

The Women's Legal Defense and Education Fund

December 1, 2023

Memorandum in Support of A306 (Cruz) / S14 (Gounardes)

For over five decades, Legal Momentum has been at the forefront of using the law to advance gender equality for women in the workplace, and it is based on this expertise that we submit this memo in support of A306(Cruz)/S14 (Gounardes). By invalidating the use of “no-rehire” clauses in settlement agreements between employers and employees or independent contractors, this bill would eliminate a longstanding practice used by employers that effectively penalize employees who challenge discrimination in a way that compounds the injury and harm faced by complainants over time.

Women continue to face high rates of workplace discrimination in many forms. There is a persistent wage gap of which, after accounting for factors such as experience, industry, and occupation, 38% can be attributed to discrimination.¹ A 2015 study concluded that women can be three times more likely than men to be passed over for an assignment, promotion, or wage increase as a result of their gender.² Repeated each year thereafter, the 2022 results of this study reveal a continued trend of women being promoted to manager at far lower rates than men, with women of color faring worse.³ And sexual harassment in the workplace remains pervasive.⁴ Yet, despite the persistence with which discrimination and harassment permeate workplaces, approximately 70% of workers never even complain internally.⁵

This is due, at least in part, to the fact that women confront substantial barriers to effectively challenging such discrimination. Women who bring legal challenges often face high rates of retaliation,⁶ as well as high financial and reputational costs that have the potential to negatively impact women's career prospects over time. Representing women in gender discrimination actions, we have seen first-hand the leverage that employers hold in settlement agreements, the hardships that women encounter in challenging discrimination, and the re-victimization they face when confronted with punitive settlement terms.

Specifically, we have seen how “no-rehire” clauses adversely impact victims of workplace sexual harassment. For example, Legal Momentum represented a client who

¹ Francine D. Blau & Lawrence M. Khan, *The Gender Wage Gap: Extent, Trends, and Explanations* 73 (Inst. for the Study of Lab., Working Paper No. 9656, 2016), <https://docs.iza.org/dp9656.pdf>.

² Lean In & McKinsey & Co., *Women in the Workplace 2015*, at 13 (2015), <https://womenintheworkplace.com/2015>.

³ Lean In & McKinsey & Co., *Women in the Workplace 2022*, at 8–9 (2022), <https://womenintheworkplace.com>.

⁴ Thirty-eight percent of women report having been subjected to sexual harassment at work. Holly Kearl, et al., U.C. San Diego Ctr. on Gender Equity & Health, et al., *Measuring #MeToo: A National Study on Sexual Harassment and Assault* 10 (2019), <https://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf>. Sixty percent of women report having been subjected to unwanted sexual attention, sexual coercion, sexually crude conduct, or sexist comments in the workplace. U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic* 9–10 (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace-report-co-chairs-chai-r-feldblum-victoria-lipnic> [hereinafter Feldblum & Lipnic].

⁵ Feldblum & Lipnic, *supra* note 4, at 16.

⁶ *Id.* at 16–17.

challenged workplace sexual harassment and was forced to leave her non-profit job in a small, unique field because her employer refused to dismiss the volunteer who was responsible for the harassment. Seeking to move on with her life and faced with the high cost of litigation, she settled the case and was strong-armed into accepting a “no-rehire” provision on claims from the employer that they never settle a case without one. Faced with an impossible choice, she accepted, but the decision exacerbated the significant emotional harm she experienced from the sexual harassment and the long process she endured trying to address it. And while we were successful in narrowing the scope of the clause, it nonetheless served to limit her career options going forward, particularly as an employee with unique expertise in a small field with limited opportunities.

As seen from the perspective of our clients, these clauses allow employers to penalize victims of workplace discrimination, compounding the economic hardship they have already endured by limiting their future employment opportunities and harming their career prospects, while further insulating the employer for engaging in unlawful discrimination.⁷ Based on our consultations with other employment lawyers, we know these clauses are commonplace. Allowing these clauses creates perverse incentives and problematic outcomes. As we saw in our case, it was our client and not the sexual harasser who was pushed out of her workplace and it was our client and not the sexual harasser who was asked not to return. These kinds of outcomes cannot be allowed to persist. For these reasons, states like California and Vermont have already banned no re-hire provisions.⁸ New York should join them.

Legal Momentum strongly supports this legislation. By invalidating these unfair clauses, this bill would correct a fundamental unfairness and eliminate a critical harm. Workers should be able to seek compensation for the harms they endured as a result of unlawful discrimination without being forced to compromise their future employment prospects.

⁷ See David E. Gottlieb & Japreena Kaur, *It's Time to Ban No Re-Hire Provisions in New York*, N.Y. L.J. (May 1, 2023), <https://www.law.com/newyorklawjournal/2023/05/01/its-time-to-ban-no-re-hire-provisions-in-new-york/?slreturn=20230805121838>; Molly Enking, *In a Move to Empower Victims of Sexual Harassment, Vermont Law Takes Aim at Common Legal Practice*, PBS News Weekend (July 22, 2028), <https://www.pbs.org/newshour/nation/vermont-sexual-harassment-no-rehire-clause-law>.

⁸ Cal. Code Civ. Proc. § 1002.5; Vt. Stat. Ann. tit. 21, § 495h(h)(1).