PLUS EDUCATION DAY
April 26, 2018

“EPL in the “MeToo Era”
EPL in the #MeToo Era

PANELISTS

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What is the #MeToo Movement?

From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories

Multiple women share harrowing accounts of sexual assault and harassment by the film executive.

By Ronan Farrow

How Tough Is It to Change a Culture of Harassment? Ask Women at Ford

After Weinstein: 50 Men Accused of Sexual Misconduct and Their Fall From Power

In early October, Harvey Weinstein, the Hollywood producer, was fired from his namesake company after multiple women came forward to accuse him of rape and sexual assault.

In what appears to be a seismic shift in what behavior is tolerated in the workplace, a cascade of high-profile men, many in the entertainment and news media industries, have since been fired or forced to resign after accusations of sexual misconduct that ranged from inappropriate comments to rape.
Why is #MeToo Relevant to EPL?

• It’s changing the defense strategy and existing claims are getting larger settlements as carriers want to avoid trial.

• Some carriers are changing their terms—Executives are being excluded for Sexual Harassment on EPL & D&O policies due to the claims climate.

• Expecting additional trainings for executives / employees for Sexual Harassment going forward.
From FY 2010 through FY 2017, EEOC sex harassment complaints remained steady at about 12,000-13,000 per year

- But the EEOC also saw a fourfold increase in visitors to the “sexual harassment” portion of its website after the Weinstein allegations broke

Almost half of U.S. women say they’ve been sexually, verbally, or physically harassed at work

- But 90% of people who experience harassment never formally report it

In 2016, harassment complaints cost U.S. companies over $160 million in EEOC settlements
Implications on EPLI Coverages and Claims

- Coverage implications
- Statute of limitations issues
- Legal standards to actionable sexual harassment
- Other insurance lines potentially at issue:
  - D&O
  - General Liability
  - Sexual Misconduct Liability
• Wait and see approach

• Increased Insured Awareness

• Review Coverage Carefully

• Opportunity! The Washington Post reported November 3, 2017 that the market is projected to grow to from $2.2 Billion to $2.7 Billion by 2019.
• I don’t care what Harvey Weinstein did... Harvey Weinstein is not my client

• Just add a few zeros to your settlement demand

• Cases harder to settle

• Trials more dangerous for companies
Underwriting EPL Coverage / Risk Selection

- What are underwriters looking at?
  - Class of Business (i.e., higher risk / severity class)
  - Employee Count
  - Mix of employees (male vs. female; mix of management – larger risks)
  - Prior losses / Prior allegations Trends
  - Percentage of higher wage earners

- Is there an employee handbook in place with best in class written guidelines/procedures?
  - Does it include a sexual harassment and discrimination policy? Copies may be requested
  - Clear outline of prohibited conduct
  - Employee grievance procedures (single or multi-channel reporting)
  - Internal investigations / confidentiality

- Is there annual certification and/or training for the harassment policy (Management / All Employees)

- What other steps have been taken to ensure that employees know harassment reporting procedure and feel comfortable doing so?

- If prior harassment claims, who was alleged harasser?
  - Was he/she in position of power? Still there?
Possible Underwriting Implications to EPL Policies

- Higher premiums
- Reduced limits of liability
- Increased deductibles
- Sub-limits
- Exclusionary wording
- Use of Annual Warranties
- Prior Acts Dates
- More safeguards
- The end of confidentiality in settlement agreements ("Ending Forced Arbitration of Sexual Harassment Act of 2017")
Real Situations from the Defense Perspective

- Sexual harassment from one incident of a client touching her hair? $25,000?

