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# R-E-S-P-E-C-T: The Impact of the #MeToo Movement on the Entertainment Business and Its Law, Including Tips to Improve Corporate Culture

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## Abstract

This article examines some important legal developments, as well as corporate strategies, that have occurred as a result of recent movements initiated by U.S. workers, such as #MeToo, Time's Up, and others. It also includes a RESPECT checklist of business strategies to assist in improving corporate culture and climate.

Keywords: #MeToo movement, cultural movements, corporate culture, entertainment business culture, employment disputes, contract law, confidentiality provisions, non-disclosure agreements, alternative dispute resolution, gender pay disparity, corporate best practices

## Introduction

Power imbalances between the sexes have always existed in the world of business, and specifically, it appears to be a discrepancy often encountered in the entertainment industry. From pay disparity to diversity issues to discrimination and more, the entertainment industry has created a workplace culture that has impacted individuals differently. Although visibility and transparency have been the hallmark of entertainers as they seek to increase their fandom, such has not always existed in their business relationships…until recently.

In the business world, whether entertainment or otherwise, the horrific experiences recently disclosed by both women and men negatively impacted have been numerous, the wrongs extensive, and the healing slow. Although the stories vary, many times the victims were weaker in

authority or influence while many of the wrongdoers, from comedian Bill Cosby[1] to sports physician Larry Nassar[2], were (and are) more powerful and well-known. While all of these incidents deserve attention, the reports offered by the *New York Times* and *New Yorker* in 2017 about Harvey Weinstein served as the momentum to inspire a movement.[3] This awareness campaign is often referred to as the #MeToo movement. A few days after the Weinstein reports were released, on October 15, 2017, Alyssa Milano, an American actress, producer, singer, and now activist,[4] tweeted:

> "Me too."
>
> Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' As a status, we might give people a sense of the magnitude of the problem."
>
> If you've been sexually harassed or assaulted, write 'metoo' as a reply to this tweet. (@Alyssa_Milano, October 15, 2017)

Within a 24-hour span, the hashtag "#MeToo" was tweeted nearly half a million times.[5] "Unlike many kinds of social media activism, it isn't a call to action or the beginning of a campaign, culminating in a series of protests and speeches and events. It's simply an attempt to get people to understand the prevalence of sexual harassment and assault in society. To get women, and men, to raise their hands."[6] This movement proved that harassment, unfortunately, is not rare or even uncommon.

Soon it was discovered that the #MeToo movement pre-existed that famous Alyssa Milano tweet, although she had no knowledge of it at the time. The phrase was originally created by Tarana Burke in 2006 when she founded a nonprofit organization to assist victims of sexual harassment and assault.[7] She developed the motto "Me Too" as a way to build a bridge and amplify the voice of the victim.[8] Through her movement, she sought empowerment through empathy.[9] Soon, Tarana Burke's "Me Too" movement was tied together with Alyssa Milano's #MeToo movement as Burke tweeted: "It's beyond a hashtag. It's the start of a larger conversation and a movement for radical community healing. Join us. #metoo."

What began with a focus on healing for the survivor[10] soon transformed into a powerful social experience the world has rarely seen. On January 1, 2018, as a complement to the #MeToo movement, the Time's Up campaign was officially introduced to the world.[11] It was started by more than three hundred women in entertainment, including celebrities Ashley Judd, Eva Longoria, and Jurnee Smollett.[12] It shares a similar vision with the #MeToo movement but appears to provide the next step as a "solution-based, action-oriented" program.[13] Some of its pledges are to change culture "so harassment and inequality are no longer tolerated," change companies "so work is safe and equitable, everywhere," and change laws and policies "so our rights are protected and expanded."[14] "TIME'S UP insists upon a world where work is safe, fair, and dignified for women of all kinds…Governments, businesses, and individuals all benefit from a world free from violence, discrimination, and barriers that hold women back. By working together, we can increase women's power and influence and ensure everyone has an equal chance to succeed at work."[15] In sum, their focus is on workplace issues, including fairness, safety, and equity in the workplace.[16]

Because these movements have shown that no one is alone in their situation by the sheer number of social media responses, if nothing else, many of those who have suffered feel comfortable sharing their stories. There is power and strength, both literally and figuratively, in numbers. At issue for all involved are accountability and transparency shown by legal, corporate, and cultural reforms instituted in response to these very powerful societal movements.

## Background

Numerous accusations of sexual assault perpetrated by entertainment industry executive Harvey Weinstein served as the impetus to the #MeToo movement.[17] As a result, the disgraced media mogul and his now bankrupt company (The Weinstein Company), once one of the largest independent film studios in the United States, have faced various demands from his alleged victims, as well as civil and criminal lawsuits.[18] One of Weinstein's victims, Zelda Perkins, came forward recently to share her story. In the 1990s, while employed by Miramax, she and other employees suffered harassment inflicted on them by Mr. Weinstein.[19] In 1998, in the course of a negotiated settlement, she signed a settlement agreement whereby Mr. Weinstein and Miramax pledged that Weinstein would undergo therapy

and that proper human resource complaints procedures would be created by Miramax, and in return for those promises, she agreed not to disclose the terms of the agreement.[20] During her recent speech to the British Parliament, she explained how "demoralizing" the three days of intense negotiations were for her.[21] Pursuant to the terms of the non-disclosure agreement, she stated that she was not allowed to speak to anyone about her experiences with Weinstein.[22] In fact, she could not even speak to medical professionals about the interactions unless they too signed a non-disclosure agreement.[23] In describing her situation, she stated that she was not even "allowed to hold" the non-disclosure agreement,[24] and she believed that she would go to jail if she breached any terms of the agreement.[25] Summing up this time in her life, Zelda Perkins believes that "her career in film was permanently damaged by her departure from Miramax."[26] She is not alone.

Zelda Perkins' recall of the events surrounding her execution of the non-disclosure agreement (NDA) has opened the floodgates for victims to re-visit, if only verbally and emotionally, their decisions related to workplace wrongs, including many in the entertainment industry. As described by Melissa Silverstein, founder and publisher of *Women in Hollywood*, "Perkins was the first one to break the system of NDAs Harvey Weinstein used to keep women silent."[27] The Weinstein story, among so many others, has served to highlight areas of the law whereby powerful individuals and institutions can silence reports of wrongdoing, as it is often accomplished outside of the courtroom.

