Chapter 3

Conducting a Sexual Harassment Investigation: A Practical Guide

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The goal of this chapter is to provide an overview to in-house counsel of the various laws and factual identifiers surrounding one of the nation's hot-button issues currently: sexual harassment. The "Me Too" movement has raised in the public's consciousness. This chapter hopes to do the same so that counsel is prepared to handle concerns in this area.

I. INTRODUCTION

The issue of sexual harassment in the workplace is at the forefront of the nation's collective conversation. This watershed moment is prompting leaders of many organizations—corporate, nonprofit, and governmental—to evaluate and improve workplace standards and culture.

According to a report prepared by the Equal Employment Opportunity Commission (EEOC) Select Task Force on the Study of Harassment in the Workplace,[1] workplace harassment—whether based on sex, race, disability, age, ethnicity, national origin, color, or religion—"remains a persistent problem." Furthermore, workplace harassment,

1. Equal Emp't Opportunity Comm'n, Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

particularly sexual harassment, often goes unreported, and therefore is not addressed. As a consequence, many organizations may have serious undisclosed sexual harassment problems.

If media coverage, ranging from CNN to the *Wall Street Journal* and other #MeToo-inspired reporting, represents an accurate bellwether, the likelihood your organization will encounter claims of workplace sexual harassment is growing.

The better prepared you are, the safer your organization and employees. A basic grasp of the federal rules governing sexual harassment is essential. Understanding the applicable laws specific to your local jurisdiction (state and municipal) is also a must. This is particularly true for those jurisdictions, such as New York State and New York City, with more stringent rules than those provided in the federal framework. Knowing your company's policies regarding sexual harassment is also necessary.

This chapter will outline applicable law governing workplace sexual harassment, provide tangible steps to protect your company and its employees in the event of a workplace sexual harassment allegation, and provide suggestions for proactively preventing sexual harassment in the workplace.

II. APPLICABLE LAW

Although the dominance of sexual harassment cases in the headlines is new, the applicable laws are not. Numerous layers of federal, state, and local laws provide employees the right to be free from sexual discrimination and harassment.

Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination on the basis of race, color, national origin, religion, and sex.[2] Specifically, Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[3] Title VII applies to employers with 15 or more employees, including federal, state, and local governments.[4] The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace,[5] including same-sex workplace harassment.[6]

The EEOC defines sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such

2. 42 U.S.C. § 2000e *et seq*.
3. *Id.* § 2000e-2(a)(1).
4. *Id.* § 2000e(b).
5. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).
6. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[7]

Almost every state has enacted state-specific sexual harassment statutes that, in many cases, follow federal law. In some cases, however, both state and municipal laws may provide expanded protection to employees. In New York State, for example, every employee is entitled to a working environment free from sexual harassment pursuant to the New York Human Rights Law, regardless of the size of the employer.[8] New York State and New York City laws provide for broader damages than federal law; specifically, they provide for unlimited compensatory damages,[9] and New York City allows for punitive damages.[10]

It is important to note that the EEOC and the United States Courts of Appeals for the Second and Seventh Circuits recently have held that discrimination on the basis of sexual orientation is a form of sex discrimination, reversing previous holdings that sexual orientation discrimination is not a form of sex discrimination.[11] The Supreme Court has not yet addressed the issue.

The EEOC and federal courts recognize two forms of sexual harassment under Title VII: *quid pro quo* and hostile work environment. These terms do not appear in the text of Title VII; however, the EEOC and federal courts have interpreted Title VII to include harassing behavior that has a tangible impact on employment (*quid pro quo*) and an intangible impact (hostile work environment).[12] The terms "*quid pro quo*" and "hostile work environment" illustrate the distinction between cases involving a threat that is carried out and offensive conduct in general.[13] For offensive conduct in general to be actionable, it must be severe or pervasive.[14]

A. *Quid Pro Quo* Harassment

Quid pro quo harassment occurs when the "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual . . . "[15] When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment and is actionable under Title VII.[16] A tangible employment action is a significant change in employment status, such as hiring, firing, failing to

