

Mineral™



Identifying and Preventing Workplace Harassment

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1. Introduction

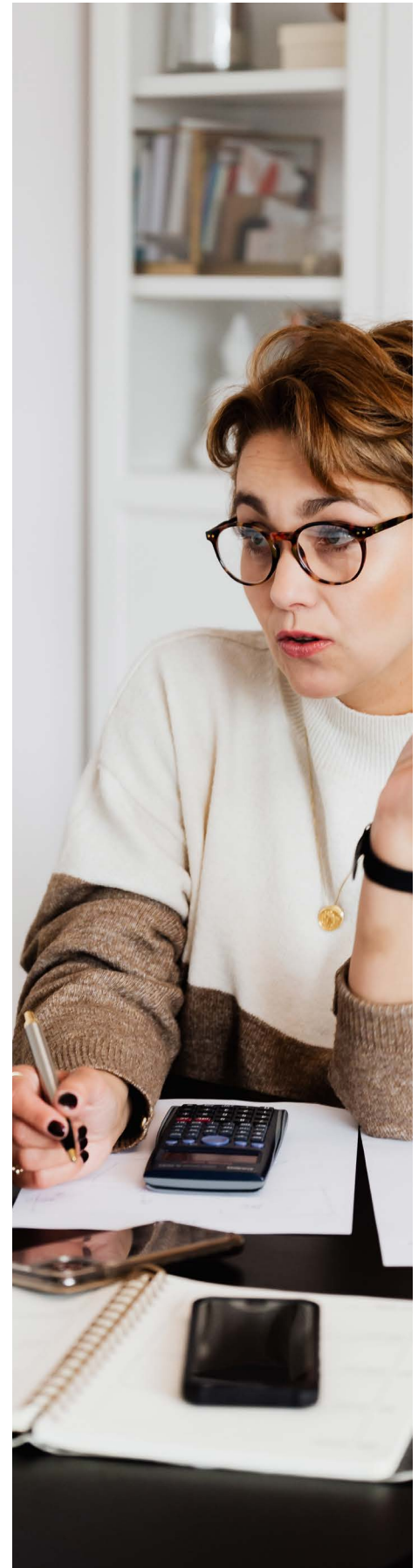
Each year, U.S. companies pay out tens of millions of dollars in penalties related to sexual harassment claims.

In addition, many cases go unreported. Victims and witnesses of harassment often refrain from reporting because the harasser has the power to retaliate or because the organization has not set up adequate communication channels. In other cases, victims report the harassment, but nothing is done about it. The harassment is excused, and the complaints are rebuffed. Word gets around that the organization tolerates harassment, further discouraging victims from coming forward. They either keep quiet, file charges with a governmental agency, or seek out an attorney.

None of these outcomes is good for employers or for the people they employ. If litigation ensues, harassment can cost employers even more, especially if it's pervasive in the company culture. And when harassment continues unabated, victims suffer physically and psychologically, and often see their careers stifled.

Training employees on what constitutes harassment and how to respond is a good and necessary first step, but employers also need to establish multiple options for reporting, investigate allegations promptly and thoroughly, and take the proper steps to discipline violators.

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1. Introduction (continued)

The EEOC recommends organizations take the following steps to prevent workplace harassment:

- Make an organizational commitment to diversity, inclusion, and respect—and establish policies and procedures to hold people accountable to that commitment.
- Establish a sense of urgency and seriousness about prevention by spending appropriate amounts of time and money on training or other prevention and response activities.
- Avoid rewarding managers for minimum complaints on their team, as doing so could incentivize the suppression of reporting.
- Assess risk factors.
- Clarify what behavior is prohibited.
- Empower those who are responsible for responding to allegations of harassment and preventing harassment from occurring.
- Survey employees on whether they're currently being harassed or know of harassment taking place.
- Protect people from retaliation.
- Assess preventative measures already in place to ensure they are effective.
- Use discipline proportional to the offense (sexual assault and an offhand remark shouldn't necessarily have the same consequence).



1. Introduction (continued)

No one can stop all harassment from happening, but employers can and should do everything in their power to prevent harassment and appropriately respond when it occurs.

