

# The #MeToo movement: Implications for employers

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What started as the #MeToo movement in late 2017 in response to allegations by numerous women that film producer Harvey Weinstein sexually harassed them has expanded to the movement known as #TimesUp and has touched every industry and workplace in America — including journalism, the financial sector, government, athletics, tech, academia and even the federal judiciary.<sup>1</sup>

As Equal Employment Opportunity Commission acting Chair Victoria Lipnic said in a recent interview, “This happens to women in workplaces all over the place.”<sup>2</sup>

There is no doubt that the #MeToo and #TimesUp movements have induced a sea change in the way employers respond to such allegations.

Employers that had not seriously evaluated the risk of sexual harassment or sexist behaviors in their workplaces have begun to revisit their harassment training, complaint procedures and disciplinary protocols. In the current environment, employers should retrain their employees on acceptable conduct in the workplace and supplement prior sexual harassment seminars.

Recognizing this new reality, the U.S. House of Representatives has passed Resolution 630, which mandates annual, in-person sexual harassment training for all members and staff.<sup>3</sup>

How an employer responds to the #MeToo and #TimesUp movements may have significant implications for its reputation, its employees’ morale, and its ability to attract and retain top female talent.

## CONSEQUENCES OF INACTION

An employer faces serious consequences if it fails to take affirmative steps to prevent harassing behavior or inadequately responds to allegations of sexual harassment. While sexual harassment claims may originate as internal complaints, which must be promptly investigated and addressed, they may also start as a discrimination charge filed with the EEOC or the corresponding state or local agency.

Since fiscal year 2010, roughly 30 percent of the 90,000 charges of discrimination received by the EEOC each year have alleged sex-based discrimination, and the number of charges alleging sex-based harassment has gradually increased from below 13 percent to above 14 percent.<sup>4</sup> This number may increase even further in the coming months as employees become more comfortable reporting

and publicizing incidents of sexual harassment in light of recent news, and due to a digital upgrade that allows employees to file EEOC complaints online.

Sexual harassment claims may also result in litigation, which can be expensive and time-consuming, while creating unwanted and adverse publicity.

Weinstein’s former company, The Weinstein Co., has been named in a \$5 million civil suit alleging that company executives failed to protect women who did business with Weinstein, despite being aware of his inappropriate behavior. *Huett v. Weinstein Co.*, No. BC680869, *amended complaint filed* (Cal. Super. Ct., L.A. Cty. Jan. 31, 2018).

Additionally, the New York attorney general’s office is investigating Weinstein Co. for potential civil rights violations in its handling of sexual harassment claims.

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## CREATE A THOUGHTFUL, PROACTIVE PLAN

Employers should not expect these trends to pass and instead should proactively address claims of sexual harassment.

In doing so, employers should ensure that their current practices include the following:

- *Effective training.* Most employers conduct some form of anti-harassment training, and those that do not offer training should. (Some states make the training mandatory). To effectively combat sexual harassment, training should be tailored to an employer’s specific workplace and audience. Employers should use realistic examples of what is, and is not, harassment, and make sure managers know how to spot potential issues and respond to complaints.
- *Robust complaint procedure.* Sexual harassment at work often goes unreported. According to the EEOC, as many as three-quarters of harassment victims do not file workplace complaints against their alleged harassers. Employers should

have a variety of effective reporting mechanisms in place to receive complaints, and they should consider creating multiple channels — such as human resources, a supervisor and an anonymous hotline — that employees can use to file their complaints.

- *Avoidance of “zero tolerance.”* While employers should not tolerate harassment in the workplace, they should consider avoiding the binary framing of “zero tolerance.” While this sounds counterintuitive, women may be discouraged from filing complaints if they believe that any incident, no matter how minor, will result in termination of the accused.<sup>5</sup> Employers instead should aim to encourage open dialogue and use proportionate discipline.
- *Prompt investigation of complaints.* Employers must do more than simply maintain a policy prohibiting sexual harassment. Upon receiving a complaint, employers must promptly and thoroughly investigate the allegations, and make sure that the employee who lodged the complaint and those cooperating in the investigation do not become victims of retaliation.
- *Independent investigations.* Employers must ensure impartiality in the process, which may mean in certain circumstances hiring an outside professional investigator or outside experienced legal counsel to conduct the investigation.
- *Thorough communication practices.* Employees who lodge complaints commonly assert that they are not kept informed about the status of an investigation. While they need not (and should not) be notified about the details or even given regular status reports, they should be notified that an investigation will occur and be given periodic updates if the investigation is lengthy. Additionally, providing closure to the complaining employee is key.
- *Proactive approach.* Soliciting feedback through employee engagement or climate surveys often helps to create positive change that prevents harassment. Employers considering this approach should consult with counsel to determine whether and how such a survey may be conducted (potentially under the self-critical analysis privilege, depending on the jurisdiction) so that it does not become evidence in a proceeding.
- *Top-level management engagement.* The #MeToo and #TimesUp movements have shown that some employers may have considered an employee’s (monetary) value to the company when determining how to address misbehavior. But when management sets the tone, models appropriate behavior and effects positive change, efforts to prevent sexual harassment will be taken more seriously by the rest of the workforce and it is more likely that workplace standards will be applied equally to everyone. The employer’s culture must reflect management’s commitment.