- Sexual relations for a year and a half—all was consensual until she met her now husband who is trained in human resources? $1.8M?
• Corporate Culture / Tone at the Top

• Loss Control Measures
  – Importance of HR Functions
  – Failure to Investigate (Board / Executive Management)
  – Workplace Relationships (Disclosure / Waivers)
  – Employee Handbooks (written guidelines / policies)
  – Internal Reporting Procedures

• Training (discrimination & sexual harassment; specific training for management)

• Proactive actions to prevent sexual harassment claims (3rd party assessments)
Federal Responses to #MeToo

• Congress may prohibit mandatory arbitration of sexual harassment claims
  – All 56 state, territorial, and D.C. attorneys general (most of whom are Republican) have asked Congress to do so

• Tax Reform Act of 2016 eliminated business deductions for settlements
  – Employers no longer can take a business tax deduction for any settlement or payment related to sexual harassment or sexual abuse (or for attorney’s fees related to such a settlement or payment) if it’s subject to a nondisclosure agreement

• Many lawmakers are arguing that NDAs in sex harassment cases should be abolished

• 162(q) to the Internal Revenue Code as part of the Tax Cuts and Jobs Act Section 13307
  – PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.—No deduction shall be allowed under this chapter for—
    “(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
    “(2) attorney's fees related to such a settlement or payment.”
States have considered and are passing their own legislation prohibiting mandatory arbitration of sexual harassment claims

- This may not be enforceable under the Federal Arbitration Act (but Congress is considering an amendment to the FAA that would do the same thing)

Stop Sexual Harassment In New York City Act: NYC Counsel recently passed 11 separate bills created to provide broader protections against workplace sexual harassment

- **Int. 614-A** requires the New York City Commission on Human Rights to make certain information about sexual harassment available online for the public. This information will include examples of sexual harassment, a description of the Commission’s complaint process, and other available agency resources.

- **Int. 630-A** requires all employers in New York City to post an anti-sexual harassment rights and responsibilities poster. Employers also must provide an information sheet on sexual harassment to each employee at the time of hire. The poster and information sheet will be created and made available by the Commission. Similar to Int. 632-A (discussed below), this revised legislation does not contain any reference to civil penalties for violations of the posting and notice requirements, which was included in a previous bill.

- **Int. 632-A** requires employers with at least 15 employees to conduct annual sexual harassment “interactive training” for employees, including supervisory and managerial employees, starting April 1, 2019. The original version of the bill required the annual training to be completed within one year of September 1, 2018, and every year thereafter.

- **Int. 657-A** will expand the New York City Human Rights Law (NYCHRL) coverage of sexual harassment cases to include employers with fewer than four employees, thus aligning the NYCHRL with the New York State Human Rights Law’s coverage of sexual harassment claims.

- **Int. 663-A** will lengthen the statute of limitations for filing harassment claims arising under the NYCHRL with the Commission from one year to three years after the alleged conduct.
And then there’s California….

- **Proposed California Legislation**-
  - **AB 3080** - bill to prohibit mandatory arbitration of sexual harassment claims
  - **AB 1870** - bill to extend the statute of limitations to three years
  - **SB 1038** - bill to allow personal liability for retaliation
  - **SB 1300** - bill to allow plaintiff to recover for failure to take a reasonable steps to prevent discrimination and harassment EVEN if Plaintiff is unable to recover for discrimination or harassment
  - **AB 3081** - bill to establish a presumption that an employee who has been unlawfully retaliated against if any negative job action occurs within 90 days of reporting sexual harassment
  - **SB 820** - bill to prohibit any provision in a settlement agreement that prevents disclosure of factual information
Carrie: “Pay equity is the next #MeToo”

Sarah: “Involve counsel often and early”

Michelle: “Only time will tell”
• Audience questions for panel

ANY
QUESTIONS?
EPL Jeopardy

Brian Platt
Host
IMA, Inc.

