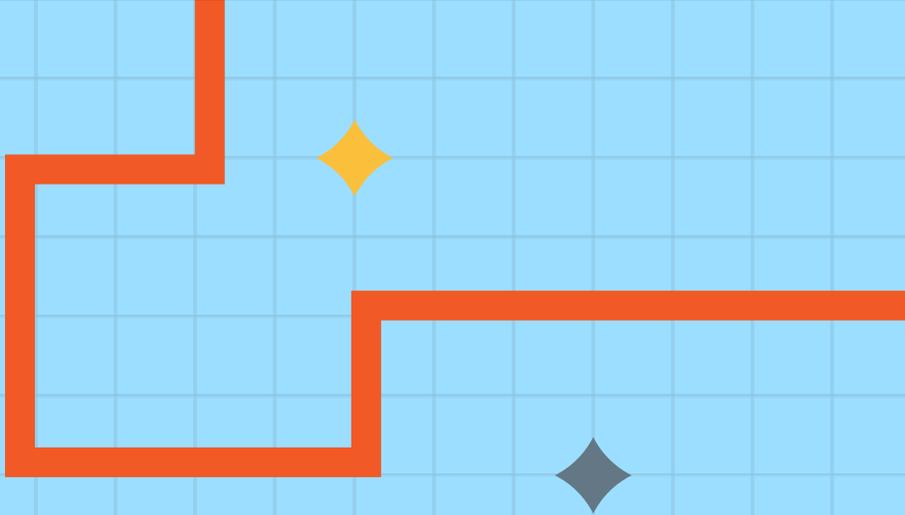


The Hostile Workplace: How to Identify, Stop, and Prevent It

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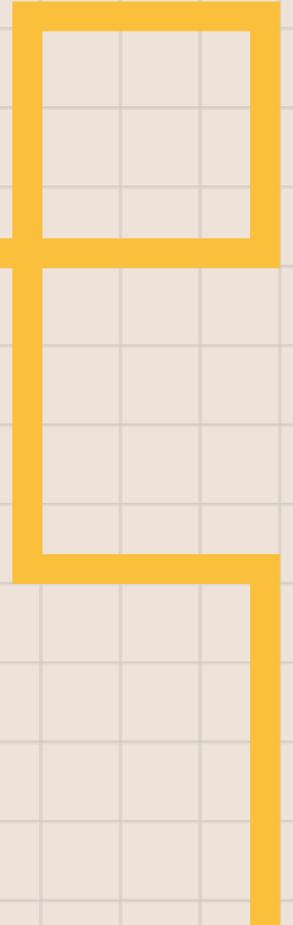


Agenda



- **Identify:** The (Real) Definition of Hostile Workplace
- **Stop:** Dealing with a Complaint
- **Prevent:** Best Practices to Prevent and Reduce Harassment

The Definition of a Hostile Workplace



Let's Start With "Harassment"



Unwelcome Conduct

+ Based on Protected Class

= Harassment

Federally protected classes with harassment protection: Race, color, religion, national origin, sex, sexual orientation, gender identity, pregnancy, age, disability, genetic information, military/veteran status, involvement in an investigation



Not All Harassment is Unlawful

Harassment becomes **unlawful** where:

1. Enduring the offensive conduct becomes a condition of continued employment, or
 2. The conduct is severe *or* pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
(*Some states have lower thresholds, and it will be easier to show harassment there.)
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Severe or Pervasive

Examples of severe harassment:

Grabbing someone's butt or breasts, circulating a picture of a coworker naked, leaving a picture of a Swastika or a noose on someone's desk.

Examples of pervasive harassment:

Calling someone by a "funny" name related to a protected characteristic repeatedly, frequently telling sexist jokes, consistently assigning less desirable tasks to a certain individual or group.





How Do You Know What's What?

At the end of the day, it's not up to the employer to decide if conduct is severe or pervasive.

If the employee and a willing attorney think it was, then the ultimate decision will be made by a judge or jury.

