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#MeToo's impact on harassment policies

By Camille Hamilton Pating

The #MeToo movement created a seismic cultural shift in society's awareness of the widespread presence of sexual harassment and assault in nearly every industry, including giants in entertainment, tech, government, nonprofits and media. While the rapid pace of the movement's front-page takedowns of major leaders and their institutions might be slowing, employers now must adapt to the lessons learned and new expectations for effective harassment prevention policies, credible investigations and relevant training programs. Those who do not will create great risk for themselves if they believe #MeToo is nothing more than a hashtag trend that will eventually fizzle out and disappear.

Lesson 1:

Update Personnel Policies

#MeToo showed what the Equal Employment Opportunity Commission has reported for years — that merely having anti-harassment policies in place does not prevent harassment. No matter how well-crafted, a policy alone cannot be effective where a culture of silence reigns, and where employees will not report harassment to their supervisors because they fear retaliation or damage to their careers, or mistrust the organization's internal process, or expect that they will not be believed and nothing will change. Employers should ensure that current personnel policies contain "silence breaking" provisions aimed at these con-



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cerns. A policy review should start with full compliance with harassment regulations issued in 2016 from the California Fair Employment and Housing Council, which require, among other things, that employers establish objective complaint mechanisms, such as complaint hotlines or access to an ombuds-person, so that employees are not required to identify themselves or complain directly to an immediate supervisor.

Women sharing #MeToo experiences confirmed that an underlying lack of respect and civility in the workplace is often at the core of the harassment problem. Employers can improve the effectiveness of their harassment policies by recognizing that civility not only matters, it often dictates. Organizations which allow behaviors that are disrespectful, rude and bullying often leads to behavior that becomes discriminatory harassment. On the other hand, organizations with cultures that are diverse, inclusive and value respectful, civ-

il behavior are less likely to have complaints in the first place. The EEOC has recommended that employers create civility training for workplaces because, as EEOC Commissioner Chai Feldblum stated last year when announcing new training programs on respectful workplaces, "We know that workplace incivility often acts as a 'gateway drug' to workplace harassment." To promote a positive and inclusive culture, employers should consider creating separate civility or respectful workplace policies and training programs, or adding these requirements into existing anti-harassment or anti-bullying policies.

Lesson 2:

Update Investigation Policies

Most investigation policies require that an employee making a complaint of harassment do so "promptly" after the incident so that an effective investigation can be conducted. However, in response to the effect of #MeToo, employees are now coming

forward with allegations long after — in some cases, ten or more years after — the statute of limitations expired for making complaints under the California Fair Employment and Housing Act. Employers must now consider whether to investigate so-called "stale" claims. Such claims are increasingly brought forward by employees who say that fear of retaliation prevented them from coming forward earlier. Employers should be aware that they may still face liability if they choose not to investigate older misconduct claims, where the accused is still employed by the organization and has the capacity to retaliate against the victim or commit the same misconduct against others. As a result, despite the evidentiary difficulties in such inquiries, investigation policies and procedures should be updated to provide for investigation of such complaints in appropriate cases.

Lesson 3:

Conduct Independent Investigations

#MeToo highlighted the importance of a credible and independent investigation process. Victims frequently expressed mistrust of an internal investigation conducted by the employer as influenced by bias or by a prominent subject. Complaints of sexual misconduct are serious allegations, particularly when made against high-profile employees, department heads, executives or officials. Conducting these investigations in the organization's human resources department or through its legal

Harassment investigations and training after #MeToo

department often raises concerns that the primary purpose of the investigation is for the protection of the employer rather than to get to the truth. In high-profile matters, outside investigators are less vulnerable to perceptions of bias or lack of credibility in the investigative process and findings. Some complainant advocates have called for more transparency for attorney-conducted investigations (California requires that independent, non-employee investigators must be licensed private investigators or attorneys acting in their capacity as an attorney. See Business and Professions Code Section 7520 et seq.), such as limiting attorney-client privilege or making such reports public. Given the intense level of scrutiny on harassment investigations involving key personnel, employers should consider using independent investigators where credibility and the integrity of the investigation are likely to be questioned.

Lesson 4: Change Training Programs

Under Assembly Bill 1825, California requires employers with 50 or more employees to provide two hours of sexual harassment prevention training every two years for supervisory employees. AB 2053 now also requires abusive conduct prevention as a component to harassment training. #MeToo highlighted that mandatory harassment training programs, just like policies, have

not prevented harassment from occurring. Ironically, AB 1825 celebrated its 10th year anniversary just two months before the #MeToo hashtag spread virally in October 2017 to demonstrate the prevalence of sexual harassment and assault. Why didn't the training programs work? Perhaps because they were singularly focused on compliance and technical interpretations of legal concepts, instead of building a respectful and inclusive culture, a critical element of preventing harassment from occurring. Or because the prevention training focused on scenarios and hypotheticals that illustrated obvious unwelcome sexual misconduct that had little application to subtle or nuanced real world employee interactions between women and men in the workplace. The old training programs certainly did not cover today's focus on micro-inequities and unconscious bias — unintentional ways in which individuals are excluded, singled out, stereotyped or marginalized. Micro-inequities and unconscious bias are key to understanding how people from different backgrounds experience workplace interactions differently. These are critical issues to address in new training programs because, while not yet illegal, these are the newly emerging claims in workplace investigations. Or it might have been the failure of such programs to provide practical guidance and tools to

help employees have honest and welcomed conversations with each other about what behaviors are — and are not — accepted. Whatever the reason, #MeToo made it clear that a harassment-free workplace is not only a legal imperative, it is also an organizational imperative that impacts productivity, a reputational imperative that impacts the brand and a social responsibility imperative that impacts the business. Employers now must revise training programs to support and model respectful and civil behavior to avoid inappropriate conduct claims, and give employees the tools for honest and effective communication about what is acceptable and unacceptable conduct for them. For employers utilizing the cultural shift to cultivate a positive, inclusive, diverse work culture, it is essential to have training programs that support this new content and are conducted frequently.

Lesson 5: Avoid Unintended Consequences

In the end, #MeToo can be viewed as a barrier or an opportunity. From the barrier perspective, there is the issue of backlash. A frequently expressed concern is that the movement has caused some male employees and leaders to withdraw from and avoid interacting with women because of the fear of being accused of misconduct.

This is a significant consequence for women in industries where mentorship, sponsorship and relationship-building are critical to success.

The opportunity is that #MeToo has provided an incentive for more credible and effective policies, workplace investigations and training programs. Perhaps its most important impact is that it can serve as the platform for honest dialogue between women and men about what behavior is OK in the modern workplace. Which path employers take depends now on their commitment to learning and leveraging the cultural changes that have to be made, and proactively creating and benefitting from a more inclusive, respectful and civil workplace.

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