Report Pursuant to 2018 Acts and Resolves No. 183, Sec. 10 Regarding Specific Issues Related to Nondisclosure Provisions in Agreements to Settle Sexual Harassment Claims

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I. Introduction and Authority

Pursuant to 2018 Acts and Resolves No. 183, Sec. 10, the General Assembly directed the Office of Legislative Council, in consultation with the Office of the Attorney General and the Human Rights Commission, to prepare and submit a report examining two potential amendments to Vermont's law prohibiting sexual harassment. Those potential amendments were intended to provide additional tools to address workplaces and individuals for which sexual harassment is a recurring problem. The proposed amendments would:

> (1) provide the Attorney General and the Human Rights Commission with notice of agreements to settle sexual harassment claims that contain a provision that prohibits or restricts the individual who made the claim from disclosing information related to the claim of sexual harassment; and
>
> (2) render provisions of agreements to settle sexual harassment claims that prohibit or restrict the individual who made the claim from disclosing information related to the claim void and unenforceable if, in relation to a separate claim, the alleged harasser is later adjudicated by a court or tribunal of competent jurisdiction to have engaged in sexual harassment or retaliation in relation to a claim of sexual harassment.

More specifically, the General Assembly charged the Office of Legislative Council with the following duties:

1. identify potential language to accomplish the intent of amendments described above;
2. review and examine laws and pending legislation in other states that are related to the amendments described above;
3. identify and examine potential legal issues, advantages, disadvantages, and obstacles to enacting the language identified; and
4. identify and examine alternative mechanisms that would accomplish substantially similar policy outcomes to the amendments described above.

In preparing this report, the author consulted with Julio Thompson, Director of the Civil Rights Unit in the Vermont Attorney General's Office; Emily Adams, Assistant Attorney General in the Civil Rights Unit in the Vermont Attorney General's Office; and Bor Yang, the Executive Director of the Vermont Human Rights Commission. The author would like to sincerely thank each of them for their generous and insightful assistance. The author would also like to thank Andrea Johnson and Ramya Sekaran from the National Women's Law Center for their assistance in compiling information regarding related laws and pending legislation in other states.

II. Notice of Settlements to Attorney General and Human Rights Commission

A. Potential Language

A potential mechanism to "provide the Attorney General and the Human Rights Commission with notice of agreements to settle sexual harassment claims that contain a provision that prohibits or restricts the individual who made the claim from disclosing information related to the claim of sexual harassment" would be the addition of a subsection to 21 V.S.A. 495h, containing language similar to the following:

(1) The parties to an agreement to settle a sexual harassment claim that contains a provision that prohibits or restricts the individual who made the claim from disclosing information related to the claim shall provide notice of the settlement agreement to the Attorney General within 15 calendar days after entering into the agreement. The notice shall specify the date of the settlement agreement, the names of the claimant, his or her employer, the alleged harasser, and any other parties to the agreement. The notice shall not be required to include any information relating to the specific details of the claim or to the terms of the settlement.

(2) The Attorney General shall maintain a database of all notices received pursuant to this subsection, and any settlement agreements related to a charge or formal complaint of sexual harassment that were filed by either the Attorney General or the Human Rights Commission. The database shall be searchable by party name and employer.

(3) Except as otherwise provided pursuant to this subsection, all notices submitted and any related records kept by the Attorney General shall be exempt from public inspection and copying under the Public Records Act and shall be kept confidential.

B. POTENTIAL LEGAL AND PRACTICAL CONCERNS

The potential language is aimed at providing the Attorney General and the Human Rights Commission with greater knowledge about workplaces where sexual harassment is potentially more of a problem. Unfortunately, for several reasons discussed below, the proposed language is probably not the best mechanism to accomplish that goal.

First, the information may be of relatively limited value to the Attorney General's Office and Human Rights Commission because knowledge of a settlement, without knowledge of the details of the claim and the settlement's terms, does not provide any insight into whether the underlying sexual harassment claim had merit.[1] In many instances, parties will agree to a settlement before any determination has been made regarding whether sexual harassment occurred. Therefore, instead of sexual harassment, the underlying behavior could be incivility, a personality conflict, general misconduct, or another form of discrimination. Moreover, even if the alleged behavior involved instances of conduct that, if continued, could rise to the level of sexual harassment, there might be insufficient information to make out a prima facie claim of sexual harassment. Without any information beyond the fact of a settlement and the names of the parties, the Attorney General's Office or the Human Right Commission would be unable to determine whether the settlement reflected a pattern of illegal behavior or something else.

While additional information about the number of settlements could potentially provide some indication of which workplaces the Attorney General's Office or Human Rights Commission may wish to inspect for compliance with the sexual harassment law pursuant to 21 V.S.A. § 495h(i), this mechanism would likely not be an effective tool for that either. In addition to the inability to determine whether settlements reflect actual violations of the law or something

[1] One potential way to address this would be to require the parties to the settlement to provide a summary of the claim or a copy of any complaint or report that was filed in relation to the claim. This might, however, lead to concerns by certain parties that complying with the notice requirement could expose them to liability for a violation of Vermont's Fair Employment Practices Act.

else, both entities have limited resources that are already dedicated to investigating complaints of harassment and discrimination. Without additional resources, they may not be able to effectively follow up with employers that submit numerous notices of settlement agreements and this provision would provide little additional clarity about an employer's compliance with the requirements of the law. Furthermore, notice without any information about the underlying claim would provide little assistance to the Attorney General's Office or the Human Rights Commission in determining how to prioritize inspections.

