

SEXUAL HARASSMENT TODAY

What Employers Need To Know

Prepared for the Illinois Manufacturers' Association

April 19, 2018

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IN THE NEWS...

Charlie Rose Fired by CBS and PBS After Harassment Allegations

#MeToo Movement Is Person Of The Year,
'Time' Says



The 'Today' show was a 'total boys' club' during Lauer's tenure

How Tough Is It to Change a Culture of Harassment? Ask Women at Ford

WHAT HAS CHANGED?

The law is (relatively) the same, but...

- More attention = More claims
- Empowerment, less fear/stigma
- More likely to involve media attention
- People (juries) will have more information and stronger opinions
- 7th Circuit Court of Appeals (IL, WI, IND) held that adverse or discriminatory actions taken because of an individual's "sexual orientation" constitute unlawful discrimination on the basis of "sex" under Title VII of the Civil Rights Act of 1964

SEXUAL HARASSMENT – DEFINED

- **Quid Pro Quo**
 - “This for that”
 - Submission to conduct is explicitly or implicitly a term or condition of an employee’s employment OR
 - When submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting that employee
- **Hostile Work Environment**
 - Unwelcome conduct that has the purpose or effect of unreasonably interfering with an employee’s work performance or creating an intimidating, hostile, or offensive work environment

QUID PRO QUO

THIS

- SEX
- OTHER SEXUAL CONTACT
- DATES
- FLIRTING
- PUTTING UP WITH SEXUAL COMMENTS/TOUCHING

THAT

- PROMOTION
- POSITIVE REVIEW
- KEEPING JOB
- PAY INCREASE
- BONUS
- MORE FAVORABLE ASSIGNMENTS, OFFICE, ETC.

HOSTILE WORK ENVIRONMENT FACTORS

- Frequency/Continuity
- Severity
- Context
- Need not be “hellish;” something “short of the Ninth Ring”
- No economic impact required
- Intention v. Perception
 - Whether conduct creates a hostile work environment is judged by “reasonable person” standard
 - Intent of perpetrator is no defense

“SEVERE OR PERVASIVE”

- The conduct of the harasser must either be severe or pervasive to be classified as sexual harassment.
- Although a single unwanted request for a date or one sexually suggestive comment might be offensive and be inappropriate, it may not fall under the category of hostile work environment sexual harassment.
- However, a number of relatively minor separate incidents may add up to sexual harassment if the incidents adversely affect the work environment.
- For example, it may be sexual harassment if repeated sexual comments make the employee so uncomfortable at work that his/her performance suffers.

SEXUAL HARASSMENT –

- Can happen regardless of gender
 - A female supervisor tells a subordinate he must date the supervisor to keep his job
- Can occur between same-sex individuals
 - Female employee frequently sends sexually explicit photos to another female employee
- Does not require that the harassing conduct be motivated by sexual desire
 - Calling someone “baby,” “doll,” “honey”

EXAMPLES OF SEXUAL HARASSMENT

- Unwanted jokes, gestures, offensive words on clothing, and unwelcome responses and witty responses;
- Touching and any other bodily contact such as scratching or patting a coworker's back, grabbing an employee around the waist, or interfering with an employee's ability to move.
- Repeated requests for a date that are turned down.
- Transmitting or posting emails, texts, or pictures of a sexual nature or other harassment related nature.
- Displaying sexually suggestive objects, pictures or posters, screen savers.
- Playing suggestive music.

SEXUAL HARASSMENT OR NOT

Dave teases his coworker, Steve, about the way he talks and his tight fitting clothing.

Are Dave's actions sexual harassment?

A. Yes

B. No, because Dave is teasing another male.

C. No, because Dave's comments have nothing to do with sex

THE FARAGHER/ELLERTH DEFENSE

Employer can **avoid liability** in hostile work environment claims by showing:

1. It took reasonable steps/care to “prevent and correct promptly any sexually harassing behavior,” and
2. The employee “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”

ELEMENTS OF EMPLOYER DEFENSE

Reasonable Care” equals:

- Comprehensive written policy
- Clear complaint procedure with alternative avenues
- Policy effectively communicated
- Training – Why we are here today!
- Consistent and effective enforcement
- Adequate corrective measures

TOP FIVE TIPS FOR
PREVENTING ISSUES WITH
WORKPLACE HARASSMENT
IN 2018 . . . AND BEYOND

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#1 – REVISIT YOUR POLICIES

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REVISIT YOUR POLICIES

- Be concise and clear
- Avoid legal jargon that is difficult for your workforce to read and understand
- Provide specific, relatable examples
- Address technology
- Include consequences
- Ensure reporting procedures are up-to-date
- Re-distribute to employees and re-post in populated areas

#2 – ENSURE REPORTING STRUCTURE IS EFFECTIVE

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ENSURE REPORTING STRUCTURE IS EFFECTIVE

- Talk to mid-level managers and supervisors
- Walk the floor and know your own workforce
- Consider multiple avenues for reporting, including anonymous options

#3 – TRAIN, TRAIN, TRAIN...AND TRAIN AGAIN

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TRAIN, TRAIN, TRAIN...AND TRAIN AGAIN

- Require some form of training for everyone
- Pay special attention to managers and supervisors
- Utilize engaging and interactive materials – avoid just checking the box
- Use real-world examples that fit your work environment
- Facilitate discussion and encourage participation
- Ensure consistency and follow up
- Don't train just to avoid legal liability

#4 – ENLIST YOUR C-SUITE

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ENLIST YOUR C-SUITE

- It all begins with leadership
- Require that the “big wigs” attend training
- Remind them that this is good for business and that they could face individual liability
- Do not ignore the “superstar harasser” or long-time employee
- Ensure that leadership holds managers and supervisors accountable

#5 – TAKE ACTION

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TAKE ACTION

- Actions speak louder than words
- Take all complaints seriously
- Develop (or revise) an investigation process for complaints
- Take the appropriate remedial action, if necessary – send the message that employees will be held accountable
- Follow up with the accuser after the investigation
- Don't just focus on legal liability and technicalities - Find teachable moments and opportunities to change the culture or work environment

SPECIFIC CIRCUMSTANCES

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WHEN YOUR ORGANIZATION'S BIG WIG IS THE ALLEGED HARASSER

- Take the allegations seriously and don't make excuses
- Investigate – use someone from outside the organization
- Take retaliation seriously
- Make it difficult to be the Harvey Weinstein of your organization

#METOO

- Is a social media post a harassment complaint?
 - Ex: *“My boss is a complete jerk. #metoo.”*
- Think through all of the potential workplace issues
 - Legal
 - Practical
 - Public Relations
- Consider scheduling a meeting to discuss
 - Keep it simple
 - Remind her of your policies and that these are issues you take seriously
 - Ask if she has any concerns or behaviors to report

WHAT'S NEXT – CHANGES IN THE LAW

- Challenges to confidentiality agreements in settlements for harassment claims
 - Lawmakers in New York, New Jersey, Pennsylvania and California, Arizona, Washington have introduced bills.
- Confidentiality disqualifies harassment settlement tax deductions
 - Companies previously could deduct settlement amounts, including attorney fees, if they were connected to sexual harassment claims arising from business operations.
 - December 2017 tax return law states: "No deduction shall be allowed under this chapter for—(1) any settlement or payment related to sexual harassment or sexual abuses if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney fees related to such a settlement or payment."

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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