Sexual Harassment

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SEXUAL HARASSMENT

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult your lawyer concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.

There is hardly a workplace left today where managers are not at least aware of the complicated and costly problems that can be created by even a single incident of sexual harassment. However, a 2010 survey by the Society for Human Resource Management showed that only 37% of the companies who responded provided annual training, while another 22% provided training every other year. What we have learned is that while having a policy in place is an important defense to a sexual harassment claim, training is important to actual prevention.

Despite the large number of policies and preventive measures in place, plaintiffs continue to sue employers for harassment. In fiscal year 2011, the EEOC processed over 11,364 charges of discrimination containing allegations of sexual harassment. While this represents a decrease of about 2,500 charges from the three years prior, it is still significant. Retaliation claims, however, have grown significantly in the last three years, from 32,690 in 2008 to 37,334 in 2011. Many aggrieved employees include a retaliation claim along with their base claim of harassment or discrimination, arguing that when they complained of illegal conduct they suffered an adverse employment action.

Many plaintiffs are also bypassing the federal system entirely and opting to proceed in state court under state laws that do not require they go to the EEOC prior to bringing suit.

Even the most cautious and concerned business may find itself the target of a sexual harassment lawsuit. These suits are costly to defend, and juries have been awarding ever increasing judgments against employers. In 2012, a jury awarded a former physician's assistant of Mercy General Hospital in Sacramento, CA $168 million in her sexual harassment and retaliation lawsuit. In 2012, a franchisee of 25 McDonald's restaurants in Wisconsin paid $1 million to settle a class action lawsuit brought by the EEOC alleging a pattern and practice of sexual harassment at **one** of its restaurants. In 2011, the EEOC obtained $52.3

million in monetary benefits for victims of sexual harassment and $147.3 million for victims of retaliation claims. These numbers do not include amounts obtained in litigation.

Legal liability for sexual harassment is usually very fact specific, and no brief discussion, such as is presented here, can cover every nuance of this complicated area. While not intended as a substitute for legal advice, this booklet outlines the basic law pertaining to sexual harassment and provides practical advice to help prevent, recognize, and resolve claims of harassment.

EVOLUTION OF THE LAW

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace. Initially, the bill which became Title VII prohibited discrimination only on the basis of race, color, religion, or national origin. "Sex" was added as a protected category at the last minute in an attempt to defeat the bill. As a result, there was very little legislative history, and it is easy to see why courts at first struggled with interpreting the law.

In 1972, Title VII was amended and clarified, but even then, "sexual harassment" was not a widely recognized legal theory. It was not until 1986 that the United States Supreme Court first held that Title VII's prohibition of sex discrimination included sexual harassment. The Supreme Court identified two types of sexual harassment: *quid pro quo* ("this for that") and *hostile working environment*. Since then, the Equal Employment Opportunity Commission (the federal agency charged with enforcing this law) and the lower courts have wrestled with 1) defining what behavior will be considered sexual harassment; 2) identifying who can be liable for harassment and under what circumstances; and 3) determining the potential scope of liability.

SEXUAL HARASSMENT: BASIC PRINCIPLES

A. What Is Considered To Be Sexual Harassment?

The EEOC defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:
>
> - submission to such conduct is made either implicitly or explicitly a term or condition of employment;
> - submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individual; or
> - such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.

This definition reflects the Supreme Court's analysis and has been widely adopted by the lower courts.

Conceivably, an individual could also complain about harassment directed at others. This situation would arise where an employee complains because favoritism is shown to another employee who granted sexual favors, or who may even be involved in a consensual relationship with a manager or supervisor. Courts have been reluctant to recognize this type of claim on the theory that preferential treatment for a lover is more akin to nepotism than sexual harassment.

On the other hand, where preferential treatment of employees who grant sexual favors becomes so pervasive that co-workers might reasonably conclude that granting sexual favors is the only way to advance in the organization or remain employed, courts are more likely to be sympathetic to a claim of sexual-favoritism.

In 1998, the Supreme Court recognized that Title VII also prohibits "same-sex" sexual harassment. It is impor-

tant to remember that neither the harasser nor the victim needs to be homosexual in order for same-sex harassment to exist. There are generally three ways an individual can support a claim of same-sex harassment:

- where the harasser making sexual advances is acting out of sexual desire;

- where the harasser is motivated by general hostility toward the presence of their gender in the workplace;

- where the plaintiff offers direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

Although these claims are not as prevalent as traditional male-female harassment, they are becoming more common. In 2011, males filed 16.3% of the sexual harassment charges brought to the EEOC. Therefore, prudent employers will treat all harassment complaints seriously.

For the sake of simplicity, all examples used in this booklet will presume a female victim and male harasser. The following discussion, however, applies equally to the reverse or a same-sex situation.