Since you can't be sure, treat all complaints as worthy of investigation if they even give off even a whiff of being related to a protected class.





Look for the Protected Class or Characteristic

Again, behavior that creates a hostile workplace is just a type of harassment, so must still be related to a protected class or characteristic to be *illegal* under employment laws.

Some behaviors that appear “random” may be rooted in bias (or a court could decide they are), so look for impacts to protected classes even if the behavior doesn’t seem to be aimed at a certain protected group.



Bad Behaviors That Don't Create a Hostile Workplace (if not motivated by or related to a protected class or characteristic)

- Bosses with a short temper
- Mean coworkers
- Teasing someone for wrinkly clothes or greasy hair
- Being called incompetent for failure to keep up
- Owners or supervisors favoring their friends
- Pranks
- Having your food stolen from the fridge
- Not having your workplace preferences respected (noise, allergens, lighting, communication style, food choices)



Employer Liability for Harassment

If there's tangible employment action, meaning discrimination in terms or conditions of employment, the employer is always liable.

If there's no tangible action (usually a hostile workplace claim), employers have a defense *if*:

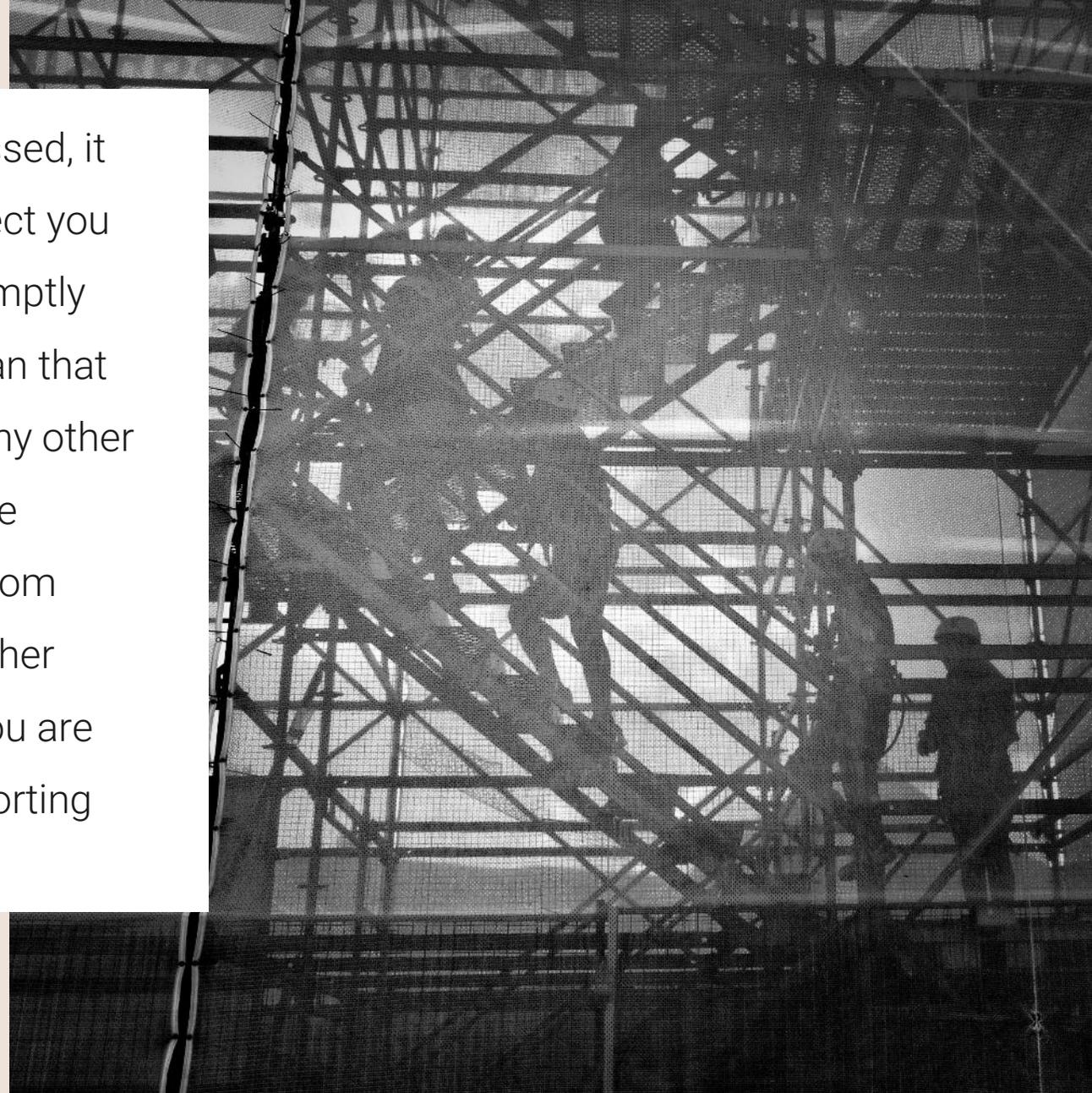
1. They exercised reasonable care to prevent and promptly correct any harassing behavior, *and*
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or failed to avoid harm otherwise.

