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# EMPLOYMENT LAW NEWSLETTER

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## **Re: Sexual Harassment: A Continuing Risk For Employers**

Prior to 1991 the term “Sexual Harassment” was virtually unknown. However, after Anita Hill testified at the Senate confirmation hearings for Supreme Court Justice Clarence Thomas in October 1991, the phrase was soon burned into our collective consciousness. There followed an explosion of attention on this unsavory topic, in the form of press coverage, cocktail party talk, political debate and legal action. More than 15 years later Sexual Harassment is a topic that may still be addressed on many levels, but certainly *must* be addressed by any employer.

Statistics compiled by the United States Equal Employment Opportunity Commission (“EEOC”) show a quantum leap in the early 1990s of Sexual Harassment charges filed with the EEOC and state enforcement agencies. This trend has continued almost unabated to the current day. While Sexual Harassment can take place in many different arenas, this article will focus on Sexual Harassment in the workplace and what employers can do to manage this risk.

### **What is Sexual Harassment?**

The EEOC has identified and defined two distinct types of Sexual Harassment:

Quid Pro Quo Sexual Harassment This includes unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature, if submission to the conduct is made a condition of employment, or if submission to or rejection of the conduct is actually used as a basis for employment decisions affecting the victim. An example might be where a supervisor demands sexual favors, the subordinate refuses and is then given less favorable work assignments because of the refusal.

Hostile Environment Sexual Harassment This includes all forms of verbal or physical conduct of a sexual nature, when such conduct has the purpose or effect of unreasonably interfering with an employee’s work performance or creating an intimidating, hostile or

offensive work environment. To be illegal, the conduct must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. Examples might include a steady stream of vulgar conversation or e-mail.

### **Who Must be Concerned?**

Just about every employer must be concerned! While federal law only applies to companies with fifteen or more employees, New York State's equal employment laws apply to companies with four or more employees.

### **Why Should an Employer Be Concerned?**

Sexual Harassment exposes an employer to legal action that could result in thousands of dollars in damage awards, and equally significant legal fees, even when the employer prevails. Further, a working environment that allows Sexual Harassment or other forms of discrimination can severely undermine work production, and lead to the loss of valuable employees.

### **How Can an Employer Best Manage this Risk?**

The Courts have enunciated that this liability may be limited by an employer exercising "reasonable care" to prevent and correct Sexual Harassment. We recommend that all employers exercise reasonable care by adopting and following the policies and procedures which follow:

1. Adopt and circulate a formal written Equal Employment Opportunity Policy, which includes an express prohibition against Sexual Harassment, as well as harassment based on other discriminatory criteria.
2. Circulate the Equal Employment Opportunity Policy effectively. Inclusion in the Company's Employee Handbook is a good first step. The policy should also be prominently displayed in the workplace and posted on the Company's website.
3. Provide training to supervisory employees. Supervisors must be educated as to the definitions of both variants of Sexual Harassment (*Quid Pro Quo* and Hostile Environment). They must clearly understand that Sexual Harassment is prohibited and that perpetrators and facilitators will be severely disciplined.
4. Adopt formal procedures, in advance, to be applied if an employee complains internally (*i.e.*, to management) that Sexual Harassment has taken place.
5. Appoint at least two employees (preferably at least one of each sex) as the

persons to whom Sexual Harassment and other discrimination should be reported. The employee's reporting options must not be limited to his or her supervisor, who could be the guilty party. The identity of these persons should be disseminated and posted in conjunction with the Equal Employment Opportunity Policy.

6. When an internal complaint is registered, respond promptly, follow the adopted procedures, and, if warranted, remedy the situation and discipline the offender.

## **Conclusion**

Adherence to the above procedures will, in many instances, deter administrative claims and litigation. If a claim is filed, adherence to these procedures will put an employer in the best possible posture to settle on favorable terms, and to win any case that cannot be settled.

The law firm of **Richard H. Waxman, P.C.** is ready to advise employers on adopting and implementing the policies and procedures described in this letter, and in connection with all other phases of employment law.

Very truly yours,

*Richard H. Waxman*

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