"What to Do in #MeToo?"

Dear Helga,

As we sit here in 2019, the #meToo movement really has changed the landscape in our firm. Of course, this is a great thing! That said, we still are having issues and I am wondering if you can share with me some mistakes you see law firms still making in the #MeToo era so that my firm can avoid problems.

Signed,

Advancing in Arlington
Legal Background

1. Why important to act
   a. Legal
   b. Fairness
   c. Productivity
   d. Public/firm/client/employee relations
   e. #metoo

***Power dynamic inherent to many organizations

2. Two types of unlawful harassment
   a. Quid pro quo
      i. Always based on sex
      ii. But why does it really happen?
   b. Hostile work environment
      i. Based on any protected group
Mistakes We’re Making in 2019

1. Adhering to our "old" EEO Policies
   a. Include non-defenses
      i. Intent
      ii. Just a joke
      iii. Very important person
      iv. We are of same gender, race, etc.
      v. Just who he/she/they are
   b. Examples of conduct
   c. Focus on inappropriate behavior
   d. Adherence to state laws

2. Not addressing romantic relationships
   a. What is firm approach?
      i. No restriction
      ii. Full restriction
      iii. Supervisor and non-supervisor
   b. Real impact
   c. Policy consideration
   d. “Love contracts”
Mistakes We’re Making in 2019

3. Ignoring bystander responsibility
   a. EEOC Task Force
   b. “Manager” responsibility and firm liability
   c. What about everyone else?
      i. Complete
      ii. Partial
      iii. None
   d. Consequences
   e. Policy

Mistakes We’re Making in 2019

4. Inaction when complainant requests inaction
   a. Talking as a friend
   b. Don’t do anything
   c. “Off the record”
   d. Request for confidentiality
“Trying To Get There Faster”

Dear Helga,

I do my best to keep up with the legal and practical developments related to transgender employees. As you may guess, my firm, however, is a bit behind the times and I’m trying to get us to catch up faster. Can you please provide me with information that will help me convince the powers that be that this is important?

Signed,

Concerned in Columbus

LGBTQ Inclusion at Fortune 500 Companies

1. As of end of 2018:
   a. 83% include gender identity and/or expression in their non-discrimination policies (20 years ago, this was about 3%)
      i. All 10 of Fortune 10 companies do so
   b. Over 60% provide transgender-inclusive healthcare benefits, including coverage of surgical procedures
      i. Approximately 45% of AmLaw 200 do so
LGBTQ Employees’ Workplace Experiences

1. Studies have indicated that 53% of LGBTQ employees have heard jokes or derogatory comments about LGBTQ people at work (Human Rights Campaign)

2. 31% of LGBTQ workers say they have felt unhappy or depressed at work (Human Rights Campaign)

3. Approximately 35% of LGBTQ employees feel they must lie about their personal lives (Catalyst)

4. Approximately 20% of LGBTQ workers report having been told or had coworkers imply that they should dress in a more feminine or masculine manner (Human Rights Campaign)

5. Approximately 43% of LGBTQ employees have experienced workplace discrimination (Williams Institute)
Definitions

1. Just so we’re all on the same page. . . .
   a. Sexual orientation
   b. Gender Identity
   c. Gender Expression
   d. Transgender
   e. Queer

Sexual Orientation

1. An individual’s experience of being physically and/or or emotionally attracted to men, women, both men and women, other types of gender expression, or people with any gender expression
Gender Identity

1. Gender identity is an individual’s sense of being a man or woman, falling outside or in between the gender binary, or combining aspects of multiple genders
2. Everyone has a gender identity

Gender Expression

1. Gender expression describes the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns, and social interactions
Transgender

1. Transgender people are people who have a gender identity or gender expression that is different from that traditionally associated with their assigned sex at birth
2. Transgender women are transgender people who identify as women
3. Transgender men are transgender people who identify as men

4. Some people who identify as transgender do not identify as men or as women
5. Some people who meet the definition of transgender do not identify with the word transgender
6. Transgender people span all communities, backgrounds, races, ethnicities, ages, sexual orientations, and abilities
Queer

