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# Sexual Harassment

In light of the increase in Sexual Harassment claims wrongful termination and sexual discrimination and violence in the workplace lawsuits alleging sexual harassment, and in view of the potential liability to which managers and supervisors are subject, and particularly in view of the employee notification requirements set forth in both Federal & State laws governing this subject, this COMPANY, in it's on going effort to provide a safe and healthful workplace and environment, is instituting it's specific sexual harassment program.

## I. Coverage

All COMPANY employees are covered and regulated under this policy as a condition of employment/continued employment.

## II. Affected Persons

1. Any COMPANY employee, no matter what level employment, falls under the coverage of this policy.
2. Customers, vendors, independent contractors, clients and visitors are some of the other parties that fall under the coverage of this policy whether as suspected perpetrators or alleged recipients of sexual harassment.

## III. Definition of Sexual Harassment

### 1. Federal - Equal Employment Opportunity Commission (EEOC)

Sexual Harassment is defined as unwelcomed sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature. Such as requests, advances or sexual conduct constitutes sexual harassment when:

- Is it an employment condition - submission to such conduct is made a term or condition of employment.
- Is an employment consequence - submission to or rejection of such conduct is used as a basis for employment decisions affecting individuals.
- Is it offensive job interference?

### 2. State - California Fair Employment and Housing Commission (FEHC) (or your state). Sexual Harassment is defined to include:

- Verbal Harassment - such as jokes, epithets, derogatory comments or slurs
- Physical Harassment - such as assault, physical interference with movement at work
- Visual Harassment - such as derogatory cartoons, drawing or posters
- Unwelcomed sexual advancements by an employer representative towards an employee of the same sex

- Harassment on the basis of pregnancy disability

#### **IV. Categories of Sexual Harassment**

1. “Quid Pro Quo” (This for that) this typical of sexual harassment evolves when a manager or supervisor conditions an employment benefit or continuing employment on the employees acquiescence in the form of sexual behavior.

2. “Hostile” or “Offensive” - Work Environment Sexual Harassment - No employment benefits need be lost or gained and this type of harassment may be engaged in not only by supervisors, but also by co-workers or persons who are not even employed by the employer. Offensive work environment sexual harassment occurs where sexual jokes, suggestive remarks, cartoons, physical interference with movement such as blocking or following and sexually derogatory comments create an offensive working environment.

**Note:** In addition discrimination on the basis of actual or perceived sexual orientation is unlawful under state law. Sexual harassment can be considered a specific type of violence in the workplace.

#### **V. Same Sex Harassment**

Sexual harassment of a person of the same gender as the harasser has been held to violate the law. A California Appeals Court held that sexual harassment not only is conduct which discriminates against a person solely because of his/her gender, but also includes unwelcomed conduct of a verbal or physical nature regardless of the gender or sexual orientation of the harasser or victim. **The court further held that the harasser’s motive was irrelevant.**

#### **VI. Sexual Harassment**

The “reasonable person of the same sex” standard viewpoint of a “reasonable person”. If the challenged conduct would not substantially affect the work environment of a reasonable person, then no violation existed. However, in a 1991 case, the 9th U.S. Circuit Court of Appeals (which covers California) held that when determining whether a sexually harassing hostile work environment exists, a court should determine whether a “reasonable person” would consider the conduct sufficiently severe or pervasive to create a hostile or abusive working environment. In rejecting the “reasonable person” standard, the court held that applying this theoretically “sex blind” standard to female employees “tends to be male/biased and systematically ignores the experiences of women.”

The court also noted that the concept of what a “reasonable woman” would consider sufficiently severe or pervasive to create a hostile work environment may change over time, and that the standard of what is acceptable behavior should mirror those changes. However, although the federal statutory prohibition against sexual harassment does require a totally desexualized workplace, even the well-intentioned complaints of a co-worker could form the basis of a sexual

harassment claim if a “reasonable women” would consider such compliments as altering her conditions of employment.

California law also specifically provides that hostile environment harassment is established where there is unwelcomed sexual conduct that a reasonable person of the same gender as the complainant would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

Even where only limited offensive sexual conduct in the workplace is directed toward a complaining employee, the employee may still pursue a hostile environment claim. Both federal and California courts have considered as relevant evidence of a hostile work environment proof that pervasive sexual harassment was directed at other female employees.

### **VII. Sexual Harassment - COMPANY strictly liable for supervisor**

Strict Liability - means that even when the employer does not know of the harassment or acts immediately to stop conduct of which it knows, absolute liability is nonetheless imposed when a supervisor engages in Quid Pro Quo sexual harassment. The employer’s sexual harassment policy and complaint procedures are irrelevant since the court holds the employer absolutely liable for the acts of the high level supervisor. This means that it is more important than ever to train supervisors about sexual harassment. Supervisors should understand the company’s liability, as well as their own personal liability for such conduct. Employers can no longer escape liability by claiming not to have known of a supervisor’s conduct amounting to sexual harassment.

### **VIII. Sexual Harassment - Personal liability for supervisors**

Supervisors should be made aware that they might be held individually liable for sexual harassment in the workplace. While the COMPANY may be held partially legally responsible for the conduct, the supervisor’s personal assets are at risk as well.

### **IX. Sexual Harassment Contact Person**

**Employee** has been designated the contact person for COMPANY. All complaints along the lines of sexual harassment should initially be reported to Employee by the recipient or complainant or by his/her supervisor. All information will be kept confidential on a need to know basis only. The contact person will gather pertinent information from the complainant to include, the alleged harasser, what type of harassment on/off COMPANY property, number of incidents, witnesses, seriousness of each incident, times, dates, etc. The contact person would then determine if the harasser were an employee, vendor, customer, independent contractor, etc.

