Transforming Workplace Culture

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Transforming Workplace Culture In the Era of #MeToo, #BlackLivesMatter, and More

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I. <u>Background</u>

A. Blacks Lives Matter

1. Following the acquittal of George Zimmerman for the murder of Trayvon Martin in 2013, activists began using the hashtag #BlackLivesMatter on social media, and particularly on Twitter.com. The movement quickly moved from the online world to the public sphere with protests in 2014 following the deaths of Michael Brown in Ferguson, Missouri and Eric Garner in New York City. Iconic images of police in riot gear and protestors closing interstate highways followed. But BLM, for short, was not just a call to action against institutionalized racism among police forces; it also represented a new era of self-reflection for employers of all sizes and across all industries.

B. Me-Too Movement

1. In early October 2017, the New York Times published the stories of a number of women who raised serious sexual harassment allegations against movie-mogul Harvey Weinstein. Less than a week later, the New Yorker featured an exposé by Ronan Farrow in which a number of women accused Weinstein of rape. On October 15, 2017, actress Alyssa Milano invited women to tweet using the hashtag #metoo "to give people a sense of the magnitude of the problem." Within 24 hours, more than 12 million #metoo posts had been posted on Facebook. Over the next several months, dozens of additional high-profile men were felled by allegations of harassment. According to a June 25, 2018 report by Time Magazine: "At least 414 high-profile executives and employees across fields and industries have been outed by the #MeToo Movement in 18 months."[1] News of super-sized corporate settlements to resolve prior claims of inappropriate behavior by employees shocked the public. Legislative bodies

[1] *See* Jeff Green, *#MeToo Has Implicated 414 High-Profile Executives and Employees in 18 Months*, http://time.com/5321130/414-executives-metoo/

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reacted aggressively, enacting new training requirements and limitations on non-disclosure agreements and arbitration clauses for sexual harassment cases. From the start, the #MeToo Movement has been linked closely to the workplace and employers have needed to react quickly, or potentially bear the brunt of public backlash and shareholder disapproval.

C. The Employment Community in the Media - Me-Too and Black Lives Matter

Countless think pieces have been written on the MeToo Movement and Black Lives Matter. Many publications, including the New York Times and the Washington Post, have cast the employment law community at large as at least partially to blame for the failure of workplace realities to keep pace with societal expectations. Below are a few examples:

1. In #MeToo Has Done What the Law Could Not, New York Times op-ed contributor Catharine MacKinnon noted that, while some may perceive an enacted law as eradicating the unlawful behavior it is designed to prevent, the reality is that "pervasive practices like sexual harassment…are built into structural social hierarchies." MacKinnon credited the #MeToo Movement with overcoming what she called this "logjam" between the letter of the law and its true operation.

2. In Why Didn't Unions Stop Sexual Harassment?, Politco reporter Ian Kullgren noted that two of the industries that faced the biggest fallout from the MeToo Movement, Hollywood and the news media, were heavily unionized industries. According to Kullgren, the inability of labor unions to prevent workplace harassment is due to a number of factors, including in part "the labor movement's own male-dominated culture, itself no stranger to sexual harassment." Labor organizations themselves have not been immune from the MeToo Movement, with top leaders at the AFL-CIO and the SEIU facing harassment allegations.

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3. In How the Legal World Built A Wall of Silence Around Workplace Sexual Harassment, Washington Post reporter Minna Kotkin argued that "our regulatory and judicial systems are complicit in protecting harassers from public exposure and opprobrium." Specifically, Kotkin blamed the prevalence of confidentiality clauses in settlement agreements and the administrative exhaustion requirements of the EEOC charge process. Kotkin also faulted the typical contingency-fee arrangement as creating improper incentives for plaintiff's lawyers to resolve cases even when the settlement agreements contain such confidentiality language.

II. Equal Employment Opportunity Commission's ("EEOC") Task Force Report

A. Background.

1. Before the #MeToo Movement even began, the EEOC had already sounded the alarm, and began examining why workplace harassment remains so prevalent, despite the fact that laws have been in place prohibiting such conduct for decades. Thus, the EEOC convened the "Select Task Force on the Study of Harassment in the Workplace" ("Task Force").

2. The Task Force consisted of an interdisciplinary select group of outside experts impaneled to examine harassment in our workplaces—its causes, its effects, and what can be better done to prevent it. The experts included management and plaintiffs' attorneys, representatives of employee and employer advocacy groups, labor representatives, and academics (sociologists, psychologists, and experts in organizational behavior). The Task Force, co-chaired by former Seyfarth Shaw LLP partner Victoria Lipnic, was charged to "identify strategies to prevent and remedy harassment in the workplace." Rather than focus only on unlawful harassment, the Task Force utilized an expanded definition of harassment. The Task Force instead looked at all "unwelcome or offensive conduct in the workplace" based on a

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protected characteristic that "is detrimental to an employee's work performance, professional advancement, and/or mental health."

3. In 2016, the two co-chairs of the Task Force, Chai Feldblum and Victoria A. Lipnic published a Report ("EEOC Report").[2] Below are some of the key findings and conclusions.

B. Workplace Harassment is Prevalent

1. 1/3 of 90,000 EEOC charges in FY 2015 included an allegation of harassment; and approximately half of those (or about 15,000) were allegations of harassment based on sex.

2. These numbers likely do not convey the widespread nature of harassment in the workplace as research indicates that "90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or complaint."[3]

3. It can be difficult to obtain accurate statistics on the incidence rate of sexual harassment in the workplace. Some surveys, such as the Sexual Experiences Questionnaire (SEQ), include both sexual harassment and what is known as "gender harassment," or hostile behaviors that are devoid of sexual interest." According to the Task Force Report, "when researchers disaggregate harassment into the various subtypes (unwanted sexual attention, sexual coercion, and gender harassment), they find that gender harassment is the most common form of harassment."

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[2] See Chai Feldblum and Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[3] EEOC, p. 8. (citing Lilia M. Cortina and Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469-96 (J. Barling & C.L. Cooper eds., 2008).

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4. There is a substantial dearth of research with respect to sexual-orientation harassment, race and ethnicity-based harassment, disability, age, and religion-based harassment.

C. Workplace Harassment Too Often Goes Unreported

1. "The least common response of either men or women to harassment is to take some formal action." In fact, according to two studies, approximately 70% of victims of harassment "never even talked with a supervisor, manager, or union representative about the harassing conduct."

2. Reporting levels also differed based on the type of harassment that occurred. For example, "gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it."

D. There is a Compelling Case for Stopping and Preventing Harassment

1. Reducing harassment, according to the Task Force Report, would reduce the number of costly harassment charges that employers must defend. For example, the Report indicates that "Since 2010, employers have paid out $698.7 million to employees alleging harassment through the [EEOC's] administrative enforcement pre-litigation process alone."

2. In addition to these direct costs, the Report also argues that businesses face substantial *indirect* costs related to harassment through decreased productivity, increased employee turnover, and reputational damage to the employer.

3. Although more prevalent prior to the #MeToo Movement, companies may still be hesitant to discharge a top-performer who has engaged in inappropriate behavior. However, a Harvard Business School study has indicated that "the profit consequences of so-called 'toxic workers'—*specifically including* those who are 'top performers'—is net negative."

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E. Factors that May Increase Risk of Harassment According to Select Task Force

1. Homogenous Workforces

2. Workplaces Where Some Workers Do Not Conform to Workplace Norms

3. Cultural and Language Differences in the Workplace

4. Coarsened Social Discourse Outside the Workplace

5. Workforces with Many Young Workers

6. Workplaces with "High Value" Employees

7. Workplaces with Significant Power Disparities

8. Workplaces that Reply on Customer Services or Client Satisfaction

9. Workplaces Where Work is Monotonous / Consists of Low-Intensity Tasks

10. Isolated Workplaces

11. Workplace Cultures that Tolerate or Encourage Alcohol Consumption

12. Decentralized Workplaces

F. Preventing Harassment in the Workplace

1. A Company's number one defense against harassment is a workplace culture that not only includes a commitment to diversity, inclusion, and respect from its leadership, but that "holds employees accountable for this expectation" throughout the organization.

a. Leadership's Focus on Harassment Prevention -- The Company's commitment to preventing workplace harassment must be evident through its internal leaders. Leaders must create a "sense of urgency" around preventing harassment. The level of value that the Company places on prevention of workplace harassment will be immediately evident by the

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amount of resources that are dedicated to its prevention. The most important of these resources are time and money.

b. Accountability Throughout the Organization -- Accountability requires that individuals who engage in unwanted behaviors are held responsible with appropriate sanctions. This requires prompt, fair, and reasonable investigations by those charged with investigating harassment. In addition, managers and supervisors must serve as the first line of defense for the Company by effectively "monitoring and stopping harassment by those they supervise and manage."

c. Training must change so that it may be an effective tool for preventing workplace harassment. We discuss training, including the EEOC's findings and conclusions regarding training, in greater detail below.

G. A Reconvening of the Select Task Force on the Study of Harassment in the Workplace - June 11, 2018

1. Following the publication of the EEOC Report in 2016 and the renewed focus on preventing workplace harassment in light of the #MeToo Movement, the Task Force reconvened in June of 2018 to hear from additional experts.

2. Much of the testimony in June focused on the potential legislative changes to non-disclosure agreements, arbitration clauses, and harassment training.

3. Representatives from academia, the plaintiff's bar, labor unions, management attorneys, and more testified.

III. <u>Leadership, Visibility, and Owning Workplace Culture</u>

A. Who owns workplace culture:

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1. In its Report, the EEOC observed that "workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment." The EEOC further provided two key take-aways in determining workplace culture. First, "leadership and commitment to a diverse, inclusive and respectful workplace . . . is paramount," and "leadership must come from the very top of the organization." Second, the commitment has to be "at all levels, across all positions" and a company "must have systems in place that hold employees accountable for this expectation." In order to shift a company's culture and create a discrimination- and harassment-free workplace, the goal must be more than simply compliance, and must instead be furtherance "of an overall diversity and inclusion strategy."[4]

B. Senior Leadership:

1. Senior leadership's commitment to a culture of respect and inclusion is critical.

2. Commitment from senior leadership must come in two forms: (i) messaging and visibility: leaders must clearly communicate and demonstrate that the company does not tolerate workplace harassment and is committed to the creation of a diverse workforce; and (ii) allocating sufficient time and resources to an anti-harassment program and initiatives that focus on the recruitment, promotion and retention of a diverse workforce.

