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RESEARCH
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Sexual Harassment in the Workplace #MeToo & #TimesUp Movement

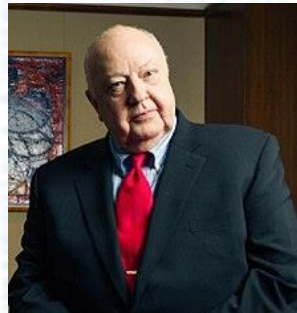
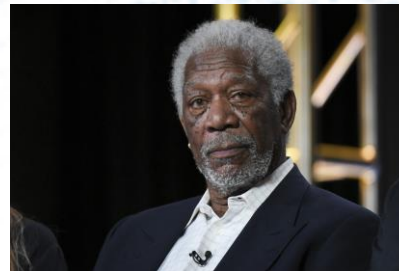
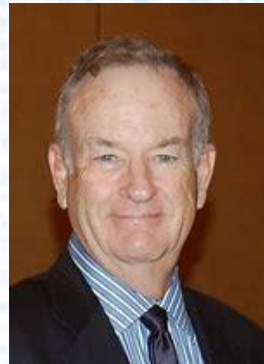
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#Me Too in the News



#Me Too in the News Celebrities and CEO's



Business Leaders





Times Up

TIME'STM ==UP

The clock has run out on sexual assault, harassment and inequality in the workplace. It's time to do something about it.

<https://https://www.timesupnow.com/>

Regina King at the Golden Globes January 6, 2019

<https://www.instagram.com/p/BsUXdn7AwE5>



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Harassment in the News Transit Industry

Muni Chief Steps Down Amid Growing Pressure over Harassment Allegations



<http://www.sfexaminer.com/embattled-sfmta-transit-director-steps-amid-pressure-harassment-allegations>



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Federal Law Update

- Title VII of the Civil Rights Act of 1964
 - Sexual harassment victims are protected under the law, because it's a form of sex discrimination that violates [Title VII of the Civil Rights Act of 1964](#).
 - Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.
 - Quid Pro Quo (This for That)
 - Hostile Work Environment



