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Sexual Harassment Prevention In the #MeToo Era

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#MeToo movement isn't slowing down

How Is #MeToo Relevant to Me?

- Most cases in media spotlight involve allegations of extreme and egregious abuses, such as drugging of victims and quid pro quo.
- You are not likely to encounter such abuses in most workplaces, but the movement has caused harassment again to be top of mind.
- As a result, expect to receive more complaints of harassment from employees.
- Expect that alleged misconduct will range from serious to trivial; some employees will gain the courage to report actual abuse, others might look for ways to join the movement.



How Is #MeToo Relevant to Me?

- Be objective and do not jump to conclusions.
- Unlike on TV, employees should not lose their jobs simply as the result of an accusation of misconduct.
- A finding of misconduct after an investigation requires discipline but it does not always require termination.



Perception vs. Reality

- Where is workplace sexual harassment and assault most prevalent?
 - We know where Americans think it occurs, but are they correct?



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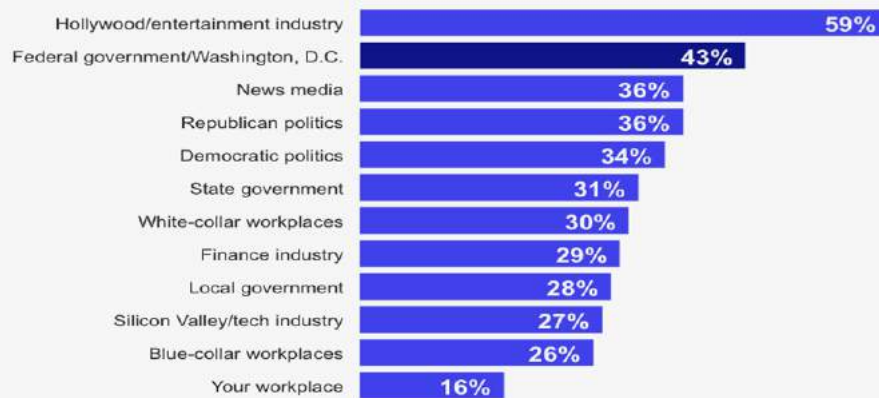
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THE PERCEPTION

Federal Government Trails Only Hollywood on Perceptions of Sexual Harassment and Misconduct

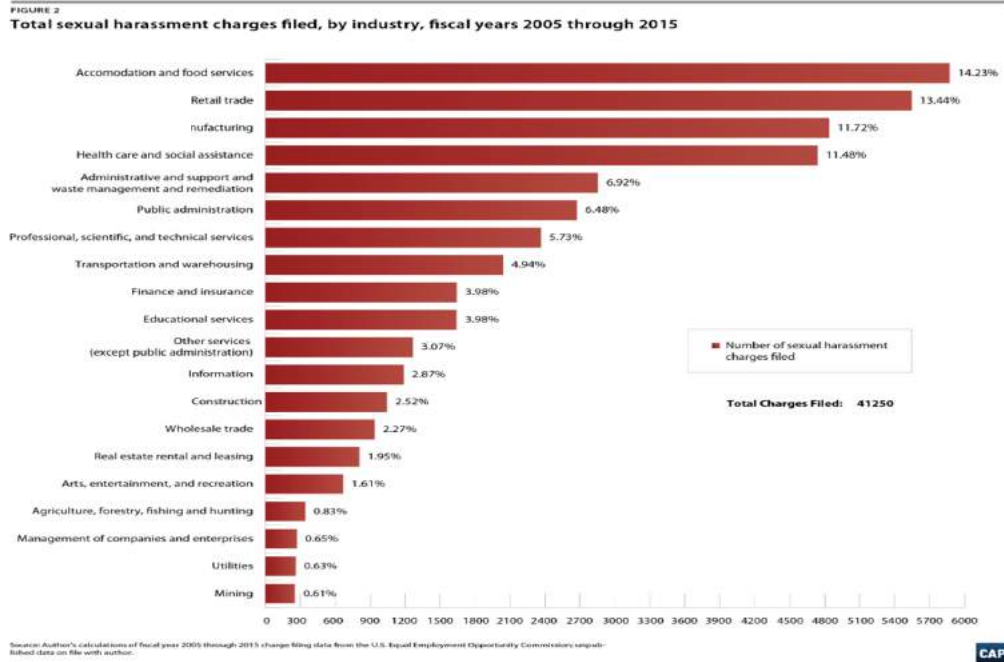
How big of a problem do you think sexual harassment and misconduct is in each of the following industries and/or workplaces?

