Section I - SEXUAL HARASSMENT IN #METOO ERA

A cultural shift emerged in 2017 when stars such as Alyssa Milano, Gwyneth Paltrow, Ashley Judd, Jennifer Lawrence and Uma Thurman took to social media to showcase how pervasive sexual harassment was in the workplace. Under the #metoo, multitudes of people identified that some level of sexual harassment occurred to them at some point in their career. Women, in particular, identified that silence was just a part of what they had learned to accept as their role in enduring sexual harassment.

Why was silence an enduring expectation? Most often, the victims take no formal action –either to report or file a legal claim. There are many layers and levels of explanation. The victim may fear that they will not be believed, that the employer will not do anything about it or that they will be blamed or retaliated against for reporting. Often, there is a position or power differential between the perpetrator and the victim. How cases were handled frequently protected the position of the perpetrator. For example, cases might be settled quietly with the intent of allowing the business to move on and if the perpetrator held a strong position (high level leader; significant producer) or was seen as valued in the organization. When the perpetrator is not disciplined or fired, a message is sent to the victim. Psychologically, that can cause the perpetrator to feel a level of confidence that they are protected or above reproach. Meanwhile, the victims frequently feel a sense of obligation to be silent and shame for even bringing the issue forward.

What is different today than even 6 months or a year ago:

* In the past: Today

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| The silence of others, not just the victims, has enabled the perpetrators to continue to harass. | Easier for victims (men or women) who have been sexually assaulted or harassed to come forward. |
| Most individuals who experience do not report the sexual harassment. | Nearly 30% of all EEOC reports are sexual harassment. |
| Employers frequently erred on the side of protecting the perpetrator or the institution. | Expectation of more rigor in investigation and less tolerance for questionable behaviors |
| Expectation: Sexual harassment was a problem that was addressed by HR | Expectation: Sexual harassment is everyone’s problem (managers, co-workers, etc.) |

The #metoo was the first step: Identifying (naming) the problem. What’s perhaps most interesting about the culture shift is not how often it occurred but the focus is shifting from protecting the perpetrator to concern that the perpetrator is getting away with continued harassing behaviors.



One year later and an innumerable number of high profile cases later (Harvey Weinstein, Bill Reilly, Bill Cosby, Garrison Keillor, etc.), employers are clamoring for what to do next. Proactive employers want to know how they can mitigate their risks. There is a palpable concern that the societal shift in what is acceptable behavior today does not match the expectations we held ourselves to even 12 months ago. Savvy employers recognize that being held to today’s standard for past conduct is going to be a challenge. The best way to close the gap is to act quickly to change the expectations we have within the workplace.

This course is designed to take a practical approach for employers who want to respond to the cultural shift. We will examine ways to modify policies, enhance their training, improve investigations and generally shift the culture to meet today’s employee expectations.

Section II – DEFINING SEXUAL HARASSMENT

There is a fair amount of discussion about what constitutes harassment. Sexual harassment is only one of many types of workplace harassment. The Equal Employment Opportunity Commission (EEOC) defines “harassment” as

*Unwelcome conduct that is based on race, color, religion, sex (including pregnancy, sexual orientation, gender identity), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where*

1. *Enduring the offensive conduct becomes a condition of continued employment;*
2. *The conduct is severe or pervasive enough to create a work environment that a reasonable person would considered intimidating, hostile or abusive.*

Title VI of The Civil Rights Act of 1964, as a form of employment discrimination, *Types of Discrimination*: <https://www.eeoc.gov/laws/types/harassment.cfm>.

Employers are liable for the conduct of supervisors and have an obligation to prevent harassing behaviors and promptly correct harassing behaviors when they have been identified. Today, what accounts for sufficiently preventing and adequately addressing is greater than what had been done in the past. Organizations are considering whether an employee should have to “endure” the offensive conduct to prove that it was harassment. Similarly, “severe” and “pervasive” are being questioned as to the extent that a victim must tolerate in order to prove that an employee was subject to harassment. Organizations need to set the tone for what is acceptable and then enforce discipline uniformly across all levels to ensure that policies, practices and culture align with today’s expectations of acceptable behavior.

