THE AFTERMATH OF #METOO

E VOLVING ISSUES

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The concept of using the phrase “#MeToo” to help empower survivors of sexual assault was actually started in 2006 by Tarana Burke, herself a survivor of sexual assault. At the time, she was starting a movement to help women and girls of color who had experienced sexual assault. She understood that the phrase had power as it helped the survivors realize they were not alone and could provide them with needed empathy and hope. In October 2017, the phrase became part of a viral movement when actress Alyssa Milano tweeted “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”

Since then, we have witnessed an explosion in public attention to, and debate concerning, sexual harassment in the workplace. Over the past several years, the U.S. Equal Opportunity Employment Commission ("EEOC") also has devoted substantial attention to this topic. In January 2015, the EEOC created a task force, comprised of 16 members throughout the United States, to study preventing harassment in the workplace, titled the EEOC Select Task Force on the Study of Harassment in the Workplace. In June 2016, the Select Task Force issued a report concerning preventing harassment in the workplace. In sum, the Select Task Force found: (1) workplace harassment remains a persistent problem; (2) that goes unreported; (3 a compelling business case exists for stopping and preventing harassment; (4) leadership and accountability are critical in stopping and preventing harassment in the workplace; and (5) new approaches to traditional, legal-focused training should be explored.

According to the EEOC, as a result of this report, the EEOC developed a training program called “Respectful Workplaces” that has been provided in over 200 training sessions to over 5,200 employees and supervisors in 18 states. In addition, the EEOC has conducted over 2,700 outreach events related to harassment, reaching approximately 300,000 individuals. In January 2017, the EEOC issued proposed enforcement guidance that was built on the findings in the report. Now, when you go to the EEOC website, there is a window that opens and provides you with the opportunity to sign-up for “EEOC news and information on harassment in the workplace.” In June 2018, the Select Task Force reconvened to hear from expert witnesses on “Transforming #MeToo Into Harassment-Free Workplaces.” In March 2019, the Select Task Force held an Industry Leaders Roundtable Discussion on Harassment Prevention. Nine association and industry group leaders who participated submitted written statements available for review at https://www.eeoc.gov/eeoc/task_force/harassment/3-20-19/index.cfm.

The recent, heightened focus on sexual harassment in the workplace appears to have led to an increase in what have been relatively stable rates of sex-based harassment filings with the EEOC. For example, in fiscal year (FY) 2015, there were 6,827 charges filed with the EEOC that alleged sex-based harassment complaints, resulting in $46M in monetary benefits paid to Charging Parties (outside of litigation). In FY 2016, there were 6,758 sex-based harassment charges filed with the EEOC, resulting in $40.7M in monetary benefits paid. In FY 2017, there were 6,696 sex-based harassment charges filed with the EEOC, resulting in $46.3M in monetary benefits paid. By contrast, in FY 2018, there were 7,609 sex-based harassment charges – a 13% increase over the average number of sex-based harassment charges from the past three fiscal years – resulting in $56.6M in monetary benefits paid – a nearly 28% increase in monetary benefits compared to the average amount paid in the past three fiscal years.

With the EEOC's renewed focus on harassment in the workplace, and with heightened media and public attention to complaints about workplace harassment, including harassment by individuals who occupy positions at or near the top of the organizational hierarchy, employers must be increasingly vigilant to ensure that their policies, practices, procedures and culture actively promote a respectful and legally compliant workplace.
I. State and Municipal Training Requirements & Recommendations

Although most employers provide some type of training about the company’s harassment policy to employees, it is important that all managers, including senior leaders and members of the C-suite, participate in training about the company’s policy, and about what they should do if they receive a complaint from an employee or otherwise become aware of behavior that violates the policy. Because there is no legal mandate that an employee use a specific term, for example, “sexual harassment” or “racial harassment” in order to inform his or her employer about a harasser in the workplace, managers often fail to recognize or adequately respond to a complaint. For example, an employee’s comment to her manager that another employee is bothering her, repeatedly touches her, or keeps staring at her might constitute a complaint or might be sufficient to put the manager on notice of unlawful conduct; however, managers often fail to recognize these types of complaints as anything more than just usual workplace gripes. Training managers at every level to recognize a complaint is especially important because in the case of co-worker harassment, “once an employer knows or should know of harassment, a remedial obligation kicks in.”

