RISKY BUSINESS
Insights about #MeToo and employment practices liability
Philip Reed is a risk advisor to high-profile organizations and executives. He draws on his experience resolving claims targeting corporate executives to map risks presented by emerging trends such as #MeToo. Philip will speak to the financial and legal exposures executives are facing as a result of #MeToo, and provide some insight into strategies and solutions available to executives.
Agenda

1. #metoo
2. Employment Practices in California
3. Prevention, Mitigation and Resolution of claims
4. Wage & Hour
Risky Business

#metoo
#MeToo: A Timeline

**2014**
- **Bill Cosby** is accused of misconduct by 60 women after **Hannibal Buress** jokes about him in comedy routine.

**October 5, 2017**
- **Ashley Judd** accuses **Harvey Weinstein** in a New York Times article.

**October 12, 2017**
- **Roy Price**, head of Amazon Studios, resigns after accusations.

**October 15, 2017**
- **Anthony Rapp** claims **Kevin Spacey** made sexual advances toward him at the age of 14.

**October 29, 2017**
- Actress Alyssa Milano sparks the “**Me Too movement**” by tweeting, “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” 12 million “Me Too” Facebook posts in 24 hours.

**November 10, 2017**
- **Louis C.K.** confirms allegations of women who accused him of sexual misconduct.
#MeToo: A Timeline

November 29, 2017
Today Show fires Matt Lauer after allegations of sexual misconduct.

November 30, 2017
Senator Al Franken says he will resign from the Senate after allegations of sexual misconduct.

January 1, 2018
Over 300 women in Hollywood form an anti-harassment coalition called Times Up.

February 6, 2018
Steve Wynn steps down as CEO of Wynn Resorts after dozens of allegations of sexual misconduct.

April 26, 2018
Bill Cosby is convicted of sexual assault, facing up to 10 years in prison.

May 7, 2018
Eric Schneiderman resigns as NY Attorney General after four women accuse him of physical assault.
#MeToo Headlines

- 21st Century Fox in $90 million settlement tied to sexual harassment (Reuters)
- Matt Lauer Camp Seeks $30M; “Not a Brass Farthing” Responds NBC (deadline.com)
- Is a Nondisclosure Agreement Silencing You From Sharing Your ‘Me Too’ Story? 4 Reasons It Might Be Illegal (aclu.org)
- California Lawmaker Nicknamed 'Huggy Bear' Told to Stop Hugging People (NBC)
#MeToo Headlines

- Directors departing Wynn Resorts’ board as lawsuits pile up (CNBC)
- Weinstein Company Can’t Avoid Bankruptcy But Will Find Relief In Collapse (Forbes)
- California Assemblywoman and #MeToo Champion Accused of Groping (CBS News)
Sexual Harassment Defined

Unwanted sexual advances, or visual, verbal, or physical conduct of a sexual nature.

- Visual conduct: leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons, or posters
- Verbal conduct: making or using derogatory comments, epithets, slurs, and jokes. Verbal abuse of a sexual nature, graphic verbal commentaries about an individual’s body, sexually degrading words used to describe an individual
- Physical conduct: touching, assault, impeding, or blocking movements
- Offering employment benefits in exchange for sexual favors
- Making or threatening retaliatory action after receiving a negative response to sexual advances
By the Numbers

**1976:** 9,000 women respond to a Redbook tear-out questionnaire
- 90% reported having been sexually harassed at work

**2016:** EEOC task force issued comprehensive study
- 85% of women surveyed reported having experienced sexual harassment in the workplace

**2018:** CareerBuilder survey finds:
- 72% of those who experience sexual harassment at work do not report it
- 28% of those who felt harassed say their boss was the harasser
- 54% say they did not confront the person responsible
- 36% of workers reported dating a coworker, a 10-year low
- 27% of women who dated at work say they dated their boss; 16% for men
By the Numbers

Study in Gender & Society – May 2017

- An estimated 75% of women experience retaliation after reporting harassment
- Women who experience sexual harassment are 6.5 times more likely to leave their job
- When leaving their jobs, women do not trade up
- Landing in less lucrative fields or positions negatively impacts earnings
Legislative Initiatives

- Proposed legislation prohibiting non-disclosure/confidentiality restrictions for sexual harassment claims in CA, NY, NJ, PA, WA

- Proposed legislation rendering arbitration agreements unenforceable with respect to sexual harassment claims in NJ, NY

- Proposed federal legislation: HR 4729 “Ending Secrecy About Workplace Harassment Act” and HR 4734 “Ending Forced Arbitration of Sexual Harassment Act of 2017

- Proposal to extend (triple) the statute of limitations for bringing harassment claims in California
Executives: Exposed

- Corporate executives and boards of directors have certain responsibilities to ensure harassment-free work environments and employee safety

- A variety of potential plaintiffs may bring suits against executives in connection with harassment:
  - The alleged victim
  - Any employee witnesses who may allege retaliation
  - An employee or executive accused of harassment who brings a claims for wrongful termination
  - Investors who allege that they were misled and/or that insufficient safeguards were in place
  - Investors – derivatively on behalf of the corporation to claw back golden parachutes (Ailes)
  - History of discrimination/harassment complaints involving applicant
#MeToo potential implications for insurance:

- Employment Practices Liability, Directors & Officers Liability, etc.
- Reporting considerations
- Increased underwriting scrutiny
- Highly publicized large settlements will push up settlement values
- Social media post may or may not qualify as a “claim”
#MeToo Considerations

