



HR CONFERENCE for LOCAL GOVERNMENT

Sexual Harassment:

Understanding #MeToo, #TimesUp, and
Workplace Legal Compliance

Bismarck, ND

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- Policy Development
- HR Counseling and Training
- Litigation/Administrative Complaints – Discrimination
- Employment Mediation – Qualified Neutral

Today's Discussion



- Intro: What is #MeToo | #TimesUp ?
- Ensuring Legal Compliance:
 1. Understand the Law.
 2. Understand the Complaint Processes.
 3. Understand the Employer's Obligation.
 4. Understand a Workplace Investigation.
 5. Understand that Prevention is Key!

2006: #MeToo

- 2006 – “Me Too” phrase coined by Tarana Burke to help women who had survived sexual violence.



October 5, 2017: #MeToo

- **Oct. 5, 2017** – Actress Ashley Judd accused media mogul Harvey Weinstein of sexual harassment of the “quid pro quo” variety in a *New York Times* article.



October 2017: #MeToo

- **Oct 5**: Amazon Studios head Roy Price resigns amid scandal of lewd behavior/propositions.
- **Oct. 15**: Actress Alyssa Milano invites #MeToo tweets.
- **Oct. 18**: Tweets begin by gymnasts against former team doctor Lawrence G. Nassar.
- **Oct. 29**: Accusations against actor Kevin Spacey.



November 2017: #MeToo

- **Series of Allegations:**
 - Roy Moore, Republican Senate nominee
 - Louis C.K., comedian
 - Matt Lauer, Today Show
 - Garrison Keillor, MN Public Radio
 - Russell Simmons, music, film and TV producer



December 2017: #MeToo

- **Dec. 6:** Time magazine names the “Silence Breakers” its 2017 Person of the Year
- **Dec. 7:** U.S. Sen. Al Franken, D-Minn. Resigns
- **Dec:** Numerous allegations continue in the film, TV, music, theater, restaurant industries



January 2018: #MeToo | #TimesUp

- #TimesUp is coined.
- Anti-harassment coalitions formed.
- Celebrities wear black to Golden Globes in protest.
- Second annual Women's March across the nation.



February 2018: #MeToo | #TimesUp

- Harvey Weinstein scandal and allegations against others in Hollywood continue.
- Many state legislatures begin reviewing their own sexual harassment policies and practices.



March 2018: #MeToo | #TimesUp

- Celebrities speak out at Oscars ceremony.
- Authorities charge Dean of Michigan State Univ. for failing to protect gymnasts against Dr. Nassar.
- Allegations emerge against high profile business owners and investors.



Where are we in April 2018?

TIME'STM ==UP

1. Understand the Law.
2. Understand the Complaint Process and its necessity.
3. Understand the Employer's Obligation under the law.
4. Understand a Workplace Investigation and its importance.
5. Understand that Prevention is Key!

1. Understand the Law.

- It is **NOT NEW!**
- **1964** = Title VII prohibits discrimination in employment based on sex (among other protected classes).
- **1985**: ND Human Rights Act, NDCC 14-02-4, becomes law.
- **1986** = U.S. Supreme Court held that Title VII prohibits sexual harassment.





Does this apply to me?

YES

- Title VII applies to private and public employers with **15 or more employees** who worked for at least twenty calendar weeks in a given year; and it applies to ALL federal employers.
- ND Human Rights Act applies to all employers with 1 or more employees for more than one quarter of the year; **and it applies to ALL public employers.**

Sexual Harassment Definition

- Unwelcome verbal, visual, non-verbal or physical conduct of a sexual nature or based on someone's sex that is severe or pervasive and affects working conditions or creates a hostile work environment.



Two Forms

1. Tangible Job Action

Harassment (“quid pro quo”):

- Member in protected class (i.e., sex-based)
- Unwelcome sexual harassment.



- Harassment was based on sex.
- Must have legal basis for imposing liability on employer (i.e., employer must be responsible).



- Tangible job action occurred, affecting employee’s compensation, terms, conditions, or privileges of employment.

- Harassment so severe and pervasive as to adversely alter conditions of employment & create abusive work environment.

When is there a basis for imposing LIABILITY on an employer?

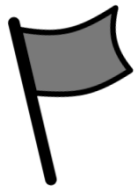
- When Supervisor is Harasser = Strictly Liable/
Vicariously Liable
- When Co-Worker or Third Party is Harasser =
Liable when employer
knew or should have
known about the sexual
harassment.
- Third Parties =
customers, independent
contractors, etc.



How do you know what to do?

- **Guidance Given:** EEOC has issued numerous directives, compliance manuals, and related publications.
- **Oversight Given:** EEOC oversees Title VII claims; ND Department of Labor and Human Rights oversees NDHRA claims.





