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Employment Law: Sexual Harassment and Compliance in the Work Place

Presented by:
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Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades

Harvey Weinstein fired after sexual harassment claims

THE WEINSTEIN COMPANY



Harvey Weinstein's wife concerned about Marchesa fashion line amid sexual harassment scandal

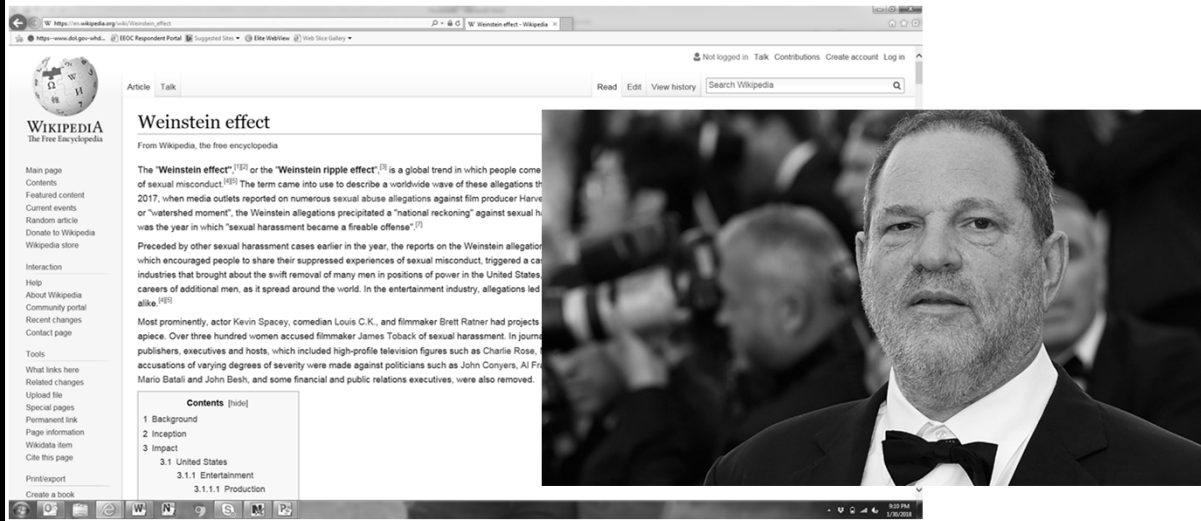
Harvey Weinstein Tried to Impede Company's Harassment Probe (EXCLUSIVE)

By Gene Maddaus | @GeneMaddaus



FESTIVAL DE CANNES
Partenaire Officiel

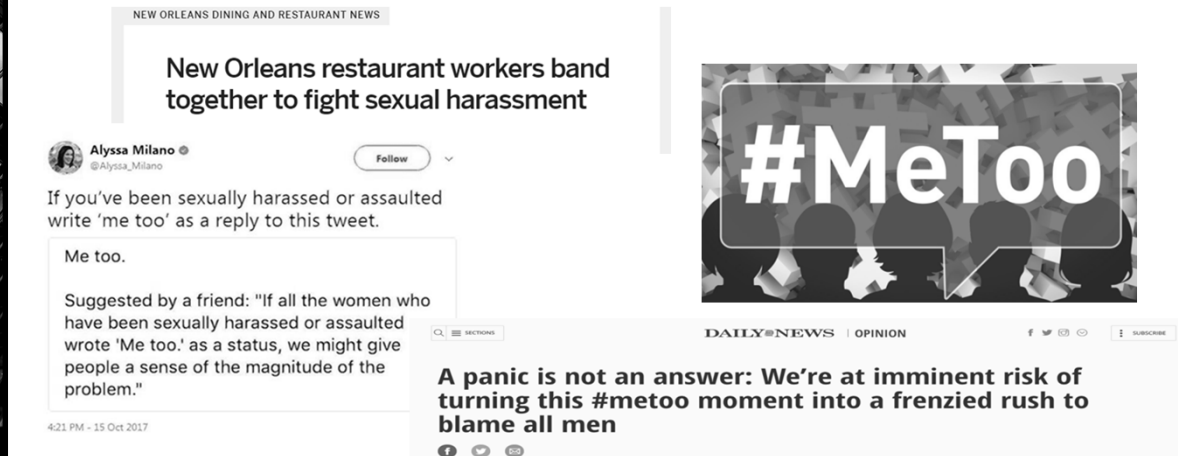
The “Weinstein effect”