An additional issue is the potential for a reporting requirement to have a chilling effect on settlement negotiations. One potential motivation for settling a claim is that one or both parties wish to avoid outside or public knowledge of the claim. While the proposed language would keep the records of settlement agreements in a confidential database accessible only to the Attorney General's Office and the Human Rights Commission, those are law enforcement entities that parties to a potential settlement might not wish to know about it.[2] This could result in more claims being pushed toward litigation or arbitration. It is also worth noting that under Vermont's existing law, a settlement with a nondisclosure provision cannot prevent an individual from reporting sexual harassment to the Attorney General or Human Rights Commission.[3] In other words, a victim of harassment may already choose to file a complaint or cooperate with the an investigation by the Attorney General or Human Rights Commission regardless of whether he or she has signed an agreement not to disclose facts related to his or her sexual harassment claim. Notice of this right is now required to be included in every settlement of a sexual harassment claim that includes a nondisclosure provision.[4]

A potential lack of compliance is another potential issue with the proposed language, which requires the parties to a settlement to submit notice of it but does not provide a penalty if they fail to do so.[5] While the Attorney General or Human Rights Commission could potentially seek to enforce the provision through 21 V.S.A. § 495d, which provides enforcement authority for the entire subchapter, that would likely require the provision of additional resources to avoid harming their ability to perform their primary work enforcing the anti-discrimination provisions in Vermont law.[6] In addition, even if a penalty provision or additional enforcement resources were provided, the Attorney General's Office and the Human Rights Commission have no practical way of knowing when a settlement that would be subject to this provision has been

[2] It should be noted that the Attorney General's Office and the Human Rights Commission already maintain records of complaints, investigations, and settlements that they have been involved with.
[3] 21 V.S.A. § 495h(h)(2)(A).
[4] 21 V.S.A. § 495h(h)(2)(B).
[5] A similar requirement under 21 V.S.A. § 495n, which requires persons filing a civil action related to a claim of sexual harassment to provide notice to the Attorney General or Human Rights Commission, has had very low levels of compliance since it took effect on July 1, 2018.
[6] The Attorney General's Civil Rights Unit enforces the provisions of 21 V.S.A. chapter 5, subchapters 1 (flexible work arrangements and nursing mothers), 4A (Parental and Family Leave Act), 5 (National Guard leave), 5A (polygraph testing), 6 (Fair Employment Practices Act, prohibiting discrimination including sexual harassment), and 11 (drug testing), as well as the Vermont statutes prohibiting hate crimes, 13 V.S.A. §§ 1454-1466. The Human Rights Commission has jurisdiction over claims under 9 V.S.A. chapter 139 related to allegations of unlawful discrimination in housing and places of public accommodation (including schools, restaurants, stores, professional offices, government agencies and other places offering goods or services to the public), and under 21 V.S.A. chapter 5, subchapter 6 related to discrimination in State employment.

agreed to. Thus, parties wishing to avoid having their settlements included in the database could simply fail to submit them with little risk of adverse consequences.

Another potential issue is the definition of a settlement agreement. As it is written, the proposal does not define what a settlement agreement is. In the absence of a narrowly written definition, the provision could be interpreted to include such things as a supervisor verbally agreeing with a victim of relatively minor harassing behavior and the employee who engaged in offending behavior that the harasser would stop and apologize for his or her actions. Similarly, additional clarity may be needed regarding what constitutes a "claim" of sexual harassment. For example, would a report from a bystander or a report of behavior that might be sexual harassment but is not described as such constitute a claim? If the General Assembly decides to pursue language similar to the proposed language, it may wish to consider adopting carefully worded definitions of settlement agreement and claim to ensure that its intent is clear.

Finally, the Attorney General's Office already has the authority to obtain information during an investigation, including prior settlement agreements. In addition, the passage of Act 183 gave it additional tools to help identify workplaces that are out of compliance with the law or lack good practices and procedures for preventing sexual harassment. Act 183 requires that all new settlement agreements include language stating that they do not "prohibit, prevent, or otherwise restrict the individual who made the claim from . . . (i) lodging a complaint of sexual harassment committed by any person with the Attorney General, a State's Attorney, the Human Rights Commission, the Equal Employment Opportunity Commission, or any other State or federal agency [or] (ii) testifying, assisting, or participating in any manner with an investigation related to a claim of sexual harassment conducted by the Attorney General, a State's Attorney, the Human Rights Commission, the Equal Employment Opportunity Commission, or any other State or federal agency…."[7] In addition, the Act provides the Attorney General's Office and the Human Right Commission with the authority to "enter and inspect any place of business or employment, question any person who is authorized by the employer to receive or investigate complaints of sexual harassment, and examine an employer's records, policies, procedures, and training materials related to the prevention of sexual harassment and the requirements of [21 V.S.A. § 495h]." Those tools provide more reliable and concrete information for determining whether an employer is complying with the law than the language providing notice of settlement agreements would.[8]

C. Related Laws and Pending Legislation

While the proposed language may not be the most effective mechanism for identifying workplaces where sexual harassment may be a problem, legislation modeled on one of the laws and pending bills from other states that is identified in this section could provide greater insight into workplaces where sexual harassment is problematic, as well as the progress Vermont is making in reducing the frequency of sexual harassment. The new laws and bills described below

[7] 21 V.S.A. § 495h(h)(2).

[8] While having some form of notice of the number of settlements that an employer has entered into in relation to sexual harassment might help the Attorney General or Human Rights Commission to prioritize which workplaces it should utilize its inspection authority in, some of the alternatives described in section C of this part could provide more reliable information about which workplaces might be having problems complying with the law.

would provide more transparency regarding the number of sexual harassment claims made against covered employers and the disposition of those claims. Some would also require employers to disclose the use of nondisclosure provisions or if the employer has entered into multiple settlements related to the same employee.

