

ROUNDTABLE DISCUSSION ON #METOO

SPONSORED CONTENT



Addressing workplace assault and harassment

Unwanted comments or staring. Expecting a date or sexual favor in exchange for a request. Making vulgar or offensive jokes about a coworker. Gossip. Intimidation. Inappropriate touching. Workplace harassment is broad and can take on many different forms, and the #MeToo movement has shed light on the prevalence of assault and harassment at work. Prior to the #MeToo movement, studies found that only 6% to 13% of individuals who experience harassment file a formal complaint, but by the end of 2018, complaints had increased by 12% over the previous year, according to the Equal Employment Opportunity Commission. Despite the increase in formal complaints, many employees who experience harassment do not file a complaint out of fear of retaliation, blame or inaction. Meanwhile, a study by HR Acuity found that the number of companies requiring mandatory investigations in response to claims nearly doubled from 23% in 2016 to 41% in 2018. That means almost 50% of companies still don't require an investigation of every complaint.

Indeed, there is still much work to be done before workplaces feel 100% safe, for all. What can companies and organizations do to reduce or eliminate workplace harassment? How can they make workplaces feel comfortable and harassment-free? Crain's Content Studio — Cleveland turns to professionals in the legal and employee relations sectors to address these and other questions pertaining to harassment in the workplace.

THE PANEL



ERIC BAISDEN
*Co-Chair, Labor & Employment
Practice Group*
Benesch



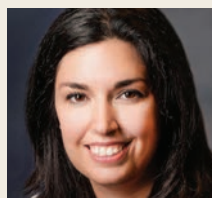
As co-chair of Benesch's Labor & Employment Practice Group, Eric Baisden maintains a national labor and employment practice through which he litigates on behalf of employers before federal and state administrative agencies and in trial and appellate courts throughout 45 states. He litigates claims of wrongful discharge and discrimination, including ADA, age, race, pregnancy, gender and sexual harassment and intentional torts. He also has significant experience in protecting employers from unfair competition, litigating the enforceability of restrictive covenants and confidentiality agreements. Eric has handled numerous cases under the Fair Labor Standards Act, and state wage and hour laws, including collective and hybrid class actions. His litigation experience also extends to cases pertaining to the Employee Retirement Income Security Act and claims relating to executive compensation and change of control agreements associated with corporate mergers and acquisitions.



ANTHONY W. COLLY
*System Director, Employee Relations
and Absence Management*
Summa Health



Anthony has more than 20 years of recruiting and employee relations experience. As system director of employee relations and absence management at a large health system, Anthony ensures the fair, efficient and effective implementation and application of Summa's employment-related policies, procedures, practices and collective bargaining agreement for non-bargaining unit and bargaining unit staff. He is an expert on employment matters and regularly counsels staff on workplace conflict resolution to help facilitate healthy work relationships. Prior to his current role, Anthony spent four years as the human resources manager of Summa Rehab Hospital, where he spearheaded all HR activities related to opening a freestanding 60-bed rehab hospital. He led the development of HR operational policies and employee engagement surveys while administering payroll and performance improvement plans. Anthony also worked for the U.S. Air Force for more than 20 years in a variety of roles. Initially, as a recruiter, he focused on fostering community and organizational relationships to fill critical Air Force vacancies throughout the world. He also had the opportunity to build a number of high-performing recruiting teams and develop effective training programs tailored to individual needs.



JOHANNA FABRIZIO PARKER
Partner
Benesch



Johanna Fabrizio Parker represents and counsels management clients in a wide range of complex employment matters, including claims of discrimination, harassment and retaliation. Those claims stem from protections under the Civil Rights Act, Americans with Disabilities Act or the Age Discrimination in Employment Act, as well as other state laws. She also represents management clients in employee benefits litigation, including cases involving retiree medical benefits. She practices in state and federal courts and before administrative agencies. Her litigation experience ranges from single plaintiff cases to large class actions. Johanna also provides daily counseling on employment-related matters and compliance issues, such as personnel management, employment policies and handbooks, investigations and corporate reorganizations and reductions in force. She is a member of the Ohio State Bar Association, the Cleveland Metropolitan Bar Association and the John M. Manos Inn of Court.