Weinstein aftermath: All the men accused of sexual misconduct (*USA Today*, November 22, 2017)

Ben Affleck	Mark Halperin	Roy Price	Sylvester Stallone
Gavin Baker	Dustin Hoffman	Brett Ratner	George Takei
John Besh	Danny Jordaan	Twiggy Ramirez	Jeffrey Tambor
George H.W. Bush	Steve Jurvetson	Terry Richardson	Glenn Thrush
Louis C.K.	Ethan Kath	Charlie Rose	James Toback
Nick Carter	Andrew Kreisberg	Gilbert Rozon	Bob Weinstein
John Conyers	John Lasseter	Chris Savino	Harvey Weinstein
Andy Dick	Benny Medina	Mark Schwahn	Matthew Weiner
Richard Dreyfuss	Murray Miller	Robert Scoble	Ed Westwick
Hamilton Fish	Roy Moore	Steven Seagal	Leon Wieseltier
Al Franken	Michael Oreskes	Russell Simmons	
Alex Gilady	Jeremy Piven	Tom Sizemore	
Gary Goddard	David Guillod	Kevin Spacey	

A Cultural Shift?



Harassment Defined

- Unwelcome conduct based on protected characteristic
- Becomes unlawful where:
 - Enduring offensive conduct becomes a condition of continued employment (*quid pro quo*) or
 - Conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (*hostile environment*)



Recognizing Sexual Harassment

Hostile Work Environment: Yes or No?

- Asking for a date?
- Commenting on clothing?
- Commenting on body parts?
- Sexually suggestive comments/language?
- Discussing sexual activities?
- Demeaning conduct or language?
- Jokes which are sexually offensive?
- Kiss on cheek?
- Touching (e.g., massaging) back/shoulders/hands?
- Touching or brushing up against someone?
- Accessing websites with sexual content?
- E-mail?
- Posting sexually suggestive images?



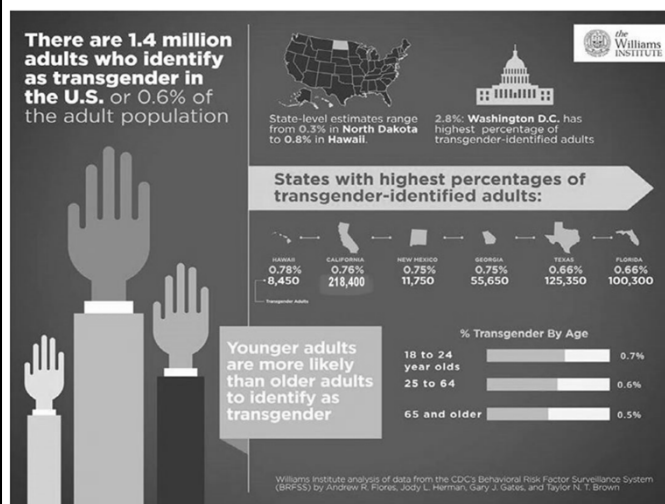
Hostile Work Environment Sexual Harassment

Harassment by Supervisors

- Vicarious Liability (i.e., courts will presume the employer is liable)
- Employer Can Avoid Liability If It Can Prove:
 - that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
 - that the complaining employee unreasonably failed to take advantage of preventive or corrective opportunities made available.