1. Was, in the past, considered a pejorative and offensive term
   a. Still is to some inside the LGBTQ community

2. Today, more of an umbrella term and includes anyone who:
   a. Feels somehow outside of societal norms in regard to gender and sexuality
   b. Wants to identify as queer

Federal Law

1. Title VII of the Civil Right Act of 1964
   a. Prohibits discrimination on the basis of “sex”
   b. Interpretation by EEOC and some courts
      i. Protection for transgender employees based on stereotyping and gender non-conformity
         • Schroer v. Billington (District Court for District of Columbia) (2008)
         • Macy v. Holder (EEOC – 2012)
         • “Addressing discrimination based on gender identity is a priority for the commission [EEOC]” – David Lopez, Former EEOC General Counsel
State Laws

1. Gender Identity
   a. 21 states + D.C. prohibit discrimination in private and public employment:

Interviewing and Hiring

1. Be ready to respond to common questions
   a. Organizational policies (e.g., trans-inclusive healthcare, restroom usage, etc.)?
   b. Comfortable environment for LGBTQ employees?
      i. Provide training – include gender identity/ gender expression issues
   c. How many LGBTQ employees?
      i. Likely very difficult to provide
   d. Employee resource groups?
   e. Leadership positions
Interviewing and Hiring

2. Danger zones in decision making process
   a. Personal comfort level
   b. Bad cultural fit
   c. Perceived customer disapproval/preference

3. Diversity in decision-makers
   a. LGBTQ representation

Practical Steps We Can Take

1. Review handbooks/polices
   a. Consider removing “he or she” and “him or her” and replace with “they” or “their”

2. Internal demographic purposes
   a. Rather than asking “gender,” consider asking “how would you describe your gender identity”
      i. Male
      ii. Female
      iii. In another way
      iv. Prefer not to say
      v. Other
Practical Steps We Can Take

3. EEO policy
   a. Specific examples
   b. Include non-binary gender designations among categories not to be considered in employment decisions

4. Pronoun issues

5. Restrooms

6. Appearance policy

“It’s All Written In Ink”

Dear Helga,

I’m not entirely sure why, but over the last year or two, we have had increasing and not insignificant issues arising out of our lawyers’ and staff’s irresponsible use of e-mail. Can you please provide me with some helpful and practical guidance I can bring back to my firm?

Signed,

Frustrated in Fresno
Overview of E-mail

1. E-mail more “casual” form of communication.
2. E-mail culture makes it closer to verbal, than to written communications.
3. Ease of e-mail means people are sending and receiving more documents than ever before.
4. E-mails are survivors – the “cockroaches of mass communication.”
5. Deleted e-mails can be retrieved. It’s all written “in ink.”

Why Are We All Here Today?

1. “Casual” e-mail use sometimes leads to unguarded use
   a. Quick response at expense of precision;
   b. Memorializes a conversation that often should be conducted by phone or in person;
   c. E-mails often reach unintended recipients;
   d. Often mix different subjects; and
   e. Can completely lose control after widespread dissemination.
2. These risks apply to everyone
Workplace E-mail Errors

1. Wrong E-mail Address
   a. In July 2014, a Goldman Sachs contractor mistakenly e-mailed highly sensitive brokerage account client data to an unknown Gmail account instead of an internal “gs.com” account.

   http://www.reuters.com/article/us-google-goldman-leak-idUSKBN0F729I20140702

2. “Auto-Completion” of an E-mail Address
   a. An outside lawyer for pharma company Eli Lilly & Co., had two people named "Berenson" in her e-mail address book:
      i. co-counsel assisting in confidential negotiations on a possible $1 billion settlement between Eli Lilly and the Government; and
      ii. the other a reporter for the New York Times.
Workplace E-mail Errors

2. “Auto-Completion” of an E-mail Address
   b. Consequences: The Times ran a front-page story revealing efforts to resolve criminal and civil investigations into marketing of the anti-psychotic drug Zyprexa.

