

# Buchalter

## Time's Up on 2018: New Legislation From the #MeToo Movement

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# #MeToo – WHERE HAVE WE BEEN

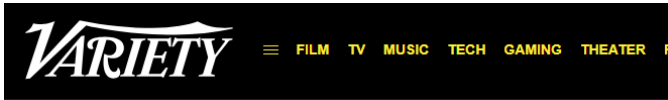
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- Numerous allegations of sexual misconduct against other powerful men in Hollywood, media, business and in the current White House
- Well known businesses and organizations have fired or suspended male executives who have been accused of harassment – aka “noisy terminations”
- Breaking news in many instances is “old news”



# #MeToo – WHERE HAVE WE BEEN

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HOME > MUSIC > NEWS

MAY 20, 2018 7:37PM PT

## Janet Jackson References #MeToo in Icon Award Speech at Billboard Music Awards

By Erin Nyren | [@ecnyren](#)



The Future of CBS

### THE LES MOONVES REPORT IS A #METOO HORROR SHOW

The latest allegations against Moonves are, if possible, even more damning. What his moral turpitude means for his \$120 million severance, Shari Redstone, and the future of CBS.



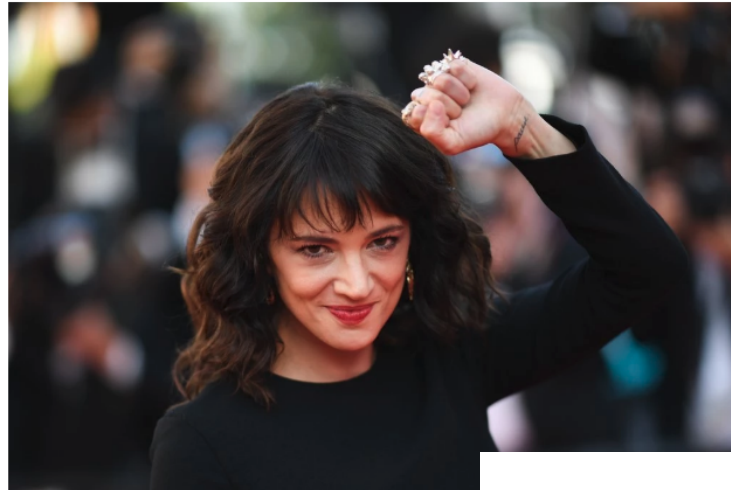
BY WILLIAM D. COHAN  
DECEMBER 8, 2018 4:18 PM



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## #MeToo Hits Cannes Closing Ceremony With a Fury



The Italian director Asia Argento publicly rebuked Harvey Weinstein called the festival his "hunting ground" and said he raped her there  
Loic Venance/Agence France-Presse — Getty Images

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### BILL COSBY'S CRIMES AND THE IMPACT OF #METOO ON THE AMERICAN LEGAL SYSTEM



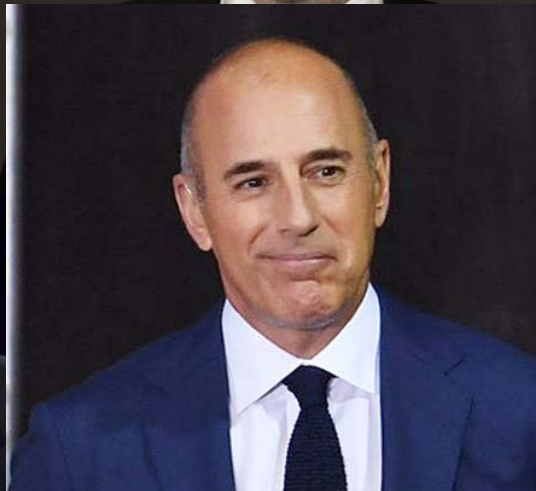
By Jeannie Suk Gersen April 27, 2018



Anticipating the decision in Bill Cosby's appeal, the court's recent choices over the studio's...



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# #MeToo – WHERE ARE WE GOING??

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## A year after Matt Lauer firing, ex-reporter calls out NBC. Comcast says she's wrong.