Illinois enacted changes to its quarterly reporting requirements for the Legislative Inspector General.[9] The existing law required the Legislative Inspector General to submit quarterly reports to the General Assembly and Legislative Ethics Commission regarding the quarterly number of allegations, investigations started, investigations finished, ongoing investigations, complaints forwarded to the Illinois Attorney General, and actions filed or pending with the Legislative Ethics Commission. The amendments require additional information that breaks down the aggregate numbers by the subject matter of the claim, as well as the number of allegations referred to a law enforcement agency or another investigatory body, and the cumulative amounts for the information reported for the current calendar year. In addition, the amendments require the quarterly report to be made available to the public on the Legislative Inspector General's website.

Maryland passed the Disclosing Sexual Harassment in the Workplace Act of 2018[10] that requires employers with 50 or more employees to submit an annual survey regarding the number of settlements related to sexual harassment, the number of times the employer has paid a settlement related to a claim of sexual harassment against the same employee within the last 10 years of employment, and the number of settlement agreements that include a nondisclosure agreement. Under the new law, employers' responses will be aggregated, and the totals will be posted on the Maryland Commission on Civil Rights' website. In addition, upon request, members of the public will be able to view the number of times that a specific employer has paid a settlement related to a claim of sexual harassment against the same employee within the last 10 years of employment.

In New York, two bills introduced during the last session would have provided for additional transparency regarding instance of sexual harassment. The first, AB 9511[11], proposed to require state contractors to report annually to the Office of General Services regarding the number of sexual harassment violations asserted against or determined to have been committed by the contractor or one of its employees; the number of sexual harassment settlement agreements including nondisclosure agreements that the contractor entered into; and a description of sexual harassment prevention training provided to the contractor's employees. The bill proposed to also require the Office of General Services to prepare a report for the Governor, Speaker of the Assembly, and President Pro Tem of the Senate detailing the aggregate number of reported sexual harassment violations, settlement agreements containing a nondisclosure agreement, and contractors that provide sexual harassment prevention training.

[9] *See* Appendix 2, 5 ILCS 430/25-85; *see also* 2018 IL Pub. Act 100-0599, *available at*: http://www.ilga.gov/legislation/publicacts/100/PDF/100-0588.pdf.
[10] *See* Appendix 3, 2018, Maryland Acts, ch. 739, § 2.
[11] *See* New York AB 9511, *available at*: https://www.nysenate.gov/legislation/bills/2017/a9511/amendment/a.

The second bill, SB 8740[12], proposed to require employers to annually report to the Division of Human Rights the number of settlements with employees and other individuals performing services in the workplace, such as independent contractors, regarding claims of discrimination on the basis of sex and sexual harassment. In addition, the bill proposed to require the Division of Human Rights to prepare an annual report detailing the aggregate number of settlements reported to the Division, the number of complaints of sex discrimination received by the Division, and a summary of the actions taken by the Division in response to the complaints it received.

At the federal level, two bills of note were introduced in Congress during the last session. The first, known as the Ending Monopoly Power Over Workplace Harassment Through Education and Reporting Act (EMPOWER Act)[13] would have, among other things, required public companies to report to the Securities and Exchange Commission (SEC) regarding workplace harassment and retaliation on Form 10-K, which is available to the public through the SEC's website.[14] The required information would have included disclosure of the number of settlements, judgments, and awards; any payments made in relation to a release of claims; the total amount paid for settlements and judgments; and whether the company has had three or more settlements or judgments in relation to any particular employee. Similarly, the Sunlight in Workplace Harassment Act[15] would have also required companies to report information related to harassment and other forms of discrimination on Form 10-K. That bill would have required companies to report the total number of settlements and the total dollar amount of those settlements, as well as the average length of time for the company to resolve a complaint of discrimination, and the number of complaints the company was currently working to resolve through internal processes or litigation.

III. Render Nondisclosure Agreements Unenforceable in Event of Future Harassment

A. Potential Language

A potential mechanism to "render provisions of agreements to settle sexual harassment claims that prohibit or restrict the individual who made the claim from disclosing information related to the claim of sexual harassment void and unenforceable if, in relation to a separate claim, the alleged harasser is later adjudicated by a court or tribunal of competent jurisdiction to have engaged in sexual harassment or retaliation in relation to a claim of sexual harassment" would be the addition of a subsection to 21 V.S.A. § 495h, which contains language substantially similar to the following:

[12] *See* New York SB 8740, *available at*: https://www.nysenate.gov/legislation/bills/2017/s8740.
[13] *See* H.R. 6406, *available at*: https://www.congress.gov/bill/115th-congress/house-bill/6406/text.
[14] Former-President Obama proposed that a similar sort of reporting mechanism be developed for equal pay data by the federal Department of Labor. The final version of the rule added questions to the Equal Employment Opportunity Commission's Employer Information Report form EEO-1 for employers with 100 or more employees regarding compensation and hours worked to the existing questions related to demographics and job categories.[14] However, the collection of this data was halted in August 2017 by the Office of Management and Budget pursuant to its authority under the Paperwork Reduction Act, 44 U.S.C. ch. 35.
[15] *See* S.2454, *available at*: https://www.congress.gov/bill/115th-congress/senate-bill/2454/text?r=4497.

