

Sexual Harassment Prevention: Have You Done Enough?

Employers frequently ask us how far they must go to prevent sexual harassment. This article addresses that question. We will discuss the importance of having a comprehensive program to prevent sexual harassment and suggest additional management practices that organizations must take to limit their liability.

LEGAL REQUIREMENTS

The topic of sexual harassment is not new to employers. In recent years, the courts, human resource specialists, and attorneys have commented frequently on it and on how employers can prevent activities that state and federal laws prohibit and that create liability exposures for employers. In addition, sexual harassment cases have attracted significant media attention. Therefore, few employers can honestly say that they are unaware of their responsibilities and exposures under the law.

Both federal and state laws mandate that employers take appropriate actions to prohibit and prevent sexual harassment in the workplace. Does this mean that an organization that has a written harassment policy can be certain of successfully defending itself against a lawsuit when one of its employees accuses another employee of sexual harassment? Although each case is unique and the courts will consider it on its merit, the organization should not assume that it has a good legal defense without taking additional measures beyond a written policy statement.

SEXUAL HARASSMENT DEFINED

Title VII of the Federal Civil Rights Act prohibits sexual harassment. These laws define sexual harassment as:

- Unwelcome sexual advances and requests for sexual favors.
- Verbal or physical conduct, or communication that is sexual in nature. This includes touching, joke telling, and suggestive displays such as male or female nude or suggestive posters.

When determining if employee conduct constitutes sexual harassment, employers should consider if the following has occurred:

- Submission to such conduct was either explicitly or implicitly implied to be a condition of employment.
- If the harasser used submission to or rejection of such conduct by an individual as a basis for employment decisions.
- The conduct or communication substantially interfered with an individual's employment.

Employers often have difficulty making this determination because they feel they must distinguish between what the victim perceived and what the accused intended. Generally, however, the courts have ruled that it does not matter what the intent was as long as the victim perceived the incident as offensive or harassing.

In 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines that described several forms of sexual harassment:

Quid Pro Quo sexual harassment occurs when an individual either explicitly or implicitly makes submission to sexual harassment a condition of employment.

Quid Pro Quo harassment occurs, for example, when a supervisor implies that an employee will not receive a promotion unless he or she participates in some type of sexual or romantic relationship. The employer should take claims of Quid Pro Quo harassment very seriously because the courts generally have interpreted such actions on a supervisor's part to be intentional.

Hostile Work Environment. Sexual harassment occurs in the workplace when verbal and/or non-verbal actions create an intimidating, hostile or offensive working environment. The offender may not have intended to create a hostile work environment. Nevertheless, another employee perceives the offender's conduct that way.

Examples of hostile work environment include displaying "cheese cake" posters, telling jokes, hazing, ridicule, or other activities that one or more individuals find offensive. The activities that lead to a claim of hostile work environment do not have to be sexual in nature. A racial, ethnic, religious, or other remark may offend an employee and result in a claim of harassment. Prohibiting any conduct that might result in claims of a hostile work environment in your policy is a good practice.

Discrimination. Employees are the victims of discrimination any time their employer treats them less favorably than he or she treats other employees because of their age, sex, race, religion, national origin, color, marital status, or disability.

In the context of sexual harassment, employees may victims of discrimination if their supervisors were to treat them differently because of sex. For example, sexual harassment occurs when a supervisor provides unwarranted career opportunities to an employee with whom he has had a sexual relationship, but denies the same opportunities to other employees.

PREVENTION IS THE BEST POLICY

Prevention is the best approach to eliminating sexual harassment. To implement a preventive program, an employer should, at a minimum, develop a written policy and procedures and communicate them to the entire work force. The policy should:

- Identify to whom the policy applies.
- Provide a clear definition of sexual harassment
- Inform employees that sexual harassment is unlawful.
- State that top management supports the policy and procedures and will not tolerate sexual harassment.
- Encourage receivers of unwanted sexual attention to communicate their feelings to the sender.
- Encourage employees to report any action, physical or verbal, that they believe constitutes harassment.
- Publish a procedure that tells employees how to lodge a complaint. The procedure should list at least two people to whom employees can bring complaints.
- Include a statement that the employer will promptly investigate all complaints.
- Indicate that disciplinary action -- up to and including discharge -- will occur.
- Include measures to protect the complainant from retaliation.

