



## ***#MeToo and You: How Employers Are Responding One Year Later***

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## **Today's Agenda**

- What is #MeToo and #TimesUp?
- What has been the impact on the workplace?
- Does this mean #YouToo?
- What about equal pay?
- How are employers responding?
- Best Practices



## What is #MeToo?

- #MeToo movement – began as a listening campaign but has morphed into an internet and cultural phenomenon since October 2017
- Has empowered victims to speak out
- Has forced us, as a society, to look directly into the abyss of sexual harassment, violence and abuse that is so much a part of our culture
- Will have long-term affects on the workplace



## What is #TimesUp?

- #TimesUp - a workplace solutions-oriented movement; goals of creating change leading to safety and equity in the workplace
  - Time's Up Legal Defense Fund provides subsidized legal support to those who have experienced sexual harassment, assault, or abuse in the workplace

***"The clock has run out on sexual assault, harassment, and inequality in the workplace. It's time to do something about it."***

## Public Backlash 2017-18



## Charges Filed With EEOC FY 2010 - FY 2018 Alleging Sex-Based Harassment

This table shows charge data for sex-based harassment allegations, including charges alleging sexual harassment. This does not include charges filed with state or local Fair Employment Practices Agencies.

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
Receipts	12,695	12,461	12,569	12,379	12,146	12,573	12,860	12,428	13,055



## Charges Filed With EEOC FY 2010 - FY 2018 Alleging Sexual Harassment

This table shows charge data for sexual harassment allegations, that is, harassment of a sexual nature.

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
Receipts	7,944	7,809	7,571	7,256	6,862	6,822	6,758	6,696	7,609
% of Charges Filed By Males	16.2%	16.1%	17.8%	17.6%	17.5%	17.1%	16.6%	16.5%	15.9%



## #MeToo and #YouToo?

- Impact on the workplace
  - More complaints of harassment
  - More focus on “Respectful Workplaces” training
- Potential consequences for women and men
  - Will females be able to obtain necessary mentoring from male mentors?
  - Will males become even less comfortable interacting with females?
- Boost or setback for women?



## What About Equal Pay?

- Gender pay gap
- Equal pay and pay equity
  - Equal Pay: males and females must receive equal pay for equal work
  - Pay Equity: criteria employers use to set wages must be sex- and race-neutral
- Federal law
  - Equal Pay Act
  - Lily Ledbetter Act
  - Executive Order 11246
- Myriad state laws

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## Salary History Bans

- Pennsylvania – Executive Order 2018-18-03, effective September 4, 2018 - prohibits **State** agencies from asking about an applicant's current compensation or compensation history; all job postings must disclose position pay scale and pay range
  - **Pittsburgh** city agencies and offices may not ask about an applicant's prior pay
  - **Philadelphia's** salary history ban on hold due to legal challenge; would apply to all employers doing business in city, including private employers, City and State agencies
- New Jersey – State agencies/offices prohibited from asking or investigations pay history of job applicants

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## EEOC Select Task Force

- June 2016 – EEOC Select Task Force on the Study of Harassment in the Workplace issued 88-page report, including findings that:
  - Workplace harassment remains a persistent problem and frequently goes unreported
  - Traditional training has not been sufficiently effective and must change
  - Focus should be on “civility training” and “bystander intervention” training
- Task force reconvened in June 2018 to hear views on topic entitled, “Transforming #MeToo Into Harassment-Free Workplaces”

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## Workplace Training Isn't Working...

- EEOC's assessment is that traditional compliance training is not working in part because it concentrates on legal definitions and standards for liability
- EEOC recommends and provides new ***Respectful Workplaces*** training
  - Goal is to prevent workplace harassment by addressing civility, acceptable workplace conduct and other behaviors that contribute to inclusive workplaces



## EEOC Task Force Report

- Report includes detailed recommendations and tools intended to aid employers in:
  - designing effective anti-harassment policies
  - developing training curricula
  - Implementing complaint, reporting and investigations procedures
  - creating an organizational culture in which harassment is not tolerated
  - ensuring employees are held accountable
  - assessing and responding to workplace “risk factors” for harassment

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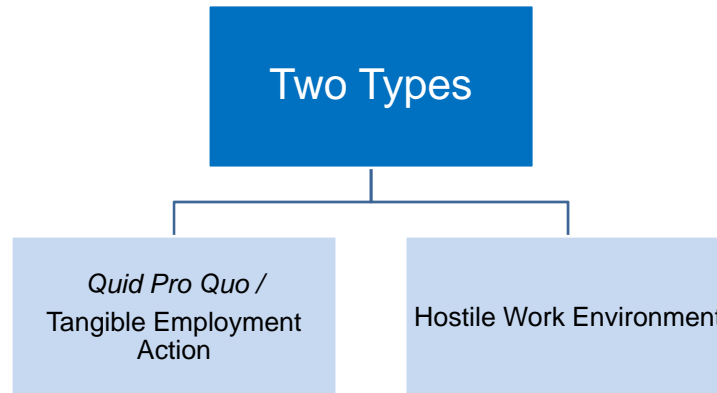


