

Lessons & Considerations for Employers in the #MeToo Era

March 7, 2019

Presented by: Lisa Banks, Jason Schwartz, and Greta Williams
Moderated by: Amit Patel

GIBSON DUNN



Speaker Information



Amit Patel
Principal Ethics & Compliance
Officer & Senior Counsel, Johns
Hopkins University Applied
Physics Laboratory

(240) 228-8321
Amit.Patel@jhuapl.edu



Lisa Banks
Partner, Katz, Marshall
& Banks, LLP

(202) 299-1140
Banks@kmblegal.com



Jason Schwartz
Partner, Gibson Dunn
& Crutcher, LLP

(202) 955-8242
JSchwartz@gibsondunn.com



Greta Williams
Partner, Gibson Dunn
& Crutcher, LLP

(202) 887-3745
GBWilliams@gibsondunn.com

Harvey Weinstein Allegations Gave Rise to the #MeToo Movement



“I came of age in the 60’s and 70’s, when all the rules about behavior and workplaces were different. That was the culture then.”



The #MeToo Movement Has Affected Companies and Organizations (Large and Small) Across the U.S.



NETFLIX

#MeToo strikes at consulting firms KPMG, EY, Deloitte and PwC

**HOW HUMAN RESOURCES IS FAILING WOMEN
VICTIMS OF WORKPLACE SEXUAL
HARASSMENT**

BY **MARIE SOLIS** ON 10/19/17 AT 12:05 PM

Pre-#MeToo Trends

- ❑ Sexual misconduct investigations were highly confidential
- ❑ Discipline was less severe
- ❑ Results of investigation were rarely released

Post-#MeToo Trends

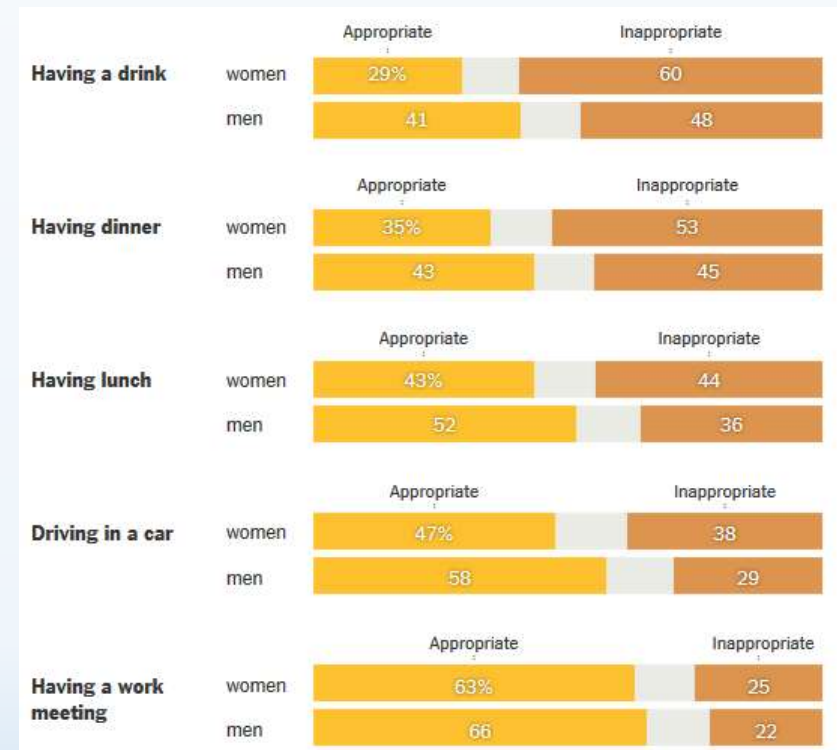
- ❑ Increasing scrutiny/revisiting of older events
- ❑ Harsher discipline
- ❑ More focus on sexual harassment training
- ❑ Greater emphasis on tone at the top and overall company/department/office culture
- ❑ Difficult issues regarding public statements about sexual misconduct allegations and investigations

Post-#MeToo: Self-Segregation

- ❑ “Preventative” self-segregation based on sex is more common than you think.
- ❑ Have you heard of the so-called “Pence Rule?”
 - In 2002, Vice President Mike Pence told the Hill that he never eats alone with a woman other than his wife and that he won’t attend events featuring alcohol without her by his side.

Post-#MeToo: Self-Segregation

- ❑ Think about what activities you feel are appropriate with a person of the opposite sex.
- ❑ The New York Times survey (July 1, 2017)



New York Times Survey: <https://www.nytimes.com/2017/07/01/upshot/members-of-the-opposite-sex-at-work-gender-study.html>

Post-#MeToo: Growing Demands for Transparency, Accountability & Discipline

- ❑ Employees
- ❑ Customers and client
- ❑ Public

Colbert calls for accountability from his CBS boss, Les Moonves, following harassment claims

“Accountability is meaningless unless it’s for everybody.”