Jayme Deerwester, USA TODAY Published 9:52 a.m. ET Nov. 29, 2018 | Updated 8:56 a.m. ET Nov. 30, 2018



Matt Lauer is speaking out about the sexual misconduct allegations that led to his termination from NBC's "Today" show Time



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Thursday marks the one-year anniversary of "Today" anchor Matt Lauer's firing over what NBC deemed "inappropriate sexual behavior," which, along with the ouster of "CBS This Morning" host Charlie Rose,

## Unintended consequences: #MeToo movement causing 'gender segregation' on Wall Street

Published time: 4 Dec, 2018 20:49  
Edited time: 5 Dec, 2018 10:45

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The #MeToo movement was supposed to make life easier for women in the workplace. It was all about respect and making real abusers pay a price for their behavior. But is it possible to have too much of a good thing?

# #MeToo – WHERE WE (IN CA) ARE GOING?? Buchalter

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er in wrong-way DUI sh that killed 6 in mond Bar gets 30 year...  Wealthy USC donors revolt after interim president pushes out top dean over...  Waymo One, the first commercial robotaxi service, is now picking up...  UCLA economists predict the U.S. economy will downshift in 2019 and 2020 

## As the legislative year ends, the #MeToo movement shows its influence

By MELANIE MASON SEP 03, 2018 | 12:05 AM | SACRAMENTO



Participants including state Sen. Connie Leyva (D-Chino), second from right, march in Hollywood against sexual assault and harassment in November 2017. Lawmakers took up several bills to crack down on sexual harassment before they adjourned for the year on Aug. 31. (Damian Dovarganes / AP)

After the #MeToo wave crashed upon the Capitol's granite steps last fall, the issue of sexual harassment seeded into nearly every corner of California's legislative landscape.

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# NEW REQUIREMENTS EFFECTIVE 1/1/19 Buchalter

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## **New Restrictions on Confidentiality of Sexual Harassment/Discrimination Settlements**

- Settlement agreements often include broad scope confidentiality provisions that often preclude the claimant from discussing the terms of the settlement and the underlying factual basis of the original claim
- SB 820 (now Section 1001 of CA CCP) will limit that practice for settlement agreements entered into on or after January 1, 2019
- It prohibits confidentiality or non-disclosure provisions in settlement agreements that prevent the disclosure of factual information involving allegations of sexual misconduct
  - Extends to allegations of sexual assault, sexual harassment, an act of workplace harassment or discrimination based on sex, or an act of retaliation for reporting same, or failing to prevent same
  - Unless the party alleging the harm desires confidentiality language to protect his or her identity

# NEW REQUIREMENTS EFFECTIVE 1/1/19 Buchalter

## New Restrictions on Confidentiality of Sexual Harassment/Discrimination Settlements

*Cont'd*



- Covers a broader category of claims than sexual harassment – includes sex discrimination, failure to prevent, and retaliation
  - SB 820 will have an impact beyond just the #MeToo movement and sexual harassment cases
- Only applies to “claims filed in a civil action or a complaint filed in an administrative action”
  - Thus, appears to not prohibit such clauses being used in settlements that occur in the “pre-litigation” phase
- The law does not void confidentiality provisions that prevent disclosure of the amount paid in settlement of a claim



# NEW REQUIREMENTS EFFECTIVE 1/1/19 Buchalter

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## New Restrictions Regarding Preventing Future Testimony

- Related note on settlement agreements – AB 3109 (now Section 1670.11 of CA CCP) will limit preclusion of future testimony for settlement agreements entered into on or after January 1, 2019
- Prohibits provisions in settlements that would prevent someone from testifying about *alleged criminal conduct* or alleged sexual harassment in an administrative, legislative, or judicial proceeding where the individual is requested to attend the proceeding pursuant to a court order, subpoena or written request from an administrative agency or the legislature

