Microsoft Has Eliminated Mandatory Arbitration of Employee Sexual Harassment Claims. So, What?

By Karina B. Sterman, Esq.
Greenberg Glusker LLP
BIO: Greenbergglusker.com

The #MeToo movement. The #TimesUp movement. Icons of media and industry brought down by sexual harassment scandals that date back years and decades. All this has led to much discussion in state legislatures, in legal circles, and in the media about possible solutions to the prevalence of allegedly unknown incidents of sexual harassment in the workplace.

On the federal side, acting EEOC Chair Victoria Lipnic recently stated that the EEOC will be updating its decades-old enforcement guidance on sexual harassment. That guidance will apparently be released "soon". In addition, congressional lawmakers introduced legislation that would make it illegal for businesses to enforce arbitration agreements that workers must sign upon taking a job if the allegations involve either sexual harassment or gender discrimination under Title VII.

On the state side, at least seven anti-sexual-harassment bills have been announced or introduced in various state legislatures, including in California, in the last few months.

In the private sector, some companies are not waiting for new laws to be passed. Rather, Microsoft and other companies are supporting future sexual harassment victims by voluntarily eliminating mandatory arbitration agreements for employee sexual harassment claims. While this move has been commended, will it really address the underlying problem and is it really a good idea? I don't believe so.

According to a new CareerBuilder survey, more than one in 10 workers reported that they felt sexually harassed at work. Twenty-eight percent of those who felt sexually harassed at work said that the harasser was their boss. However, a whopping seventy-two percent of those who felt harassed did not report the conduct. The reasons given for not reporting the harassment included not wanting to be labeled a troublemaker (40 percent), not wanting to engage in a he said/she said (22 percent), and fear of losing their job (18 percent). In other words, fear of retaliation and other pressures are the reasons harassment claims were not reported. The reason such cases did not proceed to litigation similarly include fear of losing a job if the employee is still employed, the cost of litigation and the reality of having to wait years for any recovery in court.

Would allowing litigation of sexual harassment claims to proceed in court rather in arbitration alter the analysis? Unlikely, as the same predominant fear of retaliation for existing employees would exist. Indeed, a potential court trial is likely to exacerbate the problems of what are already some of the most emotionally heated legal disputes. If a company is likely to go

through a public trial, it is more likely to throw its best ammunition and defense to clear its name, shy of the existence of a proverbial smoking gun. In cases where there is often little actual evidence except contested testimony, victims and witnesses are likely to be accused of lying or exaggerating out of spite or for pure financial gain. Arbitration, which is not in front of a jury, rarely calls for such histrionics, and parties reach ultimate resolution much sooner than in court.

So, if providing the right to court litigation of sexual harassment claims is not the solution, what is?

The solution is not in an agreement. The solution is in the system. In other words, employees need a system in which they both create a workplace that does not condone or encourage sexual harassment and an internal response mechanism that appropriately addresses complaints of sexual harassment when they do occur.

According to that Career Builder survey, employees indicated that when they did report the harassment, the issue was resolved the vast majority of the time internally (76 percent). That is very encouraging!

Employers should work to develop a workplace culture that does not tolerate harassment, that does not look the other way at sexual jokes and banter, that does not ignore inappropriate touching and similar conduct.

If harassment is reported, employers should take the claims seriously and address them promptly and fairly. Indeed, California employers are legally required to do this, as reinforced by recent amendments to the Fair Employment and Housing Act (FEHA).

Employers who have a written harassment and retaliation prevention policy and who actually enforce it along with a culture of respect and fairness are far more likely to help potential victims of sexual harassment. Those employers should be fine, whether they have an arbitration agreement or not.