

Managing Workplace Harassment: 2017 Trends and What Employers Should Know



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As employers look ahead and plan for the rest of 2017, one of the most significant challenges they'll have to address is workplace harassment.

There are multiple factors driving rapid changes in the workplace, creating new questions about what is and is not appropriate behavior. Changes in technology and always-on connectivity have altered what people feel can be best left outside the workplace and what's allowed to enter. In the United States and around the world, an increasingly diverse workforce is introducing cultural practices that may not be easy to understand or respond to. While all major elections impact communities, the 2016 U.S. election was particularly contentious, resulting in greater than normal turbulence in the workplace. In response to this, employers must evaluate how they respond to harassment that occurs in the workplace and make changes to manage it more effectively.

2017 WORKPLACE HARASSMENT TRENDS

Politics and Social Movements Are Influencing Workplace Harassment

The political and social events that occurred in 2016—one of the most heated and polarized times in recent history—will shape the workplace environment in 2017.

In addition to the 2016 U.S. presidential election, there has been a significant rise in political and social movements of all forms. These events include changes in LGBTQ rights, the Black Lives Matter movement, the All Lives Matter movement, women's marches and associated events, and religious freedom activism.

All of these influences contribute positively and negatively to the workplace. It's positive because of increased dialogue between coworkers as they discuss current events and share their opinions with one another. However, these conversations can become negative and contentious, potentially leading to claims of harassment, discrimination or retaliation.

Technology Is Increasing the Immediacy & Scale of Workplace Harassment

Technology is another factor that can make workplace harassment a bigger concern for employers in 2017. Technology plays a critical role in the workplace that employers cannot ignore. Digital devices are now smaller, more portable and more powerful, allowing for constant engagement. It also enables people to connect in ways that would not have been possible only a few years ago.

Individuals now have the ability to push ideas out to large numbers of people immediately, without thinking about the consequences of their actions. This ability to comment on anything publicly and reflexively has moved privacy boundaries, making it difficult to separate a person's work life from private life.

With the almost nonstop coverage of news events and constant stream of information through social media platforms such as Facebook and Twitter, it's almost impossible for employees to avoid discussing divisive topics in the workplace.

Why Should Employers Care?

Employers should care about political and social events and how their employees are using technology because it's their employees who are posting, commenting, attending protests and rallies, and becoming more politically and socially active. These employees are arriving to work each day with their own beliefs, thoughts, ideas, morals, judgments and opinions. Employees are also coming to work each day with more opportunities to debate with their coworkers and company business partners.



While employers cannot prevent employees from discussing or sharing their opinions on current events, and employees are capable of having respectful conversations, employers must be prepared to deal with potential harassment claims resulting from coworkers sharing their ideas and opinions.

WHAT SHOULD EMPLOYERS KNOW?

Employers want to create a safe and protective environment for their employees. To do this, employers need to figure out how what's happening outside the workplace affects what's happening inside the workplace.

There are several things employers need to know to prepare for and respond to workplace harassment incidents. Employers should become familiar with the types of harassment that can happen in the workplace and the associated federal and state laws. From there, employers should review their workplace harassment policies to determine if they are adequate. They should also communicate the policies to all employees, train employees appropriately and put in place a system that handles workplace harassment claims.

1. A Clear Definition of Workplace Harassment and Its Effects

The U.S. Supreme Court ruled in the 1986 case of *Meritor Savings Bank v. Vinson* that workplace harassment is an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964.

When people hear about harassment in the workplace, the first thing that comes to mind is sexual harassment. However, it's critical that employers know that harassment encompasses more than that.

A 2016 report on workplace harassment published by the U.S. Equal Employment Opportunity Commission found that workplace harassment is a persistent problem. Almost 33 percent of the charges received by the EEOC in 2015 included allegations of some form of harassment, including harassment based on sexual orientation, gender identity, pregnancy, race, disability, age, ethnicity, national origin, color and religion.

The EEOC report also notes that three out of four individuals who experienced workplace harassment never talked to a supervisor, manager or union representative about the harassing conduct.

In 2015, employers paid \$164.5 million to the EEOC to resolve workplace harassment claims. In addition to the financial cost, workplace harassment also costs employers in terms of lower worker productivity, increased employee turnover and potential harm to the organization's reputation.

2. The Types of Conduct Considered Harassment

The EEOC says that harassment includes offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures and interference with work performance.

However, the EEOC clarifies that Title VII does not prohibit all conduct of a sexual nature in the workplace, although some employees may be offended by sexually laden comments or conduct. This includes an employee telling a dirty joke, using foul language or making crude gestures.