3. Examples of ways senior leadership can demonstrate their commitment to anti-harassment initiatives and the promotion of diversity through messaging and visibility include:

a. Model good behavior and be an example in the company;

[4] *See* Chai Feldblum and Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

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b. Publish a diversity statement on the company website and/or in corporate materials;

c. Update and distribute the company's anti-harassment policy regularly - and if it is circulated via company email have the email come from top executives;

d. Attend or make an opening statement at anti-harassment trainings;

e. Regularly meet with human resources or institute reporting procedures to ensure senior leadership is up-to-date on complaints about harassment and how the complaints are being handled;

f. Hold other senior executives and high-value employees accountable. High-level offenders must also be subject to appropriate discipline. If violators are not punished, employees learn that the behavior is tolerated, no matter how much lip service is paid to messaging, training, and policies.

g. Set company-wide Diversity and Inclusion ("D&I") goals and include an update on diversity during annual updates with employees;

h. Regularly meet with executives to review D&I goals and assess how the company is performing;

i. Require regular reports and updates on D&I metrics;

j. Provide an annual update on diversity to the board of directors; and

k. Hold managers and teams accountable for advancing D&I goals.

4. Examples of ways senior leadership can demonstrate their commitment to anti-harassment initiatives and the promotion of diversity through resource allocation include:

a. *Assess the company's risk factors*. Undertake an internal assessment of whether key risk factors exist that could heighten the risk of harassment. Some of

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these factors include homogenous workforces, workplaces where some workers do not conform to workplace norms, cultural and language differences in the workplace (including workplaces that are extremely diverse), workplaces with "high value" employees or power disparities, decentralized and isolated workplaces, and workplace cultures that tolerate or encourage alcohol consumption.

b. *Assess the climate of the company*. Utilize survey tools, sometimes referred to as "climate surveys," which are geared towards getting feedback from employees regarding harassment and diversity initiatives. For example, surveys can be used to gauge not only whether employees feel harassment is occurring in the workplace and whether employees believe harassment is being dealt with effectively, but also whether or not the strategies employed by the company are working to prevent and/or address harassment. Use this information to better tailor existing programs and think creatively about alternative strategies.

c. *Invest money and Resources*. Add to the budget a line item for anti-harassment and diversity efforts, including customized anti-harassment, workplace civility, and/or unconscious bias training. Consider creating a senior leadership role solely dedicated to diversity and inclusion, such as a Chief Diversity Officer, a VP or SVP of Diversity and Inclusion, or a diversity director.

d. *Institute hiring, recruiting and retention initiatives aimed at diversity*. Post job opportunities on career websites geared towards specific groups like women, minorities, and LGBTQIA applicants and institute specific recruitment initiatives to target these potential employees. Offer internships, apprenticeships, and/or scholarships for individuals who belong to these underrepresented groups. Consider implementing policies that include diversity

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targets or quotas for hiring and promotion decisions (such as ensuring that one woman and one underrepresented candidate is in the final candidate pool for every position).

e. *Incorporate consideration of pay equity*. Proactively evaluate and, if necessary, modify pay practices, policies, procedures, and implement training to ensure compliance with pay equity laws. Consider conducting pay equity audits to asses if there are any disparities and if they are appropriately justified. In instances where there are unexplained differences in pay based on gender or race/ethnicity, implement strategies to make necessary adjustments.

f. *Demand diversity from your partners and suppliers through business initiatives.* Track whether your suppliers or partners are in line with your diversity efforts and/or institute a formal supplier diversity quota. For example, is your company partnering with women or minority owned businesses? Do your consultants, external PR teams, law firms, or banks meet certain diversity requirements? Consider demanding these things.

C. Engage Employees at all levels:

1. It is imperative that all employees are active participants in creating a respectful, diverse workforce. Only through a company-wide-buy-in on anti-harassment and D&I efforts will real change occur.

2. It is also important that these efforts not only ensure that employees from underrepresented groups feel valued and safe, but that other employees do not feel alienated or that the system is unfair.

3. Practical ways companies have tried to encourage employee commitment to anti-harassment and D&I efforts include the following:

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a. *Training*. It is a necessity that employees at every level are trained properly in anti-harassment efforts. However, some companies are going above and beyond required anti-discrimination and harassment training by offering additional types of training, such as: unconscious bias training, training on gender differences in communication and leadership styles, ally or up-stander training (e.g., programs designed to teach men how to be allies in the workplace); and cultural sensitivity training. Regardless of the substantive focus, the best training involves not only robust interactivity between trainers and participants, but also considerable experiential learning between group participants through modeling behaviors and group activities. Even the most doubting of employees typically find it hard to continue as outliers when it becomes apparent that the vast majority of colleagues are invested heavily in an enlightened approach.

b. *Toolkits or handbooks*. Create toolkits or playbooks to help provide supervisors with strategies designed to make meetings and assignments more inclusive.

c. *Create visibility and support networks*. Encourage employees to participate and belong to a diversity task force or committee geared towards under-represented groups. Offer to host events or support professional associations that are geared towards these groups. Implement mentoring programs specifically targeted towards employees who belong to underrepresented groups.

d. *Elicit feedback from employees at all levels*. Solicit feedback from underrepresented groups like women, employees of color, LGBTQIA employees, or employees with disabilities. Engagement surveys can include feedback on climate, culture and advancement opportunities. Make changes based on the feedback so that employees realize they have a voice and their feedback is valued. If complaints or incidents have been widespread,

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consider cultural audit including focus groups, trend analysis, communication data monitoring, & identification of reporting barriers

e. *Incentives to reinforce goals.* Consider instituting incentives for managers and supervisors who meet diversity goals or significantly contribute to D&I initiatives.

IV. Employee Training

A. The EEOC's Findings & Guidance: Training Must Change

1. In its June 2016 Report, the EEOC observed that historically anti-harassment training has generally not been a successful prevention tool. Rather, training has been too focused simply on avoiding legal liability. Thus, in order to be more effective, training must change.

2. The most effective trainings are those that are:

a. Part of a larger, holistic effort to prevent workplace harassment;

b. Supported by senior leadership;

c. Live and/or interactive;

d. Given to *all* employees;

e. Tailored to the specific workplace and workforce;

f. Offered regularly and constantly evaluated and audited;

3. Substantively, to increase effectiveness, trainings should:

a. Provide examples about what forms of conduct are not acceptable in the workplace (and those examples should not be limited to *unlawful* conduct, but should include examples of conduct that is simply unacceptable in the workplace).

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b. Clarify the ways in which employees who witness or experience harassment can report the incident, and how the formal complaint and investigation process will proceed;

c. Explain that confidentiality will be maintained to the fullest extent possible and that the company does not retaliate against individuals who report harassment or cooperate with an investigation or legal proceeding;

d. State the consequences of engaging in workplace harassment.

4. Training must also be particularly robust for middle and first-line managers. When managers are educated on methods for dealing with harassment and understand that they will be held accountable, companies may be able to prevent harassment before it starts.[5]

B. Recent Legislative Developments

1. This year, New York State, New York City, and Delaware passed legislation that requires, among other things, employers to conduct anti-harassment training.

2. *New York State*: As part of the 2018-19 budget law, New York State included provisions making sweeping changes to the law governing workplace sexual harassment. The new legislation, among other things, requires all employers (regardless of the number of its employees) to conduct anti-sexual harassment training for all employees.[6]

a. The training must be offered *annually* and must be *interactive*.

b. The training must also provide:

(i) an explanation of sexual harassment;

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[5] *See* Chai Feldblum and Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[6] *See* Robert S. Whitman, Nila Merola, and Anne R. Dana, In a Nod to the #MeToo Movement, New York Legislature Passes Comprehensive Anti-Sexual Harassment Legislation, (Apr. 5, 2018), https://www.seyfarth.com/publications/MA040518-LE.

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(ii) examples of conduct constituting unlawful sexual harassment;

(iii) information concerning the federal and state laws and remedies available to victims of sexual harassment;

(iv) information concerning employees' rights of redress and all available forums for adjudicating complaints; and

(v) a discussion of conduct and responsibilities for supervisors.

c. New York's training law went into effect on October 9, 2018. The New York State Division of Human Rights, in consultation with the Department of Labor, has issued a model training that employers may use in order to comply.

3. *New York City*: New York City passed a package of eleven bills—together referred to as the Stop Sexual Harassment in NYC Act—that, among other things, require private employers with 15 or more employees to conduct annual sexual harassment training for all employees located in New York City.[7]

a. The NYC training must also be conducted *annually* and be *interactive.*

b. Training must, at a minimum, include the following:

(i) an explanation of sexual harassment as a form of unlawful discrimination under city, state, and federal law;

(ii) a description of sexual harassment, including examples;

[7] *See* Robert S. Whitman, Anne R. Dana, and Nila Merola, Following State's Lead, New York City Council Passes "Stop Sexual Harassment in NYC Act (Apr. 17, 2018), https://www.seyfarth.com/publications/MA041718-LE2.

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(iii) a summary of the employer's internal complaint process as well as the complaint process available through the City Commission on Human Rights, the State Division of Human Rights, and the EEOC;

(iv) a prohibition of retaliation and examples of what constitutes retaliation;

(v) information concerning bystander intervention; and

(vi) a discussion of the responsibilities of and actions that must be taken by supervisory and managerial employees in the prevention of sexual harassment and retaliation.

c. The City law will go into effect on April 1, 2019. The New York City Commission on Human Rights is required to develop an online, interactive training module that may be used by employers to satisfy the training component.

4. *Delaware*: On August 29, 2018, Delaware Governor John Carney signed into law a bill (SB 360) that requires employers with 50 or more employees to provide interactive sexual harassment training for all employees and supervisors. The Delaware law will become effective on January 1, 2019.

