



How the #MeToo and Pay Equity Movements Impact Higher Education – And What to Do About It

Sponsored by  realize your potential

April 19, 2018

KNOWLEDGE | RESOURCES | ADVOCACY | CONNECTIONS

---

---

---

---

---

---

---

---



Presenter



Lynn A. Clements, Esq.  
Director, Regulatory Affairs  
Berkshire Associates Inc.



KNOWLEDGE | RESOURCES | ADVOCACY | CONNECTIONS

---

---

---

---

---

---

---

---

**Agenda**

- Why the #MeToo movement matters
- What are the legal risk areas
- Best practices for mitigating risk
- Equal Pay in higher education
- State law developments and legal risk areas
- Best practices for mitigating risk



---

---

---

---

---

---

---

---

### #MeToo and #Time'sUp

- Last several months have brought a tidal wave of well-publicized allegations of workplace sexual harassment
  - Allegations span industries from entertainment to migrant farm work
  - Victims are men and women, young and old
  - Accusations range from sexual assault, to "voluntary" activities tainted by an abuse of power, to broad "inequality" between men and women in the workplace, to bystanders and companies turning a blind eye to repeated instances of inappropriate behavior

---

---

---

---

---

---

---

---

### #MeToo and #Time'sUp

- Created a call to action much like the equal pay movement
  - Legal defense fund for low income women managed by the National Women's Law Center
  - Key focus areas:
    - Advocate for revised laws, employment agreements and company policies to ensure harassment allegations are adequately addressed
    - Immediate accountability for safe and equitable workplace
    - Change the face of the C-suite
    - Retell women's stories to shift society's perception of women

---

---

---

---

---

---

---

---

### #MeToo and #Time'sUp

- Shines a spotlight on the compliance program of all employers
  - Evaluate vulnerable work environments and risky employment practices
  - Audit and update harassment policies
  - Review confidentiality and mandatory arbitration provisions of employment agreements
  - Conduct effective anti-harassment messaging and training
  - Revamp investigative procedures to address contemporary issues and ensure accountability

---

---

---

---

---

---

---

---

### Evaluate Legal Risk Areas

- EEOC Checklists and Chart of Risk Factors  
[https://www.eeoc.gov/eeoc/task\\_force/harassment/checklists](https://www.eeoc.gov/eeoc/task_force/harassment/checklists)
- Vulnerable populations
- Addressing stale allegations, open "secrets" and social media #reports
- Determining whether a single or infrequent acts of harassment are severe enough to warrant action, and at what level
- Harassment allegations involving a repeat offender – determining the line between progressive discipline and need to terminate
- Balancing rights of victim and accused, especially if accused is "star"

---

---

---

---

---

---

---

---

### Evaluate Legal Risk Areas

- Biggest risk area may be effectively addressing the failure to report allegations
  - Nearly half of working women in the U.S. say they have experienced harassment in the workplace. [NBC News \(2017\), "NBC/WSJ Poll: Nearly Half of Working Women Say They've Experienced Harassment"](#)
  - 1 in 3 women ages 18 to 34 have been sexually harassed at work. 71% of those women said they did not report it. [Cosmopolitan survey of 2,235 full and part-time female employees, 2015](#)

---

---

---

---

---

---

---

---

### Poll Question

- What do you believe is the biggest #MeToo legal risk area for your institution?

---

---

---

---

---

---

---

---

### Audit Harassment Policies

- Address all forms of actionable harassment
- Ensure that policy clearly prohibits retaliation, and that witnesses are also protected from retaliation
- Confirm that policy covers inappropriate behavior by third-parties
- Have multiple avenues of complaint, including formal and informal mechanisms
- Distribute policy to all employees at beginning of employment and on a periodic, regular basis

---

---

---

---

---

---

---

---

### Train, or Retrain, Employees

- Revisit who provides and attends training
- Set the tone from a leadership level
- Revise training examples to
  - Focus on unwelcome conduct that may seem "voluntary"
  - Address identified legal risk areas
  - Emphasize how past unreported allegations will be handled
  - Reset expectations regarding accountability
- Add unconscious bias training, especially for managers
- Consider bystander training

---

---

---

---

---

---

---

---

### Poll Question

- Has your institution conducted, or have plans to conduct, bystander training?

