Ending the Monopoly of Power Over Workplace Harassment Through Education and Reporting (EMPOWER) Act

An Analysis

Executive Summary

The purpose of this analysis is to examine the bipartisan Ending the Monopoly of Power Over Workplace harassment through Education and Reporting (EMPOWER) Act (S. 2988 & S. 2994; H.R. 6406) to help guide lawmakers in their consideration of the bill and to highlight how it would impact private sector workplaces.

Most large companies have long-established codes of conduct and harassment policies, state-of-the-art training programs, and processes that act on harassment reports swiftly, thoughtfully, and fairly. Their prevention efforts typically go well beyond basic legal compliance, both because it is the right thing to do and because they periodically review their procedures to ensure they include the latest best practices for their industries. For these reasons, policymakers should be wary of trying to fashion new laws that could result in one-size-fits-all requirements that may not work in every workplace.

In general, the EMPOWER Act would:

• Prohibit nondisclosure and nondisparagement agreements under certain circumstances;
• Create a confidential Equal Employment Opportunity Commission (EEOC) “tip-line;”
• Require publicly traded companies to annually report to the Securities and Exchange Commission (SEC) the number of harassment settlements and settlement amounts;
• Prohibit companies from taking tax deductions for harassment-related attorneys’ fees and settlements paid; and
• Require the EEOC to develop and disseminate training programs.

The memo comprises a detailed analysis of the bill’s provisions, noting, among others, the following key concerns:

• NONDISPARAGEMENT AND NON-DISCLOSURE AGREEMENTS The EMPOWER Act makes it unlawful for an employer to enter into a contract or agreement with an employee or applicant, as a condition of employment, if the agreement contains a nondisparagement or nondisclosure clause that covers workplace harassment matters. The prohibition generally would not apply to settlement or separation agreements resolving legal claims or disputes. However, this exclusion only applies where both the employer and employee “mutually agree upon and mutually benefit from” the clauses. The “mutually benefit” requirement would create unnecessary liability questions that may discourage the use of such clauses. The bill also fails to address a common situation that often results in perpetrators leaving one employment situation only to engage in similar behavior at their next workplace. In contrast, California recently enacted legislation that would immunize past employers from the consequences of giving full and truthful information to potential employers that it would not rehire an applicant based on the employer’s determination that the former employee engaged in sexual harassment.
• **CONFIDENTIAL EEOC TIP-LINE**  The bill would require the EEOC to create a confidential tip-line for individuals to report they have experienced or witnessed workplace harassment. Although this aspect of the bill seeks to address the legitimate need for employees to have a “safe place” to report incidents, the bill is not clear on how it would interact with EEOC’s existing hotline and could create some confusion. Moreover, it is important the legislation not disrupt or cause confusion regarding the hotlines or other reporting systems that employers have widely adopted for employees to use. At the very least, it is important for the bill to acknowledge and seek to address the interaction of the new hotline with existing employer reporting processes.

• **ANNUAL SEC DISCLOSURE**  The bill would require public companies to include several new disclosures in annual Form 10-K SEC filings including the number of settlements reached regarding workplace harassment and the total amount paid for such settlements. The bill does not contain any minimum threshold for incidents that would trigger the reporting requirement. Moreover, the disclosure would delay the resolution of disputes and foment more litigation by incentivizing employers to settle less often. The requirement would also harm investors by providing misleading information that has no value as a comparative measure because the number of settlements is likely to have more to do with the size of the company than a problem with harassment claims.

• **DEFINITION OF HARRASSMENT**  The bill defines harassment more broadly than the courts have under Title VII, primarily by not specifically mentioning “severe or pervasive conduct” and would establish a lower threshold for assessing the impact on an employee. It is unclear what indirect impact the bill’s definition might have on future Title VII court decisions if it is enacted.

• **EXPANSIVE COVERAGE**  The bill’s explicit inclusion of temporary workers hired through an employment agency and independent contractors and subcontractors in the definition of “employee” poses an unprecedented expansion of employment law’s protection to non-employees and could raise serious questions under other federal and state employment laws.

• **NLRA CONFLICTS**  Policymakers may want to clarify how employer efforts to eliminate harassing behavior in the workplace will not interfere with the exercise of National Labor Relations Act rights.

