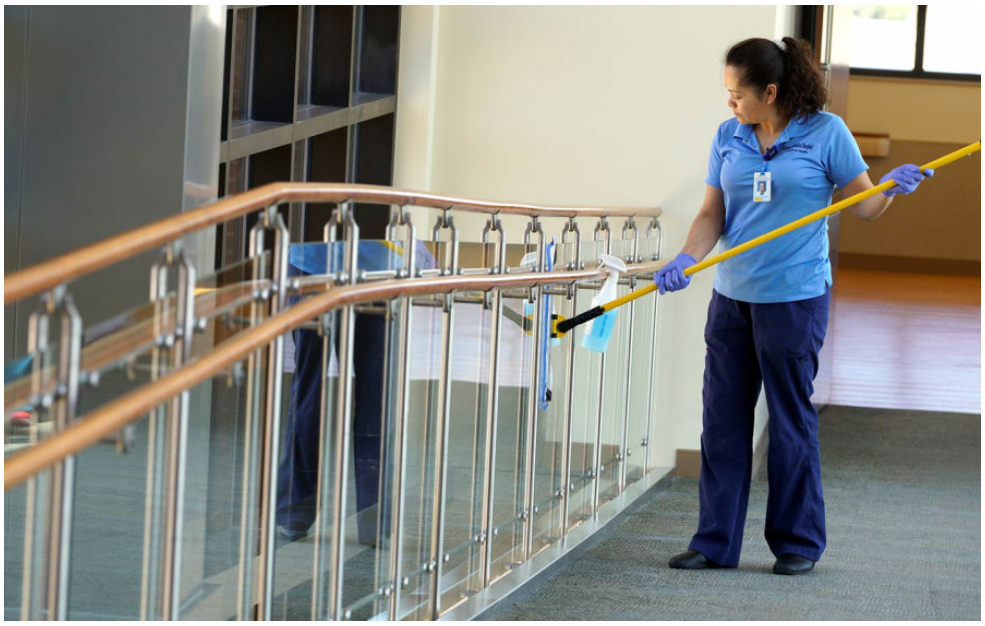
LABOR FEMINISM SEXUAL HARASSMENT

# How to End the Silence Around Sexual-Harassment Settlements

*In the wake of the #MeToo movement, lawmakers are floating bills to ban confidentiality in workplace sexual harassment settlements. But advocates are divided over whether that would benefit all victims.*

By Stephanie Russell-Kraft

JANUARY 12, 2018



Advocates say that confidentiality agreements in sexual-harassment settlements limit public understanding of the scope of the problem, but caution that low-wage workers, who suffer the bulk of harassment, wouldn't be served by banning confidentiality. *(Reuters / Rick Wilking)*

When the news of Harvey Weinstein's serial sexual predation broke in early October, part of what was so shocking was that many of the women harassed by Weinstein had privately come forward with their claims, only to be paid off by his company in exchange for their silence.

Confidentiality agreements in sexual-harassment and -discrimination claims have become standard practice, particularly in settlements between two parties with a large power disparity, like an employee and employer, a student and a university, or a powerful media mogul and a young actress. Institutions are often only willing to pay a settlement fee on the condition that the case is resolved—the victim can't continue to pursue her case in court—and can't be talked about again.

"Confidentiality has become almost rote," says Amanda Farahany, an Atlanta lawyer who frequently represents individuals in sexual-harassment and -discrimination cases. David Sanford, a prominent plaintiffs' lawyer who works primarily on discrimination cases, estimated that "about 80 to 90 percent" of the cases he takes on are

resolved confidentially before a lawsuit can even be filed. These are claims that will never be publicly known, and Sanford's figure is typical.

This leaves other employees vulnerable to harassment by repeat perpetrators, and deprives the public of information about how widespread the problem of workplace harassment is. The rare cases that have become public—like those of alleged serial sexual assaulters Harvey Weinstein and Bill O'Reilly, and the rampant gender discrimination at Jared and Kay Jewelers—have done so despite confidentiality agreements because they involve high-profile actors and are under intense press scrutiny. But they are exceptions to the rule. Most workplace disputes, including claims of sexual assault, harassment, and discrimination, will never be publicly examined in the same way.

To address the harms that confidentiality requirements impose, lawmakers in a handful of states, including New York, New Jersey, and Pennsylvania, have floated bills to bar nondisclosure provisions in employment contracts and in settlements relating to claims of discrimination, retaliation, and harassment. In California, state Senator Connie M. Leyva introduced a similar bill when the legislature reconvened last week. Although the language differs from state to state, all of

the proposed laws aim to address the problem that most victims of workplace sexual assault and harassment settle their claims with employers on confidential terms.