Q&A

What can businesses do to encourage employees to report harassment? What are the risks if employees do not report this type of behavior?

JOHANNA PARKER: An important first step is to make sure employees know how to raise these concerns. Of course, there is often (if not always) a procedure specified in a policy or handbook, but a reminder can help, and can show that you want to listen. At the same time, I would encourage front-line supervisors and managers to keep their eyes and ears open for these issues, and bring them to HR (or whomever is meant to receive them), even if there is no formal complaint. The next step is how you address a complaint, both in terms of whether/how you take action to correct inappropriate behavior and how you treat individuals who come forward. Both the employees involved and others are watching here — and a fair and respectful process will help to let others know that it's really OK to raise a concern.

ERIC BAISDEN: Companies have to take training and the complaint reporting process seriously.

Companies should start training at orientation and conduct regular follow-up training. New hires should formally acknowledge training on the policy at hire, not just that a policy exists somewhere in the handbook. The orientation needs to include the policy and reporting procedures for violations of the policy. Harassment policies should be visible and clearly state that complaints made under the policy will not result in retaliation.

Upon receiving a complaint, an investigation must be conducted and consequences need to follow as appropriate. When employees see that a company is serious about dealing with legitimate claims of harassment, they will both be more likely to report complaints and to conform behavior to appropriate norms in the workplace.

What procedures should companies be following in response to a complaint? What is the proper response?

ANTHONY COLLY: In dealing with complaints for any situation, not just #MeToo, I always recommend managers or HR conduct investigations every time they become aware of potential violation of company policy and/or state/federal law. The investigations steps

“ Companies have to take training and the complaint reporting process seriously. Companies should start training at orientation and conduct regular follow-up training.... Upon receiving a complaint, an investigation must be conducted and consequences need to follow as appropriate.”

— ERIC BAISDEN,

Co-Chair, Labor & Employment Practice Group, Benesch

are consistent, but the length and detail of an investigation can vary. An investigation includes, at a minimum, documenting the initial complaint. I always recommend including who, what, when, where, why, how and a list of witnesses. All witnesses should be interviewed; video surveillance if available should be reviewed, and a documented interview with the accused must be conducted.

After all the facts are gathered, decision makers must review the facts and identify if any violations of law or policy occurred. If so, consistent steps should be taken to ensure the behavior is stopped and not repeated in the future. Ultimately, establishing a process for dealing with violations of policy or law ensures managers

have a process for dealing with difficult situations. It also ensures an organization is investing in a culture that cares about their employees, one that believes employees should be able to come to work and feel comfortable and be productive.

ERIC BAISDEN: The company's policy should be followed, and an investigation should be conducted. Every complaint needs to be treated as a legitimate complaint. Some investigations are going to be more involved, particularly if there are witnesses involved. Nonetheless, each and every complaint needs to be

treated seriously. Once the complaint has been investigated, HR needs to follow up with the complaining party and, to the extent disciplinary action is warranted, take action.

JOHANNA PARKER: There is no one-size-fits-all for investigations, and I wonder whether the statistics referenced in the roundtable introduction really track reality. It may be how people define investigations. Some complaints warrant a more formal investigation and include multiple interviews and a summary report. In other complaints, there may be nothing to “investigate,” as in, there is no witness, or a concrete issue has not been identified. Those situations still need to be addressed, but that investigation may start and stop with the initial discussion with the complaining party.

I do think every issue needs to be addressed. I like to see the complaining party write down his/her complaint so the employer can really understand what is at issue. I also like to make sure that the employers “close the loop” and let the complaining party know what happened (in as much as is permitted due to any confidentiality

concerns). Too often, employees can be left wondering. Knowing the result — even if they don't like it — is important.

