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After #metoo and TIME'S UP comes 'What's Next?' – Steps to Preventing, Handling, and Correcting Sexual Harassment and Gender Inequality in the Workplace

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Does Training Work?  

- In June 2016, the EEOC's Select Task Force on the Study of Harassment in the Workplace failed to find any evidence that the past 30 years of corporate training has had any effect on preventing workplace harassment;
- EEOC Commissioner Victoria A. Lipnic states at the 2016 SHRM Conference, "That was a jaw-dropping moment for us."

Why Doesn't Training Work?  


- Most statutory training focuses on how to not engage in unlawful harassment
- Too much legal mumbo jumbo: *quid pro quo*, hostile work environment, severe and pervasive, disparate treatment ...
- Most incidents of inappropriate conduct do not amount to the legal standard
- Organizations are fearful of liability and "lawyers up" when allegations occur, thereby benefitting the perpetrator

Why Doesn't Training Work?




- Current California law requires the following components in supervisory training (see Gov't Code § 12950.1):
 - A definition of unlawful conduct under FEHA and Title VII of the Civil Rights Act of 1964.
 - FEHA and Title VII provisions and case law principles concerning the prohibition against and the prevention of sexual harassment, discrimination and retaliation in employment.
 - The types of conduct that constitute sexual harassment.
 - Remedies available for sexual harassment victims in civil actions and potential employer or individual liability.
 - Strategies to prevent sexual harassment in the workplace.
 - An explanation about the limited confidentiality of the complaint process.
 - Practical examples that illustrate sexual harassment, discrimination and retaliation.
 - Resources for victims of harassment.
 - The employer's obligation to conduct an effective workplace investigation of a harassment complaint and take remedial measures to correct harassing behavior.
 - A supervisor's obligation to report any complaints of sexual harassment, discrimination and retaliation of which they're aware to a designated corporate representative, such as a human resource professional, so the employer may try to resolve the claim internally.
 - How to prevent abusive conduct.
 - What the supervisor should do if he or she is personally accused of harassment.
 - The essential elements of an anti-harassment policy, and how to use it if a complaint is filed.

What About Policies?



- Nearly every U.S. organization has a sexual harassment policy (94% have policies), according to SHRM
- How many employees actually read and understand your organization's sexual harassment policy?
- Does it address the "gray areas"?
- Is it full of legalese?
- Is the complaint procedure clear?



What About Policies?



"Clearly the problem is bigger than policy; it's a matter of culture. This is where HR can do more. *This is where HR must lead.*"

Johnny C. Taylor, Jr.
President and CEO, SHRM



The “Yolo” Case

Zetwick v. County of Yolo,
No. 14-17341 (9th Cir. 2017)



- Sheriff hugged plaintiff regularly at least 125 times plus at least one unwelcome kiss from 1999 to 2012
- Sheriff also hugged and kissed 12+ other female employees but not male employees

The “Yolo” Case

- County maintained that the ‘conduct was not objectively severe or pervasive enough to establish a hostile work environment, but merely innocuous, socially acceptable conduct.’”

The “Yolo” Case

- County’s bio states that Sheriff Prieto runs “an organized and well run department” and he is “is married to retired California Highway Patrol Deputy Commissioner Ramona Prieto and boasts of being the father of five daughters and eight grandchildren.”

The "Yolo" Case

- Sheriff Prieto's "leadership has impacted every level within the Sheriff's Office, as well as the community at large", has "great respect and dedication to Yolo County residents", and serves "in a noble and honorable fashion" ...



The "Yolo" Case

- The Ninth Circuit disagrees and ruled, "A reasonable juror could find ... from the frequency of the hugs, that [the sheriff]'s conduct was out of proportion to 'ordinary workplace socializing' and had, instead, become abusive."

Are Men Too Powerful, or Too Invincible?



- Rep. Trent Franks, R-Ariz, resigned after a member of his staff alleged he asked her to carry his child in exchange for \$5 million

Are Men Too Powerful, or Too Invincible?



