Lessons from the First Year of #MeToo: Three Questions to Ask When Assessing the Strength of a Company's Culture and Training

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On October 5, 2017, The New York Times published an exposé detailing more than two decades' worth of sexual harassment and assault allegations against film producer Harvey Weinstein.[1] Shortly thereafter, actress Alyssa Milano tweeted: "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." The "Me too" status quickly became a popular hashtag and rallying cry for the modern anti-harassment movement.[2] Over the past year, there has been a sharp rise in the number of widely-reported, high-profile claims of sexual harassment brought by current and former employees against employers across industries, from Hollywood and media companies to universities and law firms. These complaints sometimes come years after the alleged misconduct took place, and employers are frequently judged publically, even if not legally, by their response to these allegations.

One of the consistent can't-miss takeaways of the rapidly maturing #MeToo movement is this: employers who ignore problematic gender-based trends or patterns of harassment in the workplace do so at the company's peril. There are numerous examples of organizations that have faced serious legal and reputational problems for alleged failure to redress reports of sexual harassment or other sexual misconduct. These cases, which appear almost weekly in legal journals and national newspapers, are a reminder that employers should consider taking proactive measures to understand their workplace culture and address any trends that could lead to claims of sexual harassment or other and gender-based inequities.

While there is no one-size-fits-all solution to sexual harassment issues, employers can ask three key questions to encourage engagement, transparency and reporting when problems arise, all with the goal of reducing legal risks and exposure, protecting the employer's brand, and fostering a safer, more productive work environment.

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1 Jodi Kantor and Megan Twohey, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, N.Y. Times (October 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

2 Although Ms. Milano's tweet popularized "MeToo" as a hashtag, "Me Too" has long existed as a motto and unifying theme for a grassroots campaign that "aid[s] sexual assault survivors in underprivileged communities." See Zahara Hill, A Black Woman Created the "Me Too" Campaign Against Sexual Assault 10 Years Ago, Ebony, Oct. 18, 2017, https://www.ebony.com/news-views/black-woman-me-too-movement-tarana-burke-alyssa-milano.

Question 1: Should the Employer Conduct a Privileged Assessment and Review of the Company's Workplace Culture?

The first step in solving a problem is identifying it. #MeToo has highlighted the blind spot some employers have in recognizing trends and patterns that lead to harassment claims. Too often, employers learn about—or first really appreciate—cultural shortcomings only after a lawsuit has been filed. And, once an individual files a complaint, addressing sexual harassment grievances in a vacuum may be insufficient from a risk management standpoint.

In order to comprehensively address current issues and minimize future problems, employers should consider broadly examining cultural and systemic concerns in the workplace before claims of harassment arise. This may include candid conversations with employees about their workplace concerns, their comfort level raising concerns through identified reporting channels, and changes that would positively affect the work environment. An array of sophisticated analytical tools and resources are at the disposal of employers to accomplish this goal. Although most employers recognize the intrinsic value of such assessments, some are concerned about what they will learn and whether these assessments may become discoverable at a later date. Many executives and boards of directors, however, have taken the position that their companies cannot address issues about which they are unaware, and a lack of transparency and understanding of these issues creates a greater—and unacceptable—risk.

Employers who decide to engage their employees to assess workplace culture can work with experienced legal counsel to conduct privileged and confidential assessments in a manner that increases the likelihood that the employer can shield its assessment, conclusions, and recommendations from discovery in future litigation. Strong case law exists supporting the notion that employers who undertake these assessments for the purpose of obtaining legal advice can assert and successfully defend the applicable privileges. See e.g., Genesco, Inc. v. Visa, U.S.A., Inc., 302 F.R.D. 168, 190–92 (M.D. Tenn. 2014) (third party consultant's analysis was protected by the attorney-client privilege where attorneys retained consultant to translate key concepts that enabled attorneys to provide legal advice); In re OM Sec. Litig, 226 F.R.D. 579, 587–89 (N.D. Ohio 2005) (documents prepared for the purpose of obtaining or rendering legal advice are protected by the attorney-client privilege even though the documents also reflect or include business issues).

In short, the key to conducting a privileged workplace assessment is involving appropriate stakeholders, including legal counsel, at the outset and ensuring that collection and handling of assessment information, analysis, and results are handled in a manner that ensures confidentiality and does not waive privilege.

