Lawyers Have Got You Covered: How the Employment Practices Liability Insurance Industry Uses #MeToo to Manipulate Legal Risk, and What the Legal Field Can Do About It

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INTRODUCTION

On October 15, 2017, "the world's first mass movement against sexual abuse"—many years in the making—took off overnight.[1] Ten days prior, the New York Times had released a bombshell report exposing media mogul Harvey Weinstein for sexually harassing dozens of young women and paying them to keep quiet for decades.[2] On the evening of October 15, after reading articles about Weinstein, actor Alyssa Milano tweeted, "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[3] Within twenty-four hours, #MeToo was trending as number one on Twitter, and within a year, the hashtag had been tweeted over 19 million times.[4] Almost immediately, this digital

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1. Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, THE ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/ [https://perma.cc/JCD2-YUGM].

2. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news [https://perma.cc/8R8F-2BFS].

On February 24, 2020, Mr. Weinstein was found guilty of criminal sexual assault in the first degree and rape in the third degree, and not guilty on two counts of predatory assault. *See Full Coverage: Harvey Weinstein Is Found Guilty of Rape*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html [https://perma.cc/533U-X7RV]. On March 11, 2020, Mr. Weinstein was sentenced to twenty-three years in prison. *See* Eric Levenson et al., *Harvey Weinstein Sentenced to 23 Years in Prison After Addressing his Accusers in Court*, CNN (Mar. 11, 2020, 4:26 PM), https://www.cnn.com/2020/03/11/us/harvey-weinstein-sentence/index.html [https://perma.cc/A3M3-HYU7].

Although the recent news marks a critically significant moment in #MeToo history, it does not substantively change the arguments set forth in this Note, and thus will not be further explored.

3. *See* Nadja Sayej, *Alyssa Milano on the #MeToo Movement: 'We're Not Going to Stand For it Anymore'*, THE GUARDIAN (Dec. 1, 2017, 7:00 PM), https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse [https://perma.cc/BJW8-77SS].

4. *Id.*; Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ [https://perma.cc/V6CS-87LG]. The "Me too" phrase did not start with Alyssa Milano; it was coined eleven years earlier by civil rights activist Tarana Burke, who used it to call out widespread sexual and domestic violence against women and girls. *See* MacKinnon, *supra* note 1.

movement catalyzed real, widespread action, collectively referred to as the #MeToo movement.

In the aftermath of the Weinstein revelations and Twitter revolution, dozens of new accusations—and often subsequent resignations—surfaced against men who had engaged in similar behavior across various industries.[5] As dozens of prominent men lost positions of power in media, journalism, technology, politics, and entertainment, "the ways in which the law could be misused to enable and conceal harassment" became increasingly apparent.[6] These revelations led to a collective mobilization and newfound intolerance for the "age-old rule of impunity" for powerful men and the idea that harassment in the workplace was something to "just live through."[7]

The fundamental cultural changes incited by #MeToo have been significant for the legal field, and particularly so for employment attorneys. For example, the sharp increase in the number of workplace sexual harassment claims reported to the Equal Employment Opportunity Commission ("EEOC")[8] reflects evolving client needs with which employment attorneys must grapple. This Note will focus on one particular proposed solution to these evolving needs: insuring companies against sexual harassment claims through Employment Practices Liability Insurance ("EPLI").

This Note will begin by examining evolving trends and developments in EPLI policies fueled by the #MeToo movement, followed by an examination of the unique harms stemming from this type of insurance. This Note will argue that these harms stem primarily from the fact that the insurance industry has usurped a power that belongs in the hands of the legal field by capitalizing on employers' fear and uncertainty in the wake of #MeToo. Finally, this Note will argue that, given the legal field's superior position to redress this harm due to specialized knowledge, experience, and the ethical duties by which those practicing law are bound, attorneys have a duty to help incentivize their clients to confront sexual harassment issues head-on—an approach that is fundamentally and irreconcilably at odds with the goals of EPLI.

I. BACKGROUND

In 1991, law professor Anita Hill publicly accused then-Supreme Court nominee Clarence Thomas of sexual harassment.[9] Her claim and the widely publicized confirmation hearings that ensued seemed to awaken a fear among industry

5. *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 231–32, 247 (2018).

6. *See id*. at 231, 234.

7. MacKinnon, *supra* note 1.

8. Andrew Murphy & Terran Chambers, *Litigating Harassment in the #MeToo Era*, 76 BENCH & BAR MINN., Oct. 2019, at 12, 13 (citing Press Release, Equal Employment Opportunity Commission, EEOC Release Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018) (on file with the EEOC Newsroom)).