• **WORKPLACE TRAINING**  The bill would give EEOC the authority to develop and disseminate new training programs and information regarding workplace harassment. Employers would not be required to use the EEOC developed training and the bill does not impose any requirements on internal employer developed and provided harassment training. Since most large companies already provide training in this area at their own expense, the primary value of this would be for smaller companies.

The EMPOWER Act represents a well-intended effort by Congress to address a problem whose solution is more likely to occur by creating an inclusive and respectful culture both in the workplace and the broader society. Employers have taken great strides over the last two decades in this area and those need to continue. Any action Congress chooses to take to address the issue, if it decides to do so, should be done in a manner that reinforces employer efforts rather than doing anything to impede them.
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INTRODUCTION

Following a steady stream of accusations of sexual harassment against prominent individuals starting in October 2017, there has been increased attention to harassment in the workplace. Since then, as many employers re-examined their own procedures to reflect the best practices that most large companies have incorporated in recent decades, the Senate and the House of Representatives in the 115th Congress each passed their own bills aiming to reform harassment reporting and investigation procedures within Congress. These bills may be revived in the 116th Congress.

As Congress seeks to address its own situation, various bills regarding harassment in the private sector have been introduced. One that has received considerable attention and bipartisan support is the Ending the Monopoly of Power Over Workplace harassment through Education and Reporting (EMPOWER) Act (S. 2988 & S. 2994; H.R. 6406), introduced in the Senate by Sens. Kamala Harris (D-CA) and Lisa Murkowski (R-AK), and in the House by Reps. Lois Frankel (D-FL), Jerrold Nadler (D-NY), Lisa Blunt Rochester (D-DE), Ted Poe (R-TX), and Barbara Comstock (R-VA).

It goes without saying that HR Policy Association members are committed to eliminating harassment in the workplace. Not only is this the right thing to do, but they also recognize the fundamental role that an inclusive culture and diverse workplace play in attracting, motivating, and developing the caliber of talent they need. Chief human resource officers (CHROs) take the issue of workplace harassment very seriously and their prevention efforts go well beyond mere legal compliance. From setting clear expectations throughout their organizations by the “tone at the top,” to proactive employee engagement and training, our members take many innovative and effective steps to ensure their companies have positive and respectful cultures, free from discrimination.

In 2018, HR Policy Association asked more than 390 chief human resource officers of some of the largest employers in the United States what they believed are the most significant factors that need to be addressed regarding workplace sexual harassment. Over 90 percent said ensuring sexual harassment victims feel free and protected in bringing their complaints to the attention of appropriate company officials was most important.1 Having a process that acts on harassment

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1 The full results and context of the survey question are:
Which of the following do you believe are the most significant factor that need to be addressed regarding sexual harassment in any workplace (check all that apply):

91% Ensuring that sexual harassment victims are not inhibited from bringing their complaints to the attention of appropriate company officials
73% Providing greater representation of women at all levels of the organization
65% Workplace culture factors involving gender relationships
48% Strengthening company policies intended to prevent sexual harassment
45% Strengthening company procedures intended to remedy sexual harassment complaints
26% Societal factors involving gender relationships
8% Strengthening government laws and procedures intended to protect against sexual harassment in the workplace
4% Other
reports swiftly, thoughtfully, and fairly is the right thing to do and helps a company achieve its business objectives as well. The CHROs also said providing greater representation of women at all levels of the organization (73%) and workplace cultural factors (65%) were key to addressing workplace respect issues. Our members have especially seen improvement regarding harassment where the overall number of women in their companies increases and as women assume roles with more responsibility and authority at all levels of the organization.

Recognizing that culture is difficult if not impossible to legislate, just 8 percent said strengthening government laws and procedures to protect against sexual harassment in the workplace would be an important factor in addressing the issue. Nevertheless, given the spate of recent highly-publicized incidents, it is not surprising that Congress would seek to address the problem. The purpose of this analysis is to examine the EMPOWER Act as to how it would impact private sector workplaces to help guide lawmakers in their consideration of the legislation. At the outset, it is important to consider the actions companies take to prevent and remedy workplace harassment, as well as those legal protections that are already in place.

I. HOW COMPANIES ARE ADDRESSING THE ISSUE

Employer responses to workplace harassment are best understood in the context of their longstanding efforts to create diverse, inclusive, and respectful workplaces. Most large companies have long-established codes of conduct and harassment policies, state-of-the-art training programs, and processes that act on harassment reports swiftly, thoughtfully, and fairly. Their prevention efforts typically go well beyond basic legal compliance both because it is simply the right thing to do and because they periodically review their procedures to ensure they include the latest best practices for their industries.

