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# Conducting Harassment Investigations With Clients

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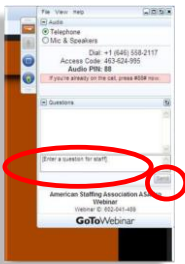
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## Conducting Harassment Investigations With Clients

By: Gerald L. Maatman, Jr.  
Seyfarth Shaw LLP  
Chicago, Illinois  
(312) 460-5965  
[gmaatman@seyfarth.com](mailto:gmaatman@seyfarth.com)

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## Today's Discussion Points

- Overview of the legal obligations of employers and supervisors to prevent and address illegal harassment in the workplace
- Understanding and identifying conduct which raises potential exposure and liability in the workplace (what is and is not illegal harassment)

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## Today's Discussion Points

- How to respond to internal complaints of workplace harassment – do's, don'ts, and methods for conducting investigations and remediating workplace problems

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## A Manager's Five Key Legal Obligations

- Do not tort, discriminate, harass, or injure others
- Know the applicable law, and follow it in good faith
- Follow, abide by, and enforce the company's personnel policies

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## A Manager's Five Key Legal Obligations

- Stop others from violating the law or harming employees
- Do not retaliate against anyone who complains about suspected or claimed violations of company policy or applicable law

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## Six Significant Rules For Managers

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### Rule # 1

- The law protects all types of protected-category employees, including:

— Age	— Color	— Mental Disability
— Domestic Partner Status	— Pregnancy	— Physical Disability
— National Origin	— Sex	— Race
— Religion	— Veteran Status	— Sexual Orientation
— Union Status	— Ancestry	
— Medical Condition	— Gender Identity	
	— Marital Status	

...Or on account of membership in or association with members of any such protected category under federal, California, or local laws.

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### Rule # 2

- Indirect Conduct Is Likewise Prohibited  
—Assisting, Soliciting, Encouraging, Or Coercing Harassment Is Also Prohibited

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### Rule # 3

- **The law's reach is all encompassing. It applies to:**
  - All dealings of any manager with any other employee
  - The dealings of any manager with non-employees such as customers, vendors, and members of the public
  - Individuals who do business with the company, who are present on the company's premises, or who interact with any manager of the company while the employee is on-duty, including independent contactors
  - Work-related settings outside of the workplace

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### Rule # 4

- **Retaliation is strictly prohibited:**
  - Retaliation against anyone who seeks advice from a state or local fair employment agency, who makes a complaint about discrimination or harassment, or who participates or assists in seeking advice, filing a complaint, or any investigation of such a complaint, is also strictly prohibited

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### Rule # 5

- **There is no legal cover for this sort of conduct**
  - any manager who engages in conduct constituting discrimination, harassment, or retaliation has no authority to do so

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## Rule # 6

- **Any alleged violation must be reported and processed:**
  - Employees Should Come Forward With Complaints About Alleged Problems Or Violations Of Company Policies, Specifically Harassment, At Any Time
  - Complaints Need Not Be Limited To Someone Who Is The Target Of The Alleged Harassing Conduct
  - Anyone Who Has Observed An Alleged Violation Of The Company's Policies, Specifically Harassment, Is Encouraged To Report It To The Company

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## Understanding Harassment In The Workplace

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## What Is Sexual Harassment?

- EEOC policy guidance memorandum (“*any unwelcome verbal statements or physical conduct of a sexual nature which unreasonably interferes with another employee’s job or work environment...*”)
- “Quid pro quo” claims
- Hostile environment claims
- Third party claims

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**Legal Definition Of Sexual Harassment**

- **Sexual harassment is physical, verbal, or visual conduct of a sexual nature when:**
  - Giving in to the conduct is an explicit or implicit condition of employment, or
  - Giving in to or rejecting the conduct affects employment decisions, or
  - The conduct unreasonably interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment
- **Quid pro quo vs. hostile work environment**
  - The latter must be severe or pervasive

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**Elements Of Sexual Harassment**

- **Sexual Harassment — “The Basic Rules”**
  - Physical, verbal, or visual conduct
  - Sexual in nature
  - Unwelcome
  - “Voluntariness” is not a defense

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**Elements Of Sexual Harassment**

