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Girl on Fire...The Price of Pursuing the Truth in the #Me Too World

I. The High Price of Sexual Harassment

Financial Price

The Financial price of sexual harassment cases, ignited in volume and awareness by the #Me Too and "Times Up movements, includes factors far beyond plaintiff and defendant cost of attorney fees. The financial price includes enhanced investigations, preparation of current and appropriate policies to avoid harassment environments, increased training and materials, and a higher price of settlements and verdicts. There is future cost if a non-disclosure agreement is deemed void, which has a higher than average potential of occurring in these types of cases.

Legal Price

There are evolving legal prices associated with the societal response to the #Me Too movement. In California, a statute was passed which requires females on boards of directors at an increasing rate over time. Case law continues to evolve in interpreting duties and whether the definition of sexual harassment is met. Compliance departments continue to incur costs to update protocol and training materials to mitigate risk in this evolving area of law.

Reputational Price

Organizations which have widely publicized sexual harassment cases, either with multiple complaints against an individual within the organization, or against a multitude of individuals, incur a reputational price. Boycotts may be overt or customers may simply refuse to do business with the organization. A customer may purchase a product or service or an advertiser at a network.

Personal Price

The personal price involved in sexual harassment cases include physical and mental health, income, career advancement, safety, family and work relationships, and moving costs.

II. The Legal Standard and Who is Primarily Affected

Civil Rights Act, 1964: Title VII

Employers are prohibited from discriminating against employees on the basis of sex. Liability of individuals may be imputed to the employer. This federal statute generally applies to employers with 15 or more employees. It applies to “quid pro quo” between individuals (e.g. promise a promotion or job in exchange for sex) or a hostile work environment. Historically, the standard was considered high: 1) unwelcome harassment, 2) harassment was based on sex, 3) harassment was sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment (critically, as judged by both an objective and subjective standard), 4) the employer knew or should have known of the harassment.

U.S. EEOC

The Equal Employment Opportunity Commission’s (EEOC) litigation program brought 41 lawsuits in 2018 for sexual harassment, an increase of greater than 50% over the prior year per the agency’s year-end report. Charges filed with the agency alleging sexual harassment increased by more than 12% over that same time-frame and the agency found cause to believe unlawful harassment had occurred in almost 1,200 charges filed, an increase of almost 25% over the prior fiscal year. The increase indicates that employees are reporting harassment in the #metoo environment and they are looking to the EEOC frequently. In April, 2018 the agency created a Harassment Prevention Action Team and hits on the sexual harassment page of its website more than doubled in 2018 over the prior year. Given the emboldened employee pool in filing complaints and increase in pursued litigation, employers are encouraged to ensure their anti-harassment policies and training remain current with local, state and federal law and encompass not only unwelcome physical or verbal conduct of a sexual nature but also any unwelcome visual, or nonverbal conduct of a sexual nature or based on someone’s sex.

High Risk Employment Areas

The higher risk employment areas include: the service industry (particularly where tips are involved), working in an isolated context, temporary work visa or undocumented immigration status employees, male-dominated jobs, and settings with high degrees of power differentials (e.g. “rainmakers”).

III. Social Movements have Caught Fire, driving up the Price of Sexual Harassment claims

The Beginning

Bill O’Reilly had a purportedly five settlements in the millions of dollars and Harvey Weinstein purportedly had eight (also, in the millions of dollars settlement range). The media attention and outcry from impacted women ignited a social movement where women advised prior silence was not an indicator of no harassment. Rather, that they were silenced after prior sexual harassment but indeed they also (“me, too”) had been harassed. They gave several reasons they had not spoken up for years: threats of career impact, threats of harm, and ridicule. “Times Up” followed as a tangential movement that it was time for systemic industry harassment to end. Solidarity among women manifested in marches, street demonstrations, collective protests (wardrobe, collective bargaining, etc.) and expanded globally. This willingness to speak of

experiences and condemn same, has created a societal wave and culture shift increasing the price of sexual harassment claims. The movement is at a time of social inflation in claims and verdicts and where plaintiff attorneys are successfully painting defendants as dangers to the community via the reptile theory. The movements partner with these other societal claim factors relative to liability nullification and damages (some but not all elements may have a statutory tort cap).