Since the end of 2017, employer efforts to increase awareness surrounding workplace harassment have been primarily focused on complaint procedures, communication and employee engagement regarding their harassment policies, reviewing their policies and processes to ensure they are up to date, and updating their education and training programs as needed.

Complaint Procedures

Companies employ a wide range of robust procedures for handling harassment complaints, as with any other grievances. This includes providing multiple avenues to raise a concern and responding promptly to complaints with thorough neutral investigations and mediation that protect the privacy and due process rights of all employees. Since the end of 2017, many employers have reviewed their procedures to make sure they have the best practices in place with a particular focus on ensuring employees are not inhibited from bringing their sexual harassment complaints to the attention of appropriate company officials. It is common for companies to have a “hotline” that is often directed to an independent third-party such as an outside law firm, which may then be charged with investigating the complaint. Meanwhile, companies are careful to communicate that while there will be zero tolerance for any form of unwelcome behavior in the workplace, any sanctions imposed against an employee proven to have violated the policy

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2 2018 HR Policy Association survey.
3 Id.
4 In fact, in the aforementioned survey, nearly half acknowledged that, in any workplace, strengthening company policies and procedures is a factor that should be addressed, as is often the case with company policies that are constantly being reviewed for improvement.
should reflect the severity of the violation, which may include termination if the behavior is serious enough.

**Communication and Employee Engagement**

More and more employees are digitally savvy, social media connected, and expect their employers to weigh in on a wide variety of cultural issues, including what they are doing regarding the #MeToo movement. Since the end of 2017, employer efforts have focused on reiterating their diversity, inclusion, and harassment policies in communications to all employees including, communications from top leadership regarding employee expectations, the importance of bystander reporting, and identifying the resources that are available to employees that have any issues. Some employers are conducting town halls and focus groups on the issue, and providing 24x7 access to someone in Human Resources to talk with about any concern they may have. Other employers are reinforcing their “Speak Up” culture with media and marketing materials distributed to employees globally, and providing more granularity on policies regarding dating a colleague or manager.

**Reviewing Policies and Processes**

While most employers have longstanding code of conduct/harassment policies, principals, and remediation processes that are regularly updated and contemporized, the #MeToo movement has caused them to review their policies and processes to ensure they remain “best in class” and reinforce the company’s culture of diversity, inclusion, and mutual respect. Since the end of 2017, some employers have expanded their conflict of interest policies to require disclosure by company officers of any relationship that could be considered as a conflict. Others have enhanced their efforts around “employee advocacy” in HR, updated their anti-retaliation policies and implemented new policies on bullying and romantic relationships. Other employers have implemented crisis teams that meet when there is a high-profile case in the news to evaluate what they would do.

**Education and Training**

Most large employers already have strong harassment training programs in place that are periodically reviewed to make sure they are up to date. This includes videos, in-person and online training, facilitated dialogues, reference cards, and frequent communication. Since the end of 2017, employer efforts have focused on reviewing all existing training programs for potential updates and improvement, increasing the frequency of training, taking a more hands on approach regarding training for the top leaders in the company, and requiring all managers to do refresher training. Some employers are increasing the amount of in-person training they do and placing a greater emphasis on harassment issues during new employee orientation programs.

**II. OVERVIEW OF CURRENT WORKPLACE HARASSMENT LAW**

Title VII of the Civil Rights Act of 1964 makes it “an unlawful practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” In 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines which specified that “sexual harassment” constitutes a form of discrimination in violation of

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Title VII.6 In the decades since, two types of harassment have been established as unlawful under Title VII:

- “Quid pro quo” harassment, in which tangible job benefits are granted or withheld based on submission to, or rejection of, unwelcome requests or conduct, based on an individual’s sex; and

- Hostile work environment claims, in which the working environment is oppressive to an individual because of the actions of coworkers, supervisors, or customers undertaken based on the individual’s sex.7

According to the EEOC, these two types of harassment are defined as “unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.”8

Petty slights, annoyances, and isolated incidents (unless extremely serious or pervasive) will not rise to the level of illegality.9 To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.10

Harassment can occur in a variety of circumstances. For example, the harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.11 The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct, and the unlawful harassment may occur without economic injury to, or discharge of, the victim.12

