

#MeToo Madness: Crafting a Cohesive Policy and Training Approach

Indiana Chamber of Commerce

Annual Human Resources Conference & Expo

April 24, 2019

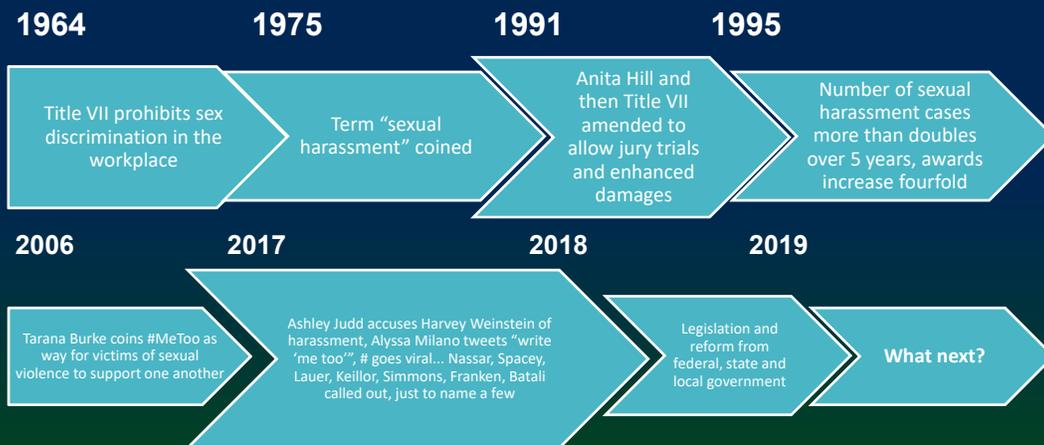
Bonnie Martin
(Indianapolis)

Ogletree
Deakins



1

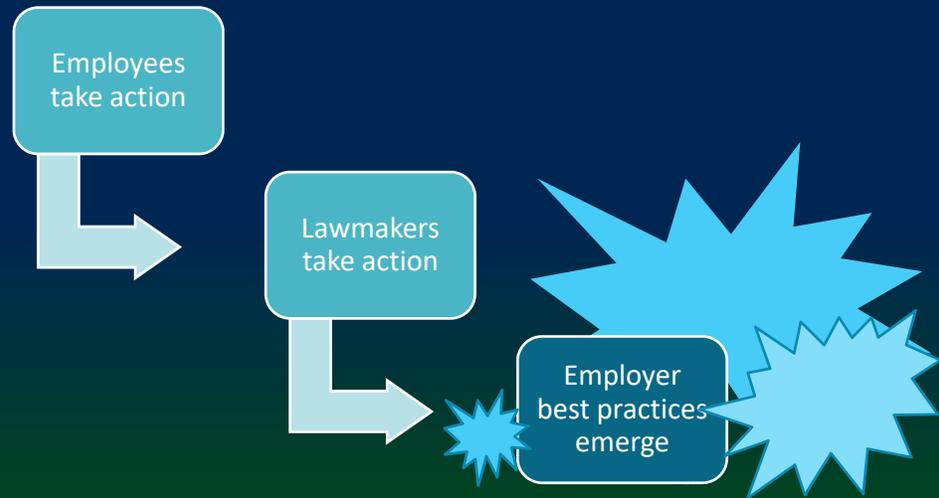
Brief Timeline of #MeToo



2

2

1 Year Later – Impact on Employers



3

3

Employees take action

- In 2018, the number of visits to the EEOC's sexual harassment website page more than doubled over the prior year.
- Sexual harassment charges increased in 2018 by more than 12% over prior year.
- Sexual harassment lawsuits filed by the EEOC's attorneys increased by 50% over prior year.

4

4

What does this mean for you?



5

5

Obvious Economic Impact

- Monetary awards in sexual harassment cases increased by more than 22% over prior year.
- The total amount of money awarded to employees in sexual harassment cases settled or conciliated at the EEOC stage was \$70 million.

