HR DIVE

OPINION

#MeToo leads to training mandates (and more)

Only a few new state and local requirements for sexual harassment training have emerged in the past year, writes David W. Garland of Epstein Becker Green, but employers should still be wary.

By David W. Garland

Published Sept. 7, 2018

This installment of "HR Legal Briefing" is written by David W. Garland, a Member of the Firm and Chair of Epstein Becker Green's National Employment, Labor & Workforce Management Steering Committee. Garland is frequently retained in matters involving clients' most senior executives and in high-profile, high-stakes and highly sensitive cases. He can be reached at dgarland@ebglaw.com. For additional information and resources, visit EBG's "Halting Harassment" webpage.

In our last column, we addressed the flurry of lawsuits brought by the U.S. Equal Employment Opportunity Commission (EEOC) aimed at sex harassment in the workplace. States and cities, too, have been busy this year, crafting their own response to the #MeToo movement. Both New York state and New York City have enacted new laws requiring employers to provide training on sex harassment in the workplace. Although the number of these laws remains small, these requirements impact employers with operations there, and they come on top of requirements in some states that existed before the #MeToo movement. Other legislative responses have also occurred in the first half of this year, such as banning nondisclosure provisions in settlement agreements, and more mandates are likely to come.

Most recently, while many were trying to enjoy the last bit of summer vacation before Labor Day, New York state launched a

website related to the sex harassment training mandated earlier in the year. Although subject to public comment through Sept. 12 (not nearly a long enough period to provide sufficient comments), the website states that all employers must complete the training of all current employees by Jan. 1, 2019 — less than four months from now. It also provides that beginning the same day, all new hires must complete training within 30 days of their hire. The law also spells out what must be included in a company's sex harassment policy and reporting procedure.

When finalized, New York state's new training requirements will likely require employers to provide training for all employees, including temporary and transient employees — which means employees who work "just one day" for the employer or "just one day" in New York. Moreover, New York employers will be required to provide training that satisfies minimum standards spelled out by the state. Among other things, it must be interactive, include an explanation of sexual harassment consistent with state-issued guidance, include examples of conduct that would constitute unlawful sexual harassment and include information about remedies available to victims of sexual harassment.

Not to be outdone, New York City this year enacted its own anti-harassment training law. It also requires training on the responsibilities of supervisory and managerial employees and defining and providing examples of retaliation. Violations can lead to penalties of up to $250,000.

Even before the #MeToo movement, California had imposed requirements on its employers with 50 or more employees, including employees outside of California, to provide supervisors within California with two hours of sexual harassment training every two years. Likewise, Connecticut has required employers with 50 or more employees to ensure that supervisory personnel receive at least two hours of such training, and Maine has mandated that employers with 15 or more employees train all new employees, and provide specialized training for supervisors

and managers, within one year of hire. These requirements may be enhanced through further legislation, and additional states are likely to follow with their own training regimes.

States have not stopped with merely setting training requirements, however. Arizona, Louisiana, New York and Vermont have enacted laws restricting the use of, or permitting a limited breach of, confidentiality provisions in agreements of sex harassment claims. Bills have been introduced in the legislatures of numerous other states, including California, Florida, New Jersey, Pennsylvania and Virginia, that would ban or restrict the use of non-disclosure provisions in settlement agreements.

These developments, like others we have discussed, make clear that the C-suite must continue to address the impact of the #MeToo movement throughout the company — which also means complying with these new training requirements and other regulations. Failure to do so is not an option.

Recommended Reading:

HR Dive
What an employer can do to prevent becoming the next Weinstein or Wynn

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With EEOC's involvement, more sex harassment suits are likely

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BRIEF

EEOC sexual harassment suits jump more than 50% in 2018

By Ryan Golden

Published Oct. 8, 2018

Dive Brief:

- The U.S. Equal Employment Opportunity Commission (EEOC) filed 66 harassment lawsuits so far this year, according to preliminary data from the agency, including 41 suits specifically alleging sexual harassment. That amounts to a more than 50% year-over-year increase in sexual harassment-specific suits compared to fiscal year 2017 figures, EEOC said.
- Additionally, sexual harassment charges filed with EEOC increased by more than 12% year-over-year, with reasonable cause findings and successful conciliations also up from 2017 totals. The agency recovered $70 million total for employees alleging sexual harassment, up from $47.5 million last year.
- Additionally, the number of hits to the agency's sexual harassment webpage also more than doubled in the past year. EEOC said it conducted more than 1,000 outreach events for more than 115,000 individuals and employers on the topic of harassment alone.

