



MEMORANDUM

TO: Diane Campanile
FROM: [Mary Akhimien](#)
DATE: December 13, 2017
RE: **Primer on Sexual Harassment**

The U.S. Equal Employment Opportunity Commission (“EEOC”) announced today that it will be scrutinizing settlement agreements that include non-disclosure provisions in sexual harassment cases to ensure that complaining parties are not being unlawfully barred from filing complaints with the EEOC. See [here](#).

In light of this announcement and the current state of affairs, it is imperative that employers begin to review their settlement agreements to ensure that they are in compliance with the law, conduct training on sexual harassment and anti-retaliation, review and update policies, and engage legal counsel as necessary.

Some additional helpful tips are also included below.

Q: What is sexual harassment?

There are two types of sexual harassment: 1) quid pro quo and 2) hostile work environment.

Quid pro quo means “this for that.” Quid pro quo harassment occurs when submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. In this context, it involves expressed or implied demands for sexual favors in exchange for some benefit (e.g., a promotion, pay increase) or to avoid some detriment (e.g., termination, demotion) in the workplace. Quid pro quo harassment is perpetrated by someone who is in a position of power or authority over another (e.g., manager or supervisor over a subordinate). A clear example of quid pro quo harassment would be when a supervisor offers a promotion in exchange for sex.

This material is for informational purposes only and not for the purpose of providing legal advice.

Hostile work environment harassment arises when speech or conduct is so severe and pervasive that it creates an intimidating or demeaning environment or situation that negatively affects a person's job performance. Unlike quid pro quo harassment, this type of harassment can be perpetrated by anyone in the work environment, including a peer, supervisor, subordinate, vendor, customer or contractor.

Q: What should an employer do when sexual harassment occurs at work?

An employer's legal duty to promptly and thoroughly investigate any complaint of perceived discrimination, harassment, or retaliation is well-established. Under Title VII of the Civil Rights Act of 1964, an employer may avoid liability for harassment that does not involve an adverse employment action (e.g., termination or demotion) if the employer can demonstrate: (1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and (2) the aggrieved employee unreasonably failed to take advantage of this protection. This principle often is referred to as the "*Faragher/Ellerth* affirmative defense," a reference to two 1998 United States Supreme Court decisions in which the Court established the defense.

Generally, an employer can meet the first element of this defense by establishing, distributing, and enforcing an anti-harassment policy that includes a procedure for submitting complaints. As for the second element, courts have explained that employees must follow the employer's reporting procedures and must sufficiently articulate the complaint to put the employer on notice of the harassment. Accordingly, an employer can satisfy the second element of the *Faragher/Ellerth* defense by demonstrating that an employee failed to utilize the proper reporting mechanism.

Q: What types of behavior qualify as sexual harassment?

Hostile work environment situations are not as easy to recognize, given that an individual comment or occurrence may not be severe, demeaning behavior may occur that is not based on sex, and there may be long periods between offensive incidents. Examples of conduct that might create a hostile work environment include inappropriate touching, sexual jokes or comments, repeated requests for dates and a work environment where offensive pictures are displayed.

Sexual harassment can also occur in a variety of other circumstances. Thus, it is important to keep in mind that:

This material is for informational purposes only and not for the purpose of providing legal advice.

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker or a nonemployee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

Q: How can an employer eliminate sexual harassment in the workplace?

Prevention is the best tool to eliminate sexual harassment in the workplace. Here are some steps every company should consider:

1. Review harassment policies and audit the effectiveness of complaint reporting mechanisms and anti-retaliation precautions.
2. Make necessary or desired adjustments not only to the company's existing anti-harassment policy and complaint-reporting procedures, but also to the content and frequency of anti-harassment training. By communicating to employees that sexual harassment will not be tolerated, employers have an opportunity to stop inappropriate behavior before it reaches the level of illegal harassment.
3. Consider targeted training for C-Suite executives, managers and supervisors to remind them of what is expected of them and the employees who report to them.
4. Conduct an internal audit to identify vulnerabilities and risk areas. Many companies use experienced HR professionals, legal counsel or a third-party auditor for such purposes.

ABOUT THE AUTHOR: MARY AKHIMIEN

Mary Akhimien represents clients in a variety of areas including business and employment law, corporate counseling and, if necessary, litigation. She successfully defends clients before administrative tribunals and agencies, in state and federal courts, and before professional licensing boards. She also helps clients conduct internal investigations, revise handbooks and policies, structure employment relationships and agreements, conduct training and audits, negotiate complex settlements, executive compensation arrangements, and regularly works with clients to avoid disputes and resolve them successfully when they occur, including at trial and in mediations.

She can be reached by phone at 302-252-3645 or via e-mail at makhimien@connollygallagher.com.

This material is for informational purposes only and not for the purpose of providing legal advice.