

Reflecting on Exposure and Coverage in the #MeToo Era

This article examines Employment Practices Liability (EPL) insurance and corresponding risk in the wake of a historical shift in how workplace harassment is perceived, reported, and addressed.

A WATERSHED MOMENT FOR WORKPLACE HARASSMENT

As the press continues to extensively cover allegations of sexual misconduct by individuals in a position of authority or influence, the matter of workplace harassment is front and center at watercoolers and dinner tables across the country. Not since the 1991 sexual harassment allegations by Anita Hill against then United States Supreme Court nominee Clarence Thomas, regarding Thomas' role as Hill's boss at the U.S. Department of Education and Equal Employment Opportunity Commission (EEOC), has there been such national attention paid to workplace harassment. It is particularly noteworthy that the recent flood of sexual misconduct allegations is not limited to any one segment of society, or industry. It has touched executive suites; academia; media and publishing; Silicon Valley;

the entertainment, hospitality, healthcare, restaurant and agricultural industries; professional and Olympic athletics; the armed forces; and various political figures. Few, if any, American institutions have remained insulated from allegations of workplace harassment in recent months.

Further, it is clear that we have reached a tipping point with regard to both acknowledgment of and consequences for workplace harassment. For instance, in response to allegations of inappropriate sexual behavior toward a subordinate, NBC rapidly terminated the face of The Today Show Matt Lauer, following his stable presence in American households for over 20 years. Lauer joins a growing list of many high profile individuals who recently have experienced career fallout following allegations of workplace harassment.

Employment related consequences are not the only example of the sea change that has occurred with regard to societal acknowledgement of workplace harassment. The #MeToo campaign, a social media hashtag topic denouncing sexual assault and harassment, gained incredible steam in late 2017. Entertainment industry executives have banded together to form and fund the Commission on Sexual Harassment and Advancing Equality in the Workplace, which will be chaired by, incidentally, Anita Hill. The Time's Up Legal Defense Fund, established in December 2017 to "provide subsidized legal support to women and men who have experienced sexual harassment, assault, or abuse in the workplace," raised more than \$16 million within the first month of collecting donations via the GoFundMe platform. To further underscore the fact that the workplace harassment floodgate has broken wide open, Time Magazine named the anti-harassment movement, dubbed "The Silence Breakers," its Person of the Year for 2017.

Undoubtedly, the increasing presence and accessibility of social media has facilitated greater discussion regarding workplace harassment, if not greater potential for allegations to quickly become public knowledge. As survivors desire for their voices to be heard, we expect to witness a surge in employment related claim activity.

HOW PREVALENT IS WORKPLACE HARASSMENT?

Evidence suggests that workplace harassment is widespread. According to a June 2016 report by the EEOC Select Task Force on the Study of Harassment in the Workplace (hereinafter referred to as the EEOC Task Force Report), "anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace," depending on sample pool and questions posed. While the statistical range here is wide, the problem is pervasive even by the EEOC's most conservative estimate – indicating that at least one in four women are affected by workplace harassment. Other assertions paint an even bleaker picture. As stated in a November 2017 article in The Economist, "Sociologists broadly agree that about half of American women are sexually harassed at least once during their working lives." In fact, amidst the ongoing, spirited discussion about workplace harassment playing out in popular culture, The New York Times (NYT)

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reports that men are reflecting on and acknowledging their own misconduct. In a recent survey resulting from a collaboration between the NYT, leading sexual harassment researchers, and polling and media company Morning Consult, "about a third of men said they had done something at work within the past year that would qualify as objectionable behavior or sexual harassment."

The foregoing is not at all to suggest that workplace harassment is perpetrated solely against women. Stories of workplace harassment have been shared by women and men alike. Further, as noted in the NYT survey results discussed above: "The phenomenon cuts across demographic divides ... Harassing behaviors are committed by blue-collar and white-collar workers, Democrats and Republicans, the young and the old, the married and the unmarried, high earners and low ones, people who feel powerful at work and those who do not." To illustrate the salience of the workplace harassment issue in legal terms, USA Today reports that "law firms in the nation's capital are seeing a spike in inquiries about sexual harassment cases," and visits to the EEOC's Harassment webpage have at least doubled since the Harvey Weinstein scandal broke. The message to employers? In the words of Charla Bizios Stevens, Employment Law Practice Group chair at law firm McLane Middleton, *"Be prepared for an onslaught of new allegations and claims."*

WHAT CAN EMPLOYERS DO TO MINIMIZE RISK?

