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THE EFFICACY OF NEW YORK'S QUALIFIED PROHIBITION ON NDAS AND REFORMS THAT CAN PROTECT SEXUAL HARASSMENT SURVIVORS

*Bina Nayee**

The numerous sexual harassment scandals that were uncovered following the Harvey Weinstein exposé¹ have at least one very positive byproduct: new state legislation aimed to protect and combat sexual misconduct in the workplace.² New York is leading the charge by creating a legislative framework that protects a broader spectrum of workers against sexual harassment in the workplace.³ The State's 2019 fiscal year budget substantiates the commitment to empower survivors and protect those who may be future targets of sexual harassment in their workplaces.⁴ As part of this framework, the State's human rights laws now extend to and protect independent contractors, who ordinarily would have limited federal protections against sexual harassment because they are ineligible for Title VII protection.⁵ In another forging step, New York now prohibits employers from including or agreeing to include a nondisclosure agreement (NDA) in a settlement agreement regarding a sexual harassment claim, unless the employee seeks the confidentiality.⁶ This prohibition is a step in the right

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1. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [https://perma.cc/YQB5-C38P].

2. Cara Kelly & Aaron Hegarty, *#MeToo Was a Culture Shock. But Changing Laws Will Take More Than a Year*, USA TODAY (Oct. 5, 2018, 12:28 PM), <https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/> [https://perma.cc/NVW3-4J2V].

3. *See generally Combating Sexual Harassment in the Workplace*, N.Y. STATE, <https://www.ny.gov/programs/combating-sexual-harassment-workplace> [https://perma.cc/C94W-LXJL] (last visited Mar. 6, 2019).

4. N.Y. STATE, FY 2019 EXECUTIVE BUDGET 119 (2018), <https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19book/BriefingBook.pdf> [https://perma.cc/NRJ5-B7Y7] (summarizing a variety of funded legislation, including a bar on taxpayer funds being used to settle sexual harassment claims and the creation of a unit within the Joint Commission on Public Ethics to handle sexual harassment complaints).

5. *See Coverage*, EQUAL EMP. OPPORTUNITIES COMMISSION, <https://www.eeoc.gov/employers/coverage.cfm> [https://perma.cc/X5PB-EQ36] (last visited Mar. 6, 2019).

6. N.Y. C.P.L.R. 5003-b (McKinney 2018) (“[F]or any claim or cause of action . . . the factual foundation for which involves sexual harassment, in . . . [an] agreement to settle . . .

direction as new data shows the increasing prevalence of NDAs in the workplace, often silencing instrumental employee speech.⁷ The legislature's regulation over NDAs is revolutionary in itself; however, in its current condition, the law has two shortcomings which limit its efficacy. First, the key state resources that employees would turn to in order learn about their rights do not contain any information about their right to reject an NDA when they do not prefer it.⁸ Second, the way that the legislation is currently drafted allows employers to manipulate employees into "preferring" an NDA, canceling the law's intended effect. The law's current mode of dissemination and its parameters should therefore be amended to address both the notice and coerced NDA issues.

Many survivors often do not wish to file a complaint with their employer because they fear that they would face adverse action or worse—that the whole process would be futile.⁹ In the face of these risks, it is helpful for survivors to know their rights, one of which is that their employer cannot sweep a legitimate complaint under the rug by exchanging a settlement for an NDA.¹⁰ The legislative framework requires that employers establish and distribute to employees a sexual harassment policy, as well as a complaint form.¹¹ Within their respective sexual harassment policies, employers must "inform employees of their rights of redress."¹² Part of those rights of redress would presumably be notice of the employee's right to control the inclusion

no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference."); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2018).

7. See generally Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1 (2015).

8. See N.Y. STATE DIV. OF HUMAN RIGHTS, SEXUAL HARASSMENT, <https://dhr.ny.gov/sites/default/files/pdf/sexual-harassment.pdf> [<https://perma.cc/6LG2-55M8>] (last visited Mar. 6, 2019) (describing the complaint process without mention of the employee's right to reject a nondisclosure agreement); see also N.Y. STATE, SEXUAL HARASSMENT POLICY FOR ALL EMPLOYERS IN NEW YORK STATE, <https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelPolicy.pdf> [<https://perma.cc/ZK9P-VZHY>] (last visited Mar. 6, 2019). This policy lacks reference to the NDA law or any information about an employer's inability to insert NDAs on their own. See *id.*

9. See L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 724–25 (2007); see also Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 51–52 (2003).

10. See Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27, 51 (1993) ("Victims of sexual harassment must know that their harassers will be punished and that they will not be prodded to minimize their abuse . . ."). Having notice of one's rights in a settlement agreement with her employer gives her the knowledge that she can create real pressure on her employer to implement internal reforms.

11. See N.Y. LAB. LAW § 201-g (McKinney 2018). The employers' policies must meet a number of basic requirements, as illustrated in the State's model policy. See N.Y. STATE, MINIMUM STANDARDS FOR SEXUAL HARASSMENT PREVENTION POLICIES, <https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf> [<https://perma.cc/WG72-9UZ6>] (last visited Mar. 6, 2019).