Question 2. Is the Employer Revisiting Prior Complaints to Look for Trends?

In addition to assessing the employer's current corporate culture, leadership should also consider conducting a privileged and comprehensive review of any past complaints to identify trends or similarities among those complaints, and evaluate the efficacy of internal complaint channels and procedures.

Employers who discover, for example, a low number of historical complaints, a high number of unsubstantiated complaints, or complaints that are concentrated in a certain division or business may need to review again selected complaints or otherwise obtain an understanding of the reasons for those patterns.

Again, this is an area where the assistance of experienced legal counsel may be beneficial in identifying potential areas of risk and advising companies about remedial actions, while maintaining the attorney-client privilege.

Question 3. Is the Company Invested in Robust Training and Updating Policies?

Since 1998, when the Supreme Court established the Faragher/Ellerth affirmative defense to claims of sexual harassment, 3 most sophisticated employers have developed strong compliance programs featuring strong anti-harassment policies and training, sound investigation procedures, and good disciplinary standards to promptly address inappropriate workplace conduct. In light of #MeToo, however, employers should review and update their current harassment policies and reporting procedures, and invest in comprehensive training.

Updating Dated Policies

Although most employers have anti-harassment policies and designated channels through which to report harassment, recent studies, including one by the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace, indicate that most employees (approximately 70 percent) do not report harassment to their employers. Each employer should assess the extent to which changes in policies and in reporting channels might improve the prospects of reporting; each should also assess whether reporting avenues are well-publicized through handbooks and trainings. Developing a "civility code" —separate from anti-harassment policies— that addresses all types of workplace misconduct, including bullying defined more broadly, merits consideration where employees may be under-reporting misconduct.

Employers can quite obviously further encourage employee reporting by fostering a culture where employees do not fear reprisal for reporting claims of harassment. While anti-retaliation policies are necessary and helpful, employers frequently need to do more to encourage candid reporting of harassment and assure employees that their concerns will be handled appropriately. This can be tricky in practice. For example, if a company touts a "zero tolerance" policy regarding harassment and bullying, what does that look like when a complaint arises? Does "zero-tolerance" mean "one strike and you're out," regardless of the gravity of the complaint? Is it the expectation that the accused will be dismissed or put on administrative leave immediately? Are coaching and counseling obsolete? Are certain employees given more leeway because they are "star performers" or "rainmakers"? These are all questions that employers need to wrestle with to ensure consistency of internal decision-making and compliance with ever-changing state and local harassment laws.

Provide Executive and Non-Executive Training

It is a best practice for employers to provide—and require attendance at—robust sexual harassment trainings. Although many employers already provide some form of training, older versions of anti-harassment training (which are often conducted via video or other non-interactive media, due to cost-control and efficiency considerations) are increasingly obsolete in the #MeToo era.

At a minimum, employers should separate out manager and executive training from the general employee training and provide detailed trainings to both groups. For non-managerial employees, training should include an

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3 The Faragher/Ellerth defense refers to the two-part defense developed in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 US 742 (1998). Under this defense, a company may avoid liability on sexual harassment claims if it can demonstrate that: 1) it took reasonable steps to prevent and correct promptly sexual harassment in the workplace; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided. Employers have typically relied on the existence of trainings and clear policies with multiple reporting channels to make these required showings.

overview of sexual harassment and an explanation of employees' rights under applicable state, federal, and local law, as well as specific content regarding bystander intervention, the employer's complaint procedure and process, and the possible consequences of engaging in sexual harassment in the workplace and at off-site work-related events. In addition to the topics covered in the general employee training, management and executive training, in particular, should include specific instruction on preventing, identifying, and reporting harassment and/or retaliation. All trainings should be interactive, address real-life scenarios, and encourage informal discussions about trust and workplace environment expectations.

Finally, newly-enacted sexual harassment prevention legislation passed in Maryland, New York, and California (as well as pending measures in more than a dozen other states) underscores the need to reassess existing policies and training programs, and to assess current workplace culture.

By asking proactive questions and creating opportunities for employee engagement, employers can reduce the risks associated with sexual harassment and related gender-based complaints.

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