

# Sexual Harassment Workplace Investigations in the MeToo Era

A Practical Guidance® Practice Note by  
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This practice note provides an overview of the statutes and standards governing the various legal issues implicated by the MeToo (or #MeToo) movement and addresses best practices for conducting sexual harassment workplace investigations in the MeToo era.

Specifically this note covers the following issues regarding sexual harassment workplace investigations:

- #MeToo Movement
- Legal Landscape
- Best Practices for Conducting a Sexual Harassment Investigation
- Best Practices to Prevent Sexual Harassment in the Workplace

For more guidance on conducting workplace investigations, see the Investigations task page.

For more information on workplace harassment, see the [Discrimination, Harassment, and Retaliation](#) task page. Also see [Harassment Claim Prevention and Defense](#). For more information on state laws concerning workplace harassment, see [Discrimination, Harassment, and Retaliation State Practice Notes Chart](#). For non-jurisdictional and state-specific forms on workplace harassment, see [Discrimination, Harassment, and Retaliation State Expert Forms and Checklists Chart](#).

For information on key workplace harassment-related legal developments and other labor and employment legal developments in jurisdictions across the country, see [Labor & Employment Key Legal Development Tracker](#).

## #MeToo Movement

In 2006, activist Tarana Burke began using the #MeToo hashtag to destigmatize survivors of sexual assault and raise awareness about the issue. Eleven years later, actress Alyssa Milano posted a viral tweet: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” Milano’s tweet was shared over 200,000 times, sparking a global movement in the United States against sexual harassment and abuse. Along with Burke, Milano, and many others who spoke up about sexual abuse and harassment in the #MeToo movement in the United States, powerful parallel #MeToo movements also developed around the globe.

Coupled with the Black Lives Matter movement, which was founded in 2013 in response to the acquittal of Trayvon Martin’s killer, the #MeToo movement has had a profound impact on how society regards discrimination, harassment, and assault within and outside of the workplace.

Among the impacts of the #MeToo movement on different facets of life, employers have shifted to focusing on issues of workplace harassment by:

- Increasingly investigating allegations of sexual harassment
- Adding anti-harassment policies to employee codes of conduct
- Establishing new procedures for addressing allegations – and–
- Enhancing employee training on topics including sexual harassment and corporate culture

Prior to the #MeToo movement, allegations of workplace misconduct were often met with inaction or handled privately. Perpetrators were not held accountable for sexual harassment and other sexual misconduct and instead faced nominal consequences, if any. Often, employers retaliated against employees reporting harassment. In recent years, there has been less tolerance for sexual harassment in the workplace with more women reporting sexual misconduct and perpetrators being held accountable through legal and nonlegal avenues.

Additionally, the U.S. Equal Employment and Opportunity Commission (EEOC) has experienced increased traffic to their website since the #MeToo movement became widespread. The EEOC has both brought multistate lawsuits against major corporations for sexual harassment and established a special task force dedicated to investigating the various legal challenges that arise in sexual harassment cases, including the propriety of mandatory arbitration in employment contracts.

Enhanced expectations on the part of the public, coupled with intense media and social media attention, have led to rapidly evolving views on what the appropriate standards of workplace conduct and employer accountability should be.

Employers, in turn, are taking a fresh look at the processes and procedures governing sexual harassment internal investigations in light of these heightened expectations. For example, in response to a scathing blog post detailing a toxic culture of sexual misconduct at Uber, the company conducted a robust internal investigation process led by former Attorney General Eric Holder to investigate company practices around sexual harassment. Uber adopted all of Holder's post-investigations including among others, specific personnel changes at the executive level to restructuring the board of directors to include independent seats.

## Legal Landscape

This section addresses key legal issues regarding sexual harassment investigations and the #MeToo movement.

## Definition of Sexual Harassment

The EEOC defines sexual harassment in its guidelines as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
- Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual –or–
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment

29 C.F.R. § 1604.11.

## What Constitutes Actionable Sexual Harassment?

This section addresses actionable sexual harassment under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. and various state laws.

