



**Vermont Bar Association
Seminar Materials**

Sexual Harassment in the #MeToo Era

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Sexual Harassment in the #MeToo Era

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Why Now?

- #metoo
- Increased scrutiny on employers
- Changing laws

What is “Harassment”?

- ***Unwelcome conduct*** based on a ***protected classification*** which has the ***purpose or effect*** of impacting the work environment.

- Takes two forms
 - Hostile work environment
 - A spectrum of ***severe and pervasive*** conduct.
 - Microaggressions
 - Quid pro quo

Sexual Harassment

- Harassment that includes **unwelcome** conduct of a **sexual** nature.
- Sexual harassment is about power, not sex.
 - The stereotype is true: women are more frequently the victims; men are more frequently the harassers.
- It is outcome that matters, not intent.

21 V.S.A. § 495h: Sexual Harassment

- All employers **must** have a policy prohibiting sexual harassment and retaliation.

- Employers **must** distribute this Policy.
 - At the time of hire
 - Anytime the policy changes
 - Display a poster

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- Employers **may** conduct regular trainings.

Who is Involved?

- All employers have an obligation to keep sexual harassment out of the workplace.

- This includes:
 - ▣ Employees
 - ▣ Independent Contractors / Service Providers
 - ▣ Vendors
 - ▣ Customers
 - ▣ Third-party Witnesses

Relationship to the Workplace

- Can be off-duty
- Can be off-premises
- Can be on social media
- The test: how does it impact the employee's job?

Sexual Harassment

- Can include:
 - ▣ Verbal statements
 - ▣ Physical conduct
 - ▣ Visual or auditory communications
 - ▣ Electronic communications (email, text messages, etc.)
 - ▣ Off-duty / off-hours conduct

Addressing Harassment in the Workplace

- You have a legal obligation to address this.

- It starts at the top
 - ▣ Train your leadership, but don't stop there.
 - ▣ You must walk the talk

- Have clear policies **and** expectations
 - ▣ With the right culture, you don't "need" policies. With the wrong culture, no policy will ever be enough.

Addressing Harassment in the Workplace

- Watch for stray comments & unconscious biases
- Encourage (but don't require) bystander intervention
 - ▣ Call it out when you see it
 - ▣ Provide tools to facilitate this.
- Leaders must respond to each and every issue
 - ▣ This is a legal requirement, but that is not the only reason you should so it.

Addressing Harassment in the Workplace

- Communicate resources to your employees
 - Explain your expectation
 - When is it “enough”?
 - What is the reporting process?
 - Be clear about what happens next
 - No. More. Manager. Gossip.
 - Be mindful of the message we send to the next employee.
 - There will be nay-sayers.

Workplace Investigations



It Begins: The Complaint or Knowledge

- Take action at the point in time when you **know or should have known** something inappropriate was happening.

- Complaints
 - ▣ Might not always use exact legal terminology
 - ▣ Might be labeled as *not* a complaint
 - ▣ Might not come from the victim
 - ▣ Might be visual and not verbal

Triage: Assess the Urgency

- What is the potential for continuing harm?
- When in doubt, put the alleged aggressor on **paid** leave.
 - ▣ This is not disciplinary
 - ▣ Preserves the validity of the investigation
 - ▣ Document any restrictive instructions (such as to not contact the alleged victim)
- Unless specifically requested, do not alter the working conditions of the reporting employee or alleged victim.

The Importance of Neutrality

- An unbiased investigation is critical.
 - ▣ Contemplate hiring an outside investigator.
- Keep your mind open to the very end.
- Provide support and doubt equally.
- Be mindful of your tone, body language, and facial expressions.

The First Witness: The Alleged Victim

- Allows you to capture the entirety of unwelcome behavior.
 - ▣ Don't make assumptions.
- Be human first.
 - ▣ This is scary for people. Be the source of stability.
- Ask for witnesses, corroborating documents, texts, Facebook messages – anything that will help.
- Explain the next steps.

Possible Next Step: Meet with Witnesses

- Which interview goes next depends on:
 - ▣ Severity of allegations
 - ▣ Anticipated level of factual dispute

- Use your judgment to determine what is most reasonable.

- You generally needn't identify the reporting employee. Stick to the objective allegations.

- Be cautious about confidentiality statements.
 - ▣ “Given the sensitive nature of the allegations, I ask you to use your best discretion in discussing this with others.”

Possible Next Step: Meet with the Alleged Aggressor

- Be mindful of the location.
- You generally needn't identify the reporting employee. Stick to the objective allegations.
- Be cautious about confidentiality statements.
 - “Given the sensitive nature of the allegations, I ask you to use your best discretion in discussing this with others.”
- Be aware of body language, tone, and credibility.

Give it a Minute: Review and Reflect

- It is OK if you need to follow up with employees.
- What additional research would help?
- Do you need a formal report?
 - At the very least, clean up your notes.
- Check your neutrality through the eyes of all parties.

The Scary Part: Make a Determination

- You have to be reasonable, you don't have to be right.
 - ▣ Is it more probable than not?
 - ▣ Are you able to substantiate a violation?

- Ultimately, address the behavior in a way that makes you reasonably confident that it will not repeat again in the future.
 - ▣ Training issue?
 - ▣ Discipline issue?
 - ▣ How have you handled this in the past?

Closing the Loop: Follow-Up

- The alleged victim &/or the reporting employee
 - ▣ Thank them for reporting.
 - ▣ Confirm that the investigation is complete
 - ▣ You don't need to share the exact discipline assigned
 - “We have taken appropriate corrective action.”
 - ▣ Reaffirm your commitment to no retaliation
 - ▣ Any repeated conduct or retaliation should be reported immediately.

Closing the Loop: Follow-Up

- The accused employee
 - Confirm that the investigation is complete
 - Report the substantiated conduct
 - Administer the appropriate discipline
 - At the very least, this is a reminder of the policy & expectations
 - Be very clear about the consequences of retaliation

After the Investigation: Wait & See

- Things may be awkward, but unwelcome behavior should stop immediately.

- If it doesn't...
 - Continued conduct will support far more severe discipline.
 - Retaliation will support far more severe discipline.

- Failure to act firmly in response to continued conduct creates large legal exposure.