



HARASSMENT: Plain Talk About the Why, the What and the How

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Resources Available on Dorsey.com

Quirky Questions: *It May Be A New World For Sexual Harassment, But Many Old Rules Still Apply*, David Y. Trevor (December 14, 2017)
<https://quirkyemploymentquestions.com/>

Dorsey eUpdate: *Hugging Can Create a Hostile Work Environment, Ninth Circuit Rules—Are Your Employees Aware?*, Aaron Goldstein (February 27, 2017)
<https://www.dorsey.com/newsresources/publications/client-alerts/2017/02/hugging-can-create-a-hostile-work-environment>

The Dorsey Employment Law Handbook: A Practical Guide for Employers
<https://www.dorsey.com/services/labor-employment-handbook>

Quirky Questions: Real Life Employment Law Blog: <https://quirkyemploymentquestions.com/>

HARASSMENT: **Plain Talk About the Why, the What and the How**

Dorsey & Whitney LLP
December 19, 2017

What exactly is sexual harassment?

Sexual harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964.

Sexual harassment is unwelcome conduct that is based on sex. Sexual harassment becomes unlawful when: (1) enduring the offensive conduct becomes a condition of continued employment (*quid pro quo* harassment); or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (hostile work environment harassment).

Quid Pro Quo Harassment

Quid pro quo harassment requires that the harasser occupy a position of some authority or control over the victim. It exists where a supervisor or person in authority extorts or attempts to extort sexual favors or other sexual consideration in exchange for a job benefit or the absence of a job detriment. To establish *quid pro quo* harassment, an employee must prove:

- The actor sought sexual consideration in exchange for a job benefit or the absence of a job detriment;
- The actor's conduct was unwelcome;
- The conduct was based on gender; and
- The conduct is attributable to the employer.

Hostile Work Environment Harassment

Hostile work environment harassment exists where unwelcome conduct has the purpose or effect of unreasonably interfering with an individual's work performance or otherwise creating an intimidating, hostile, or offensive working environment.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

To establish hostile work environment harassment, an employee must prove:

- The actor committed the offensive conduct;
- The conduct was unwelcome, offensive, and unsolicited by the employee-plaintiff;
- The conduct was based on the employee's protected group status (e.g., sex);
- The conduct was sufficiently severe or pervasive so as to alter the terms or conditions of employment; and
- The conduct is attributable to the employer.

Hostile work environment harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

How can employers **prevent** sexual harassment?

Conduct a detailed assessment. Employers should conduct, or consider hiring an outside expert or legal counsel to conduct, an assessment of the risk factors for sexual harassment, which include: (1) a homogenous workforce; (2) a workplace in which some workers don't conform to workplace norms; (3) cultural and language differences in the workplace; (4) coarsened social discourse outside the workplace; (5) a workforce with many young workers; (6) a workplace with "high-value" employees; (7) a workplace with significant power disparities; (8) a workplace that relies on customer service or client satisfaction; (9) a workplace in which work is monotonous; (10) a workplace with isolated workspaces; (11) a workplace culture that tolerates or encourages alcohol consumption; and (12) a decentralized workforce.

Clearly communicate to employees that unwelcome harassing conduct will not be tolerated. Employers can do this by:

- (1) establishing a sexual harassment policy, including an effective complaint/grievance process;
- (2) providing anti-harassment training to managers and employees; and
- (3) taking immediate and appropriate action when an employee complains.

The EEOC Select Task Force on the Study of Harassment in the Workplace has established recommendations for employers on steps they can take to prevent and respond to sexual harassment. (Attached hereto.)

How should an employer respond to claims of sexual harassment?

Upon receiving an initial complaint (formal or informal) of harassment, an employer should:

- Get the information - be supportive without acknowledging validity.
- Focus on the facts - remain objective and impartial.
- Be supportive and emphasize that the complaint will be taken seriously.
- Do not promise confidentiality - in fact, tell the complainant that the Company has a duty to investigate.
- Let the complainant know what to expect from the investigation.
- Tell the complainant that no retaliation will be allowed.
- Document everything.
- Invite complainant to come back with additional questions.
- DO NOT: (1) Dismiss the complaint; (2) state an opinion (agree/disagree); or (3) delay the investigation.

