#MeToo

Is it time up for discrimination in the workplace?

Virtual Round Table Series
Employment Working Group 2018

#MeToo

Is it time up for discrimination in the workplace?

The #MeToo movement officially began in October 2017 as a social media hashtag in the wake of sexual misconduct allegations aimed at high profile Hollywood film producer Harvey Weinstein.

It was designed to expose the widespread prevalence of sexual assault and harassment, not just in the film industry, but in a myriad of mainstream industries and organisations.

The hashtag initially served as a public forum where people could share their experiences of sexual harassment, but has gathered momentum to a point where it is now beginning to influence organisational culture and affect employment legislation and human resource policy.

A mark of the success of the movement has been its ability to generate legislative responses across the world in a very short space of time. In the US, a new Federal bipartisan bill called The Empower Act has made significant progress through the Senate. It is designed to stop employers from enforcing confidentiality agreements when settling harassment claims with employees.

Related tax legislation has already been adopted in the US, as part of the Tax Cuts and Jobs Act, which went into effect January 1, 2018. As a result of the law, companies that use non-disclosure agreements in sexual harassment or abuse cases are prohibited from deducting the settlement and associated cost, including attorneys' fees, for tax purposes. In Europe, Sweden has made changes to its penal code to require explicit consent before sex, while in the UK a 2018 report from the Equality and Human Rights Commission (EHRC) proposes a number of legislative reforms designed to make employers responsible for addressing harassment in the workplace.

The #MeToo movement has also been absorbed into workplace culture, transitioning from a forum for shared experiences into a mantra that informs the behaviour of co-workers, supervisors and senior management. This has manifested itself in an additional, yet related movement known as "#TimesUp." While both the #MeToo and #TimesUp movements have focused primarily on the issue of sexual harassment, the #TimesUp movement focuses more broadly on inequality within the workplace and societal institutions, with an emphasis on pay equity. #TimesUp attempts to expand the fight against workplace inequality that has flourished for so long on an institutional level, beyond the realm of the individual stories associated with the #MeToo movement.

As a consequence of #MeToo and #TimesUp, employers may be more reluctant to defend allegations of sexual harassment and more likely to reach fair and transparent settlements. Co-workers, particularly men, are also revising their estimation of acceptable behaviour, as a result of #MeToo. Our California member Rebecca Torrey points out the increase in 'hugger cases' and social media harassment claims she is dealing with this year, as previously acceptable behaviour/communication is now under the harassment spotlight.

Employers are also scrambling to update their HR policies to incorporate more detailed and inclusive harassment procedures. Many have implemented or updated standalone harassment policies and are offering harassment training to all employees, not just supervisors. Much of this training involves understanding exactly what behaviour constitutes sexual harassment and encouraging active monitoring and reporting by all workers.

The following report includes insight into all these issues from IR Global's employment experts and provides a perspective on the influence of #MeToo on a number of jurisdictions around the world, including the USA, UK, France, Sweden and Mexico.

The View from IR

Ross Nicholls

Business Development Director

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

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Magnus Berterud has extensive experience in providing corporate employment law advice to both national and international companies and organisations. The advice covers all areas of corporate employment law, inter alia, reorganisations and redundancies, transfer of business, individual employment issues, trade union negotiations, discrimination, trade secrets and work environment issues.

Magnus also advises regularly with employment law advise in M&A transactions and in outsourcing and has experience in labour litigations, both in public courts and in arbitration proceedings.

Furthermore, Magnus lectures on a regular basis about Swedish employment law.

U.S - NEVADA

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Laura Thalacker has practiced management-side employment law for 24 years. Prior to founding Hartwell Thalacker, Ltd. in 2014, she was a partner in the Litigation Department of Nevada's then-largest law firm. Laura has devoted her career to representing employers in Nevada, throughout the U.S., and worldwide in employment law and litigation matters.

Laura is a certified senior professional in human resources. Using her unique combination of practical human resources experience and in-depth legal knowledge, Laura takes a pro-active, preventative and strategic approach to handling employment matters. In addition to advising clients on a wide range of workplace issues, Laura represents employers in administrative proceedings before government agencies and in employment-related litigation in Nevada state and federal courts. She has represented employers in cases involving such matters as trade secrets, non-competes, wrongful termination, harassment and discrimination, leaves of absence, breach of contract, and wage and hour violations.