## Alternative Dispute Resolution and the Creation of Secret Contracts

Resolution of matters outside the courtroom is not new to American jurisprudence. In 1984, Chief Justice Warren Burger reminded society that we should look for options other than litigation:

> The entire legal profession, lawyers, judges, law teachers…has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be 'healers of conflict.' For many claims, trial by adversarial contest must go the way of the ancient trial by battle and blood. Our system is too costly, too lengthy, too destructive, and too inefficient for a civilized people.[28]

Although the legal industry continues to grow rapidly, the resolution of matters by trial has, as intimated by Chief Justice Burger, undergone a sharp decline. One current trend in jurisprudence and business is the utilization of formal or informal processes to resolve disputes by means other than trial—in other words, alternative dispute resolution. The law, in fact, promotes private settlement of disputes. The utilization of alternative dispute resolution, such as mediation, arbitration, and negotiation, has been extolled as the most expeditious way to offset the high cost of litigation—both economically and emotionally. Contrary to its label, alternative dispute resolution is no longer an alternative or substitute method of resolution. Alternative dispute resolution has become the most desired solution to legal conflict in the United States.[29]

## Employment Disputes: Settlements Contracts Containing Confidentiality Provisions

When a dispute arises, an agreed-upon resolution (in other words, negotiation) between the parties, in many instances, provides the best result. In such cases, it allows the parties to focus on the issues most important to them and resolve the matter pursuant to their wishes rather than as determined by an outsider—the court. It is not unusual for settlement agreements to contain some sort of confidentiality provision, such as a confidentiality condition forbidding the parties from disclosing any details about the settlement or any of the facts that led up to the settlement.[30] In some instances, there may even be reservations for disclosures to the employee's spouse, attorneys, or tax advisors.[31] Furthermore, the consequences for failing to keep the terms of such agreements confidential can be very severe.[32]

These types of provisions, whether defined as a confidentiality clause, non-disclosure clause, or something else, have long been used to settle sexual harassment and similar claims, giving the victim a confidential way to quietly seek financial recourse from the other party while providing protection to the employer and/or the accused party. Even though it is unlawful for any settlement agreement in an employment case to prohibit employees from filing charges with or assisting the Equal Employment Opportunity Commission in its investigations under Title VII of the Civil Rights Act, confidentiality provisions remain a material part of most settlement agreements.[33]

While these confidentiality provisions give the aggrieved party the opportunity to put the matter behind them and allow businesses the ability to avoid negative publicity resulting from non-meritorious claims in many instances,[34] they also prevent important information about the situation to be shared with others, which may make other victims or potential victims more susceptible to the same kind of treatment. Such provisions may also directly or indirectly promote a culture of silence allowing the individual perpetrators to avoid accountability in some cases.[35] The secrecy surrounding these agreements may also allow companies and wrongdoers to avoid reporting these issues to shareholders and regulators.[36] According to a report by the *New York Times,* in the case of Harvey Weinstein, he "enforced a code of silence; employees of the Weinstein company have contracts saying they will not criticize it or its leaders in a way that could harm its 'business reputation' or 'any employee's personal reputation,'" as well as requiring most of the women who accepted payouts to enter into confidentiality clauses.[37] As privacy, confidentiality, and secret settlements have become the hallmark of these agreed-upon resolutions, what happens when the resolutions reached in private result in the cover-up of reckless, wrongful, or even criminal behavior?

## Employment Contracts: Non-disclosure Agreements Created in Consideration of Hiring

Apart from confidentiality provisions that are often included in the settlement of a claim, employers frequently require their employees to execute non-disclosure or non-disparagement agreements in consideration of hiring.[38] *Black's Law Dictionary* defines a non-disclosure agreement as a contract or contractual provision containing a person's promise not to disclose any information shared by or discovered from a holder of confidential information, including all information about trade secrets, procedures, or other internal or proprietary matters.[39] It further defines a nondisparagement clause as a contractual provision prohibiting the parties from publicly communicating anything negative about each other.[40] These types of pre-employment contracts or provisions are important, as businesses have a legitimate business interest in protecting their trade secrets and other proprietary information. In fact, these provisions are "prevalent in the entertainment industry where salacious details about the private lives of public figures can easily be sold to tabloids for a significant profit."[41] While there are important business reasons to employ non-disclosure

agreements, we must be mindful when these agreements seek to obscure future bad acts and protect bad actors.

## Secret Contracts in the Entertainment Industry

As shown by the experiences of Zelda Perkins and many others, no matter the type of contract entered into by the employer and employee, revelations about the abuse and misuse of confidentiality provisions have initiated a conversation about whether these types of clauses and contracts are valid or contrary to the law; and if not contrary to law, at least, incompatible to our moral code. Accordingly, as our society bears witness to so many accounts of mistreatment, we should not only consider the legal concerns related to these contractual provisions, but we should also examine our ethical responses.

## Contract Law: Common Law

It is a well-founded principle of American jurisprudence that private parties have the freedom to contract as they desire. When testing the validity of a contract, including those that require secrecy, courts generally rely on common law, whereby valid contracts should "be reasonable and negotiated between two equal parties."[42] In sum, "the formation of any contract requires that legally capable parties mutually assent to the terms of the contract and that consideration be present. Mutual assent is a meeting of the minds of the parties on all essential terms of the contract."[43] Accordingly, based upon the idea that parties have the freedom to contract if based on a legal purpose, courts generally will not interfere.[44] Some exceptions have been carved out based on public policy[45] or contract defenses, [46] such as fraud, misrepresentation, unconscionability,[47] duress,[48] etc.