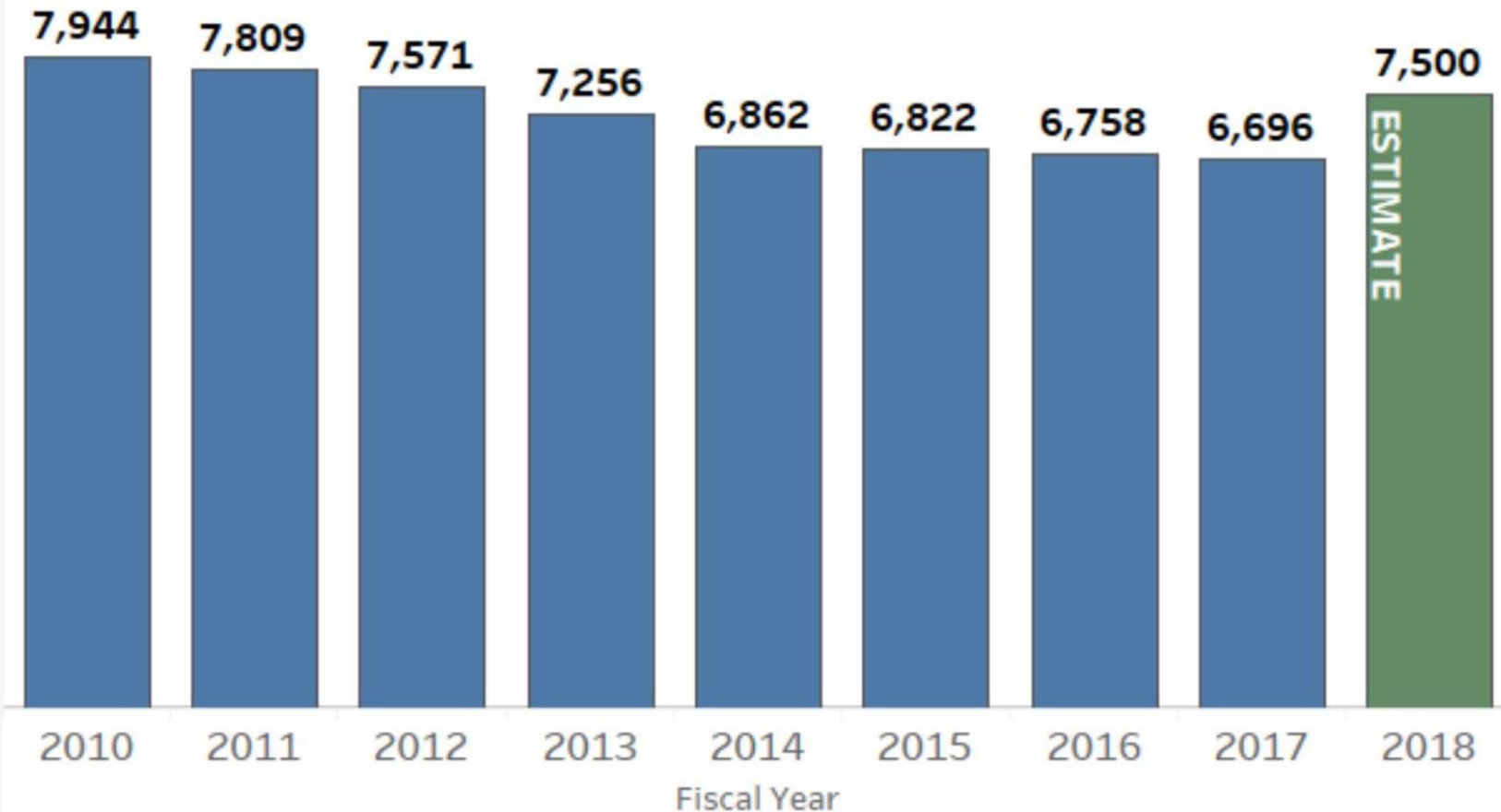
EEOC

Vigorous Enforcement (continued)

- In the year since the #MeToo movement took off, the EEOC has launched 50% more sexual harassment lawsuits than it did the previous year and has seen a spike in the number claims.
(see, <https://www.law360.com/articles/1089413/print?section+employment>)
- For charges alleging harassment, reasonable cause findings increased to nearly 1,200 in FY 2018 compared to 970 in FY 2017. Successful conciliations reached nearly 500 up from 348 in FY 2017.
- The EEOC recovered nearly \$70 million for the victims of sexual harassment through administrative enforcement and litigation in FY 2018, up from \$47.5 million in FY 2017.

EEOC Charges Of Sexual Harassment Climb

For the first time this decade, the U.S. Equal Employment Opportunity Commission had an increase in sexual harassment complaints.



Source: U.S. Equal Employment Opportunity Commission



EEOC

Vigorously Enforced the Law to Combat Workplace Harassment

EEOC Preliminary FY 2018 Sexual Harassment Data

- The EEOC filed 66 lawsuits challenging workplace harassment.* 41 of which alleged sexual harassment. A 50+% increase from 2017.
- In both June and August, the EEOC coordinated the filing of federal court cases around the country as a reminder that harassment violates
 - Commissioner Feldblum, ***"Our challenge is to use this #MeToo moment well. We have a road map given the work we have done at the EEOC.*** We have the attention and commitment of the range of different actors in society that we need. Together, we can channel that energy to create significant and sustainable change."

*See, <https://www.eeoc.gov/eeoc/litigation/selected/2018harassment.cfm>



FTA Circular 4704.1A

- EEO Program Requirements
 - EEO Policy Statement and Written EEO Program
 - EEO Officer
 - Reports directly to CEO or GM
 - May need to separate from HR—no conflicts of interest or appearance
 - Knowledge of Civil Rights Laws
 - Authority and Ability to work with others
 - Investigate Complaints of Discrimination—EEOC Certified Investigator



Discrimination and Harassment Policies and Procedures –FTA Guidelines

- Review EEO/AA Statement and Program
- Update policies, procedures and releases
- Dissemination of EEO Policies and Procedures
 - Training Management and Employees
 - Complaint process
 - Accountability for EEO Policies and Procedures
- Investigation procedures
- Anti-Retaliation policy



