

Workforce Strategies

Sexual Harassment Training: The Do's and Don't's

February 2018
Volume 36, Number 2

Bloomberg BNA
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INTRODUCTION

Human resources departments are reevaluating the way they deal with sexual harassment, following recent high-profile incidents in the entertainment industry, the media, and politics. They need to look at how to train managers and employees to avoid sexual harassment and how to report it when it does occur.

Some argue that sexual harassment training is merely an exercise in protecting employers from legal liability and is actually useless at stopping harassment.

“I think training is mostly something firms do as CYA,” Robert I. Sutton, professor of management science and engineering at Stanford’s Graduate School of Business, told Bloomberg Law. “I see such training as something that vendors sell, that HR likes because it gives them a budget, that legal likes because it creates a good argument that the firm is dealing with it and it makes offenders easier to fire. But training alone is much less important than what happens on the job.”

HR professionals and management-side attorneys agree that training won’t work if it is a perfunctory, checkbox exercise such as a canned online session, or a legalistic snoozefest that risks leaving the impression that harassing behavior is tolerable as long as it doesn’t break the law. But they say it doesn’t have to be that way.

“I find that when companies take a look at this as an opportunity rather than as an obligation, those companies tend to have the most success,” Michael J. Studenka, a management-side attorney and partner in the Newport Beach, Calif. office of Newmeyer & Dillion LLP, told Bloomberg Law.

The key is that “there has to be support from the top, and it needs to be framed in terms of valuing employees and protecting them,” attorney Jonathan A. Segal told Bloomberg Law. Segal is a partner in management-side law firm Duane Morris LLP in Philadelphia.

Besides giving meaning to the cliché that the company’s most important asset is its people, solid sexual harassment training also protects the bottom line. “These kinds of issues are a distraction at every level,” Carrie Hoffman, a partner in the labor and employment practice of Texas-based law firm Gardere Wynne Sewell LLP, told Bloomberg Law. In addition to costly lawsuits or legal settlements, employers stand to lose good employees who are fed up with undergoing sexual harassment, while retaining harassers whom the company shouldn’t want on its payroll anyway, she said.

When viewed this way, as essential business training that protects the employees, the organization they work for, and the employer’s core values and assets, training can be a useful tool in the sexual harassment prevention toolbox. The following pages contain suggestions on how to go about it, along with case studies.

TRAINING THAT CHANGES THE CULTURE

Managers and employees are unlikely to take seriously sexual harassment training that is perfunctory, such as a module to be watched on one's computer, or overly legalistic. Setting the tone that treating everybody with respect is at the heart of the company's core values begins with a commitment from the topmost levels of the organization, HR professionals, consultants, and attorneys say.

"It's disappointing to think you'd need to *convince* leaders to engage in this training," Joelle Emerson, founder and CEO of Palo Alto, Calif.-based diversity and inclusion consultancy Paradigm, told Bloomberg Law. "Ultimately, I think it's important that leaders understand not just the business case for reducing harassment, but the human case—it's impossible for people to feel healthy and happy at work, much less to be engaged and perform well—if they don't feel safe from harassment."

If upper management is reluctant to get personally involved in the training, Ellen Bravo, co-director of the Milwaukee-based advocacy coalition Family Values @ Work, suggests bringing them a mock newspaper headline about the company being sued and its reputation damaged. There should be separate training for managers to deal with issues like the tendency to want to protect "rainmaker" figures accused of harassment, and how to deal with "problem employees" who bring sexual harassment complaints, she told Bloomberg Law.

Similarly, Gardere Wynne Sewell's Carrie Hoffman suggested that it can work "to emphasize to the C-suite the hard dollar costs and soft dollar costs" of tolerating harassment.

"Harassment trials can result in verdicts in the multi-million dollar range. And continued harassment and disrespect in the workplace will affect employee morale and retention," Molly Lee Kaban, a management-side attorney and partner at the California law firm Hanson Bridgett LLP, told Bloomberg Law. "It is important for leadership to go through all the steps that other employees do, to show that no one is exempted from the policies and expectations of the company."