Contestants
Leigh Aslin
The Hanover

Joe Robuck
Worldwide Facilities

Karen Price-Eakins
USI Insurance Services
Welcome to
JEOPARDY!
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<th>IS IT REALLY EPL?</th>
<th>EXCLUSIONS &amp; EXCEPTIONS</th>
<th>#METOO</th>
<th>ALPHABET SOUP</th>
<th>LOSERS AND WINNERS</th>
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This insures the physical injury to an employee.
What is Workers Compensation?
This exclusion precludes coverage for any Wrongful Act, fact, circumstance or situation which has been the subject of any written notice given under any other policy.
What is the prior notice exclusion?
This woman brought a high profile lawsuit against her Silicon Valley, venture capital firm employer, alleging sexism & discrimination.
Who is Ellen Pao?
Violation or failure to comply with OSHA (Occupational Safety and Health Act).
What is “excluded from EPL”?
This exclusion states that any physical injury is not covered under the EPL policy
What is the bodily injury (and property damage exclusion)?
To date, California, Delaware, Massachusetts, New Orleans, Oregon, Puerto Rico, New York City, Philadelphia and Pittsburgh have all banned or are set to ban in the near future, this employment practice.
What is the ban on Salary History Inquiries?
This labor law protects employees at companies with more than 100 employees to provide 60 calendar-day advance notification of plant closings and/or mass layoffs of employees.
What is the WARN Act?
(Worker Adjustment and Retraining Notification Act of 1988)
This coverage defends harassment and discrimination complaints brought by customers or other outsiders.
What is Third Party EPL Coverage?
The phenomenon where multiple additional complaints are filed after a first complaint is successful.
What is a “MeToo” claim?
This is a United States Labor Law requiring certain employers to provide employees with job-protected and unpaid leave for qualified medical and family reasons.
What is the FMLA (Family Medical Leave Act)?
Intentional acts may be covered under many of today’s EPL policies, but this kind of act is only covered until you are found to be guilty (subject to a final adjudication of course)
What are criminal acts?
In 2017, TIME Magazine, named this group of people as their “person of the year.”
Who are the “Silence Breakers”?
The phrase used to describe the time period employees spend putting on and removing uniforms. Prevalent in restaurants and other service industries.
What is “Don and Doff”?
In his recent legal woes, Harvey Weinstein is up against a myriad of allegations, including this form of harassment “when an authority figure offers or hints that he/she will give something in return for his/her own satisfaction of a sexual demand.”
What is Quid Pro Quo?
The provision stating that if an insured does not agree to the first settlement opportunity recommended by the carrier, the carrier’s liability is capped at the amount for which the claim could have settled, plus defense costs as of the date of the settlement opportunity.
What is a Hammer Clause?
The most common reason for claim denial under an EPL policy.
What is late reporting?
Failure to investigate alleged misconduct; breach of fiduciary duties by engaging in a pattern of intentional egregious misconduct.
What is a likely derivative complaint that may be addressed by the D&O?
When the insured has a written employment agreement, the damages will not be covered but defense costs might if the exclusion is worded correctly.
What is the contract exclusion?
This industry has recently had the most notable/predominant publicized sexual harassment claims.
What is the Entertainment Industry?
Supervisor sends a nasty email to an employee who is alleging wrongful termination. Email accuses employee of inappropriate activity at work and says now the employee can sit on their lazy butt on a sofa and “eat bon-bons” instead of working.
What is a bad idea?
Under this new law, any settlement or payment attributable to sexual harassment or sexual abuse – as well as the attorney’s fees related to such settlement or payment – are **not tax deductible** if the settlement is subject to a nondisclosure agreement.
What is the New Federal Tax Cut and Jobs Act?
This 1974 law sets minimum standards and provides oversight for pension and health plans and providers.
What is ERISA? (Employee Retirement Income Security Act)
This category had the largest amount of EEOC charges in 2017.
What is Retaliation? (48.8%)
Arbitration or grievance proceeding pursuant to a collective bargaining agreement.
What is not Covered under an EPL policy?
This Act ended segregation in public places and banned employment discrimination on the basis of race, color, religion, sex or national origin.
What is the Civil Rights Act of 1964?
An employer’s adverse response to a protected action (for example terminating an employee for filing a workers compensation claim)
What is Retaliation?
This coverage provides protection for property owners and managers against claims brought by tenants alleging discrimination.
What is Tenant Discrimination?
Federal agency responsible for employment related issues and typically the first responder that sends a notice of violation to the insured.
What is the EEOC?
Coverage that would respond to a complaint by a visually impaired individual alleging discrimination. For example, they could not read a company’s website.
What is defense costs coverage for ADA (Americans with Disabilities Act) claims?
The amount of time an Insured has to report a Claim is found within this section of this policy.
What is the Claims Reporting section?
The ruling on this case recently overturned the previous administration’s position on joint employer liability (hint: franchisors and franchisees)
What is the Browning-Ferris Industries ruling?
Speaker Bios

