

# Workplace Complaints in the #MeToo Era

The #MeToo + #TimesUp movements have sparked an undeniably important conversation. They have brought to light allegations of **sexual assault, harassment + discrimination** in society at large and in the workplace in particular. **No company or industry is immune** from these issues. For employers receiving complaints of inappropriate or illegal behavior, **the stakes have never been higher.**

**Key contacts:**



**Neil H. Abramson**  
Partner  
New York  
+1.212.969.3001  
nabramson@proskauer.com



**Elise M. Bloom**  
Partner  
New York  
+1.212.969.3410  
ebloom@proskauer.com



**Mark W. Batten**  
Partner  
Boston  
+1.617.526.9850  
mbatten@proskauer.com



**Keisha-Ann G. Gray**  
Partner  
New York  
+1.212.969.3855  
kgray@proskauer.com



**Stacey C.S. Cerrone**  
Partner  
New Orleans  
+1.504.310.4086  
scerrone@proskauer.com



**Kathleen M. McKenna**  
Partner  
New York  
+1.212.969.3130  
kmckenna@proskauer.com



**Catherine A. Duke**  
Legal Director  
New York  
+1.212.969.3959  
cduke@proskauer.com



**Anthony J. Oncidi**  
Partner  
Los Angeles  
+1.310.284.5690  
aoncidi@proskauer.com



**Scott A. Faust**  
Partner  
Boston  
+1.617.526.9650  
sfaust@proskauer.com



**Andrew A. Smith**  
Associate  
New York  
+1.212.969.3502  
asmith@proskauer.com

# The #MeToo and #TimesUp movements have sparked an undeniably important conversation.

They have brought to light allegations of sexual assault, harassment and discrimination in society at large and in the workplace in particular. For employers receiving complaints of inappropriate or illegal behavior, the stakes have never been higher.

No company or industry is immune from these issues. In the first year of the #MeToo era, on average, at least one prominent figure was publicly accused of misconduct every day.<sup>1</sup> Enforcement efforts have been similarly expansive. The EEOC filed 50% more sexual harassment suits during roughly the same period.<sup>2</sup> Its recovery on behalf of sexual harassment victims ballooned almost 50% as well, to nearly \$70 million.

Legislative changes rapidly followed. Some states quickly barred confidentiality provisions in sexual harassment settlements. Others limited or banned arbitration of sexual harassment claims. California even enacted legislation requiring a minimum number of women on boards of directors.

In the current environment, business leaders face enormous pressure to prevent or eradicate workplace misconduct. Every organization should expect that the speed and precision of its response will be scrutinized. To help in-house counsel prepare for these crucial events, Proskauer launched its *Workplace Complaints in the #MeToo Era* survey.

We set out to solicit and aggregate input from organizations grappling with these issues in real time. We began by surveying individuals who make high-level legal decisions regarding employment issues. We supplemented that input through discussions with focus groups of in-house counsel and through interviews with multiple Proskauer partners who practice in this area.

The result of these efforts is unprecedented insight into the rapidly evolving landscape of workplace complaints. The #MeToo movement is far from over, but we believe this analysis will be critical in navigating the current challenges and the changes still to come.

---

<sup>1</sup> #MeToo: One Year Later: <https://www.bloomberg.com/graphics/2018-me-too-anniversary/>. The beginning of the #MeToo era is commonly regarded as October 2017, when allegations of misconduct against movie producer Harvey Weinstein became widely publicized.

<sup>2</sup> What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment: <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm>.

**We know  
what the law  
is, but how  
do we change  
culture?**

Survey Respondent

## Executive Summary

# Impact

Harassment complaints have increased, but so have other types of workplace complaints. Among survey respondents:

**42%** reported an increase in harassment complaints

**23%** reported an increase in discrimination complaints

**35%** reported an increase in other workplace complaints, such as retaliation

Despite increasing complaints, organizations continue to rely heavily on traditional reporting mechanisms rather than introducing new ones.

Some organizations are finding that employees are more likely to initiate complaints through lawyers or to make anonymous complaints.