# NEW REQUIREMENTS EFFECTIVE 1/1/19 Buchalter

## New Restrictions Regarding Preventing Future Testimony

*Cont'd*

- Inspired by the case of Olympic gymnast McKayla Maroney
  - According to media reports, Maroney's settlement agreement with USA Gymnastics subjected her to a \$100,000 fine for testifying in a criminal trial against the team doctor that was alleged to have sexually abused her and many other gymnasts
- May have broader implications because of prohibition of clauses that prohibit a party's right to testify about *alleged criminal conduct*



# **NEW REQUIREMENTS EFFECTIVE 1/1/19** Buchalter

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## **New Requirements for Sexual Harassment Training**

- SB 1343 will soon require employers with five or more employees to provide sexual harassment prevention training to both supervisory and non-supervisory employees



## **New Requirements for Sexual Harassment Training** *Cont'd*



- ***Smaller Employers Now Covered***

- Existing law generally requires employers with 50 or more employees to provide sexual harassment (and similar conduct) prevention training to supervisors once every two years
- SB 1343 greatly expands the number of California employers who are required to provide training to those with five or more employees
- These employers will now generally be required to provide the mandated training by January 1, 2020

# NEW REQUIREMENTS EFFECTIVE 1/1/20 Buchalter

## **New Requirements for Sexual Harassment Training** *Cont'd*

- ***Training Required For Both Supervisors And Non-Supervisors***
  - Existing law requires two hours of training for supervisory employees only, SB 1343 extends a new training obligation to all other non-supervisory employees



# NEW REQUIREMENTS EFFECTIVE 1/1/20 Buchalter

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## **New Requirements for Sexual Harassment Training** *Cont'd*

- By January 1, 2020, employers with five or more employees must provide:
  - Supervisors with at least two hours of training within six months of their assumption of a position
  - Non-supervisory employees with at least one hour of training within six months of their assumption of a position
- After January 1, 2020, covered employers must provide the required training to each employee in California once every two years.
- The new law specifies that an employer who has provided the training to an employee after January 1, 2019 is not required to provide training again by the January 1, 2020 deadline

# NEW REQUIREMENTS EFFECTIVE 1/1/20 Buchalter

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## **New Requirements for Sexual Harassment Training** *Cont'd*

- Training may be completed by employees individually or as part of a group presentation, and may even be completed in shorter segments as long as the total hourly requirement is met
- Beginning January 1, 2020, for seasonal and temporary employees, or any employee that is hired to work for less than six months, employers shall provide the required training within 30 calendar days after the date of hire, or within 100 hours worked, whichever occurs first
  - In the case of a temporary employee employed by a temporary services provider to perform services for clients, SB 1343 specifies that the training shall be provided by the temporary services employer, not the client
- An employer may develop its own training or may direct employees to view online DFEH training videos





## **SB 1300 – “The Mother of #MeToo Bills”**

### ***Limitations On Release Of Claims And Non-Disparagement Agreements, Cont’d***

- Tangible Productivity – The law contains language affirming U.S. Supreme Court Justice Ginsburg’s concurrence in *Harris v. Forklift Systems* that, in a workplace harassment suit, “the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find...that the harassment so altered working conditions as to make it more difficult to do the job.”
- Single Incident Sufficient – The new law declares that a “single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment.”

**SB 1300 – “The Mother of #MeToo Bills”**

***Limitations On Release Of Claims And Non-Disparagement Agreements, Cont’d***

- Rejection Of “Stray Remarks Doctrine” – Affirms that the existence of a hostile work environment claims depends on the totality of the circumstances, and that a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant and circumstantial evidence of discrimination
- Summary Judgment “Rarely Appropriate” – SB 1300 declares legislative intent that harassment cases are “rarely appropriate for summary judgment”

## **SB 1300 – “The Mother of #MeToo Bills”**

### ***Limitations On Use of 998 Offers to Compromise***

- SB 1300 amended FEHA to provide that statutory offers to compromise under Code of Civil Procedure 998 may not be used to shift the recovery of fees and costs to a prevailing defendant ***unless the court finds the action was frivolous***
- Significantly curtails the usefulness of such offers as a tool to recover fees and costs for employers who are ultimately successful in defending FEHA claims
  - Emphasizing this point, after SB 1300 was passed, the Court of Appeal in *Huerta v. Kava Holdings, Inc.*, 29 Cal. App. 5th 74 (2nd Dist., Nov. 14, 2018) noted the statutory change to take effect January 1, 2019 to deny fee shifting

