

# EMPLOYMENT WEB SERIES



## The Paradigm Shift in Workplace Sexual Harassment: Practical Advice to Get It Right

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## About the Presenters



**Tom Luetkemeyer** represents management employers around the country in the full range of labor and employment matters.



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## 2017: The Reckoning

- Harry Weinstein, Matt Lauer, Al Franken and numerous others accused of sexual harassment
- The #MeToo movement:
  - Alyssa Milano's "Me too" tweet was retweeted more than 17,000 times in 24 hours
  - The "#MeToo" hashtag went viral launching the "MeToo" movement

# »» What is Harassment?



## What is Harassment?

- Harassment is a term often used in the media to refer to a wide range of conduct
- Harassment also is a legal term that arises out of federal law, including Title VII and corresponding state statutes
- Harassment also may be a term used in an employer's policies or handbook to describe prohibited conduct



# What is Harassment?

- Form of discrimination
- Sexual harassment is unwelcome conduct of a sexual nature, and a form of gender discrimination
- **Unwelcome** conduct **based upon a protected status:**
  - May start as welcome but evolve to unwelcome
  - "STOP!" not required
- So **severe or pervasive** that it **alters the terms and conditions of employment**
- Offensive to reasonable person & subjectively offensive to the victim

# Unlawful Harassment?

- Rude behavior (e.g. refusing to say hello, thank you, etc.)?
- Giving someone an undesirable assignment?
- Forcing someone to work with someone they don't like?
- Subjecting subordinates to a high level of workplace stress?
- Overruling or reprimanding a direct report, even when you're wrong?
- Yelling and screaming?



## The Answer...No

- "Discourtesy or rudeness should not be confused with racial harassment and a lack of racial sensitivity does not, alone, amount to actionable harassment." *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)
- "[The law] does not set forth a general civility code for the American workplace" or "immunize [employees] from those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington Northern v. White*, 548 U.S. 53 (2006)



# Costs

- Morale suffers
- Absenteeism
- Turnover
- Low productivity
- Claims & Litigation



## Collateral Consequences?

- Do women make less (relatively speaking) because of harassment some confront at work?
- Some say the gender pay gap has been hovering at 80%
- Women who experience harassment tend to leave their positions within a year or two of the alleged harassment
- Women who leave often have to "settle" for alternative employment
- Their careers are set back, they work in positions for less compensation or experience periods of unemployment

## Legal Developments in Harassment Law

- The legal standards regarding harassment have not changed despite the current societal and cultural movement
- The "ME TOO" bill: New legislation introduced regarding sexual harassment claims made against members of Congress
- May see new harassment laws or training mandates at the state or local level in response to the movement
- Likely see legislative efforts at minimizing or prohibiting outright the use of confidentiality provisions in settlements of harassment cases

# Best Practices: Preventing Claims

- Establish the culture of the workplace:
  - Most policies speak in terms of what is prohibited
  - Think instead of what should be promoted:
    - Respect for the individual
    - Creation of a working environment aligned with the employer's strategic plan
    - Recognition that disputes will arise in any workplace
    - Encouragement of early efforts to address disputes and conflict
    - Provide mechanisms to mediate disputes
  - Encourage effective communication before complaints

# Best Practices: Preventing Claims

- Encourage active listening
- Encourage open dialogue
- Encourage self-help for addressing unwelcome behavior before it becomes severe or pervasive
- Encourage consequence-free apologies for early-stage misunderstandings
- Increase awareness of cultural and gender differences in the perception of workplace behaviors
- Promote the recognition that no workplace is perfect



# Best Practices: Preventing Claims

- Immediately reaffirm the "culture of the workplace":
  - The policy must be communicated by the **highest levels** of management
  - Reaffirmation and additional training from human resources alone is insufficient
  - Confirm that promotion of the culture will be a factor in advancement and evaluation
  - Department managers must be accountable for the culture in their departments
  - Department managers must be empowered to initiate the investigatory process

# Best Practices: Preventing Claims

- Assess your workforce and your managers
- Identify common harasser personality types:
  - The jokester
  - The bully
  - The errant employee
  - The player
  - The drinker
  - The emailer
- Engage in proactive counseling before a problem surfaces / deal with the problem

# Best Practices: Preventing Claims

- Assess the presence of common sources of harassment in the workplace:
  - Remarks and jokes
  - Family balance
  - Socializing opportunities
  - Mentoring and career advising
  - Social media
  - Email
  - Acting before thinking
  - Office romances

## Best Practices: Preventing Claims

- Conduct **effective, second-level** training – in this advanced training, avoid an overly legal approach
- Focus first on the culture of the company
- Focus next on identifying common causes of harassment
- Go beyond what does or does not cross the line at the second level and instead focus on causes
- Instead focus on early conflict identification and solutions
- Promote the recognition that conflict will occur and effectively addressing conflict early minimizes escalation to a hostile work environment