#MeToo has highlighted employees' lack of trust in HR departments and how HR handles reported incidents. What can corporate HR departments do to build this trust back so all employees are comfortable reporting these type of incidents?

JOHANNA PARKER: First, as I discussed in response to the first question, how you treat people in investigating concerns and how you respond to those concerns sets the overall tone for HR's interaction with employees. Beyond this, getting out there with the employees in more informal settings is key here. I know HR has to maintain confidentiality and often can be closed off from the overall workforce. But I would encourage your HR team to make an effort to eat lunch in common areas, attend department meetings and even offer an “open house” to engage with employees when there is not necessarily a problem or issue.

ANTHONY COLLY: In general, the value HR brings to an organization is the support and professionalism it provides its employees. If employees don't trust their HR department, it almost always points to a failure in one or both areas. HR must provide defined policies and a process that handle complaints in a timely and confidential manner. An organization should have zero-tolerance policies for retaliation.

Employers should proactively train all employees on harassment and reporting options. I always recommend establishing a well-defined investigation process that includes steps to protect all employees involved as well as the work environment from further potential harassment. A complaint must be thoroughly documented because it is the roadmap for the entire investigation. It identifies witness, dates, times, locations and details of the complaint.

Completing the investigation and taking timely, appropriate action will establish and build trust with employees and management. #MeToo is an important example. It is a serious situation that if left unchecked can demoralize the workforce, lower productivity and result in financial liability for the organization.



CONTINUED ON NEXT PAGE

CONTINUED FROM PREVIOUS PAGE

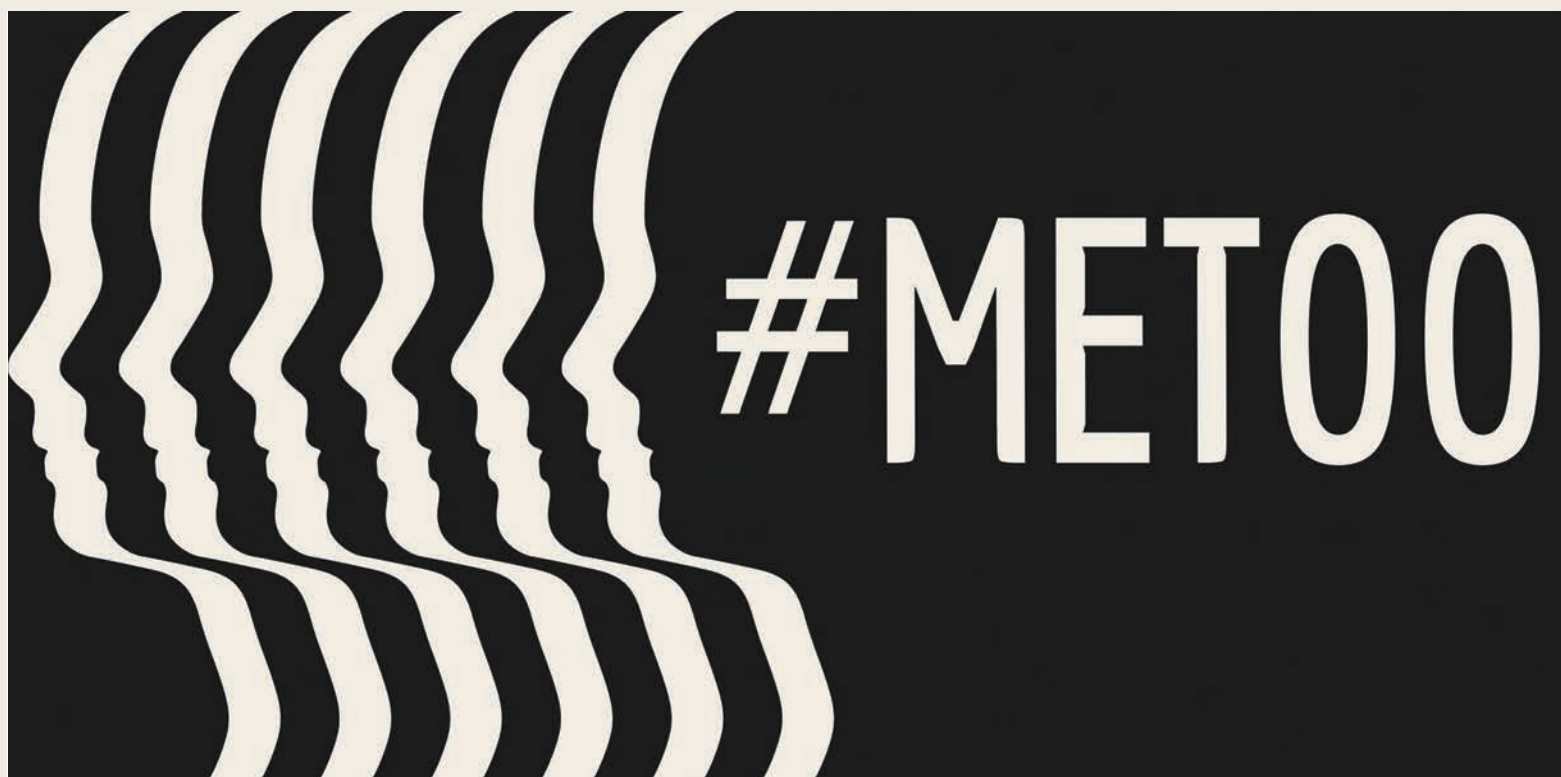
ERIC BAISDEN: I do not necessarily agree with the premise of this question. The employers that I work with on a daily basis have a history of handling reported incidents in a prompt and effective manner. It is important that any HR department has properly trained anyone investigating complaints to make a prompt, thorough and unbiased investigation. This includes, to the extent possible, keeping the claims and information included in the report confidential. Confidentiality cannot be absolute in these types of investigations, but the audience of who needs to know can be kept small and still be effective in addressing the issues raised in an investigation.

