The #MeTooReckoning
How Far We’ve Come and Where We Go From Here
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- Specializes in representing individuals in employment discrimination, sexual harassment, Title IX, and whistleblower claims.

- Represented Christine Blasey Ford during Supreme Court nomination hearing of Brett Kavanaugh.

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- 2018 Co-Lawyer of the Year Metropolitan Washington Employment Lawyers Association
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California Employment Lawyers Association (CELA), Past President 2014, 2015
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The #Me Too Movement

- Alyssa Milano Tweets
- #Me Too / Tarana Burke
- 19 Million posts on Twitter within a week
- Reveals a failure in our system
- As powerful are toppled, legislative and corporate response
- Christine Blasey Ford (September 2017)
- Movement, not a moment
Non-Disclosure Agreements

- Well-intentioned efforts to bar NDAs.
- “Gag orders” v. negotiated confidentiality
- Confidentiality inherently harmful in harassment context
- Categorical bans not the answer
- Confidentiality may be important to victims as well as employer.
  - Resolution
  - Reputation
  - Privacy
- Who should bear the burden?
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HOW FAR WE HAVE COME

• Segregated jobs or no jobs at all
• Filling the "woman's" slot
• Elizabeth Warren: separated from teaching job because she got pregnant
• From no protections at all to: "She is pregnant; can we terminate her": NO, IT'S AGAINST THE LAW
• Being told that a recruitment tool showing all tall white males reflects "the image we like to project"
• Complaint would lead to opposite of result sought
WHERE WE GO FROM HERE

• National legislation: vacuum compared to other wealthy countries
• Protections in many states and localities but hodge podge of rules with which employers must comply
• Causes employers to focus on how to create a modicum of uniformity rather than enlightenment
• But employers should take holistic approach to their policies to recruit, mentor, retain, and promote
• Parental benefits
HOW FAR WE HAVE COME

• Complaints were initially not made or ignored
• Or worse: led to termination of complainant
• Leaving was often the best remedy
• But substantial progress occurred
• Clients investigated/terminated for misconduct
• Examples too numerous to cite but: even claims against founders/CEOs led to termination
• Yet there were still Harvey Weinsteins
WHERE WE GO FROM HERE

• Importance of investigations for all parties
• Better trained human resources professionals who value people over paperwork
• No more: but "it's she said / he said"
• Trained intuitive investigators who understand chronology and direct and background evidence
• Decision on appropriate corrective action
• Documentation and follow up
WHERE WE GO FROM HERE

• Comprehensive adoption of progressive policies
• Involvement of / leadership from Board of Directors
• Not just diverse workforce but diverse Board
• More than just solving problem when it occurs
• Comprehensive holistic approach to workforce
  • Leadership development
  • Talent management, inclusion, emotional intelligence
  • In person; no "on line" training
  • No bullying
WHERE WE GO FROM HERE

- Ongoing developments in limiting confidentiality clauses in settlement agreements
- Federal: IRC162(q): If NDA, no employer deduction for payment related to sexual harassment
- Different state rules / comprehensiveness
- Illinois Workplace Transparency Act: 1/1/2020: document that employee desires confidentiality
- California: no NDA for sex discrimination or harassment if civil or administrative complaint filed
WHERE WE GO FROM HERE

• ABA House of Delegates Resolution 106
• Urges all employers in legal profession to close compensation gap between men and women
  • Leadership and governance
  • Pool of candidates for same
  • Compensation and review process
  • Credit for business generation / remove barriers
  • Promotion rates
  • Assignment system
WHERE WE GO FROM HERE

• We have "promises to keep" and "miles to go before we sleep"  
  Robert Frost
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Reforms in Fifteen States Since #MeToo Went Viral

Key Reforms: Expanding Protections to All Working People

• Protecting more types of workers, e.g. independent contractors, unpaid interns

• Extending laws to cover smaller workplaces
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- Protecting more types of workers, e.g. independent contractors, unpaid interns
- Extending laws to cover smaller workplaces
Key Reforms: Increasing Transparency and Accountability

- Stopping abusive use of Nondisclosure Agreements (NDAs)
  - As a condition of employment
  - In a settlement
- Limiting forced arbitration
- Requiring affirmative reporting by employer
Key Reforms: Removing Barriers to Access to Justice

