

A world map is centered in the background, overlaid with a grid of red and purple lines. The map is rendered in a dark, almost black color, with the grid lines providing a sense of global connectivity and data. The overall aesthetic is modern and technological.

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2019 MANAGING THE GLOBAL WORKFORCE WEBINAR SERIES

WORKPLACE CULTURE AND CONDUCT: WHERE ARE WE NOW GLOBALLY?

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SEXUAL HARASSMENT CLAIMS PRE-#METOO AND THE AFTERMATH



Sexual Harassment Claims Pre-#MeToo

Legal and/or technical ways to fend off claims of sexual harassment included:

1

Failure by victims to complain about conduct, thus preventing companies from investigating and remedying situations

2

Complained-about conduct was not "severe or pervasive"

3

Claims were asserted too late and barred by the statute of limitations

The #MeToo Aftermath

- For many employers the statute of limitations may be a technical or legal defense, but they do not have a defense for PR purposes.
- Boards of directors are consequently concerned about the #MeToo movement and the potential resulting damage to the company brand and reputation.
- While the legal standard for what constitutes sexual harassment and the defenses to such claims have not changed, the enforcement standard has increased.
- Employers may be quicker to “pull the trigger” and terminate the alleged harasser based on the allegations.

In the Post-#MeToo Era We See:

Many claimants coming forward.

Claims lodged against high-profile individuals in the entertainment and media industries.

Claims against executives and high-producing individuals in many other industries.

Claims made against politicians, and criticism of the procedure and process for handling such claims.

The #MeToo Aftermath

- Legislatures and regulators are mobilising across the globe to tackle sexual harassment locally
- Macro and micro approaches
- Industrywide and company-specific cultures under increasing scrutiny
- Recent focus internationally on:
 - Use of confidentiality or nondisclosure agreements (NDAs)
 - Strengthening rights to raise complaints
 - Raising awareness and workplace policies
 - Improved staff training

SEXUAL HARASSMENT IN THE UNITED KINGDOM POST-#METOO



Post-#MeToo in the United Kingdom

- Sexual harassment in the workplace is still common despite #MeToo.
- Recent BBC survey found **40% of women and 18% of men** had experienced unwanted sexual behavior in the workplace.
- Many believe that government, regulators, and employers have failed to do enough to tackle unlawful behavior and instill the right culture.
- In July 2018, the House of Commons Women and Equalities Committee (WEqC) issued a report recommending **four key areas** in which the government can take action:
 1. Putting sexual harassment at the **top of the agenda** with a mandatory duty
 2. Requiring **regulators** to take a more active role
 3. Making **enforcement processes** work better for employees
 4. Cleaning up the use of **NDA**s

40%

OF WOMEN

and

18%

OF MEN

**experience
unwanted sexual
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workplace.**

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Post-#MeToo in the United Kingdom (cont'd)

- UK government is taking the following steps:
 - Consulting on:
 - Statutory Code of Practice on Sexual Harassment
 - Use of NDAs
 - Increasing time limit for claims from three months to six months
 - Strengthening and clarifying laws on protecting employees from third-party harassment
 - Whether additional legal protection is needed for volunteers and interns



Post-#MeToo in the United Kingdom (cont'd)

- UK government is taking the following steps (cont'd):
 - Increased and improved gathering of representative data to help identify most effective interventions to address root causes
 - Will bring forward legislation to increase aggravated breach penalty cap from £5,000 to £20,000
 - Will add the UK's Equality and Human Rights Commission (EHRC) as a "prescribed person" for the purposes of UK whistleblowing legislation
 - Will work with Acas, EHRC, and employers to raise awareness of appropriate workplace behaviours and individual rights



Post-#MeToo in the United Kingdom (cont'd)

- NDAs:
 - UK Government agrees they need to be better regulated
 - Employees need clearer explanations of their rights (and the rights they cannot sign away)
 - Public consultation ran March-April 2019
 - Asked 10 questions, including:
 - Asking respondents to send in examples of confidentiality clauses that went too far
 - Views on appropriate limitations
 - Whether government should prescribe a set form of words
 - UK government now analysing feedback



- WEqC:
 - Launched inquiry in November 2018
 - Looking into use of NDAs more broadly where allegations of harassment or discrimination

WATCH THIS SPACE!