### *Federal Law – Title VII*

Employees commonly allege sexual harassment in violation of Title VII—a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, or religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. See [Title VII Compliance Issues](#).

In 1980, the EEOC declared that workplace harassment, including harassment based on sex, race, and national origin, violates Title VII. However, conduct we now know as unlawful harassment was not widely recognized until 1986, when the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), affirmed the EEOC's guidelines, interpreting Title VII's prohibition on sex to encompass both types of sexual harassment—"quid pro quo" harassment and harassment that creates a "hostile work environment."

Over the next several years, the Supreme Court continued to balance the need to discourage sexual harassment in the workplace without making every "pass" actionable. For example, in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), the Supreme Court held that harassing conduct must be "severe" or "pervasive" enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive. Similarly, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court held that not all harassing

conduct violates the law, emphasizing that the harassment must be because of sex (or race or other statutorily protected characteristic) to violate Title VII.

However, the “because of sex” element does not clarify which conduct gives rise to a sexual harassment claim. Rather, it is presumed when sexual advances are made by a heterosexual to a member of the opposite sex and, thus, is problematic when applied in same-sex harassment cases. Moreover, courts have deemed the most egregious conduct (i.e., rape and, in the rare instance, particularly offensive remarks in a particularly sensitive setting) to be sufficiently “severe,” giving rise to a sexual harassment claim under Title VII. In contrast, crude comments, even repeated ones,

lewd gestures, and unwanted touching have been deemed insufficiently severe, without more, to violate Title VII.

Employers must be particularly vigilant about harassment claims in the wake of the #MeToo and Black Lives Matter movements, which have brought gender and race claims to the forefront of the public’s consciousness. Indeed, harassment claim filings in federal district courts, which had been decreasing in the years prior to #MeToo, have steadily crept up since allegations of sexual misconduct against film mogul Harvey Weinstein first came to light in 2017, although this upward trend nose-dived in 2020, likely as a result of the novel coronavirus (COVID-19) outbreak.

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## Harassment Claims Filed in Federal District Court from 2011 to 2020



Source: [Lex Machina](#)® (current as of 3/9/2021). For more information on Lex Machina and to sign up for a live demo, click [here](#).

For more information on sexual harassment issues generally, see [Harassment Claim Prevention and Defense](#), [Anti-harassment Policy \(with Acknowledgment\)](#), and [Office Relationship Contracts: Drafting “Love Contracts”](#).

### State Law

Many states also have laws that enumerate which types of conduct may constitute actionable sexual harassment in the workplace. For example, under New York Human Rights Law § 296.1, sexual harassment in the form of a “hostile environment” consists of words, signs, jokes, pranks, intimidation, or physical violence which are of sexual nature, or which are directed at an individual because of that individual’s sex. See [New York State Human Rights Law \(NYSHRL\)](#). Under the California Fair Employment and Housing Act (FEHA), sexual harassment occurs when an employer harasses an employee “because of sex.” Sexually harassing conduct includes making sexual gestures or derogatory comments or jokes, and offering employment

benefits in exchange for sexual favors, among others. See [California Fair Employment and Housing Act \(FEHA\)](#).

California courts analyze whether sexual acts rise to the level of sexual harassment on a case-by-case basis and under the federal standards of “severe” or “pervasive.” *Mogilefsky v. Superior Court*, 20 Cal. App. 4th 1409 (Cal. App. 2d Dist. 1993). New York State, on the other hand, bans harassment due to a worker’s membership in a protected class or participation in a protected activity if it subjects him or her to inferior terms, conditions, or privileges of employment; the worker need not prove the harassment rose to a severe or pervasive level. N.Y. Exec. Law § 296(1)(h). For more detail, see [New York State Human](#)

[Rights Law \(NYSHRL\)](#). Also see [New York City Human Rights Law \(NYCHRL\)](#), which details New York City's lower bar for alleging workplace harassment. Accordingly, you will need to check state and potentially local law to see if the applicable state/city has a less restrictive standard for making workplace harassment claims.