---

---

---

---

---

---

---

---

### Conduct Effective Investigations

- Investigate every complaint, no matter how minor.
- Define the purpose and scope of the investigation in writing.
- Determine whether investigation should be conducted by internal or external resource.
- Investigate promptly but do not rush to judgement.
- Ensure investigator understands difference between “voluntary” and “unwelcome” behavior.
- Take deliberate steps to avoid unconscious bias.
- Maintain confidentiality to the greatest extent possible.
- Follow through on investigation, including results.
  - A dropped investigation = no investigation

---

---

---

---

---

---

---

---

### Conduct Effective Investigations

- Document your investigation carefully - assume 12 jurors will review your report.
- Do not assume you will be available to answer questions later about the file.
- An outside party should be able to reconstruct the entire investigation from your report.
- An omission or mistake in documentation may become “Exhibit 1” in a lawsuit!
- Use COAT as your guide
  - Careful
  - Objective
  - Accurate
  - Thorough

---

---

---

---

---

---

---

---

### Proactive Planning for Crisis Management

- Proactively addressing power imbalance issues
- Establish a strong working relationship with faculty
- Develop a plan for handling “reputational issues”
  - Messaging to stakeholders
  - Media monitoring
  - Deciding when and how to comment

---

---

---

---

---

---

---

---

### Equal Pay

- Continued focus on equal pay at EEOC and OFCCP
- Private litigation is growing
- Obama-era pay transparency requirements remain in place – culture of disclosure is being created
- Public and institutional demand for fair pay studies and disclosures

---

---

---

---

---

---

---

### Equal Pay

- Flurry of states and localities have revised pay discrimination laws since 2016
  - Varied scope of who should be compared
  - Narrowed defenses
  - Requirement to explain “entire pay difference”
  - Bans on use of salary history
  - Affirmative defenses for conducting proactive salary equity studies

---

---

---

---

---

---

---

### Poll Question

Does your institution rely on prior salary history when setting starting pay?

---

---

---

---

---

---

---

### Evaluate Legal Risks

- How similar are you to other organizations who lost or settled a pay equity case?
- When is the last time you analyzed compensation data for pay discrimination?
- Do you have all of the available data you need?
- How many employees receive pay from multiple different sources?
- Are employees voicing complaints?

---

---

---

---

---

---

---

---

### Evaluate Legal Risks

- Are there pay compression concerns at your institution?
- How much of your explanation for pay differences is tied to assignment, promotion, performance history, department, or similar factors?
  - When have you last examined the fairness of these processes?
  - Are there any steering concerns?

---

---

---

---

---

---

---

---

### Develop a Comprehensive Plan

- Develop a comprehensive plan
  - Are you preparing an offensive or defensive analysis?
  - What is timing of study?
  - What budget is available for equity adjustments?
  - Will you examine base pay only, or merit increases, bonuses, overtime, etc.? How will you handle payments from multiple sources?
  - If for OFCCP compliance, keep in mind the agency often reviews by job group

---

---

---

---

---

---

---

---

### Poll Question

If your institution is a federal contractor, have you reviewed your job groups in the last 24 months to determine if they are appropriate groupings in today's enforcement environment?

---

---

---

---

---

---

---

---

### Best Practices for Mitigating Risk

- Determine who you will compare in your pay analysis
  - State Personnel/Classified Employees
  - Academic Professionals
  - Union vs Nonunion Employees
  - Student Employees
  - Temporary Staff
  - University-affiliated hospital staff
  - Faculty distinctions

---

---

---

---

---

---

---

---

### Best Practices for Mitigating Risk

- Gather the data you believe influences pay
  - Time based variables first (time with institution, time in job)
  - Level/grade/salary band
  - Department/school/college
  - Geographical differences
  - Educational attainment/certifications
  - Prior experience/age or time since earning degree as proxy
  - Performance

---

---

---

---

---

---

---

---

### Best Practices for Mitigating Risk

- Evaluate data using appropriate statistical model under attorney-client privilege
- Refine analyses as you gain insight into how pay decisions are made
- Investigate areas with unexplained disparities
  - Common factors or employee-level explanations
  - Develop a plan for gathering “missing data” that could explain differences
- Carefully implement any equity adjustments

---

---

---

---

---

---

---

---

### Best Practices for Mitigating Risk

- After your analysis, evaluate system changes
  - Decide whether your institution will rely on salary history, if still permitted under state or local law
  - Decide if you will enhance early communications about salary levels or monitor/limit late-stage negotiations
  - Train managers on pay equity considerations and develop a clear process for documenting exceptions
  - Develop/Enhance system for monitoring decisions that impact pay going forward

---

---

---

---

---

---

---

---

### Questions?

Lynn Clements, Esq.  
Director, Regulatory Affairs  
Berkshire Associates Inc.

[lync@berkshireassociates.com](mailto:lync@berkshireassociates.com)  
800.882.8904 ext. 1246



---

---

---

---

---

---

---

---



**Thank You!**

How the #MeToo and Pay Equity Movements Impact  
Higher Education – And What to Do About It

April 19, 2018



KNOWLEDGE | RESOURCES | ADVOCACY | CONNECTIONS

---

---

---

---

---

---

---

---