



Practical Tips on Creating an Effective Unlawful Harassment Policy

It has been a long time since the 1991 Clarence Thomas Supreme Court confirmation hearings brought the issue of sexual harassment to the forefront of public consciousness. Hundreds of thousands of unlawful harassment claims later, most employers have policies in place announcing their opposition to harassment and providing employees with avenues to complain and seek redress.¹ Yet the fact that thousands of claims continue to be filed each year, costing employers tens of millions of dollars in damages and attorneys' fees, indicates that problems remain. Constant changes in the law make formulating the right unlawful harassment policy a continuing challenge. Indeed, sometimes an employer's well-intended policy simply seeking to combat unlawful harassment can lead to unanticipated legal liability. This article addresses key issues and offers practical guidance for adopting the right policy.

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NEWSLETTER

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¹ In the past four years alone, more than 85,000 unlawful harassment charges have been filed with the United States Equal Employment Opportunity Commission (EEOC). In that same period, employers paid in excess of \$353 million to resolve harassment charges filed with the EEOC. http://www.eeoc.gov/eeoc/statistics/enforcement/harassment_new.cfm. These figures do not include lawsuits filed in court or the legal costs associated with defending those charges.

WHAT IS UNLAWFUL "HOSTILE WORKPLACE" HARASSMENT?

Reduced to its simplest formula, "hostile workplace" unlawful harassment is conduct directed against an individual because of his or her membership in a protected class that causes the workplace to be "hostile" within the meaning of the law.² How many instances of harassment, the types of conduct that will be considered harassing and at what point the working environment will be considered legally "hostile" depend on a multitude of factors.

Explicitly racial jokes, sexual comments or expressed hostility toward a particular religion or ethnic background are rather easy to characterize as forbidden conduct, but other conduct can also lead to claims. Indeed, the offending conduct need not be "sexual" to give rise to a sexual harassment claim.

In one case arising out of a New Jersey workplace, a woman claimed that her co-workers, all male, went to great lengths to make her feel unwelcome and thus made the workplace "hostile." The woman gave as one example an incident in which all the men came into the office smoking cigars shortly after she mentioned that she was allergic to cigar smoke. The court ruled that that incident could be used as evidence of sexual harassment because the harassment was directed at the plaintiff because of her gender/sex.

The absence of any bright line identifying what conduct may be considered unlawful harassment is among the issues that make this subject challenging to address.

² Another strain of unlawful harassment, called *quid pro quo* (this for that) harassment, requires an expressed or implied threat of some adverse employment action or promise of a benefit in exchange for submitting to the unlawful conduct. The classic example is the manager who threatens a subordinate with discharge if the subordinate does not submit to a sexual advance. This article focuses on "hostile work environment" harassment, but the principles discussed herein apply to the *quid pro quo* variety. Moreover, the same principles apply to a policy that announces the employer's stand against all types of unlawful discrimination, whether the conduct constitutes harassment or not. The employer's anti-discrimination policy can be incorporated in its unlawful harassment policy.

WHY AN UNLAWFUL HARASSMENT POLICY AT ALL?

Some jurisdictions require employers to create and maintain unlawful harassment policies, sometimes in connection with mandatory training of all or part of the workforce. See, e.g., Cal. Gov. Code § 12950; Conn. Gen. Stat. § 46a-54; ALM GL ch. 151B, § 3A (Massachusetts); R.I. Gen. Laws § 28-51-2. Even if not mandated by law, however, employers are wise to adopt such policies.

An employer's well-crafted unlawful harassment policy serves many positive purposes. First, such a policy is designed to protect the employer's workforce from having to endure conduct in the workplace that is both wrong and unlawful. Employers obviously applaud such a goal. Second, the policy helps the employer ensure that if there are problems, they are brought forward so they can be addressed. Again, this makes good business sense. Finally, the proper policy can be a vital defense for the employer if a legal claim is nevertheless made by an alleged victim of harassment.