(1) A provision of an agreement to settle a sexual harassment claim that prohibits or restricts the individual who made the claim from disclosing information related to the claim of sexual harassment shall be void and unenforceable with respect to the claimant if in a separate claim against the alleged harasser:

(A) a court or tribunal of competent jurisdiction determines in a final decision or judgment issued after the date of the agreement that he or she engaged in sexual harassment or retaliation in relation to a claim of sexual harassment; and

(B) the decision or judgment is no longer subject to appeal.

(2) As used in this subsection, "information related to the claim of sexual harassment" does not include the specific terms of the related settlement agreement or the amount of any monetary settlement.

B. Potential Legal and Practical Concerns

The language proposed above raises potential legal concerns related to its impact on settlements relating to multiple claims, how the right would be asserted, and the due process rights of parties to the relevant settlement agreement. In addition, the potential effect of the provision would likely be significantly limited by the small number of sexual harassment claims that ultimately go to trial or arbitration,[16] as well as the lack of public knowledge about the results of employment claims that are resolved through arbitration.

As an initial matter, it is not entirely clear how the proposed language might impact nondisclosure provisions for settlement that relate to multiple separate claims. Take, for example, an agreement settling allegations of sexual harassment, gender discrimination, racial discrimination, and wrongful termination that had a nondisclosure provision that prohibited disclosure of the terms of the agreement and the details of the underlying claims. If the nondisclosure provision of that agreement applied to all the claims and was rendered void pursuant to the proposed language, would that mean that the claimant could now discuss the details of all the claims, or just the alleged sexual harassment? Even if the language were written more narrowly to apply only to the details of the alleged sexual harassment, could the claimant discuss instances of sexual harassment that were inextricably connected with other alleged discrimination, such as sexually harassing behavior that included the use of racial epithets? While releasing a claimant to discuss other discrimination and harassment may be a desirable outcome, ambiguity about the degree to which a nondisclosure provision was rendered void and unenforceable could lead to confusion for parties to the agreement and potentially litigation.

An additional concern is about how the prior nondisclosure agreement would be rendered void. While the proposed language would render a prior nondisclosure provision void by operation of law, a prior victim might want protection against a lawsuit related to his or her disclosure of the sexual harassment claim. However, a court or other tribunal adjudicating the new claim against the harasser likely could not address the provisions of earlier settlement agreements as part of its ruling. This is because litigants typically lack standing to raise the

[16] This assumes that "tribunal of competent jurisdiction" would include private arbitrations. If that term did not encompass arbitration, it could result in an increase in arbitration of employment disputes. If the General Assembly elects to consider the adoption of language similar to the proposed language, it should consider this issue as well as any potential impacts that the Federal Arbitration Act may have on the language that it considers.

claims of other individuals who are not before the court in their case.[17] Likewise, a court's jurisdiction is limited to the cases or controversies that are before it. Thus, whether a prior victim's nondisclosure provision had been rendered void by a later judgment against the harasser could become the subject of a new lawsuit.

One possible way to address the risk of new lawsuits would be to provide the prior victim with an affirmative defense to an action for breach of a nondisclosure provision following a judgment against his or her harasser. A possible provision could provide that "It shall be an affirmative defense to any breach of contract claim, or any claim for fees, costs, or liability associated with the disclosure of information related to a claim of sexual harassment that the alleged harasser has subsequently been determined by a court of competent jurisdiction to have engaged in sexual harassment or retaliation in relation to sexual harassment. This could also be strengthened by granting a prior claimant his or her attorney's fees and costs if he or she prevailed in the action. Nevertheless, the potential for litigation could present significant financial risks or up-front costs for a victim, which raises concerns about whether, even with language providing an affirmative defense and recovery of costs and fees, such a provision would provide any benefit to individuals who may lack the resources to bring their claim to court.[18]

In addition, voiding the nondisclosure provisions of prior settlements related to a harasser's misconduct could potentially violate the Due Process Clause[19] and raise concerns about fairness. As a practical matter, the harasser may not have been a party to some or all of the prior settlements related to his or her misconduct.[20] Instead, those settlements may have been between his or her employer, or former employer, and the alleged victims. In the case of a former employer, the employer may have taken appropriate disciplinary action against the harasser and entered a settlement with the victim that provided him or her with compensation in exchange for a nondisclosure provision that would protect the employer's reputation. If the proposed language rendered the prior nondisclosure agreement void, the former employer would lose the value of its nondisclosure provision through no fault of its own and without the opportunity for a hearing to assert its interests. Thus, the proposed language could result in a business that acted appropriately being harmed by the future actions of an employee that it dismissed. Even if the prior employer had not handled the earlier claim well, the basic Due Process and fairness issues would remain if it lost the value of its prior settlement through no fault of its own and with no opportunity for a hearing to defend its interests in retaining the nondisclosure provision.

A final practical issue to consider is that the proposed language would likely be relatively ineffective as a tool for revealing repeat sexual harassers. Nearly all sexual harassment claims are settled or resolved through internal processes before they ever go to trial or arbitration. Of the

[17] *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiff has standing to assert own legal rights and interests and not legal rights and interests of others).

[18] This likely would be an even more acute issue if the subsequent judgment against the alleged harasser occurs in another jurisdiction.

[19] U.S. Const. Amennds. V and XIV.

[20] This is in part because the laws against sexual harassment primarily contemplate employer liability. While Vermont permits victims to sue the harasser or the employer, 21 V.S.A. § 495h(a)(1) provides that all "employers . . . have an obligation to ensure a workplace free of sexual harassment." Similarly, 21 V.S.A. § 495(a) provides that "[i]t shall be an unlawful employment practice … for any employer … to discriminate against any individual because of … sex, sexual orientation, [or] gender identity …"

claims that do go to trial, a significant number of those are also settled before a decision is rendered on the merits of the claim. In addition, arbitration decisions related to employment claims are generally private and therefore may not be easily discovered by prior harassment victims. In short, this provision would make little to no progress in revealing repeat harassers or the companies that might choose to shield their behavior behind settlements with nondisclosure provisions or who require arbitration of sexual harassment claims.

