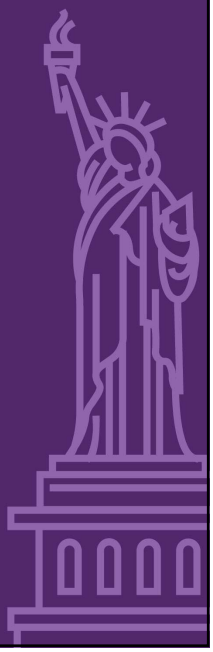
大成 DENTONS

CLE FOR IN-HOUSE COUNSEL
NEW YORK I SEPTEMBER 2019

Employer Liability Concerns: Emerging Sexual Harassment Trends

Dan Beale, Partner Christina Dumitrescu, Associate



Goals of the Presentation

- Overview of the #MeToo movement and its impact on the workplace.
- Review various state statutes prohibiting sexual harassment.
- Identify best practices for effective sexual harassment workplace trainings.

#MeToo

Origins of the "#MeToo" Movement

- Founder: Tarana Burke, activist and survivor of sexual assault;
- Founded: 2006.
- Began as an online community for women and girls, particularly women and girls of color, who had experienced sexual violence.
- Gained traction in October 2017, following a New York Times ("NYT") exposé of sexual harassment and assault allegations against film producer Harvey Weinstein.

The New York Times' Exposé on Harvey Weinstein

- The NYT investigation found previously undisclosed allegations against Mr. Weinstein stretching over nearly three decades.
- Actress Ashley Judd was one of the accusers interviewed by the NYT.
- That same day, Harvey Weinstein issued an apology published by the NYT.

Aftermath of the New York Times' Exposé

- On October 8, 2017, the Weinstein Company, a production company that Weinstein co-founded, terminated his employment.
- On October 10, 2017, the *New Yorker* magazine published an article adding detail to the NYT's initial report with allegations from 13 more women.
- That same day, the NYT published another article that included new accounts about Weinstein from actresses Angelina Jolie and Gwyneth Paltrow.
- On October 12, 2017, actress Rose McGowan posted on Twitter that Weinstein raped her.
- On December 6, 2017, a lawsuit seeking class-action status was filed against Weinstein, Miramax, the Weinstein Company and members of its board.
- On February 11, 2018, state prosecutors in New York filed a lawsuit against the Weinstein Company for failing to protect employees from Weinstein's alleged harassment and abuse.

#MeToo Reignites on Twitter

- Actress Alyssa Milano had been following the news stories on Harvey Weinstein.
- On October 15, 2017, she posted the following message on Twitter:

  "If you've been sexually harassed or assaulted, write 'me too' as a reply to this tweet."
- The tweet went viral as Twitter users and celebrities began to repost it, encouraging women who had survived sexual harassment or assault to do the same.
- On October 16, 2017, Milano posted on Twitter crediting "an earlier #MeToo movement" and attaching a link to the movement's website with a description written by Tarana Burke.
- Milano's tweet has since been reposted on Twitter over 20,000 times.
- As of October 24, 2017, Twitter confirmed over 1.7 million tweets were posted with the hashtag "#MeToo."

#MeToo Stories Make the Headlines

- October 18, 2017: Olympic gymnast McKayla Maroney posted on Twitter that she was sexually assaulted by former team doctor Lawrence G. Nassar.
- October 29, 2017: actor Anthony Rapp accused actor Kevin Spacey of making an unwanted sexual advance towards him.
- November 9, 2017: The Washington Post published an investigative piece about former Republican Senate candidate Roy Moore's alleged history of sexual abuse towards underage girls.
- November 29, 2017: the "Today" show opened with a revelation that co-host Matt Lauer had been fired after NBC received detailed allegations about the anchorman's sexual misconduct.

