

Harassment at the Highest Levels: Beyond Checking the Box



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Why Now?



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If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

2:21 PM · 15 Oct 2017

10,717 Retweets 21,812 Likes



Attitudes Are Changing



Can HR Do More to Protect the Company?



Is That Still the Right Question?



Agenda



- #MeToo Is Changing the Rules
- Is Your Anti-Harassment Policy Enough?
- Training—Is It Working?
- HR— Friend or Foe?
- Investigation Standards
- What's In Store Next?

Rules are Changing



- Will #MeToo change the definition/application of the severe or pervasive standard?
- Timeline for responding to complaint
- What constitutes adequate complaint / investigation procedures?

Redefining Sexual Harassment?



- Evolving Views of What Constitutes Sexual Harassment
 - Severe or Pervasive standard
 - Are juries going to lower the threshold?
- Impact on Discrimination Claims
 - #MeToo and disparate treatment of women
 - Gender equality issues

#MeToo—Response Time



NBC News – Today Show Host Matt Lauer

- NBC completed investigation of Lauer within 48 hours of receiving complaint
 - Conducted “dozens of interviews” with current and former staff members at NBC
- Remedial action = Lauer terminated immediately
- NBC Chairman: “Our highest priority is to create a workplace environment where everyone feels safe and protected, and to ensure that any actions that run counter to our core values are met with consequences, no matter who the offender.”

Is Your Policy Good Enough?



Typical Harassment Policy



- Zero tolerance
- Reporting mechanism
- Prompt remedial action if violation found
- Confidentiality
- No retaliation
- Training

What Does It Mean?



- We have entered a zero tolerance environment—and this time we really mean it!



- What are the consequences for policy violations?
 - Remedial action = designed to stop harassment and correct its effects.
 - Punishment should fit the crime

Harassment Policy



- What does the policy say re: confidentiality? Is this still appropriate?
- Policy states that employees who report are protected from retaliation, but is this really sufficient to encourage people to come forward?
- Should managers be held to higher standard?

Can We Make Policies Better?



- Hope for the best but plan for the worst
 - Fire drills
 - Plan for complaints against members of senior management or HR
 - Avoiding executive access or allegations of meddling

Can We Make Policies Better?



- Hotline or other reporting mechanisms
- Message/video from President / CEO
- Grade managers on harassment prevention & awareness.
 - It's a privilege to be a boss. Act like it.
- Encourage reporting; discourage silence
 - Failing to report harassment is a violation
- How is your policy rolled out?

Rewrite Harassment Policy?



- Drop the legalese
- Explain Why Company Has a Harassment Policy:
 - “We have the policy because those who are harassed can’t rise to their full potential as employees or as human beings. That’s not good for them, for you or for the company as a whole.”
- Add a Professionalism Policy
 - “We hire employees because we believed them to be professionals and that they will do so with our customers/clients as well as their colleagues.”

Harassment Training; Does It Work?



Harassment Training



- Old View
 - Prevent harassment lawsuits
 - Protect employers (affirmative defenses)
- New View
 - Protect employees
 - Encourage workplace citizenship & open communication
 - Culture shift - it is expected that employees will speak up if they see something wrong

Assessing Effectiveness



- How often and how long?
- Is it only symbolic?
- Does it really change behavior?
- Does it actually reinforce gender stereotypes?
- Is it tailored to your workplace and does it reinforce company values?

Can We Improve It?



- “Check the box” mentality no longer sufficient
- Must be part of holistic approach
 - Hiring and promoting women
- “Bystander” training—show employees that staying silent impacts everyone
- More intensive training by interactive trainers
- Require executives/C-Suite to actively participate in training

HR—Good or Evil?



HR's Role in the #MeToo Era



- How is HR perceived in the company?
- Whom do they represent?
- Independence?
 - “Business Partner”
 - Is there a perception that certain managers / “high performers” are untouchable?
- How thorough is their investigation and documentation?
- Do executives demonstrate support for HR?

Conducting Investigations



Investigations



- Must have credible investigator and process
- Who conducts investigation into improper behavior?
 - HR
 - Managers
 - 3rd Party
- Scope of investigation
 - Seriousness of complaint
 - Geographic & time constraints

Investigations



- What about the accused employees?
 - Should understand allegations against them and respond
 - General fairness principles
 - Need sufficient information to make a good judgment
- Also need to respond “promptly”
 - NBC/Lauer situation reportedly investigated / remedied within 48 hours of complaint

Investigating Complaints by Employee's Attorney



- **NY Times** Article: *“Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.”*
 - Some advocated bypassing HR and hiring an attorney to file complaint with company
- How to Handle Letter From Attorney
 - Get outside legal counsel involved
 - Company still obligated to investigate complaint

What About Old #MeToo Claims?



- #MeToo Has Empowered Women to Speak Up About Past Incidents
 - Do you need to investigate stale claims?
 - Statute of limitations (300 days) means likely no lawsuit from “Me Too” accuser.
 - But what if your accuser is still in the workplace?
 - Proportional discipline (age of claim vs. severity)
- #MeToo Claims on Social Media?

False Allegations/Bad Faith



- How to Handle:
 - Repeated false allegations
 - True allegations reported for a demonstrably bad faith reason
- Balancing Interests
 - Must maintain credibility with employees
 - Continue to respond to all allegations made via reporting systems

What's In Store?



- Separate / Independent HR
- More independent investigation teams
- Accuser gets more input in interim / final remedy
- Reduce risk areas
 - Stricter no dating policies
 - Limit / ban alcohol at any work event / meeting
 - Approach male dominated industries differently

What's In Store?



- More effective anonymous reporting channels
 - Hotlines, third-party providers
- Increased use of mandatory employment arbitration agreements
 - Employee agrees to submit claims to a neutral arbitrator
 - Reduced costs, confidentiality, class action waiver
 - Better Outcome?

New Trends to Watch



- Board / Executive involvement
 - Conducting top-down review of culture
 - Direct access to by employees
- #MeToo backlash?
 - More “Pence Rule” followers?
- Less tolerance of workplace harassment by Judges & Jurors

