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Internal Investigations in the New Era

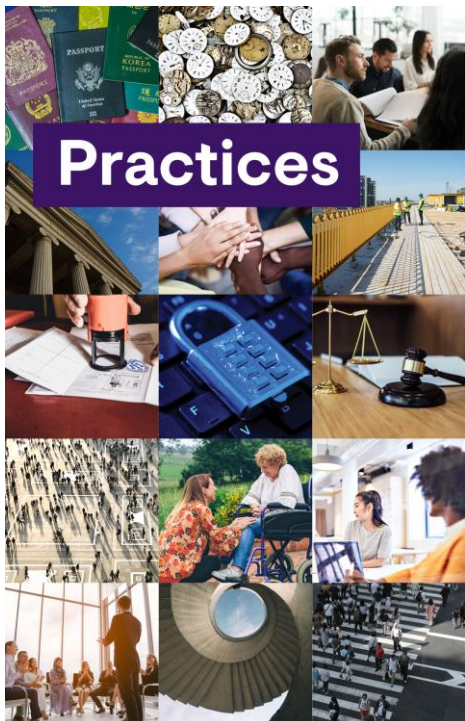
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- Affirmative Action, OFCCP and Government Contract Compliance
- Class Actions and Complex Litigation
- Corporate Diversity Counseling
- Corporate Governance and Internal Investigations
- Disability, Leave and Health Management
- Employee Benefits
- ERISA Complex Litigation
- General Employment Advice and Counsel
- General Employment Litigation
- Immigration
- International Employment
- Labor Relations
- Privacy, Data and Cybersecurity
- Restrictive Covenants, Trade Secrets and Unfair Competition
- Wage and Hour
- Workplace Safety and Health

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David Jimenez

- Principal and Co-Chair of the Jackson Lewis P.C. Corporate Governance & Internal Investigations Practice Group.
- Practice involves defending companies against Sarbanes Oxley, Dodd Frank Act, False Claims Act and related whistleblower litigation, leading internal investigations, advising on corporate compliance and code of conduct matters, and providing counsel to employers and corporate boards on related high risk matters.
- Former Associate General Counsel, Head of Employment Law and Vice President of Employee Relations for The Hartford.

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Agenda

- Major corporate/public investigations and scandals: 2017 through today
- The emergence of new stakeholders in these cases
- Investigations are now Zooming
- The role of the Board, Social Media, and Brand/Reputation management
- Takeaways

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#TIMESUP

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#METOO ERA CHARACTERISTICS

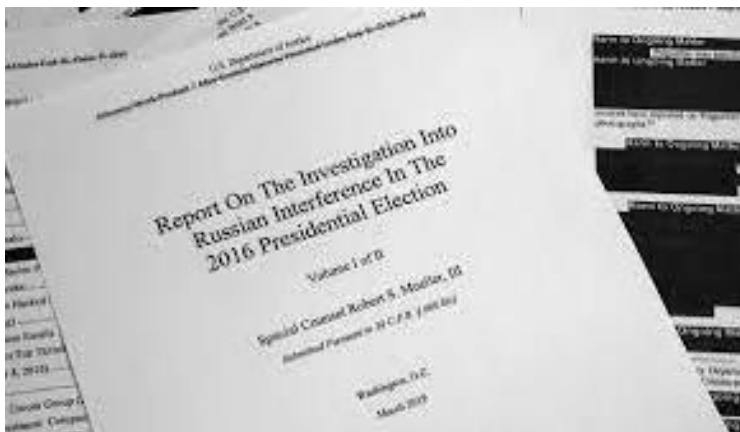
- High profile allegations of sexual misconduct.
- CEOs or high-profile employees have been either terminated or asked to step aside.
- Major/Material risk to the organization.
- Negative publicity and seemingly quick adjudication via the media.
- Company management and board are called into question.
- Lawsuits well beyond employment – shareholder, regulatory, law enforcement.

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THE MUELLER REPORT OF 2019



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- Special Counsel Investigation
- Russian Interference; Obstruction of Justice
- Submitted to U.S. Atty General William Barr on March 22, 2019
- Redacted version of the 448 page report was released April 18, 2019

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GOVERNOR CUOMO OF NEW YORK



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A New York Month in 2021

- **Feb. 24:** **Lindsay Boylan**, an ex-staffer claims the Governor asked her to play strip poker; harassed her via comments about her looks. She published an essay on "Medium"; and is running for Manhattan borough president.
- **Feb. 27:** Governor accused of sexual harassment by a second former aide, **Charlotte Bennett**
- **March 1:** **Anna Ruch** (a non-employee, wedding party guest) says Governor made an unwanted advance by touching her back and asking: "Can I kiss you?"

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GOVERNOR CUOMO OF NEW YORK

A New York Month in 2021

- **March 6 :** **Ana Liss**, another ex-aide, alleges the Governor's conduct was inappropriate.
- **March 7:** Another **former aide** accuses Governor of misconduct; **Governor defies calls to step down.**
- **March 9:** **Female aide** accuses Governor of touching her inappropriately; lodges her report with the NY AG.
- **March 19:** A **current aide** accuses Governor of sexual harassment, her anonymous interview with the Times Union was published on April 7.

