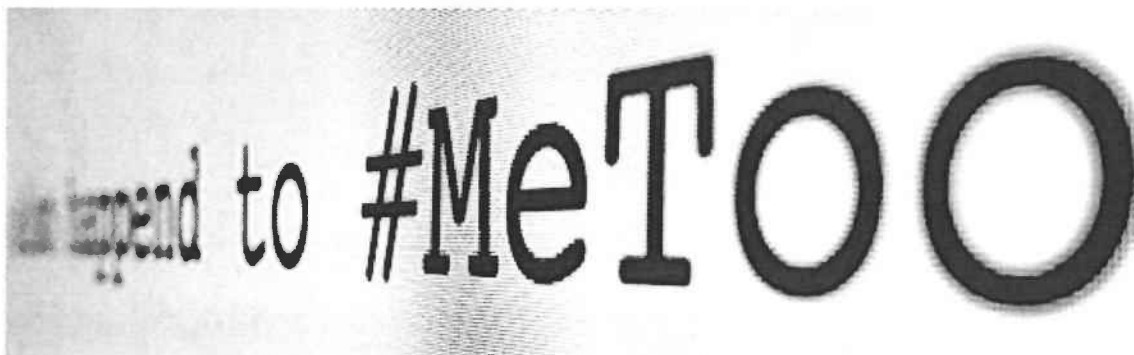


## The Legal Consequences of Saying #MeToo

By Anna Stolley Persky

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2017 was the year that brought the issue of the prevalence of sexual harassment and sexual assault into the mainstream consciousness, from the rise of the #MeToo movement to the ensuing fall from grace of Hollywood mogul Harvey Weinstein and other high-profile names.

Activist Tarana Burke coined the phrase "Me Too" in 2006, but in October 2017 it became viral after actress Alyssa Milano's tweeted: "If all the women who have been sexually harassed or assaulted wrote 'Me too' as a status, we might give people a sense of the magnitude of the problem." And they did.

The hashtag took off on social media, offering women and some men a different outlet to describe their experiences with assault and harassment. Personal stories continue to flood social media today, sometimes with vivid details, sometimes with just the hashtag #MeToo or, now, #TimesUp.

"One powerful aspect of the #MeToo movement is that people are choosing to speak their truths and they have done so and continue to do so in an empowering way," says Debra S. Katz, founding partner of the Washington, D.C.-based Katz, Marshall & Banks. "People are writing in this movement to get something off their chests that has been too painful to talk about before. It's an important movement, and there's a psychic healing value of not being silenced."

But Katz, a well-known employment discrimination lawyer, cautions people who want to share their stories to pause a moment first to determine if the cost of speaking out outweighs the benefit.

There could be, Katz warns, unintended consequences of speaking about a #MeToo moment, especially for victims considering litigation or pursuing some sort of behind-the-scenes remedy to a particular employment situation.



“People need to be aware that there are potential risks to speaking out, especially if you are naming names and alleging specific conduct,” says Katz.

In some cases, women and men are posting about past work or personal situations, but have no intention to pursue any legal recourse. In many circumstances, these moments occurred years, even decades earlier, but were never forgotten. For these individuals, the cathartic value of speaking out may well outweigh any concerns of legal consequences.

Even under these circumstances, Cynthia Calvert, president of Workforce21C in Ellicott City, Maryland, encourages women and men to speak out, but to be as vague as possible.

“When it comes to the #MeToo movement, there are some powerful reasons for speaking out, such as being part of a broader picture for societal change,” says Calvert, whose organization helps employers advance women. “The concern is a defamation suit, but truth is always a defense. However, if you can avoid a lawsuit in the first place, that’s preferable. So be truthful, but keep it brief.”

An even more difficult question is whether or how much to post about harassment or assault that is currently occurring.



Pete Whelan, a partner in the Washington D.C., office of Bernabei & Kabat, PLLC, points out that individuals who describe their #MeToo moments on social media may find their posts landing in human resources before they are ready for HR to be involved.

“If you are friends with your coworkers, one of them could forward your post to HR,” says Whelan, who specializes in employment law. “There are lots of reasons to report harassment to HR, but you may not want your expressions of solidarity on Facebook to blow up into something that you hadn’t intended.”

Employment lawyers also specifically warn employees considering or involved in sexual harassment or discrimination litigation to be careful in everything they post online, especially #MeToo moments. If individuals feel compelled to post their

current #MeToo situation, they should be cautious about relaying any particulars, such as dates or times when the harassment or assault allegedly occurred.

“Your Instagram account, your LinkedIn account, your Twitter, your Facebook, your text messages are all open for discovery in litigation,” says Kara Maciel, chair of Conn Maciel Carey LLP’s labor and employment practice. “If your #MeToo post is different than your subsequent deposition, it could hurt your claim. Any inconsistencies or discrepancies in your story about what happened could hurt you.”

In addition, Calvert advises people who want to speak out as part of the #MeToo movement to clarify that they are not giving all of the details, using a statement like, “Of course, I won’t get into all the details here,” but also “make it clear that they were deeply affected by what happened to them.”

“You can be discredited later on, not just with what you say but with what you fail to say,” says Calvert. “They don’t want to have



lawyers parsing through how they said they were affected in an attempt to limit the types or amount of damages they are able to seek later on.”

In addition, someone trying to negotiate a settlement or quietly effectuate a change in an employment situation risks losing leverage by posting even allusions to a #MeToo situation.

“Companies are often trying to buy silence, so if an accusation of sexual harassment or discrimination has been put in the public domain, they will have less of an incentive to settle at a premium rate,” says Katz.



Additionally, Amy Bess, a shareholder in the Washington, D.C., office of Vedder Price and chair of the firm’s labor and employment practice, warns that the age-old concern that speaking up about current harassment or discrimination could trigger retaliation is still, sadly, “a very real possibility.”

“The risk of retaliation, being fired or demoted, has stymied women and kept them quiet. That risk hasn’t gone away,” says Bess.

Bess adds that women who speak up could also be labeled a troublemaker or “squeaky wheel.”

“This subtle form of retaliation still exists,” says Bess. “As this movement evolves, this will hopefully be less and less of a concern, but it is still something to consider.”

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*A member of the California State Bar and recovering lawyer, Anna Stolley Persky has worked in newspapers, wire service, magazines and television, usually reporting on legal affairs. Stolley Persky is also an adjunct professor at Penn State Dickinson Law.*