9. Danielle Paquette, *More Companies are Buying Insurance to Cover Executives who Sexually Harass Employees*, WASH. POST (Nov. 3, 2017, 11:35 AM), https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00_story.html [https://perma.cc/45Z6-VMJ5].

leaders about the increasing risk that their companies might be charged with similar sexual harassment claims.[10] Insurance companies saw an opportunity to fill a void in general commercial liability policies, which had traditionally excluded employment claims, and began to offer EPLI policies that included indemnity and defense costs for sexual harassment claims, racial discrimination, and wrongful-firing claims.[11] At the time of Hill's testimony, only five insurance companies offered EPLI policies.[12] In the aftermath of Hill's testimony, the EPLI industry steadily expanded, and today, around fifty-five companies are in the EPLI business.[13] In 2016, U.S. companies spent an estimated $2.2 billion on EPLI cover age,[14] and presently the market is expected to reach $3.1 billion by 2025.[15]

Though the EPLI industry has seen steady growth since the 1990s, the more rapid growth in the last few years is attributable to a multitude of factors, including 1) the cultural influence of the #MeToo movement, 2) renewed public attention to sexual harassment in light of the increasing number of high-profile sexual harassment cases against high-profile public figures,[16] and 3) large jury verdicts under the Civil Rights Act of 1991 that led companies to deeply fear an adverse verdict.[17] As EPLI continues to grow and become more mainstream, it is important to understand how these policies work, and the implications of some of the marketing tactics insurers use.

A. HOW EPLI POLICIES WORK

EPLI policies vary in a variety of ways, including how a claim is defined, who is covered, who is considered a claimant, types of covered claims, how claims must be reported, and limitations on coverage.[18] Typically, EPLI policies extend to officers, employees, and former employees of a business, but claims can only

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10. *See* Aileen Spiker Berry & Katie Kruizenga, *Employment Practices Liability Insurance in the Age of #MeToo*, AMWINS (2017), https://www.amwins.com/insights/article/employment-practices-liability-in-the-age-of-metoo_1-18 [https://perma.cc/8FRC-HTSW].

11. EPLI policies had existed in some form for decades, but arose and spread in their current form in the 1990s. Stephanie D. Gironda & Kimberly W. Geisler, *Employment Practices Liability Insurance: A Guide to Policy Provisions and Challenging Issues for Insureds and Plaintiffs*, 33 ABA J. LAB. & EMP. L. 55, 55–56 (2017).

12. Paquette, *supra* note 9.

13. *See* Susan Antilla, *Entire Industries are Being Blacklisted over #MeToo Liability*, THE INTERCEPT (Feb. 2, 2019, 10:30 AM), https://theintercept.com/2019/02/02/workplace-harassment-insurance-metoo/ [https://perma.cc/BDN5-TPAP].

14. Paquette, *supra* note 9.

15. David Tobenkin, *Does My Insurance Cover That?*, 63 HR MAG. 73, 74 (Sept. 1, 2018).

16. *See* Mariel Concepcion, *Insurance in the Age of #MeToo*, SAN DIEGO BUS. J. (Apr. 5, 2018), https://sdbj.com/news/2018/apr/05/insurance-age-metoo/ [https://perma.cc/KZ6E-2P76].

17. Gironda & Geisler, *supra* note 11, at 55–56; *see* 42 U.S.C. § 1981(a) (West 2018); Murphy & Chambers, *supra* note 8, at 14 (explaining that cultural changes resulting from #MeToo have also contributed to higher jury verdicts).

18. Kenneth J. Diamond, *Employment Practice Liability Insurance*, in 10 LAB. AND EMP. L., § 268.02 (Matthew Bender ed., 2020).

be made by parties as defined in the policy during the policy period.[19] "The filing of a lawsuit, an administrative complaint, arbitration claim, or a simple demand letter can trigger coverage."[20] EPLI policies cover federal claims under Title VII of the Civil Rights Act of 1964, and other federal or state statutory claims for unlawful discrimination or harassment.[21] The policies include a deductible sometimes known as a self-insured retention, a limit of liability, and an aggregate limit per policy period.[22]

Most policies provide defense costs and indemnity for a covered claim, but in some cases, the defense costs may exceed potential damages.[23] The issue of who will handle the defense arises frequently in litigation involving EPLI claims because depending on the policy, the insurer may allow the insured to use its own employment counsel, or it may require the case to be handled by a firm of its choosing.[24]

B. EPLI MARKETING TACTICS AND TRENDS

EPLI companies strategically market their product "with #MeToo paranoia in mind."[25] They harness the power of the #MeToo movement through brochures that tell readers that their business is "more likely to have an employment claim than experience a fire," or ask readers, "Is your industry a snake pit for sexual harassment claims?"[26] One brochure from AmWINS lures readers using various tactics.[27] The brochure implies that even if an individual does nothing wrong, his actions may still give rise to a claim: "when people interact . . . what individuals say or do to each other isn't always . . . perceived as appropriate"; it implies that harassment is an inevitable part of the workplace because "[p]eople are not perfect, and mistakes are made"; it implies that #MeToo is a vicious tornado that has shaken big organizations, and is coming for the small organizations next, stating, "[a] movement that started out in very high-profile, public industries and in politics will soon spread into the hallways of everyday American business"; and it markets AmWINS as the one-step solution because "[w]ith daily revelations of an unexpected workplace predator, employers are renewing their focus on the value of EPLI coverage."[28]

