



Call in directly: (877) 668-4493

Code: 922 573 171

Sexual Harassment in the Workplace:
Employer Risks and Prevention

ZYWAVE May 2019 hr360

Introduction >

Today's Presenters

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- Employment and benefits attorneys
- Expertise in employment law and other laws affecting the workplace
- Educate employers on compliance obligations
- Creates educational materials and compliance resources

We welcome your questions at any time!

- Questions will be addressed at the end of the session.
- Please choose "Send to All Panelists" when submitting your question.

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Agenda

- What is Sexual Harassment?
- Employer Liability for Workplace Sexual Harassment
- Preventing Sexual Harassment
- Reporting Sexual Harassment
- Sexual Harassment Investigations
- Corrective Actions
- Questions

What is Sexual
Harassment? 

> Sexual Harassment Laws

Title VII of the Civil Rights Act of 1964 (Title VII)

- Applies to employers with 15 or more employees
- Prohibits discrimination based on sex, including sexual harassment
- Enforced by the Equal Employment Opportunity Commission (EEOC)

State laws prohibiting discrimination based on sex

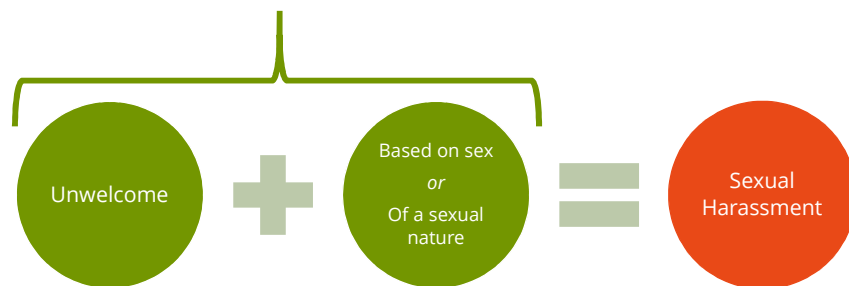
- Many similar to Title VII but apply to smaller employers
- Some dictate practices and policies for employers (such as sexual harassment training)

Today's focus: Title VII

- Employers should become familiar with applicable state laws as well

> What is Sexual Harassment?

Conduct that is:



➤ What is Unlawful Sexual Harassment?

Sexual Harassment violates Title VII if it:

- Affects a term, condition or privilege of an individual's employment;
- Unreasonably interferes with an individual's work performance; **or**
- Creates an intimidating, hostile, or offensive work environment.

➤ What is Unlawful Sexual Harassment?

Includes unwelcome:

- Sexual advances
- Requests for sexual favors;
- Verbal comments or physical actions of a sexual nature;
- Offensive remarks about a person's sex (for example, women in general), sexual orientation or gender identity.

Victims may be:

- Male or female
- The same gender as the harasser

➤ What is Unlawful Sexual Harassment?

Title VII does NOT prohibit:

- Simple teasing, offhand comments, or isolated incidents that are not very serious
- Harassment based solely on factors other than protected traits (sex, race, color, religion or national origin)

➤ What is Unlawful Sexual Harassment?

“Quid pro quo”

- Victim’s submission to, or rejection of, unwelcome conduct is explicitly or implicitly used as a basis for employment decisions
- For example:
 - Hiring/firing
 - Job responsibilities
 - Promotion/demotion

“Hostile work environment”

- Unwelcome conduct is either **severe** enough or **frequent** enough that it:
 - Creates a work environment that a reasonable person would consider intimidating, hostile or abusive; or
 - Unreasonably interferes with a person’s work performance

> What is Unlawful Sexual Harassment?

Unlawful sexual harassment may occur:

On or off the employer's premises

- _____ In office
- _____ At off-site work parties or functions
- _____ While traveling for business
- _____ At client offices or events

Through technology

- _____ Text messages
- _____ Email messages
- _____ Social media
- _____ Computer / cell phone screen displays

> What is Unlawful Sexual Harassment?

Unlawful sexual harassment may occur:

Even if the unwelcome conduct does not involve sexual activity or language

- _____ Subtleties / Innuendos
- _____ Hostility / favoritism toward members of one gender or other sex-based group (such as sexual orientation or gender identity)
- _____ Offensive comments about members of one gender or other sex-based group
- _____ Stereotyping

Even if the victim does not suffer economic injury

- _____ Frequency and severity
- _____ Physically threatening or humiliating
- _____ Unreasonably interference with work performance
- _____ Psychological harm

Employer Liability for Workplace Sexual Harassment

Employer Liability



Tangible Employment Action

Any action affecting a **term, condition** or **privilege** of an individual's employment

- Hiring / firing
- Promoting / demoting
- Reassignment to significantly different responsibilities
- Compensation decisions
- Decisions causing a significant change in benefits