Laura is a three-time Las Vegas "Lawyer of the Year" in Best Lawyers and has been recognised for her work in employment law by Chambers USA and Super Lawyers.

FRANCE

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Admitted to the Bar in 1997, Lionel Paraire founded Galion in 2008, a boutique law firm focused on labour and employment law.

Lionel has lectured at the University of Paris XII in Labour Law and European Labour Law. He is currently Senior lecturer at the University of Montpellier I (DJCE and Certificate of Special Studies in Labour Law), where he teaches employment litigation. He is a member of various national and international organisations including Avosial (Association of French Employment Lawyers Association), EELA (European Employment Lawyers Association) and IBA (International Bar Association). He is an active member of IR Global.

Lionel has developed an acknowledged expertise in the area of individual employment relations and (high risk) litigation and dispute resolution. He regularly assists companies with restructuring and the labour and employment law aspects of corporate transactions, extending his activity towards Alternative Dispute Resolution (ADR), notably as a mediator.

Lionel speaks French, English, Spanish and German.

U.S - CALIFORNIA

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Rebecca Torrey is a partner at Elkins Kalt Weintraub Reuben Gartside LLP in Los Angeles and head of the firm's employment practice.

She is experienced in all aspects of employment law, with an emphasis on defending employers in 'bet the company' class action and multi-plaintiff state and federal court trials and arbitrations. Rebecca is committed to developing an employer's understanding of the law to reduce the sting of litigation.

Her clients include healthcare companies, professional services firms, entertainment, digital media and technology innovators, manufacturers and recyclers and tax-exempt organisations operating both internationally or domestically. Rebecca is a frequent speaker and writer on key developments and cutting edge legal issues, including the current proliferation of employment regulation at state and local levels and the challenge to compliance and litigation risk.

MEXICO

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Edmundo founded Escobar y Gorostieta in 1993 as a response to the needs of different customers to have comprehensive advice provided by experts in the various branches of law and disciplines related to the business.

It has grown into prestigious Mexican firm known for providing a high quality of service attached to professional ethics.

Based in Mexico City, the firm specialises in labor and employment, corporate and foreign investment, providing comprehensive advice to domestic and foreign investors operating in Mexico, assessing the legal affairs of foreigners in Mexico and their operations abroad.

Edmundo prides himself on responding immediately to legislative, social, commercial and professional changes both in Mexico and abroad, helping to maintain a flexibility that is reflected in his services.

ENGLAND

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Shilpen has a dual practice focused on dispute resolution and employment law. His expertise as a litigator is in high-value commercial dispute resolution and contentious corporate matters, often involving an international element. He has conducted a number of reported cases and cross-border disputes. Shilpen also advises and represents employers, employees and professional clients in all aspects of employment law. He has particular expertise in acting for senior executives, self-employed professionals and company directors in connection with their entire employment needs, including claims in the Employment Tribunal and the High Court.

Shilpen provides day-to-day employment law and practical troubleshooting advice to the senior management of high profile corporate clients, including the London arm of a leading multi-billion dollar US private equity house and one of the world's foremost and best recognised designer fashion brands.

Gunnercooke is a full service corporate and commercial law firm comprised solely of senior lawyers. There are 100 partners, operating nationally and internationally via offices in London and Manchester.

QUESTION ONE – CHANGES TO RELEVANT LAWS

What laws and regulations apply around harassment and discrimination in your jurisdiction? Has this been affected by the #MeToo movement?

Nevada – Laura Thalacker (LT) In the US we have Title VII of the 1964 Civil Rights Act, which governs statutory claims that come up with regard to discrimination against women based on sex and sexual harassment. In Nevada, we also have requirements under Nevada law in NRS chapter 613 that govern discrimination based on sex and equal pay.

The laws cover harassment committed by a co-worker, as well as harassment committed by a supervisor. To be actionable, a hostile work environment harassment must be 'severe' or 'pervasive' and the conduct at issue must be unwelcome. For co-workers, courts will look at whether the employer knew or should have known about the harassment and failed to take prompt remedial action. For supervisors, the employer is vicariously liable for the supervisor's conduct if there is a tangible employment action (for example, discipline, demotion or termination) that results from harassment.

If there's hostile work environment harassment engaged in by a supervisor with no tangible employment action, then the employer can raise an affirmative defence to liability. This defence requires a showing that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behaviour, and that the employee unreasonably failed to take advantage of the employer's preventative or corrective measures.