### **X. Sexual Harassment - Investigation Coordinator**

This employee has been designated as the chief investigator for COMPANY concerning sexual harassment related matters.

## **XI. Investigation Procedures**

All allegations of sexual harassment will be vigorously investigated to a successful conclusion by COMPANY investigation procedures will follow the guidelines and criteria herein.

### 1. Complainant Interview Procedure:

As an aid, we have provided two pages of questions which begin on page 13. This interview will accomplish many things including but not limited to:

- Will cause complainant to feel better
- To begin the fact gathering/finding mission
- Issue confidentiality
- An outside OBJECTIVE person can decipher facts from the account given by the complainant.
- Clarity - have facts restated, clarify statements recount important points, dates, times, etc. until the investigator has clear understanding of the scenario as the complainant perceives it

File formal complaint

### 2. Accused Interview Procedure:

This interview will accomplish many things also, including but not limited to:

- a. Inform the accused at the onset, the purpose for the meeting
- b. Set parameters for the meeting - fact finding
- c. Assure confidentiality on a need to know basis
- d. Investigators role - not biased
- e. Spell out parameters of investigation - the complainant and accused interviews, witness interview, interviews of others affected by accused in past who may/may not have filed a complaint
- f. What investigators will cover - Notice of Complaint
- g. Level of seriousness
- h. Cease & desist - stopping the harassing activity
- i. No retaliation against complainant or witnesses

j. Disciplinary action - Normally judged on frequency and severity

### 3. Witness Interview Procedure

Following is the procedure to be followed when interviewing witnesses.

a. Separate witnesses as soon as is appropriate.

b. Interview witness as soon as possible.

c. Assure each witness of confidentiality and non-retaliation policy COMPANY.

d. Either tape the interview or have each witness write their account, date and sign the statement and have it witnessed.

e. Have a third, non-biased person in the room for all witness interviews.

f. Make sure you have the witness answer WHO, WHAT, WHEN, WHERE, WHY & HOW in chronological order in their statement.

g. Compare and analyze all witness statements. Color code like items such as alleged perpetrator, victim, times, dates, areas, etc. so that each of these items can be compared across numerous witness statements with ease.

### 4. First Meeting Assessment: Contact Person and Investigator

a. What type of harassment - physical, visual or auditory

b. Who to notify, on a need to know basis - upper management, law enforcement, etc.

c. Who else if anyone needed to investigate. Turn over to outside source?

d. Who will make final decision on final outcome after all pertinent facts have been presented in an unbiased manner with all recommendations?

### 5. Follow-Up:

a. Training records - to see if employee was trained

b. Personnel file - to check for other complaints, etc.

c. Analyze all information - any loose ends

d. Complete investigation

e. Make a determination - to be turned over to final decision-maker

f. Action(s) to be taken:

g. 1. Suspension 2. Termination 3. Law Enforcement Intervention

h. Report back to complainant, as this is the proper, legal and moral action  
COMPANY has a zero tolerance policy towards Sexual Harassment and will vigorously investigate any complaint and discipline any employee at any level found to be in violation of this policy to include false accusations filed, as well as actions taken against nonemployees found to fall within the parameters of this policy.

### **ADDITIONAL INFORMATION**

Sexual harassment has existed in the workplace for many years. Supervisors and company management are faced with the realities that sexual harassment is wrong and cannot be condoned or tolerated by anyone, including other employees. This is a sensitive subject and most people aren't willing to discuss it, but companies and supervisors have the responsibility to train all employees so they are aware of their responsibilities, then follow through with an effective enforcement program. The rules are simple. When a supervisor finds evidence, knowledge or existence of sexual harassment, action must be taken to eliminate the problem. Procedures for identifying and determining sexual harassment on the job must be developed, then it's up to the supervisor to enforce these policies and procedures.

Generally, a male, upon a female initiates sexual harassment. Female harassment of males has been recorded, but for this program, the majority of the information relates to male sexual harassment of females. It's best defined as deliberate or repeated, unsolicited male behavior that asserts a woman's sex role over her function as a worker. It can include verbal comments, staring at, gestures, or physical contact. Physical contact can include touching a woman's body. Sometimes it's as blatant as repeated propositions for dates or demands for sex. Unwelcomed sexual attention from a supervisor or boss or even a co-worker is intimidating and viewed as a weapon to coerce women. Most experiences of sexual harassment may not seem like a big deal to a male, but women resent it and have disruptive effects on all women employees and productivity. Sexual harassment is an act of aggression at any stage and is viewed at keeping women subordinate to males at work. Sexual harassment works only when a woman is vulnerable, such as needing a job, or having a strong desire not to lose her job and is afraid to say anything.

Whether supervisors think sexual harassment isn't a big deal or not, let's look at the consequences. Working women have sought legal action from sexual harassment on the job since early 1974, with varying degrees of legal action. Unemployment hearings, private suits against a company or supervisor, human rights complaints, and federal law suit under Title 7 jurisdiction. It is serious

business. Monetary awards for unemployment due to sexual harassment is on the rise, although each state decides each case differently. Civil action for sexual harassment is also a very costly situation for an offending company. Most women who take civil action want justice. They usually aren't concerned for the monetary award, but they feel they are entitled to punitive damages and in these cases, the awards can be big bucks. The point to remember here, senseless sexual harassment can destroy reputations, causes physical distress and loss of jobs for the persons affected. Organizations can lose a lot of money, plus destroy management credibility and morale of other employees and it's something that must not be tolerated by any employee. Sex isn't going to go away as a business issue. Intelligent methods of solving this problem are easily found, but people's attitude about sexual activity is very contradictory and difficult to change.

