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Cleaning Up the Construction Site: the #MeToo Movement

I. The #MeToo Movement – the history and nature of this movement

A. Timeline of #MeToo events

1. Origin of “MeToo” (2006)

Tarana Burke coined phrase “MeToo” as a way to help women who had survived violence. The phrase in 2018 took on new life as the slogan of the anti-sexual harassment movement.

2. How did we get here?

The 'Me Too' movement (URL without the hashtag) actually predates the Harvey Weinstein scandal by more than a decade, and it certainly bears noting that cultures of harassment and abuse did not start or end with one person. Civil rights activist Tarana Burke founded the initial Me Too movement in 2006 “to help survivors of sexual violence, particularly young women of color from low-income communities, find pathways to healing.”

The movement’s slogan ‘You are not alone’ resonated with millions and was able to spread last year through the power of social media. Actress and activist Alyssa Milano popularized #MeToo, encouraging women to spread the hashtag to “give people a sense of the magnitude of the problem.” Millions of women did just that, and the movement went viral on a global and multilingual scale.

Now, more and more industries have been implementing changes in the workforce, like sexual harassment training, in response to this global movement.

The movement has brought to light allegations against very public figures which has opened a path for

November 29, 2017 – The “Today” show opens with a stunning revelation that cohost Matt Lauer has been fired after NBC received detailed allegations of sexual misconduct;

March 27, 2018 – The sexual abuse scandal at Michigan State University widened when authorities charged a former dean with failing to protect patients from sports doctor and student trainer, Larry Nassar;

April 26, 2018 – Bill Cosby is convicted of drugging and molesting a woman in the first big celebrity trial of the #MeToo era;

April 26, 2018 – a news correspondent for NBC News accused Tom Brokaw of groping, forcibly kissing and making inappropriate overtures toward her;

May 20, 2018 – NYPD confirms allegations of sexual misconduct against celebrity chef Mario Batali and the Eately company and well as other investors/advertisers separate officially from the chef;

May 25, 2018 – Harvey Weinstein turned himself into the New York authorities after being charged with rape in the first and third degrees, as well as criminal sexual act in the first degree for forcible sexual acts against two women in 2013 and 2014;

B. Construction industry data on #MeToo

Construction is traditionally and continues to be a male-dominated field, and stereotypes of the job and its workers are slow to change. In the wake of the #MeToo movement, there is an increased focus on the construction industry’s treatment of women on the job site.

Women are still very much outnumbered in the construction industry. According to the National Association of Women in Construction (NAWIC), women now make up 9.1% of the construction industry in the United States. Numbers aren’t divided equally across roles, however. Women make up 43% of the office and sales staff, for example, 31% of management roles, and 21% of natural resources, construction and maintenance roles. By contrast, they only fill 1.5% of service occupations and 1.4% in production, transportation, and material moving.

Interestingly, women in construction earn an average of 95.7% of their male counterparts' salaries – still a wage gap, but smaller than the 81.1% for the US jobs market as a whole.

In the UK, CITB figures showed that at the end of 2015, women represented almost a fifth (19.9%) of the construction industry's workforce.

II. How has #MeToo Affected Conduct and Risk Management on the Construction Site

A. What is red flag conduct or comments that create a potentially hostile work environment on a construction site

"The construction industry is predisposed to workplace sexual harassment due to several factors: gender disparity, marginalization, 'macho culture,' normalized behavior and outdated attitudes."

– Stuart Binstock, CEO, Construction Financial Management Association

In a 2016 report, the U.S. Equal Employment Opportunity Commission (EEOC) found that while only 25% of women surveyed characterized an experience as sexual harassment, 75% had experienced behaviors that can be described as harassment, such as unwanted sexual attention and coercion, suggestive comments and derogatory language, says Romila Singh, a workforce trends expert and associate business school professor at the University of Wisconsin, Milwaukee. ***"The report also described that regardless of whether or not women label such unwanted conduct and offensive comments as sexual harassment, they all suffered similar negative physical, psychological, health and work consequences,"*** she says.