#MeToo Headlines Continue

- November 30, 2017: Russell Simmons resigned from his companies after writer Jenny Lumet accused him of sexual assault in the Hollywood Reporter.
- December 6, 2017: Time magazine named the "Silence Breakers" its 2017 Person of the Year, citing individuals like Tarana Burke.
- December 7, 2017: U.S. Senator from Minnesota Al Franken said he would resign from Congress amid allegations of sexual misconduct.
- Other public figures accused of sexual misconduct in the wake of #MeToo include:

Mario Batali	James Levine	Bill Cosby
Gary Goddard	Michael Ferro	Tom Brokaw
James Franco	William Strampel	Morgan Freeman
Quentin Tarantino	Stan Lee	Leslie Moonves

#MeToo Headlines Continue

- Since the #MeToo movement began, male victims of sexual harassment have also become more outspoken.
- Nimrod Reitman accused his former N.Y.U. graduate school adviser, Avital Ronell, of sexually harassing him. An 11-month Title IX investigation found Professor Ronell responsible for both physical and verbal sexual harassment, to the extent that her behavior was “sufficiently pervasive to alter the terms and conditions of Mr. Reitman’s learning environment.” The university suspended Professor Ronell for the coming year.
- Soon after the university made its final, confidential determination this spring, a group of scholars from around the world, including prominent feminists, sent a letter to N.Y.U. in defense of Professor Ronell, echoing many of the same past defenses of powerful men.
- The claims and the results from the investigation raise questions about how to respond when the alleged harasser is a woman and the victim is a male.

Epic Systems

Epic Systems Affirms the Enforceability of Arbitration Agreements with Class and Collective Action Waivers

- In May 2018, in a 5-4 decision, the Supreme Court upheld the enforceability of employment agreements that bar class actions by mandating individualized arbitration.

Case Law Following Epic Systems

- The National Labor Relations Board's ("NLRB") decision in *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (2019), decided on August 14, 2019, was the first to address the lawfulness of employer conduct surrounding mandatory arbitration agreements since the Supreme Court's decision in *Epic Systems*.
- The NLRB held that:
  - Under the National Labor Relations Act ("NLRA"), employers are not prohibited from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge;
  - Under the NLRA, employers are not prohibited from including mandatory arbitration agreements in response to employees who opt into a collective action under the Fair Labor Standards Act or state wage-and-hour laws.
  - In keeping with the NLRB's long-standing precedent, employers cannot take adverse action against employees for engaging in concerted activity by filing a class or collective action.

Epic Systems and the #MeToo Movement

- #MeToo has demonstrated that power in numbers and access to a public forum can drive employers, both public and private, to pay more attention to the problems of sexual assault and harassment.
- There is a concern that *Epic Systems* deprives employees of both power in numbers and access to a public forum.

Criticism of Epic Systems as a Threat to the #MeToo Movement

- On May 21, 2018, the Huffington Post published an article with the following headline:

  "The Supreme Court is Helping Companies Get Away with Sexual Harassment."

- The President and CEO of the National Women's Law Center, Fatima Goss Graves, said the decision eliminated a "powerful tool for women to fight discrimination at work."
- Prior to the decision, the Guardian warned that the outcome "could be disastrous" by making it easier for employers to retaliate against women who report harassment and assault.

Reconciling *Epic Systems* with the #MeToo Movement

- Some private-sector employers, like Uber, Lyft, and Microsoft, have carved out sexual harassment claims from their otherwise mandatory arbitration programs. Such a "carve out:"
  - Might help avoid public relations concerns.
  - ***But*** might also be seen as prioritizing claims of sexual harassment over other claims of discrimination, such as racial, age, and disability.

Pros and Cons of arbitration

Although the Supreme Court has issued a series of rulings over the past 25 years favoring the enforcement of arbitration agreements in the employment setting, the ruling in *Epic Systems* will extend many employers' ability to require that all employment disputes—including wage-and-hour litigation and discrimination claims—be handled through individual, private arbitration proceedings.

Employers should consider the following pros and cons when deciding whether to adopt a mandatory arbitration program for its workforce:

PROS

- Regardless of the strength or weakness of the underlying claims, class and collective actions are extremely expensive for an employer to litigate—resulting in a strong incentive to pay a substantial settlement even in weak cases. Individualized arbitration processes may weed out some frivolous claims.