“My goal in this legislation is making sure there are no secret settlements, no nondisclosure agreements,” said Leyva. “I’m sure that we wouldn’t know everything, but right now we know nothing.”

A number of the lawyers and advocates working in the trenches of workplace sexual harassment I spoke with believe that these legislative proposals are a necessary step toward ending the silence around the scope and prevalence of these claims. For victims of sexual harassment, they say, confidentiality agreements can exact a particularly high price; the enforced silence can be isolating and impede healing.

Boston civil-rights attorney Rebecca G. Pontikes was confronted with this problem recently when she sat down to negotiate a settlement with a university on behalf of a student who had been sexually assaulted by her host brother on a study-abroad program.

“They stuck a confidentiality agreement in there, and I said, ‘Look, she wants to be able to participate in a Take Back the Night march,’ which often involves speaking about what happened to you,” Pontikes said. After some

negotiating, Pontikes was able to carve out an exception. But before her client was able to participate in the rally, they had a meeting about what was and what wasn't safe to say, according to Pontikes.

"I've been practicing law for 20 years," said Pontikes. "Never in my experience has a plaintiff said to me, 'Rebecca, I want to have a really broad confidentiality agreement so neither of us can say anything about this.'" Pontikes said almost all of her clients have gone on to become activists because "they want to be able to use their experience to help other people."

Pontikes and others say, however, that laws to ban confidentiality in sexual-harassment settlements should be the first step of many to end silence around the practice.

For example, legislative efforts to eliminate nondisclosure provisions in harassment settlements must also address arbitration, an out-of-court process where proceedings are kept out of the public eye and settlements are almost always confidential. A recent study by the Economic Policy Institute found that more than half of nonunion private-sector employees in the United States are currently subject to mandatory arbitration in disputes with their employers. Among large employers, the proportion is even higher. Between

arbitration and pre-suit settlements, only a small fraction of workplace harassment claims are ever filed in court.

But several other attorneys I spoke with warned that barring confidentiality provisions in these settlements won't address the underlying problems of harassment, and that it may even hurt victims in the process.

Debra Katz, a civil-rights attorney based in Washington, DC, believes the proposed bills are "misguided" and will ultimately harm victims of workplace sexual harassment. For some victims, the promise of confidentiality is actually alluring, according to Katz.

"I've had clients say to me, the last thing I want is for somebody to Google my name and see that I was subjected to sexual harassment by the CEO or by Congressmen X," Katz said. "They want their privacy protected and if they feel like they can't end these situations with a private resolution, they're not going to come forward."

High-profile women's-rights attorney Gloria Allred has also said many of her clients prefer confidentiality.

To address this problem, some advocates have suggested partial confidentiality agreements, in which personal details are kept private but information valuable to the public interest is disclosed. “I think you could have some type of [confidentiality] agreement,” said Suja Thomas, a law professor at the University of Illinois College of Law. “But I think you have to have the dollar amount that’s public, I think you have to have the nature of the claim that’s public, the company, and the harasser.”

“If you don’t have the dollar amount, you don’t have the seriousness of the claim,” she stressed. “The Weinstein numbers are just crazy.”

But these measures might still cause problems, according to Katz. Without the promise of confidentiality, companies will be less likely to pay out fair settlement amounts, leaving victims, many of whom are low-wage workers, without the financial resources they may need while seeking other employment.

Gillian Thomas, senior staff attorney for the American Civil Liberties Union’s Women’s Rights Project, believes that eliminating confidentiality clauses can benefit the public interest but that it isn’t necessarily the best solution for individual victims. “If an employer can’t get a settlement that’s going to provide a [nondisclosure

agreement], employers are going to settle less, they're going to force whoever is bringing the claim to think long and hard about pursuing litigation instead, and litigation is a horrible alternative," said Thomas, who stressed that her views are her own and do not represent the official position of the ACLU. "It lasts for years, it involves being very public, it involves being on the receiving end of all sorts of defense tactics, and that's all if the person can find a lawyer."

For low-wage workers, immigrant workers and workers of color, who bear the brunt of workplace sexual assault and harassment, finding a lawyer who is willing to take their case on a contingency basis can be next to impossible. But even if those victims were able to find lawyers and settle their claims fairly, the ability to speak openly about them would only go so far. That's because most harassment isn't happening at the hands of famous individuals that reporters will take the time to write about.