Dive Insight:

HR executives may not be exactly surprised to see numbers this drastic, but EEOC's preliminary figures do help put a full year of the #MeToo movement — which has swept through workplaces, schools, social media and just about every public space one can think of — into perspective.

For Barry Hartstein, attorney and co-chair of Littler Mendelson's EEO & diversity practice, the report signals two things: 1) employees are "more emboldened" in the current climate to report harassment, and are looking to the EEOC as a result; and 2) the EEOC's emphasis on sexual harassment litigation has only continued, shortly after a public commitment by the agency to do so last summer.

"Based on its recent actions, aside from the EEOC's June 2016 Task Force Report on the Study of Harassment, which preceded the flurry of events involving Harvey Weinstein and others, the EEOC has continued to stay ahead of the curve in addressing harassment in the workplace," Hartstein said in a statement emailed to HR Dive.

Earlier this year, EEOC officials indicated that the commission hadn't seen a spike in complaints. It was at a hearing in June that commissioners Chai Feldblum and Victoria Lipnic said that, anecdotally, internal company complaints had risen instead. An analysis of EEOC filings by attorneys at Seyfarth Shaw showed that a ramp-up in EEOC court filings occurred in the summer months of June, July and August, which saw 63 cases filed. It filed another 84 lawsuits in September alone. The same analysis showed Title VII claims were the largest category of 2018 EEOC filings at 55%, with sex-based discrimination accounting for 74% of those Title VII filings.

This may be an indication, Epstein Becker Green attorney David Garland previously wrote for HR Dive, that employers should be aware of the increased likelihood of sex-based discrimination and sexual harassment charges in the current climate. Employers may need to take stock of all aspects of their internal process for dealing with harassment, including reporting, handbook composition and investigatory measures.

Recommended Reading:

US EEOC

What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment

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Seyfarth Shaw

The EEOC Puts The Pedal To The Metal: FY 2018 Results Show Increase In Filings, With #MeToo Lawsuits Adding Fuel To The Agenda

Checklist: Preventing and Responding to Internal Retaliation Complaints

Editor's Note: This checklist is meant to assist employers in receiving and responding to internal complaints asserted by current employees and avoiding any potential retaliation claims. Though investigating and responding to internal complaints may present many challenges, following the recommended processes below for handling these complaints can assist a company in avoiding any potential negative reactions leading to allegations of retaliation.

This document was contributed by David W. Garland and Nathaniel Glasser of Epstein Becker & Green, P.C., with assistance from Maxine Adams.

Creating a Formal Complaint Procedure

□ Create a formal complaint procedure outlining the company's commitment to investigating internal complaints and maintaining a workplace free from discrimination, harassment, and retaliation.

□ Make clear in the complaint procedure that the company does not tolerate retaliatory behavior and that complainants should promptly report any retaliation associated with having made the complaint.

□ Ensure that the complaint procedure includes multiple – but clear and unambiguous –avenues for employees to file complaints.

□ Consider creating a method for employees to file anonymous complaints, such as an anonymous hotline or website submission page.

□ Perform periodic trainings regarding relevant laws and company policies prohibiting retaliation.

□ Educate managers and supervisors to appropriately receive complaints and to notify Human Resources immediately upon receipt.

□ Periodically review the effectiveness of the complaint procedure, management's commitment to it, and the comfort level of employees to utilize it.

Investigating the Complaint

□ Designate a neutral investigator.

o Carefully consider the individual conducting the investigation to ensure neutrality and reduce the potential for conflicts. Keep in mind that the investigator may ultimately become a witness should there be a dispute.

o Consider whether to appoint an outside counsel to conduct the investigation. Be aware, however, that conflicts of interest may arise by hiring an attorney that previously has represented the company; further, the attorney-client privilege may not attach to the entirety of the investigation file.

o Where possible, identify an individual to assist the investigator and to attend witness interviews to ensure adequate documentation.

□ Draft an interview plan identifying all potential witnesses with relevant information.

o Do not prematurely draw conclusions or propose resolutions.

o Use funnel method of questioning.

o Leading questions may be appropriate later to test the witnesses' credibility.

o Do not attempt to predict or outline potential outcomes.

o Do not characterize your understanding of any potentially applicable company policies or legal principles.

□ Promptly contact the complainant to schedule an initial interview and request supporting documentation.

o Inform the complainant that the complaint will be kept confidential to the maximum extent practicable, but do not promise absolute confidentiality.