In order to comply with local, state and federal labor laws, and/or promote a healthy work environment, many businesses periodically conduct mandatory anti-harassment training for their employees. Such efforts are important, however the effectiveness of traditional anti-harassment training has come under scrutiny amidst highly publicized reports of sexual harassment occurring even in work environments where this training takes place.

Authors of the EEOC Task Force Report state that “[m]uch of the training done over the past 30 years has not worked as a prevention tool,” adding that “it’s been too focused on simply avoiding legal liability.” Moreover, while the role of anti-harassment training in the workplace has grown during the past few decades, evidence suggests that workplace harassment remains significantly underreported. According to the EEOC’s research, “roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager or union representative about the harassing conduct,” perhaps due to fear of retaliation, damage to a complaining employee’s own reputation, or ostracism by co-workers. While use of anti-harassment training may signal a company’s efforts to nurture a healthy, harassment-free work environment, it is at least debatable whether such training, in its typical form, yields true behavioral change.

Dr. Eden King, a psychologist at Rice University who was consulted for the EEOC Task Force Report, argues: “Organizations often implement training programs in order to reduce their likelihood of being named in harassment suits or to check a box for EEOC purposes . . . If we’re actually trying to change or reduce the likelihood of sexual harassment, that’s a different outcome altogether. That’s not a knowledge problem, that’s a behavior problem.” Accordingly, employers should go beyond cookie-cutter, web-based anti-harassment training, and consider implementing evidence-based strategies designed to create a workplace culture that rejects harassment. Dr. King suggests conducting live, in-person, interactive anti-harassment training that lasts for a minimum of four hours and includes role playing. Other evidence-based strategies include empowering bystanders to intervene when witnessing harassing behavior, encouraging civility among colleagues, and promoting more women to management positions in an effort to reduce gender inequality.

Further strategies to prevent workplace harassment recommended by Vice President of Risk Management at AWAC Services Company, Gwen Stokes, include: adopting a “zero tolerance” policy and “holding the line,” regardless of a perpetrator’s rank or position; ensuring that non-employees (consultants and vendors) understand and uphold an organization’s code of conduct during interactions with employees, visitors, etc.; and establishing a mechanism to allow employees to anonymously report

inappropriate or threatening behavior, for example, a hotline managed by an outside firm.

Without doubt, these recent findings and recommendations may be troubling for many businesses that, in all good faith, have endeavored to foster a work environment free from harassment. However, these conclusions do provide important information that companies can use to strengthen their anti-harassment training and protocols, and address workplace harassment when it arises.

WHAT ARE THE IMPLICATIONS FOR EPLI COVERAGE?

Employment Practices Liability protection has been available in the insurance market for over 20 years. The policy protects organizations, including executives and employees, from workplace related claims of harassment, discrimination, wrongful termination and retaliation. Such claims are costly and time consuming, and within the current climate surrounding workplace harassment, bound to become even more burdensome for businesses. According to an Advisen white paper, defense and settlement costs can easily exceed \$300,000, with resolutions taking between 18 and 24 months. In light of such findings and the recent flood of workplace harassment claims, it is no wonder that more and more companies are seeking EPLI coverage. According to Professor of Law and director of the New Workplace Institute at Suffolk University, David Yamada, companies are increasingly buying EPLI to cover costs associated with employment lawsuits. Research firm MarketStance projects that in 2019, the EPLI market will grow by \$2.7 billion.

Fallout from the #MeToo movement will undoubtedly fuel this trend. The NYT has reported that several Harvey Weinstein accusers collected six-figure settlements, allegedly entered into *in order to avoid lengthy and costly litigation*. The NYT has also reported that Fox News paid out \$13 million over several years to address complaints from various women about Bill O’Reilly’s behavior toward them.

An additional exacerbating factor is the new tax legislation, which bars employers from deducting settlement and defense costs related to sexual misconduct claims, when the settlement is subject to a non-disclosure agreement.