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Other Federal Laws

Tax Cuts and Jobs Act of 2017 (TCJA)

26 U.S. Code 162 - Trade or business expenses

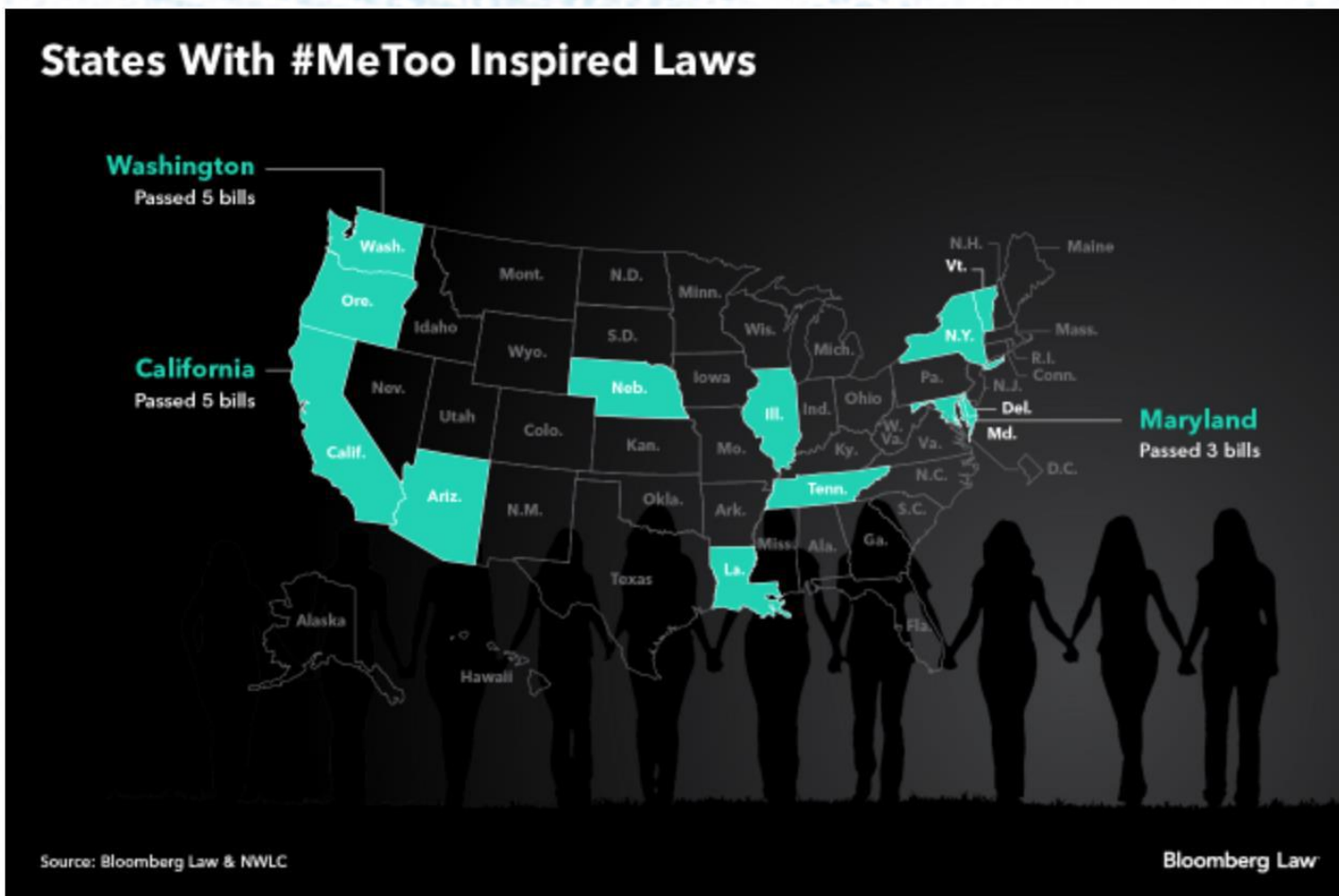
(q) Payments related to sexual harassment and sexual abuse

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](#).