- **Statutes are not a “general civility code”**
- **Harassment requires:**
  - Conduct which is “severe” or “pervasive”
  - Objectively hostile or abusive work environment
  - Reasonable person would find offensive
- **“Totality” analysis**
  - Frequency
  - Severity
  - Physically threatening/humiliating vs. Mere utterance
  - Whether unreasonably interferes with work performance
  - Merely “offensive” conduct is insufficient

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## Practical Examples Of Sexual Harassment

- Sexual advances or requests for sexual favors
- Making or threatening undesired physical contact
- Using insulting or obscene gestures or words
- Displaying sexual images
- Making sexual jokes or innuendos
- Improper questioning about an employee's personal life

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## Invalid Defenses

- Lack of intent
- “Right” to express one’s view
- Absence of a complaint
- Workplace vs. Non-workplace conduct
- The “indiscriminate” manager or so called “Archie Bunker” defense
- Relevance of “victim’s off-duty conduct”
- Office affairs, dating, and flirting

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## Employer Liability For Harassment

- Non-supervisory conduct negligence standard
  - Employer knew or should have known of the conduct; and
  - Failed to stop it
- Liability for harassment for non-supervisory conduct
  - Harassment by co-workers/third parties
  - Negligence standard
    - Discovery of harassment
    - Remediating harassment

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## Employer Liability For Harassment

- **Supervisor harassment**
  - Traditional terms:
    - Quid pro quo
    - Hostile environment
  - Key term impacting on scope of liability:
    - Tangible employment action (“TEA”)
- **Supervisory conduct**
  - Tangible employment action → strict liability (“vicarious liability”)
  - No tangible employment action → affirmative defense

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## Employer Liability For Harassment

- **Supervisor Harassment**
  - Meaning of tangible employment action:
    - “A tangible employment action constitutes a significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits.”

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## Employer Liability For Harassment

- **Absence of tangible employment action supervisor harassment – affirmative defense**
  - Employer exercised reasonable care:
    - To prevent sexually harassing behavior
    - To correct promptly sexually harassing behavior; and
  - Employee unreasonably failed to take advantage of:
    - Preventative opportunities
    - Corrective opportunities or otherwise avoid harm

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## Employer Liability For Harassment

- **Supervisor harassment – tangible employment action**
  - Covered:
    - Hiring
    - Firing
    - Demotion/decrease in salary
    - Reassignment/significantly different responsibilities
    - Loss of significant job benefits
  - Excluded:
    - Unfulfilled threats
    - Transfer at request of employee
    - Demotion/no change in pay
    - Reassignment/more inconvenient job

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## But, Practically Speaking...

- **Acts of workplace harassment by supervisors are difficult to defend on a legal basis**
- **Wrongful acts by supervisors, practically speaking, cannot be tolerated and companies are left with little choice but to fire the supervisor**
- **California state law imposes strict liability**

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## Strategies For Preventing Harassment

- **Implement a comprehensive anti-harassment policy**
  - Description of harassment
  - Multiple reporting avenues
  - Policy of no retaliation
- **Disseminate the policy**
  - Signed acknowledgement upon hire
  - Periodic distribution
  - Employee handbook
- **Follow the policy**

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## Strategies For Preventing Harassment

- **Require periodic training for management and employees**
- **Intervene if inappropriate conduct occurs, even if no one complains**
- **Create a professional and respectful work environment**

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## How To Address Potential Instances Of Harassment

- **Harassment work script for managers and supervisors**
  - 4-step model
  - Process a complaint consistent with harassment prevention policy
    - “Thank you for coming.”
    - “We take this seriously.”
    - “Someone will get back to you.”
    - Then call the proper person designated by the anti-harassment policy

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## Purpose Of An Investigation

- **Gather the most facts possible so that management personnel can make a credible, sound, and expeditious determination as to:**
  - What actually happened;
  - How it ought to be resolved; and
  - What can be done to prevent future problems.