- UC Regent Norman J. Pattiz resigns amid offensive remark
- Pattiz asked Comedian Heather McDonald, “May I hold your breasts? Would that help?”
- All regents are now required to take sexual harassment training

Are Men Too Powerful, or Too Invincible?

- Bay Area Station KNBR radio personality, Patrick “P-Con” Connor was fired after stating, “She’s fine as hell! If she was 18, you wouldn’t be ashamed to say that she’s a little hot piece of ass. And she is. She is adorable. I’m a huge Chloe Kim fan.”
- He apologized later explaining “in a weird attempt to make people laugh I failed.”

Are Men Too Powerful, or Too Invincible?

- Ninth Circuit Court of Appeals Judge Alex Kozinski retired amid allegations of sexual harassment – comments about having just had sex, pinching a female’s side and leg, grabbing breasts, offering to go to a hotel to have sex, kissing on the lips, bear hugging with no warning, showing junior staff pornography;
- Ninth Circuit has opened a misconduct inquiry;
- “I’ve always tried to treat my male and female clerks the same”, said Kozinski.

Are Men Too Powerful, or Too Invincible?



“Sexual harassment is often a manifestation of power. The supervisor has the power over the employee and can effectively demand that the employee tolerate sexual advances – or worse – or tolerate a hostile working environment.”

Janice R. Bellace
Wharton Professor of Legal Studies
and Business Ethics

Washington Post-ABC Poll



Sharp increase in Americans who say sexual harassment of women in the workplace is "serious problem"

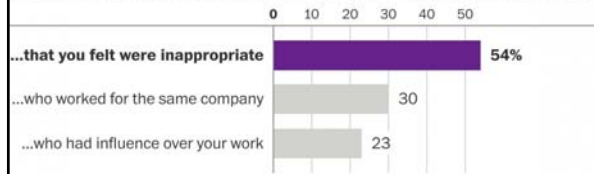


Washington Post-ABC Poll



Over half of women cite unwanted sexual advances from a man, including 3 in 10 from a coworker

AMONG WOMEN) Q: Have you ever received unwanted sexual advances from a man...



Source: Oct. 11-15 Post-ABC News poll with error margin of 4 points among national sample of 740 women.

Washington Post-ABC Poll



- 31% of women have experienced unwanted sexual advances from male co-workers
- 23% were by men who had influence over their jobs
- 33% were sexually abused
- 42% reported the inappropriate behavior
- 95% of the men went unpunished

2015 Cosmopolitan Survey

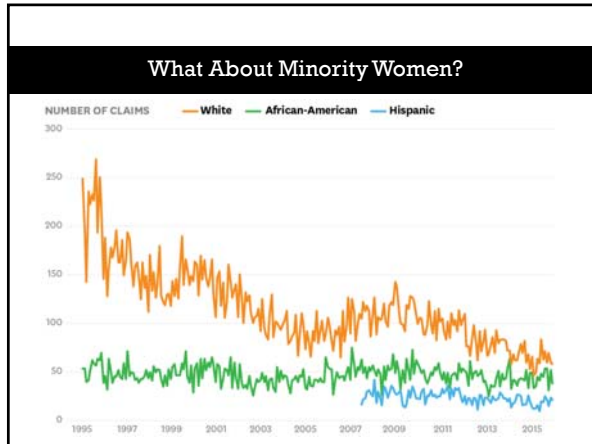


- Survey sample: 2,000
- 33% of women between ages 18 to 34 had been sexually harassed at work
- 71% did not report the harassment

EEOC – 40% Decline in Harassment?



- According to EEOC data, in 1997, the agency received 16,000 complaints about sexual harassment;
- In 2017, that figure fell to 9,000 -- a drop of more than 40% in 20 years



#WhatAboutUs?

The New York Times



How Tough Is It to Change a Culture of Sexual Harassment? Ask Women at Ford (2017)

<https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>

Quid Pro Quo?