Post-#MeToo in the United Kingdom (cont'd)

- Pending outcome of consultations, UK employers should take the following steps:
 - Check current drafting of confidentiality clauses/NDAs
 - Make sure they are not too broad
 - Take reasonable steps to ensure that employees fully understand the meaning of any NDA and/or confidentiality clauses



Post-#MeToo in the United Kingdom (cont'd)



- Sexual harassment as misconduct falls within scope of UK regulatory framework
- Senior Managers and Certification Regime (SMCR):
 - Senior Managers must be preapproved by regulators
 - Certified staff must be “fit and proper”
- Approved Persons Regime
 - Those outside SMCR may need to be preapproved by regulator
- Nonfinancial conduct is being taken into account by regulators and regulated firms

SEXUAL HARASSMENT IN THE UNITED STATES POST-#METOO



Post-#MeToo in the United States

- Growing trend of employee #MeToo rights throughout the United States
- Most advances at state level or city level rather than federal
- Settlement agreements
 - New York, California, and New Jersey have introduced new laws on NDAs in settlement agreements
 - Limitations on when they can, and cannot, be included; generally voiding provisions preventing disclosure of sexual harassment
 - Vermont has banned “no re-hire” provisions in settlement agreements resolving sexual harassment claims
- Steps to increase awareness
 - Delaware, New York State, and New York City have introduced new laws requiring employers to provide/display sexual harassment info sheets and posters

SEXUAL HARASSMENT IN JAPAN POST-#METOO



Post-#MeToo in Japan

- Sexual harassment continues to be common in the workplace in Japan.
- According to a recent survey of 150 allegations by women in media, a third of the cases involved inappropriate behavior by government officials, police officers, and members of parliament.
- The poll was taken in response to the resignation by Japan's most senior finance ministry bureaucrat over highly publicized allegations of sexual misconduct in April 2018, which followed on the heels of the resignation of a Niigata governor over sexual misconduct.
- Generally, notwithstanding #MeToo, employees in Japan are still somewhat reluctant to bring claims, but this is expected to change over time.
- General harassment claims have been increasing, including "maternity harassment" and power harassment.

Japan: Current Harassment Landscape

Harassment in Japan

- Illegal to harass on the basis of individual's race, color, religion, creed, sex; **pregnancy, childbirth;** and medical conditions related to pregnancy, childbirth, or breastfeeding; **being a child-care provider; being a family-care provider;** national origin; mental or physical disability; ancestry; marital status; citizenship status; social status; or any other status protected by applicable law.

Maternity Harassment

- Maternity harassment has recently been recognized under Japanese law in order to counter growing incidences of redundancy, demotion, or other harassment directed at mothers and pregnant workers.

Child and Family-Care Harassment

- In addition to recognizing the need to protect mothers and pregnant workers, workers taking care of children or other family members are also entitled to protection from harassment.

Japan: Power Harassment

- **The most common employee claims made in Japan in the last six years have been “power harassment” claims.**
- Currently, there is no legal definition of “power harassment,” but below is a definition by a team of experts commissioned by the Japanese Ministry of Health, Labor and Welfare:
 - “Conduct that causes physical or mental pain or deteriorates the work environment of a colleague **beyond appropriate business needs** based on **superiority within the workplace** due to the individuals’ positions or relationship”
- Power harassment is not necessarily limited to conduct between a manager and his or her subordinate. It could occur between colleagues at the same level, or could be committed by a subordinate vis-à-vis his or her manager.

Japan: Power Harassment

- Power harassment can take the form of (1) physical abuse (assault), including acts of force or violence (punching, throwing items, shoving); (2) mental abuse (intimidation, slander, degrading remarks); (3) isolation (ceasing company communication and notices); (4) excessive work demands (imposing an assignment that is clearly unnecessary or impossible to complete); (5) reduced work demands (ceasing work assignments or assigning work that is far below the employee's ability or experience); or (6) invasion of privacy (excessive intervention into personal life).
- Some discussion now that laws will be enacted to specifically prohibit "power harassment."

Japan FAQs

Q: What is “Power Harassment”?

A: “Power Harassment” is conduct that is bullying and causes physical or mental pain or deteriorates the work environment of a colleague beyond appropriate business needs based on superiority within the workplace, due to the individual’s position or relationship.

Q: Who can be held liable for damages in a Power Harassment claim?

A: Both the employer and the individual engaged in the harassing activities.

