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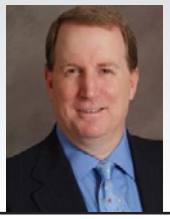


Ensuring that #MeToo is #NotUs: Using HCM Technology to Combat Sexual Harassment

The #MeToo movement got its name (and some say its voice) in October 2017 with revelations related to the Harvey Weinstein affair. But informed HR people know that the problem of sexual harassment in the workplace has been lingering for decades, and has occupied some part of most HR department's attention for just as long. The latest laser-like public attention to the problem (12 million Facebook posts related to it in the first 24 hours after the coining of the phrase) simply moves to the "front burner" an issue, which all responsible employers know they must address.

But the burning question remains: how to address it?

With the clear shift in emphasis at the federal level toward deregulation and rollback of administrative rules of all kinds, states and localities are picking up the pace. But when it comes to sexual harassment, the states have almost always had a leading role. And perhaps no state has done more in this area than California.

While only a few other states (Connecticut, Maine) followed California's lead prior to the emergence of the #MeToo movement, we can expect many additional states and cities to take action in the wake of the latest national headlines. Indeed, in May 2018, largely in response to the national uproar over #MeToo, New York State and City passed into law coordinated revisions of their existing human rights ordinances that phase in a whole series of new requirements:

a) Expanding New York anti-harassment protection from "traditional" definitions of employees to include contractors, subcontractors, vendors, consultants, and others who provide services under contract;

b) Most case settlement non-disclosure and binding arbitration rules implemented by New York employers become null and void, effective July 11, 2018 (although apparent conflict with the U.S. Supreme Court decision in *Epic Systems Corp versus Lewis*, which specifically allowed employers to require their employees to submit to binding arbitration, will have to be worked out by new case law); and,

c) New comprehensive anti-sexual harassment policies and posters, and *mandatory employee anti-sexual harassment training for New York employers* goes into effect October 9, 2018. The details differ at the New York State and City levels, so check with your favorite legislative reporting service for more complete information.

Philadelphia, D.C., and Chicago are all in the process of passing laws either mandating training or prohibiting non-disclosure agreements in settlements. And a little-known provision of last December's Tax Cuts and Jobs Act of 2017 (P.L. 115-97), signed into law by President Trump on December 22, 2017, eliminates corporate tax deductibility of most of the expenses associated with a sexual

harassment settlement, if that settlement is covered by a non-disclosure agreement.

Given the overall risk profile presented by sexual harassment (with or without state laws in place), best practice for many organizations appears to be to adopt "California/New York policy and practice" nationwide, even if they don't have employees within the geographic limits of those states today.

An AB1825 "Did you know?"

- California Assembly Bill 1825 (state law "AB1825") first became effective on August 17, 2007 and requires all organizations with 50 or more employees to provide anti-sexual harassment training to all supervisors. The "50 or more employees" count is for any 20 or more consecutive weeks in the current or prior calendar year, and must include employees and contractors. The count must also include out-of-state employees and contractors.
- The law applies to employers headquartered in California, or *anywhere else in the U.S.,* if they have California employees being supervised from within or outside the state.
- Anti-sexual harassment training must be two hours in length, include a series of mandatory topics, and can be instructor-led, individual e-learning, or through scheduled webinars.
- Training must be delivered for new supervisors within six months of hire or promotion to supervisor, and repetitively for *all* supervisors every two years.
- The law was amended in 2015, under (California) Assembly Bill 2053, to add abusive conduct and "bullying" to the roster of required training content.
- It was further amended effective January 1, 2018, under (California) Senate Bill 396, to require manager and supervisor training specific to preventing harassment on the basis of sexual orientation, gender identity, and gender expression.
- A surprise to many was that AB1825 carries no state reporting requirements or prescribed administrative penalties for failure to comply! Rather, complete record keeping proving compliance with AB1825 acts as a mitigating factor in sexual harassment decisions by the courts, and, of course, the converse is also true: lack of training history acts as an aggravating factor, potentially increasing awards to successful plaintiffs dramatically. When the law was being written, the author of AB1825 was asked why they failed to include tougher sanctions for failure to comply with the law's training requirements, and her response was, "The best penalty is a plaintiff's lawyer!"

Quantifying the Risk

A recent study of more than 50 sexual harassment cases in Chicago found that the average settlement amount (avoiding a jury trial) was $53,000. As bad as that number sounds, the average jury verdict in these cases was $217,000 (about four times larger), and plaintiffs won on cases that made it to a jury about 40 percent of the time. Any way these numbers are sliced, the typical HR organization simply cannot afford to ignore this risk.