Duress and unconscionability are similar to and often intersect with public policy defenses.[49] When faced with a public policy defense and invalidation of a contract or provision, courts generally review based on two avenues of reasoning: "(1) the understanding, bolstered by the principle relating to the dignity of the legal system, that the party seeking relief on this basis did not commit any fault, and (2) that a court's refusal to allow such unconscionable contracts or terms discourages their formation and use, which eventually benefits public welfare and advances public policy."[50] Furthermore, a promise or provision is unenforceable on the grounds of public policy if legislation provides that it is unenforceable

or if, when the facts are weighed, the public policy reasons outweigh enforcement of the terms.[51]

Whether it is truly the desire of the parties to keep matters secret or whether there are deficiencies and inequalities in the bargaining process which, in fact, keep the matters hidden, defenses under the common law are available to test the formation and/or validity of the contract. However, in light of recent events, including the #MeToo movement, several states have created specific statutes which also deal with the enforceability of these types of agreements. Some focus on settlement contracts, entered into to resolve employment disputes, that contain confidentiality provisions (see Appendix 1); while others focus on non-disclosure agreements created in consideration of hiring and included in employment contracts (see Appendix 2).

Although contract law and recent legislation are mostly based in state law, there has also been some activity related to settlements at the federal level. With the 2017 amendment to the Tax Cuts and Job Act, employers now face greater expense in resolving claims if the settlement involves non-disclosure obligations.[52] The amendment now states that "no deduction shall be allowed under this chapter for any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a non-disclosure agreement…"[53] The law also prohibits deduction of any "attorney's fees related to such a settlement or payment."[54] Accordingly, no matter the applicable state law, all employers should be mindful of this federal law as certain deductions are no longer allowed.

## Arbitration

In addition to the resolution of claims or demands by way of a negotiated or mediated settlement agreement, another form of alternative dispute resolution is arbitration. Arbitration is a dispute resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.[55] The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.[56] Parties in arbitration generally forfeit certain constitutional and civil procedure protections[57] since the process occurs outside the state or federal court system, but gain a much quicker resolution with generally less costs and expenses. Subject matter disputes for employment

arbitration may include such things as discrimination, breach of contract, defamation, business torts, or personal injury.[58]

Even though arbitration has traditionally been used as a means of resolving disputes concerning specialized and/or technical issues, there has been a growth of arbitration in the employment realm over the last thirty years.[59] Claims brought to the Supreme Court show that employers often require arbitration in various ways, such as by employee handbooks and applications.[60] It is estimated that over sixty million private sector, non-union U.S. employees operate under mandatory arbitration provisions.[61] Since 2010, according to the Employee Rights Advocacy Institute for Law and Policy, eighty percent of the largest domestic American companies as ranked by *Fortune* magazine use arbitration agreements to resolve workplace disputes and more than one half of the companies appear to have forced arbitration clauses where "workers did not have a meaningful choice to accept or reject the arbitration clause."[62] As such, there are times when agreements to arbitrate are unilaterally imposed by employers on employees who have little choice but to agree, and, in such cases, meaningful consent is not obtained.[63] For some, arbitration is an "expeditious and economical alternative to litigation," while others contend that arbitration clauses create "one-sided arrangements that deny consumers and employees advantages afforded by a judicial proceeding."[64]

## Federal Arbitration Act[65]

As arbitration is consistently well-received by common law, it has also achieved approval in statutory schemes. The Federal Arbitration Act ("FAA") was enacted in 1925 in response to widespread judicial hostility to agreements requiring arbitration,[66] and to replace judicial indisposition to arbitration with a "national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts."[67] The enactment of the new law "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[68] The FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution."[69]

In response to the #MeToo movement, the correlation between heavily utilized mandatory arbitration provisions in the employment realm and sexual harassment claims has also gained a lot of attention. On February 19, 2017, Susan Fowler wrote a now famous blog post entitled *Reflecting*

*On One Very, Very Strange Year At Uber.*[70] In it, she reflected on her tenure at Uber, which began in 2015 when she was employed as a site reliability engineer.[71] The blog entry sets out many of her and other women's day-to-day challenges which, in summary, can best be described as overt "sexism within the organization."[72] In the amicus curiae brief she filed in *Epic Systems Corp. v. Lewis,*[73] Ms. Fowler described the standard contract she signed, along with all other employees of Uber, that contained an arbitration agreement with a class action waiver. She also explained that other technology companies such as Facebook and Google require the same sort of arbitration agreements. Fowler believes that "forced arbitration is kind of a legal loophole that these companies could use—companies like Uber—to cover up illegal behavior."[74] Ultimately, "forced arbitration ends up covering up all these underlying behaviors because they just get funneled through this very carefully crafted legal pipeline. You get pushed into this forced arbitration, you get an NDA, you can never talk about what happened to you. This covers up all these really bad instances of harassment that then becomes systemic. If you have more transparency you can catch the problems in your company way more quickly."[75]

Even though the #MeToo campaign was in full swing and looking for ways that employees could be protected, in 2018 the Supreme Court issued somewhat of a blow to the movement's momentum by consolidating three employment arbitration cases—*Epic Systems Corp. v. Lewis,*[76] *Ernst & Young v. Morris,*[77] and *Murphy Oil USA, Inc. v. NLRB,*[78]—and determining that the FAA's requirement that arbitration agreements should be enforced as written could not be impacted by the National Labor Relations Act's guaranty to class and collective action procedures. Specifically, it addressed the question of "whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the FAA, notwithstanding the provisions of the National Labor Relations Act."[79] The Supreme Court, in a five-to-four decision, held that employees who entered into contracts with employers providing for individualized arbitration proceedings to resolve employment disputes between the parties were not entitled to litigate Fair Labor Standards Act or related state-law claims through class or collective actions in federal court.[80] In 2019, the Supreme Court issued another historic decision regarding arbitration in the case of *New Prime, Inc. v. Oliveira*.[81] This time, the Court "reasoned that before a court could invoke the power of the

FAA to send a dispute to an arbitrator, a court must first assess whether the FAA applies to the particular contract."[82] The Supreme Court ruled that there was no power under the FAA to compel arbitration of the defendant's claim, as the FAA was not applicable to contracts of transportation workers.[83] Whether the Supreme Court's decision in *New Prime* is reflective of "current sociopolitical movements" with a view to a more "restrained interpretative approach"[84] of arbitration cases, or whether the decision and its reasoning is more limited in scope is not yet known.