A recent trend suggests that, despite this aggressive marketing, certain industries face increased scrutiny by some insurance companies due to reputational

19. Gironda & Geisler, *supra* note 11, at 57–58.
20. *Id*. at 56.
21. Diamond, *supra* note 18.
22. *Id*. at § 268.03.
23. *Id*. at § 268.04.
24. *Id*. For a more in-depth explanation of the inner workings of EPLI policies, *see* Gironda & Geisler, *supra* note 11.
25. Antilla, *supra* note 13.
26. *Id*.
27. *See* Berry & Kruizenga, *supra* note 10.
28. *See id*.

issues, past sexual harassment claims, well-known executives or employees, or "iffy corporate cultures."[29] "Frowned-upon" companies—those with either a history of sexual harassment claims or who are considered particularly risky—often have to pay a higher premium, or may even be rejected altogether by insurers.[30] That said, given the number of companies that offer EPLI coverage, being rejected by a few major providers does not mean that companies in "frowned-upon" industries cannot get insurance at all.

Thus, the heightened scrutiny practiced by some insurers is not severe enough to create a crisis that would force companies to turn inward and examine flaws in company culture that give rise to sexual misconduct claims. Even when the insurance companies do take a more proactive approach by offering trainings and education for employers, the training programs have traditionally focused on "limiting a company's liability" rather than "improving the workplace."[31] The unique harms stemming from EPLI policies will be further explored in section II-B below, and potential solutions will be examined in section III.

II. HOW DO EPLI POLICIES AFFECT VICTIMS AND EMPLOYERS?

A. EPLI HELPS VICTIMS AND EMPLOYERS ALIKE IN THE SHORT-TERM

EPLI policies can help victims of workplace sexual harassment in the short-term by helping them achieve swift recovery. The primary goal of civil rights and employment law is to "protect an employee's right to a workplace free of discrimination and harassment," in recognition of the fact that "employees deserve recourse for acts of discrimination committed against them[,] and that monetary penalties are effective tools in deterring such discrimination."[32] Accordingly, EPLI policies can help victims of sexual harassment by entitling them to legal recourse through adequate and timely compensation. EPLI policies can be particularly helpful for suits against small or midsize businesses who may not have the cash to pay the victim a large jury verdict without such insurance.[33] Thus in the immediate term, EPLI policies can help effectuate the first goal of employment and civil rights law by allowing attainment of deserved monetary compensation for victims.

EPLI policies also help businesses in the short term by creating a safety net that can soften the blow of an adverse verdict, provide peace of mind, and, in extreme circumstances, save a business.[34] While #MeToo has helped empower and motivate victims to assert their right to a workplace free of sexual

29. Antilla, *supra* note 13.
30. *Id.*
31. *Id.*
32. Shauhin Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Antidiscrimination Laws*, 37 L. & POL'Y 209, 210 (2015).
33. Paquette, *supra* note 9.
34. Tobenkin, *supra* note 15, at 74.

harassment,[35] it is this very force that has led to the uptick in sexual harassment claims in recent years.[36] This increase has, in turn, stirred fear and anxiety among many businesses who fear that they may be next and may be unprepared.[37] EPLI offers a relatively easy solution: a mechanism through which companies can pay for peace of mind by transferring the increased risk they face onto a third party. By simply paying a premium, companies can resume business as usual, knowing they are protected against the seemingly existential threat of #MeToo and the onslaught of reputationally-damaging lawsuits.

B. EPLI HARMS VICTIMS AND EMPLOYERS ALIKE IN THE LONG-TERM

Despite their ability to help both victims and employers in the short-term, EPLIs actively harm both victims and their employers in the long-term, for distinct reasons.

1. EPLI HARMS EMPLOYERS IN THE LONG-TERM

EPLI policies risk harming employers in the long-term by removing incentives for employers to take necessary steps to target the sexual harassment that leads to the need for coverage in the first place. This is harmful to the employers because it leads to increased spending on coverage over time and does nothing to lower the risk of future claims. The harm is best understood through the lens of moral hazard, or the idea that the existence of insurance alters incentives to prevent losses, and in most cases actually increases the probability of loss because the insured party knows that the insurance will cover any harm he or she produces.[38]

Any form of insurance raises issues of moral hazard, but in certain contexts and industries, this risk is more salient.[39] For example, pollution liability insurance protects companies that produce hazardous waste emissions against resulting damage caused by these emissions.[40] This allows companies to cover

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35. *See, e.g.*, Michael T. Zugelder, *Consequences of #MeToo: Intended and Not. What Employers Should Do*, 16 J. LEADERSHIP, ACCOUNTABILITY & ETHICS 109, 109 (2019); *see also* MacKinnon, *supra* note 1 (explaining that #MeToo has set off cataclysmic transformations, demonstrating butterfly politics in action).

