

# Living in a #metoo world

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# #metoo: a Primer

## What is #metoo and how did it start?

- Movement began in 2006 to assist survivors of sexual assault
- October 2017 – #metoo goes viral
  - NY Times – Ashley Judd accuses Harvey Weinstein of sexual assault
  - That list has now grown to over 80 women including:
    - Selma Hayek
    - Daryl Hannah
    - Gwyneth Paltrow
    - Heather Graham
    - Several dozens more

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# #metoo: a Primer

## What is #metoo and how did it start?

- This leads to allegations against people of prominence from several different industries, including business, entertainment, news and politics
  - Kevin Spacey
  - Jeremy Piven
  - Jeffrey Tambor
  - James Franco
  - Louis CK
  - Matt Lauer
  - Charlie Rose
  - Bill O'Reilly
  - Steve Wynn
  - Donald Trump
  - Al Franken
  - John Conyers
  - Blake Farenthold
  - Eric Schneiderman

# #metoo: A growing movement

## Time's Up Now

- In response to #metoo, in January 2018, the Time's Up Now Legal Defense Fund was established
  - Provides assistance to individuals initiating legal action against harassers
- 2018 Golden Globes
  - Women in entertainment used the 2018 Golden Globes as a platform to get out a message of solidarity



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# #metoo: Impact on Employers

## The cost to employers of harassment/discrimination claims

- 2017 Equal Employment Opportunity Commission (“EEOC”) Statistics
  - Total Workplace discrimination/harassment Charges filed with EEOC
    - 84,254
  - EEOC secured \$398 million for victims in FY 2017
  - Over 30% of Charges alleged discrimination/harassment based on sex
    - 25,605
  - Specific Charges alleging sexual harassment
    - 6,969
  - EEOC obtained \$46.3 million in monetary benefits for victims of sexual harassment in FY 2017

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# #metoo: Impact on Employers

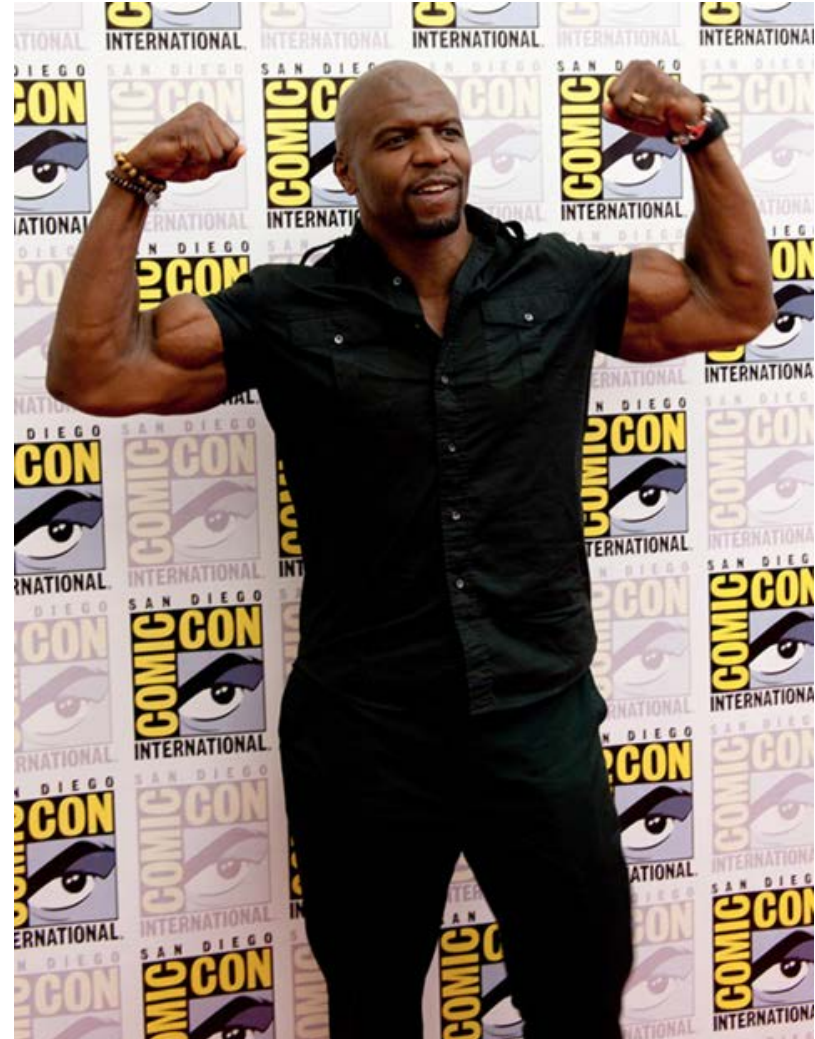
## Side Question – Do only women make allegations?