1. Examples Of Conduct That Could Constitute Sexual Harassment

Determining whether particular actions constitute sexual harassment can be extremely difficult. The EEOC regulations do not make clear whether it takes one, two, or ten sexually offensive comments or actions to constitute harassment. The Supreme Court has stated that Title VII does not reach "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." In other words, there is a certain amount of horseplay or simply annoying behavior that people must accept without legal redress.

Because of that, courts will look at several factors to determine if actionable harassment has occurred including 1) the frequency of the discriminatory conduct; 2) the

severity; 3) whether the conduct is physically threatening, or a mere offensive utterance; 4) whether the conduct unreasonably interferes with an employee's work performance; and 5) the conduct's effect on the employee's psychological well-being.

Unfortunately, the line between actionable harassment and merely boorish behavior is drawn on a case-by-case basis and often left to a jury. One federal judge likened the difficulty of performing the analysis to "attempting to nail a jellyfish to a wall." It is clear that the range of actions that could constitute sexual harassment is enormous and leaving such a determination to a jury is risky and expensive. Some common examples of conduct that might be deemed harassment include:

Physical actions:

- giving a neck or shoulder massage;
- touching a person's body, hair, or clothing;
- hugging, kissing, or patting another;
- standing close to, or brushing up against, a person;
- touching or rubbing oneself in a private area or with sexual overtones near another person;
- exposing oneself;
- touching, leaning over, cornering, or pinching some one; or
- snapping a woman's bra strap.

Verbal actions:

- referring to another as a "girl," "doll," "babe," "hunk" or "honey";
- whistling or making cat-calls at another;
- making comments about a person's body, clothes, looks, anatomy, or manner of walking;
- turning work discussions into sexual topics;

- telling sexual jokes or stories;
- discussing one's love life;
- asking about sexual fantasies, preferences, or history;
- repeatedly asking a person for a date who clearly is not interested;
- making kissing sounds, howling, or smacking lips; or
- telling lies or spreading rumors about a person's sex life.

Non-Verbal actions:

- looking a person up and down (elevator eyes);
- staring at someone;
- blocking a person's path;
- making sexual gestures with one's tongue or hands or other body movements;
- following a person around;
- giving unwanted personal gifts;
- displaying sexually-suggestive visuals (calendars, pictures, comics, food displays);
- making sexual overtures, comments or propositions via electronic media, such as text messages, instant messages, emails, and social media sites; or
- making facial expressions such as winking, throwing kisses, licking lips, or requiring an employee to wear provocative clothing.

Whether any of these or other possibly sexually-related actions constitute sexual harassment depends not only on their severity and whether they were isolated or repeated, but also on whether or not they were "welcomed" by the recipient.

2. Was The Conduct "Welcome"?

To be actionable harassment, the sexual behavior must have been "unwelcome." Thus, determining whether the perpetrator's actions were welcomed by the recipient becomes an important issue in determining whether behavior has gone from mutually consensual behavior to actionable sexual harassment. The Supreme Court has made it clear that submission to a sexual advance does not prove that the advance itself was welcomed. The Court recognized that a subordinate may "voluntarily" participate in a sexual act that is actually unwelcome, because of the supervisor's threat (explicit or implicit) of adverse employment consequences. The correct inquiry is whether the recipient's *conduct* indicated that the sexual advances were unwelcome, not whether participation was voluntary.

A related issue is whose perspective is to be used to determine whether the behavior was offensive or unwelcome. Is welcomeness judged from the perspective of the victim, the alleged harasser, or some "reasonable person" in society? The Supreme Court has held fast to its rule that conduct must be unwelcome from the perspective of both the particular victim **and** of a *reasonable person* in the victim's situation. This analysis eliminates liability for behavior found offensive by extremely sensitive victims who may not necessarily represent society's norms.

In determining whether the behavior was welcome, it is appropriate to examine the recipient's activities both before and after the alleged sexual advance. Unwelcomeness might be demonstrated by facts such as the following:

- the employee did not solicit or incite the sexual advance;
- the employee regarded the advance as undesirable or offensive;
- the employee grimaced, frowned, or otherwise exhibited disagreement or resistance to the advance;
- the employee turned away or pretended not to hear the sexual comments;

- the employee pulled away, backed up, or attempted to avoid the perpetrator's touch;
- the employee complained to co-workers about the conduct; or
- the employee immediately complained to management about the incident or complained within a reasonable period under the circumstances.

It is important to understand that even if the recipient of the advance has dressed provocatively or has engaged in sexual horseplay with some co-workers, these activities do not necessarily mean that she welcomed the sexual behavior from the alleged harasser. The proper inquiry focuses on the recipient's response to the specific sexual advance(s) at issue. That being said, however, the victim's dress and behavior with others is not totally irrelevant in determining welcomeness, and juries can be adept in recognizing frivolous claims asserted by "victims" who use raw language or dress in a sexually provocative manner.