Chad Bertuleit
Sarah Goldstein
Carrie Kurzon
Michelle Levine
Brian Platt
Karen Price-Eakins
Leigh Aslin
Joe Robuck
Chad Bertuleit  
Moderator

Chad is an Underwriting Specialist with Arch Insurance Group – Executive Assurance Division. His responsibilities include Underwriting Management Liability Lines for both private and public companies throughout a multi-state territory/region. Coverages include Directors and Officers Liability, Employment Practices Liability, Fiduciary Liability, Crime, Kidnap and Ransom and Cyber Liability.

Prior to Arch Chad was an Underwriting Consultant at CNA Insurance Co. – Financial Institutions Division where he underwrote Management and Professional Liability programs for Banks, Insurance Companies, Mutual Funds, Hedge Funds, Non-Traditional Lenders and Asset Managers.

Chad has been working in Management and Professional Liability Insurance space for 12 years and prior to Insurance has 2 years in Banking/Mortgage Lending experience. Chad received his B.A from the University of Northern Colorado. He is also an active member of the PLUS Southwest Chapter Steering Committee.
Sarah Goldstein is Co-Chair of the Labor and Employment Group and a partner in the Employment Litigation practice. She represents organizations of all sizes in employment-related matters and advises companies on proactive compliance with employment and wage and hour laws. Sarah is an experienced trial lawyer in both the Federal and California Superior Courts, with a focus on harassment, wrongful termination, retaliation, discrimination, and wage and hour matters.

Her litigation practice includes defending employment actions under the Fair Employment and Housing Act including gender, pregnancy, race, ancestry, color, religion, age, national origin, sexual orientation, disability, wrongful termination claims, whistleblower claims, wage and hour claims, and retaliation matters. Sarah also represents employers in administrative actions before the U.S. Equal Employment Opportunity Commission, U.S. Department of Labor and the Department of Fair Employment and Housing.

Prior to joining Tressler, she served as Director of the Employment practice group at Kaufman Dolowich & Voluck for the Los Angeles office. In 1998, Sarah received the Wiley W. Manuel Award for Pro Bono Legal Services. An active member of the Professional Liability Underwriting Society (PLUS), Sarah currently serves on the Board of Trustees and she chaired the Women’s Leadership Network event in Los Angeles in September 2012. From 2009 to 2011, she served as Southern California Chapter Chairperson.
Carrie Kurzon is the National EPLI Practice Leader for Large Commercial at The Hartford. In her role, Carrie is responsible for leading all aspects of The Hartford’s EPL underwriting initiatives, focusing on underwriting strategy, appetite and policy forms, as well as identifying EPL trends and concerns for the underwriting staff and senior management.

Prior to her employment at The Hartford, she was a Claims Consulting Director within the Specialty Claims Group at CNA Insurance Co. where she handled complex and high severity EPL and Fiduciary claims. Prior to her employment with CNA, Carrie litigated employment claims on behalf of plaintiffs as an associate at The Ottinger Firm in New York.

Carrie received her B.A. from the University of Wisconsin-Madison and her J.D. from the Benjamin N. Cardozo School of Law. She is a member of the New York State Bar and actively involved in the Advancement of Professional Insurance Women (APIW).
Michelle Levine joined Tri-City /CRC in 2008 and is a Vice President on the Financial Services San Francisco team. She serves as a broker specializing in Employment Practices Liability, Lawyers Professional Liability (LPL), and other management and professional liability coverages.

Michelle began her tenure at Tri City as an EPL Program Underwriter for Lloyds of London. Michelle has over 13-years of professional insurance experience. Michelle received her B.A. from San Francisco State University.
Brian Platt joined IMA in 2012 as AVP in the Executive Risk group. His responsibilities include the successful marketing and placements of Executive Liability lines of coverage including D&O, EPL, Fiduciary, Crime, Cyber and E&O.

Previously to IMA Brian was the underwriting Manager for Monitor Liability Managers where he oversaw the Western Region for the Management Liability book.