Lack of managerial training about how to recognize harassment complaints can lead to disastrous results for an employer. For example, in Gentry v. Export Packing Co., the plaintiff sued her former employer, alleging she was sexually harassed by her supervisor. Although the plaintiff admitted she never formally used the term sexual harassment when she complained, she did tell the company’s benefits coordinator in the human resources department that she “was uncomfortable with some of the discussions in the office and there was a lot of shoulder rubbing, touching, and interoffice dating.” The appeals court affirmed the jury verdict in favor of the plaintiff and stated that the plaintiff’s comments about feeling uncomfortable with touching and hugging in the office “should have raised suspicions.” The court further held that when an employee complains about this type of behavior, it “should be sufficient to alert an employer about a potential harasser, assuming the proper sexual harassment policy and training are in place.”

Given the high levels of employee turnover in today’s workplace, employers must remain constantly vigilant to ensure their senior leaders and managers are adequately trained on the dangers of harassment and about the importance of maintaining and promoting a respectful workplace. Providing live, interactive training to all new hires and annual harassment training for supervisors and managers is one way to ensure managers recognize a potentially protected complaint when they see one and understand their obligation to act. In today’s environment, it is also essential that senior leaders demonstrate a visible commitment to the company’s anti-harassment and respectful workplace initiatives.

The following is a current list of training requirements imposed by cities and states on private employers, as well as recommended training by state law or state enforcement agencies.

II. Overview of Required Sexual Harassment Training

California

California Governor Jerry Brown recently signed SB 1343 relating to sexual harassment training requirements. The new law amends Government Code Sections 12950 and 12950.1.

The law covers employers with 5 or more employees (including temporary or seasonal employees) and requires at least 2 hours of sexual harassment training for all California supervisory employees (we recommend that any supervisor, regardless of geographic location,
who has direct reports in CA be trained as well) and at least one hour of sexual harassment training for all California nonsupervisory employees by January 1, 2020, and once every 2 years thereafter. Supervisors must receive training within 6 months of hire or assuming a supervisory position.

In addition, beginning January 1, 2020, for seasonal and temporary employees, or any employee who is hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. In the case of a temporary employee employed by a temporary services employer, the training shall be provided by the temporary services employer, not the client.

The Department of Fair Employment and Housing will develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace, as specified, and post the courses on the department’s Internet Web site.

The training used by an employer must be “effective interactive training and education regarding sexual harassment,” abusive conduct and gender identity, gender expression, and sexual orientation. We recommend that the training also include training on preventing harassment of other protected categories (i.e., race, disability, religion, etc.). An employer who provides compliant training and education to an employee after January 1, 2019, is not required to provide training and education by January 1, 2020.

The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. The department shall provide a method for employees who have completed the training to save electronically and print a certificate of completion. Employers must provide sexual harassment prevention training in a classroom setting, through interactive E-learning, or through a live webinar. E-learning training must provide instructions on how to contact a trainer who can answer questions within two business days.

Specifically, the training must cover the following topics:

- The definition of sexual harassment under the Fair Employment and Housing Act and Title VII of the federal Civil Rights Act of 1964;
- The statutes and case-law prohibiting and preventing sexual harassment;
- The types of conduct that can be sexual harassment;
- The remedies available for victims of sexual harassment;
- Strategies to prevent sexual harassment;
- Supervisors’ obligation to report harassment;
- Practical examples of harassment;
- The limited confidentiality of the complaint process;
- Resources for victims of sexual harassment, including to whom they should report it;
- How employers must correct harassing behavior;
- What to do if a supervisor is personally accused of harassment;
- The elements of an effective anti-harassment policy and how to use it;
- “Abusive conduct” under Government Code section 12950.1, subdivision (g)(2);
- A discussion of harassment based on gender identity, gender expression, and sexual orientation, including practical examples of harassment based on gender identity, gender expression, and sexual orientation.

Finally, the training must include questions that assess learning, skill-building activities to assess understanding and application of content, and hypothetical scenarios about harassment with discussion questions.

**Connecticut**

Is Training Required? Yes, for supervisors.

Required content: Supervisory sexual harassment training must include specific detailed information, including federal and state laws regarding sexual harassment, the state law definition of sexual harassment, the types of conduct that constitute sexual harassment under the law, remedies available in sexual harassment cases, advise employees that sexual harassers can be subject to civil and criminal penalties, and strategies for preventing sexual harassment in the workplace (see citation below for detailed requirements).

Frequency: Within six months of assuming supervisory duties. While not required by law, the regulations "encourage" employers to provide enhanced/updated training to supervisors every 3 years.

