

# Sexual Harassment in the Workplace: How Hollywood Headlines Could Impact Your Business and What To Do About It

A taskforce appointed by the Equal Employment Opportunity Commission (EEOC) to study workplace harassment recently published some eye-popping statistics:<sup>1</sup>

- Up to 85% of women reported experiencing sexual harassment in the workplace.
- 87 to 94% of those victimized by harassment did not file a formal complaint with their employer.
- 75% of the employees who spoke out against workplace mistreatment faced some form of retaliation.

Enter #MeToo. Sparked in October 2017, primarily in response to allegations of sexual harassment made against Hollywood mogul Harvey Weinstein, the #MeToo movement has cast a national spotlight on the fight to end sexual harassment and abuse. Countless high-profile executives, public officials, media personalities and business owners have (very publicly) resigned or been terminated in its wake.

This has left many employers wondering how #MeToo will impact their workplace and what they can do to minimize the risk of harassing behavior.

## More Complaints and Increased Expectations

#MeToo is premised on combating sexual harassment, so employers should expect more employee complaints about inappropriate workplace behavior and anticipate receiving

them earlier than they otherwise might have. Victims will be more likely to lodge a complaint after the first inappropriate joke or awkward encounter. As a result, more complaints will involve behavior that some employers consider to fall in the gray area of workplace behavior, i.e., conduct that is certainly questionable but does not necessarily jump off the page as sexual harassment.

The movement is also changing society's expectations of how employers should respond to harassment. #MeToo has resulted in the resignation or termination of high-profile employees and your employees will expect the same from you if one of your employees sexually harassed a coworker.

So will juries. Just ask Bill Cosby, whose sexual assault charges resulted in a mistrial prior to #MeToo and a conviction post-#MeToo. Though it is an extreme example, the Cosby case shows the heightened litigation risk currently associated with claims of sexual harassment.

In short, employers should expect complaints earlier and more often and understand that more is now expected from them in addressing those complaints. So it's critical that employers better equip themselves to spot and prevent sexual harassment.

## Spotting Sexual Harassment

Generally speaking, unlawful sexual harassment occurs when: (1) a term or benefit of employment is conditioned on submitting to a sexual demand or denied for refusing to do so ("quid pro quo" harassment); or (2) an employee is subjected to unwelcome behavior that unreasonably interferes with his or her work performance or creates an intimidating, hostile or

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<sup>1</sup>A full copy of the EEOC taskforce's report can be found online: [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf).

offensive working environment (“hostile work environment” harassment). (Note that these are the standards set by federal law; state or local laws could be written differently.)

People mistakenly tend to view sexual harassment as an “I’ll know it when it see it” thing and often overlook some common misconceptions. For example:

- Sexual harassment does not need to be motivated by sexual desire.
- Sexual harassment can be done to anyone, by anyone. The gender of the accused and the victim are irrelevant.
- The focus is on the impact to the victim, not the intent of the accused. “It was a joke” or “I didn’t mean it that way” are not defenses to sexual harassment.
- Victims do not need to be the direct target of the harassing behavior.
- The harasser need not be a supervisor, or even one of your employees, to create liability. A contractor, vendor, customer, client or random passerby can create a hostile work environment.
- Unlawful harassment can take place without any economic injury to the victim.

It’s important to understand, however, that the legal definition of sexual harassment is a floor, not a ceiling. Employers can, and should, aim to prevent not just unlawful harassment, but any inappropriate behavior that could eventually lead to it. Here are a few examples of such behavior that you should outlaw in your workplace:

- Unwelcome sexual advances or invitations.
- Threats or demands that a person submit to sexual requests as a condition of continued employment or to avoid some other loss, and offers of employment-related benefits in return for sexual favors.
- Derogatory or insensitive jokes, pranks, or comments.
- Slurs or epithets.
- Non-verbal behavior such as staring, leering or gestures.
- Intentionally excluding someone from normal workplace conversations and making them feel unwelcome.
- Displaying or sharing offensive images such as posters, videos, photos, cartoons, screensavers, emails, or drawings that are derogatory or sexual.
- Offensive comments about appearance, or other personal or physical characteristics.
- Unnecessary or unwanted bodily contact such as groping or massaging, blocking normal movement, or physically interfering with the work of another individual.

## Preventing Sexual Harassment

Fortunately, employers can curb the risk of workplace harassment in many ways. The first step is to identify your risk factors and take steps to minimize them. For example, most employers don’t recognize that the employees most likely to place their company at risk for liability are not executives or human resources personnel, but front-line supervisors and mid-level managers. In the eyes of the law, these employees are the company and, since they have frequent contact with their direct reports, should be the ones who are on notice of potential problems. Yet employers do not often give middle management the training needed to deal with these situations effectively. In other words, those employees most likely to be on notice of a problem the company needs to fix are the least trained to deal with it. Effectively training your mid-level managers (discussed below) is an important step in maintaining a positive work environment.

Other risk factors identified by the EEOC taskforce include homogenous workforces, workplaces where some workers do not conform to workplace norms, workforces with many young workers, workplaces with significant power disparities and decentralized workplaces. See Appendix C of the EEOC taskforce report referenced above for suggestions as to how you can minimize these risks.

Another step to take is to improve your anti-harassment policy. Here are five things to consider including:

1. Concrete examples of what behavior is (and is not) prohibited by the policy. See the previous list for a good start.
2. A requirement that all supervisors/managers report concerns and encouragement for all employees to do likewise.
3. A complaint reporting process that: (a) provides multiple accessible avenues to report complaints; and (b) tells employees what information to provide when making a report.
4. An assurance that reports or complaints will: (a) be kept as confidential as possible; (b) be promptly and appropriately investigated; (c) lead to proportionate corrective action if a violation of company policy is found; and (d) not prompt retaliation.
5. A description of the available benefits and resources.

You should also update your anti-harassment training so that it mirrors what your employees can expect to encounter in their day-to-day work. Ditch the legalese and teach your employees about your policies and culture. Educate them about their rights and responsibilities under those policies, e.g., that they must or should (depending on their role) report behavior that they in good faith believe violates the company’s policies and that they must be truthful and cooperative during the investigation process.

Conduct separate training for your supervisors. Make sure they know that they are the company in the eyes of the law. Convey that they have a duty to respond to harassing behavior, even if there's no complaint, and that many serious problems start as small ones that could be snuffed out early and that doing so is as much a part of their job as meeting their quotas. Teach them what to do and say when one of their direct reports walks into their office, closes the door, and complains that a coworker is harassing them. First impressions matter.

How your supervisors respond in such moments could be the difference between a problem solved and a federal lawsuit.

Finally, when complaints are made, respond to them promptly, impartially and thoroughly. If you do not deal with a complaint effectively, with the #MeToo movement now in full swing, chances are greater than ever that your employee will ask the EEOC or a federal court to do it for you. ♦