



EEOC Sees Sexual Harassment Statistics Explode In Past Year

Insights

10.05.18

The Equal Employment Opportunity Commission (EEOC) just released its preliminary findings examining sexual harassment in the workplace over the past year, and, in wake of the #MeToo movement, no one should be surprised to see the figures rise dramatically. The numbers demonstrate that employers need to be more vigilant than ever when it comes to addressing issues of harassment and discrimination in the workplace.

Raw Data: Explosion In Claims, Attention, And Recovery

The FY2018 numbers aren't yet official; the EEOC's Office of Enterprise Data and Analytics has to validate them before they can be finalized. But even if the final statistics are adjusted slightly in the near future, [Wednesday's EEOC data release](#) presents stark evidence that the #MeToo movement is not just a passing fad. Among the most significant statistics that should capture the attention of every employer:

- [Sexual harassment charges](#) with the EEOC **increased by more than 12 percent** from FY2017. This represents the first increase in such charges in five years—and a massive increase at that.
- The EEOC's litigation attorneys filed 41 separate [sexual harassment federal lawsuits](#) on their own, which is **more than a 50 percent increase** from the previous year.
- [Reasonable cause findings](#) in sexual harassment cases increased from 970 to nearly 1,200, an **increase of over 23 percent**.
- Successful [conciliation proceedings](#) (a formalized mediation process run by EEOC personnel) jumped from 348 to nearly 500, a **43 percent increase**.
- In FY2017, the EEOC recovered \$47.5 million for the victims of sexual harassment through [administration enforcement proceedings and litigation](#). In FY2018, that number increased to nearly \$70 million, a **leap of over 22 percent**.
- Finally, one of the more interesting statistics demonstrates the heightened interest that the general public has when it comes to sexual harassment. The EEOC reported that [website visits to its sexual harassment page](#) **more than doubled** over the past year.

What's Next?

Given the increased interest and awareness of sexual harassment in the workplace, it was no surprise that the EEOC announced late last year that it was putting the finishing touches on updated guidelines on the subject for the first time in over 20 years. Acting EEOC Chair Victoria Lipnic acknowledged that “the update comes up at a time of burgeoning publicity for sexual harassment and assault in the workplace,” though she said the timing of the update was “purely coincidental.”

After several years of drafting and editing, which included incorporating public opinion on key issues, the Commission unanimously approved the new guidelines in early November 2017. The draft guidelines—some 70 pages in length—were then sent to the White House’s Office of Management and Budget, with an expectation that they would be quickly approved and released to the public. Almost a year later, we’re still awaiting the guidance’s release.

The reason for the holdup is uncertain. Acting Chair Lipnic told Bloomberg Law in June that she has been “very persistent in trying to move it along,” but the guidance remains mired in administrative red tape. Some suspect that the delay is political in nature, as the White House awaits the seating of a new EEOC General Counsel and two Republican nominees to the five-person Commission. If that’s the case, it’s unlikely we will see any movement until after the midterm elections, and possibly until next year’s Congress begins its 2019 session.

What Should Employers Do? A 5-Step Plan

The delay in the guidance’s release is no excuse to sit idly by and wait, however. As the raw statistics described above show, the modern sexual harassment revolution is in full swing. For that reason, we recommend that you immediately implement a five-step plan to address this issue before you become another statistic.

Step One: Make Sure Your Policies Match Modern Standards

If you haven’t updated your sexual harassment policy in the past several years, you might be behind the curve. Recent court decisions have placed greater responsibility on employers to establish policies that address sexual harassment in a more realistic and thoughtful manner. At a minimum, your policy should clearly indicate that you have “zero tolerance” for sexual harassment in any form. You should clearly define the term and provide examples of conduct that would run afoul of your standards (including, for example, boorish behavior, off-color jokes, unsolicited hugs or shoulder rubs, sharing pornographic images, etc.) so that there is no confusion.

Your reporting policy should encourage employees to report their concerns about potential harassment immediately. You should also provide several avenues for the employee to provide their report, whether through their immediate manager, a human resources representative, another manager, or even a hotline number or intranet reporting mechanism. Finally, your policy should clearly guarantee your workforce that they will not face retaliation as a result of their report. Providing this level of safety and security is important if you truly want to foster an open and respectful atmosphere.

Step Two: Disseminate Your Policies In A Thoughtful Way

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Your policy is worthless if it sits on a shelf and is never accessed by your employees. You need to ensure that your workforce is aware of your position on sexual harassment if you want the policy to be effective. Most employers distribute the policy as part of the onboarding process and require new employees to sign an acknowledgment of receipt. And that's a good start – but it's just a start. You should take additional steps if you want the policy to truly become part of your workplace culture.

At the time of hire, a human resources representative should take the time to specifically describe your harassment policy and start a conversation about your organization's zero-tolerance philosophy. That lets the new employee know right out of the gate that you take this issue seriously. If your organization has an intranet, you should consider hosting the policy there permanently so that it can be readily accessed by anyone at any time. You should periodically provide copies of the policy as a standalone document to all of your employees to remind them of their rights and responsibilities. A good way to accomplish this is by having one of your highest level officials – if not the highest level executive – distribute the policy from their email account or via signed memorandum. By setting the tone from the top, your organization will send a signal to everyone that you take the subject matter seriously.

Step Three: Train Your Managers To Address Issues And Avoid Common Mistakes

Training your managers on your sexual harassment policy is a critical step. Your organization could be held automatically liable for any proven sexual harassment if carried about by a managerial employee, so all of your hard work in developing and disseminating your policy could be deemed irrelevant if your managers act inappropriately. You need to drill your policies into their minds on at least an annual basis through formal training sessions.

