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Your Honey-Do List—Identifying and Avoiding Sexual Harassment Claims

While executives do not want to think that sexual harassment exists in *their* companies, the sad fact is that sexual harassment can plague any organization. Just look at the [headlines surrounding Uber](#) as allegations of sexual harassment surface. So what can you do as a well-meaning, law-abiding employer? Well, first you have to understand what sexual harassment is...and what it is not. Many business owners have this mindset: "I'm just going to ban all harassment. That way, everything will be included." However, employers should not institute a general, overall ban on "harassment" because it gets you nowhere. Not all "harassment" rises to the level of unlawful harassment.

What Exactly Is Unlawful Harassment and a Hostile Work Environment?

Harassment is unlawful only if it is based on or *because of* an employee's legally protected characteristic such as sex, race, religion, age, disability or another protected characteristic.

There are two types of sexual harassment: "quid pro quo" and hostile work environment. Sexual harassment based on quid pro quo behavior occurs when an employee's submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting or leading to favoritism of such individual to the detriment of other employees.

To constitute a hostile work environment, conduct and/or comments must be based on a protected characteristic, such as gender—the harassment must be *because of* the harasser's sex (or race, disability, or age, etc.), and must be severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, offensive, or abusive. "Locker room banter" may subject an employer to liability under [Title VII of the Civil Rights Act of 1964](#) ("Title VII") if it rises to the level of sexual harassment by creating a hostile work environment. Finally, the sexually charged conduct must be severe and pervasive to the point that the employee herself considers it offensive and abusive.

An environment containing conduct that is unpleasant, nasty, and unprofessional does not automatically morph into a hostile work environment. Title VII does not mandate a code of conduct and behavior. Rather, offensive conduct may include, but is not limited to, offensive jokes, slurs, name calling, physical assaults or threats of assaults, intimidation, ridicule, insults, unwelcome sexual advances, offensive objects or pictures, and interference with work performance.

Not only can the harasser be the victim's colleague, customer, or supervisor, but the victim need not be personally harassed by the harasser. A person of any gender may be sexually harassed if affected by the offensive conduct.

Steps To Take for Prevention and Correction

Employers *must* take such behavior seriously. The Equal Enforcement Opportunity Commission considers systemic sexual harassment to be one of its **top national enforcement priorities**. Here are some tips businesses can employ to prevent sexual harassment in their workplace and take corrective action if it (allegedly) occurs:

1) Have a clear, no-tolerance written sexual harassment policy set forth in your employee manual or handbook, ensure it is disseminated throughout your company, and understood by all of your employees;

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- 2) Have a specific written procedure for investigating sexual harassment claims and follow your procedure—unlike Uber who appears to have ignored a female employee who reported sexual harassment of both types. Document the process throughout, which is key when responding to an agency investigation;
- 3) Provide regular, interactive training and education, tailored to your workplace, to your employees and managers;
- 4) Encourage reporting of sexual harassment and explain in your handbook and elsewhere that your company does not retaliate; and
- 5) Require senior executives to set an example through their own anti-harassment conduct and respectful behavior.

These procedures may not stop all sexual harassment in your workplace, but they will reduce your risk of liability, including payment of considerable damages.

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