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#MeToo: Rapid Legal Developments But Considerable Uncertainty Remains

By Weil's Complex Commercial Litigation Practice

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The #MeToo movement sparked a legislative response that continues to spread across the country. In the absence of significant federal legislation, states and cities have jumped into the breach to address sexual harassment from a variety of angles, with some prohibiting or restricting mandatory arbitration and nondisclosure agreements, others focusing on investigations, policies, and training, and still others expanding the definitions and remedies related to sexual harassment claims.

Much of this new legislation, however, has left employers in a state of uncertainty. For example, while several states responded to #MeToo by banning mandatory arbitration, it remains to be seen whether these laws will be enforceable in light of recent Supreme Court decisions such as *Epic Systems* (in 2018) and *AT&T Mobility* (in 2011) recognizing the broad scope of the Federal Arbitration Act. On that basis, the former governor of California refused to enact legislation barring mandatory arbitration as a condition of employment or benefits, but the 2018 election of a new governor could allow similar legislation to make a comeback.

Employers are likely to see further change throughout 2019, as legislators seek to clarify what many on both sides of the employer-employee relationship have found to be ambiguous or impractical. For example, New York's 2018-2019 budget legislation included [several provisions related to sexual harassment in the workplace](#), including a ban on mandatory arbitration, procedural requirements for the inclusion of nondisclosure provisions in settlement agreements, and policy and training requirements. In part in response to public comment to the legislation, the New York State Legislature held a public hearing in February 2019 involving various constituencies and experts in the field (at which Weil Employment Litigation partner Gary D. Friedman was asked by the Legislature to, and did, [testify](#)) to consider amendments to the legislation and further legislative change on #MeToo issues.

Other states already have passed or proposed new legislation in 2019, such as New Jersey's restriction on the enforceability of nondisclosure requirements. The expansive law purports to render unenforceable *against employees* any provision in an employment contract or settlement agreement that has "the *purpose or effect* of concealing the details relating to a claim of discrimination, retaliation, or harassment." (emphasis added). At the federal level, Democrats announced legislation that includes proposals to extend the

statute of limitations for discrimination claims, replace the “severe and pervasive” standard for workplace discrimination, develop a list of factors for workplace harassment, and prohibit or restrict pre-dispute and post-dispute arbitration and nondisclosure agreements.

Importantly, the #MeToo movement has not only generated such reactive behavior, but also has incentivized companies to take [proactive measures to ensure their cultures, policies, and practices are equipped to prevent and respond to sexual harassment in the workplace](#). This momentum will continue, and will impact corporate governance issues as boards address the heightened demands of investors, customers, and the general public, and consider a variety of issues, including analyzing the company’s approach to investigations, creating a culture of reporting and remediation, establishing robust compliance programs, and developing protocols for addressing allegations against C-suite executives. These types of modifications ultimately will drive internal corporate policy changes, such as review of employee handbooks and rules, implementation of training programs, and re-examination of past reports of sexual harassment. Thus, employers are faced with many considerations as they juggle reacting to and anticipating both legislative change and public pressure for reform. 🇺🇸

A Roadmap for Building Goodwill as a Corporate Defendant

By Allison Brown

In February, a New Jersey jury of eight men heard opening statements in a personal injury trial that lasted over a month. One of thousands of lawsuits against Johnson & Johnson pending throughout the country concerning its iconic baby powder, the case was the third to go to trial in Johnson & Johnson's hometown, New Brunswick, New Jersey (Weil served as lead trial counsel to J&J in two of these three cases). Plaintiff Ricardo Rimondi alleged that his use of Johnson's Baby Powder for more than 50 years caused his rare and fatal cancer, mesothelioma. A month later, the jury returned a unanimous defense verdict, after deliberating for less than 30 minutes. Key to our success in securing this verdict is a concept we [write about frequently](#), teach in all of our associate trainings, and, together with our clients, structure at the heart of every trial engagement: How to Humanize the Corporation.

Mr. Rimondi, his health noticeably failing, appeared in the courtroom throughout the trial with his wife, elderly aunt, and five sons. During opening statements, plaintiffs' counsel introduced the members of the Rimondi family to the jury, offering a personal anecdote about each one as he or she stood for an introduction. The Rimondi family sat no more than a few feet away from the jury, making a personal connection impossible to avoid. Plaintiffs' counsel argued that, in stark contrast to a sympathetic family man who was dying of cancer, Johnson & Johnson was a faceless multi-billion dollar, multi-national corporation that had engaged in a decades-long conspiracy to sell asbestos to babies.

We focused early and often on making Johnson & Johnson relatable, following three key tenets.

1. Use Voir Dire to Strike Early and Often: Our efforts began during voir dire. New Jersey's jury questionnaires and individual voir dire not only allowed us to identify and strike jurors who entered the courtroom with a preexisting anti-corporate bias, but also provided the first

opportunity to give Johnson & Johnson a human face through its counsel. We used the opportunity to speak with jurors one-on-one before the case even began and to attempt to soften and mold the corporate image in a favorable manner.

- 2. Make Compelling Opening Statements that Emphasize the Personal Aspect:** With a jury empaneled, we pursued the next opportunity to humanize the company. Rather than begin opening statements by focusing on the strong scientific evidence supporting the safety of baby powder, we began with a simple proposition: "Corporations are made up of people." We argued that plaintiffs were not lodging their accusations against a faceless company, but rather accusing hundreds of New Jersey mothers and fathers, soccer coaches and scientists, of knowingly making and selling a product for babies that contained a deadly contaminant. Put in those terms, and against the backdrop of strong scientific evidence and decades of product testing, plaintiffs' arguments seemed even less plausible, if not absurd.
- 3. Throughout the Trial Use Every Opportunity to Personalize:** Throughout the trial, the Weil team emphasized Johnson & Johnson's strong ties to the New Brunswick community, focusing on its thousands of New Jersey employees, and headquarters just blocks away from the courthouse. The team also relied on Johnson & Johnson's corporate representative, Dr. John Hopkins, to attend opening statements and testify live. Dr. Hopkins presented with a friendly, authoritative, and earnest voice to discuss the company's policies and communications, frequently humanizing corporate documents by offering background on their authors. Finally, and over plaintiffs' counsel's objection, the Weil team secured jury charges that would ensure the last words the jury heard before deliberations underscored one of the major defense themes: "The defendant is a corporation. Under the law, a corporation is entitled to be treated the same as anyone else and is entitled to be treated the same as a private individual."

Sidebar

While each jury trial presents new and unique challenges, particularly when a sympathetic individual sues a large corporation, it is always critical for

defense counsel to think creatively and strategically about how to re-orient the jury's perception of the company. 🚀

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If you have questions concerning the contents of this issue of *Sidebar*, or would like more information about Weil's [Complex Commercial Litigation](#) practice, please speak to your regular contact at Weil, or to the editors listed below or the authors of each article.

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