collar ones like medicine and science.¹¹

In recent months, ever-increasing numbers of women, and some men, who have experienced sexual harassment at work have come forward to disclose their experiences. Many of these individuals remained silent for years because the risks of speaking out were too high. Victims were reluctant to make allegations of sexual harassment for a number of reasons, including fear of losing their jobs or otherwise hurting their careers, fear of not being believed, and the belief that nothing would be done about the harassment.

Moreover, the laws and systems in place designed to address sexual harassment were inadequate to provide redress and justice, and instead subjected victims to devastating economic, physical, and psychological consequences, while protecting predators. Longstanding gaps in federal law, and judicial decisions undermining existing protections and their enforcement, have stymied efforts to address and



prevent persistent workplace sexual harassment. These gaps put certain workers—particularly those in low-wage jobs, women, and immigrants—at increased risk of harassment and vulnerability to retaliation with little or no legal recourse. Court-imposed standards have made it difficult for victims to hold employers and individual harassers accountable, and federal law has failed to prevent the proliferation of employer-driven agreements that help hide the true extent of sexual harassment and shield serial harassers from accountability. Federal law also focuses largely on remedying harassment after the fact, with little emphasis on preventing harassment in the first instance.

This is a critical moment to advance key policy initiatives to better protect workers, promote accountability, and prevent harassment. These initiatives, which many states have already implemented or begun to explore, would expand protections to greater numbers and types of workers, improve victims' ability to hold employers and individual harassers accountable, redress victims' harm by improving recovery of monetary damages, restrict employers' efforts to impose secrecy regarding harassment, and emphasize prevention strategies.

Extending Protections to More Employees

Title VII and state antidiscrimination laws provide important protections against workplace sexual harassment—but only for some employees. Individuals deserve to be protected from sexual harassment on the job regardless of the size of the establishment where they work or their employment classification.

Protecting Employees of Small Businesses

Title VII's protections only apply to employers with fifteen or more employees.¹² For those employees working for a business with less than fifteen employees, there is no federal remedy for workplace sexual harassment. Reducing the employer size threshold for harassment laws and other antidiscrimination laws, as several states have already done, would ensure that employees working for small businesses will no longer be left without recourse when they are harassed. Antidiscrimination laws in **Alaska, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont,** and **Wisconsin** cover employers with one or more employees, ensuring that employees working for employers of all sizes have a legal remedy if they experience harassment.¹³

Protecting Independent Contractors

Title VII and most state antidiscrimination laws by their terms only protect “employees” from sexual harassment on the job. This leaves the growing segment of workers classified as “independent contractors” without protection from workplace harassment.¹⁴ Freelancers and individuals who work in the gig economy, for example, have no legal protection against workplace sexual harassment in most of the country. Employers' misclassification of people as independent contractors in an attempt to limit their liability under labor and employment laws also threatens many individuals' ability to avail themselves of sexual harassment protections.¹⁵

Some of the country's most vulnerable workers—like home healthcare workers and domestic workers—are often classified as independent contractors.¹⁶ Amending antidiscrimination laws to apply to independent contractors would extend protection from workplace harassment to many women of color and immigrants, who make up the vast majority of individuals in these jobs. A few states and localities have taken action to ensure that all workers, regardless of employment classification, are protected from workplace sexual harassment.

California's workplace antidiscrimination statute prohibits “harassment” of employees, job applicants, unpaid interns, volunteers, and any person “providing service pursuant to a contract,” including independent contractors.¹⁷ In 1996, the Supreme Court of **Washington** held that independent contractors are protected under Washington's law against discrimination, which includes a prohibition on sexual harassment in the workplace.¹⁸ Lower courts in Washington have found that independent contractors are protected under the law against discrimination's sexual harassment provisions in particular.¹⁹ **New York City's** Human Rights Law specifies that “natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers” are considered employees under the law's protection.²⁰ However, New York State's Human Rights Law does not protect independent contractors.

Strengthening Employees' Ability to Hold Employers and Individual Harassers Accountable

Title VII imposes a legal obligation on employers to protect their employees from sexual harassment. Accordingly, employers can be legally responsible for sexual harassment against their employees and liable to them for damages.

When an employer is liable for harassment depends on the



type of harassment, and who committed it. The Supreme Court has made clear that employers have a heightened legal obligation to guard against supervisor harassment because of the potential for supervisors to exploit their authority over their subordinates by harassing them.²¹ Therefore, if the harassment by a supervisor results in a tangible employment action against the victim (such as firing, demotion, or a pay cut), the employer is automatically responsible. If the harassment does not result in a tangible employment action, then the employer will be automatically liable unless it can show that (1) the employer exercised reasonable care to prevent and promptly correct any harassment, and (2) the employee unreasonably failed to take advantage of the company's preventive or corrective measures or to otherwise avoid harm, like a system for reporting and investigating harassment.²²

The employer may also be liable for harassment by a low-level supervisor, coworker, or customer if the employer was negligent in allowing the harassment to occur—meaning that the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action.²³

However, individual harassers may not be held personally liable for workplace sexual harassment under federal law.

While judicial interpretations have made it more difficult to hold employers accountable under federal law, some state courts and legislatures have made it easier for workers who have been harassed to bring those responsible to justice. Strengthening accountability for both employers and individual workplace harassers helps ensure that meaningful remedies are available for those who are victims of sexual harassment.

