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#MeToo Movement Brings Busy Times for Labor Lawyers

By Stephanie Russell-Kraft - *Big Law Business*
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Perkins Coie at the end of November assembled a workplace harassment task force of about 20 lawyers to address the uptick in calls the firm was receiving from clients.

The task force is based in the labor and employment practice. But it also includes attorneys from corporate governance, in case C-Suite executives are implicated, white collar, to address any potential criminal assault charges, and insurance, to help clients determine what their policies will cover.

"We felt that it would be a great thing to, in a more formal way, gather a group of attorneys from different practice areas that could be triggered or mobilized very quickly when a client has a need that needs to be addressed promptly," said partner Ann Marie Painter.

What began in October with reports about Harvey Weinstein's alleged serial sexual predation has sparked a viral engagement with the #metoo social media movement, a national conversation about sexual misconduct, and a wave of high-profile workplace sexual harassment allegations in entertainment, media and politics that shows no sign of letting up. On Monday, Ninth Circuit Judge Alex Kozinski **announced** via his lawyers at Quinn Emanuel Urquhart that he will retire immediately following allegations of sexual misconduct from more than a dozen women.

The cultural phenomenon has created work for lawyers, from creating new internal policies at corporations, to advising them on upcoming legislation that could fundamentally change how sexual harassment allegations are settled.

Painter and other management-side attorneys who spoke with Big Law Business described a fundamental shift in the way clients are asking for advice.

“No practitioner who’s been practicing in the area of labor and employment for the past 25 years is surprised by any of these allegations,” said Painter. “What is surprising is the volume and the public nature of them and the swiftness with which employers are taking action in response to these allegations.”

Painter said the public nature of the recent allegations has changed the way her clients are thinking.

“It is apparently getting the attention of investors, shareholders, business partners, so that it has taken on a greater degree of significance,” she said.

The most common requests Painter and other lawyers have received are for sexual harassment training in 2018 and help with internal investigations.

Strong training programs and comprehensive internal complaint mechanisms put employers in a better position to defend themselves from liability when complaints are made against them. Employers are not expected to monitor every action taking place within their workplaces, but they must take reasonable steps to prevent harassment and assault from occurring in the first place, according to Helene Wasserman, a shareholder at Littler Mendelson.

“We are seeing clients more focused on how investigations are to be conducted, and by whom,” she said. “Employers are definitely more and more aware and more skittish.”

That skittishness is clear this holiday season, as many employers have decided to eliminate alcohol from their staff holiday parties, according to **a survey** by outplacement consultancy Challenger, Gray & Christmas. Some companies have canceled their shindigs altogether, **Bloomberg News reported**.

Wasserman said the current climate has also led to higher pre-suit settlement values in sexual harassment and misconduct matters with employers eager to avoid the risks and public scrutiny of litigation.

“There’s a fear that the jury pools are going to be potentially overzealous,” she said.

Melanie Pate, a partner at Phoenix-based Lewis Roca Rothgerber Christie, said the media attention has raised settlement values on her pre-litigation workplace harassment and discrimination matters "by at least 15-25 percent, depending on the facts of the case."

"Companies are concerned about issues becoming public and affecting their reputation and their ability to attract good, top talent," she said. "And victims are rightly feeling empowered and feeling they can use that empowerment as leverage to request more money and more non-monetary benefits."

Given the confidential nature of pre-suit settlements, Pate and Wasserman's claims are impossible to verify. In fact, most workplace sexual harassment claims are settled outside of the court system, with strict non-disclosure agreements attached, making it difficult for the public to understand the scope and depth of workplace sexual assault.

The use of NDAs in high-profile settlements involving Harvey Weinstein, Roger Ailes, Bill Cosby and others has put them on the political chopping block. In the past several months, lawmakers in a handful of states including New York and New Jersey have introduced legislation to bar the use of confidentiality agreements in claims of workplace sexual harassment.

Proponents of the bills believe that these confidentiality clauses, which have become nearly standard in all workplace settlements, promote a culture of silence around sexual harassment. Advocates also argue that the inherent power imbalance between employers and employees makes it difficult for employees to sign truly voluntary non-disclosure agreements, meaning companies are able to force victims into silence as condition of settling their claims.

The lawyers who spoke with Big Law Business said they and their clients are worried about unintended consequences for both companies and employees if such laws are passed.