36. The EEOC received 7,609 sexual harassment charges, excluding an unknown number of complaints settled by victims who did not contact the EEOC, in its 2018 fiscal year, up almost 14% from 2017. Antilla, *supra* note 13. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGES ALLEGING SEXUAL HARASSMENT FY 2010 – FY 2019, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [https://perma.cc/7NQ6-2LZU].

37. *See* Jena McGregor, *Fear and Panic in the H.R. Department as Sexual Harassment Allegations Multiply*, WASH. POST (Nov. 30, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/11/30/fear-and-panic-in-the-h-r-department-as-sexual-harassment-allegations-multiply/ [https://perma.cc/8MB4-NFB2].

38. Joan T.A. Gabel et al., *The Peculiar Moral Hazard of Employment Practices Liability Insurance: Realignment of the Incentive to Transfer Risk with the Incentive to Prevent Discrimination*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 639, 639–40 (2012).

39. *See id.*

40. Janet Hunt, *Do You Need Pollution Liability Insurance?*, THE BALANCE (Feb. 3, 2019), https://www.thebalance.com/do-you-need-pollution-liability-insurance-1969926 [https://perma.cc/E76G-JGYD].

themselves against potential lawsuits brought by anyone injured as a result of their hazardous waste emissions, which may, in turn, alter companies' incentives to take steps to actually reduce emissions.[41] Covering sexual misconduct of employees against other employees not only has the potential to similarly alter incentives, but it creates a "peculiar and *particularly* troubling moral hazard" that extends beyond issues that traditionally inhere in other forms of insurance like pollution.[42]

This "peculiar and particularly troubling moral hazard" is best demonstrated by contrasting EPLI with an auto accident.[43] An auto accident can still harm the driver, so even without insurance there is an incentive for the driver to practice caution.[44] In other words, moral hazard is traditionally offset by the risk the wrongdoer bears regardless of the presence of insurance.[45] With workplace discrimination and harassment, however, there is less or no such incentive because the wrongdoing employee bears no risk of physical injury or monetary harm.[46] Thus the individual wrongdoer's incentive to behave legally already exists solely within the risk of damages and finding of liability.[47] On top of that, having an EPLI policy in place that employers know will transfer the risk and offset damages reduces their incentive to take steps toward holding wrongdoing employees accountable and cultivating a healthy work atmosphere.[48]

Beyond moral hazard issues, EPLI also offsets the carefully crafted balance that the employment law framework intended to strike.[49] Employment law evolved as a tool to right the imbalance of power that favors management over its employees and seeks to protect the worker from harmful employment practices and discrimination.[50] In passing legislation like the National Labor Relations Act and the Civil Rights Act, Congress effectively set forth guidelines for moral behavior in the workplace by introducing incentives, such as broader damages provisions that entitle injured employees to a wider variety of remedies, which ultimately help both eliminate abuse of power and encourage non-discriminatory conduct.[51] EPLI coverage erodes this carefully crafted system of moral imperatives built on prevention and negates the incentives that help encourage non-discriminatory conduct by promising coverage for abusive and discriminatory behavior.

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41. *Id.*
42. Gabel et al., *supra* note 38, at 640–41 (emphasis added).
43. *Id.* at 641.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* This, admittedly, does not account for potential reputational harm given increasing social media use, but that is beyond the scope of this Note.
48. *See id.* at 640, 651.
49. *See id.* at 642.
50. *Id.* at 644.
51. *Id.* at 645.

The final and perhaps most concerning way in which EPLI can harm employers in the long run is through the subtle manipulation and scare tactics insurance companies employ to demonstrate an ever-increasing need to purchase more of their product. These tactics are implemented at the direct expense of taking steps toward creating a discrimination-free work environment.[52] One researcher sought to understand how the EPLI industry constructs the meaning of and advises employers on compliance with existing antidiscrimination laws.[53] Through participant observation at conferences of insurance field actors, ethnographic interviews with these actors around the country, and content analysis of primary sources including webinars, the policies themselves, industry reports, and loss prevention manuals, Shauhin Talesh uncovered several harmful outcomes of the way the EPLI industry markets its product and interacts with employers.[54] Insurance institutions attract customers by claiming that: 1) employers face uncertain legal risks due to unpredictable, vague, and ever-changing antidiscrimination laws that provide no clear guidance on compliance; 2) employers' risk of a devastating suit is inevitable due to increased threat of litigation and aggressive inquiries by the EEOC and plaintiffs; and 3) purchasing EPLI is the clear solution.[55]