INVESTORS DEMAND TRANSPARENCY IN THE #METOO ERA

**Women employees at NPR
“furious” at company’s
handling of sexual
harassment**

Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment

Your Policy

Important Elements:

- Zero tolerance
- Define sexual harassment
- Examples
- Reporting mechanisms
- Prompt remedial action
- Confidentiality
- No retaliation
- Training



Your Policy



Potential Improvements:

- Make your policy accessible to employees
- Improved or additional reporting mechanisms (e.g., hotline, anonymous reporting)
- Include message from CEO to set the “tone at the top”
- Bystander awareness
- Consider how your policy is rolled out
- Consider requiring reporting by supervisors and/or managers
- Consider increased transparency and check ins with complainants and witnesses

Training

Considerations for Sexual Harassment Training:

- ❑ Rebrand your training
 - Focus on creating a respectful workplace
- ❑ Make trainings interactive and encourage participation
 - Web-based with questions or live training
- ❑ Incorporate bystander awareness training
- ❑ Involve senior leaders and encourage their participation
 - For example, have CEO introduce the training to emphasize its importance
- ❑ Have additional trainings for supervisors and managers who may have a duty to report
- ❑ Discuss reporting mechanisms and where to find additional information
- ❑ Examples of prohibited behaviors



Considerations for Investigations of Workplace Issues

❑ Preliminaries

- To whom do the investigators report?
- Do the investigators have relevant expertise and experience?
- What is the scope of the inquiry? What questions are to be answered?

❑ What is the work plan?

- Document Review
 - Policies
 - Emails/correspondence
 - Hotline/complaint history; possible special investigation hotline
 - Survey data
 - Relevant litigation, police reports, investigations or other proceedings
 - Personnel records
- Coordination with other relevant organizations
- Witness interviews



Considerations for Investigations of Workplace Issues

- ❑ How are the findings and conclusions presented?
- ❑ Privilege?
- ❑ Available publically?
- ❑ Media inquiries
- ❑ Employee inquiries
- ❑ Contents of report
 - Recommendations?
- ❑ Consistent with others' conclusions?

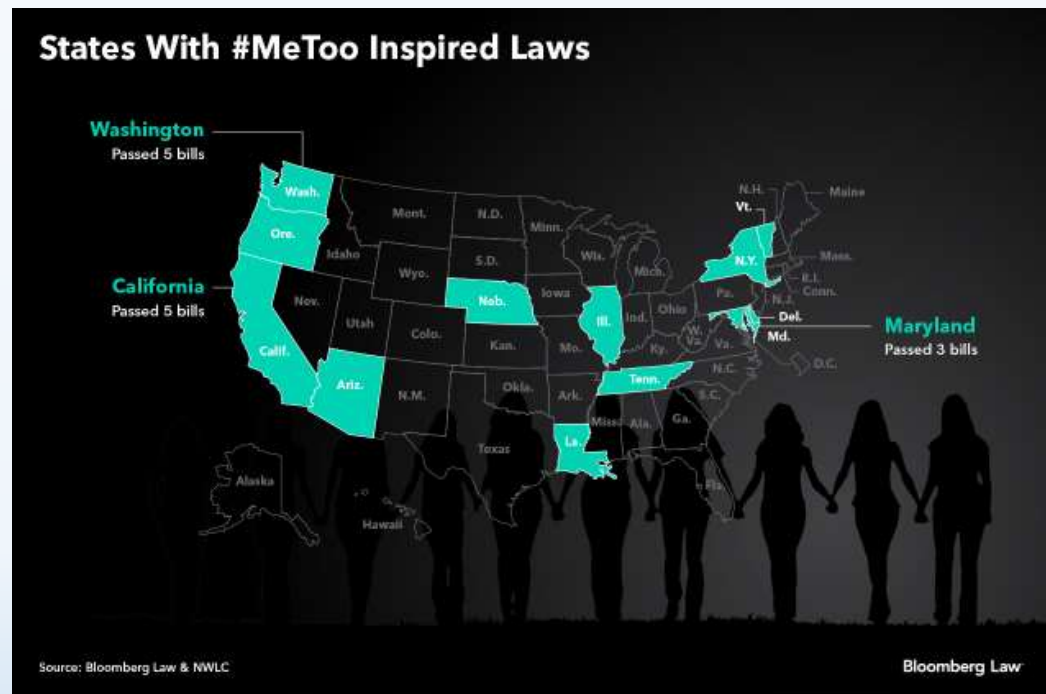


Recent Developments: #MeToo State Legislation

At least **twelve states** passed #MeToo-related laws addressing workplace harassment in 2018

Main themes

- **Restricting Non-Disclosure Agreements**
- **Limiting Forced Arbitration**
- **New Training Requirements**



Sources: [https://www.bna.com/states-metoo-mantle-n73014482949/;](https://www.bna.com/states-metoo-mantle-n73014482949/)
<https://www.cnbc.com/2018/12/28/new-state-laws-in-california-elsewhere-inspired-by-metoo-movement.html>