As large payouts for workplace harassment hit the headlines, employees are bound to take notice. Further, as societal attitudes toward workplace harassment evolve and institutions adjust, potential reparation for victims may escalate. The take-away is twofold: workplace harassment claims are very likely to increase not only in frequency, but also in severity.

Based on the foregoing, we strongly recommend that businesses keep the following in mind as they review their EPL insurance program. This is certainly not an exhaustive list, but outlines some important considerations:

Limits of Liability: In light of the costs associated with defending an EPL claim, limit adequacy is a key topic, as defense expenses can exhaust the limit of liability, leaving little or nothing for settlement. Factors to consider are your class of business, jurisdiction, size, employee count, previous EPL losses, and other matters. Jurisdiction is particularly important as there is a much greater likelihood of claim activity in certain states (e.g., California, New Mexico and Nevada). Businesses should earnestly discuss with their insurance representatives: adequate limits, a company's ability to absorb the self-insured retention on an EPLI policy, jurisdictional considerations, and any other factor to provide decision-makers with the necessary information.

Reporting and Notice: We encourage all insureds to report instances of sexual harassment as soon as possible, even if a claim has not yet been made. If crafted appropriately, reporting a Notice of Potential Claim will “anchor” the circumstances in the policy year in which the potential claim is reported, so that if a claim later arises, that particular policy will be triggered. Additionally, any correspondence, administrative charges, arbitrations, lawsuits or other similar events / items should be noticed to a business entity's EPLI carrier without delay. Companies and insurance brokers should fully understand both the reporting and notice requirements as well as the nuances of the Claim definition in the EPLI policy.

Duty to Defend: The EPLI policy contains provisions that govern the defense of covered claims. These provisions detail which party retains the responsibility to defend and direct the defense of a given claim. For many EPLI policies, the policy will be written on a “duty to defend” basis. Under a duty to defend policy, the insurance company retains the

right and duty to defend a covered claim once it is tendered to the insurer. When the insurer retains the duty to defend, the insurer will select defense counsel from its list of panel firms to defend the insured. Again, the insurance company will select counsel – not you, the insured. If you have a relationship with a law firm and you want to use their services, this matter needs to be discussed and addressed prior to binding an EPLI policy.

Coverage: EPLI coverage protects against employment related claims brought by employees, and sometimes independent contractors. As with most insurance policies, it is a contract that can be amended to improve and broaden coverage. For instance, EPLI includes a third party liability coverage component that addresses harassment and discrimination claims brought by third parties, including customers and business invitees. Some policies limit the types of claims brought by third parties, so it is imperative for businesses to understand what coverage is in place, any exclusions, and all relevant definitions. Further, many policies contain a “Hammer Clause” that dictates, in a claim situation, how the policy will respond if the carrier recommends a settlement but the insured prefers to continue to litigate. This clause can be favorably amended.

Loss Prevention Services: Many EPLI policies include built-in risk management services for no additional cost. Such services can include, among other things: guidance regarding the development or revision of employee handbooks or other employment related policies and procedures; templates; legal compliance audits; expert consultation regarding training program design and implementation; confidential legal advice on employment related issues; statistical analyses pertaining to workforce and employment practices; and anti-harassment training. As stated in a recent AWAC publication on workplace harassment, “[u]nderstanding what is available and utilizing it appropriately is an excellent supplement to any robust risk management program.” While there is certainly cause for concern at this time regarding the liability that can arise from workplace harassment, there are also a number of things that companies and insurance professionals can do to address that concern. Exercising risk management – via comprehensive insurance coverage as well as the implementation and maintenance of appropriate policies and procedures – is crucial in order for businesses to avoid and appropriately respond to workplace harassment.

LOOKING AHEAD

In the #MeToo era, private and public company insureds must be prepared to accept that workplace harassment allegations will no longer be dealt with behind closed doors. Victims are coming forward, bad actors are being held to account for their behavior, and consequences are hitting business' bottom line. A well placed, comprehensive EPL insurance program is an imperative component of any risk management plan, but companies should also give genuine consideration to the type of anti-harassment training that they provide, and what they can do to improve workplace behavior. A review of internal policies would well complement the annual management liability insurance program review. For business entities that currently do not purchase EPL insurance, the time is ripe for a discussion with insurance representatives about putting a program in place, taking advantage of resources that the EPLI marketplace has to offer, and strengthening a corporate culture free of harassment.

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