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OLD TOPIC, NEW PERSPECTIVES

Sexual harassment in the workplace: how recent high-profile scandals have reinvigorated the conversation and what employers should be mindful of

The topic of sexual harassment has returned to the fore in recent months as several high-profile celebrities have been involved in headline-making scandals.

This recent activity has served as a reminder to employers that there are things they need to be doing to ensure their employees understand the severity of the problem.

As part of its monthly series of panel discussions, NJBIZ on Jan. 30 convened a group of experts to weigh in on the topic and talk about issues surrounding harassment in the workplace and ways to safeguard against it.

Members of the panel, moderated by NJBIZ Editor Howard Burns, included Peter Frattarelli, partner with Archer Law; Ian Meklinsky, partner with Fox Rothschild LLP; Mike Owen, general counsel & chief human resources officer with Easter Seals New Jersey; and Ciana Williams, employment counsel with MidAtlantic Employers' Association.

The following are excerpts from the panel discussion, which kicked off with a simple question: If not for the media coverage of the celebrities who've been accused of sexual harassment or worse, would we even be having this discussion today?

Williams: ... You know, I think we might not be having the conversation but we 100 percent should be having the conversation. ... It's very clear that about one in three female employees is experiencing sexual harassment in the workplace of some form. And so, both because it's the right thing to do we should be having the conversation, but also because there are real practical things that employers can do to limit and reduce the risk of being liable for sexual harassment.

They're very basic, the law in this area is very compliance-oriented. If employers are complying with efforts to prevent harassment and to correct it when it does arise, they can dramatically reduce or eliminate their liability for harassment if it does actually happen in their workplace because they've been taking the right steps to prevent it. So, I think it's an area we should be talking about from an employment perspective both because it's the right thing to do and because there are real practical steps you can take to reduce

your company's risk for liability.

Meklinsky: Good morning, I agree. Quite honestly, if you take a look at the history of anti-harassment law in this country and in this state over the last 20 years or so, it's pretty clear. It's incumbent upon every employer to have a well-drafted and implemented anti-harassment policy. The policy should have reporting mechanisms, effective reporting mechanisms, and while the law doesn't per se require as a mandatory nature of your implementation of the program in-house training somewhat akin to what's the law in California, where you have to have a requisite number of hours in training and supervisors need additional hours of training, it's incumbent upon you to train and implement the policies so people understand the mechanisms that are there in place to solve workplace harassment issues. If you follow those steps, you're going to be better suited as an employer to avoid liability.

I agree that it's a great conversation to have. My concern is that we've somewhat mixed, from a societal perspective, these highly publicized sexual abuse-type cases with what I'll loosely call the garden variety sexual harassment case. Whether it's someone who just treats men better than women in the office or may act or tell inappropriate jokes in the workplace is somewhat materially different than individuals who engage in these really outrageous, abusive-type behaviors that are so prevalent in the press today.

Frattarelli: ... I certainly agree with all of those comments, I will tell you, in many ways I think the notoriety that this has gotten through the press has probably [been], I don't want to say a good thing in the end, but I think a good thing for employers just to be aware or be reminded of. Certainly all my clients that I've talked to, we tell them about harassment, why they have to do harassment training as Ciana and Ian mentioned. There are a lot of employers out there who frankly are not fully up to speed on this: Small to mid-sized employers don't realize what their obligations are and again, it's one of the few areas in labor and employment law where if you take affirmative steps to put a policy in place you can avoid liability.

It's one of the few areas where you really do have some protections. I do

think it just raises enough awareness out there, besides the fact that just having public awareness on this type of issue is a good thing.

Owen: In our worlds, we've been talking pretty actively about this subject for 20 years or more, including the time that we were all discussing as a nation, Anita Hill and Clarence Thomas. We might not be talking about it today if not for the #MeToo Movement, but it's never going away as a workplace topic for those of us in this end of the business. We have seen this massive high-profile outcropping of people coming forward and people making complaints and what we've also seen is that that notoriety and that publicity in that volume has generated a willingness for more people to come forward.