## NEW CONFIDENTIALITY CONSIDERATIONS

The #MeToo and #TimesUp movements also have prompted consideration of the appropriate use of confidentiality provisions in settlement agreements.

The recently passed Tax Cuts and Jobs Act prohibits employers from taking a tax deduction for settlements “related to” sexual harassment or sexual abuse if the settlement is subject to a non-disclosure agreement.<sup>6</sup>

The implications of this provision remain uncertain, as it is unclear whether it applies to settlement of sex discrimination claims, whether companies can apportion some settlement payments to sex harassment claims and other payments to other claims and then take a partial deduction, and whether it applies to severance agreements.

Until the IRS issues guidance, employers must carefully consider whether and how to incorporate confidentiality clauses in their settlement agreements.

Additionally, legislation has been introduced in multiple jurisdictions aimed at making sexual harassment allegations public, whether by limiting the use of confidentiality agreements in employment or settlement agreements, or precluding contractual provisions mandating arbitration of sexual harassment claims, or both.

At the national level, Congress has proposed legislation that would bar mandatory arbitration of sexual harassment claims.<sup>7</sup> A number of states — including Arizona, California, New Jersey, New York and Pennsylvania — are considering legislation that would limit or eliminate the use of non-disclosure provisions in agreements that resolve allegations of sexual harassment.<sup>8</sup>

## PAY EQUITY IMPLICATIONS

Sexual harassment can also affect the makeup of an employer’s workforce. Various studies have reported that harassment may lead to the departure of women from the workplace.<sup>9</sup> Some women may even leave for lower-paying jobs if they believe there is less risk of harassment in the new position.<sup>10</sup> Thus, sexual harassment can affect compensation in a way that hurts pay equity.

The #MeToo and #TimesUp movements, evolving in scope as they have expanded in size, have also more explicitly hit upon this connection.

As with #MeToo, recent attention on pay equity traces back to Hollywood, where lead actors’ salaries are often public knowledge.

Michelle Williams co-starred in the year-end blockbuster “All the Money in the World” alongside Mark Wahlberg and Kevin Spacey. When sexual misconduct allegations against Spacey came to light shortly before the movie’s release, director Ridley Scott decided to reshoot all of Spacey’s scenes with a replacement actor, requiring the other leads to reshoot as well.<sup>11</sup>

Shortly after the premiere, reports surfaced that while Williams was paid only \$800 to cover her per diem expenses for the reshoot, Wahlberg received over \$1.5 million. Though ultimately a question of contractual obligation (Williams' contract committed her to reshoots while Wahlberg's did not), the optics were not good and reignited a national conversation about pay equity.

Pay equity issues should be especially top of mind for employers operating in California, Delaware, Massachusetts, New York City, Oregon, Philadelphia and Puerto Rico; all these jurisdictions have recently passed salary history inquiry bans, preventing employers from asking applicants about their prior pay.<sup>12</sup>

As these bans continue to gain momentum, employers who proactively address this issue will better position themselves for any future compliance requirements and reduce one risk factor associated with pay discrimination claims under the federal Equal Pay Act and similar state and local laws.

Moreover, the current spotlight shed on pay equity by Hollywood should only intensify employer focus on the various state pay equity amendments that recently have or are going into effect in states such as New York, California, Maryland and Massachusetts.<sup>13</sup>

If the #MeToo and #TimesUp movements maintain their current momentum, employers should expect to be pressured even further to evaluate their pay practices.

In sum, while the Weinstein revelations sparked immediate focus on sex harassment in the workplace, which will continue to shape employee interactions in the near future, they also will have a broader impact on pay equity and related issues going forward.