# Challenges

Organizations are facing three major challenges in the wake of the #MeToo movement:

1. Keeping Up With the Proliferation of New State and Local Laws
2. Calibrating Training for the #MeToo Era
3. Choosing the Right Resource When Faced With a Complaint

Organizations are also facing a number of other external reputational challenges, as well as internal cultural ones.

# Best Practices

Five major best practices emerged from our research:

1. Demonstrating Leadership Buy-In
2. Maximizing the Value of Training
3. Optimizing Policies
4. Leveraging Outside Counsel
5. Keeping an Eye on Developing Trends

Best practices for the #MeToo era are still evolving, and organizations continue to look for guidance on adapting to the #MeToo movement.

**Impact.**

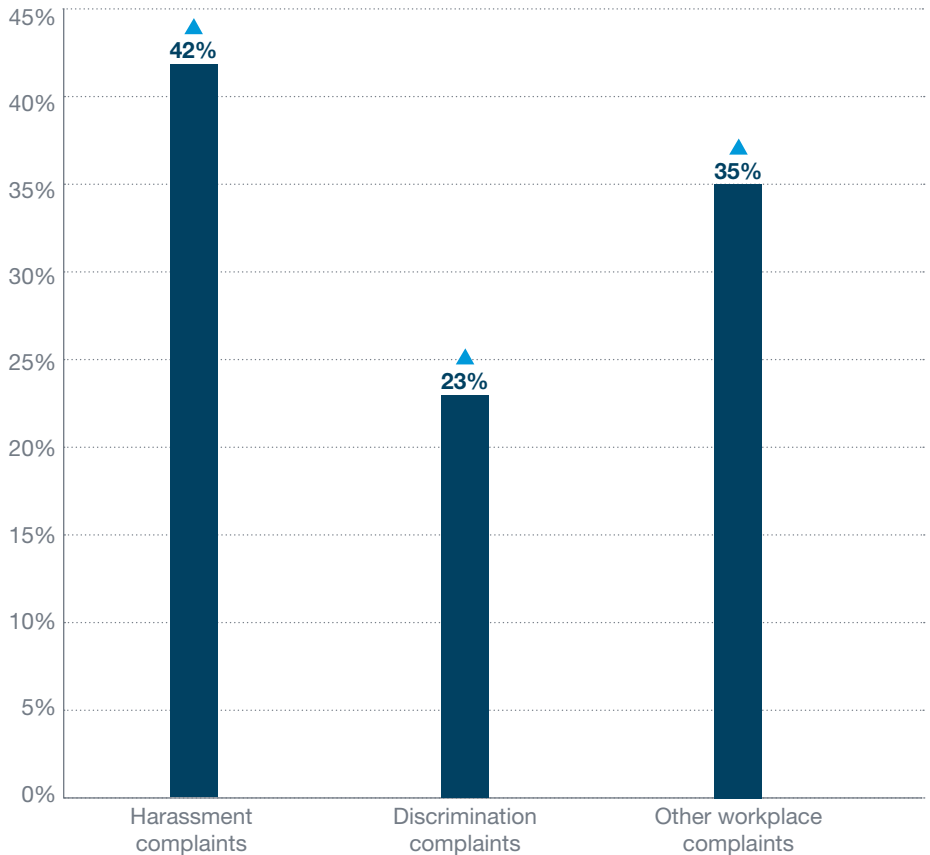
The image features a monochromatic blue color scheme. The background is a blurred landscape, possibly a beach or a field, with a horizon line. In the foreground, there is a dynamic splash of water, with several large, clear droplets captured in mid-air, creating a sense of movement and impact. The overall aesthetic is clean and modern.

# The most striking feature of #MeToo was the breadth of the impact.

With great variation in size, geographic location, and industry, two-thirds of survey respondents reported a high or moderate impact on their organizations.

That impact was felt most directly through a surge in complaints. Most organizations understandably saw the greatest uptick in harassment complaints. Many organizations, however, reported a similar effect on other types of complaints as well, including retaliation.