Burns: Gallup did a couple of polls, one in 1998 and one in 2017, that reported as recently as 1998, a majority of Americans said people in the workplace were too sensitive about sexual harassment, while today, 59 percent say people aren't sensitive enough. In 1998, 55 percent of women and 45 percent of men said sexual harassment in the workplace was a big problem. In 2017, 73 percent of women and 66 percent of men said it was a big problem. So what happened in those 20 years?

Owen: I'll take a first stab at that. I think the numbers fluctuate and I think they're both true. So, what we see is, depending on the mood of society or the mood of a particular workplace or the country as a whole, we see a shift in those kinds of things. From my own personal experience, the number of harassment claims that get made in workplaces ... are either unsubstantiated or substantiated. They're not all real, but they are all serious and they do all call for what some of the other panelists have talked about: the process, the analysis, the review of the claims to make sure they're handled properly.

Frattarelli: I want to supplement that point. One thing I always do when I do a harassment training is ... a really weird dichotomy to me when you look at society versus the workplace. I always tell people that, in the 1950s, everyone remembers, some of you will remember "The Dick Van Dyke Show." Mary Tyler Moore, they wouldn't let her wear slacks on TV because they thought that was too sexy or too racy. Even in the '70s, "One Day at a Time"

had some off-color comments about sex and they moved the show to 9:30 because they didn't want those comments on at 8 or 8:30. I remember, I don't really watch the show much, it was "Two Broke Girls." I guess they were talking about some masturbation contest they were having. It was an 8 o'clock episode. You combine that with Howard Stern, everything else you hear on the radio, you just think about how society has gotten much more [racy], just in terms of what's out there, what's publicized, certainly everything on social media.

So that's going in one direction, and I don't want to say our workplace has gotten more puritan or more pure, but certainly we're trying to be more respective of women's rights, more respective of harassment, so you have society going one way. Not that it's an excuse, but I think it's difficult to tell your employees who have a society out there that is very sexually charged and much more open about comments and commentary to get to the workplace and shut off your morals and stop acting the way you did for the other 16 hours of the day. I think that's part of the reason I think we're seeing these trends.

Williams: ... When you're investigating a claim of workplace harassment, sexual harassment, very often the finding will be either these particular allegations were substantiated or not substantiated. Just because something's not substantiated doesn't mean it's not a real claim, it doesn't mean it didn't really happen and that goes both ways. Someone claims something bad happened and a manager or another employee says no, it didn't, it happened this way. Very often you can't substantiate either side, right, so the conclusion would then be, you can't verify either one.

There are certain steps employers should take in those circumstances to still guard against and monitor conduct that's happening in the workplace. ... I think it's totally accurate to say, look, as a society, we're more sexually liberal. We are very coarse in the language we're using in the public environment, even in our politics, but it's true across the board that a lot of that language, a lot of that commentary, and a lot of those actions would be unlawful if they happened in the workplace under an-

Sexual Harassment in the Workplace

A panel presented by NJBIZ



Panelists for NJBIZ's Sexual Harassment in the Workplace discussion, from left, Peter Frattarelli, partner with Archer Law; Ciana Williams, employment counsel with MidAtlantic Employers' Association; Ian Meklinsky, partner with Fox Rothschild LLP; and Mike Owen, general counsel & chief human resources officer with Easter Seals New Jersey. - AARON HOUSTON

ti-harassment and anti-discrimination laws. And why is that? Think about it this way. Anywhere else, you can turn off the TV. You can leave, you know, if you're at a friend's house and they start talking about what they saw on "Two Broke Girls," you can say I don't want to deal with this. You can leave. But you are captive in the workplace, all of us are. You have to be there to earn your living. These laws reflect that, and they say when you are at work, you should not be subjected to this conduct, no matter what's going on out there. But it does create more risk for employers to a degree because people see it.

In trainings ... employees will say, "You mean to tell me, what I see so-and-so saying or doing on TV, I'm not allowed to say that at work?" and I'm like, oh, my training has been effective, that's 100 percent right. You might find yourself meeting with HR or being subjected to an investigation if you choose to repeat those things in the workplace. Again, the sexual harassment topic we're talking about is sexual harassment in the workplace. That's different from sexual assault outside of the workplace that is in no way connected to work, or in the media you'll see allegations about sexual misconduct. Those things, those are held to our societal standards, we decide if we want to continue following that celebrity or not but these laws and rules that apply in the workplace are there because typically our employees are, in a way, captive if they want to earn a living.