These tactics are demonstrated in the following example from Talesh's research. Workplace bullying, consisting of verbal abuse or intimidating or humiliating conduct against an employee, has been "increasingly litigated by plaintiff's lawyers" in the last few years.[56] Several states have responded by drafting legislation to push for laws that encourage employers to raise awareness about bullying issues and foster a safe and positive work environment.[57] By contrast, insurance institutions took this opportunity to emphasize that their EPLI policies have a "catch-all" provision for "these situations," so in the event an employer is found liable for bullying, it is covered against this particular claim.[58] Thus in response to workplace bullying and evolving antidiscrimination laws, insurance institutions choose to focus on "shift[ing] risk and responsibility away from employers" and onto themselves, rather than taking the opportunity to simply encourage more lawful conduct.[59]

Insurers thus suggest that the companies themselves need not be the ones to protect against the heightened legal risk they face.[60] This approach re-contextualizes civil rights law around a "non-legal risk logic" that harnesses fear and then offers a

52. *See* Talesh, *supra* note 32, at 233.
53. *Id.* at 214.
54. *Id.* at 211, 221.
55. *Id.* at 218–21.
56. *Id.* at 227–28.
57. *Id.* at 228.
58. *Id.*
59. *Id.*
60. *See id.* at 221–22.

self-serving solution.[61] This exposes a "disconnect between the moral tones in which . . . judges[] and lawyers discuss antidiscrimination law and the risk tones that insurers use that suggest that litigation is inevitable and needs to be managed (rather than a sign of morally wrongful conduct that must be eradicated)."[62] This disconnect, in turn, dilutes Title VII's "deterrence capabilities" through insulating employers from liability and allowing them to "avoid more active engagement" with their employment policies and workplace culture.[63]

2. EPLI CAUSES LONG-TERM HARM TO CURRENT AND FUTURE VICTIMS OF SEXUAL HARASSMENT

EPLI policies also cause long-term harm to both current and future victims primarily through the above-mentioned moral hazard mechanisms and perpetuating a culture of silence through encouraging secret settlement agreements. The first harm concerns future victims. The same moral hazard reasoning—that paying a premium to shift risk onto a third party removes employer incentive to cultivate a harassment-free workplace—harms future victims by upholding power structures that perpetuate the very harassment that EPLI exists to cover.

EPLI policies also encourage settlement agreements through including "hammer clauses" in their policies that help insurers maintain control over the litigation.[64] If implemented, hammer clauses limit insurers' exposure if the insured employer refuses to accept a settlement that the insurer feels is in the company's best interest.[65] If the insurer triggers a hammer clause, "the insurance company's liability under the policy will be capped at the amount of the settlement that was refused plus defense expenses incurred up until that point in time."[66] Hammer clauses are sometimes referred to as "blackmail clauses," because of the power they give the insurer to force the insured to settle.[67]

Since settlement of workplace sexual harassment cases almost always comes with nondisclosure agreements ("NDA"),[68] any additional pressure to settle that comes from insurers is harmful. NDAs perpetuate a culture of silence through

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61. *Id*. at 222.

62. *Id*. at 233.

63. *Id*.

64. *See* Gironda & Geisler, *supra* note 11, at 64.

65. David Schooler, *Ethical Issues for Defense Counsel in Employment Practices Liability Insurance Litigation*, EMP. L. COMM. NEWSL., 201, 205 (2013).

66. *Id*. Some policies may also employ a "soft hammer" approach, which permits "the carrier and the insured to share the costs incurred after the insurer would have otherwise settled the claim" at a pre-determined rate. Joseph M. Gagliardo & Sara P. Yager, *Employment Practices Liability Insurance (EPLI) Policies and Coverage*, Practical Law Practice Note w-006-7127 12 (2017), http://www.lanermuchin.com/media/news/10_Employment_Practices_Liability_Insurance_EPLI_Policies_and_Coverage.pdf [https://perma.cc/T77Q-LWWT].

67. Julia Kagan, *Hammer Clause*, INVESTOPEDIA (Feb. 17, 2018), https://www.investopedia.com/terms/h/hammer-clause.asp [https://perma.cc/62AX-Q3DZ].

68. Paquette, *supra* note 9.

allowing the cycle of abuse to continue in secrecy.[69] In addition, "individuals' lives and well-being are threatened every time a perpetrator of sexual misconduct is allowed to retain his or her privacy at the expense of a far more numerous pool of potential future victims."[70] This structure—paying survivors to remain silent about past abuse—leaves in place both the abusers and the culture that enables them, at the direct expense of future victims who will be unable to detect an unsafe work environment until it is too late.[71] To the extent EPLIs encourage settlement, then, there is potential for significant harm. This is especially so given the fact that the pressure to settle is coming from a third-party insurer who inevitably values economic efficiency over the parties' best interests.