Share of voters who said it was a big problem...



MORNING CONSULT

Poll conducted from 11/16 – 19, 2017, among 2,586 registered voters, with a margin of error of +/-2%.



Prevalence

- A 2017 poll by *ABC News* and *The Washington Post* found that 54% of American women reported being subjected to, at least once, some form of sexual harassment or assault while at work
- Moreover, a recent *New York Times* poll found that nearly 1/3 of men reported doing something at work within the past year that would qualify as objectionable behavior or sexual harassment

Reporting Harassment and Assault

- Despite the admitted prevalence of sexual harassment, the Equal Employment Opportunity Commission receives approximately 6,700 sexual harassment complaints each year
- EEOC estimates that only 6% to 13% of individuals who experience harassment actually file a formal complaint with the EEOC



How Employees Historically Respond?

- Avoid harasser (33% to 75%)
- Attempt to ignore, forget or endure (44% to 70%)
- Seek support from friends (50% to 70%)
- **LEAST COMMON RESPONSE WAS TO TAKE FORMAL ACTION → Report internally = 30%, File Formal Complaint = 6 – 13%)**

HC1



HC1 Anything more recent since this is from 2008?

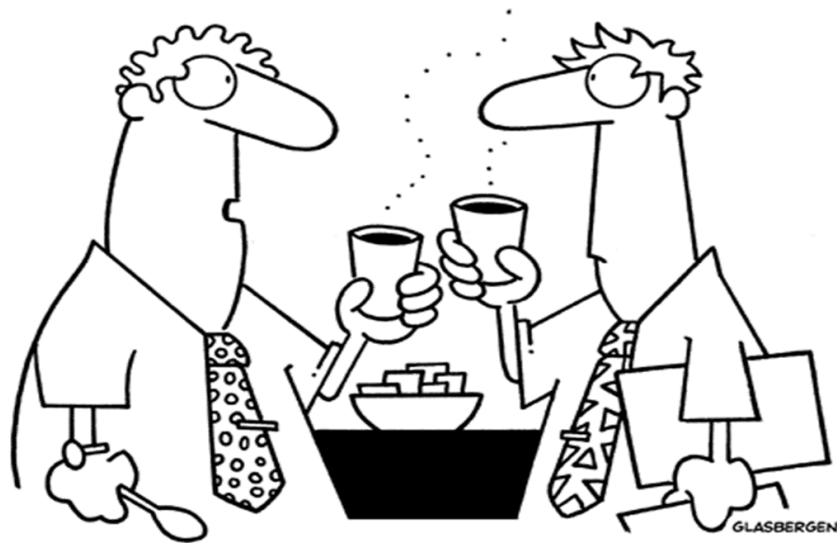
Howard, Christine, 8/5/2018

How Harassment Will Evolve (Eventually)

1. More complaints to process in general & about acts that past employees did not complain about (**maybe**)
2. More scrutiny of investigations and reports (especially of prominent personnel)
3. Presumption of guilt by juries (**maybe**)
4. The rise of “backlash litigation” (**maybe**)
5. Evolution in law re: severity/pervasiveness & *Faragher/ Ellerth*, both of which have objective components that are influenced by larger culture



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**“Our sexual harassment policies are too strict.
I got in trouble for trying to embrace change.”**

Traditional Approaches to Combatting Workplace Harassment

- Click through a PowerPoint on an office computer
- Check a box that you read the employee handbook and policies on anti-harassment
- Attend a mandatory seminar where someone (like us) lectures you about harassment for an hour

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Does This Work?

- Yes!
 - It covers the basic — but critical — foundational items



Does This Work?

- No!
 - Easily ignored
 - May be improperly tailored to address new #MeToo problems
 - Potentially confusing
 - Not always relatable
 - May reinforce gender stereotypes
 - May create a backlash



Takeaways from the Criticism

- Should employers get rid of traditional anti-harassment training?
- NO!
 - Traditional training remains necessary
- But, is it sufficient?