Meklinsky: So, recently, we conducted at our firm in-house harassment avoidance training for all of our attorneys and our staff. Training the staff is relatively straightforward. Just imagine training 850 lawyers on anti-harassment training when lawyers by nature are confrontational, Type A personalities. So, the way I explain the difference in behavior and what the expectations are is that it may be OK to behave outside of the work environment the way you see people act on TV and in politics.

The analogy I use is, at work, you have to behave as if you're on the Starship Enterprise. Everyone wears the same uniform, everyone behaves with the same appropriate decorum to each other. When you watch "Star Trek," you don't hear inappropriate, locker room talk, and this is what the expectation is in the workplace. That is a very difficult standard to meet, but what I say to people when we do the training is that's what the courts are expecting. If we all sat on a jury, we may have a totally different view of what is or isn't sexual harassment or racial harassment or age harassment or handicap harassment, but courts are the ones who are interpreting the law and what you have to do as a lawyer and as an employer is take a look at it from the perspective of who's going to ultimately be the decision maker here and how are they going to view the conduct.

Generally speaking, a lot of the law that we rely on are court decisions where appellate courts have interpreted what juries have done and set out standards. But these jurors for the most part, first of all, they're not employers in the traditional sense that you would expect. They live in a highly academic environment so they're not necessarily thinking through the implications of their decisions the way you would as an employer if you were the one making the ultimate decision based on "how does this play out in the long run?" And I'm not being critical of the judiciary and how they've come

to their conclusions but sometimes decisions have odd outcomes from a practical perspective in the workplace and you just have to have these very stringent, kind of bright-line rules in order to avoid liability on behalf of the company.

Burns: Well, and that begs the question, is the compliance training that is being done by companies out there in general right now adequate to address these concerns?

Williams: So, the compliance training, I view it as an awareness mechanism, right, because employees, first of all, I think a lot of employers are focusing on providing this training now. A typical anti-harassment training is going to talk about what is unlawful harassment, what is sexual harassment. It should include what is unlawful discrimination, what is retaliation, and the complaint process within that organization. I think, now, employers are focusing on it a good bit. I mean, it has been done over the years but now, I think, people are having a heightened awareness of the need to provide it.

It has an impact because it makes employees aware and puts tools in their hands in terms of what is appropriate and not and ... I know that just from feedback in employee sessions of training. They very clearly did not know that some of the things they were doing in the workplace are not appropriate. Maybe they don't even rise to the full level of unlawful harassment or sexual harassment but they, over time, could accumulate and amount to that.

Owen: I'm going to give you my HR take on this for a minute. I think that they are adequate, the trainings that exist are adequate and there are a lot of them. They can be done and they can be done annually. They can be done more frequently, they can be done for different groups. But the real issue at the heart of it always is the training goes away and then what do you do as an organization when the training is over? It always comes down to leadership and management and the tone that they set and the buy-in that they create.

Even in the highest-profile sexual abuse cases that are almost outside of the realm of what we talk about ... what we see there is the tone set by leadership is one that condones the behaviors on the basis of the power, the responsibility, the work product that's generated by the people committing the bad acts. If you have leadership being clear with its management chain all the way through — that this is not what this organization is about — then that's the best kind of training you can have, right?

Frattarelli: I certainly agree, I feel that the training out there is adequate. I think the issue is, are you doing it frequently enough, are you getting it in front of the right people? I certainly know the training I've done, I think every time I've done one I've seen a face in the room or a look in the room like "oh wow, I didn't realize that could be the issue," whether it's "I'm making a comment to a friend" and "I didn't think someone sitting in the next cubicle over might've heard it and might've been offended," whether it's that or just explaining what some of the boundaries are.

I think it works and I think it's effective, I think the real issue is are you doing it enough? Are you just doing it when entry-level people come in and not doing it again, not repeating it? Certainly, as Ian said, whether it's attorneys or managers or supervisors, to me those are the ones that really need

to be trained, your managers and supervisors, to understand how to react and respond to a complaint or an incident happening in front of them. The last thing you want to be in a case is where someone's alleging harassment and the evidence comes out that this was happening in front of supervisors all the time and they did nothing or ignored it. I think that's the worst shape to be in. You really do lose the benefit of the training and the defense.