Holding employers accountable for harassment by a low-level supervisor

Recent interpretations of Title VII have limited victims' ability to obtain legal redress when they experience sexual harassment by low-level supervisors. In 2013 in *Vance v. Ball State University*, the Supreme Court significantly undercut protections against supervisor harassment by essentially reclassifying as coworkers those lower-level supervisors who direct an employee's daily work activities, but do not have the power to take concrete employment actions like hiring and firing employees.²⁴ This means that when employees with the authority to direct daily work activities—but not the authority to hire, fire, and take other tangible employment action—harass their subordinates, their employers are no longer vicariously liable for that harassment. Instead, lower-level supervisors without the power to take tangible

employment actions are now treated as coworkers, and in order to succeed in her sexual harassment case, the victim of harassment must make the much tougher showing that the employer was “negligent” in allowing the harassment to occur.

The *Vance* decision is grossly out of touch with the realities of the workplace, as supervisors with the authority to direct daily work activities can wield a significant amount of power over their subordinates. This is a particular problem for many workers in low-wage jobs, the majority of whom are women.²⁵ For too many workers seeking justice against workplace harassers in positions of power, important administrative and legal remedies are out of reach due to the Supreme Court's misguided decision. Since *Vance* limited vicarious liability for supervisor harassment, victims have had their claims thrown out by courts and have been prevented from bringing claims at all.²⁶

The Fair Employment Protection Act would restore strong protections for employees from supervisor harassment, but it has not advanced in Congress.²⁷ At the state level, the **New Jersey** Supreme Court rejected *Vance*'s restrictive definition of “supervisor” for employees bringing sexual harassment claims under the state law against discrimination. Instead, the court adopted the more expansive definition that existed before *Vance* – that a supervisor is an employee with the power to direct a victim's daily work activities.²⁸

Holding a workplace harasser individually accountable for harassment

Under Title VII, it is an “employer's” legal duty to protect employees from sexual harassment. Federal courts have interpreted this to mean that only businesses or organizations, and not individuals, may be held liable for sexual harassment pursuant to Title VII. While an employer may take action to discipline, fire, or otherwise penalize the harasser, federal law does not permit victims to hold individual harassers—whether a supervisor, coworker, client, or customer—directly and personally accountable for sexual harassment. As a result, if an employer chooses not to take action against a harasser, the harasser may suffer no consequences for his or her behavior.

While this is an evolving area of law,²⁹ several states currently permit victims to sue their individual harassers under state antidiscrimination laws. Through both state court decisions interpreting state antidiscrimination laws, and through legislation specifically addressing liability for sexual harassment, states have allowed harassers to be held personally accountable for harassment in particular circumstances. In the **District of Columbia**,³⁰ **Massachusetts**,³¹



Michigan,³² **Missouri**,³³ **Montana**,³⁴ **New Mexico**,³⁵ and **Washington**,³⁶ a harasser who is a supervisor can be held individually liable for sexual harassment. In **California**,³⁷ **Iowa**,³⁸ and **Vermont**,³⁹ any employee can be held individually liable for harassing another employee, regardless of whether the harassed employee is a subordinate or a coworker.

Redressing the Harm to Victims of Harassment

If an employee wins a sexual harassment lawsuit, the employee can obtain several forms of relief, including monetary damages. Title VII provides for the recovery of compensatory and punitive damages. Compensatory damages compensate victims for out-of-pocket expenses caused by the harassment and for any emotional harm. Punitive damages may be awarded to punish an employer who acted maliciously or recklessly in engaging in harassment.

However, a plaintiff's recovery of compensatory and punitive damages is capped under federal law depending on the size of the employer. For a plaintiff succeeding in a harassment case against an employer with 15-100 employees, for example, damages are capped at \$50,000, no matter how severe the harassment or how culpable the employer. Even for employers with more than 500 employees, damages are capped at \$300,000.⁴⁰ This means that in the most egregious cases of employer-sanctioned sexual harassment, up to and including sexual assault, if a jury awarded a plaintiff millions of dollars in compensatory and punitive damages, the most she could recover from a large employer is \$300,000, which could be insufficient to compensate her for the injuries she suffered. Such limited remedies also reduce employer incentives to prevent harassment before it happens; \$300,000 is a small amount to a large and profitable corporation. Damages caps mean that employers can come out ahead by gambling that it costs less to discriminate than to create a workplace free of discrimination and harassment.

Some state antidiscrimination laws prohibiting harassment provide for the recovery of compensatory and punitive damages, but often without caps, or with higher limits than those under federal law. **California**,⁴¹ **Hawaii**,⁴² **Massachusetts**,⁴³ **New Jersey**,⁴⁴ **Ohio**,⁴⁵ **Oregon**,⁴⁶ **Vermont**,⁴⁷ and **West Virginia**⁴⁸ do not limit plaintiffs' compensatory and punitive damages, ensuring that victims of harassment can be fully compensated for the harm they suffered. In other states, however, no such compensation is available.⁴⁹

Restricting Employer-Imposed Secrecy and Restoring Victims' Voices

Individuals may accept employment with a company without knowing if discrimination and harassment are particular problems at that workplace. Once employed, harassers and employers use a variety of legal tools in order to limit how, when, why, and to whom an employee can disclose details about harassment. Through employment agreements—entered into upon hiring at a new job, and settlement terms—agreed to when resolving a sexual harassment complaint—employees can be forbidden by contractual terms from speaking out about sexual harassment and assault. Such circumstances operate to isolate victims, shield serial predators from accountability, and allow harassment to persist at a company. Policy efforts to increase transparency regarding the incidence of harassment at a company would redress the power imbalance exacerbated by employer-imposed secrecy provisions, and restore victims' voices.

