

EEOC HARASSMENT GUIDANCE: UPDATING POLICIES AND TRAINING

In 2015, as a result of the persistence and prevalence of harassment complaints received, the Equal Employment Opportunity Commission (EEOC) embarked on an effort to “reboot workplace harassment prevention efforts.” It created a Select Task Force for this purpose comprised of sixteen members from various backgrounds, including representatives of academia; legal practitioners on both the plaintiff and defense side; employers, employee advocacy groups and organized labor. From April, 2015 through June, 2016, the Select Task Force held a series of meetings (some open to the public), received testimony from more than 30 witnesses and gathered public comments. The goal of the Select Task Force was to provide insight on how to prevent harassment in the workplace.

In June 2016, the agency published the findings, conclusions and recommendations of the Select Task Force in its *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* in June of 2016 (“*Task Force Report*”). As noted, the Select Task Force did not limit its charge to only looking at the legal definition of workplace harassment, but “rather included the examination of conduct and behaviors which might not be legally actionable, but left unchecked, may set the stage for unlawful harassment.” (*Task Force Report*) Key findings include the following: (1) workplace harassment remains a persistent problem; (2) workplace harassment too often goes unreported; (3) there is a compelling business case for stopping and preventing harassment; (4) leadership and accountability are critical; (5) training must change; (6) new and different approaches to training should be explored; and (7) an “it’s on us” campaign should be furthered to engage those in the workplace to be part of workplace harassment prevention rather than being bystanders. With respect to changes in training, the

findings of the Select Task Force conclude that too much training has focused on simply avoiding legal liability and has been designed as a “one size fits all” program. The *Task Force Report* comments: “We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhealthful or even counterproductive. However, even effective training can occur in a vacuum – it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does *not* fit all: Training must be effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer’s most valuable resource in preventing and stopping harassment.” (See *Task Force Report*, Executive Summary, p. V.)

Regarding new and different approaches that should be explored, the Select Task Force highlights models of training based upon “bystander intervention training” which has been used to combat sexual violence on school campuses. The training is designed to empower co-workers and gives them tools to intervene when they witness harassing behavior. Further, the Select Task Force suggests “civility training” that focused on promoting respect and civility in the workplace as a means to eliminate unwelcome or offensive behavior.

The *Task Force Report* contains detailed recommendations and a number of tools to assist in defining effective anti-harassment policies, developing training curricula, implementing complaint reporting and investigation procedures, creating an organizational culture in which harassment is not tolerated, ensuring employees are held accountable, and assessing and responding to workplace “risk factors” for harassment.

The following discussion focuses on the recommendations of the Task Force regarding the necessary components of a complaint reporting policy and system, critical response in

handling reported complaints and changes an employer can make to the structure of its compliance training program in order to reduce identified risk factors that may give rise to unlawful harassment in the workplace.

I. Complaint Reporting

A. Designing Proper Reporting Systems

It is essential to have an effective reporting system within any complaint procedure. The Select Task Force emphasizes that an effective policy should make clear that harassment on the basis of any protected category characteristic will not be tolerated and the prohibition should be communicated on a regular basis. It is particularly important to communicate the information about how to file a complaint and how to report harassment that an employee may observe in the workplace.

The Select Task Force recommends that the policy clearly prohibits retaliation and promises protection against retaliation for employees making complaints or providing information, witnesses and others that participate in the investigation. The policy should also carefully outline a complaint process that provides multiple and accessible avenues of complaint, providing assurance that the employer will protect the confidentiality of the harassment complaint to the extent possible. As well, the complaint process must assure that there will be a prompt, thorough and impartial investigation once a report is made. The reporting process should also provide an assurance that the employer will take immediate and appropriate proportionate corrective action when it determines that harassment has occurred. The Select Task Force further recommends that the policy should state that the employer will respond to and prohibit behavior that does not constitute legally actionable harassment but, if allowed to continue, could lead to harassment.

Typically, depending upon the size of the organization, an organization should identify two or more individuals to whom complaints alleging harassment can be directed. If the size and structure of the organization allows, instructing employees that they can direct complaints to both a male and female charged with the responsibility of following up on the complaints is advantageous. Depending upon the nature of the complaint, an individual of one gender may feel most comfortable communicating that complaint to an individual of the same gender. Reporting systems must be flexible and accessible. Requiring an employee to put any complaint in writing before it will be investigated can impose a barrier to an individual that wants to bring forward a complaint. Such requirements should be avoided so that all complaints can be received and investigated.

Overall, in developing a reporting procedure, it is important that any employer representatives listed to receive complaints take any reported complaint seriously and provide an encouraging and supportive environment where individuals feel safe to report harassing behavior to management. It is also important to the investigation process to appoint well-trained objective and neutral investigators that will timely respond and investigate concerns which are brought forward. There should also be systems to ensure that individuals alleged to have engaged in harassment are not “presumed guilty” and are not “punished” until the investigation is completed and there is a determination that harassment has occurred. In addition, this reporting procedure should involve the communication of the determination of the investigation to all parties. Where appropriate, communication of the sanction imposed should take place in a manner that recognizes the privacy interests of those involved.

