

# The EMPOWER Act: Legislation to Combat Workplace Harassment

MARCH 2019

Workplace harassment is a pervasive issue that affects workers across the country and across industries. The Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (EMPOWER) Act enhances protections and reduces barriers that prevent people who experience harassment from speaking out and seeking justice and puts companies on notice that they can no longer shield harassers.

## Key Provisions of the EMPOWER Act

The EMPOWER Act was first introduced in 2018 by the bi-partisan team of Sens. Kamala Harris (D-Calif.) and Lisa Murkowski (R-Alaska) to address workplace harassment and the subsequent culture of fear that is created as a result of workers being silenced by those in power.

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**“SEXUAL HARASSMENT AND MISCONDUCT MUST NOT BE ALLOWED BY ANYONE AND SHOULD NOT OCCUR ANYWHERE.”**

— **Sen. Kamala Harris**  
(press release, June 2018)

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### The EMPOWER Act would:

#### ○ **End the use of nondisparagement and nondisclosure agreements in employment agreements.**

- Nondisclosure and nondisparagement agreements have become increasingly common in employment contracts and in settlement agreements for sexual harassment claims. Over one-third of workers are bound by nondisclosure agreements,<sup>1</sup> which have a chilling on the reporting of sexual harassment. The EMPOWER Act follows the lead of nearly 20 states that introduced - including six states that introduced and passed - legislation to ban the use of nondisclosure and nondisparagement clauses in employment agreements. Greater transparency makes the workplace safer for everyone.

#### ○ **Require public companies to report the number of settlements and judgments related to workplace harassment.**

- Under the EMPOWER Act, public companies would be required to disclose repeat settlements tied to a particular individual through filings with the Securities and Exchange Commission.

This would allow for greater transparency between the company, its workers and shareholders.

○ **End the practice of companies using tax deductions to write off legal fees associated with workplace harassment settlements.**

- Currently, when a company concludes a harassment case or settles a claim, they can write off the expenses, attorney's fees and compensation amount as tax deductions. The EMPOWER Act would end this practice of allowing companies to receive a benefit from a harassment claim. It would also protect an employee who wins a settlement award from incurring a tax penalty by classifying the settlement as nontaxable income.

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**“NO MATTER WHO YOU ARE OR WHERE YOU WORK, HARASSMENT IN THE WORKPLACE IS NOT ACCEPTABLE.”**

— **Sen. Lisa Murkowski**  
(press release, June 2018)

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○ **Create a confidential tip line for anonymous Equal Employment Opportunity Commission (EEOC) reports of workplace harassment.**

- In 2017, the EEOC received reports of nearly 27,000 claims of workplace harassment.<sup>2</sup> More than half of those claims were about sex-based harassment, and a quarter specifically about sexual harassment.<sup>3</sup> At the same time, the EEOC estimates that 90 percent of people who experience workplace harassment never file a complaint, primarily due to a fear of retaliation.<sup>4</sup> The EMPOWER Act creates a confidential tip line to receive, log and acknowledge the receipt of reports from workers, applicants, bystanders or other individuals who have witnessed or experienced harassment in the workplace.

○ **Require the development and dissemination of workplace training programs to educate all workers about what constitutes workplace harassment, including sexual harassment, how to prevent the behavior and how to report it.**

- The EMPOWER Act tasks the EEOC with creating and sharing best practices and training programs for employers about workplace harassment, including sexual harassment. The trainings will describe what constitutes sexual harassment, the rights of workers within the workplace, ways to report harassment, and measures of prevention.

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**“BY LIFTING THE VEIL OF SECRECY AND INCREASING TRANSPARENCY AND ACCOUNTABILITY, THE EMPOWER ACT WILL CREATE MORE RESPECTFUL AND EQUITABLE WORKPLACES.”**

— **Rep. Lois Frankel**  
(*Bustle*, July 2018)

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## Support the EMPOWER Act

### **The EMPOWER Act is needed to make workplaces safer for all employees, and especially those disproportionately affected by harassment.**