## A Brief Reminder About Unlawful Harassment

- #MeToo is focused on all forms of sex discrimination, including harassment, violence and equal pay, so we will focus on sexual harassment; but
- Harassment is not limited to sexual conduct and can also be based on a person’s protected status



## What is Sexual Harassment?



## What is **QUID PRO QUO** Harassment?

- Submission to the conduct is either an explicit or implied term or condition of employment
- Submission to or rejection of the conduct is used as a basis for an employment decision affecting the employee
- Such conduct is intended to interfere or results in the interference with the employee's work performance





## Some Examples of *QUID PRO QUO* Harassment

- Requiring or threatening to require sexual conduct or a dating relationship as a condition of:
  - Hiring
  - Promotion, raise, easier work assignments
  - Retaining a job
- *Adverse action by a supervisor in retaliation for an applicant or Employee refusing to have a sexual or dating relationship*



## What is Hostile Environment Harassment?

- Unwanted behavior or conduct based upon a person's protected characteristics that has the effect of unreasonably interfering with an individual's work performance or creating an offensive work environment
- Severe or pervasive
- Does not need to involve loss of economic benefits



## **Examples Of Conduct Or Behavior “Of A Sexual Nature”**

- **Verbal Conduct**
  - Remarks about physical characteristics (e.g., comments about breasts, legs, etc.)
  - Remarks about attractiveness or appearance (e.g., “That outfit looks sexy.”)
- **Nonverbal Conduct**
  - Leering
  - Making obscene gestures



## **Conduct Or Behavior “Of A Sexual Nature”**

- **Physical Conduct**
  - Any unwanted physical contact
  - Touching – any part of another’s or your own body, especially in a suggestive manner
  - Sexual assault
- **Visual and Written**
  - Explicit pictures
  - Email jokes/graphics
  - Love notes or letters
  - Suggestive comments on memos
  - Graffiti



## Who Can be Harassers?

- Management/Supervisory Personnel
- Co-workers
- Third parties
  - Customers
  - Vendors
  - Other visitors

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## Offensive Conduct: Whose Perspective?

- The Reasonable Person
  - Pervasiveness and severity are judged by a reasonable person standard
- The reasonable victim's perspective must be considered in determining whether or not a reasonable person would find the conduct offensive
- Employers are not required to accommodate the individualized concerns of hyper-sensitive employees

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## Intent vs. Impact

- **Intent** is **not relevant** in determining whether or not a behavior is harassment
- All that matters is the **impact** of the behavior
  - on the recipient of the behavior
  - on the work environment



## Unwelcome Conduct

- Conduct neither solicited nor incited by employee
- Conduct regarded as undesirable by employee
- Previous complaints not required but help



## Consensual Conduct

- Did the employee participate in the conduct?
- How was the employee's behavior at work?
- Did employee inform other(s) that conduct was unwelcome?
- Did the employee *willingly* engage in relationship
- What was employee's past conduct with alleged harasser
- If there was a past relationship, must notify other that it is over and conduct no longer welcome

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## Impact of Consensual Conduct

- Complaints by other employees of favoritism (in superior-subordinate situations)
- Claims of retaliation after a relationship ends
- Claims by third parties that the prevalence of allegedly consensual conduct created a hostile or intimidating environment or an implied "quid pro quo" situation

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## Who Suffers in a Hostile Work Environment?

- Unlawful harassment can occur even if everyone appears to be participating in jokes or antics in the workplace
- Victims can include:
  - **Forced Participant** – someone seemingly active in the harassing conduct, who may feel prevailed upon to “go along” or “put up with it” without objection
  - **Innocent Bystander** – someone who is indirectly subjected to the harassing conduct, but does not actively participate in the behavior

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## Liability for Acts of Supervisors

- Employer is vicariously liable for harassment committed by supervisor regardless of whether employer knew of harassment or whether supervisor was acting within the scope of his or her employment when s/he committed the unlawful act

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## Acts of Co-workers and Third Parties

- An Employer is liable for unlawful harassment by its non-supervisory employees and 3<sup>rd</sup> parties *if Employer knew or should have known of the alleged harassment*, or discrimination and *failed to take immediate and appropriate corrective action*
- “Employer” includes managers and supervisors
- Therefore – a supervisor who observes or learns of harassment – even “in confidence” – *must* report it, because the company can be considered to be on notice



## The Affirmative Defense

- Employer exercised reasonable care to avoid or eliminate harassment
- AND
- Employee failed to follow the complaint procedure or otherwise avoid harm
- BUT
- If employee suffers adverse, tangible employment consequences as a result of supervisory harassment:
  - Employer is liable for unlawful harassment
  - No Affirmative Defense