5. Notably, New York State, New York City, and Delaware's training requirements are limited to anti-*sexual* harassment training.

C. Other Training Requirements Around the Country

1. While New York is not alone in requiring employers to provide anti-sexual harassment training, the requirements of the State law are now perhaps the most robust in the country, given that *all* employers must provide *annual* training to *all employees*.

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2. For example, California requires employers with *50 or more employees* to provide at least two hours of training *every two years*, but *only to supervisory employees*. However, as of January 2018, in addition to sexual harassment, content on harassment based on gender identity, gender expression and sexual orientation must be included in the training. *See* CA Govt. Code § 12950.1.

3. Similarly, Connecticut law requires employers with *50 or more employees* to conduct two hours of sexual harassment awareness training for *all supervisory employees* within 6 months of commencement of employment. *See* Conn. Gen. Stat. §§ 46a-54 (15) (B) and 46a-54-204.

4. Additionally, Maine (the first state in the country to enact a training requirement for private employers) requires employers with *15 or more employees* to conduct an education and training program for all new employees and all supervisory and managerial employees within one year of commencement of employment. *See* Title 26 M.R.S.A. § 806.

D. Going Above and Beyond: Employers searching for ways to go above and beyond basic compliance might also consider the following:

1. Require *all employees*, including those outside New York State and City, to participate in training;

2. Require training not just on sexual harassment, but all forms of harassment, discrimination, and retaliation (especially for those employers in New York State and City, where only sexual harassment training is required);

3. Offer live training, rather than web-based or pre-recorded training;

4. Conduct training in multiple languages, depending on the workforce;

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5. Incorporate principles of bystander intervention training. Bystander training aims to give employees the tools to recognize potentially problematic behavior, motivate them to step in and take action when they observe problematic behavior, and empower them to intervene when appropriate;

6. Offer workplace civility training. Civility training does not focus on eliminating unwelcome behavior based on characteristics protected under employment non-discrimination laws, but rather on generally promoting respect in the workplace;

7. Conduct unconscious bias training. Unconscious (or implicit) biases are learned stereotypes that are automatic, unintentional, deeply engrained, universal, and able to influence behavior. Unconscious bias training programs are designed to expose people to their unconscious biases, provide tools to adjust automatic patterns of thinking, and ultimately eliminate discriminatory behaviors. A critical component of unconscious bias training is creating awareness for implicit bias.[8] If unconscious bias training is conducted, it is critical to make it clear that the focus is solely on increasing awareness of the benefits of reflecting on potential unconscious biases before taking action, while emphasizing that any testing will be anonymous and does not in any way predetermine that actions will reflect any testing results (particularly with the benefits of reflection before action).

[8] *See* Nila Merola, Anne Dana, Cameron Smith, and Loren Gesinsky, The Future of Anti-Harassment Training and Shifting Workplace Culture in the Era of #MeToo, #BlackLivesMatter, and Others (Aug. 6, 2018), https://www.futureenterprise.com/blog/2018/8/2/the-future-of-anti-harassment-training-and-shifting-workplace-culture-in-the-era-of-metoo-blacklivesmatter-and-others.

See also Camille A. Olson et al., Implicit Bias Theory in Employment Litigation, http://files.ali-cle.org/files/periodical/articles/TPL1710_Olson.pdf.

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E. Survey Results: What are other organizations doing?

1. As of January 2018, 32% of organizations had changed their sexual harassment training in the past 12 months, and 22% planned to change their sexual harassment training over the next 12 months.[9]

2. The most common changes organizations have recently made to their training programs include:

a. Adding workplace civility components to their trainings (49%);

b. Tailoring training to the specific organization's workforce (47%);

c. Requiring training for all staff (46%).[10]

3. Some companies are instituting more robust manager training, which includes additional or more nuanced training. One survey polled 33 companies, many of which are Fortune 500 companies, regarding the types of management training offered. The participating companies were polled in 2012 and 2016. As the results show below, the percentage of companies offering more nuanced and targeted manager training rose significantly from 2012 to 2016:

a. Micro-inequities (such as unconscious bias) -- 85% of participants included this as a component to training in 2016, compared with 52% in 2012;

b. Generational diversity -- 79% of participants included this as a component to training in 2016, compared with 50% in 2012;

c. Bias in talent process -- 67% of participants included this as a component to training in 2016 (N/A for 2012);

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[9] *See* SHRM Harassment-Free Workplace Series: A Focus on Sexual Harassment, https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Workplace-Sexual-Harassment.aspx, (last visited Aug. 21, 2018).

[10] *See id*.

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d. Sexual orientation diversity -- 64% of participants included this as a component to training, compared with 30% in 2012;

e. Cross-cultural issues -- 61% of participants included this as a component to training in 2016, compared with 55% in 2012;

f. Gender differences in communication/leadership styles -- 55% of participants included this as a component to training in 2016, compared with 36% in 2012;

g. Racial/ethnic communication/leadership styles -- 46% of participants included this as a component to training in 2016, compared with 3% in 2012.[11]

V. Policies

A. Background: The EEOC Task Force report explained that "reporting procedures, investigations, and corrective actions are essential components of the holistic effort that employers must engage in to prevent harassment." It is the EEOC's position that "employers should adopt a robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy." The same statements and related concepts apply equally well to the prevention of discrimination and retaliation; and they can even apply to the promotion of a respectful workplace at a level well beyond legal compliance.

B. The EEOC recommends that policies should include the following:

1. A clear explanation of prohibited conduct, including examples;

2. Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;

[11] *See* 2012 & 2016 Diversity Best Practices Benchmarking Tool, https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/attachments/2017/01/2016_dbp_executive_summary_.pdf (last accessed Aug. 21, 2018).

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3. A clearly described complaint process that provides multiple, accessible avenues of complaint;

4. Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

5. A complaint process that provides a prompt, thorough, and impartial investigation;

6. Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same;

7. Written in clear, simple words, in all the languages used in the workplace and the policy itself should be simple and easy to understand;

8. Make clear that harassment on the basis of any protected characteristic will not be tolerated; and

9. The policy must be communicated on a regular basis to employees, particularly information about how to file a complaint or how to report harassment that one observes, and how an employee who files a complaint or an employee who reports harassment or participates in an investigation of alleged harassment will be protected from retaliation.

10. Notably, the Task Report cautioned against use of the phrase “a ‘zero tolerance’ anti-harassment policy.” This is because they believe use of the term "zero tolerance" is misleading and potentially counterproductive. Their research found that “[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct.” Thus, referencing “zero tolerance” could incorrectly “convey a one-size-fits-all approach, in

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which every instance of harassment brings the same level of discipline," which could then "contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior - they simply want the harassment to stop."

C. New York State's New Sexual Harassment Law

1. Earlier this year, the New York legislature passed legislation that creates uniform requirements for employers' sexual harassment policies.

2. The law, which among other things amends the New York State Labor Law by adding Section 201(g), requires that effective October 9, 2018, employers either (1) adopt the model sexual harassment prevention policy to be provided by the Department of Labor, in consultation with the division of Human Rights; or (2) adopt a sexual harassment prevention policy that meets or exceeds the minimum standards required under the law.

3. At the time of publication of this outline, the final model policy and guidance concerning the state law were not yet available. However, on August 23, 2018, the Office of Governor Andrew M. Cuomo released drafts for comment of the Model Sexual Harassment Policy[12] and Minimum Standards for Sexual Harassment Prevention Policies,[13] among other documents.

4. At minimum, a compliant policy must prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights and must:

[12] Draft Model Sexual Harassment Policy, https://www.ny.gov/sites/ny.gov/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf
[13] Draft Minimum Standards, https://www.ny.gov/sites/ny.gov/files/atoms/files/StandardsSexualHarassmentPreventionPolicies.pdf

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a. Provide examples of prohibited conduct that would constitute unlawful sexual harassment;

b. Include federal and state statutory provisions regarding sexual harassment, the remedies available to victims, and a statement that there may be additional applicable local laws;

c. Include a complaint form;[14]

d. Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;

e. Inform employees of their rights and all available forums where they may obtain redress;

f. State clearly that sexual harassment is a form of employee misconduct and that sanctions will be enforced against individuals who engage in such conduct and supervisory and managerial employees who knowingly allow such behavior to continue; and

g. State clearly that it is unlawful to retaliate against any individual who complains of sexual harassment or who testifies or assists in investigations involving sexual harassment.

5. Employers must provide each employee with a copy of the written policy in the language that is spoken by their employees. According to preliminary guidance, employers may distribute the policy electronically if workers are able to access the employer's policy on a computer provided by the employer during work time and are able to print a copy for

[14] Complaint form for reporting sexual harassment, https://www.ny.gov/sites/ny.gov/files/atoms/files/ComplaintformSexualHarassment.pdf

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their records. Although no acknowledgment is required, employers are encouraged to obtain a signed acknowledgment from employees.

D. New York City Sexual Harassment Law

1. The New York City law, which among other things amends Section 8-07 of the New York City Code, requires that effective September 6, 2018, employers conspicuously display an anti-sexual harassment rights and responsibilities poster in employee break rooms or other common areas and that employers. The notice must be posted in both English and Spanish. Employers must also distribute an information sheet to new employees at the time of hire.

2. The New York City poster provides a definition of sexual harassment under the law, provides examples of sexual harassment, and states that retaliation is prohibited under the law. Further, the poster provides contact information for employees who have witnessed or experienced sexual harassment, directing them to contact (1) a manager; (2) the equal employment opportunity officer at the employee's workplace, (3) human resources; or the NYC Commission on Human Rights. The poster also directs employees to federal (www.eeoc.gov) and state (www.dhr.ny.gov) resources.

E. What Are Other Companies Doing?

1. A survey conducted by Society for Human Resource Management ("SHRM") found that despite approximately 94% of Human Resources professionals reporting that their organization has a sexual harassment policy, one-out-of-five non-manager employees reported that they were not sure whether their organization had a policy.[15]

[15] SHRM, Harassment-Free Workplace Series: A Focus on Sexual Harassment, Research and Surveys (Jan. 31, 2018) available at https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/workplace-sexual-harassment.aspx.