Duration: Two hours

Format (e.g., live, video, web-based): Supervisory training must be provided in a classroom-like setting with the opportunity for participants to ask questions. As to whether some form of e-learning training will satisfy the training requirement, the CHRO has advised that "so long as an e-learning program otherwise satisfies the statutory and regulatory requirements [of § 46a-54-204(c)(1) and (2)], and provides an opportunity for students to ask questions and obtain answers in a reasonably prompt manner, then such a program does comply with our statutes and regulations." Thus, provided “an individual from Human Resources [is available] to answer questions based on the program” or that employees can post questions to an electronic bulletin board, which would be answered promptly,” an e-learning platform can be used.

Who must receive (e.g., all, rank and file, supervisors, etc.): Supervisory employees of employers with 50+ employees in Connecticut.

Recordkeeping: Employers are "encouraged" to maintain training records for at least one year.

Any other relevant information: N/A

Citation (statute, regulation, case name): Conn. Gen. Stat. § 46a-54(15)(B); Conn. Reg. Sec. 46a-54-204; May 19, 2003 CHRO Opinion Letter (regarding e-learning)

**Delaware**

Is Training Required? Yes, for all employers with 50 or more employees who are located in or doing business in Delaware.

Mandatory notices to employees: The new provisions direct the Delaware Department of Labor to create an information sheet on sexual harassment. Employers are required to distribute the
sheet to new employees when they begin employment, and to current employees within six months of the effective date (six months from January 1, 2019, or May 31, 2019). Failure to provide the notice will not “in and of itself result in liability” in a sexual harassment action. The notice requirement presumably applies not only to regular employees, but also to unpaid interns, joint employees, and apprentices.

Mandatory training for non-supervisory employees: The training must be interactive, and must cover the following topics: (1) that sexual harassment is illegal; (2) the definition of sexual harassment, including examples (see definition below— it matches Title VII); (3) “[t]he legal remedies and complaint process available to the employee”; (4) “[d]irections on how to contact the [state] Department [of Labor]”; and (5) retaliation. The training must be given to new employees within a year of the start of employment, and every two years afterward. Training for current employees must be given within a year of the effective date of the legislation (or no later than December 31, 2019), and every two years afterward.

The definition of “sexual harassment” under H.B. 360 is identical to that under the regulations interpreting Title VII of the Civil Rights Act of 1964:

[Un]welcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an employee’s employment;
2. submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or
3. such conduct has the purpose or effect of unreasonably interfering with an employee’s work performance or creating an intimidating, hostile, or offensive working environment.

Supervisors: In addition to the subjects that must be covered with non-supervisory employees, employers must provide interactive training to supervisors that addresses: (1) “the specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment”; and (2) retaliation. The training must be given to new supervisors within a year of them taking a supervisory position and every two years afterward. Existing supervisors must receive training within one year of the effective date of the legislation (or no later than December 31, 2019), and every two years afterward.

“Supervisor” under the amendments means much more than front line supervisors, and includes any “individual that is empowered by the employer to take an action to change the employment status of an employee or who directs an employee’s daily work activities.”

Employers who provide (or provided) training that meets the requirements of the law before January 1, 2019 will not be required to provide any additional training until January 1, 2020.

In determining whether an employer meets the 50-employee requirement for the training provisions, applicants and independent contractors are not counted. Employers are not required to provide sexual harassment training to applicants, independent contractors, or employees who have been employed for less than six continuous months. Employees of employment agencies do not have to be trained by the “client” employers. The agencies are responsible for conducting their training.
**Louisiana**

New law only applies to state agencies and governmental employees.

**Maryland**

Is Training Required? No, but the Maryland Commission on Human Relations will likely consider whether an employer provides training a factor in deciding the outcome of cases.

Required content: Not specified

Frequency: Not specified

Duration: Not specified

Format (e.g., live, video, web-based): Not specified. Since there is no specific training requirement, it appears that a quality e-learning program can be used.

Who must receive (e.g., all, rank and file, supervisors, etc.): Not specified

Recordkeeping: Not specified

Any other relevant information: N/A

Citation (statute, regulation, case name): N/A

**Maine**

Is Training Required? Yes, for all employers with 15 or more employees who are located in or doing business in the state of Maine must train all employees about sexual harassment within a year of the beginning of their employment. Supervisors and managers must receive additional training within one year of assuming their positions.

