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Sexual & Other Forms of Harassment in the #MeToo Era

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Legal Definition of Sexual Harassment

- Unwelcome conduct due to someone's gender. It's conduct that's sexual in nature.
- “Unwelcome” is the harassment aspect.
- 2 types:
 - Hostile environment—it's what it sounds like, but emphasis on conduct that's sexual in nature.
 - Quid-pro-quo—Latin for this for that. E.g., you sex-me-up & I'll hire you.

What It Really Means

It's a power-play. It's someone exercising power over another using sexuality (or some other form of protected class or activity) as the leverage or means to assert authority.

Whether it's sexuality, sensuality, words, actions, leering, whistling, it doesn't matter. If the harasser has authority over the victim, & the conduct is welcome by the victim, odds are it's sexual harassment.

The same goes for unwelcome conduct on the basis of any other protected class whether it's age, ethnicity, religion, disability, sexual orientation, etc.

Has the #MeToo Movement Resulted in Progress? Why or Why Not?

The #MeToo movement has resulted in progress by calling attention to the issue & by proving that even the powerful aren't as powerful as they believe they are. But it's not the tipping point.

Why not?

Salary Disparity Slide 1/3

According to the Bureau of Labor Statistics (part of the US DOL:

In the 4th Q of 2017, white males' median weekly earnings were \$982. White womens' comparable earnings were \$791.

In 2016, the median weekly earnings for women (\$749) were 82 percent of the median weekly earnings for men (\$915). Women accounted for 44 percent of full-time wage and salary workers.

Salary Disparity Slide 2/3

- In 2012, women who were full-time wage and salary workers had median usual weekly earnings of \$691. On average in 2012, women made about 81 percent of the median earnings of male full-time wage and salary workers (\$854). In 1979, the first year for which comparable earnings data are available, women earned 62 percent of what men earned.
- Warning: The stats I'm providing are just a sample of what's available. This isn't the gospel on wage disparity between the sexes.

Salary Disparity Slide 3/3

As of now, there's no evidence that the pay disparity between men & women has decreased due to the #MeToo movement. So, whether or not we've reached the tipping point is debatable.

See BLS table for broader demographic info.

What Should Employers Do?

- Pay attention to complaints, even those coming via the grapevine. Respond immediately.
- Create a zero tolerance policy & workplace.
- If an assault or alleged assault occurs, call law enforcement. Encourage calling law enforcement. Don't stall.
- Train **ALL** employees.
- Be effective leaders. Lead by example.
- Get insurance, if you can afford it.

Investigations & Documentation Slide 1/2

Focus on the W's:

Who, What, When, Where, Why &
HoW

- Who was involved, who witnessed it & what, who said what.
- What happened, what were your or their impressions, how do you know this.
- When events occurred, when related events occurred, what time of day, not just what day

Investigations & Documentation Slide 2/2

The W's Continued

- Where events occurred, where witnesses or accused/accusers were located
- Why do those involved think events happened; Impressions
- How events transpired
- Protect witnesses from retaliation & ostracization
- Protect whistleblowers

Training

- Train all employees
- Train for leadership & maturity (if that's possible)
- Recognize leadership & maturity when encountered
- Train for all forms of discrimination & harassment
- Have internal complaint & resolution procedures; if you don't a 3rd party will
- Train in multiple formats; e.g., Braille or languages
- Train how to document

Employment Agreements Slide 1/3

- Don't create or use if you haven't had an attorney do it for you; in other words don't DIY; DIY usually fails
- Be cautious with NDAs (non-disclosure agreements) & separation & severance agreements
- Can't prohibit employees from reporting illegal conduct or filing an EEOC or similar complaint, unless sufficient consideration & it's specific

Employment Agreements Slide 2/3

- Many things can't be waived including unemployment comp., workers comp, IL WPCA, some federal claims. It's typically state-by-state
- Be specific about what is & isn't being waived (don't just take something you saw on the internet)

Employment Agreements Slide 3/3

- Be careful of waivers related to “concerted activities” Sec. 7 of the NLRA—wages, hours & conditions of employment
- Can’t waive participation in official agency investigations
- Be careful about waivers of reporting of criminal activity
- You can waive rehiring of employee

The Bottom Line

If It's Possible to Make Such a Statement

- Leadership, maturity & communication skills are key
- Model effective & mature behavior & leadership
- Look for circumstances where power is or can be abused & how those imbalances are addressed
- Address issues immediately; the law is more lenient when issues are conscientiously addressed
- Don't destroy records that are less than 7 years old

Damages & Awards Available in Litigation Slide 1/2

- Not all of these apply to each case. Damages are contingent upon the conduct of the employer and the jurisdiction (local, state or federal).
- **Injunctive relief**, including reinstatement, hiring, or requiring the employer to take affirmative steps to avoid future discrimination.
- **Back pay** -- the wages and other fringe benefits the employee would have earned from the time of the unlawful employment action until the date of reinstatement or judgment.

Damages & Awards

Available in Litigation Slide 1/2

- **Front pay** -- compensates employees for lost earnings, including wages & other benefits, from the date of judgment and reinstatement or in lieu of reinstatement (when reinstatement is unavailable or not feasible).
- **Compensatory damages** -- for intentional discrimination, AKA actual damages. Compensates for an injury or loss caused by another party's unlawful conduct. The purpose is to make the claimant "whole," but not to punish the wrongdoer.
- **Punitive damages** for intentional discrimination with malice or reckless indifference. This is the punishment aspect not available in compensatory damages.
- **Attorneys' fees and costs** -- these can be astronomical.

About Charles Krugel

Charles Krugel has 20-plus years of experience in the field and has run his own practice for more than 15 years (www.charlesakrugel.com). His clients are small-to-medium-sized companies and not-for-profits in a variety of industries; some are even based overseas. His practice is equal parts prevention, negotiation and litigation. Relative to civic and association involvement, he's on the following boards of directors: Latinos Progresando; the Lakeside Community Committee; Youth Outreach Services; the Kelly Hall YMCA; and Oak-Leyden Developmental Services. He was also 2014 Chair for the GOA Regional Business Association. From 2009-2014 he was a member of the Young Professionals Board of The Chicago Bar Foundation, and is currently on their Advocacy Committee. In 2013, the Chicago Lawyers Committee recognized him as their Outstanding Volunteer Attorney of the Year. Education: JD, Ohio Northern University School of Law; MA, I/O psychology, University of North Carolina at Charlotte; and B.S. psychology, Bradley University.