State Laws



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State Laws

- Mandatory Training
 - i.e., New York state requires an “interactive’ training” for interns and employees
- Sexual Harassment Prevention Policies
- Anti-Retaliation Policies
- Tax laws
- Reporting time frames



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What is "Zero Tolerance" ?

- “Zero Tolerance” is misleading and potentially counterproductive.
- Accountability requires that discipline for harassment be proportionate to the offensiveness of the conduct.
- Although not intended as such, the use of the term "zero tolerance" may inappropriately convey a one-size-fits-all approach, in which every instance of harassment brings the same level of discipline.
- This, in turn, may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior - they simply want the harassment to stop.
- It is important for employers to communicate that absolutely no harassment will be permitted in the workplace, EEOC does not endorse the term “Zero Tolerance.”



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Increase Board and Senior Staff Engagement

- Extensive and Real Sexual Harassment Training
- Update Charters and Code's of Conduct
- Periodic Privileged Updates to the Board
- Investigation Process for Claims Against Management, including Senior or Executive Level
- Heightened Sensitivity to Harassment Issues since #MeToo



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Complaint and Investigation Matters

- Multiple Avenues to Complain
 - EEO
 - Complaint Hotline/Anonymous Complaints
- Process
 - Thorough, fair, respectful and credible
 - Satisfied employees do not sue
- Internal vs. External Investigation
- Updated Investigation Procedures
 - “Trauma Informed” Standards
 - Old and Stale Complaints
- Confidentiality
 - Confidentiality Agreement or Non-Disclosure Agreement (NDA)???



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Complaining Party

- What to do with Complaining Party if they are still with the Company?
 - Reporting Structure
 - Day to Day Interactions
 - Transparency of Investigation and Conclusion
 - Represented by an Attorney
 - Retaliation



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CULTURE IS KEY

*“Manuals and training are **useless** in workplaces **where bad behavior is silently tolerated**. It is **culture**, not compliance, that **guides workplace conduct**.”*

- Johnny C. Taylor

President and CEO of the Society for Human Resource Management



Union Matters

- Goals should be same as Employer
- Coordinate with EEO Officer
- Discipline for union members
 - Definitions and Processes to Complain
 - Meets work rule or contract definition “harassment”
 - Just Cause
 - Progressive if called for in agreement
 - Broad nondiscrimination clause—should include harassment under Title VII
 - Weingarten Rights
 - —Modified by NLRB Circus Circus Casino* (notes)





Unintended Consequences

- Meetings Alone?
- Overnight Business Trips?
- Friendly compliments?
- Opening doors?
- Hugs and other greetings?
- Interrupting?
- Hesitancy to mentor female employees?



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Backlash

#HimToo



THE WALL STREET JOURNAL

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MARKETS

Meet the Lawyer Representing Wall Street's #MeToo Men

John Singer helps men fired over allegations of unwanted advances and other misconduct

By *Rachel Louise Ensign*

Aug. 27, 2018 7:00 a.m. ET

12 COMMENTS

Mo



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Policies for Consideration

- Compare and update policies and procedures with Federal and State laws and “Best Practices”
- Non-Fraternization
 - Hard to enforce
 - “Love Contracts”



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Best Practices

- Review policies to define inappropriate workplace conduct
- Implement civility and bystander intervention training
- Robust complaint and investigation procedures
 - Must go further than traditional litigation defense
 - Train Investigators
 - Increased use of expert testimony on investigation process
- Track complaints and discipline
 - Consistent



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Best Practices

- **Clauses in Executive Agreements**
 - Define termination for cause to include a violation of company policy
 - Including substantial allegations/findings of sexual harassment.
 - Forfeit or Claw back Compensation
 - Including Benefits and Severance





Caselaw in the Transit Industry

- Evans v. Sharrocks; New York City Transit Authority
 - Former bus driver brought claim for sexual harassment and retaliation
 - Sharrock, her trainer, intentionally brushed up against her, and made inappropriate and disparaging sexual comments about women's intelligence and ability
 - Evans asserted that she performed properly during the training period, but the NYCTA purportedly refused to certify her as a bus driver, and terminated her employment.
 - Jury awarded her \$100,000 in lost wages, \$25,000 for pain and suffering and \$7,500 in punitive damages against Sharrocks



Case Law (Cont,)

Hamilton vs. First Transit

- Plaintiff claimed sexual harassment over a four-month period
- The harassment was reported on two occasions and no action was ever taken.
- Defendants conducted a two-day investigation but did not interview any of the female bus drivers at the worksite.
- Despite a request by the union that defendant Douglas be transferred to another location, the management refused to do so.
- As of the date of trial, Douglas was never transferred and no sexual harassment training was ever offered to the drivers.
- Jury awarded her \$1125,000 which was broken down as follows:
\$300,000 emotional distress damages; \$450,000 front pay;
\$375,000 punitive damages.



