

#MeToo in the Workplace:

Creation

Compliance

Countermeasures

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Creation

Learn the history of the movement

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#MeToo History



- 2007 Tarana Burke coins “Me Too”
- October 15, 2017: Actress Alyssa Milano tweets “Me too”
- October 16, 2017 over 30,000 #MeToo



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#MeToo History

- Social media accelerant



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#MeToo History

- December 18, 2017:
#MeToo “Silence Breakers”
TIME’s Person of the Year
 - Tarana Burke
 - Ashley Judd
 - Strawberry picker Mexico
 - Uber engineer
 - Corporate lobbyist
 - Anonymous hospital worker



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The Studies

- Pew Study:
 - Of 6000 adults, 59% of women had experienced unwanted sexual advances or sexual harassment
- Termin and Company Study:
 - 400 executives and employees accused of sexual harassment
 - 193: Terminated or left their jobs
 - 122: Placed on leave, suspended, or facing investigation
 - 69: No apparent discipline



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EEOC FY 2018 Statistics



- The EEOC filed 66 harassment lawsuits,
 - 41 that included allegations of sexual harassment
 - More than a 50% increase in suits challenging sexual harassment over fiscal year 2017
- EEOC Charges alleging sexual harassment increased by more than 12% from fiscal year 2017
- EEOC recovered nearly \$70 million for the victims of sexual harassment in FY 2018, up from \$47.5 million in FY 2017

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EEOC Approach



- Congress has appropriated an additional \$16m to EEOC to fight workplace sexual harassment and discrimination
- EEOC will take advantage of the awareness generated and aggressively pursue sexual harassment complaints
- “Our challenge is to use this #MeToo movement well.” *Former EEOC Commissioner Chai R. Feldlum, June 11, 2018*

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Impact in the Workplace



How has #MeToo movement impacted claims in our work places?

- Assertion of older claims
- Targeting of high-profile executives
- Reputational harm

Employer responses

- Public relations strategy/policy
- Better training
- Reviewing and investigation procedures

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Compliance

Understand an employer's obligation to prevent illegal harassment

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Why Are We Here? Why Is This Important To You?

- Even a claim with no merit can create significant costs to an employer:
 - Cost to defend
 - Team member time and focus
- Money paid out to settle claims or to pay jury verdicts could have been used for:
 - Raises
 - Benefits
- Do the Right Thing/Employer culture

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Federal Law & Harassment

- Federal Law Prohibits Harassment as “Unwelcome Conduct” On The Basis Of:



- Race,
- Color,
- National Origin
- Religion
- Sex (Title VII)
- Disability (ADA)
- Age (40 or Older) (ADEA)
- Genetic Information (GINA)

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- Harassment/Discrimination
—Negative action based on “protected class” status or affiliation
 - “Adverse action”
 - “Protected class” - sex



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- Sexual Harassment—“Sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature” when:



1. Hostile Work Environment: It is unwelcome, and unreasonably interferes with employee's work by creating an "intimidating, hostile, humiliating or sexually offensive environment"
2. Quid Pro Quo: Employment terms based on employee's submission or rejection of this conduct

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Proving a Hostile Work Environment

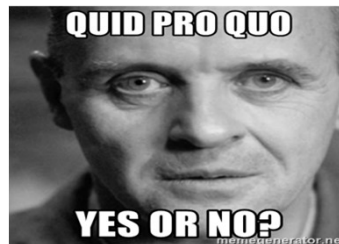


- Courts look at:
 1. How severe the conduct was
 - Did someone physically get hurt, raped, sexually assaulted, hit, locked in a room, called names, humiliated, embarrassed, yelled-at?
 - Simple teasing, off-hand comments, isolated incidents that are not extremely serious are not violations of the law
 - But employees still bring claims...
 2. Courts look at how often the conduct occurred.
 - Every day, every week, for months, for years, etc
 - Cases where single act = hostile work environment

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Quid Pro Quo Harassment: What Is An Adverse Employment Action?