One reason upper management should get actively involved in harassment training is the importance of using "people who are trusted within the organization," Mark Lipton, professor of management at New York City's New School, told Bloomberg Law.

Outside diversity consultants and trainers do important work, he said, "but because of the nature of this issue and the screaming out there," it's vital to involve figures who can ensure that employees absorb a new way of thinking. Thus, another approach is to bring in "an important line person, such as a man and a woman who are universally acknowledged as high-credibility people within the organization."

“The C-suite needs to attend the training, not just say it’s important and then go back to work,” Duane Morris’s Jonathan Segal said. “It goes a long way if the senior vice president of sales says, ‘One of my expectations for the quarter is civility and non-harassment. I will be measuring you on that, not just your numbers.’” He recalled a “very powerful” statement from a CEO who said, “Nothing is more important than ensuring our employees have a workplace free from harassing behavior.” In that light, outside trainers can only be effective if it is clear company leadership is sponsoring them, he said.

To ensure the backing of upper management, Tulsa-based consultant Risha Grant said she insists on four points: “1) A personal commitment from the CEO and senior-level executives;” 2) diversity and inclusion language in all mission, purpose, and core-value statements; 3) a company-wide commitment to hire and develop a diverse, skilled workforce; and 4) established “strategies, tactics, and communication tools regarding diversity and inclusion.”

With support from the top assured, another key question is the proper balance to strike between trainers from within the organization and outside consultants and counsel. There’s no set formula for this, HR professionals and attorneys agree.

One factor is company size, Hoffman said. “Fortune 500 companies will have sophisticated HR experts in this. Smaller ones may have a less sophisticated HR department and need to bring in outside people.”

Both an internal and an external training component are necessary, Newmeyer & Dillion’s Mike Studenka said. Ideally, the organization’s HR department should do refresher training twice a year as well as when an incident occurs, he said.

“An external person can be successful in conjunction with” whoever is doing the training internally, once every two years or any time a hostile working environment complaint is filed, Studenka said. They are complementary, because “HR can be caught up in the direction the company is moving in,” he said.

David Barron, an attorney at management-side law firm Cozen O’Connor in Houston, leans more toward an internal approach. “Unlike management, whose presence in employee meetings can sometimes make things awkward, HR has an important role in training both management and rank-and-file employees,” he told Bloomberg Law. “We recommend having an HR presence in each and every training session, and for HR to meaningfully participate. An outside vendor can never speak as clearly to the company’s values and reporting procedures as an internal HR representative. Moreover, creating a one-on-one connection between HR and employees can foster confidence in making complaints internally.”

That could be an important part of the goal of preventing sexual harassment since, as Bravo said, “the problem with HR is that they are hired by upper management, and people see them as representing management.”

Nevertheless, it’s vital that once the outside experts have finished their part of the training, “the HR and other internal officials perform regular follow-up on

the trainings and continued communication throughout the year about the appropriate desired workplace culture,” Mike Schmidt, a management-side attorney and managing partner of Cozen O’Connor’s Midtown Manhattan office, told Bloomberg Law.

And whoever presents the training, it’s important that it not take the form of reciting company policy to passively listening employees. “Training has to resonate within the culture, and not be canned,” Segal said. “Look at the workforce and see where the risks are, and tailor it to them.” For example, he said, in a health-care setting, it’s useful to discuss what to do when a patient becomes a harasser.

“It needs to be granular and specific,” Lorrie Lykins, managing editor and vice president of research at the Institute for Corporate Productivity (i4cp), told Bloomberg Law. There should be explicit examples. For example, what may seem like an innocuous comment can be accompanied by a creepy leer. Questions for discussion could include whether the organizational culture is one “where hugs are expected and acceptable,” she said.

The bystander question is another one that can’t be addressed by just reciting company policy. Lipton urged discussing “the increased responsibility of men to call out other guys when they see behavior that potentially crosses the line.”

“Men need to take some of that burden off women,” he added.

Managers naturally have an even greater responsibility that must be emphasized in their training. “Point out they are the eyes and ears of the company,” Studenka said. “Here’s what you need to do, and how you can hurt the company if you fumble it.”