- No – Allegations by men accounted for 16.5% of the 6,696 sexual harassment Charges filed with the EEOC in FY 2017
  - Male on male harassment
  - Female supervisor on male subordinate male harassment
  - Gender stereotyping/sexual orientation harassment

# #metoo: Impact on Employers

## Side Question – Do only women make allegations?

- Terry Crews testifies before Congress
  - Alleged an agent, Adam Venit, twice groped him at a party in February 2016
  - “I believed no one would believe me if I went public.”
  - “It was the #metoo movement and the victims of Harvey Weinstein that inspired me to tell my story.”



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# #metoo: Impact on Employers

## Other costs to consider

- The amounts collected by the EEOC do not include:
  - Defense costs
  - Employee non-work time
    - Meeting with lawyers
    - Meeting with EEOC investigators
    - Attending depositions and court hearings



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# #metoo: Impact on Employers

## Costs other than financial costs

- Reputation of individuals and entities
  - Netflix
    - Cutting ties with Kevin Spacey cost Netflix a reported \$39 million
  - Fox News
    - Bill O'Reilly – ratings for primetime coverage have dropped for his timeslot
    - Roger Ailes
  - NBC/Universal
    - Matt Lauer
  - Disney/Pixar
    - John Lasseter

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# #metoo: Impact on Employers

## Costs other than financial costs

- The Weinstein Company
  - Previously nominated for 341 Academy Awards, winning 81
  - Six months from Ashley Judd to ruin
    - Filed for bankruptcy in March 2018
  - Remaining parts sold just this week

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# #metoo: How can employers protect themselves?

## A well written anti-harassment policy

- Describe what constitutes “harassment”
- A “zero tolerance” policy
- Reporting structure
  - There should be a well-documented reporting structure that each employee is aware of
    - Multiple outlets for reporting
  - There will be no retaliation for reporting
  - “If you see something, say something”

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# #metoo: How can employers protect themselves?

## Employee Training

- Begin during the onboarding process
  - Discuss your well written anti-harassment policy
- But it should also be ongoing
  - It must be apparent to the employees that it is important
  - The one-time 45 minute video is not sufficient

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# #metoo: How can employers protect themselves?

## Employee Training

- What is good ongoing training?
  - Employee meetings to discuss
    - Example:
      - Is one unwanted hug sexual harassment?
      - What about John Lasseter hugs?
    - Delivering regular written messages to employees when they log on
    - Implicit bias tests and discussions
    - Outside speakers
      - Outside counsel or other experts

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# #metoo: How can employers protect themselves?

## Investigations of Allegations

- Who should investigate?
  - Internal?
    - Supervisor
    - Human Resources
    - Legal
  - External?
    - Outside legal counsel
    - Non-legal counsel

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# #metoo: How can employers protect themselves?

## Investigations of Allegations

- Who should investigate?
  - Investigation must be neutral
  - Important to be thoughtful of power dynamics
    - If an entry level employee accuses the CEO – HR may not be the best investigator
    - But if the accused and accuser are on the same level of hierarchy?

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# #metoo: How can employers protect themselves?

## Investigations of Allegations

- Investigation tips
  - Be neutral
  - Be respectful
  - Use common sense
  - No retaliation
  - Document interviews
- What about confidentiality?
  - That's complicated



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# #metoo: How can employers protect themselves?

## Investigation Steps – Step 1: Advise the accused

- Discuss with the accused that a complaint has been alleged
- Discuss things NOT to do during investigation:
  - Do NOT confront the complainant
  - Do NOT apologize to the complainant
  - Do NOT recruit witnesses

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# #metoo: How can employers protect themselves?

## Investigation Steps – Step 2: Interviews

- Interview the complainant
  - Explain that there must be an investigation
  - Reassure the complainant that the company will take appropriate action
  - Reassure that there will be no retaliatory action for making the complaint
  - Who, what, when, where, how?
  - Did the complainant confide in anyone after the fact?
  - Any threats or promises made by the accused?
  - Is the complainant aware of any other complaints?
  - What does the complainant want?
  - Anything else?