After receiving an initial report of harassment, an employer should set up a mechanism for a prompt, thorough, and impartial investigation.

As soon as management learns about alleged harassment, it should work with human resources and/or outside counsel to determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the

conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

When can an employer be held liable for sexual harassment?

The scope of employer liability for sexual harassment varies under federal and state laws.

Federal Law

Supervisor Harassment

An employer is **automatically liable** for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.

If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: (1) it reasonably tried to prevent and promptly correct the harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Non-Supervisor Harassment

An employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

Minnesota Law

Employer liability for sexual harassment under Minnesota law is the same as employer liability under federal law.

EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (JUNE 2016)

Key Findings

Workplace Harassment Remains a Persistent Problem.

Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion. While there is robust data and academic literature on sex-based harassment, there is very limited data regarding harassment on other protected bases. More research is needed.

Workplace Harassment Too Often Goes Unreported.

Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint. Roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

There Is a Compelling Business Case for Stopping and Preventing Harassment.

When employers consider the costs of workplace harassment, they often focus on legal costs, and with good reason. Last year, EEOC alone recovered \$164.5 million for workers alleging harassment - and these direct costs are just the tip of the iceberg. Workplace harassment first and foremost comes at a steep cost to those who suffer it, as they experience mental, physical, and economic harm. Beyond that, workplace harassment affects all workers, and its true cost includes decreased productivity, increased turnover, and reputational harm. All of this is a drag on performance - and the bottom-line.

It Starts at the Top - Leadership and Accountability Are Critical.

Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated - effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation. Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so). Finally, leadership means ensuring that anti-harassment efforts are given the necessary time and resources to be effective.

Training Must Change.

Much of the training done over the last 30 years has not worked as a prevention tool - it's been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhelpful or even counterproductive. However, even effective training cannot occur in a vacuum - it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does not fit all: Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.

New and Different Approaches to Training Should Be Explored.

We heard of several new models of training that may show promise for harassment training. "Bystander intervention training" - increasingly used to combat sexual violence on school campuses - empowers co-workers and gives them the tools to intervene when they witness harassing behavior, and may show promise for harassment prevention. Workplace "civility training" that does not focus on eliminating unwelcome or offensive behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally, likewise may offer solutions.

It's On Us.

Harassment in the workplace will not stop on its own - it's on all of us to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change themselves. For this reason, we suggest exploring the launch of an It's on Us campaign for the workplace. Originally developed to reduce sexual violence in educational settings, the It's on Us campaign is premised on the idea that students, faculty, and campus staff should be empowered to be part of the solution to sexual assault, and should be provided the tools and resources to prevent sexual assault as engaged bystanders. Launching a similar It's on Us campaign in workplaces across the nation - large and small, urban and rural - is an audacious goal. But doing so could transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.

Recommendations

EEOC Recommendations Regarding Workplace Leadership and Accountability

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.
- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.
- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.
- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership's commitment to creating a workplace free of harassment.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.
- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

EEOC Recommendations Regarding Harassment Prevention Policies and Procedures

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.
- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.
- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.
- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.

- Employers should periodically "test" their reporting system to determine how well the system is working.
- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

Recommendations Regarding Anti-Harassment Compliance Training

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.
- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information - even before such harassment reaches a legally-actionable level.

Recommendations Regarding Workplace Civility and Bystander Intervention Training

- Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.