Q: What are some of the consequences of an employer being found liable in a Power Harassment claim?

A: Damages based on a tort claim, determination by the Labor Standards Inspection Bureau that the actions constitute an industrial hazard, and damage to corporate image.

Japan FAQs

- Q:** Which of the following actions did a court find to be illegal power harassment?
- a. Kicked an employee while scolding him.
 - b. Placed a fan near two employees, claiming that they smelled of cigarettes, and continued to work the fan throughout the winter.
 - c. Mentioned to an employee that “your wife surely has a unique taste. How could she marry a guy like you?”
 - d. Required an employee to submit a letter admitting, “I was not doing the job I was getting paid to do.”
 - e. During a company event where sushi was served, told an employee who could not eat sushi, “You should just be drinking water.”
 - f. Directed employees to change their previous working method, resulting in increased workload and poor results.

A: (a)-(d) were found to be illegal, while (e) and (f) were not.

SEXUAL HARASSMENT IN CHINA POST-#METOO



Sexual Harassment Laws in China

- Before 2005
 - No explicit prohibition of sexual harassment
 - Protection based on right to health, dignity, and reputation under civil, criminal, and administrative laws
- 2005 – 2011
 - First law in China explicitly prohibiting sexual harassment of women (*Protection of Women's Rights and Interests of the PRC*, effective Dec. 1, 2005, art. 40)
 - Local implementing regulations issued: define sexual harassment and impose affirmative obligation on employers to prevent and prohibit sexual harassment against **female employees**

Sexual Harassment Laws in China

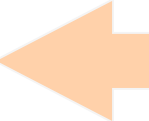
- 2012–2017
 - Preventing and prohibiting workplace sexual harassment against **female employees** became a national requirement (*Special Regulations on Labor Protection of Female Employees of the PRC*, effective Apr. 28, 2012, art. 11)
 - Local regulation in Shenzhen provides broader definition of sexual harassment, protecting both **males and females** from workplace sexual harassment (*Gender Equality Improvement Ordinance of Shenzhen Special Economic Zone*, effective Jan. 1, 2013, art. 23)
 - PRC Criminal Law included sexual offenses **against males** in the crime of “indecent assault” (*PRC Criminal Law*, effective Oct. 1, 1997, as amended Nov. 1, 2015, art. 237, Sec. 13 of Amendment (IX))
- 2018
 - First regulation in China with **detailed rules on employers’ affirmative obligation** to prevent and prohibit workplace sexual harassment (*Special Regulations on Labor Protection of Female Employees of Jiangsu Province*, effective July 1, 2018, art. 19)

Pre-#MeToo in China

- Claims were few and far between
 - Cultural limitations
 - Social pressures
 - Limited damages available
 - Law and legal precedent has not been defined
- Claims limited to individual harasser
- Effect of NDA unclear
- Legal proceedings open to public (default)

Post-#MeToo in China

- In January 2018, the movement hit Chinese college campuses, with several women coming forward with sexual misconduct allegations against university officials, including famous professors at prestigious universities. Some of the professors were fired after details of the allegations were circulated on Chinese social media.
- A prominent Buddhist monk, the founder of a well-known charity, several activists who have long advocated for equal rights, a famous state television show host, two badminton coaches, and several journalists have all been accused of sexual harassment in recent months, with the accusations spreading rapidly through Chinese social media, although state censors usually quickly quash the messages.
- In August 2018, Chinese billionaire Richard Liu Qiangdong was arrested on a rape accusation filed by a Chinese student at the University of Minnesota, a felony if the founder and CEO of JD.com is charged with the crime. JD.com, China's second largest e-commerce player, is facing class action lawsuits that allege the company failed to disclose information pertinent to Richard Liu. In December 2018, US prosecutors declined to bring charges, but the Chinese student has brought a civil suit against him in the US.
- Although allegations were widely read and sparked some discussion about sexual harassment, observers say the #MeToo movement has not been as prominent on Chinese social media compared to many other countries. Feminist activists have cited a lack of proper mechanisms to deal with sexual harassment, fears of victim-blaming, internet censorship, and the detention of five prominent feminists in 2015 as potential reasons for this.



One of the most popular means to evade censors is to use a variation on the #RiceBunny hashtag (#米兔) and related emojis because "rice" (米) and "rabbit" (兔) are pronounced "mi tu" in Mandarin.

