#MeToo: Effective Strategies in Investigating Sexual Harassment Claims

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GOALS OF THIS PRESENTATION

• Discuss best practice strategies in investigating claims of sexual harassment

• Learn how companies have revised or updated policies related to workplace behaviors

• Evaluate the impact of the #MeToo movement on the American workforce

• Decide whether outside counsel should be retained in investigating sexual harassment claims

• Review and analyze sexual harassment case studies
SEXUAL HARASSMENT DEFINED

• Sexual harassment is a legal term generally describing unwelcome conduct of a sexual nature. The term is defined differently across jurisdictions, and definitions may change with new legislation and court decisions.

• **EEOC Definition:** Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment. → *Quid Pro Quo and Hostile Environment Harassment*

• Victim as well as harasser can be a woman or a man. Victim does not have to be the opposite sex.

• Harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or non-employee. It may occur without economic injury to or discharge of the victim.

• Harasser's conduct must be unwelcome.
#METOO MOVEMENT & AWARENESS (BACKGROUND)

Historically, sexual harassment was not adequately addressed:

- In France, a person who makes a sexual harassment complaint at work is reprimanded or fired 40% of the time, while the accused person is typically not investigated or punished.
- In the United States, a 2016 report from the EEOC states that although 25–85% of women say they experience sexual harassment at work, few ever report the incidents, most commonly due to fear of reprisal.
- Goal of the movement is awareness and to emphasize the scope of the problem.
EXAMPLES

- Scenario #1: Young female harassed by older co-worker(s) or manager
- Scenario #2: Woman in male-dominated office subject of sexual pranks
- Scenario #3: “Stalking” behavior
- Scenario #4: Physical abuse
THE INVESTIGATION

Why investigate?

• To uncover and eliminate wrongdoing

• To identify problem employees and correct the behavior

• To reduce or eliminate liability
  o Promptly investigating and taking remedial action may be a defense if the complaint evolves into a lawsuit

• Promptly crafting remedies may lessen chance the complainant will bring suit
SEXUAL HARASSMENT INVESTIGATIONS – BEST PRACTICES (1)

What are the functions of the investigation?

• Identify claims
  o Violations of company policy
  o Violations of applicable law

• Obtain evidence of wrongdoing

• Allow the accused the opportunity to present exculpatory or mitigating evidence

• Maintain confidentiality balanced with thoroughness
SEXUAL HARASSMENT INVESTIGATIONS – BEST PRACTICES (2)

Planning the investigation:

• Should any initial action be taken before the investigation starts?

• Who should investigate?
  o Does the investigator have the necessary skills?

• Is the investigator impartial?
  o Can it appear that the investigator was improperly influenced by anyone?
  o Are there any actual or perceived conflicts of interest with anyone involved?
SEXUAL HARASSMENT INVESTIGATIONS – BEST PRACTICES (3)

Planning the investigation:

• Ideally, there should be two interviewers

• Interviewers should not know the witnesses or have pre-conceived ideas about the complaint or the individuals involved

• Possible candidates as interviewers are:
  - Outside counsel
  - Inside counsel
  - Employee Relations personnel
  - HR from outside the relevant unit
Planning the investigation:

- Consider timing and sequence of witnesses

- Assume your witnesses will talk to each other

- It may be necessary to schedule witnesses back to back

- Don’t disclose who you’ve met with, who you plan to meet with, or what you have learned
Disclosures to witnesses in the investigation:

*Consider these disclosures to witnesses:*

- Purpose of the interview
- No conclusions have been reached yet
- Company takes reports of sexual harassment seriously
  - Full, truthful cooperation is expected
    - *Upjohn* warnings, if applicable
    - Confidentiality disclosures
- Company’s commitment to non-retaliation
Documenting the investigation:

• Take detailed notes

• Write a report that summarizes:
  - The complaint
  - The reason for the investigation
  - Witnesses interviewed
  - What each witness had to say of relevance
  - Documents or other evidence reviewed

• State the conclusions: Was the investigator able to substantiate the allegations?
Responding to complaints:

- Do so as promptly as possible.
- The trust, morale, and fair treatment of employees are at stake. An employer’s actions send powerful signals about what another employee can expect in similar circumstances.
- Use active or deep listening skills to gather information.
  - Listen for understanding and use empathy.
Ethics & Compliance Hotline Benchmark Report, NAVEX Global (2019):

- Organizations that offer and track the full range of incident report methods (hotline, web, open door, etc.) show a much higher reporting rate than do organizations that track only via phone calls and a website: 2.1 per 100 employees versus 1.1 per 100.

- Organizations in the latter category are missing a significant percentage of concerns and risks that employees could be raising.

- Awareness has driven some change. More companies, incl. Facebook, Microsoft, Google and Uber, have eliminated policies requiring mandatory arbitration for sexual harassment claims.

- From the EEOC's perspective, workers are filing more claims. The agency filed 50% more harassment lawsuits in 2018 on their behalf than in the year before.
An effective anti-harassment policy:

- Should include a section on how to make complaints and a section about the investigation of such complaints.
  - The complaints section should apply to complaints of discrimination, harassment and retaliation -- not just harassment complaints.
  - It should also provide at least 2 avenues for complaints in case the employee is not comfortable seeking out a certain individual.
  - The investigations section should state that the investigation will remain confidential to the extent possible, but not guarantee confidentiality.
  - The policy cannot require the employee to keep the complaint or investigations confidential.
CODES OF CONDUCT

- Be sure to reference your anti-harassment policy in any code of conduct.

