The EMPOWER Act

***E**nding the **M**onopoly of **P**ower **O**ver **W**orkplace harassment through **E**ducation and **R**eporting*

Workplace harassment, including sexual harassment and sexual assault are prohibited by law. Yet they are pervasive in the workplace. The Equal Employment Opportunity Commission (EEOC) estimates that 90% of individuals who say they have experienced harassment never take formal action, such as filing a charge or complaint. And roughly three in four never speak to a superior about this conduct.[1] The result of this silence is that workplace harassment persists.

Recent reports have led us to a moment of reckoning. This includes a wave of accusations of sexual harassment and sexual assault against Hollywood producer Harvey Weinstein. But the issue reaches far beyond Hollywood. We have seen that this issue extends to Silicon Valley, to Congress and state houses, to Wall Street and Main Street, and to the fields and homes where many women of color and immigrant women work. Ultimately, there is a monopoly of power in workplace harassment—those who control a paycheck, or a reputation, or a promotion have the power to perpetrate harassment, to protect harassers, and to silence victims.

This moment calls for action. Workplace harassment is illegal, but still ubiquitous. We must address gaps in the law that make it so.

First, in many workplaces, there is an expectation of silence reinforced by nondisparagement and nondisclosure clauses (NDAs) in their contracts that employees are effectively forced to sign as a condition of their employment. *The New York Times* reports these clauses "…are not limited to legal settlements. They are increasingly found in standard employment contracts in many industries, sometimes in a simple offer letter that helps to create a blanket of silence around a company."[2] Individuals who sign on to silence as a condition of employment often do so without representation and without a full understanding of the ramifications of their actions. The result is that an employee is uncertain of whether she is allowed to speak up about workplace harassment for fear of being fired or sued by her employer. These clauses that perpetuate the culture of silence should not be permitted.

Second, individuals who report workplace harassment are often blind to how pervasive these incidents may be at the workplace. This bill provides the tools for the EEOC to set up a confidential tip-line where it can easily receive additional information about incidents of harassment and assault at the workplace. The EEOC, who would share this data with state-based Fair Employment Practice Agencies, could then use this data to bring civil enforcement actions against employers where workplace harassment is pervasive and systemic.

Third, public companies owe a duty to their shareholders to disclose material developments regarding the company. However, these companies often find loopholes to evade disclosing critical information about the culture of the company that may very well affect its net worth. This practice has allowed employees who harass to quietly settle, essentially paying for the privilege to abuse.

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[1] CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, June 2016, v, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

[2] Katie Benner, *Abuses Hide in the Silence of Nondisparagement Agreements,* N.Y. TIMES, July 21, 2017, https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-non-disparagement-agreements.html.

For example, in January, 2017, Bill O'Reilly struck a $32 million agreement to settle a sexual harassment allegation. Top executives at Fox were aware of the complaints and made a business calculation to stand by O'Reilly. But in April, *The New York Times* reports, "[the Murdochs] decided to jettison Mr. O'Reilly as some of the settlements became public and posed a significant threat to their business empire."[3] Disclosures thus have a demonstrable effect on companies. But absent required disclosures, there is no transparency encouraging companies and their powerful employees to comply with the law.

Fourth, companies are allowed to write off their costs when litigating or settling claims of workplace harassment. This effectively allows companies to treat workplace harassment claims as simply the "cost of doing business." Ultimately, these write-offs remove important financial incentives for employers to prevent or punish harassers. On the victims' side, there are financial disincentives for plaintiffs to stand up against harassers in litigation or settlements. Victims who are willing to put themselves on the line to speak out against workplace harassment should not be penalized under the tax code when courts vindicate their claims or when they receive payments for a settlement.

Finally, the silence around harassment in the workplace may persist because some individuals lack critical knowledge and awareness about exactly what harassment *is*. Without fully understanding what constitutes workplace harassment, these individuals may not know if they have engaged in or experienced harassment. We must ensure that all employers and employees are educated about their rights and duties at the workplace, and know how to create a respectful workplace culture to prevent harassment in the future.

Accordingly, this bill:

- Prohibits nondisparagement and nondisclosure clauses that cover workplace harassment as a condition of employment, promotion, compensation, benefits, or change in employment status or contractual relationship;

- Establishes a confidential tip-line to receive reports about harassment to allow the EEOC to target employers that continue to allow for systemic harassment at the workplace. This would supplement the EEOC's current formal complaint process. The information would be shared with state-based Fair Employment Practice Agencies, who could also bring civil enforcement actions against employers;

- Requires that public companies disclose the number of settlements, judgments, and aggregate settlement amounts in connection with workplace harassment (as a material disclosure) in their annual SEC filings; and disclose the existence of repeat settlements with respect to a particular individual;

- Prohibits companies from tax deductions for expenses and attorneys' fees in connection with litigation related to workplace harassment; prohibits tax deductions for amounts paid pursuant to judgments related to workplace harassment; protects plaintiffs' awards and

[3] Emily Steel and Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES, Oct. 21, 2017, https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0.

settlements received in connection with workplace harassment as nontaxable income; and ensures that plaintiffs who receive frontpay or backpay as a result of harassment and discrimination are not taxed unjustly.

- Requires development and dissemination of workplace training programs to educate at all levels about what constitutes prohibited workplace harassment and how to prevent this behavior; educates employees about their rights with respect to workplace harassment, including how to report it; and trains bystanders on how to intervene and report; develops a public service advertisement campaign to provide further education on this issue.

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