□ Determine whether any immediate action is necessary to ensure the complainant feels comfortable in the workplace while the investigation is ongoing.

□ In interviewing the complainant:

o Give the complainant the opportunity to explain in detail the basis for the complaint, and obtain as many details as possible.

o Ask the complainant to provide a thorough, truthful accounting of the matter.

o Obtain a complete list of individuals the complainant believes has relevant information.

o Ask the complainant to provide all relevant documents, or a list of such documents.

o Inform the complainant that his or her continued cooperation is essential.

□ Investigate each claim thoroughly and promptly, interviewing all individuals that may possess relevant, non-cumulative knowledge.

□ At the beginning of each interview conducted by an attorney, and particularly in corporate compliance investigations or where there is a potential conflict of interest between the investigator and the witness, provide and memorialize an *Upjohn* notice.

o An *Upjohn* notice is provided to a company employee to inform him or her that the attorney represents the company and not the employee individually.

o Do not provide an *Upjohn* notice to the complainant, as it could be perceived negatively and may have a chilling effect on bringing complaints.

□ Assure witnesses that the company will not tolerate any retaliation against them for cooperating in the

investigation or for providing information in good faith, nor will the company tolerate any retaliatory conduct on their part.

o Remind witnesses that they may be disciplined for any retaliatory conduct.

o Remind witnesses that they should promptly report any retaliation they may experience.

o Inform witnesses that they may be disciplined for knowingly providing false or fraudulent statements or refusing to participate in the investigation.

□ Collect and review documents that may be relevant to the complaint.

Drafting the Investigation Report

□ Determine whether the investigation requires a formal report.

o Consider not creating a written report if maintaining any privilege of the investigation is a concern.

□ List the information reviewed and considered in investigating the complaint, including:

o The names of the individuals interviewed; and

o Any relevant documents, if the investigation included a review of documents.

□ Limit the report to summarizing the facts and making credibility determinations.

o When not tasked with providing legal advice, do not provide any such advice.

o Avoid making conclusory statements that might be deemed admissions of unlawful conduct by the employer.

o Refrain from providing advice regarding what disciplinary action, if any, should be taken.

□ Maintain the confidentiality of the investigation.

o Keep the findings private.

o Only distribute the findings to those necessary to the decision-making process.

□ Clearly mark the report as privileged if it is completed by an attorney and is subject to privilege.

Concluding the Investigation

□ Provide timely feedback to the complainant regarding the results of the investigation, but do not disclose the specific remedial action taken following the investigation or the details of the analysis that led the company to that action.

□ Inform the target of the investigation of any disciplinary action, if necessary, and complete any appropriate documentation regarding the discipline.

□ Document the conversations with both the complainant and the target of the investigation.

□ Create an investigation file to maintain all relevant investigation documents.

□ Make periodic follow-up inquiries to the complainant (if a current employee) to ensure that the issues have been resolved.

□ During follow-up communications, remind the complainant that he or she should report any other concerns or issues and that the company does not tolerate retaliation.

Creating a Formal Complaint Procedure

Weinstein Saga Has Business Leaders Calling Their Lawyers

By Chris Opfer - *Bloomberg Law*
October 20, 2017

By Chris Opfer, Bloomberg BNA

The reverberations from movie producer Harvey Weinstein's fall from grace has some businesses—and their lawyers—taking another look at how a permissive office culture can allow sexual harassment to go unchecked.

"I'm getting hit with a lot of calls," Jonathan Segal, an attorney at Duane Morris who advises businesses on compliance with discrimination and harassment laws, told Bloomberg Law. "It isn't really just what do we have to do to protect ourselves from liability, but also how do we protect our workers."

Weinstein was canned in early October, following a New York Times report that he had secretly settled sexual harassment claims with at least eight women. Several actors and others in the entertainment business have come forward with similar allegations in the days since, exposing what some have called the worst-kept secret in Hollywood.

The movie mogul is the latest in what seems to be an increasingly long line of powerful people—often men—publicly exiled after reports of decades of alleged harassment, and sometimes more. From comedian Bill Cosby, who continued to work in entertainment as rape allegations slowly mounted, to former Fox News commentator and subject of multiple

sexual harassment accusations Bill O'Reilly, revelations of wrongdoing have been quickly followed by questions about how alleged harassers managed to continue to operate for so long.

"Any time you have an organization dominated by a particularly strong and powerful person who is essential to the mission and viability of the company, that presents challenges in all sorts of ways," David Garland, an attorney at Epstein Becker & Green, told Bloomberg Law. Garland last year represented former Fox News chief Roger Ailes in a harassment lawsuit by anchor Gretchen Carlson. Ailes later resigned, as similar allegations from other Fox News anchors went public. He died in May.