The Fire Spreads

As more women come forward contending they are victims of sexual harassment and supporting each other to believe, irrespective of evidence, the issue has spread. It permeates all industries and areas of government, impacting claim volume and severity. Cases include Geoffrey Rush (Hollywood) who lost an acting role and sued, Daniel Gibson (LBHA) and six plaintiffs, and Albert Alvarez and two investigations by the NJ Governor's office.

Older, Simmering Flames Ignite

Google paid \$135 million to two executives who were accused of sexual harassment and left. Shareholders have sued Google over these payouts. Defunct Lehman Brothers continues litigation with six whistleblowers over financial impropriety who subsequently alleged sexual harassment as a result of attempts to silence them. The Times Up Defense Fund is not only funding actresses who claim blacklisting after refusing unwanted sexual advances, but also is funding a reinvigorated 2008 case against Walmart, where earlier attorneys were reticent to pursue the behemoth.

Why are Lawsuits Forced?

Dr. Ford, Joni Ernst, and various women claiming sexual harassment against various Presidents of the United States show little has changed since the Anita Hill/Clarence Thomas hearings. They are ridiculed, disbelieved, and the men contend to be the victim of the situation. As the complaints are not taken seriously, even with similar descriptions by several women, the women are forced to file lawsuit. The cost of litigation is daunting and a historical deterrent to filing suit, combined with the high liability standard. The solidarity and social support for the #Me Too movement is changing this dynamic, according to the EEOC data.

IV. The High Price

Human Price-

The human cost can be compelling to a trier of fact and there are several elements of damages: Physical threats to plaintiff and family, mental and physical health impacts which may be long-term, loss of career opportunity and income, forced job change and abandonment of well-paying careers, having to move residences, as well as the fees and costs of litigation.

Organizational Price-

The organizational cost of sexual harassment cases include legal fees (including appeals, avoiding class action situation or certification pursuits), costs for investigation and experts, and bottom line impact from lost productivity. The decrease productivity results from employee absences, reduced moral, and organizational disruption. Additionally, enhanced training costs and updated protocol for compliance and mitigation as case and statutory law evolve in the new environment create higher organizational costs.

Equal Employment Opportunity Commission Data

The EEOC is filing more lawsuits for sexual harassment than it has historically filed, at a vastly increased rate. It filed 41 cases in fiscal year 2018 for sexual harassment allegations, almost double the prior year's amount. Cases brought to the EEOC increased 12% that year. The recovery for victims of sexual harassment by the agency in 2018 was \$70 million (both litigation and administrative enforcement), versus \$47.5 million in 2017. The agency's vastly increased trajectory of pursuit, including on an enforcement basis, comports with the timing of the #Me Too movement and public reaction to cases from that publicity.

V. The Price is High for Everyone

Visible Price Tags- Verdicts

Although there are statutory caps on federal cases, the lawsuits often involves several allegations. Bad facts have resulted in high verdicts, which create additional costs to pursue appeals, remittitur, or judgment notwithstanding verdicts. A record \$168 million verdict in CA in 2012 preceded the movement but was a harbinger of changing societal mores as to values. \$11 million was a recent verdict for two plaintiffs at a winery and \$3.2 million at FedEx. Juries are comfortable awarding high amounts, and punitive damages, for these cases.

Visible Price Tags-Statutory

As the movement creates public uproar, government agencies beyond the EEOC are responding. Legislation is changing to address public interest concerned. California passed a statute requiring women on board of directors, at an increasing rate over time. In reviewing claims or lawsuits, review of compliance with this law in CA would be a critical piece of the overall defense record.

Visible Price Tags- Case Law

Case law evolves over time but the # Me Too movement has resulted in attempts to mitigate jury verdicts. Not only are arbitration clauses and non-disclosure agreements increasing in employment situations, but administrative remedies are ardently sought. The U.S. Supreme Court accepted certiorari on a case which will review the exhaustion of administrative remedies.

The Long Term Price to the Industry

The long-term cost for clients and policyholders of sexual harassment claims in the #Me Too movement is extensive. Will organizations with poor reputations be able to attract talent and maintain diversity? Will class action potential grow as the solidarity of women grows with the movement, recollection of events are shared (as opposed to remaining silent) and noted to be similar with similarly situated employees? Will legislation continue to increase compliance requirements to protect public interest, necessitating that organizations remain current with compliance matters and keeping clear records of same for evidence should a claim arise?

Carriers and counsel can mitigate costs in the emerging high price of the #me too movement by partnering with their organizations with best practices and compliance training, policy and procedure review, and record keeping as well as encouraging a respectful and harassment-free environment.