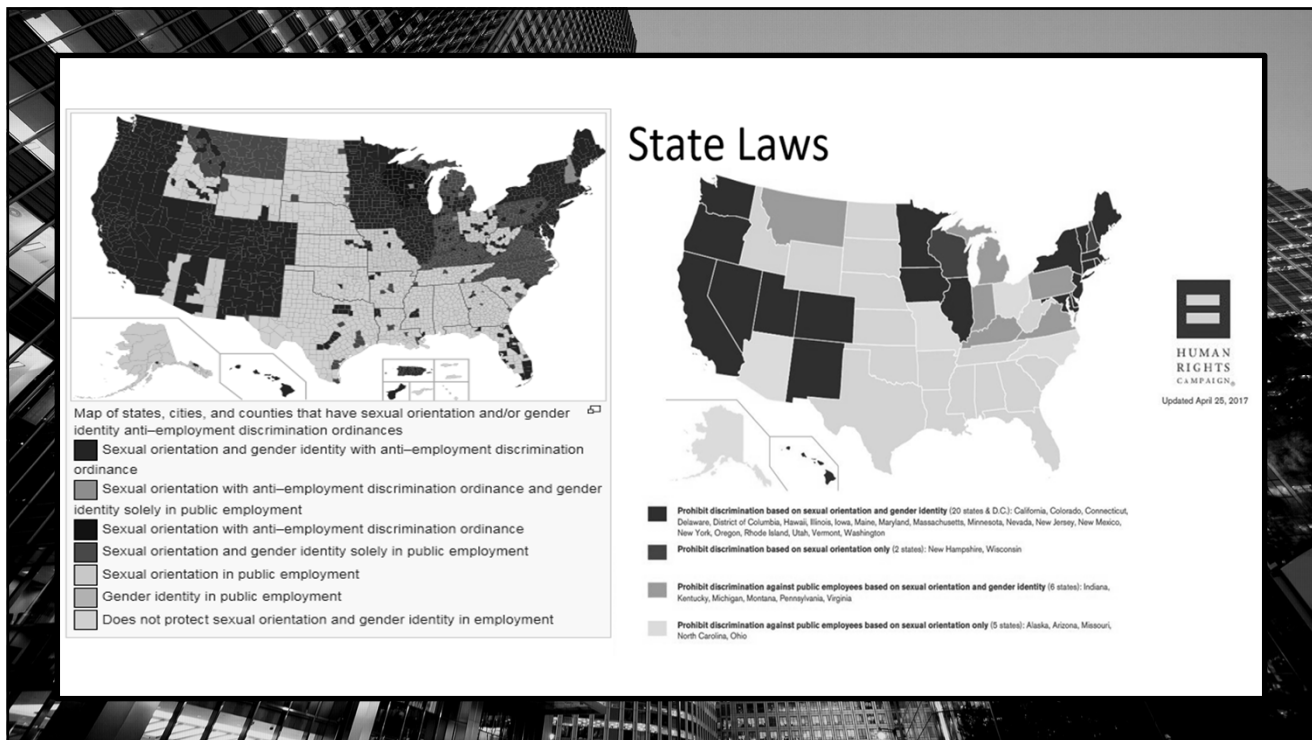
Current EEOC Climate

A New Protected Class?



62% harassed at work
36% lost a job

National Gay and Lesbian Task Force and National Center for Transgender Equality, "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey" (2011)