To be credible, an organization has to be able to address both unsubstantiated and substantiated situations appropriately. And has to be willing to apply the same standards for an investigation throughout all levels of the organization. Favoritism or turning a blind-eye to a situation because of who is involved is the fastest way to destroy credibility in the HR function and will lead to an unwillingness to make complaints.

Will the #MeToo movement cause, or has it already caused, boards and investors to become more involved or interested in the company culture? What can companies do to demonstrate to their board/investors that they “get it” and want to create a culture of gender equity, genuine inclusiveness and zero tolerance at all levels?

JOHANNA PARKER: I have always liked the concept of “sponsor” (as opposed to mentor). Women and other minorities need real opportunities to have a seat at the table, and having a sponsor (as in, someone who has that seat) goes a long way toward making that happen. Also, it is not enough just to say it. When I had kids, my dad told me that they will be looking so much more at what you do versus what you say. I think the same advice holds true here; what leadership actually does in terms of diversity is worth so much more than any statement.

ERIC BAISDEN: Companies were already focused on diversity and inclusion efforts before #MeToo. #MeToo has simply shone a bright light on another specific problem in the workplace. Too often these efforts have been misguided or half-hearted in an attempt to be able to portray the particular entity as meeting certain diversity or inclusion goals.



If companies want to create an inclusive and diverse culture, they have to come up with a way to reward individuals in the organization who make genuine efforts and achieve results in these areas, even though it may not immediately show up on the bottom line.

What are some other key solutions that can and should be implemented in the workplace in general to eliminate workplace harassment?

JOHANNA PARKER: It starts with education. While there is certainly increased attention on this issue in the media, we can't assume that everyone just gets it. Employees at all levels need to understand what is not acceptable behavior.