**Respondents Reporting an Increase in the Volume of Complaints Arising from the movements**

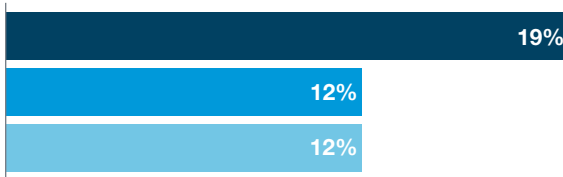


In at least some organizations, #MeToo has prompted complaints about conduct that predated the movement and was well outside any applicable statute of limitations. A significant number of respondents saw complaints based on conduct that was more than a year old. Some even received complaints based on conduct that was more than 5 years old. At one of Proskauer’s Peer Perspectives events, several companies reported having received more “stale” or “time-barred” complaints, including one going back to the 1980s. Companies are also seeing complaints about the conduct of individuals that, in some instances, predates their employment with their current employer.

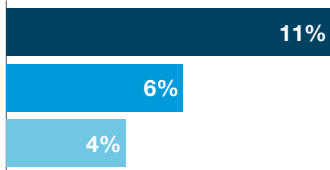
Respondents also observed changes in the source of complaints. One in five found that employees were more likely to initiate a complaint through a lawyer than in the past. That effect was not isolated to harassment complaints. Similarly, some respondents – and Peer Perspectives participants – saw an increase in all types of anonymous complaints and complaints that surfaced through non-traditional means like social media and reports from witnesses/bystanders.

### Age of Complaints

#### Historic complaints 1-5 years old



#### Historic complaints 5-10 years old



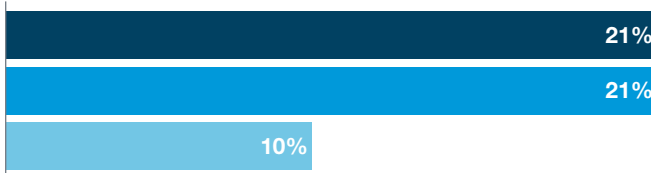
0% 5% 10% 15% 20% 25%

### Changes in Reporting Complaints

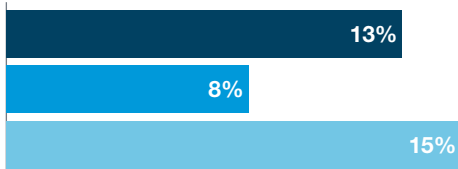
- Harassment complaints
- Discrimination complaints
- Other workplace related complaints

### Source of Complaints

#### Complaints initiated by counsel



#### More anonymous complaints



0% 5% 10% 15% 20% 25%



In the face of increasing complaints, most organizations relied on existing mechanisms for receiving complaints. A minority of respondents (15%) introduced new reporting mechanisms, most commonly a hotline. Whether they introduced new mechanisms or not, most organizations provided multiple reporting channels. Respondents leaned heavily on human resources, management and, to a slightly lesser extent, hotlines.

## Reporting Mechanisms in Place

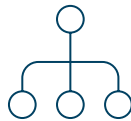
98%

Human Resources



91%

Manager/Supervisor



81%

Hotline



36%

Employee Relations



9%

Ombudsman



### Proskauer Perspective

The significance of this trifecta – older complaints, anonymous complaints and unorthodox reporting – coupled with increased public scrutiny of corporate responsiveness, has added pressure on in-house teams to employ effective investigation methods, quickly gather facts and ascertain appropriate remedial action. This has punctuated the need for effective training of human resources personnel on conducting investigations. Additionally, in-house counsel need to be more than just legal advocates. Because of potential reputational and brand damage, older or outdated complaints have resulted in investigations and disciplinary action taken despite the fact that the alleged conduct predated employment, often by many years.

# Challenges.



# In the wake of #MeToo, organizations report challenges that fall into three major categories.

“Policing the competing laws has been the most challenging part.”

Peer Perspectives Participant

## 1. Keeping Up With the Proliferation of New State and Local Laws

#MeToo brought widespread legislative change, but much of that change was at the state and local level. This added further complexity to what was already a patchwork of legal requirements for organizations with employees in multiple jurisdictions. It was, therefore, no surprise that respondents’ most frequently reported challenge was ensuring compliance with (and employees’ awareness of) these requirements. This concern was echoed by companies participating in Peer Perspectives events, particularly those operating in multiple jurisdictions.