III. PROPOSED SOLUTION: HOW THE LEGAL FIELD CAN RESPOND

A. AN INCENTIVE STRUCTURE TO INCREASE ACCOUNTABILITY

Societal recognition of the harms resulting from increased EPLI policy coverage is certainly the first step toward a solution. Given the scope and complexity of the harms, however, there is no easy answer, and potential solutions mirror the complexity of the problem. That said, this Note posits that the legal field is uniquely positioned to address and remedy many of the harms resulting from the insurance industry's appropriation and manipulation of civil rights law for the reasons set forth below.

The insurance industry has reframed legal rules around a "nonlegal risk logic" that is hyper-focused on avoiding litigation and equates compliance with purchasing EPLI.[72] Insurance institutions have the opportunity to encourage more lawful conduct in light of changing antidiscrimination laws, but they forgo this opportunity in favor of marketing their product.[73] This is not a moral wrong in and of itself; insurance industries must successfully market their product to remain competitive. But given the growing need for employers to better understand employment law, civil rights law, and the evolving meaning of compliance in the wake of #MeToo, the power to help employers contextualize this compliance and make a conscious effort to target underlying issues belongs in the hands of lawyers. This is because lawyers have a duty to act morally and ethically, they are bound by a comprehensive set of ethical rules, and they have a deeper understanding of employment law, which enables them to help their clients—employers—grapple with evolving standards.

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69. *Id.*; Danielle Paquette, *How Confidentiality Agreements Hurt – and Help – Victims of Sexual Harassment*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/02/how-confidentiality-agreements-hurt-and-help-victims-of-sexual-harassment/ [https://perma.cc/HGV9-8E4B].

70. David Hoffman & Eric Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 172 (2019).

71. One argument goes so far as to say that both parties to the NDA—the victim and the abuser—are jointly responsible, at least to a degree, for similar harm that befalls future victims in the same workplace, though the merits of this argument fall beyond the scope of this Note. *Id.* at 200.

72. *See* Talesh, *supra* note 32, at 231.

73. *See id.*

B. REPLACING LEGAL INTERMEDIARIES WITH LAW FIRMS AND LEGAL ETHICS

Both the American Bar Association and a number of law firms have stepped in to fill the need to help employers grapple with evolving standards, and much of the topical scholarship about best practices for employers in the wake of the #MeToo movement has been published by partners at large firms.[74] This shifting of power back into lawyers' hands reflects positive movement away from outside insurance companies, and is likely to succeed because 1) it is implemented by members of a profession bound by a comprehensive and continuously evolving set of normative ethical standards, and 2) the strategies proactively target underlying issues, as opposed to simply transferring risk.

1. ATTORNEYS ARE BOUND BY LEGAL AND ETHICAL STANDARDS THAT HAVE EVOLVED WITH #METOO

Attorneys can help encourage more lawful conduct, as opposed to insurers who are focused on marketing a product that provides coverage for unlawful conduct, because they are bound by rules of professional conduct within their practicing jurisdiction.[75] As members of the legal profession, lawyers are considered "officer[s] of the legal system and . . . public citizen[s] having special responsibility for the quality of justice."[76] This provision of the Preamble to the *Model Rules*, while sometimes interpreted as a call to focus on pro bono representation, should also be seen as an affirmative duty to embrace the role of a reformer and take on "problematic systemic issues that might call for nontraditional advocacy efforts in order to be meaningfully addressed."[77] The #MeToo movement is precisely the type of complex, systemic issue that calls for meaningful, nontraditional advocacy efforts.

In 2016, the American Bar Association (ABA) acted on this commitment and affirmative duty by first turning inward and attempting to explicitly bar attorneys

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74. *See, e.g.*, Jonathan A. Segal, *Avoiding Women is No #MeToo Answer—Good Training, Messaging Is*, BLOOMBERG L. NEWS (Apr. 3, 2019), https://www.bloomberglaw.com/product/labor/le_home/document/X5MOFOSK000000 [https://perma.cc/A9LA-XQCJ] (written by a partner at Duane Morris); Kerry Berchem et al., *#NotMe—Sexual Harassment Risk Assessment in Mergers & Acquisitions*, BLOOMBERG L. NEWS (Feb. 28, 2019), https://www.bloomberglaw.com/product/labor/le_home/document/X5DLB084000000 [https://perma.cc/6A2S-62FM] (written by partners at Akin Gump); Debra S. Katz & Matthew LaGarde, *The Societal Reckoning Caused by the #MeToo Movement Must Now Translate into Legal Reform*, BLOOMBERG L. NEWS (June 6, 2018), https://www.bloomberglaw.com/product/labor/le_home/document/X7TKQBH4000000 [https://perma.cc/CV77-7W7X] (written by partners at Katz, Marshall & Banks).