Sexual Harassment Examples Given

- Commenting on clothing, behavior, relationships or body
- Sex-based jokes
- Requesting sexual favors
- Denying advancements based on someone's sex
- Spreading rumors about sex life
- Threatening person for refusing sexual advances
- Physically blocking someone's movement
- Inappropriate or unwanted touching
- Staring at a person's body
- Sex-based gestures
- Displaying/distributing sex-based pictures, drawings, posts, e-mails, etc.



2. Understand the Complaint Processes.

- **(A)** Any employee who witnesses or experiences sexual harassment has a right (and sometimes obligation) to complain to the employer...

...AND **(B)** to the EEOC/ ND Department of Labor!



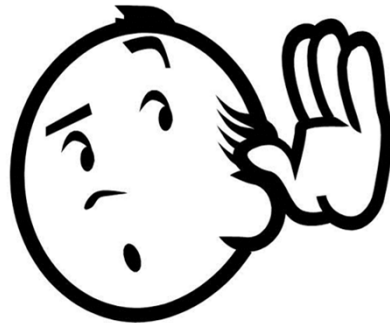
A. Employee Complains to Employer

- Have a clear complaint process & procedures in place.
- Make sure that process is communicated to employees.
- Do not *require* employees to confront/complain to harasser(s). Identify point person/people.
- Develop a sexual harassment complaint form.



Harassment Complaint Form

- Provide space for alleged harassment description.
- Allow complainant to mark information it wants kept confidential.
- **Provide Disclaimer** – confidentiality maintained only to the extent it is consistent with employer's obligation to identify and remedy sexual harassment.



What if alleged victim *does not* want to file a complaint?

- Document the victim's objection.
- Investigate to the extent possible in order to identify and remedy any harassment occurring.
- Because once on notice = duty to act!
- And also = others may be experiencing harassment.





B. EEOC / ND DOL Complaints

- Employee (current or former) fills out paperwork within 300 days of last harassment.
- EEOC/ ND DOL sends Employer a Charge of Discrimination.
- EEOC / ND DOL may recommend mediation/settlement.
- Investigator is assigned and proceeds with interviews, evidence review, etc.
- Investigator issues finding – harassment likely occurred or did not.
- Right to sue letter issued.

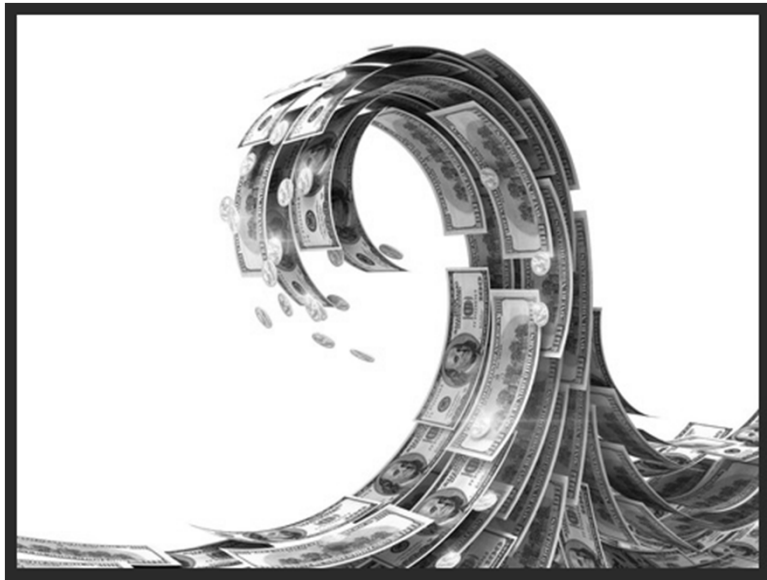
What to Know – EEOC / ND DOL Complaints

- Investigations are lengthy and time-consuming.
- Have to spend significant time answering questions and producing documents.
- Have to participate in interviews.
- Have to be prepared to answer for your actions/ inactions.
- **NO RETALIATION!!!**



What may come next?

- Potential Mediation / Settlement



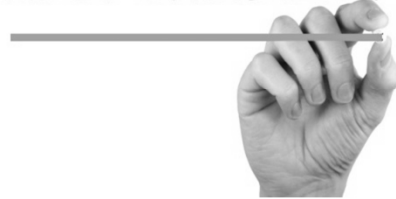
- Potential Lawsuit:
 - Private employers = injunctive relief, backpay/front pay, punitive damages, attorneys' fees, etc.
 - Public employers = sovereign immunity from money damages, BUT still subject to injunctive relief and declaratory judgment lawsuits.



3. Understand the Employer's Obligation

- *AGAIN* – Liable for supervisor sexual harassment & co-worker/third party sexual harassment that it knew or should have known about.
- So KNOW what is going on in your workplace.
- Have clear anti-discrimination policies in place that are COMMUNICATED regularly.
- Respond PROMPTLY to complaints.