Among the legislative changes brought on by the #MeToo movement were specific standards for sexual harassment policies. New York, for example, began requiring that policies describe the administrative and judicial forums available to pursue harassment claims—something that many employers previously chose not to include.<sup>3</sup> In view of the fact that only a minority of respondents (14%) recently changed their policies, these legislative developments suggest that percentage will be rising.<sup>4</sup>

---

## Proskauer Perspective

Despite major legislative changes in a number of states, only one respondent indicated concern over efforts to limit arbitration of sexual harassment claims or efforts to restrict confidentiality provisions in settlement agreements involving harassment claims. The potential impact of these changes on arbitration and confidentiality provisions has not yet been felt.

---

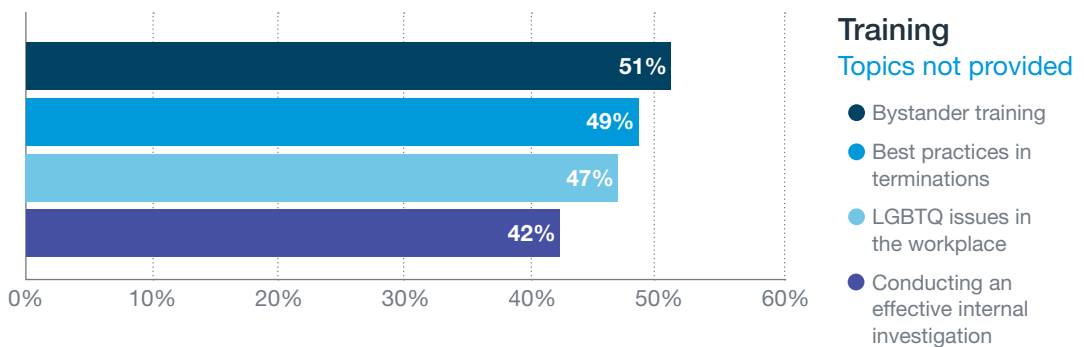
<sup>3</sup> New York’s requirements for sexual harassment policies became effective October 9, 2018, after they were enacted in April 2018 as part of the New York State budget.

<sup>4</sup> Indeed, this figure is only slightly higher than the 13% of respondents who reported in our Value Insights: *Delivering Value in Labor and Employment Law Survey* (2017) (“2017 Value Insights Survey”) that they had introduced or updated policies – including anti-harassment, anti-discrimination and whistleblower policies – as a risk prevention measure.

## 2. Calibrating Training for the #MeToo Era

Respondents overwhelmingly cited education and training as the most effective way to reduce workplace complaints and make a positive impact on workplace culture. This is consistent with our *2017 Value Insights Survey* in which we reported that 44% of respondents had introduced additional training as a measure to reduce claims. All respondents (100%) reported providing anti-harassment, anti-discrimination and retaliation training. Many respondents in our current survey have begun providing more frequent training (40%), have refreshed the content of their training (37%) or have expanded training to broader groups of employees (31%).

Despite those adjustments, respondents were slow to incorporate training on a number of topics that have generated considerable attention during the #MeToo era. These include bystander intervention and LGBTQ issues, among others.




---

### Proskauer Perspective

Ensuring that training is effective for the audience is key. We identified this as an issue for organizations in our *2017 Value Insights Survey*, and it is apparent from current survey responses and Peer Perspectives attendees that this remains a significant challenge. Updating content is not enough. Presentation is key. For example, online training for employees who are not reliant on computers may “check the box” but not deliver the message effectively. Many companies reported a struggle to secure sufficient budget to provide live training. Others reported that the sheer volume of employees across jurisdictions necessitated foregoing live training. Peer Perspectives participants reported, however, that they have seen a positive impact from implementing live training and also from training managers separately from non-management employees.

---

People are  
seeing the  
impact to the  
workplace.