Note: "Avoid harm otherwise" generally means the employee ignored a readily available employer-provided option for getting help – not that they failed to change their own behavior to avoid harassment.

Dealing with a Complaint



“Once your employer knows that you are being harassed, it has a responsibility to correct the situation and protect you from further harassment. Your employer should promptly and thoroughly investigate your claim. This may mean that your employer will interview you, the harasser, and any other witnesses. If your employer determines that you were harassed, it should take steps to stop the behavior from continuing, such as transferring the harasser to another location. Your employer also must make sure that you are not punished, treated differently, or harassed for reporting harassment.” - The EEOC





Act Fast



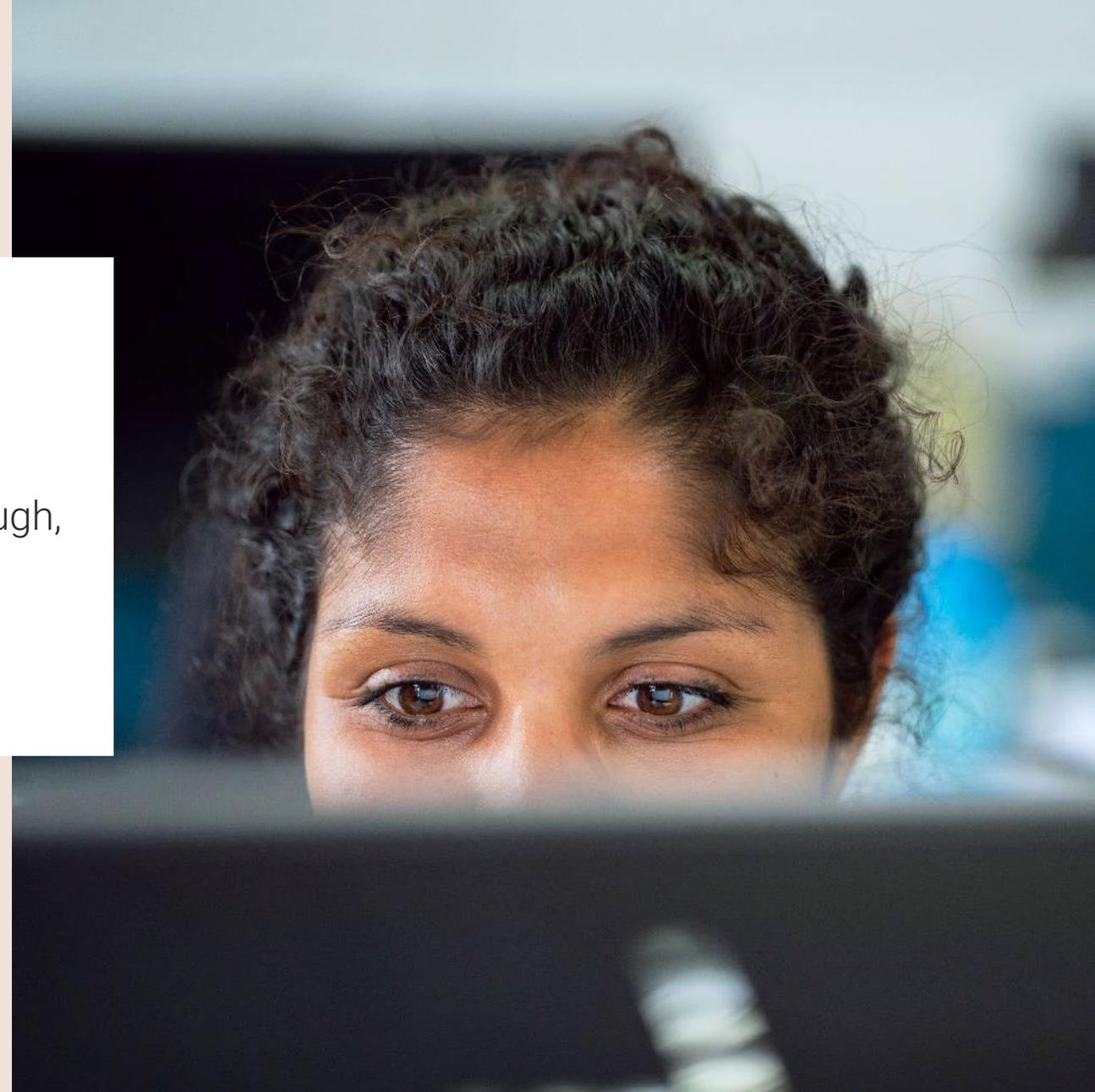
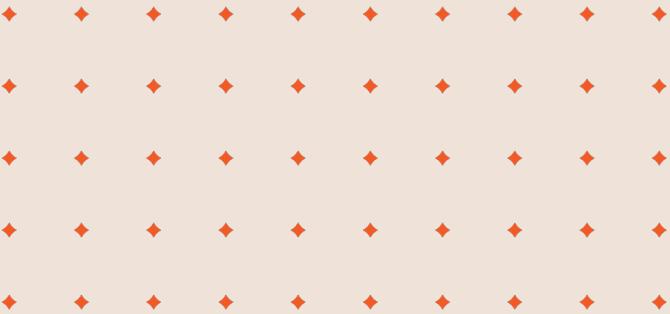
If the behavior reported appears to have any *potential* relationship to a protected class or characteristic, act as soon as possible.

If the reported behavior was egregious, separate the reporter and the accused and consider whether you should suspend the accused employee during the investigation.



Select an Investigator

You'll likely choose someone in HR, but if there's a conflict, the HR person doesn't feel empowered enough, or they don't feel they have the expertise for this, you may want to look at hiring a third party.



Interview the Person Who Reported the Behavior

Interview:

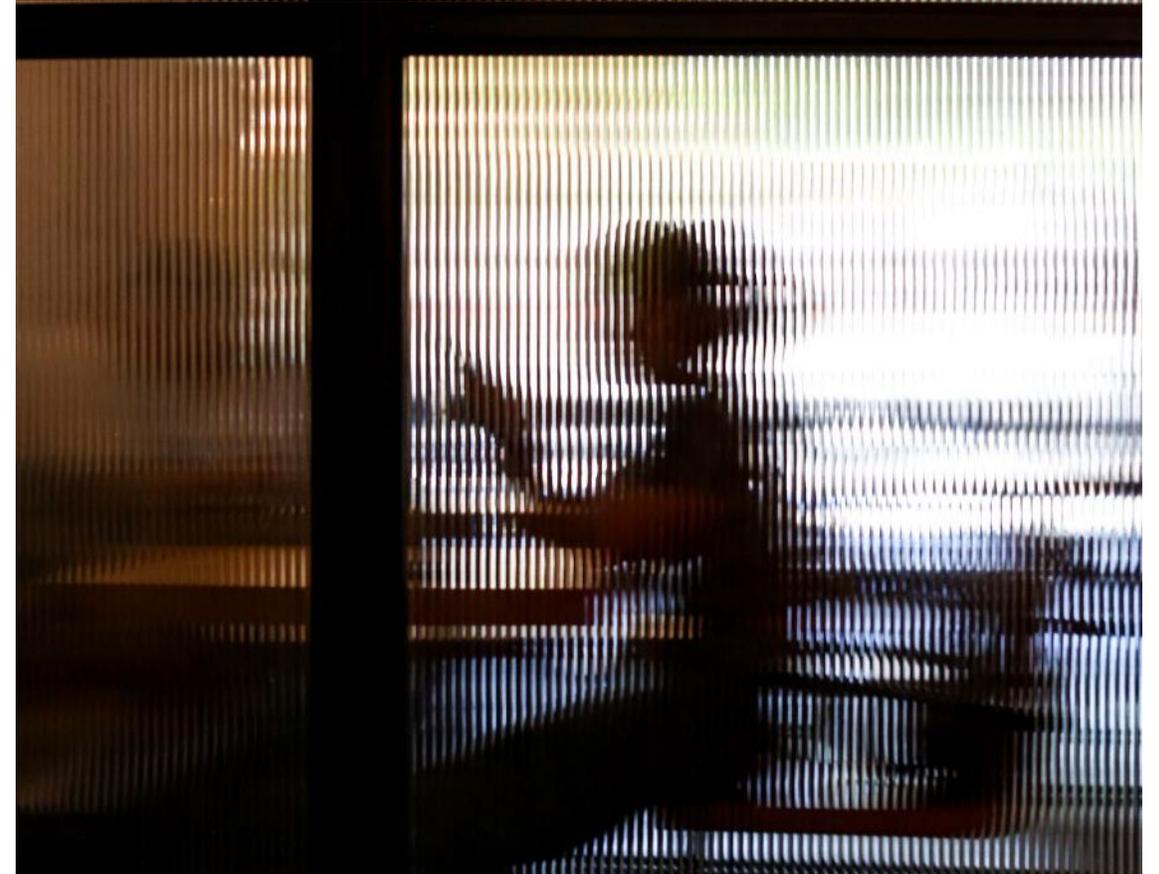
- Always conduct meetings in a private location
- Ask open-ended questions
- Leave any bias at the door
- Take notes and, if possible, get a written statement (or sign off on your notes) from the reporter

Potential questions:

- Whose conduct was unwelcome and what exactly did they do or say?
- When and where did this happen?
- Was anyone else around?
- Do you know of any other supporting evidence (email, videos)?
- Do you know if other employees have experienced something similar?
- Are you aware of a specific reason for the hostility?
- How were you and your work affected by this situation?
- What is your desired result from this investigation?

Important Info to Share With the Reporter

- Retaliation against them for reporting will not be tolerated
- You will follow up after the investigation
- That they should come to come to management or the designated investigator if anything new occurs related to the investigation, including continuation of the unwelcome behavior
- That you have a responsibility to hear out the accused party (meaning you can't just take the reporter's word for it)
- That you will keep this information confidential to the greatest extent possible



Interview Witnesses and Gather Evidence

The same as with your interview with the reporter, approach the witness interviews with an open mind, free of judgment.