6

6

Less Obvious Impact

- Employee absences
- Employee turnover
- Low productivity

Study shows that 80% of women who reported unwanted touching or a combination of other forms of harassment changed jobs within two years, compared to 54% of women who did not experience harassment.

The Economic and Career Effects of Sexual Harassment on Working Women (May 10, 2017)

7

7

Lawmakers take action

- Every level of government
- Direct and indirect methods
- Aimed at employers
- New legislation enacted and proposed

8

8

Federal measures – stay the same

Title VII of the Civil Rights Act of 1964

- Continues to prevent discrimination on the basis of sex.
- Harassment is a form of discrimination.
- Prevents quid pro quo harassment and hostile work environment based on sex.
- Limited defenses when a supervisor is harasser.

9

9

Federal measures - enacted

Tax Cuts and Jobs Act of 2017: Effective 1/1/2018

Section 162(q): prohibits employers from deducting costs/fees for sexual assault and sexual harassment complaint settlements subject to non-disclosure agreements.

10

10

Federal measures - enacted

Congressional Accountability of 1995 Reform Act

Signed by Trump on December 21, 2018, the Reform Act amends the 1995 Act and revises dispute resolution procedures for certain claims by government employees who claim that their offices have violated their right to be free from sexual harassment. Members of Congress must reimburse treasury for damages.

11

11

Federal measures – proposed

H.R. 4495: Settlement Tax Deductions are Over for Predators Act (STOP Act)

No deductions for judgments/settlements originating from claims of sexual abuse or harassment.

12

12

Federal measures – proposed

H.R. 4729: Ending Secrecy About Workplace Sexual Harassment Act

Imposes additional EEO-1 disclosure requirements regarding sex discrimination and harassment settlements.

13

13

Federal measures - proposed

H.R. 4734/S. 2203: Ending Forced Arbitration of Sexual Harassment Act

Amends Federal Arbitration Act to invalidate predispute agreements requiring arbitration of sexual harassment or sex discrimination claims under Title VII.

14

14

State and local measures - enacted

Ten states enacted legislation addressing at least one aspect of sexual harassment in the workplace in 2018

California		Arizona		Illinois
			Vermont	
	Delaware			Washington
Tennessee			Georgia	
		Maryland		New York

15

15

State and local measures - enacted

California's New Measures

- SB 820: Prohibits NDAs in settlement agreements that include sexual assault, harassment, or discrimination claims.
- SB 826: Requires public companies with principle offices to have set number of women on the board of directors.

16

16

State and local measures - enacted

California's New Measures

- SB 1300: Prohibits employers from requiring release of claims under FEHA, non-disparagement agreement, or other agreement not to disclose unlawful employment acts in exchange for a raise, bonus, or condition of employment/continued employment.

17

17

State and local measures - enacted

California's New Measures

- SB 1343: Requires employers with five or more employees, including seasonal/temporary workers, to provide at least:
 - Two hours of sexual harassment training to all supervisors
 - One hour of training to all non-supervisory employees

18

18

State and local measures - enacted

New York

- Voids mandatory binding arbitration agreements applying to sexual harassment claims.
- Extends liability to employers who “permit” sexual harassment of “non-employees” (like contractors).

19

19

State and local measures - enacted

New York

- Requires NYSDOL and DHR to develop model prevention policies and training programs that meet specific criteria.
- All employers must adopt model harassment policy or develop one that is compliant.

20

20

State and local measures - enacted

21

21

State and local measures – not new

- Connecticut and Maine have preexisting harassment training requirements that were enacted in the early 1990s.
- All 50 states have at least some version of anti-discrimination statute that would likely also prohibit sexual harassment.

22

22

State and local measures - 2019

New Jersey

- No non-disclosure provisions for discrimination claims
- Employment agreement and settlement agreement

23

State and local measures - proposed

Massachusetts
Pennsylvania
Rhode Island
Virginia

Considering
proposed
legislation requiring
harassment training
for private
employers.

