

In the wake of #MeToo, employers must revisit, revamp practices

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Harvey Weinstein. Matt Lauer. Charlie Rose. Kevin Spacey. John Conyers. The #MeToo movement has led to seismic changes in perceptions about sexual harassment: what it is, how pervasive it is and how devastating it can be for individuals as people and as professionals.

For employers and their workplaces, credible allegations of sexual harassment have the potential to wreak havoc on their reputations — and their bottom lines.

Sexual harassment is not a new phenomenon, and this is not our first reckoning with its insidiousness. While most of us were not professionals in the workplace in the 1950s and '60s, we have probably seen enough episodes of shows like "Mad Men" to get a feel for the general atmosphere of disrespect and sexual entitlement common to the era.

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The recent spate of allegations makes one wonder if there has been any progress at all in the last 50 years. The tolerance of bad behavior by men in power seems to continue unabated.

Some common themes have emerged in the last year, and they inform what seems to be an epidemic. First, almost all of those accused have been prominent men in positions of power.

Second, the power these men wield extends beyond the accusers and their careers to their monetary or political power in the marketplace.

Third, the allegations primarily arose in environments where there were almost no systems or safeguards in place to address the issue: entertainment, media and politics.

The men who have been accused are their own power centers. They are either moneymakers for larger corporate entities like film studios or media conglomerates, or they are politicians.

We also have learned in the last year that sexual harassment is rarely a secret. For example, Weinstein's despicable assaults

were common knowledge among women in the entertainment business.

Astonishingly, his own company put contractual provisions in place to protect him and the company from his behavior.¹ This is just one indication of his shielded status given his power to produce hit movies that made millions of dollars, not to mention his ability to make or break a young woman's career.

Based on media stories since his dismissal,² Matt Lauer's reputation certainly preceded him, and the powers that be at NBC ostensibly knew about his inappropriate behavior well before he was fired.³

The Civil Rights Act was passed in 1964, but the Equal Employment Opportunity Commission did not issue guidance declaring sexual harassment a violation of Section 703 of Title VII until 1980.

At that time, the commission established criteria for determining when unwelcome sexual conduct constitutes sexual harassment and when an employer can be liable for the conduct.

Helpfully, the EEOC suggested steps an employer should take to prevent sexual harassment.⁴

These include:

- Creating a policy that comports with the relevant state and federal laws prohibiting sexual harassment in the workplace.
- Establishing a complaint process for those alleging harassment.
- Creating a process for investigating allegations.
- Prohibiting retaliation for bringing a complaint.
- Training all managers and staff on the policy.
- Disciplining those found to have committed sexual harassment.

This has been the law since 1986, when the U.S. Supreme Court in *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, affirmed the commission's definition and guidance.

In 2015, the U.S. Bureau of Labor Statistics found that around 70 percent of employers provide sexual harassment training and 98 percent of companies have sexual harassment policies.

Yet 6,822 sexual harassment claims were filed with the EEOC that year. And this does not take into consideration all the claims never filed.

If sexual harassment is as pervasive as ever, why does it appear some companies, nonprofits and even Congress are looking the other way? Why have the law and associated guidance been so ineffective as deterrents to this abhorrent behavior? Where does the guidance fall short?

Employers' goals in preventing sexual harassment are twofold: Create a safe and secure environment free from harassment for all employees, and protect themselves from liability. Following the EEOC's guidance has been their default response to accomplish both for decades, through well-defined policies, training of managers and staff, and maintenance of processes for the reporting, investigation and resolution of harassment allegations.

Policies and training also have an added legal benefit: Their proactive implementation is demonstrable, and employers have not been required to demonstrate efficacy.⁵

This check-the-box approach is incredibly advantageous for employers, because data indicate training is not terribly effective. Will the standard change now? It is hard to say, but the law frequently follows the culture and, as such, "The law should create incentives for employers to conduct ... evaluations [of training programs], as [it is] indicative of a sincere desire to truly change the way women are treated in the workplace."⁶

An employer's goal in implementing harassment policies and training should to make all employees feel confident it is adamant about preventing sexual harassment. Employees must know the employer will take complaints seriously and fully investigate them, and that harassers will be disciplined. This must be the case regardless of the accused's position within the organization.

At the same time, there is a real danger of overcorrection in this hypercharged environment. Women who made sexual harassment claims in the past often reported being marginalized or ostracized afterward. Of course, a small number of men also file sexual harassment claims. But for purposes of discussing historical repercussions, I will speak of "women."

If men fear being alone with women at work or feel as though they can't speak freely around women, women still lose.

Business is conducted in all kinds of non-work environments, and marginalizing half the population is not conducive to a healthy and productive work environment. Nor does it help women achieve their career goals.

