



# **SCG Legal – 2019 Annual Meeting**

## **Session 4-B: The #MeToo Movement Marches On**

**Felicity A. Fowler**

September 6, 2019

Washington, D.C.

# #MeToo Marches On

October 15, 2017



**Alyssa Milano** 

@Alyssa\_Milano

Follow 

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."



# Topic 1

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## Federal and State Efforts to Tackle #MeToo

# “New” Law on Settlement Agreements

- Tax Cuts and Jobs Act signed into law on December 22, 2017
- Eliminates tax deduction for any employer payment or settlement “related to sexual harassment or sexual abuse” if subject to confidentiality or non-disclosure provisions
  - Also takes away tax deduction for an employer’s attorneys’ fees related to such a settlement or payment
- Both employers and employees may seek workaround solutions to get around these new rules
  - Multiple settlement agreements in situations involving additional employee claims?
- Recent IRS guidance makes clear that this only applies to employers’ attorneys’ fees, not employees’ attorneys’ fees.

# State Legislation in Response to #MeToo

- California – effective Jan. 1, 2019
  - New laws aimed at limiting the use of non-disclosure agreements to prevent parties from disclosing factual information related to sexual harassment unless the claimant requests confidentiality
  - Updated training requirements significantly to require all employers with 5 or more employees to conduct interactive anti-sexual harassment training of *at least* 2 hours to supervisory employees and *at least* 1 hour to all other employees by January 1, 2020
- Connecticut – effective Oct. 1, 2019
  - Expanded current law (in effect since 1993) requiring employers with 50 or more employees to provide training and education on state/federal sexual harassment laws
  - New law will require employers of **all** sizes to provide this training to supervisory personnel and employers with 3 or more employees to provide this training to all employees



# State Legislation in Response to #MeToo

- Delaware – effective January 1, 2019
  - Enacted new law requiring that all employers with 50 or more employees must provide interactive sexual harassment training to all employees
- Vermont – effective July 1, 2018
  - New legislation prohibiting employee agreements that purport to waive any substantive or procedural right with respect to claims of sexual harassment
  - Also prohibits inclusion of no re-hire provisions in settlement agreements resolving claims of sexual harassment



# State Legislation in Response to #MeToo

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- Washington State – effective June 7, 2018
  - New law prohibits non-disclosure provisions in employment agreements that prevent the employee from disclosing sexual harassment or sexual assault in the workplace
  - Notably, this law does **not** prohibit confidentiality with respect to settlement agreements

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# Pay Equity





# Equal Pay is an EEOC Strategic Priority



# EEO-1: Component 1

## Section D-EMPLOYMENT DATA

Employment at this establishment – Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Number of Employees (Report employees in only one category)														
	Race/Ethnicity														
	Hispanic or Latino		Not-Hispanic or Latino												Total Col A - N
	Male	Female	Male						Female						
White			Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races		
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	
Executive/Senior Level Officials and Managers 1.1															
First/Mid-Level Officials and Managers 1.2															
Professionals 2															
Technicians 3															
Sales Workers 4															
Administrative Support Workers 5															
Craft Workers 6															
Operatives 7															
Laborers and Helpers 8															
Service Workers 9															
TOTAL 10															
PREVIOUS YEAR TOTAL 11															

# Revised EEO-1 Report – Two Components

Component 1	Component 2
<ul style="list-style-type: none"><li>• Current EEO-1</li></ul>	<ul style="list-style-type: none"><li>• Aggregate compensation data and hours</li></ul>
<ul style="list-style-type: none"><li>• Counts of employees by race/ethnicity and sex in each of ten job categories</li></ul>	<ul style="list-style-type: none"><li>• Organized by 10 EEO-1 categories</li></ul>
	<ul style="list-style-type: none"><li>• 12 specified pay bands</li></ul>

# EEO-1: Component 2

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)														Total Col A-N
		Race/Ethnicity														
		Hispanic or Latino		Non-Hispanic or Latino												
				Male						Female						
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O		
Executive/Senior Level Officials and Managers 1.1	\$19,239 and under															
	\$19,240 - \$24,439															
	\$24,440 - \$30,679															
	\$30,680 - \$38,999															
	\$39,000 - \$49,919															
	\$49,920 - \$62,919															
	\$62,920 - \$80,079															
	\$80,080 - \$101,919															
	\$101,920 - \$128,959															
	\$128,960 - \$163,799															
	\$163,800 - \$207,999															
\$208,000 and over																



# EEOC Pay Data: EEO-1 Component 2

- In *National Women's Law Center, et al., v. Office of Management and Budget, et al.*, Civil Action No. 17-cv-2458 (D.D.C.), the EEOC was ordered to start collecting detailed pay data for covered employers regarding compensation and hours worked sorted by job category, pay band, race, ethnicity, and gender (Component 2)—by **9/30/19**.
- The EEOC began collecting Component 2 data for 2017 and 2018 in mid-July 2019.
- Employers were required submit Component 1 data for 2018 by **5/31/19**



# Paycheck Fairness Act

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- Introduced into Congress on 1/30/19
- Updates the Equal Pay Act
- If approved, the new law would:
  - Prohibit employers from using salary history to determine a new hire's pay
  - Protect employees from retaliation for discussing their pay with colleagues
  - Increase remedies available to plaintiffs



# Topic 2

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## #MeToo and the Movement's Effect on EEOC Charges of Discrimination and Litigation



# EEOC Charges of Discrimination

- In the wake of #MeToo, the EEOC filed 66 lawsuits in 2018 challenging workplace harassment, 41 of which alleged sexual harassment
- Charges filed with the EEOC alleging sexual harassment increased by 13.6% from 2017
- The EEOC successfully conciliated 498 charges alleging harassment, a 43% increase from 2017
- The EEOC recovered approximately \$70 million for victims of sexual harassment in 2018—compared to the \$47.5 million recovered in 2017





# #MeToo Reaches the Legal Industry

- A few of the nation's most prominent law firms, including Ogletree Deakins, Jones Day and Dentons, are facing sexual harassment and gender discrimination lawsuits in the wake of #MeToo
- Despite the spotlight of #MeToo on the legal profession, the EEOC reports fewer charges for 2017 and 2018 alleging sexual harassment in law firms—possibly because law firms are proactively handling problems before they escalate



# Topic 3

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## Proactive Steps for Employers and Organizations to take to Prevent and Address Sexual Harassment

# EEOC's New Harassment Guidelines

- Currently awaiting approval from the Office of Management and Budget. The draft, issued on 1/10/17, was a 75-page document.
- If issued, it will supersede several previously issued EEOC information on harassment from the 1990s.
- The final part of the EEOC guidance includes four core principles of “Promising Practices”: leadership and accountability, comprehensive and effective harassment policy, an effective and accessible harassment complaint system, and effective harassment training.
- Will include specific recommendations: live training, regular anonymous employee surveys, and other specifics.



# Employer Mitigation of Harassment

Employers can minimize their potential liability and exposure for harassment claims by:

- Developing and enforcing policies, procedures, and handbooks that address discrimination, harassment, and bullying
- Consistent training of employees regarding the organization's policies and how to complain if the employee is a victim or witness of inappropriate conduct
- Conducting thorough, prompt and credible internal investigations when allegations are raised



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**Questions?**

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