The EEOC’s strategic enforcement plan for 2017-2021 lists preventing systemic harassment as one of its substantive priorities. “Strong enforcement with appropriate monetary relief and effective injunctive relief to prevent future harassment of all protected groups is critical, but not sufficient. In addition, the Commission believes a concerted effort to promote holistic prevention programs, including training and outreach, will greatly deter future violations.”13 In recent months, the Commission has taken a very aggressive stance in response to allegations of workplace harassment, filing a number of enforcement actions.14

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7 EMLP. DISCRIM. COORD. ANALYSIS OF FED. L. § 48:4.
9 Id.
10 Id.
11 Id.
12 Id.
Courts Strengthening Title VII Harassment Protections

A recent Seventh Circuit Court of Appeals ruling finding an employer liable for inappropriate harassment by customers is the latest in a string of court decisions that are effectively lowering the burden for proving that unwelcome conduct is deemed “severe or pervasive” under Title VII of the Civil Rights Act. The decision in *EEOC v. Costco Wholesale Corp* determined that a customer’s conduct toward an employee does not have to be “overtly sexual” to create a hostile work environment under Title VII and that a tepid response to harassment claims can trigger liability for employers.15 The court found the company's response was “unreasonably weak” with regard to an employee's complaints, rejecting the company’s claims that the customer's conduct was not lewd enough to create a hostile environment.

Another court ruled an employee can proceed with her sexual harassment claim against two companies that jointly own a temporary employment company.16 Although the alleged harassment came at the hands of an employee of one of the companies to which she was assigned to work, the EEOC has determined an employer can be held responsible for the acts of non-employees with respect to sexual harassment, when the employer knows to take corrective action and fails to do so.

In fiscal year 2018, the EEOC significantly stepped up its litigation efforts by filing 66 harassment lawsuits, including 41 that included allegations of sexual harassment – a 50 percent increase in suits challenging sexual harassment over fiscal year 2017. However, Commissioner Chai Feldblum (D) recently noted that while the EEOC likes the term “zero tolerance” because “it communicates that there will be zero tolerance for any form of unwelcome behavior in the workplace. … employee[s] should understand that it does not mean that every type of conduct results in the same consequence, for example, termination.”17 For similar reasons, policymakers should be wary of trying to fashion any new laws or regulations that could result in “one-size-fits-all” enforcement.

III. THE EMPOWER ACT GENERALLY

According to its sponsors, the EMPOWER Act will “address the ongoing issue of workplace harassment”18 and “deter, prevent, reduce, and respond to harassment in the workplace, including sexual harassment, sexual assault, and harassment based on protected categories.”19 In general, the bill would:

- Prohibit nondisclosure and nondisparagement agreements (NDAs) under certain circumstances;
- Create a confidential EEOC “tip-line;”
- Require publicly traded companies to annually report to the Securities and Exchange Commission the number of harassment settlements and monetary settlement amounts;

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• Prohibit companies from taking tax deductions for harassment-related attorneys’ fees and settlements paid;
• Require the EEOC to develop and disseminate training programs;
• Provide a definition of “harassment” for purposes of the bill (without altering current definitions used in interpreting Title VII); and
• Take an unprecedented expansive approach that includes non-employees under the bill’s protections.

IV. COVERAGE AND DEFINITIONS

The Act covers employers, employees, and applicants as defined in Title VII of the Civil Rights Act of 1964, the Government Employee Rights Act of 1991, and the Congressional Accountability Act of 1995. “Outside workers” are also covered, defined as “a temporary worker hired through an employment agency,” an “intern or volunteer, whether paid or unpaid,” as well as independent contractors and subcontractors thereof based on the common law of agency.  The EMPOWER Act is a standalone bill that does not amend Title VII, although the bill gives EEOC the same enforcement powers as it has under Title VII and sections 302 and 304 of the Government Employee Rights Act of 1991 to administer the Act. The bill also provides the EEOC with rulemaking authority to implement the nondisclosure and nondisparagement provisions in the Act but does not extend rulemaking authority to Title VII.