Pros and Cons of arbitration (continued)

PROS (CONTINUED)

- Arbitration proceedings are private, and can also be confidential if specified in the agreement.
- Arbitration can involve somewhat less discovery and can move through the system more swiftly than court actions.
- Arbitration hearings can be scheduled more efficiently and are not dependent on the mandates of a judge's schedule.
- An experienced arbitrator may be less of a "wild card" than a jury.
- Arbitration decisions are generally final and not subject to appeal, except in extraordinary circumstances or unless broader appeal rights are provided in the arbitration program.

Pros and Cons of arbitration (continued)

CONS

- Courts have required that employment arbitration programs must satisfy certain due process protections, such as not requiring the employee to pay more in arbitration costs than the employee would have had to pay in filing fees were the employee to file the same action in a court. Thus, the employer ends up bearing a significant majority of the arbitrator's fees and administrative costs.
- Some employers with mandatory arbitration programs have experienced more claims than employers without such programs, perhaps due to the confidential nature of arbitration and the ease of filing claims without an attorney.
- While arbitration is generally considered a more cost-effective forum than court, that is not always the case, especially given that arbitrators can require the same amount of discovery, or even more, than is typically available in court.

Pros and Cons of arbitration (continued)

CONS (CONTINUED)

- Arbitrators are less likely to resolve a case early through a motion to dismiss or a motion for summary judgment, and thus a higher proportion of arbitration claims may be fully litigated through a hearing (the equivalent of a trial).
- There is a popular belief that arbitrators are more likely to "split the baby" in an award rather than fully dismiss a weak claim.
- Arbitration decisions cannot be easily appealed, unless an appeal right is built into the program, so an adverse decision is unlikely to be overturned.
- Requiring employees to sign mandatory arbitration agreements can be viewed as heavy-handed, negatively impacting employee morale and subjecting the employer to negative publicity.

Arbitration programs and recommendations

If an employer wishes to adopt a mandatory arbitration program (or review an existing program), the employer should:

- Ensure that the program meets the due process protections required by federal and state courts. These can include: (i) limiting the fees and/or costs that the employee must pay; (ii) confirming that the employee can recover the same types of damages that would be available in court; (iii) making sure that the terms of the program are understandable to the average employee; and (iv) providing for adequate consideration for the agreement.
- Think through the internal and external public relations implications of implementing a mandatory arbitration program.

Arbitration programs and recommendations (cont.)

- Plan a protocol for confirming the employee's agreement. An employer utilizing a digital or electronic signature must be able to present credible evidence that the signature was the act of the employee. Employers should therefore review their computer and intranet security measures with their IT department to ensure they comply with current technological and legal standards to establish that digital or electronic signatures are authentic and genuine. Employers who do not implement proper safeguards to authenticate their employees' signatures risk having their arbitration agreements invalidated.
- Prepare for the possibility of an increase in number of claims, although they will individually be smaller because they cannot be pursued on a class or collective basis.

Arbitration programs and recommendations (cont.)

- Employers should note that arbitration programs will not prevent enforcement actions by federal and state agencies, such as wage-hour audits by the Department of Labor or pattern-and-practice litigation by the U.S. Equal Employment Opportunity Commission. There may also be state law mechanisms allowing plaintiffs to circumvent mandatory arbitration programs, such as California's Private Attorneys General Act (PAGA).

Developments in State Legislation on Sexual Harassment

Developments in California

- In August 2019, SB 778 was approved by the Governor and chaptered by the Secretary of State.
- The bill covers new sexual harassment training requirements.
- By January 1, 2020, an employer having five or more employees shall provide at least two hours of classroom or other effective interactive training (*i.e.* e-learning) and education regarding sexual harassment to all supervisory employees and at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within six months of their assumption of a position. This training must be provided once every two years by a qualified trainer.
- What must information must a training include?
- Who is a qualified trainer?