**NOTES**

<sup>1</sup> See Gerry Smith, Scott Moritz & Drew Armstrong, 'Today' Show Host Matt Lauer Fired Over Allegation of Misconduct, BLOOMBERG (Nov. 29, 2017, 10:07 AM), <https://bloom.bg/2zPUomY>; Charles Stein, Fidelity's CEO Says Firm Has 'No Tolerance For Harassment,' BLOOMBERG (Oct. 23, 2017, 12:07 PM), <https://bloom.bg/2yItv04>; Laura Litvan & Erik Wasson, Chuck Schumer Calls on AI Franken to Resign, BLOOMBERG (Dec. 6, 2017, 6:41 PM), <https://bloom.bg/2o8mG33>; Carla Correa, The #MeToo Moment: For U.S. Gymnasts, Why Did Justice Take So Long?, N.Y. TIMES, Jan. 25, 2018, <http://nyti.ms/2ELbqEk>; Emily Chang, This Is Also Tech's #MeToo Moment, BLOOMBERG (Oct. 18, 2017, 7:00 AM), <https://bloom.bg/2yTKT5g>; Melissa Korn, Allegations of Groping, Lewd Comments and Rape: Academia's #MeToo Moment, WALL ST. J., Jan. 11, 2018, <http://on.wsj.com/2qSSbDb>; Kristen Korosec, Federal Judge Alex Kozinski Resigns over Sexual Harassment Allegations, FORTUNE, Dec. 18, 2017, <http://for.tn/2EFZALL>.

<sup>2</sup> See Braden Campbell, 'We See This Everywhere,' EEOC Chair Says of Weinstein, LAW360 (Oct. 24, 2017, 8:37 PM).

<sup>3</sup> Requiring Each Member, Officer, and Employee of the House of Representatives to Complete a Program of Training in Workplace Rights and Responsibilities Each Session of Each Congress, and for Other Purposes, H.R. 630, 115th Cong. (2017), <http://bit.ly/2GgRZjD>.

<sup>4</sup> See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://bit.ly/2mlY7yL>.

<sup>5</sup> See Olivia Goldhill, 'Zero Tolerance' Sexual Harassment Policies Are Terrible for Women, QUARTZ (Nov. 10, 2017), <http://bit.ly/2hq77Vr>.

<sup>6</sup> Tax Cuts and Jobs Act of 2017 § 13307, 26 U.S.C.A. § 162(q).

<sup>7</sup> Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017), <http://bit.ly/2Bih6Ui>.

<sup>8</sup> H.B. 2020, 53d Leg., 2d Reg. Sess. (Ariz. 2018), <http://bit.ly/2ErYhN6>; S.B. 820, 2017-2018 Leg., Reg. Sess. (Cal. 2018), <http://bit.ly/2C13w8N>; S.B. 3581, 217th Leg. (N.J. 2017), <http://bit.ly/2HfelDv>; B. S6382A, 2017-2018 Leg. Sess. (N.Y. 2017), <http://bit.ly/2EH3yUi>; S.B. 999, 2017 Sess. (Pa. 2017), <http://bit.ly/2By058n>.

<sup>9</sup> See Jane Coaston, How Sexual Harassment Might Make the Gender Pay Gap Even Worse, VOX (Nov. 30, 2017, 10:00 AM), <http://bit.ly/2kd0IHu>.

<sup>10</sup> See Rebecca Greenfield & Laura Colby, Sexual Harassment Helps Explain Why Women Get Paid Less, L.A. TIMES, Jan. 6, 2018, <http://lat.ms/2nZtFfK>.

<sup>11</sup> See Brooks Barnes, Purge of Kevin Spacey Gives 'All the Money in the World' a Pay Problem, N.Y. TIMES, Jan. 10, 2018, <http://nyti.ms/2mt3jC5>.

<sup>12</sup> See CAL. LAB. CODE § 432.3 (West 2017); DEL. CODE ANN. tit. 19, § 81:41 (2017); MASS. GEN. LAWS ANN. ch. 149, § 1 (West 2016); N.Y.C., N.Y., ADMIN. CODE § 8-107 (2017); OR. REV. STAT. § 652.219 (West 2017); PHILA., PA., CODE tit. 9, § 9-1100 (2016); P.R. Law No. 16-2017.

<sup>13</sup> See N.Y. LAB. LAW § 194; CAL. LAB. CODE § 1197.5 (West 2017); MD. CODE ANN., LAB. & EMPL. § 3-301 (West 2016); MASS. GEN. LAWS ANN. Ch. 149, § 1 (West 2016).

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