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COVER STORY

## Cover story: #MeToo is a call to action for Colorado business

**Allegations of sexual misconduct are front and center. How should your business react?**

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With sexual misconduct and harassment policies front-and-center, local attorneys say now is a good — even critical — time to review internal policies.

When movie mogul Harvey Weinstein in early October was accused of years of sexually harassing and abusing actresses, it led to a firestorm of national headlines and attention to an issue that 22 percent of women say they've experienced, according to a late summer 2017 Pew Research Center poll.

And more revelations and accusations against other high-profile actors, politicians and news and entertainment celebrities — plus a social media movement with hashtag #MeToo that showed the prevalence of sexual harassment in the workplace — have also garnered national attention.

The spotlight on workplace harassment has not been a bad thing for the business community, said employment-law attorney Sybil Kiskin, partner at Davis Graham & Stubbs LLP.

Rather, “all employers should use this as an opportunity to review their policies,” she said.

Today, it's not good enough to reject a sexual harassment claim if it doesn't meet the letter of the law. It's not OK to dismiss an event as “he said, she said” and take no action.

And companies ought to abandon the old 45-minute hokey training videos in favor of a real company culture shift.

That's the advice from Kiskin and other Denver attorneys and human resources experts — whose phones in recent months are ringing off the hook with questions from employers hoping to avoid the harassment and abuse incidents that have gone public and engulfed the country's discourse.

“The last time sexual harassment came into the American vernacular was with Anita Hill (at the Clarence Thomas) hearings,” said Elaine Marino, founder of Equili, a Denver-based consulting business that works



PHOTO ILLUSTRATION: KATHLEEN LAVINE, DENVER BUSINESS JOURNAL

Office parties can become situations in which harassment can occur.

with the tech industry on diversity issues. "That was a generation ago. That means there is a whole generation of workers who have not been trained in sexual harassment."

In 1991, attorney Hill accused U.S. Supreme Court nominee Clarence Thomas, who was her boss at the U.S. Department of Education, of sexual harassment. Hill testified at Thomas' confirmation hearings.

Thomas was confirmed to the high court.

"After Anita Hill, there were conversations in the workplace," Marino said.

Then, people largely stopped talking about sexual harassment.

"It's not to say the behavior went away. The awareness went away. Now, companies need to bring it back," she said.

In December, Hill was asked to chair a Hollywood Commission on Sexual Harassment and Advancing Equality in the Workplace.

"If 2017 was the year of eruption, then 2018 will be the year of reformation," Marino said.

### **Money, moral imperative and reputation**

The headlines and national debate about sexual harassment in Hollywood and politics have caught the attention of employers, who face various liabilities and risks.

An employee or group of employees may file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC), or the Colorado Civil Rights Division.

"If sexual harassment is found, the employer will likely have to pay money and agree to various non-economic terms to resolve the charge or risk a lawsuit," Kiskan said.

In January alone, the EEOC reported that GEO Group Inc. in Phoenix paid \$550,000 to settle a sexual harassment and retaliation lawsuit; and Kentucky-based restaurant chain Indi's Fast Food Restaurant Inc. paid \$340,000 to 15 former female employees to settle a sexual harassment lawsuit.

In 2016, 29.4 percent of the 97,443 charges of employment discrimination in the U.S. were sex discrimination claims.

But the true amount paid in settlements by employers is unknown since most settle before reaching court.

There is money and reputation at stake, Marino said.

"But there is a moral imperative," she said. "You don't want people in your company getting hurt. You want to progress your business forward."

Since about the early 1990s, insurance companies began offering employment practices liability insurance, which covers businesses against claims by workers that their legal rights have been violated.

"It has evolved into a necessary product we provide to all clients as an option," said Andrew Mahoney, CCIG Insurance advisor. "It doesn't matter how small or big the industry."

Those policies cover sexual harassment third-party investigations and settlements, Mahoney said. But now, companies are asking for additional policies to cover sexual harassment claims.

“A normal policy, let’s say with \$10 million of EPLI (employment practices liability insurance) within that, sexual harassment is covered. Now, corporations are asking for more sexual harassment limits of liability.”

About 10 to 15 percent of clients are asking for the additional sexual harassment policy, Mahoney said.

“Within the last year, the political arena is really blowing up with claims. And employers are starting to pay a lot more attention to the exposure they have within the company,” Mahoney said.

The media attention on sexual harassment will convince employers to strengthen their anti-discrimination and sexual harassment policies, he said, but it could mean more claims too.

### **Carefully constructed policies**

Employers’ greatest defense is a strong anti-discrimination policy and a company culture that doesn’t want or encourage any kind of sexual misconduct. But what is the conduct and how is it conveyed to employees?