Meklinsky: Going back to your original question about the #MeToo movement, what I've found in the last few months is that when our clients have conducted their in-house training, people are feeling more comfortable about coming forward because of what's in the news. I have clients who have called me up and said, "After we did the training, I had an employee come up to me and they complained about sexual harassment and I'm not really sure what to do with the complaint." Well, you have an internal procedure, follow the internal procedure. And they said, "Yeah, except for the complaint is about a set of events that occurred a decade or more ago." And in one case I had ... it was 40 years ago that the woman now is complaining about [the alleged abuse] and just because there's that difference in time doesn't absolve the employer from actually looking at it and dealing with it.

Luckily, these employers that have contacted me have been smart enough to say we need to look at it and investigate it but how do we do that when the allegations are, as I'll term it, stale. ... I have enough trouble remembering what I had for lunch yesterday, let alone what I may have said to somebody 20 years ago. Regardless of the time frame in which the complaint is made, you have to go and investigate it. Interestingly enough, and I think this is part of maybe, some of the difference we're seeing in the political sphere today, I've had cases where, when challenged, the male supervisor has admitted to the conduct 20, 30, and even 40 years later which makes, by the way, the employer's job incredible easy. Goodbye!

Just because people are coming forward with delayed complaints doesn't absolve an employer of the obligation to investigate it. It may make it more difficult but you have to do it and I see that because of the training a lot of employees are coming forward with complaints that have been sitting around that they've been uncomfortable bringing forward. ... The good part about that is if you do have a supervisor who has a pattern of behavior that you don't know about, it opens the door to learn about that person's behavior and can provide you with a defense in terms of the process we talked about earlier.

Burns: Senate Majority Leader Loretta Weinberg is spearheading a bill that would ban employers from entering into nondisclosure agreements with employees, so those who have faced harassment can speak publicly. Why is that a good thing? Is it a good thing?

Meklinsky: Ah! My buddy Loretta Weinberg. So, I think our legislators need to be a little cautious when they go into this area of the law and try to legislate without really thinking about the implications of what they're doing. Loretta's bill ... says is that if there is a claim of sexual harassment or abuse, a claim, and it is resolved between the employer and the claimant, it is prohibited to have a confidentiality provision in the settlement. Why is that a



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good or a bad thing? Well, the plaintiffs' bar says it's a good thing because a claimant should be able to settle with the company, take the money and then broadcast to the world the alleged bad acts of the harasser. The examples that the people who are pushing for this legislation give are the Harvey Weinstein cases, the Roger Ailes, the Bill O'Reilly, the Steve Wynn. These [are] really public and for the most part, more sexual abuse than sexual harassment, but they lump it all together and they use it as a mechanism to say ... women should know when they go to work in a certain workplace, they should be able to know what kind of environment they're walking into.

OK, I get it, I think that is a fair position to take. What a lot of lawyers ... say [is] this is a really bad idea. Why is it a bad idea? One, because sometimes the victim doesn't want the employer talking about it. They want their privacy as well. So that's one reason. Two, the employers that Pete and I represent, when I'm representing an employer and they're being either sued or it's presued, where there's an allegation of sexual harassment our clients are making, for the most part, [there's] an economic decision: "Do I resolve this claim and put it behind me, or do I engage in litigation that can take two, three years, a tremendous amount of economic resources, and a tremendous number of people hours in terms of defending the case and the distraction of our business," and what they make is an economic decision.

More often than not, the goal is to try to resolve the case instead of litigate it because in the long run it's just too expensive to do. If I say to a client, "If

you go to settle this case, you're going to write a check to your former employee and to their lawyer and then they can take a billboard out on the New Jersey Turnpike saying how bad of an actor you are," do you honestly think my client's writing that check? I think it's going to interfere with the ability to settle cases. There are other mechanisms that can be implemented to achieve the goal that the bill sponsor is trying to accomplish but what they're doing is, they're taking this broad brush stroke in a knee-jerk fashion to solve a problem that really, quite honestly, isn't a problem because if you want to make it public, don't take the company's money. Litigate it, go to the press, go to trial, and if you win and the person is a recidivist bad actor, you're going to get a punitive damage reward that's going to be through the roof.