The difficulty with the welcomeness analysis can lie in the shifting perceptions of the alleged victim. If an employee is complaining, it is very likely she has been offended. More importantly, however, an employee's perception of events can depend upon a variety of factors including her relationship with the company. An employee who is open to sexual jokes may on a later date, when under fire for performance issues, claim she was offended. She then may report allegations of harassment in an attempt to make it difficult for the employer to terminate her for the unrelated performance issues. Because of this reality, we recommend fostering an atmosphere with a level of professionalism and respect that eliminates discussion of potentially harassing topics at all times.

B. Under What Circumstances Can Your Company Be Held Liable For Sexual Harassment?

Title VII applies to private employers that "affect commerce" and have 15 or more employees, including part-time employees, for 20 or more weeks per year. The phrase "affect commerce" is construed very broadly and will encompass nearly all companies. Title VII also applies to

most public employers regardless of the number of employees.

Many states and localities have their own statutes and ordinances patterned after Title VII covering companies with even fewer employees, and frequently containing more stringent rules and definitions of prohibited conduct. You should never disregard a complaint of sexual harassment (absent legal advice) on the basis that your company has too few employees to be covered by any law (local, state, or federal) or because there is no employer-employee relationship with the complainant.

Note that under some circumstances, the law imputes an employer-employee relationship where no such relationship would otherwise exist. For example, under the concept of "joint employer" liability, if you exercise significant control over a worker you could find yourself a legal "co-employer" of the individual. This often occurs in temporary employee leasing situations. Further, even persons that you consider "independent contractors" could actually be your employees, depending on the amount of control you exert over their daily activities.

1. Acts Of Managers And Supervisors

a. Quid Pro Quo Sexual Harassment

Examples:

- A manager's implication that an applicant's or employee's submission to sexual demands will cause her to be hired, promoted, or benefited in some way.
- A supervisor's suggestion to an employee that rejecting a sexual advance will result in her being disciplined, terminated, or economically harmed.
- An employee is demoted or reassigned to a less desirable shift/station after declining a supervisor's advances even though the employee's pay does not change.

Under the Supreme Court's most recent analysis, your company will be held strictly liable for managers' quid pro quo sexual harassment where the victim has suffered some job detriment. Whether you had notice of the harassment or expressly forbade it, it is irrelevant. Managers will be considered your "agents" by virtue of their authority to act on behalf of the company. Therefore, knowledge of a manager's actions which affect a victim's terms and conditions of employment will automatically be imputed to the company.

Note that there is no defense in this situation (other than arguing that the harassment did not occur) and the only question at issue will be the amount of damages. This rule is harsh, and emphasizes the importance of carefully selecting, supervising and training your managers and supervisors. This includes middle managers and especially new managers. Those managers that rise from peer to supervisor may have particular difficulty assimilating to their new role and understanding how their actions equate to liability for the company.

The fact that a threatened adverse employment action was not actually carried out does not necessarily eliminate the employee's claim for harassment. Where no tangible employment action was taken, the employee can still claim that the supervisor's conduct created a hostile environment.

b. Hostile Environment Sexual Harassment

By creating a hostile environment, your managers and supervisors can expose your company to liability, even without conditioning an adverse employment action on the granting of sexual favors. A hostile environment is a situation where sexual harassment is so severe or pervasive that it alters the conditions of the victim's employment by creating an abusive working

environment. The types of verbal and non-verbal conduct described in the previous section might all contribute to the creation of a hostile environment.

It is extremely important that employers adopt and enforce a written "No Harassment" policy to protect themselves from such hostile environment claims. The Supreme Court's rulings provide employers an affirmative defense to a hostile environment claim as long as no tangible employment action has been taken against the employee. This defense allows an employer to avoid liability for a hostile environment where:

- the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
- the victim unreasonably failed either to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

To ensure that you receive adequate and immediate notice of any potentially harassing behavior, you should adopt, disseminate, and consistently enforce a written "No Harassment" policy — the law clearly favors employers who do. Where the victim knows that your company has a policy prohibiting harassment, but unreasonably fails to report the harassment, Title VII will allow you to use this as a defense against liability

2. Acts Of Co-Workers

a. Quid Pro Quo Sexual Harassment

Unlike managers or supervisors, co-workers generally do not have the authority to affect conditions of employment: they generally cannot grant promotions, discipline, or terminate other workers. For this reason, nearly all quid pro quo cases involve allegations against a manager or supervisor.

There have been cases, however, where victims have claimed that co-workers engaged in quid pro quo sexual harassment. These generally involve situations where a co-worker and supervisor are friends and the co-worker suggests to the victim that she would receive better training opportunities, better assignments, and better evaluations if she granted him sexual favors.

