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Moderated by: Alex Gordon
#MeToo During COVID-19 –
Investigations and Issues
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Speaker Information



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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.



#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

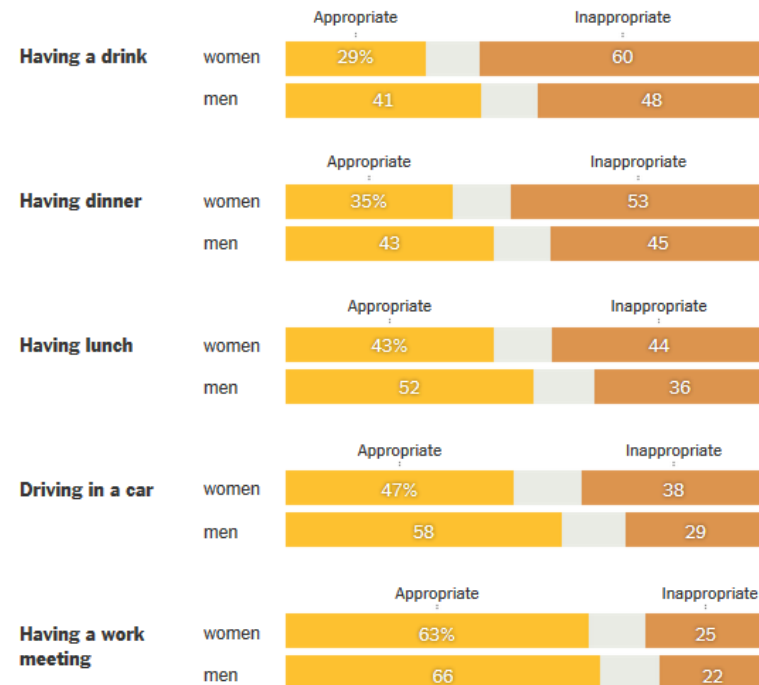
Post-#MeToo: Self-Segregation

- ❑ “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 Clients
- ❑ 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

Considerations for Sexual Harassment Training



❑ **Customize Training To Your Workplace**

- Focus on having the training align with your organization's values, goals, and policies to build a culture of respect
- Avoid melodramatic, soap opera-like training and avoid training depicting stereotypes or clichés

❑ **Make Trainings Interactive**

- Use a combination of online and live training with opportunities for small-group discussions (e.g., Zoom's Breakout Rooms)
- Consider: Instructor-Led Training, eLearning, Streaming, and Webinars

❑ **Involve Senior Leaders and Encourage Their Participation**

- Consider having additional trainings for supervisors and managers who may have a duty to report

❑ **President Trump's Recent Executive Order 13950 (September 2020)**

- Unconscious bias or implicit bias training may *not* teach or imply that an individual is racist, sexist, oppressive, or biased *based on* their race, sex, and/or national origin.

Source: <https://www.gibsondunn.com/executive-order-on-combating-race-and-sex-stereotyping/>

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?



COVID-19 Considerations for Investigations of Workplace Issues

❑ Challenges With Physical Document Collection

- Remote Data Collection

❑ Conducting Investigations Virtually

○ *Advanced Preparation*

- Technology
 - Alternative Platforms
- Privacy
- Documents
 - *Attorney Work Product*: Detail the scope and purpose of the investigation and document contemporaneous communications with outside counsel or consultants reflecting the need for legal advice. *See Cicek (Beijing) Science & Technology Co. LTD v. Misonix, Inc.*, 331 F.R.D. 218 (E.D.N.Y. 2019) (finding that emails and memoranda derived from the company's internal investigation were prepared in anticipation of litigation where outside counsel conducted the investigation and the manner in which the interviews were conducted were "shaped by the specter of litigation").
- Privilege and Confidentiality
 - You must perform the investigation for the purpose of obtaining legal advice for the attorney-client privilege to apply. *See Parneros v. Barnes & Noble, Inc.*, No. 18-cv-7834, 2019 WL 4891213 (S.D.N.Y. Oct. 4, 2019) (holding that legal privilege attached to the initial interview of the former CEO accused of potentially serious misconduct because the purpose in conducting the investigation was to provide the company with legal advice).



#MeToo and COVID-19

MAGAZINE

OPINION | CORONAVIRUS

A Second Covid Crisis Is Coming

If we don't act now, women and girls will be suffering from the pandemic's fallout for decades to come.