Developments in Connecticut

- In June 2019, Substitute SB-3 (PA 19-16), known as the "Time's Up" bill, was signed into law.
- SB-3 makes substantial changes to the State's sexual harassment laws Majority of these provisions go into effect on October 1, 2019.
- Changes include:
  - All Connecticut employers must satisfy certain mandatory training requirements. Amount and timing of training depends on the employer's size. Failure to train will be considered a "discriminatory practice," subject to fines up to $1,000;
  - New posting requirements;
  - Expanded protections for employees reporting alleged sexual harassment;
  - Expanded time to file discrimination complaints;
  - Potential damages expanded.

Developments in Delaware

- In August 2018, HB 360 was signed into law.
- HB 360 provides greater protections related to sexual harassment under the Delaware Discrimination in Employment Act. The bill creates a new section in the DDEA devoted to sexual harassment. It went into effect on January 1, 2019.
- Changes include:
  - An employer of 4+ employees can be liable for sexual harassment of its employees, unpaid interns, job applicants, joint employees, or apprentices;
  - Definition of sexual harassment under HB 360 is the same as that under Title VII of the Civil Rights Act of 1964;
  - Provides standard for finding employer liable;
  - Mandatory notice to employees; and
  - Mandatory training.

Developments in Illinois

- In August 2017, SB 189 was signed into law.
- SB 189 removes the statutes of limitations on certain sexual abuse crimes. As amended, the statute states:
  - "When the victim is under 18 years of age at the time of the offense, a prosecution for criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, aggravated criminal sexual abuse, or felony criminal sexual abuse may be commenced at any time when corroborating physical evidence is available or an individual who is required to report an alleged or suspected commission of any of these offenses under the Abused and Neglected Child Reporting Act fails to do so."

Developments in Michigan

- In June 2018, two statutes extending the statute of limitations to bring claims were signed into law, giving victims of sexual misconduct more time to bring their claims.
- Act No. 182
  - For minor victims, an indictment may be filed up to the following dates, whichever is later:
    - The individual reaches age 28.
    - Within 15 years of the offense.
- Act No. 183
  - Minor victims of criminal sexual conduct can bring civil claims up to the following dates, whichever is later:
    - The individual reaches age 28.
    - Within 3 years of the date the individual discovers, or reasonably should have discovered, his or her injury and the causal relationship between the injury and the criminal sexual conduct.
  - Minor victims of criminal sexual conduct may commence actions to recover damages within 90 days after the effective date of the amendatory act if certain criteria are met.

Developments in Maryland

- In May 2018, Maryland passed the Disclosing Sexual Harassment in the Workplace Act of 2018.
- The act provides for the following:
  - Employment contract provisions that waive future rights or remedies to sexual harassment claims or retaliation for reporting sexual harassment are void.
  - Reporting requirement under which employers with 50 or more employees must create a survey with alleged sexual harassment settlement statistics. Statistics must be reported to the Maryland Commission on Civil Rights. The Maryland Commission on Civil Rights will post the aggregate number of settlements reported by employers on its website.

Developments in New York

- In April 2018, New York passed legislation that provides for the following:
  - No mandatory arbitration of sexual harassment claims unless a collective bargaining agreement provides otherwise.
  - Ban on non-disclosure agreements in sexual harassment settlements unless keeping the matter confidential is "at the complainant's preference."
  - Mandatory sexual harassment policy and training on an annual basis pursuant to Section 201-g of the N.Y. Labor Law.
  - Protections for non-employees who provide services to employers.

Developments in Tennessee

- In May 2018, HB 2613 was passed.
- The law restricts employers from executing sexual harassment related nondisclosure agreements as a condition of employment.
- If an employee is injured as the result of the provision, he or she will have rights and remedies available under the retaliatory discharge provision of the Tennessee Code.

Developments in Washington

- In March 2018, Washington enacted three separate laws related to sexual harassment:
- SB 5996 prohibits requiring employees, as a condition of employment, to sign nondisclosure agreements or similar documents that prevent them from speaking out about sexual harassment.
- SB 6068 makes any agreement that would limit, prevent, or punish disclosures related to sexual harassment or assault unenforceable.
- SB 6313 makes any provision of an employment contract that requires an employee to waive his or her right to pursue claims under antidiscrimination laws void and unenforceable.