C. RELATED LAWS, PENDING LEGISLATION, AND OTHER ALTERNATIVES

There are a variety of potential approaches that could reduce the effectiveness of nondisclosure provisions as a tool for hiding repeat harassers or workplaces where harassment and other forms of discrimination are common. The approaches include giving the victim the option to disclose the details of his or her claim, prohibiting nondisclosure provisions from applying to the facts of a claim, limiting the number of nondisclosure provisions that may be used with respect to claims against a specific employee, granting victims time to review and rescind agreements containing nondisclosure provisions, and enacting sunshine in litigation protections.

Grant Victims the Choice of Whether to Disclose:

In New Jersey, S.121,[21] which has passed the New Jersey Senate and is currently pending in the House, would make nondisclosure provisions that have "the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" unenforceable with respect to an employee who is a party to the settlement agreement. In addition, if "the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable" the nondisclosure provision would also become unenforceable against the employer that is a party to the agreement. This proposal is interesting because it provides confidentiality for the employee unless he or she elects to discuss his or her claim publicly and in sufficient detail that the employer can be identified. If he or she elects to do so, then the employer is also released and may defend itself.

Translucency:

Another possible approach would be to limit the subject matter that could be covered by a nondisclosure provision. For example, nondisclosure provisions could be permitted to cover the terms and compensation provided by a settlement agreement, but not the facts of the underlying claim. An important consideration in such a provision would be whether and how to protect the identity of the claimant. Because many claimants would prefer to keep their experience private, a potential solution might be to include a provision like New Jersey's S.121, which allows nondisclosure provisions that bind the employer and harasser unless the claimant elects to discuss the facts of the claim in sufficient detail to identify the other parties.

California's SB 820 provides another possible approach.[22] It would prohibit settlement agreements that prevent disclosure of factual information related to actions brought alleging

[21] *See* N.J. S.121, *available at*: https://www.njleg.state.nj.us/2018/Bills/S0500/121_R1.PDF.
[22] *See* CA SB 820, *available at*: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820.

sexual assault, sexual harassment, or workplace harassment or discrimination on the basis of sex. It would also prohibit courts from issuing an order that prevents the disclosure of such information. The bill would, however, permit provisions in agreements that shield the identity of the claimant and prevent disclosure of the amount of the settlement.

Limit the Number of Nondisclosure Provisions that can be Utilized with Respect to a Harasser:

Another alternative would be to restrict employers from including a nondisclosure provision in a settlement of a claim of sexual harassment against a particular employee more than one time. If the penalty for violating a law like this was significant, it could potentially provide a disincentive to attempt to cover up repeated misconduct by an employee through multiple nondisclosure provisions. However, such a provision could be difficult to enforce if the victims were unaware of each other. In addition, if a future victim did not know about the harasser engaging in misconduct with other employees he or she might not know that the employer was prohibited from including a nondisclosure provision in a settlement agreement. While significant penalties for knowing violations of the restriction or prohibiting insurance companies from paying claims for settlements that violated it could reduce such risks, enforcement could still prove difficult. In addition, a provision like this could provide a greater incentive for employers to utilize arbitration to settle claims of sexual harassment, because that process can also maintain secrecy without a settlement agreement. Finally, this alternative would also not prevent future employers from utilizing a nondisclosure provision in relation to an employee who had engaged in misconduct in the past while he or she was working for other employers.

Time for Review:

Another approach that might provide better informed consent by claimants who are signing a settlement agreement with a nondisclosure provision would be to provide them with time to review the agreement before signing it and to provide them with time to revoke the agreement after signing it. A well-established version of such a provision exists in the federal Age Discrimination in Employment Act (ADEA). That provision provides that an agreement waiving an individual's right to sue is only valid if:

> "(F)(i) the individual is given a period of at least 21 days within which to consider the agreement;
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> * * *
>
> "(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired . . ."[23]

New York State has adopted two similar provisions related to sexual harassment that provide claimants with 21 days to consider a settlement agreement with a nondisclosure provision related to the facts and circumstances underlying the sexual harassment claim, and seven days to revoke an agreement that includes such a provision after executing it.[24] The two New York laws

[23] 29 U.S.C. § 626(f)(1).

[24] *See* Appendix 5, N.Y. General Obligation's Law § 5-336 ("[A nondisclosure] term or condition must be provided to all parties, and the complainant shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the complainant's preference, such preference shall be memorialized in an agreement

also prohibit the inclusion on a nondisclosure provision "unless the condition of confidentiality is the complainant's preference."[25] While laws like these may not significantly diminish the use of nondisclosure provision in relation to repeat harassers, they can help to ensure informed consent by claimants considering whether to agree to a settlement that includes a nondisclosure provision.

Sunshine in Litigation:

A final alternative would be to enact a so-called sunshine in litigation law that prohibits the concealment of public hazards. One example of such a law is Florida's Sunshine in Litigation Act.[26] That Act prohibits any "portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard."[27] The Act also prohibits a court from entering an "order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard [or] of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard."[28] Like Florida's Act, a similar law related to sexual harassment, or employment discrimination more generally, could provide an interested party with the right to obtain a court order voiding any agreements or prior court orders that concealed the potential public hazard posed by an individual who had engaged in multiple instances of harassment, discrimination, or retaliation. While that might provide a process for revealing individuals who engage in repeated instances of sexual harassment, it is important to note that its impact could be limited because victims would need to go to court to obtain a release from their nondisclosure agreement.