Direct economic consequences not required

- Change in job duties that limits victim's eligibility for promotion
- Demotion without loss in pay

May occur at any time during hostile work environment

- Need not occur at the end of employment nor serve as the culmination of the harassing conduct

Preventing Sexual 
Harassment

> Prevention Strategies

Workplace Sexual Harassment Policy

- Prohibited conduct
- Complaint process

Communication

- Distribute policy regularly
- Post policy in workplace

Training

- Provide to all employees
- Provide additional training to management
- Comply with state requirements

> Prevention Strategies

Workplace Sexual Harassment Policy

- **Clear explanation of prohibited conduct**
- **Complaint process** that provides:
 - Accessible avenues for reporting harassment; and
 - Prompt, thorough and impartial investigation
- **Assurances** that employer will:
 - Protect confidentiality of harassment complaints to the extent possible;
 - Take immediate and appropriate corrective action when it determines that harassment has occurred; and
 - Provide protection against retaliation to employees who report harassment

➤ Prevention Strategies

Communication

- Write policy and complaint process in a way that will be understood by all employees
- Distribute copies to every employee
- Redistribute periodically
- Post in central locations
- Incorporate into employee handbooks

➤ Communication – State/Local Laws

Distribute Written Policy	Distribute Fact Sheet / Brochure	Display Poster
<ul style="list-style-type: none"> • New York State (eff. 10/9/18) • District of Columbia (eff. 7/1/19) 	<ul style="list-style-type: none"> • California • Delaware (eff. 7/1/19) • New York City (eff. 4/1/19) • Maine 	<ul style="list-style-type: none"> • California • Connecticut • Maine • District of Columbia (eff. 7/1/19)

These and other states/localities may require written policies, posters and other materials that cover **more general anti-discrimination topics** as well

➤ Prevention Strategies

Employee Training

- Provide comprehensive, interactive training to **all employees** (all levels and all locations)
- *Training is most effective if:*
 - Championed by senior leaders
 - Repeated and reinforced regularly
 - Tailored to the specific workplace and workforce
 - Conducted by qualified, live, interactive trainers (or at least designed to include active engagement by participants)
 - Routinely evaluated by participants and revised as necessary

➤ Prevention Strategies

Leadership Training

- Provide **additional** training to those who have additional responsibilities relating to sexual harassment



➤ Employee Training – State Laws

California (5 or more employees)

- Train all employees within 6 months of hire or start of supervisory position (existing employees **by Jan. 1, 2020**) and every 2 years
- Supervisory employees – 2 hours
- Nonsupervisory employees – 1 hour
- Must include information about harassment based on gender identity, gender expression and sexual orientation
- Online training courses available – employers may use this in conjunction with an eligible trainer

➤ Employee Training – State Laws

Connecticut (50 or more employees)

- Train all employees within 6 months after hire (diversity training) – no time requirement
- Train all supervisors within 6 months of starting supervisory position – 2 hours
- *Encouraged but not required: Train supervisors again every 3 years*

➤ Employee Training – State Laws

Delaware (50 or more employees)

- Train all employees within 1 year after hire (existing employees **by Jan. 1, 2020**) and every 2 years
- Requirement applies after 6 months of continuous employment
- Supervisor training must include additional information (no time requirements)

Employee Training – State Laws

Maine (15 or more employees in one workplace)

- Train all employees within 1 year after starting employment (training checklist available)
- Supervisor training must include additional information (no time requirements)
- Keep training records for at least 3 years

Employee Training – State/Local Laws

New York State (1 or more employees)

- *Effective Oct. 9, 2018*
- Train all employees “as quickly as possible” after starting job (existing employees **by Oct. 9, 2019**)
- Model training program available (may use other program as long as it meets minimum standards)

New York City (15 or more employees)

- *Effective April 1, 2019*
- Train all employees after 90 days of employment (existing employees **by April 1, 2019**) and again every year
- Obtain signed employee acknowledgements of training
- Keep training records at least 3 years
- City to provide model training program by effective date

Employee Training – Local Laws

District of Columbia (Tipped Employees)

- *Effective Dec. 13, 2018*
- All tipped employees must attend training (*in person or online*) within 90 days after hire (except those who have received the training in the past 2 years)
- Existing tipped employees must receive the training training **by Dec. 13, 2020**
- Managers must attend (*in-person*) training at least once every 2 years
- Owners and operators of businesses that employ tipped employees must attend training (*in person or online*) at least once every 2 years.
- D.C. Office of Human Rights must provide model training program or list of providers

Employee Training Programs

Definitions	Unwelcome conduct
	Relating to sex or of a sexual nature
Prohibitions	Title VII
	State Law
	Local Law
	Employer Policy
Explanations	Unreasonable interference
	Hostile Work Environment
	Quid Pro Quo
Examples	Physical
	Visual
	Verbal