The Nevada legislature is only in session every two years, and does not go back into session until February 2019. This #MeToo movement really only started in the Fall or 2017, so we have not seen legislative action yet in Nevada, but are anticipating attempts to pass additional equal pay laws, and laws addressing confidentiality of settlements.

The other big thing that's happening in Nevada right now in the wake of the #MeToo movement is the accusation of sexual misconduct in the gaming industry against high profile individuals. In response, the Nevada Gaming Control Board, for the first time, is proposing specific requirements for licensees regarding sexual harassment policies, investigations, and procedures for reporting and remedying violations. This proposal has not yet been adopted and discussions surrounding it are ongoing.

California – Rebecca Torrey (RT) California has a legislative scheme similar to Nevada, governed by both Federal law and state law.

There have been laws on the books for quite a long time protecting California employees, which offer more protection and broader remedies than Federal law. California discrimination and harassment laws are contained in the California Fair Employment and Housing Act (FEHA). It differs from Title VII, the Federal law that Laura mentioned, in a number of ways. For example, it provides employees with a longer statute of limitations. Currently under state law, individuals have a year to file an administrative claim for harassment, discrimination or retaliation and then they have one more year after the state labour agency issues a right to sue notice to allow the filing of a civil lawsuit..

There also are additional protected classifications of individuals working in California, about three times as many as there are under Federal law. There is no cap or limit on punitive damages in California and the unlimited potential of compensation for emotional distress, which is a subjective, open-ended type of compensatory damages available in court.

FEHA also applies to smaller employers of at least five employees, while Title VII only applies to employers with at least 15 employees.

Since 2004, California has required employers to provide annual or bi-annual anti-harassment training of all supervisors working for companies with 50 or more employees. As of 2016, California also regulates what components must be included in written harassment policies and what topics must be covered in the harassment training for supervisors. This training requirement has been picked up by four other jurisdictions outside California and is currently under consideration by Congress along with other states and municipalities

This California regulatory framework, however, pre-dated the #MeToo movement. The primary new potential legislation (at the moment under consideration by Governor Jerry Brown and not yet enacted), prohibits employers' imposition of confidential settlements of gender discrimination claims and mandatory arbitration of claims. Californian Senator Kamala Harris, is a co-sponsor of a similar Federal Bill called The Empower Act, which will attempt to do the same thing on a national level.

Nevada – LT Does that specifically only address sexual harassment or is it all types of discrimination claims or harassment claims, such as racial or religious harassment? It's so interesting that they're treating sexual harassment cases differently than other types of discrimination claims.

California – RT It addresses settlements that relate to sexual misconduct and would include both sexual assault and sexual harassment.

The strategic focus in California on these types of bills has been to tackle one aspect of the problem and then expand on it in order to broaden the coverage. We saw that last year with the Fair Pay Act, an aggressive statute seeking to eliminate pay disparity by placing the burden to justify pay differences on the employer. The ultimate burden of proving discrimination usually rests on the employee. The Fair Pay Act initially covered only gender pay disparities and then was amended the following year to include pay disparities based on race and ethnicity. It is an effective tactic of

Rebecca Torrey and Lionel Paraire pictured at the 2017 IR Annual Conference in Berlin

legislators in garnering support for a limited protection and then seeking to expand it.

Nevada – LT There was one direct legislative response to #MeToo at the Federal level that we should mention, within the Tax Cuts and Jobs Act, passed in the US at the end of 2017.

There is a provision now under tax law that if you settle a sexual harassment or sexual abuse claim with a confidentiality provision in it, then you cannot write off or deduct as a business expense the settlement or the attorney's fees related to settling that claim.

California – RT Yes, the 2017 tax law change eliminated federal tax deductions for employers settling a claim of sexual misconduct. The Protection Act, currently pending in Congress, conversely seeks to provide a deduction for settlement amounts received by employees, eliminating their obligation to pay federal taxes on that amount.

Sweden – Magnus Berterud (MB) In Sweden, when it comes to the laws and regulations regulating sexual harassment in the workplace, everything comes down to the Discrimination Act which protects individuals from discrimination in the workplace.

in Sweden sexual harassment is considered as a form of discrimination and that actually comes from the EU laws which are the same in all EU countries.

It means that an employer may not sexually harass an employee, someone applying for a job, someone applying for or carrying out a traineeship, or a person who is performing work on a temporary basis. A person who has the right to make decisions on behalf of the employer in this kind of matters shall be equated with the employer in this respect.