Developments in New York City

- In May 2018, the Stop Sexual Harassment in NYC Act was signed into law.
- The act's provisions include:
  - An amendment to the New York City Human Rights Law (NYCHRL) to permit claims of gender-based harassment by all employees, regardless of employer size.
  - An expansion of the limitations period for gender-based claims under the NYCHRL from one year to three years.
  - A requirement that contractors include their sexual harassment practices, policies, and procedures as part of an existing report for particular contracts.
  - A requirement that employers conspicuously display an anti-sexual harassment rights and responsibility poster and circulate information sheets to new hires.
  - A requirement that employers with 15 or more employees must conduct annual anti-sexual harassment training.

Developments in Seattle

- In May 2018, the Seattle City Council passed Bill 119240.
- The bill extends the statute of limitations for sexual harassment claims that are investigated by the Office of Civil Rights by nearly 1 year, from 180 days to 1 year and 6 months.

Examples of Attempted Changes

- Michigan: In February, 2018, SB 877 was introduced. The bill would have amended the government immunity law to specify that a government agency is not immune from tort liability for the sexual misconduct of its members, officers, employees, or agents. This bill did not make it out of the Michigan House.

Developments in Federal Legislation on Sexual Harassment

Tax Cuts and Jobs Act (TCJA)

- The TCJA, signed into law on December 22, 2017, added a new section to Internal Revenue Service Code to discourage the use of nondisclosure agreements ("NDAs") as it relates to sexual harassment claims.
- Section 162(q):

  "No deduction shall be allowed under this chapter for - (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."

Tax Cuts and Jobs Act (TCJA)

- The TCJA applies to all settlement amounts paid after Dec. 22, 2017.
- May lead parties who negotiated settlements prior to Dec. 22, 2017 to incur tax liabilities they did not anticipate when they first entered into the agreement.
- Unanswered questions:
  - What does it mean to be "related to sexual harassment or sexual abuse"?
  - How does Section 162(q) apply to the settlement of cases that also involve other types of claims?

Tax Cuts and Jobs Act (TCJA)

- On February 28, 2019, the IRS posted an FAQ clarifying Section 162(q).
- A strict reading of 162(q) indicates that both the employer's **and** employee's attorney's fees related to the settlement of a sexual harassment claim subject to an NDA may not be deductible.
- The IRS, however, clarified that this rule only applies to employers and **not** employees.

Tax Cuts and Jobs Act (TCJA)

- Question:
  - Does section 162(q) preclude me from deducting my attorney's fees related to the settlement of my sexual harassment claim if the settlement is subject to a nondisclosure agreement?
- Answer:
  - No, recipients of settlements or payments related to sexual harassment or sexual abuse, whose settlement or payment is subject to a nondisclosure agreement, are not precluded by section 162(q) from deducting attorney's fees related to the settlement or payment, if otherwise deductible. See Publication 525, Taxable and Nontaxable Income, for additional information on when all or a portion of attorney's fees may be deductible.
- Publication 525 allows employees to deduct certain attorney's fees and court costs related to an unlawful discrimination lawsuit as adjustments to income, rather than as a miscellaneous itemized deduction.

What is Sexual Harassment?

Sexual Harassment

- Quid pro quo ("this for that") express or implied demands for sexual favors in exchange for favorable reviews, assignments, promotions, continued employment, or promises of continued employment.
- Hostile work environment.
- Example of a definition of "sexual harassment" used in a risk-pool sharing agreement:
  - “Sexual Harassment“ means any actual, attempted or alleged unwelcome sexual advances, requests for sexual favors or other unwelcome conduct of a sexual nature directed toward a person by another person, or persons acting in concert, which causes BODILY INJURY or PERSONAL INJURY, including but not limited to:
    a. Submission to or rejection of such conduct is made either explicitly or implicitly a condition of a person’s employment, or a basis for employment decisions affecting a person;
    b. Such condition has the purpose or effect of unreasonably interfering with a person’s work performance or creating an intimidating, hostile or offensive work environment.
    c. CLAIMS by third parties that a MEMBER has committed unwelcome acts of a sexual nature against them.