Employee Training Programs

Claim Reporting / Contact Information	Internal (HR Rep, supervisor)
	External (EEOC, state/local agencies)
Retaliation Protections	Legal prohibitions
	Employer policy
Complaint Processing	Limited confidentiality
	Investigations
	Corrective/disciplinary actions
Remedies Available to Victims	Compensatory Damages
	Punitive Damages

Additional Leadership Training

<i>Reducing Risk</i>	How to identify potential risk factors for harassment
	Specific actions that may minimize or eliminate the risk of harassment
	Realistic methods for addressing observed or reported harassment
<i>Reporting</i>	Clear instructions about how to report up the chain of command
	Explanation of confidentiality rules associated with complaints
<i>Responding</i>	Unequivocal statement that retaliation is prohibited and will not be tolerated
	Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation and other prohibited conduct.

Reporting Sexual Harassment >

> Reporting Sexual Harassment

Victim Reporting

- Not obligatory, but best if victim informs harasser directly that conduct is unwelcome and must stop
- Victim should use employer complaint mechanism

Supervisor Response

- Immediately notify person designated to handle sexual harassment complaints—this could be an HR person
- Notify this person upon **suspicion** or **belief** of sexual harassment

➤ Reporting Sexual Harassment

Avoid Retaliation

- Title VII prohibits retaliating against an employee or applicant for:
 - Opposing employment practices he or she reasonably believes to be unlawful
 - Filing a discrimination charge
 - Participating in a Title VII investigation, proceeding or lawsuit

➤ Reporting Sexual Harassment

Confidentiality

- Complaint should be kept confidential to extent possible
- Total confidentiality cannot be guaranteed
- Reporting policy must comply with state law requirements

Determine next steps

- Promptly determine whether investigation is warranted
- If investigation is necessary, it should be launched immediately

Sexual Harassment > Investigations

> Sexual Harassment Investigations

Conducting the investigation

- Investigator should independently and objectively gather facts
- Alleged harasser should not have authority over investigator or investigation
- Investigator should have skills required for interviewing witnesses and evaluating credibility
- Investigation must comply with company policy and applicable law
- Employer should take intermediate measures as necessary to prevent further harassment during investigation (but avoid retaliation)

➤ Sexual Harassment Investigations

- Basic Steps**
- 1) Interview complainant
 - 2) Interview alleged harasser
 - 3) Interview all witnesses
 - 4) Make a detailed record
 - 5) Weigh evidence
 - 6) Make a determination
 - 7) Take action

➤ Interviews

Complainant	Alleged Harasser	Witnesses
<ul style="list-style-type: none"> • What happened and where? • Who is alleged harasser? • Isolated incident or ongoing? • How did you react? • Were there any witnesses? 	<ul style="list-style-type: none"> • Response to allegations? • Other parties with relevant information? • Stay objective • Don't make assumptions 	<ul style="list-style-type: none"> • Ask open-ended questions • Avoid giving information or influencing answers

➤ Make Detailed Record

- Initial complaints
- Witness reports
- Written materials relevant to investigation
- Records of meetings and interviews with parties
- Discipline or termination reports
- Notes of supervisors or other management personnel

➤ Sexual Harassment Investigations

Weigh evidence

Make determination

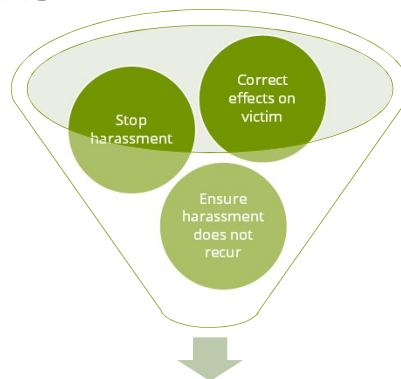
Take action

Corrective Actions >

> Corrective Actions

Should be designed to:

- Stop harassment
- Correct its effects on the victim
- Ensure harassment does not recur



**Reasonable
Corrective Actions**

- Need not be what complainant prefers
- Should not penalize or adversely affect complainant

➤ Corrective Actions

Disciplinary measures may include:

- Oral or written warning or reprimand
- Transfer or reassignment
- Demotion
- Reduction of wages
- Suspension
- Discharge
- Training or counseling
- Monitoring

➤ Corrective Actions

Measures to correct the effects of harassment may include:

- Restoration of leave taken due to harassment
- Expungement or removal of any negative evaluations
- Reinstatement
- Apology by harasser
- Monitoring treatment of victim
- Correction of any harm caused by harassment

Ensure compliance with state law requirements

Preventing Sexual Harassment

- Prevention is the best solution
- Employers should inform employees of their policies against sexual harassment and their grievance procedures
- Employers should take immediate action when a complaint is registered
- All employees should take sexual harassment training (be sure to comply with state requirements)

Questions? 

Thank you! 

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