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2. Sexual harassment is underreported and 76% of non-manager employees who have experienced sexual harassment within the last year have not reported the incidents.[16] Some of the reasons for the underreporting include:

a. Fear of retaliation;

b. Belief that little or no action would have been taken had it been reported;

c. Downplaying of behavior; and

d. Addressing the harasser personally.[17]

3. Typically, sexual harassment policies are presented in an employee handbook or manual (86% of surveyed employers) and/or are provided to employees during new-hire orientation (74% of surveyed employers).[18] Other employers distribute their sexual harassment policy when conducting training (56% of surveyed employers) and by providing the policy on the Company website or intranet (41% of surveyed employers).[19]

4. To support their sexual harassment policies, employers implement:

a. Complaint procedures (95% of surveyed employers);

b. Complaint investigation procedures (82% of surveyed employers);

c. Documentation of policy acknowledgement from employees (73% of surveyed employers);

d. Online/video training (37% of surveyed employers);

e. Face-to-face training (27% of surveyed employers);

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[16] Id.
[17] Id.
[18] Id.
[19] Id.

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f. Both face-to-face and online/video training (36% of surveyed employers).[20]

5. The EEOC recommends that employers should offer reporting procedures that offer a range of methods and multiple points of contact for an employee to report harassment. Employers should also test their reporting systems in order to determine whether the system is properly working. The EEOC further recommends that employers ensure that discipline is prompt, consistent, and proportionate.

F. How To Go Above and Beyond

1. The anti-harassment policy should be written in straight-forward language, use easy-to-understand examples, and be reiterated to employees consistently (*e.g.*, through the Company's intranet).

2. Employers should include provisions in their policy regarding the Company's prohibition of sexual harassment and other forms of harassment at events that take place outside of work (*e.g.*, work trips, happy-hour events, holiday events, and other social events).

3. Employers should go beyond limiting unlawful conduct and should implement a code of civility, requiring that employees be respectful. Employers must ensure that such code of civility complies with the National Labor Relation Act, as well as any other applicable law.

4. Employers should indicate that the employer does not tolerate harassment from employees and non-employees.

5. Policies should provide specific examples of unacceptable behavior and they should be tailored to the workplace.

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[20] Id.

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6. Policies should also convey that the policy does not provide that individuals should avoid those who are different from them, but supervisors can and should engage in mentoring and promoting social inclusion within a diverse workplace. The Company should also encourage inclusion among co-workers.

7. Ensure that management and first-line supervisors are trained properly to follow the procedures/protocols in the policy, including protocols relating to reporting harassment claims to the appropriate person/department.

VI. Reporting Channels and Investigation Procedures:

A. The EEOC Task Force Report found that harassment is under-reported.

a. The most common explanations from non-reporters include:

(i) Avoid alleged bad actor (33% to 75%).

(ii) Deny or downplay harassing behavior (54% to 73%).

(iii) Ignore harassing behavior 44% to 70%).

(iv) Confer with family (27% to 37%) or friend/confidant (50% to 70%).

2. Employees who fail to report harassment often fear:

a. Disbelief or trivialization of allegations;

b. Blame for alleged acts;

c. Inaction or ineffective investigation;

d. Toothless remedial action; or

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e. Retaliation:

(i) As much as 70% of employees report experiencing some form of retaliation following reports.[21]

(ii) Employment actions that courts routinely have held are not materially adverse would dissuade employees from complaining.[22]

(iii) Cost/benefit analysis is made by potential complainants based on fear of retaliation.[23]

B. Effective Reporting Systems and Channels

1. Effective reporting systems should provide those who experience and/or observe harassment with confidence to report incidents.

2. Channels should incorporate a range methods and contact points.

a. Clear and prominent Open-door policy.[24]

b. Anonymous and Multi-lingual Hotline.[25]

c. Ombudsmen.

d. Apps or Artificial Intelligence - (*AllVoices, STOPit, tEQitable, Callisto, Talk to Spot*): Web platforms and artificial intelligence applications that allows employees to anonymously report instances of sexual harassment.[26]

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[21] See EEOC Report a 15 - 16.

[22] See Nicole Buonocore Porter, Ending Harassment by Starting with Retaliation, 71 Stan. L. Rev. Online 49, 51 (2018).

[23] See id.

[24] See EEOC Report at 43-44.

[25] See EEOC Report at 40-41.

[26] See Rashal G. Baz, Katherine Mendez, and Chelsea D. Mesa, Click To Complain: Using Technology to Outsource Workplace Harassment Grievances, (Mar. 23, 2018),

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e. Information Escrow: Information escrows allow people to transmit sensitive information to a trusted intermediary, an escrow agent, who only forwards the information under pre-specified conditions.[27]

3. Effectiveness: Are employees comfortable using reporting channels?

a. Diverse members of reporting structure - reporting structures that are dominated by one race, gender, or any other protected class may reduce the effectiveness of reporting structure.

b. User-friendly and accessible to complainants.

c. Intake process collects information necessary for investigation (*i.e.*, dates of incidents, witnesses, documents, narrative prompts).

d. Separate reporting structure when allegations are made against high-level management or member reporting structure.

e. Clear presentation of anti-retaliation policies throughout intake and reporting process.

C. Responding to Complaint of Harassment

1. Goal is to *promptly* investigate complaints and issue a *proportionate* remedial response that *prevents* future harassment.

2. Prompt investigation:

a. Well-trained, objective, and neutral investigators are a key component of an investigation.

(i) Guidelines for credibility determination.

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https://www.laborandemploymentlawcounsel.com/2018/03/click-to-complain-using-technology-to-outsource-workplace-harassment-grievances.

[27] See Ian Ayres & Cait Unkovic, Information Escrows, 111 Mich. L. Rev. 145 (2012).

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(ii) Detailed documentation of investigation.

(iii) Proper resource allocation.

(iv) Soft-skill training.

b. Consistent with applicable law, protect the privacy of alleged victims, witnesses, and alleged harassers.

(i) Acknowledge that assigned investigator will do her or his best to keep witness statements confidential, but she or he may need to disclose to others to do a thorough investigation, including post-investigation report.

(ii) National Labor Relations Board has held that a blanket instruction not to discuss the investigation may violate an employee's Section 7 rights under the National Labor Relations Act unless the employer has a legitimate and substantial business justification for requesting strict confidentiality.[28]

c. Create supportive environment where alleged victims, individuals who report harassment, and witnesses are not subjected to retaliation.

3. Proportionate Response:

a. Ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined. Avoid unintended consequences of zero tolerance.

(i) Avoid reduced workplace/professional engagement with members of a protected classification.

(ii) Avoid reduced involvement in diversity initiatives.

b. Consider use of voluntary alternative dispute resolution processes to facilitate open communication as well as prevent and address prohibited conduct.

[28] See Banner Health System, 362 NLRB No. 137 (June 26, 2015).

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c. Convey the resolution of the complaint to the complainant and the alleged harasser. Consider in-person check-ins with complainants and in-person reminders to offenders.

4. Prevention of Future Harm:

a. Accountability

(i) Prompt and decisive action on "gateway" conduct by managers *(i.e.*, abuse of authority, bullying, inappropriate personal relationships, etc…).

(ii) Supervisors and managers are held responsible for monitoring and stopping harassment.

(iii) Disciplinary actions for those who fail to undertake prompt or thorough investigations.

(iv) Disciplinary actions for those that fail to report instances of harassment or discrimination.

b. Data collection: Track & Respond to Trends

(i) Use data to monitor the number of complaints, potential recidivism, and prevalent types of harassment/discrimination.

(ii) Recalibrate reporting structures and investigation processes based on results.

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AUGUST 6, 2018 · FUTURE EMPLOYER

The Future of Anti-Harassment Training and Shifting Workplace Culture in the Era of #MeToo, #BlackLivesMatter, and Others

BY: NILA MEROLA, ANNE DANA, CAMERON SMITH, AND LOREN GESINSKY

In the wake of the #MeToo movement, there has been considerable buzz surrounding workplace culture. For many employers, simply satisfying basic legal requirements is a thing of the past. The future, instead, is focused on creating and fostering a workplace culture of respect and inclusion. Over the next several weeks, we will review what it means to transform a workplace culture, what initiatives work and don't work, and what employers who want to "go the extra mile" can and should be thinking about.

In this post, particularly in light of recent legislative developments, we will focus on anti-harassment training. Some states like Connecticut, California, and Maine have, for some time now, required that certain employers provide anti-harassment training for supervisors. New York State recently upped the ante and passed legislation mandating *all* employers to provide *annual* anti-sexual harassment training to *all* employees. Shortly thereafter, New York City also passed legislation mandating annual anti-sexual harassment training for employers with 15 or more employees. Beyond basic legal compliance, however, how can employers design trainings that are effective tools for preventing harassment?

EEOC Report

Indeed, in June 2016, the Equal Employment Opportunity Commission ("EEOC") issued a report regarding harassment in the workplace. In that report, the EEOC observed that, over the last several years, anti-harassment training has generally not been a successful prevention tool. Rather, training has been too focused simply on avoiding legal liability. Nevertheless, and despite its shortcomings, the EEOC concluded that training is still an essential element of an overall anti-harassment effort and *can be* an effective prevention tool. Among the EEOC's key conclusions,

therefore, is that anti-harassment training must change.

The EEOC observed that the most effective anti-harassment trainings are those that are part of a holistic effort to prevent and combat workplace harassment. In other words, in order to be effective, training cannot stand on its own. Senior leadership must be truly committed and the organization must allocate sufficient resources to its anti-harassment initiatives. Further, the most effective anti-harassment trainings are those that are live, interactive, offered to *all* employees, and tailored to the specific workforce and workplace. Trainings should also be offered regularly—rather than once in an employee's career—and routinely evaluated. It is also critical that middle-managers and first-line supervisors are properly trained to prevent, identify, and stop workplace harassment. Importantly, while the report focused primarily on sexual harassment, the EEOC was clear that employees should be trained on all forms of harassment, not just sexual harassment.