Legislative Updates

- At least 16 states introducing bills to restrict non-disclosure agreements.
- Has become law in Arizona, Maryland, New York, Tennessee, Vermont, California and Washington
- California:
 - the law will prohibit any provision in a settlement agreement that prevents the disclosure of factual information Including:
 - Acts of workplace sexual harassment;
 - Acts of workplace sex discrimination;
 - The failure to prevent acts of workplace sexual harassment or sex discrimination; and
 - Retaliation against a person for reporting sexual harassment or sex discrimination.



Appendix

Helpful Information



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EEOC Checklist for Employers

Leadership Accountability

Check the box if the leadership of your organization has taken the following steps:

- Leadership has allocated sufficient *resources* for a harassment prevention effort
- Leadership has allocated sufficient *staff time* for a harassment prevention effort
- Leadership has assessed harassment *risk factors* and has taken steps to *minimize* those risks



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Identifying Harassment

Hostile Work Environment

Such conduct has the purpose or effect of unreasonably *interfering with the individual's work performance or creating a intimidating, hostile offensive working environment*"



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Identifying Harassment

- Harassment can occur in a variety of circumstances, including, but not limited to, the following:
 - The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker or a nonemployee.
 - The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
 - Unlawful harassment may occur without economic injury to, or discharge of, the victim.



Identifying Harassment

Harassing Behaviors

- Unwanted Hugs, Touching, Kissing or Groping
- Date for Promotion or Repeated Requests for a Date
- Terms of Endearment (sweetie, honey, etc.)
- Inappropriate Pictures
- Staring, leering, winking or suggestive looks.
- Inappropriate Comments
- Sexually explicit texts, e-mails, cartoons, jokes or objects
- Cyberstalking
- Inquiries into personal lives or discussing sex life
- Whistling/ Cat Calls



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Anti-Retaliation Policy

- Strictly Prohibited
- Separate Cause of Action
- Company Transfer policies not in violation of Title VII
- Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.
- The EEOC [reported](#) that 70 percent of women who experience sexual harassment at their jobs don't report it, for fear their report would cause negative repercussions both personally and professionally.



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Other Harassment

- Offensive or disparaging remarks or conduct that is based on an individual's membership in any protected group such as
 - Age
 - Race
 - Disability
 - Pregnancy
 - National origin
 - Religion
 - Sexual orientation
 - and others.



Identifying Harassment

Online Harassment

- Harassment online can include hateful speech in emails, instant messages, tweets or other social platforms. It can range from name-calling to threatening behavior.
- Easy to prove and very documentable—email, texts and screenshots
- IT Forensics



Bullying –Legal Harassment?

Title VII

- The focus is often on whether a protected group was the target.
- Often, investigators come back and say that there was no protected class so there is no suit.


Occupational Safety and Health Administration (OSHA)

- Anti-Bullying Policy use “Health Workplace Policy”
- Looks at bullying from a safety perspective
- Some OSHA regulations reference verbal threats and intimidation
- Form of workplace violence???



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EEOC Checklist

Commitment of Leadership

Check the box if your organization has the following components in place:

- A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
- A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
- *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
- *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
- Regular *compliance trainings* for all employees so they can recognize prohibited forms of conduct and know how to use the reporting system
- Regular *compliance trainings* for mid-level managers and front-line supervisors so they know how to prevent and/or respond to workplace harassment



EEOC Checklist

Bonus Points

Bonus points if you can check these boxes:

- The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
- The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews (Required by FTA EEOC Guidelines)
- The organization conducts *workplace civility training* and *bystander intervention training*
- The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort



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