Brian received a Bachelor of Science, Finance from the University of Northern Colorado.
Karen Price-Eakins is a Claims Consultant with USI and provides Claims Management for USI Mountain Region clients. Karen has 39 years of experience in the insurance industry and has wide-ranging knowledge in Personal Lines claims and Commercial claims, including construction risks, homeowner associations, and healthcare. Karen’s focus areas include: client advocacy, Education, Claim Reviews, Coverage Reviews, Communication, Negotiation and Subrogation.

Before joining USI in 2016, Karen had 37 years of experience in the insurance industry. This included 30 years of experience in handling Personal lines claims as an Adjuster and Supervisor on the carrier side for multiple lines including Auto, Property, General Liability and No Fault (PIP), Subrogation, and seven years as a Commercial Associate and Commercial Claims Advocate on the Agency/Broker side. As an insurance risk professional, she is particularly skilled in detail management, problem solving, and fostering communication between clients, adjusters, and attorneys.

Karen has a BS degree in Business Administration from Colorado State University. She has her Property/Casualty license and has obtained AIC, GCA, and INS designations. She is also on the Board of the Colorado Claims Association.
Leigh Aslin has been part of the Management Liability Industry for over 20 years. Most recently, she is serving as an Assistant Vice President at Hanover Insurance Group, in Denver, Colorado. She currently leads the Western region's management liability team, portfolio of private company and non-profit organizations, overseeing all sales, service, and underwriting.

She has underwriting expertise in Directors & Officers Liability, Employment Practices Liability, Fiduciary Liability, Crime, Kidnap Ransom, and Cyber Liability. She has extensive experience in leading, underwriting, training, and education of evolving management liability exposures.

Leigh holds a BSBA in accounting from Creighton University in Omaha, Nebraska.
Joe is Senior Vice President and wholesale broker at Worldwide Facilities in Los Angeles where he specializes in the financial lines of insurance including Directors and Officers Liability, Employment Practices Liability, Fiduciary Liability, Crime Insurance, Professional Liability and Cyber Liability.

Joe manages a team of professionals that assist their retail clients in the placement of these policies for their clients. Joe has been with Worldwide for the last 13 years. Prior to joining Worldwide, Joe spent the early part of his career in technology.

Joe is a frequent speaker, has published a number of articles and is a past chairperson of the Los Angeles Chapter of the Professional Liability Underwriting Society. Joe received his Bachelor’s degree in Computer Science from York University.
Assessing Sexual Harassment Response and Prevention Strategies After #MeToo

A TAASA White Paper

January 5, 2018
Like many, we have been simultaneously saddened and energized by the national reckoning with sexual harassment and assault, which has crystalized under the banner of Tarana Burke’s hashtag #MeToo. Many women and men have been affirmed in their experiences of sexual harassment and abuse for the first time, and we, as a society, seem prepared to confront this problem more frankly and openly than in the past. Unquestionably we are moving in the right direction.

Yet, as a new year begins, we also sense a mood of uncertainty about what’s next. What might a sustained commitment to eliminating sexual harassment look like? What have we already accomplished in 2017, and how might those accomplishments guide our actions going forward, in terms of policy reforms, cultural norms, or both?

Now is a pivotal moment to intensify our focus on this problem, not to shy away. Simply put, the strong anti-discrimination policies many institutions have in place are necessary, but not sufficient, to end harassment and abuse. Sexual harassment tends to be an intractable problem because it is symptomatic of an array of overlapping power imbalances. These include but are not limited to sexism and hostility toward gender nonconformity; the license to abuse power in the absence of transparency and accountability; professional, financial, and societal incentives to look away from “open secrets;” and inadequate public understanding of all the above. Indeed, widespread sexual harassment has persisted even after decades of anti-harassment policy development, with particularly alarming prevalence among transgender and gender nonconforming workers and students. As Professor Joanna L. Grossman of the Dedman School of Law at Southern Methodist University writes, existing law only takes us so far:

“[D]espite more than thirty years of doctrinal development and broad proclamations about its interference with equal employment opportunity, sexual harassment remains disturbingly common and unaddressed . . . We are left instead with a somewhat confused doctrine that rewards the proliferation of policies and procedures, but never inquires whether they have had the desired effect.”