A #MeToo Era Solution

- Focus on culture
- Company culture can play a big role in curbing or permitting harassment



Why Does Workplace Culture Matter So Much?

- What is it?
- Why should we care about it?
 - 3 Compelling Attributes of Organizations that Do It Right



Culture Done Poorly

- Certain industries keep making headlines with frequency: media, venture capital and finance, entertainment, politics, etc.
 - Commonality – bestow power based upon impact on bottom line:
 - Bad behavior is enabled and overlooked
- Is it worth retaining the “star”?
 - Often it is more costly to retain a toxic “star employee” because the profits they provide do not offset the damage they do



Create a Positive Culture

- Create a culture in which all employees are treated as equals and treat one another with mutual respect
 - How do we do it?
 - Time, money and top down support
 - Meaningful training – equip employees with tools to root out bad behavior
 - Consider making prevention everyone's responsibility through bystander empowerment training; implicit bias workshops; basic how-to's of investigating/resolving complaints, etc.



Create a Positive Culture (continued)

- Revamp your HR policies to encourage civility
- Take steps that encourage reporting
- Identify risk factors and employ strategies to reduce risk



A Positive Culture Leads To

- A respectful environment for all employees
- Fewer complaints, charges, and lawsuits
- Improved morale and efficiency



The Main Point

- We spend a lot of time telling people what not to do but very little on what they should do



An Updated Policy Against Harassment

- Policy should express your organization's commitment to prohibiting harassment based on sex and all other protected classifications.
- It should not be too broad so as to cover petty conflicts not addressed by harassment laws.
- It should provide examples of prohibited harassment.
- It should provide multiple options for employees to complain about harassment.
- It should state that all complaints will be investigated.



An Updated Policy Against Harassment

- It should state that employees found to have violated the policy will be disciplined, up to and including termination of employment.
- It should assure employees that they will not be retaliated against for complaining.
- It should **not** advise employees to go to the EEOC.



Training of Managers

- All managers and supervisors should be trained on harassment avoidance and prevention
- Training should stress that employees look to managers and supervisors, not to the employee handbook, for clues regarding acceptable behavior; managers therefore must be role models.
- Training should also stress, however, that merely avoiding harassing behavior is not enough, because.....**many harassment complaints arise as the result of poor judgment on the part of managers.**



Supervisory Evaluation

- From the very top of your organization down, evaluate supervisors and managers, in part, on: (i) their knowledge of respectful workplace factors; (ii) their commitment to a respectful workplace; and (iii) their role in intervening to stop inappropriate behavior.
- Take appropriate action against supervisors who do not take the elements of a respectful workplace seriously.
- Terminate supervisors who are bullies.
- Terminate supervisors who tolerate harassment, bullying or abusive conduct by employees.



Bystander Intervention

- Bystander intervention techniques are strategies employees should use to intervene when they observe instances of inappropriate behavior
- There are a variety of such strategies, including:
 - Interrupting the behavior
 - Publicly supporting the victim
 - Naming or acknowledging the offense
 - Use body language to show disapproval
 - Encourage dialogue
 - These strategies can be taught and practiced



When Issues Do Arise

- Investigate all claims, whether time-barred or not
- Follow policies/procedures



Employers Should Ask These Questions . . .

- Under what circumstances should an employer retain independent investigators?
 - Actual or appearance of conflicts
 - Inexperience in conducting workplace investigations
 - Allegations of systemic conduct



Investigating Claims

- Key Steps:
 - Preliminary Interview with Complainant
 - Emergency Action (if needed)
 - Formal Investigation
 - Planning
 - Conducting Interviews
 - Documentation
 - Reaching Conclusion
 - Recommending Action/Outcome
- Implement Action



Reach a Conclusion!

The infamous “he said / she said” situation:

- Review the facts you can prove
- Make credibility determinations
- Use common sense
- Is it “*more likely than not . . .*”



To Discipline or Not To Discipline?