- Workplace romance – banning relationships isn’t always the answer
- #MeToo backlash – survey shows impact of sexual harassment on male managers
- #MentorHer – Sheryl Sandberg’s campaign to encourage men to mentor women in the workplace
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Risky Business

EMPLOYMENT PRACTICES IN CALIFORNIA
Employment Risks in California

- California employment laws provide greater protections to employees
- Penalties awards for violations of employment laws are more severe
- California juries are widely viewed as employee-friendly
- Attorney fee-shifting as applied favors employee plaintiffs
- Fair Pay Act – from 2018 no salary history
- California is particularly hostile to independent contractor classification
In the harassment context, employers have more at stake in California:

- Anti-discrimination statutes are broader than Title VII
- No caps on compensatory or punitive damages
- Employers must “take all reasonable steps necessary to prevent and correct harassment”
- Employers are strictly liable for hostile environment harassment by a supervisor
- Individual managers and supervisors can be held personally liable for harassment
- Employers can be liable when vendors and customers harass workers
Potential Liability

Potential exposure is high:

- **2018**: $7.9 million damage award by a California jury to Chipotle manager wrongfully terminated; case settled prior to the assessment of punitive damages, which could have reached $70 million
- **2017**: $25.1 million verdict in favor of a salesperson who complained about misconduct because he was retaliated against and wrongfully terminated
- **2016**: $7.3 million verdict in favor of a legal advisor to Bikram Choudhury (of “hot yoga” fame) for sexual harassment and retaliation for her investigation of claims that Choudhury had raped a yoga student
- **2015**: $8.8 million verdict in favor of Rite-Aid store manager for disability discrimination, harassment, and retaliation
- **2014**: $185 million verdict in San Diego for gender/pregnancy discrimination by AutoZone
- **2013**: $21.8 million verdict for a customer service representative in a suit for disability discrimination (she was fired after she called in sick 3 days in a row due to panic attacks)
- **2012**: $168 million verdict in favor of physician assistant in sex-based hostile work environment suit
Evaluate Company Culture

- Buy-in from the top
- Recruitment, retention, promotion of women
- Anonymous email and phone hotlines
- Evaluate how employees perceive company’s sexual harassment training program
Have Clear Anti-Harassment Policy

- Policy should be written in straight-forward language
- Easy to understand protocols
- Reiterated to employees consistently
- Include no retaliation
- Clarify complaint will be kept confidential to the extent possible
- Multiple avenues to report
Improve Sexual Harassment Training

- Attendance of company leadership
- “Bystander” intervention
- Clearly describe complaint process
- Assure confidentiality to the greatest extent possible and protection against retaliation
Common Employer Mistakes

- Trusting confidentiality provisions to protect the company’s reputation
- Not accounting for potential sexual harassment when drafting executive employment agreements
- Failing to carefully consider whether to implement arbitration agreements with employees
Consider Implicit Bias Training

- Employees learn how to detect implicit gender biases that may lead to sexual harassment and engage in behaviors that reduce bias

- Used by Facebook, Dell
Hiring Process

- Consider contractual provisions designed to deter harassment policy violations (e.g., for-cause termination provisions, bonus or equity forfeiture provisions)

- Consider ways to identify potential trouble areas as part of background check/hiring diligence process
  - History of discrimination/harassment complaints involving applicant
First 24 Hours After a Complaint

1. Determine whether complaint will engender publicity
2. Contact complainant
3. Contact alleged harasser
4. Develop public relations strategy
5. Initiate prompt investigation
6. Stabilize work environment
Consider Relationship Between Complainant and Alleged Harasser

- Consider need to separate alleged harasser and complainant
- Consider placing complainant on leave with pay
- Consider placing alleged harasser on administrative leave pending investigation
- Ensure alleged harasser receives due process
Arbitration v Jury

• Do the corporate defendants pick the arbitrator?
  – The corporate defendant may pay the cost of arbitration

• Why plaintiffs and their attorneys dislike arbitration:
  – Private proceedings
  – No jury
    • Emotion
    • Who are the arbitrators?
  – Efficiency... (?)
  – By definition, no class-actions
    • Incentive lacking for “small” claims

• Arbitration not appealable
Arbitration Agreements

- Mandatory arbitration agreements are commonly included in employment contracts
- Parties to an arbitration agreement do not have confidentiality obligations
- Settlement agreements often combine arbitration agreements with confidentiality requirements (NDAs)
- Federal Arbitration Act v National Labor Relations Act
  - Issue: class action waivers
- State Attorney Generals sign letter to ban mandatory arbitration for workplace sexual harassment
Non-Disclosure Agreements

• With few exceptions settlements in the employment context involve Non-Disclosure Agreements (NDAs)

• NDAs require that both parties refrain from discussing the subject of the dispute that was settled, or even acknowledge the existence of the NDA

• If a victim of harassment has signed a valid NDA, they cannot share their story

• As more stories have come to light, it has become apparent that NDAs have contributed to situations where harassers go undetected

• NDAs may be found invalid under certain limited conditions
Risky Business

WAGE & HOUR
Wage & Hour: old school issues

- Rest breaks, meal breaks
- Overtime
- Donning & Doffing
- Security procedures
- Tip sharing
- Misclassification
Wage & Hour: old school issues

BRIEF

Rosa Mexicano pays $3.6M to settle tip-sharing suit
Wage & Hour: new school issues

• “Gig Economy”:
  – Misclassification

• Dynamex
  – ABC test
    • Free from control or direction in performing the work
    • Performs work that is outside the normal scope of hiring entity’s business
    • Worker is established in an “independently established trade” of the same nature as the work performed
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