## Individual Liability

- Assault and battery
- Intentional infliction of emotional distress
- False imprisonment
- Invasion of privacy
- Defamation
- Interference with contractual relations



## Employer Policy Should Include

- Harassment will not be tolerated
- Employees are to notify supervisor and/or Human Resources of any problems
- All complaints will be taken seriously
- All complaints will be investigated promptly
- Confidentiality will be protected to extent possible
- Discipline including termination for any violator
- No retaliation for good faith complaints





## What is Retaliation?

- Taking materially adverse action against a person who engages in protected activity **BECAUSE OF** that activity
  - Motivation for the action must be that the employee engaged in that activity
  - Merely engaging in protected activity does not insulate employee from discipline or other acts based on real, provable and unrelated actions... but be consistent !!!!



## Addressing Complaints

- Investigation will be conducted promptly
- All parties and witnesses will be interviewed
- Everyone is expected to cooperate with any investigation
- Confidentiality will be protected to extent possible, but cannot be assured
- Those interviewed should keep matter confidential



## Initiating the Investigation

- Identify the need for the investigation
- Determine the goals of the investigation
- Assess possible concerns regarding the investigation
- Select an appropriate investigator
- Prepare a strategy for the investigation
- Prepare an investigative work plan and timetable
- Consider separation of the complainant and the respondent
  - Suspending the accused with pay?
  - Leave or other accommodation for the complainant?

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## Investigation Goals

- Determine whether allegations have merit
- Determine who was involved in the misconduct
- Disciplinary or other measures that should be taken against alleged perpetrators to prevent recurrence and limit employer liability
- Preventive steps to avoid future similar incidents
- Improve employee morale
- Increase productivity (when coupled with appropriate disciplinary action)
- Reduce turnover rates
- End inappropriate conduct on a company-wide level

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## Possible Concerns

- Discovery concerns – will the investigation materials be discoverable?
- Privacy concerns – Will the investigation encroach on employee privacy issues?
- Defamation concerns – Can the Employer ensure that the investigator and others involved will not defame the participants?
- Retaliation concerns – Can the Employer ensure that there is no retaliation against anyone involved?



## Use In-House Investigator?

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|--|--|
| <ul style="list-style-type: none"><li>• In-House - Pros<ul style="list-style-type: none"><li>– knows business &amp; people involved</li><li>– knows company policies and protocols</li><li>– able to take prompt disciplinary action, where justified</li><li>– less expensive than outside investigator</li></ul></li></ul> | <ul style="list-style-type: none"><li>• In-House - Cons<ul style="list-style-type: none"><li>– may lack necessary skill, training or experience</li><li>– may lack authority or time to conduct thorough investigation</li><li>– may be perceived as partial</li><li>– may stir up employee conflict or resentment</li></ul></li></ul> |
|--|--|



## Use Outside Investigator?

### • Outside Investigator - Pros

- Likely to have requisite skill, training, experience
- Autonomy
- More likely to be perceived as impartial
- Able to meet time demands for thorough investigation
- Employees more likely to be candid
- Experience testifying & protecting privileges

### • Outside Investigator - Cons

- May not be familiar with particular business and players
- May lack knowledge of written and unwritten policies and protocols
- More expensive than in-house investigator



## Choosing the Investigator

- Knowledge of relevant legal and behavioral issues
- Trained & skilled in conducting investigations
- Detail-oriented
- Able to listen well & take good notes
- High personal integrity, respected by employees & management
- No interests that would prejudice investigation
- Neutral & objective
- Able to devote time necessary
- Able to ask tough questions
- Capable of keeping confidences
- Expert-quality appearance, demeanor and speaking ability



## Investigation Do's & Don'ts

- **Do** take copious notes; recall that the notes may be discoverable if litigation ensues
- **Do** make sure notes are accurate
- **Do not** make judgments in notes
- **Do not** overstate or exaggerate witness statements or reactions
- **Do** include observations of witness reactions
- **Do** take accurate, but not necessarily verbatim, notes
- **Do not** include own reactions



## Expect the Unexpected

- Recording devices in the room
- Bringing a friend to the interview
- Witness raises new claims during the interview
- Witness threatens the investigator



## Workplace Culture

- Workplace culture does not change quickly
- Employers must lead by example
- Employees must be encouraged to speak up:
  - Action, not just words
  - Enforcement of policies and culture goals
  - Creating a safe, comfortable workplace by protecting employees
  - No retaliation - - EVER!
  - **Training all employees regularly**
  - Creating a culture of respect and civility



## Goals

- Creating a workplace culture of respect and civility
- Educating employees
- Preventing harassment from occurring
- Making any harassment stop!
- Pre-litigation resolution
- Preventing liability
- Minimizing any damage



# Questions?