- Extending the statute of limitations to file a charge
- Strengthening accountability for employers/harassers
- Addressing overly restrictive liability standards, e.g. "severe or pervasive"
- Removing caps on damages
Key Reforms: Promoting Prevention

- Mandating regular training
- Anonymous climate surveys
- Requiring employers to provide multiple reporting mechanisms
BE HEARD in the Workplace Act

The first comprehensive federal proposal to address workplace harassment in the wake of #MeToo

• Protecting more workers
• Removing barriers to access to justice
• Promoting transparency and accountability
• Funding and requiring prevention
• Increasing access to legal services for workers in low-wage jobs
Resources

TIME’S UP Legal Defense Fund
https://nwlc.org/times-up-legal-defense-fund/

Progress in Advancing #MeToo Workplace Reforms in #20StatesBy2020

The BE HEARD in the Workplace Act: Addressing Harassment to Achieve Equality, Safety, and Dignity on the Job
https://nwlc.org/resources/the-be-heard-in-the-workplace-act-addressing-harrassment/

#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protection and Accountability
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Stopping Harassment on All Bases

- Sex (including sexual orientation, gender identity, and pregnancy)
- Race
- Age
- Disability
- National Origin
- Religion

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Look Beyond Stopping Illegal Harassment

- Create a **safe** workplace on all bases. Workers should feel both psychologically and physically safe.
- Create a **respectful** workplace. Workers should not be belittled, humiliated, or ignored.
- Create a **diverse and inclusive** workplace where women and under-represented individuals feel listened to and included.

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Leadership and Accountability

- Leaders must believe that a safe, respectful, diverse, and inclusive workplace is important. They must articulate those values and act on them.
- Leaders must hold accountable those who engage in misconduct, those responsible for responding to the misconduct, and those who retaliate.
- Leaders must hold accountable those responsible for recruitment, hiring, and retention with respect to diversity.
A Campaign for Culture Change

Policies and Procedures

- Use simple and clear language to explain prohibited conduct and the complaint process.
- Provide multiple avenues to report.
- Take those who report seriously and investigate reports in a timely fashion.
- Take proportionate and timely corrective action.
- Provide real protection against retaliation for those who report or corroborate unsafe or disrespectful behavior.
A Campaign for Culture Change

- Conduct data analyses on pay equity, workplace demographics, and applicant pools.
- Develop talent recruitment and retention strategies.
- Create a diversity and inclusion council and/or employee resource groups.
### Good Compliance Training

1. Use a live, interactive trainer
2. Provide examples that fit the workplace
3. Explain unacceptable conduct, not illegal conduct
4. Explain steps to report harassment
5. Explain what will happen in an investigation
6. For supervisors – make CLEAR the expectations for responding to complaints
Respectful Workplace Training

- Goal is to create a **civil and respectful workplace for all**. Not focused on status-based characteristics.
- Teaches employees to increase their **awareness** of respectful and disrespectful behavior.
- Teaches employees how to **give and respond to feedback** about uncivil behavior.
- Teaches **supervisors** how to **coach** problematic employees.

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Bystander Intervention Training

**Collective Responsibility**
Help workers feel collectively responsible for having a safe, respectful, and inclusive workplace.

**Unacceptable Behavior**
Reminds workers about the behavior that is unacceptable.

**Realistic Options**
Give workers realistic options for intervention, in light of power dynamics.

**Skills for Intervention**
Help workers develop skills for intervention.

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Commission on Judicial Performance Hearings

- Justice Jeffrey Johnson
- 17 women accused him of sexual impropriety or bullying, spanning two decades
- Defense:
  “… a victim of the #metoo movement run amock…”
  “…there is a huge increase in questionable claims from people who are rethinking the past…”
Commission on Judicial Performance Hearings

• Justice Victoria Chaney

• Accusations: hugging and grabbing her breasts 150x, asking for perform oral sex and to have an affair – over *nine years*

• Inconsistent actions:
  • Wrote a glowing letter (“brilliant and thoughtful”) recommending him to the Supreme Ct
  • Affectionately referred to him as her “twin brother”, “conjoined twins” because appointed at same time. Periodically invited him to lunch; worried for him, but afraid of him…
  • She thought she was the only one. She thought she could handle it, and she did.
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