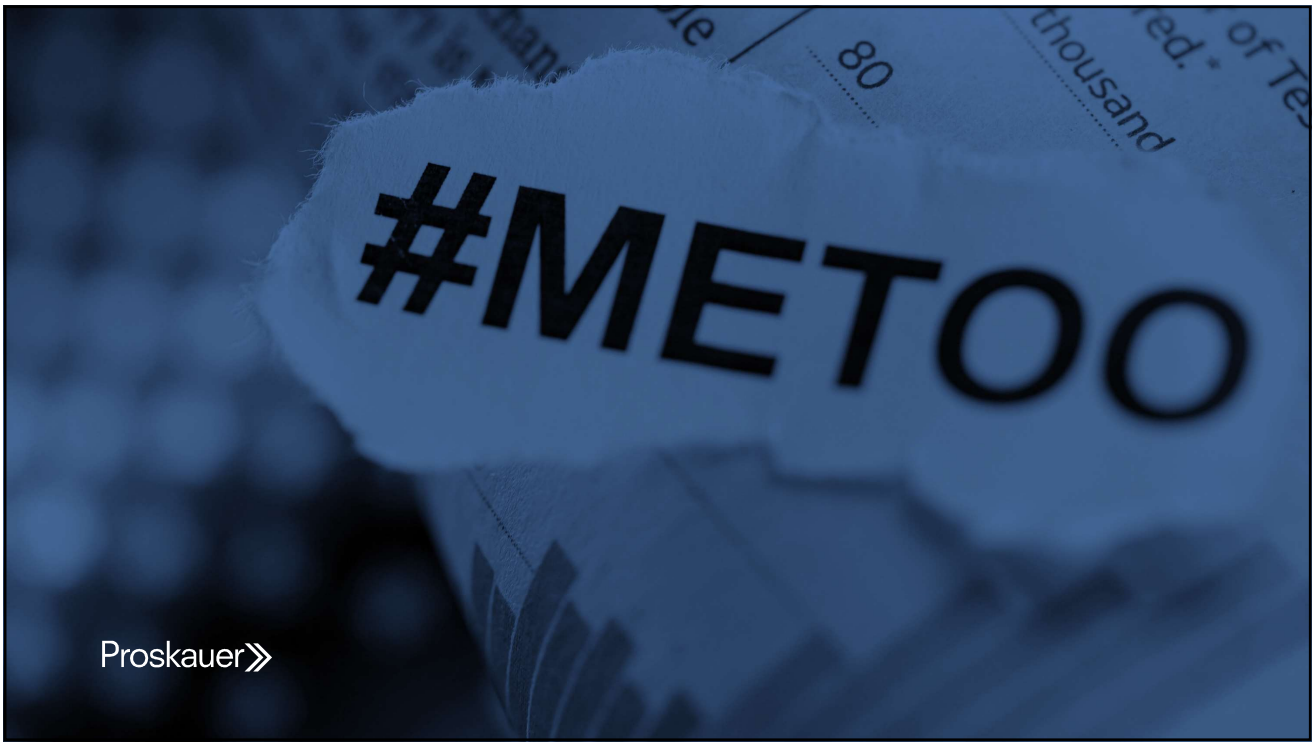

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The #MeToo Movement -
Timeline of Events

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2

The #MeToo Movement

Today show opens with a stunning revelation that co-host **Matt Lauer** had been fired after NBC received allegations about his sexual misconduct.

Four women accuse New York Attorney General **Eric Schneiderman** of sexual and physical assault. Schneiderman resigns immediately.

Bill Cosby sentenced to 3 to 10 years in state prison

Google and **Facebook** announce they are ending mandatory arbitration of sexual harassment claims.

?

Actress Ashley Judd accuses media mogul **Harvey Weinstein** in a breaking story by *The NYT*.

TIME'S UP

Over 300 women of Hollywood form an anti-harassment coalition called **Times Up**.

The NYT reveals that **Asia Argento,** an original Weinstein accuser and #MeToo figurehead, settled sexual assault allegation made against her

Hearings held before the Senate Judiciary Committee to address Dr. Ford's sexual assault allegation against **Judge Kavanaugh.** After allegations of sexual misconduct and investigation, confirmed 50-48.