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# #metoo: How can employers protect themselves?

## Investigation Steps – Step 2: Interviews (cont.)

- Interview the accused
  - Who, what, when, where, how?
  - Any witnesses?
  - Was the alleged conduct welcome?
  - Could the complainant be confused?
  - Why would the complainant make a false claim?

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# #metoo: How can employers protect themselves?

## Investigation Steps – Step 2: Interviews (cont.)

- Interview witnesses
  - Only interview witnesses if absolutely necessary
    - Witnesses should only be interviewed if there are unanswered questions after interviewing the complainant and accused
  - Give them as little information as possible
    - Do not prompt them on what to say
    - Do not use names
    - “Did you witness anything out of the ordinary in the kitchen on July 1<sup>st</sup>?”

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# #metoo: How can employers protect themselves?

## Investigation Steps – Step 3: Present findings

- Evidence and results should be presented to decision makers
  - Facts first (and only) – do NOT editorialize
- Consider action to be taken
  - Severity of harassing conduct
  - Prior offenses
  - Preventing future violation of policy
- No legal conclusions
  - Do not make a legal conclusion regarding violation of any law
  - Instead address whether the accused engaged in:
    - Violation of company policy
    - Unprofessional conduct
    - Exercise of poor judgment

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# #metoo: How can employers protect themselves?

## Investigation Steps – Step 4: Follow up

- Meet with accused
  - Explain results of investigation
  - Discuss actions to be taken by company, if any
- Meet with the complainant
  - Explain results of investigation
  - Discussion actions to be taken by company, if any
  - Advise complainant to report any future harassment or retaliation
  - Continue to follow up (regular check in's)

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# #metoo: Response from employers?

## Have employers changed policies in the wake of #metoo?

- American Psychological Association survey – March 2018
  - 32% of American workers say employer has taken new steps to prevent and/or address sexual harassment in the workplace
  - 10% of workers say employer has added more training or resources
  - 8% of workers say employer has implemented a more stringent policy
  - 7% of workers report that employer has hosted an all-staff meeting or town hall to discuss sexual harassment

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# #metoo: A flood of Charges to the EEOC?

## Have there been more EEOC Charges filed in the wake of #metoo?

- There has NOT been an increase in the number of Charges filed for claims of sex harassment or discrimination – Yet
- Likely too early to tell
  - 300 day window to file an EEOC Charge
- EEOC web traffic has tripled since last fall



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# #metoo: How has the EEOC responded to #metoo?

## June 2018 – EEOC files lawsuits against 7 employers across US

- Tapioca Express, Inc. – California
  - Milk tea franchises – owner accused of making unwelcome physical contact with two female employees
- Sierra Creative Systems, Inc. – California
  - Printing and mailing company – allegations that there was a failure to prevent sexual harassment by supervisors towards female employees at multiple locations
- Total Maintenance Solutions, Inc. – Ohio
  - Commercial cleaning company – owner accused of harassing office manager through unwanted touching, sexual comments and repeated phone calls at night

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# #metoo: How has the EEOC responded to #metoo?

## June 2018 – EEOC files lawsuits against 7 employers across US

- New Prime, Inc. – Missouri
  - Trucking company – created hostile working environment by requiring female drivers to ride with male driver despite knowing he has previously sexually harassed female employees
- Real Time Staffing Services, Inc. – New Mexico
  - Staffing company – failed to prevent alleged sexual harassment of a group of female employees who were placed at the ABQ police department, despite repeated complaints
- G2 Corporation – Texas
  - Screen door manufacturer – female warehouse employee was subjected to harassment by her production manager and company VP, including following her into a restroom, groping her and attempting to physically force himself on her

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# #metoo: How has the EEOC responded to #metoo?

## June 2018 – EEOC files lawsuits against 7 employers across US

- Master Marine, Inc. – Alabama
  - Shipbuilder – allegation that no action was taken when an employee sexually and racially harassed an Asian male colleague

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# #metoo: How has the EEOC responded to #metoo?

## June 2018 – EEOC files lawsuits against 7 employers across US

- Why does this matter?
  - The variety of factual backgrounds
  - Not just supervisors
  - Co-workers
  - Even third parties (staffing company case)
- Employers have an obligation to maintain a safe and harassment free workplace for all employees

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