

#MeToo and You: Sexual Harassment in the Workplace in 2018

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Agenda

- Overview
- What has not changed – statutory protections
- The current environment
- What does this mean for employers?
 - How to Respond
 - How to be Proactive

Key Themes

- This is a new world
- Legal defenses cannot be the focus
- Proactive action must be implemented
 - Boy's club atmosphere is unsustainable

Key Themes

- Employee Expectations:
 - Expectation that you will take proactive action
 - Expectation of prompt, rapid investigation and action when faced with complaint
- Be ready to act!

The Fundamentals of Unlawful Harassment

- Federal and State statutory protections against discrimination and harassment:
 - Sex (including pregnancy)
 - Sexual orientation (broadly defined)
 - Race, color, religion, creed, national origin
 - Disability
 - Age, Marital status, familial status, etc.

Sexual Harassment

- Quid pro quo harassment
- Hostile work environment
 - Unwelcome sexual conduct that is “severe or pervasive” and :
 - Unreasonably interfere with an individual’s work performance; or
 - Create an intimidating, hostile or offensive working environment
 - Intent is not required
 - “I did not mean to offend anyone” will not necessarily work

Sexual Harassment

- Behavioral concerns – examples:
 - Teasing, unwelcome personal inquiries
 - Unwelcome solicitation
 - Staring
 - Invading personal space
 - Invading privacy

Sexual Harassment

- Behavioral concerns – examples:
 - Text messages, email, YouTube, social media
 - Touching
 - Suggestive behavior
 - Sexually-graphic pictures or materials

Sexual Harassment

- Employer's legal obligation:
 - Knew or should have known of the harassment
 - Investigation, timely and appropriate action
- Potential for strict (automatic) liability

Sexual Harassment

- Parameters of sexual harassment:
 - By any individual and toward any individual
 - Unlawful harassment by:
 - A man against a woman
 - A woman against a man
 - A woman against a woman
 - A man against a man

Retaliation

- Retaliation examples:
 - Job status or environment negatively affected because the employee has:
 - Complained about potentially illegal harassment or illegal discrimination
 - Participated in an investigation
 - Filed a charge or lawsuit

Retaliation

- Conduct of concern – examples:
 - Termination/demotion
 - Poor performance review
 - Denial of work opportunity
 - Shunning, targeting

Sexual Harassment v. Inappropriate Behavior

- The legal bar to prove sexual harassment was and still is high, BUT
- The focus should be on preventing all inappropriate behavior, not just conduct you can be liable for

The Media Explosion

- Hollywood
- TV Personalities
- CEOs
- Coaches
- Writers, performers
- Judges
- U.S. gymnastics
- And everyone else...

And It Goes Viral

- Me Too movement – **#MeToo**
- Explosion – Facebook, Twitter, Instagram
- Across generations
- Across cultures
- International

Changing Perceptions

- 2011: 47% of Americans – sexual harassment a serious problem
- 2018: 82% – sexual harassment a problem
- 2018: 72% – sexual harassment a serious problem

Washington Post – ABC News Polls 10/2017, 1/2018

New Environment

- Issue has entered the public psyche
- Public discourse will continue for some time
- Ground has already shifted

New Environment

- Heightened awareness
- Heightened sensitivity
- Awareness of legal rights
- Legal thresholds not a barrier

Awareness and Sensitivity

- Sensitivity and awareness extends beyond traditional harassment:
 - Rude behavior
 - Abusive behavior
 - Bullying

Awareness and Sensitivity

- Sensitivity and awareness extends beyond traditional harassment:
 - Advancement
 - Work opportunities
 - Compensation, pay equity

Increased Scrutiny

- Scrutiny of behavior and actions
 - Boards
 - Executives
 - Management
 - Supervisors
 - Individuals in positions of power: i.e. physicians
 - Patients!

Practical Effects of the New Environment

- Increase in internal complaints
- Employees seeking legal advice
 - More frequently
 - Earlier in process
- Higher demands
- Some increase in agency activity
- Litigation not increasing?
 - More settlements

Legal Thresholds are No Barrier

- What about the statute of limitations?
- Complaints about former employees
- Anonymous complaints
- Complaints on social media
- Concern must be multi-faceted
 - Correcting the issue (i.e. preventing bad behavior!)
 - Mitigating risk
 - Mitigating public relations problems

How Did We Prepare in the Past?

- Traditional “training”
 - One-time “training” or every several years
- Policy in handbook
- Focus on legal definitions
- High thresholds
- Tolerance for the way things have always been

Proactive Measures in the Past

- Policies were not read
- Training was not taken seriously
- Programs were not designed for specific work environment
 - Specific issues for health care industry
 - Patient issues and privacy
 - Hierarchical structures

Meeting the Challenge: Being Proactive in Today's World

- Involve senior management and practitioners in discussion, preparation, content and message
- People do not take things seriously at their own peril

How Can You Address Challenges Today?