Lifetime airs a six part docuseries about **R. Kelly** and the accusations of abuse from multiple women.

10/5/17 | 11/29/17 | 1/1/18 | 5/7/18 | 8/19/18 | 9/25/18 | 9/27/18 | 11/12/18 | 1/03/19 | TBD

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Trends

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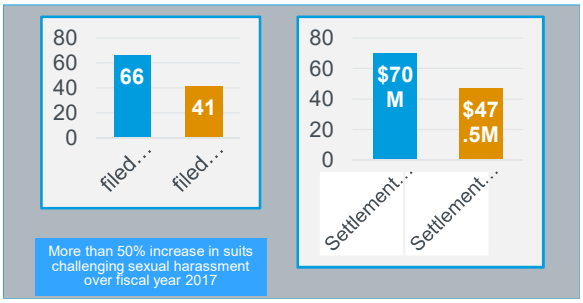
4

Trends:
EEOC Response

This past year, the EEOC filed 50% more sexual harassment suits during roughly the same period as the year before.



The EEOC's recovery increased almost 50% to nearly $70M.

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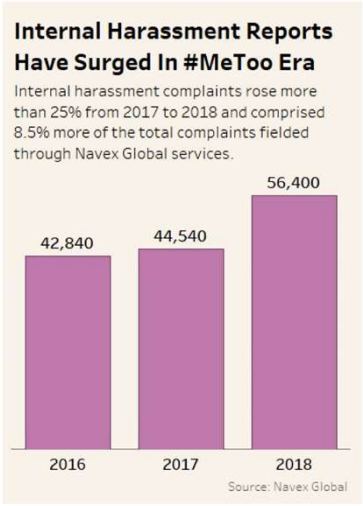
5

Trends:
Navex Global - Internal Harassment Reports



https://www.law360.com/articles/1146246/print?section=employment

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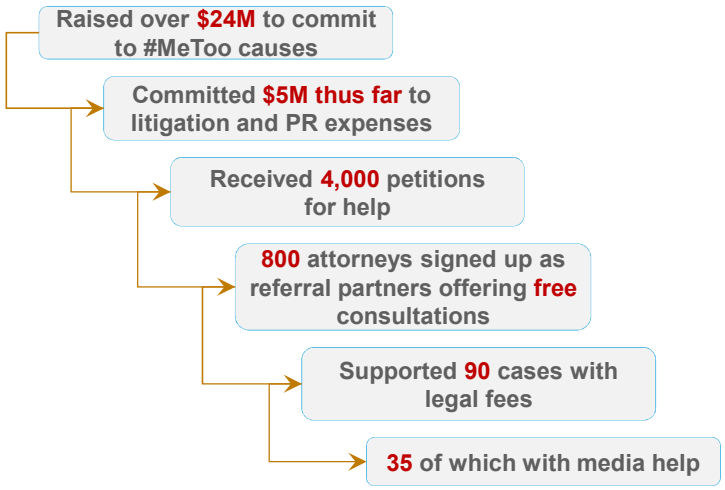
6

Trends:
Victims Rights & Support Group Response

As of January 18, 2019, TimesUp Legal Defense Fund:



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7

Trends:
Legislative Response

Legislative action at the **federal, state and local** levels in the areas of:

1. **Training** (CA, CT, DE, MA, ME, NY require annual harassment training of all employees)
   - Requirements vary by state (*e.g.*, minimum # of employees that trigger requirement, length, topics that must be covered, & frequency)
2. **Prohibition of mandatory arbitration** agreements (except where in conflict with federal law) (MD, NY, VT, and WA)
3. **Prohibition/regulation of non-disclosure** (CA, MD, NJ, NY, TN, VT & WA)
   - **HB 4242 –** Requires governing, school, and taxing bodies in Illinois to release terms of severance agreements relating to sexual harassment to the public / media within 72 hours

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8

Trends:
Corporate Response

December 2017: Microsoft eliminates mandatory arbitration of sexual harassment claims.