EEOC Training Tips

The EEOC found that, in order to increase effectiveness, anti-harassment trainings should contain certain components. For example, training should:

- Provide examples about what forms of conduct are not acceptable in the workplace. Importantly, the conduct discussed should not be limited only to conduct that is unlawful. Rather, the training should describe conduct that is simply unacceptable in the workplace and, if left unchecked, might rise to the level of illegal harassment. To have a real impact on employees, these examples should be tailored to the specific workplace and workplace.
- Clarify employees' rights and responsibilities if they witness or experience unacceptable conduct. Specifically, the training should clarify the ways in which employees who witness or experience harassment can report the incident, and explain how the formal complaint and investigation process will proceed.
- Explain that the employer will keep the investigation and complaint as confidential as possible and ensure that those who report having experienced or witnessed harassment will not be retaliated against.
- State the consequences of engaging in unacceptable workplace conduct, including that corrective action will be proportionate to the severity of the conduct.

Further, middle and first-line managers should receive even more robust training. In order for an organization to prevent harassment before it starts, managers must understand that they are accountable. They must also be educated on methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information (even if there is no formal complaint). Managers should also be instructed on how to report harassing behavior further up in the organization.

Employers who are considering additional ways to go above and beyond might also consider conducting training in multiple languages, depending on their workforce, and/or offering new models of training, such as bystander intervention training or workplace civility training. Bystander training aims to give employees the tools to recognize potentially problematic behavior, motivate them to step in and take action when they observe problematic behavior, and empower them to intervene when appropriate. Civility training does not focus on eliminating unwelcome behavior based on characteristics protected under employment non-discrimination laws, but rather on generally promoting respect in the workplace.

New York's Revised Training

The drafters of the New York State and New York City legislation appear to have been cognizant of the criticism of existing training programs and considered the EEOC's recommendations when drafting the new laws. As a result, the New York State and New York City laws setting forth the requirements for anti-sexual harassment training are now among the most comprehensive in the country.

Notably, however, both the New York State and New York City trainings requirements are limited to anti-*sexual* harassment training.

Specifically, the New York State law, which goes into effect on October 9, 2018, requires the Department of Labor, in consultation with the Division of Human Rights, to produce a model sexual harassment prevention training program. Every employer must either adopt the model training program or establish a training program that equals or exceeds the minimum standards provided by the model.

The law includes the following requirements that the training: (i) be interactive; (ii) provide an explanation of sexual harassment; (iii) provide examples of conduct constituting unlawful sexual harassment; (iv) provide information concerning the federal and state laws and remedies available to victims of sexual harassment; (v) provide information concerning employees' rights of redress and all available forums for adjudicating complaints; and (vi) address conduct and responsibilities for supervisors.

NYC-Specific Requirements

The New York City law, which goes into effect on April 1, 2019, requires covered employers to conduct annual, interactive anti-sexual harassment training for all employees employed in New York City, including supervisory and managerial employees. In order to help employers meet this mandate, the New York City Commission on Human Rights is tasked with creating and posting on its website an online, interactive training module.

Similar to the State law, the City law requires that the training be "interactive." While the law does not require that the training be live, it must qualify as participatory teaching "whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program, or other participatory forms of training as determined by the commission."

The City law also requires that the training must include the following: (1) an explanation of sexual harassment as a form of unlawful discrimination under city, state, and federal law; (2) a description of sexual harassment, including examples; (3) the employer's internal complaint process as well as the complaint process available through the City Commission on Human Rights, the State Division of Human Rights, and the Equal Employment Opportunity Commission; (4) a prohibition of retaliation and examples of what constitutes retaliation; (5) information concerning bystander intervention; and (6) the responsibilities of and actions that must be taken by supervisory and managerial employees in the prevention of sexual harassment and retaliation.

While it is not yet known what the impact of the new training requirements will be, the passage of the New York State and City laws suggest that more comprehensive training programs, which take into consideration the EEOC's recommendations, are the way of the future. Thus, while employers with employees in New York State or New York City will have to comply with the mandatory training requirements, these new laws provide an opportunity for employers nationally to take stock of their existing training programs and consider whether they want to go above and beyond what the law may require.

For example, although the New York State and City laws require only anti-sexual harassment trainings, employers should consider conducting annual training that does not focus exclusively on sexual harassment, but rather covers all forms of harassment, discrimination, and retaliation. Additionally, employers in other states may want to utilize New York's model training programs. For employers with employees in New York as well as other states without mandatory training laws, they may want to consider expanding the training to all employees and tailoring it to each state or municipality in which they operate. Finally, for employers that do institute a training program (whether required or voluntarily), they will need to consider whether to expand the training to include more novel training models, such

as bystander intervention training and work place civility training.

As we move toward a future more focused on creating a positive and inclusive workplace, rather than just complying with the law, employers should review their existing trainings and consider whether and how they could be more effective for their specific workforce and workplace. And, of course, employers without existing training programs should consider making training a requirement. But, as noted above, training cannot stand on its own. It must be part of a holistic anti-harassment effort, with robust policies and procedures and committed senior leadership.

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Reporting and Investigating Harassment in the Age of Social Movements

BY: EPHRAIM J. PIERRE, NILA MEROLA, ANNE DANA, AND LOREN GESINSKY

Social movements such as #MeToo, #TimesUp, and #BlackLivesMatter have created an ongoing conversation about workplace culture. For many employers, simply satisfying basic legal requirements is a thing of the past. The future, instead, is focused on creating and fostering a workplace culture of respect and inclusion by re-evaluating workplace policies, practices, and procedures. As part of an ongoing series, we continue to examine what it means to change a workplace culture, what initiatives work and do not work, and what employers who want to "go the extra mile" can and should be thinking about.

In our last post, we examined effective anti-harassment training. In this post, we will focus on effective reporting systems and internal investigations. In June 2016, the Equal Employment Opportunity Commission (EEOC) issued a report regarding harassment in the workplace. In the report, the EEOC observed that approximately 70% of individuals who experienced harassment *did not* report such conduct to a manager, supervisor, or union representative. Even more troubling, approximately 90% of individuals who experienced workplace harassment *never formally* filed a complaint with their employer. Instead, the report found that employees often avoid the alleged harasser, ignore or minimize alleged harassing conduct, or confide in friends or trusted advisors.

Given the resoundingly high percentage of employees who do not report harassing conduct, it begs the question as to why employees are so reluctant to report harassment. The answer, according to most studies and anecdotal evidence, is that non-reporting employees often fear an ineffective response and retaliation. Sometimes employees simply do not know or recall how and where to report harassment.

Effective Reporting Systems and Investigations

According to the EEOC's June 2016 report, current reporting systems and investigation procedures are simply not instilling confidence in those who experience or observe harassment, and thus inappropriate conduct often goes unreported. The EEOC's report observed that effective reporting systems and investigations are among the most critical elements of a holistic anti-harassment effort. As a result, employers should carefully re-examine their reporting systems so that harassing conduct is reported, promptly investigated, and appropriately addressed.

To that end, the EEOC found that, to increase effectiveness, reporting systems and investigations should contain certain components. Specifically, employers should:

- Adopt and maintain a comprehensive anti-harassment policy as well as a clear and prominent open-door policy, which encourages employees to report harassing behavior not only to direct supervisors,

but also to management personnel;

- Ensure that the anti-harassment policy describes in detail how to complain about harassment, and that such policy is communicated frequently to employees in several forms and methods;
- Offer multi-faceted reporting procedures, including multiple points-of-contact with geographic and organizational diversity, where possible;
- Make clear that retaliation will not be tolerated and outline the steps employees should take to report retaliation if it occurs;
- Ensure that management personnel are held accountable for monitoring and stopping harassment;
- Periodically "test" reporting systems to assess their effectiveness;
- Devote sufficient resources so that harassment allegations are objective as well as promptly and thoroughly investigated;
- Conduct regular training for investigators, human resources personnel, and management tasked with conducting investigations;
- Ensure investigations are kept as confidential as possible under applicable federal, state, and local laws; and
- Ensure that investigations result in a proportionate and consistent response.

Non-Traditional Ideas for Improvement

In addition to the measures outlined above, employers may also consider exploring non-traditional means for improving reporting systems. In particular, recent technology and outside consultants may provide useful tools for mitigating perceived biases and fear of ineffectual response and retaliation. Below are novel measures that some employers utilize:

- *Mobile Applications/Online Platforms*: Several recent mobile applications and online platforms (*i.e.,* AllVoices, STOPit, tEQuitable, Callisto, Talk to Spot) allow employees to report harassing conduct anonymously through pre-populated forms or interactions with artificial intelligence systems. These mobile applications and online platforms solicit key details regarding harassment allegations such as potential witnesses, incident dates, narrative responses, and documents. These mobile applications and online platforms claim to provide a safe space for raising concerns, free from external interference and potential retaliation. However, these technologies do pose certain challenges. One challenge is that these technologies may embolden employees with non-meritorious claims to submit petty workplace grievances, which nonetheless may require prompt investigation to ensure nothing more material has been missed. Another challenge is that the anonymity of an accuser/observer makes it more difficult to investigate promptly and thoroughly because of the lack of an identifiable person with whom to meet and follow up.
- *External Consulting Groups*: Third-party consulting groups have also responded to the #MeToo movement by creating company-specific tools through which employees can file complaints. In turn, consultants assess the complaint, write an action plan regarding an investigation, and provide a third party at least arguably more independent than someone in-house to conduct the workplace investigation. These services promote their experienced personnel as well as their ability to mitigate perceived bias towards human resources and management personnel among employees. Employers should note that using an external service does not change an employer's obligation to investigate claims. Thus, employers should carefully consider whether consultants are indeed qualified to handle complaints. Further, an employer's uniform response is helpful in investigating and later defending against retaliation suits. External consultants could introduce variance into the investigation process, which may weaken potential defenses in litigation.
- *Hotline Services*: While ordinary hotlines simply provide employees a voicemail or email inbox to report harassing conduct, third-party services now offer more interactive complaint intake procedures. Several third parties are now offering human resources professionals who intake complaints and produce a report that allows the employer to investigate potential claims internally or externally with a consultant. As noted above, employers should carefully consider whether consultants are indeed qualified to receive complaints and formulate responses. Further, employers should also consider how consultants augment rather than replace in-house human resource professionals. Employers should also consider internal training for human resources professionals and supervisors on how to

respond to a complaint from outside consultants.