- Provide enough info so they can place the incident or behavior, but don't recount the story as told by the reporter
- Listen and document carefully
- Note any biases the witnesses might have (e.g., they are good friends with either the reporter or the accused)
- Ask if they know of any other witnesses
- Ask if they have seen similar behavior at other times
- Remind them that you won't tolerate any type of retaliation against the person who made the report, or anyone else involved in the investigation (including them)
- Gather other evidence: video, audio, emails, texts, social media posts, screenshots
- Look for past reports, write-ups, or notes in the accused's file that could show a pattern of behavior

Interview the Accused

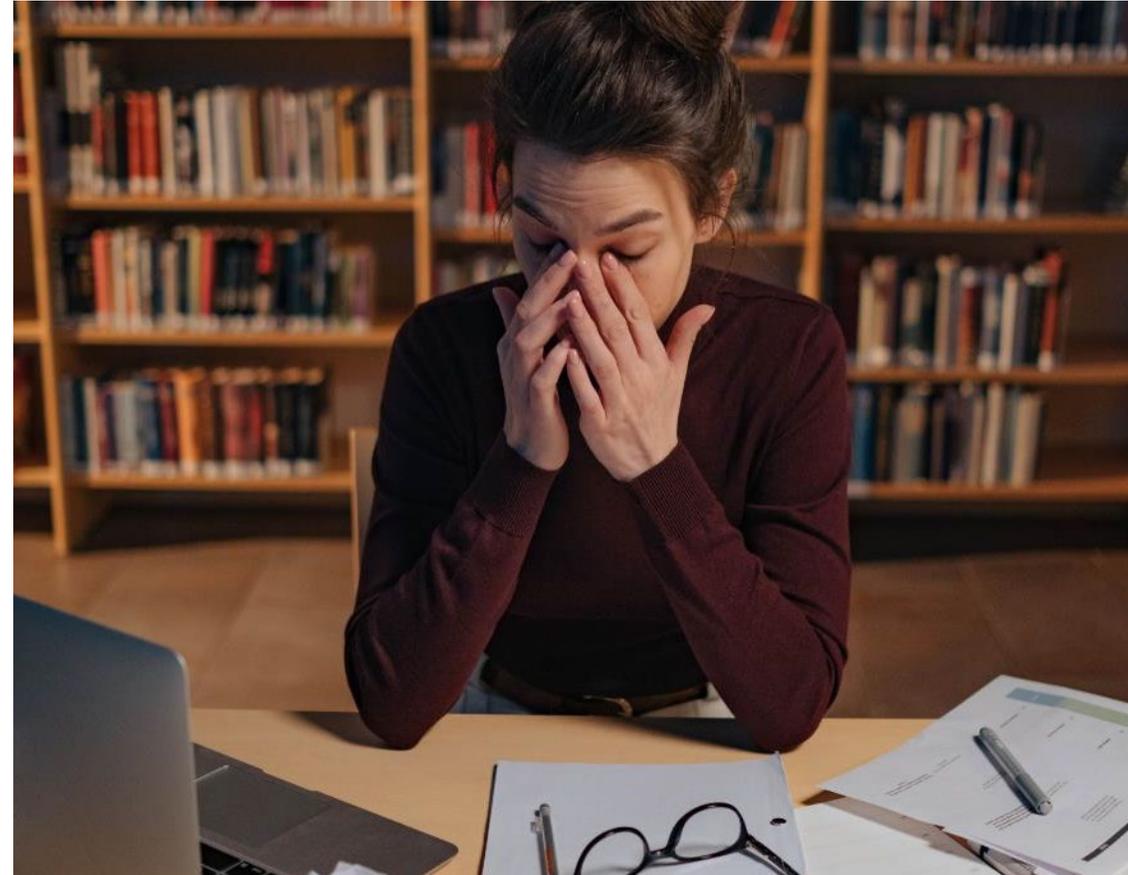
The same as with your interview with the reporter, approach the interview with the accused with an open mind, free of judgment.

- Inform the alleged perpetrator about the claim - be specific
- Allow them an opportunity to respond to the allegations
- Listen and document carefully
- Ask if there are any witnesses or other evidence that supports their version of what happened
- Remind them that the organization does not tolerate any type of retaliation against the person who made the report, or anyone involved in the investigation (e.g., witnesses)

Resolve the Complaint, Part I

This isn't a court of law—you're not required to follow the rules of evidence and you can accept hearsay—but do your best to give everyone a fair shake and to assign the appropriate weight to evidence based on its credibility.