There are a few common mistakes to warn your managers about at these sessions. First, many companies get in trouble when managers ignore inappropriate behavior that they believe is “welcomed” by the victim, or if it appears to be part of a mutual and voluntary interaction. Your managers need to know that victims of harassment will often pretend to “go along” with the behavior for fear of losing their job, or simply because they want to appear to be part of the team, but that they will more than welcome managerial intervention that puts a stop to the conduct. Moreover, the conduct that your managers see out in the open, or hear about through the grapevine, is often just the tip of the iceberg, and it could signal that much worse behavior is taking place outside of your knowledge. For these reasons, your managers should be trained to address any behavior they witness or hear about, no matter if it appears that it is all in good fun and that no harm is occurring.

Second, it is common for some managers to allow extra leeway for certain employees because it is commonly accepted that their behavior is simply a harmless personal idiosyncrasy. Reports about misconduct or inappropriate behavior are met with a chuckle and a statement such as, “Oh, that's just Harvey being Harvey!” It becomes commonly known around the workspace that you need to operate differently around that employee because they've been acting like that forever. “He likes to give hugs but he's harmless,” or “Just don't caught in his office one-on-one and you'll be fine” are common sentiments in these workplaces. This is exactly the kind of attitude that leads to festering

situations and that should be eradicated from your workplace. All employees should be held to the same standard, no matter how long their actions have been tolerated in the past.

Step Four: Promptly Investigate Any Issues Raised

Once you receive a report of sexual harassment, it's time to take immediate action. If you delay your investigation until work slows down or until an important project is completed, you will send a signal to your workforce that this isn't a priority. Moreover, you could face hostile questioning under oath in a subsequent lawsuit about what you were doing that was so important that it trumped the well-being of your workers. Therefore, you should clear the decks and do everything reasonably possible to make the investigation your highest priority.

Your human resources department should take the lead in the investigation, as they are trained to carry out an effective and legally compliant inquiry. There is no cookie-cutter approach to investigations because they are all unique depending on the circumstances, but there are some common threads that accompany a reasonable examination:

- Try to obtain a written report from the victim so you have a clear and specific understanding of the issues at play, but don't delay your investigation if for some reason a written report can't be generated right away.
- All relevant witnesses should be interviewed, including those who might be able to provide a glimpse into the working relationship between the employees in question.
- To the extent you need to obtain evidence to support the claims or defenses – emails, texts, documents, photos, etc. – make sure you have reviewed them all before concluding your investigation.
- Make a clear record of your investigation by taking notes during your interviews and review of the evidence. This will help you sort out all of the claims as you conduct your review, but will also serve as evidence that you are taking the matter seriously if you are later called into question for your role in the matter. Keep the notes focused on objective information and free of conclusions and opinions; you should be ready for your notes to be an exhibit in a lawsuit one day.
- During the pendency of your investigation, you should take reasonable steps, if possible, to ensure that the victim is not forced to work side-by-side with the accused. This might mean reassigning the accused worker to a different assignment, but it might also mean suspending the accused (with or without pay) for that period of time.
- Finally, don't ignore older complaints. You never know what you might find when you start exploring a situation involving an alleged harasser. For example, you might ask a witness if they've ever seen that employee do or say something inappropriate, and that witness might reluctantly tell you about some obscene behavior from the office holiday party three years ago. Just because it's older news does not make it irrelevant. Again, each situation is unique, and the

specific facts and circumstances of the situation will dictate your response and how you factor that unearthed information into your decision.

Step Five: Consistently Enforce Your Standards

Finally, and perhaps most importantly, you need to take action against the accused employee if the allegations against them are substantiated through your investigation. If your workforce figures out that your policy is toothless, they will lose respect for your organization and will feel dissuaded from reporting other misconduct. This could lead to legal trouble, but also to flagging morale and high turnover among your key contributors.

Your goal in meting out a response is to take action sufficient to ensure that the behavior is not reasonably likely to occur again. In some situations involving mild misconduct, it might be sufficient to give a documented verbal warning to the employee along with an acknowledged reminder of your sexual harassment policy. In more severe or reoccurring situations, the only reasonable possible response is termination. In between the two are a whole host of possible options, including written warnings, mandatory professionalism classes, behavioral improvement plans, suspensions, demotions, and the like.

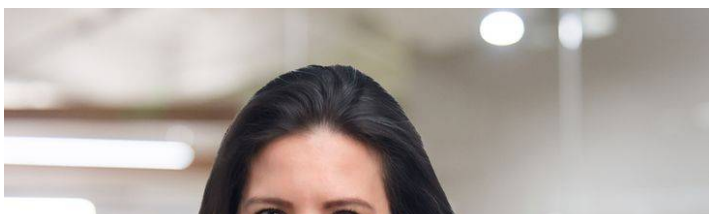
Some employers run into trouble when they inconsistently apply standards to high-performing or high-ranking individuals accused of harassment. When push comes to shove, these organizations value the contributions these employees make to the company's bottom line more than they value the ideals contained in the sexual harassment policy. There is no better way to hurt morale at your organization and neuter your harassment policies than to give a pass to a key executive accused of misconduct while coming down hard on a mid-level manager or hourly worker accused of similar behavior. On the other hand, your policy's effectiveness will be given a boost if your workforce sees it applied in an evenhanded manner, no matter who is accused of a violation.

Conclusion

Once the long-awaited guidance is released, our firm will stand ready to analyze the document and summarize the key points for you. Until then, we recommend you take the above steps to ensure that you provide a safe and professional working environment for your employees.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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Jennifer B. Sandberg
Regional Managing Partner
[Email](#)



Joseph P. Shelton
Regional Managing Partner
615.488.2901
[Email](#)

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