



HONOR AND PROTECT

The #MeToo movement has triggered a rise in harassment claims. Make sure your company is carefully prepared for potential problems.

By DAVID WISSERT & AMY WIWI

S O MUCH CAN HAPPEN IN 15 MONTHS. It was that short time ago when *The New Yorker* expose of entertainment titan Harvey Weinstein's outrageous behavior gave birth to the #MeToo movement. Women who had been previously silent came forward in droves, offering personal tales of sexual abuse and harassment in the workplace spanning decades.

Increased public awareness of the issue has led to more complaints. According to the Equal Employment Opportunity Commission (EEOC), allegations of sexual harassment claims increased by more than 12% in the fiscal year ending Sept. 30, 2018. In addition, the EEOC has reported that it filed 50% more lawsuits charging sexual harassment than it did in the year prior.

The #MeToo movement has inspired new anti-harassment legislation as well. In 2018, New York State enacted laws that impose extensive training, policy and posting requirements. The state now also prohibits the use of nondisclosure provisions in settlement agreements involving sexual harassment claims unless confidentiality is the employee's preference.

Further, New York has declared null and void any clause or provision in any contract entered into after July 11, 2018,

that requires the parties to submit to mandatory arbitration to resolve any allegation or claim of sexual harassment.

New California laws also lower a plaintiff's burden and standard of proof in sexual harassment lawsuits. In addition, they increase sexual harassment training requirements for employers and limit the use of nondisclosure agreements to settle sexual harassment claims.

These laws are part of a nationwide trend. According to the National Conference of State Legislatures, more than 32 states have introduced over 125 pieces of legislation related to sexual harassment and workplace misconduct in 2018. In light of this, employers should expect to face a more educated and demanding workforce, with a clearer understanding of what is prohibited, employees' legal rights and where to seek redress. As Ruth Bader Ginsburg recently noted in a speech at Georgetown University Law Center, gone are the days when bad behavior will be excused under the premise that "boys will be boys."

There are several actions that employers can take to prevent and address sexual harassment. Let's look at each one in turn.

EXAMINE THE CULTURE

Take a hard look at your company's culture to determine whether it supports and reinforces a respectful workplace free of sexual harassment. You may find that leaders in the organization engage in, ignore or perpetuate sexual harassment or other gender discrimination. There may be employees who believe that complaints will not be treated seriously or that alleged perpetrators will merely be given a slap on the wrist.

Find out if women have been penalized for assertive behavior – if they are silenced or spoken over at meetings. And there may be pay disparities between men and women who hold similar jobs. Whether explicit, implicit or passive, all of these issues must immediately be addressed.

A good way to improve culture is to formally evaluate supervisors on how they handle harassment and discrimination issues and promote diversity. Then tie that evaluation to career advancement opportunity and increased compensation.

Management should further determine whether a gender imbalance exists in the workplace – in the rank and file, in

management, in the board room. Women remain vastly underrepresented at every level in corporate America according to the Women in the Workplace 2018 report. It's based on a survey by LeanIn.Org and McKinsey & Co., which compiled four years of data from 462 companies employing 20 million people. The #MeToo movement has led to heightened public scrutiny of that imbalance.

Employers should consider providing women with leadership training, promoting them into the executive ranks or forming committees that focus on women's issues and concerns. These efforts will certainly bolster an employer's message that its female employees are valued and respected.

DEVELOP A STRONG POLICY

Employers are well advised – and required in many states – to adopt a sexual harassment policy. What's more, it should contain a prominent statement that the employer is committed to maintaining a workplace free from sexual harassment. It should clearly define sexual harassment, emphasize that it is against the law and state that all employees have a legal right to a workplace free from sexual harassment.

The policy should specify that it applies to all employees, applicants for employment, interns as well as contractors and other third-parties who conduct business with the employer, as may be required by state law. The policy should advise that sexual harassment is not limited to the physical workplace and can occur while employees are traveling for business or at employer-sponsored events or parties.

There should be a clear mechanism for reporting and handling complaints, specifying the people to whom the employee can complain. The options should include someone who will seem safe to a given employee, if he or she needs to lodge a complaint. To that end, someone in addition to the supervisor must be listed, and preferably the list should include at least one male and one female.

The employer should confirm that complaints will be treated confidentially, to the extent possible, promptly investigated and that the employer will take prompt corrective action to stop any inappropriate conduct. Some states, including California and New York, now require employers to specify how an employee can file a complaint with the EEOC or state agency that enforces the

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THE INVESTIGATION PROCEDURE

There are critical questions to answer in any harassment investigation. Among them are:

- Who will investigate?
- What evidence needs to be collected (i.e., emails, photos, text messages, social media posts)?
- Who should be interviewed?
- How should the process be documented?

The person selected to investigate should be well trained, unbiased, able to communicate well and defuse emotional responses. They also need to be capable of clearly documenting investigative procedures and analysis, and ultimately be a good witness in the event of litigation.