In November 1980, the Equal Opportunity Commission issued guidelines on this very heated subject. Sexual harassment is a violation of Title 7 of the Civil Rights Act of 1964. The employer and supervisors are responsible for their actions and the actions of all employees. Employers and supervisors have a responsibility to prevent this misconduct from occurring in their organization. Many organizations have gotten into trouble by saying sex is not their concern, it's just an incident between two employees. The federal guidelines make it clear that management is responsible for correcting the situation and take positive actions to ensure sexual harassment is eliminated from the job. Employers must train their employees, supervisors and managers on this issue and establish procedures and corrective action to protect all employees from sexual harassment. All instances of sexual harassment reported to supervisors must be investigated and action taken to prevent it from occurring in the future. Don't treat reports of sexual harassment lightly. It's serious business. Handling sexual harassment after the fact is extremely difficult and even more difficult to prove. Often, it's one person's word against another.

What about the woman that constantly flaunts sexual behavior at fellow male employees then files a charge of sexual harassment when those employees respond to her actions? What about women who tell dirty jokes, or express vulgarity openly at work, but file a complaint when male employees turn the tables? We could list a thousand different case studies, with all sorts of misconduct on both sides, but that's not the intent of the program. Experienced supervisors know what sexual harassment is and they probably know who the perpetrator and recipient are in their organization.

The point we're trying to make is sexual harassment on the job is illegal, the company must establish guidelines for eliminating this type of behavior, they must train all employees in these guidelines and supervisors must enforce these policies and procedures. Any questions? Women traditionally suffer sexual harassment because men look at them first as women, secondly as business associates. Ever heard the old saying: "That's women's work"? Look at the resistance experienced by women entering traditional police work. Male officers

were reluctant to have a woman as a partner, for fear of lack of ability, strength and other characteristics. Every organization has job descriptions and requirements for certain jobs. There should be no distinction as to whether it's a male job or a female job. Anyone qualified for the job should be given an opportunity to compete for the job. How about handicapped persons? The same rules apply. If they can do the job, they should compete for the job. Employees who work in non-traditional jobs should not be harassed. Employees who work in traditional jobs should not be harassed.

There has been much headway and improvement over the years in eliminating sexual harassment in the workplace. Where employers have developed policies and procedures relating to sexual harassment have trained all employees in these policies and have enforced these policies, sexual harassment has stopped.

As people become more aware of the problem, they have cooperated by not engaging in this senseless behavior. Does that mean everything is ok and the sexual harassment thing is dead? As long as males and females work together, you're exposed to the potential of sexual harassment. You'll always find people of both genders using sex as a manipulator to obtain certain goals or desires. Sex itself may be the goal of the offender, but oftentimes it's something else in the workplace. Power, control or just plain harassment of someone you don't like. It's a serious problem if it is allowed existing in the workplace.

Some people see sexual harassment as a social problem for women, but it's a problem with a profound economic impact, as well. Whenever there is a high rate of sexual harassment, there is a corresponding high rate of female resignations and job losses. It slows down career advancement and self esteem. It can destroy the morale of the workforce. It's serious business.

Harassment occurs among all job categories, ages, marital statuses and pay ranges. Supervisors have the most important role in enforcing company policies relating to sexual harassment and must accept this responsibility in eliminating sexual harassment when it is reported or supervisors gain knowledge it is happening.

The company is responsible, and the supervisor is responsible. Employees will follow the rules, if they understand you're serious about the program and intend to enforce company policies and procedures, to the letter of the law.

- Establish company sexual harassment policies and procedures.
- Train all employees in these policies and procedures.
- Investigate every reported incident of sexual harassment.
- Take action to ensure the program is enforced.

Accept your responsibilities as supervisors and never tolerate sexual harassment by any employee, male or female. This advice will make you a better supervisor, have a better workforce and will eliminate the need for legal action and potentially high monetary judgments against your company.

## **SEXUAL HARASSMENT FOR MANAGERS AND SUPERVISORS**

Your employer should prepare an employee handbook and it's your responsibility for the successful distribution of the handbook. As a manager or supervisor, you are a Very Important Person in communicating personnel policies, work rules and employee benefits to your employees. That's why we're counting on you to help with the new handbook.

The employee handbook is a collection of personnel policies, work rules or standards, and some employee benefits. We want you to understand how important the employee handbook is to you and your company.

For someone who has just been hired, the handbook helps them understand the policies, procedures and benefits of the company, right from the beginning. Employees are more receptive to communications the first day on the job.

For employees who already work for your company, most of what they will read in the employee handbook will not be new. The information in the handbook is simply a written statement of existing policy, rules and procedures they currently understand and know. It contains:

- Provides Structure
- Defines Rules
- Enhances Training
- Promotes Communication, Fairness, and Consistency
- Eliminates Confusion

Handbooks provide structure and serve as a readily available aid for personnel administration. The handbook is a training tool for both experienced and new workers. Employee handbooks promote open communication and eliminate confusion. Handbooks also promote fairness and consistency in the administration of policies and procedures.

Because of your management position, you will be primarily responsible for enforcement of, and compliance with the provisions of the new handbook. You will also be expected to answer employee questions and concerns.

This handbook will help employees fully understand company policies, procedures and benefits. Hopefully, it will foster an "open door" attitude where employees know that management will listen to concerns, or complaints, without fear of reprisal or retaliation. This in turn, improves employee morale and productivity.

The employee handbook will help the company treat employees with fairness and consistency. Frequently, a fired employee or one who feels they have been treated unfairly or inconsistently will sue the company. Often the suit involves a

complaint that a manager or supervisor treated the person unfairly or inconsistently.

