

LEGAL ALERT

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Why You Too Should Care About #MeToo: How Social Media is Shifting the Regulatory Compliance Landscape for Employers

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Over past months, we have borne witness to a national movement centered on sexual harassment and gender discrimination in American culture, particularly as it concerns the workplace. Specifically, the #MeToo Movement (hereinafter “#MeToo”) is proof positive of the potential for media, and social media in particular, to shift how our nation’s social contract operates by and through its impact on individuals and institutions. Hollywood moguls and actors, professional athletes, popular musicians and recording artists, captains of industry, members of Congress, sitting judges, and even our sitting president have all been caught up in the whirlwind of allegations and protestations of sexual misconduct transpiring nationwide.

While some may question whether the #MeToo movement is politically motivated, the concerns for employers regarding workplace harassment are very real. In today’s heightened climate, businesses and employers will have to quickly adjust and employ intelligent, forward-thinking strategies to limit their liability for the coming wave of vicissitudes concerning what constitutes acceptable workplace behavior and/or institutional culture.

#MeToo is not a new phenomenon. Rather, #MeToo first began approximately one decade ago in the Bronx, New York, when Tarana Burke created the hashtag to give voice to working class women who quietly endured sexual abuses daily and, perhaps due to fear of retaliation, were deterred by the cultures of their work environments from reporting their experiences. The hashtag was recently popularized by actress Alyssa Milano, joined by a sizeable group of celebrities, who posted to Twitter encouraging women to write “me too” on social media as an experiment. The goal of the social experiment was simply to get a sense of the magnitude of the problem of sexual harassment and assault in our national workforce. In just 24 hours, Twitter confirmed close to half a million uses of the hashtag. Since Milano’s initial post, there have been millions of posts on a variety of social media platforms, such as Facebook, Instagram, and even Snapchat. Some shared the intimate details of their encounters, others simply posted the hashtag in support of the cause.

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The fanfare and resulting awareness around #MeToo has caused employees across the nation to become all the more sensitive to these serious workplace issues, and employers might expect the recent upsurge in claims to continue to rise. Even so, the problem of sexual misconduct is by no means a novel one. To the point, the Equal Employment Opportunity Commission (“EEOC”) received approximately 85,000 sexual harassment complaints over the ten-year span between 2005 and 2015. The upswing in #MeToo postings, however, poses a practical dilemma for employers who are confronted with or made aware of a #MeToo posting by a current or former employee. Employers are then confronted with a decision on how, if at all, to respond to such a posting.

A #MeToo posting alone would likely be insufficient to qualify as a formal complaint warranting investigation under most productive work environment policies, which ban workplace harassment. Most such policies instruct employees who want to register a complaint to notify a supervisor, or call a 1-800 number, or contact a specific member of management or the HR department. A vague and non-descript posting on social media is not likely to be included in any such policy as a reporting option for a workplace harassment claim. To hold the employer responsible for workplace harassment occasioned by a supervisor, an employee must follow the employer’s reporting procedures and sufficiently articulate the complaint to put the employer on notice of the harassment. Some courts have concluded that an employee fails to follow the employer’s reporting procedure by notifying someone other than the person(s) authorized by the employer to accept harassment claims. This line of reasoning would certainly support an employer not responding to a vague #MeToo posting by a current or former employee.

Notwithstanding, there are solid reasons why an employer may want to respond by meeting with the employee to discuss the posting. Initially, by meeting with the employee, the employer can reinforce its commitment to eradicating workplace harassment and show that it takes all such allegations seriously. The employer can also reinforce at that time its policies governing the use of social media and establishing a productive work environment, and explain the proper procedure to be followed for making a claim of workplace harassment. Furthermore, the interaction may reveal that the employee has a legitimate concern about workplace conduct, which the employer should then treat as it would any other similar accusation by conducting a thorough investigation consistent with the employer’s governing policy on productive work environment.

Responding to the post will also send a positive message to your workforce and beyond. A publicly posted #MeToo message is likely to be seen by other current and former employees, as well as by others outside of your organization. In the absence of some action taken by the employer in response to the posting, the “court of public opinion” will draw its own conclusions,

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right or wrong, about your organization and its commitment to eradicating workplace misconduct. It is not likely to reflect well on your organization if word circulates that you did nothing when confronted with the #MeToo posting.

Importantly, the “court of public opinion” is not the only body taking these issues more seriously contemporarily. The policy implications of #MeToo are rather expansive. In response to recent events, the EEOC recently promulgated a guidance entitled Promising Practices for Preventing Harassment. The guidance proffers various means for employers to enhance their regulatory compliance efforts, such as having committed and engaged leadership, strong mechanisms for holding individuals accountable, clear and comprehensive harassment policies, a reliable and trusted confidential reporting system, and consistent, tailored, and interactive training.

Proponents of #MeToo of course desire to have individual wrongdoers held accountable for their actions, but they are truly endeavoring to alter the way our institutions operate. That is, #MeToo is focused on shifting corporate culture. Stated another way, #MeToo creates unique pressure, born of the advent of social media, for institutions to make progress both in terms of individual accountability for bad actors, as well as in terms of strengthening processes for handling these sensitive situations.

Employers can and should address these sensitive issues long before a claim is ever filed. As prevention and resolution are key for successful prevention of claims, employers should focus on their corporate culture, harassment prevention, and training. The foundation of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated. For example, some industries may consider revising their executive agreements’ morality clauses in response to the groundswell of sexual harassment claims involving top executives and politicians. Explicitly and proactively broaching the issue of sexual harassment in the executive agreement makes it significantly more difficult for an employer and/or an executive to overlook or attempt to rationalize executive conduct that should result in termination. This, in turn, may encourage the executive to hold his or her subordinates similarly accountable.

#MeToo evidences developments in national social sentiment and places corporations, particularly corporate managers and supervisors, under the microscope. As the social taboo shrouding the reporting of these incidents begins to wane, businesses will need to have a strong code of conduct for all employees that covers sexual misconduct and other unacceptable behavior. However, it is not enough just to have the code: employees need to be made aware of it and employers need to enforce it. Accordingly, employers should review their employment agreements, harassment policies and procedures and ensure they function the same on paper as

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they do in practice. To assist in the prevention of workplace misconduct rising to the level of unlawful workplace harassment, employers should focus on establishing a productive work environment that prohibits all forms of offensive workplace conduct and not just conduct that is legally prohibited. To this end, employers also may find it helpful to consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training.

As more sexual harassment and gender discrimination allegations arise on social media and in workplaces across the nation, demonstrating a shift in our nation's social landscape, so too will the legal landscape continue to evolve. Employers are therefore encouraged to heighten and focus their compliance and oversight efforts to adjust to recent policy and enforcement developments, and their impact on potential employer liability. If you are uncertain about how to respond to a #MeToo posting, or if you are concerned that your employment agreements and workplace policies are insufficient for limiting your liability for workplace misconduct in today's changing environment, please contact the authors or any member of the firm's Labor & Employment Law Practice Group for assistance.

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