Even in light of the *New Prime* decision, many scholars suggest that, based on the numerous pro-arbitration cases decided by the United States Supreme Court, they have misjudged the FAA and interpreted its directives too broadly. In support of the #MeToo movement, many advocates argue that mandatory arbitration clauses shield wrongdoers from the public scrutiny provided by an open and transparent court system. Many are demanding that the FAA be modified to address this problem. In February 2018, attorneys general for every state, Washington D.C., and five United States territories sent an open letter to the U.S. Congress seeking an end to mandatory arbitration in sexual harassment claims, stating that "[e]nding mandatory arbitration of sexual harassment claims would help put a stop to the culture of silence that protects perpetrators at the cost of their victims."[85]

Shortly thereafter, during the 116th Congress, the Forced Arbitration Injustice Repeal (FAIR) Act was introduced.[86] This bill would generally prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration for an employment, consumer, antitrust, or civil rights dispute.[87] Accordingly, among other things, the FAIR Act would prohibit agreements from making the arbitration of employment claims mandatory. The bill was passed by the House of Representatives on September 20, 2019.[88] In the Senate, it has been referred to the Committee on the Judiciary where at the time of this writing, it remains pending.[89]

In the meantime, several states have stepped in and proposed and/or enacted legislation prohibiting mandatory arbitration of sexual harassment claims (see Appendix 3). Challenges to these state statutes have resulted and will continue, as many legal specialists believe that such state laws are preempted by the FAA.[90] The Supremacy Clause of the U.S. Constitution establishes that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[91]

In addition to the Supremacy Clause, the principle of federalism[92] dictates preemption. Generally, where federal and state laws conflict, the state law is usually displaced, leaving it without effect.[93] The U.S. Supreme Court has held that state laws related to the validity, revocability, and enforceability of arbitration contracts are enforceable.[94] Each of our fifty state courts have laws related to arbitration, such as "arbitrator qualifications, arbitrator disclosures, ethics, and process requirements—hearing location, consolidation of arbitrations, notice and the like."[95] However, any state laws that seek to interfere with arbitration in other ways are likely preempted by the federal act.[96] Accordingly, it is expected that many of the new state arbitration laws will be challenged by employers, especially for those that conflict with federal laws.

## Gender Pay Disparity

Gender pay disparity is another hotly debated issue encountered in business, and the entertainment industry has been no exception, as has been brought to light in recent years. *The Daily Beast* reported that *American Hustle* stars Amy Adams and Jennifer Lawrence worked about the same amount of time on the film as did their male counterparts, Christian Bale and Bradley Cooper, but only earned $1.25 million and seven percent of the profits, while the men earned $2.5 million each and nine percent of the profits.[97] Although her male counterparts were "commended for being fierce and tactical" in their negotiations, when Jennifer Lawrence sought to do the same, she was viewed by some as a "spoiled brat," and in response, she penned a strongly worded essay about pay inequality.[98] Jennifer Lawrence is not alone in her grievances. While accepting her Oscar in 2015 for best supporting actress, Patricia Arquette concluded her speech with these powerful words: "To every woman who gave birth, to every taxpayer and citizen of this nation, we have fought for everybody's equal rights. It's time to have wage equality once and for all. And equal rights for women in the United States of America."[99]

Pay disparity has been discussed for many years, and some laws have even been enacted to address it. Title VII of the Civil Rights Act of 1964 is the paramount federal anti-discrimination law that provides specific protections against pay discrimination.[100] It bans discrimination on the basis of race, color, national origin, sex, or religion in hiring, firing, terms, and conditions of employment and "compensation."[101] Title VII has been limited in its ability to provide redress for discriminatory pay policies by

narrow court interpretations, including strict requirements for evidence.[102] A year earlier, in 1963, U.S. President John Kennedy signed the Equal Pay Act.[103] Under the Equal Pay Act, an employer cannot pay men and women different wages for the same or similar job unless this disparity is based on: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[104] Wages "can include more than just hourly or annual pay," and can include alternative forms of compensation such as "bonuses, company cars, expense accounts, insurance, etc."[105] The Equal Pay Act provides for recovery of two or three years (if the violation is willful) of back wages and liquidated or double damages of an amount equal to the back wages, as well as reimbursement of attorney fees and costs.[106] "Any violation of the Equal Pay Act is also a violation of Title VII."[107] Due to the language of the statute and the related court interpretations, the Equal Pay Act "usually reaches only the most overt and narrow forms of gender pay discrimination."[108]

Even after passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act, the reality is that the United States, according to some research, still maintains a pay gap of approximately 20% between men and women,[109] although there may exist some nondiscriminatory reasons for such a gap, such as taking a break from a career to have children or seeking lower paid positions to offer more flexibility in managing a family. According to the Gender Pay Gap Report for 2020, the uncontrolled gender pay gap, which compares the median salary for all men and women regardless of job type or worker seniority (without controlling various compensable factors), shows that women make only $0.81 for every dollar a man makes; and, the controlled gender pay gap, which controls for job title, years of experience, industry, location, and other compensable factors, shows that women make $0.98 for every $1.00 a man makes.[110] Another group of economists found a 13.5% difference when industry, occupation, and work hours were controlled to model "a man and woman with identical education and years of experience working side-by-side in cubicles."[111] In fact, as of 2015, the gender pay gap for higher-earning women (those who earned wages in the top tenth percentile of earnings) showed they earned $0.92 for every $1.00 earned by men.[112]

In a recent study, the wages of 246 male and female actors featured in 1,343 films between 1980 and 2015 were analyzed by economists Sofia Izquierdo Sanchez (Huddersfield University), John S. Heywood (Univer-

sity of Wisconsin-Milwaukee), and Maria Navarro Paniagua (Lancaster University).[113] According to *The Guardian*, "The gap has been quite persistent," Izquierdo Sanchez said. "It [was] almost the same in 2015 as it was in 1980. It [did not] show any signs of improving."[114] The economists factored in several variables, including a star's past success based on box-office receipts, awards won, and popularity on Twitter. When these factors were stripped out, it showed that female stars were paid 56% less than their male counterparts – the equivalent of $2.2 million less per film.[115]