For any of these measures to work, employees need to know that if they report harassment, their report will be taken seriously, they'll be protected from retaliation, and the harassment will stop. In short, they need to trust their employer. Anything an employer does to foster distrust will make anti-harassment measures much less effective. When it comes to preventing harassment, employers cannot say one thing and do another.



2. How to Investigate a Harassment Complaint

A company can help reduce risk related to harassment complaints by conducting a quick, thorough, fair and well-documented investigation, followed by steps to minimize the risk of such behavior happening in the future.

When a company suspects that an employee has violated its harassment or discrimination policy, conduct a complete (and well-documented) investigation into the allegations. This includes speaking with the employee who made the complaint, the accused employee, and any witnesses they name.

Investigate Promptly

1. Investigations should begin once you have received notification or once management has been made aware that wrongdoing has occurred.
2. Document all steps of the investigation including interviews, progressive discipline, and incident follow-up.

Selecting a Qualified Investigator

1. The investigator should be objective and without bias with no stake in the outcome.
2. The investigator should have knowledge of employment laws, prior investigative experience, strong interpersonal skills, and attention to detail.
3. Consider having more than one investigator (other members of management or HR) involved who can take notes.
4. Determine whether to involve third-party investigators (e.g., an HR consultant, legal counsel, etc.). This may be wise if the accused employee is high-ranking within the organization or you are unable to identify a neutral internal investigator.



2. How to Investigate a Harassment Complaint (continued)

Interview the Complainant

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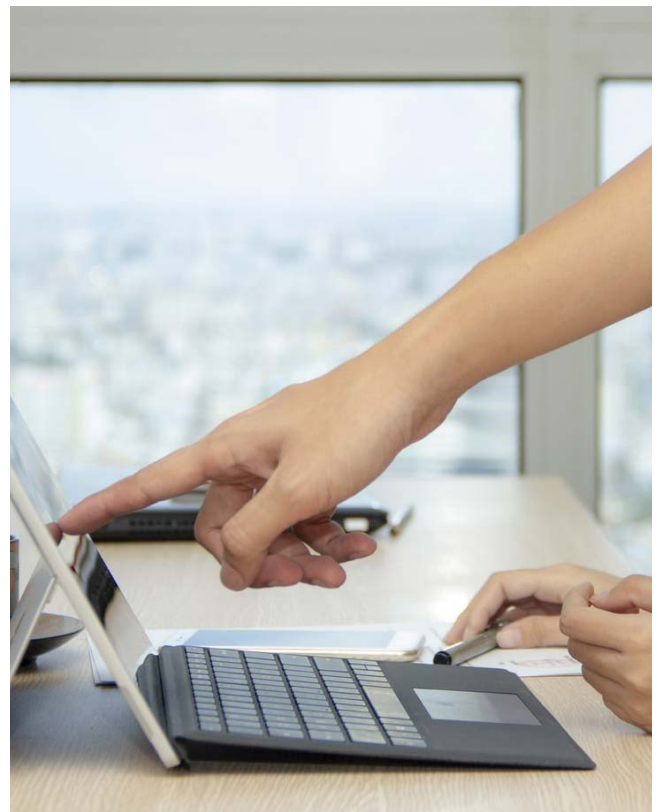
The questions asked during the interview should not “lead” a witness toward a particular response and should not be accusatory in nature. They should be unbiased and open-ended. Formulating them in advance is a best practice. It’s also important not to promise a particular outcome to employees participating in the investigation.

Always conduct investigation meetings in a private location. Ask open ended and non-leading questions:

- Who is/are the alleged perpetrator(s)?
- When and where did the incident(s) occur?
- Be specific—find out dates and times.
- Are you aware of other employees that may have experienced a similar situation(s)?
- Are you aware of a specific reason for the hostility? (e.g., retaliation, etc.)
- How were you and your work affected by this situation?
- Did you discuss the incident with anyone else?

Consider the situation and ask additional questions. Some additional considerations include:

- Is this related to an incident that was previously investigated?
- Can any witnesses be identified?
- Is there any other evidence of the incident occurring?
- Is there any other information that you believe to be relevant to the investigation?