May 2018: Uber abandons mandatory arbitration for sexual misconduct claims.

November 2018: Google Walkout: employees stage protest of company's handling of sexual harassment claims demanding representation on the corporate board, and elimination of mandatory arbitration and nondisclosure agreements.

February 2019: Google abandons mandatory arbitration policy for "all work disputes."

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Trends:
Securities and Derivative Lawsuits

- Since the #MeToo movement broke, the following companies have been hit with securities and derivatives lawsuits arising from harassment claims: American Apparel; CBS; CT Partners; HP; Liberty Tax; National Beverage; Papa John's; Signet Jewelers; Twenty-First Century Fox; Wynn Resorts

- **Securities suits** arising from sexual harassment issues generally allege that the company misled investors about the existence and vitality of its anti-harassment policies while knowing of, or recklessly disregarding, incidents of harassment.

- **Derivative actions** arising from sexual harassment issues generally allege that the directors and officers breached their fiduciary duty to implement and/or enforce policies against sexual harassment – and perhaps failed to take action against harassers – and that the company was injured as a result. The injury could include claims filed by harassment victims, other employees, and shareholders, as well as reputational injury arising from those claims.

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10

Hot Topics:
#MeToo Backlash

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#MeToo Backlash

- "Pence Effect": Exclusion from mentoring, assignments and networking events.
  - Recent survey results:
    - March 2018 Pew Research poll of over 6,000 found 51% feel #MeToo has made it *harder* for men to know how to interact with women in the workplace, "walking on eggshells."
    - Lean In survey from the same timeframe (of almost 3,000) found male managers now report being *three times* as likely to say they are uncomfortable mentoring women and *twice as uncomfortable* working alone with a woman
      - Equates to 1 in 6 managers who are uncomfortable being alone with, or mentoring a woman.
- Lawsuits from men terminated based on sexual harassment complaints
  - Breach of contract (no cause and disparagement)
  - *E.g.*, Barnes & Noble – lawsuit filed in federal court by former CEO alleging the company terminated him without cause & defamed him by issuing an "intentionally vague" press release that implied he was let go for sexual misconduct.

12

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12

#MeToo Implications:
Minimizing Risks in the Workplace

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Minimize Risk:
Develop a Special Committee of the Board of Directors

Create subcommittee or task a committee with harassment within its charter (*e.g.*, audit committee).

- Charter Selection of members of committee (or subcommittee)
- Scope of authority
- Reporting line to Board

14

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14

Minimize Risk:
Conduct Risk Assessment

- Analyze past complaints to HR, hotline, Legal & Compliance
  - Number of complaints;
  - Number of anonymous complaints;
  - Nature of complaints;
  - Level of alleged harasser;
  - Corporate division from which complaints emanate;
  - Investigations; and
  - Resolutions

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15

Minimize Risk:
Mitigate Against Backlash

- Formal Mentoring & Sponsorship Programs
- Executive Coaching
- Instill trust in “Workplace Due Process”
- Address “Pence Effect” in Training

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16

Minimize Risk:
Conduct Training

- Consider training at all levels, including executives and Board of Directors:
  - Training can include:
    - Anti-harassment and discrimination
    - Bystander intervention training
    - How to Properly Receive, Respond to, and Investigate Complaints
    - Avoiding retaliation

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17

Minimize Risk:
Review and Revise Policies and Procedures

Policies and Agreements:

- Sexual harassment, retaliation and EEO policies
- Romantic Relationships Policies
- Code of Conduct
- Employment Agreements
- Arbitration Agreements
- Non-disclosure Agreements

18

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Minimize Risk:

Develop Protocol for Responding to Complaints

- Protocol for responding to complaints
- Hotline protocol
  - Publicized
  - Allowance for anonymous complaints
  - Utilization rates
  - Routing of complaints to Human Resources or Compliance
  - Database for tracking complaints
- Protocol for reporting harassment complaints to Board?
- Process for investigating complaints and taking remedial action
- Protocol for appointing a liaison to the complainant