There had been little federal legislative activity related to pay inequity since the 1960s until the Lilly Ledbetter Fair Pay Act of 2009.[116] This law effectively overturned the decision of the Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[117] a decision which "severely restricted the time period for filing complaints of employment discrimination concerning compensation."[118] "The Ledbetter Act recognizes the 'reality of wage discrimination' and restores 'bedrock principles of American law,'" including allowing for each paycheck that contains discriminatory compensation to be considered a separate violation, as well as allowing workers to challenge a variety of discriminatory compensation practices, such as "employer decisions about base pay or wages, job classifications, career ladder or other noncompetitive promotion denials, tenure denials, and failure to respond to requests for raises."[119]

In 2016, there were changes proposed to the Employer Information Report EEO-1 that would require employers with one hundred or more employees to report pay data for all employees, rather than just certain demographic information that the report had historically required.[120] The goal of the enhanced reporting requirements was to facilitate greater pay transparency, both to help enforcement agencies spot trends in pay disparities among industries for targeted enforcement and to facilitate greater voluntary employer compliance with equal pay laws.[121] According to the 2020 court order in the matter of *National Women's Law Center, et al., v. Office of Management and Budget, et al.*,[122] the EEOC's EEO-1 Component 2 "pay data" collection for 2017 and 2018 is now complete.[123]

The Paycheck Fairness Act was passed by the House of Representatives in early 2019.[124] If enacted into law, "[i]t [will] amend equal pay provisions of the Fair Labor Standards Act of 1938 to (1) restrict the use of the bona fide factor defense to wage discrimination claims, (2) enhance nonretaliation prohibitions, (3) make it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information

about the employee's wages, and (4) increase civil penalties for violations of equal pay provisions."[125] At this time, the bill remains unpassed, despite its introduction in every Congressional session since 1997.[126]

Recognizing the significance of pay equity, several states have passed laws seeking to protect and guard against pay inequality, for example:

> Massachusetts, the first state in the U.S. to pass an equal pay act in 1945,[127] updated its law to become effective on July 1, 2018.[128] Under the law, no employer shall discriminate in any way on the basis of gender in the payment of wages.[129] Among other things, it permits employees to discuss their salaries with co-workers, prohibits employers from requiring applicants to provide their salary history during the interviewing process, and significantly broadens the definition of "comparable work" by removing the previous judicial requirement that comparable work must entail comparable duties.[130] By updating its law, the state hopes to ensure that everyone has the "opportunity to earn a competitive salary for comparable work."[131]

> In 2018, New Jersey enacted the Diane B. Allen Equal Pay Act (DAEPA), which amended the New Jersey Law Against Discrimination (NJLAD), to make it unlawful to discriminate in compensation decisions.[132] Effective July 1, 2018, DAEPA allows complainants to recover damages for up to six years of unequal pay.[133] Additionally, complainants can recover up to three times their actual monetary damages.[134]

Additionally, some U.S. states and territories, such as Alabama, California, Colorado (effective January 1, 2021), Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Puerto Rico, Vermont, and Washington, have expanded employee protections by prohibiting employers from soliciting historical pay data during the preemployment process.[135] Other states, including California and New York, have enacted laws that alter how equal pay claims are analyzed.[136] Current anti-discrimination laws and related court interpretations have

failed to fully close the gender pay gap;[137] thus, it is crucial to improve these laws to effectively do so.

## Business Response: RESPECT

Although government should continue to react and respond to the challenges highlighted by these societal movements, no single policy or law is, or can be, sufficient to address all of society's inequalities. All forms of workplace discrimination affect the victims as they suffer, in many cases, immeasurable costs—emotional, physical and financial.[138] Workplace discrimination also affects all workers, even though the damages may not be as personal or direct as those faced by the victims of it. Workplace discrimination, in turn, also impacts employers as there is "decreased productivity, increased turnover, and reputational harm,"[139] among many other costs—both quantifiable[140] and unquantifiable. Thanks to the messages of many victims and the social media outlets that shared their stories, these workplace issues can no longer be swept under the proverbial rug.

When focusing only on law and legislation, it seems that there is one thing missing—respect. Respect, as defined by Merriam-Webster, is "to consider worthy of high regard—ESTEEM." Delving further, esteem is defined as "to set a high value on: regard highly and prize accordingly." It is this author's opinion that rules and regulations cannot replace respect, nor can they replace reasonable business decisions, hence, it is important for all companies to respond to, and participate in, the current and dynamic movements which began with #MeToo and Time's Up.

Many companies, understanding that there are compelling business reasons to improve their corporate culture, have responded positively. Shortly after the movements began, in 2017, Microsoft dispensed with arbitration agreements in employee contracts for sexual harassment claims.[141] Soon, other companies such as Google,[142] Facebook,[143] and Uber[144] followed suit. Wells Fargo recently announced its decision to halt the use of mandatory arbitration in any sexual harassment claim.[145] Based on the Wells Fargo news releases, the firm has "taken many steps to create and maintain a workplace environment that promotes and protects the safety and well-being of our employees."[146]

Businesses that want to do more than just react, must respect the workplace by continually working to create and maintain a positive corporate culture. As companies work to be transparent in this process, employ-

ee confidence will improve. The following sets forth a list of best practices that are critical for every business to employ as they are attentive to and conscious of their corporate climate. It all begins with R-E-S-P-E-C-T… (Can you not hear Aretha Franklin singing her signature song?)

### 1. R – Review the Laws

Of course, businesses should monitor their compliance with the various laws of the jurisdictions in which they operate and focus on improvements to their culture, policies, and procedures through coordination with the law. Compliance with the ever-changing state and federal mandates is essential. Such compliance could become overwhelming as companies operate in various jurisdictions with various and contrary laws, as discussed herein. Accordingly, a systematic approach must be employed.

