Sexual Harassment in the Workplace: New Awareness and Strategies to Address an Old Problem

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It's been more than 30 years since the U.S. Supreme Court first recognized sexual harassment as a form of illegal discrimination, but the issue is currently receiving more attention now than at any time in recent history. The rash of stories about career-ending misbehavior by celebrities, politicians, business leaders, and others, coupled with the #MeToo movement, has given heightened awareness to this issue. Now, everyone is paying attention.

While the law hasn't changed, public perception and expectations regarding harassment have. The renewed attention to sexual misconduct in the workplace is a wakeup call for employers. In addition to the potential damage to an organization's reputation, culture, and employee morale, sexual harassment claims are time consuming and expensive.

So what should employers do? A good start is to re-examine attitudes and assumptions about sexual harassment. Here are ten “old” approaches that should be re-examined in light of today’s hyper-aware environment.

10. Timing Convenience of Investigation

In today’s climate, it is crucial that claims of harassment be investigated promptly, completely, and carefully. Recently, however, promptness may have begun to take a back seat for many employers in favor of other factors. Human resources staff may be overwhelmed by other issues, and feel they don’t have time to respond to a sexual harassment complaint right away. Management may be distracted by business concerns and not place a priority on addressing harassment allegations. And key witnesses may argue that they are “too busy” to sit for an interview. But urgency is a key word for today’s environment. Employers need to show they care about these issues, and a timely response to allegations is critical.

That said, fairness to the accused and a reasoned approach to an investigation are also very important for cultural and potential legal liability purposes. We need to make sure we don’t “shoot first, ask questions later.” So while urgency is key, be sure that allegations are thoroughly and fairly investigated before taking action.
9. “We’ve Got This”

Many employers have assumed harassment is extinct, or that the problem only exists in “other” industries -- showbiz, factories, bars and restaurants, the entertainment industry, etc. Wrong. Additionally, some employers may assume that employees will report harassment if it happens in their workplace. Also wrong. Investigators need to approach every situation with an open mind and take all complaints seriously. Additionally, employers should be proactively on the lookout for illegal or inappropriate behavior. There are many reasons why a subordinate may not report harassment at work, but employers could potentially still be liable if it occurs.

8. “These Four Walls”

Recognize that the boundaries of the workplace have changed. More and more often, alleged harassment occurs outside the brick-and-mortar workplace. Harassment can occur via electronic communications such as text messages and social media. It can occur on business trips or at social events after-hours. Just because the alleged behavior occurred “outside of work” doesn’t mean the employer bears no responsibility. Employees often perceive that a supervisor has authority 24/7, particularly because a supervisor can exert authority once the parties return to the workplace. For all these reasons, employers must consider whether out-of-work behavior is causing effects inside the workplace.

7. The “Containment” Mentality

A complete investigation that preserves confidentiality to the extent practicable has been the traditional goal, and it remains a good one. However, be sure you are not sacrificing completeness in the interest of confidentiality. A recent radio program documented the story of five women who were sexually harassed by the CEO of their company, who has since resigned. The story underscored the absurdity of the subsequent investigation, which included no interviews with any of the primary victims. It is unclear whether the employer avoided conducting the interviews in an effort to preserve confidentiality, but it is clear that many times employers don’t talk to everyone they should because of a desire to maintain confidentiality and privacy. Failure to conduct a thorough investigation, however – even when the complainant requests that the matter be kept confidential and/or anonymous – can often come back to bite the employer. The lesson: Consider who you need to talk to in order to really complete the investigation and resolve the concern, and consider the
6. Media Response

While there may not be one right way to respond to media inquiries, employers should consider the issue carefully in light of the particular facts they are facing. Responding with “no comment” or providing only the barest minimum (such as dates of employment, position held), might be the necessary approach, but could be construed as a cover up in the new environment of the #MeToo movement. Instead of ignoring media inquiries or stating “no comment,” employers may want to consider issuing a statement that addresses how the company is responding to the current claim(s), as well as addressing the protection of employees in the future. Remember that employee privacy always remains extremely important, so think carefully about how to balance these factors.

5. Confidential Settlements

Settlements have been a cornerstone of resolving sexual harassment concerns in the past, even when allegations are disputed or can’t be substantiated. Confidentiality and non-disparagement clauses have been staples of such agreements. But things are different now in light of tax reform and the #MeToo movement. The U.S. Tax Cuts and Jobs Act of 2018 amends the Internal Revenue Code to eliminate deductions for:

- any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement;
- and
- attorney’s fees related to such a settlement or payment.

This provision is in effect now, though it is not currently well defined. It’s not clear if it applies to unsubstantiated allegations of sexual harassment, or if it applies in cases involving other claims, such as other claims of harassment or discrimination. But regardless, in light of this new law, employers must now choose between taking the tax deduction for settlements and attorney’s fees or keeping confidentiality/non-disparagement provisions in the settlement agreement. Employers will need to think through the options carefully when considering settlement of sexual harassment claims.
4. “Check the box” Training

Has your training become stale or rote? Public suspicion of “going through the motions” training has increased. Consider the need for updated examples, increased interactivity, and the robustness of your training program. Training needs to be part of establishing a genuinely desired culture, not just checking off of a “to do” list item.

3. This is “Civil” Stuff

Increasingly, sexual harassment cases involve more than just inappropriate jokes and comments – they can actually even involve criminal conduct, such as druggings and assaults. Moreover, these kinds of criminal matters are not limited to celebrities; they are happening in academic institutions, manufacturing environments, and office workplaces. Be proactive to ensure the safety and security of all your employees, regardless of whether they may be at work or offsite at a conference or after-work social gathering. If serious allegations of this nature do arise, don’t be afraid to initiate law enforcement involvement. Throughout the process, keep in mind the need to balance the privacy interests of complainants with workplace safety.

2. The Scope of Appropriate Remedial Action

Employers are legally obligated to take “appropriate remedial action” upon notice of harassment. Appropriate remedial action can be defined as action that is reasonably calculated to end the harassment. While these rules haven’t changed, employers should take a fresh look at their approach. Consider: What does the company need to do to a) end the harassment for the complainant, b) end the risk of harassment for others in the work environment, and c) create an anti-harassment culture. Sometimes the answer is not obvious, and can require careful consideration and creative solutions.

1. Sexual Harassment is a Discrete Issue

In the past, incidents of sexual harassment may have been thought of as an anomaly, separate from the workplace culture. However, current events suggest sexual harassment is part of a broader cultural phenomenon of gender/power dynamics. Employers should consider whether they can effectively address the issue of sexual harassment without looking at broader cultural issues of equity in the workplace. Are men and women
employees treated equally with regard to compensation and leadership consideration? Are general civility expectations the same for men and women? These are all issues to consider as employers grapple with how best to address sexual harassment in the workplace.

As we reconsider these ten outdated “approaches” to dealing with sexual harassment, and discuss how we can effect meaningful change in the future, there remains one important adage to keep in mind: Change starts from the top. Sexual harassment can only be addressed effectively if top management is fully engaged and committed to meaningful solutions. A demonstrated commitment on the part of leadership results in more proactive and effective investigations, more openness on the part of employees to report concerns, and actual changes in workplace behavior. This is a positive outcome that everyone should support.

Please contact your Varnum Labor and Employment attorney with any questions about your sexual harassment policy.

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