Between 2005 and 2015, women reported 80 percent – more than 68,000 – of the charges of sexual harassment to the EEOC.<sup>5</sup> Between 2012 and 2016, Black women filed nearly three times as many harassment charges as white, non-Hispanic women per 100,000 workers.<sup>6</sup> Overall, approximately one in four women experience sexual harassment while at work.<sup>7</sup> And in some industries, the number is as high as 85 percent.<sup>8</sup>

### **States have already taken steps to dismantle the system that upholds and protects harassers, and now we need federal action.**

During 2018 state legislative sessions, hundreds of bills were introduced across the country aimed at curbing sexual harassment in the workplace and protecting workers. New York<sup>9</sup> and California<sup>10</sup> passed laws establishing sexual harassment prevention training protocols and requirements. Vermont<sup>11</sup> and Washington<sup>12</sup> passed laws banning the use of nondisclosure agreements in employment contracts. And as the 2019 session gets underway, states across the country are introducing legislation related to sexual harassment. The EMPOWER Act would build on state action and secure protections for all workers.

### **What You Can Do to Support the EMPOWER Act**

#### **○ Contact your senators and representatives.**

- Make sure your representatives in Congress know that this law is crucial to reduce incidents of sexual harassment in the workplace.

#### **○ Encourage others to do the same.**

- Spread the word about the EMPOWER Act and encourage your family and friends to contact their representatives in Congress and tell them to support the bill.

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<sup>1</sup> Lobel, O. (2018, January 30). NDA's Are Out of Control. Here's What Needs to Change. *Harvard Business Review*. Retrieved 4 February 2019, from [https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=hbr](https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change?utm_source=twitter&utm_medium=social&utm_campaign=hbr), citing Thomas, R. S., Bishara, N., & Martin, K. J. (2014, February). *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants*. Vanderbilt University Law School, Law & Economics Working Paper. Retrieved 4 February 2019, from [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2401781](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2401781)

<sup>2</sup> Shaw, E., Hegewisch, A., & Hess, C. (2018, October). *Sexual Harassment and Assault at Work: Understanding the Costs*. Retrieved 1 February 2019 from Institute for Women's Policy Research website: [https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief\\_FINAL.pdf](https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf)

<sup>3</sup> Ibid.

<sup>4</sup> Feldblum, C. R., & Lipnic, V. A. (2016, June). *Select Task Force on the Study of Harassment in the Workplace*. Retrieved 5 February 2019 from the Equal Employment Opportunity Commission website: [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf)

<sup>5</sup> Frye, J. (2017, November 20). *Not Just the Rich and Famous: the Pervasiveness of Sexual Harassment Across Industries Affects All Workers*. Retrieved 4 February 2019 from the Center for American Progress website: <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>

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<sup>6</sup> Rossie, A., Tucker, J., & Patrick, K. (2018). *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*. Retrieved 4 February 2019 from the National Women's Law Center website: <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>

<sup>7</sup> See note 4.

<sup>8</sup> Ibid.

<sup>9</sup> New York State. (2018, April). 2018 Women's Opportunity Agenda. Retrieved 5 February 2019, from <https://www.ny.gov/2018-womens-opportunity-agenda-new-york/womens-opportunity-agenda#workplace>

<sup>10</sup> Cal. Govt. Code. §12950.1 (2018). Retrieved 9 January 2019, from <https://legiscan.com/CA/text/SB1343/id/1819377/California-2017-SB1343-Enrolled.html>

<sup>11</sup> Landes, J. M., Gross Sholinsky, S., & Gunzenhauser Popper, N. (2018, June). Vermont Enacts Sweeping Sexual Harassment Prevention Law [Blog post]. Retrieved 5 February 2019 from Epstein Becky Green website: <https://www.retailaborandemploymentlaw.com/sexual-harassment/vermont-enacts-sweeping-sexual-harassment-prevention-law/>; see also An Act Relating to the Prevention of Sexual Harassment, Sec. 1. 21 V.S.A § 495h (2018). Retrieved 5 February 2019, from <https://legislature.vermont.gov/bill/status/2018/H.707>

<sup>12</sup> An Act Relating to encouraging the disclosure and discussion of sexual harassment and sexual assault in the workplace, Wash. Rev. Code § 49.44 (2018). Retrieved 22 February 2019, from <https://app.leg.wa.gov/billsummary?BillNumber=5996&Initiative=false&Year=2017>

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