"These bills have a real risk of overturning the apple cart," said Ogletree Deakins shareholder Ron Chapman. "Companies are going to be more reluctant to settle at all, certainly more reluctant to spend more money on settlements and more likely to take cases to trial."

Some plaintiffs' attorneys who spoke with Big Law Business also believe that bars on confidentiality might hurt their clients by reducing companies' willingness to settle or by lowering the value of settlements. If employers no longer have the promise of confidentiality in a pre-suit settlement, they may offer less money or be more likely to take their chances in court.

Confidentiality agreements can also protect employees from retaliation.

“Victims often want them,” said Gillian Thomas, senior staff attorney for the American Civil Liberties Union’s Women’s Rights Project. “Often someone who has been harassed or has had any discrimination happen to them wants to put that incident or incidents behind them.”

Mark Konkel, a labor and employment attorney at Kelley Drye & Warren, said he understands the impetus behind the proposed legislation, but believes it is misguided. He said the #metoo movement on its own has led to a “sea change” in the way his clients are thinking about sexual harassment.

For many years, companies thought of harassment as a legal risk, and they sought training on how to avoid situations that might hurt them in court, according to Konkel, who said the perception of that risk has changed.

“I think there was more room for a kind of cynical compliance when this issue was not as public, and by cynical compliance I mean regulatory box checking,” said Konkel. “And now the focus is, ‘How can we make sure that our female employees don’t feel this way, and how can we identify who may be making them feel this way, and what do we do with him when we find him.’”

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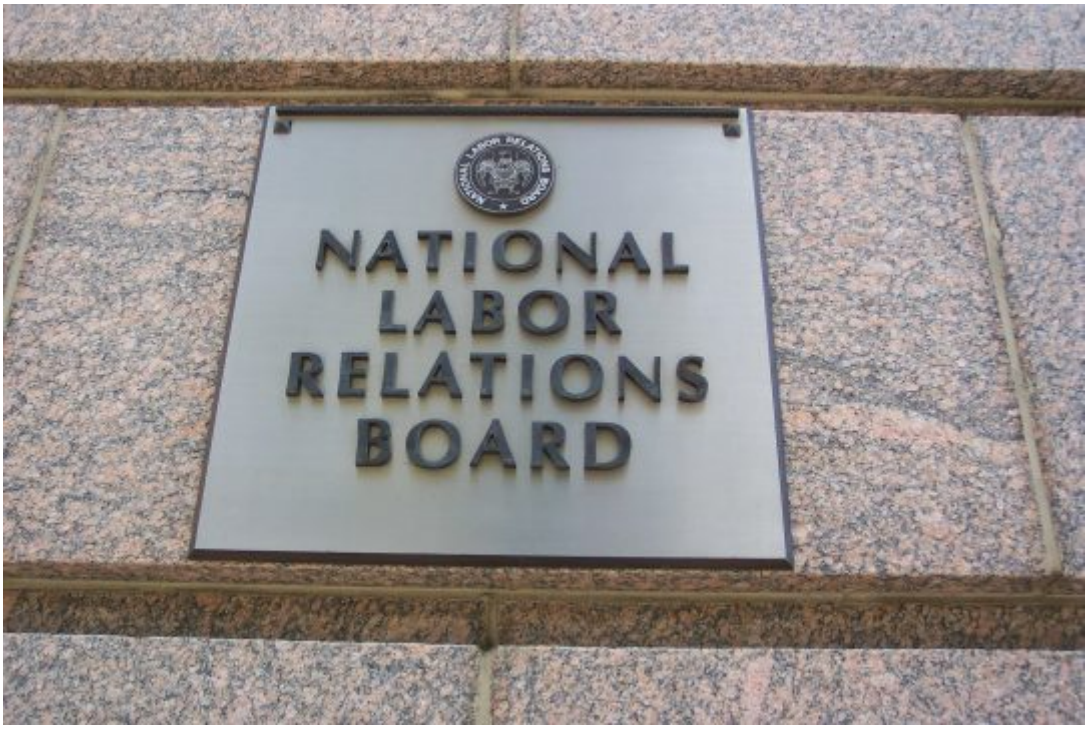