“Companies rise and fall because low-level managers are good, or not,” he added. Training them to become leaders on this issue lends itself to making them better managers overall, which is how sexual harassment training can become broader “leadership training,” he said.

SIMULTANEOUS OR SEPARATE TRAINING?

The very term “sexual harassment” presents a dilemma for those designing harassment training: whether to deal with it during general harassment training or as a separate issue.

Federal law recognizes that employees may have a claim for having undergone harassment on the basis of other “protected characteristics” than their sex, such as race, national origin, religion, or disabled status.

Moreover, the same employee may suffer from both sexual harassment and harassment for another of her personal characteristics. For example, last year the Equal Employment Opportunity Commission said it found reasonable cause to believe that female and black employees at Ford Motor Co.’s Chicago Assembly Plant and Chicago Stamping Plant were subjected to sexual and racial harassment, and that employees who complained about the harassment and discrimination were subjected to job retaliation.

On Aug. 16, 2017, the agency announced a \$10.1 million agreement, reached through voluntary conciliation among the parties under Title VII of the 1964 Civil Rights Act. The agreement requires among other things that Ford conduct regular employee training at the two facilities for the next five years.

These kinds of connections lead many to believe that all types of harassment should be covered in the same training, although this view is not universally held. “It needs to be at the same time or it won’t hold people’s attention,” Gardere Wynne Sewell’s Carrie Hoffman told Bloomberg Law.

The main difference between the different forms of harassment, she said, is that sexual harassment uniquely may involve “touching” and can turn into “quid pro quo” harassment, wherein the victim feels she has to go along to keep her job, get a promotion, etc. “Hostile work environment” harassment is another form sexual harassment can take, but the verbal abuse that it entails “can apply to race, religion, age, or disability” as well, she said.

Another voice in favor of offering training on all types of harassment at the same time is Duane Morris’s Jonathan Segal. “We’re dealing with a situation where sexual harassment is front and center, so it needs to be dealt with front and center; but it’s dangerous not to deal with race, religion, and ethnicity,” he said. Focusing solely on sexual harassment could lead someone to wonder why the organization is dead set on preventing it, but not other kinds of harassment, which could potentially become a point of contention in a lawsuit, he said.

At the same time, Segal said, racial or ethnic harassment doesn’t usually fall into a gray area, “but you may need to spend more time on sexual harassment because of questions about hugs and compliments.”

Views like this seem to be common among management-side attorneys, such as Cozen O'Connor's David Barron, who said, "For both practical and logistical reasons, we recommend that these issues be addressed together at one time. It all comes down to respecting other employees in the workplace, and how to deal with disputes." The solutions are much the same, he added.

Non-lawyers are more equivocal. From the perspective of consultant Joelle Emerson of Paradigm, treating the different forms of harassment as a unit for training purposes may make sense, but the real issue is that the training can't be a perfunctory one-off session. "I'd avoid a short training that aims to be a catchall of every type of harassment, but an ongoing series that considers different types of harassment and discrimination could be compelling," she said.

Mark Lipton of the New School offers the dissenting view that combining the different types of harassment training is actually counterproductive. Sexual harassment training should be "separate and distinct" from training on avoiding harassment based on someone's race or sexual orientation, he said, because "we need to elevate how the message is heard."

Another voice on the side of separating the different types of harassment for training purposes is the Institute for Corporate Productivity's Lorrie Lykins. Her argument is that sexual harassment is "a really uncomfortable topic that needs to be addressed directly and deliberately. It needs to be separate and it needs to be explicit—there need to be explicit examples."

One management-side attorney who comes down in the middle on the separation question is Hanson Bridgett's Molly Lee Kaban. "It depends on the situation," she said. "It is important for all employees to know that harassment can take many forms and that sexual harassment is not the only concern. That being said, if there is a particular problem in the workplace related to sexual harassment or discrimination, a training targeted specifically at those issues may be more effective."

Consultant Risha Grant also opined that it depends on the situation. "If you have developed a training model that includes all forms of discrimination, then yes, include sexual harassment as well, but if each one is individually taught then give it its own space and time. It certainly fits in with the other issues of discrimination and in retrospect, should have been included all along."