Examples of Prohibited Behavior

Sexual Harassment - Illegal Conduct

- touching or assaulting an individual's body, or staring in a sexual manner

Prohibited Behavior is typically defined in employee handbooks to include conduct that may not be illegal

- Threatening, intimidating, or hostile acts of a sexual nature
- Written or graphic sexual material that is placed on walls, bulletin boards, computer screens, or elsewhere
- Sexual stories, jokes, pranks
- In determining whether the conduct is illegal: Does such conduct have the effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive work environment?

Sexual Harassment Claims Statistics

Sexual Harassment Claims Statistics

- In FY 2018, there were 7,609 sexual harassment complaints filed with the Equal Employment Opportunity Commission (“EEOC“);
- 15.9% of those complaints were filed by men;
- The amount of money paid to resolve sexual harassment claims brought before the EEOC for FY 2017 was $56.6 million;
- 56.4% of charges filed resulted in a finding of “no reasonable cause;“
- 5.4% of charges filed resulted in a finding of “reasonable cause;"
- 8.7% of charges filed settled;
- 8.7% of charges filed were resolved through a withdrawal with benefits;
- 20.9% of charges filed were administratively closed;

What penalties might employers face for workplace sexual harassment?

- Payment of lost wages to the victim – These are the benefits and wages that the victim would have earned from the date when the harassment occurred to the date of the settlement or trial.
- Payment of future lost wages to the victim – These are payments to the victim of the wages and benefits that the victim would have earned if the sexual harassment had never happened.
- Compensatory damages – These are payments that the employer may be ordered to pay to the victim for the emotional pain and anguish that the victim has suffered.
- Punitive damages – These are payments that are above and beyond the economic and noneconomic losses that were suffered by the victim and are designed to punish and deter the employer.
- Legal fees and costs – These are payments to the victim for the court costs and attorneys' fees that the victim incurred as a result of the sexual harassment case.
- Job reinstatement or promotion – This is an order to reinstate the victim to his or her job or to give the victim a promotion.

Top Sexual Harassment Settlements/Verdicts

- 2016: *Gretchen Carlson v. Roger Ailes*: FOX agreed to pay **$20 million** to former broadcaster Gretchen Carlson to settle a sexual harassment lawsuit she filed against former FOX News CEO Roger Ailes.
- 2012: *Ani Chopourian v. Catholic Healthcare West*: A physician's assistant won what may be the largest-ever sexual harassment verdict for a single plaintiff.
  - Jury award: **$168 million**
- 2011: *Ashley Alford v. Aaron's Rents:* Former employee at Aaron's Rents said a manager made relentless sexual advances.
  - Jury award: **$95 million** (reduced by the court to $41.3 million because of caps on compensatory and punitive damages under Title VII).

Top Sexual Harassment Settlements/Verdicts

- 2011: *Carla Ingraham v. UBS*: Former senior client service associate said male broker she worked for made sexual advances and she was later fired one week after filing an amended charge of sexual discrimination.
  - Jury award: **$10.57 million**
- 2007: *Anucha Browne Sanders v. Madison Square Garden, et al.*: Former executive for the New York Knicks alleged she was fired after complaining that she'd been sexually harassed by Isiah Thomas, the Knicks' then head coach.
  - Jury award: **$11.6 million**
- 1999: *Linda Gilbert v. Daimler Chrysler:* First female millwright at a Chrysler plant claimed she endured cruel jokes and sexually explicit cartoons.
  - Jury award: **$21 million**

Sexual Harassment Training - Does It Work?