- Hard evidence is best, but often doesn't exist.
- Firsthand experiences are next best, and the more of them that match up, the stronger your evidence in favor of that version of the story.
- Consider employees' credibility when there are differing accounts or conflicting versions.
- Review any documentation of previous employee reports, behavior, or incidents.
- Determine whether a company policy was violated.



Resolve the Complaint, Part II

- Take proportionate action based on the severity of the conduct. The action should also be educational and preventative.
- Let the reporter know that the investigation has concluded, what was determined, and what action was taken (you don't need to disclose the exact details of the disciplinary action).
- Consider offering the reporter access to an Employee Assistance Program (EAP) if available.
- Document your findings, follow up conversations, and disciplinary actions if applicable.



Best Practices to Prevent and Reduce Harassment



Best Practices - Sometimes Also Required by Law!

Harassment Training Required

- California
- Connecticut
- Delaware
- District of Columbia (if employing tipped employees)
- Illinois (and those that interact with IL employees)
- Maine
- New York (and those occasionally in NY)
- Washington (retail, hotel, motel, security, and property services industries but only for certain employees)

Harassment Policy Required

- California
- Connecticut
- District of Columbia (if employing tipped employees)
- Illinois (bar and restaurant industry)
- Maine
- Massachusetts (6+ employees)
- New York State
- Oregon
- Rhode Island (50+ employees)
- Vermont
- Washington

Promising Practices for Preventing Harassment:

An EEOC Technical Assistance Document

The EEOC created a Select Task Force on the Study of Harassment in the Workplace. In 2016, they provided a report that identified **five core principles** that have generally proven effective in preventing and addressing harassment:

- Committed and engaged **leadership**
- Consistent and demonstrated **accountability**
- Strong and comprehensive harassment **policies**
- Trusted and accessible **complaint procedures**
- Regular, interactive **training** tailored to the audience and the organization



Leadership and Accountability

Leaders can demonstrate this commitment by:

- Allocating sufficient **resources** and staff time for effective harassment prevention strategies
- Providing **authority** to individuals responsible for creating, implementing, and managing harassment prevention
- Assessing harassment risk factors and taking steps to **minimize or eliminate risks**
- **Engaging leadership** in harassment prevention and correction efforts
- **Training supervisors** and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, *may rise to the level of prohibited harassment*
- **Acknowledging** employees and managers who create and maintaining a culture where harassment is not tolerated

Don't set it and forget it!