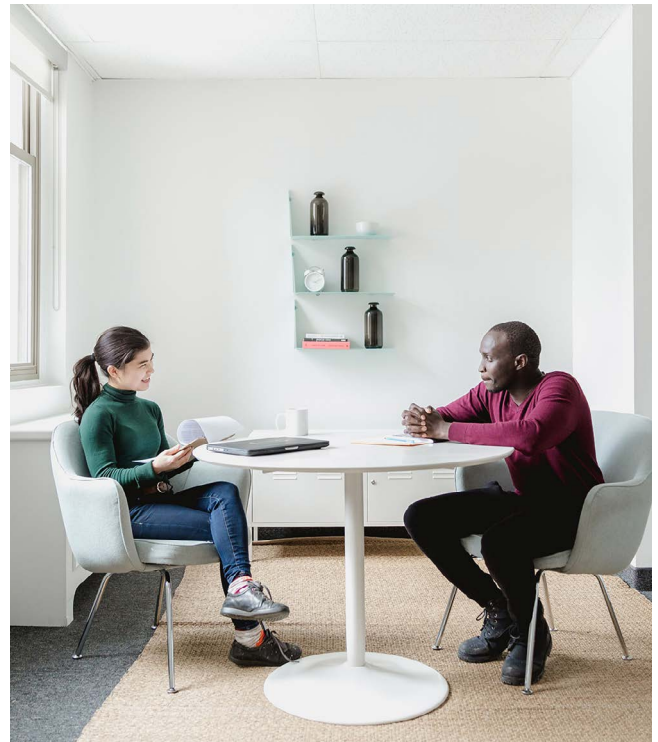


2. How to Investigate a Harassment Complaint (continued)

- Obtain written statements from the complainant and other witnesses if possible.
- Inform them that retaliation will not be tolerated, and that you will follow up after the investigation.
- Advise them that information concerning allegations will be kept confidential to the extent that it is possible. Let them know that you may need to share that information with those who need to know, such as the alleged perpetrator and potentially other witnesses.
- Instruct the employee to keep the incident and contents of your discussion confidential so the investigation isn't impeded.
- Instruct the employee to come forward to management (or designated investigator) if anything new occurs related to the investigation.
- Assess whether measures need to be taken to separate the complainant from the alleged perpetrator during the investigatory process (e.g., schedule change, transfer or leave of absence, etc.).

Interview the Accused Employee

- Inform the person being accused of the allegations and afford them an opportunity to respond. Be as specific as necessary.
- Operate under the assumption that the alleged perpetrator has not committed acts of harassment until an investigation substantiates these claims.
- Listen and document carefully.
- Ask if there are any witnesses to substantiate their position.
- Let them know that you intend to proceed and that confidentiality will be maintained to the fullest extent possible.
- Instruct them to keep the incident and contents of discussion confidential so the investigation isn't negatively affected.
- Remind them that the organization will NOT tolerate any type of retaliation.



2. How to Investigate a Harassment Complaint (continued)

Resolve the Complaint

- Interview witnesses to the allegations.
- Determine employees' credibility and whether there is any supporting evidence when there are differing accounts or conflicting versions.
- Review documentation of previous employee behavior and incidents.
- Determine if a company policy has been violated (e.g., Harassment, Hostile or Unsafe Work Environment, etc.).
- Determine if the complainant was a participant in the violation of company policy.
- Maintain good records of everything that was done during the investigation as well as the findings and other steps taken.
- Determine if the work environment is safe. Consider offering the complainant access to an Employee Assistance Program (EAP) if available and applicable.



2. How to Investigate a Harassment Complaint (continued)

Follow Up

- Follow-up with those involved in the investigation, and any others who have a need to know.
- Apply appropriate disciplinary action as necessary.
- Determine if training or education would be beneficial for an individual employee or all employees.
- Determine if any modifications need to be made to existing policies and redistribute as needed.
- Continue to monitor the situation.
- Follow up with the complainant to ensure that retaliation is not occurring.
- Place a memo summarizing the findings in the accused employee's file.

If the results of the investigation do not warrant terminating the accused employee, we recommend corrective measures such as a written warning and additional training on your harassment policy. It's also important that you notify both employees about your anti-retaliation policy. In some situations, it is advisable to separate the two employees to limit the potential for future incidents, but care should be taken so this step doesn't have a negative impact on the employee who raised the complaint.

Companies that do not make changes substantial enough to eliminate harassment once they become aware of it face greater liability if future issues occur.

In addition to the above guidelines, it's often a good idea to consult with your legal counsel whenever allegations of harassment or discrimination occur.



