

Almost Two Years of the #MeToo Era: The Unexpected Impact on Your Business

by Tiffany Brosnan and Christy Joseph

Almost two years have passed since the Harvey Weinstein story broke in October 2017, and no one could have predicted how far-reaching its impact would be felt. Employers of all sizes are reevaluating their practices and focusing on preventative measures. The #MeToo movement has affected how harassment cases are litigated and settled and has spawned new theories of litigation against businesses and their shareholders. It has changed everything from hiring practices to due diligence in mergers and acquisitions.

Emphasis on Training, Hotlines and Investigations

California legislation now requires employers with five or more employees to provide two hours of sexual harassment training by the end of 2019 to all supervisory employees, and one hour of sexual harassment training to all nonsupervisory employees.

Companies have introduced employee hotlines as a safe space to anonymously lodge a complaint. This fulfills California regulation stating employers must have a third-party reporting mechanism, so that employees are not required to complain to an immediate supervisor.

After a complaint of harassment occurs, employers in California are obligated to conduct an

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impartial and timely investigation by qualified personnel.

Due Diligence in Mergers & Acquisitions

The increased legal, financial and reputational risks a business faces have the potential to effect a merger or acquisition. To prevent this, businesses are making modifications, including:

- Assessing the seller's human resources department, investigative practices, training materials, and claims history.
- Demanding new representations and warranties from the seller, which affirm: its investigative practices are sound; it is unaware of any sexual harassment or abuse occurring within the company or among executives; and that no such complaints or lawsuits have been raised, or settlements paid.

Executive Hiring

Companies are looking at their hiring and onboarding practices and implementing several new strategies, including:

- Tougher scrutiny in the hiring process aimed to identify past complaints against a candidate.
- Executive agreements, an affirmative representation that the executive has not been involved in past misconduct.
- Incorporating sexual harassment or misconduct into the definition of "for cause" in executive agreements.

Confidential Settlements

A company's ability to deduct settlements related to claims of sexual harassment or abuse including those related to attorney fees can be important to a company's bottom line. However, the #MeToo movement criticized employers for keeping sexual harassment claims and settlements confidential. In response, California enacted legislation which restricts this practice.

Shareholder Derivative Litigation & Securities Actions

Companies are now facing derivative class actions brought by shareholders alleging breach of fiduciary duty or waste of corporate assets for knowing about sexual misconduct and turning a blind eye or concealing it from shareholders. Investors are likewise bringing securities lawsuits, based on drops in the price of their shares when #MeToo claims are made public, alleging the company or executives made false or misleading statements about an executive's unethical behavior with an intent to mislead investors.

What's Next?

The ripple effect of the #MeToo movement continues with other states such as New York and Delaware following California's lead with reactive legislation. In 2018 Congress added \$16 million to the EEOC's budget and the EEOC Chair stated she intended to use the funds to enhance the agency's work in harassment prevention.

The importance of having a culture that discourages such conduct and promptly addresses it when issues arise is now more important than ever to businesses to avoid what can be devastating effects to an organization's purpose.



Snell & Wilmer's employment and labor attorneys assist clients through all phases of employment and labor-related counseling and litigation. We routinely provide management training in the areas of sexual harassment, workplace diversity, employee retention, hiring practices, wrongful discharge, internal investigations and numerous other areas intended to educate and motivate supervisory personnel in the proper handling of workplace issues. We also regularly advise clients on non-competition, non-solicitation and confidentiality issues designed to protect their significant investments in people, territories and proprietary information.

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