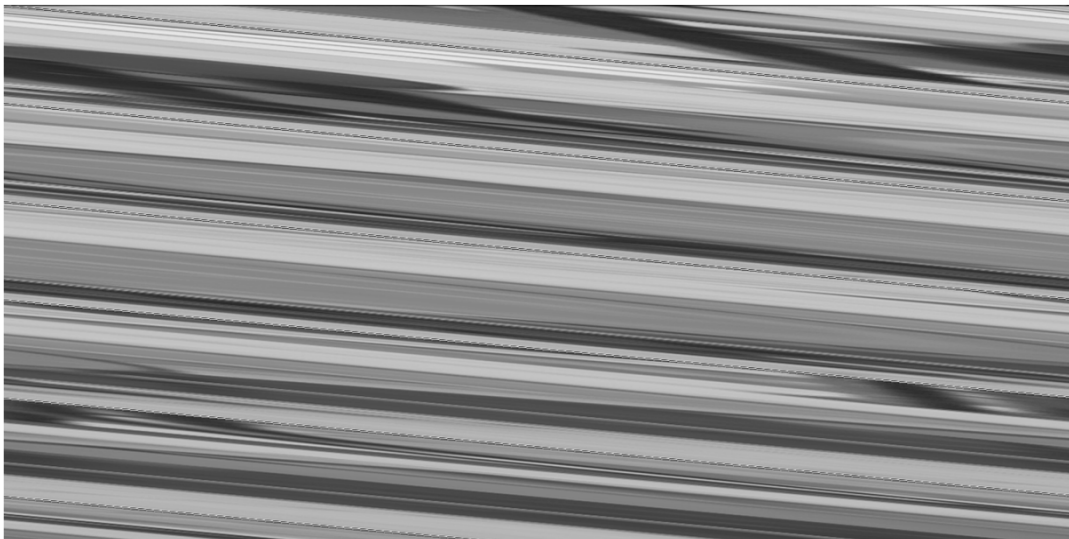


Fortune 500 by the Numbers

- **92%** include sexual orientation in non-discrimination policy
- **82%** include gender identity in their non-discrimination policy
- **53%** offer transgender-inclusive health care coverage
- **47%** have made public commitment to the LGBT community

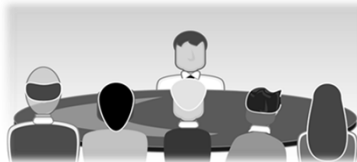


Compliance/Prevention



Tone Begins at the Top

- From very highest levels in organization
- Foster organizational culture promoting respect and civility
- Establish a sense of urgency around prevention
 - Take visible role in communicating and reinforcing importance of diverse and inclusive workplace, free of harassment
 - Commit to ensuring that harassment-free culture is maintained

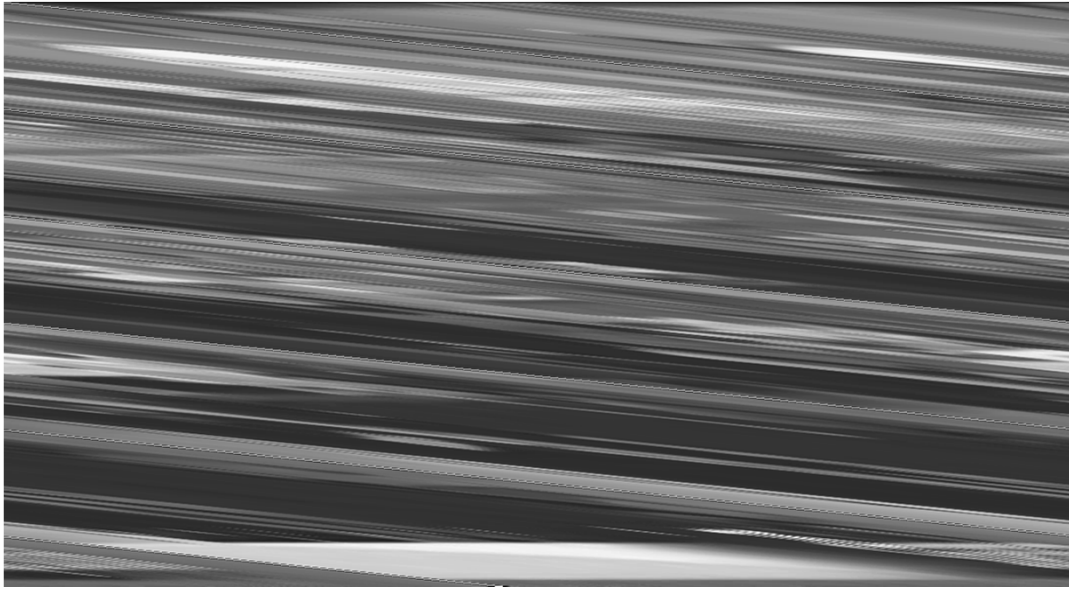


Harassment Prevention

Multi-faceted, holistic approach:

- Active and engaged leadership
- Consistent and demonstrated accountability
- Strong, comprehensive policies
- Trusted and accessible complaint mechanisms
- Regular, interactive, tailored training





Distribution of Essential Policies

- Distribute and explain “essential” policies at time of hire and when revisions are made
 - In each instance, obtain acknowledgment of receipt and place in personnel file
- “Essential” policies available in multiple ways, *e.g.*, handbook, intranet, break room, during training sessions



Regular Training for All

- At least once a year – and change it up. Don't make it the same each time
- Separate training for employees and for management
 - For employees
 - Explore employee rights and responsibilities under policy, including reporting
 - Describe formal complaint process and emphasize that retaliation is prohibited
 - For managers
 - Provide training to managers and supervisors outlining accountability and steps necessary to prevention or response expectations
 - Stress affirmative duties of managers/supervisors



Regular Training for All

- Reconsider use of computer-based training and rely more on in-person and inactive training from third party
- Don't allow phones, computers, etc. in training
- Use sign-in sheets/keep track



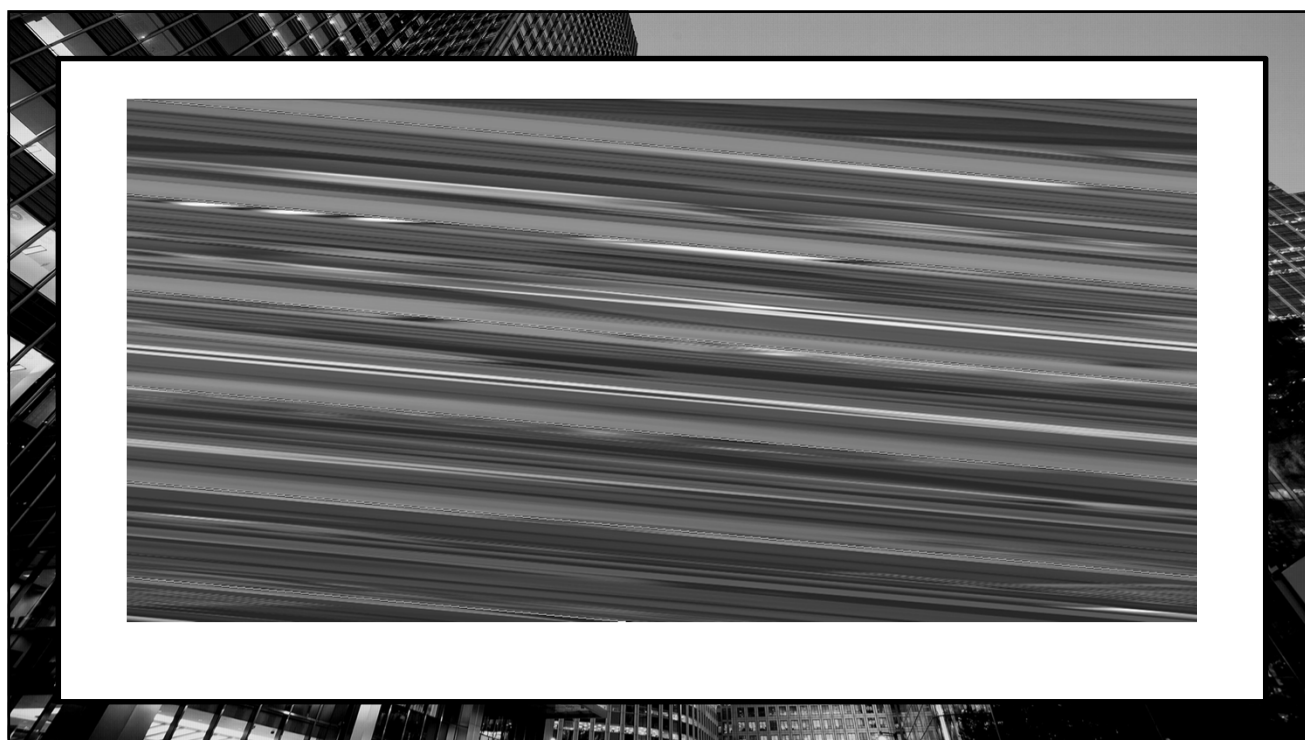
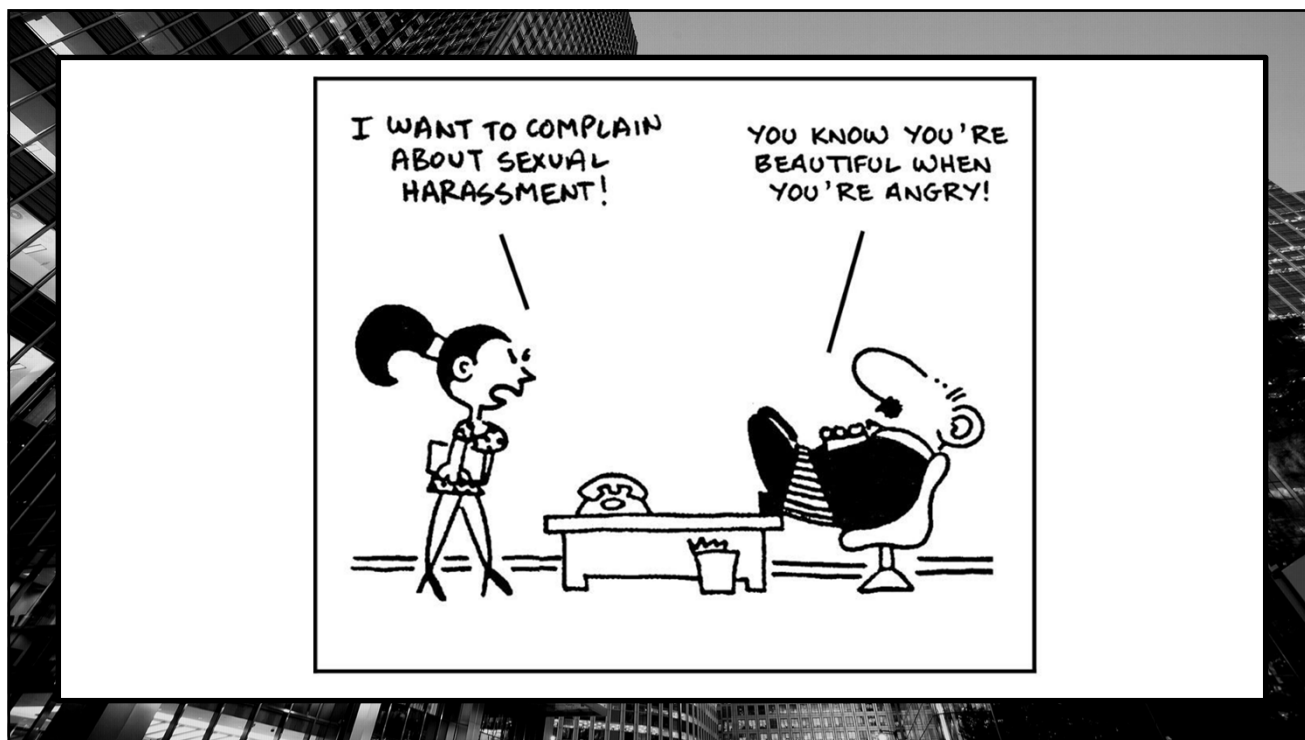
Regular Pulse Checks

- Consider use of
 - Culture surveys
 - 360 reviews
- HR should be visible and accessible – open door
- Conduct at least annual review of complaints/concerns to identify and proactively address trends



Conduct Effective and Thorough Investigations





Why Are Investigations Important?

