

## Employment Law Update: Workplace Sexual Harassment – January 2018

### Preventing Workplace Sexual Harassment and Employer Liability

*By: Spencer M. Ritchie*

In the wake of recent sexual misconduct allegations against numerous public figures, the U.S. Equal Employment Opportunity Commission (EEOC) agency responsible for enforcing federal laws prohibiting workplace harassment reported a deluge of visits to its sexual harassment website. And the National Women's Law Center organization that disseminates information about the legal definition of harassment and how to file charges with the EEOC seen a five-fold increase in the number of calls about sexual harassment. Many expect this increased awareness of improper sexual behavior will lead to a dramatic increase in the number of workplace sexual harassment claims.

Sexual harassment in the workplace can come in many forms and from numerous sources, including supervisors, co-workers and non-employees. Depending on the circumstances, employers may be liable for harassment from any of these sources as well as for favoritism that may occur when employees have consensual sexual relationships with supervisors.

Employers may be able to avoid liability or limit damages on account of sexual harassment occurring in the workplace if they can show they exercised reasonable care to prevent harassing behavior and promptly correct or address any such behavior. Such reasonable care starts with taking the following proactive steps aimed at preventing sexual harassment before it happens.

#### **Maintain an anti-harassment policy.**

Employers should develop, publicize, and enforce clearly understood anti-harassment policies and complaint procedures. The EEOC suggests that an anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct, including concrete examples of such conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;

- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

### **Make sure everyone understands the policy.**

It is not enough to have an anti-harassment policy tucked in an employee handbook, never discussed and virtually unknown to workers. Employers should supply the policy to all employees and obtain their signatures acknowledging receipt of the policy and promising to comply with it. Employers should also consider posting the policy in office areas frequented by employees, such as employee break rooms. Further, employers should disseminate the policy at least annually to remind employees of its content.

Employers should also give strong consideration to providing annual training sessions to all employees on the anti-harassment policy. Such training should focus on explaining types of behavior prohibited by the policy and on the complaint and investigation process.

Finally, in drafting the anti-harassment policy and in educating employees about the policy, it should be made clear that the policy applies to ALL employees, including supervisors and upper management.

If an employer has developed a clear policy against workplace sexual harassment with effective complaint procedures that is routinely distributed and well-known, that employer has taken the first steps towards protecting itself from liability for such unwanted conduct.

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## **Responding to Complaints of Workplace Sexual Harassment**

*By: Malissa Wilson*

What good is an anti-harassment policy if there is no mechanism in place to respond to complaints of harassment? While there is no guarantee that a properly done investigation will stave off a lawsuit, a slipshod investigation may expose a company to money damages and reputational harm. The following steps will help to avoid the latter.

### **Take Action.**

Take all complaints of sexual harassment seriously. This is not the time to question the veracity of the complainant or assume the complainant is being overly sensitive. A delayed response could be interpreted as the company ignoring the behavior or even sanctioning it. Conversely, a prompt response sends the message that the company takes complaints of sexual harassment seriously and helps stop the creation of a culture of harassment that results from a fear of speaking out.

### **The Statement.**

Memorialize complaints of sexual harassments in a written statement detailing each act of alleged harassment. The statement needs to follow the Who, What, When, and Where format. Who is the alleged harasser and who witnessed the acts of harassment? What happened? When did the harassment occur? Where did it occur? The statement will serve as the roadmap for the investigation.

### **The Timeline.**

Complaints of harassment should be investigated timely — five business days on the average. At the onset, communicate to the alleged harasser and the complainant the steps to be taken and the timeline for the investigation. Also, they should be informed that the investigation will be confidential. Last, advise them what will be investigated and who will conduct the investigation. The person conducting the investigation should not be connected to the allegations or have close social ties to any party to avoid the appearance of bias.

### **The Investigation.**

Depending on the details of the harassment, an investigation may consist of a few steps or many steps. For instance, a one-time boorish comment or crude joke may only require meeting with the employee who made it and any employees who heard it. Complaints of aggressive and physical acts of harassment require additional considerations. First, it may be necessary to place the alleged harasser on paid leave or separate the harasser from the complainant before moving forward with the investigation. However, you don't want the separation to be interpreted by the complainant as an adverse act for making the complaint by doing it without the complainant requesting it or moving the complainant to a new assignment that would be deemed a demotion.

The investigation should be well documented. Close the investigation with a written report laying out the findings. The final step of the investigation is to inform the alleged harasser and complainant about the findings.

### **Mitigation.**

The next step after the investigation will be dictated by the findings and the company's anti-harassment policy. The response to a substantiated act of harassment could range from a verbal warning to a written reprimand placed in the employee's personnel file to termination. If the finding is inconclusive or that harassment as defined by the company's policy did not occur, the company should continue to monitor the situation. It may also be beneficial to conduct training for all employees on the company's anti-harassment policy and to review the policy to ensure that it is current with the evolving case law.

### **The Aftermath.**

Following an investigation into complaints of sexual harassment, no matter the finding, the complainant, alleged harasser and others involved in the investigation may find it challenging to return to normal and the environment may become ripe for retaliatory acts. The Equal Employment Opportunity Commission's *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* offers direction on how to protect against retaliation: "Employers should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure

that such decisions are not based on retaliatory motives.”

Simply stated, sexual harassment in the workplace is unacceptable. A company should take prompt and decisive action to address and correct harassment. Having an anti-harassment policy and an action plan to respond to complaints may not stop harassment from occurring in the workplace, but they will certainly serve to minimize the company’s legal exposure.

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