“I was propositioned. I slept with him because I needed my job. I had small children. The mindset and mentality of that environment is that this is the best thing you have ... the best thing you'll ever have. You don't want to lose them. Where else are you going to go and make this kinda money?”

VICTIM # 1

Severe and Pervasive?  



“He talked about his penis ... all of 10 to 12 inches of penis ... offering that to another lady on the line as well. The lady came and told me what he said. He knew she told me ... When he got into the car and drove off the lot, I was next to drive down. He looked at me and said, ‘You know you can have some of this too.’”

VICTIM # 2

Hostile Work Environment?  

“He texts me messages – ‘Come over here right now ... take a picture of your boobs for me ... get over here.’ I told him no every time. He kept on going with it. When he sees me at work, he comes over to the line and presses his penis up on my booty. And he goes ‘Oh, my wife gets my whole paycheck, but she does not have sex with me.’”

VICTIM # 3

The “Investigation”?  

“I wrote up a statement and complaint. I put it on paper and turned it in ... It took a while, but they called me back a few times. They wanted to talk about it. Then they told me one day, ‘Oh it's been investigated and it's closed. And we can't discuss the outcome or anything.’ So to me, I felt like it was swept under the rug ... and, I don't know if he was ever reprimanded, but I witnessed him do it to someone else after I filed a complaint.”

VICTIM # 4

Union Involvement?



“The union, they really didn’t want us to call the hotline. It was going to close the plant. And the Union told me, ‘Terri, if I was you, you need to stop with the complaint ... Stop going to labor relations or you're gonna make a name for yourself.’ I asked them, ‘What’s that?’, and they said, ‘A troublemaker.’ Then a troublemaker I shall be.”

VICTIM # 5

Company Apology?



“On behalf of myself and the employees of Ford Motor Company, who condemn such behavior and regret any harassment as much as I do, I apologize. More importantly, I promise that we will learn from this and we will do better.”



JIM HACKETT
President and chief executive of Ford

#WhatAboutUs?





- Ford Motor Company failed twice in tackling sexual misconduct at two Chicago plants
- \$22 mil. settlement with EEOC in 1990s
- \$10 mil. in August 2017; at least 100 women received payments
- Leadership, HR, and Union failed
- Women proposed a new campaign: #WhatAboutUs



A Summer of #metoo Legislation (California)

Assembly Bill 1867 (CA)  



- Add Government Code section 12950.5 to Fair Employment and Housing Act (FEHA)
- Would require employers of 50 or more employees to maintain internal records of complaints alleging sexual harassment for five years after the date the complainant *or* any alleged harasser leaves the company – whichever date is later.

Assembly Bill 3109 (CA)  



- Would void any contractual provision that waives a party's right to testify about criminal conduct or sexual harassment by the other contracting.

Senate Bill 1300 (CA)  

1. Would amend FEHA by expanding an employer's potential liability;
2. Prohibit a release of claims under FEHA or a nondisclosure agreement (with certain exceptions) in exchange for a raise or a bonus or as a condition of employment or continued employment; and,
3. Prohibit a prevailing defendant from being awarded fees and costs in certain circumstances.

Assembly Bill 3080 (CA)  

- Would outlaw mandatory arbitration agreements between businesses and employees or independent contractors, and thus ensure that harassment complaints get aired in public lawsuits instead of private arbitrations. Further, AB 3080 would prohibit any contractual rule against disclosing instances of sexual harassment.

Assembly Bill 1870 (CA)  

- Would extend the period to file an administrative charge with the DFEH alleging an unlawful employment practice under the FEHA. The current deadline is one year from the time the alleged incident. AB 1870 would extend the deadline to three years.

Assembly Bill 3802 (CA)



- Would require the state Department of Social Services to develop or identify educational materials addressing sexual harassment of in-home supportive services (IHSS) providers, develop or identify a method to collect data on the prevalence of sexual harassment in the IHSS program, and provide a summary of those items to the Legislature by September 30, 2019.