For more information on discrimination, harassment, and retaliation in New York, see [Discrimination, Harassment, and Retaliation \(NY\)](#). For more information on discrimination, harassment, and retaliation in California, see [Discrimination, Harassment, and Retaliation \(CA\)](#).

For more information on state and local anti-harassment laws generally, see [Discrimination, Harassment, and Retaliation State Practice Notes Chart](#) and [Discrimination, Harassment, and Retaliation State Expert Forms and Checklists Chart](#).

## Best Practices for Conducting a Sexual Harassment Investigation

An employer must investigate any time an employee reports a credible incident of sexual harassment. The manner in which the employer conducts the investigation is as important as its outcome to an employer's reputation. Responding appropriately to employee allegations of sexual harassment, sexual assault, and hostile work environment requires employers to have clear procedures and transparent processes to equitably resolve claims internally where possible, and to preserve evidence in the event of litigation or external investigation. Equally important, those procedures must be both accessible and adequate, which means that investigations need to be part of a broader, holistic approach to preventing, deterring, and remedying workplace misconduct. Further, best practice dictates that employers develop those processes and procedures proactively, rather than in response to a crisis.

### Investigation

Initiate an investigation as soon as an employee files a complaint. In certain situations, it may be necessary or appropriate to commence an investigation prior to an employee filing a formal complaint when there is informal knowledge that sexual harassment may have occurred. Timeliness in carrying out the investigation ensures accurate collection of information, particularly from witnesses whose testimony may become increasingly unreliable with the passage of time. It is also important to diligently document each step of the investigation and to treat all claims

seriously. Furthermore, take precautions to preserve the confidentiality of the investigation and all parties involved in the investigation. Take the following steps:

- **Identify potential witnesses.** Identify all individuals who have or may have information related to the investigation. Keep in mind that the list of potential witnesses may evolve throughout the investigation as more information becomes available through review of available records and witness interviews.
- **Identify available records and custodians.** Identify available records and documents, and their location, including relevant custodians. As necessary, send document preservation notices and collect documents as soon as possible at the start of the investigation. See [Document Identification and Preservation in Workplace Investigations](#).
- **Create a strategy for the investigation.** Prepare a task list and timeline for the investigation. Also prepare a road map of the information sought during the investigation. This ensures that the investigation stays on track.

For more information on workplace investigations, see [Workplace Investigations: Step-by-Step Guidance](#) and [Internal Workplace Investigations Checklist \(Step-by-Step Guidance\)](#).

### Interview

Conduct separate interviews for each witness. Before the start of the interview, the interviewer should explain the purpose of the interview. While it is important to emphasize that the employer takes the allegations seriously, the investigators should refrain from opining on the merits or getting into too many specific details concerning the investigation. Explain that the witness should avoid discussing the matters covered during the interview with other employees. Inform the witness that following the completion of the investigation, the employer will use the information to determine what occurred and take appropriate actions based on its findings, and that the information shared by the witness may be disclosed as part of this process. Tell the complainant and the alleged harasser that the employer will tell each of them about the result of the investigation and any actions the employer takes.

The following is a list of additional best practices for conducting interviews during a sexual harassment investigation:

- **Think about the order of interviews.** In general, it is best practice to conduct the interviews in the following order to help ensure a logically organized investigation:

- o Employee alleging sexual harassment
  - o Alleged harasser
  - o Other witnesses, including coworkers
  - o Second interview with employee alleging sexual harassment to better understand any unclear details
  - o Second interview with the alleged harasser to better understand any unclear details
- **Investigation team.** Make sure there are at least two individuals from the investigation team present at the meeting. One person should be in charge of asking the questions; the other person should take notes and be a witness to the interview. It is recommended that investigations into allegations of sexual harassment be conducted by a team comprised of individuals of both genders, and those who have received training regarding sexual harassment laws and the anti-sexual harassment policy. It is also important to ensure that the number of persons involved in any particular investigation is limited to preserve confidentiality.
  - **Detailed notes.** Take detailed notes, including observations and records of the witness's verbal and nonverbal responses.
  - **Questions.** Ask open, non-leading questions. Don't express judgment in the questions. For a list of key questions to ask, see [Sexual Harassment Investigation Questions](#).
  - **No video or audio recordings.** Do not videotape or audio-record the interview since this may be discoverable in any subsequent litigation, including litigation brought by other parties.
  - **No retaliation.** Assure all witnesses that the employer will not tolerate retaliation.
  - **Final determination.** After completing all interviews, reviewing documentary evidence (including the complainant's and alleged harasser's personnel files), and discussing the investigation results and proposed action with the investigation team, draft a final report addressing findings and recommended actions. See [Employment Discrimination, Harassment, and Retaliation Investigation Determination Form](#).

For more information on investigatory interviews, see [Interviewing Employees in Workplace Investigations](#).

## Privilege

In general, employers can assert attorney-client and work product privileges over materials generated during an internal investigation, so long as the privilege is not waived. However, where employers rely on their internal investigation as an affirmative defense to liability, the

associated records may be discoverable. The discoverability of investigation reports, interview notes, memorandums, and other work product generated in an internal investigation in a related lawsuit is often contested and litigated. A court will conduct a fact-intensive inquiry into potential privilege, including the attorney-client privilege and the work product doctrine, and whether these privileges have been waived, before ordering production of any particular document.

However, an employer can take certain steps to increase the likelihood that its notes and interview materials will not be discoverable, including:

- Attorneys conduct the interviews (or at the instruction of attorneys), not human resources (HR) personnel
- Conduct interviews confidentially, with the intention of preserving the attorney-client privilege between the employer and its counsel
- Inform all witnesses at the outset of each interview that the purpose of the interview is to assist in the provision of legal advice to the company and that the interview is privileged and should be kept confidential
- Don't make a verbatim transcript or recording of the interview
- A summary report of the interview, if one is written, should be marked "Privileged and Confidential" and "Attorney Work Product"

For more information on privilege issues, see [Attorney-Client Privilege and Work Product Protection in Workplace Investigations](#).

## Best Practices to Prevent Sexual Harassment in the Workplace

This section addresses key steps employers should take to help proactively prevent workplace sexual harassment.

### Promote an Anti-sexual Harassment Culture

Below are strategies for developing an anti-harassment workplace culture.

- **Implement programs, processes, and controls to identify, investigate, and address potential wrongdoings by officers, directors, and employees.** To promote and enforce a culture of anti-harassment, it is necessary to have a robust anti-sexual harassment policy in place. The anti-sexual harassment policy should clearly define discriminatory and harassing conduct, provide applicable

laws and regulations, and set forth procedures for investigating and resolving any complaint of sexual harassment, discrimination, or retaliation. Employers should also review and refresh employee handbooks to reflect the changing environment (including changes relating to civility and work from home practices).

For an anti-harassment policy, see [Anti-harassment Policy \(with Acknowledgment\)](#). For state-specific harassment policies, see [Discrimination, Harassment, and Retaliation State Expert Forms and Checklists Chart](#).

For practical guidance resources on employee handbooks, see [Employee Handbook Resource Kit](#). For additional resources, see Employee Handbook and Personnel Policies Manual (Castle), §§ 1.1–1.7 and §§ 3.1–3.4.

- **Provide up-to-date and regular training programs.**

Training is key to the successful implementation of an anti-sexual harassment policy. Training makes employees aware of policies and increases policy use through reporting of sexual harassment and other sexual misconduct. Regular training should address sensitivity issues, investigation processes, legal rights and protections, evidentiary standards, and means of encouraging reports. This should go a long way in addressing concerns or fears that the victim will be blamed, that there will be adverse employment consequences (including retaliation), that confidentiality will be violated, or that the investigation processes will not be fair or handled in a sensitive matter.