- *Big Data*: Employers now routinely collect data and metrics regarding efficiency and productivity. To encourage accountability, some employers collect and monitor data relating to harassment complaints and their resolutions. Employers may elect to collect and analyze this data with an eye towards recalibrating processes if the data suggests significant room for improvement. Employers should note that trends revealed by complaint data and analytics may trigger investigation obligations. Further, employers should note that plaintiffs' counsel may seek complaint data and analytics in future litigation in an effort to exploit such trends.

Importantly, while additional and novel reporting processes may be beneficial to obtaining data and addressing complaints, using external technology and professional services does not change an employer's ongoing obligations to investigate harassment allegations promptly and effectively. Indeed, new methods for reporting harassment may mean a resulting uptick in potential harassment complaints, including dated claims and claims against high-value employees. Employers should be prepared to fully investigate and address such claims. Nonetheless, the potential for improved reporting systems via technology and external servicers is promising for employers and employees alike.

As we move toward a future more focused on creating a positive and inclusive workplace, rather than just complying with the law, employers should review their existing reporting systems and investigation procedures and consider whether and how they could be more effective for their specific workforce and culture. And robust reporting and investigation systems only achieve maximum effectiveness if they mesh seamlessly with other aspects of a holistic anti-harassment effort.

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Transforming Workplace Cultures and The Future of Diversity and Inclusion Initiatives

BY: ANNE DANA, LOREN GESINSKY, AND NILA MEROLA

This is the third article in a series in which we address what it means to transform workplace culture in light of the #MeToo, #BlackLivesMatter, and other movements, what initiatives work and don't work, and what employers who want to go above and beyond can and are thinking about. Our first post discussed how to create an effective training program, and our second post discussed reporting and investigating harassment. In this post, we focus on how leadership can transform workplace cultures and what practices companies at the forefront of change are implementing.

In June 2016, the Equal Employment Opportunity Commission (EEOC) issued a report regarding harassment in the workplace. In that report, the EEOC observed that "workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment." The EEOC further provided two key take-away points in determining workplace culture. First, "leadership and commitment to a diverse, inclusive and respectful workplace . . . is paramount," and "leadership must come from the very top of the organization." Second,

the commitment has to be "at all levels, across all positions" and a company "must have systems in place that hold employees accountable for this expectation." At bottom, in order to shift a company's culture and truly create a workplace free of discrimination, harassment, and retaliation, the goal must be more than simply compliance, and must instead be "part of an overall diversity and inclusion strategy.

Notably, the report also acknowledged the business case for preventing harassment, citing not just the direct financial costs associated with harassment complaints and litigation, but the indirect costs of decreased productivity, increased turnover, and reputational damage. Companies are also increasingly acknowledging the long-term economic benefits to having a diverse workforce, which can result in a wider variety of perspectives, approaches, and experiences resulting in increased creativity, more efficient strategies, and improved client services.

In light of this, we address some of the key steps companies can take to promote diversity and inclusion and shift workplace cultures.

Leadership and Commitment from the Top

Senior leadership's commitment to a culture of respect and inclusion is critical. Part of that commitment is about messaging and visibility. Leaders must clearly communicate and demonstrate that the company does not tolerate workplace discrimination, harassment, and retaliation and is committed to the creation of a diverse workforce. Another part of that commitment is about allocating sufficient time and resources to prevention programs and initiatives that focus on the recruitment, promotion and retention of a diverse workforce.

Here are some ways in which senior leaders may demonstrate their commitment to preventing discrimination, harassment, and retaliation

and anti-harassment initiatives and the promotion of diversity through messaging and visibility:

- Model positive behavior and be an example to employees in the company;
- Insist upon policies and practices that require a respectful workplace with standards above just basic compliance in preventing illegal discrimination, harassment, and retaliation;
- Update and distribute the company's anti-discrimination, harassment and retaliation policies regularly;
- Make an opening statement at, and participate in, respectful workplace trainings;
- Regularly meet with human resources or institute reporting procedures to ensure senior leadership is up-to-date on complaints about discrimination, harassment, and retaliation and how the complaints are being handled;
- Hold other senior executives and high-value employees accountable. High-level offenders must also be subject to appropriate discipline. If violators are not punished, employees learn that the behavior is tolerated, no matter how much lip service is paid to messaging, training, and policies.
- Set company-wide Diversity and Inclusion (D&I) goals, and include an update on diversity during annual updates with employees;
- Publish a D&I statement on the company website and/or in corporate materials;
- Meet regularly with executives to review D&I goals and assess how the company is performing;
- Require regular reports and updates on D&I metrics;
- Provide an update on D&I to the board of directors quarterly or at least annually; and
- Hold managers and teams accountable for advancing D&I goals.

Some of the ways in which senior leaders may demonstrate their commitment to respectful workplace and D&I through resource allocation include:

- **Assess your company's risk factors**. Undertake an internal assessment of whether key risk factors exist that could heighten the risk of discrimination, harassment, and retaliation. Some of these factors include homogenous workforces, workplaces where some workers do not conform to workplace norms, cultural and language differences in the workplace (including workplaces that are extremely diverse), workplaces with "high value" employees or power disparities, decentralized and isolated workplaces, and workplace cultures that tolerate or encourage alcohol consumption.
- **Assess the climate of the company**. Utilize survey tools, sometimes referred to as "climate surveys," which are geared towards getting feedback from employees regarding respectful workplace and D&I initiatives. For example, surveys can be used to gauge not only whether employees believe discrimination, harassment, and/or retaliation is occurring in the workplace, but also whether the strategies employed by the company are working to prevent and/or address it. Use this information to better tailor existing programs and think creatively about alternative strategies.
- **Invest money and other resources**. Add to the budget a line item for respectful workplace and D&I efforts, including customized anti-harassment, workplace civility, and/or unconscious bias training. Consider creating a senior leadership role solely dedicated to D&I, such as a Chief Diversity and Inclusion Officer.
- **Institute hiring, recruiting and retention initiatives aimed at D&I.** Post job opportunities on career websites geared towards specific groups like women, minorities, LGBTQ and disabled

applicants and institute specific recruitment initiatives to target these potential employees. Offer internships, apprenticeships, and/or scholarships for individuals who belong to these underrepresented groups. Consider implementing policies that include diversity targets or quotas for hiring and promotion decisions (such as ensuring that one woman and one underrepresented candidate is in the final candidate pool for every position).

- **Demand diversity from your partners and suppliers through business initiatives**. Track whether your suppliers and other business partners are in line with your diversity efforts. For example, is your company partnering with women or minority owned businesses? Do your consultants, external PR teams, law firms, or banks meet certain diversity requirements?

Employee Commitment at All Levels

No matter which of the above efforts are undertaken, leadership cannot do it alone. It is imperative that all employees are active participants in creating a respectful, diverse, and inclusive workforce. This requires that employees at every level are trained properly in respectful workplace efforts and empowered to have a voice in D&I initiatives. It is also important that these efforts not only ensure that employees from underrepresented groups feel valued and safe, but that other employees do not feel alienated or that the system is unfair. Significant change is only likely to occur through a universal company-wide buy-in on respectful workplace initiatives and D&I efforts. Below are some practical ways companies have tried to encourage employee commitment to respectful workplace and D&I efforts.

- **Training and toolkits.** Go above and beyond required training on preventing discrimination, harassment, and retaliation by offering additional types of training, such as: unconscious bias training, training on gender differences in communication and leadership styles, ally or up-stander training (*e.g.*, programs designed to coach men on how to be valued allies in the workplace); and cultural sensitivity training. Create toolkits or playbooks to help provide supervisors with concrete steps designed to make meetings and assignments more inclusive.
- **Create visibility and support networks.** Encourage employees to participate and belong to a D&I task force or committee geared towards under-represented groups. Offer to host events or support professional associations that are geared towards these groups. Implement mentoring programs specifically targeted towards employees who belong to underrepresented groups.
- **Elicit feedback from employees at all levels**. Solicit feedback from underrepresented groups like women, employees of color, LGBTQ employees, and employees with disabilities. Make changes based on the feedback so that employees realize they have a voice and their feedback is valued.

At the end of the day, there is no "silver bullet" to ending discrimination, harassment, and retaliation in the workplace or to creating a diverse and inclusive workforce. However, as companies increasingly realize the direct and indirect financial costs of litigation arising out of discrimination, harassment, and retaliation, coupled with the realization that there are significant economic benefits to having a diverse and inclusive workforce, they are increasingly looking to new and dynamic approaches to solve these issues.

SEYFARTH SHAW

Management Alert

Recent New York State and New York City Anti-Sexual Harassment Legislation: Now What?

By Robert S. Whitman, Nila M. Merola, and Anne R. Dana

***Seyfarth Synopsis**: New York Governor Andrew M. Cuomo and New York City Mayor Bill de Blasio have each signed new laws designed to combat workplace sexual harassment. Together, these new laws have resulted in sweeping changes to City and State law governing employers in the State and City.*

Both New York State and New York City have enacted comprehensive legislation targeting workplace sexual harassment. On April 12, 2018, Governor Andrew M. Cuomo signed a bill enacting anti-sexual harassment legislation. On May 9, 2018, Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act, which is a collection of eleven pieces of legislation. With that law officially on the books, employers in the State and City now know the effective dates of the various provisions the laws enact, with some provisions effective immediately and others taking effect on future dates. Our previous Alerts on these laws, linked here and here, outlined the key provisions of both the State and City laws. Below is a brief re-cap of the State and City provisions, highlighting their effective dates.

Key Provisions of New York State Law

Extension of Protections to Non-Employees -- Effective Immediately

The law adds Section 296-D to the New York State Executive Law. Section 296-D imposes upon all employers liability for sex-based harassment experienced by non-employees, such as contractors, vendors, or consultants.

