

Presented by: **Caroline Larsen (Shareholder, Phoenix)**
For **Scottsdale Regional Compliance & Ethics Conference**



**Ogletree
Deakins 40th**
Employers & Lawyers, Working Together

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Workplace Sexual Harassment in 2017

“The year that sexual misconduct became a fireable offense.”

- USA Today



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Today's Agenda

- I. How did we get here?
- II. What can employers expect and how can you best prepare for this emerging “counter-revolution?”

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Why now?



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Tipping point



Why it matters: The speed and sweep of this are unprecedented.

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Culture shift

"Weinstein ripped off a band aid that covered the wounds and scars that so many women still carry in industries that are still predominately male-led, and now that it is off, I think it is time to examine and heal. This is not an act of revenge, but rather an opportunity for social reform. It is an uncomfortable but healthy conversation to be having in a society that understands that the rules of the game have changed."

Dana Weiss, Chief Political Analyst, Israel's Channel 2 and CNN Worldwide News Contributor

"This is really an extraordinary teaching moment for our nation. We are in an environment where people coming forward, rather than being attacked or villainized, ...their stories are being accorded gravity. The victim-blaming is over."

Debra Ness, President, National Partnership for Women & Families

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Role of social media

The screenshot shows several tweets from the #MeToo movement. One tweet from Susan Banderton asks for support for women who broke their silence. Another from Lisa Mizzoni shares a list of cities where #MeToo events are taking place. A third from Paula Acquillo shares a link to a video. A fourth from Lisa Mizzoni provides instructions on how to use the #MeToo hashtag. A fifth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A sixth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A seventh from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A eighth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A ninth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A tenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A eleventh from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twelfth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirteenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A fourteenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A fifteenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A sixteenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A seventeenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. An eighteenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A nineteenth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twentieth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-first from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-second from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-third from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-fourth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-fifth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-sixth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-seventh from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-eighth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A twenty-ninth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirtieth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-first from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-second from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-third from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-fourth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-fifth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-sixth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-seventh from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-eighth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A thirty-ninth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A fortieth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-first from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-second from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-third from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-fourth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-fifth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-sixth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-seventh from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-eighth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A forty-ninth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet. A fiftieth from Lisa Mizzoni suggests writing 'Me too' as a reply to a tweet.

What to expect...for now

Increased focus on how companies respond to sexual harassment claims:

- (1) Scrutiny of requiring confidentiality when resolving sexual harassment complaints and lawsuits ("silencing victims")
- (2) Companies "covering up" or discouraging employees from coming forward with complaints of sexual harassment
- (3) Companies failing to hold sexual harassers accountable for misconduct

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#1 Increased Scrutiny of Arbitration Agreements

- **Murphy v. NLRB**
 - Argued in October 2017 and awaiting decision from U.S. Supreme Court
 - Can employees be forced to waive class or collective actions and individually arbitrate claims?
- **Arbitration Fairness Act of 2017**
 - Introduced in Senate by Al Franken
 - Seeks to amend Federal Arbitration Act



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#2 Increased Scrutiny of Confidential Settlements/NDAs

California State Senator Connie Leyva:



“Secret settlements in sexual assault and related cases can jeopardize the public—including other potential victims—and allow perpetrators to escape justice just because they have the money to pay the cost of the settlements.”

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Legislation may bar confidentiality clauses

New York Senator Brad Hoylman, introduced SC6382A
“Attempts by employers to compel employees to waive those protections as a condition of employment, particularly pertaining to sexual harassment and discrimination protections, are unconscionable and should be explicitly prohibited in New York as a matter of public policy. Recent high-profile reports of sexual misconduct by powerful executives have highlighted the role nondisclosure agreements play in protecting abusive workplace cultures.”



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#3 Increase in EEOC scrutiny

- Expect sexual harassment complaints to increase on state and federal level
- EEOC Select Task Force on Study of Harassment in the Workforce reported 162,872 claims of sexual harassment between 2010 and 2015
- EEOC recently issued a notice on its website with detailed instructions for employers on prevention programs: “Promising Practices for Preventing Harassment”

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#4 Increase in lawsuits

- 83% of claimants are women, although only 3 out of 4 employees who experience harassment report it.
- Watch for an uptick in lawsuits from alleged harassers.

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What can employers do now?

- (1) Strengthen harassment policies
- (2) Harassment prevention training for all employees
- (3) Remove barriers complaint system
- (4) Involve senior leadership in anti-harassment efforts

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#1 Effective Written Harassment Policy

- Will you follow a zero tolerance policy?



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#1 Effective Written Harassment Policy

- Available in multiple ways
- Describe process for informally sharing concerns about harassment without filing complaint

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#2 Training

- “Championed by senior leaders”
- Provided to employees at every level and all locations
- Tailored to specific industry and employee workforce
- Conducted by qualified live trainers
- Routinely evaluated by audience
- Explain what information from the victim will aid investigation

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#2 Training

- Focus more on how employees should handle harassment when it happens and use realistic (and current) examples
- Role play using real examples
- “Bystander intervention” training
- Incorporate social media and other forms of communication familiar to your workforce

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#3 Effective and accessible complaint system

- Well-trained and neutral employees should investigate complaints
- Consider third-party investigator if potential claims of bias or insufficient resources
- Document complaints from intake to resolution
- Maintain confidentiality
- Focus on culture

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#4 Leadership and Accountability

Senior leaders must show their commitment to preventing and responding to harassment. How?

- Allocate sufficient resources to human resources
- Consider organizational reporting changes to neutralize HR
- Recruit and evaluate HR talent based upon their ability to prevent and address harassment
- Regularly evaluate company's response to harassment complaints

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Example: How to handle a PR nightmare...

- Formulate plan in advance of claims becoming public
- Evaluate +/- of proactive vs. reactive strategy
- Have resources available for rapid response capability
- Determine your threshold for damage to your reputation/brand



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Thank You

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