

# CFMGMA

## Preparing for #MeToo

### PREVENTING AND RESPONDING TO SEXUAL HARASSMENT CLAIMS

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# #ME



# Sexual Harassment

## Preparing for #MeToo: Preventing and Responding to Sexual Harassment Claims

### **Sexual Harassment:**

“Unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature.”

Two Types:

- Quid Pro Quo
- Hostile Environment

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**Quid Pro Quo:** An authority figure at your practice offers or merely hints that he or she will give employee something in return for the employee satisfying a sexual demand.

- Give raise, promotion, hiring or firing

**Hostile Environment:** Employee's work environment is made hostile due to the unwelcome conduct, and the conduct unreasonably interferes with the employee's performance.

- Making offensive sexual comments, displaying sexually-oriented materials
- Does not have to include sexual advances
- What constitutes pervasive and severe?

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## Retaliation is Prohibited!

Retaliation occurs when an employee suffers an adverse employment action for filing a sexual harassment complaint (for himself/herself or on behalf of another).

Examples include:

- Termination
- Demotion
- Reassignment
- Failure to award pay increases
- Failure to promote
- Poor performance evaluations
- Isolating the complainant

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## Direct Liability for Sexual Harassment

- Harasser is victim's supervisor
- When the practice has either failed to have a process in place to prevent harassment or knew (or should have known) about the conduct and did not investigate.

## Defense:

- They took reasonable care to stop and efficiently remedy the problem; and
- Employee failed to take advantage of opportunities for recourse.

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Employers can also be liable to third parties. (patients, vendors, pharmaceutical sales reps, etc.) if:

- The employee made an effort to inform the employer of the harassment;
- The employer knew or should have known that the harassment was occurring; and
- The employer failed to take prompt and appropriate corrective action that was reasonably likely to prevent the recurrence of harassment.



# BEYOND THE EEOC: Local Laws Shifting the Paradigm

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## BEYOND THE EEOC

### Title VII:

- 300 days to file Charge of Discrimination with EEOC and/or dual file with Florida Commission on Human Relations (FCHR)
- 90 days to file federal civil lawsuit after receipt of “right to sue” letter

### Florida Civil Rights Act:

- One year to file Charge of Discrimination with FCHR
- 180 days to investigate and issue determination
  - Cause
  - No Cause
- After 180 days
  - Four year statute of limitations to file civil lawsuit under Florida law

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## BEYOND THE EEOC

### City of Orlando Human Rights Ordinance: Chapter 57

- Smaller employers, includes individual actors
- 180 days to file Complaint of Discrimination
- 150 days to investigate
- No Cause: Petition board for review; Appeal to Ninth Circuit
- Cause: Conciliation; Public Hearing before Chapter 57 Review Board

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## BEYOND THE EEOC

### Orange County Human Rights Ordinance: Chapter 22

- Smaller employers, includes individual actors
- No administrative remedies
- Claimant can go straight to court
- One year statute of limitations



# PREVENTION

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### PREVENTION

#### Five Measures:

- Strong, committed leadership
- Regular and proven accountability
- Robust and comprehensive anti-harassment policies
  - Regularly communicated
  - Readily accessible
  - Address third party harassment
- Reliable complaint procedures
  - Internal
  - External
- Routine, interactive training
  - All employees



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## PREVENTION

### Investigate Complaints Promptly:

- Legal and ethical obligation to do so
- Prompt and thorough
- Independent review
- Interview complainant, target, and witnesses
- Document each stage of investigation

### Prompt Corrective Action:

- If harassment is confirmed
- If harassment is not confirmed
- Follow up with complainant



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## PREVENTION

### Special Issues

- “Minor” complaints
- Old news
- Victim does not cooperate





# Preparing for #MeToo: Preventing and Responding to Sexual Harassment Claims

## SILENCE IS NO LONGER GOLDEN: CONFIDENTIALITY IN SEXUAL HARASSMENT INVESTIGATIONS AND SETTLEMENT AGREEMENTS

### Investigations:

- Instructing witnesses to maintain confidentiality: Unfair Labor Practice
- NLRB: Employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employ.

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## **SILENCE IS NO LONGER GOLDEN: CONFIDENTIALITY IN SEXUAL HARASSMENT INVESTIGATIONS AND SETTLEMENT AGREEMENTS**

- Employer must determine on a case by case basis:
  - whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated and there is a need to prevent a cover up.
  - only if the employer determines that such a corruption of its investigation would likely occur without confidentiality is the employer free to prohibit its employees from discussing these matters among themselves.
- Employer may need to use investigation as an affirmative defense to sexual harassment claim.

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## **SILENCE IS NO LONGER GOLDEN: CONFIDENTIALITY IN SEXUAL HARASSMENT INVESTIGATIONS AND SETTLEMENT AGREEMENTS**

### **Settlement/Severance/Separation Agreements:**

- Employee may not waive right to file a Charge of Discrimination.
- Employee may waive right to recover monetary or other individual relief if Charge is filed.

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## SILENCE IS NO LONGER GOLDEN: CONFIDENTIALITY IN SEXUAL HARASSMENT INVESTIGATIONS AND SETTLEMENT AGREEMENTS

- Tax Cuts and Jobs Act:
  - Eliminates the deduction for any payment or settlement related to sexual harassment or sexual abuse that is subject to a confidentiality or nondisclosure provision.
  - Payments Related to Sexual Harassment And Sexual Abuse—No deduction shall be allowed under this chapter for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney’s fees related to such a settlement or payment.
- Some states (e.g., New York, Washington) implementing outright ban on confidentiality/non-disclosure agreements in the settlement of a sexual harassment claim.

## Preparing for #MeToo: Preventing and Responding to Sexual Harassment Claims

1. Change behaviors in the workplace for the common good
2. Foster mutual respect for coworkers of all genders
3. Reduce distractions
4. Increase **productivity**
5. Attract and retain **talent**



**THANK  
YOU**

# QUESTIONS?



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