An employer may face a lawsuit or administrative charge filed by an employee (or often, an ex-employee) who never complained of harassment previously. The absence of any prior complaint in the face of a strong policy against harassment provides the employer with a powerful argument that the harassment did not happen or even if something did happen, it could not have been as offensive as the individual now claims (or she would have complained). That eminently logical argument may resonate with a jury as simple common sense.

In addition, well-established case law may apply to bar the harassment claim based on the plaintiff's failure to report the supposed harassment where the employer has a known policy against harassment. E.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); see also *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (App. Div. 1999) (employer defeats an alleged hostile work environment claim by showing "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed

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to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”) (citations omitted), *overruled in part on other grounds by Cutler v. Dorn*, 196 N.J. 419 (2008).

What then, should a well-crafted unlawful harassment policy contain?

THE POLICY SHOULD IDENTIFY WHAT IS UNLAWFUL HARASSMENT

Harassment requires both offensive conduct and an intent to target a person because of his or her membership in some protected class. An unlawful harassment policy can explain this legal definition to the workforce so they can avoid committing harassment before they inadvertently do it, or take steps to stop it if they feel they are a victim of it.

Keeping in mind that there is no all-encompassing definition, cautious employers know that the first line of defense against a claim of harassment is letting its entire workforce, management and non-management, know that unlawful harassment will not be tolerated. In that regard, the employer’s policy should let the workforce know what is, or can be, considered harassment. Ideally, a policy should not simply provide the legal definition of harassment (summarized above), but provide examples of verbal and non-verbal actions that could be construed as harassing. The more education that is provided, the less likely that someone will inadvertently fall into a situation in which he or she commits an act that the law considers potential harassment.

The policy should ensure that employees know that harassment is not limited to “sexual” harassment, but includes harassment based on any “protected” classification (*i.e.*, age, citizenship, disability, gender, national origin, race, religion, sex, sexual orientation or any other characteristic protected under applicable law).

Not only will identifying harassment for the workforce help prevent it from ever occurring, but providing such education will make it more difficult for an employee

later to claim that he or she was not aware of the right to complain about the conduct at issue. An employer does not want a plaintiff’s lawyer to be the first to advise an employee that what he or she was experiencing was illegal.

THE POLICY SHOULD COVER HARASSMENT BY ANYONE

The policy should make it clear that *anyone* who works for the employer is protected from harassment, and that such protection applies regardless of who is the harasser. This should include an announcement that harassment by any persons with whom the individual comes into contact is covered by the policy (*e.g.*, non-employees such as customers and vendors).

THE POLICY SHOULD BE STRONG, BUT OVERDOING COMMITMENT CAN LEAD TO OTHER PROBLEMS

No employer wants unlawful harassment in the workplace. Not only is such conduct wrong and subject to legal liability, but it introduces an unwelcome dynamic to the workplace and can hurt productivity. It is thus expected that an employer may use strong language in its policy, such as making an ironclad commitment to prevent harassment and promising to punish anyone who is guilty of harassment.

Such “promissory” language should be avoided. In many states, promises set forth in employee handbooks and other employer policies can give rise to enforceable contracts. Contract claims generally have longer statutes of limitations, meaning that a claim based on a breach of contract may remain viable long after it is too late for an employee to bring a claim under state or federal anti-discrimination law (unlawful harassment being a form of discrimination). While an appropriate “disclaimer” that nothing in the unlawful harassment policy is an enforceable promise can provide a safeguard, it is better that the employer does not, in an excess of enthusiasm for doing the “right” thing, leave itself open to an old claim it could otherwise avoid.

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A strong, non-promissory, statement might read as follows:

Purpose of This Statement

This Sexual and Other Unlawful Harassment Statement and Complaint Procedure is intended to describe the current state of the law against unlawful harassment, and to make certain that all personnel are aware of the law, and of the Company's procedures for reporting and remedying unlawful harassment in accordance with the law. While the Company is firmly committed to the principles established in the state and federal laws to combat unlawful harassment and discrimination, nothing in this policy is intended to impose upon the Company any obligations beyond what those laws impose, or to extend any deadlines provided by any of those statutes.