- Team building sessions regarding history, concerns, past incidents
- Surveys (work with counsel)
- Examine and evaluate current “state of affairs”/past concerns and challenges
- Determine goals and outline steps

How Can You Address Challenges Today?

- Consider a program in the nature of an ongoing dialogue rather than a once a year or once every several year focus
- Potential forums: management meeting, team meetings, one-on-one check ins

How Can You Address Challenges Today?

- Consider special focus meetings for new leaders, individuals moving into leadership positions
- Utilize performance evaluations and meetings with management as opportunity
- Reward and consequences

How Can You Address Challenges Today?

- Broaden the discussion/provide tools for mgmt to address “accidents waiting to happen”:
 - Rude behavior
 - Disruptive behavior
 - Bullying behavior, teasing
 - Physical boundaries/personal boundaries
 - Dating or budding romantic relationships

How Can You Address Challenges Today?

- Broaden the discussion/provide tools for mgmt to address “accidents waiting to happen”:
 - Problem patients
 - Problem vendor personnel
 - Company-sponsored events
 - Trade shows
 - Business trips
 - After hours!

Meeting the Challenge: Employees at Large

- Consider frequent touch points, rather than annual “training”
- All employee meetings
- Team meetings
- One-on-one check ins

How Can You Address Challenges Today?

- Content of message and discussion
- Move beyond legal definitions
- Broaden the message and discussion to:
 - Mission
 - Culture

How Can You Address Challenges Today?

- Discuss/do not avoid the tough topics:
 - Rude behavior
 - Disruptive behavior
 - Bullying, teasing
 - Physical boundaries/personal boundaries

How Can You Address Challenges Today?

- Discuss who to contact in the event the employee witnesses or is subject to inappropriate behavior, conduct
- Discuss the company's commitment to addressing concerns brought to its attention

Takeaway

- Focused, multi-faceted training
- Don't just rely on a policy
- Create culture shifts where necessary

Reaction: What to do When You Receive a Complaint?

- Investigate
- Take action as needed
- Reflect

Why Investigate: The Lawyer's Perspective

- Evaluate merits of potential claim
- Identify admissions
- Satisfy company requirement and the law
- Identify soft spots
 - Prevent small problems from becoming bigger

Why Investigate: What Would a Normal Person do?

- Find out what happened
- Resolve problems
- Limit workplace disruption
- Employee expectations
- Right thing to do

When to Investigate

- Aware of possible misconduct
- Internal complaint/grievance
- Agency contact
- Lawyer contact

Sources of Complaints

- Written, electronic, oral
- Employee, supervisor, or third party
- Exit interviews
- Hot lines

Sources of Complaints

- Off-hand comments
- Comments overheard
- Social media

Successful Investigations

- Clear scope
- Impartial and credible investigator
 - Outside or inside?
- Prompt and thorough
- Interviews, documents and data
- Careful documentation

Take Action

- Based on your investigation, what do you do?
- Evaluate credibility
- Proportional and appropriate response
 - Not all bad behavior is created equally
 - But: employees expect termination for bad behavior
 - Consider how this will look in litigation

Reflect

- Why did this happen?
- What can you do to prevent it in the future?

Implications of Inaction or Ineffective Action

- Business reputation, personal reputation
- Disputes played out in traditional media
- Disputes played out in social media
- Impact on productivity, talent turnover, recruiting talent
- Impact on client and patient relationships

Implications of Inaction or Ineffective Action

- Agency charges
- EEOC lawsuits
- Threatened lawsuits
- Negotiated settlements

Implications of Inaction or Ineffective Action

- 2018 reported settlements - examples:
 - GEO Group – \$550,000 (1/2018)
 - Indi's Fast Food – \$340,000 (1/2018)
 - Mariscos Altata – \$220,000 (9/2018)
 - Discovering Hidden Hawaii – \$570,000 (5/2018)

Implications of Inaction or Ineffective Action

- 2018 reported settlements - examples:
 - Burger King – \$2.5 million (1/2018)
 - IHOP – \$1 million (7/2018)
 - DDZ – \$625,000 (4/2018)

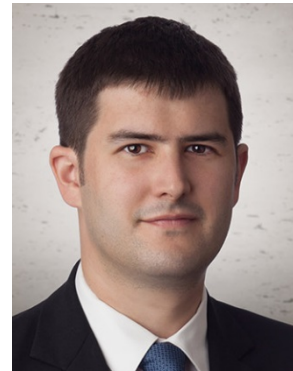
Takeaways: New Reality

- The world is different
- Public discourse expected to continue
- Employee awareness and sensitivity
- Old habits will not suffice

Questions?



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