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Me Too - Meaningfully Responding to Sexual Harassment Accusations in the Wake of the Weinstein Scandal



Presented by:

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- Numerous allegations of sexual misconduct against other powerful men in Hollywood, media, business and in the current White House
- Well known businesses and organizations have fired or suspended male executives who have been accused of harassment – aka “noisy terminations”
- Breaking news in many instances is “old news”



And then the skies turned

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Stormy....

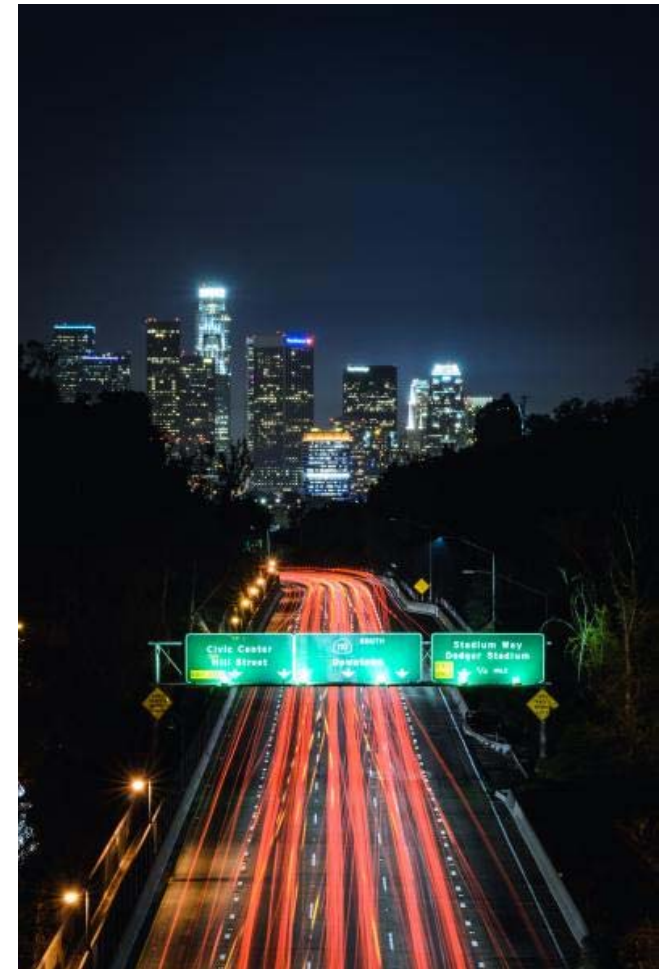
- Non-disclosure agreements under fire
 - March 6, 2018 – Stormy Daniels/Stephanie Clifford files suit against Donald Trump and others, seeking to invalidate the non-disclosure aka “Hush Agreement”
 - March 20, 2018 – Karen McDougal files suit accusing the National Enquirer’s owner of colluding with her then-lawyer to force her to sign a non-disclosure agreement

Universal impact

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Claims made in all industries:

- Entertainment
- Legal
- Government
- Hospitality
- Agriculture
- BIOCOM
- Technology



Results show a significant % of those polled felt they had been sexually harassed

- Differences in age and gender

Then ...

- 1 in 3 women ages 18-34 have been sexually harassed at work - 71% of those women said they did not report it

- Source: Cosmopolitan survey of 2,235 full and part-time employees. (2015)

Now ...

- Nearly half of working women in U.S. say they have experienced harassment in the workplace.

- Source: NBC News (2017) "NBC/WSJ Poll: Nearly Half of Working Women Say They've Experienced Harassment."



Private Plaintiffs Stepping in as Government Shrinks

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- Per EEOC Commissioner, Victoria Lipnic, on March 13, 2018
 - EEOC charges for sexual harassment are stagnant
 - However, the number of private suits and threats of same are on the rise; insurance companies reporting same
- Federal government shrinking
- Funding to equal rights agencies decreasing
- State initiatives filling some of the gap



Viral Hashtags: #MeToo/#Time's Up

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The Movement Has Already Evolved

- Focus NOW on solving the problem

Time's Up Legal Defense Fund

- \$21,043,145 raised so far by 19,765 people in two months
- Donations from \$5 on up



Time's Up Legal Defense Fund

- Time's up on silence
- Time's up on waiting
- Time's up on tolerating discrimination, harassment and abuse



Consider how we got here

- Delay in complaints, why?
- Inherent conflict with the HR department –is department’s job to protect the company or the employee?



Proposed legislation on the horizon... Buchalter

- Ending Forced Arbitration of Sexual Harassment Act
 - Bipartisan bill sponsored by Senators Kirsten Gillibrand (D-NY) and Lindsay Graham (R-SC) proposes to invalidate mandatory employment arbitration for gender-based harassment and discrimination claims.
- Comparable legislative movements exist in New York, California, New Jersey, and several other states
- Similar action happening in corporate America - Microsoft announced in December of 2017 that it was waiving the contractual requirement for the arbitration of sexual harassment claims in its arbitration agreements
- EEOC Sexual Harassment Guidance is anticipated to be issued soon

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Other Proposed Changes in the Law **Buchalter**

- Potential to void existing confidentiality restrictions in settlements
- Prohibit confidentiality requirements in settlement agreements
- Prohibit non-disparagement restrictions
- Expand statutes of limitations
- Void arbitration clauses
- Expansion of what is considered a workplace safety and/or health hazard under Cal OSHA/OSHA



Other Proposed Changes in the Law **Buchalter**

(cont.)