ERIC BAISDEN: Companies should have regular and systematic training on a variety of topics including harassment. More than that, companies need to adopt a culture that promotes civility in the workplace and holds managers and supervisors accountable when they fall short of these standards and yet also rewards those who are leaders in promoting an inclusive and collaborative culture.

ANTHONY COLLY: In general, eliminating workplace harassment begins with strong leadership. A leadership team must lead by example and establish a culture that ensures a safe work environment for all employees. Initial steps to eliminating harassment include establishing comprehensive workplace harassment policies that define harassment, clearly identify reporting procedures and emphasize a zero toler-



A leadership team must lead by example and establish a culture that ensures a safe work environment for all employees. Initial steps to eliminating harassment include establishing comprehensive workplace harassment policies that define harassment, clearly identify reporting procedures and emphasize a zero tolerance for retaliation.”

— ANTHONY W. COLLY,
System Director, Employee Relations and Absence Management,
Summa Health

ance for retaliation. It is also important to establish expectations and train employees.

I also believe how the organization responds to a complaint is critical in fostering the desired culture. How we respond to complaints will ultimately send a leadership message. What will that message be? Are complaints taken seriously, is confidentiality important, did we protect complainants, and was the accused treated appropriately and given an opportunity to respond? Failing to establish policies, processes and effectively responding to complaints will result in a lack of trust in an organization.

Has your organization made any changes to its leadership composition, and if so, what and how?

ERIC BAISDEN: Companies are focused on efforts to bring more diversity to the C-suite. C-suite leaders also are more vocal concerning the company culture and expectations for all levels of the organization. I have seen real efforts to diversify leadership teams by gender.

What are some of the ways in which #MeToo has impacted your workplace?

JOHANNA PARKER: I recently presented on this topic and found (per a recent survey by the Pew Research Center), the majority of people (51%) — men and women — say the increased focus on sexual harassment/assault won't make much difference for women's workplace opportunities. And according to a LeanIn/McKinsey 2018 report, women still are underrepresented at every level.

ERIC BAISDEN: On the positive side, most companies that I work with already have zero-tolerance policies in place. But now, employers are more likely to enforce the policy more stringently, and the disciplinary consequences for violations of the policy tend to be more severe as well.

Companies are also focusing on more formalized training and mentoring of all employees concerning appropriate interactions in the workplace.

#MeToo has had some negative unintended consequences in this regard, as well. Clients have experienced situations where male supervisors are less willing to engage in socializing or mentoring with female subordinates. A recent study confirmed this is more than an isolated trend when it reported there is a general hesitance of male supervisors to engage in mentoring or activities outside normal work hours with female subordinates.

Approximately 55% of men and 47% of women in the survey believe it is now more difficult for men to navigate these interactions. This is an unanticipated negative impact of #MeToo that may stifle progress.

What types of harassment training do you utilize? Has that changed at all, and if so, how?

ERIC BAISDEN: Companies have a tendency to bring this training in-house because of the cost (both direct and indirect) for training of all employees. More companies are looking to third-parties to provide a more polished/individualized product and sometimes combining harassment training with other types of diversity and inclusion training. Even companies doing a good job with training have looked at ways to increase training and awareness of anti-harassment initiatives. Companies also are focusing more on emphasizing inclusion and diversity at all levels.

CONTINUED ON NEXT PAGE



CONTINUED FROM PREVIOUS PAGE

JOHANNA PARKER: Some of the states now require anti-harassment training, and in at least one jurisdiction, the training has to be interactive.

How have organizations in general changed their harassment or reporting policies and procedures?

ERIC BAISDEN: Virtually all of the companies that I work with have compliant harassment policies and reporting procedures. Most also do a good job in training on their policy and investigating claims. So for them, it is simply continuing to build on the foundation that was already in place to prevent harassment in the workplace.

“ People spend a significant amount of time at work, work outside of the office and often regularly interact with their coworkers even when not working — whether in person or on social media. Given the wide reach, work and workplace interactions no longer can exist only in a separated world.”