Post-#MeToo in China

- At the national level, China is preparing the Draft Civil Code, which is set for a complete and final review by 2020. It requires employers to take reasonable measures against sexual harassment in the workplace.
- Similarly, at the local level, Jiangsu Province enacted legislation that imposes an affirmative obligation on companies to take certain steps to tackle the issue of sexual harassment in the workplace.
- Together, these recent legislative measures signify a shift in the employers' duties by instilling a general right of employees to be free from sexual harassment and establishing a duty to create a harassment-free workplace.
- Many MNCs are also revisiting their harassment policies – what they really cover and how to enforce them

SEXUAL HARASSMENT IN FRANCE POST-#METOO



Post-#MeToo in France

- According to a survey published in 2018, nearly one in three women (32%) say they have experienced some form of sexual harassment during their careers.
- The French president indicated in 2017 that he will make gender equality the "great cause" of his five-year term. A law dated August 1, 2018 for the freedom to choose one's professional future and a law dated August 3, 2018 strengthening the fight against sexual and gender-based violence contain new regulations for employers.
- The main novelty: mandatory nomination of a reference person by any company with more than 250 employees by January 1, 2019, whose task will be to guide, inform, and support employees who are victims of sexual harassment and sexist behavior.

France: Key Recommendations

- The prevention of sexual harassment is part of the employer's general obligation to preserve health and safety. It is required to take all necessary measures to prevent, stop, and punish acts of sexual harassment. This is a reinforced obligation of means.
- The employer must take preventive measures against sexual harassment. For example:
 - posting in the premises possible civil or criminal actions and the contact details of the competent authorities and compliance with the obligation to display the provisions of the Criminal Code on sexual and gender-based violence
 - implementation of policies/ethical code/charter
 - training programs
 - reminder in the internal regulations of the provisions relating to moral and sexual harassment and the procedure that victims or witnesses of sexual harassment must

France: Key Recommendations

- When there is a claim: conduct an investigation to ensure that the matter is promptly examined and treated with complete confidentiality by interviewing the protagonists and also their colleagues at work. The investigation should be conducted by the ombudsman (if any) of the company/group or by an external advisor (attorney, HR consultant, etc.).
- Involve staff representatives, labor inspector, and occupational doctor.
- Initiate, if necessary, disciplinary proceedings for gross misconduct that may result in the dismissal of the employee who has committed sexual harassment.
- NDA and settlement agreements: are they permissible? Advisable?

MITIGATING RISK POST-#METOO



Developing a Global Standard

- New rights developing incrementally around the world
- Some jurisdictions moving faster than others
- Similar goals but localised differences
- Creating a global plan of action to simplify company's approach is challenging but valuable



Developing a Global Standard

- Benefits

- Can put your company's "stamp" on the issue globally
- Manage risk on global footing
- Single reference point
- Clear and consistent messaging to both internal and external audiences
- Consistency in outcome and transparency help manage employee expectations and maintain trust

- Challenges

- Agreeing on a global standard among key stakeholders can be challenging
- Agreed upon standards may not match local expectations
- Senior and local "buy-in" may be difficult
- May not be perfect from a legal perspective in every jurisdiction
- Resources and training may be needed to upskill local HR/ER/compliance functions to required standard

Developing a Global Standard

- Typical approach
 - Identify which jurisdiction drives the company's values
 - Prepare an approach for that jurisdiction
 - Assess significant other jurisdictions
 - Seek legal advice on the local law requirements of those significant jurisdictions
 - Assess local law feedback and decide:
 - Which rights and benefits to enhance globally (leveling up to most beneficial)
 - Which rights and benefits to maintain globally (accepting associated legal risks)
 - Which rights and benefits to confer locally (by way of exception)

Crisis-Management Plan

- Ensure that a good crisis-management plan is in place



Taking Prompt Action

- React more quickly and decisively to harassment claims
- Engage in greater attempts to investigate anonymous claims
- Act firmly and promptly
- Follow reasonable investigatory steps
- Take a comprehensive approach to making “zero tolerance” for sexual harassment a permanent reality
- Provide more transparency regarding investigations and their outcomes



Reasonable Investigations

1. Investigation Scope
2. Investigation Plan
3. The Meetings
4. Gathering Evidence
5. Investigation Report
6. Recommendations

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WORKPLACE CULTURE ASSESSMENTS



Workplace Culture Assessments – Becoming a Best Practice

- Since the #MeToo movement, we have conducted more workplace culture assessments than ever before.
- Workplace culture assessments provide valuable information and observations and allow employers to get ahead of issues in the workplace that may be percolating.
- These assessments are tailored and customized for companies.
- Our recent assessments have involved talking with thousands of employees in individual interviews or focus groups.