Companies that do not make changes substantial enough to eliminate harassment once they become aware of it face greater liability if future issues occur.

3. Commonly Asked Questions

Q: Do we need to investigate rumors of harassment even if no one has made a complaint?

Yes, we recommend you investigate. A company always has some inherent liability in relation to discriminatory or harassing comments or behavior. The level of liability usually correlates to the nature, severity, and context of the comments, the position of the employee who made them, and what the employer does or does not do about it.

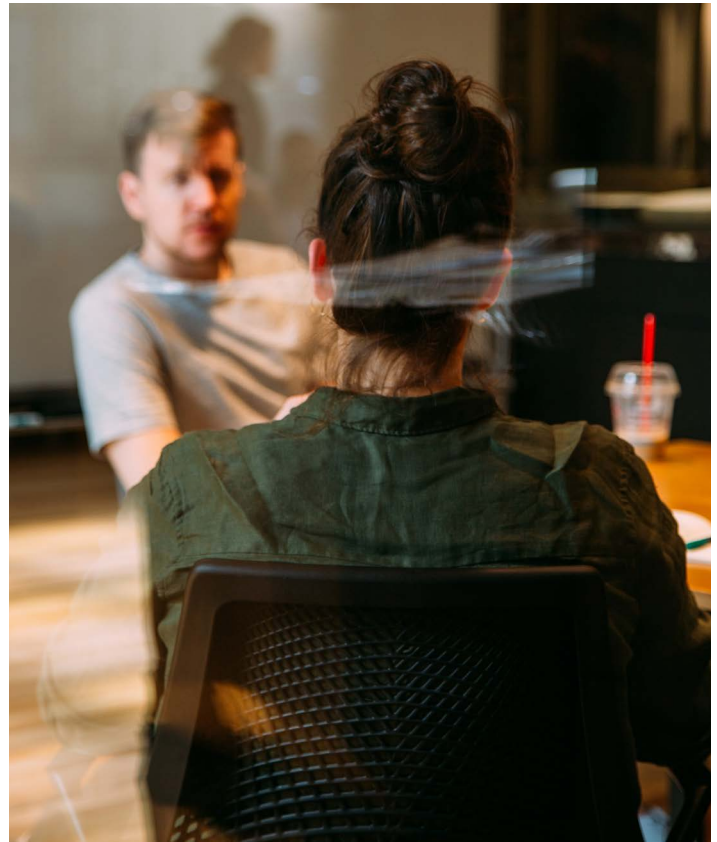
Since you have knowledge of a potential situation, we recommend you investigate the matter and take appropriate disciplinary action if it turns out your anti-harassment policy was violated. As you conduct the investigation, document the discussions you have as well as your findings, and reassure those you interview that their participation will not result in retaliation.

Q: What constitutes a “hostile work environment” and what’s my obligation if an employee complains about it?

A hostile work environment occurs when unlawful harassment in the workplace either 1) becomes a condition of continued employment (meaning the employee must continue to endure it in order to keep their job), or 2) becomes severe or pervasive enough that a reasonable person would consider the work environment intimidating, hostile, or abusive.

For workplace harassment to be unlawful, it must be unwelcome and based on a protected class such as race, gender, age, religion, national origin, disability, or any other protected class. Sexual orientation and gender identity are also protected classes in most states and under current federal interpretations. For example, pervasive or frequent negative feedback from a supervisor to a subordinate may not itself create a hostile work environment. However, negative feedback given only to female staff or to one particular ethnic group might.

As you conduct the investigation, document the discussions you have as well as your findings, and reassure those you interview that their participation will not result in retaliation.



Federal law not only prohibits discrimination based on these protected groups, but also obligates employers to prevent or stop harassment of employees when that harassment is based on these protected characteristics, whether it’s coming from supervisors, peers, or even customers. The victim can be anyone affected by the conduct, not just the individual at whom the offensive conduct is directed. You should therefore have a strong anti-harassment policy in place and carefully investigate all complaints and allegations, documenting as you go. Don’t ignore the issue or treat it lightly.

How to discipline an employee for unlawful harassment is up to you. A simple misunderstanding or single act of poor judgment may be best handled with a write-up, but serious policy violations or ongoing harassment may require termination. We generally recommend corrective action that will cause the behavior to stop and show that you take it seriously. Promptly responding to complaints of harassment can help prevent claims of a hostile work environment in the future. In turn, this can help avoid potential agency investigations and employment lawsuits.