Senate Bill 1038 (CA)





- Would impose personal liability under FEHA for retaliating against a person who has filed a complaint against the employee, testified against the employee, assisted in any proceeding, or opposed any prohibited practice.

Senate Bill 1343 (CA)





- Would expand sexual harassment prevention training requirements to employers with five or more employees and would require that Department of Fair Employment and Housing (DFEH) materials be made available in multiple languages.

Senate Bill 820 (CA)



- Would void provisions in settlement agreements that prevent the disclosure of facts relating to sexual assault, sexual harassment, sex discrimination, and failure to prevent sex-based harassment and discrimination.

EEOC v. Costco Wholesale Corp., No. 17-2432 (7th Cir., Sept. 10, 2018)






- 7th U.S. Circuit Court of Appeals has upheld a ruling for a former Costco employee who brought a hostile work environment claim;
- Court finds that harassment need not be "overtly sexual" to constitute actionable discrimination under Title VII of the 1964 Civil Rights Act;
- Whether a workplace is hostile is determined "based on 'all the circumstances' of a case" rather than a separate analysis of each incident.



10 Tips and Strategies

Strategy # 1: Reimagine Training  

- Minimize the use of legalese; use real words
- Select a committed, passionate trainer
- Promote respectful workplace – no leering, patting, joking, innuendo, kissing, improper gestures, touching, hugging (?), etc.
- Define the “gray” and reset the cultural norm
- Avoid offensive comments – better left unsaid
- Open up dialogue to promote understanding among genders, races, religions, etc. as people



Strategy # 1: Reimagine Training  

- Learn from the power of storytelling – consider the Ford stories
- Poll the audience to personalize the training and highlight what *actually* happens at work
- A picture is worth a thousand words – show the humans who have been victimized
- Empower the audience and seek their ideas, input, solutions
- Engage men in the conversation



Words of a Victim  

“Every time I would have a new instance of something new sexual happened, because I’ve already seen the ramification of saying anything, I would stand there and take it. And then each time I would take it again and again, it just felt like more of me diminishing, just getting smaller until it was just a shell of a person.”



VICTIM # 6

Strategy # 1: Reimagine Training  

- Include Implicit/Unconscious Bias Training (examples below)
 - “A man’s competence is more likely to be presupposed, a woman’s question.” Beyond the Double Bind - Kathleen Hall Jamieson
 - 63% of women were asked by court workers if they were attorneys
 - American Sociological Review 2016 study shows male candidate was three times more likely called to an interview than females for attorney positions

Strategy # 1: Reimagine Training  

- Include Implicit/Unconscious Bias Training (examples below)
 - “he-peating” – when a man simply repeats a woman’s idea, it is accepted with authority
 - Studies show women are penalized more than men when asking for a salary increase

Strategy # 1: Reimagine Training  

- EEOC Promising Practices for Preventing Harassment
 - Committed and engaged leadership
 - Consistent accountability
 - Strong policies
 - Trusted, accessible complaint procedures
 - Regular, interactive, and tailored training
- EEOC Training Institute
 - Leading for Respect (Supervisors)
 - Respect in the Workplace (Employees)

Strategy # 2: Revamp Policies



- Make clear who can bring complaints – empower “bystanders”
- Clear investigation and resolution procedures that hold *everyone* accountable, including HR, senior leadership, legal, and managers
- Provide multiple points of contact
- Detail what constitutes prohibited conduct (i.e. the gray)
- Include civility and respect

Strategy # 2: Revamp Policies





- Start with: “ABC Agency prohibits unlawful harassment of any kind and complies with all federal, state, and local laws ...”
- Followed by sexual harassment is prohibited, and that inappropriate conduct in violation of the policy can take many different forms
- Then, try adding: “For example, sexual harassment is a form of predatory sexual behavior in which a person targets another employees ...”