- Examples include:
 - Hiring and firing
 - Promotion or failure to promote
 - Demotion
 - Undesirable reassignment
 - Decision causing significant change in benefits
 - Decrease in pay, no increase in pay
 - Undesirable work assignments
 - Poor evaluations that affect compensation
 - Conditioning a job benefit on sexual favors

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Whose Conduct Can Raise Concern?

- Supervisors, owners, officers, directors (management)
- Co-workers. Any employee can commit an act of workplace harassment, discrimination or retaliation
- Even non-employees can commit acts of workplace harassment and discrimination (vendors, suppliers who come on-property)



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Let's Talk About Behavior That Could Be Sexual Harassment

- Physical Harassment
 - Hugs, Kisses, Neck Rubs, Back Rubs
 - Standing Too Close/Brushing Against Someone
- Verbal Harassment
 - Jokes, Innuendos, Gestures, Compliments
 - Computer Programs, E-Mail Messages
 - Demeaning Language or Behavior
- Non-verbal Harassment
 - "Elevator Eyes," Looking Someone Up & Down
 - Photographs, Cartoons of a Sexual Nature, Pornography



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Countermeasure

Develop strategies for effective investigations

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Employer Liability Under The Law

- Employers are always liable for a supervisor's harassment if a supervisor takes an adverse employment action against the employee
 - "Strict liability" = employer has NO defense
- Employers may have defense to co-worker/third party harassment, but only if
 - Employer has Anti-Harassment Policy
 - Supervisor follows the Policy



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Mitigating the Risk of Liability



Three objectives:

- Prevent harassment by managers/supervisors
 - Why? Company is automatic liable
- Identify and correct harassment consistently
 - Why? Reasonable steps avoid liability
- Create and follow a fair investigation procedure
 - Why? Improve trust of employees/victims, and establish reasonable steps to avoid liability

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Mitigating the Risk of Liability



Recommended Steps:

- Update handbook and policies to condemn harassment, give examples, and provide recourse
- Train/re-train managers
- Consistently discipline even borderline conduct
- Formalize and follow an investigation procedure

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Updating Handbooks



- Some state law requires written sexual harassment policy
- Handbooks can be important evidence, which can make employer look good (or look bad)
- Revised handbook announcement—opportunity to reiterate company's harsh anti-harassment stance
- Stay updated (e.g. *sexual orientation*, gender identity, etc.)

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Updating Handbook – Policy Contents



- A clear explanation of prohibited conduct
- A clear complaint procedure
- Reporting requirement
- Multiple reporting avenues (Supervisor, Human Resources)
- Investigated promptly and appropriate action will be taken.
- Assurance of no retaliation
- Assurance that complaint will be kept confidential to the extent possible

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Updating Handbook – Affirmative Defense

- If no adverse employment action exists, the employer may be able to escape or limit liability by establishing an affirmative defense that includes two necessary elements:
- The employer exercised reasonable measures to prevent and promptly correct any harassing behavior; and
- The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise



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Updating Handbook – NO Retaliation

- Anyone who makes a report or participates in an investigation will not be retaliated against.
- Retaliation: Any action that would discourage a worker from making or supporting a discrimination charge.



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Updating Handbook – Retaliation



- Examples of Possible Retaliatory Acts:
 - Changes to job duties
 - Temporary suspensions (even with pay)
 - Schedule changes
 - Refusal to provide training or other non-monetary benefits
 - Virtually any non-trivial act that would dissuade a reasonable employee from complaining of discrimination

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Train/Re-train Managers



- Every single employer should train their managers
 - Small cost
 - Especially, industries with cultural hazing or historical problems (construction, IT, etc.)
 - Managers cause automatic liability, so train them!
 - They are also in best position to see and stop harassing conduct on the ground