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## Situations That Require An Investigation

- Allegations of discrimination, harassment, or retaliation
- Violence in the workplace or issues relative to danger to life, safety, or health in the workplace
- Whistleblower complaints or allegations of criminal misconduct
- Any workplace problems that could lead to litigation

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## A Legal Duty To Investigate

- When a complaint is made
  - Even if it appears to be fabricated
- When no complaint is made, yet employer is aware of, or suspects, potentially inappropriate conduct
- When management becomes aware of inappropriate conduct
  - Responsive action – telling an alleged wrongdoer to “stay away” from complainant is no substitute for an investigation

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## Goals Of An Investigation

- Improve factual basis for corporate decision-making
- Identify violations of corporate policy or the law
- Halt discriminatory, harassing, unsafe, or criminal activity
- Develop a thorough record on which to base a legal opinion/personnel decision

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## Goals Of An Investigation (Cont'd)

- Minimize or diminish the likelihood of a government investigation
- Control negative publicity
- Avoid the costs of litigation and its disruptive effects on business operations
- Limit corporate liability
- Protect future victims

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## Nine Potential Pitfalls

- 1) Inaction—Ignoring the complaint
- 2) Delay—Failing to investigate promptly
- 3) Sloppy record-keeping—Creating inadequate records
- 4) Poor investigative techniques—Failing to investigate thoroughly and completely
- 5) “Killing the messenger”/potential for retaliation—Failing to prevent adverse personnel actions against employees who make complaints

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## Nine Potential Pitfalls

- 6) Ignoring the evidence—Taking an “ostrich approach,” or more serious, ratifying the misconduct by doing nothing about it
- 7) Lack of confidentiality—Failing to keep the investigation confidential
- 8) Failing to defuse a crisis—Letting problems escalate or grow due to A failure to initiate appropriate remedial measures
- 9) Lack of follow-up—Failing to ensure closure with complaining parties, witnesses, or decision-makers

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## Choosing The Right Investigator

- Understands the role
- Properly trained
- Is neutral and objective
- High level of personal integrity
- Understands issues under investigation
- Has time to devote to the investigation
- Has the respect and backing of employees and upper-level management
- Adept at interviewing witnesses
- Able to interview witnesses with A variety of emotions
- Is A credible and effective witness should litigation result
- Does not judge the accused and the accuser

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## When To Use Outside Investigators

- When high-level executive is alleged wrongdoer
- To ensure no appearance of bias
- Cases involving complicated facts
- Cases involving likely litigation
- Alleged wrongdoer is perceived to be violent and/or retaliatory
- To emphasize the company's serious response and commitment
- To avoid difficult privilege issues

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## The Investigation Procedure

- Identify documents to be reviewed
- Identify potential interviewees and their relationship to the matter under investigation
- Decide the order of the interviews
- Determine the format for recording witness comments
- Determine whether 3rd party witnesses will interview
- Determine whether the investigative record will be discoverable should litigation follow

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## How To Prepare Proper Documentation

- The “poster board” rule
- The “Joe Friday/Dragnet” method – covering the who, what, when, where and how/why issues
- E-mail
  - Legal Rules About E-Mail
  - Meta-Data Issues
  - Is The Delete Button Really A Delete Device?

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## Identify Documents To Be Reviewed

- Notes regarding complaint
- Company rules, policies, procedures, and instructions
  - Employee handbooks and anti-harassment policies
  - Grievance procedures or progressive discipline policies
- Managers’ notes and files
- Prior investigation files
- Personnel files
- Memoranda or notes about the incident(s)
- Physical evidence
- Records of prior complaints against alleged perpetrator
- Records of prior complaints by complainant
- Statements written and obtained from witnesses
- Relevant business records

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## Note Taking: “Do”

- Start a new page for each interview
- Indicate those present at the interview, date, time and place
- Indicate author of notes (sign and date notes)
- Take detailed notes
- At conclusion, review key points with the witness for accuracy
- Review and finalize notes on completion of interview
- Check spelling and grammar, to avoid discrediting of interview if used in litigation
- Indicate notes are “privileged and confidential” and/or “attorney - client privilege” and/or “attorney work product”
- Determine whether interviewee has anything to add

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### Note Taking: “Do Not”

- Do not include your own interpretations, beliefs, assumptions, or conclusions
- If note things during an interview that may impact a credibility determination, record observations in a separate document
- “Joe Friday” method – “just the facts...”

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### Conducting Interviews: “Do”

- Determine extent of personal knowledge, as opposed to hearsay
- Ask witness to identify any other likely witnesses and/or relevant documents
- Ask open-ended questions/ “who, what, when, where, and how...”

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### Conducting Interviews: “Do”

- Ask follow-up questions to ensure detail
- Determine basis for concern of any witness who “doesn’t want to get involved.”