RESPONSIBILITY



What to do if Employee Complains about Sexually Harassment?

INVESTIGATE!

- EEOC/ ND DOL investigation *does not* relieve employer from investigating on the front end.

- First Questions EEOC / ND DOL will ask:
 - Did you know?
 - What did you do?



Be Prepared...

- **Did you know?**

- Watch for those Red Flags on a daily basis.
- Communicate with employees.
- Take every complaint seriously.



- **What did you do?**

- Make Complaint Form available.
- Separate alleged harasser from victim (but NO retaliation)
- Document, document, document!
- **Conduct that investigation!**

4. Understand a Workplace Investigation.

- **Purpose:**
 - Avenue for prompt response to complainant
 - Identify sexual harassment
 - Remedy sexual harassment
 - Alleviate legal liability!!





Who should investigate?

- **Options:**
 - Your Human Resource Department
 - An attorney working in employment law
 - An agency that offers investigative services
 - Any neutral party that the company trusts and/or seems appropriate

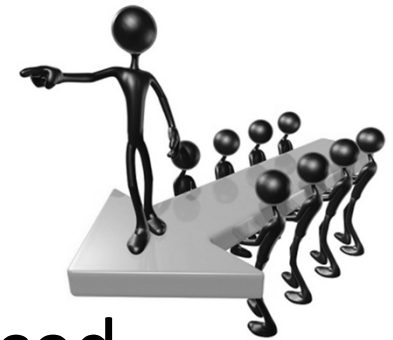
What should the investigation entail?

- Promptness
- Interviews
- Written statements
- Confidentiality (where possible)
- A Final Report that indicates:
 - Whether the alleged incident / policy violation occurred
 - Recommendations for workplace improvement/ further action



Complaints regarding an Employer's Response Arise When....

- Unclear Policies and Procedures (or employer failed to follow)
- Failure to respond to Complaints or Recommendations
- Supervisors fail to understand enhanced expectations of their roles:
 - Duty to report sexual harassment
 - Duty to prevent sexual harassment



What Remedial Action should be Taken?

- If Sexual Harassment is Confirmed:
 - Termination / Discipline / Restructuring positions
 - Workplace Anti-Harassment Training
 - Review / Revise Anti-Harassment Policies & Procedures
 - Restructure
 - Ensure Retaliation DOES NOT occur!



What Remedial Action should be Taken?

- If Sexual Harassment IS NOT Confirmed:
 - Notify alleged victim:
 - Inability to credit or discredit his/her claim.
 - Do not suggest allegation was false.
 - Assure – anti-harassment policy will be reiterated.
 - Notify the accused:
 - Claim not credited or discredited.
 - Reiterate anti-harassment policy and discipline policies.



5. Understand that Prevention is Key!

- Defenses against Sexual Harassment claims:
 - Employee did not utilize clear complaint procedures (and employer had NO knowledge)
 - Sexual harassment policy in place & followed.
 - Employer conducted thorough investigation
 - Employer took prompt action.
 - No adverse action occurred against employee (compensation, terms, conditions privileges of employment)
 - No hostile work environment shown



Sexual Harassment Policy

- Prohibit any and all harassment
- Identify all protected classes:
 - Federal: sex, race, color, religion, national origin, age, disability, genetic information
 - State: *Same* + marital status, public assistance, participation in lawful activity on employer's premises during nonworking hours which is not in direct conflict with employer's essential business-related interests.



Sexual Harassment Policy

- Provide clear complaint procedures
 - To whom, when, how, etc.
- Identify Investigation Procedure
- Explain policy against Retaliation



Sexual Harassment Policy

- Identify in own section or subsection of harassment policy
- Provide Definition of Sexual Harassment
- Give specific Examples of Prohibited Conduct



Anti-Harassment Training

- Educate your employees.
- Make your policies available.
- Regularly reiterate those policies.
- Offer ONGOING TRAINING to everyone!



When in Doubt?

- Call your attorney!
- I'm always happy to help.





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Employment Law 2018



Save **the** Date!

05.02.18 | Bismarck, ND & **05.03.18** | Fargo, ND

Join us for our biennial Employment Law Update! Ever changing labor and employment laws and regulations are a constant challenge for human resources professionals and business owners.

That's why every other year we offer our Employment Law Update, updating you on new laws, regulatory changes and recent state and federal court cases of critical importance to area employers. Our expert presenters will cover 2018's hot topic employment law issues.

Wednesday, May 2, 2018

Ramkota Hotel
Bismarck, ND

Thursday, May 3, 2018

Hilton Garden Inn
Fargo, ND

Seminar details and registration information coming soon!

Questions & Answers



Thank You!

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