IV. Conclusion

The two potential amendments that are the subject of this report present potential practical and legal concerns that could significantly limit their effectiveness as tools for identifying workplaces and individuals for whom repeated sexual harassment is a problem. If the General Assembly wishes to pursue legislation to reduce instances of repeated sexual harassment by individuals or in the workplace, it may wish to consider examining one of the alternative approaches identified in this report.

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signed by all parties. For a period of at least seven days following the execution of such agreement, the complainant may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired."); *see also* Appendix 6, N.Y. Civil Practice Laws and Rules § 5003-b.

[25] *See* Appendix 5, N.Y. General Obligation's Law § 5-336 ("Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves sexual harassment, 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 complainant's preference.") ."); *see also* Appendix 6, N.Y. Civil Practice Laws and Rules § 5003-b.

[26] Fl. Stat. § 69.081.

[27] Fl. Stat. § 69.081(4).

[28] Fl. Stat. § 69.081(3).

Appendix 1: 2018 Acts and Resolves No. 183, Sec. 10

Sec. 10. PRIOR HARASSMENT CLAIMS; IDENTIFICATION; RELEASE FROM NONDISCLOSURE AGREEMENT; REPORT

(a) On or before January 15, 2019, the Office of Legislative Council shall submit a written report to the Senate Committee on Economic Development, Housing and General Affairs and the House Committee on General, Housing, and Military Affairs that examines mechanisms to:

(1) provide the Attorney General and the Human Rights Commission with notice of agreements to settle sexual harassment claims that contain a provision that prohibits or restricts the individual who made the claim from disclosing information related to the claim of sexual harassment; and

(2) render provisions of agreements to settle sexual harassment claims that prohibit or restrict the individual who made the claim from disclosing information related to the claim of sexual harassment void and unenforceable if, in relation to a separate claim, the alleged harasser is later adjudicated by a court or tribunal of competent jurisdiction to have engaged in sexual harassment or retaliation in relation to a claim of sexual harassment.

(b) In particular, the report shall:

(1) identify potential mechanism to accomplish the potential changes described in subdivisions (a)(1) and (2) of this section;

(2) review and examine laws and pending legislation in other states that are related to subdivisions (a)(1) and (2) of this section;

(3) identify and examine potential legal issues, advantages, disadvantages, and obstacles to the mechanisms identified; and

(4) identify and examine any alternative mechanisms that would accomplish substantially similar policy outcomes to the potential changes described in subdivisions (a)(1) and (2) of this section.

(c) The Office of Legislative Council shall consult with the Attorney General's Office and the Human Rights Commission when preparing this report.

(d) As used in this section, "information related to the claim of sexual harassment" does not include the specific terms of the related settlement agreement or the amount of any monetary settlement.

Appendix 2: 5 ILCS 430/25-85.

Quarterly Reports by the Legislative Inspector General

Quarterly reports by the Legislative Inspector General. The Legislative Inspector General shall submit quarterly reports of claims within his or her jurisdiction filed with the Office of the Legislative Inspector General to the General Assembly and the Legislative Ethics Commission, on dates determined by the Legislative Ethics Commission, indicating:

(1) the total number of allegations received since the date of the last report and the total number of allegations received since the date of the last report by category of claim;

(2) the total number of investigations initiated since the date of the last report and the total number of investigations initiated since the date of the last report by category of claim;

(3) the total number of investigations concluded since the date of the last report and the total number of investigations concluded since the date of the last report by category of claim;

(4) the total number of investigations pending as of the reporting date and the total number of investigations pending as of the reporting date by category of claim;

(5) the total number of complaints forwarded to the Attorney General since the date of the last report;

(6) the total number of actions filed with the Legislative Ethics Commission since the date of the last report, the total number of actions pending before the Legislative Ethics Commission as of the reporting date, the total number of actions filed with the Legislative Ethics Commission since the date of the last report by category of claim, and the total number of actions pending before the Legislative Ethics Commission as of the reporting date by category of claim;

(7) the number of allegations referred to any law enforcement agency since the date of the last report;

(8) the total number of allegations referred to another investigatory body since the date of the last report; and

(9) the cumulative number of each of the foregoing for the current calendar year.

For the purposes of this Section, "category of claim" shall include discrimination claims, harassment claims, sexual harassment claims, retaliation claims, gift ban claims, prohibited political activity claims, revolving door prohibition claims, and other, miscellaneous, or uncharacterized claims.

The quarterly report shall be available on the website of the Legislative Inspector General.

Appendix 3: 2018 Maryland Acts, ch. 739.

Disclosing Sexual Harassment in the Workplace Act of 2018

Chapter 739

(Senate Bill 1010)

AN ACT concerning

~~Labor and Employment – Sexual Harassment – Contractual Waivers and Reporting Requirements~~
Disclosing Sexual Harassment in the Workplace Act of 2018

FOR the purpose of providing that, except as ~~provided~~ *prohibited* by federal law, a provision in certain employment contracts, policies, or agreements that waive certain rights or remedies to a claim of sexual harassment~~, discrimination,~~ or certain retaliation is null and void as being against the public policy of the State; prohibiting an employer from taking certain adverse actions against certain employees; providing that certain employers are liable for certain attorney's fees; requiring certain employers to submit a certain ~~report~~ survey to the Commission on Civil Rights on or before ~~a~~ certain ~~date~~ *dates* ~~each year~~; requiring employers to submit a certain survey electronically; requiring the Commission to include a certain space in a certain survey for a certain purpose; requiring the Commission to publish and make accessible to the public ~~on the Commission's website certain reports~~ certain information in a certain manner; requiring the Commission to take certain actions related to certain surveys and submit a certain executive summary to the Governor and certain committees of the General Assembly on or before ~~a~~ certain ~~date each year~~ *dates; providing for the termination of certain provisions of this Act*; defining certain terms; providing for the application of this Act; and generally relating to sexual harassment in the workplace.