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 **Conducting Interviews: “Do Not”**

- Do not intimidate witnesses
- Do not promise absolute confidentiality!
- Do not make judgments
- Do not provide unnecessary information
- Do not allow the witness to see the investigator’s interview notes

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 **How To Conclude The Investigation**

- The decision-maker should be someone other than the investigator
- The decision-maker should review all materials supplied by the investigator

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 **How To Conclude The Investigation**

- Questions of credibility should be determined
  - Quality of the source, motives of witnesses to embellish, motives of witnesses to lie, general credibility, judgment of investigator, independent interviews, etc.
- The decision-maker should consider whether there is corroboration of evidence against the wrongdoer

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## Impact Of The Law & Legal Duty

- **Impact of the law**
  - Always refer to the investigation and the allegations in terms of violations of “company policy” and not as violations of the law
- **Do not document the conclusion that unlawful harassment occurred**

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## Impact Of The Law & Legal Duty

- **Legal duty**
  - After an investigation, “an employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring.” (EEOC policy guidance 405:6700)

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## Legal Obligation

- “Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct.” (EEOC Policy Guidance 405:6700)

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## Making A Decision

- **Decide:**
  - There was a violation of company policy or there was some misconduct justifying discipline
    - Consider severity of conduct, employment records, persuasiveness of conduct, discipline for previous violations of company policies, and wrongdoer's awareness of the policy
  - There was no violation
    - Proceed with great caution in imposing any discipline, lest the company incur liability for retaliation
  - The evidence is too inconclusive to determine if there was a violation
    - Assure complainant of protection against unlawful misconduct and retaliation
    - Assure accused of protection against misconduct and retaliation
    - Consider non-disciplinary steps

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## Informing The Parties And Follow-Up

- **If no violation of policy or evidence is insufficient, offer complainant an opportunity to respond**
- **If there was basis for discipline, indicate that the employer has taken appropriate action and fully expects no problems will reoccur**
- **Do not reveal details of discipline to complainant**

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## Informing The Parties And Follow-Up

- **Reiterate employer's interest in hearing about further problems immediately**
- **Reiterate anti-retaliation policy**
- **Document notice in memo, letter, or conversation**

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## Informing The Parties And Follow-Up

- Document follow-up conversations with complainant
- If basis for discipline, consider providing psychological counseling to complainant
- If there was discipline, consider an “action plan” for the wrongdoer
- Ongoing follow-up:
  - Periodically check with complainant to ensure environment is problem-free

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## Lessons Learned – Recent Cases Checklist For Compliance

1. Did the company commence an immediate investigation?
2. Did the company meet with all the employees/witnesses identified by the alleged victim?
3. Was/Were the offending employee(s) interviewed?
4. Did the company take contemporaneous notes of interviews with witnesses?
5. Did the company follow its internal guidelines regarding harassment complaints?
6. Did the company document the incidents in the file(s) of the offending employee(s)?
7. Did the harassing conduct stop after the employee complained?
8. Did the company remind employees of its written harassment policy?
9. Did the company order the offending employee(s) to apologize and/or did such personnel offer an apology?
10. Did the company offer the alleged victim an alternative to continuing to deal directly with the alleged harasser?

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## EEOC Guidance - Checklist

1. Did the alleged victim communicate to the alleged harasser that the conduct was unwelcome?
2. What complaints or protest were initiated by the victim, if any, whether to the alleged harasser, higher management, co-workers or others?
3. Have the alleged victim and alleged harasser been questioned in detail?
4. Is there corroborative evidence of any nature?
5. Has the employer asked co-workers and supervisory and management employees about their knowledge of the alleged harassment?
6. Have those with whom the alleged harasser discussed the incident, such as co-workers and others, been questioned?

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**EEOC Guidance - Checklist**

7. Have employees been asked about any changes in the alleged victim's behavior at work or the alleged harasser's treatment of the alleged victim?
8. Have there been other instances and, if so, what was the response?
9. In what context did the alleged harassment occur and who was the intended target?
10. What was the nature, frequency, context of the conduct and who was the intended target?
  - Was the alleged victim singled out?
  - Did the alleged victim participate?
  - What was the relationship between the alleged victim and alleged harasser?
  - Were any alleged remarks hostile and derogatory?

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**QUESTIONS?**

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**Gerald L. Maatman, Jr.**  
Seyfarth Shaw LLP  
Chicago, Illinois 60603  
(312) 460-5965  
gmaatman@seyfarth.com

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