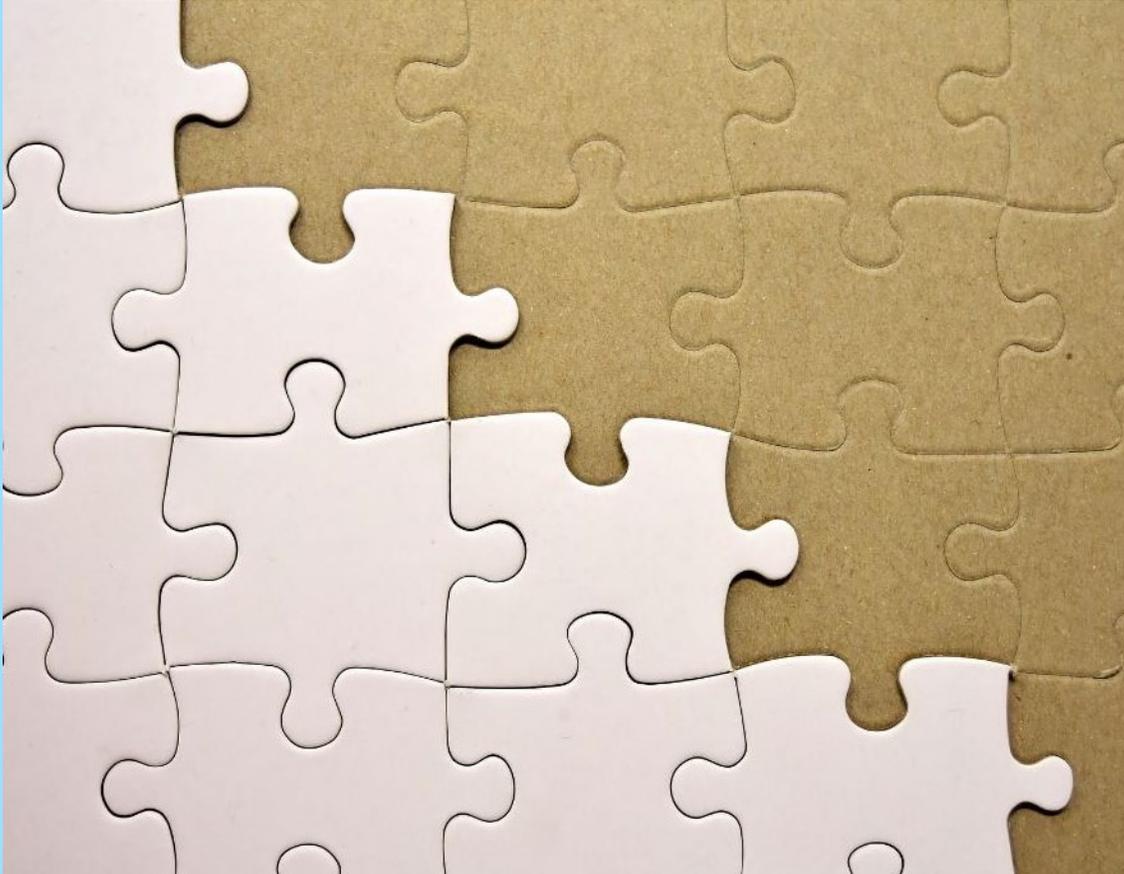
Comprehensive and Effective Harassment Policy:

What it Says

A comprehensive harassment policy includes, for example:

- A statement that the policy applies to all employees, as well as applicants, clients, customers, vendors, etc.
- Examples of prohibited conduct (harassment is not just quid pro quo or physical assault)
- A description of the organization's harassment complaint system and where and how to access it
- A statement that the employer will provide a prompt, impartial, and thorough investigation
- A statement that people and information will be kept confidential to the extent possible
- An assurance that the organization will take immediate and proportionate corrective action
- An unequivocal statement that retaliation is prohibited

Comprehensive and Effective Harassment Policy: Best Practices



- Written and communicated in a clear, easy to understand style and format
- Translated into all languages commonly used by employees
- Provided to employees upon hire and during harassment trainings
- Posted centrally, e.g., on the company's internal website, in the company handbook, and in communal spaces
- Periodically reviewed and updated, re-disseminated to staff, and re-posted in central locations

Effective and Accessible Complaint System: What it Does and Says

An effective harassment complaint system should:

- Be fully **resourced**
- Protect the **privacy** of those involved to the greatest extent possible
- Include processes to identify and **sanction retaliation**
- Provide **due process** to the alleged harasser (hear them out)
- Convey the **resolution** of the complaint to the complainant and the alleged harasser (level of detail will vary)



Effective and Accessible Harassment Complaint System :

The People Accepting Complaints



The employees responsible should, among other things:

- Be well-trained, objective, and neutral
- Have the authority, independence, and resources to receive, investigate, and resolve complaints appropriately
- Take all questions, concerns, and complaints seriously, and respond promptly and appropriately
- Create and maintain an environment in which employees feel comfortable reporting harassment to management
- Understand and maintain confidentiality associated with the complaint process
- Document every step of the complaint, investigation, and resolution



Training: Best Practices

Harassment training is better when it's:

- Championed by senior leaders
- Repeated and reinforced regularly
- Provided to employees at every level and location of the organization
- Provided in a clear, easy to understand style and format
- Tailored to your workplace and workforce

Q + A