Guillermo Legaria/Getty Images

By DAVID MILIBAND and SHERYL SANDBERG
04/24/2020 04:30 AM EDT

David Miliband is president and CEO of the International Rescue Committee.

Sheryl Sandberg is founder of LeanIn.org and COO of Facebook.



Recent Headlines



When Mom's Zoom Meeting Is the One That Has to Wait

"The way we've been able to MacGyver a career as a woman is completely under attack by a global pandemic."

Sources:

<https://www.politico.com/newsletters/women-rule/2020/04/24/a-second-covid-crisis-the-impact-on-women-and-girls-489026>

<https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects#>

<https://www.nytimes.com/2020/04/22/us/politics/women-coronavirus-2020.html>

<https://dev.devurl.info/nwlc2.org/blog/covid-19-shows-us-we-need-me-too-now-more-than-ever/>

Recent Developments: #MeToo and COVID-19

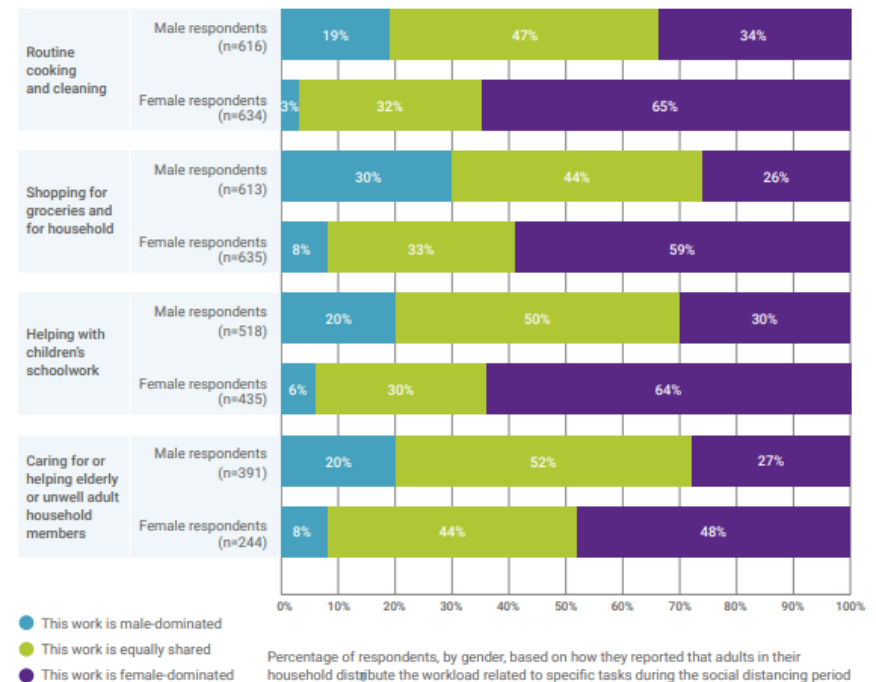
Impacts of COVID-19:

❑ Legislative Momentum Stalled

❑ Adverse Effects on Women

- *Greater Risk of Job Loss*
- *Intensified Unpaid Care and Domestic Workload*

DISTRIBUTION OF THE WORKLOAD



Sources:

<https://promundoglobal.org/new-research-covid-19-and-a-crisis-of-care-in-the-united-states/#>

<https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects#>

<https://dev.devurl.info/nwlc2.org/blog/covid-19-shows-us-we-need-me-too-now-more-than-ever/>

Recent Developments: #MeToo and COVID-19

Employment Litigation Claims Spike

- ❑ Workplace claims filed in June 2020 reflected a **30% increase** from May 2020 and a **103% increase** from April 2020.
- ❑ **Most Common Claims:**
 - Employment Discrimination Claims
 - Work-From-Home/Leave Claims
 - Retaliation
 - *See, e.g., Fitzgerald v. We Company*, No. 1:20-cv-05260 (S.D.N.Y. July 9, 2020) (alleging that former employer's pandemic-related layoffs were pretext to fire her in retaliation for sexual harassment complaint and taking intermittent FMLA leave).