The EMPOWER ACT defines harassment more broadly than that used by the courts under current law, primarily by not specifically mentioning “severe or pervasive conduct” and establishing a lower threshold for assessing the impact on an employee. Under the EMPOWER Act, workplace harassment means:

“Unwelcome or offensive conduct based on sex (including such conduct based on sexual orientation, gender identity, and pregnancy), race, color, national origin, disability, age, or religion, whether that conduct occurs in-person or through an electronic medium (which may include social media), in a work or work-related context, which affects any term, condition, or privilege of employment.  The definition of harassment in the bill appears to be broader than the current definition under Title VII. For example, the language “unwelcome or offensive conduct” in the bill is clearly different than, and arguably broader than, “sufficiently severe or pervasive conduct.” Further, the language “which affects any term, condition, or privilege of employment” in the bill may be broader than the “sufficiently affect[s] the conditions of employment” Title VII standard.

20 This includes any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof to be a member of the elected official’s personal staff; to serve the elected official on the policymaking level; or to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.
21 This includes employees of the legislative branch, including employees of the House of Representatives and the Senate (both Washington, D.C. and state district office staff); the Office of the Architect of the Capitol; the U.S. Capitol Police; the Office of Congressional Accessibility Services; the Congressional Budget Office; the Office of the Attending Physician; and the Office of Compliance. Certain provisions of the Act also apply to the Government Accountability Office and to the Library of Congress.
23 Id.
This will likely result in substantially more reports of harassment to the confidential EEOC tip-line and could, under the bill, increase the number of EEOC and state and local Title VII enforcement actions (see below). Consequently, it is unclear what, if any, indirect impact the bill’s definition of harassment might have on future Title VII court decisions.

In addition, the bill’s explicit inclusion of temporary workers hired through an employment agency and independent contractors and subcontractors in the definition of “employee” poses an unprecedented expansion of an employment law’s protection to non-employees. There is already a disturbing trend toward this approach through broad interpretations of “joint employer” liability and narrow interpretations of “independent contractor” status under other laws. The Association has addressed these concerns in in other communications and documents and there is no need to repeat them here. The measure would set a disturbing precedent and could ultimately impact Fair Labor Standards Act, the National Labor Relations Act (NLRA), Title VII, and other federal and state labor and employment laws. This expansive definition should be removed from the bill.

A notable omission from the measure is a clarification of how employer efforts to eliminate harassing behavior in the workplace will not interfere with the exercise of NLRA rights. Although the National Labor Relations Board’s Boeing decision acknowledges employers have legitimate business purposes for establishing civility rules and articulated new guidelines for evaluating employment policies, rules, and handbook provisions, it remains unclear how, or if, these civility policies could be applied in a strike or picket line situation. Further, there remains a direct conflict between the EEOC’s recommendation that employers maintain the confidentiality of internal harassment investigations to the extent possible and the Board’s 2012 Banner decision that prohibits employers from routinely forbidding employees from discussing investigations of misconduct. It is not unusual for Board decisions to shift back and forth from administration to administration and it would be helpful for Congress to provide some certainty regarding these issues.

V. PROHIBITING MANDATORY PREDISPUTE NONDISPARAGEMENT AND NON-DISCLOSURE AGREEMENTS COVERING WORKPLACE HARASSMENT

The EMPOWER Act makes it unlawful for an employer to enter into a contract or agreement with an employee or applicant, as a condition of employment, promotion, compensation, benefits, or change in employment status or contractual relationship, if the contract or agreement contains a nondisparagement or nondisclosure clause covering workplace harassment or retaliation for reporting, resisting, opposing, or assisting in the investigation of workplace harassment. Any employer effort to unilaterally enforce an NDA or nondisparagement clause would be similarly unlawful. However, NDAs in settlement or separation agreements that

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resolves legal claims or disputes where both the employer and employee mutually agree upon and mutually benefit from the clauses would not be prohibited.²⁷

In our communications with our member companies, we are not aware of any employer that, as a general practice, would require such an agreement as a condition of employment or in any other circumstance that arises prior to any allegations or disputes. The general view is that this approach would not be an acceptable practice by an employer wishing to foster a climate of openness and inclusion in their workplace.