In a June report, the National Academies of Sciences, Engineering, and Medicine found that 58% of all female faculty and staff in academia experienced gender harassment, unwanted sexual attention or sexual coercion. It noted that 25% of female engineering undergrads and graduate students in the University of Texas system were harassed by faculty or staff. "There is no evidence that current policies, procedures and approaches—which often focus on symbolic compliance with the law and on avoiding liability—have resulted in a significant reduction in sexual harassment," said the academies.

1. Legal definitions
2. Examples
3. What is the key? Unwelcome, abusive, belittling, intimidating conduct

B. How do you recognize (and distinguish) behavior in this unique work environment that can result in potential exposure to *actionable claims* – the Law

1. State Laws are Widely Diverse

States are also ramping up sexual harassment prevention rules now for employers in everything from worker training to bans on secret arbitrations and brokered settlements and reduced or eliminated time limits for claims.

Amendments recently enacted to **New York City and state laws** expanded workplace sexual harassment bans to outside contractors, vendors and service providers as well as outlawing nondisclosure clauses unless claimants say otherwise. State law now extends the time to file a misconduct claim to three years, from one year.

But the state just announced it would delay its employee-training deadline to October 2019 from January 2019 and dropped a requirement to train new employees within 30 days of hire.

California (law) goes further in a new sexual harassment protection law that will take effect on Jan. 1, 2019.

It sets new training rules for firms with at least five employees, bans most secret pacts and clarifies legal standards for claims, including required jury resolution.

In Maryland, employers with more than 50 workers must now disclose each year the number of sexual harassment pacts they enter.

Bills also are pending in both houses of Congress to eliminate or curtail secret arbitration agreements that would apply in other states.

One little-known facet of the Trump administration tax cut passed last year also restricts employers from deducting costs of sexual harassment pacts, but observers say other provisions of the law pertaining to allowed deductions could limit the amount of settlements for plaintiffs.

While prosecutions have been limited by statute of limitations or plaintiffs not pressing cases, some employers are rethinking how far back incidents can be probed. New Jersey-based Rutgers University announced that it will drop its statute of limitations on case filings—formerly just two years—which while meeting state civil code, was “inconsistent with both our practices and our values,” said President Robert Barchi.

2. Examples of Legal Trends and Advancements

During fiscal year 2018, which basically coincides with the one-year #MeToo anniversary the EEOC:

received 7,500 new harassment charges, which is a 12 percent jump over the year before filed 41 sexual harassment lawsuits including allegations of sexual harassment, which is a 50 percent jump over 2017 (out of 66 total lawsuits), and recovered \$70 million through litigation and enforcement administration from miscreant employers, which is up from \$47.5 million in 2017.

These numbers aren't gigantic, but should be seen as a "directionally accurate" reflection of the overall response in the age of #MeToo. That's because of three things.

First, EEOC lawsuits really are just the tip of the spear. Part of the purpose of the agency is to have a government investigative process and a chance at mediation prior to civil lawsuits, so employers don't get swamped and claimants have someone to bring their complaints to.

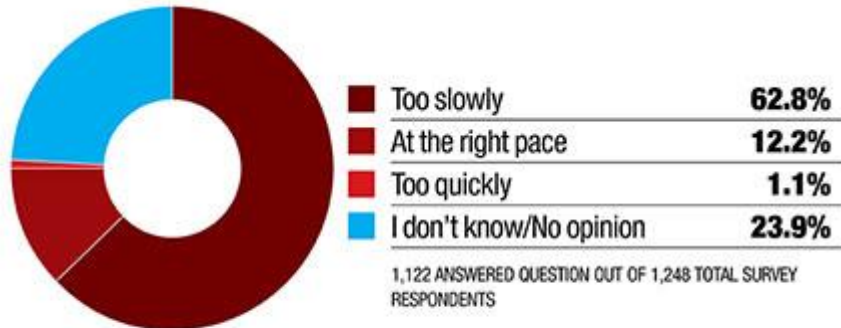
Second, a lot of people also have to go through state administrative processes, and those state agencies might wind up acting instead of the federal agency. Most importantly, this data that the EEOC is releasing seems to reflect only the lawsuits that the EEOC itself brings against employers.