Prohibition of Mandatory Arbitration Clauses -- Effective July 11, 2018

The law adds Section 7515 to the Civil Practice Law and Rules ("CPLR"). It provides that, "except where inconsistent with federal law," employers are prohibited from including, in any contracts with employees, provisions that mandate arbitration for allegations or claims of sexual harassment. The law also declares null and void clauses in existing contracts that mandate arbitration of sexual harassment claims.

Prohibition of Non-Disclosure Agreements -- Effective July 11, 2018

The law adds Section 5-336 to the General Obligations Law and Section 5003-b to the CPLR. These provisions prohibit employers from including an NDA in any settlement of a sexual harassment claim unless the complainant requests confidentiality. If the complainant requests confidentiality, the complainant must have 21 days to consider the terms, and 7 days to revoke the agreement.

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Mandatory Sexual Harassment Prevention Policy and Training Program -- Effective October 9, 2018

The law amends the Labor Law by adding Section 201-g, which requires the Department of Labor, in consultation with the Division of Human Rights, to produce a model sexual harassment prevention policy and a model sexual harassment prevention training program.

Every employer must either adopt the model policy and training program, or establish a policy and training program that equals or exceeds the minimum standards provided by the models. Employers are also required to provide all employees with a written copy of the policy and training on an annual basis.

Prevention of Sexual Harassment By Bidders for State Contracts -- Effective January 1, 2019

The law amends the State Finance Law to require that, for every bid made to the State, *where competitive bidding is required*, the bidder must certify that it has a written sexual harassment policy and provides annual sexual harassment prevention training to all employees. Where competitive bidding is not required, the certification requirement is at the discretion of the department, agency or official.

Key Provisions of Stop Sexual Harassment in NYC Act

Expansion of the Statute of Limitations -- Effective Immediately

The Act amends section 8-109(e) of the City Code to expand the statute of limitations for claims of gender-based harassment from one year to three years after the alleged harassing conduct occurred.

Increased Coverage -- Effective Immediately

The Act amends 8-102(5) of the City Code to expand coverage of sexual harassment cases to employers with fewer than four employees. Previously, only employers with four or more employees were covered by the law.

Sexual Harassment Poster and Information Sheet -- Effective September 6, 2018

The Act amends section 8-107 of the City Code to require employers to display conspicuously an anti-sexual harassment rights and responsibilities poster in employee break rooms or other common areas. Employers will also be required to distribute a sexual harassment information sheet to new employees at the time of hire. The Commission will design and post on its website the poster and information sheet, both of which must be in English and Spanish.

Mandatory Anti-Sexual Harassment Training -- Effective April 1, 2019

The Act amends section 8-107 of the Administrative Code of the City of New York to require employers with 15 or more employees to conduct annual, interactive anti-sexual harassment training for all employees employed in New York City, including supervisory and managerial employees. In order to help employers meet this mandate, the New York City Commission on Human Rights is tasked with creating and posting on its website an online, interactive training module.

What Happens Next?

The provisions of most direct impact for employers are those that concern mandatory arbitration clauses, NDAs, policies, and training.

As we explained in our previous Alert, the Statewide prohibition on mandatory arbitration clauses for sexual harassment claims may be vulnerable to a legal challenge based on preemption by the Federal Arbitration Act. But sorting out that thorny legal issue could take years. In the meantime, and in anticipation of the July effective date of the prohibition, employers that currently have arbitration agreements, or are considering adopting them, should consult with legal counsel to assess whether to revise their agreements and/or policies and to be cognizant of the impact the law may have on pre-existing agreements.

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New York employers should also review and revise their standard settlement agreements to ensure that they comply with the State law's new prohibition of certain NDAs.

The State law will also likely require employers to make substantial revisions to their existing anti-harassment policies and employers without written policies will need to institute them. In addition, all New York State employers will need to comply with the State law's training requirements. All New York City employers with 15 or more employees will similarly need to comply with *both* the State *and* the City training requirements. While there is some overlap between those requirements, the State law has an earlier effective date and certain substantive requirements not mandated by the City law, whereas the City law has certain requirements not necessary under the State law. Compliance with both the training and policy requirements will be easier to assess once the model policy and training modules are published by the applicable agencies.

The attorneys at Seyfarth Shaw LLP are available to provide assistance with guidance on both the State and City requirements, including ensuring that employers have robust policies in place regarding anti-harassment in the workplace and procedures to effectively respond to complaints. We can also provide interactive anti-harassment training tailored to your company's specific business and needs.

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IMPLICIT BIAS THEORY IN EMPLOYMENT LITIGATION

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The term "implicit bias" is commonly used to refer to ingrained beliefs, whether positive or negative, about other individuals or groups that are triggered automatically. These beliefs are not conscious thoughts but rather represent reflexive reactions at the unconscious level.

The developers of the theory, social psychologists Anthony Greenwald and Mahzarin Banaji, first used the term to describe the theory in 1995.[1] Greenwald and Banaji also created a test to attempt to measure an individual's implicit bias. Known as the Implicit Association Test ("IAT"), the test is designed to provide data on the unconscious associations people maintain between social groups and positive or negative characteristics.[2]

Some social psychologists, including Greenwald and Banaji, believe that these unconscious attitudes actually predict behavior. These social psychologists posit that people's unconscious beliefs in certain stereotypes result in biased decisionmaking and discriminatory behaviors based on unintentional preferences.[3]

Since 1995, the theory of implicit bias has moved from the halls of academic debate to the parlance of everyday Americans with remarkable speed. Many people may recall that in the first presidential debate between Hillary Clinton and Donald Trump, Clinton responded to a question from Lester Holt regarding whether police were implicitly biased by stating, "Implicit bias is a problem for everyone, not just police."[4] Part of this visibility is owed to the fact that the IAT is easily accessible via the website Project Implicit, hosted by Harvard University.[5] In fact, according to Greenwald, the test has been taken over 17 million times on the Project Implicit website.[6]

All of this might lead one to believe that the concept of implicit bias and its relationship with discriminatory behaviors is well-settled. That is certainly not the case. Although many social psychologists agree that people often possess non-conscious preferences, the degree to which such biases play a role in deliberative behavior is hotly contested.[7] Further, many academics have specifically criticized the IAT itself as an ineffective metric of implicit bias.[8]

WORKPLACE TRAINING

Despite academic divergence over the impact of implicit bias in the workplace, corporations have shown a marked willingness to adopt training measures intended to combat the issue. The exercises are designed to facilitate uncovering employees' unconscious biases, in the hopes that by revealing certain stereotypes, people may begin to eliminate them.

A June 12, 2017 New York Times article entitled, "150 Executives Commit to Fostering Diversity and Inclusion" describes a new initiative called "C.E.O. Action for Diversity" in which the CEOs of many of the nation's largest and most recognizable companies have pledged to "support more inclusive workplaces" in part via a commitment to "implement and expand unconscious bias education."[9] The website for the initiative notes, "Unconscious bias education enables individuals to begin recognizing, acknowledging, and therefore minimizing any potential blind spots he or she might have, but wasn't aware of previously. We will commit to rolling out and/or expanding unconscious bias education within our companies in the form that best fits our specific culture and business. By helping our employees recognize and minimize their blind spots, we aim to facilitate more open and honest conversations. Additionally, we will make non-proprietary unconscious bias education modules available to others free of charge."[10]

According to the Wall Street Journal, one estimate by the FutureWork Institute predicts that unconscious bias training will be provided by more than 50 percent of large U.S. employers with diversity programs by 2019.[11]

Often, however, these corporate exercises designed to reveal and eliminate implicit biases have unintended consequences. In one noteworthy case, statements made by participants during a diversity training were used as direct evidence to support a class action suit alleging discrimination on the basis of sex.[12]

Beyond legal ramifications, the well-meaning exercises may also unintentionally reinforce certain negative attitudes simply by providing a mechanism to voice their existence. This is not to say that companies must shy away from providing diversity trainings to their employees; just that such trainings should be carefully evaluated to ensure that they are more helpful than harmful.[13]

In addition to large corporations, the ABA has also launched endeavors aimed at combatting implicit bias, including the aptly named, "Implicit Bias Initiative" created "To help combat implicit bias in the justice system."[14]

IMPLICIT BIAS THEORY IN EMPLOYMENT LAW

For many employment practitioners, the theory of implicit bias raises complex questions when applied to the traditional legal standards and theories of proof in discrimination cases. Implicit bias has encountered a mixed reception in the judiciary, primarily due to the difficulty of establishing a causal link between employer conduct and discriminatory action. Importantly, this link is closely tied to the requirement in Title VII disparate impact cases that plaintiffs identify a specific employment practice causing the disparate impact based on a protected category.[15] Where this causal link is more obvious, courts are more willing to accept that bias may have permeated individual decisions.