Limiting Employer-Imposed Secrecy in Employment Agreements

Employers sometimes use employment agreements to forbid employees from speaking out about sexual harassment and assault. Other provisions in such agreements also often prohibit employees from going to court to enforce their rights, instead forcing employees to litigate sexual harassment and assault claims in a private arbitration, which is frequently designed, chosen, and paid for by the employer or corporation, and conducted and resolved in secret.

Federal laws, like the National Labor Relations Act (NLRA)⁵⁰ and Title VII, limit an employer's ability to enforce contracts that restrict employees' ability to discuss employment conditions or situations. An employer cannot, for example, forbid employees covered by the NLRA from discussing employment conditions with each other, including sexual harassment.⁵¹ Employers also cannot require an employee to waive their right to report violations of federal law to civil rights enforcement agencies like the Equal Employment Opportunity Commission, or require employees to waive in advance the ability to report a crime to authorities.⁵²

Despite these protections, employers continue to use contractual provisions to prevent employees, including victims, from publicly disclosing the details of sexual harassment or assault, allowing serial harassers to act without accountability, and preventing employees from joining together to counter a predator. Other provisions in employment agreements, such as confidentiality clauses prohibiting employees from publicly disparaging the employer, and forced arbitration clauses requiring



all employment-related disputes to be settled in private arbitration proceedings, are standard provisions in some industries, imposed on new hires as a condition of their employment. These contractual provisions can mislead employees as to their legal rights and prohibit employees from publicly telling their story, which in turn makes it less likely that other victims of harassment will speak out and hold their employers accountable.

Prohibiting contractual provisions that restrict employees' ability to speak out about harassment as a condition of employment—especially contractual language that makes a victim question whether they can report harassment to federal and state antidiscrimination agencies, and force employees to give up their day in court—would help lift the veil of secrecy that enables predatory behavior, and protect employees' right to speak with enforcement agencies and act collectively to challenge harassment.⁵³ Because the Federal Arbitration Act likely preempts any state attempts to limit mandatory arbitration clauses, a federal remedy such as the Arbitration Fairness Act,⁵⁴ or the Ending Forced Arbitration of Sexual Harassment Act,⁵⁵ is necessary.

Restoring Victims' Power in Settlement Agreements

Nondisclosure clauses in settlement agreements also often operate to prevent harassment victims from speaking out publicly about the harassment they experienced, the fact of settlement, the settlement terms, or the identity of the parties as a condition of their settlement with a harasser or employer. Here too secrecy can help hide the true extent of sexual harassment at a workplace, shield a serial harasser from accountability, and prevent other victims from coming forward.

On the other hand, victims sometimes want to ensure confidentiality as to these matters in order to protect themselves from retaliation or damage to their professional reputations and job prospects. Moreover, the promise of mutual nondisclosure as to some or all aspects of the settlement can provide victims with useful leverage in settlement negotiations. A policy banning all nondisclosure agreements in sexual harassment settlement agreements could make employers less likely to settle claims of harassment, forcing victims of harassment to take up the difficult, expensive, and time consuming task of pursuing legal claims in court in order to obtain any restitution. Accordingly, regulation of nondisclosure clauses in settlements must be carefully calibrated to balance these competing interests, restoring power to a victim to decide what should be confidential.

A few states have limited when employers can impose contractual conditions in settlements that silence employees. In 2006, **California** passed a law prohibiting the use of nondisclosure agreements in any settlement of felony sex offenses.⁵⁶ The statute was amended in 2016 to also prohibit nondisclosure agreements in settlements for other non-felony sexual crimes, including childhood sexual abuse, sexual exploitation of a minor, and sexual assault against an elder or dependent adult.⁵⁷ In 1990, **Florida** became the first state to pass a “Sunshine in Litigation” law, which prohibits court orders and settlements that would have the purpose or effect of “concealing a public hazard.”⁵⁸ By the terms of the statute, a “public hazard” is a “device, instrument, person, procedure or product[] that has caused and is likely to cause injury,” which to date has been primarily applied in cases of products liability and sexual abuse of minors.⁵⁹ Several other states, including **Delaware, Indiana, New York, North Carolina, Oregon,** and **Washington** have adopted similar Sunshine in Litigation statutes.⁶⁰

Requiring Disclosure or Reporting of Harassment Claims, Charges, and Lawsuits

Greater transparency regarding discrimination complaints, formal charges, and lawsuits filed against an employer, and the resolution of those claims, would help alleviate the secrecy around harassment, thereby empowering victims and encouraging employers to implement prevention efforts proactively. For instance, civil rights agencies could make publicly available the type and number of discrimination charges filed against a business or organization, whether the charges were dismissed or resolved, and general information about the nature of the resolution (for instance, whether the charge was resolved through a monetary settlement). Such information could be made available on the agency's website, so that members of the public could conduct searches by company name, while at the same time protecting the identity of individuals who filed charges.