Recent Developments: #MeToo State Legislation

Non-Disclosure Agreements

- ❑ **Seven states** have limited the use and enforcement of nondisclosure clauses in agreements to settle claims of sexual harassment

Forced Arbitration

- ❑ **Four states** limit employers' ability to force employees to arbitrate claims of workplace sexual harassment



Source: <https://www.bna.com/states-metoo-mantle-n73014482949/>

Recent Developments: #MeToo State Legislation



New Training Requirements

- ❑ **Eight states** have passed legislation requiring regular training
- ❑ The specifics vary from state to state

Sources:

<https://www.bna.com/states-metoo-mantle-n73014482949/>

<https://www.hallrender.com/2019/01/18/metoo-on-the-move-new-sexual-harassment-legislation-may-impact-employers/>

Recent Developments: #MeToo State Legislation

Example: New York

Restrictions on Mandatory Arbitration of Sexual Harassment Claims: Effective July 11, 2018, employers with more than four employees are prohibited from using contractual provisions that mandate confidential arbitration as the mechanism for resolving claims of sexual harassment.

Restrictions on Non-Disclosure Provisions:

Effective July 11, 2018, non-disclosure provisions in agreements settling claims of sexual harassment are prohibited, unless the complainant prefers to include a non-disclosure requirement and unless the provision meets other requirements.



Sources:

<https://www.perlmanandperlman.com/metoo-catches-new-york-state-new-york-city/>
<https://www.natlawreview.com/article/new-york-state-and-city-pass-sweeping-anti-sexual-harassment-laws-amid-metoo>

Recent Developments: #MeToo State Legislation

Example: New York (cont.)

Policy Requirement: Every employer in New York state must create and distribute a sexual harassment prevention policy that meets or exceeds the **Model Sexual Harassment Policy** requirements:

1. Prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights
2. Provide **examples of prohibited conduct** that would constitute unlawful sexual harassment
3. Include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws
4. Include a **complaint form**
5. Include a **procedure for the timely and confidential investigation** of complaints that ensures due process for all parties
6. Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
7. **Clearly state** that sexual harassment is considered a form of employee misconduct and that **sanctions will be enforced** against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue
8. Clearly state that **retaliation** against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is **unlawful**

Recent Developments: #MeToo State Legislation Example: New York (cont.)

Employers in New York State also have the option of displaying a sexual harassment prevention policy notice, as a way to direct both employees and non-employees to their Sexual Harassment Prevention Policy.



Sexual Harassment Prevention Policy Notice



Combating
Sexual Harassment

Sexual harassment is against the law.

All employees have a legal right to a workplace free from sexual harassment, and [Employer Name] is committed to maintaining a workplace free from sexual harassment.

Per New York State Law, [Employer Name] has a sexual harassment prevention policy in place that protects you. This policy applies to all employees, paid or unpaid interns and non-employees in our workplace, regardless of immigration status.

If you believe you have been subjected to or witnessed sexual harassment, you are encouraged to report the harassment to a supervisor, manager or [other person designated] so we can take action.

Our complete policy may be found: _____

Our Complaint Form may be found: _____

If you have questions and to make a complaint, please contact:

[Person or office designated]

[Contact information for designee or office]

For more information and additional resources, please visit:

www.ny.gov/programs/combating-sexual-harassment-workplace

Recent Developments: #MeToo State Legislation

Example: New York (cont.)

Training

- ❑ Every employer in New York State is required to provide employees with **annual sexual harassment prevention training**.
- ❑ Every employee in the state must complete sexual harassment training by **October 9, 2019**
- ❑ Employers who do not use the model training developed by the Department of Labor and Division of Human Rights must ensure that their training meets or exceeds **certain minimum standards**.



Sources:

<https://www.ny.gov/combating-sexual-harassment-workplace/employers>

<https://www.law.com/newyorklawjournal/2018/10/17/new-york-new-york-taking-the-lead-to-combat-sexual-harassment-in-the-workplace/>

Recent Developments: #MeToo State Legislation Example: New York (cont.)

Sexual Harassment Prevention Training Must:

- be interactive
- include an explanation of sexual harassment consistent with guidance issued by the Department of Labor
- include examples of conduct that would constitute unlawful sexual harassment
- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment
- include information concerning employees' rights of redress and all available forums for adjudicating complaints
- include information addressing conduct by supervisors and any additional responsibilities for such supervisors



New York's model training materials are located here: <https://www.ny.gov/combating-sexual-harassment-workplace/employers>

Unintended Consequences of #MeToo State Legislation

- ❑ Confidentiality and Non-Disclosure Agreements
- ❑ Arbitration Agreements



Conclusion

- ❑ Greater attention to knowledge and (in)action by HR and management
- ❑ Focus on tone at the top and culture
- ❑ Instill confidence in employees that complaints:
 - taken seriously
 - investigated thoroughly
 - investigated fairly
- ❑ Pay attention to state law developments
- ❑ Revise sexual harassment policies and training
- ❑ Review and revise employee separation templates

Questions?