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ALYSSA MILANO

Social Media

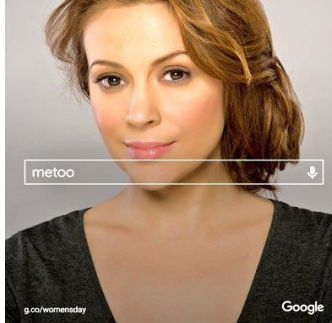
Waves of victims

Very public

Media awareness

High stakes/material risk

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[Alyssa Milano](#)✓ [@Alyssa_Milano](#)

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

4:21 PM - Oct 15, 2017

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WOMEN HARASSED AT WORK**60%**

of women say
they have been sexually
harassed

27%

of men say
they have been
sexually harassed

*of these***55%**

of women say
it happened at work

42%

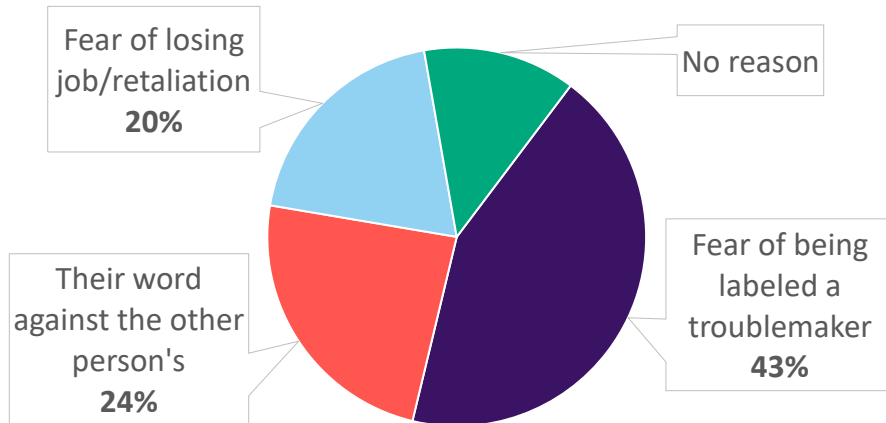
of men say it
happened at work

Source: 2018 Pew Survey

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WORKPLACE HARASSMENT IS UNDERREPORTED

72% of employees who were harassed **DID NOT** report it!



Source: 2018 EEOC Task Force Study

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#METOO's AFFECT ON INTERNAL INVESTIGATIONS



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- Notice via **Social Media** vs internal complaint
- **Immediate** public awareness, judgment, and PR challenge
- **Numerosity** of victims occurs via public exchanges
- Lack of interest in **litigation or legal defenses**
- A whole **new approach** to investigations
- The need for **super fast** investigations to get to a decision point
- **Decision point** is often a change of direction (i.e. senior management)

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EVOLUTION OF WHISTLEBLOWER MATTERS



- From fraud, financial irregularities, & ethics **TO** historical behavior complaints
- From a solo party **TO** group complaints
- From private hotlines **TO** social media
- From claims between rank & file employees **TO** claims against executives
- From current employees **TO** current & former employees
- From money focus **TO** corrective action oriented
- **Leading to an entirely new risk profile**

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TRADITIONAL INVESTIGATION PLANNING

- A good investigation plan accounts for:
 - Well defined scope - time, place, and context
 - An understanding of the purpose of the investigation;
 - Knowledge of the issues to be addressed, universe of documents and universe of witnesses;
 - Thoughtful use of resources and skill sets;
 - A balance between seeking all information available vs. seeking information necessary to reach informed decision-making;
 - Consideration of past precedent balanced with current dynamics;
 - Thoughtful record creation;
 - Fact-based, but imperfect decision-making;
 - Confidentiality (need-to-know basis) vs. transparency

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WHAT DOES THIS NEW ERA MEAN?



The New York Times

Movie Mogul Weinstein Paid Off Harassment Cases for Years

By JESS KATZ and BRIAN FROST 8 minutes ago
An investigation by The New York Times found previously unreported allegations



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NEW ERA INVESTIGATION PLANS

- Who's our client? Board, Board Committee, the Chair, Management, Others?
- Do we tell the CEO?
- Is there a report & if so, who sees the report?
- Does our plan include a review of Facebook Chats/Facebook Friends?
- Will this investigation be impartial or for legal advocacy?
- Do we issue a press release about the investigation?
- Will we share this with law enforcement?
- Can we be done in a matter of days? weeks? months?
- What do the WB'ers really want?
- Beyond decision making, do we need the investigation to provide other optics?

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PANDEMIC ERA INVESTIGATIONS

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PANDEMIC LOGISTICS

- Working with the client
 - Client meetings
 - Board meetings
- Records Collection & Review
 - Is there anyone around to collect them?
 - Who will scan them and send them?
 - If records are in physical form, can we touch them?
 - Do we have resources? Paralegals, associates, assistants?
- Witness Interviews
 - Access to Zoom?
 - Will witness agree to appear?
 - Logistics planning leads to timing/scope questions
 - Pros/Cons

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THE COMPANY'S BOARD OF DIRECTORS

- Greater accountability and involvement
- Systemic involvement and engagement on a case/transactional basis
- Must have greater initiative on all things HR related
- Sarbanes Oxley/Financial oversight is a good model/roadmap

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KEY TAKEAWAYS

Workplace harassment has evolved and become a more material risk to the organization and now affects reputation, brand, and sustainability in addition to posing monetary risks.

Traditional concepts of harassment avoidance still apply, however, the public awareness, and social media aspects of these cases add a good deal of complexity to how these matters are handled.

These matters extend beyond the human resources & legal functions; senior management and the board have a role to play. Organizations must have an effective compliance, investigative and risk plan.

Investigations must be managed with urgency and with due regard to the new set of stakeholders.

Management of financials, financial controls, and public filings are a good model (think SOX compliance, and executive compensation). Companies that plan now, for the worse, will be ahead of the issue.

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Thank **you.**