If a supervisor takes adverse action against the victim based upon a co-worker's suggestions or recommendations, with knowledge of the co-worker's request for sexual favors, courts have held the employer liable for the supervisor's actions. Thus, you should ensure that employees understand (through your harassment policy and training) that no one in your company has the authority to require sexual favors for job benefits.

b. Hostile Environment Sexual Harassment

Co-workers can also expose your company to liability for the hostile working environments they create. The standards for establishing liability on the part of co-workers is slightly different than for establishing liability on the part of supervisors. Particularly, notice to the employer of the harassment, either constructive or actual, is a requirement.

"Actual notice" occurs when you learn, either through an employee complaint or from observation (through your supervisors) that harassment is occurring. "Constructive notice" occurs when the facts or circumstances are such that any reasonable person in your shoes would or should have known that harassment was occurring. Constructive notice situations often involve employees who are loud and obnoxious and use sexually explicit, vulgar, or profane language. Although some co-workers may characterize individuals like this as "eccentric" or "colorful," many others are often truly offended by such behavior.

Even if the company is engaged in an industry that attracts "eccentric" individuals, that does not eliminate an employer's duty to provide an environment free from harassment; even when these individuals are otherwise good workers. There are no excuses.

It is important to understand that managers and supervisors have a duty to stop or at a minimum to report situations they observe which involve potentially harassing behavior. A supervisor's knowledge of harassment will in almost every instance be imputed to the employer.

The pro-active steps an employer takes, such as adopting policies and conducting training, help in this arena too. Thus, if your company has a No Harassment policy that includes a clearly defined reporting procedure, liability will generally be imposed only if you failed to investigate and take appropriate corrective action following your actual or constructive notice of the harassment.

3. Acts Of Non-Employees

a. Quid Pro Quo Sexual Harassment

Such claims could arise in situations where the employer acts jointly with a non-employee to affect an individual's job because the individual either acquiesced or rejected the non-employee's sexual advances.

Examples:

- A favored customer asks the employer to terminate an employee because she rejected the customer's sexual advances.
- A vendor suggests that the employer would receive a better bargain if one of the company's employees acquiesced to the vendor's sexual advances.

- A client threatens to stop doing business with the employer unless the employer can convince an employee to engage in sexual liaisons with the client.

You should ensure that all employees understand that harassment in any form, initiated by any person, whether employed by you or not, will not be tolerated and must be reported so that you can take appropriate corrective action.

b. Hostile Environment Sexual Harassment

While quid pro quo actions are unlikely, non-employees can expose your company to liability by creating hostile working environments for your employees. Such claims of harassment occur most commonly in the hospitality and service industries. These claims are made more troublesome because the employer naturally wants to please its customers and keep vendors happy. Moreover, employers often lack significant control over non-employee conduct.

Examples:

- A cocktail server is repeatedly subjected to jeers, catcalls, groping, or lewd comments by inebriated patrons.
- A nurse is repeatedly fondled by a patient.
- A hotel housekeeper is continually "flashed" by the same guest.

As with other types of hostile environment claims, your company can be liable for sexual harassment by non-employees if you become aware of the harassment (through actual or constructive notice; in legal terms, you knew or should have known) and you fail to take appropriate corrective action.

C. Potential Damages

Your company can be sued by a victim of sexual harassment under federal law; both the company and the individual alleged harasser could be sued under most state laws. A summary of the claims that can be made and the potential liability for each follows.

1. Under Federal Law

Under Title VII, as amended by the Civil Rights Act of 1991, a victim who proves that sexual harassment occurred can obtain an award of:

- up to $300,000 in combined compensatory and punitive damages, depending on the size of the company;
- back pay (for lost earnings from the time of termination until the lawsuit);
- front pay (for lost earnings into the future for some "reasonable" period of time);
- attorneys' fees and costs; and
- appropriate equitable relief (such as an injunction or reinstatement).

2. Under State Law

Many states have statutes prohibiting discrimination that are modeled after, or similar to, Title VII. Some of these laws, however, do not have caps on the amount of damages that can be awarded. Thus, a plaintiff has incentive to seek redress in state court where the damages award can be much higher.

Further, victims of sexual harassment may be able to sue under the following additional types of state-law claims which are intended to protect persons from emotional and physical harm:

- *Battery.* Conduct that results in any harmful or offensive touching of another. Grabbing, brushing against, touching, and fondling are typical claims.

- *Assault.* Conduct that results in the imminent apprehension of a harmful or offensive contact. Either verbal or physical harassment may constitute an assault.
- *Intentional Infliction of Emotional Distress.* Behavior that is so shocking in character, or so extreme in degree, that a person of normal sensibilities would consider the action "outrageous." Either verbal or physical harassment may constitute intentional infliction of emotional distress.
- *Defamation.* False statements about an individual that tend to damage reputation.
- *Negligent Hiring, Training, Supervision and Retention.* An employer's failure to fulfill a duty of reasonable care owed to employees or third parties, either by failing to investigate an applicant's background, by failing to train them on anti-harassment policies and procedures; or by failing to take appropriate corrective steps when an employee has demonstrated a propensity for misconduct.
- *Invasion of Privacy.* Conduct in which one person intrudes upon another's physical solitude or unnecessarily passes private information (whether true or false) about an individual to others.
- *False Imprisonment.* Conduct in which one person confines another within the boundaries fixed by the first person, such as blocking someone's path, holding someone in a fixed place, or locking someone in a room.
- *Loss of Consortium.* Claims by the victim's spouse that the spouse has been denied sexual relations by the victim as a result of the harassment.

