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Workplace sexual harassment during the #MeToo and Time's Up movements

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Claims of sexual harassment in the workplace, while always prevalent, are expected to spike in the days, months, and years to come. This is, in large part, thanks to movements like #MeToo and Time's Up. You cannot turn on the TV, listen to the radio, or browse social media without being bombarded with new allegations of sexual harassment and/or sexual assault against the likes of Hollywood moguls (e.g., Harvey Weinstein and Les Moonves), TV personalities (e.g., former *Today Show* coanchor Matt Lauer, former NBC News anchor Tom Brokaw, PBS's Charlie Rose, and comedian Bill Cosby), and politicians and judges (e.g., President Bill Clinton, President Donald Trump, former senator Al Franken, former congressman Anthony Weiner, and, most recently, Judge Brett Kavanaugh, the newest U.S. Supreme Court Justice). Whether these allegations are substantiated or not, they undoubtedly have made an indelible impression on our collective psyches. More importantly, in what has been dubbed the "Weinstein Effect," victims now feel empowered to share their stories, especially following the #MeToo social media movement.[1] This movement has spread, turning a national spotlight on the issue of workplace sexual harassment.

So what impact is this likely to have on employers? You may well expect to see a corresponding spike in allegations of sexual harassment in your workplace. It is worth noting, too, that such claims often come down to "he said/she said," with little, if any, corroborating evidence. Yet they must be taken seriously, lest they expose your business to a claim that you failed to take prompt and effective measures to eradicate unlawful harassment from your workplace. Additionally, sexual harassment claims are one of the most difficult types of claims for an employer to successfully have dismissed on summary judgment. For these reasons, a short refresher on the subject is in order.

What is unlawful workplace sexual harassment?

Generally speaking, unlawful sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and similar state civil rights laws. Title VII recognizes two types of sexual harassment: quid pro quo and hostile work environment.

Quid pro quo is a Latin phrase that means "this for that." Thus, quid pro quo harassment occurs when someone in a superior position, such as a manager or supervisor, attempts to elicit sexual favors from a subordinate employee by either promising that the favor will be returned with a job-related benefit (e.g., a promotion or salary increase) or by threatening an adverse employment action (e.g., a demotion or negative performance evaluation) if the sexual favor is not provided. Of the two types of claims, quid pro quo claims are generally less prevalent.

The more likely sexual harassment claim you may face is the so-called hostile work environment claim. This occurs when an employee claims that he/she has been subjected to unwelcome and offensive behavior (e.g., off-

color jokes, commenting on physical attributes, unsolicited hugs or shoulder rubs, discussing sexual activities) that has risen to such a level that it has become "severe or pervasive" so as to "alter the conditions of [the victim's] employment and create an abusive working environment."[2] Title VII requires that, in order to be actionable, the harassment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[3] Courts must look at the totality of the circumstances when determining whether an environment is sufficiently hostile, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[4]

On the other hand, the law is clear that "simple teasing, offhand comments and isolated incidents (unless extremely serious)" will not be actionable under Title VII.[5] Moreover, the harassment must be based on the victim's sex. In some situations, it can actually be quite difficult to prove the harassment was based on the victim's sex. Some courts, too, have found that, absent extrinsic evidence of sex discrimination, the alleged harasser's words alone are insufficient to establish harassment. For example, one court found that the mere use of the word "bitch," without other evidence of sex discrimination, [was] not particularly probative of a general misogynist attitude.[6] In another case, the court found the use of the word "bitch" was not necessarily motivated by gender, as several possible motives explained the speaker's reference to the employee as a "sick bitch."[7] Furthermore, the law does not protect against the "equal opportunity" harasser, since inappropriate conduct directed equally at both sexes is not discriminatory.[8] Courts frequently remind employees that Title VII is not a general civility code.