Section III – USING COMPLIANCE AS SEXUAL HARASSMENT PREVENTION TOOL

The best way to prevent harassment in the workplace is through a robust compliance approach. Effective compliance programs include the following elements:

1. Governance and Oversight;
2. Policies and Procedures;
3. Open Lines of Communication;
4. Training and Education;
5. Auditing and Monitoring;
6. Responding to Detected Offenses;
7. Enforcement of Discipline

The following are options and considerations in enhancing compliance for sexual harassment.

Leadership, Governance and Oversight – Tone at the Top

An organization’s culture is set at the top. Leadership behaviors establish and model a respectful culture of an organization. Leaders must refuse to tolerate harassment both by word and by action so that employees see that the policies are actually a reflection of the organizations values. One way to start that conversation with leadership is to assess harassment risk factors and identify ways to mitigate the risks. Leadership also needs to provide resources, including time, for prevention activities such as training and communication. Leaders themselves need to be trained to ensure they understand acceptable behaviors and their role. All efforts will fall flat if you do not start at the top.

EEOC Checklist One: Leadership and Accountability

***The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:***

◻ Leadership has allocated sufficient *resources* for a harassment prevention effort

◻ Leadership has allocated sufficient *staff time* for a harassment prevention effort

◻ Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

***Based on the commitment of leadership, check the box if your organization has the following components in place:***

◻ A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees

◻ A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed

◻ *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred

◻ *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment

◻ Regular*compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system

◻ Regular*compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

***Bonus points if you can check these boxes:***

◻ The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace

◻ The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews

◻ The organization conducts *workplace civility training* and *bystander intervention training*

◻ The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

Policies and Procedures

Nearly every organization has a policy on harassment free work environment and a code of conduct which will likely address what constitutes harassment and/or sexual harassment. Now is the time to review the language and determine:

1. Is it in clear, easy to understand language?
2. Do definitions put too much emphasis on how severe or oppressive the conduct must be in order to constitute harassment?
3. Are there clear examples of prohibited conduct?
4. Do the examples help both to identify and prevent harassing conduct?
5. Does it provide ways to report?
6. Does it assure that reporters and witnesses will not be retaliated against for bringing the issue forward?
7. Does it explain that a prompt, thorough and fair investigation will be done?
8. Is there an explanation of that corrective action will be taken when it determines that harassment has occurred?

Every organization will have multiple considerations to include in reviewing their policies and procedures. For example, most adults use some type of social media. Harassment can occur on many platforms and in circumstances that occur outside the walls of the organization. Consider how you may include the reality of social media today in how you address your policy on harassment.

EEOC Checklist Two: An Anti-Harassment Policy

***An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:***

◻ An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated

◻ An easy-to-understand description of prohibited conduct, including examples

◻ A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees

◻ A statement that the reporting system will provide a prompt, thorough, and impartial investigation

◻ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation

◻ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation

◻ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred

◻ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors

◻ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately

◻ Is written in clear, simple words, in all languages commonly used by members of the workforce

Open Lines of Communication

Having effective reporting systems must include the ability for a reporter to remain anonymous. However, the reality of the thorough investigation is that anonymity cannot be 100% guaranteed. Perhaps more importantly is how the person who reports is treated throughout the investigatory process. If he or she is not treated well, their complaint or report is not responded to promptly or the investigation only includes asking the perpetrator if the allegations are true, you can expect a chilling effect. If the process feels inadequate, employees will not bother to report to the employer. In some cases, the employee may bi-pass the internal reporting system altogether and go straight to the EEOC or an attorney.

The most effective reporting tool for an employer to have is multiple tools. The employer should offer the employee’s manager as a first point of contact. But, recognize that the manager is sometimes the problem. Other options for the employee are human resources, the compliance department, the hotline, and any other reporting mechanism the organization offers. Additionally, the employer needs to train all managers that they have a responsibility to address all reports of harassment, including reports that occur outside of their area. If the employee can prove that they reported the matter to leadership, the employer cannot say they were not aware.