BY adding to
Article – Labor and Employment
Section 3–715
Annotated Code of Maryland
(2016 Replacement Volume and 2017 Supplement)

~~BY repealing and reenacting, without amendments,~~
~~Article – State Government~~
~~Section 20–101(a) and (b)~~
~~Annotated Code of Maryland~~
~~(2014 Replacement Volume and 2017 Supplement)~~

~~BY adding to~~
~~Article – State Government~~
~~Section 20–208~~
~~Annotated Code of Maryland~~
~~(2014 Replacement Volume and 2017 Supplement)~~

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Labor and Employment

3–715.

(A) ~~(1) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, A~~ EXCEPT AS PROHIBITED BY FEDERAL LAW, A PROVISION IN AN EMPLOYMENT CONTRACT, POLICY, OR AGREEMENT THAT WAIVES ANY ~~FUTURE~~ SUBSTANTIVE OR PROCEDURAL RIGHT OR REMEDY TO A CLAIM THAT ACCRUES IN THE FUTURE OF SEXUAL HARASSMENT~~, DISCRIMINATION,~~ OR RETALIATION FOR REPORTING OR ASSERTING A RIGHT OR REMEDY BASED ON SEXUAL HARASSMENT IS NULL AND VOID AS BEING AGAINST THE PUBLIC POLICY OF THE STATE.

~~(2) PARAGRAPH (1) OF THIS SECTION MAY NOT BE CONSTRUED TO APPLY TO THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT.~~

(B) (1) AN EMPLOYER MAY NOT TAKE ADVERSE ACTION AGAINST AN EMPLOYEE BECAUSE THE EMPLOYEE FAILS OR REFUSES TO ENTER INTO AN AGREEMENT THAT CONTAINS A WAIVER THAT IS VOID UNDER SUBSECTION (A) OF THIS SECTION.

(2) ADVERSE ACTION PROHIBITED UNDER THIS SUBSECTION INCLUDES:

(I) ~~FAILURE TO HIRE;~~

~~(II)~~ DISCHARGE;

~~(III)~~ *(II)* SUSPENSION;

~~(IV)~~ *(III)* DEMOTION;

~~(V)~~ *(IV)* DISCRIMINATION IN THE TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT; OR

~~(VI)~~ *(V)* ANY OTHER RETALIATORY ACTION THAT RESULTS IN A CHANGE TO THE TERMS OR CONDITIONS OF EMPLOYMENT THAT WOULD DISSUADE A REASONABLE EMPLOYEE FROM MAKING A COMPLAINT, BRINGING AN ACTION, OR TESTIFYING IN AN ACTION REGARDING A VIOLATION OF THIS SECTION.

(C) AN EMPLOYER WHO ENFORCES OR ATTEMPTS TO ENFORCE A PROVISION THAT VIOLATES SUBSECTION (A) OF THIS SECTION SHALL BE LIABLE FOR THE EMPLOYEE'S REASONABLE ATTORNEY'S FEES AND COSTS.

~~**Article – State Government**~~

~~**20–101.**~~

~~**(a) In Subtitles 1 through 11 of this title the following words have the meanings indicated.**~~

~~**(b) "Commission" means the Commission on Civil Rights.**~~

~~**20–208.**~~

~~**(A) IN THIS SECTION, "EMPLOYER" MEANS AN EMPLOYER WITH 50 OR MORE EMPLOYEES.**~~

~~**(B) (1) ON OR BEFORE JANUARY JULY 1 EACH YEAR, AN EMPLOYER SHALL SUBMIT A REPORT SHORT SURVEY TO THE COMMISSION ON:**~~

~~**(1) (I) THE NUMBER OF SETTLEMENTS MADE BY OR ON BEHALF OF THE EMPLOYER AFTER AN ALLEGATION OF SEXUAL HARASSMENT BY AN EMPLOYEE;**~~

~~**(2) (II) THE NUMBER OF TIMES THE EMPLOYER HAS PAID A SETTLEMENT TO RESOLVE A SEXUAL HARASSMENT ALLEGATION AGAINST THE SAME EMPLOYEE OVER THE PAST 20 10 YEARS OF EMPLOYMENT; AND**~~

~~**(3) (III) THE NUMBER OF SETTLEMENTS MADE AFTER AN ALLEGATION OF SEXUAL HARASSMENT THAT INCLUDED A PROVISION REQUIRING BOTH PARTIES TO KEEP THE TERMS OF THE SETTLEMENT CONFIDENTIAL.**~~

~~**(2) (I) AN EMPLOYER SHALL SUBMIT THE SURVEY REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION TO THE COMMISSION ELECTRONICALLY.**~~

~~**(II) THE COMMISSION SHALL INCLUDE IN THE SURVEY A SPACE FOR AN EMPLOYER TO REPORT WHETHER THE EMPLOYER TOOK PERSONNEL ACTION AGAINST AN EMPLOYEE WHO WAS THE SUBJECT OF A SETTLEMENT INCLUDED IN THE SURVEY UNDER PARAGRAPH (1)(II) OF THIS SUBSECTION.**~~

