



Ogletree Deakins

© 2018, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

# Recent Trends in Workplace Harassment Law

Indiana Chamber of Commerce  
Human Resources Conference & Expo

Brian Burbrink & Michelle Maslowski – Ogletree Deakins

## Timeline

Timeline of Workplace Harassment Law:

- 1991: 1994-99
- 2012-15: [Image of a woman]
- July 2016: [Image of a man]
- Oct. 2016: [Image of a man]
- Feb. 2017: [Image of a man]
- June 2017: [Book cover: reset MY FIGHT FOR INCLUSION reset and LASTING CHANGE ELLEN PAO]
- Sept. 19: [Image of a man]
- Oct. 5: [Image of a man]
- [Image of a woman holding a #METOO sign]

# Tipping Point: #MeToo

- Academy of Motion Picture Arts and Sciences
- Richard Meier & Partners Architects LLP
- United States Forest Service
- Netflix
- Warner Bros. Television
- E!
- Save the Children
- Guess
- Conde Nast
- The Society of Children's Book Writers and Illustrators
- Universal Television
- The Humane Society
- Vincent Cirrincione Associates
- Republic Records
- The Weinstein Company
- Republican National Committee
- Wynn Resorts
- Worldwide Production Agency
- PBS
- The Spotted Pig
- The New Yorker
- CNN
- Batali & Bastianich Hospitality Group
- The Paris Review
- American Media, Inc.
- New York City Ballet
- New York Public Radio
- Metropolitan Opera
- Gloucester Stage Company
- Minnesota Public Radio
- Latham & Watkins LLP
- Jean-Georges
- Virgin Management
- Pixar and Walt Disney Animation Studios
- CBS
- Bloomberg
- Def Jam Recordings
- Rush Communications
- Phat Farm
- Argyleculture
- Tantris Yoga
- CW
- New York Times
- Lionsgate Television
- HBO
- FX
- TBS
- Tronc, Inc.
- Standard
- BBC
- NPR
- The New Republic
- Showtime
- Artforum
- Valentino
- Bulgari
- Besh Restaurant Group
- Vox Media
- Transformation Group, LLC
- Nickelodeon
- Defy Media
- Royal Philharmonic Orchestra
- NFL Network
- Uber

3

# PR Issues: Impact of Social Media



4

## #MeToo: Speed of Social Media

### ■ Before

- Gretchen Carlson accused Roger Ailes of workplace harassment in July 2016
- 15 days between complaint and resignation

### ■ After

- Eight female employees accused Charlie Rose of workplace harassment in November 2017
- Suspension and termination in less than 24 hours

5

www.ogletree.com

## Recent Updates

- Nike
- Bill Cosby
- Tom Brokaw



6

www.ogletree.com

## Takeaway #1: Increased Scrutiny of Employment Agreements

- *Murphy v. NLRB* (pending before the U.S. Supreme Court)
  - Whether employees can be forced to waive any class or collective actions in favor of individual arbitration of claims
- Arbitration Fairness Act of 2017
  - H.R. 1374 and SB 537
  - Introduced in the Senate by Al Franken

7

[www.ogletree.com](http://www.ogletree.com)

## Takeaway #1: Increased Scrutiny of Employment Agreements

- Ending Forced Arbitration of Sexual Harassment Act
  - Bipartisan Bill
  - Invalidates mandatory employment arbitration for gender-based harassment and discrimination claims
- State Attorney Generals
  - Unanimous request for federal legislation to address “the impediment of arbitration requirements”
- State Law Equivalents
  - Washington & New York – passed legislation (pending in other states)

8

[www.ogletree.com](http://www.ogletree.com)

## Takeaway #2: Increased Scrutiny of Confidential Settlements or NDAs

- California
  - STAND (Stand Together Against Non-Disclosures Act)
  - “Secret settlements in sexual assault and related cases can jeopardize the public—including other potential victims—and allow perpetrators to escape justice just because they have the money to pay the cost of settlements.”
- New York / Washington State - passed legislation (pending in other states)

9

[www.ogletree.com](http://www.ogletree.com)

## Takeaway #3: Increase in Lawsuits (and EEOC Scrutiny)

- Expect sexual harassment complaints to increase
- EEOC recently issued a notice on its website with detailed instructions for employers on prevention programs: “Promising Practices for Preventing Harassment”
- Employers already reporting an uptick in demand letters from alleged harassers

10

[www.ogletree.com](http://www.ogletree.com)

## What to Expect...for Now

- Scrutiny of the confidential ways employers resolve sexual harassment complaints and lawsuits, i.e., “silencing victims”
- Perceived “covering up” or discouraging employees from coming forward with complaints
- Perceived failure to hold sexual harassers accountable for their misconduct

11

[www.ogletree.com](http://www.ogletree.com)

## Questions for New Environment

- How to create a safer environment free from workplace harassment?
- What proactive measures should we be considering in this new environment?
- What are the new challenges for HR professionals?

12

[www.ogletree.com](http://www.ogletree.com)

## Strategies/Tactics to Protect Organization

1. Leadership and accountability
2. Conduct #MeToo audit
3. Lower threshold to trigger investigations
4. Training
5. Responsibility vs. rights of alleged harasser

13

[www.ogletree.com](http://www.ogletree.com)

## 1. Leadership and Accountability

- Senior leaders should demonstrate a commitment publicly that harassment (or similar misconduct) should not be tolerated.
  - Strict adherence (even for high performers)
  - Strong, neutral & visible HR Department
  - Consider privileged audit of response to sexual harassment complaints

14

[www.ogletree.com](http://www.ogletree.com)

## 2. Conduct #MeToo Audit

- Update policies/agreements/releases
- Arbitration carve-out; include jury trial waiver
- Investigation practices / results
- Bystander intervention

15

[www.ogletree.com](http://www.ogletree.com)

## 3. Lower Threshold to Trigger Investigations

- Glassdoor / social media
- Rumors
- Hotline / anonymous complaints
- Employees' preference for social media vs. company's reporting policies

16

[www.ogletree.com](http://www.ogletree.com)



## 4. Training

- Championed by senior leaders
- Provided to all employees annually
- Tailored to specific industry/workforce
- Qualified live trainers
- Routinely evaluated by audience
- Maintain records

17

[www.ogletree.com](http://www.ogletree.com)

## 5. Balance Enhanced Responsibility With Rights of Alleged Harasser

- Due process vs. presumption of guilt
- Be consistent
- Alleged harasser claims/lawsuits
- Protect “good-faith belief” defense

18

[www.ogletree.com](http://www.ogletree.com)



## Presenter Information

Brian D. Burbrink

brian.burbrink@ogletree.com

317.916.2152

Michelle Maslowski

michelle.maslowski@ogletree.com

317.916.2535

www.ogletree.com



Ogletree  
Deakins

© 2018, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

# Recent Trends in Workplace Harassment Law

**Indiana Chamber of Commerce**  
Human Resources Conference & Expo

Brian Burbrink & Michelle Maslowski – Ogletree Deakins