### 2. E – Evaluate the Corporate Culture

Evaluation of the corporate climate begins with a review of the value placed on a positive and harassment-free workplace. In its 2016 report entitled *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* (hereinafter the "EEOC Task Force"), the EEOC Task Force, in an attempt to "reboot workplace harassment prevention efforts,"[147] sought to gain insights on how to prevent workplace harassment. The EEOC Task Force found that workplace culture has the "greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated."[148]

It is corporate leadership and accountability that creates the corporate culture.[149] The "tone at the top" must be evaluated to make sure that core values are being effectively communicated to all.[150] As such, many opportunities exist to create and show the importance of a positive culture, such as getting the employees involved, getting the board of directors involved, and just listening.[151]

Additionally, outside sources can drive this review. Implementation of goals and directives can be a starting point. As of 2019, only 20.4% of the board seats of Russell 3000 Index companies (the largest U.S. traded stocks, representing 98% of all incorporated equity securities in the United States) were filled by women.[152] The 2020 Women on Boards initiative is "a global education, public awareness and advocacy campaign urging corporations to meet or exceed 20% women directors on their boards by the year 2020." Another initiative by the motion picture industry called

"50/50 by 2020" is hoping to create "equity in Hollywood."[153] Further, the Academy of Motion Picture Arts and Sciences and the Producers Guild of America have adopted codes of conduct emphasizing the "values of respect for human dignity, inclusion, and a supportive environment that fosters creativity" as they set forth their opposition "to any form of abuse, harassment, or discrimination on the basis of gender, sexual orientation, race, ethnicity, disability, age, religion, or nationality," and have developed a process through which claims may be brought in order to determine whether membership status should be revoked.[154] These and other initiatives are making strides to increase awareness that all should be treated fairly and equitably, including women in entertainment, the C-suite, and at board level leadership.

### 3. S – Set Clear Corporate Policies

Well-written corporate policies should mirror and support the corporate culture by setting forth behaviors that are and are not acceptable.[155] They should be crafted to help employees understand and comply with company expectations, help prevent problems that may result, and limit liability should an issue occur.[156] Review and/or creation of policies that relate to workplace behavior should be included, such as those that address relationships, travel, hiring, and promotions.[157] Several states, including New York[158] and Washington,[159] have established laws that require certain state departments to establish best practices that can be utilized by corporations.

In particular, an anti-harassment policy is critical, as it defines specific conduct that is barred.[160] It should certainly describe and proscribe conduct that is illegal—offensive, unwanted conduct based on race, color, religion, sex, national origin, age, disability, genetic information, and any other classification protected by law, which is either made a condition of continued employment ["quid pro quo"] or is severe or pervasive enough to create a hostile work environment. It should also describe and prohibit conduct that has the potential to become illegal.[161]

The reporting of bad behavior is likewise essential, and the policy should set out a clear process for reporting, including the person or persons to report to[162] and the form to be utilized in the reporting. Additionally, "bystander involvement and witness reporting," even when anonymous, should be part of the process, and as a result, it should be unequivocal that there will be no retaliation against any person for reporting any conduct that is concerning.[163]

By way of example, the Purple Campaign is working to build a "broad coalition of diverse stakeholders to work together to implement stronger corporate policies" to, among other things, establish policy standards and shared norms, effective training programs, internal reporting systems, and fair investigative procedures.[164] Many businesses are partnering with this campaign, including Amazon, Airbnb, Expedia, and Uber.[165] All of these public efforts seem to be working as evidenced by a survey conducted by Challenger, Gray & Christmas, Inc., which found that fifty-two percent of the companies surveyed eight months after the start of the #MeToo movement reported that they were reviewing their sexual harassment policies; and, fifty-eight percent of those companies stated that they had already updated these policies.[166] Aimed at bettering the American workplace, these types of organizations focus on collaboration between employers and employees not only to self-police against bad behavior in the workplace, but also to focus on positive preventative action.

### 4. P – Plan the Corporate Investigation Process and Discipline

Once a claim of any sort is raised, it is necessary to have a detailed and transparent investigation process. As part of that process, there should be a clear and fair procedure that protects the parties;[167] properly trains fact finders[168] who are not only neutral, but who are also perceived to be neutral; and maintains accurate records.[169] Confidentiality should be maintained, if at all possible.[170] Additionally, immediate action to investigate potential wrongdoing is imperative.[171] It is significant to note that this proceeding is neither criminal nor civil, thus the objective is not to determine whether any law has been violated but instead to determine if any company policy has been violated and whether the employee's conduct is deemed unacceptable pursuant to the company's guidelines.[172] Above all, when confronted with a complaint, the employer should conduct "a good-faith investigation—one that is prompt, thorough, and impartial."[173] Making certain that the process is fair to the accused is also of great import and "contributes to all employees' faith in the system."[174] In addition, it is essential, once harassment has been determined, to impose discipline that is "prompt, consistent, and proportionate to the severity of the harassment."[175] The discipline may take many forms, from diversity training to remedial coaching to termination.[176] Clear processes and consistent discipline are vitally important to the maintenance of a positive company culture.

### 5. E – Engage in Corporate Training

Not only is it essential to have effective policies and procedures, but it is also important to conduct effective trainings on those policies and procedures.[177] Training takes time and resources.[178] Although empirical studies about the effectiveness of training programs are lacking for several reasons, including lack of access given by corporations to researchers, one conclusion that the EEOC Task Force has drawn is that "training can increase knowledge about what conduct the employer considers unacceptable in the workplace."[179] Also, even though the empirical data is lacking, practitioners believe that training is a key component of prevention.[180] Some states, such as California[181] and Delaware,[182] require that some sort of training and education be given to all employees. No matter the legal requirements, training programs should be developed to the specific requirements and needs of particular companies; conducted on a regular basis; attended by all employees, including management; taught by qualified, live trainers; and continually updated, as needed.[183] Training should also include workplace civility and bystander intervention processes.[184] Bystander training should teach co-workers how to recognize and respond to challenging behaviors.[185] Additionally, employee climate surveys serve an important role by allowing concerns to be shared by employees.[186] Comprehensive training shared on a consistent basis will provide positive results.