In a wrongful termination lawsuit, an employee handbook can establish that an employee was employed at-will and was therefore subject to termination without cause. In sexual harassment lawsuits, an employee handbook containing a policy prohibiting unlawful harassment and providing a procedures for internal discipline often bolsters and employer's defense.

All managers and supervisors must understand that an employee handbook defines a relationship and directs the company's action and conduct as much as it binds the action and conduct of employees. In fact, violation of an employee handbook provision by a manager or supervisor can independently constitute a breach of a contractual obligation and form the basis of a lawsuit. In other words, you have a big responsibility in implementing the information contained in the handbook.

As managers and supervisors, you were hired or promoted because of your talents and job expertise, not necessarily for your personnel administration expertise. However, even managers with personnel experience need to have a resource that provides a clear understanding of company policy. The employee handbook must be your resource. Uninformed supervisors are a major cause of employment disputes resulting in litigation.

It's very important that explanations given to employees be consistent and must not undermine the purpose of the handbook. You should avoid making statements that minimize the handbook's significance. An example of minimizing the significance could be "this handbook is just a formality, don't worry, it won't change the way we do things". The handbook is your guide. In fact, a handbook can change past practices; particularly those that are ill advised and may violate employment laws.

Once you have your employee handbook, it is very important that you follow its terms. If a provision of the handbook proves to be unwieldy or unworkable, it should be revised, not ignored.

Because of your management position, supervisors will be primarily responsible for enforcement of and compliance with the provisions of the new handbook. As managers and supervisors, you're an important part of the distribution of the handbook and information contained in the handbook.

You may experience some resistance when you introduce the employee handbook because someone may find the whole idea of an employee handbook threatening. It may appear to be a get-tough attitude by the company, or the company is going to become "big brother". It's your job to overcome these perceptions as soon as possible.

An employee video is available to help you communicate with your employees regarding the handbook. The employee is reminded they are probably familiar with many of your company's policies and procedures. The employee handbook simply puts these policies and procedures in writing.

The employees are reminded that your company also has a policy against sexual harassment of any kind. That it is against the law and will not be tolerated.

The safety policy is explained briefly to remind the employees that your company is concerned about their welfare and believes in a safe and healthy workplace. It mentions the importance of safety training that employees are expected to use common sense and work safely to prevent injuries and illnesses.

The policy that seems to be the most troublesome for employees is employment-at-will. At will is the law in California (and many other states) and simply states that an employee can quit a job anytime he or she so desires. That's at-will employment. That same policy gives the employer the same right to terminate the employee at any time. It's not a new policy, but seeing it in writing may make people a little nervous, even when it's been a factual policy for years.

You are the VIP, or very important person in the distribution process. Part of this responsibility is training your employees to understand the handbook is an asset to them.

You should conduct meetings with employees to present the employee handbook and the information contained in the book. Copies of the handbook should be distributed at the end of the meeting because employees have a tendency to review handbook material and may not be attentive to the presentation.

If some form of employee meeting is impractical, you may want to prepare a cover letter or memo to accompany the handbook when it's distributed. The letter or memo should be written in a positive tone when explaining the purpose of the handbook.

Employers who simply distribute an employee handbook and expect employees to understand its purpose will often experience a negative reaction from their employees. On the other hand, employers who take the time to explain the purpose of the handbook, generally find the employees appreciate having the company's policies and procedures established in a written form.

Each employee will be asked to sign an Acknowledgement of Receipt form when the handbooks are distributed. These forms may prove critical in a subsequent litigation should your company need to rely on the handbook as part of its defense. In such a case, your employer would be required to prove the employee actually received a copy of the handbook. Any training classes provided on the handbook should be documented as well.

Your employer has invested a lot of time and thought into your new employee handbook. The company is counting on you to make the distribution of the handbook go smoothly and to provide the information in the handbook, to your employees. Having policies in writing will give you the direction and communications you need to help make your company an even better place to work.

### **COMPLAINT INVESTIGATION CHECKLIST**

1. Interview the person making the complaint. Get the facts.
2. Determine if an internal investigation is needed. Can it be resolved or do you need further information?
3. Determine the nature of the complaint before initiating an informal investigation. What company policy, guideline or procedure is involved?
4. Plan the investigation. Determine who will investigate, the order of the interviews and questions to be asked.
5. Conduct the investigation. Be prepared, stress confidentiality and emphasize that no conclusion has yet been reached.
6. Conduct an effective interview. Start with broad questions, obtain detailed information and finish with tough questions designed to elicit relevant facts.
7. Before closing the interview, review answers; ask for any additional information and stress seriousness and confidentiality.
8. Assess credibility. Make notes; review chronology of events, demeanor, admissions, denial, conflicting statements and plausibility.
9. Make recommendations after completing your analysis. Were policies, guidelines or procedures violated? Were any laws broken? Consider employee's company history. What, if any, discipline should be taken?
10. Comply with the company's policies regarding documentation. Distribute findings to appropriate people and document proper files.

### **Indicators that an Employee is Being Sexually Harassed**

1. The employee avoids the harasser and/or the workplace (increase in sick leave, excessive absences).
2. The employee no longer joins in employee group activities.
3. The employee suddenly gains or loses weight.
4. The employee suddenly starts wearing very concealing/conservative clothes.
5. The employee experiences health problems related to stress (fatigue, headaches, nausea, and colds).
6. The employee exhibits uncharacteristic emotional outburst.
7. The employee suffers a sudden decrease in work performance.

## **Interviewing the Person Raising the Complaint**

At this point, you are ready to begin your *initial* interview with the person raising the complaint. This interview is very important. It will help you determine whether the complaint can be resolved *informally* or whether an *internal investigation* will be necessary. Once you realize a complaint is being discussed, the most important objective of this initial interview is to **get the facts!** Get the **who, what, where, when** and **why**. Indicate to the employee you will be taking notes to make sure you get all the facts. (An initial interview form and checklist for concluding the interview are available at the end of this step.)