In sum, ending sexual harassment and exploitation requires shining a light, not only on abusers when they do harm, but also on the conditions that tolerate, or even encourage, abuse.
Therefore, this paper is not intended as a summary of current legal compliance criteria, nor does it focus narrowly on recommendations for institutional sexual harassment policies. Instead, it outlines considerations for developing holistic prevention and response strategies. Those considerations fall into three key areas: (1) leadership and accountability, (2) organizational policy, and (3) training.

We offer this white paper in an effort to assist institutional officials, firms, policymakers, and any individuals seeking concrete steps to foster environments in which people can work, learn, and thrive free of sexual harassment and assault. To those organizations and individuals, we also extend our tremendous thanks and commitment to work in partnership in the long-term effort to eliminate sexual violence.

**Leadership & Accountability**

According to the Equal Employment Opportunity Commission, “[t]he cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated.” Although a clear, comprehensive sexual harassment policy is an essential component in preventing harassment, any policy’s effectiveness is ultimately a function of the cultural norms that leaders foster in their organizations.

Research indicates a “strong relationship between environmental norms and individual harassment.” Regardless of the strength and content of an express policy, “harassment is more likely to occur in workplaces where it appears to be permissible.” Failure to acknowledge and punish sexual harassment conveys both that the behavior is acceptable and that reporting harassment does not effectively end it. Moreover, when supervisors or others in positions of authority commit sexual harassment, the behavior can have a compounding effect on the workplace culture—lower-level employees conclude the behavior is permissible for them as well.

To prevent or counteract a permissive workplace environment, leaders should consider the following concrete steps:

- Acknowledge that the sexual harassment policy alone cannot prevent harassment and enthusiastically enlist the help of managers and staff to foster a zero-tolerance environment, free from harassment and retaliation.
- State, frequently and unambiguously, that harassment and retaliation will not be tolerated, regardless of any individual’s status or authority.
- Assess the organization’s harassment risk factors and take proactive steps to minimize or eliminate those risks.
- Impose prompt, consistent discipline that is proportionate to the severity of the harassment or retaliation every time it is found to have occurred.
- Institutionalize evaluation, at regular intervals, of the effectiveness of strategies to prevent and address harassment, including reviewing preventative measures, complaint data, and corrective actions taken; partner

Eliminating sexual harassment is not equivalent with mere legal compliance.
with researchers to assist in evaluation.

- Allocate sufficient resources for effective harassment prevention strategies, including sufficient staff time for participation.
- Solicit feedback from employees, students, or others about the sexual harassment policy, complaint system, and training, by anonymous surveys or other means to protect employees from retaliation.
- Personally acknowledge, publicly or privately, individuals for efforts to foster a workplace in which sexual harassment is not tolerated, such as those who appropriately report complaints or who aggressively address harassment by peers or subordinates.
- If appropriate, establish a harassment policy for one’s own department or office that is more encompassing or protective than the organization’s overarching harassment policy.

In short, actions speak louder than words. It is incumbent on the leaders of any institution or organization to earn the trust of individuals whom a sexual harassment policy is meant to protect. Creating workplaces and learning environments free from harassment has as much, if not more, to do with attitudes toward harassment as the policies prohibiting it. Effective leaders are those who have a positive influence on attitudes within their organizations.

At this pivotal moment, when many are reassessing their roles in preventing and responding to sexual harassment, we urge organizational leaders to begin with this premise—eliminating sexual harassment is not equivalent with mere legal compliance.

**Organizational Policy**

A clear policy prohibiting sexual harassment and an accompanying complaint system that is effective, accessible, and protects individuals from retaliation are essential to eliminating sexual harassment from any workplace or educational setting. The Supreme Court, in fact, has found that one of the core purposes of Title VII is “to encourage the creation of antiharassment policies and effective grievance mechanisms.”