Required content: Training must encompass: (1) the definition and illegality of sexual harassment under state and federal laws; (2) examples of sexual harassment; (3) the employer’s complaint process; (4) legal recourse and complaint process through the Maine Human Rights Commission; (5) directions on how to contact the Commission; and (6) the protection against retaliation. In addition to the subjects that must be covered with non-supervisory employees, employers must provide interactive training to supervisors that addresses, at a minimum: (1) the specific responsibilities of supervisory employees; and (2) steps supervisors must take to ensure immediate and appropriate corrective action is taken in response to sexual harassment complaints.

Sample Maine language to include in training and practice notes:

Please find below sample language for compliance with the sexual harassment training requirement in Maine, specifically concerning “the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation as provided under Title 5, section 4553, subsection 10, paragraph D.” Note: Local practitioners normally place this section following the internal complaint procedure for reporting harassment, with emphasis on taking advantage of the internal procedure first.
Legal Recourse – Maine Human Rights Commission
An employee who believes that he or she has been subjected to unlawful harassment may file a complaint with the Maine Human Rights Commission (MHRC). The MHRC is the state agency that receives and investigates complaints of unlawful harassment and discrimination in employment, and may pursue a remedy in court when alternative resolutions, such as mediation, have failed.

MHRC Complaint Process
A complaint of sexual harassment may be initiated by writing or visiting the office of the Maine Human Rights Commission at 51 State House Station, Augusta, Maine 04333 or by calling 207-624-6290. An Electronic Intake Questionnaire may be completed and submitted online at www.main.gov/mhrc.

Retaliation is Prohibited
The Maine Human Rights Act prohibits retaliation against any employee because of the filing a complaint with the MHRC, or participating in an investigation of harassment. This protection extends to any good-faith complaints, even if the investigation does not result in a finding of illegal harassment. Any employee who retaliates against another employee who complains about harassment will be disciplined, including and up to discharge.

Citation: 26 Me. Rev. Stat. § 807(3)

Massachusetts

Is Training Required? No, but it is “encouraged” by statute.

Required content: None, because it is a not a requirement. However, trainings are encouraged to have: (1) a description and examples of sexual harassment; (2) a statement of the consequences for employees who commit sexual harassment; (3) a statement that sexual harassment in the workplace is unlawful; (4) a statement prohibiting retaliation against those who report sexual harassment; (5) a description of the process of filing internal complaints; and (6) the identify of state and federal employment discrimination agencies and directions for how to contact those agencies. Trainings for supervisory employees are also encouraged to contain: (1) the specific responsibilities of supervisory employees in combatting sexual harassment; and (2) the steps supervisors should take to ensure immediate and appropriate corrective action in addressing complaints.

Frequency: within one year of commencement of employment for new employees.

Duration: Not specified

Format: Not specified

Citation: Mass. Gen. Laws Ch. 151B, Sec. 3A

New York

Employers must implement a compliant training program, which all employees (including part-time, temporary, and transient employees, etc.) must complete by October 9, 2019 (the initial draft FAQs from the NYSDOL required the first training to be completed by January 1, 2019).

Citation: Mass. Gen. Laws Ch. 151B, Sec. 3A
• New employees are required to be trained “as quickly as possible” (the initial draft FAQs required training to be completed within 30 days of hiring).

• Employers are not responsible to train third-party vendors or other non-employees who interact with an office location New York State.

• Only employees who work or will work in New York need to be trained. However, if an individual works any portion of their time in New York State, even if they are based in another state, they must be trained.

Training must be “interactive”, which can include:

• If the training is web-based, (i) questions at the end of a section and the employee must select the right answer; or (ii) the employees are given an option to submit a question online and receive an answer immediately or in a timely manner.

• If training is in-person, the presenter asks the employees questions or gives them time throughout the presentation to ask questions.

• If web-based or in-person, a Feedback Survey for employees to turn in after they have completed the training.

• However, an individual watching a training video or reading a document only, with no feedback mechanism or interaction, would NOT be considered interactive.

• The minimum standards require that a compliant sexual harassment policy includes a written complaint form. The FAQs clarify that the complaint form need not be included in full in the policy. However, employers should be clear where the form may be found, for example, on a company’s internal website.

In lieu of adopting the state’s model policy and training, the company may elect to: (1) ensure that the company’s existing policy and training program meets or exceeds the state’s required minimum standards; or (2) modify the state’s model policy and training to reflect the work of your organization and industry specific scenarios or best practices. Of course, given the impending deadline of October 9, 2019, it is of critical importance to ensure that the company’s anti-harassment policy is compliant.