That means that if a manager at a company sexually harasses a colleague, it may lead to that employer becoming liable to pay compensation for the manager's actions.

The thing that has caused the most publicity and actions among employers though, is the obligation to investigate and take measures if you become aware that an employee is or has been subject to harassment. This has actually been quite a big deal in Sweden where employers have used law firms to investigate possible harassment.

If an employer concludes that there is a case of sexual harassment, then they are obliged to take proper measures, which could range from warnings to dismissals in serious cases. The Discrimination Act also prohibits reprisals when it comes to sexual harassment claims, so an employee who raises an issue of sexual harassment should not be subject to any disadvantage.

An employer who acts in breach of these rules may be liable to pay compensation to the employee or the victim, but I would assume that compared to the US, for example, the levels of compensation are moderate here in Sweden.

It will depend on how serious the harassment was, but the compensation normally ends up in the range of SEK 40,000 and SEK 60,000, which in Euros would be between EUR 4,000 and EUR 6,000. As a result, employees do not file claims to get money, but for other reasons.

If they succeed in such a claim, then the employer will have to pay the employee's legal costs. However, when it comes to these kind of cases the employee does normally not appoint an attorney.

They are either represented by their trade union, or by the Equality Ombudsman which is a government agency that supervises the application of the Discrimination Act.

Although it has been discussed for some years, somewhat of a response to the #MeToo movement came into force on July 1st this year, and relates to the Swedish penal code. There have been changes to the rules when it comes to sexual assault and that kind of crime and now there's a requirement for explicit

consent, in word or action, in order to have sex in Sweden.

These changes have been very much debated and criticised by lawyers and the Swedish Bar Association, because it's largely a politically motivated legislation and it is questionable if it will lead to more convictions.

France – Lionel Paraire (LP) Sexual discrimination and harassment have been prohibited by French law for decades now even if the very last definition of sexual harassment comes from a recent act dated August 6th 2012.

This act provided exactly the same definition of sexual harassment in both criminal and labour codes, which was not the case before. It is now both a criminal offence and a misconduct for sanction in the workplace.

French law has also prohibited discrimination based on gender orientation since the early 1990s.

Sexual harassment under the criminal legislation maybe sanctioned by two years of imprisonment or a fine of EUR 2000 euros.

There is also an old EU directive dating from 23rd September 2002 that deals with both discrimination and sexual harassment. All the European countries have the same directive.

With regard to the #MeToo campaign, we have not seen any particular change linked to this campaign, even though the government has taken this into consideration when strengthening reform.

The French parliament is currently debating an order to reduce the gaps in equality between men and women, particularly with regard to remuneration. It is a very old topic and I think the female MPs have tried to use #MeToo as leverage to have this reform voted in.

On August 2018, a law reinforcing the fight against sexual and sexist violence has also been published. It completes the provisions relating to offenses of sexual harassment and creates a new offense (sexual affront) punished with the fine set for fourth class offences and defined as "the fact, to direct to a person any remark or behavior, with a sexual or sexist connotation, which either undermines their dignity due to its degrading or humiliating nature, or creates against them an intimidating, hostile or offending situation".

Interestingly, the fallout of the Weinstein case has led to the French Ministry of Justice recording a 30 per cent increase in sexual harassment complaints, but there is no data yet about the outcome of those complaints.

Mexico - Edmundo Escobar (EE) In Mexico we have a range of different types of laws and regulations. The constitution states the existence of discrimination, including for sexual reasons, while we have Federal law designed to prevent and eliminate discrimination.

There is a general law that recognises a woman's right to a life free from violence and then we have some safety and security law regulations for the workplace.

Finally, we have the criminal code. Harassment as a criminal offence is dealt with by the states, not federal law, and sexual harassment is not recognised by 11 states out of 32 in Mexico. It is pretty interesting that Federal law does recognise harassment, but that 11 states don't consider it to be a criminal offence.

We work together with criminal lawyers when we have to deal with these issues, since Mexican Federal labour law gives grounds for dismissal for any employee that participates in mistreatment and abuse or is involved in violence, threats or personal harassment against the employer, the employer's family, co-workers or workers from outside the company.

if the employer doesn't do anything or tolerates the harassment then the affected party can terminate the contract and sue the employer, so that both labour, criminal and administrative claims can start.