Another transparency initiative could require contractors, as a condition of submitting a bid or keeping an awarded contract, to report regularly to the relevant agency the type and number of discrimination complaints or lawsuits filed against the company within a particular time period, and the nature of the resolution of claims or lawsuits. Making even some portion of the reported information publicly available would provide job applicants and employees with valuable information about discrimination and harassment at a particular workplace. Such reporting also would encourage employers to implement practices to effectively address complaints and prevent sexual harassment.



Requiring Sexual Harassment Prevention Strategies

Prevention should be a primary goal for employers in addressing sexual harassment. While Title VII has been interpreted to provide employers with an incentive to adopt sexual harassment policies and training, such practices are not mandatory, and often fail to effectively prevent harassment. Harassment prevention ultimately requires changes in attitude and behavior, for which there is no short-term solution. Yet for businesses, investing in sexual harassment prevention is not only the right thing to do, it is the financially advantageous thing to do. Preventing sexual harassment in the first instance helps employers avoid costly litigation, settlements, and higher insurance premiums, as well as attendant negative publicity and lower productivity.

Implementing a Comprehensive Prevention Program

Harassment prevention involves changing workplace culture and practices, and that change starts at the top. The organization's highest leadership must make clear that sexual harassment is taken seriously, and commit appropriate time and resources to implement strong prevention and response strategies. Many companies have a written policy prohibiting sexual harassment, but such a policy is only the first step in prevention. An employer must also have policies and procedures regarding how to report harassment (with multiple avenues for making a report), how harassment complaints will be promptly and thoroughly investigated and addressed, and ensuring that harassment perpetrators will be held accountable. Employers also should have strong and appropriately enforced policies against retaliation.

An effective prevention program should also include an anonymous climate survey of employees, which will help management understand the true nature and scope of harassment and discrimination in the workplace. The survey can help inform important issues to be included in training, and help identify problematic behavior that may be addressed before it leads to formal complaints or lawsuits.

All of these policies and procedures are essential elements for prevention, and must be implemented through training for all employees, including managers and supervisors. Although many companies provide sexual harassment training, it often falls short of the mark. Effective training must go beyond mere compliance, or simply telling employees what the law requires. Training is more likely to be effective if it helps employees and supervisors recognize sexual harassment in the context of their specific workplace, and understand their rights and responsibilities. Training should explain how to report harassment as a victim or a

witness, as well as the reporting and investigation process, the consequences for engaging in harassment, and identify internal and external resources that are available to an employee who feels they have been harassed. The most effective training is live, rather than video training or self-administered online training; mandatory; frequent (upon hire and at least annually thereafter); interactive; relevant to the particular workplace context; and requires employees to problem solve common scenarios, including by utilizing bystander intervention techniques.⁶¹

Mandating Workplace Training

To varying degrees, states have imposed requirements on public and private sector employers to train employees on preventing, recognizing, and reporting sexual harassment. Existing state requirements vary by which employers must provide training, which employees must participate, whether trainings must be repeated over time, and whether the content of the training must conform to a state standard. The most effective harassment training mandate would apply to all employers in both the public and private sectors, and require all employees to participate, with possible additional training for supervisors. The training mandate should further require that trainings be given with regularity, both upon an employee's hire and at reoccurring intervals thereafter, and specify the content that must be included in the training.

Twenty-seven states require at least some form of statutorily mandated sexual harassment training. Only three of these states—**California**,⁶² **Connecticut**,⁶³ and **Maine**⁶⁴—require employers in the private sector to provide workplace sexual harassment training. The training requirements for private sector employers in California and Maine include important provisions such as the number of training hours required, whether employees as well as supervisors must be trained, and how often regular retraining must occur. Both California and Maine also include some information on the content of the required training, which is critical in guiding employers to implement effective trainings.

South Dakota⁶⁵ and **Washington**⁶⁶ impose a training requirement on businesses contracting with the state, although South Dakota's requirement only applies to a limited group of contractors.

An additional twenty-two states require only public sector supervisors and employees to participate in mandatory training; ten states require all public employees to participate,⁶⁷ while twelve states require only some public employees in certain departments or positions to participate.⁶⁸ An additional eight states have explicit statutory or regulatory guidance merely encouraging, but



not mandating, private sector employers to implement sexual harassment training, or any form of training.⁶⁹

Existing state efforts' narrow scope, and failure to provide detailed requirements for training or for broader prevention strategies, likely undermines their effectiveness. The most powerful policy efforts would mandate instituting and implementing a variety of prevention strategies beyond training, including a broader array of harassment policies and procedures explaining how to report harassment, providing multiple points for reporting, conducting prompt investigations and responding to harassment complaints, strong and consistently enforced policies against retaliation, and disciplinary consequences for harassers.

Eliminating the Tipped Minimum Wage

The federal minimum cash wage for tipped workers has been frozen at \$2.13 per hour for 25 years, and now represents less than a third of the federal minimum wage (\$7.25 per hour). Women, who represent two-thirds of tipped workers nationally, are hit especially hard by this poverty level wage.