Courts Rejecting Implicit Bias

The lack of conclusive links between implicit bias and actual decision-making have left some courts wary of accepting evidence or expert testimony concerning implicit bias, even where disparities in employment outcomes exist. The Supreme Court most notably rejected the application of general evidence of implicit bias in Wal-Mart v. Dukes,[16] as did the Iowa courts in Pippen v. Iowa.[17]

In Wal-Mart v. Dukes, the Court rejected a proposed class of 1.5 million women nationwide who had been employed by Wal-Mart because it found social science evidence of implicit bias in the exercise of managerial discretion insufficient to support their allegations of discrimination.[18] The plaintiffs alleged, among other things, that Wal-Mart's policy of granting local managers discretion over pay and promotion decisions had caused a disparate impact on the basis of gender. To

establish commonality under Rule 23(a)(2) by showing significant proof that the company "operated under a general policy of discrimination," the plaintiffs relied on statistical evidence of pay and promotion disparities based on sex, anecdotal evidence of sex discrimination, and the testimony of sociologist Dr. William Bielby.[19] Dr. Bielby conducted a social-framework analysis of Wal-Mart's culture and personnel practices and concluded that Wal-Mart was "vulnerable to gender discrimination."[20] The Court found this testimony unpersuasive, noting that Dr. Bielby could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart … [and at] his deposition … conceded that he could not calculate whether 0.5 or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[21] Based on this criticism, the Court found Dr. Bielby's analysis insufficient to establish commonality under Rule 23 and also expressed doubt that this evidence would survive a Daubert analysis.[22] The Court, in a footnote, recognized peer criticism of Dr. Bielby's report for "testif[ying] about social facts specific to Wal-Mart" with "no verifiable method for measuring and testing any of the variables that were crucial to his conclusions."[23] The Court stated that "[o]ther than the bare existence of delegated discretion, [the plaintiffs] have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[24] In this opinion, the Supreme Court raised substantial doubt as to whether social science analysis that the exercise of managerial discretion is vulnerable to bias, even when coupled with sex-based disparities in pay and promotions, can establish a policy of discrimination sufficient to establish commonality for a class of employees.[25]

Soon after, in Pippen v. Iowa, a class of African-American employees asserted Title VII and state law claims of disparate impact based on race in Iowa state court.[26] The plaintiffs alleged that the state of Iowa's discretionary, merit-based hiring and promotion practices systemically discriminated against African-American employees.[27] The plaintiffs submitted the testimony of two experts who opined that it was possible that implicit bias affected decision-makers and that implicit bias is so pervasive that it would affect any merit-based employment system, merely serving to legitimize inequality.[28] Neither of the experts opined on any specific employment decisions by the relevant Iowa officials.[29] For reasons similar to those in Dukes, the court rejected the use of such generalized social science evidence. The court criticized the plaintiffs' failure to identify a specific employment practice creating the racial disparity and echoed the idea that "[d]elegated discretion without a specific employment practice, even supported by adverse outcomes in ultimate hiring statistics" will not suffice.[30] Where the experts showed no evidence of how many discretionary employment decisions made in Iowa's hiring process resulted from unconscious bias, the court concluded the experts had not demonstrated that the "bottom-line figures were caused by implicit racial bias."[31]

Other courts have recently rejected the use of social science evidence in employment discrimination cases on evidentiary grounds under the standards of Daubert. In Jones v. Nat'l Council of Young Men's Christian Associations of the United States of America, the Northern District of Illinois refused to admit the plaintiffs' expert testimony on implicit bias theory during the class certification stage of a race discrimination case.[32] The court determined that general evidence on the existence of implicit bias could not be used to "educate the factfinder" because it was not "adequately tied to the facts of the case to be useful to a jury. Even opinions about general principles have to be logically related to the factual context of a case to be admissible—those general principles must still 'fit' the case."[33] Under similar circumstances, the Third Circuit concluded in Karlo v. Pittsburgh Glass Works, LLC that the trial court had not abused its discretion by excluding expert testimony on implicit bias theory in an age discrimination case on the grounds that it did not "fit" the facts of the case as required by Daubert.[34]

Courts Accepting Implicit Bias

Other jurisdictions have proven more receptive; notably these cases involve a single plaintiff and workplace.

In Thomas v. Eastman Kodak Co., the First Circuit reviewed the lower court's grant of summary judgment against a plaintiff claiming that she was discriminatorily laid off because of her race. In assessing whether the employer's articulated reason for the plaintiff's layoff was pretextual and whether the true reason was discrimination, the court noted that where "the employee has been treated disparately 'because of race,'" a disparate treatment claim survives "regardless of whether

the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."[35] The court relied on disparate treatment case law and several law review pieces (accepting the existence of implicit bias) to support its statement that several types of biased thinking are "widely recognized."[36]

In Ahmed v. Johnson, the First Circuit reversed the trial court's grant of summary judgment to an employer in a single plaintiff case alleging the discriminatory denial of a promotion based on race, national origin, and religion.[37] Although not explicitly relying on implicit bias theory, the court noted that "[o]utright admissions of impermissible [discriminatory] motivation are infrequent" and "unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus."[38]

THE EEOC PERSPECTIVE

The EEOC has made its position regarding the role of unconscious bias in employment discrimination clear. According to its own guidance on race and color discrimination, the EEOC notes that intentional discrimination occurs "when an employment decision is affected by the person's race . . . includ[ing] not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups."[39]

From 2008 to 2013, the EEOC implemented an initiative known as "Eradicating Racism and Colorism from Employment" or E-RACE. The purpose of the E-RACE initiative, according to the EEOC website, was to "retool [the EEOC's] enforcement efforts to address contemporary forms of overt, subtle and implicit bias."[40] As part of its E-RACE efforts, the EEOC committed to holding a series of public hearings to address implicit bias in employment.[41] Other examples of the EEOC's position on implicit bias, specifically with respect to race and color discrimination, include:

- In its recommended best practices for employers on how to prevent race and color discrimination, the EEOC recommends that employers "Establish neutral and objective criteria to avoid subjective employment decisions based on personal stereotypes or hidden biases."[42]
- According to the Compliance Manual, Section 15: Race & Color Discrimination, "Racially biased decisionmaking and treatment, however are not always conscious. The statute thus covers not only decisions driven by racial animosity, but also decisions infected by stereotyped thinking or other forms of less conscious bias."[43]

To a much more limited degree, the EEOC has also addressed implicit bias with respect to sex discrimination. Thus, in the EEOC's enforcement guidance for unlawful disparate treatment of workers with caregiving responsibilities, the agency notes, "Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer's evaluation of a worker's general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decision-making."[44]

Finally, a number of panelists speaking before the EEOC have recently integrated the concept of implicit bias into their testimony. Although those testifying do not speak on behalf of the agency, the comments made during public hearings may reflect the EEOC's own perspective and may even provide insight into future EEOC initiatives.

Thus, for example:

- On October 13, 2016, Marko J. Mrkonich, Shareholder with Littler Mendelson P.C., testified that "Big Data, used correctly, can be a powerful tool to eliminate overt and implicit bias from an employee selection process, and a misplaced, rigid adherence to outdated legal tests and standards cannot prevent this progress from taking place."[45]
- On May 18, 2016, Kweilin Ellingrud, Partner with McKinsey & Company testified regarding promoting diverse and inclusive workplaces in the tech sector. In his testimony, Ellingrud noted, "There are . . . companies that are using advanced analytics to understand and assess unconscious bias much more strongly throughout their people processes. They are searching for keywords in review memos and other sources for gender-skewed feedback on things like 'abrasive style' and 'lack of executive presence,' for women vs. men."[46]
- On March 16, 2016, Betsey Stevenson, Associate Professor of Economics and Public Policy at the

University of Michigan, argued that the proposed revisions to the EEO-1 Report would assist in "making employers aware of implicit bias."[47] However, for a contrary view, see Camille A. Olson's testimony on the proposed revisions to EEO-1.[48]

- On July 1, 2015, Rachel D. Godsil, Professor at Seton Hall University School of Law described implicit bias at length, noting, "Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects."[49]

- On April 15, 2015, Barbara Arnwine, President for the Lawyers' Committee for Civil Rights Under Law testified that "The sad fact is that the explicit discrimination that existed for decades, when state statutes and union rules expressly excluded African Americans from many job opportunities, has been succeeded by a new and enhanced set of barriers to employment for African Americans and other disadvantaged groups. These added barriers range from a simple double standard in the minds of hiring managers—implicit bias that unconsciously results in African Americans being required to demonstrate superior qualifications to be considered—to new examples of explicit criteria, like criminal background checks, credit background checks, unemployment bias, and entry-level tests of various abilities, many of which have a devastating impact to deprive African Americans of equal opportunity to obtain jobs and advance in their careers."[50]

Notes

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3 John T. Jost, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser, & Curtis D. Hardin, The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore, 29 Research in Organizational Behavior, 39 - 69 (2009); Richard F. Martell, Cynthia G. Emrich, James Robison-Cox, From Bias to Exclusion: A Multilevel Emergent Theory of Gender Segregation in Organizations, 32 Research in Organizational Behavior, 137-162 (2012); Jens Agerstrom, Dan-Olof Rooth, The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination, 96 Journal of Applied Psychology, 790-805 (2011); Dan-Olof Rooth, Automatic Associations and Discrimination in Hiring: Real World Evidence, 17 Labour Economics, 523-534 (2010).

4 Daniel A. Yudkin & Jay Van Bavel, The Roots of Implicit Bias, NY Times, Dec. 9, 2016, https://www.nytimes.com/2016/12/09/opinion/sunday/the-roots-of-implicit-bias.html.

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12 Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992).

13 For example, trainings should focus on action and positive solutions rather than negative stereotypes.

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16 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

17 Pippen v. Iowa, 854 N.W.2d 1 (Iowa 2014).

18 Note that the Supreme Court and First Circuit, decades ago, had rejected the attempt to use implicit biases as evidence of discrimination. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("subconscious stereotypes and prejudices… may not prove discriminatory intent"); Jackson v. Harvard Univ., 721 F. Supp. 1397, 1432-33 (D. Mass. 1989), aff'd, 900 F.2d 464 (1st Cir. 1990), cert. denied, 498 U.S. 848 (1990) ("[d]isparate treatment analysis is concerned with intentional discrimination…. [S]ubconscious attitudes… are precisely the sort that disparate treatment analysis cannot and was never designed to police.")

19 Dukes, supra, 564 U.S. at 346, 353.

20 Id. at 346 (internal quotation marks and citation omitted).

21 Id. at 354 (internal quotation marks and citation omitted).

22 The standards for the admission of expert testimony are found in Federal Rule of Evidence 702 and the Supreme Court case, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

23 Dukes, supra, 564 U.S. at 354 n.8.

24 Id. at 357.

25 In an opinion issued soon thereafter with very similar allegations and reasoning as Dukes, the Sixth Circuit echoed the logic of the Supreme Court. Davis v. Cintas Corp., 717 F.3d 476, 489 (6th Cir. 2013) (finding unpersuasive the plaintiffs' implicit bias theory evidence and finding the proposed class lacked commonality).

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32 Jones v. Nat›l Council of Young Men›s Christian Associations of the United States of Am., 34 F. Supp. 3d 896, 900 (N.D. Ill. 2014).

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