Overview of Workplace Assessments

- **Identification of issues:**
 - We work with management and HR to identify the scope of assessment and whether to use focus groups, individual interviews, or a combination of both
 - We then develop a “bull’s-eye” question map
 - From there we identify specific questions to be asked in focus groups and/or individual interviews
- **Analysis:** we identify key themes, trends, and/or areas for follow-up or escalation based on what we heard in focus groups or interview sessions
- **Results and recommendations:** we provide concrete recommendations based on the themes that we heard
- **Implementation:** we work with management and HR to implement recommendations

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Themes

- The power phenomenon in the workplace is real; relationships in the workplace involving the power dynamic (superiors/subordinates) cannot be truly consensual.
- Men question whether companies are “pulling the trigger too quickly.”
- Most employees lack knowledge regarding procedures for complaining.
- Employees are reluctant to complain for fear of retaliation and victimization.
- Unintended consequences include undermining the mentoring and development of women by senior male leaders for fear of sexual harassment claims.

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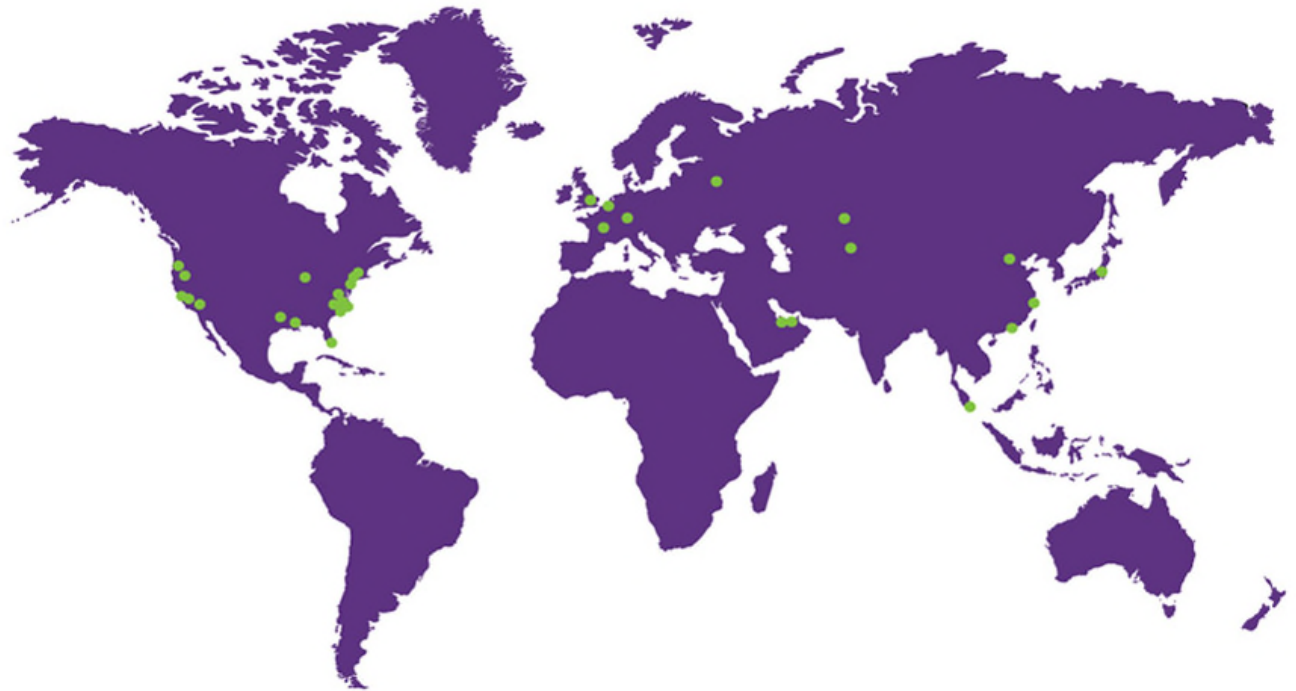
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