Now we  
devote more  
time and  
resources  
to handling  
the issues.

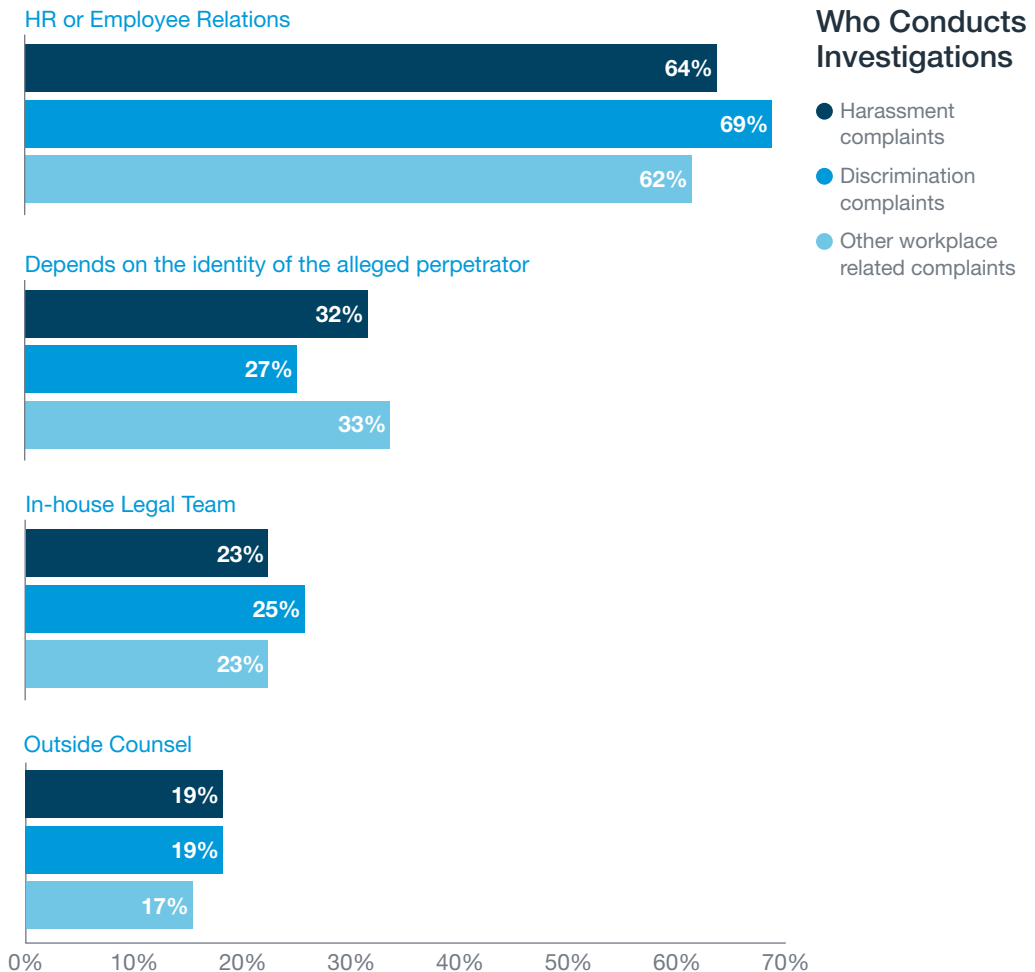
Survey Respondent

### 3. Choosing the Right Resource When Faced With a Complaint

The increase in complaint volume understandably stretched respondents' resources. At the same time, enhanced scrutiny of complaint handling added to the pressure respondents faced. As with reporting mechanisms, only a small minority of organizations (15%) have changed how they conduct investigations—commonly by emphasizing the rapid and more thorough completion of the investigation. Surprisingly few respondents were focused on how to ensure that their investigations were viewed as credible.

A majority of respondents used internal Human Resources departments or Employee Relations teams to investigate most complaints. In-house legal teams took on responsibility for investigations at a minority of respondents.

Outside counsel were more likely to be retained to conduct investigations involving the CEO or other C-level executives. Human Resources handled most investigations involving claims against managers, co-workers or in-house counsel.