1. What happened?
2. Who was involved?
3. When did the incident take place?
4. Where did it take place?
5. Was the employee's ability to work affected? If so, how?
6. Were there any observers? If so, who?
7. Was the incident isolated or was it part of a pattern?
8. Has the employee talked to anyone else at the company about this issue? If so, who?
9. Are there any written documents relevant to the complaint that the employee knows about?
10. Has the employee kept any written records or diaries that are relevant to the complaint? Any personnel file memos, other notes?
11. Does the person raising the complaint know if any other employees have the same or similar concern?
12. Did you participate, and to what degree? How?
13. What was your relationship with the harasser?
14. Are there any other issues this employee wants to discuss?
15. Does the employee have any additional facts or information that would be helpful in an investigation, if one is merited?
16. Does the employee have any suggestions or preferred resolutions?
17. If you can readily and easily resolve a complaint with an employee "on the spot" or with very little effort, an investigation usually is not warranted. Should the complaint be about suggestive pictures displayed in the office, the complainant may be satisfied if the pictures are removed. An interoffice memo reminding all staff that such pictures are unacceptable could resolve the matter without the employee ever being identified as a complainant or anyone singled out as in violation of policy. Follow-up would be necessary to make sure the pictures were removed.

## **Is an Investigation Necessary?**

Before beginning an investigation decide:

1. Whether the complaint raised merits an investigation.
2. Whether your legal counsel should be contacted to discuss the possibility of protecting all or part of the investigation under the attorney-client privilege.

Not all complaints require the initiation of a full-scale internal investigation. Problems may be resolved without the need for an investigation. It usually is in the best interests of the employee and the company to attempt to resolve complaints as quickly and efficiently as possible. When complaints are raised, one of the most important jobs of the human resources representative is to determine what additional information, if any, is



2. Who was involved?

3. When did incident(s) occur?

4. Where did incident(s) occur? Give dates and times.

5. What impact has the incident had on your work or the work of others?

6. Who, if anyone, witnessed the incident(s)?

7. Is this a one-time occurrence or have there been others?

8. If others: who, what, where, when?

*Sample:*

**Initial Interview Form**

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9. With whom (if anyone) has the complainant discussed the incident(s)?

10. Do you have any written documentation relevant to the complaint, including any type of personnel action taken as a result of the incident?

11. Have you kept a diary, journal, calendar or other documentation? [If yes, ask for the document.]

12. Are you aware of any other employees who have similar complaints? [If yes, who are they and what happened?]

13. Did you participate in the incident? If yes, to what degree and how?

14. What was and is your relationship with the harasser? Have you previously engaged in a consensual sexual relationship with the harasser?

15. Are there any other issues we should discuss?

16. Are there any other facts or information I might need to conduct an investigation if one is merited?

17. Do you have any suggestions or preferences as to how this should be resolved?

## **Understand the Basics of Investigation**

When a claim of harassment necessitates an investigation, it is essential that your company, and frequently its human resources representative, be prepared to conduct a comprehensive, objective and professional investigation. It is the investigative process that will permit your company to monitor itself - to see to it that its managers, supervisors and employees are complying with the letter and the spirit of federal and state laws, as well as your policies and guidelines.

Conducting an objective and thorough investigation minimizes the risk that an employee is disciplined or terminated for something he/she didn't do. Perhaps things are not as they initially seemed. If this turns out to be true, the company will have avoided making what could have been a devastating and costly decision.

A sexual harassment investigation also gives the subject assurance that his/her complaint will be heard and that it will be resolved within the company. This makes it less likely that an outside agency and/or attorney will become involved.

The purpose of an investigation is to gather facts so you can make a credible determination as to what happened in a given situation. If someone is thought to have engaged in sexual harassment, conducting an effective investigation helps you reach a sound conclusion that is based on the best facts available.

Conducting an effective investigation is an acquired skill. People who conduct investigations with skill know how to ask questions; they know how to extract information from people who are reluctant to communicate. Sorting relevant from irrelevant details and making credibility resolutions requires skill. Practice will increase the investigator's skills. The goal of the investigator is to reach a skill level that ensures objective and fair treatment of all individuals involved in the investigation.

The goal of this chapter is to strengthen your skills. It will teach you how to conduct an investigation effectively. Keep in mind that developing investigative skills takes time and effort. This chapter will call to your attention certain principles and techniques. Applying these principles and techniques is the way you will develop your skills.

### **Role of the Investigator**

The investigator:

1. Sees to the integrity of the investigatory process.
2. Conducts the investigation.
3. Often collects the facts and documents the results.
4. Often makes a recommendation to line managers, who review the recommendations of the investigator and make the decision to implement all or part of the recommendations.

Remember the investigator's *primary* responsibility is to see to it that things get done fairly and effectively.

### **Steps for the Internal Investigation**

#### **1. Confirm the Complaint**

Whether an employee provides written or oral notification of his/her concerns, a confirmation memo or letter should be given, when appropriate, to the employee summarizing the complaint(s) raised. This generally should be done within a few business days. Issuing confirmation will provide both the people responsible for handling the investigation and the employee raising the complaint an opportunity to make sure that all issues are understood clearly before starting the investigation. This confirmation should include, but is not limited to, the following:

1. The date the complaint was first raised the name of the employee raising the complaint, and the name of the person to whom the complaint was raised.
2. A summary of all the issues raised.
3. A statement confirming with the employee that he/she has shared all the complaints and/or information to be addressed, or will do so at this time.
4. A statement confirming with the employee that he/she has supplied all documentation that might be helpful in the investigation, or will do so at this time.
5. A summary of the previous discussion with the employee regarding the complaint resolution process, what he/she will be expected to do, and what he/she can expect from the person conducting the investigation.