- Research on sexual harassment training programs is likely to grow given (1) the increase in states passing laws demanding sexual harassment training, and (2) the EEOC's ongoing Select Task Force on Harassment.
- Researchers have been able to provide information on:
  - Effective practices for sexual harassment training
  - Areas of focus for sexual harassment training
  - Two specific types of recommended sexual harassment training
  - Overarching culture changes required for effective sexual harassment prevention

Sexual Harassment Training - Effective Practices

- Training is a crucial and necessary component of ensuring anti-harassment in the workplace.
- However, certain methods of training appear to work better than others.
  - A one-size-fits-all approach to sexual harassment training is not effective.
  - The EEOC recommends that employers conduct sexual harassment training in an interactive, live environment. States that have passed laws on sexual harrassment training also require an interactive environment.
    - The trainers for a sexual harassment training should be engaging and interactive, to maintain the focus of attendees.
  - Sexual harassment training should also occur on a regular basis.
    - Once a year may not be enough to show the commitment that the company has to preventing sexual harassment.
  - A sexual harassment program should be routinely evaluated to ensure that it is effective.

Effective Sexual Harassment Training Areas of Focus

- The EEOC recommends that sexual harassment training include examples of troubling conduct that do and don't rise to the definition of sexual harassment.
- The EEOC also recommends utilizing real-life examples and scenarios that are specifically tailored to your workplace.
- Sexual harassment training should also inform employees about their rights, by explaining to employees the avenues that should be taken to report inappropriate conduct.
  - Sexual harassment training should detail the complaint procedure to be followed under such circumstances.

Sexual Harassment
Effective Training - Overarching Cultural Changes

- The EEOC indicates that sexual-harassment training should be a part of a "holistic culture of non-harassment."
  - It is important to shift the focus away from legal terms towards promoting an overall culture of civility within the workplace.
  - One study has found that sexual harassment training is ineffective when employees are cynical toward their larger work organization.
  - Training videos and lengthy programs will not suffice to solve this problem completely where the core issue often lies in employee attitudes and behaviors.

Sexual Harassment
Two Types of Training Found Effective by EEOC

- Two types of training found to be effective by the EEOC:
  - Bystander intervention training - training that empowers employees to intervene when harassment occurs.
    - This type of training also helps to create a sense of awareness and collective sense of responsibility within the workplace
  - Workplace civility training - training that focuses on promoting respect and civility throughout the workplace
    - This type of training will typically include exploring workplace norms, providing training on interpersonal skills and informing about the conflict-resolution process
    - This type of training is effective because it focuses on the positive -- what should be done, as opposed to the negative -- what should not be done

Sexual Harassment Avoidance Best Practices

What an employer should do:

- Have a clearly defined written anti-harassment policy.
- The policy should include a procedure by which employees can report any harassment and have procedures for investigating such complaints.
- Train all employees about the anti-harassment policy and the complaint procedure.
- Document the employees' receipt of the written policy and any training.
- Prompt Remedial Action.
- All these steps are important because, in certain cases, they allow an employer to raise an **affirmative defense** to vicarious liability for sexual harassment.

Sexual Harassment - Typical Language in an MOC

Language Commonly Found in a Memoranda of Coverage ("MOC"):

- *"**Sexual Abuse.** This MOC does not cover **DEFENSE COST** or **DAMAGES** for any **CLAIM** or **SUIT** arising directly or indirectly from any actual or alleged participation in any act of **SEXUAL ABUSE** of any person by any **MEMBER**, except for **CLAIMS** or **SUITS** alleging negligence on the part of a **MEMBER** other than the **MEMBER** personally accused of such **SEXUAL ABUSE** covered under [Other Sections].*
- ***Sexual Harassment**. This MOC does not cover **DEFENSE COST** or **DAMAGES** for any claim or suit arising directly or indirectly from any actual or alleged participation in any act of **SEXUAL HARASSMENT** of any person by any **MEMBER**, except for **CLAIMS** or **SUITS** alleging negligence on the part of a **MEMBER** other than the **MEMBER** accused of such **SEXUAL HARASSMENT** covered under [Other Sections].*
- *However, for purposes of **SEXUAL HARASSMENT**, **POOL** may provide a defense to a **MEMBER**, subject to a reservation of rights, until such time that it is established judicially or otherwise that the **MEMBER** committed or participated in **SEXUAL HARASSMENT**."*

- The provisions above clarify that the "bad actor" will not be covered by the MOC for the act of sexual abuse or sexual harassment, but that a Member entity (*e.g.* a school district) would be covered for negligence (*e.g.* negligent failure to terminate).