"The challenge is not necessarily complicity, it's how you address the allegations," Garland said.

Top-Down Culture Club

Management lawyers say the Weinstein case is a prime example of how corporate culture can keep bad behavior, especially by big names, under the radar. They say changing the environment starts at the top.

"People with power need to stand up," Segal said. "To be silent is to condone. When it comes to people with authority, there is no innocent bystander."

Companies can go a long way by creating a clear policy against harassment, including behavior that may not necessarily rise to the level of a legal violation. Bad behavior has to be so baked in that it becomes a condition of a worker's job or otherwise qualifies as "severe or pervasive" to be considered harassment under federal law. But that doesn't mean a business can't nip lesser transgressions in the bud.

Attorneys also said it's important to open up multiple channels for workers to lodge complaints, including to human resources managers and a company's board of directors, in some cases. That helps ensure that workers feel comfortable coming forward.

"Most boards take very seriously their role as stewards of the organization and the need for them to have an independent view of issues that arise in the course of the business," Valerie Hoffman, an attorney at Seyfarth Shaw who represents technology and finance companies, told Bloomberg Law.

In the end, it's more about what the company does in response to harassment complaints than what it says. Boards and executives have to be willing to take corrective action against harassers, whether that means a stern talking to, a suspension, or termination.

Weinstein, Cosby, O'Reilly, and others were able to keep a lid on much of the allegations against them by reportedly convincing their accusers to sign nondisclosure agreements as part of legal settlements. Attorneys told Bloomberg Law that businesses are likely to continue requiring NDAs as part of settlements, which they said may be offered as a way to avoid costly litigation rather than as an admission of guilt.

Where companies run into trouble, and open themselves up to significant liability, is when they use NDAs to protect a harasser and then allow the person to stay on the job.

Jon Hyman, who represents small and medium-size businesses in Ohio, said the Weinstein situation is a "perfect example" of why confidentiality agreements "are a bad idea" for cases involving alleged serial harassers. "Now it's not just did you know about this one claim, but did you create an environment that allowed this to continue," he said.

Mad Men

Culture shifts don't happen overnight, but Segal said it's vital that a company's entire leadership get on board with the change. That includes the men.

When confronted with allegations of workplace harassment, Segal said some men tend to try to wrap their heads around the situation by referencing a sister or daughter. He's not a fan of that approach.

"This is not about rescuing women because women don't need rescuing," Segal said. "You don't need to have a daughter, you need to have a conscience and a spine."

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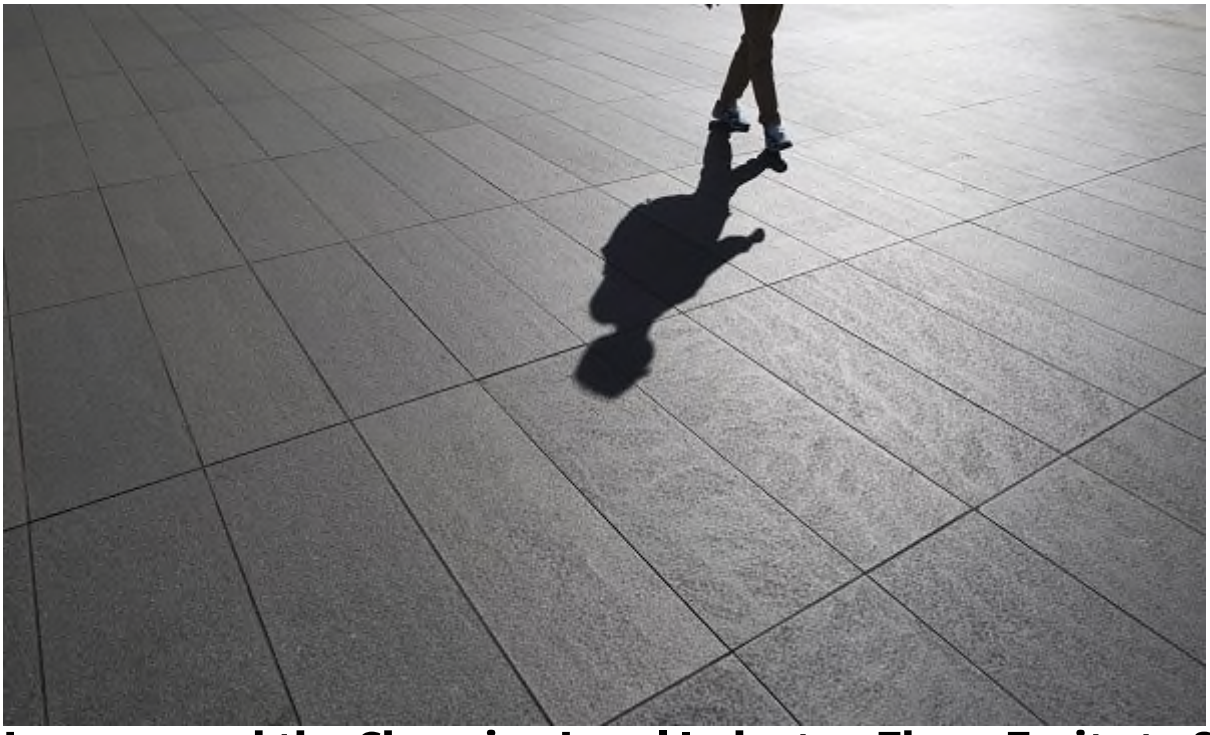