EEOC Checklist Three: A Harassment Reporting System and Investigations

***A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.***

***Check the box below if your anti-harassment effort contains the following elements:***

◻ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed

◻ Employer representatives who take reports seriously

◻ A supportive environment where individuals feel safe to report harassing behavior to management

◻ Well-trained, objective, and neutral investigators

◻ Timely responses and investigations

◻ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility

◻ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible

◻ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation

◻ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred

◻ A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

Training and Education

In the early days of compliance, training was considered one of the most powerful tools for an organization to prove “they had done the right thing.” Today, we know more and recognize that have a policy and training on it are not enough. However, training is still essential. The most important thing to convey what is unacceptable behavior and what to do if you observe or experience unacceptable behaviors.

Sexual harassment training has evolved over the years. The trends and themes in training have gone from women in less powerful positions enduring sexual advances to focusing on the business impact of sexual harassment – i.e. avoiding litigation (Bloomberg Business, March 13, 2018 Demand for Anti-harassment Training Videos Surges in #MeToo Era, Gerry Smith https://www.bloomberg.com/news/articles/2018-03-13/better-call-hr-demand-for-training-videos-surges-in-metoo-era). In June of 2016, the EEOC Task Force on Study of Sexual Harassment in the Workplace recommended specific training for all employees and additional training for managers and supervisors so they know how to manage harassment that they observe or that gets reported to them. Video production companies are seeing significant increases in requests for sexual harassment training courses and the demand is to update and make it more culturally relevant.

The EEOC Select Task Force on the Study of Harassment in the Workplace (Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic) June 2016.

EEOC Checklist Four: Compliance Training

***A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:***

* Structural Principles

◻ Supported at the highest levels

◻ Repeated and reinforced on a regular basis

◻ Provided to all employees at every level of the organization

◻ Conducted by qualified, live, and interactive trainers

◻ If live training is not feasible, designed to include active engagement by participants

◻ Routinely evaluated and modified as necessary

* Content of Compliance Training for All Employees

◻ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment

◻ Includes examples that are tailored to the specific workplace and the specific workforce

◻ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace

◻ Describes, in simple terms, the process for reporting harassment that is experienced or observed

◻ Explains the consequences of engaging in conduct unacceptable in the workplace

* Content of Compliance Training for Managers and First-line Supervisors

◻ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods

◻ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report

◻ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

Auditing and Monitoring

Proactive compliance in sexual harassment prevention programs should include reviewing and understanding the frequency of how often the issues are getting reported. Many organizations are seeing a notable increase in reports of sexual harassment. Some reports may even include previously reported matters that Human Resources departments may feel they have already addressed. It’s important to revisit those complaints and reports with a fresh perspective.

1. Why is the reporter identifying the issue again?
2. Is there ongoing behaviors that did not previously get addressed?
3. Should a deeper investigation be considered?
4. What has management done about the reported/alleged conduct?
5. Is it an issue that spans an entire department?

Auditing and monitoring can be an essential tool to identify problem departments and problem employees that have not been adequately addressed in the past.

Responding to Detected Offenses

Conducting a prompt and thorough investigation is critical. If you do the investigation internally, start the investigation as soon as possible. The investigator should interview all people who have relevant information. Best practice for investigative interviewing in the case of sexual harassment should consider interviewing the person bringing the complaint first. At the conclusion of the investigational interviews, the person should be re-interviewed so that the investigator can ask any pertinent follow-up questions that may have arisen in the process of interviewing others. The interviewer should focus on finding facts rather than protecting the employer’s best interests.

When the investigator has detailed and thorough gathering of the relevant facts, he or she should summarize findings and basis for any conclusions. The investigator should put together a summary of all the relevant facts and conclusions into a written report.

Enforcement of Disciplinary Standards

When an allegation of sexual harassment has been substantiated, enforcement of discipline must be done uniformly and appropriately. The level of punishment will vary depending on the accusations but should not vary based on the position level of the harasser or his/her productivity or perceived value in the organization. Corrective actions can include:

* Termination
* Demerits or written warnings
* Remedial training
* Separating the harasser from the victim