For a sexual harassment training prevention checklist, see [Sexual Harassment Prevention Training Checklist](#). For non-jurisdictional workplace harassment training presentations, see [Sexual and Other Workplace Harassment Guidance for Managers: Training Presentation](#), [Sexual and Other Workplace Harassment Guidance for Nonsupervisory Employees: Training Presentation](#), and [Workplace Discrimination and Harassment Guidance for Managers: Training Presentation](#). For practical guidance on creating effective employee sexual harassment training and prevention, see Sexual Harassment Training and Prevention Manual (Castle), §§ 2.1–2.18.

For a state law survey of sexual harassment training, see [Sexual Harassment Prevention Training State Law Survey](#). For training materials for managers in New York, see [Sexual and Other Workplace Harassment Guidance for Managers: Training Presentation \(NY and NYC\)](#). For training materials for nonsupervisory employees in New York, see [Sexual and Other Workplace Harassment Guidance for Nonsupervisory Employees: Training Presentation \(NY and NYC\)](#).

For training materials for managers in California, see [Sexual and Other Workplace Harassment Guidance for Managers: Training Presentation \(CA\)](#). For training materials for nonsupervisory employees in California, see [Sexual and Other Workplace Harassment Guidance for Nonsupervisory Employees: Training Presentation \(CA\)](#).

For training materials for managers in Illinois, see [Sexual and Other Workplace Harassment Guidance for Managers: Training Presentation \(IL\)](#). For training materials for nonsupervisory employees in Illinois, see [Sexual and Other Workplace Harassment Guidance for Nonsupervisory Employees: Training Presentation \(IL\)](#).

## **Evaluate Board Performance and Diversity and Inclusion Efforts**

The #MeToo movement has fueled large-scale changes in the gender makeup of corporate boards, including the enactment of legislation. Some states have mandated strict quotas while other states have urged diversity efforts through disclosure requirements. Corporations are being pressed by increasingly impatient investors and consumers to take tangible actions to address gender inequity in the United States. Investors have taken the governance position that diverse perspectives lead to better decision-making, and in turn can reduce risk and improve company resiliency.

Major institutional investors are pressing boards to increase gender diversity and, more recently, racial and ethnic diversity. Similarly, activist investors have begun to pressure companies to diversify their board composition and state legislators are pushing for tangible progress on diversity. A number of state and local pension funds and other socially responsible investors have been engaged in letter-writing campaigns calling on companies to increase disclosure of director diversity and alluding to the possibility of negative votes at companies lacking board diversity.

Companies should take specific steps and strategies to diversify their corporate boards, including:

- Evaluating board performance and diversity and inclusion efforts
- Addressing limitations of the current board candidate pipeline –and–
- Retaining diverse board members

## **Create Metrics to Track Progress**

Companies should create metrics to track their progress with diversity and inclusion initiatives. Companies should also ensure the company's prohibitions against sexual harassment and discrimination are emphasized.

### ***Regularly Review Diversity Policies***

It is also important for companies to regularly review their diversity policies across the organization and create a clear and focused statement on diversity. The board should ensure that leadership at the management level determines whether there are gender barriers to how the company finds, develops, compensates, and promotes its talent. The board should also be aware of expectations of its employees, customers, and communities with whom the company engages.

### ***Evaluate Traditional Diversity Factors***

Companies should evaluate whether they consider traditional diversity factors, such as gender, race, ethnicity, and LGBT status, as a plus when recruiting new board members. This approach—considering whether a candidate can add value—contrasts with the prior approach of assessing whether a candidate is a good “fit” with the existing board, which entrenches homogeneity.

For more guidance on corporate board diversity, see [ESG, MeToo, and Black Lives Matter: Key Corporate Governance and Workplace Issues](#) and [The #MeToo Movement: The Critical Role of the Board in Preparing for, Responding to and Avoiding Sexual Misconduct Allegations](#). Also see [Workplace Diversity, LGBTQ, and Racial and Social Justice Resource Kit](#) and [Environmental, Social, and Governance \(ESG\) Resource Kit](#).

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