But this bill isn't the only knee jerk reaction to it. There's another piece of legislation that is in the process of the new federal tax law. Our state Sen. Bob Menendez did something without really thinking it through. He introduced an amendment to the tax bill that says if a sexual harassment or sexual abuse claim is settled, resolved between an employer and an employee and there is a confidentiality provision in the agreement, the payment to the alleged victim and all of the attorney's fees paid out to settle the claim are not tax-deductible by the company. There is not, by the way, another provision in the tax law that says anything remotely like that, but what he didn't realize because he didn't think it through is he just hurt the alleged victim.

... The way he wrote the bill, the amendment to the tax code is that ... the victim, the money that they get, they were able to take a tax credit for the amount of money that they then paid their lawyer. The way the ... amendment was written, and the way the law was passed, is that the victim can't take that tax credit any longer. So the windfall for the federal government is the victim pays tax on 100 percent what gets paid out and then the lawyer who gets a percentage of what the settlement is has to then pay tax on what they get.

Here's an example. Let's say you pay \$100,000 to a victim to settle a sexual harassment claim. Let's say the lawyer's fee was \$30,000. It used to be that the victim would get taxed on the \$100,000 but take a \$30,000 tax credit and net, only pay tax on the 70. The lawyer would get the 30 and pay the tax on the 30. Thanks to Bob Menendez, the victim now pays tax on the full 100 and the lawyer still pays tax on their 30. So the federal government gets double taxation on that set part of the money and when challenged about it, he actually said that he thought the Republicans would figure that out after he made the amendment and would fix it.

So, lo and behold, today, we have this new tax problem because it was a knee-jerk reaction to try to penalize for settling with confidentiality agreements without thinking through the ramifications on what the alleged solution to the problem is. So, I think we really have to take a look and put all this stuff in perspective and say let's take a step back, what's really going to fix the perceived problem with the system instead of just throwing things out there on a knee-jerk basis.

Williams: I totally agree that knee jerk reactions are not always well thought out. ... Something to keep in mind. I don't want to leave anyone

with the impression that confidentiality provisions in a settlement agreement with a victim of harassment or potential victim of harassment are going to be viewed favorably or enforced necessarily. That's because the [U.S. Equal Employment Opportunity Commission], the federal agency ... that oversees violations of the federal anti-harassment laws views them very unfavorably. So, very frequently, almost always, those provisions should contain ... confidentiality provisions that say, yes, we're settling this matter and of course, nobody admits to any wrongdoing on either side; however, the individual retains the right to file a charge with the EEOC and here she will not receive any compensation as a result.

The pending legislation on confidentiality provisions, it could change things in New Jersey law but you also have to be concerned about federal law, and federal law in a way is already addressing this. Same thing with the standards for liability, with respect to harassment that incurs from one employee to another and from a manager to an employee. So, some of the defenses that are available, one of them, when there has been harassment among or between employees and a manager knew or should've known about it, it requires you to also show that you took reasonable efforts to prevent or correct harassment in the workplace and those reasonable efforts are training your entire employee population. So I'm one of those people who thinks everyone should be trained.

Frattarelli: Let me just make one quick point about confidentiality. There's a big difference to my clients [regarding] confidentiality about what happened versus confidentiality about what we paid to settle the case. My clients, particularly if a complaint is filed, they go to the EEOC. The allegations are out there in the public so typically we're not all that concerned about preventing them talking about what happened. What we're concerned about is preventing them from talking about what we paid to settle the case. That's why you really have to be careful when you hear these cases that are conflating two things.

... We're not talking about settling a lawsuit, we're talking about, "I'm going to pay you money just to shut up," which you can do. If that's a contract, you can enforce it. That's not what we're talking about. What we're talking about, claims are made, we're settling it and what we don't want ... other employees and plaintiffs' bar particularly to know we paid money just because you made an allegation.