3. Commonly Asked Questions (continued)

Q: Can we tell employees how they have to behave at non-work events? We're trying to prevent harassment from occurring outside the office.

While employers have the right to regulate employees' on-duty conduct, they are more limited in how much control they can exert when employees are not on duty.

We know issues may arise when employees engage in social activities after hours where they feel they can let loose or otherwise act in a way that is inconsistent with company policy. While an employer can't regulate what goes on in that setting—in fact, many states protect legal off-duty conduct—you can expect and require that there not be any residual effects that carry over into the workplace. For instance, if an employee made threatening comments about a certain religious group on their Facebook page, and these comments were seen by another employee who then felt fear in the workplace, you would need to address this behavior.

It's also worth keeping in mind that there is a higher legal standard for the behavior of supervisors. Employers will always be responsible for harassment by a supervisor that results in a tangible employment action like demotion, termination, or constructive discharge—even if the harassment originated outside the workplace. And even if the harassment from a supervisor doesn't lead to a tangible employment action, the employer is liable unless it proves that it exercised reasonable care to prevent and correct the harassment and that the employee “unreasonably” failed to complain to management.

Your best defense is a clear sexual and unlawful harassment policy along with well-trained managers. This should help limit problematic behavior outside of the workplace, as well as assist your managers and supervisors in dealing with these issues if they begin in, or seep into, the workplace.



3. Commonly Asked Questions (continued)



Q: An employee's recent public Facebook post contains negative statements directed toward a minority group and has caused a stir at the office. It is her private Facebook account, but on it she identifies herself as working for our company. Coworkers and clients have told me the post is offensive and hurtful. I am also worried about it being associated with our company. How should I respond?

While an employee has the right to hold views that are unpopular or offensive to co-workers or clients, the employee does not have the right to disrupt the organization's operations or harass other employees or create a hostile work environment. As the employer, you are caught between your policies and laws that prohibit discrimination and harassment and laws that protect an employee's speech (NLRA and Title VII religious protections).

If the employee made no threats or statements about coworkers and is not a supervisor, then it may be safest to take no action. Anyone who does not care for such speech could always elect to unfriend or stop following the employee on social media.

Alternatively, you could hold a meeting with the employee (and a third party witness) to explain the reaction the post has caused and ask the employee to voluntarily make the Facebook page (or post) private. Make it clear that you're not disciplining the employee and that your suggested course of action is voluntary.

Communicate that you're not trying to curtail free expression, but are concerned that her views may be misinterpreted as the organization's views based on her identification of herself on the page as your employee.

If the employee's post is harassing, identifying, or disparaging coworkers, clients, or vendors, or if the language itself incites violence or is hate-speech, then you would have more cause to intervene, with disciplinary action if necessary. Additionally, if the employee is a supervisor, then you may have more leeway to take action. Given the difficult balancing act and degree of risk in a situation such as this, if you do decide to take disciplinary action or to terminate, we'd recommend you involve legal counsel.

While an employee has the right to hold views that are unpopular or offensive to coworkers or clients, the employee does not have the right to disrupt the organization's operations or harass other employees or create a hostile work environment.

Going forward, we recommend creating a social media policy if you don't already have one. The policy should prohibit discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct. With a social media policy in place, you have a clear and concrete standard to which you may hold employees accountable.

4. Creating a Harassment-Free Workplace

To help create a workplace environment that is free of harassment, consider:

- Establishing a written Employee Handbook policy specifically addressing a hostile work environment.
- Updating the company's electronic assets usage (i.e. internet, texting) policies specifically addressing sexual harassment issues.
- Training management and employees on what sexual harassment is and how to avoid it.
- Investigating each complaint and reporting immediately.
- Documenting all information gathered in the investigation of a complaint.
- Not overreacting and sticking to the facts. Managers and supervisors who do overreact and jump to unfounded conclusions toward an accused employee are held accountable as likely as those who do nothing.
- Communicating with involved parties while emphasizing protection of confidentiality and privacy as appropriately as possible.
- Keeping aware, whether following up on specific cases or monitoring the workplace in general.



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