The company will be fined for violation of the labour law if it is determined that there was sexual harassment. Severance payment will be given to the employee and administrative law preventing discrimination will apply. Damages may also be sought through the criminal courts.

England – Shilpen Savani (SS) Discrimination law in the English workplace is governed by the Equality Act 2010. The Act is concerned with nine protected characteristics, which are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

There are five types of discrimination under the Act, namely: direct discrimination, indirect discrimination, harassment, victimisation and instructing, causing, inducing and helping discrimination. As such it is a very broad-based and progressive statute that is already quite well equipped for the new challenges presented by the #MeToo and #TimesUp movements.

Yet there is no doubt that #MeToo and #Times Up have heightened public interest in this area of the law and there is always room for improvement. The most compelling calls for change have recently come from the Equality and Human Rights Commission (EHRC), which published a report earlier in 2018 seeking a number of reforms.

These include calls for an extension of the existing three-month limitation period for harassment to six months, the introduction of a mandatory duty on employers to take reasonable steps to protect workers from harassment and the mandatory publication of company policy. Also of importance is the EHRC's recommendation that non-disclosure agreements and confidentiality clauses seeking to prevent disclosures of harassment should be made void. None of these things have passed into law yet but they have added to the current debate that surrounds the issue of discrimination and harassment in the workplace.

SESSION TWO - LITIGATION CONSIDERATIONS

Has the #MeToo movement altered litigation considerations in court cases? What is the impact within the court system in your jurisdiction?

England – SS In my view, the #MeToo movement has introduced greater sensitivity into the equation for employers involved in employment disputes.

The media frenzy in the last year or so has made it more uncomfortable than ever for employers to be found to condone or tolerate misconduct – and especially sexual misconduct – in the workplace. This is engendering a change of culture and an increased reluctance on the part of senior managers to go to the Employment Tribunal and defend allegations of discrimination. In my experience employers are now more reactive to allegations of sex harassment in particular and there is a greater willingness to settle such claims before trial.

Another interesting by-product is that employers do not wish to be seen trying to bury unwanted allegations of discrimination and there is a notable reluctance to impose, or enforce, confidentiality clauses against employees. This means victims in the workplace are becoming bolder in expressing their grievances and there is greater acceptance that they should not be discouraged or prevented from doing so. Of course, this does not mean that genuine trade secrets and confidential data are no longer protected, but simply to say that an employee who wishes to air a personal grievance of a discriminatory nature is much less likely to be obstructed from doing so by an employer in the current climate of transparency.

Amidst all the popular clamour and support for #MeToo, the need for due process remains – both in the way that employers manage their internal grievance and disciplinary procedures and in ensuring that the necessary legal and evidential tests are applied to claimants in the Employment Tribunal.

These are not legal or procedural changes, but they are practical considerations that seem to have become more relevant after the impacts of #MeToo.

Nevada – LT I don't think we have felt the full effect of #MeToo yet, since it is a relatively recent phenomenon.

I'm not sure it's trickled its way through the court system yet.

I would say that there is a general perception that workplace harassment complaints have increased and that people feel more comfortable coming forward. Down the road this will probably result in additional litigation.

As a litigator, I've thought about how you would present these types of cases to a jury and how some of the defences that are available to employers, like aggressively questioning why an employee did not come forward to complain, will be altered. I wonder how that will play in front of a jury now in light of the #MeToo movement.

A lot of these cases get privately arbitrated in the United States, rather than being in front of a jury or a judge. The #MeToo movement has also raised questions about the appropriateness and effect of keeping these cases out of the public eye (via private arbitration) and some legislators are proposing laws prohibiting mandatory arbitration of these types of claims. Having said that, the US Supreme Court has just recently affirmed that, under the Federal Arbitration Act, arbitration agreements can be used in the employment context. There's going to be a tension between federal and state law in this area if state legislatures attempt to prohibit arbitration of these types of disputes.

One other thing that relates to federal Equal Pay Act Claims (and this is really more of a #TimesUp issue on pay disparity) is a decision issued in April 2018 by the Ninth Circuit Court of Appeals, which governs a large number of western states in the United States including Nevada and California. It limits one of the defences that U.S. employers traditionally raise in Equal Pay Act (EPA) claims.

Employers will often defend EPA claims by saying that a disparity between men and women's salaries is a result of the female employees' prior salary history. The Ninth Circuit Court of Appeals eliminated that defence, holding that prior salary history, in the language of the statute, is not a 'legitimate factor other than sex' justifying a pay differential.