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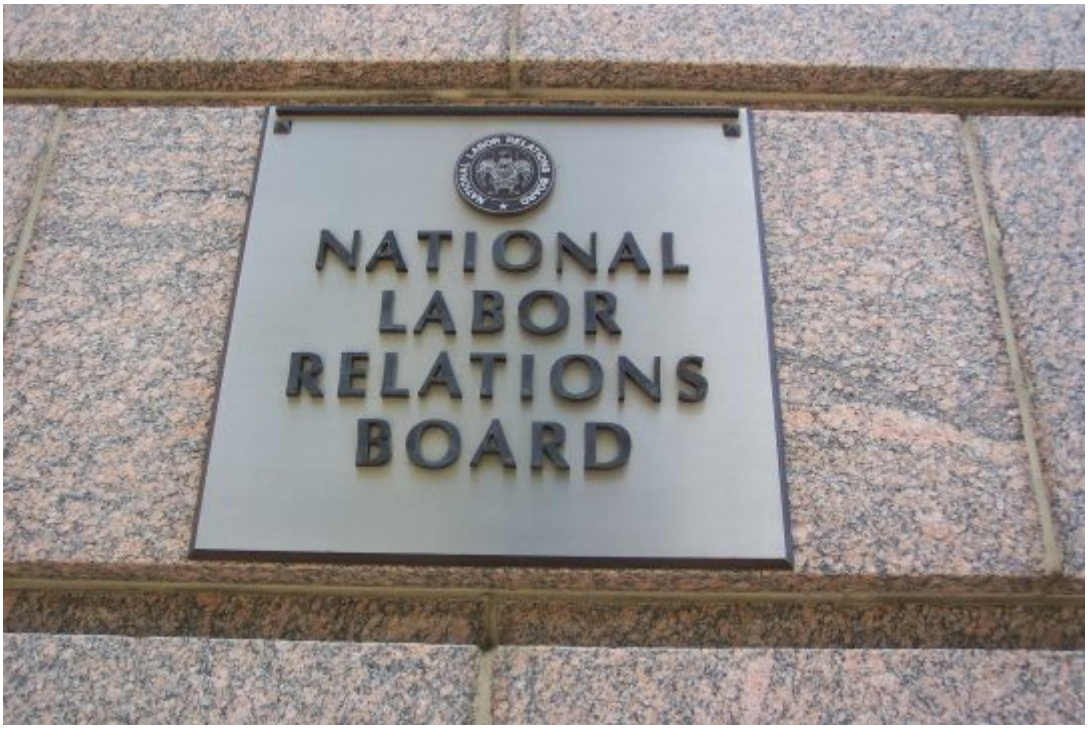

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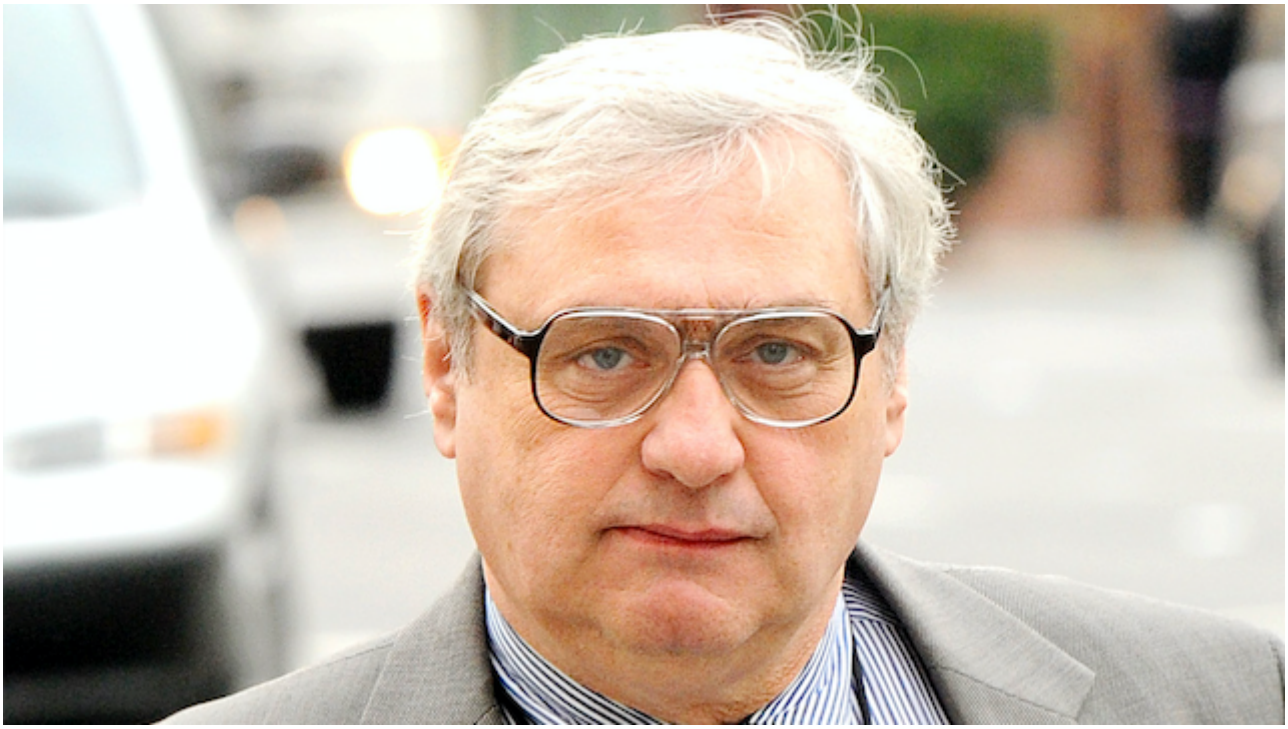