75. *See* Aditi Kumar, *Professional Ethics in the #MeToo Era: A Growing Awareness of Sexual Harassment*, AM. B. ASS'N EMP. BENEFITS COMM. NEWSL. (June 3, 2019), https://www.americanbar.org/groups/labor_law/publications/ebc_news_archive/spring-2019-issue/professional-ethics-in-metoo-era/ [https://perma.cc/RJG7-GPNF].

76. MODEL RULES OF PROF'L CONDUCT pmbl., para 1 (AM. BAR ASS'N 2016) [hereinafter MODEL RULES].

77. Mae C. Quinn, *Teaching Public Citizen Lawyering: From Aspiration to Inspiration*, 8 SEATTLE J. SOC. JUST. 661, 661–62, 666 (2010).

from engaging in harassment or misconduct through passage of Resolution 109, which added a new paragraph (g) to Rule 8.4 of the *Model Rules*.[78] Revised Rule 8.4(g) provides that it is unprofessional for a lawyer to:

> Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[79]

This addition to the rule received significant criticism and backlash, and Vermont was "the only state that . . . embraced the recommended language[.]"[80] Since then, "20 jurisdictions have adopted a rule analogous to . . . Rule 8.4(g), 6 jurisdictions have declined to adopt Rule 8.4(g), and 19 jurisdictions have no language regarding discrimination."[81]

Two years later as #MeToo erupted, the ABA continued to evaluate how to address the challenge as a profession.[82] One of the results of these continued efforts was a manual outlining practical recommendations for the legal industry with "practical advice for legal employers and employees, including sample policies for prohibiting harassment and for progressive discipline."[83] This top-down approach may appear insular in its exclusive focus on the legal profession, but subsequent action and initiatives taken by the ABA and attorneys specializing in employment law suggest that stamping out the issue within the field was merely a first step along the way to helping other industries tackle sexual harassment issues.

2. LAW FIRMS AND THE ABA TAKE A PROACTIVE APPROACH THAT TARGETS UNDERLYING ISSUES RATHER THAN TRANSFERRING RISK

The action that the ABA and many law firms have taken in the wake of #MeToo demonstrates that the legal field is taking its affirmative duty to be a "public citizen" quite seriously. For example, during the 2019 Annual ABA Meeting, one of the six Showcase CLE Programs in the Civil Rights and Social Justice Section was devoted to targeting "intersectional discrimination and harassment," and featured a panel of attorneys working on #MeToo issues from a

78. Kumar, *supra* note 75.
79. MODEL RULES R. 8.4(g).
80. Kumar, *supra* note 75.
81. *Id.*
82. *See id.*
83. *Id.* The contents of the manual are only accessible through purchase from the ABA. The manual can be found at https://www.americanbar.org/products/inv/book/313437172/ [https://perma.cc/CUJ2-3CAB].

diverse array of perspectives and positions in the legal field.[84] Each panelist agreed that #MeToo has led to positive progress since its inception, but that more reform is still needed.[85] The panelists had differing beliefs, however, about what that reform should look like.[86] For example, panelist Lisa Banks, a partner with Katz, Marshall & Banks LLP (a plaintiff-side firm focusing on employment discrimination and whistleblower cases at the trial and appellate level) believes that improved training efforts by corporations has led to success, but that non-disclosure agreements are still a major hurdle toward progress.[87] By contrast, fellow panelist Sandra McCandless (a partner at Dentons in San Francisco who represents management in employment litigation) believes that sitting through or participating in an online training is not particularly effective, and that companies should instead take a holistic approach, employing strategies like hiring a wellness coach.[88]

Events like these give these attorneys a platform through which they can help the legal field steer the #MeToo movement in the right direction. By promoting healthy exchanges of ideas among experts on the frontlines of this movement with a diverse array of perspectives, the ABA helps create change and reinforce the idea that #MeToo is not a fleeting trend, but rather a seismic shift in cultural norms.[89]

In addition to the work done by the ABA, a number of individual partners, task forces, and teams within law firms across the country have played a similar role in helping companies deal proactively with #MeToo issues and evolving legal and cultural standards.[90] Morgan, Lewis & Bockius LLP attorney Grace Speights, for example, built an all-female team of attorneys to help businesses identify problems in their culture that may enable or permit sexual misconduct,

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84. *The #MeToo Reckoning: How Far We've Come & Where We Go from Here*, 2019 ABA Annual Meeting, https://www.americanbar.org/groups/crsj/events_cle/2019-annual-meeting/me-too-reckoning/ [https://perma.cc/PN79-LB3U]; *Section Events at the 2019 ABA Annual Meeting*, 2019 ABA Annual Meeting, https://www.americanbar.org/groups/crsj/events_cle/2019-annual-meeting/ [https://perma.cc/FQ82-BD7U]. Each panelist's materials, along with relevant reports, articles, and empirical data, is available at https://www.americanbar.org/groups/crsj/events_cle/2019-annual-meeting/me-too-reckoning/ [https://perma.cc/PN79-LB3U].