- Expansion of prohibited conduct including “abusive” workplace environments
- Eliminate damages caps on employment discrimination claims
- Eliminate use of public funds to pay damages in harassment cases
- Create independent whistleblower process
- Expanded individual liability for harassers

What's Next?

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- Do you wait to see if the tsunami passes?
OR
- Is it time for a candid review and, if need be, reconciliation?



What does your policy say?

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- Do you encourage whistleblowing?
 - Set the tone
 - Train the right way



- Complaint mechanism
 - Go back and review your policy
 - CA requires specific provisions for sexual harassment; on a national scale, consider the same

What does your training look like?

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Evaluate current training practices

- Who provides the training?
- Who gets the training?
- How often?
- What setting?
- Any follow-up?



What does your structure imply?

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Evaluate your structure and leadership

- Do employees communicate effectively?
- Is your organization genuinely receptive to reports?
- Is it responsive to claims?
- Does your organization conduct appropriate investigations?
- Does it take appropriate remedial action at all levels?



What is in your claims history?

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Review your claims and settlement history

- Internal reports, charges and lawsuits
- How were claims settled?
- Do you have a history of buying silence?
- Do you have repeat offenders?
- Are there particular circumstances under which harassment has occurred?
 - Events at hotels with alcohol
 - Sales conferences
 - Late night projects, etc.



New development on sexual harassment settlements

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- Under the Tax Cuts and Jobs Act, effective 12/1/17, *if a business imposes a non-disclosure agreement*, it can no longer deduct as a business expense:
 1. Any settlement or payment related to sexual harassment or abuse; OR
 2. Any attorney's fees related to any settlement or payment for sexual harassment or abuse.

What are your investigation protocols?

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Why are investigations so important?

- Support “honest belief” defense
 - CA – “good faith belief”
- Limit punitive/liquidated damages
- Support *Faragher/Ellerth* affirmative defense
- Avoid litigation
- Improve morale

and

- Uncover the truth!



- Federal and state discrimination laws impose a duty to investigate employee-related complaints
- Federal and state safety laws impose duty to investigate accidents and safety violations
- Whistleblower laws impose duty to conduct investigation based on allegations of wrongdoing



Assess the Complaint

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- Ask for the complaint in writing
 - This will help guide investigation and help pin down the facts early on
- Does the complaint deserve a full investigation?
- Does the complaint merely require employee relations or other limited response?
- Important initial step – interim remedial action?
 - Ensure no impact/minimize on the Complainant



Who should investigate?

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- Internal
 - HR
 - Legal
 - Internal audit
 - Security
 - Compliance
- External
 - Outside counsel
 - Accountants
 - HR consultants
 - Security personnel?

WHAT DO YOU CALL AN
ALLIGATOR IN A VEST?



AN INVESTIGATOR.

Attorney Client Privilege and Waiver **Buchalter**

- No privilege for non-attorney's investigation
- Good investigation cannot be a “sword and shield”
- Attorney's investigations may be discoverable if the investigation is defense, or critical, to liability
- Attorney investigator may be witness in resulting litigation
- May result in attorney being conflicted from representing the company in litigation



Elements of a “Good” Investigation Buchalter

- Each investigation is different
- Some key factors:
 - Prompt
 - Impartial investigator
 - Thorough
 - Well documented
 - Establishes facts, not conclusions
 - Confidentiality is protected (to the extent possible)
 - Results communicated to complainant and accused
 - Effective remedial action
 - Retaliation warnings

How not to respond to a complaint Buchalter

- Blame the Complainant
- Send in general counsel to investigate
- Fail to take disciplinary action against harasser
- Wait and see approach
- Retaliating, or otherwise taking adverse action against the Complainant



What's next?

Consider new programs

- Internal vs. external resources for reporting
- 360 reviews
- Surveys
- Progressive internal resolution programs
 - Binding vs. nonbinding
 - Complaint, mediation, arbitration

- Ensure your business provides a welcoming environment
 - Foster true mentors
 - Interactive dialogues
 - Avoid witch hunt mentality
- Zero tolerance
 - What does it truly mean
 - Is it realistic?
 - React to all claims
 - Perform a complete and proper investigation
 - Impose discipline where necessary

- Foster productive working relationships
 - Avoid the “I won’t go to dinner with women” response
 - Avoid the “I will only go out with women colleagues if I have an equal number of men”
- Recognize that men need to be supported and not just blamed

Questions?

Join us for our next webinar in this series:

May 23, 2018, 12-1 pm Pacific

Equal Pay for Equal Work: How to Ensure Your Company is in Compliance

Special contribution from
Emily Howe, Portola Advisors

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