The policy statement should not:

- Promise to investigate a complaint within a certain number of days
- State that only particular individuals will investigate allegations of harassment.
- State that employees must submit complaints in writing or within a certain time.
- Guarantee confidentiality.

TAKING EXTRA MEASURES

Written policies and procedures do not guarantee that a prohibited behavior will not occur or that, if it does, it will not result in litigation. However, an organization can take specific steps to increase the effectiveness of its policy. The organization should:

- Train all employees on the organization's desire to eliminate all occurrences of sexual harassment. Acceptable forms of training are brief talks by knowledgeable individuals, videos, handouts, and posters. Training should clearly convey that the organization strongly disapproves of sexual harassment. We recommend that organizations provide some form of training to all employees at least annually. Always document the training.
- Design a reporting system that does not require employees to confront the individuals who are allegedly harassing them.
- Document the determination of harassment in the offender's personnel file. Employers should maintain investigation documentation in a separate file. It does not belong in either the complainant's or the offender's personnel file.
- Discuss harassment incidents and complaints with an attorney knowledgeable about state and federal employment laws before taking disciplinary action.
- Investigate. Even with a stated policy and firm guidelines, sexual harassment can occur. Once an employer receives a complaint of sexual harassment complaint, it should:
 - Take immediate steps to correct the known hostile or offensive work environment.
 - Investigate the complaint of sexual harassment promptly and thoroughly.
 - Resolve valid complaints through counseling, discipline, transfer, or termination. Discipline should be appropriate. Depending on circumstances, it may range from reprimand to dismissal.
 - Act to make the individual whole if necessary.
 - Prevent the misconduct from recurring.
 - Follow up to assure that the sexual harassment has not resumed and that the victim has not suffered retaliation.

A MORE PROACTIVE APPROACH

Take all claims seriously and consider them objectively. Regardless of how credible you perceive an allegation to be, when receiving a complaint, treat all parties impartially. Do not give either party the impression that you do not believe his or her story. Many employees with complaints have greater concerns about how management treated them than with how the organization resolved the situation. The objective is to be sympathetic but not to draw conclusions when investigating. Do not make statements such as "I am going to fire that guy this time" or "You are too sensitive." If you find yourself in a position where the accused is more than just an "employee" to you, find a clearly objective person to investigate the claim. This might be another knowledgeable individual including other department heads or outside professionals

Provide Workplace Diversity training to employees. Many employers are facing significant employee turnover, and employees must understand and be sensitive to equal opportunity for all individuals. Diversity training includes educating employees to be more sensitive to areas such as gender, religion, race, color, national origin, age, or disability. You send your employees to an external training program or you can develop your own using the many books, videotapes and other resources that are widely available.

Allow supervisors to conduct the training for their employees. This reduces your training costs and scheduling problems. It also clearly establishes supervisory knowledge of and responsibility for the organization's policy and procedures on sexual harassment. Supervisors who properly conduct the training are less likely to use their lack of knowledge of company policy as a defense if employees accuse them of harassment. Since the courts do not distinguish the supervisor from the "employer," the employer's defense is much stronger if all supervisors take an active role in prevention measures. The organization should provide the supervisor with the proper information and tools to conduct the training and a representative from human resources should sit in on the training to assist if necessary.

Hold supervisors accountable for enforcement of your policies and procedures. Clearly, communicate to all members of management the organization's expectations about supervisory responsibility for the prevention and investigation of sexual harassment incidents. Include these requirements in all management job descriptions and measure managers' performance during their annual appraisals. Publicly recognize those supervisors who communicate and enforce the organization's policy effectively. Coach, retrain or discipline, if necessary, supervisors who perform poorly.

The principle of **Management by Walking Around** applies to effective implementation of the organization's sexual harassment program. A top official should occasionally walk around and talk to individuals informally about the organization or department's policy. This is a good time to observe such things as posters, joke telling, or to simply to obtain employees' perceptions about the effectiveness of the policy. In addition, employees can also see that the organization and the official support the policy.

CONCLUSION

Because the situation in each department or organization may differ significantly, implementing different strategies may be appropriate and more effective for each. When developing a sexual harassment program, an organization should consider its personnel, budget, past successes and failures in addressing human resource issues and then select those practices that are most practical and beneficial. As always, you should involve your attorney or Human Resource professional in the design and implementation phase of your sexual harassment program.

Note: Always discuss any employment practice issues with your attorney before acting.