Although employers are legally required to make up the difference between the regular minimum wage and the lower wage they pay their tipped workers if the tips they receive fall short of this amount, this requirement is difficult to enforce and employers often fail to comply. As a result, tipped workers frequently struggle to make ends meet on unpredictable tips with virtually no dependable income from a paycheck.

Tipped workers also are particularly vulnerable to sexual harassment and sexual assault at work, because of their typically limited power within the workplace, because of the

economic vulnerability that leaves them without a financial cushion if they lose their job, and because of the need to please the customer in order to bring home anything approaching an adequate wage. Tipped workers' reliance on tips to supplement a sub-minimum wage forces them to tolerate sexual harassment and other inappropriate behavior from customers just to make a living, which in turn perpetuates a culture of harassment in tipped industries.

Equal treatment for tipped workers—that is, requiring that tipped workers are paid the regular minimum wage before tips—can help alleviate tipped workers' vulnerability to sexual harassment. Some states now require employers to pay their tipped employees the regular minimum wage regardless of tips. **Alaska, California, Minnesota, Montana, Nevada, Oregon,** and **Washington** are “equal treatment” states.⁷⁰ And as of 2016, **Hawaii** has a maximum tip credit of 75 cents, meaning that tipped employees can be paid no less than 75 cents below the regular minimum wage, and only if the total wages paid by her employer plus tips equal at least \$7.00 more than the regular minimum wage.⁷¹ Adopting one fair wage helps ensure that tipped workers in service industries no longer have to endure sexual harassment in order to support themselves and their families.

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As the movement ignited by #MeToo shows, for too long, many women, and some men, have suffered workplace sexual harassment in silence, with little or no accountability for harassers. Now more than ever, corporate leaders and policymakers must step forward to go beyond simply responding to harassment, to refashioning systems, laws, and culture ensuring victims can obtain justice, predators are held accountable, and sexual harassment is eradicated.

1 NAT'L WOMEN'S LAW CTR., *SEXUAL HARASSMENT IN THE WORKPLACE* (Nov. 2016), <https://NWLC.org/wp-content/uploads/2016/11/Sexual-Harassment-Fact-Sheet.pdf>.

2 See 42 U.S.C. § 2000e-2; *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

3 For data on sexual harassment charges by the Equal Employment Opportunity Commission and state fair employment practices agencies, see U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *SEXUAL HARASSMENT CHARGES, EEOC & FEPAS COMBINED: FY 1997-FY 2011*, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm.

4 EEOC, *ENFORCEMENT AND LITIGATION STATISTICS, ALL CHARGES ALLEGING HARASSMENT FY2010-FY2016*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

5 EEOC, *ENFORCEMENT AND LITIGATION STATISTICS, CHARGES ALLEGING SEXUAL HARASSMENT FY2010-FY2016*, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

6 HUFFINGTON POST & YOUNGOW, *Poll of 1,000 Adults in United States on Workplace Sexual Harassment* (Aug. 2013), http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf.

7 See M.V. LEE BADGETT ET AL., THE WILLIAMS INSTITUTE, *BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION* (2007), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf> (16 to 68 percent of lesbian, gay or bisexual respondents reported experiencing employment discrimination, and seven to 41 percent of lesbian, gay or bisexual workers were verbally/physically abused or had their workplace vandalized as a result of their sexual orientation); JAMIE M. GRANT ET AL., J., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER*