Combining training is possible, Rosemary Haefner, chief human resources officer of Chicago-based jobs website CareerBuilder, told Bloomberg Law. However, she said, "some companies prefer to structure sexual harassment training as a standalone module so that there is enough time to include a variety of examples that bring clarity to the definition of harassment and encourage time for healthy dialogue with participants."

The lack of consensus on whether it makes sense to combine all forms of harassment training suggests that employers may have to evaluate their particular situation, including whether sexual harassment and other forms of harassment are

known to have occurred in the organization. Asking legal counsel and outside consultants seems wise as well.

CASE STUDY: TRAINING FOR A 'RESPECTFUL WORKPLACE'

Amy Polefrone, president and CEO of Ellicott City, Md.-based consultancy HR Strategy Group LLC, kept seeing a problem with the way sexual harassment training was delivered, and she was determined to fight it.

When this essential training is billed as “harassment prevention training,” she told Bloomberg Law, it leads to “stupid jokes, like ‘you’re gonna teach us how to harass.’ ” Additionally, the goal should not be to deliver equal employment opportunity training, which implies a legalistic compliance focus, she said.

Given such chronic problems and the importance of the topic, “how we deliver sexual harassment training has changed 180 degrees” in the past six months, Polefrone said. Now, her consultancy calls it “respectful workplace training,” and has trained 700 employees of various clients, customizing it for each client, as well as for employees of the consultancy itself.

The point, she said, is to convey the message that “this is the kind of organization we are, and this is how harassment pulls us off course.”

For a typical client, Polefrone said, the consultancy starts out before the training by getting buy-in from the CEO and other top executives, who need to grasp that “it’s not just a compliance jump-rope. They can contribute to the design” of the training. Live training is always the best way to go, she said; webinars are useful only as a first step.

First comes a full day of training for the HR department on how to handle sexual harassment issues. HR should partner with outside consultants to deliver training to the rest of the company, “especially where HR has credibility problems,” she said.

Senior management then gets up to two-and-a-half hours of training. “They have to understand their liability and their role,” Polefrone said, and “they really need to stick around and be a part” of training everyone else in the organization.

The next stage is to address front-line supervisors and employees. Some executives participate again in this stage of the training, Polefrone said, so that employees can see they will have support from upper management if they have to file a sexual harassment complaint.

Using case studies is an important part of the method, as is “bystander training,” the goal of which is to help managers and employees learn how to intervene if they see somebody being sexually harassed. “Sometimes it’s easier to stand up for others than for oneself,” Polefrone said.

Polefrone said she favors combining sexual harassment training with discussion of racial, religious, and disabilities harassment, partly because employers only

have a limited amount of time to deal with the entire issue, but also because “we can’t lose the opportunity to draw parallels” between the different types of harassment. “We get a lot of nodding of the heads when we bring up the other examples” that aren’t tied to gender, she said.

CASE STUDY: HOW TO INCULCATE A 'CORE VALUE OF RESPECT'

Training employees to embody a “core value” of respect begins well before each employee’s first day on the job, according to Piyush Patel, founder and former CEO of creative software training services company Digital-Tutors and author of *Lead Your Tribe, Love Your Work*.

Job interviews at his company before its 2014 acquisition by another firm were always conducted by a paired team of a male interviewer and a female interviewer, he told Bloomberg Law. Though this was done for broader reasons of gender equity, he recalled being amazed at a job candidate who would always look at him when answering a question even if it was posed by the female interviewer.

Formal sexual harassment training took place as part of the onboarding process for new hires, he said, and was then done every six to seven months during the employee’s tenure. Instead of the training being a paperwork, check-the-box and sign exercise, “with every new hire, we go over who they can contact if there’s a complaint,” and who is on the next rung up if the immediate supervisor is the one engaging in the harassment, all the way up to Patel himself.

While corporate counsel helped conduct the training, Patel views it as a broader cultural question. Roughly three-quarters of a full-time creative staff of 42 and the same proportion of about 500 contractors were millennials, many of whom were holding down their first professional job. He saw helping them learn how to behave in that setting as essential.