Strategy # 2: Revamp Policies



- Strengthen “bystander reporting” or even empower bystander to speak up
 - Simple statement, “That is making me uncomfortable” or “That is not appropriate”
 - Be an “upstander”: if you see something, say something
 - However, no “bystander” for managers or supervisors

Strategy # 2: Revamp Policies  

- Policy should apply to all instances of harassment and discrimination, including:
 - same gender or other protected category
 - peer-to-peer or among colleagues
 - multiple work locations


Strategy # 2: Revamp Policies  

- Consider all other legal aspects when revamping policies, such as the following in California:
 - Abusive Conduct (AB 2053)
 - Gender Identity and Expression (SB 396)
 - Salary Inquiry Ban (Labor Code section 432.3)
 - Pay Equity (Labor Code section 1197.5)
 - All things equal, women still make between 81 to 92 cents on the dollar as men – see Georgetown University report, [Women Can't Win: Despite Making Educational Gains and Pursuing High-Wage Majors, Women Still Earn Less than Men](#)


Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations  

“Complaints about sexual harassment have historically been brushed off as jokes or not as a big deal or just how things are.”


Ashleigh Klein-Jimenez
Project Manager
California Coalition Against
Sexual Assault

Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations 


- Investigation Plan
 - Who investigates?
 - What methodology do you employ?
 - Evidence gathering?
 - IT/forensics/metadata
 - Weingarten rights?
 - Union involvement?
 - Written report?
 - Steps after the report?

Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations 


- What Constitutes Notice?
 - Verbal complaint?
 - Written complaint?
 - Grievance?
 - Venting? Then “Never Mind ...”
 - Anonymous?
 - Whisper?
 - Water Cooler Talk?
 - Social Media? “#metoo”

Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations 

- Common “Rookie” Mistakes
 - Not having an adequate and clear way for employees to report problems
 - Not having a general guideline for how an investigation will be conducted
 - Allowing relevant information (read: evidence) to be ignored or destroyed
 - Failing to thoroughly document the investigation
 - Waiting too long to start an investigation
 - Allowing personal biases to cloud judgment or influence the investigation in any way


Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations 

- Common “Rookie” Mistakes (Cont’)
 - Stopping the investigation before getting all of the facts
 - Not taking steps to ensure that the evidence you find is accurate
 - Not training managers on retaliation
 - Not creating a formal summary report of the findings
 - Not creating a plan for follow-up—and then acting on it

Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations 

- Outside Investigator / Attorney

Pros	Cons
No inherent bias or conflicts of interest	Need time to bring up to speed
Substantial training / experience	Complainant or witnesses may “clamp up”
Attorney investigators can provide privileged report	May or may not make policy violation determinations
Shield for HR, especially if findings are unfavorable	HR or management must still take action after receipt of the report
Will testify to adequacy of investigation if litigation ensues	Costs money and resources, and more money if complex

Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations 

- *Rice v. FCA USA LLC*, Calif. Ct. App., No. E064958 (Jan. 10, 2018)
 - Claim by former Chrysler employee for sexual harassment, hostile work environment, failure to prevent harassment, and negligent retention of unfit employees
 - Evidence that the investigation was not thorough or timely, as investigator did not interview several employees who plaintiff said witnessed the harassment or the plaintiff herself, no written report, and took five months

Strategy # 3: Conduct Prompt, Fair, Impartial, and Thorough Investigations



- *Rice v. FCA USA LLC*, Calif. Ct. App., No. E064958 (Jan. 10, 2018)
 - FEHA makes it unlawful for an employer to “fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring”
 - Plaintiff must prove she was:
 - Subjected to sexual harassment;
 - Company failed to take all reasonable steps to prevent the harassment;
 - The failure caused her injury, damage, loss or harm

Strategy # 4: Break the Silence



- Encourage reporting via multiple channels, including anonymous reporting
 - SpeakUpNHM (Natural History Museum)
 - AllVoices, Blind, Glassdoor, STOPit, tEQitable, Callisto
 - First Responders/ Ombudsperson
 - Key influencers: shop stewards, tenured employees, mentors