# Best Practices: Preventing Claims

- Depending on the size of the employer, consider designating a trained employee as a conflict mediator:
  - Formal, empowered role
  - Deals with personality conflicts and low-level problematic behaviors on a confidential basis
  - Non-HR role for an alternative resource
  - Answers questions and provides information
  - The conflict mediator is empowered to elevate complaints unilaterally
  - Empowered to suggest (but not implement) resolutions for low level conflict





# Best Practices When a Claim Is Received: Investigations

- Knowledge of the claim usually results from supervisory observations or from a report or complaint made by an alleged victim or another employee
- A supervisor first should take immediate steps to encourage the alleged victim to come forward and describe the incident if he or she did not make a formal complaint
- Supervisors should not disregard signs of discrimination, harassment or retaliation
- An initial determination needs to be made as to whether the action at the heart of the observation or the complaint arises to a violation of company policy



# Best Practices When a Claim Is Received: Investigations

- All arguable claims of harassment should be referred to Human Resources or the individual, committee or entity designated in the policy for handling the investigation
- If there is a potential for retaliation or further inappropriate conduct, steps should be taken to separate the alleged victim and the accused
- In supervisor/subordinate employee situations, the employee should be removed temporarily from the supervision of the accused

# Conducting the Investigation

- Some employers appoint a standing committee or group of individuals to conduct investigations
- The committee approach promotes:
  - Consistency in the way investigations are conducted
  - Consistency in the perspective of the investigators with respect to hostile work environments
  - Familiarity with the work place, the law and the policy of the employer
- Other employers delegate investigations to a specific individual, such as to the Director of Human Resources
- An outside investigator may be appropriate

## Selecting the Investigator

- Understanding privilege issues is critical
- Due to the nature of the affirmative defense, your investigator may be a witness
- How do you protect attorney-client and work product privilege?
- Consider retaining counsel just for the investigation
- Waiver of privilege could be made at a later time

# The Investigation Plan

- Every investigation should commence with the following considerations in mind:
  - What steps are necessary immediately to prevent further deterioration of the relationship
  - Who will need to be involved
  - The sequencing of witness interviews
  - How best to obtain and segregate written documentation
  - Who will be the decision-maker?
- Once those considerations are addressed, the investigation should commence



## The Alleged Victim's Interview

- The most important aspect of any investigation is to obtain in writing from the alleged victim a full and complete statement of his or her claim
- The individual should be advised to be complete and leave nothing out
- The reasons for this are self-apparent:
  - Incomplete facts lead to incomplete investigations
  - Allegations tend to expand over time
- Have a witness present

## The Alleged Victim's Interview

- With respect to each incident which is part of a harassment or discrimination claim, the following questions should be answered:
  - When did the alleged incidents take place?
  - Where did the alleged incidents take place?
  - Who was involved?
  - The identity of any witnesses
  - A complete description of what actually occurred
  - An explanation by the alleged victim as to the events leading up to the event of harassment

## Important Disclaimer

- Alleged victims often see the investigator as their advocate; however, that is not the appropriate role of an individual conducting an investigation
- The alleged victim should be advised specifically that the investigator is not providing any legal advice or will share conclusions regarding whether violations of employer policy have occurred
- The alleged victim should be reminded that the role of the investigator is to gather facts
- Some investigators will be charged with drawing conclusions based on those facts, whereas in other situations, other investigators also may be tasked with making a finding

## The Interview of the Victim

- Many victims are unsure of the process or the procedures which will be utilized by the investigator
- Familiarity breeds comfort, and the interview with the victim should include an explanation of exactly how the policy will work
- It will be important to state that absolute confidentiality cannot be guaranteed:
  - Witnesses will be involved
  - Decision-makers will be advised of information arising out of the investigation on a "need to know" basis

## Interview of the Accused

- The interview of the accused should be conducted as quickly as possible
- The reason for this is that the accused likely will have heard of the complaint prior to official notification by the investigator
- The same cautionary advice regarding the role of the investigator should be provided to the accused
- In addition, the accused should be advised specifically of the prohibition against retaliation
- The accused also should be notified that the mere fact that an investigation is occurring should not be construed as a conclusion that a violation of policy or law has occurred

## Interview of the Accused

- All of the allegations of the complaint should be covered with the accused
- The accused should not be provided with a copy of the complaint, but each of the facts should be covered with him or her
- Always have a witness during the interview of the accused



# Interview of the Accused

- The accused should have the freedom to address the context of the allegations
- He or she also should be given freedom to explain relevant facts concerning the relationship between the accused and the alleged victim
- Context becomes important to assess the severity of the situation:
  - Was there a misunderstanding between the parties?
  - Is bad intent present?
  - Have the allegations been exaggerated?
- The accused should be afforded the opportunity to submit a written statement at the conclusion of the interview

