

PUBLICATION

Creating a Safe Workplace in the Wake of the #MeToo Wave

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The number of prominent men accused of sexual harassment in recent months is staggering: Mario Batali. Matt Lauer. Roy Moore. Roger Ailes. Al Franken. Harvey Weinstein. Kevin Spacey. While politicians, entertainers, media moguls and professional athletes make headlines when such allegations are made, the truth is that sexual harassment in the workplace is nothing new. What seems to have changed, however, is the court of public opinion regarding such allegations. The recent accusations by equally prominent women (particularly those who first spoke out against Harvey Weinstein) have created such a loud roar that more women are feeling safe to step forward and report past harassment, claiming #MeToo. As the deluge of sexual harassment allegations continues to dominate the news, employers need to take a hard look at whether their culture, policies and practices are identifying, preventing and remedying sexual harassment in their workplaces.

1. Don't Just Have Policies, Have "Live" Policies. "We do not tolerate harassment or inappropriate conduct." Every company says that and catchall anti-harassment policies are the norm. The question, however, is whether the company lives by those policies. Are those policies known by employees and enforced by management? When policies are merely distributed upon hire and stuck in a drawer somewhere, they do little to help prevent sexual harassment. A "live" policy is not just definitions in a handbook; it is integrated into the culture of the workplace so that behavior that is violative of the policy is regarded as intolerable and reported. Frequent trainings and refreshers on the company's sexual harassment policies are critical to maintaining a safe and positive way to reduce corporate exposure.

2. Define What is Unacceptable. Employers need to be specific in their policies about what conduct is considered improper harassment. Sexual harassment is not easily defined because it encompasses a wide range of behavior – from the boorish comment to the suggestive proposition to the criminal conduct of sexual assault. Harassing conduct (unless egregious) must be pervasive to be considered illegal sexual harassment under federal law. However, company anti-harassment policies can (and often do) define harassing behavior much broader than the law does. Therefore, some harassing conduct may be a violation of company policy even if it does not meet the legal definition of harassment. If a policy, culture and practice against sexual harassment is to be successful, there must be clear lines about what type of interaction and conduct is forbidden.

3. Establish a "See Something, Say Something" Environment. It is not uncommon when investigating a harassment complaint to discover many people who knew about the behavior and did not report it or do anything about it. The question employers must ask is why? Did employees merely laugh it off or just attribute it to the harasser's personality? Did the employees not know that the company policy protects them if they complain? Were the employees merely tolerating the behavior out of fear of repercussions? Do employees think their complaints are dismissed or that the company takes little action upon receiving complaints? It is a given that companies need to have solid, publicized, clear complaint procedures. A successful complaint process provides multiple reporting sources and assures the complainant that there will be no retaliation for reporting. But beyond the policy and procedures, companies need to educate and encourage employees to come forward to identify risky behavior in the workplace.

4. Don't Just Train, Educate. It is easy to stick employees in front of a computer and have them sign off that they completed sexual harassment training. But this type of training does little to prevent sexual harassment in the workplace or encourage victims to come forward. While most training educates employees on the definition of harassment and the company policies against it, in order for the training to help prevent the harassment (the number one goal), employers should look for education programs that allow employees to interact and discuss what is not tolerated in the workplace and ways to create a culture of respect. Training should be the beginning of a discussion. The training for management should address how to identify risky behavior, to sensitively address issues with employees, and to create an environment that makes employees feel safe to talk about such conduct and report it.

5. Finally, Investigate and Take Action. Sexual harassment breeds when a culture of complacency exists. Every complaint, whether formal or informal, should be investigated. Investigations should be prompt, thorough and effective to protect the accuser, the accused and the company. The Society of Human Resource Managers says to look for an investigator who has:

- An ability to investigate objectively without bias.
- No stake in the outcome. The investigator should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator's position within the organization.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.

Investigations should be conducted with no presumptions. Both the complainant and the accused should be heard. Regardless of the results of the investigation, action is always required. If the investigation determines that there was no policy violation, it is still imperative that the company stay in contact with the complainant and communicate that his/her complaints were taken seriously and investigated. If sexual harassment in any form is found, companies must then determine what steps are necessary to make the workplace safe for the complainant.