For similar reasons, Patel doesn’t believe in separating sexual harassment training from training on combating harassment that’s based on race, religion, or disabilities. He recalled a company trip to Chicago that included attending a live performance, where one employee, “a hard-working, high performer” started shouting the “n-word.” Patel immediately pulled him aside and told him his behavior was unacceptable, and “I let him go the next morning when we got home.”

Employers should think twice about looking the other way when a high performer is a harasser, Patel said. “What is it really costing you if they are crushing three others? It affects the bottom line, it affects how profitable the organization is, because someone is really destroying your culture from the inside out” by making other employees feel harassed sexually or because of their race, religion, or disabilities.

HR departments and counsel can help conduct harassment training, Patel said, but employers should beware of online articles about harassment training that may be tailored to a certain state’s requirements that wouldn’t apply where the employer operates.

CONCLUSION

The #MeToo movement has helped keep sexual harassment on the national agenda for several months now. And that is requiring employers of all sizes to take a careful look at how they train their staff on preventing and combating sexual harassment. It's a necessary renewal of focus that can yield broad benefits for organizations that are open to change.

"Training employees on harassment is a good business practice," CareerBuilder's Rosemary Haefner said.

HR should keep the training fresh. "It's important not to be rolling out the same program year after year," Gardere Wynne Sewell's Carrie Hoffman suggested. "Use different presenters and different templates, and do not read the policies out loud. Use real-world examples and new and different hypotheticals. It has to be fresh every year. Otherwise, it's just a checkbox exercise."

Be sure to emphasize that behavior doesn't have to be illegal like outright sexual assault to be unacceptable in a professional context, said Duane Morris's Jonathan Segal. Sexist "jokes" are an example.

When Segal served on the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace, a key finding was that "interactivity and dialogue are important in training." In addition, the examples offered have to include both "severe" sexual harassment and more subtle violations, he said. Don't make the mistake of not mentioning actions that are wrong on their face, "because then you may ignore the most hideous behavior."

Done right, sexual harassment training can strengthen an organization's culture across the board. "When I go in with a company, I say I will do management training as well as sexual harassment training," said Newmeyer & Dillion's Mike Studenka, a former Marine Corps officer. Well-managed organizations with the right culture, policies, and procedures in place should be able to avoid getting swept up in the #MeToo maelstrom.

RESOURCES

Burger King has a three-minute YouTube video in which actors pretend to bully a high school junior and an employee “bullies” a “Whopper Jr.” burger by smashing it. Many more customers complain about the latter performance than the former. “When Burger King is the standard bearer for this going on in our society, we need to sit up and pay attention,” Amy Polefrone, president and CEO of Ellicott City, Md.-based consultancy HR Strategy Group LLC, said. See <https://www.youtube.com/watch?v=mnKPEsbTo9s>.

Piyush Patel’s book *Lead Your Tribe, Love Your Work* (<https://www.leadlovetribe.com/>) includes sections on workplace harassment.

The 9 to 5 Guide to Combating Sexual Harassment by Ellen Bravo, co-director of the Milwaukee-based advocacy coalition Family Values @ Work, first published in paperback in 1992, is available at <https://www.amazon.com/Guide-Combating-Sexual-Harassment-Association/dp/0471575763>.

Mean Men: the Perversion of America’s Self-Made Man by Mark Lipton, professor of management at New York City’s New School, is available at <https://www.amazon.com/Mean-Men-Perversion-Americas-Self-Made/dp/0998613010/>.

A report from the Equal Employment Opportunity Commission’s Select Task Force on the Study of Harassment in the Workplace is available at <http://src.bna.com/f2H>. More information on a June 20, 2016 task force meeting, including text of witness testimonies, is available at <https://www.eeoc.gov/eeoc/meetings/6-20-16/index.cfm>.

The Ethics and Compliance Initiative (ECI), a nonprofit that does research and shares best practices for compliance professionals, has developed a hypothetical “case study” on responding to possible sexual harassment. While most of the ECI’s work is aimed at ethics and compliance practitioners, CEO Pat Harned told Bloomberg Law, the sexual harassment case study, which is available at <http://ethics.org/resources/talk-the-walk>, is intended for any manager to talk over with his or her subordinates.