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7. 29 C.F.R. § 1604.11(a) (2018).
8. NYCLS Exec. § 292(5) (2018).
9. *Id.* § 296 (2018); NYC Admin. Code 8-101 *et seq*. (2018).
10. N.Y.C. Admin. Code 8-502 (a) (2018).
11. Zarda v. Altitude Express, Inc., 2018 U.S. App. LEXIS 4608 (2d Cir. Feb. 26, 2018); Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 339 (7th Cir. 2017); Baldwin v. Foxx, 2015 EEOPUB LEXIS 1905, 116 FEOR (LRP) 2, EEOC (IHS) 120133080 (E.E.O.C. July 16, 2015).
12. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64-66 (1986); 29 C.F.R. § 1604.11(a)(3) (2018).
13. Burlington Indus. v. Ellerth, 524 U.S. 742, 753 (1998).
14. *Ellerth*, 524 U.S. at 753-54.
15. 29 C.F.R. § 1604.11(a) (2018); *see also Ellerth*, 524 U.S. at 751.
16. *Ellerth*, 524 U.S. at 753-54.

promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.[17] A tangible employment action is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates" and requires an official act of the enterprise.[18]

B. Hostile Work Environment

A plaintiff may establish a violation of Title VII without showing an economic effect on the plaintiff's employment by proving that discrimination based on sex has created a hostile or abusive work environment.[19] For sexual harassment to be actionable under a hostile work environment claim, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the complainant's] employment and create an abusive working environment.'"[20]

A hostile work environment exists when unwelcome sexual conduct "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment."[21] For a hostile work environment claim, conduct does not need to result in a tangible employment action (such as discharge, demotion, or an undesirable reassignment); however, that conduct must be so "severe or pervasive" that it creates an abusive working environment.[22]

Off-color jokes, sexually suggestive compliments about bodies or apparel, unwelcome and insistent invitations, vulgar language, overly familiar touching, standing inappropriately close, and conversations about or innuendoes to sex acts or sexuality qualify as forms of harassment. They can be conveyed verbally and via text message, e-mail, photographs, and social media posts. When such actions are common in a workplace, they can form a hostile work environment.

C. Defining Sexual Harassment

The EEOC's *Policy Guidance on Current Issues of Sexual Harassment* provides extensive guidance on defining sexual harassment, including the following sections quoted below:[23]

> **Determining Whether Sexual Conduct Is Unwelcome**
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> Because sexual attraction may often play a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected"[24] sexual advances may well be

17. *Id.* at 761.
18. *Id.* at 762.
19. *Meritor*, 477 U.S. at 66.
20. *Id.* at 67 (citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
21. 29 C.F.R. § 1604.11(a) (2018); *see also Meritor*, 477 U.S. at 66-67.
22. *Ellerth,* 524 U.S. at 754.
23. EEOC Notice N-915-050, Policy Guidance on Current Issues of Sexual Harassment (Mar. 1990).
24. *Id.* (citing Barnes v. Costle, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon J., concurring)).

> difficult to discern. But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. . . . When confronted with conflicting evidence as to welcomeness, the Commission looks "at the record as a whole and at the totality of circumstances . . . ," 29 C.F.R. § 1604.11(b), evaluating each situation on a case-by-case basis. When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest. . . . When welcomeness is at issue, the investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome.
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> **Determining Whether a Work Environment Is "Hostile"**
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> In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person."
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> . . .
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> Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment.
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> . . .
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> When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:
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> - Did the alleged harasser single out the charging party?
> - Did the charging party participate?
> - What was the relationship between the charging party and the alleged harasser(s)?
> - Were the remarks hostile and derogatory?

D. Employer Liability

An employer will be held vicariously liable under Title VII for *quid pro quo* sexual harassment committed by a supervisor, and there is no defense available to employers.[25] Further, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively

25. *Ellerth*, 524 U.S. at 760-61.

higher) authority over the employee."[26] However, if no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.[27] The affirmative defense is comprised of two necessary elements: (1) reasonable care by the employer to prevent and promptly correct any sexually harassing behavior, and (2) unreasonable failure by the harassed employee to take advantage of any preventative or corrective opportunities provided by the employer or otherwise avoid the harassment.[28] No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[29] Further, no affirmative defense is available if the harassing employee holds a high rank in the company, which makes him or her the employer's "alter ego."[30]

Sexual harassment allegations can serve to expose multiple layers of culpability within an organization. Although an allegation and investigation may focus on one perpetrator, in court the accused's behavior may be portrayed as an extension of the company's culture. Executive leadership and high-level managers may be portrayed as having tacitly allowed harassing behavior from not only employees, but also clients and outside consultants and vendors. In such instances, high-level management and the company itself may have exposure to liability.