Should a plaintiff prevail on these types of claims, most states *do not limit* the type or amount of damages, which means that both compensatory damages and punitive damages may be awarded in any amount determined by the jury.

3. Claims By The Alleged Harasser

Although many males accused of harassment believe they should have a claim against the woman lodging the complaint or against the company that takes some form of disciplinary action against them, most courts do not agree. Alleged harassers have often tried to sue for defamation, wrongful discharge, and negligent investigation/discipline. With certain rare exceptions, usually involving a totally frivolous complaint or a sham investigation, courts generally refuse to recognize such claims. The reasoning is that the law encourages the resolution of sexual harassment or discrimination complaints and will not punish the complainant or the employer for taking what was reasonably believed under the circumstances to be appropriate action.

4. Claims By Those Who Assist Or Support The Rights Of The Victim

Co-workers who support a victim in a claim of sexual harassment are also protected by the anti-retaliation provisions of Title VII (and related laws). This is true whether the assisting employee gives the company a statement, gives the EEOC a statement, is interviewed on your premises by the EEOC, or testifies at an agency hearing or in court. Thus, you should act with care when imposing discipline or terminating employees following their involvement in a sexual harassment matter, and ensure that the discipline is warranted and proper under company policy and practice.

5. Claims By Those Within The "Zone Of Interests"

In 2011, the Supreme Court in a unanimous ruling determined that an employee who does not directly engage in protected activity can still assert a claim for retaliation under Title VII of the Civil Rights Act as a victim who falls within the "zone of interests" of protection afforded by the statute.

The Supreme Court found that the co-worker fiancé of a female employee who filed a harassment claim was a person aggrieved within the meaning of Title VII. In doing so, it applied the "zone of interests" test to determine that he had standing to sue under the statute. Like other federal statutes which may sanction a cause of action for an individual closely associated with an employee who engages in protected activity, such as the National Labor Relations Act and the Fair Housing Act, the Court determined that here Congress intended the same broad result under Title VII.

The Supreme Court further reasoned that the nature of the anti-retaliation provision included a broad range of employer conduct that might dissuade a reasonable worker, such as a close family member or fiancé, from making or supporting a charge of discrimination. In this instance, the fiancé was terminated shortly after the harassment complaint was lodged.

GUIDELINES FOR PREVENTIVE ACTION

A. Developing A No Harassment Policy

There are several proactive measures you can and should implement to help prevent sexual harassment from occurring and to reduce your exposure when it does occur. Probably the most important measure is the adoption, communication, and consistent enforcement of a written policy prohibiting all forms of harassment. This policy should:

1. Define Harassment

Some employers choose to use the EEOC definition of harassment; others use plainer language and include examples of various kinds of harassment. Whichever approach you utilize, it is usually wise to include a prohibition of harassment based on other criteria, such as religion, age, race, disability, etc.

2. Prohibit Any Level Of Harassment

The policy should communicate a "zero-tolerance" stance. Many employers have found it beneficial to prohibit all sexual advances, not just those that are unwelcome.

3. State That Supervisors Do Not Have The Authority To Harass Employees

To avoid any possibility that employees may believe that a manager's actions are either impliedly approved or known by the company, the policy should specifically state that supervisors and managers do not have the authority to harass employees.

4. Outline Responsibilities

The policy should advise that all employees are obligated to report any harassment that they observe, have heard about, or believe may be occurring.

5. Provide That Violators Will Be Disciplined Appropriately

The policy should state that disciplinary action will be taken up to and including discharge for conduct involving prohibited harassment.

The appropriate level of discipline will generally depend on the severity of the harassment. If the harassment is a one-time relatively innocuous occurrence, verbal counseling (documented) or a written warning may be sufficient. If your investigation reveals a pattern of similar harassing behavior, or the conduct is aggravated, more severe discipline such as probation or even termination may be appropriate. In any harassment investigation, it is usually wise to seek legal advice.

6. Encourage Complaints

The policy should require all individuals who believe that they have been the victims of harassment, or who have observed or heard about harassment, to report it. In fact, somewhere in your policy, you should include the following in capital letters and bold type: DO NOT ASSUME THAT THE COMPANY KNOWS ABOUT ANY PARTICULAR SITUATION. REPORT ALL INCIDENTS OF HARASSMENT.

7. Assure That The Complaint Will Be Kept As Confidential As Possible

Never promise that the complaint or investigation will be kept "strictly confidential;" this is unrealistic and usually not possible. Rather, if the subject comes up, you should advise that the complaint will be handled in a discreet manner and information will be kept on a need-to-know basis.