Nevertheless, as the bill implicitly recognizes, NDAs can and do play a valuable role in resolving disputes once they arise. Yet, the EMPOWER Act places certain restrictions on NDAs that may harm employees to the extent that it may prohibit such agreements during the investigation process. As two plaintiff attorneys who represent victims of sexual harassment and discrimination noted recently in the Wall Street Journal:

[W]e must be careful not to ignore the victim who doesn’t want the details of her claim made public. NDAs can play an important role in protecting victims, without allowing harassers to continue unchecked. … If the goal is to encourage women to come forward and report harassment, organizational leaders should expand confidentiality to protect victims early in the internal complaint process. By helping ensure that the details of the harassment don’t become the subject of water-cooler gossip, NDAs can encourage women to report without fear of backlash. Victims should be able to report sexual harassment internally through the proper channels and, with the aid of a carefully drafted NDA from the outset, not only receive an appropriate remedy, but also be protected from ridicule and retaliation.”²⁸

The bill should be amended to allow for confidentially during an employer’s internal complaint and mediation process.

The EMPOWER Act also only allows NDAs in settlement or separation agreements where the clauses “mutually benefit” both the employer and employee, a vague term that raises unnecessary liability questions that may discourage the use of such clauses. For example, to what extent do the clauses have to benefit both parties for it to qualify as an exception under the Act? Does the benefit have to be equal for both sides? Exactly how can an employer show the clauses benefit an employee? The lack of clarity could result in litigation where a court would have to resolve whether such mutual benefit occurred, thus negating the whole settlement process. The bill should be amended to only require the clauses be “mutually agreed upon.”

Meanwhile, the Act fails to address a common situation that often results in perpetrators simply leaving one employment situation only to engage in similar behavior at their next workplace. Currently, a former employer who reports such behavior to a prospective employer may be subjected to a defamation claim if it contains negative employment related information to a prospective employer, thus severely inhibiting and often foreclosing such disclosures. In the aforementioned Wall Street Journal op-ed, the plaintiff attorneys noted that “the current litigation environment discourages employers from being truthful about past misdeeds, lest they

find themselves at litigation risk from the harassing former employee.”  

The bill should be amended to immunize past employers from the consequences of giving full and truthful information to potential employers that it would not rehire an applicant based on the employer’s determination that the former employee engaged in sexual harassment. California recently enacted such legislation.  

VI. CONFIDENTIAL EEOC TIP-LINE

The EMPOWER Act would require the EEOC to create a confidential tip-line that would supplement the Commission’s current process for submitting discrimination charges. Through the tip-line the EEOC would receive, log, and acknowledge receipt of reports from employees, applicants, bystanders, or other individuals who attest they have experienced or witnessed workplace harassment. The tip-line would also:

- Make tip-line reports available to the Commission and state and local enforcement agencies for potential investigation;
- Provide informational material to reporting individuals including how to file a discrimination charge and encourage individuals to file such charges;
- Provide an option for reporting individuals to not identify individual employees, but would identify the entity, employer, division, or subdivision “responsible for the workplace harassment;”
- Educate reporting individuals about how to preserve their right to make any reports, complaints, or discrimination charges; and
- Offer reporting individuals the option to elect to be informed if their report leads to an investigation, so they may choose to provide further information or participate in any resulting investigation.

30 AB 2770, “Privileged communications: communications by former employer: sexual harassment. A privileged publication or broadcast is one made: In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision applies to and includes a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence and communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment. This subdivision authorizes a current or former employer, or the employer’s agent, to answer, without malice, whether or not the employer would rehire a current or former employee and whether the decision to not rehire is based upon the employer’s determination that the former employee engaged in sexual harassment. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law. July 9, 2108. (emphasis added to highlight amended language), available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2770.
32 Id.
33 Id.
The tip-line would not allow for anonymous reporting, but does allow for confidential reports independent of an actual charge of harassment, which would have to be made separately through the EEOC’s existing process.\textsuperscript{34} Although tip-line reports “will not prompt individualized investigations, except in the limited circumstances,” the EEOC and state and local enforcement agencies will monitor reports “to identify trends and determine whether investigations should be undertaken,” for instance if multiple complaints regarding a particular employer have been received or there is evidence of a broader pattern or practice of workplace harassment.\textsuperscript{35} Moreover, in the event an EEOC Commissioner determines that information received from the tip-line warrants an investigation, the Commissioner may initiate an investigation by filing a Charge of Discrimination.\textsuperscript{36} Tip-line reports would not be discoverable in civil cases, unless the reporting individual waives the confidentiality of the submitted reports.\textsuperscript{37} The EEOC is also required to market and publicize the tip-line.