Laws may vary among jurisdictions. Regardless of the locale, however, it is imperative to take essential certain steps when investigating sexual harassment allegations. Decisions made at the beginning of a sexual harassment investigation—whether considerate or careless, systematic or sloppy—can serve to enhance or diminish the potential of a swift and successful resolution, perhaps even avoiding litigation. Poor decisions may pave the way for a costly and drawn-out legal saga resulting in unwanted headlines, alienated clients, public protests, and a social media crisis, significantly impacting your company's reputation. Knowing the applicable laws, adhering to internal rules and regulations, and following the tips below will help you avoid a bungled investigation or litigation.

Under federal law (and most state laws), an employer has a duty to take all reasonable steps to prevent sexual harassment from occurring.[31] Reasonable steps may include:

- adopting and disseminating an anti-harassment policy;
- establishing an employee-friendly reporting procedure (and providing a reporting channel separate from chain-of-command);
- monitoring employee behavior;
- conducting periodic training;
- treating all reports of harassment in a serious manner;
- conducting prompt, thorough, and impartial investigations;

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26. *Id.* at 765.
27. *Id.*; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
28. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.
29. *Ellerth*, 524 U.S. at 765.
30. *Id.* at 758.
31. 29 C.F.R. § 1604.11(f) (2018).

- taking appropriate remedial action based on the findings of the investigations; and
- protecting employees from retaliation.

III. ESSENTIAL STEPS FOR CONDUCTING WORKPLACE SEXUAL HARASSMENT INVESTIGATIONS

Successful internal investigations will help identify and stop unwanted behavior, and will serve to maintain legal compliance with federal and local employment laws. A solid investigation will also lay the groundwork for a defense to harassment claims and related damages, especially if conducted in conjunction with a reliable channel for reporting. Effective investigations will also help defend against civil litigation and can ward off government enforcement actions. Well-run internal investigations can also serve to protect your company's reputation and enhance employee morale, recruitment, and retention.

The law requires a prompt, thorough, and impartial investigation.[32] The longer an organization or its leaders or managers have known about a harassment claim without taking action, the increased exposure down the road if litigation commences. Consider carefully any decision to conduct your investigation internally. There may be many potential conflicts of which you are unaware when initiating the investigation. An internal investigation may seem cost-efficient, but you could pay significantly for that decision in the long-run. Consider carefully whether there are potential conflicts of interest raised by the party conducting the investigation. For example, engaging the attorney who drafts your employee contracts may pose a conflict of interest. A wiser choice might be to engage someone with no history of interfacing with your employees.

Successfully investigating alleged harassment within your organization can be thorny in itself, but a sensitive situation can be compounded by otherwise easily avoided mistakes. Implementing these important steps will allow you to act quickly, avoid critical mistakes, and reach the best possible resolution.

A. Take Control Quickly

Hear a rumor? Don't wait. Act immediately. If you are in-house counsel and an allegation surfaces, take action quickly. Even a mere rumor places the onus on the employer to act on the allegation and conduct an investigation. On the other hand, stalling in response to complaints and failing to initiate an investigation could expose your organization to liability. Being proactive not only helps satisfy your legal obligations, it also sends a signal that you take harassment allegations seriously. Employee morale could suffer if employees learn about allegations and believe the employer is nonresponsive or has ignored a long-term situation despite repeated complaints.

32. EEOC Notice 915.002, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999).

There is no requirement that a "formal" complaint must be made or that a complaint must be in writing. There is also no requirement that an employee must complain through the chain-of-command or that a complainant identify herself or himself.

Do not dismiss an allegation simply because it originates from a single source. Likewise, do not underestimate the potential veracity of a rumor. Create a record about what you heard and what you did to address the allegations as soon as possible.