“We understand what gross sexual harassment is — Weinstein is a perfect example — but what about a failed personal relationship?” said Steven Suflas, employment law attorney at Ballard Spahr’s Denver office.

The answer, he said, is for companies to double their efforts in training employees and management. The CEO and senior management should lead by example in supporting the anti-discrimination policies. They need to roll up their sleeves and have a heart-to-heart with employees about what is not tolerated.

“It’s absolutely crucial from a legal compliance and litigation posture,” Suflas said. “They must have a carefully constructed, widely publicized procedure for complaints to be brought forward and investigated thoroughly and effectively.”

And they must emphasize that there will be no retaliation, even if the claims are found to be untrue.

The goal is to prevent the harassment in the first place, he said. And when complaints arise, they must be investigated or an employer’s legal defense is compromised.

“I think the risk to a typical employer is they have a policy; the training is 45 minutes online and it’s an old video — with a bit of buffoonery to it — and the result is the whole system has no credibility,” Suflas said.

Complaints need to be made in good faith, but so do the investigations, he said.

### **The joke. The date. The back rub.**

When it comes to sexual harassment and misconduct, it certainly is a broad range, said Mark Flynn, attorney and founder of Flynn Investigations Group. His firm is called to conduct investigations into discrimination claims. Most of the calls are about sexual harassment, he said.

“I’m not surprised by the national debate,” Flynn said. “It’s a good thing. It’s a sign that people are not going to tolerate this kind of behavior whatever their work place may be.”

There is no one-size fits all investigation. What feels like harassment to one person may not feel that way to another. It’s complicated and messy. And it’s a tough subject to talk about in company meetings, Flynn said.

The unsolicited backrub never seems to go away, he said. Was it an inappropriate hug? Was there a hand on the thigh, or a lingering touch, or was it a grope or assault?

"I get asked if it's harassment to ask someone on a date at work," Flynn said. "I try to explain why it's not an absolute. It depends what was said and what is the circumstance. Context always matters."

Employers have to stress that there will be no retaliation for raising a concern, he said.

"In the vast majority of cases, the investigation helps," he said. "The process of investigation demonstrates an organization's concerns about addressing this behavior properly."

And employers have come a long way, he said. It used to be that if a sexual harassment claim did not meet the legal definition, employers dismissed the claim. But that's changed. Today, he's called in even if the complaint is made by someone who witnesses alleged bad behavior.

"HR should look at their policies and say, 'is it intended to encourage the disclosure of misconduct even if it doesn't reach the legal standard?'" Flynn said.

In most of his investigations there isn't a clear falsehood. It's usually a different interpretation of the same event.

"In the investigation process, I look for what conduct appears to be intentional – that helps me gauge the severity of the conduct at issue."

The courts have said that if there is a policy in place that is followed, it can eliminate liability in certain cases, said Lorrie Ray, attorney and director of membership for the Employers Council. Her office receives at least a call a week about a possible sexual harassment issue.

"The policy is right up front — it's one of the first policies in the handbook and it's written in clear and understandable language," she said.

Good policies lay out the process, including who to call to make the complaint and how the claim would be investigated. If an employer were to terminate employment without an investigation, they may end up being sued for wrongful termination, Ray said.

"The courts say the action they [employers] take has to stop the harassment," Ray said.

### **Zero toleration policy**

Marino, who advises tech companies on issues of diversity, said the policy writing may be the easy part. The difficult part is creating a culture that won't tolerate harassment and a culture where people feel safe reporting bad behavior.

"There are two camps: There are the companies that are reactive, hoping that there are no problems at their company. And then there are proactive, they are thinking how do we get ahead of this? How do we change our culture?" Marino said.

It is scary for people to make a complaint, said Kiskan, who hosts seminars for employers on how to write their policies.

The women who have come forward in Hollywood and Congress are smart professionals, she said. "And even they had a hard time."

Ray, who also hosts seminars for employers to discuss their anti-discrimination policies, said the policies are important. But she encourages employers to create a workplace culture that says the company doesn't

tolerate harassment of any kind and encourages employees to report harassment when it happens.

“We’ve been in work environments where a person wouldn’t dream of harassing someone — it’s just not acceptable,” Ray said. “Then, we’ve been in other work environments where there is some sort of hazing, and bad behavior is accepted.”

In Hollywood and Congress the sexual harassment described has been quid pro quo — something for something — Ray said, as in a movie producer saying an actress would get a part in exchange for sex.

That isn’t something widely reported in the business community — so far, Ray said.

“It is on executives’ minds. And it’s very difficult to root out that kind of quid pro quo behavior because it’s an abuse of power and the [accuser] is dealing with fear,” Ray said.

“I do wonder if now people will feel more brave,” she said.

**Monica Mendoza**

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