### 6. C – Consider the Corporate Contracts, including Non-disclosure Agreements and Confidentiality Terms

Non-disclosure and confidentiality terms in employment contracts may be appropriate in many circumstances. Except when state or federal statutes have been written to address them, courts will generally not interfere with the freedom to contract—even a contract whereby the parties promise to keep quiet about something.[187] However, corporations should recognize that defenses, such as public policy and duress, become stronger and more viable when there is inequality of the parties' power and/or defects in the bargaining process. Accordingly, it makes sense for many reasons to protect each party in the process of contracting. A review of the use of all contract provisions should occur, such as examining the terms used, analyzing the negotiation process, ensuring that no provision hinders future criminal investigation,[188] and confirming that both parties' basic de-

sires have been met so that each particular circumstance is treated individually. Always make sure to include the employee in the process and be certain that the process is transparent.[189] Businesses should seek to balance their underlying desire to keep facts secret for business reasons, such as the company's reputation, while providing victims with individual choice about disclosing those facts—as some may want the ability to share their story while others may place more value on maintaining their privacy. Not only does it make business sense to openly and honestly review contracting policies, but in doing so, the corporate culture will be enhanced. Businesses can provide a vastly more positive work culture when they are willing to lead the way as it relates to contract terms, rather than being forced to respond to legislated efforts.

### 7. T – Take Time to Make Additional Assessments and Analyses

It is important for all businesses to make additional assessments and analyses to determine that they are equitably considering, reviewing, and, if needed, responding to current situations. Some additional reviews to make are as follows:

a. Assess how promotions and compensations are tracked, including regular audits to determine possible problems with issues and disparities, such as pay equity.[190]
b. Analyze how third party vendors conduct their business, including whether there are pertinent policies in place for protection of their employees and independent contractors.[191]
c. Examine the community-based initiatives that are or should be supported by the business, as corporate citizenship and social accountability are extremely important.

## Conclusion

The many societal crusades launched in recent years have inspired change and should serve as a reminder that real progress requires participation and effort. Everyone must do their part to become part of the solution, and it all begins with respect. Employers and employees must respect one another. Lawmakers must respect their positions and seek to do what can be done legislatively. Most importantly, businesses must respect the need for a positive corporate culture that provides protection, transformation, and equal employment opportunities for all.

# Appendix 1

## Contract Law – Statutes:
## Employment Disputes – Settlements Contracts Containing Confidentiality Provisions

Some examples of legislation enacted to govern confidentiality provisions in settlement contracts include, but are not limited to, the following:

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| Arizona | Arizona's law provides that the terms of a non-disclosure agreement may not be used to prohibit a party to the agreement from responding to a prosecutor's inquiry or making a statement not initiated by that party in a criminal proceeding. It also prohibits public funds from being used as consideration in exchange for a non-disclosure agreement related to sexual assault or sexual harassment.[192] |
| California | California's law prohibits provisions in settlement agreements that prevent the disclosure of factual information relating to certain claims of sexual harassment or sexual assault that are filed in a civil or administrative action. Claimants can request a confidentiality provision to protect their identity unless a government agency or public official is a party to the settlement agreement."[193] |
| Illinois | Illinois' law provides that, as it relates to settlement or termination agreements, any confidentiality provisions are valid and enforceable so long as (i) confidentiality is the documented preference of the employee, prospective employee, or former employee and is mutually beneficial to both parties; (ii) the employer notifies the employee, prospective employee, or former employee, in writing, of his or her right to have an attorney or representative of his or her choice review the settlement or termination agreement before it is executed; (iii) there is valid, bargained for consideration in exchange for the confidentiality; (iv) the settlement or termination agreement does not waive any claims of unlawful employment practices that accrue after the date of execution of the agreement; (v) the employee is given a period of twenty-one calendar days to consider the agreement; and (vi) the employee is given seven calendar days following execution to revoke the agreement. The employer is not to include any provision that prohibits the employee from making truthful statements regarding unlawful employment practices.[194] |

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| Louisiana | Louisiana's law states that no settlement agreement can be entered into with the state or related state agencies whereby public funds are paid which contains a provision prohibiting the disclosure by the claimant of terms or facts associated with an underlying claim that is related to allegations of sexual harassment or sexual assault.[195] |
| Nevada | Nevada's law prohibits a settlement agreement from containing provisions that prohibit a party from disclosing information relating to a civil or administrative action for a felony sexual offense, sex discrimination by an employer or landlord, or retaliation by an employer or landlord for reporting sex discrimination. The law also prohibits courts from entering an order that would prevent disclosure of this information. The claimants can request a confidentiality provision to protect their identity.[196] |
| New Jersey | New Jersey's law states that any settlement agreement (or employment contract) which has the effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable against an employee who is a party to the contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the non-disclosure provision shall also be unenforceable against the employer. Further, every settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer shall include a bold, prominently placed notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.[197] |
| New York | New York's law provides that no employer, its officer, or employee shall have the authority to include or agree to include, in any such resolution of a cause of action that involves discrimination, 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. The complainant must be given twenty-one days to consider the provision and seven days to revoke the agreement.[198] Additionally, New York has added protections for employees who have been harassed and who choose to enter into a non-disclosure agreement that the provision should be written in plain English and in the primary language of the employee, if applicable, and provide that the |

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| | provision is void if it prevents the employee from participating with any government agency's investigation or from disclosing facts necessary to receive public benefits.[199] |
| Oregon | Oregon's law makes it unlawful for an employer to enter into an agreement with an employee (as a condition of employment, continued employment, promotion, compensation, or the receipt of benefits) that contains a non-disclosure provision which prevents the employee from disclosure of factual information relating to discrimination, harassment, or sexual assault that occurred between employees or between an employer and an employee in the workplace, or at a work-related event that is off the employment premises and coordinated by or through the employer, unless the employee requests to enter into it and has seven days to revoke the agreement.[200] |
| Tennessee | Tennessee's law provides that any provision in a settlement agreement entered into by a governmental entity that prohibits the parties from disclosing the details of a claim or the identities of people related to a claim is void and unenforceable as contrary to public policy. However, victims of sexual harassment, sexual assault, or other offenses retain the ability to keep their identities confidential.[201] |
| Vermont | Vermont's employment laws related to sexual harassment require that a working relationship be free from sexual harassment and prohibit agreements to settle a claim of sexual harassment from including provisions that prevent an employee from working for the employer or an affiliate of the employer in the future; require an agreement to settle a claim of sexual harassment to state that it does not prevent the employee from reporting sexual harassment to an appropriate governmental agency, complying with a discovery request, or testifying at a hearing or trial related to a claim of sexual harassment, or exercising his or her right under State or federal labor law to engage in concerted activity for mutual aid and protection; and permit the Attorney General or Human Rights Commission to inspect a place of business or employment for purposes of determining whether the employer is complying with the law related to sexual harassment.[202] |