## Investigation Missteps

- The following practices or decisions often compromise an investigation and should be avoided:
  - Giving either side the appearance of advocacy
  - Limiting the investigation to the scope of the written statement
  - Failing to inquire into the nature of the relationship between the alleged victim and the accused
  - Failing to understand completely the context of the relationship
  - Failing to take prompt, remedial action when steps are necessary to protect one party or the other
  - Delay in moving forward with the investigation
  - Involving individuals who either are not witnesses or who have no need to know

## Investigation Missteps

- The following practices or decisions often compromise an investigation and should be avoided (*continued*):
  - Permitting acts of retaliation
  - Using intrusive investigative techniques, such as confining in a room or restraining an individual against his or her will during an interview
  - Using unlawful recording or truth-testing devices, such as a polygraph
  - Failing to inform the parties of the results of the investigation

## Decision-Making

- The most frequent problem confronted by investigators is the assessment of credibility of the parties
- An investigation does not require the same standards as a court of law
- The same strict measures of proof will not apply
- Investigators will have to rely upon their "gut" at times to make credibility determinations
- Despite the lesser standard, investigators need to understand that individuals' reputations and careers are at stake

## Decision-Making

- Just as consistency in the investigation process is important, consistency in decision-making also is important
- Consistency among decision-makers is important because they will have knowledge about what had been done in the past and what discipline was imposed
- Inconsistent discipline (differing penalties in similar situations) can affect morale and might result in further claims against the employer
- Trained investigators and decision-makers will understand the law and be able to distinguish inappropriate and unwelcome behavior from a mere workplace dispute

## Decision- Making

- Before a final decision is made, both the alleged victim and the accused should be allowed to respond to any information deemed relevant and pertinent which was discovered subsequent to the initial interviews
- This might require sharing certain documentary evidence with either of the parties
- Both parties should be allowed to supplement their written statements, if appropriate



## Decision-Making

- The investigator should complete a memorandum summarizing his or her factual conclusions
- There will be times when credibility determinations cannot be made
- Investigators should be trained to conclude that credibility is not decided on the basis of the number of witnesses, but rather on the totality of the circumstances
- It is very permissible to conclude that, despite conflicting testimony, no clear factual conclusions can be drawn
- The investigator should conclude whether a violation of employer policy has occurred, if that is part of his or her task

## Penalty

- The goal of any remedial measure is to provide reasonable assurance that the behavior will cease and will not reoccur in the workplace
- If within the scope of duties of the investigator, he or she should recommend the appropriate remedy
- Some violations of employer policy require discharge - - the capital punishment of employment law
- Suspensions, reductions in pay or job duties may also be appropriate
- Written warnings sometimes are as appropriate and as effective as more significant discipline

## Penalty

- The investigator should determine whether the individuals may continue to work together or in proximity to each other
- If a supervisory relationship exists, the decision-maker needs to determine whether sufficient controls could be implemented to ensure against retaliation or further claims
- In addition to other remedial measures, an investigator might consider whether counseling or training is necessary

## Concluding the Investigation

- Once the discipline has been decided upon, the results of the investigation decision on discipline should be discussed with both the alleged victim and the accused
- The alleged victim should be informed of why the decision was made and how the disciplinary action fits into past practice
- A similar conversation should be held with the accused

# Best Practices: Picking up the Pieces

- Control the outcome:
  - Do not infer the necessity of buy-in from the victim
  - Tailor your remedy to the specific situation
- When discipline is imposed, inform the accuser that discipline has been imposed and explain the standards for the proper measure of discipline
- Affirm there will be continued monitoring
- Focused education and training
- Reaffirm policy and culture

# Best Practices: Picking up the Pieces

- Assess the initial cause of the conflict:
  - Situational
  - Personality
  - Workplace competition
  - Bullying
- Identify missed early warning signs
- Identify steps that could have been taken early in the process
- Identify other preventative measures and alternative approaches



# Best Practices: Picking up the Pieces

- Enhance managerial credibility:
  - Demonstrate that action was taken promptly
  - Accountability exists at all levels
  - Use each incident to reaffirm culture
- Morale is improved through:
  - Consistency in enforcement of policy
  - All employees are empowered to promote the culture
  - Dialogue is encouraged / disagreement is okay
- Discussion is encouraged

## Best Practices: Picking up the Pieces

- Employees must have faith in the internal process
- HR cannot be perceived as having the primary role of minimizing a claim against the employer
- HR must have a direct or an alternative reporting line to the chief executive of the company
- Assess errors in the investigative process
- Consider trained investigators where the company is small and HR lacks experience
- Executives should address recent problems and how recent behavior compromises the culture of the company

# Questions?



## Contact Details



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