- Limits the likelihood of lawsuits
- Supports affirmative defenses to employer liability
- Limits the likelihood of punitive damages
- Improves employee morale
- Prevents public relations nightmares

What Triggers an Investigation?

- An investigation should be commenced whenever a harassment complaint is made
 - Complaint need not be written or use magic words
- An investigation should also be commenced in the absence of a complaint if:
 - The employer becomes aware of information that creates a reasonable suspicion that harassment has occurred
 - Manager knowledge imputes awareness to the company

Investigatory Mistakes that May Prove Costly

- Unexplained delay in receipt of the complaint and the investigation
- Having inexperienced HR professionals handle the investigation without guidance or oversight
- Protecting the accused because of his/her position
- Relying on unsigned statements
- Conclusory investigations



Internal v. External Investigator

- If internal investigator is used:
 - Should be outside chain of command
 - Have no personal or professional ties or business stake
 - Should not have been involved in prior discipline
- If outside counsel is used:
 - Cannot represent employer in subsequent litigation
 - Investigation is not privileged



Other Interesting Effects of the #MeToo Movement

Taxation of Settlements



- Employers may generally deduct amounts of settlements as long as it is directly connected to the employer's trade, business or income-producing activity and is ordinary, necessary, and reasonable
 - See IRC Sec. 162 and Sec. 212
- However, the Menendez Amendment – Section 13307 of the Tax Cuts and Jobs Act of 2017 (Public law no. 115-97) – amended the Internal Revenue Code of 1986 for fiscal year 2018
- Payments related to sexual harassment and sexual abuse now require special treatment
- Under the new code, no deduction is allowed for any settlement or payment (or related attorneys fees) related to sexual harassment or sexual abuse **IF** the settlement or payment is subject to a nondisclosure agreement
 - New IRC Section 162(q)
- This new rule has **not** yet been tested in the courts or by the IRS

Taxation of Settlements



- Because the lack of definitions in the Act, there is significant uncertainty regarding:
 - Identifying which claims are related to sexual harassment or abuse
 - Does including a sexual harassment or abuse claim in the complaint invoke this rule for all associated payments?
 - Must such a claim be credible?
 - Identifying whether the rule also applies to the plaintiff/complaining party
 - The rule seemingly applies to victims, potentially affecting related but otherwise deductible payments
 - Identifying whether a blanket release which covers sexual harassment and abuse claims also invoke this rule
 - Identifying what attorneys' fees are affected
 - Can fees for drafting unrelated portions of the settlement be deducted?

State Sex Harassment Reforms

■ AZ House Bill 2020 (HB2020) – Passed by Legislature; Awaiting Governor Approval

- Bipartisan legislation which amends the AZ Revised Statutes by adding Section 12-720 relating to sexual assault and harassment
- Allows victims of sexual assault and sexual harassment who signed non-disclosure agreements to break those agreements without penalty if asked by law enforcement or during a court proceeding
- Interestingly, the original bill voided **ALL** non-disclosure agreements in these types of situations even in civil cases; however, the bill ultimately was amended only to void NDA's in criminal cases
- On 4/18/18, AZ HB 2020 passed unanimously and was transmitted to Gov. Doug Ducey on 4/19/18 where it awaits his signature or veto