# Appendix 2

## Contract Law – Statutes:
## Employment Contracts – Non-disclosure Agreements Created in Consideration of Hiring

Some examples of legislation enacted to govern non-disclosure agreements crafted as a condition of employment are as follows:

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| California | California's statute prohibits employers from requiring an employee to sign, as a condition of employment or continued employment or in exchange for a raise or a bonus, either a release of claim or a non-disparagement agreement, or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including sexual harassment. The law states that these provisions do not apply to a negotiated settlement agreement to resolve an underlying claim that has been filed by an employee in court, before an administrative agency, before an alternative dispute resolution forum, or through an employer's internal complaint process if the agreement is voluntary, deliberate, and informed, provides valuable consideration to the employee, and the employee is given notice and has an attorney or is allowed to retain an attorney.[203] |
| Illinois | Illinois' statute states that any agreement which is a unilateral condition of employment (or continued employment) that prevents an employee (or prospective employee) from making truthful statements about alleged unlawful employment practices, or requires the waiver or arbitration of any claim (current or future) related to any unlawful employment practice, is void and against public policy, except when it is mutual. In order to prove mutuality, the agreement must be negotiated in good faith; be in writing; demonstrate actual, knowing, and bargained-for consideration from both parties; and acknowledge the employee's right to report allegations to the appropriate government agency or official, participate in agency proceedings, make truthful statements required by law, and request and receive legal advice.[204] |
| Maryland | Under Maryland's statute, it is against public policy to include a provision in any employment contract or policy that waives any right or remedy (substantive or procedural) to a claim that accrues in the future related to sexual harassment or retali- |

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| | ation. The law also protects employees from retaliation for refusing to enter into such an agreement.[205] |
| New Jersey | New Jersey's law states that any employment contract (or settlement agreement) which has the effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable against an employee who is a party to the contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the non-disclosure provision shall also be unenforceable against the employer.[206] |
| New York | New York's statute renders void and unenforceable any provision in a contract or other agreement between an employer and an employee (or potential employee) that prevents the disclosure of factual information related to any future claim of discrimination, unless the provision provides notice that it does not prohibit the employee from speaking with law enforcement, the Equal Employment Opportunity Commission, a state division of human rights or local commission on human rights, or an attorney retained by the employee (or potential employee).[207] |
| Oregon | Oregon's law makes it unlawful for an employer to enter into an agreement with an employee (as a condition of employment, continued employment, promotion, compensation or the receipt of benefits) that contains a non-disclosure provision that prevents the employee from disclosure of factual information relating to discrimination, harassment, or sexual assault related to occurrences between employees or between an employer and an employee in the workplace or at a work-related event that is off the employment premises and coordinated by or through the employer or between the employer and employee off the employment premises.[208] |
| Tennessee | In 2018, Tennessee made it unlawful for an employer to require an employee or prospective employee to execute or renew a non-disclosure agreement with respect to sexual harassment in the workplace as a condition of employment.[209] |
| Vermont | Vermont prohibits employers from requiring any employee or prospective employee, as a condition of employment, to sign an agreement or waiver that either prohibits the employee or prospective employee from opposing, disclosing, reporting, or participating in a sexual harassment investigation, or that purports to waive any right or remedy available to the employee with respect to a claim of sexual harassment (except as permitted by state or federal law).[210] |

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| Virginia | Virginia prohibits employers, as a condition of employment, from requiring an employee or a prospective employee to execute or renew any provision in a non-disclosure or confidentiality agreement that has the effect of concealing the details relating to a sexual assault claim.[211] |
| Washington | Washington's statute prohibits employers, as a condition of employment, to require an employee to sign a non-disclosure agreement that prevents the employee from disclosing sexual harassment occurring in the workplace or at work-related events (coordinated by or through the employer, or between employees, or between and employer and an employee) off the employment premises.[212] Washington also passed a statute that non-disclosure agreements that limit or punish a disclosure of evidence regarding past instances of sexual harassment is against public policy.[213] |

# Appendix 3

## Statutes Prohibiting Mandatory Arbitration of Sexual Harassment Claims

Several states have proposed and/or enacted legislation prohibiting mandatory arbitration of sexual harassment claims. Some examples are as follows:

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| Illinois | Illinois' statute states, although not exclusively, that any agreement that is a unilateral condition of employment (or continued employment) that prevents an employee (or prospective employee) from making truthful statements about alleged unlawful employment practices or requires the waiver or arbitration of any claim (current or future) related to any unlawful employment practice is void and against public policy, except when it is mutual. In order to prove mutuality, the agreement must be negotiated in good faith; be in writing; demonstrate actual, knowing, and bargained-for consideration from both parties; and acknowledge the employee's right to report allegations to the appropriate government agency or official, participate in agency proceedings, make truthful statements required by law, and request and receive legal advice.[214] |

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| Maryland | Under Maryland's statute, it is against public policy to include a provision in any employment contract or policy that waives any right or remedy (substantive or procedural) to a claim that accrues in the future related to sexual harassment or retaliation. The law also protects employees from retaliation for refusing to enter into such an agreement.[215] |
| New Jersey | Pursuant to New Jersey's statute, a provision in any employment contract that waives any right or remedy (procedural or substantive) relating to a claim of discrimination shall be deemed against public policy.[216] |
| New York | New York prohibits any clause in any contract that requires the parties to submit to mandatory arbitration to resolve any allegation of discrimination unless the condition of confidentiality is the preference of the complainant.[217] |
| Vermont | Vermont prohibits employers from requiring any employee or prospective employee, as a condition of employment, to sign an agreement or waiver that either prohibits the employee or prospective employee from opposing, disclosing, reporting, or participating in a sexual harassment investigation, or that purports to waive any right or remedy available to the employee with respect to a claim of sexual harassment (except as permitted by state or federal law).[218] |
| Washington | A provision of an employment contract is void and unenforceable if it requires an employee to waive the employee's right to pursue a claim for discrimination or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.[219] |

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