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The #MeToo movement: Implications for employers

By David W. Garland, Esq., and Nathaniel M. Glasser, Esq., *Epstein Becker & Green*

FEBRUARY 27, 2018

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.[1]

As Equal Employment Opportunity Commission acting Chair Victoria Lipnic said in a recent interview, "This happens to women in workplaces all over the place."[2]

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.[3]

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.[4] 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.

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

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.[5] 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 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.[6]

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.[7] 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.[8]

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.[9] Some women may even leave for lower-paying jobs if they believe there is less risk of harassment in the new position.[10] 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.[11]

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.[12]

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.[13]

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

[1] *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/2yltv04; Laura Litvan & Erik Wasson, *Chuck Schumer Calls on Al 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.

[2] *See* Braden Campbell, *'We See This Everywhere,' EEOC Chair Says of Weinstein*, Law360 (Oct. 24, 2017, 8:37 PM).

[3] 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.

[4] *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, U.S. Equal Emp. Opportunity Comm'n, http://bit.ly/2mlY7yL.

[5] *See* Olivia Goldhill, *'Zero Tolerance' Sexual Harassment Policies Are Terrible for Women*, Quartz (Nov. 10, 2017), http://bit.ly/2hq77Vr.

[6] Tax Cuts and Jobs Act of 2017 § 13307, 26 U.S.C.A. § 162(q).

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

[8] 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.

[9] *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.

[10] *See* Rebecca Greenfield & Laura Colby, *Sexual Harassment Helps Explain Why Women Get Paid Less*, L.A. Times, Jan. 6, 2018, http://lat.ms/2nZtFfK.

[11] *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.

[12] *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.

[13] *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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OPINION

What an employer can do to prevent becoming the next Weinstein or Wynn — Part II

By David W. Garland

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This installment of "HR Legal Briefing" is written by David W. Garland, a Member of the Firm and Chair of Epstein Becker Green's National Employment, Labor & Workforce Management Steering Committee. Garland is frequently retained in matters involving clients' most senior executives and in high-profile, high-stakes and highly sensitive cases. He can be reached at dgarland@ebglaw.com.

In Part I, we identified some of the steps that an employer should take to minimize the risk that it might find itself in the headlines because of sex harassment allegations against a founder or other key player in the organization. Those steps included creating a culture of compliance, communicating with a complainant after the complaint is made, establishing a safe work environment for employees and providing effective training to the employee population. In Part II, we discuss additional steps that the C-suite should be taking.

A key first step is having in place the right team and protocol *before* a complaint is made and publicized. With the disappearance of a traditional news cycle — and the emergence of a non-stop, 24/7 social media culture — any lapse in response time can have a devastating impact on a company's reputation and brand. The team must consist of senior leadership with decision-making authority from human resources, legal and communications, as well as their top lieutenants. Key high-level management personnel also should be integrated, depending on the identity of the complainant and the alleged harasser. Team

members should receive significant training on the company's harassment policy and appropriate investigative and remedial responses.

The roster of individuals who will investigate the complaint must be prepared as well. It should include experienced outside investigators who can independently investigate the allegations — and more than one option should be identified ahead of time in case of unavailability or conflict. The investigation team should include members with prosecutorial or law enforcement background, in case that experience is required. It is also prudent to retain investigators without any significant prior connection to the organization. The investigators' independence is critical to an unbiased review of the allegations — and in determining what the evidence actually shows. The last thing that an organization needs is a charge that it failed to properly investigate a claim because of a prior relationship with the investigator. Independence is critical, too, if the matter is litigated; even if the investigation was performed impeccably (and time pressures can make that difficult to do), an investigator's alleged bias can undermine its conclusions.