Sources:

<https://www.fisherphillips.com/resources-alerts-fp-covid-19-employment-litigation-tracker-reveals>
<https://www.fisherphillips.com/resources-alerts-caregiver-covid-19-workplace-litigation-begins>
<https://www.icle.org/updates/COVID19/QASchulz.aspx> (image)

Recent Developments: #MeToo and COVID-19

Employer Best Practices

- ❑ Be flexible in granting reasonable accommodations
- ❑ Review requests for leave under the FFCRA with objectivity
 - Document all discussions
- ❑ Develop neutral and objective criteria for selecting employees to terminate or furlough
 - Ensure criteria do not result in a disproportionate impact on a protected class
 - Ensure that managers/supervisors apply the criteria fairly and consistently
- ❑ Document the rationale behind the termination or furlough



Sources:

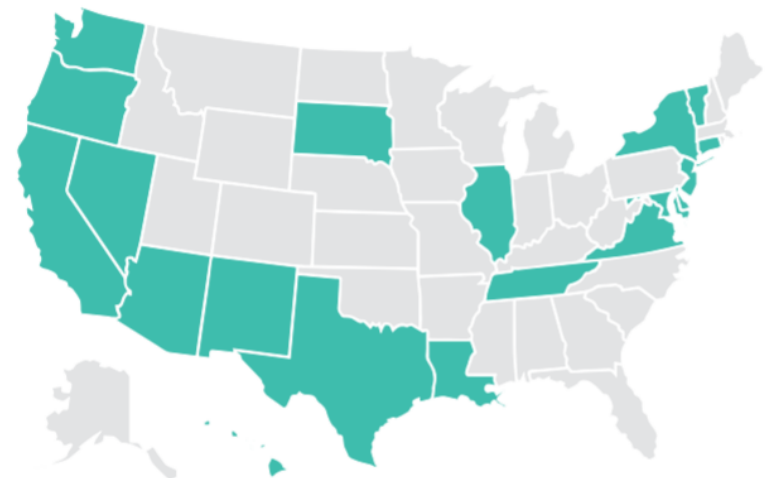
<https://www.corporatesecretary.com/articles/enforcement/32196/how-covid-19-employment-litigation-taking-shape> (image)

Recent Developments: #MeToo State Legislation

At least **nineteen states** passed #MeToo-related laws addressing workplace harassment

Main themes

- ☐ **Restricting Non-Disclosure Agreements**
- ☐ **Limiting Forced Arbitration**
- ☐ **New Training Requirements**
- ☐ **Expanded Scope of Protections**



Source:

<https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/09/NWLC-2020-States-Report-FINAL-1.pdf>

Recent Developments: #MeToo State Legislation

Non-Disclosure Agreements

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

Forced Arbitration

- ❑ **Five states** limit employers' ability to force employees to arbitrate claims of workplace sexual harassment
 - **Two states** passed legislation that federal district courts found to be preempted

Source: <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf>;
<https://www.lawyer-monthly.com/2018/11/google-harassment-scandal-should-ndas-be-banned/> (image)



Recent Developments: #MeToo State Legislation



New Training Requirements

- ❑ **Five states** have legislation ***requiring*** anti-harassment trainings for ***all*** employees.
- ❑ **Fourteen states and D.C.** have legislation ***requiring*** anti-harassment trainings for ***some*** employees.
- ❑ **Ten states *encourage*** anti-harassment training.
- ❑ The specifics vary from state to state

Sources:

<https://inspiredelearning.com/hr-compliance/state-specific-compliance-training/sexual-harassment-training-requirements-by-state/>

<https://www.bloomberg.com/news/articles/2019-10-10/sexual-harassment-training-now-required-for-20-of-u-s-workers>

Recent Developments: #MeToo State Legislation

Expanded Scope of Protections

- ❑ **Six states** have expanded workplace harassment protections to include **independent contractors, interns, or graduate students**
- ❑ **Four states** have **extended the statute of limitations** for filing harassment or discrimination claim
- ❑ **Three states and New York City** have passed laws requiring **increased transparency** about harassment claims, complaints, investigations, and/or settlements
- ❑ The specifics vary from state to state



Sources:

<https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/09/NWLC-2020-States-Report-FINAL-1.pdf>

<https://nwlc.org/press-releases/fifteen-states-have-passed-new-laws-protecting-workers-from-sexual-harassment-in-wake-of-metoo-nwlc-report-reveals/>

<https://econreview.berkeley.edu/metoo/> (image)

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 are:
 - Taken seriously
 - Investigated thoroughly
 - Investigated fairly
- ❑ Pay attention to federal and state law developments
- ❑ Revise sexual harassment policies and training
 - Consider the disparate impact of COVID-19 on women
- ❑ Review and revise employee separation templates

Questions?

