

Harassment Prevention Training: More Important Than Ever

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Despite decades of prevention efforts and enforcement actions, harassment, whether based on gender or other protected characteristics, continues to occur in the workplace. According to statistics from the Equal Employment Opportunity Commission (EEOC), in fiscal year 2015, more than 31% of private sector charges included an allegation of harassment. See

<https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>. In recognition of this trend, the EEOC has included the prevention of systemic harassment as a national enforcement priority in its Strategic Enforcement Plan for 2017-2021. See <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

How do employers begin to confront these issues? By adopting Equal Employment Opportunity policies, implementing those policies, and – critically – training managers and other employees on the importance of those policies to their daily work lives. Fundamentally, employees have the right to be free from discrimination and harassment in the workplace. Employers, too, have a stake in ridding their workplaces of discriminatory and harassing behavior. Discrimination and harassment can result in low employee morale, lost productivity and profits, damage to the employer’s reputation and good will, burdensome investigations and lawsuits, and costly legal fees and judgments.

Training is a key element of any effective harassment prevention program. Under Title VII of the Civil Rights Act of 1964, an employer can avoid liability for a supervisor’s unlawful harassment only if it can prove that (1) it reasonably tried to prevent and promptly correct the harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. See *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). Conduct that demonstrates reasonable care includes educating supervisors on harassment prevention and informing non-supervisory employees of the internal process for making harassment complaints. For Massachusetts employers, the stakes for failing to adequately train supervisory employees are even higher. Under the Massachusetts Fair Employment Practices Act, an employer is liable for the sexual harassment of employees by managers and persons with supervisory authority, regardless of whether the employer knows of the conduct. See MCAD Guidelines on Sexual Harassment in the Workplace, available at <http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-harassment-gen.html>; *College-Town Division of Interco, Inc. v. MCAD*, 400 Mass. 156 (1987). This means that Massachusetts employers cannot assert the potential defense to harassment claims involving supervisors that is available under federal law and have even more incentive to implement ongoing training efforts.

The EEOC takes a broad view of training in the context of its mission to create equal employment opportunities. In June 2016, the EEOC released its Report of the Select Task Force on the Study of Harassment in the Workplace authored by Victoria A. Lipnic, Acting Chair of the EEOC, and Chai R. Feldblum. The full report is available here https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm. The report emphasizes that workplace harassment remains a persistent problem and that training is a key component of an employer’s harassment prevention efforts. The report notes that “when trained correctly, middle-managers and

first-line supervisors can be an employer's most valuable resource in preventing and stopping harassment." The report also concludes that, to be effective, training must be part of a "holistic effort" by the employer that includes leadership engagement and employee accountability. The EEOC also advises that training should not be one-size-fits all, but rather tailored to the realities of a particular workplace. For compliance training to be successful, the EEOC recommends that employers embrace the following principles:

- Training should be supported at the highest levels.
- Training should be conducted and reinforced on a regular basis for all employees.
- Training should be conducted by qualified, live, and interactive trainers.
- Training should be routinely evaluated.

The EEOC has incorporated many of the recommendations from the Report of the Select Task Force on the Study of Harassment in the Workplace into its proposed Enforcement Guidance on Unlawful Harassment, which recently underwent a period of public comment. The proposed enforcement guidance is available here <https://www.regulations.gov/document?D=EEOC-2016-0009-0001>. In its proposed enforcement guidance, the EEOC identified five Promising Practices that, in the Commission's view, have generally proven effective in preventing harassment: (1) committed and engaged leadership; (2) consistent and demonstrated accountability; (3) strong and comprehensive harassment policies; (4) trusted and accessible complaint procedures; and (5) regular, interactive training tailored to the audience and the organization.

The attorneys in Peabody & Arnold's Employment Law and Litigation Practice have the skills and experience to develop and deliver interactive discrimination and harassment prevention training suited to the unique concerns of individual workplaces across a wide range of industries. The defense of an administrative charge or lawsuit is burdensome, time-consuming, and expensive. An investment in training can not only mitigate risk, but also ensure that an employer's Equal Opportunity Employment policies translate into workplace practices that benefit employees and employers alike.