- DISCRIMINATION SURVEY 51 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (fully 90 percent of transgender workers have encountered some form of harassment or mistreatment at work).
- 8 See EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM AND VICTORIA LIPNIC, Part Two, Section B (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [EEOC TASK FORCE REPORT]; LANGER RESEARCH, ABC NEWS & WASHINGTON POST, *One in Four U.S. Women Reports Workplace Harassment* (Nov. 16, 2011), <http://www.langerresearch.com/uploads/1130a2WorKplaceHarassment.pdf>.
 - 9 Jasmine Tucker & Kayla Patrick, NAT'L WOMEN'S LAW CTR., *LOW-WAGE JOBS ARE WOMEN'S JOBS: THE OVERREPRESENTATION OF WOMEN IN LOW-WAGE WORK* (Aug. 2017), <https://NWLC.org/wp-content/uploads/2017/08/Low-Wage-Jobs-are-Womens-Jobs.pdf>.
 - 10 Women constitute 66 percent of the occupations that receive a sub-minimum wage of \$2.13 per hour that must be supplemented with tips wages that leave many women working and living in poverty. REST. OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, *THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 2-6* (2014), http://rocunited.org/wp-content/uploads/2014/10/report_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf. See also *id.* at 27 (70 percent of restaurant workers surveyed felt there would be negative repercussions, such as lower tips, if they complained about customer harassment); HUMAN RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT* (May 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual> (documenting pervasive sexual harassment and violence among immigrant farmworker women); Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 *VIOLENCE AGAINST WOMEN* 237, 241 (Jan. 2010), <http://vaw.sagepub.com/content/16/3/237.abstract> (eighty percent of female farmworkers in California's Central Valley reported experiencing some form of sexual harassment); *Gasper v. Ruffin Hotel Corp. of Maryland*, 183 Md. App. 211, 216, (2008) *aff'd*, 418 Md. 594, 17 A.3d 676 (2011) (in which an employee of Ruffin Hotel Corporation sued the company because she alleged that the company retaliated against her by terminating her employment due to her reports of sexual harassment from other employees); UNITE HERE LOCAL 1, *HANDS OFF, PANTS ON: SEXUAL HARASSMENT IN CHICAGO'S HOSPITALITY INDUSTRY* (July 2016), <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf> (58 percent of hotel workers and 77 percent of casino workers surveyed reported being sexually harassed by a guest. Hospitality workers surveyed said they chose not to report customer harassment "because inappropriate guest behavior is so frequent and widespread, it 'feels normal' or they had become 'immune' to it"); Hart Research Assoc., *Key Findings From a Survey of Women Fast Food Workers* (Oct. 5, 2016), <http://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf> (in a nationwide survey of workers in the fast food industry, nearly 40 percent of the women reported experiencing unwanted sexual behaviors on the job; of those workers, 21 percent reported that they suffered negative workplace consequences after raising the harassment with their employer).
 - 11 See, e.g., NAT'L WOMEN'S LAW CTR., *WOMEN IN CONSTRUCTION: STILL BREAKING GROUND* (2014), http://NWLC.org/wp-content/uploads/2015/08/final_NWLC_womeninconstruction_report.pdf; MATHEMATICA POLICY RESEARCH, *AN EFFECTIVENESS ASSESSMENT AND COST-BENEFIT ANALYSIS OF REGISTERED APPRENTICESHIP IN 10 STATES 50-52* (2012), http://wdr.doleta.gov/research/FullText_Documents/etaop_2012_10.pdf; Elizabeth J. Bader, *Skilled Women Break Through Barriers to Entry and Promotion in Trades Work*, TRUTH-OUT.ORG (Oct. 6, 2012), <http://www.truth-out.org/news/item/11927-skilled-women-break-through-barriers-to-entry-and-promotion-in-trades-work>; CHICAGO WOMEN IN TRADES, *BREAKING NEW GROUND: WORKSITE 2000* (1992), <http://chicagowomenintradess2.org/wp-content/uploads/2015/02/Breaking-New-Ground2.pdf>; ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, *OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION* (1999), <https://www.osha.gov/doc/accsh/haswicformal.html>; Reshma Jagasi et al., *Sexual Harassment and Discrimination Experiences of Academic Medical Faculty*, 315 *J. AM. MEDICAL ASS'N*, 2120 (May 17, 2016), <http://jama.jamanetwork.com/article.aspx?articleid=2521958> (almost one-third of medical academic faculty responding to survey had experienced workplace sexual harassment); Kathryn B. H. Clancy, et al., *Survey of Academic Field Experiences (SAFE): Trainees Report Harassment and Assault*, 9 *PLOS ONE* 7 (2014), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0102172> (sixty-four percent of survey respondents reported they had personally experienced sexual harassment in the scientific fieldwork setting).
 - 12 42 U.S.C. § 2000e ("the term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person").
 - 13 ALASKA STAT. ANN. § 18.80.300(5); COLO. REV. STAT. § 24-34-401(3); D.C. CODE ANN. § 2-1401.02(10); HAW. REV. STAT. § 378-1; ME. REV. STAT. ANN. TIT. 5 § 4552; MICH. COMP. LAWS § 37.2201(A); MINN. STAT. § 363A.03, SUBD. 16; MONT. CODE ANN. § 49-2-101(11); N.J. STAT. ANN. 10:5-5(E); N.D. CENT. CODE § 14-02.4-02(8); OKLA. STAT. TIT. 25, § 1301(1); OR. REV. STAT. §§ 659A.001(4), 659A.350(1); S.D. CODIFIED LAWS § 20-13-1(7); 21 VT. STAT. ANN. § 495b(1); WIS. STAT. § 111.321. In addition, Arizona, California, Illinois, and New York State's antidiscrimination laws cover employers with one or more employees for sexual harassment claims only. ARIZ. REV. STAT. § 41-1461(6); CAL. GOV'T CODE § 12926(d); 775 ILL. COMP. STAT. 5/2-101(B)(1)(b); N.Y. EXEC. L. § 296.
 - 14 SARAH LEBERSTEIN & CATHERINE RUCKELSHAUS, NAT'L EMPLOYMENT LAW PROJECT, *INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT* (2016), <http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>.
 - 15 See *id.* Workers misclassified as independent contractors may gain coverage under state and federal sexual harassment laws if they challenge their misclassification and do, in fact, meet the definition of "employee" under the state statute.
 - 16 *Id.*
 - 17 CAL. GOV. CODE § 12940(j)(1) (making it an unlawful employment practice "[f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of ... sex [or] gender ... to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract.")
 - 18 *Marquis v. City of Spokane*, 130 Wash. 2d 97 (1996).
 - 19 See, e.g. *Currier v. Northland Servs., Inc.*, 182 Wash. App. 733, 743 P.3d 1006 (2014) (applying *Marquis* to allow independent contractor to bring a retaliatory discharge sexual harassment claim against putative employer).
 - 20 N.Y.C. ADMIN. CODE § 8-102(5).
 - 21 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).