The chosen investigator must be sensitive to the occasional need to use an outside investigator or to consult with outside counsel. This is especially true when the accused is a high-level executive or a person with real or perceived control over a human resources department.

Documentation is the key to any defense at trial. This makes it imperative that investigators review their notes – often made quickly or using shorthand – for errors and omissions. Make sure they are in a form easily understood by others in case they become trial exhibits.

The form of the investigator's report is another important consideration. The investigator must decide whether to make recommendations regarding corrective action or only issue factual findings and have human resources personnel take the next steps. If written recommendations are not followed, employers must be prepared to explain why.



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 laws prohibiting discrimination.

Employers are strongly encouraged to outline and prohibit other forms of unlawful harassment and discrimination within their policy, beyond sexual abuse. For example, employers should affirm they provide equal employment opportunities to all staff members and job applicants without regard to race, color, religion, gender, national origin or any other characteristics protected by state and local law. The same complaint mechanism can be used to report claims of other unlawful discrimination and harassment.

The policy should emphasize that retaliation is prohibited. However, the employer should make clear the provision does not protect employees from making intentionally false charges of harassment.

New York employers are now required to include a sample complaint form within their policy. Employers from other states may wish to do the same.

COMMUNICATE THE POLICY

Employers should disseminate a written copy of their policy to employees either

as a hard copy or via email. Alternatively, they should post the current version of their policy on a company intranet with a tracking system. Intranet tracking is a compliance tool that allows employers to track and confirm that handbooks and policy updates have been received and reviewed by employees. In all events, the employer should secure an acknowledgment form

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from the employee.

Policies should be redistributed at least annually and provided to each new hire. But that's not all. The employer should consider reminding employees of its harassment policies before holiday parties and at town halls or other large group meetings. By doing so, the employer can emphasize its commitment to the policy.

TRAIN, TRAIN AND RETRAIN

New York and California have enacted legislation that requires anti-harassment

training in the workplace either every year or every other year and further require that employers track compliance. But employers in every state should provide anti-harassment training to their employees not only because it helps when defending a lawsuit, but also because it is good for the employer's culture.

The New York and California training

requirements serve as a model for employers in all states. Educational sessions should be interactive, which means they should allow employees to ask questions and require them to provide feedback about the information and materials presented.

Include an explanation of sexual harassment consistent with the law of the state in which the employee works and provide examples of conduct that would constitute unlawful sexual harassment. Also provide information about the federal and state

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statutory provisions prohibiting sexual harassment and identify the internal and external complaint forums available to employees.

The subject of supervisor responsibility is an area of special concern, and employers should provide separate training for supervisors so they know exactly what to do

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when someone complains, or if they observe or know of sexual harassment even if no one is objecting to it.

Many states hold supervisors to a higher standard of behavior. Training should advise supervisors that they are required to report all complaints or instances of suspected harassment to a designated company representative (as provided in the employer's anti-harassment policy) and that they will be subject to discipline for failing to make that report.

Supervisors must also be advised that

retaliation against any employee because that individual complained of harassment, or helped another employee who did, is strictly prohibited. Retaliation includes any action taken to alter an employee's terms and conditions of employment, such as a demotion, reduction in pay or location change.

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CONDUCT INVESTIGATIONS

A prompt and thorough response to reports of sexual harassment is critical to a successful legal defense. Because there are more legislative efforts to combat workplace harassment, it's likely that workplace investigations will face more scrutiny moving forward.

Not only are victims likely to complain about investigation procedures, but accused

harassers, facing stricter policies and penalties, may also complain that an investigation or the ensuing response is unfair.

Recent legislation limiting the use of confidentiality clauses in agreements that settle harassment claims will probably result in more claims going to trial. There, employers should expect their entire investigation process will be put under a microscope. (For tips on how to launch an investigation, see sidebar page 20.)

ACT & COMMUNICATE PROMPTLY

Many employees expect that an alleged harasser will be immediately fired once allegations are made. While that expectation may be unrealistic, employees expect follow-up information from an employer once an investigation is concluded.

Ordinarily, employers should notify complainants in general terms either that the allegations were substantiated and corrective action was taken, or that the allegations were not substantiated. To emphasize the employer's strong response to sexual harassment claims and the thoroughness of its investigation, some employers may choose to provide additional information regarding the scope of the investigation, the number of witnesses interviewed and the nature of the corrective action.

CONSIDER INSURANCE

Employment practices liability (EPL) insurance policies allow companies to mitigate risk and reduce the costs associated with certain employment-related claims and litigation. The policies generally cover companies, executives and employees for claims arising from wrongful discharge, harassment, discrimination and retaliation. Coverage exclusions do exist and should be reviewed carefully.

Dealing with harassment, and guarding against it, is not a simple process. It requires ongoing efforts by employers to set and communicate policy, train, respond and promote a culture of respect.

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