The IT department also has a role. E-mails, text messages, instant messaging, cell phone records and publicly available social media presences may need to be canvassed as part of the investigation. The electronic and digital data must be collected promptly and efficiently, and the protocol needs to address this reality before a complaint arises.

As soon as the investigation is concluded, its results must be reported to the decision-makers. In today's atmosphere, the tendency is to immediately terminate the alleged harasser if there is any evidentiary support for the allegations. But some have questioned whether that is always the right result, and whether that outcome may prevent an employee from coming forward.

The communications team also must be prepared to move quickly on the messaging. Key media influencers in the company's industry must be reached — personally, if possible — to deliver the message and to provide the necessary background. Internal messaging also must be planned and its delivery considered. Should senior leadership conduct a town-hall meeting? Might a videotaped message from the C-suite be more effective than an e-mail? In all events, the company's commitment to a workplace free of harassment — and steps taken to fulfill that commitment — must be a central part of the message.

With a solid plan in place, employers will be well-equipped to respond to complaints. And while all of these steps underscore the vital role of the HR department, they also require the strong support of the C-suite.

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With EEOC's involvement, more sex harassment suits are likely

The #MeToo movement may be several months old, writes David W. Garland of Epstein Becker Green, but now is not the time to take your eye off the ball.

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For months, there has been a flurry of news stories growing out of the #MeToo movement, some of which we've written about in this column. But there had not been a noticeable spike in the filing of sex harassment lawsuits. Now, however, the U.S. Equal Employment Opportunity Commission (EEOC) has unleashed of a series of sex harassment lawsuits across the country — and additional litigation may therefore follow.

Last month, the agency filed seven lawsuits against different employers from Birmingham, Alabama, to San Diego, alleging that each of them had allowed harassment in their workplaces. In a press release announcing the filings, EEOC stated that its action "should reinforce to employers that harassment — on all bases — is a violation of federal law."

"There are many consequences that flow from harassment not being addressed in our nation's workplaces," EEOC acting chair

Victoria A. Lipnic added, and the lawsuits filed by the EEOC "are a reminder that a federal enforcement action by the EEOC is potentially one of those consequences."

Virtually all of the lawsuits contained similar allegations. Male supervisors engaged in verbal harassment of female subordinates, using sexually charged language. In some, the EEOC alleged, the male managers called their female employees "sluts," "whores," and "cows." There was inappropriate touching and aggression. When female employees complained, the companies allegedly failed to take appropriate action, either to investigate or to otherwise address the alleged hostile environment.

In each and every case, the EEOC issued a press release announcing the lawsuit's filing. Each one carried the same message, essentially verbatim, that the EEOC had recently reconvened its Select Task Force on the Study of Harassment in the Workplace, which was formed "to explore ways to combat this national menace." Each press release added that "[p]reventing workplace harassment through systemic litigation and investigation is ... one of the ... national priorities identified by the [EEOC's] Strategic Enforcement Plan."

While it remains to be seen whether the allegations made by the EEOC in the various lawsuits turn out to be true (the filing of the complaints does not mean that each and every allegation has merit), several truths can be drawn from these recent actions. We are now entering a period where there is likely to be a spike in sex harassment lawsuits — not only from EEOC but also from private litigants as well. The media attention on sex harassment issues had heretofore led to internal complaints and demand letters. Now, with the passage of time and the light shined on these issues by EEOC, more lawsuits are likely.

That leads to another truth: Employers will be confronted with the decision whether to fight or settle. In some of those situations, employers will have to decide whether to settle

meritless claims to avoid unwanted publicity and potential reputational damage. In today's environment, even a meritless allegation has the potential to do damage that warrants settlement over litigation. Compounding the challenge facing employers, state legislatures are now enacting bans on the use of confidentiality or non-disclosure agreements where sex harassment claims have been made; New York State's legislation, for example, goes into effect this month. How all this plays out remains to be seen.

But another truth should not be surprising: Employers, perhaps more than ever, need to be paying attention to these issues at all levels of the company, from the C-suite to the employee working remotely. That means more effective training (and state legislatures are enacting mandates here as well) and placing a high priority on creating a work environment that is less susceptible to complaints of harassment, including now from the EEOC.