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19

Whistleblowing & Retaliation

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20

Federal Whistleblower Protection Provisions Enforced By The DOL

- OSHA investigates alleged violations of whistleblower provisions contained in a number of different federal statutory schemes, including:
  - Consumer Product Safety Improvement Act of 2008;
  - Energy Reorganization Act of 1974;
  - Federal Railroad Safety Act;
  - International Safe Container Act;
  - National Transit System Security Act;
  - Pipeline Safety Improvement Act of 2002;
  - Surface Transportation Assistance Act of 1982;
  - Asbestos Hazard Emergency Response Act of 1986;
  - Clean Air Act;
  - Comprehensive Environmental Response, Compensation, and Liability Act of 1980;
  - Federal Water Pollution Control Act;
  - Safe Drinking Water Act;
  - Solid Waste Disposal Act;
  - Toxic Substances Control Act;
  - Wendell H. Ford Aviation Investment and Reform Act for the 21st Century;
  - Occupational Safety and Health Act of 1970; and
  - Sarbanes-Oxley Act of 2002.

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21

SOX Whistleblower: Coverage

- **Applies to publicly traded companies and their subsidiaries**
  - Section 806 of SOX applies to publicly traded companies, defined as all companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934 (the "SEA") and to all companies that are required to file reports under § 15(d) of the SEA
  - The Dodd-Frank Act amended the SOX anti-retaliation provision by extending its application to subsidiaries and affiliates of publicly traded companies whose financial information is included in the publicly traded company's financial statements
- **Also covers "any officer, employee, contractor, subcontractor or agent" of a covered company**
  - SOX protects employees of private contractors and subcontractors (*e.g.*, investment advisers, law firms, and accounting enterprises) of publicly traded companies and their subsidiaries
    - *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014)

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22

SOX Whistleblower: Protected Activity

- Employee engages in lawful whistleblowing activities when:
  - S/he provides information or investigative assistance regarding any conduct which the employee "reasonably believes" to be a violation of: §§ 1341, 1343, 1344 or 1348 of the U.S. Code (which address mail fraud; wire, radio and television fraud; bank and securities fraud); the rules or regulations of the SEC; or any federal law provisions relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1).
  - S/he files, cause to be filed, testifies, participates in or otherwise assists in a proceeding filed or about to be filed regarding an alleged violation of §§ 1341, 1343, 1344 or 1348 of the U.S. Code (which address mail fraud; wire, radio and television fraud; bank and securities fraud); the rules or regulations of the SEC; or any federal law provisions relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(2).

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SOX Whistleblower: Employee's Burden of Proof

- Whistleblowing was a **contributing factor** to the adverse action
- Employee must show:
  - The employee engaged in **protected activity/conduct**;
  - The named person **knew or suspected, actually or constructively** of the employee's protected activity;
  - The employee suffered an **adverse personnel action**;
  - There are circumstances sufficient to raise an inference that the protected activity was a **contributing factor** in the adverse action.
- If the employee fails to meet this burden, the Secretary must dismiss the complaint and discontinue the investigation.

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SOX Whistleblower: Adverse Employment Action

- No Tangible Harm Required For An Adverse Action
  - *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254 (5th Cir. 2014)
    - Affirmed ARB's grant of $30K award for "outing" whistleblower
    - Employers must maintain anonymity of whistleblower

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SOX Whistleblower: Employer's Burden Of Proof

- Clear and convincing evidence employer would have acted the same absent the whistleblowing
  - If the employee meets his/her burden, the employer can still avoid liability if it demonstrates by **"clear and convincing"** evidence that it **"would have taken the same unfavorable personnel action in the absence of that behavior."**

    49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. Part 1980.104(e).

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SOX Whistleblower: Remedies

- In both the administrative hearing and court action, a prevailing employee is entitled to **"all relief necessary to make the employee whole."** This includes reinstatement, back pay with interest, and compensation for "special damages" incurred, such as litigation costs, reasonable attorneys' fees, and expert witness fees. 18 U.S.C. § 1514A(c).
- **Objections Will Not Stay Preliminary Order**: Although an employer can file objections to the preliminary order and has the right to a hearing before an ALJ on claims of retaliation, the filing of objections will not stay a reinstatement remedy in the preliminary order.
- **No Punitive Damages**
- **Criminal Penalties**: SOX provides that any person who knowingly and intentionally retaliates against an individual for providing law enforcement with truthful information relating to the commission or possible commission of a federal offense is subject to fines up to $250,000 for individuals or up to $500,000 for organizations, and up to 10 years of imprisonment, or both. 18 U.S.C. § 1513(e).

