

U.S. Employment in the #MeToo Era

July 25, 2018 – Cross-Border Counselor

by Aaron Goldstein

The United States isn't the only country addressing its history of gender inequality, sexual abuse, and sexual harassment. However, the United States is having its own unique experience in doing so. For U.S. employers, the current focus on these issues poses challenges, but also opportunities to address problems of diversity and harassment in the workplace. Non-U.S. companies looking to hire employees in the United States should be aware of the issues facing U.S. employers and be prepared to address them.

One major change in the U.S. workplace resulting from the #MeToo movement is that employees who allege sexual harassment are far more likely to be believed. According to a November 2017 Quinnipiac University poll, 60% of U.S. women report that they have been sexually harassed, but according to the Equal Employment Opportunity Commission (the U.S. Federal Agency charged with investigating claims of sexual harassment in the workplace), 90% of women who have been sexually harassed never formally report it. That second statistic is changing rapidly. The deluge of credible allegations of sexual harassment against previously well-regarded public figures such as Bill Cosby, Matt Lauer, and Charlie Rose has eroded the view that "nice guys" aren't capable of such behavior and that sexual harassment is relatively rare. In the post #MeToo era, the presumption favors the accuser, and the burden is on the accused to prove that the harassment didn't occur.

Since the #MeToo movement began, the standard for what constitutes sexual harassment has changed as well. Sexually harassing behavior is legally defined, in part, as behavior that is "offensive to a reasonable person." This definition is fluid and depends upon prevailing social norms. In the post #MeToo era, behavior that used to be considered merely crude or boorish can now qualify as sexual harassment. In early 2017, the Ninth Circuit Court of Appeals, which hears cases from Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, held that excessive hugging in the workplace could constitute sexual harassment.

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Companies with U.S. customers also face public relations challenges over and above any legal liability resulting from sexual harassment allegations. U.S. customers are voting with their dollars, and if a company is perceived as turning a blind eye to sexual harassment in the workplace—or, worse, actively concealing it—many U.S. consumers and advertisers will cease doing business with the company. After numerous sexual harassment claims surfaced against then Fox News host Bill O'Reilly, more than a dozen marketers withdrew their ads from Mr. O'Reilly's show, *The O'Reilly Factor*. Fox News had paid roughly \$13 million to settle harassment claims against Mr. O'Reilly over the years, but it was the withdrawal of ad revenue that eventually led the company to fire Mr. O'Reilly.

How can companies with U.S. employees adapt to this new reality?

First, the bad news. As discussed above, what constitutes sexual harassment depends on prevailing social norms and those norms are rapidly changing in the United States. Employers cannot simply give employees a list of behaviors to avoid. Traditional anti-harassment training, which often focuses on such lists of bad behaviors, is not enough. Instead, employers must train their employees to be mindful of their impact on others and to be alert to signs that their behavior is unwanted or unwelcome.

Employers should also establish strong anti-harassment policies and procedures for reporting workplace harassment. U.S. law provides employers with a defense to certain types of harassment claims where the employer has established an anti-harassment policy and procedure for employees to report harassment in the workplace, but the employee fails to do so. When employees do report harassment, employers should thoroughly investigate and make sure that the reporting employee is not subject to any retaliation—even if the employer determines that the harassment complaint is meritless.

Finally, the revelations of the #MeToo movement—that sexual harassment and assault is pervasive and often goes unreported—have been deeply upsetting to many employees. Consider creating forums for discussion, such as pre-scheduled and moderated company meetings, where employees can express their concerns regarding these revelations without distracting co-workers from their jobs.

The #MeToo movement has raised important issues regarding pervasive sexual harassment in the workplace. Companies that do not take this opportunity to assess their own practices are likely to face increased scrutiny and liability.