

5 New Year's Resolutions for Employers Who Want to Keep the #MeToo Movement Out of the Workplace

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The #MeToo social media movement went viral after actress Alyssa Milano shared a tweet asking those who had been sexually assaulted or harassed to tweet "me too," to "give people a sense of the magnitude of the problem." As of late October, it was estimated that #MeToo had been retweeted nearly 2 million times across 85 countries. The movement continues to pick up steam as more and more celebrities, including Matt Lauer, Kevin Spacey, and Mario Batali, are accused of sexual misconduct.

The #MeToo movement will undoubtedly continue to permeate the workplace in 2018. It is therefore imperative that employers take the necessary steps both to prevent unlawful harassment in the workplace and know how to respond to harassment complaints. Here are five resolutions that will help employers keep the #MeToo movement at bay:

Resolution #1: I will have a robust anti-harassment policy in place.

Employers should ensure that anti-harassment policies are disseminated to all employees and management. A well-drafted policy should contain several avenues for reporting harassment. The policy should define sexual and other types of unlawful harassment and give examples of conduct constituting prohibited harassment. The policy can also include a provision regarding the consequences of failing to report workplace harassment of which an employee is aware. The policy should contain strong prohibitions on any retaliatory conduct as well. Employers should ensure employees sign an acknowledgment stating that they received, read, and understood the anti-harassment policy.

Resolution #2: I will conduct effective anti-harassment training at least once a year.

All employees and supervisors should receive anti-harassment training at least annually. Employers should fully document the training including what materials were distributed and who was in attendance. This training should enable employees to recognize unlawful harassment and know how to respond to it and report it. Employees with proper training may be more inclined to handle reports of harassment internally instead of seeking out a plaintiff's attorney or the Equal Employment Opportunity Commission ("EEOC"). If an employee knows about his or her

employer's internal reporting procedure but does not use it, the employer may, in the event of a lawsuit, have an affirmative defense that can defeat the employee's claim because it was not provided an opportunity to investigate or remedy the situation.

Bringing in a third party to conduct anti-harassment training is beneficial. In a 2016 report, the EEOC's Select Task Force on the Study of Harassment in the Workplace concluded that "much" of the anti-harassment training programs sold to companies has not prevented harassment. Effective anti-harassment training should be interactive—employees should be forced to discuss how they would respond in various situations. The training should also include information about troubling conduct that, while not actionable harassment at first, can become actionable if done persistently.

Resolution #3: I will stress the importance of taking harassment complaints seriously.

Someone being sexually harassed does not often approach management and say, "I am being sexually harassed." Instead, they say something vaguer like "Shawn is bothering me." In that situation, it is incumbent that management ask for more details and investigate. Ask the employee to tell you the whole story and thoroughly document the conversation. Employers should have the complaining employee sign and date his or her statement. However, do not require a complaining employee to provide "proof" prior to instituting an investigation—the purpose of the investigation is to gather information. Remember: inaction can have serious consequences.

Resolution #4: I will train my management regarding how to thoroughly and fairly investigate complaints.

Management should be well-trained, objective, and neutral investigators. Employers should think about having an attorney draft a checklist management can follow when responding to complaints. Plaintiffs' attorneys are quick to attack an employer's investigation by showing how it was not comprehensive. Management should strive to quickly respond to allegations, but should also avoid knee-jerk reactions. Instead management should fully and fairly investigate the claim. Management should document all steps taken from the point of first contact with the complaining employee and prepare a written report including any credibility determinations. Every investigation should be documented with the worst-case scenario in mind—that is, the investigator facing cross-examination in front of a jury about every step he or she did or did not take.

Resolution #5: I will take proper remedial actions.

Employers should focus on temporary remedial measures along with long-term ones. Depending on the situation, you may need to put into place temporary remedial measures during the investigation, such as separating the

complaining employee from the alleged harasser until the investigation is complete. A word of caution—you must be careful not to do anything that can be construed as penalizing the complaining employee (such as an involuntary transfer or increase in workload) as this can be interpreted as retaliation. Once you have conducted the investigation, you should make credibility determinations and decide what remedial or disciplinary actions are appropriate if any. It is a good idea to get a lawyer involved at this point—a lawyer can help determine both whether there was harassment and the proper remedial steps to take.

Studies have shown that 80% of New Year’s resolutions fail by the second week of February. Employers would be wise to ensure these resolutions are not merely aspirational. According to the EEOC, in the past seven years, U.S. companies paid out more than \$295 million in public penalties over sexual harassment claims. That figure does not account for the undoubtedly massive amount of money changing hands to settle cases privately. With 2018 right around the corner and the #MeToo movement in full swing, now is the time to revise and republish anti-harassment policies and conduct anti-harassment training.

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