- 22 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
- 23 See *Faragher*, 524 U.S. at 799.
- 24 133 S.Ct. 2434 (2013).
- 25 FATIMA GOSS GRAVES ET AL., NAT'L WOMEN'S LAW CTR., REALITY CHECK: SEVENTEEN MILLION REASONS LOW-WAGE WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT (2014), https://NWLC.org/wp-content/uploads/2015/08/final_NWLC_vancereport2014.pdf.
- 26 NAT'L WOMEN'S LAW CTR., THE FAIR EMPLOYMENT PROTECTION ACT: WHY WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT (2016), <https://NWLC.org/wp-content/uploads/2014/02/fepa-Why-Workers-Need-Strong-Protections-from-Harassment.pdf>.
- 27 See *id.*
- 28 *Aguas v. State*, 220 N.J. 494 (2015). In 2015, Maryland considered the Fair Employment Preservation Act, which would have adopted the more expansive definition of “supervisor” for the purpose of state sexual harassment claims. Modeled after the federal Fair Employment Protection Act, Maryland’s Fair Employment Preservation Act would have restored strong protections from harassment for employees bringing claims under Maryland’s sexual harassment law. HB 42, 435th Leg., 2015 Reg. Sess. (Md. 2015), available at <http://mgaleg.maryland.gov/2015rs/bills/hb/hb0042f.pdf>.
- 29 Approximately half of the states have not addressed the question of whether personal liability is permitted under state antidiscrimination laws. The following states have case law disallowing or otherwise negatively treating individual liability: Alaska, Arkansas, Connecticut, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, New Jersey, New York, Oklahoma, Oregon, Rhode Island, Tennessee, and Texas. Illinois courts have split on individual liability; low-level supervisors and employees may not be held personally liable for sexual harassment, but certain high-ranking officers may be held personally liable if they have sufficient authority to be considered an “agent of the complainant’s employer.” *Compare* *McGee v. City of Chicago*, No. 11 C 2512, 2011 WL 4382484, at *8 (N.D. Ill. Sept. 16, 2011) (individual liability is not available for a supervisor’s discriminatory acts) *with* *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 930 (7th Cir. 2017) (individual liability is available if the supervisor is an “individual or agent” of the employer).
- 30 *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 888 (D.C. 1998) (finding individual liability for supervisors’ discriminatory behavior under District of Columbia Human Rights Act); see also *Purcell v. Thomas*, 928 A.2d 699, 715 (D.C. 2007) (applying *Wallace* to find individual liability of supervisor for sexual harassment).
- 31 *Beaupre v. Cliff Smith & Assocs.*, 738 N.E.2d 753, 764 (Mass. App. Ct. 2000) (finding individual liability for supervisor’s sexual harassment under Massachusetts antidiscrimination law).
- 32 *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851, 857 (Mich. 2005) (finding individual liability for supervisor’s sexual harassment under Michigan Civil Rights Act).
- 33 *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 244 (Mo. Ct. App. 2006) (finding individual liability for supervisor’s sexual harassment under the Missouri Human Rights Act); see also *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 669 (Mo. 2009) (endorsing several Court of Appeals decisions, including *Cooper*, to find individual liability for supervisor’s sexual harassment).
- 34 *Fandrich v. Capital Ford Lincoln Mercury*, 901 P.2d 112, 115 (Mont. 1995) (finding individual liability for supervisor’s sexual harassment under the Montana Human Rights Act).
- 35 *Williams v. Mann*, 388 P.3d 295, 302 n.2 (N.M. Ct. App. 2016) (finding individual liability for supervisor’s sexual harassment under the New Mexico Human Rights Act).
- 36 *Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 928 (Wash. 2001) (finding individual liability for supervisor’s sexual harassment under the Washington Law against Discrimination). While the court in *Brown* held that the Washington Law Against Discrimination allows for individual liability of a supervisor, later decisions have rejected individual liability for coworker harassment. See *Jenkins v. Palmer*, 66 P.3d 1119, 1122 (Wash. App. 2003) (declining to extend *Brown* to cover coworker harassment because coworkers do not fall under the plain reading of the statutory definition of “employer”).
- 37 CAL. GOV. CODE § 12940(j)(3). California cases have confirmed that Section 12940(j)(3) can be used to hold harassers personally liable for harassment and retaliation under the California FEHA. See, e.g., *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1010 (N.D. Cal. 2001).
- 38 *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) (finding individual liability for supervisor’s sexual harassment under the Iowa Civil Rights Act); see also *Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1023 (N.D. Iowa 2011) (extending *Vivian* to permit individual liability for sexual harassment by a coworker).
- 39 *Payne v. U.S. Airways, Inc.*, 987 A.2d 944, 953 (Vt. 2009) (finding individual liability for supervisors’ discriminatory acts under Vermont Fair Employment Practices Act); *Wyatt v. City of Barre*, 885 F. Supp. 2d 682, 700 (D. Vt. 2012) (applying *Payne* to permit individual liability for coworkers’ discriminatory acts).
- 40 42 U.S.C. § 1981a(b)(3).
- 41 CAL. GOV’T CODE § 12965.
- 42 HAW. REV. STAT. ANN. § 368-17.
- 43 MASS. GEN. LAWS ANN. CH. 151B, § 9.
- 44 N.J. STAT. ANN. § 10:5-3.
- 45 OHIO REV. CODE ANN. § 4112.99.
- 46 OR. REV. STAT. ANN. § 659A.885.
- 47 VT. STAT. ANN. TIT. 21, § 495B.
- 48 W. VA. CODE ANN. § 5-11-13.
- 49 Some states prohibit the recovery of both compensatory and punitive damages, leaving victims of harassment with only nominal relief for workplace harassment such as back pay and injunctive relief. See, e.g., *Ariz. Rev. Stat. Ann. § 41-1481*; *N.D. Cent. Code Ann. § 14-02.4-20*; *S.C. Code Ann. § 1-13-90*; *Utah Code Ann. § 34A-5-107*; *Wis. Stat. Ann. § 111.39*; *Wyo. Stat. Ann. § 27-9-106*.
- 50 Certain workers are not protected by the NLRA, including federal, state, or local government employees, agricultural workers, and workers whose employers are subject to the Railway Labor Act, including interstate railroads and airlines. See Nat’l Labor Relations Board,