“Our biggest challenge is managing investigations while managing immediate internal challenges.”

Survey Respondent

---

### **Proskauer Perspective**

Some Peer Perspectives participants have looked closely at their investigation processes and have concluded that the in-house legal team or a dedicated, well-trained employee relations team should handle investigations. Using the in-house legal team potentially jeopardizes privilege and can blur the line between privileged and non-privileged communications. The use of in-house lawyers, however, or a dedicated employee relations team can minimize potential conflicts of interest on the part of human resources and add to the integrity of the investigation. Other participants are focused on securing training for their in-house teams on how to conduct effective investigations.

The media attention, public scrutiny and brand or reputational risk that can arise from harassment allegations have, however, increasingly prompted some respondents to rely on outside counsel to conduct or guide investigations, particularly for sexual harassment complaints. When the alleged perpetrator was a CEO, C-level executive or board member, a majority of respondents reported engaging outside counsel. Peer Perspectives participants similarly reported that potential reputational harm and the level of the alleged offender often dictate the use of outside counsel to avoid any suggestion of bias or influence.

---



**Best Practices.**



# As organizations continue to adapt to the changes brought on by the #MeToo movement, five major best practices emerged.

## 1. Demonstrating Leadership Buy-In

A meaningful commitment to building a positive work environment starts with leadership. Respondents repeatedly expressed that engagement from those at the highest levels of the organization is critical to progress in this area. Demonstrating such engagement by the organization is equally critical and can be accomplished by:

“Statement from our CEO that we will not put up with any type of employee harassment.”

Survey Respondent  
talking about strategies  
to minimize risk

- Statements from leadership emphasizing the organization’s commitment to creating a respectful workplace and treating complaints seriously;
- Communications from leadership about available reporting mechanisms and the organization’s response to complaints that have received publicity; and
- Attendance at and active participation in training sessions by leadership, including opening/closing remarks.

Of course these steps assume that leadership is already engaged on these issues. Where that is not the case, organizations can consider measures like linking executive compensation to participation in such workplace initiatives.

## 2. Maximizing the Value of Training

Respondents agreed that training was the most effective way to reduce complaints, but there was less agreement on what makes for effective training. An approach to training should account for at least the following considerations:

- **Coverage:** evaluate any gaps in current training and identify materials or resources to fill those gaps;
- **Presentation:** balance the potential cost savings of online training with the enhanced effectiveness of in-person training;
- **Audience:** determine whether training will differ for management and non-management employees or for employees in different business units; and
- **Participation:** ensure complete participation, including having leadership send initial training invitations and informing employees that leadership will be in attendance and will be notified of those who do not attend.

### 3. Optimizing Policies

Policies are effective tools for dealing with workplace complaints only if they can be read, understood and utilized. Policies can be made more accessible to employees by:

- Simplifying language in favor of words commonly used by non-lawyers;
- Condensing policies to ten or fewer pages, maximizing readability;
- Describing changes to policies rather than simply issuing updated policies;
- Making policies readily available on intranet portals or apps;
- Requiring employees to acknowledge that they have received and read policies; and
- Keeping an archive of what policies existed and during what periods of time.

### 4. Leveraging Outside Counsel

The enhanced scrutiny on workplace complaints in the #MeToo era requires reexamining the role of outside counsel. Effectively leveraging outside counsel means more than determining whether outside counsel will investigate a complaint. It also means, among other things:

- Using outside counsel to guide investigations conducted by internal investigators;
- Relying on outside counsel to gauge how the proposed handling of a complaint compares with industry norms;
- Supplementing internal training with specialized training from outside counsel;
- Having outside counsel provide training to internal investigators on investigative practices; and
- Recognizing from the outset that the attorney-investigator may not be the same lawyer/law firm that defends the company in the related litigation.

“Universal, live training for all full-time employees regardless of location; shows we take the issue seriously.”