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Dodd-Frank Whistleblower Provisions: Overview

- Retaliation claims under the Securities Exchange Act of 1934 ("SEA") and the Commodity Exchange Act of 1936 ("CEA")
- "Bounty" program to incentivize SEC whistleblowers
  - SEC received over 5,200 whistleblower tips in fiscal year 2018. The number of whistleblower tips continues to increase on a yearly basis, and since fiscal year 2012, the number of whistleblower tips received has increased by about 76%. The SEC noted that there was an increase in tips following SCOTUS 2/21/18 ruling in *Digital Realty v. Somers*.
- Retaliation claim for whistleblowers in the financial services industry relating to consumer financial products or services

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Dodd-Frank: Whistleblower Bounty

- Individuals are eligible for an award for **voluntarily** providing **original information** regarding a violation of the federal securities or commodities laws that leads to monetary sanctions exceeding $1 million
- Award = 10% to 30% of the total monetary sanctions collected

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SEA Anti-Retaliation: SEC Enforcement

- SEC has taken the position that it has the authority to enforce Dodd-Frank's anti-retaliation provisions
  - Paradigm Capital Management in 2014
  - International Game Technology in 2016
  - SandRidge Energy in 2016

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Whistleblower Bounty: Regulations

- Significant issues:
  - Prohibition of actions that would "impede an individual from communicating" with the SEC re: securities law violations
  - Internal reporting not required, but encouraged
  - Exclusion of certain persons and information from award eligibility

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31

Confidentiality Agreements

- § 240.21F-17(a) prohibits taking "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communication"
- In 2015, SEC announced its first enforcement action against a company for including improperly restrictive language in confidentiality agreements, charging Houston-based global technology and engineering firm KBR
  - KBR required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department
  - KBR agreed to pay a $130,000 penalty to settle charges and agreed to amend confidentiality statement by adding language making clear that employees were free to report possible violations to the SEC and other federal agencies without KBR approval or fear of retaliation.
- SEC has enforced Rule 21F-17 in the context of severance or separation agreements

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32

Key Trend

- "Gatekeepers" as whistleblowers
  - *E.g.*, *Wadler v. Bio-Rad*
    - Former GC claimed he was discharged for investigating and reporting to Bio-Rad's upper-level management possible FCPA violations in China. He asserted whistleblower retaliation claims under SOX and Dodd-Frank and a wrongful termination claim under California common law.
    - GC used privileged information at trial.
    - Jury verdict of approx. $11M.
    - Largely upheld by 9th Circuit, but court vacated award of $2.96 million under Dodd-Frank in light of *Digital Realty v. Somers*. Court vacated the SOX verdict based on a finding that the jury instructions as to the SOX claim erroneously listed the FCPA's anti-bribery and books-and-records provisions as "rules and regulations of the SEC" under Section 806 of SOX. Held that the error was not harmless and remanded for a determination of whether a new trial was warranted.

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33

SEC Proposed Rules

- On June 28, 2018, SEC proposed two rules to enable it to make upward and downward adjustments to whistleblower bounty awards.
  - SEC proposed a rule to allow it, in its discretion, to make an upward adjustment to the award percentage for an award that could yield a payout of less than $2 million. The award could be increased up to $2 million, subject to the 30% statutory maximum.
  - SEC proposed a rule to allow it, in its discretion, to make a downward adjustment to the award percentage an award that could yield a payout of at least $100 million. The award would not be adjusted below $30 million, subject to the 10% statutory minimum. The downward adjustment would ensure that the amount "does not exceed an amount that is reasonably necessary to reward the whistleblower and incentivize other similarly situated whistleblowers."

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34