The vast majority of employment discrimination cases are brought by private parties, using private lawyers (although they can only act after they've gone through the administrative process and received a "right to sue" letter from the government agency).

But overall the data provides a big clue as to what one ultimate result of #MeToo might be. And that result seems to be: more claims, more settlements, more lawsuits.

Facing the flurry of new mandates, construction sector groups say they are supporting member firms in combatting harassment.

In confronting gender harassment, the construction sector is moving...



The American Institute of Architects' board approved last month an anti-abuse and anti-harassment resolution passed at its June convention, to amend its ethics code.

III. Practical risk management tools to prevent, investigate and respond to inappropriate conduct on the job site

It appears, from the upward trending of complaints related to sexual harassment and/or gender bias as a result of inappropriate conduct, that we have not seen the crest of this litigation yet. In fact, it appears that the law is barely keeping up with the movement. However, have the practical ways to deal with bad behavior on a job site really changed—NO.

Awareness of the need to ramp up the risk management tools to prevent, investigate and respond to the issue is key.

Internal and external risk management for construction firms and contractors of all sizes should be in place. Several companies are addressing the #MeToo movement squarely by:

1. Revamping anti-harassment policies and procedures to be current with recent law; in other words, there should be person(s) dedicated to keeping up with applicable laws, claims trends, and regular, documented employee training (rather than read and sign off on the policy);

2. Hiring external consultants and utilize external resources to implement policies through practical training; interactive male and female employee exercises to illustrate what type of conduct may lead to potential claims;
3. Recognizing that no company, big or small, is immune from #MeToo and find cost effective outside resources – seminars, industry organizations, insurer provided risk management manuals, webinars, training –to address it preventatively;
4. Defining and practicing no tolerance without putting a reverse chill on your employees.

Under criticism is the perception that the construction industry needs to commit to ending what appears to be a toxic culture. In reality, like any other industry, it is the minority of individuals who promulgate bad conduct. Common sense suggestions for all persons in positions that lend to possible exposure to claims of sexual harassment, sexual misconduct and/or gender bias, include: identifying toxic impulses (e.g. belittling other people); demonstrate and be an example of professional conduct and train those to be an example; although you may not be a lawyer, familiarize yourself with federal laws on harassment and safety in the workplace through articles, industry resources; and finally, read, practice your employer guidelines on harassment/misconduct and intervene if you witness improper conduct.

IV. The Need for Implementing and/or Updating Policies and Procedures to address the job site climate in the wake of the #MeToo movement

The focus of a risk manager and/or claims professional is to create a respectful workplace and a strong organizational culture – both of which are supported by a strong ethics & compliance program which is implemented through actual employee training.

From a compliance perspective, bad actors are always a problem. In fact, in organizations large and small, outliers surface in even the strongest cultures. In the world of #MeToo organizational risk mitigation begins and ends with the implementation of best practices to create a respectful workplace, standardized investigative review and unbiased accountability.

How do you succeed in keeping your organization respectful?

It is a team effort--internal and external resources – risk managers, claims professionals, defense counsel -- to ensure that the client/organization, from top-to-bottom, has:

- Clear, precise policies;

- Leveraging company core values;
- Training & raising awareness;
- Supporting Equal Opportunity & Performance Management (and not just stating the same in handbooks);
- Identifying high-risk individuals;
- Safe, confidential steps in place to report acts that violate company policies;
- Consistent review of all wrongdoing and misconduct; and,
- Accountability when wrongdoing occurs.

When allegations of misconduct occur, there should be no question as to whether the ethics & compliance program offered safe recourse for employees. There should also be no gray area or room for interpretation in how violations are defined.