85. *#MeToo: Its Impact and What's Happening Now*, AM. BAR ASS'N (Sept. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/september-2019/-metoo–its-impact-and-whats-happening-now/ [https://perma.cc/U5SW-XPYE].

86. *Id.*

87. *Id.*

88. *Id.*

89. *See* Sharon P. Masling & Chai R. Feldblum, *How Employers are Developing New Best Practices in Response to #MeToo*, BLOOMBERG L. NEWS (Sept. 2019), https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2019/bloomberglaw_metoo-best-practices_23sept19.ashx [https://perma.cc/RS8A-5TTJ].

90. *See* Gayle Cinquegrani, *#MeToo Movement Keeps Employment Lawyers Busy*, BLOOMBERG L. NEWS (Mar. 20, 2018), https://news.bloomberglaw.com/business-and-practice/metoo-movement-keeps-employment-lawyers-busy [https://perma.cc/U268-NZKU].

using tools designed to evaluate and mitigate risk, like cultural assessments.[91] Morgan Lewis now has twelve attorneys working full time on #MeToo issues, and has launched a full-scale workplace culture consulting and training division.[92] A number of firms have taken a similar proactive approach; for example, some have set up task forces comprised of partners with significant employment law experience and former prosecutorial experience to help clients tackle sexual misconduct claims.[93] Perkins Coie LLP, for example, has a task force of around "twenty-five partners and associates from practice groups including white-collar investigations, business, and insurance."[94] Labor and employment law firm Seyfarth Shaw LLP established a #MeToo working group, which the chair described as "a SWAT team" that has forced it to "redeploy a great amount of [its] attorney talent" in order to meet the needs of its clients.[95] In addition to the expansion of workplace harassment defense groups that advise employers on how to proactively avoid sexual harassment charges, Quinn Emanuel Urquhart & Sullivan LLP recently launched a new plaintiff-side #MeToo practice group that will represent victims of workplace sexual harassment and employment discrimination.[96] While the shape of these practice groups and task forces vary, the desire for law firms to create a formal structure, to which they will devote staff and resources, is uniform.

CONCLUSION

Increasing EPLI coverage over time is harmful to employers and victims alike, and the legal field is uniquely positioned to dismantle the power structures that fuel the status quo by helping companies address underlying issues in workplace culture. By taking steps to help businesses target underlying issues and understand the evolving meaning of compliance over time, employment attorneys can help cultivate a harassment-free workplace, in turn eliminating—or substantially diminishing—the need for EPLI.

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91. Ben Seal, *Grace Speights the American Lawyer's Attorney of the Year*, AM. LAW. (Dec. 5, 2018), https://www.morganlewis.com/-/media/files/news/2019/aml_grace-speights-named-attorney-of-the-year_7dec18.ashx?la=en&hash=522831AD830E08819E0968028ED91DA4C7659AEE [https://perma.cc/CA62-R8MQ].

92. *Id.*; *Workplace Culture Consulting & Training*, MORGAN LEWIS (last visited Feb. 26, 2020), https://www.morganlewis.com/services/workplace-culture-consulting-training [https://perma.cc/82ZN-VN6R].

93. *See* Stephanie Russell-Kraft, *Big Law's Moment in Corporate America's #MeToo Reckoning*, BLOOMBERG L. NEWS (Feb. 22, 2018), https://news.bloomberglaw.com/daily-labor-report/big-laws-moment-in-corporate-americas-metoo-reckoning [https://perma.cc/LB8B-HJXG].

94. Cinquegrani, *supra* note 90.

95. *Id.*

96. Stephanie Russell-Kraft, *Quinn Emanuel Launches #MeToo Plaintiffs Practice Group*, BLOOMBERG L. NEWS (Sept. 23, 2019), https://biglawbusiness.com/quinn-emanuel-launches-metoo-plaintiffs-practice-group [https://perma.cc/83CV-X7YA].

This is not to say that EPLI should be altogether abolished—at least not yet. Rather it is to say that the goal should be incentivizing employers to both confront these issues head-on and take active steps to cultivate a healthy, harassment-free workplace. In the meantime, insured companies can incorporate new EPLI policy provisions that require them to team up with firms that devote time and resources to #MeToo issues and undergo cultural assessments and tailored training. Proactive measures that help companies understand the evolving meaning of compliance and directly target company culture, when enacted by attorneys rather than insurers, are, at the very least, a great start.