- Are mere allegations enough?
 - We are seeing people lose their jobs over allegations
- What if the allegations are unsubstantiated?
 - Were you fair . . . ?
- Be consistent with discipline

**THE PURPOSE OF
DISCIPLINE IS NOT
TO PUNISH, BUT
TO CORRECT**

JOHN WOODEN



Discipline - One Size Does Not Fit All

- **Reminder** to the accused employee, in writing, of workplace expectations
- Requiring accused to complete **remedial training – one-on-one**
- **Separation** of complainant and accused
- **Termination** of employee found to have engaged in unlawful conduct



Even if No Violation of Policy is Found



- Issue a reminder to the accused employee, in writing, of workplace expectations
- Requiring accused to complete remedial training – one-on-one
- Assure the complainant that the allegations were taken seriously and reinforce importance of continued reporting



Once the Dust Settles . . .

- Assure the complainant that the **allegations were taken seriously** and reinforce importance of continued reporting
- Continue to **monitor the situation** to assure that the problematic conduct has stopped
- Periodically meet with the complainant to **confirm no retaliation has occurred**

DOCUMENT!! DOCUMENT!! DOCUMENT!!



Settlement Confidentiality Provisions

SEC. 13307. Denial of deduction for settlements subject to nondisclosure agreements paid in connection with sexual harassment or sexual abuse.

(q) Payments **related to sexual harassment and sexual abuse**. No deduction shall be allowed under this chapter for:

(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

(2) **attorney's fees related to such a settlement or payment.**

(b) Effective date.—The amendments made by this section shall apply to amounts paid or incurred after the date of the enactment of this Act, (signed into law on Dec. 22, 2017).

HC10



HC10 What was date?

Howard, Christine, 8/5/2018

Settlement Confidentiality Provisions

SEC. 13307. What to do?

- Caution internal client there will be no confidentiality
- Important to distinguish between sexual harassment and other claims for disclosure/deduction purposes.
- Two agreements with multiple claims (maybe)
 - Separating claims via two settlement agreements:
 - One with confidentiality and the other without.

*Signed into law on Dec. 22, 2017



Moving Beyond Sexual Harassment Avoidance

- The Value of Implementing a Workplace Bullying Policy:
 - 35% of Workers Feel Bullied at Work
 - 16% Suffered Health Problems as a Result
 - 17% Quit Their Jobs to Escape the Bullying
 - 3x More Prevalent than Sexual Harassment
 - Referred to as “Status-Blind Harassment”
 - Sexual Harassment is a Subset



What is Workplace Bullying?

As defined by the framers of the “Healthy Workplace Bill,” Workplace Bullying is repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that takes one or more of the following forms:

- Verbal abuse, or
- Threatening, intimidating or humiliating behaviors (including nonverbal), or
- Work interference – sabotage – which prevents work from getting done, or
- Some combination of one or more.

<http://healthyworkplacebill.org/problem/>

Bullying v. Harassment: Similar But Different

Harassment

- Often involves physical contact
- Target selected because of who they are, i.e. member of a protected class
- Often a clear overt incident – i.e. grabbing
- The target knows they have been harassed virtually immediately
- Harassment is revealed by use of recognized offensive vocabulary and gestures
- Harassment occurs in and out of work, i.e. texting, emails, social media

Bullying

- Almost exclusively psychological
- Target selected because they are vulnerable and, typically, competent
- Typically an accumulation of small incidents
- The target may not realize for weeks or months that they are being bullied
- Bullying tends to fixate on trivial criticisms, casual insults, exclusion from the “in” group
- Bullying occurs mostly at work, but increasingly now on social media as well

Lateral Violence – Employee to Employee

- The scholarly literature defines employee-to-employee bullying as “lateral violence.”



Microaggressions: Another Form of Bullying

- The concept: Death by a thousand paper cuts
- Small, day-to-day behaviors/statements/practices that are derogatory/hostile/negative and convey a message of inferiority to the target



Moving Beyond Sexual Harassment Avoidance

- The Benefits of Prevention:

- Allows employers to regulate workplace misconduct from a position of maximizing productivity and the health & safety of employees without falling into evolving political traps associated with gender politics
- Gives HR greater freedom to stop predatory behaviors before they become sexual harassment claims
- Employers who have workplace anti-bullying policies may have fewer sexual harassment claims
- Promotes **Psychological safety** and better teams



Final Key Points

- Manage employee complaints and problems
- Realize “perception” is as important as reality
- Remember the goal is to *avoid* claims not to “win” claims
- Review your hiring, promotion, disciplinary and termination decisions
- Prepare the paperwork you need
- Ensure your paperwork supports your position
- Know what the law requires & what it prohibits





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Final Questions




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