B. Maintain Confidentiality

There are multiple reasons for limiting the number of people who know about allegations and the investigation. First, the subject of the allegation can suffer a tarnished reputation if it turns out he or she is exonerated. Confidentiality also reduces the likelihood of future litigation by the falsely accused. Second, the complainant is vulnerable and must be shielded from possible retaliation. In addition, the reputation of a complainant can be tarnished in the course of an investigation. Moreover, an investigation will fare better if conducted in a discreet manner: employees may be franker if they believe their interviews will not be the subject of office gossip, and potential witnesses may be more truthful if they are approached without advance knowledge of an on-going investigation.

Note, however, that the need for confidentiality should not be confused with the message to employees that encourages whistleblowers or other reporting of allegations. Also, even though you want to maintain confidentiality of the investigation to the extent possible, do not guarantee strict confidentiality to any participants in the investigation. There will be certain circumstances in which disclosure of facts will be necessary (for example, a person accused of sexual harassment must be informed of the nature of the allegations).

C. Preserve, Collect, and Analyze Relevant Documents

The duty to preserve company documents based on the existence of pending, threatened, or reasonably foreseeable litigation is mandated by law. Moreover, documentary evidence is often the most reliable source of facts and also serves to refresh witness memory. In-house or outside counsel should take affirmative steps to plan, implement, and monitor document preservation in the event of anticipated litigation. Document hold orders should be issued and compliance should be monitored. A sample document hold order is included in Appendix B. In addition, evidence on company IT systems should be preserved. In addition to e-mail, relevant evidence might include video or audio recordings. You should strive to mitigate the potential for destruction of evidence, which may occur if word gets out about the investigation. You should also take steps to preserve documents outside the purview of the company, such as social media posts, as well as photographs and texts messages that might be stored on employer-issued devices. Ensuring the extraction and preservation of vital potential proof of harassment also protects your firm against allegations of not fully cooperating or, worse, a cover-up.

Be aware that key electronic evidence is sometimes lost unintentionally through routine server maintenance and data purges. Whether your company uses servers or cloud-based storage, ensure that evidence will be preserved and not destroyed in this manner. Working closely with someone in your IT department or an outside IT consultant can help in recovering digital evidence that was otherwise deleted, including e-mail deleted from computers and smart phones but stored on servers.

In addition, you may decide to engage an outside IT consultant in order to gather evidence in an expert and confidential manner. At the same time, an internal senior and trusted IT manager must be briefed to assist in efforts to recover digital evidence. Be mindful not to alert the entire IT staff to the existence of the investigation and the underlying allegations.

D. Know Your Internal Policies and Procedures

If you are in-house counsel, review all relevant company policies and procedures even before a harassment issue surfaces. Update your sexual harassment prevention policy as necessary to comply with relevant federal, state, and/or local laws. Before initiating an investigation, thoroughly review your firm's policies and procedures, including personnel policies, hiring contracts, and nondisclosure agreements. Review the specific rules and regulations disclosed to employees during hiring and through routine training. Review also the rights afforded by employment contracts. If the organization is unionized, know the relevant provisions of applicable collective bargaining agreements.

A complete understanding of internal rules will protect the company from the perception that it violated employee rights and help establish a legally sound roadmap for the investigation. In most companies, employee e-mail accounts are the property of the company, and you should ensure that your employee manuals make this clear while noting that the company has the right to review all e-mails.

Be aware of any signed agreements specific to the complainant or the subject of the complaint, including employee and nondisclosure agreements. In addition, review your company's applicable insurance policies: some insurance policies require early notification of any potential wrongdoing that may subject the company to legal claims.

If the employer is a publicly traded company, additional actions and disclosures may be warranted. Depending on the seriousness of the allegations and the potential impact on stock value, crisis management may also be necessary.

E. Select an Investigator

In an effort to contain costs, organizations sometimes resist bringing in outside help. At the same time, using an outside firm may ensure the investigation will be objective. Moreover, an outside firm should have expertise in interviewing witnesses and evaluating credibility, as well as the resources to conduct forensic exams of electronic devices. If the allegations involved many people within the company, you may have no choice but to bring in an outside firm to conduct the investigation.