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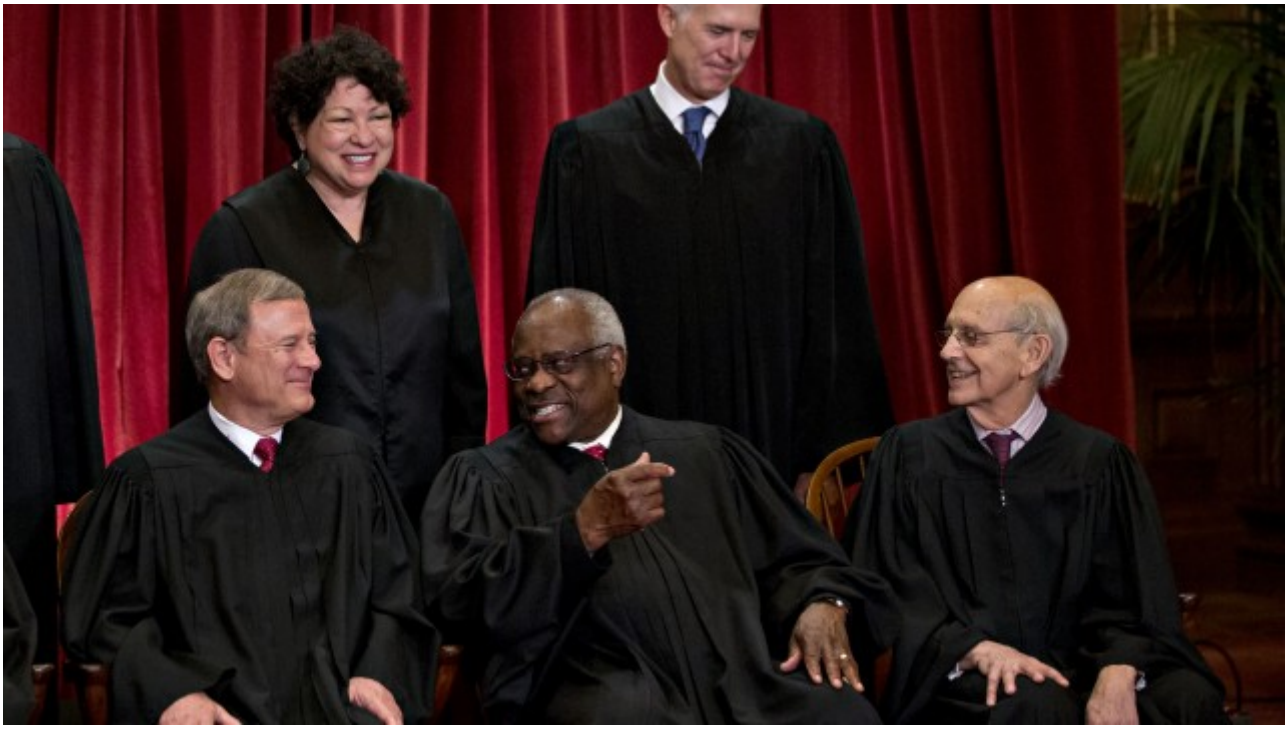

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