12. N.Y. LAB. LAW § 201-g(1)(A) (McKinney 2018).

of an NDA in the settlement agreement. However, neither the Department of Labor's "model policy" for employers nor what the State terms its "Employee Toolkit" explaining the new legislation contain any reference to the NDA law.¹³ These omissions leave open the very real possibility that employers will not include any mention of the nondisclosure legislation in their own policies. Employees generally are unaware of the protections and exemptions to NDAs that they sign with their employer.¹⁴ Without readily available notice to this legislation, survivors who already believe that filing a complaint in their workplace to be futile will continue to believe so. One reform which can be implemented quickly and at little cost is to include this information in the State's model policy. The state legislature should further require that the employer's policy be posted in the workplace rather than merely available in some written or electronic form.¹⁵ Giving employees ready and clear access to all of their legal rights related to sexual harassment in the workplace will be helpful for them to ultimately make the decision to file a complaint.

A second drawback to the current legal regime is that it allows for employer manipulation, which could effectively wash away the NDA law's entire impact. While some survivors truly desire an NDA for their own privacy, opting out of an NDA can still benefit them and play a real role in alleviating the pattern of sexual harassment in their workplace.¹⁶ The law's plain language requires that the employee must prefer confidentiality in order for a settlement agreement between her and the employer to contain an NDA.¹⁷ In other words, the employer cannot include an NDA in the settlement without establishing that it was the employee's preference. However, there is no prohibition against the employer using its inherently greater bargaining power to pressure the employee to include an NDA. For instance, an employer can leverage a greater settlement amount in exchange

13. See N.Y. STATE, SEXUAL HARASSMENT POLICY FOR ALL EMPLOYERS IN NEW YORK STATE, https://www.ny.gov/sites/ny.gov/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf [<https://perma.cc/2BHA-KA8V>]; N.Y. STATE, SEXUAL HARASSMENT PREVENTION EMPLOYEE TOOLKIT, <https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionToolkitforEmployees.pdf> [<https://perma.cc/JC9K-2D9V>].

14. See Orly Lobel, *NDAs Are out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change> [<https://perma.cc/W54V-2FXA>].

15. See *Combating Sexual Harassment: Frequently Asked Questions*, N.Y. STATE, <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-workers> [<https://perma.cc/R9TW-BGKF>] (last visited Mar. 2, 2019) (explaining the requirements for employers' mandated sexual harassment policies, which fail to impose a requirement that employers physically and publicly post their sexual harassment policy).

16. See Annie Hill, *Nondisclosure Agreements: Sexual Harassment and the Contract of Silence*, GENDER POL'Y REP. (Nov. 14, 2017), <https://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/> [<https://perma.cc/F53K-NZ3M>] (discussing the difficulty of identifying alleged sexual harassers when claims against them were settled with an NDA, and emphasizing the increased difficulty of identification once they moved on to different employers).

17. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2018).

for the employee's "preference" for an NDA.¹⁸ In an even more extreme case, an employer can refuse to settle with an employee or implicitly threaten to instead litigate the sexual harassment claim of an employee who has fewer resources or lacks an attorney.¹⁹ The high cost of litigation weighed against a settlement that includes an NDA would be preferable to less sophisticated workers, who either cannot afford legal counsel or are afraid to seek legal advice.²⁰ To give this legislation its intended impact, the law must be amended to bar such employer manipulation. One possible amendment would be to include a clause that requires employers to make settlement offers in good faith, without putting any direct or indirect pressure on the employee to include an NDA. This amendment would provide a right of action for the employee if the employer were to act in bad faith prior to or during the settlement negotiations. Moreover, it would incentivize employers to self-police their interactions with employees who bring harassment claims.

A seemingly attractive amendment would entirely remove the condition of the plaintiff's preference. Such an amendment would place a full bar on NDAs and, in theory, remove the employer's opportunity to leverage its power against the employee. However, such an amendment would be misguided because employers could then threaten to publicly disclose details about the complaining employee in exchange for more favorable settlement terms. Having to publicly relive their trauma would compel many complainants to submit to a less favorable settlement in exchange for safeguarding their own privacy.²¹ Thus, such an amendment would pose the same coercion issue that the current law presents. Instead, an alternate amendment that still allows employee-preferred NDAs—but with a narrower state-defined scope—would strike a better balance. The NDA's legislatively-defined scope could omit the employee's name and some details harmful to the employer, such as the settlement amount agreed upon. The NDA's narrower scope, however, should not mean that wrongdoers' names and actions are off-limits, but rather that the employer's entire reputation does not dissolve with the details of one of its employee's actions. Regardless of the exact amendment that the state sets for NDA legislation, it must acknowledge and react to the law's current insufficiency and potential effectiveness.

18. Lobel, *supra* note 14.

19. See Hill, *supra* note 16.

20. While the legislation does establish a unit within the Joint Commission on Public Ethics to address sexual harassment claims, the unit would not be able to provide legal advice to employees in the private sector. See *Jurisdiction and Authority*, N.Y. STATE JOINT COMMISSION ON PUB. ETHICS, <https://jcope.ny.gov/jurisdiction-and-authority> [<https://perma.cc/A98Y-PAHK>] (last visited Mar. 6, 2019) ("The Commission regularly provides advice and guidance to State officers and employees and lobbyists and clients concerning ethics and lobbying laws.") (emphasis added); see also FY 2019 EXECUTIVE BUDGET, *supra* note 4, at 119 (establishing new unit within the Joint Commission on Public Ethics).

21. See Hill, *supra* note 16.

New York State is pioneering important legislative reforms that combat sexual harassment in the workplace. However, the State should not overlook shortcomings in its current laws. To do so would weigh swiftness over substance, leaving many employees just as unprotected as they were before the reforms.