Though organizational officials have fairly broad discretion to determine the specific details of their policies and complaint systems, many components have been widely identified as best practices. Notably, organizations themselves also benefit from adopting such practices. Signaling to employees or students that sexual harassment complaints are taken seriously and ensuring an accessible complaint process can lead to earlier, less costly resolutions of such complaints.

A comprehensive harassment policy includes, but might not be limited to, the following:

- A statement that the policy applies to individuals at all levels of the organization, as well as to other relevant third parties, such as customers, clients, business associates, interns, or volunteers; if appropriate, a statement that the policy applies to certain geographical locations other than a main site or campus
- Clear descriptions and examples of sexual harassment and retaliation, including harassment on the basis of actual or perceived sexual orientation or gender identity, continual or intentional mis-gendering, and stereotyping on the basis of sex
- A clear description of the complaint system, including multiple, easily accessible reporting
avenues and, if possible, an avenue for individuals to share information about harassment without filing a complaint, such as a phone line or web page

- A process to investigate and resolve complaints without actual or perceived bias on the part of investigators, fact-finders, or those determining appropriate corrective action
- Measures to ensure no actual or perceived bias or conflict in investigations and disciplinary determinations, including, if appropriate, contracting with independent third-parties
- A statement of a reasonably prompt timeframe within which complaints will be resolved, except under extraordinary circumstances
- Clear descriptions of possible interim measures to ensure the safety and well-being of complainants, including, for example, workplace safety plans, permanent or temporary adjustments to complainants’ or respondents’ schedules or work stations, use of security escorts, protocols for handling civil protective orders by security and management, availability of administrative leave, and referrals to community-based support resources.
- A clear statement that retaliation against individuals filing complaints, participating in investigations, or taking any actions protected under anti-discrimination laws is strictly prohibited and will be punished
- A process to determine whether a complainant, witness, or other individual has been subjected to retaliation and to impose sanctions on those responsible for retaliation
- A statement that the organization will investigate complaints regardless of whether they are received from organizational affiliates or from third parties
- If applicable, an express protocol for investigating and determining sanctions for harassers who may be subject to special ethics rules in addition to ordinary anti-discrimination policy, such as elected officials
- An assurance that information obtained during an investigation, including the identities of complainants and witnesses, will be kept confidential to the extent permitted by law and consistent with a thorough and impartial investigation
- An assurance that complainants will be given timely advance notice before any disclosure of information related to the complaint, if such disclosure is necessary to ensure workplace safety or other legitimate purpose
- An assurance that the organization will take immediate corrective action proportionate to any harassment found to have occurred
- A process to notify complainants and respondents of the resolution of complaints, including, whenever possible, the specific preventative or corrective action taken
- A process to ensure individuals responsible for receiving, investigating, or resolving complaints are adequately trained, neutral, and independent from outside influence

Because an organization’s express sexual harassment policy is often the first place an employee turns after experiencing harassment, it is crucial that the policy is easily accessible and clear. The policy should be available in all languages commonly spoken by covered individuals, as well as in braille and audio recording.

By articulating a zero-tolerance philosophy and describing a complaint process that is unbiased, regardless of a respondent’s status or authority, the written policy can serve as the embodiment of the leadership’s commitment to a harassment-free workplace.
Finally, for even the strongest policy to be effective, people must understand it. Therefore, an essential component of a sexual harassment prevention strategy is comprehensive, evidence-based training.

It is important to recognize that training cannot serve as a substitute for conspicuous engagement by senior leadership or the consistent demonstrated fairness and effectiveness of the sexual harassment policy, as described above. Nevertheless, training serves an important function by ensuring all employees or students receive basic information about harassment protections and by providing a venue to ask questions.

One area in which training has been shown to be particularly effective is educating people on what conduct constitutes sexual harassment. Coupled with clear definitions and examples set out in a policy, training can help employees or students name their own experiences of harassment, abuse, or assault and, in turn, facilitate better reporting. The authors of one study explained as follows:

“Having the words, a name, a category (even if the category is flawed as any box or set of boxes must be) enables women to recognize and recall what happens to them with less shame, guilt, or embarrassment. A social context in which the telling does not shame or blame the teller makes telling more likely.”