Remember, the information supplied throughout this material is intended to provide you with a list or "boiler plate" of possible steps (not requirements) to follow when documenting an investigation.

## **2. Identify the Nature of the Complaint**

It goes without saying that different complaints are handled differently. The nature of a complaint determines how it is handled. As a result, before initiating an internal investigation, it is important that you fully understand the nature of the issue and any *special* obligations the company may have with respect to the complaint.

Before you initiate an investigation, specifically *identify* what the employee is complaining about (assault, rape, obscene remarks, off-color jokes, unwanted touching, etc.) and then determine *what* your obligation is with respect to resolving this issue and *who* else in the company is necessary to assist you in resolving the issue. Only after you have determined the answers to these questions are you ready to begin planning your investigation.

Note: It is suggested that action and resolution take place within the shortest time possible. To allow the complaint to sit unresolved creates an environment ripe for the rumor mill, gossip, speculation, etc. As a result, the employees spend all their time discussing the latest rumor and nothing is accomplished in the workplace except speculation.

## **3. Gather Support Documents**

All documents relevant to an investigation should be identified and obtained quickly. These documents may provide background information that will help to verify facts in the investigation, as well identify who may need to be interviewed, and which questions to ask.

Throughout the investigation, it is important to repeatedly ask those involved whether they have any documentation that might be helpful in the investigation. This documentation can come in all shapes and forms from notes to scribbles on a napkin.

In addition to the documentation collected from those involved in the investigation, the person conducting the investigation also will obtain and review other sources of documentation that may supply helpful information. For example, depending on the complaint being investigated, reviewing timecards, sales or productivity reports, performance appraisals or disciplinary action may provide important information.

## **4. Confidentiality; Need-To-Know-Basis**

Access to the documents involved in an investigation should be limited exclusively to those who have a legitimate business need-to-know. This might include disclosing or providing access to information under, but not limited to, the following circumstances:

1. Information necessary for decision-makers to make a decision.
2. Information necessary for people to conduct the investigation or any action taken as a result of the investigation.

3. Information to be shared during the investigation in order to obtain more information. If a person needs to know one piece of information in a document, share only that information rather than disclose the whole document.

## **5, Right to Privacy**

Individuals have a right to privacy. Employers, however, have an obligation to investigate and resolve certain claims. These competing rights and obligations must be weighed and balanced to determine what, and how much, information will be shared.

Part of this equation is analyzing whether an individual has a "reasonable expectation" of privacy in a given situation. Determining what is "reasonable" depends partly on the circumstances under which the interviewee shared the information. Accordingly, the interviewer should not make promises regarding confidentiality unless it is certain the confidence can be kept. Preferable to an unconditional promise of confidentiality is an understanding with the interviewee that the interviewer will keep the information on a business need-to-know basis.

## **6. Be Prepared - Ask "What If..."**

Below are situations that you may encounter while investigating claims of sexual harassment. Having a ready answer or solution will put you one step ahead. Each sexual harassment claim will bring its own set of "what ifs." Practice with the case studies in this book. Investigators will often have to "think on their feet." Be ready!

- What if an employee tells you that he/she is being sexually harassed but does not want you to do anything?

*If the alleged harassment is serious in nature, you must take appropriate action.*

- What if the harasser is the subject's boss and the harasser says the employee is complaining because of an unsatisfactory performance appraisal?

*Determine if there has been documentation of the unsatisfactory job performance. If others have witnessed or complained about the unsatisfactory performances, include this information in your report.*

- What if an employee who complains requests that his/her name is held confidential in any subsequent investigation?

*While you may try to keep the identity of the complainant confidential, it will not always be possible. Reassure the employee that he/she is protected from retaliation by company policy and the law.*

- What if a female employee who complains of sexual harassment tells you (a male, Human Resources Rep) that she does not believe any man could really understand what sexual harassment is all about?

*It is advisable to have two people designated as investigative officers - a female and a male. You may want to include in your company policy that investigative officers must be from the human resources department or management. This prevents requests from employees that a potentially biased peer investigates the claim.*

- What if an employee doesn't complain?

*If you know about sexual harassment, you must take action, regardless of how you find out.*

- What if there is a long period of sexual harassment before the employee complains?

*For purposes of filing an administrative or civil complaint, the statute of limitations may have run out and the employee may not be able to file a complaint. However, depending on the circumstances, you may need to take some sort of action to ensure the harasser does not engage in this conduct again. You will need to make a determination of whether such harassment did occur.*

- What if you or you no longer employ the witnesses (es) to the harassment otherwise cannot determine if there was sexual harassment?

*A verbal warning to the alleged harasser will put him/her on notice that such conduct is not acceptable and further complaints could result in further discipline, including termination.*

- What if the employee who complains has previously joined in and/or initiated sexual harassment activity?

*Has the victim indicated the activity is now unwelcome? Can you resolve this without a confrontation by a memo to employees reminding them those sexual jokes; comments and pornographic material are inappropriate in the workplace. If not, ask the victim what he/she wants. Does he/she feel comfortable asking the harasser to stop, or does he/she prefer that you investigate and take appropriate action. Appropriate action may be that you indicate to the harasser that the activity is now unwelcome. Each complaint will be different, and your response should be tailored to fit.*

- What if the employee entered into a consensual relationship with another employee or his/her supervisor?