THE POLICY SHOULD ENCOURAGE THAT CLAIMS BE MADE (PART I)

This may seem a strange statement, but the unlawful harassment policy should encourage that claims be made. There are practical reasons for this approach. First, the more quickly claims are made, the sooner they can be addressed, limiting potential legal exposure.

Also, harassment claims may be based on a simple misunderstanding. A manager or a co-worker may not be aware that his or her conduct is offensive to another, and could be implicitly encouraged to keep it up if no objection is made. Employees should be encouraged to speak up directly to someone whose conduct is offensive. That alone may solve the problem, essentially with no harm. However, if the employee is uncomfortable with confronting the harasser (who may be a direct supervisor), it is important that the employee bring the matter to higher-ups quickly. Better to nip the problem in the bud than to allow it to fester, and then perhaps explode. Also, an employee who feels he or she is being harassed on an extended basis may become more insistent on a dramatic disciplinary response against the harasser, and lesser discipline would be unsatisfactory to the complaining party. That situation can become a recipe for further problems in the workplace.

Moreover, if the situation is surfaced promptly and addressed, it is possible that the conduct will not even be found by a court to satisfy the threshold of creating a hostile work environment if a legal claim is made later.

THE POLICY SHOULD ENCOURAGE THAT CLAIMS BE MADE (PART II)

Managers should be told that they are independently responsible for bringing forward claims of possible harassment. Sometimes a manager may be approached by an employee who asks to speak "off the record." That employee may complain about another worker's conduct, then say he or she does not want to make a formal claim. Maybe the employee just wants to blow off steam and have a sympathetic ear, but the manager is now in an awkward position. If he honors the employee's request and does not report the conduct, the employee may later sue and claim, despite her own request not to report the claim, that the employer was still on notice of the conduct through the report to the manager.³ Managers also should be instructed not to try to handle a possible harassment complaint themselves. Ultimately the decision whether to act and in what manner should remain in the hands of the employer's human resources (HR) department. Again, this requires that all managers receiving a complaint report it to HR for handling. HR can meet with the employee and determine the appropriate next steps.

Non-management employees similarly should be encouraged to report possible harassment, even if it is not directed against them. Again, the employer should be on record as encouraging the surfacing of any possible unlawful harassment situations as part of its commitment to eradicate the problem.

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³ Although beyond the scope of this article, it is important to note that training of managers and non-management employees on the subject of unlawful harassment is an important element of a total unlawful harassment prevention and remediation program. Indeed, the failure to train may be sought to be used by a plaintiff as an element of a claim of liability for unlawful harassment. That is not to say that a failure to train will always result in a finding of liability, nor should it, especially in the face of a good unlawful harassment policy made known to the workforce, but it is a topic to discuss with legal counsel.

IDENTIFY HOW CLAIMS CAN BE MADE

The harassment policy should identify how the employee can make a complaint and to whom. A number of different individuals (or titles) should be identified to receive complaints to guard against the possibility that the only person identified to receive complaints under the policy is the alleged harasser. Also, the policy should not state that the “chain of command” must be followed, to avoid this very issue.

The employer may prefer that complaints be put in writing as a way of ensuring that it has all the facts, and perhaps to help guard against the complaining employee changing his story later; however, the employee should not be told that the complaint will not be investigated unless it is in writing. Instead, the employer’s representative should take notes and consider having the complaining employee sign them to ensure the employer knows what to investigate.

RETALIATION IS *VERBOTEN*

The policy should state that no employee will be subject to retaliation for making a complaint of unlawful harassment or for cooperating with an investigation into such a complaint. The policy should also encourage persons who feel that they have been subject to retaliation to come forward just the same as victims of a harasser are expected to do.