The investigator you choose must be perceived as credible, unbiased, and independent. You may choose to retain expert investigative help by hiring a law firm or an investigative firm, or a combination of the two. The advantages to retaining a law firm are the benefits of attorney-client privilege confidentiality and resources to conduct an investigation while mindful of applicable law. On the other hand, an investigative firm can also be retained through outside counsel, which may serve to cover the investigative firm's work with the same attorney-client privilege protections, while also containing costs. Moreover, an investigative firm can bring to the table professionals with extensive experience in this work.

Whether a law firm or an investigative firm, be sure to hire people with experience in reviewing sexual harassment claims. Sexual harassment investigations require particular sensitivity and experience in dealing with particular witnesses, such as employees who have been subjected to harassment for extended periods of time but have not been comfortable coming forward. A person who has been sexually harassed might be embarrassed or blame herself or himself, resulting in a reluctance to discuss what happened. Moreover, a person who has been sexually harassed might have multiple reasons to hold back on important facts, including fear of retribution and a concern that he or she will not be deemed credible. A good investigator should be able to unpeel the layers of information with sensitivity, thoroughness, and efficiency. Needless to say, learning of important facts later could cause serious problems if the case advances to litigation.

F. Create an Investigative Plan

The investigative plan (which could be oral or written, depending on the circumstances of the investigation) should be flexible and should consider the need to retain expert investigative help while also protecting attorney-client privilege. The plan should determine the scope of the investigation by taking into consideration the nature and gravity of the allegation, the source and circumstances under which allegations are received, and available corroborative evidence. The plan should ensure that the investigation be conducted as promptly as reasonably possible and that all appropriate witnesses are interviewed and all relevant documents and other evidence is collected and reviewed. The plan should also provide for the documentation of the investigation and, if necessary, a formal report.

G. Interview Witnesses

The investigation plan should identify individuals the investigator intends to interview, including the complainant, alleged harasser, and other relevant witnesses, including those in whom the complainant may have confided. The plan should consider the order in which witnesses are examined and the timing of third-party witness interviews. Analysis of documents may impact timing of interviews: documents can serve to refresh witness memory or challenge a witness who may be less than truthful. The investigation plan should also determine how interviews will be memorialized, with options ranging from formal memoranda to detailed notes.

H. Ensure No Retaliation

The law protects from retaliation not only those who have been sexually harassed, but also those who report harassment allegations. Every effort should be made to ensure that no actions by other employees or managers could be portrayed as retaliatory in nature. Retaliation can include not only termination and demotion, but also exclusion from meetings, reduction in resources, and artificially poor performance reviews. You should ensure through close monitoring and educating staff that the complainant has not suffered and will not suffer retaliation.

IV. CREATING A HARASSMENT-FREE WORKPLACE

Going forward, ensure your organization maintains a workplace free from sexual harassment. These six steps will help.

1. **Set the tone at the top of the organization.** Effective prevention efforts must begin at the highest level of management. Leadership and accountability are crucial, and no system of training, monitoring, or reporting is likely to succeed in preventing harassment in the absence of genuine and public buy-in from the top levels of any organization.
2. **Utilize strong policies with clear principles.** Institute strong policies and procedures to support the clear principles set by senior management, with clear reporting lines. Implement policies and procedures that govern what employees should do if they encounter harassment. In addition to making the reporting process clear, include alternative reporting channels to allow complainants to bypass immediate supervisors. Conduct compliance reviews and evaluate policies and procedures periodically and update them as necessary based on the needs of the organization.
3. **Train your employees.** Develop tailored workplace training that sets the standard for respectful behavior at work. Effective training can reduce workplace harassment, but it must also serve as one component within a broader culture in which harassment is deemed unacceptable. Consider that training is an ongoing process, not a one and done.
4. **Establish and enforce anti-retaliation policies.** Through close monitoring and educating staff, ensure that employees who report harassment will not be subjected to retaliation through close monitoring and education of staff.
5. **Communicate with your employees.** Make it clear that all employees have a role to play in keeping the workplace safe and free of harassment.
6. **Ensure equal opportunities.** In order to maintain a workplace free of harassment, all employees must have equal opportunities to succeed, including through mentoring, advising, and promotion. A wide range of employees should be included in decision-making processes and in shaping the culture of the workplace.