Training is also particularly useful to educate employees on how to engage the complaint system and what their rights are within that process. One explanation frequently given for not reporting harassment is that the person harassed was simply unaware of the complaint process.

In addition, to be effective training must be conducted in a manner that reflects evidence-based adult learning methods, including interactive engagement and sufficient dosage. Research indicates that the common reliance on training videos is probably “not effective in changing long-term attitudes and belief systems associated with the propensity to harass” and that “employers should be hesitant to accept the use of mere training videos if they truly want to lessen and eradicate sexual harassment at their workplaces.”

Thus, training serves a valuable purpose, provided that it is implemented as a component of a holistic sexual harassment prevention strategy. The EEOC recommends that sexual harassment training be:

- Overtly championed by senior leaders
- Repeated and reinforced regularly
- Provided to covered individuals at every level and location of the organization, with specially tailored information for supervisors and managers related to preventing, identifying, reporting, intervening in, and correcting harassment, and an explanation of the consequences for failing to fulfill their responsibilities related to harassment and retaliation

Employers should be hesitant to accept the use of mere training videos.
• Provided in a clear, easy to understand style and format
• Provided in all languages commonly used by covered individuals and with accommodations for individuals with sign and hearing impairments
• Tailored to the specific setting, including, for example, workplace-specific examples of prohibited conduct and retaliation and examples of conduct that, if left unchecked, might rise to the level of prohibited harassment or retaliation
• Tailored to the details of the particular organization’s policy and complaint process, including reporting protocols; various individuals’ rights and responsibilities if they experience, observe, or become aware of sexual harassment; and the range of possible consequences for harassment and retaliation
• Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants
• Conducted in a manner offering attendees opportunities to ask questions about the training, harassment policy, complaint system, or any related rules or expectations
• Routinely evaluated by participants and revised as necessary

The Path Ahead

As innumerable accounts by women and men have starkly illustrated in recent months, sexual harassment and assault are prevalent. Countless women, men, boys, and girls endure it at work and in school, frequently remaining silent for fear of ostracization by friends and colleagues, of receiving less meaningful assignments, of lost opportunities for advancement, of being branded as a troublemaker, of imperiling professional references, or of any combination of other subtle or overt retaliation. Ultimately, many quit their jobs or cut short their educations—the material, discriminatory result that sexual harassment law is intended to prevent.

But despite its prevalence, sexual harassment is also preventable. Like more extreme forms of sexual violence, its prevalence is a function both of conditions that permit people to exploit others with impunity and of the behavioral expectations we assign in a given environment. When abusers face consequences and the people they abuse do not, we will have succeeded.

Now is an important moment. We have an unprecedented opportunity to build meaningful protections from harassment and retaliation, to implement processes that are truly unbiased, and, in doing so, to earn the trust of the people they are intended to protect. If we wish to build on the progress that has already been made, we must commit to long-term strategies to improve the cultures of our workplaces and institutions. It plainly will not be sufficient to rely on the same policies and prevention approaches that have brought us to this point.

This paper represents general considerations for strategizing such a long-term organizational commitment and, as such, cannot encompass the specific needs and constraints of any one firm or institution. Therefore, TAASA enthusiastically offers our assistance in examining specific policies, practices, or prevention strategies throughout Texas.
The Texas Association Against Sexual Assault is the unifying voice to end sexual violence in Texas. As the statewide coalition of rape crisis centers, advocates, and survivors, we are committed to fostering a culture that respects the fundamental rights and dignity of all Texans.

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6Id.
7See generally EEOC, supra note 1.
9Beiner, supra note 3, at 302 (citing James E. Gruber, The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment, 12 GENDER & SOC. 301, 304 (1998)).
10See generally EEOC, supra note 1.
13See, e.g., Alexa Ura, Morgan Smith, Jolie McCullough, and Edgar Walters, “At the Texas Capitol, victims of sexual harassment must fend for themselves.” The Texas Tribune. Nov. 13, 2017. Updated Nov. 14, 2017 (quoting one former staffer regarding the Texas House of Representatives grievance process: “I didn’t even know that was a process that existed.”)
15Beiner, supra note 3, at 301.
16See generally EEOC, supra note 1.