"If you think about women who are migrant workers or women who are hotel maids, some of the most vulnerable people in the workplace, it's not going to make their lives easier if we legislate that if they settle with Ramada, Ramada cannot put in place a confidentiality agreement," said Katz. Additionally, banning confidentiality cuts both ways. If employees

are given the freedom to speak openly about their claims, employers would be free to publicly denigrate them as well.

Removing confidentiality restrictions alone won't create a database of harassment claims that can be searched by reporters or job seekers, and it still puts the onus on women to bring the problems of workplace sexual harassment to light.

Many of the attorneys I spoke with acknowledged a tension between the pressures on their individual clients and what is best for the public interest. Meaningful reform efforts must work in the public interest while still centering the needs of victims, they said.

Pontikes said she's sympathetic to the concerns of advocates like Katz and Thomas, but is wary of letting companies' willingness to settle dictate the terms of victims' rights. "I don't think we should allow them to instill this fear in us that we should do whatever the companies want just so they put money on the table," she said. Given the current workplace structures, many victims likely have good reason to seek confidentiality, but we don't know what they would choose in a system that looks completely different.

"There's a tendency in the public and legal debate to say that abolishing NDAs in settlement agreements is the make-or-break solution to the problems we're trying to solve, but advocates and workers need there to be other options, and policy-makers need to know there are other ways to handle the problem," said Noreen Farrell, executive director of Equal Rights Advocates, where she litigates sexual-harassment and -discrimination cases.

An alternate solution popular among many advocates is to require employers to report detailed information like the number of complaints they receive, whether those claims involve repeat offenders, and how much the company has paid to settle harassment or discrimination claims. This would offer the public critical information about hostile workplaces without obligating individual women to lay bare the details of their claims and settlements.

Employer reporting could be done through existing federal agencies like the Equal Employment Opportunity Commission, which currently requires private companies with 100 or more employees to submit workforce-demographic information. Company-specific information could be made public and expanded to include aggregated data on the number and size of harassment settlements.

In a similar vein, publicly traded companies should have a direct duty to report to the Securities and Exchange Commission when they face widespread sexual-harassment claims or when those claims are brought against high-level executives. In other words, accountability for workplace sexual harassment should be tied to a company's bottom line.

"We're in a moment where we're realizing it's not enough to bank on employers' wanting to be good citizens and adopting best practices because it's the right thing to do," said Thomas.

Marci Hamilton, law professor and founder of CHILD USA, a nonprofit academic think tank dedicated to preventing child abuse and neglect, has proposed putting pressure on the insurance providers that cover the bad acts of employees and executives. Over the past decade, employment-practices-liability insurance plans have become common ways for companies to protect themselves from financial liability for sexual-harassment and -discrimination claims.

"Insurance companies exist to make cases go away," said Hamilton in an interview. "They encourage settlement, they encourage nondisclosure and they want things

done as quickly as possible so there are fewer attorneys' fees. All of the incentives in the insurance industry are driving the institutions to do the wrong thing."

Under the threat of legislative reform, Hamilton suggests, insurance providers should start requiring companies to undergo annual sexual-harassment trainings and audits as a condition of coverage, just as a property-liability-insurance provider might require companies to undergo building-safety inspections.

Framing sexual harassment as a public risk and safety hazard might also help litigators in the few states with so-called "sunshine in litigation" laws push back against confidentiality provisions in harassment settlements, according to Farrell.

In Florida for example, confidentiality clauses are banned in settlements that involve a public hazard, like a toxic-waste dump. For egregious harassment cases like Weinstein's, Farrell said, "there's a great case to be made that those are a public hazard."

Without a silver bullet to end the silence around workplace sexual harassment, all tactics are worth considering. N

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She has written for *The New Republic*, *The Atlantic*, *Religion & Politics*, and *Religion Dispatches*, and is a regular contributing reporter for *Bloomberg Law*.

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**Eugene Barnes** says:
January 12, 2018 at 6:19 pm
Since #MeToo started, I've been wondering about how ethical it is to bring up cases that were solved with a settlement. I mean, wasn't the idea of the settlement supposed to be punishment by fine? It seemed to work well for the individual victims. They got money, after all.

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**James M Rawley** says:
January 13, 2018 at 11:56 am
Good for the present victim, maybe not so good for the future victims. And that's just one of the problems with confidential settlements. Maybe, like murder and theft, sexual harassment

should not be "punished" by civil lawsuits, but by actual criminal penalties, whether at the misdemeanor or felony level. Perhaps, as in Sweden, the definition of rape should be expanded to include some of what is now called harassment.

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