THE #METOO MOVEMENT: THE NEW REALITY FOR SEXUAL HARASSMENT

- The advent of the #MeToo social media campaign has created a resurgence of public awareness towards the issue of sexual assault and harassment.
- The #MeToo hashtag has been used more than 19 million times on Twitter since Alyssa Milano’s October 15, 2017 tweet urging victims to speak out about their experiences.
SO WHAT HAS CHANGED?

• Sexual harassment has been unlawful in the workplace for decades!
• Agencies, companies and legislatures are taking affirmative steps to change workplace culture:
  - Agencies seeing increased numbers of sexual harassment complaints
  - Employers making public gestures to show their commitment to creating harassment-free workplaces
  - States requiring employers to develop sexual harassment policies and provide sexual harassment training, and forbidding mechanisms that shroud claims of sexual harassment

AN UPTICK IN CLAIMS OF SEXUAL HARASSMENT

• Sexual harassment claims have increased significantly:
  - In fiscal year ‘17 the EEOC processed a total of 6,696 charges
  - In fiscal year ‘18 the number increased to 7,609
• EEOC’s preliminary data for fiscal year ’18 reveals the agency filed 66 harassment lawsuits, 41 of which included allegations of sexual harassment
  - This is more than a 50% increase from the previous fiscal year
50 STATES, 50 REQUIREMENTS

• Several states and NYC now require private employers to adopt sexual harassment policies and/or training programs

• Other states (and the EEOC) strongly recommend such policies and/or training

NEW RULES FOR NON-DISCLOSURE AND MANDATORY ARBITRATION

• Growing trend of legislation aimed at limiting or prohibiting the use of non-disclosure agreements and/or mandatory arbitration agreements in relationship to sexual harassment matters

• NY, VT, TN, CA and WA have all passed laws restricting the use of non-disclosure agreements in sexual harassment claims and/or in the settlements of such claims

• NY, VT, MD and WA have passed laws that prohibit mandatory arbitration of sexual harassment claims
WHY ARE POLICIES, TRAINING AND NDA RULES IMPORTANT?

• Unlawful harassment policies set expectations, put employees on notice and tell the world that your club takes this seriously
• Training brings it to life
• Prohibition of non-disclosure agreements in resolution of sexual harassment cases sends message to employees that they are heard

NEW SEXUAL HARASSMENT OBLIGATIONS: NEW YORK

• All NY employers (including those headquartered out-of-state) must provide a copy of the company’s sexual harassment policy to all employees
• Employers are required to provide annual sexual harassment training, the first round being completed by October 9, 2019
• Settlement agreements requiring “mandatory” arbitration of sexual harassment claims are generally prohibited and may not contain an NDA unless at complaining party’s request
NEW SEXUAL HARASSMENT OBLIGATIONS: CALIFORNIA

- Cannot require employees to waive claims of discrimination or harassment or agree not to disclose information about such claims
- As of January 1, 2019, settlements of claims filed in agencies or courts can include terms that shield the amount paid, but cannot limit the disclosure of the underlying circumstances
- Effective January 1, 2020, employers with five or more employees must train all employees every two years

NEW SEXUAL HARASSMENT OBLIGATIONS: VERMONT

- All new hires must get a copy of the employer’s sexual harassment policy; the policy must be redistributed to all employees each time it is changed
- Employers are “encouraged” to train employees within one year of hire and all supervisors/managers within one year of promotion
- VT Attorney General has right to conduct on-site inspections with just 48 hours of notice
NEW SEXUAL HARASSMENT OBLIGATIONS: WASHINGTON

• Mandatory arbitration of sexual harassment (and retaliation) claims are now banned
• Employers are now prohibited from requiring blanket NDAs that arguably prohibit disclosure of sexual harassment claims as a condition of employment
• The state’s working group for sexual harassment issues recently released materials regarding best practices for preventing sexual harassment, including a model sexual harassment policy

MORE UPDATES IN THE NORTHEAST

• **Maine** – Policy dissemination and training is already required (for employers of 15 or more), but the state recently adopted new training guidance as to what must be included in the training and new penalties for employers who fail to comply
• **Delaware** – Employers with 4 or more employees must distribute a fact sheet by July 1, 2019, and all new hires thereafter. Employers with 50 or more employees must provide interactive training
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IGNORANCE IS NOT BLISS

Failing to address sexual harassment appropriately can be a costly mistake for employers:

• A New York federal jury awarded over $13 million to a single plaintiff against American Sugar Refining ($11.7 million of that award constituted punitive damages)

• Settlements can reach up to several hundred thousand dollars, such as the $675,000.00 settlement Atlantic Capes and BJ’s Service Co. reached with four employees in January 2019; or even millions as was the case for Fox News Channel

WHAT TO DO IF IT HAPPENS TO YOU?

• Investigate!
• Be responsive, listen and act promptly
• Promise confidentiality but only to the extent possible
• Do not let it be even if reporter claims to not want action yet
• Consult with legal counsel and consider outside investigator
• Draw conclusions after investigation complete
• Take action to rid the workplace of harassment, if warranted
• Circle back with the reporter and the subject of investigation
• Ensure no retaliation!
WHAT ARE YOUR NEXT STEPS?

• Get that policy out
• Train your employees and supervisors
• Ensure your supervisory employees know the policy and how to spot issues when they arise
• Conduct prompt investigations
• Take appropriate action

THANK YOU!
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