Strategy # 4: Break the Silence



- 2018 Career Builder Survey
 - 36% have gone out with a coworker
 - 30% have dated someone in a higher position
 - 22% have had a workplace romance with their boss

Strategy # 4: Break the Silence



- Components of a Dating Policy
 - Goal of upholding appropriate boundaries between personal and business relationships
 - Whether to prohibit or just discourage fraternization between managers and subordinates
 - Requirement to report participation in such relationships, including those with vendors and other business associates.
 - Employer's right to modify reporting structures, such as transferring a boss who is in a relationship with a subordinate
 - Prohibition on physical contact between employees during work hours
 - Anti-harassment policy and harassment-reporting mechanisms
 - Love contract?

Strategy # 5: Create Expectations



- Demand human decency and respect as a fundamental job requirement for *everyone*:
 - Common courtesy
 - Respect competencies
 - Use wisdom
 - Self-monitor
 - Honor personal space
 - Create a 'culture of voice'
 - Be a decent human being

Strategy # 6: Support the Victim



- Give the victim a voice
- Don't ignore issue by transferring victim
- Offer counseling services and cover costs
- Show compassion
- Assign an ombudsperson
- Follow up regularly
- Prepare for domestic violence crossing into work
- Absolutely prohibit retaliation

Strategy # 7: Expedited or Alternative Resolution  

- Mediation or informal conferences
- Mandate 'rules of engagement'
- Coaching and counseling for less severe conduct
- Prompt disciplinary action for more severe conduct
- Engage the union in solutions
- Document everything

Strategy # 8: Build a Business Case  

- Randstad US survey shows 78% of employees say a workplace where people are treated equally is important
- 56% of female workers and 52% of male workers believe their employers can do more to promote gender equality and diversity
- Highly valued by millennials

Strategy # 8: Build a Business Case  

“For companies that fail to establish an inclusive workplace, attracting and retaining quality talent will be a major challenge in the years ahead.”

Audra Jenkins
Chief Diversity and
Inclusion Officer
Randstad North America

Strategy # 8: Build a Business Case



- Harassment is a workplace and health hazard to employees
- Ball State University study found it is potentially physically unhealthy for victims, in addition to stress, loss of sleep, depression, PTSD
- More likely to suffer from low self-esteem, concentration difficulties, anger, lower life satisfaction, reduced productivity, increased absenteeism
- Harms victims, witnesses, and organizations

Strategy # 9: Make I&D a Priority



- Incorporate inclusion and diversity into the strategic plan
- Review job descriptions and consider re-writing them, as they may unintentionally exclude diverse applicants (i.e. Unitive)
- Evaluate candidates based on “culture add” versus “culture fit”

Uber’s New Four-Step Guide to I&D

Strategy # 9: Make I&D a Priority



“Diversity of being invited to the party; inclusion is being asked to dance.”

Verna Meyers
Author, Cultural Innovator, Activist

Strategy # 10: It Starts with the Top



- Top leaders must model behavior and support HR
- Deliver powerful messages year-round, not just lip service
- *Quis custodiet ipsos custodes?*
 - Who will guard the guard themselves?
- Organizational culture must make it psychologically safe for employees to express concerns, complaints and suggestions

Strategy # 10: It Starts with the Top



• The power of a leader's words:
 "I don't want to be stepping over any lines in how I (or other leaders here) treat any of you. So, if you ever feel uncomfortable with my conduct or that of any executive, supervisor or colleague, please simply 'forget the chain of command.' Go over anyone's head. And, if I am directly part of the situation, in any way, please go right to legal." ~ CEO

Culture vs. Policy?



"Culture trumps policy" when it comes to addressing any form of harassment in the workplace, and organizations need to create a "holistic culture of non-harassment ... that starts at the top."

Johnny C. Taylor, Jr.
 President and CEO, SHRM

Culture "Trumps" All

Culture

Training

Law Policy

The Time Is Now!

Questions and Answers

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