*Consensual does not mean that the relationship was "welcomed." Did the supervisor indicate that the employee's job, raise, promotion, etc., depended on consenting to the relationship? Your investigation should determine if the subject's conduct is consistent or inconsistent with the assertion that the sexual harassment is unwelcome.*

- What if the employee entered into a consensual relationship with another employee or his/her supervisor?

*If the relationship was initially welcomed and remains as such, the employee has no complaint. However, you may want to be alert to changes in the relationship. A lover scorned may start sexually harassing the former lover. Also, do you want a supervisor involved in a personal relationship with an employee? Will the other employees resent the "special treatment" the lover-employee receives? Can you*

*transfer the lovers without creating more problems? The fact that an employee welcomes behavior from one person does not mean that such behavior would be welcome from someone else.*

- What if an obscene joke/remark is a one-time occurrence?

*A one-time occurrence probably is not sexual harassment. However, this may be a good opportunity to send out the company policy against sexual harassment, just as a reminder.*

- What if the unwanted touching is a one-time occurrence?

*The unwanted touching is more serious. What are the circumstances? A hug is very different from a pat on the buttocks. The hug may warrant the reminder memo, while the pat requires at least a verbal warning. Obviously a man wrote the above. This female editor feels that a pat on the buttocks is as sexual as it comes and should receive a written warning.*

- What if a supervisor and employee enter into a consensual relationship and the employee was promoted?

*If other employees complain, you will need to know if the promotability of employees is based on their entering into a relationship with the supervisor. If yes, all the employees who did not get promoted have a complaint. If no, you have the perceived "special treatment" problem. Can you transfer the lovers without causing other problems?*

- What if the subject has not told the harasser that the conduct or behavior is unwelcome?

*It is not necessary that the subject confront the harasser. Employees and/or the company may incur liability if the subject has indicated by his/her conduct that the harasser's behavior is unwelcome. Remember that the subject may decide confrontation is not an acceptable response for fear of termination, retaliation or physical harm.*

- What if the subject files an administrative, Equal Employment Opportunity or Department of Fair Employment and Housing, or legal charge?

***Warning: Do not stop your investigation.*** *The Equal Employment Opportunity Commission has held that such action constitutes retaliation.<sup>1</sup> You still have the responsibility to investigate the claim and take appropriate action if warranted.*

- What if the investigation truly is inconclusive? Do you have reason to believe the subject or the harasser?

*If nothing conclusive, it's time to reissue the company's policy against sexual harassment, retaliation, impeding an investigation, and lying about any aspect of the charge.*



In our meeting you told me that these are all the concerns you have about the matter. If I've missed something, or if you have additional concerns, please let me know immediately. I also told you that I would be the person investigating the allegation of sexual harassment. I want to make sure from the beginning that you believe I will be impartial and fair in conducting this investigation. I asked if you believe I will be impartial and fair, and you stated that you believe I will be.

We also discussed what you could expect as I conduct the investigation. I will review the information and documentation you provide to me. As appropriate, I will consult with other employees and managers to assist in addressing and resolving the issues. And I will strive to keep you informed of the progress of this investigation.

### **Summary Checklist**

Warning: Even if others witnessed the sexual harassment, you *must* interview the harasser. You may get more information about others who were harassed. Remember that the company has an obligation to take appropriate action. If you don't know about other subjects of harassment, your ignorance is no defense - you should have known.

1. Your initial meeting with the employee raising the complaint.
  - a. Be sure the person raising the complaint is comfortable with you handling any investigation.
  - b. When conducting your initial interview, get the facts—who, what, when, where, how and why.
2. Determine if an internal investigation is needed.
  - a. Will a single answer resolve the complaint?
  - b. Are other employees involved?
  - c. Do you need more facts than the employee is able to provide?
  - d. Do you need the help of any other resource in order to reach a conclusion?
3. Determine the nature of a complaint before initiating a formal investigation.
  - a. Identify the employee's specific complaint(s).
  - b. Determine the company's obligation to resolve the issue.
  - c. Decide who else is necessary to assist you in resolving the issue.
4. Plan the investigation.
  - a. Determine which policies, guidelines or practices apply to this situation.
  - b. Obtain all relevant documents that will assist you in conducting your investigation.

- c. Determine who is suited to conduct this investigation.
  - d. Decide whom you should interview.
  - e. Decide the order of your interviewees.
  - f. Determine if any interim actions are necessary before you initiate the investigation.
  - g. Outline the questions you will ask.
5. Conduct the actual investigation.
- a. Anticipate the questions that each of your interviewees will ask.
  - b. Before you begin the interview, be prepared to explain what you are investigating, why the interviewee is being interviewed and how the information obtained will be used.
  - c. Remember to stress that no conclusion has yet been reached.
  - d. Be sure to emphasize your company's policy regarding confidentiality and reprisal.
6. Conduct an effective interview.
- a. Give the person who is the focus of the investigation sufficient information to respond to the claim.
  - b. Obtain the interviewee's detailed account of the events surrounding the claim.
  - c. Get as much information as possible from the interviewee.
    - a. Understand what policy or guideline forms the basis of the complaint.
    - b. Understand what facts are necessary to reach a conclusion.
  - c. Effective techniques for asking questions
    - d. Draft a preliminary list of questions you want to ask.
    - e. Save unfriendly or embarrassing questions until the end of the interview.
    - f. Don't begin with hostile or tough questions.
    - g. Start with "broad" questions.
    - h. Do not put words into the interviewee's mouth.
    - i. Ask the tough questions.
    - j. Go beyond your pre-planned questions.
    - k. Ask questions designed to elicit relevant facts.
    - l. Ask *who, what, when, where, why* and *how* type questions.
7. Before closing the interview.
- a. Relate the seriousness of the investigation.
  - b. Remind the interviewee of the confidentiality of the investigation.
  - c. Ask if there is anyone else you should talk to.
  - d. Review the interviewee's answers with the interviewee.
  - e. Encourage the interviewee to come back with additional information and/or documents.
8. Assess credibility.
- a. Make notes that will help assess credibility as soon as the interviewee leaves.
  - b. Review the interviewee's chronology of events.
  - c. Note the interviewee's demeanor.
  - d. What, if any, admissions were made during the interview.
  - e. Did the interviewee deny anything?
  - f. Were conflicting statements made?
  - g. Was the interviewee's explanation plausible?
9. Make a recommendation after completing your analysis.
- a. Were any of the company's policies, guidelines or procedures violated?
  - b. Is any violation serious or minor?