Workplace harassment also encompasses more than inappropriate conduct between coworkers. Employers can also be held liable under Title VII for third-party harassment of their employees if they know an employee is being harassed by a third party and fail to take steps to stop the harassment. For example, in the case of *EEOC v. Costco Wholesale Corp.* (2016), a federal district court jury in Illinois decided that Costco had to pay \$250,000 in damages to a female former employee who was sexually harassed by a male customer for more than one year. The EEOC sued Costco for failing to stop the harassment, even though the employee complained to store managers about the customer's unwelcome touching and stalking.



3. The Nuances of Sexual Harassment

Sexual harassment, in its strictest sense, occurs when a supervisor denies employment opportunities or benefits because an applicant or employee was not complicit with sexual advances.

When this “quid pro quo” harassment happens, there is strict liability for the company and personal liability for the supervisor.

Unwelcomed actions, whether they are sexual or not, can also create a “hostile work environment” resulting in an additional form of harassment. An employee’s work environment is considered hostile when any unwelcome conduct is made toward an individual that is so severe and pervasive that it alters the person’s employment conditions and creates an abusive working environment for the victim.

Employers should also be aware that both men and women can be subject to harassment by members of either sex, regardless of sexual orientation. In the case of *Oncale v. Sundowner Offshore Servs. Inc.* (1998), the Supreme Court ruled that Title VII prohibits same-sex harassment and sexual orientation discrimination when these behaviors are targeted at someone because of his or her gender.

This means that an employee violates Title VII if he or she harasses a coworker of the same gender, while a supervisor who retaliates against an employee of the same gender who refuses the supervisor’s romantic overtures also violates the law.

4. Protections Regarding LGBTQ Status Harassment and Discrimination

Sexual orientation is also considered a protected category, although case law sometimes holds that it is not protected under Title VII. However, case law also provides that sex discrimination under Title VII can include discrimination based on an individual’s failure to conform to gender stereotypes.

Although Title VII contains no express employment protections based on transgender status, the EEOC’s position is that discrimination based on gender identity is sex discrimination under the law.

Recent court cases shed light on the difficulty of proving discrimination based on sexual orientation or gender identity. For example, it was not until 2015 that the EEOC took the position for the first time that Title VII’s prohibition against sex discrimination includes sexual orientation bias (in the case of *Baldwin v. Foxx*).

One case that has caused some controversy is *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (2016), in which a district court ruled that a Michigan funeral home was entitled to a religious exemption and therefore did not violate federal employment bias law when it required a transgender employee who was transitioning from male to female to wear a man’s suit at work. This case is considered a major setback in the EEOC’s efforts to have gender identity and transgender status as a protected category under Title VII.

The issue of LGBTQ rights has moved to the forefront in the past few years, especially with laws being passed at the federal and state level that either protect or discriminate against those in the LGBTQ community. For example, North Carolina passed a law requiring individuals to use the restroom that corresponds to the sex listed on their birth certificate. Mississippi and Texas have proposed similar laws. On the other end of the spectrum, California recently implemented a law requiring all single-user restrooms be identified as “all gender.”

At the federal level, former President Obama signed an Executive Order in 2014 on LGBTQ Worker Rights for Federal Government Contractor Employees. The order imposed non-discrimination obligations for employers with certain federal government contracts and added sexual orientation and gender identity as protected categories. So far, President Trump has indicated this order will remain in place.

Even in jurisdictions with few or no protections in place, many companies are implementing EEO policies that include “sexual orientation” and “gender identity” as protected categories.

Company policies that merely add LGBTQ-related language should be reviewed, because a company can get in trouble for failing to comply with its own policies. If a company does not address LGBTQ harassment and discrimination, a policy should be created or amended to address this.



For example, in the case of *Matthews v. Wal-Mart* (2011), a federal appeals court ruled that Wal-Mart did not violate religious discrimination protections under Title VII when it discharged an employee for saying religion-inspired, anti-LGBTQ statements on company premises during a work break—a clear violation of company policy.

WHAT SHOULD EMPLOYERS DO?

1. Handle Disrespectful Speech Appropriately

When responding to claims of disrespectful speech, employers should consider how they responded to similar situations in the past and if corrective action is an option. If the conduct occurred at work or directly impacts the workplace, employers should evaluate if it concerns terms and conditions of employment, violates company policy or is a combination of these two factors.

For example, in the case of *Peterson v. Hewlett Packard Co* (2004), a federal appeals court ruled that an employee was properly terminated for displaying anti-homosexual biblical scriptures on his cubicle—a violation of the employer's policy prohibiting harassment.