24

24

State and local measures - proposed

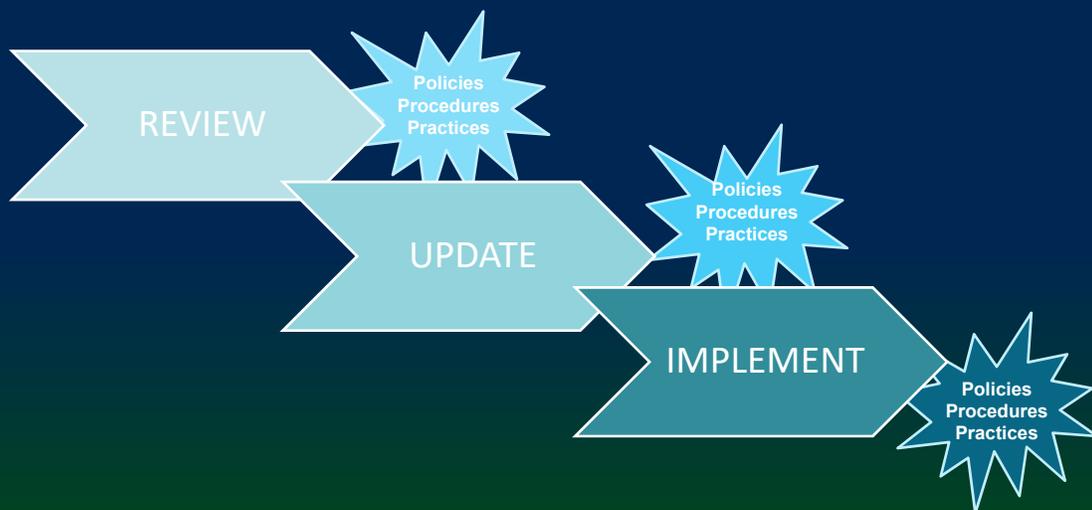
Alaska
Indiana
Kentucky
New Jersey
Virginia
South Carolina
Texas

Considering proposed legislation restricting or prohibiting arbitration and non-disclosure agreements for sexual harassment claims/allegations.

25

25

Now what?



26

26

Hiring

Consider asking applicants whether they have:

- been convicted of sex-related or assault harassment-related conduct.
- been disciplined for such conduct by an employer or licensing body.
- knowledge of facts that would result in embarrassment to the company if they are hired.
- been asked to leave a company.

27

27

{Hiring Side Note}

- Studies show that when men in leadership positions take sexual harassment seriously, so will the rest of the workforce.
- Studies also show that organizations with leadership and power shared across gender have lower incidents of harassment than those with a power disparity by gender.

28

28

Written policies

- Include clear anti-harassment statement*
- Description of prohibited conduct
- Examples of prohibited conduct*
- Include information about statutory provisions and remedies*
- Include that there may be applicable local laws*
- Include clear reporting mechanism
- Include complaint form*

* NY Requirement

29

29

Written policies, continued

- Description of investigation process: prompt, thorough, and impartial*
- Confidential to fullest extent possible*
- Employees encouraged to cooperate in an investigation
- Employer will take prompt, remedial action if needed*
- Anti-retaliation statement*
- Harassment is a form of employee misconduct*

30

30

Written policies, continued

- Posted in visible, central location
- Include in all languages commonly used by employees
- Reviewed periodically
- Given to new employees, redistributed periodically*
- Provide contact information for state/local agencies*

31

31

Training – best practices

- Supervisors and non-supervisors alike
- Interactive (in-person or online)
- Regularly scheduled at least every two years
- Employees sign-off on attendance
- “Respectful Workplace” Training

32

32

Training – practical best practices

- Senior leadership attends employee training
- Clear and easy to understand format
- In all languages regularly used by employees
- Tailored to workplace and workforce
- Conducted by qualified trainers
- Evaluated by participants

33

33

Agreements

- Employment Agreements
- Arbitration Agreements
- Settlement Agreements
- Confidentiality Agreements

Consider whether your various agreements include legal/appropriate provisions based on federal NDA law and applicable state law.

34

34

Conclusion

Over the next year, we will be watching the legislation develop in Indiana and elsewhere and will continue to provide our clients with strategies for developing compliant, consistent, and manageable anti-harassment policies and procedures.

35

35

Questions?

Thank you!

36

36