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Sexual Harassment in the Provider's Workplace



PREFACE

- Me Too
- Time's Up
- Significant lawsuits



Significant Lawsuit

- 2017 one of largest publicized verdicts—health care.
 - Female physician vs. male physicians
 - 168 Million





IMPORTANT LESSONS

3 out of 4 victims never reported

Media focus will bring more stale claims to light

Important to promptly investigate and take appropriate action

- Even if it means discharging important staff member



LEGAL FRAMEWORK

Definition & Types

Standard of Proof

Standard of liability

DEFINITION

Unwelcome advance, conduct and comments

Requests for sexual favors

Physical touching of a sexual nature

That unreasonably interfere with your work performance or create an intimidating, hostile or offensive work environment.

Types

Quid Pro Quo

Hostile Work Environment



Quid Pro Quo

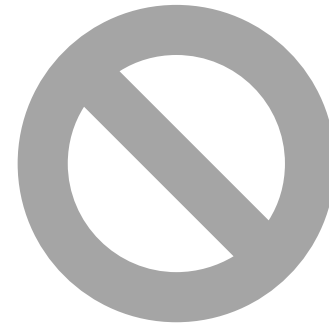
- Demand that subordinate tolerate as condition of getting or keeping job or job benefit:
 - Promotions
 - Raises

* Single instance can suffice.

Hostile Work Environment



Pattern, Severity, and
Pervasiveness



Creates abusive or offensive
work environment

STANDARD OF PROOF

- He/she subjectively believed the conduct was hostile, abusive, or offensive; and
- A reasonable person in the plaintiff's position would objectively believe the conduct was hostile, abusive, or offensive.



Standard of Liability

15 or more employees

Committed by Superior?

Committed by co-worker?

Damages

- Compensatory
- Punitive



MITIGATION OF RISK

Culture

Policies

Training



CULTURE

Must start at the top

Encourage Reporting

Attention to Red Flags

Lack of favoritism for key employees

POLICIES

Go beyond prohibiting legal definition of sexual harassment.

Expectations of reporting.

Clear procedures for reporting and escalation of reports.

Questions about confidentiality.

Employee responsibility.

Bystander intervention

Expectations of Employees

Policies that address reaction by employee.

Bystanders and reporting.

CONFIDENTIALITY

Can't be ensured.

Should be honored to the extent possible to prevent retaliation during investigation, etc.



IMPLEMENTATION

- Reporting System
- Effective Training
- Investigation

REPORTING SYSTEM

Encourage Reporting.

Clarity as to whom and
how.

Escalation.



Warning

- Can't wait for complaint if supervisor has actual or constructive knowledge
 - Know or should have known

TRAINING

Go

Go beyond general legal definitions to examples.

Discuss

Discuss impact on workplace and consequences to perpetrators.

Train

Train supervisors in counseling victims.

- Can't tell them to ignore.

HOW TO INVESTIGATE

Confidentiality?

Interim
Protection

Selecting the
Investigator

Create
Investigation
Plan

Develop
Interview
Questions

Conduct
Interview

Make a Decision

Closure of
Investigation

Written
Summary of
Investigation

CONFIDENTIALITY

Can't ensure.

Must make effort.

INTERIM
PROTECTION

Remove risk from
complainant.

Only those who need
to know should be
privy.

SELECTING THE INVESTIGATOR

Unbiased

No stake in outcome

Skills in investigation and knowledge of employment laws

Good interpersonal skills and ability to establish rapport

Detail oriented

Right temperament

THE INVESTIGATION PLAN

Outline	Outline issues
Develop	Develop witness list
List	List sources for information and evidence
Prepare	Prepare targeted interview questions
Develop	Develop process for retention of investigative documents

CONDUCTING THE INTERVIEW

Explain	Explain need for investigation
Explain	Explain limits of confidentiality
Focus on	Focus on gathering facts in impartial manner
Do not direct	Do not direct witness in any particular direction
Do not offer	Do not offer opinions or discredit credibility of witness
Take	Take notes to detect inconsistencies and ask further questions
Consider	Consider letting employee write a statement as well
Ask	Ask questions that may uncover conflicts of interest or personal interests

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MAKE A DECISION

- Assess credibility
 - Inconsistencies
 - Personal interest
 - Conflicts of interest
 - Axe to grind

WRITTEN SUMMARY OF INVESTIGATION

Incident and/or issues with dates

Parties involved

Key factual and credibility findings with sources

Policies and applicability to investigation

Specific conclusions

Parties responsible for final determination

Unresolvable issues

Employer actions taken

CLOSURE OF INVESTIGATION



- How to address the findings and conclusions
 - Ensure consistency, completeness, promptness and transparency
 - Assure complainant that steps have been taken

Closure

Damages?

Education/training beneficial?

Need to review, modify or redistribute policies?

Assess whether investigation and complaint resolution processes sufficiently robust?

Risk Management

Make

Make clear that the position of the harasser will have no bearing

Check

Check employment agreements for consequences of harassment and potential indemnity

Ensure

Ensure that no compartmentalization working against implementation

OTHER RISKS

Retaliation Claims

Intentional Infliction of Emotional Distress

Negligent Retention or Supervision

Invasion of Privacy

Defamation

Civil Assault and Battery

RETALIATION CLAIMS

Negative Employment actions

- Consider using written Performance Improvement Plan
- Detail deficiencies and future expectations

Policy forbidding retaliation and encouraging reporting



The End

Questions?