Chart of Risk Factors for Harassment and Responsive Strategies

Available at: https://www.eeoc.gov/eeoc/task_force/harassment/risk-factors.cfm

| Risk Factor | Risk Factor Indicia | Why This is a Risk Factor for Harassment | Risk Factor-Specific Strategies to Reduce Harassment |
|---|---|--|--|
| <p>Homogenous workforce</p> | <p>Historic lack of diversity in the workplace</p> <p>Currently only one minority in a work group (e.g., team, department, location)</p> | <p>Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others.</p> <p>Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.</p> | <p>Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity.</p> <p>Pay attention to relations among and within work groups.</p> |
| <p>Workplaces where some employees do not conform to workplace norms</p> | <p>"Rough and tumble" or single-sex-dominated workplace cultures</p> <p>Remarks, jokes, or banter that are crude, "raunchy," or demeaning</p> | <p>Employees may be viewed as weak or susceptible to abuse.</p> <p>Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.</p> | <p>Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership.</p> <p>Pay attention to relations among and within work groups.</p> |
| <p>Cultural and language differences in the workplace</p> | <p>Arrival of new employees with different cultures or nationalities</p> <p>Segregation of employees with different cultures or nationalities</p> | <p>Different cultural backgrounds may make employees less aware of laws and workplace norms.</p> <p>Employees who do not speak English may not know their rights and may be more subject to exploitation.</p> <p>Language and linguistic characteristics can play a role in harassment.</p> | <p>Ensure that culturally diverse employees understand laws, workplace norms, and policies.</p> <p>Increase diversity in culturally segregated workforces.</p> <p>Pay attention to relations among and within work groups.</p> |

| Risk Factor | Risk Factor Indicia | Why This is a Risk Factor for Harassment | Risk Factor-Specific Strategies to Reduce Harassment |
|---|--|---|--|
| Coarsened Social Discourse Outside the Workplace | Increasingly heated discussion of current events occurring outside the workplace | Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable. | Proactively identify current events-national and local-that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace. |
| Young workforces | Significant number of teenage and young adult employees | <p>Employees in their first or second jobs may be less aware of laws and workplace norms.</p> <p>Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable.</p> <p>Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions.</p> <p>Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.</p> | <p>Provide targeted outreach about harassment in high schools and colleges.</p> <p>Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct.</p> <p>Provide training on how to be a good supervisor when youth are promoted to supervisory positions.</p> |
| Workplaces with "high value" employees | Executives or senior managers Employees with high value (actual or perceived) to the employer, e.g., the "rainmaking" partner or the prized, grant-winning researcher | <p>Management is often reluctant to jeopardize high value employee's economic value to the employer.</p> <p>High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.</p> | <p>Apply workplace rules uniformly, regardless of rank or value to the employer.</p> <p>If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).</p> |

| Risk Factor | Risk Factor Indicia | Why This is a Risk Factor for Harassment | Risk Factor-Specific Strategies to Reduce Harassment |
|--|---|---|---|
| Workplaces with significant power disparities | <p>Low-ranking employees in organizational hierarchy</p> <p>Employees holding positions usually subject to the direction of others, e.g., administrative support staff, nurses, janitors, etc.</p> <p>Gendered power disparities (e.g., most of the low-ranking employees are female)</p> | <p>Supervisors feel emboldened to exploit low-ranking employees.</p> <p>Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies).</p> <p>Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.</p> | <p>Apply workplace rules uniformly, regardless of rank or value to the employer.</p> <p>Pay attention to relations among and within work groups with significant power disparities.</p> |
| Workplaces that rely on customer service or client satisfaction | <p>Compensation directly tied to customer satisfaction or client service</p> | <p>Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.</p> | <p>Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.</p> |
| Workplaces where work is monotonous or tasks are low-intensity | <p>Employees are not actively engaged or "have time on their hands"</p> <p>Repetitive work</p> | <p>Harassing behavior may become a way to vent frustration or avoid boredom.</p> | <p>Consider varying or restructuring job duties or workload to reduce monotony or boredom.</p> <p>Pay attention to relations among and within work groups with monotonous or low-intensity tasks.</p> |

| Risk Factor | Risk Factor Indicia | Why This is a Risk Factor for Harassment | Risk Factor-Specific Strategies to Reduce Harassment |
|--|--|---|--|
| Isolated workplaces | Physically isolated workplaces Employees work alone or have few opportunities to interact with others | Harassers have easy access to their targets. There are no witnesses. | Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (e.g., in person, on line) to share concerns. |
| Workplaces that tolerate or encourage alcohol consumption | Alcohol consumption during and around work hours. | Alcohol reduces social inhibitions and impairs judgment. | Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately. |