8. Provide Several Avenues Of Complaint

One of the lessons of sexual harassment jurisprudence over the last several years comes from a common scenario present in many cases. Sexual harassment victims will report the conduct to someone in a supervisory role to whom they feel comfortable speaking. Many times, these complaints are accompanied by requests that the supervisor "do nothing." This potential issue can be solved by training supervisors in identifying and properly responding to harassment issues. Once something is reported, action *must* be taken to at least investigate further.

It is not up to the employee to decide whether the company will or will not investigate. If a report is made or the company acquires knowledge of harassment, it has a duty to act.

The breadth of many employers' reporting procedures, telling employees to complain to "any supervisor," leads courts to conclude this was a proper report and put the employer on actual notice of the claim. Yet often, the supervisory personnel do not respond properly claiming they did not think the conversation was a "formal" complaint.

Courts have also criticized policies that tell employees they are obligated to report harassment up the ladder if nothing happens. For this reason, it is important to direct complaints to a place where you are confident that they will receive an appropriate response. Larger companies often provide 1-800 numbers for this purpose. Smaller employers often direct these complaints

to specifically named individuals in the Human Resources Department. Critically, whoever is listed as someone with authority to receive complaints of sexual harassment must be trained how to properly respond.

It is also important to provide an alternate means of complaint (such as directly to the company president) if the employee is uncomfortable reporting to one of the specifically designated persons for some reason. This prevents a victim from asserting that the complaint reporting procedure could not be followed because she would have had to report the harassment to the alleged harasser.

9. Assure No Retaliation

Specifically assure that employees who, in good faith, report what they believe to be harassment, or who cooperate in any investigation, will not suffer any retaliation. The policy should also state that any employee who believes he or she has been the victim of retaliation for reporting harassment should immediately report the retaliatory acts. The same assurances should be made for those who participate in investigations.

10. Require Employees To Acknowledge Receipt Of The Policy And Agree To Abide By Its Terms

Requiring new hires to read and acknowledge receipt of all your rules and policies during their initial orientation is a good idea. You should have separate acknowledgment forms for supervisors and non-supervisory employees. In the supervisor's acknowledgment, you may wish to add wording advising the supervisor that he or she might be held personally liable for engaging in sexual harassment.

B. Communicating The Policy

Once adopted, you should ensure that your No Harassment policy is communicated to employees in several ways. The policy should be posted on company bulletin boards, by

time-clocks, in lunch rooms, or in other areas where employees regularly congregate. During initial employee orientation, a manager should cover the policy in detail and encourage questions from new hires to ensure their understanding and acceptance of the policy.

Managers should verbally communicate the No Harassment policy at periodic supervisor and employee meetings, stressing each individual's responsibility for not engaging in prohibited behavior and reporting inappropriate behavior. Acknowledgment forms confirming receipt of the policy and agreement to report harassment or retaliation should be obtained from each employee and placed in employee personnel files.

Simply having a No Harassment policy is rarely going to be sufficient to establish that an employer took reasonable care to prevent sexually harassing behavior. In this arena, the old adage actions speak louder than words is particularly true. If you are faced with a sexual harassment claim, your response to the claim will be critical to your defense. Supervisors who are not trained will not respond appropriately and their inadequate responses can often be more damaging than the conduct that gave rise to the complaint.

Supervisor training should be done at least on an annual basis. It need not be overly technical, but should emphasize the priority the company places on preventing sexually harassing behavior. It should include training on the same elements that are included in a sexual harassment policy. Additionally, training should dispel common misperceptions about sexual harassment such as the need for an employee to make a "formal complaint" or the belief that a supervisor should acquiesce in an employee's request to "do nothing about it." Finally, supervisors should be made aware that the company obligates them to report sexual harassment and the failure to do so could lead to disciplinary action against them.

C. Investigating Complaints

There are four basic steps to handling a sexual harassment complaint: 1) taking the complaint; 2) interviewing the alleged offender; 3) investigating the complaint, including interviewing witnesses; and 4) taking appropriate action. Guide your investigation by ensuring that the steps outlined below are followed and **documented**. Maintain all documentation in separate, confidential personnel files. Ensure that all interviews are conducted in private areas.

1. Taking The Complaint

a. Listen carefully to the complainant's story. Put aside your personal biases and emotional responses and allow the person to speak candidly. A tactful and sympathetic demeanor is important, but express no opinion and make no commitment, other than to investigate the complaint.

b. Consider having a witness in the room with you to take notes of the conversation. If the complaining employee is male, have a male witness. If the complaining employee is female, have a female witness. This will help make the employee more comfortable in discussing intimate or sexual matters.

c. Be an active listener, asking open-ended questions, acknowledging the complainant's statements, and paraphrasing to ensure understanding.

d. Get specific facts of the incident(s), including:

- what the behavior was;
- where it occurred;
- who was involved;
- when it happened (date and time);
- whether there were witnesses (and who);
- whether it has occurred before; and
- whether the complaining employee has told anyone else.

e. Assess welcomeness by determining what the complaining employee's response was to the harassment.