~~**(C) (1) THE COMMISSION SHALL PUBLISH AND MAKE ACCESSIBLE TO THE PUBLIC: ON THE COMMISSION'S WEBSITE EACH EMPLOYER'S ANNUAL REPORT REQUIRED UNDER SUBSECTION (B) OF THIS SECTION.**~~

~~(I) BY POSTING ON THE COMMISSION'S WEBSITE, THE AGGREGATE NUMBER OF RESPONSES FROM EMPLOYERS FOR EACH ITEM LISTED UNDER SUBSECTION (B) OF THIS SECTION; AND~~

~~(II) BY RETAINING FOR PUBLIC INSPECTION ON REQUEST, THE RESPONSE FROM A SPECIFIC EMPLOYER REGARDING THE NUMBER OF SETTLEMENTS INCLUDED IN THE SURVEY UNDER SUBSECTION (B)(1)(II) OF THIS SECTION.~~

~~(2) ON OR BEFORE DECEMBER 15 EACH YEAR, THE COMMISSION SHALL:~~

~~(I) REVIEW A RANDOM SELECTION OF SURVEYS SUBMITTED UNDER SUBSECTION (B) OF THIS SECTION;~~

~~(II) CREATE AN EXECUTIVE SUMMARY OF THE RANDOMLY SELECTED SURVEYS, REDACTING ANY IDENTIFYING INFORMATION FOR SPECIFIC EMPLOYERS; AND~~

~~(III) SUBMIT THE EXECUTIVE SUMMARY TO THE GOVERNOR AND, IN ACCORDANCE WITH § 2–1246 OF THIS ARTICLE, THE SENATE FINANCE COMMITTEE AND THE HOUSE ECONOMIC MATTERS COMMITTEE.~~

SECTION 2. AND BE IT FURTHER ENACTED, That:

(a) (1) In this section the following words have the meanings indicated.

(2) "Commission" means the Maryland Commission on Civil Rights.

(3) "Employer" means an employer with 50 or more employees.

(b) (1) On or before July 1, 2020, and on or before July 1, 2022, an employer shall submit a short survey to the Commission on:

(i) the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee;

(ii) the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and

(iii) the number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential.

(2) (i) An employer shall submit the survey required under paragraph (1) of this subsection to the Commission electronically.

(ii) The Commission shall include in the survey a space for an employer to report whether the employer took personnel action against an employee who was the subject of a settlement included in the survey under paragraph (1)(ii) of this subsection.

(c) (1) The Commission shall publish and make accessible to the public:

(i) by posting on the Commission's website, the aggregate number of responses from employers for each item listed under subsection (b) of this section; and

(ii) by retaining for public inspection on request, the response from a specific employer regarding the number of settlements included in the survey under subsection (b)(1)(ii) of this section.

(2) On or before December 15, 2020, and on or before December 15, 2022, the Commission shall:

(i) review a random selection of surveys submitted under subsection (b) of this section;

(ii) create an executive summary of the randomly selected surveys, redacting any identifying information for specific employers; and

(iii) submit the executive summary to the Governor and, in accordance with § 2–1246 of the State Government Article, the Senate Finance Committee and the House Economic Matters Committee.

SECTION ~~2.~~ *3.* AND BE IT FURTHER ENACTED, That this Act shall apply to any employment contract, policy, or agreement executed, implicitly or explicitly extended, or renewed on or after the effective date of this Act.

SECTION ~~3.~~ *4.* AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2018. *Section 2 of this Act shall remain effective for a period of 4 years and 9 months and, at the end of June 30, 2023, Section 2 of this Act, with no further action required by the General Assembly, shall be abrogated and of no further force and effect.*

Approved by the Governor, May 15, 2018.

Appendix 4: 29 U.S.C. § 626.

Record Keeping, Investigation, and Enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion; unlawful practice

(1) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(A) within 180 days after the alleged unlawful practice occurred; or

(B) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

(2) Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this chapter, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Appendix 5: N.Y. General Obligations Law § 5-336.

Nondisclosure agreements

Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves sexual harassment, 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 complainant's preference. Any such term or condition must be provided to all parties, and the complainant shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the complainant's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the complainant may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

Appendix 6: N.Y. Civil Practice Laws and Rules § 5003-b.

Nondisclosure agreements

Notwithstanding any other law to the contrary, for any claim or cause of action, whether arising under common law, equity, or any provision of law, the factual foundation for which involves sexual harassment, in resolving, by agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance or otherwise, 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. Any such term or condition must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the plaintiff may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

Appendix 7: Fl. Stat. § 69.081.

Sunshine in Litigation; Concealment of Public Hazards Prohibited

(1) This section may be cited as the "Sunshine in Litigation Act."

(2) As used in this section, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.

(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

(8)(a) Any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced. Any person has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this subsection by motion in the court that entered such order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(b) Any person having custody of any document, record, contract, or agreement relating to any settlement as set forth in this section shall maintain said public records in compliance with chapter 119.

(c) Failure of any custodian to disclose and provide any document, record, contract, or agreement as set forth in this section shall be subject to the sanctions as set forth in chapter 119.

This subsection does not apply to trade secrets protected pursuant to chapter 688, proprietary confidential business information, or other information that is confidential under state or federal law.

(9) A governmental entity, except a municipality or county, that settles a claim in tort which requires the expenditure of public funds in excess of $5,000, shall provide notice, in accordance with the provisions of chapter 50, of such settlement, in the county in which the claim arose, within 60 days of entering into such settlement; provided that no notice shall be required if the settlement has been approved by a court of competent jurisdiction.