- c. Do any local, state or federal laws require you to take certain actions?
- d. What is the employee's history at your company regarding length of employment, prior complaints and/or problems, performance, etc.?
- e. What, if any, factors would mitigate against instituting discipline in this case?
- f. Follow up as appropriate.

10. Comply with the company's policies regarding documentation.

- a. Review the documentation guidelines. Confirm you have documented your investigation properly.
- b. Distribute your findings to appropriate people pursuant to your company's guidelines.
- c. Be sure that the "personnel files" of the employee raising the complaint and the employee who was the focus of the complaint are properly documented.

### **Analyze the Facts and Make a Conclusion**

When analyzing facts, don't throw basic life experiences to the wind. Very few issues are black or white. Quite often, you will be dealing with various shades of Grey. You will have to apply your logic skills in order to reach a conclusion. Unless the subject of an investigation makes admissions that make your job easy, you frequently will have to view the relevant facts you gather against the foundation of your experience. Remember; don't refuse to reach a conclusion because you are afraid of being wrong.

### **Examine the Objective Facts**

In determining what actually happened, examine the objective facts to reach a logical conclusion:

1. Did the person raising the complaint raise it in a timely manner? If not, why?
2. Why was the complaint raised now?
3. Did similar things happen in the past, which were not raised? Why?
4. What motivation would the person raising the complaint have to fabricate facts?
5. What motivation would the person who is the subject of the investigation have for denying the incident(s)?
6. Did either the person raising the complaint or the person being investigated say anything at any point that you subsequently found to be untrue?

### **Make a Recommendation**

After analyzing the facts you have gathered during your investigation, and after reaching a conclusion as to what happened, you should be prepared to recommend action to your manager or the appropriate line manager. In formulating a recommendation, consider the following:

1. Did some form of sexual harassment occur?
2. If so, would you consider the violation to constitute a serious offense?
3. What has the company done in the past with regard to similar violations?
4. Are there any federal, state or local sexual harassment laws that require you to take certain actions in this case?
5. How long has the employee who violated your policy been employed at the company?
6. Has the employee ever violated any other sexual harassment policies in the past?
7. What is the employee's performance history at the company?

8. Are there any other circumstances that could affect your recommendation, i.e., and any "mitigating" circumstances?

### **Discipline Options**

After you consider these factors, you are ready to determine the amount of discipline that is warranted in this situation. It is important to try to "make the shoe fit." The following lists some of your options:

No action	Suspension
Demotion	Reduction in Salary
Termination	Written Warning
Transfer	Corrective Action Plan
Verbal discussion/counseling	
Education of an individual, work group, etc	

After addressing additional complaints that have been raised., ask, "Is there anything here the larger group can learn? Keep in mind that there is no one way to handle all situations. Different situations call for different actions.

### **Investigation Summary**

Once you have collected and analyzed the facts, and the final decision(s) has been made, you should document the findings and conclusions in an investigation summary. This summary should include the following sections and information.

- Investigation Background. This section should summarize the sequence and process you followed from the time the complaint was raised, through the investigation, to the final decision. Two to three paragraphs usually are sufficient.
- Relevant Company Guidelines or Policies. This section should refer to any guidelines or policies that are relevant to the situation.

### **Key Findings of the Investigation**

This section should include the key facts you relied on to make your final decision:

1. Interview(s) with employee raising the complaint.
2. Interview(s) with the investigated employee(s).
3. Interviews with persons who may have information relevant to the investigation.
4. Any relevant support documentation.

Include only facts. Do not draw conclusions in this factual summary section. Do not include extraneous information that you collected in the investigation that is not relevant to the complaint.

Next, analyze these key factual findings. Include a description of how you analyzed the facts collected, including but not limited to:

1. Any conflicting or inconsistent information produced in the investigation.

2. How you assessed the credibility of the individuals supplying information. (What did they say that you believed and why? What was said that you did not believe and why?).
3. Why you believed or did not believe the employee raising the complaint and the employee being investigated. (You may find that you believe some - but not all - of an employee's version of events.)

### **Conclusion**

Based on the findings and analysis of the investigation, you should include the following in this section:

1. How any guidelines or policies apply to the situation?
2. The bottom-line factual conclusions. For example:
3. "As a result of the investigation, it has been concluded that you did touch one of your employees and that this touch was a form of sexual harassment."
4. Describe any complaints that were not resolved in the investigation and why they were not resolved.
5. What action, if any, will be taken?

In reaching and documenting the conclusion, use facts, not assumptions of intent. Use your guidelines or policies, not references to law. Facts are objective, assumptions of intent are not. Legal definitions are better suited to a court of law. Legal definitions usually involve several components, all of which must be present for a legal term to apply. Referring instead to violations of guidelines or policy provides more clarity to the conclusion.

**ABOVE ALL, FOLLOW YOUR COMPANY POLICIES AND PROCEDURES, WHICH PROBABLY HAVE BEEN WRITTEN OR APPROVED BY A LABOR LAW ATTORNEY.**