State Sex Harassment Reforms

■ California Assembly Bills – Newly Introduced Proposed Legislation

- CA AB 1867 – Employers with 50 or more employees to required retain records of all internal sex harassment complaints for 10 years
- CA AB 1870 (SHARE Act) – Extends current 1 year statute of limitations for filing **ALL** harassment claims to 3 years
- CA AB 2366 – Increases protection for victims of domestic violence, stalking, sex assault by permitting employees to take time off of work to help immediate family members and adds sex harassment to list of reasons for application of protections
- CA AB 2770 – Creates “privilege” for employer investigation files, for statements made to prospective employers as to whether an employee would be rehired, and for determinations that the former employee had engaged in sexual harassment in contemplation of defense of employer defamation claims
- CA AB 3080 – Prohibits mandatory arbitration agreements and non-disclosure provisions in settlement agreements regarding sex harassment/assault claims
- CA AB 3081 – Creates presumption of retaliation if any adverse job action occurs within 90 days of employee's sex harassment claim; extends current sex harassment training requirements to employers with 25 or more employees

State Sex Harassment Reforms

■ California Senate Bills – Newly Introduced Proposed Legislation

- CA SB 1038 – Imposes personal liability on employee who retaliates against a person who has filed a complaint or opposed any prohibited practice, regardless of whether the employer knew/should have known of conduct
- CA SB 1300 – Amends Fair Employment and Housing Act (FEHA) to:
 - Absolve plaintiffs who allege that employer failed to take all reasonable steps necessary to prevent discrimination and harassment from proving that sex harassment/discrimination actually occurred
 - Prohibits release of claims in exchange for raise or bonus or as a condition of employment/continued employment
 - Require employers, regardless of size, to provide 2 hours of sex harassment prevention training within 6 months of hire and every 2 years thereafter to all employees

State Sex Harassment Reforms

■ 2018 NY State of the State Proposals – Governor's Proposed Legislation

- On 1/2/18, Gov. Andrew Cuomo unveiled the NY 2018 State of the State Proposals
- The 18th Proposal included the Governor's plan for legislation targeting workplace sex harassment
- Governor Cuomo aimed to
 - Prevent public dollars from being used to settle sex harassment claims
 - Void forced arbitration policies in employee contracts
 - Mandate that any company doing business with NY state disclose number of sex harassment adjudications and nondisclosure agreements executed

Cuomo said, "2017 brought a long overdue reckoning where the secret and pervasive poison of workplace sexual harassment was exposed by brave women and men who said this ends now...Our challenge in government is to turn society's revulsion into reform, and we in New York must seize the moment and lead the way. There must be zero tolerance for sexual harassment in any workplace, and we can and will end the secrecy and coercive practices that have enabled harassment for far too long."

State Sex Harassment Reforms

- **NY State Budget Bill for 2019 – Signed into Law by Gov. Cuomo on 4/12/18**
 - Touted by Governor Cuomo as “the strongest and most comprehensive anti-sex harassment protections in the nation”
 - Includes provisions for
 - Preventing sex harassment in the workplace
 - Helping survivors of rape and sex assault
 - Preventing “sextortion”
 - Prohibits secret settlements unless complainant requests confidentiality
 - Prohibits mandatory arbitration for sex harassment complaints
 - Protects non-employees (e.g. consultants, vendors) in the workplace
 - Creates a uniform sex harassment policy and training for businesses
 - Requires all state contractors to submit an affirmation that they have a sex harassment policy and that they have trained all of their employees
 - Protects taxpayer funds from being used for individual sex harassment judgments

State Sex Harassment Reforms

- **NY City Counsel Proposed Legislation – Newly Introduced**
 - Requires companies with 15 or more employees to provide annual interactive sex harassment training for all employees working more than 80 hours annually in NY City
 - Must take place within 1 year of law’s effective date (9/1/18)
 - Mandates topics of training with specific requirement of supervisor education
 - Imposes civil penalties for failure to keep compliance records
 - Requires NY City Commission on Human Rights to develop model interactive training
 - Amends NY City Human Rights Law regarding gender-based harassment to apply any sized company
 - Extends limitations period for filing gender-based harassment claims with NY City Commission on Human Rights from 1 year to 3 years

Questions?



Thank you!

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