

Employment Law Corner

Monthly Report



FOLEY & FOLEY^{PC}
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Employment Law Corner: Sexual Harassment Policies and Investigations

The beginning of a new year is the perfect time to take proactive measures to address your sexual harassment policy and complaints. Between 2018 and 2021, sexual harassment complaints made up 35% of all complaints received by the EEOC. An employer's ability to successfully defend a sexual misconduct case often comes down to the steps taken to address the allegations, more specifically, the investigation.

Sexual Harassment Rule Number One:

The first step to successfully mitigate your risk is to implement an anti-harassment policy to ensure that all employees are properly trained to understand the types of behaviors that are prohibited. Having a designated employee available to conduct fair and impartial investigations is critical as well. Generally, this can be your Human Resources department or other designated employee, but for more serious or egregious issues, you can elect to have a third party investigate.

Every allegation of sexual misconduct should be taken seriously and investigated as quickly as possible. Failing to respond timely to complaints of sexual harassment not only gives the perception that the employer is not taking the allegations seriously, but also increases your liability. Supervisors should be trained to flag all concerns raised by employees, regardless of how minor they might appear. Prompt and reasonable steps to address and correct the conduct is an important affirmative defense for the employer.

Have a Game Plan for Conducting Investigations

Once a report of misconduct has been made, the investigator should determine a plan, based on the type of allegation made and the steps outlined in your employee handbook, policy or collective bargaining agreement for unionized employees. The steps in the investigation may vary based on the specifics of the individual complaint. One complaint might require a more extensive process involving interviewing witnesses and reviewing various documents, videos, text messages, etc. while another might only require interviewing the complainant and the accused. Most of the information on how to proceed will depend on the complaint, the

information the reporting employee provides and your workplace procedures.

Conduct Fact-Finding Interviews

At minimum, the complainant and accused should be interviewed. The interviews should be done in a safe space, away from other employees. Investigators should prepare questions ahead of time for efficient fact finding and to mitigate any risk of bias in the process. If possible, have two investigators present so that one can take notes, while the other conducts the interview. Focus on open ended questions to get as much information as possible.

During the interview, it is important to assess the credibility of the interviewee but it is equally important to be empathetic. Regardless of whether a complaint has merit, individuals participating in the process should be given the benefit that they are doing so in good faith. For the complainant specifically, it is important to ask what the desired outcome would be in order to clarify any motives for the complaint and set realistic expectations on outcomes.

Interviews with complainants should target the who, what, when, and how questions. It's crucial to get as much specific information as possible, including any potential witnesses, documents, or recordings. The accused should be given the opportunity to respond to the allegations, provide their version of events and provide any witnesses or documents as well. Identified witnesses should be asked about information that could help corroborate or refute the allegations made. Questions to witnesses should be broad and allow them to share their perceptions without partiality to what the victim or complainant might have said.

Complete and Communicate Investigation Outcomes Timely

Once all relevant evidence has been reviewed, the investigator should promptly determine whether it's more likely than not that the conduct occurred. Once that determination has been made, a report should be provided to management to decide the appropriate course of action and resolution. Refer to your procedures and implement disciplinary action that is proportional to the alleged offense and reasonably expected to prevent the offense from reoccurring. Do not take remedial actions that negatively impact the complainant in any way as it could be perceived as retaliation.

Maintain Confidentiality and Avoid Retaliation

A sexual harassment complaint is a very sensitive matter and all persons interviewed must be instructed to keep the matter confidential to the extent possible. A victim of sexual harassment could face backlash from the accused, management or for the accused, regardless of the outcome. Any adverse treatment of the complainant is considered unlawful retaliation. Similarly, a witness could be subject to retaliation based on their participation in the investigation. It is crucial to emphasize that retaliation is prohibited throughout the investigation and at the outcome stage to all decision makers and supervisors.

Sexual harassment investigations are inherently problematic. Our team regularly drafts handbooks and policies, reviews complaints, fields questions, conducts investigations and provides training on this issue. We can support you at any level you need. We also provide a fixed fee [Sexual Harassment Prevention Toolkit](#). Contact us! **We can help!**

Contact Us



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