- Did the complaining employee say anything to the alleged harasser to indicate that the behavior was unwelcome, uninvited, or offensive?
- What was the complaining employee's physical response (i.e., did she turn away, laugh, smile, etc.)?
- If the complaining employee said or indicated that the behavior was unwelcome, ask about the alleged harasser's response.

f. Determine whether the complainant kept notes and if so, ask to make a copy of them. If not, get as many details as possible. Find out when she began making the notes; whether the notes were kept contemporaneously with the event; how many pages exist; what type of book it is in (spiral bound, loose-leaf notebook, etc.); what color the outside of the book is; why she is keeping it; and whether she has written down every event of harassment. The purpose of obtaining minute details about such notes is to ensure that the complaining employee does not create an "after-the-fact" record of the alleged events that may be elaborated.

g. Determine whether there might be other evidence, such as letters, emails, text messages, pictures, voicemails, social media posts, or video surveillance. Secure and maintain copies of these items through the conclusion of the investigation and the appropriate statutory limitations period for potential legal claims. This can vary greatly by state law, so it's best to consult with an employment attorney.

h. Ask the employee if she thinks there are other individuals you should be interviewing, or if there is anything else that she believes you should know to more thoroughly investigate the matter.

i. Ask how the complainant would like to see the situation resolved (i.e., what action the company should take to resolve the problem).

j. Assure the complainant that you consider the complaint a serious matter and that appropriate action will be taken as quickly and confidentially as possible.

k. If the employee requests to have an attorney in the room to report the event, you should seek your own legal advice. Generally, it is not advisable to discuss this situation with an employee's lawyer; rather, you should discuss the guidelines and parameters of the interview with your own employment counsel.

l. Ask the employee not to discuss the investigation with any of the witnesses she has identified until you have spoken with them. This will help to keep the investigation as objective as possible.

m. Tell the employee that you will inform her of the results of the investigation.

2. Interviewing The Alleged Harasser

a. Remember that the accused has a right to hear and respond to the allegations, in detail.

b. Conduct the interview in the same straight-forward, unbiased manner as your interview with the complaining employee.

c. Consider having a witness in the room with you to take notes of the conversation. Again, if the alleged harasser is male, have a male witness. If the alleged harasser is female, have a female witness. This may help make the alleged harasser more comfortable in discussing intimate or sexual matters.

d. Be serious and to the point. Begin with something like, "The purpose of this meeting is to talk about an allegation of sexual harassment." You do not want excessive small talk to signal that you do not consider this a serious matter.

e. Focus on the alleged harasser's actual behavior rather than intent. Ask the accused to respond to each allegation separately and obtain the same type of information that you obtained from the complaining employee.

f. Find out whether the alleged harasser and the complaining employee socialize together (alone or in a group). If so, obtain details of the situations in which they have socialized.

g. If the alleged harasser claims the behavior is consensual, determine whether there might be supporting evidence, such as letters, emails, text messages, pictures, voicemails, social media posts, or video surveillance. Secure and maintain copies of these items through the conclusion of the investigation and the appropriate statutory limitations period for potential legal claims. This can vary greatly by state law: consult with an employment attorney.

h. If the accused harasser admits to unlawful behavior, state that the behavior must stop immediately, and consider what will be appropriate disciplinary action.

i. If the accused harasser denies the behavior, explain that you now have two sides of the story and that you will be investigating further before making any determination. Caution the alleged harasser not to speak with co-workers at this time regarding the allegation because any attempt to influence others could be construed negatively. Before disciplining anyone for discussing the complaint or investigation, however, you should consult labor counsel to ensure that any such discipline will not violate the "protected concerted activity" provisions of the National Labor Relations Act.

j. Advise the alleged harasser that the complaint and investigation will be kept as confidential as possible.

k. Caution the alleged harasser strongly that you will not tolerate retaliation against the complaining employee or witnesses, if any.

3. Developing Information

a. Monitor the workplace to ensure that the harassment (if any) stops and that no retaliation occurs. You may need to separate the two persons temporarily by reassigning one or the other until the matter is resolved. You should obtain legal advice in determining who to transfer to avoid retaliation claims for your actions.

b. Try to speak with all of the witnesses and the parties' supervisor(s) as soon as possible (within the same day, if possible). Be as discreet as possible. Only interview witnesses who may have relevant information.

c. If there are no witnesses, consider speaking with one or two trusted, long-term employees who may be able to provide insight into the behavior of both parties.

d. Inform any witnesses that the investigation is confidential and that discussing the matter may result in disciplinary action. Again, as mentioned above, before imposing any discipline for talking about the investigation, consult labor counsel to ensure that you do not violate the "protected concerted activity" provisions of the National Labor Relations Act.

e. Phrase questions so as not to give away any unnecessary information. Try to ask open-ended questions to determine what the witness knows, rather than obtaining yes/no confirmation of events you recite.

f. Do not limit the investigation to current employees. Interview former employees, friends, and relatives of both parties, if appropriate.

g. Review and consider the personnel and supervisory files of both parties.