Here's What Employers Can – and Must – Do Now!

While there are dozens of ways that an HRMS can assist an organization in addressing the sexual harassment risk, let's focus on the three biggest areas: policy acknowledgement and retention, training, and workflow or, as we'll refer to it here, "electronic workforce monitoring."

Policy Acknowledgement and Retention

In 2018, it is true that *any employer still maintaining anti-sexual harassment policy statements and acknowledgements, signed by employees, in paper files, is living with an unacceptable level of risk*, and needs to be looking at the process improvements necessary to address this risk.

Paper policies (signed or not) get misplaced. Annual re-acknowledgements and revisions to the policies only exacerbate this problem. Some paper never even makes it into the

physical files in the first place. As HR professionals know, the time to find out that a policy acknowledgement from the "files" is missing, or unsigned, or illegible, is *not* when it's being requested by corporate counsel in response to a legal complaint.

Current best practices that every organization should be striving for in sexual harassment policy maintenance include:

a) Collecting signed acknowledgements during the new hire onboarding process. Why have a gap, of even one day, in documenting employees' and supervisors' agreement to your "zero tolerance" working environment? Bear in mind, the combination of a criminal/civil background check and this signed policy acknowledgement, acts like an "immunization" for the company as the new hire walks through the door.

b) Scanning and attaching every signed sexual harassment policy acknowledgement to the related employee's record (or alternatively, e-signature on an electronic policy record.) For many companies, unlimited attachment space, maintained indefinitely, without additional charge, is now a "drop-dead" requirement for cloud-based HRMS.

c) An aging, or recertification system, that automatically prompts employees to re-sign their policy acknowledgement on a user-chosen frequency (annually is preferred), and supervisor/administrator reports to identify and track down any "scofflaws."

Employee/Supervisor Training

If or when your organization is unfortunate enough to be hit with a claim of sexual harassment at the hands of a supervisor or co-worker or by an active or former employee, on a most simplistic basis, you need to prove: (a) you maintained a clear policy against it, (b) the alleged offended signed that policy, (c) you administered detailed training to the alleged offender on all required topics, e.g., *"What is a hostile working environment?"* and/or *"What is quid pro quo?* (d) the alleged offender took that training on these dates, and (e) *as evidenced by the records we can provide, the alleged offender took the required mid-training quizzes and "final exam" that proves that he/she knew what behavior constituted prohibited acts* (but engaged in them anyway.) With apologies to the attorneys reading this for the over-simplification, the above is the baseline to which all employers should adhere.

So given the requirements of (c) through (e) above, a good learning management system (LMS) is key to an employer's defense. Whether training is being offered in person or online (or a combination of both – most jurisdictions allow for either as effective means of training), the record-keeping around issues like dates of training exposure, time spent learning, and review questions posed by the system, and answered interactively by the learner, are key to mitigating damages that might be visited on the employer.

Systems compliant with the shareable content object reference model (SCORM) can deliver all of this capability. Additionally, SCORM or Aviation Industry CBT Committee (AICC), compliance is the protocol that assures a level of "plug-and-play" compatibility to offer employers maximum flexibility in choosing systems from one provider and content from another.

Other requirements employers should be including in their search for a good LMS include the ability to:

- Mix and match purchased, leased, or self-authored content (with SCORM or AICC compliance being the common denominator that makes this interchangeability relatively easy.)
- Versionize content and require re-training when versions change. As we've seen with California AB1825, as an example, additional training topics have been added multiple times over the years, and we can expect that to continue.
- Automate the training requirements presentation to employees/supervisors in multiple ways. Examples include: annual, biennial, or any other frequency retraining requirements, new training when an employee becomes a supervisor for the first time, and new training if an employee changes work location from one state or city to another (although, as previously mentioned, the simplest approach to this

issue is to administer the most stringent training requirement company-wide and avoid possible missed opportunities.)

"Electronic Workforce Supervision" (formerly known as Workflow)

OK admit it: even the most capable and responsible HR professional, working 60 hours a week, cannot be everywhere at the same time. You don't have a crystal ball that allows you to oversee every update to your HRMS, and (to repeat a phrase) the time to find out that something incriminating against your company has been sitting in your HRMS for months or years is not at the discovery stage of litigation!