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Investigation

- Have a procedure (and stick to it!):
 - Take action immediately to stop harassment
 - Be careful not to worsen complainant's situation (e.g. reassign further away)
 - Consistent investigation (order of witnesses, weight of evidence, past practice)
 - Weigh evidence/risks, and make a decision
 - Discipline (better too much than not enough)



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Effective Investigator



Investigator should interview:

- Complainant
- Alleged harasser
- Supervisors of all parties involved
- Witnesses identified as having knowledge

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Effective Investigations

- Remind all interviewees:
 - Confidentiality
 - No retaliation
 - Policy
 - Reporting requirement



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Effective Investigations - Typical Question to Complainant



- **Who** committed the alleged harassment?
- **What** exactly occurred/was said?
- **When** did it occur?
- **Where** did it occur?
- **How** often did it occur?
- **Who** witnessed?
- **Who** did you tell?
- Has it impacted your work? **How**?
- **What** notes, evidence, or documentation relevant to the event, if any, exist?
- **What** else? Do you have any other relevant information?

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Effective Investigations - Typical Question to Alleged Harasser



- **What** is your response to each allegation?
- (If denied) **Why** would the complainant lie?
- **Who** else might have other relevant information?
- **What** notes, evidence, or other documentation relevant to the event, if any, exist?
- **What** else? Do you have any other relevant information?

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Effective Investigations - Typical Questions to Witness



- **What** did you see/hear?
 - **When/where** did this occur?
Were others present? **Who?**
 - **What** did the complainant tell you?
 - **When** did s/he tell you?
 - Do you know of other instances of improper conduct?
 - **Who** else might have other relevant information?
 - **What** notes, evidence, or other documentation relevant to the event, if any, exist?
 - **What** else? Do you have any other relevant information?
- Who, what, when, where, why?**

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Effective Investigations - Credibility Determinations

- **Inherent plausibility:** Is the testimony believable?
- **Demeanor:** Did the person seem to be telling the truth? Lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Are there other witnesses who agree with testimony? Does physical evidence exist that supports one side or the other?
- **Past record:** Does the alleged harasser have a history of similar conduct?



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Investigation Determination

- Made by investigator or management personnel who review the report of the investigator
- Parties should be informed of the determination
- If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventative measures:
 - Training
 - Monitoring



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Corrective Action

Where warranted, Corrective action must:

- Be taken immediately
- Must be in proportion to the infraction



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Corrective Actions - Examples

- Oral or written warning
- Transfer or reassignment
- Demotion
- Reduction of wages
- Suspension
- Discharge
- Training/counseling
- Monitoring



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Corrective Measures



Examples:

- Restoration of leave taken because of harassment
- Expungement of negative evaluation provided by the harasser
- Reinstatement
- Apology by the harasser
- Monitoring treatment of complainant to ensure against retaliation
- Correct any other harm to the complainant

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Takeaways

- Create a compliant Policy
- Know/Enforce the Policy
- Distribute/acknowledgement
- Train employees
- Investigate all complaints
- Consult with HR
- Take corrective action where necessary



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Harassment - A Quick Quiz

Question1: Can only women be sexually harassed?



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Answer

- No. Both sexes can be sexually harassed and same sex harassment is recognized under the law.



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Question 2



- A co-worker e-mails to you at work pictures of naked men and women, sexually related jokes and a picture of a heart. You get these e-mails every week. You respond by saying do not send me these e-mails. At some point you call in sick because you don't want to see the e-mails. Is this sexual harassment?

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Answer

- Yes. The conduct is unwelcome to you. It has become so repeated that you do not want to come to work. This means your working environment has been affected.



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Question 3



- If an employee requests her complaint be kept confidential, will it be?

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Answer

- No complaint made under the anti-harassment policy can be completely confidential. Organizations must conduct an investigation into the matter which will necessarily involve talking with certain individuals. The investigation and the results of the investigation should be kept as confidential as possible.

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QUESTIONS?



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