B. Ensuring Timely Responses

Once a complaint is communicated, an investigation should be launched as soon as possible. It is generally advisable to ensure the completion of a thorough interview with a complaining or charging party within 24 to 48 hours after receiving the complaint, unless circumstances arise that are outside the employer's control. Expediency in handling complaints expresses the seriousness of the complaint and assures the charging party that the employer does not condone such behavior. It also shows that the employer stands behind its investigation process.

At the outset, if the investigation does not begin as soon as possible, it sends a message to employees (including the charging party) that these types of issues are not important and/or that the employer does not stand behind its policy. In addition, evidence of undue delay may serve to show the employer failed to take reasonable corrective action in response to harassment about which it knew or should have known. This may lead to liability for a hostile work environment where an employer was negligent by failing to take action to reasonably prevent harassment from occurring. As part of its responsibility for taking reasonable corrective action to prevent unlawful conduct from continuing, an employer is expected to conduct a prompt and adequate investigation. If an employer opens an investigation into a complaint one day after it is filed, it has clearly acted promptly. See *Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 985 (8th Cir. 2012) (employer exercised reasonable care when it initiated an investigation upon receipt of complaint, placed alleged offender on administrative leave within two days and terminated him within two weeks); *Pantoja v. Dept. of Air Force*, EEOC Appeal No. 01995176, 2001 WL 1526459, at *1 (November 21, 2001) (no liability found where agency immediately investigated allegations and within one day moved alleged harasser to another building). It should be noted that the Seventh

Circuit has found that where an employer waited two months it did not act promptly. *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012). Timing of the investigation may be fact sensitive and may depend upon other considerations as to the nature and severity of the alleged harassment and the reasons for delay. For example, when allegations include physical touching, an employer that waits two weeks before responding may be deemed to have not acted promptly if there is no reasonable explanation for the delay. *Rockymore v. U.S. Postal Serv.*, EEOC Appeal No. 012010311, 2012 WL 424237, at *5 (Jan. 31, 2012).

II. ANTI-HARASSMENT COMPLIANCE TRAINING: KEY INGREDIENTS

The *Task Force Report* is unequivocal in requiring employers to undertake a holistic harassment prevention effort which includes a strong policy combined with employee and supervisor training on employer's policies, reporting systems and investigation procedures. It identifies three basic components of this system: (1) the structural principles; (2) the content of compliance training for all employees; and (3) the content of compliance training for managers and first-line supervisors. The following discussion summarizes Task Force guidance on required components in these three areas.

A. Structural Principles

The Task Force suggests key structural components that should underlie all anti-harassment training. Most significantly, the harassment prevention effort must be supported at the highest levels of the organization. This can be reflected by statements of those at the highest level of the organization. It may also be demonstrated by participation in, and endorsement before, during and after the compliance training. Efforts should include repeated and reinforced training on a regular basis. Additionally, this training and education should be provided to all employees at every level of the organization.

The repeated trainings should be interactive and conducted in-person by qualified trainers. The Task Force suggests that if live, in-person training is not feasible, the prevention program should be designed to include active engagement by the participants. As well, the training should be routinely evaluated and modified as necessary as the goal for such programmatic training should be the education and understanding of all employees.

B. Content of Compliance Training for all Employees

With respect to the content of the training to be communicated to all employees, the harassment training should describe illegal harassment as prohibited under the policy. In addition, the policy should address how inappropriate conduct might rise to the level of illegal harassment and should prohibit such conduct as violating the policy. Examples should be tailored for the specific workplace and for the specific workforce. This training policy should educate employees about their rights to complain and their responsibilities if they experience or observe conduct that is not acceptable in the workplace. With respect to the reporting procedure, this should be described in simple terms. All employees participating in the training should understand what the reporting procedure is in the event that any harassment is experienced or observed in the workplace. In addition, the content of all compliance training for employees must explain the consequences of the conduct. All employees must understand that there will be consequences for engaging in unacceptable conduct violative of the policies, up to and including discharge from employment.

C. Content of Compliance Training for Managers and First-Line Supervisors

Because the overall goal of compliance training is to prevent harassment from occurring in the workplace, training for managers and first-line supervisors must be tailored to ensure that managers and supervisors know what to do when they observe, or have reported to them,

conduct that may violate the harassment policy. Training should provide easy-to-understand and realistic methods for dealing with any inappropriate conduct or harassment that they observe, that is reported to them, or of which they have knowledge or information. This may include a description of sanctions for failing to use such methods. The policy should state that it is expected that managers and first-line supervisors will act in accord with the policy.

In addition, training for managers and first-line supervisors should provide clear instruction on how to report harassing behavior up the chain of command. Again, to reinforce the importance of making sure the reports are brought forward to the appropriate personnel, the training can include a description of the sanctions for failing to report this type of behavior.

The Task Force also recommends that compliance training for managers and first-line supervisors include situational awareness. Providing examples of expected behavior with respect to managers and supervisors is important as it emphasizes their responsibility to respond. The compliance training should encourage managers and supervisors to assess workforces within their scope of responsibility for risk factors of harassment and to act according to the policy to reduce the risk of employees engaging in behaviors that violate employer policy.

CONCLUSION

Employers seeking to evaluate and “reboot” their policies and procedures are encouraged to review the *Task Force Report* and to consider using the checklists contained within the *Task Force Report* issued in June of 2016. Those checklists are attached.