As Ian said, there's a lot of reason to settle cases. Sometimes, the facts are bad, sometimes it happened, other times I tell my clients you have a wonderful case and you can pay me \$150,000 to prove how wonderful your case is, or you can pay \$25,000 and make this thing go away right now. ... It's so important to us, however, not to have eight other employees at the doorstep saying "wait a minute, all I've got to do is make an allegation and I get paid \$25,000," so that's the reason we want the amount kept confidential. The facts, they are what they are.

Burns: Is there a worry, given all of this high profile publicity that's come about, that employers may feel compelled to take swift action against employees who have been complained about without due process?

Frattarelli: ... I think it's easy to say during training, you know what, when everything's equal, just fire the perp. Fire the alleged harasser because it's a tie and he can't sue you for anything so you're better off firing the person [whether] you're not sure if it happened or not. But that's a very dangerous and slippery slope because what that means is you've now set the bar lower and lower each time the next allegation goes in and on top of that, forget about the law, it's bad for morale to have that happen.

What I think is most important is just make sure your investigation is thorough and complete. What you don't want to have happen is, you do an internal investigation, you talk to four witnesses, you can't decide [so] you decide maybe a reminder is all that's needed. I couldn't corroborate [the allegation], let's move on, then when you end up in court, there's four or five other witnesses you should have talked to. Maybe they worked on the same shift, maybe they were brought up by one witness and you didn't follow up. That's where the real danger is.

You have to make sure you investigate it [and] it's a thorough enough investigation that you feel confident that you've gathered all the facts [and] made a decision based on ... the totality of the circumstances. You want to make sure you're making a decision based on all that and not find out later that it was a rushed, hurried and not thorough investigation. Then you would lose the benefit of that defense because it was not an adequate investigation.

Williams: Yeah, absolutely, and on the investigation point and to your original question, so a lot of what we see in the media is well outside what any of our clients would do and what would happen within any of your organizations, right. We learn about the allegations one day and the next day, someone loses their job. This is another thing that can be driven home to employees in a training session that that is not how it's going to work. It's important both for the accuser and the accused to know that there are going to be investigative steps taken. When we say investigation, it just means fact gathering. It's really important to have a process in place to do that because it can both, as you just mentioned, it can compromise your defense in that particular matter and it can compromise your ability to defend against claims down the road.

Meklinsky: I agree with everything but I think going back to your original comment, I think some employers because of the current environment have been on occasion quick to dispense with the due process.

[Here's an example:] A client calls up and says, "We're an employer, we're a private school, we received a phone call from a woman that said when she was a student at another school, one of the teachers at the new school ... sexually abused her, and in light of what's in the news, she thought she should bring it to the school's attention."

The head of school calls me up and tells me this and said, "We can't have this person on our staff, I'm just going to go down the hall and fire him."

I said, "Wait a second. First of all, when did this occur? Last year, two years ago, when?"

"Forty years ago."

I said, "OK, have you had any complaints about this teacher in the 10 years that they worked for you?"



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"Nope."
"Would anyone describe him as creepy?"
"No."

Totally nice guy, hard-working, blah blah blah. I said, "Alright, before you fire him, maybe you should talk to him," and they said OK.

I said, "Look, I have to go to a meeting and I'm going to get in my car. Go talk to him and call me." A half-hour later they call me up, they say we talked to him. They asked if I was driving, I said "yes." They said, "Can you pull over?" I said OK.

They said they confronted him and he admitted it. I said, "He did what?" That's a defense lawyer's reaction. ... He admitted that he ... had a weak moment 40 years ago, he did something he knows was wrong, he's come to grips with it and he's totally accepting of any ramifications of this kind, period.

I said "Alright, what are we doing?" and they said "No, no, no, we already fired him."

... I would classify that as kind of the unusual case where someone 40 years later says yeah, I did it. Just on the allegation alone, and I get it, it's an incredibly serious allegation — it's in the context of a private school, it's sexual in nature — but don't throw the baby out with the bath water. Take a step back and say, what's the process? Follow your process. Do the investigation. Do the fact-finding, and they did it, and they came out the exact same place but, I know, and we all agree that if you're the alleged harasser you have very little rights and you can be fired.

... I think the employer has due process obligations to at least treat [the accused] fairly in the process. While the law doesn't technically require that I think as an employer you're better off if you do that and follow your internal process.