Survey Respondent

## 5. Keeping an Eye on Developing Trends

For all the change that the #MeToo movement has brought, its full impact likely has not been felt. Being prepared for what #MeToo brings next includes:

- Monitoring legislation and public reaction that may limit the legality or desirability of arbitration for harassment claims;
- Evaluating limitations (existing and future) on confidentiality provisions in sexual harassment settlements;
- Anticipating and acknowledging complaints through unconventional channels (e.g., social media) or anonymous complaints and determining how to handle them;
- Identifying pay equity concerns and proactively dealing with them in ways that minimize risk;
- Curbing efforts by men to inappropriately avoid women in the workplace (the “Mike Pence Effect”); and
- Examining practices for recruiting and hiring.

As the #MeToo era continues to unfold, best practices are still evolving. Respondents expressed a need for guidance on a number of emerging issues. These included how to respond to complaints from new, external sources; how to handle complaints about conduct that predates the alleged wrongdoer’s employment with the company; and whether to provide information to the media about those who are the subject of complaints. Adapting to the #MeToo era will undoubtedly require organizations to account for these and other still-developing issues.

We expect our next survey to be open for participation in Summer 2019. If you would like to participate, please email:

[ProskauerValueInsights@proskauer.com](mailto:ProskauerValueInsights@proskauer.com)

## Methodology

Our initial web-based survey included more than 50 high-level legal decision makers responsible for employment issues within their organizations. Acritas independently administered the survey over three weeks in July and August 2018. Respondents were asked to assume that the #MeToo and #TimesUp movements began October 1, 2017.

Respondents came from public and private organizations in numerous sectors and included McDonald's Corporation, Planet Fitness, McGraw-Hill Education, A&E Television Networks, Standard Chartered Bank, Navigant Consulting, Endemol Shine North America, and Citizens Financial Group.

Almost all respondents (89%) had employees in multiple states, and a majority (51%) had more than 1,000 employees. The majority of individual respondents (60%) were the sole decision maker for labor and employment matters in their organizations. The others influenced or were consulted on those decisions.

We supplemented our survey results through Proskauer Peer Perspectives events, where we presented our findings to a select group of in-house counsel and solicited their feedback. We also conducted in-depth interviews with several Proskauer partners who are experts in the area of workplace complaints.

60%

Decision makers  
in L&E



51%

Have more than  
1000 employees



89%

Have employees based  
in more than one state



23%

Technology, Media  
and Telecoms (TMT)



17%

Finance and  
Banking



15%

Not-for-profit and  
Education



13%

Hospitality



11%

Health Care



26%

Chief Counsel  
for L&E

21%

Deputy GC

19%

Non-legal L&E  
Specialist

15%

Chief Legal Role

8%

L&E Legal  
Specialist

8%

Chief Role

# Proskauer's Sexual Harassment Taskforce

Proskauer partners with C-suite executives, boards of directors and employers seeking the highest level of advice and execution, from training their employees to advising on investigations and allegations of gender discrimination and sexual harassment.

The current landscape favors transparency, up-to-date policies and gold-standard corporate governance. We are the firm of choice for employers and boards of directors seeking the most practical and useful advice for handling sexual harassment claims, investigations and lawsuits.

Our Rapid Response Protocol is a tested, effective approach, enabling clients to immediately respond to and minimize the risks of sexual harassment claims. Our early intervention focuses on corporate culture issues and reputation protection, while diminishing the risk of litigation and adverse publicity.

## Key contacts:



**Joseph Baumgarten**

Partner  
+1.212.969.3002  
jbaumgarten@proskauer.com



**Kathleen M. McKenna**

Partner  
+1.212.969.3130  
kcmckenna@proskauer.com



**Elise M. Bloom**

Partner  
+1.212.969.3410  
ebloom@proskauer.com



**Anthony J. Oncidi**

Partner  
+1.310.284.5690  
aoncidi@proskauer.com



**Keisha-Ann G. Gray**

Partner  
+1.212.969.3855  
kgray@proskauer.com



**Steven J. Pearlman**

Partner  
+1.312.962.3545  
spearlman@proskauer.com



[Proskauer.com](https://www.proskauer.com)

Beijing | Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles  
New Orleans | New York | Newark | Paris | São Paulo | Washington, D.C.