In closing, below are a few highlights from the EEOC's chart of risk factors for sexual harassment in the workplace. If you recognize any of these red flags in your workplace, please bookmark this chapter. You may need to revisit it sooner than anticipated.

> **Homogenous workforce: Historic lack of diversity in the workplace.** Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. 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.

“Rough and tumble” or single-sex-dominated workplace cultures: Remarks, jokes, or banter that are crude, “raunchy,” or demeaning. Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.

Young workforces: Significant number of teenage and young-adult employees.

Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. 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.

Workplaces with significant power disparities. Supervisors may feel emboldened to exploit low-ranking employees. Low-ranking employees may be less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.

Appendix A:
EEOC Sexual Harassment Checklists

Checklist One: Leadership and Accountability[33]

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Determine if the leadership of your organization has taken the following steps:

- Leadership has allocated sufficient resources for a harassment prevention effort.
- Leadership has allocated sufficient staff time for a harassment prevention effort.
- Leadership has assessed harassment risk factors and has taken steps to minimize those risks.

Based on the commitment of leadership, determine if your organization has the following components in place:

- A harassment prevention policy that is easy-to-understand and that is regularly communicated to all employees.
- A harassment reporting system that employees know about and is fully resourced and which accepts reports of harassment experienced and harassment observed.
- Imposition of discipline that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred.
- Accountability for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment.
- Regular compliance trainings for all employees so they can recognize prohibited forms of conduct and know how to use the reporting system.
- Regular compliance trainings for mid-level managers and front-line supervisors so they know how to prevent and/or respond to workplace harassment.

Bonus points if you can confirm these statements:

- The organization conducts climate surveys on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace.
- The organization has implemented metrics for harassment response and prevention in supervisory employees' performance reviews.

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33. EEOC Checklists for Employers, Checklist One: Leadership and Accountability, https://www.eeoc.gov/eeoc/task_force/harassment/checklist1.cfm.

- The organization conducts workplace civility training and bystander intervention training
- The organization has partnered with researchers to evaluate the organization's holistic workplace harassment prevention effort.

Checklist Two: An Anti-Harassment Policy[34]

An anti-harassment policy is a key component of a holistic harassment prevention effort. Determine if your anti-harassment policy contains the following elements:

- An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated.
- An easy-to-understand description of prohibited conduct, including examples.
- A description of a reporting system—available to employees who experience harassment as well as those who observe harassment—that provides multiple avenues to report, in a manner easily accessible to employees.
- A statement that the reporting system will provide a prompt, thorough, and impartial investigation.
- A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation.
- A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation.
- An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred.
- An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors.
- A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately.
- Is written in clear, simple words, in all languages commonly used by members of the workforce.

Checklist Three: A Harassment Reporting System and Investigations[35]

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

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34. EEOC Checklists for Employers, Checklist Two: An Anti-Harassment Policy, https://www.eeoc.gov/eeoc/task_force/harassment/checklist2.cfm.

35. EEOC Checklist for Employers, Checklist Three: A Harassment Reporting System and Investigations, https://www.eeoc.gov/eeoc/task_force/harassment/checklist3.cfm.

Determine if your anti-harassment effort contains the following elements:

- A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed.
- Employer representatives who take reports seriously.
- A supportive environment where individuals feel safe to report harassing behavior to management.
- Well-trained, objective, and neutral investigators.
- Timely responses and investigations.
- Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility.
- An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible.
- Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation.
- During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred.
- A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred.

Checklist Four: Compliance Training[36]

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Determine if your organization's compliance training is based on the following structural principles and includes the following content:

Structural Principles

- Supported at the highest levels.
- Repeated and reinforced on a regular basis.
- Provided to all employees at every level of the organization.
- Conducted by qualified, live, and interactive trainers.
- If live training is not feasible, designed to include active engagement by participants.
- Routinely evaluated and modified as necessary.

36. EEOC Checklist for Employers, Checklist Four: Compliance Training, https://www.eeoc.gov/eeoc/task_force/harassment/checklist4.cfm.