— JOHANNA FABRIZIO PARKER, Partner, Benesch

What role do companies and organizations play in ensuring that workplace harassment or intimidation of any kind is eliminated?

ERIC BAISDEN: Companies have to take the lead in setting the cultural tone for the work environment, including providing robust training

programs for anti-harassment, inclusion and diversity for employees at all levels. Executives should actively participate in the training and visibly commit to enforcing the policies.

Accountability for any failures to meet these expectations and rewards for doing so will show the organization that the company is truly

serious of keeping the workplace free from harassing behavior and allow everyone to focus on doing their jobs.

ANTHONY COLLY: Companies have a responsibility to provide a work environment that is free of harassment and discrimination. They are also required to comply with both state and federal law. Company policies defining what harassment and intimidation are should be established. The development of education will communicate company expectations. These are steps in the right direction, but will not always eliminate bad behavior. Companies should also invest in a workplace culture focused on respect and trust for all employees. Combined with solid policies, training and appropriate investigation into complaints will go a long way in

reducing workplace harassment.

JOHANNA PARKER: People spend a significant amount of time at work, work outside of the office and often regularly interact with their coworkers even when not working — whether in person or on social media. Given the wide reach, work and workplace interactions no longer can exist only in a separated world. While companies and organizations don't need to (or want to) regulate all activity among their employees, the current state of the law (as well as the direction it seems to be moving) should motivate organizations to set the standard for acceptable behavior. They also need to hold people accountable when/if they step out of line — no matter the position. Can we make kindness the new normal?



CRAIN'SCONTENTSTUDIO
CLEVELAND

Managing editor, custom and special projects: Amy Ann Stoessel, astoessel@crain.com **Project editor:** Kathy Ames Carr **Graphic designer:** Lisa Griffis
For more information about custom publishing opportunities, please contact Amy Ann Stoessel.

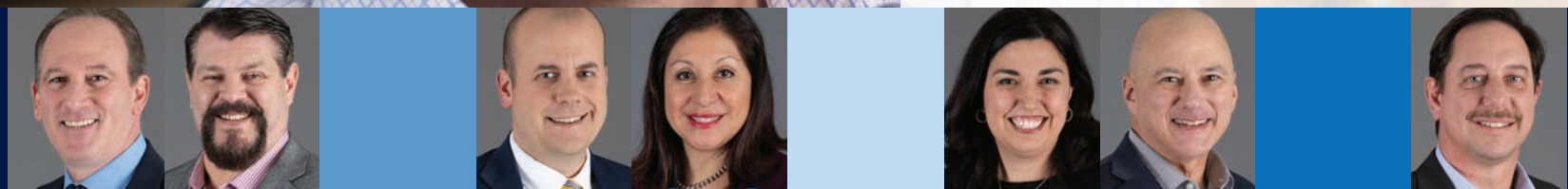


“Benesch always does a good job of explaining what our options are and giving us counsel from a very pragmatic approach aimed at keeping matters moving forward and reaching effective agreements.”

FRITZ KOHMANN
CFO, Shearer's Snacks

Not every company has an on-site legal team, but the right legal partner can make you feel as if you do. Fritz and the Shearer's team rely on Benesch to help them handle a wide array of legal matters touching all parts of Shearer's business—from contract negotiations, M&A deals and IP protection to leases, litigation, employment and more. They know they can count on the Benesch team for a practical, risk-intelligent perspective that cuts through legalese and focuses on the business. It's the convenience of in-house counsel with the advantage of wide-ranging business experience and deep legal knowledge.

To learn more about our relationship with Shearer's, visit beneschlaw.com/myteam



MY BENESCH MY TEAM

Featured team (left to right): ROBERT A. ROSS, W. ERIC BAISDEN, COREY CLAY, MARGARITA S. KRNCVIC, JOHANNA FABRIZIO PARKER, JOSEPH N. GROSS AND RICK HEPP

© 2019 Benesch Friedlander Coplan & Aronoff LLP