The Act also makes it unlawful to discriminate with respect to employee use of the tip-line, including contacting or making threats to contact law enforcement authorities, such as the police, immigration officials, or other officials, with respect to an employee or applicant because that employee or applicant has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing.\textsuperscript{38}

As noted in the aforementioned CHRO survey, an important element of combatting workplace harassment is providing a “safe place” for victims to bring their complaints. It is a widely adopted “best practice” for companies to provide this to their employees through a third party “hot line” or some similar mechanism and many, if not most, large companies have these protocols in place. It may be less likely among medium sized and smaller companies. This provision in the bill would take an important step towards providing that mechanism for those employees in smaller companies.

However, it is important that the legislation not disrupt or cause confusion regarding those effective mechanisms employers already have in place. This provision in the bill could confuse employees how, and to whom, they should report an incident of harassment. Over the past few years, employers have developed and deployed robust reporting systems including, mobile reporting apps and 800-numbers. If an employee uses the EEOC tip-line instead of the employer’s reporting system, the employer would have no knowledge there may be problem that needs to be addressed, which is the first crucial step.

It is also important that the legislation address how the new tip-line differs from the EEOC’s telephone hotline that already exists. The current EEOC hotline exists for individuals to “discuss their situation” with an EEOC representative who will provide the individual with guidance over whether the information provided is covered by EEOC-enforced laws and how the individual can file a charge.\textsuperscript{39} The creation of a new tip line therefore appears to be redundant and may create confusion about which number to call for what reasons.

\textsuperscript{34} S.2994, 115\textsuperscript{th} Cong. §5 and H.R. 6406 115\textsuperscript{th} Cong. §104 (2018).
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
Clearly, the bill should acknowledge and seek to address the interaction of the hotline with existing employer reporting processes. For example, the EEOC hotline official who receives a report could ask the employee if their employer has a reporting system, and if so, advise the employee to use that system to ensure a quicker resolution to their report. Meanwhile, in any public service announcements publicizing the hotline, the EEOC could be required to urge individuals to use their employer reporting process first. In the end, the true value of the hotline will be to those employees who do not have employer reporting systems available to them.

Petty slights and annoyances are also likely to be reported to the EEOC tip-line along with serious incidences. How will these be treated by the EEOC and state and local enforcement agencies? Moreover, should there be some time limitation for tip-line reporting? If so, what should it be – 180 days, 300 days, longer? Should employers be allowed to request and receive information on the reports that have been made regarding their workplaces so they can address them? Further, disgruntled employees and corporate campaigns could flood the tip-line with meritless reports – a very real possibility given the bill requires the tip-line have the option for reporting individuals to only identify an employer and not a specific harassing individual. If tip-line reports are going to be used to identify trends to determine if an investigation should be undertaken these questions and related issues need to be addressed. Otherwise both the EEOC and employers could waste valuable resources investigating and defending against meritless claims.

VII. ANNUAL SEC DISCLOSURE

The EMPOWER Act would require public companies to include several new disclosures in annual Form 10-K Securities and Exchange Commission (SEC) filings. These new disclosures include:

- The number of settlements reached regarding workplace harassment and retaliation regarding harassment reporting, or when the company is the beneficiary of a release of claims;
- Whether any judgments or awards (including awards through arbitration or administrative proceedings) were entered against the employer in part or in whole, or any payments were made in connection with a release of claims;
- The total amount paid for such settlements, judgments, awards or release of claims; and
- Information on whether there have been three or more settlements or judgments related to a particular employee without identifying them by name.

The SEC would have one year from date of enactment to publish rules on how public companies are to report this information.

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41 Id.
42 Id.
The SEC reporting requirements should be eliminated from the legislation because they are unnecessary, of no value and/or misleading to investors, arbitrary, and create a perverse incentive for employers to litigate every harassment claim to avoid reporting.\textsuperscript{43}

The SEC reporting requirement fails to recognize that companies settle harassment claims for a variety of different reasons that could lead to the false conclusion that the issue is more serious than it really is. Legislation should be designed to encourage settlements that are mutually beneficial to employees and employers and expedites the judicial process. Settlements often occur where the facts are very much in dispute, but the parties want to resolve the matter without going through the time and expense of lengthy litigation. To assume that a settlement always means actual guilt is overly presumptuous. Moreover, harassment claims are often an ancillary part of a settlement agreement that involve a number of other issues. Finally, requiring the disclosure of the number of settlements would incentivize employers to settle less often and litigate more harassment claims to avoid reporting. This would create a drag on a litigation process that is already extremely difficult and expensive for all parties.