- In addition to including your anti-harassment policy in an employee handbook, specifically reference the anti-harassment policy in the code of conduct / disciplinary policy.

- Make sure that employees know that violating the anti-harassment policy will lead to discipline up to and including termination of employment.

- Policy applies to employees at all levels of the organization.
STATE LAWS ARE POWERFUL

**TRAINING**

**POLICIES**

**NON-DISCLOSURE AGREEMENTS**

**MANDATORY ARBITRATION**

**STANDARDS FOR ACTIONABLE CONDUCT**

**LIABILITY STANDARDS**

**IL law requires annual disclosure of final and non-appealable adverse judgments and non-appealable administrative rulings involving sexual harassment and other discrimination.**

**NY law eliminates restriction that harassment be “severe or pervasive” for it to legally actionable.**

**CA law provides that the perpetrator is personally liable for damages to victim. Employers are held “strictly liable” if perpetrator is supervisor.**
STATE-MANDATED POLICIES

- While a harassment policy is highly recommended for all employers, certain states require a written policy/notice concerning harassment, including:
  - California
  - Connecticut
  - Illinois
  - Maine
  - Massachusetts
  - New York
  - Oregon
  - Rhode Island
  - Vermont
  - Washington

- Some of these states only require a policy for certain industries
- Employers in these states should review the laws closely, as the details that must be included in the policy vary from state to state
STATE-MANDATED TRAINING

• California: Bi-annual training (1 hour for employees, 2 hours for supervisors) for employers with 5 or more employees

• Connecticut: Training at least every 10 years (2 hours for all) for employers with 3 or more employees

• Delaware: Bi-annual training (no specific length) for employers with 50 or more employees

• Illinois: Annual training (no specific length) for all employers

• Maine: Training (no specific length) for employers with 15 or more employees (retaining not required except upon promotion)

• New York State: Annual training (no specific length) for all employers

• New York City: Annual training (no specific length) for employers with 15 or more employees

• Washington: Training for all employers in certain industries (no retraining)
TRAINING, TRAINING AND MORE TRAINING

• Hallmarks of an effective compliance program:
  - Make no-tolerance sexual harassment policies widely accessible; encouraged by upper management/board; updated regularly.
  - Train on all relevant laws/regulations – everyone must take the training.
  - Ensure employees know how to use those policies, laws, procedures in reality -- and experience the appropriate disciplinary measures for engaging in/failing to stop it.
  - Employees can easily & anonymously report wrongdoing.
  - Enforcement cases/news/investigative findings used as lessons for staff at all levels.
  - Adequate resources and appropriate authority is given to the persons overseeing the policies, investigations. Outside expertise is consulted in timely way.
  - System of monitoring that goes beyond one person & department – checks & balances.
CONFIDENTIALITY AGREEMENTS (NDAs, ETC.)

- Some states, including CA, IL, and NY have moved to restrict non-disclosure agreements about harassment claims, or potential claims.
- These restrictions arise in both the settlement context and in other employee agreements, such as confidentiality agreements and separation agreements.
- In NJ, such agreements are **altogether banned**.
- In NY and IL, settlement agreements are generally permitted provided they are done so at the employee’s request and certain other conditions are met, such as allowing the employee 21 days to consider whether to enter into such agreement and 7 days to revoke such agreement.
MANDATORY ARBITRATION TO RESOLVE CLAIMS

• Several states, including IL and NY, among others, have enacted legislation that either bans or significantly restricts an employer’s ability to impose mandatory arbitration of harassment claims.

• However, there have been legal challenges based on the premises that such laws are preempted by the Federal Arbitration Act, which broadly favors arbitration.

• For example, a New York District Court recently ruled that the NY law was preempted.
#MeToo Backlash – Real, Imagined, Surmountable?

- 12/18 (Bloomberg) & 1/19 (NYT) – Interviews with executives suggested some avoidance in men in choosing to mentor women, have dinners/travel with them and even hire them.


- Silver lining – most men have a more expansive view of what constitutes sexual harassment than women and don’t want to work for a business ignoring its occurrence.

- Studies show traditional sexual harassment training has limited effect, perhaps because much of it focuses on helping employees understand what constitutes harassment, and the data shows they already do. Recommendation: Companies should consider more sophisticated training conducted by experienced professionals; this may include educating employees about sexism, as employees who display high levels of sexism are more likely to engage in discrimination/harassment, and training can reduce those levels.
5 KEY TAKEAWAYS FOR ANTI-SEX HARASSMENT POLICIES & TRAINING

1. Pay attention to state law differences when drafting policies, preparing employment and settlement agreements, and conducting training.

2. Carefully craft and update sexual harassment policies using the guidance of in-house or external counsel. Make these policies accessible, well-known.

3. Develop training programs and tools for all employees to successfully complete.

4. Make sure all managers, department and branch offices understand these policies and the confidentiality and anti-retaliation requirements involved.

5. Have senior executives articulate clear messaging that sexual harassment is not tolerated.