2. Identify Valid and Invalid Defenses to Harassment Claims

Common defenses for a person accused of harassing another person include statements such as “I didn’t mean it that way,” “It had nothing to do with sex,” “I was telling the joke to everyone,” or “He never complained about it.”

These defenses do not matter to the EEOC or to a court of law, and should not affect an employer's response to the situation. If the harasser is a supervisor with immediate or higher authority over the plaintiff, the company is strictly liable.

What does matter, legally speaking, is a “recognized affirmative defense,” which an employer can use to show that it shouldn't be held liable for the offending behavior. An affirmative defense may be available if the following conditions are met:

- A well-publicized non-harassment policy and investigation procedure exists.
- The company exercised reasonable care to prevent and promptly correct any harassing behavior.
- The employee unreasonably failed to take advantage of preventative and corrective opportunities available.

An example that illustrates how employers should not handle sexual harassment claims involves ride-sharing company Uber and its response to sexual harassment claims made by a female software engineer. The engineer published a blog post alleging she had been sexually harassed while working at the company and, when she contacted the human resources department, she was told the offender was a high performer and that HR did not want to punish him because it was probably a mistake on her part. After she took her story public, the company's CEO issued a statement apologizing for Uber's responses to employee complaints, and vowed to help in the investigation of her claims.

3. Train Supervisors to Correctly Report Harassment Claims

First and foremost, it's important that supervisors are trained to avoid engaging in inappropriate behavior with direct reports or coworkers or doing anything that may be construed as harassment. Additionally, regarding the behavior of others, they should not trivialize an employee's concerns, wait for a situation to become severe or pervasive, prejudice allegations or jump to conclusions.

Supervisors should remember that they represent the company, and their tone matters. All harassment claims should be taken seriously and reported directly to HR. Supervisors should be a role model in the following of policies, complete all relevant harassment training and remind employees that the company's policy does not tolerate harassment.



4. Stay Ahead of Problems by Staying Within Regulatory Guidance

The first step is to put clear, reasonable and relevant policies in place. It's generally considered permissible to maintain rules about what happens during working hours regarding business issues. This includes issues associated with productivity, safety and distribution of literature during working hours in work areas. It also includes prohibition of conduct that violates non-violence, anti-discrimination and anti-harassment policies.

In addition to those considerations, there are several important limits placed on an employer's right to restrict its employees' speech. These include the federal National Labor Relations Act (even for non-union employers) and state laws protecting off-duty conduct. Section 7 of the NLRA protects a non-supervisory employee's right to discuss and engage in protected concerted activities. This includes political topics, such as right to work legislation, discussions concerning which candidates are pro-union, political engagement around discrimination and fair pay.

Lawful off-duty conduct laws generally prohibit employers from penalizing an employee because of conduct that occurs while off-duty, as long as the conduct is covered by the law in question. A limited number of states have laws, with protections extending to managers and employees alike. Examples of lawful conduct include participating in rallies or protests, posting opinions online and commenting in chat rooms.

When it comes to limits on employees, it is important to know that the First Amendment of the U.S. Constitution does not apply to the private workplace: Workers in private companies cannot file First Amendment free speech claims against their employers.

For example, in the case of *Three D, LLC v. NLRB* (2015), a federal appeals court agreed with a National Labor Relations Board ruling that a Connecticut sports bar illegally fired two employees who criticized their employer during an online Facebook discussion. The employees were fired after one employee made a comment about the company's payroll management on Facebook and the second employee added a "like" to the comment. The board ruled the employees were engaged in a NLRA-protected work-related discussion and the firings were illegal. The employer sought review of the ruling, but the Second Circuit agreed with the NLRB, saying the ruling "accords with the reality of modern-day social media use."

Companies must have legal counsel review their policy prior to implementation and apply the policy fairly and consistently throughout the company.

CONCLUSION

As employers contend with the political environment, social events and technological developments that are increasingly prevalent in the workplace, they must focus on how these factors can influence workplace harassment and develop a plan to respond to these changes.

For a workplace harassment policy to succeed, there must be accountability across all levels of an organization. Employers should foster a safe and protective environment, one that employees will feel comfortable in when reporting policy violations to a supervisor, HR staffer or another manager, and be confident their employer will sufficiently address their claims.

Employers should train all managers and non-managers on company policies and expectations. Training should be conducted regularly, cover relevant and contemporary issues facing their employees, help employees understand how some topics and behaviors can be offensive and violate company policy, and teach managers how to spot, address and prevent disrespectful conversations.



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