



# #MeToo: Addressing and preventing workplace harassment

By: Talene M. Carter

In 1986 the Supreme Court of the United States held that sexual harassment is a form of sex discrimination under Title VII. In 1991, Anita Hill came forward with her allegations of sexual harassment against Clarence Thomas. This sparked a movement in awareness; the purchase of employment practices liability insurance skyrocketed, and Equal Employment Opportunity Commission (EEOC) charges alleging sexual harassment doubled over the next five years. Fast forward to today and sexual harassment is still a major problem in the workplace, as evidenced by the #MeToo and Time's Up movements. We are seeing notable people being ousted from power and legislation being passed to arguably protect the victims.

The EEOC's statistics show that 85% of women report they have been sexually harassed at work, but their statistics also show that 90% of workers who say they have experienced harassment never formally report it. According to the Pew Research Center, 59% of women and 27% of men received unwanted sexual advances, verbal or physical harassment of a sexual nature in or outside of a work context.<sup>1</sup> A further study shows that women who have experienced sexual harassment are 6.5 times more likely to leave the organization.<sup>2</sup> A CNN/Time survey conducted in December 2017 showed that today, 70% of Americans classify sexual harassment as a "very serious problem," compared to 36% in 1998,<sup>3</sup> evidencing a major shift in focus and awareness of sexual harassment in the workplace.

The EEOC is taking action and making strides to eradicate this problem that has persisted for decades. Over the past couple months the EEOC has filed more than 10 lawsuits against various organizations charging them with harassment. Further, in January 2015, the EEOC formed the Select Task Force on the Study of Harassment in the Workplace. The Task Force spent 18 months studying workplace harassment, and found: (1) workplace harassment remains a persistent problem; (2) workplace harassment goes unreported; (3) there is a compelling business reason for stopping and preventing harassment; (4) change starts at the top, meaning that leadership and accountability are critical; and (5) training must change as it is focused on avoiding legal liability and not enough on creating an environment of non-harassment, inclusion and diversity.

Based on these findings, the EEOC identified five core principles to address workplace harassment. They are:

1. Committed and engaged leadership
2. Consistent and demonstrated accountability
3. Strong and comprehensive harassment policies
4. Trusted and accessible complaint procedures
5. Regular, interactive training tailored to the audience and the organization



## Harassment across industries

While we have seen notable people in the news and entertainment industry be accused of sexual harassment, this issue goes beyond the entertainment industry. The legal industry unfortunately has had its fair share of harassment problems, from both the bar and the bench. One of the potential drivers behind the prevalence of workplace harassment in the legal industry is similar to that in the entertainment industry, the legal industry's reliance on "rainmaker revenue" (revenue that is generated by individuals who bring in substantial new business and cash flow for an organization) is significant. Similar to the EEOC, the American Bar Association has taken action and adopted Resolution 302, which "urges all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation and the intersectionality of sex with race and/or ethnicity."

The financial services industry has also taken proactive steps to address this issue. Pension funds are updating their asset manager due diligence protocols. CalPERS (California Public Employees' Retirement System), the largest public pension fund, is requesting external asset managers to disclose sexual harassment settlements and their policies and procedures for preventing workplace harassment. The new policies are meant to encourage boards to take an active role in shaping corporate culture, and inclusion and diversity initiatives. Further, in response to the #MeToo movement, some consultants have begun to closely monitor asset managers by creating an "unfavorable news committee" to address misconduct type issues.

## Mitigating harassment claims exposure

The #MeToo movement is sparking positive change in the workplace. Beyond what specific industries are doing in response, changes have been made that will have a financial impact on organizations. The Tax Cuts and Jobs Act, enacted on December 22, 2017, includes a new provision (Section 162(q)), which modifies Section 162 of the Internal Revenue Code. The provision as it currently stands, prohibits deducting as a business expense any settlement or payment (including attorney fees) related to sexual harassment or sexual abuse if the settlement/payment is subject to a non-disclosure agreement. The intent of this is to increase employer settlement costs and prevent confidentiality. However, the general consensus is that there are some unintended consequences to this legislation. For example, an argument is to be made that this provision also applies to the victims, which means their settlement (including the attorney fees) can be taxed. Given this issue, there are proposals to amend the language.

While there is really no way to completely protect your organization from harassment claims, here are just a few tips to help mitigate the exposure:

- Focus on the organization's workplace culture and make clear that harassment is not tolerated.
  - Leaders should clearly articulate the values of the organization.
  - The buy in from the leaders should be visible to the entire organization.
  - Hold managers to the same standards as non-managerial employees.
- Consult with counsel when preparing your policies and procedures to ensure they make clear, among other things, what type of conduct will not be accepted, the proper reporting channels and that there will be no retaliation.
- Review your employment practices liability insurance policy with industry specialists. While the EPL policies are intended to cover harassment claims, in order to maximize coverage it is important to review the definition of claim, the definition of harassment, the bodily injury exclusion and the definition of loss.

## Source

<sup>1</sup> Pew Research Center, April 2018, "Sexual Harassment at Work in the Era of #MeToo"

<sup>2</sup> Heather McLaughlin, Christopher Uggen, and Amy Blackstone

<sup>3</sup> "CNN poll: 7 in 10 Americans say sexual harassment is a very serious problem", Juana Summers and Jennifer Agiesta, December 22, 2017, <https://www.cnn.com/2017/12/22/politics/sexual-harassment-poll/index.html>

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