For years HR professionals have looked at workflow almost purely as an efficiency tool: "Kill excess paper!" "Save a tree!" "Ensure all required approvals are documented!" "Reduce processing time on Personnel Action Forms by 80 percent!" And as such, workflow has done an admirable job. But workflow's "Act II" is just beginning, and it's pretty simple: workflow can be used to interrupt any process where a supervisor, or HR professional, should be monitoring for the possibility of company-damaging information being updated to the system of record by an employee. Here are three examples:

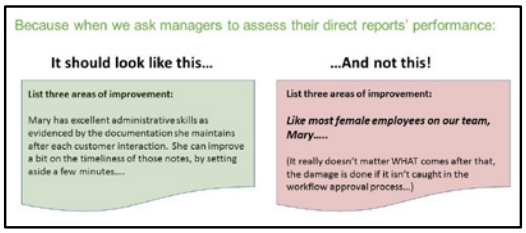
Example One: The Case of the Incriminating Avatars

Acme Manufacturing is very proud of their new HRMS employee self-service and invites every employee to post a selfie to their employee profile page. Despite strict rules around this process (no cartoons, no group pictures, professional clothing and demeanor, please!), it is almost inevitable that someone is going to try to submit a picture of Shrek, or a picture in which they are inappropriately attired, or…well, we can only imagine.

Moral of the story: a good HRMS should always allow for the same detailed workflow capabilities for the upload of attachments, pictures, and notes files as it does for data update.

Example Two: The Case of "Did He Really Write That? Yikes!"

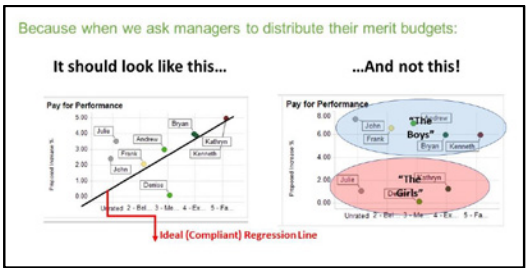
Beta Industries is automating their performance appraisals and is thrilled to finally get the documentation online within the HRMS. They have integrated a rudimentary spell/grammar-checker, but decided against any attempt to incorporate a legal check add-in into their system.



Moral of the story: No amount of automated legal checking can detect every turn of phrase that, like the example above, reveals a level of discriminatory animus with which no employer should ever want to be associated. The example on the right simply proves that the reviewer/supervisor is more in need of improvement and re-training than the employee he or she is evaluating.

Example Three: The Case of the "Merit" Award System Gone Wrong

Cavalier Systems has just gone live with a new compensation planning tool. Managers have been trained how to use performance results to make annual merit budget awards, but the amount of each award is left largely to the discretion of each manager.



Moral of the story: The distribution proposal on the left shows a quite reasonable (in fact, almost perfect!) regression analysis relating

About the Author

Bob Greene currently serves as channels manager and account executive at Ascentis. His 40 years in the human capital management industry have been spent as a practitioner, a consultant, and in vendor/partner roles. As a practitioner, he managed payroll for a 5,000 person bank in New Jersey. As a consultant, he spent eight years advising customers in HRMS, and payroll and benefits system design, as well as acquisition strategies. He also built a strategic HCM advisory practice for Xcelicor (now Deloitte Consulting.) As vendor/partner, he has had prominent roles in sales support, marketing, and product management. He recently completed six years as contributing editor for IHRIM's *Workforce Solutions Review* journal and holds a B.A. in English from Rutgers University.
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performance to merit award. The distribution proposal on the right (albeit an intentionally dramatic example) shows that gender appears to be the only explanatory factor to explain the distribution. *Imagine if a plaintiff's attorney, bringing an action for sexual harassment within the team of people in the example on the right, got their hands on that analysis (even if the proposal were later overridden by a VP higher up.) *Shudder**

Notice that the last two examples seem to wander a bit from the direct topic of sexual harassment, to the allied topic of sexual discrimination. Evidence of sexual discrimination within managerial ranks can frequently be a useful diagnostic tool for predicting where harassment might spring up. Such discrimination would certainly be an aggravating factor in any future litigation that would weigh against the employer. (Author's note: I had intended to call sexual harassment and sex discrimination "kissing cousins" in this context, but given the subject matter, they'll just have to settle for a handshake!)

Summary

The "#MeToo" movement has raised the stakes, as well as the visibility, on all issues surrounding sexual harassment at work. While it might be tempting to try to predict where the "feds" versus the states and cities might be going in their enforcement provisions around prevention, best practice dictates that that's a dangerous game, with high costs for error. The safest approach may be to adhere to the most stringent rules in effect at any given time.

An HRMS is an essential tool for documenting an employer's efforts to comply with these laws, and offers many capabilities – from policy management, to continuous training, to electronic workforce supervision (workflow). Forward-looking employers are sitting down together now to plan out any reconfigurations needed to use those HRMSs to their fullest extent to help defend against claims of sexual harassment.