This no-retaliation policy should be explained to the alleged harasser, who may be shocked and upset to be accused of such misconduct. As noted, a complaint of harassment may be based on a misunderstanding. The investigation may conclude that there was no harassment. The employer certainly does not want to be confronted with a new complaint of retaliation, conduct that also is unlawful under federal and state law.

If harassment or simply inappropriate conduct is found to have occurred, and the offender is disciplined, the employer may face an awkward situation if the complaining employee continues to report to the disciplined worker. Avoiding retaliation in such a situation is something that must be addressed.

This is not, of course, to suggest that retaliation will occur, simply that the original complaining employee may perceive that to be the case in the future.

ENSURE PROOF THAT THE POLICY WAS PUBLISHED AND DISTRIBUTED

Even the best unlawful harassment policy does little good if employees do not know about it, or are allowed to be in a position to *claim* they did not know about it.

Employers should ensure that their policy is widely disseminated. Make sure that *every* employee, management and non-management, receives his or her own copy of the policy. Even non-employees who are actually employed by another entity but who may be on the worksite for extended periods of time *perhaps* should receive copies to help defend against claims of alleged harassment by employees against those individuals, or by those non-employees against employees. (Employers should consult with legal counsel before issuing employment policies to non-employees, since non-employment status may raise a number of issues including so-called “joint employer” issues.)

Have everyone sign receipts stating that they have received a copy of the policy and understand that they are required to read it and adhere to it. Ensure that those receipts are maintained. Post the policy in prominent locations throughout the workplace. Include the policy in the company handbook at the earliest opportunity.

Again, as noted above, when distributing the policy as a freestanding document, it is especially important that the policy (1) avoid promissory language that might give rise to a contract claim and (2) include proper disclaimer language.

THE SUBJECT OF MANDATORY CONFIDENTIALITY

The policy should avoid threatening employees with discipline if they fail to maintain the confidentiality of the complaint during the investigation.

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It would seem only logical for a number of good reasons to impose such a rule, such as ensuring that the employer receives facts from each relevant witness without the possibility of the witness being influenced by others, as well as protecting the privacy of the complaining employee who may not wish his or her complaint to become the subject of gossip. Indeed, the practice of “sequestering” witnesses (that is, keeping them from sharing their statements with one another) has long been seen as a valuable tool for reaching the truth.

The federal National Labor Relations Board (NLRB), however, has recently taken the position that a blanket policy of mandating that employees not discuss an investigation into workplace misconduct under pain of discipline may violate federal labor law, the National Labor Relations Act (NLRA). The NLRA applies to employers even if they are not unionized, so the NLRB’s position must be taken into account both in drafting a policy and during an investigation.

There has even been a report that an office of the EEOC may take the position that mandatory confidentiality somehow violates Title VII.

CONCLUSION

A well-considered unlawful harassment policy is an extremely valuable employer initiative on many levels. Apart from the fact that the failure to have such a

policy in place may be used against the employer in any litigation claiming unlawful harassment, such a policy is an effective teaching tool that may well prevent harassment before it starts, which after all is the ultimate goal. But a well-crafted policy can also help ensure as a practical matter that complaints are promptly brought forward and addressed, making the workplace a better place for all concerned. Finally, a good policy can be used as a powerful defense if legal claims are made against the employer.

This short article cannot address the myriad issues raised by unlawful harassment, nor even touch upon all the elements of a truly comprehensive unlawful harassment program, including issues surrounding training one’s workforce on harassment issues, proper investigation techniques, who to use to perform an investigation and the separate legal issues that may arise from the identity of the investigator. Nevertheless, coupled with legal guidance from a professional in the field of employment law, the foregoing tips should assist employers of all sizes and in all market segments in facing the threat to one’s business posed by unlawful harassment and possible costly lawsuits arising from that misconduct.

Please note that nothing herein, including the proposed sample language, is legal advice, and should not be used without actual legal consultation. Legal counsel should be consulted to address any particular issue facing the reader, including the details of proper language to use in preparing a proper unlawful harassment policy appropriate for your jurisdiction and situation.

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