



10 Things an Employer Needs to Know About Limiting Liability for Harassment in the Work Place

12.12.2017

1. Have a clear, updated and effective policy prohibiting harassment based on all protected characteristics.

This is a minimum requirement for avoiding liability for hostile work environment claims pertaining to non-supervisor conduct. Having a policy won't create a defense unless it is published in an employee handbook that is distributed to, and understood by, all employees (if your employees can't read English, you will need to translate it), and the policy is followed to-the-letter when complaints are made. At least two avenues in which to file a complaint should be made available under the policy, and a guarantee of non-retaliation for filing a complaint in good faith is essential.

2. Make sure your anti-harassment management training is up to date

This is a no-brainer. If you haven't conducted training for all members of management in the last eighteen months – do it now and document who attended the training. It shouldn't take more than an hour and a half. Review the policy when new members of management come on board. A shorter training session for non-management employees that reviews the behavior that is prohibited and the way a complaint should be made is advisable.

3. Don't require employees to decide whether an employee is going to get in trouble for violating your anti-harassment rule.

When an employee believes he or she is being subjected to a hostile work environment, the employee should be required to report it promptly. Don't put the employee in the position of having to decide whether to file "a formal complaint." Although you can ask the employee what he or she wants you to do to remedy the situation, it isn't fair to put your employee in the position of deciding another employee's fate. Management needs to make that decision – that's why you are getting the big bucks!

4. Take all complaints seriously, in accordance with your policy, by promptly conducting a thorough and complete investigation.

When you receive a complaint or otherwise have a reason to believe that an employee is being subjected to unwelcome harassment, you need to investigate promptly – don't wait until your Human Resources Manager returns from vacation! Ideally, the person conducting the investigation has had some HR training. If the alleged harasser admits to the conduct at issue, the investigation will be more

limited, focusing on why he or she engaged in the behavior. But that typically is not the case. If there are credibility issues, make sure that **everyone** with potential knowledge of the alleged conduct is interviewed – even if they are not scheduled to work that day or they work on the second shift. Ask if there are any text messages, pictures, emails or tape recordings. If the conduct is denied by the alleged harasser, ask if the complainant has a reason to lie about him or her. After the complainant has identified all actions on which he or she is basing his or her complaint, ask if there is anything else. DOCUMENT! DOCUMENT! DOCUMENT!

5. Don't promise complete confidentiality.

Although you should keep the investigation as confidential as possible, it can't be totally confidential. You need to interview the alleged harasser and potential witnesses. Promise that you will keep the investigation as confidential as reasonably possible and encourage those with whom you speak (complainant, alleged harasser and witnesses) not to discuss this confidential personnel information with others.

6. Watch out for quasi-supervisors and require any temp agency that supplies workers to comply with anti-harassment directives.

Alternate employment relationships continue to be an area of focus in the EEOC's 2017-2021 Strategic Enforcement Plan. If you employ temporary workers that work alongside your employees, the temp agency should be required to provide training and supervision for its employees. Consider including an indemnification provision in your contract with the agency. "I'm not the employer" doesn't usually work anymore.

To the extent that you have employees who may be perceived as having power over other employees (e.g. lead people on the second shift), you may have liability for their actions even if they don't have a supervisory title. If in doubt, include them in your management training or conduct separate training for them.

7. Don't be afraid to make credibility determinations.

After a thorough investigation, you, as the employer, have the right/obligation to make credibility decisions based, among other things, on the prior conduct of those involved, their behavior and attitude in the course of the investigation; their motivation to lie, if any, and information provided by witnesses. If, at the conclusion of the investigation, it remains a "he said she said" situation and you don't know who is telling the truth, document your inability to determine what happened, formally warn the alleged harasser that future credible allegations may result in termination of employment and tell both parties that retaliation will not be tolerated. Follow up periodically with both parties and document that no subsequent issues have arisen.

8. Don't make legal conclusions.

"Sexual harassment" is a legal term of art, and you don't ever want to admit that employees in your work place have been submitted to unlawful conduct. You also want to avoid a defamation claim. Frequently the conduct complained of constitutes a violation of Company policy without rising to the level of being unlawful. Instead, reference in the disciplinary write-up your conclusion that the employee violated Company policy or has demonstrated poor judgment.

9. Make the punishment fit the crime.

When faced with complaints of a hostile work environment, your obligation is to make the unwelcome conduct stop. The action you take should depend on several factors including: the frequency and

severity of the conduct; the employee's past conduct; whether the employee is a member of management (you have higher expectations for your management team); whether the behavior has legal consequences; the employee's behavior in the course of the investigation (whether the employee lies or attempts to obstruct the investigation); whether there are extenuating circumstances and the message that your actions are sending to the work floor.

10. Avoid any action that could appear retaliatory.

An employee coming forward in good faith to complain about harassment is engaging in protected conduct, even when the behavior complained of does not yet rise to the level of unlawful harassment. Advise the employee that she or he won't be subjected to retaliation for having come forward and warn the alleged harasser that retaliation against the complainant likely will result in termination of employment.

If your company would benefit from additional details or an in-depth training, please contact [Lynn Jacob](#) for more information.

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