4. Taking Appropriate Action

If you conclude that harassment has occurred, you are *legally obligated* to take appropriate disciplinary action. Appropriate discipline may range from verbal counseling to immediate termination, depending on the severity of the circumstances, the parties' past record, and their position within the organization.

If the complaint alleges employee harassment by a supervisor, you should:

a. Ensure that whatever action taken is equitable, consistent with the company's past practice, and appropriate under the law.

b. Be prepared to explain fully the results of your investigation and the action that will be taken. If applicable, explain to the alleged harasser the right to appeal the decision to a higher level.

c. Always communicate the results to the complaining employee with a reminder that she will not be retaliated against for bringing the complaint.

d. Instruct the complaining employee to report any recurring or continuing harassment immediately.

e. Monitor the workplace to ensure that the harassment has stopped and that no retaliation is occurring. Mark your calendar to check with the complaining employee regarding these issues at regular intervals for the next few weeks.

f. Document carefully every step of the investigation and any subsequent action.

What constitutes "appropriate corrective action" for non-employee harassment varies considerably, depending on the circumstances, including the amount of control that you have over the non-employee and the legal relationship between you and the non-employee. You need to do whatever is reasonable under the circumstances to try to stop the harassment from occurring.

Reasonable corrective action may include the following:

- Where the alleged harasser is a specific known individual (i.e., guest, client, or vendor), communicate directly with the individual to advise of your concern and request that the harassment stop. If the harassment continues, you may need to consider terminating your relationship with the non-employee.
- Where your employees complain that customers in general try to grope them or regularly make sexually-suggestive remarks, you may need to evaluate your dress policies, post a No Harassment notice in a conspicuous place, and train your managers to police the environment, including removing customers who refuse to abide by your policy.
- Where the alleged harassers may be homeowners or business persons on your employee's route, you might consider allowing the employee to change the route, or assign those locations to other employees. If your employee's customers change frequently (as in house calls for installations and service), you may need to consider including a No Harassment policy or notice in your customer newsletter or correspondence.

Regardless of the type of situation, you must do whatever is reasonable under the circumstances to address and try to stop the harassment.

5. Taking Action Even If The Investigation Is Inconclusive

Even if the investigation is inconclusive (i.e., you have believable allegations sincerely brought, but no witnesses, and the alleged harasser credibly denies all allegations) you should still take proactive measures to ensure that both employees understand their responsibilities and that the company takes such matters seriously. Consider the following steps:

a. Write a memorandum to each employee's file documenting the investigation. Make a record of the relevant facts, including factors that you considered that raised suspicion one way or another.

b. Write separate memoranda to the complaining party and the alleged harasser, placing copies in your confidential investigation file. The memoranda should include:

- the fact that the investigation was inconclusive, but will remain open in case other information surfaces that will assist the company in making a final determination;
- a reminder of the company's No Harassment policy, attaching another copy for their reference;
- an expectation that no other harassment complaints against the alleged harasser will surface in the future. Also include an assurance that if any complaint is made, the company will take immediate appropriate action; and
- a reminder that retaliation will not be tolerated.

c. Meet with each individual separately and communicate the results of the investigation, the action the company will now take, and the content of the memoranda discussed above. The company may also consider having each employee sign the memorandum acknowledging that they were apprised of the outcome of the investigation so as to discourage the employees from later claiming ignorance as to the company's efforts to investigate and remediate harassing conduct.

A COMMON SENSE APPROACH TO PREVENTING LAWSUITS

No employer enjoys listening to employees complain about the working environment. However, hearing complaints, especially about sexual harassment, is very important. First, complaints offer employers a chance to take remedial action before a more severe or pervasive environment can develop. Second, complaints allow employers a means to discover and eliminate employees who are disruptive to others through their harassing conduct. This not only saves money in the long run but improves the morale of the entire work force.

Finally, experience has shown that sexual harassment occurs in all sizes and types of companies. An employee experiencing sexual harassment has many options in today's world. She can quit, tolerate the conduct, file a charge with a state or federal agency, or sue you to list a few of the options. The best case is for the complaining employee to come to you so you can resolve the problem and thereby ensure that your work environment remains a place where employees can work without improper and illegal demands or pressure on them.

The best advice for preventing lawsuits of all types, including sexual harassment, is to develop and implement an effective procedure for handling complaints, publicize the procedure and then encourage your employees to use it.

For more information contact any office of Fisher & Phillips LLP or visit our website at www.fisherphillips.com

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