California – RT As a litigator, I see companies taking harassment allegations more seriously and much more concerned about the likelihood of a big jury verdict. For that reason, they are working to settle claims pre-litigation and sometimes settling them early for larger amounts in order to eliminate the risk of huge exposure from a jury charged up by what they read in the news.

This past year I have seen a number of cases filed on theories that probably would never have been imagined a year or two ago. That includes efforts by plaintiff attorneys to expand harassment laws beyond the employer relationship under California Civil Code section 51.9 (pertaining to alleged harassment or assault in certain professional relationships, e.g. physicians, attorneys and bankers) to relationships occurring through social media or other connections. While I don't expect any new legal theories to result, these claims demonstrate the impact of the #MeToo movement on efforts to expand the law

I have also seen recent claims brought against employers based on conduct that would not have been regarded as harassment in the past, for example, claims related to occasionally hugging between co-workers and others involving impolite but not sexual conduct in the workplace.

Sweden – MB In Sweden, the area that has received most publicity are the criminal law cases that have been up for trial regarding famous TV personalities and so forth. There has not been much focus on civil law cases based on the Discrim-

The IR Global Employment Group pictured during the 2018 'On the Road' Conference Toronto

ination Act, although there has been a lot of focus on the #MeToo movement among employers. They have handled it quite well with their obligations to take measures and investigate.

One reason for so many cases not ending up in court, is that the employer usually tries to settle these cases quickly. There has been one year or so since this movement started, so maybe there will be more cases in civil law. There hasn't been any real increase yet at least.

France – LP The #MeToo phenomenon is too recent to have had an impact. As I mentioned earlier though, legislation around sexual discrimination is not new under French law and we have already seen some cases like this. I don't say many, but some cases like this. It's not frequent in France, because even if the burden of proof is easier for the employees now, it is still not easy or comfortable to bring claims before the court, either criminal or labour courts, on the basis of sexual harassment or discrimination.

Moral harassment in France is used more than sexual harassment. In most cases in the labour courts, you will have cases for moral harassment, but it's not the same for sexual harassment. We have had cases like this and when the case is serious, a settlement is often offered and signed before coming to the court.

I don't think we have seen any effect from the #MeToo media campaign yet because of the length of the procedures in the French courts, but if it is the case we will see it in two or three years, not earlier.

Mexico – EE The statistics in Mexico show that only 30 per cent of cases of sexual harassment are declared or initiated, so there is a big amount of cases that are not publicly taken through the courts. The #MeToo movement in Mexico started in February 2018, when CNN brought Mexican soap opera stars onto television to say they were violated and harassed in their careers.

Despite this, there hasn't been a big increase in litigation numbers. We have only seen a few cases and this is due to the labour authority, which played a very important role at the end of 2016. They enacted a protocol against labour violence and sexual harassment and this protocol was a way to show companies how to act and prevent the existence of harassment. They were very opportune with this preventative measure.

Another reason for the lack of increase in litigation is that a lot of cases go out for settlement.

SESSION THREE - HR POLICY AND PROCEDURE

Has the #MeToo movement altered the HR policies and procedures adopted by companies in your jurisdiction. What are the potential liability risks of new policies?

California – RT As mentioned before, prior to the #MeToo movement California had laws requiring harassment training of supervisors. Two years ago, new regulations were issued that dictate what must be included in a written harassment policy and in supervisor training. When the #MeToo movement hit, I began receiving many more requests by employers to update harassment policies, including adapting them to include the written acknowledgement of receipt employers are now required to obtain from every employee.

I have received many requests for anti-harassment training for smaller businesses and businesses seeking to train all their employees, not just supervisors. Training non-supervisory employees about the complaint procedure for unlawful harassment and discrimination helps them speak up and opens up dialogue in an organisation about inclusion in general.

Requests for help in terms of investigations or employment advice that I have fielded recently are largely about complaints raised by both men and women about inappropriate conduct. They include individuals who have experience harassment and others who care about the inappropriate conduct their colleagues may have experienced.

There clearly is more active participation by employees raising complaints for others and supporting their colleagues who have been victims of harassment or discrimination. Employers I speak with are deeply concerned about the impact of harassment on the organization's culture and morale, as well as the increased liability and negative publicity in response to the #MeToo movement. I rarely hear speculation now that a person raising a complaint may be fabricating the account—the shocking headlines are constant now, reflecting a widespread realization that workplace harassment occurs all too frequently. The proactive response I see on behalf of US businesses is heart-warming in terms of moving towards a more positive future.

