



SEXUAL HARASSMENT IN THE #METOO ERA

Promoting A Respectful Workplace And Limiting Risks of Liability

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The #MeToo movement has ushered in an era of greater public awareness of sexual harassment. While this movement initially involved celebrities, it has had ripple effects on all segments of society. In that regard, the Acting Chair of the Equal Employment Opportunity Commission, Victoria Lipnic, has noted an increase in harassment charges filed in 2018 and has stated that she believes this increase in reporting is related to the #MeToo movement.

Although the #MeToo movement has not yet resulted in substantive changes to federal or North Dakota law, increased public awareness of sexual harassment has brought this issue to the forefront of employers' and employees' minds. Additionally, the perceptions of juries and other decision-makers are likely affected by the attention this issue has received. We know that in our practice, we have seen an uptick in the number of complaints and allegations of sexual harassment.

In this environment, employers want to know how to limit their exposure to liability. Under applicable law,

employers may not be liable if they have acted "reasonably" (a legal term of art) to prevent and address harassment issues. Employers are therefore well served to review their policies and practices, with an eye toward managing the risks associated with sexual harassment and preserving legal defenses. Beyond that, having sound policies and practices in place serves the important goals of improving employee morale and retaining good employees. To the right are recommendations for employers, based both on the preservation of the reasonableness defense and the goal of fostering a respectful and positive work environment.



I. Non-Discrimination/Anti-Harassment Policy

Employers must have clear, written policies prohibiting discrimination, including sexual harassment. Such policies, usually found in the employee handbook, are vital to employees' understanding of what constitutes prohibited conduct. A good policy provides a nonexclusive set of examples of prohibited conduct and behavior, thus providing clear communication to employees regarding the employer's expectations about conduct in the workplace.

2. Reporting Procedure in the Policy

A sound anti-harassment policy must also include clear instructions on how to report any perceived harassment. This is important because employees must know that the company welcomes feedback and reports regarding inappropriate conduct.

The reporting policy should provide several avenues for making a report. Having only one place to lodge complaints can undermine the reporting policy. For example, if a policy directs employees to make reports of sexual harassment solely to their direct supervisor, how likely is an employee to report sexual harassment by that same supervisor? An employer can prevent this issue by identifying several options as to where to submit a complaint or report, usually including other managers

or the human resources department, or by establishing a hotline that employees can utilize to make a report.

The easier the employer makes this difficult step for an employee, the better. The goal is for employees to report any issue early, so that the employer can promptly investigate and address the situation.

3. Non-Retaliation Policy

Employers also must have a policy explicitly informing employees that retaliation for making a claim of harassment or participating in an investigation of harassment is strictly prohibited. This non-retaliation policy should be found in or near the anti-harassment policy in the handbook. Clear communication of the employer's non-retaliation policy is crucial to creating a respectful work culture. Simply stated, employees are more likely to feel comfortable about coming forward if they do not need to fear retaliation for making a report.

4. Training and Setting the Tone of Respect

Having sound policies in place is important, but not sufficient. Employers should also ensure that their employees are periodically trained on the policies and the employer's expectation of a respectful workplace. We recommend that this training not be a canned program, but rather one that is thoughtfully prepared with the specific

Disclaimer: Since each situation is different, readers should consult a qualified attorney for legal advice. This article addresses common issues on the topic, but should not be considered legal advice.

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An employer's response is critical both legally and as a matter of employee morale.

workplace in mind. If possible, the training should be interactive, so that employees are able to ask questions. The goal is to get everyone on the same page as to expectations about conduct in the workplace.

Additionally, we recommend specific training for managers and supervisors about their obligation to set a tone of respect and professionalism in the company. The examples that managers set go a long way toward fostering a positive workplace culture. If managers observe or receive a report of inappropriate conduct, they should be instructed to obtain assistance from the human resources department, to be sure that the matter is investigated and addressed as needed.

5. Handling Complaints of Harassment

Once the employer has established policies and training that clearly set forth the employer's expectations and the ways by which employees may report sexual harassment, the next challenge is knowing what to do in response to a complaint of harassment.

An employer's response is critical both legally and as a matter of employee morale. Specifically, an employer will want to ensure that an investigation is properly conducted. The legal standard for an investigation is that it must be prompt and thorough, and the person conducting

the investigation should be neutral and competent.

As a practical matter, the scope of an investigation depends on the facts alleged. Sometimes an investigation involves only a couple of interviews. Other times, it may be more involved, including numerous interviews and a review of documents. We recommend consulting counsel for guidance as to investigations.

6. Following Through

When an investigator has completed the investigation and made determinations as to the alleged harassment, the employer needs to address and remediate any inappropriate conduct. Many times, the issues are very minor and can be remediated with a little coaching and sensitivity training. Where the issues are more serious, a higher level of discipline, up to and including termination, may be warranted.

The employee who reported the harassment should be informed that the matter has concluded and remedial action, if any, has been taken. While the details need not be provided, the employee should be informed that the matter has been handled. The employer should further assure the reporting employee that retaliation is not allowed, encouraging the employee to report any concern in that regard. We also recommend that

the employer check in with the employee periodically for a while, to be sure that the situation has been resolved and no retaliation has occurred.

7. Document, Document, Document!

As is often the case in the world of litigation, good documentation is critical; an employer's ability to defend against harassment claims is often dependent on contemporaneous documentation of its reasonable efforts to prevent and address harassment issues. The employer should have an investigation file with not only the investigation summary and determinations, but also the interview notes and documentary evidence reviewed by the investigator. The employer should also have good documentation of the follow-up efforts and any reports from the complainant at that point. If the complainant has noted continued issues, those issues trigger further investigation and potential remediation, all of which should be documented. If the complainant reports that all is well, that is also important evidence for the file.

Through a combination of these efforts, an employer can navigate the #MeToo era with confidence and use the increased social awareness as an opportunity to improve communication and create a culture of respect, all while serving to limit the employer's exposure to potential liability. ■



SANDY KJELVIK
SVP of Human Resources
Discovery Benefits



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