Although it is illegal to retaliate against someone who files a sexual harassment complaint, women can experience retaliation in numerous ways that may seem innocuous.

For example, a woman who files a claim of harassment may be excluded from a team working on a high-profile project, when she likely would have been included had she not filed the claim.

Some women eventually quit or are pushed out of their jobs.⁷ Many of the women who accused Charlie Rose have maintained anonymity because of the potential for negative professional consequences.⁸

And this doesn't even begin to address the obstacle course those who allege harassment face to pursue legal recourse, an expensive effort that can derail a career and does not always result produce a successful outcome.

A common effect of sexual harassment on women may be self-selection out of the job. A 2017 study reported that sexual harassment in the workplace contributes to financial difficulties primarily because women leave jobs to escape the abusive behavior, and changing jobs can have a significant impact on their careers.⁹ Women may also leave because they are dissatisfied with their employer's response to the allegation.

Another issue — one that will loom large as we move into more of a gig economy — is that the EEOC's guidance may not be relevant for this cultural era.

Many workplaces today are small businesses with little in the way of HR infrastructure. Or they are startups run by a "guru" who is untouchable because he essentially is the company. And the future workforce is more likely to include more freelancers who — unlike employees — have limited institutional recourse to challenge inappropriate behavior.

Although almost no research has been done on the vulnerability of freelancers, HoneyBook, a freelancing website for events workers, did a survey on the topic and released the results in December. It is a random sampling, not a scientific study, but 54 percent of respondents reported being sexually harassed on the job.

Only about 13 percent of those who said they had been harassed brought the incidents to someone's attention, and more than 80 percent continued to work on the project where the harassment occurred. More than half of those who complained were ignored.¹⁰

The challenge of getting it right is daunting. Employers must provide clarity with respect to how employees report both observations and experiences of sexual harassment. The processes must address the potential risks of retaliation and even hearsay gossip.

Employers should offer training on their HR reporting system that provides clear goals for the employer and employee in the event a complaint is lodged. The training should include specific examples of prohibited behavior so that employees do not leave feeling confused and overwhelmed.

Employees must be able to report confidentially both sexual harassment experiences and observations of harassment. Confidentiality is required to protect against the risk of retaliation and/or idle gossip that may damage the reputations of those involved.

The heightened awareness of this issue has forced some very unpleasant truths to the surface. In a society that celebrates wealth, people can be made to feel like commodities that can be used up and then discarded. It is not much of a leap from this belief to the tacit acceptance of sexual harassment.

As I write this article, the Washington Post is reporting that the Humane Society of the United States has chosen to retain CEO Wayne Pacelle after an internal investigation discovered allegations of inappropriate sexual behavior brought by three women. "The nonprofit also offered settlements to three other workers who said they were dismissed or demoted after speaking up about Pacelle's alleged sexual misconduct."¹¹

We are only beginning to grapple with the fallout. If we have any hope of changing this paradigm, employers are going to have to step up with meaningful examinations of their readiness for the coming deluge. #MeToo and #TimesUp have thrown down the gauntlet, and the old rules may no longer apply.

NOTES

- ¹ Eric Sherman, *Harvey Weinstein's Ultimate Enabler Is His Employment Contract, Says a New Report*, INC.COM, <http://on.inc.com/2g8BBH0>.
- ² Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017), <http://bit.ly/2AHqmBz>.
- ³ Callum Borchers, *NBC Pleads Ignorance on Matt Lauer – with a Couple Big Caveats*, WASH. POST (Nov. 30, 2017), <http://wapo.st/2slgGDU>.
- ⁴ Title VII, 29 C.F.R. § 1604.11.

⁵ Courts neither review the content of training programs nor ask employers to assess their validity internally. See Vicki J. Magley & Joanna L. Grossman, *Do Sexual Harassment Prevention Trainings Really Work?*, SCIENTIFIC AM. (Nov. 10, 2017), <http://bit.ly/2B5Qbla>.

⁶ *Id.*

⁷ Noam Scheiber & Julie Creswell, *Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.*, N.Y. TIMES (Dec. 12, 2017), <http://nyti.ms/2C5LHCb>.

⁸ Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them –with Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), <http://wapo.st/2CaWZbN>.

⁹ Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, SAGE J. (May 10, 2017), <http://bit.ly/2C9T5Qb>

¹⁰ Nathan Heller, *The Gig Economy Is Especially Susceptible to Sexual Harassment*, NEW YORKER (Jan. 25, 2018), <http://bit.ly/2FqYJuU>.

¹¹ Danielle Paquette, *Humane Society Keeps CEO After Sexual Harassment Complaints, Prompting Seven Board Members to Resign*, WASH. POST (Feb. 1, 2018), <http://wapo.st/2GtvGrm>.

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