Content of Compliance Training for All Employees

- Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment.
- Includes examples that are tailored to the specific workplace and the specific workforce.
- Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace.
- Describes, in simple terms, the process for reporting harassment that is experienced or observed.
- Explains the consequences of engaging in conduct unacceptable in the workplace.

Content of Compliance Training for Managers and First-line Supervisors

- Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods.
- Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report.
- Encourages managers and supervisors to practice “situational awareness” and assess the workforces within their responsibility for risk factors of harassment.

Note: These checklists are meant to be useful tools in thinking about and taking steps to prevent harassment in the workplace and responding to harassment when it occurs. They are not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.

Appendix B:
Sample Document Hold Order

Attorney-Client Communication

Privileged and Confidential

[SAMPLE]

URGENT – PLEASE REVIEW THIS LEGAL HOLD NOTICE

DO NOT DESTROY ELECTRONIC INFORMATION OR PAPER RECORDS OF ANY KIND
THAT MAY BE RELEVANT TO THIS MATTER

TO: [Relevant Parties]

DATE:

REGARDING: [Description of matter]

Please be advised that [your organization] reasonably anticipates commencement of litigation involving [description of matter].

Applicable laws and rules require you to preserve all Potentially Relevant Information (as defined below) and any failure to comply could result in severe penalties against [your organization]. To protect your interests and fulfill any legal obligations, it is necessary to preserve all Potentially Relevant Information immediately.

The affirmative and continuing duty to preserve and maintain all Potentially Relevant Information applies both to hard-copy documents and electronically stored information ("ESI"). **Accordingly, it is vitally important that you retain and preserve all Potentially Relevant Information, whether paper, electronic, or otherwise, wherever located.**

Potentially Relevant Information as used in this Notice includes all records, communications, and data, including memoranda, letters, spreadsheets, databases, calendars, telephone logs, computer disks, E-mails (including attachments), audiotapes, videotapes, CDs, DVDs charts, handwritten notes, drafts, files, archives, and other material related in any way to [description of the matter].

All Potentially Relevant Information should be preserved regardless of whether it is stored in your paper files, on your computer, on removable electronic media, or in some other format or location (including your home).

Effective immediately, it is critical that you do not delete, over-write, or otherwise alter or destroy any documents or files (print or electronic) that may contain Potentially Relevant Information. The obligation to retain and preserve Potentially Relevant Information applies to Potentially Relevant Information that currently exists or is created in the future. Therefore, you should preserve all existing Potentially Relevant Information and continue to preserve information in the future. If your business practices involve the routine destruction, recycling, relocation, or mutation of documents or files that may contain Potentially Relevant Information, please (1) halt such business practices; (2) sequester or remove such material from that business practice; or (3) arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery.

In addition, please note the following concerning the preservation of Potentially Relevant Information:

- E-Mail and ESI: Preserve relevant E-mail and electronic information of any kind (i.e., any information created, stored, accessible, or that uses or can use computer technology). Also, do not delete any potentially relevant E-mail (or attachments to any E-mail) in any inbox, outbox, delete box, or other location, or any potentially relevant E-mail that may be sent or received in the future.
- Duplicate Records: All duplicate copies of potentially relevant records should be preserved.
- "Non-Official" Files: You should not distinguish between "official" company files and "personal' or other "non-official" files for purposes of preserving Potentially Relevant Information. All Potentially Relevant Information should be preserved, including any files or copies of files that employees may have in addition to "official" or "company" files, including any files stored off-site.
- Backup Tapes and Offline Data: You should preserve backup tapes and offline data. Backup tapes (especially if used for disaster recovery purposes) and offline data, may not be reasonably accessible, but may still contain Potentially Relevant Information.
- Other Possible Sources: All sources of Potentially Relevant Information should be included in your preservation efforts, including, for example, any laptops, PCs, handheld devices (such as BlackBerry devices), or other devices such as USB drives. In addition, you should preserve any Potentially Relevant Information on network shared drives, individual user drives, local E-mail servers, self-created CDs or DVDs, and home computers, if applicable.

In the future, we may collect some or all of the Potentially Relevant Information from you as necessary. Until then, please continue to protect and preserve all of this information.