# **NEW REQUIREMENTS EFFECTIVE 1/1/20** Buchalter

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## **Corporate Boards Are Required to Include Women**

- All California-based publicly traded corporations must have at least one female director on their board of directors by the end of 2019
- In 2021, this requirement increases depending on the total number of directors on the board



## **New Restrictions on Talent Agencies**

- Aimed at preventing directors and producers from taking advantage of young talent looking for a break, SB 224 creates a new cause of action for sexual harassment related to these types of businesses and professional relationships where unwelcome sexual advances, solicitations, sexual requests, demands for sexual compliance, or other verbal, visual, or physical conduct of a sexual or hostile nature cause the client injury
- AB 2338 requires that a talent agency, as a condition of the requirement that it be licensed with the Labor Commissioner, provide educational materials on sex harassment prevention, retaliation, and reporting resources to its talent (the artists)
  - Failure to comply will result in \$100 fines for each violation.

## **New Requirements on Human Trafficking Awareness**

- SB 970 requires that employees who are likely to interact or come into contact with victims of human trafficking (e.g., those who have recurring interactions with the public such as receptionists, housekeepers, and drivers) go through 20 minutes of classroom or other interactive training regarding human trafficking awareness

# #MeToo – What Else Should be in Buchalter Your Resolution?

## What do your policies say?

- Do you encourage whistleblowing?
  - Set the tone
  - Train the right way
- Complaint mechanism
- Go back and review your policy
- CA requires specific provisions for sexual harassment; on a national scale, consider the same



# #MeToo – What Else Should be in Buchalter Your Resolution?

## What does your training look like?

- Evaluate current training practices
  - Who provides the training?
  - Who gets the training?
  - How often?
  - What setting?
  - Any follow-up?





# #MeToo – What Else Should be in Buchalter Your Resolution?

## What does your structure imply?

- Evaluate your structure and leadership
  - Do employees communicate effectively?
  - Is your organization genuinely receptive to reports?
  - Is it responsive to claims?
- Does your organization conduct appropriate investigations?
- Does it take appropriate remedial action at all levels?



# #MeToo – What Else Should be in Buchalter Your Resolution?

Review your claims and settlement history

- Internal reports, charges and lawsuits
- How were claims settled?
- Do you have a history of buying silence?
- Do you have repeat offenders?
- Are there particular circumstances under which harassment has occurred?
  - Events at hotels with alcohol
  - Sales conferences
  - Late night projects, etc.



# #MeToo – THE YEAR TO COME

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- Watch the developments on mandatory arbitration agreements – if legislation does not require a change – the public itself might!



A Google employee holds a sign during a walkout to protest how the tech giant handled sexual misconduct at Jackson Square Park in New York, Nov. 1, 2018. Peter Foley/Bloomberg via Getty Images

News


## More Employers Turn to Arbitration to Handle Job Claims

Posted Dec. 6, 2018, 3:16 AM

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SINCE 2018

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We are Harvard Law School students working with students, faculty, and alumni at our institution to end harassment and discrimination in the legal profession.



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## After Kirkland, Sidley Arbitration Flip, Group Eyes DLA Piper

By Chris Villani

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Law360, Boston (November 28, 2018, 12:06 PM EST) -- After pressuring Kirkland & Ellis LLP and Sidley Austin LLP to reverse arbitration policies covering employment disputes, a group of Harvard law students on Wednesday urged peers to "dump" DLA Piper until the firm promises to stop using so-called coercive contracts.

The Pipeline Parity Project, an organization started earlier this year by several Harvard Law School students, took to social media Wednesday morning to encourage other legal industry hopefuls to #DumpDLA over the company's alleged use of mandatory arbitration agreements as a condition of employment. The new campaign comes a week after a pre-Thanksgiving Kirkland & Ellis memo to all staff saying the firm would no longer require arbitration for associates or summer associates. Sidley Austin, which Pipeline Parity said also used forced

**Questions?**