Nevada – LT Absolutely, my experience has been very similar to what Rebecca has described. One thing with some of our clients is looking more closely at what conditions need to exist to make people comfortable coming forward to complain. We've also talked about some research that's out there about the critical role that co-workers and other colleagues can play in supporting the person who is the victim and also bringing complaints forward.

As a result, we've done some redrafting of policies to include additional bystander language to encourage people to come forward. A lot of companies are looking at their pay structures right now and trying to do payroll audits to see whether there are some inequities in pay structure that are systemic and need to be corrected. For example, Nike, a huge global employer, recently announced it had reviewed its pay structure and is giving raises to a certain percentage of its workforce as a result of that review.

That type of voluntary, publicly announced action, on such a large scale, is unusual. Likewise, some large law firms have voluntarily abandoned arbitration and non-disclosure requirements for harassment claims. All these actions seem to be a direct result of the #MeToo and #TimesUp movements.

Sweden – MB We actually had some new provisions in the Discrimination Act that came into force in January 2017, which put an obligation on employers to actually take active measures to prevent sexual harassment in the workplace.

This is done by investigating the existence of any risks of sexual harassment, analysing the cause of this harassment and then of course taking all the preventive measures that can reasonably be demanded on a continuous basis. Furthermore, the employers are obliged to have guidelines and routines, or policies for their activity.

These new rules actually came into force prior to the #MeToo movement, but obviously the movement put a lot of focus on the new rules and we have had a lot of companies coming to us asking for advice on how they should act to fulfil these rules and whether their policy is correctly drafted and so forth. I think it was Rebecca who said that many companies ask for training when it comes to sexual harassment.

This is the same in Sweden, since I have had several sessions on what sexual harassment is and how a company and its employees should act with respect to these kind of issues.

I also think there has been a greater awareness among employees when it comes to these rules, so they are more eager, not just to speak up and actually confronting employers with these issues, but to monitor what the employer does and doesn't do when it comes to resolving them.

Nevada – LP I have three comments here, first I think there is a need for more training by organisations on the topic of sexual harassment, so companies are encouraged to train their employees. That will help them in defending harassment claims, as the employer can show they took all reasonable measures to prevent discrimination or harassment.

Shilpen Savani pictured at the 2018 IR 'On the Road' Conference in Toronto

Employers should also be encouraged to negotiate internally. The reforms of September 2017 have encouraged employers to negotiate agreements in order to move from a labour law ruled by the French labour code to a more practical and adaptable law which will be closer to the employees' needs, notably around discrimination and harassment, which are part of the discussion with trade unions.

Thirdly, there needs to be equality between men and women. One reform to be mentioned, is that every year employers have to submit a report on gender equality and remuneration. These sorts of reforms need to be part of the thought process going forward.

England – SS There is no doubt that #MeToo has dragged the question of what is, and is not, acceptable behaviour in the workplace into the spotlight. This is to be welcomed on every level because it is driving us towards a better understanding of the issue. It is manifesting itself in the form of increased workplace training by progressive employers and HR personnel. Those who don't have express anti-harassment and discrimination policies in place are hurrying to get these in place, and those who do have them are best advised to review and update their policies regularly.

There is also a greater appreciation that grievances and disciplinary matters must be dealt with proactively and fairly, rather than passively or with a bias towards the employer's interests.

It is quite common for employers to seek legal advice in the event of a workplace dispute arising, and to enquire about removing particular employees through the means of redundancy. A very recent case in the UK has, however, highlighted how the privileged status of such legal advice can be lost if the advice goes too far and amounts to a cloak for discrimination. This appeal decision is a timely reminder to employment advisors that advice involving discrimination may be so unconscionable that it is unlawful, and they must curb their advice so that it remains within the limits of public policy.

Mexico – EE I would say that the impact of the movement is very low in Mexico, but many publicly traded companies and some global companies that have come to us, to ask for advice to establish those policies and protocols, and attend any claim from employees that are having issues with sexual harassment cases.

It is unfortunate that not all the companies keep a protocol system to prevent these issues, and more unfortunate is that it is only big companies that are taking steps to do this. My hope is that this is not just because they want to comply with regulations in other jurisdictions.

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