Meanwhile, the requirement would harm investors by providing misleading information. Generally, investors use SEC disclosures to compare one company to another. However, the bill’s SEC disclosure requirements would have no value as a comparative measure because the number of settlements is likely to have more to do with the size of the company than a problem with harassment claims. Moreover, to the extent a company has an effective reporting and mediation process that identifies and resolves harassment claims, having to report the total number of settlements is inherently misleading for investors because it implies a company has a material problem when the opposite maybe true.

The reporting requirement also is arbitrary since it only applies to public U.S. companies. The thousands of large and small companies that have not accessed the U.S. public capital markets are not required to make these disclosures. This highlights the arbitrary, incompatible and distortive impact of the requirements, underscoring that pursuing a set of laws specifically designed for one purpose to instead achieve a completely unrelated objective is ineffective.

\textbf{VIII. TAX TREATMENT OF AMOUNTS RELATED TO JUDGMENTS}

The EMPOWER Act amends the Internal Revenue Code to prohibit employers from deducting amounts paid or incurred pursuant to any judgment or award in litigation related to workplace harassment, or for expenses and attorneys’ fees in connection with litigation related to workplace harassment resulting in a judgment or award, or for any insurance covering the defense or liability of the underlying claims with respect to such litigation.\textsuperscript{44} Further, awards or judgments received by plaintiffs in claims related to workplace harassment or other unlawful discrimination would not be taxed as gross income.\textsuperscript{45} The bill would also limit taxes on any employment discrimination compensation received by the plaintiffs, such as front or back pay received as a result of harassment claims.\textsuperscript{46}

\textsuperscript{43} Under current SEC regulations, public companies are already required to report any material pending legal proceedings, including those involving harassment, to which the registrant or any of its subsidiaries is a party (17 CFR 229.103). Any additional reporting is simply unnecessary for investors.

\textsuperscript{44} S.2988, 115\textsuperscript{th} Cong. §2 and H.R. 6406 115\textsuperscript{th} Cong. §201 (2018).

\textsuperscript{45} Id.

\textsuperscript{46} Id.
The tax changes contemplated by the Act expand upon the prohibitions in Public Law No: 115-97 (a.k.a. the Tax Cuts and Jobs Act), which expressly denies taxpayers the ability to deduct as a business expense any settlement or payment related to sexual harassment or sexual abuse, or any attorney’s fees related to any settlement or payment if such settlement or payment is subject to a nondisclosure agreement. Although the bill increases the prohibition to cover all workplace harassment litigation, it is unlikely to have any significant impact on employers. However, it is likely to increase the incentives to settle harassment claims—even where they are frivolous or relatively baseless—before they go to litigation because settlement costs that are not related to litigation would still be deductible.

IX. WORKPLACE TRAINING

The EMPOWER Act would give EEOC the authority to develop and disseminate new workplace training programs and information regarding workplace harassment. Such training would include information on what constitutes workplace harassment, the rights of individuals with respect to workplace harassment, and how to report such harassment. Additionally, the training would highlight how those who encounter workplace harassment can intervene or report the harassment, and how employers and managers can prevent workplace harassment. The bill also would require the EEOC to develop and disseminate a public service campaign that distributes information and advertises about the tip-line.

Employers would not be required to use the EEOC developed training and the bill does not impose any requirements on internal employer developed and provided harassment training. The new training and awareness programs would be solely the responsibility of the EEOC. Since most large companies already provide training in this area at their own expense, the primary value of this would be for smaller companies, which could be beneficial for those employees who do not work in larger companies. The sponsors are to be commended for recognizing that employers that can afford to do so already see the value of training, and not including in the bill a complex federally mandated training requirement that could inhibit the creation of new, more effective approaches would be counterproductive.

X. CONCLUSION

The EMPOWER Act represents a well-intended effort by Congress to address a problem whose solution is more likely to occur by creating an inclusive and respectful culture both in the workplace and the broader society. That solution cannot be legislated but is more dependent on efforts by employers and others to address the issues in a thoughtful and just manner. Employers have taken great strides over the last two decades in this area, and those need to continue. Any action Congress chooses to take to address the issue, if it decides to do so, should be done in a manner that reinforces those efforts rather than doing anything to impede them. A careful review of each aspect of the bill is needed. We hope this analysis has been helpful.

48 Id.
49 Id.
50 Id.