

NO TIME LIKE THE PRESENT TO (RE)EVALUATE AND TRAIN ON YOUR SEXUAL HARASSMENT POLICY

In the wake of the salacious Harvey Weinstein allegations, the topic of sexual harassment is making the headlines...again. The Weinstein story followed right on the heels of the various (and seemingly ongoing) harassment-related woes of Fox News, which, in turn, followed on the heels of the developments that came to light on the presidential campaign trail. NBC News has compiled a “**growing list**” of famous men who have been accused of sexual misconduct since the Harvey Weinstein story first broke. Men on the list currently number 26, including actors, senators, opinion leaders and celebrities. Plainly put, there's no time like the present for health care organizations to: i) (re)evaluate their policies and procedures for dealing with sexual and other harassment; and ii) proactively engage the workforce with a quick onsite harassment training session.

Additionally, the #MeToo campaign has generated heightened concern about America's culture in the workplace and the perceived prevalence of sexual harassment across multiple “industries”—entertainment, traditional employment and American politics. More than one Congressperson has introduced a bill to strengthen protections against sexual harassment on Capitol Hill itself, and the Senate and House have now decided to impose mandatory workplace harassment training for all 535 members and their respective staff during each session of Congress.

The liability from harassment claims can be substantial. While the damages for claims brought under Title VII are capped, allegations of harassment often give rise to other state law claims as well where punitive and non-economic damages can amount to the tens of millions of dollars.

In one case from 2012, for example, a physician assistant successfully sued a Catholic health care employer for harassment, retaliation, wrongful termination and intentional interference with economic advantage (among other claims). After a jury trial, the court entered judgment for more than **\$82 million**, and all but a few million of that sum consisted of the jury's calculation of punitive and non-economic damages. And that, of course, doesn't take into account the negative PR and havoc wreaked on the employer's reputation, which is especially problematic in a religious-based Catholic health care setting.

Also bear in mind that any educational institution that receives federal money—including most residency programs—is potentially liable under Title VII as well as Title IX for employment-related harassment or for harassment of students. Medical residents are considered both students **and employees** and can sue under both Title VII and Title IX.

In light of these considerations, here are some best practices with regard to sexual harassment. Implementation of these practices can substantially decrease the risk of harassment-based liability and, in case of a lawsuit, help an organization show that it exercised reasonable care to prevent and promptly correct harassing behavior.

- Ensure the harassment policy is straightforward and sets forth clear reporting alternatives so that any given employee or student is not dependent on any one individual or any one reporting line to be able to lodge a complaint.
- Ensure that individuals who report harassment are insulated against retaliation under the policy and practice of the organization.
- Require victims and witnesses of harassment to report it. Consider enabling anonymous reporting.
- Communicate and enforce the harassment policy evenhandedly, with no exceptions based on (for example) executive status or a physician's productivity.
- Conduct regular training, beginning at orientation, to ensure that management, employees and/or students understand their responsibilities under the law and the harassment policy, know how to report harassment and comprehend that they are required to do so if they are victims or witnesses of harassment. Document such training.
- Promptly investigate and address any harassment complaints. At the least and in all cases, remind all parties of the harassment policy.

Make sure any accused individual is aware that he/she may not retaliate.

- Document clearly all steps taken to address harassment complaints and the reasoning behind all decisions regarding the appropriate response in each instance.
- Ensure that all levels of the organization recognize the importance of fostering a safe and harassment-free workplace, and work cooperatively to achieve this goal.
- Encourage senior leadership to be engaged with and accessible to the rank and file, in part to enable the leadership to tune in to employees' perceptions about harassment and take steps to address those perceptions before a complaint is filed.

If you have any questions, please contact your regular Hall Render attorney.