**New York City**

Under NYC Local Law 96 of 2018, employers with 15 or more employees are required to conduct annual anti-sexual harassment training for all employees. Effective April 2019, employers have one year to implement the training for all employees and must ensure all employees are trained annually thereafter. The NYC Human Rights Commission will develop and share an online training to be available on its website that will satisfy this requirement in the coming months. Employers may also choose to provide their own annual anti-sexual harassment training for employees provided that it includes the following elements:

• An explanation of sexual harassment as a form of unlawful discrimination under local law;

• A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;

• A description of what sexual harassment is, using examples;

• Any internal complaint process available to employees through their employer to address sexual harassment claims;

• The complaint process available through the Commission, the New York State Division of Human Rights and the United States Equal Employment Opportunity Commission, including contact information;
- The prohibition of retaliation including examples;
- Information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
- The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.

**Oregon**

Law only applies to state agencies/legislature.

**Rhode Island**

Is Training Required? No, but it is “encouraged” by statute.

Required content: Not specified

Frequency: within one year of commencement of employment for new employees.

Duration: Not specified

Format: Not specified

Citation: R.I. Gen. Laws § 28-51-3

**Vermont**

Is Training Required? No, but it is “encouraged” by statute.

Required content: None, because it is a not a requirement. However, trainings are encouraged to have: (1) a description and examples of sexual harassment; (2) a statement of the consequences for employees who commit sexual harassment; (3) a statement that sexual harassment in the workplace is unlawful; (4) a statement prohibiting retaliation against those who report sexual harassment; (5) a description of the process of filing internal complaints; and (6) the identify of state and federal employment discrimination agencies and directions for how to contact those agencies. Trainings for supervisory employees are also encouraged to contain: (1) the specific responsibilities of supervisory employees in combatting sexual harassment; and (2) the steps supervisors should take to ensure immediate and appropriate corrective action in addressing complaints.

Frequency: within one year of commencement of employment for new employees.

Duration: Not specified

Format: Not specified

Citation: 21 Vermont Stat. Ann. § 495h.
The Aftermath of #MeToo—Evolving Issues

Presenters
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Internal Effects of #MeToo

- Internal concerns
  - Increase in numbers?
  - Who are the accused?
  - New and varied complaint mechanisms?

- Handling of complaints
  - Due process
  - Interim remedial action(s)

- Consequences of inappropriate conduct
Required/Recommended Training

Training Update

Preventive Measures – Respectful ... right?
- The “Zig Zigler Rule”
  - Refusing private meetings with opposite sex?
  - No individuals in office before 7am or after 7pm?
  - No car rides with opposite sex?
- NO EMPLOYEE SHOULD EVER BE SUBJECTED TO DISPARATE TREATMENT BASED ON THEIR PROTECTED CHARACTERISTIC(S)
  - Purportedly “protective” and short-sighted personal rules like the “Zig Zigler Rule” are unacceptable and will not be tolerated.
  - “Due process” under policy and practice.
Training Update – Bystander Intervention

Know How & When To Intervene

- “That conduct is not appropriate.”
- “Knock it off.”
- “I find that offensive.”
- “I can call HR to ask about that choice of words, if you’d like?”
- Know your language in advance – your day will come.
- Intervene on the spot to communicate the unacceptable nature of behavior – do not delay.
- Follow-up afterwards as well and escalate as needed.
- If you misstep, be accountable.

Time’s Up Legal Defense Fund

- Created January 1, 2018
- $22 million raised from 21,000 contributors
- Help pay legal fees and costs
- Media and storytelling process support
- 3,755 individuals in contact
- 800 attorneys in network
- 75 cases funded; 35 receiving media support
Who is reaching out?

- Women of color = 37%
- Women ages 40-64 = 57%
- Women identifying as LGBTQ = 10%
- Women identifying as low income = 68%
- Largest industry sectors
  - Arts & Entertainment = 11%
  - Healthcare = 8%
  - Retail = 5%

Effect of #MeToo on Judges and Juries
Nondisclosure & Arbitration Legislation

- Enacted/pending legislation
  - Prohibiting NDAs for claims involving harassment allegations and others
  - Payments for harassment claims not tax deductible if there is an NDA (including attorneys’ fees)

- Employer responses
  - Carving harassment claims out of arbitration agreements
  - Ending arbitration altogether

Pay Disparity & Harassment Intersection
What’s Next?

- March 20, 2019 Industry Leader/EEOC roundtable; ongoing feedback?
- Select Task Force Guidelines issued?
- Joint employer liability addressed?

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