   Debra Cassens Weiss, Did Lawyer's E-Mail Goof Land $1B Settlement on NYT's Front Page?, ABA JOURNAL, Feb 6, 2008.

THINGS TO AVOID
Avoid “Reply All”

Example of Embarrassing “Reply All” E-mail

1. CEO of Spirit Airlines inadvertently included customer in a “Reply All” response to a complaint about a delayed flight:

   Please respond, Pasquale, but we owe him nothing as far as I’m concerned. Let him tell the world how bad we are. He’s never flown us before anyway and will be back when we save him a penny.
Avoid Using an Older E-mail Where Subject Matter Is Different

1. Using an old e-mail chain (particularly when adding new recipients) could unintentionally reveal:
   a. Privileged information
   b. Confidential information not intended for certain individuals’ consumption
   c. Totally unrelated topics

Avoid Hyperbole, Inflammatory Language, Speculation and Sarcasm

Example: The day after Apple CEO Steve Jobs’ 2004 Macworld keynote speech, a Windows executive wrote this leaked e-mail:

I am not sure how the company lost sight of what matters to our customers (both business and home) the most, but in my view we lost our way...I would buy a Mac today if I was not working at Microsoft.
GOOD E-MAIL PRACTICE

1. Think Before You Write
For Example, Use Correct Punctuation

“Let’s eat grandma”
“Let’s eat, grandma”

Punctuation... It saves lives.

Proofread

Dear Team,

Attached please find the Final Project.

I apologize for any incontinence caused by the delay.

Regards,
Failed Proofreader
2. Be Aware that Tone Does Not Always Translate

Avoid Inappropriate Language

1. Don’t write anything you would not want a judge or a regulator or national newspaper to see
2. Think before you write
3. Make sure you have your facts straight
**Avoid Inappropriate Language**

4. Review e-mail from the reader's perspective and revise before you hit send

5. Limit the circulation list (send only to necessary recipients)

6. When sending to a large group, include request to “reply only to me”

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**“Trust the Process”**

Dear Helga,

As I know you know, we in HR, well, we are incredibly busy. That said, one of the things that really is time-consuming is when I receive an EEO complaint and then have to investigate. Obviously, I understand the critical nature of the investigation, but is there anything you can do to help streamline the process, at least at the beginning?

Signed,

Marred in the Muck in Malvern
Do We Need To Investigate?

1. Whether to Investigate
   a. Investigate if:
      i. Employee brings complaint directly to HR
      ii. Manager/supervisor reports (as required) a complaint made to him or her by employee
      iii. Employee reports complaint by co-worker
      iv. Anonymous complaint capable of investigation
      v. Constructive discharge allegations
      vi. Complaint upon involuntary termination
      vii. Complaint filed with administrative agency

Requests for Non-Action

1. When Employee Requests No Investigation – Tangible Action Alleged
   a. Tangible employment action: duty to investigate
Requests for Non-Action

2. When Employee Requests No Investigation – No Tangible Action Alleged
   a. Presumption in favor of investigation
   b. Factors to consider (include but are not limited to):
      i. Severity
      ii. Pervasiveness
      iii. Whether others impacted
      iv. Positions of parties
      v. When and where

Requests for Non-Action

2. When Employee Requests No Investigation – No Tangible Action Alleged
   c. If don’t investigate:
      i. Document basis in memo to employee (not just to file)
      ii. Follow-up with complaining employee and monitoring behaviors
Can HR Investigate?

1. Who Should Investigate?
   a. Refrain from participating in investigation if actual, potential or perceived conflict of interest, such as:
      i. Personal relationship with either party
      ii. Necessary witness to any of the material events
      iii. Don’t think you can be objective for any reason
   b. If allegations are very serious in terms of either severity or pervasiveness or involve senior manager/executive/officer, consider investigation by inside or outside counsel or outside human resources consultant

Let’s Get Started

1. Setting Schedule
   a. Complainant first
   b. Who next?
      i. Accused?
      ii. Witnesses?

2. Be PROMPT!