| Risk Factor | Risk Factor Indicia | Why This is a Risk Factor for Harassment | Risk Factor-Specific Strategies to Reduce Harassment |
|---------------------------------|--|---|---|
| Decentralized workplaces | Corporate offices far removed physically and/or organizationally from front-line employees or first-line supervisors | <p>Managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules.</p> <p>Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.</p> | <p>Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be.</p> <p>Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction</p> <p>Develop systems for employees in geographically diverse locations to connect and communicate.</p> |



ideas at work

DORSEY'S LABOR & EMPLOYMENT GROUP

Dorsey handles every sort of employment matter, litigated and non-litigated. A few examples of how we can assist you and your clients include:

Litigation

Our attorneys have extensive, successful trial experience as well as an outstanding record for obtaining summary judgments in employment law matters nationwide. We have handled individual claims, collective actions, and class actions. We handle arbitrations before the American Arbitration Association, and the Financial Industry Regulatory Authority, Inc., as well as labor arbitrations required under collective bargaining agreements. Our experience includes typical employment law issues such as wrongful termination, contract claims, wage and hour claims, harassment, whistleblower, and retaliation, as well as disputes involving the protection of trade secrets, covenants not to compete, and fiduciary duty issues.

Advice and Counsel

Time is critical in the workplace. A key part of Dorsey's practice includes advising companies, in real-time, on the employment law issues that arise, often unexpectedly, on a daily basis. This includes everything from compliance and development, policy handbook review, and advising on the employment implications of M&A transactions, to training and other measures that can greatly reduce the likelihood of litigation or governmental enforcement actions. We also advise on the types of issues and disputes that present high litigation risk, such as harassment complaints and sensitive terminations. We can oversee – or conduct directly – workplace investigations. We also can assist you in dealing with EEOC and other discrimination charges, including preparing the company's response.

Labor

Dorsey has management-side labor expertise. We advise employers on their collective bargaining agreements and help them resolve disputes and maintain their union relationships for a cooperative workplace. Our labor-related counsel extends to union organizing, NLRB matters, and labor arbitrations.

Immigration

Our employment lawyers help U.S. companies with immigration matters, including placing key employees from foreign countries. Our practice concentrates on obtaining temporary non-immigrant status and visas for executives, treaty traders and investors, business visitors and other professionals. We also assist clients with transitioning from temporary non-immigrant status to permanent residency and naturalization.



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Dorsey Labor & Employment

Our Education and Training Programs

Education and training are important components of our proactive approach to employment challenges. Training offers a comprehensive and practical understanding of key employment issues and can improve workplace morale. With more clearly defined expectations of employees, training can have the added benefit of reducing the likelihood of costly employment litigation.

Dorsey offers its various seminars to help you meet and exceed your strategic workplace goals. Areas of training include:

Managing within the Law

- Hiring and onboarding
- Employment contracts and non-competes
- Discrimination law
- Harassment prevention and response
- Leaves of absence
- Effective termination procedures

Managing the Workforce Series

- Discipline and Discharge/Effective Performance Evaluations
- Leave Issues Under FMLA, ADA and other statutes
- Write It Right – Effective Workplace Communications
- Workplace Violence; Reducing the Risks

Discrimination Series

- Basics of Discrimination Law
- Sexual Harassment
- Age Discrimination (including Reductions in Force)
- Retaliation Claims – Managing the Litigious Employee

Asset Protection Series

- Post-Employment Restrictive Covenants
- Fiduciary Obligations and Related Duties
- Trade Secrets: Protecting Your IP and Avoiding Litigation
- Best Practices for Dealing with the Departing Employee

Management Series

- Management and Human Resources Mistakes
- Evaluating the Case: How Big is the Risk to Your Company
- Conducting Workplace Investigations
- 15 Reasons Why Employees Sue