Jurisdictional Standards, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Dec. 13, 2017).

- 51 See *Phoenix Transit Sys.*, 337 NLRB 510 (2002); see also *Hyundai Am. Shipping Agency, Inc. & Sandra L. McCullough*, 357 NLRB 860, 874 (2011), *rev'd on other grounds*, *Hyundai Am. Shipping Agency, Inc. v. N.L.R.B.*, 805 F.3d 309, 314 (D.C. Cir. 2015) (upholding NLRB's determination that the "confidentiality rule was so broad and undifferentiated" that it violated the NLRA).
- 52 See, e.g., *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 741-45 (1st Cir. 1996) (invalidating settlement agreements requiring employees not to file charges with the EEOC or assist the agency with future investigations of charges of discrimination).
- 53 For more information on how mandatory arbitration clauses impact sexual harassment claims, see Emily Martin, "Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing," <https://NWLC.org/blog/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing/>.
- 54 See H.R. 1374, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/1374>.
- 55 See S. 2203, H.R. 4570, 115th Cong. (2017).
- 56 CAL. CIV. PROC. CODE § 1002.
- 57 A.B. 1682, 2016 Reg. Sess. (Cal. 2016), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160ab1682.
- 58 FLA. STAT. ANN. § 69.081.
- 59 *Id.*
- 60 Del. R. CIV. P. 26(c); Ind. R. P. 26(c); N.Y. COMP. CODES R. & REGS. TIT. 22, § 216.1 (applies to "court records" only); N.C. GEN. STAT. ANN. § 132-1.3 (settlements involving public sector defendants only); OR. REV. STAT. ANN. § 17.095 (settlements involving public sector defendants only); WASH. REV. CODE § 4.24.611(2)
- 61 See EEOC TASK FORCE REPORT, *supra* note 8, Part Three & Appendix B.
- 62 CAL. GOV'T CODE § 12950.1 (private sector employers and state employees); CAL. GOV'T CODE §§ 53237.1-53237.5 (local elected officials).
- 63 CONN. GEN. STAT. § 46A-54(15).
- 64 HB 1477, 128th Leg., 2017 Reg. Sess. (Me. 2017), available at <https://legiscan.com/me/text/ld1477/2017>.
- 65 S.D. ADMIN. R. 46:11:09:02.
- 66 Exec. Order No. 1, Gov. Booth Gardner (Wash. 1989), available at http://www.governor.wa.gov/sites/default/files/exe_order/eo_89-01.pdf.
- 67 Illinois, Iowa, Louisiana, Nevada, New York, North Carolina, Pennsylvania, Tennessee, Texas, and Utah require all state or public employees to participate in sexual harassment training. See 775 ILL. COMP. STAT. ANN. 5/2-105; Exec. Order No. 44, Gov. Terry Branstad (Iowa Apr. 30, 1992); Senate Concurrent Resolution No. 107, 2012 Regular Session; NEV. ADMIN. CODE 284.496; Executive Order No. 19, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.19; 25 N.C. ADMIN. CODE 1J.1101; 4 Pa. Code § 7.595; TENN. CODE ANN. § 4-3-1703; TEX. LABOR CODE ANN. § 21.010; Exec. Order No. 12, Gov. Jon M. Huntsman, Jr. (Utah Dec. 13, 2006); UTAH ADMIN. CODE R. R477-15.
- 68 Alabama, Alaska, Arkansas, Florida, Hawaii, Idaho, Maryland, Mississippi, New Mexico, Oklahoma, and Rhode Island require some public sector employees to participate in sexual harassment training. A full list of state training requirements is available upon request.
- 69 Colorado, Hawaii, Massachusetts, Ohio, Oregon, Rhode Island, Vermont, and Wisconsin have explicit statutory or regulatory guidance encouraging private sector employers to implement sexual harassment training or other preventative measures.
- 70 See NAT'L WOMEN'S LAW CTR. & ROC UNITED, RAISE THE WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (Oct. 2016), <http://NWLC.org/wp-content/uploads/2016/10/Tipped-Wage-10.17.pdf>; NAT'L WOMEN'S LAW CTR., THE FIGHT FOR \$15 IS WINNING FOR WOMEN AND FAMILIES (Apr. 2017), <https://NWLC.org/wp-content/uploads/2017/04/The-Fight-for-15-is-Winning.pdf>.
- 71 NAT'L WOMEN'S LAW CTR. & ROC UNITED, RAISE THE WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS, *supra* note 70.

