A Delicate Balance: Transparency and Confidentiality in Responding to Harassment

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TODAY’S DISCUSSION POINTS

- Workplace Sexual Harassment Allegations Since October 2017

- Balancing Commitments to Transparency and Confidentiality
  - Best Practices

- Resources
  - What to do when you receive an internal sexual harassment complaint?
  - How to conduct a compliant and thorough workplace investigation?
THE SILENCE BREAKERS

- Significant shift in focus on and awareness of sexual harassment in the workplace
  - 100+ public, high-profile sexual harassment accusations made against celebrities, public figures, politicians and corporations
  - #MeToo social media campaign

- In 2017: 70% of Americans describe sexual harassment as a "very serious problem."
  - In 1998: 36% of Americans described sexual harassment as a "very serious problem." (Source: CNN/Time)
THE ISSUE OF SEXUAL HARASSMENT IN THE WORKPLACE IS NOT AN ISSUE THAT IS LIMITED TO PRIVATE EMPLOYER WORKPLACES
SEXUAL HARASSMENT IN THE PUBLIC SECTOR

Conyers allegations: Ex-staffer says congressman 'inappropriately touched' her

90 state lawmakers accused of sexual misconduct since 2017

By The Associated Press  February 2, 2019

G.O.P. Senate Candidate Roy Moore Accused of Sexual Misconduct with Underage Girls

Report: Rep. Trent Franks, who is resigning immediately, offered staffer $5 million to be his baby surrogate

Colorado Rep. Steve Lebsock expelled from state House over sexual harassment

First Colorado lawmaker expelled since 1915
EEOC: FIVE CORE PRINCIPLES & THE ROLE OF TRANSPARENCY AND CONFIDENTIALITY

1. Committed and Engaged Leadership

2. Consistent and Demonstrated Accountability

3. Strong and Comprehensive Harassment Policies

4. Trusted and Accessible Complaint Procedures

5. Regular, Interactive Training Tailored to the Audience and the Organization

Relevant Resources:
EEOC’s Promising Practices for Preventing Harassment
EEOC’s Select Task Force on Harassment June 2016 Report
NLRB’S POSITION ON EMPLOYEES’ PROTECTED RIGHTS

- Employee’s right to concerted activity includes right to engage in discussions of job-related complaints with co-workers.
- Employer can require employee to keep complaint confidential only if it has a “legitimate business justification” that outweighs the employee’s NLRA rights.
- The Business Justification must go beyond “generalized concern with protecting the integrity of the investigation.”
- Individualized determination is necessary.
  - Witnesses will collude or be coerced
  - Evidence will be destroyed
- Banner Estrella Medical Center 358 NLRB 809 (2012)
BALANCING CONFIDENTIALITY AND TRANSPARENCY
EEOC ON CONFIDENTIALITY

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee confidentiality, since it cannot conduct an effective investigation without sharing information to the alleged harasser and potential witnesses. However, information regarding the allegation of harassment should be shared only with those who need to know.

Records relating to harassment complaints should be kept confidential on a need-to-know basis.

A conflict between an employee’s desire for confidentiality and the employer’s desire to investigate may arise if an employee informs a supervisor about alleged harassment and asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. When in doubt, it is reasonable to let the employee determine whether to pursue a complaint, discharge its duty to prevent and correct harassment. One mechanism for addressing such conflicts would be for the employer to set up an informational phone line that employees can use to discuss questions or concerns about harassment on an anonymous basis.
MAINTAINING CONFIDENTIALITY

Do Not:

- Guarantee complete confidentiality
- Guarantee anonymity
- Share all information learned
MAINTAINING CONFIDENTIALITY

Benefits of Confidentiality

- Encourages employees to raise complaints and participate in investigations.
- Protects employees from retaliation, unfounded rumors, and ostracism.
- Protects the integrity of the investigation (ex: preventing witnesses from aligning their stories).
- Protects the integrity of accused; limits claims of defamation, intentional infliction of emotional distress, slander, libel, injury to reputation, ostracism, and chilling effect.
- Others...
Costs of Confidentiality

- May negatively impact the course/effectiveness of the investigation.
- Keeping the outcome of investigations confidential can be perceived as “sweeping problems under the rug” and allowing bad behavior to continue.
- Lack of transparency and accountability can reflect a lack of commitment to combatting harassment and discrimination.
- Others…
MAINTAINING CONFIDENTIALITY

- Safeguarding confidentiality of investigation

- Role of Attorney/Client Privilege and Work Product
  - Outside Counsel Investigator
  - Outside or Inside Counsel as providing legal advice

- Revealing information to conduct an effective interview
  - Who can discuss the investigation in the workplace?
MAINTAINING CONFIDENTIALITY...SCOPE?

- Mandated Confidentiality
- Best Practices
STATE LEGISLATURES TACKLE THE ISSUE IN CERTAIN STATES

- **State Confidentiality Obligations**
  - **New York**
    - *New uniform policy addressing harassment at all levels of government bars secrecy, requiring government officials found liable for harassment to pay their own costs.*
  - **Tennessee**
    - *A law that prohibits employers from requiring employees and job applicants to sign confidentiality agreements about sexual harassment as a condition of employment.*
  - **Illinois**
    - *Illinois General Assembly created a sexual harassment hotline for anonymous reporting of harassment in any place of employment, public or private.*
MAINTAINING CONFIDENTIALITY – BEST PRACTICES

- Communications with Complainant
  - Should you share results of investigation and outcome?

- Communications with Accused
  - Do they have a right to know who complained, what they said, or what other witnesses said? Can they read the report or interview notes?

- Communications with Interviewees
  - What if a witness requests confidentiality? “I’ll tell you what happened, but please don’t include my name or tell anyone what I share.”
  - Are there circumstances where you’d provide the name of the accused, and if so, how?
  - Are there circumstances where you’d provide the name of the complainant, and if so, how?
MAJOR MISTAKES TO AVOID

DO NOT:

- Do not search the accused’s desk, papers, emails, voice mails, locker, etc. without consulting with counsel first
- Do not secretly tape record interviews, telephone calls or intercept emails
- Do not try to use polygraph testing in any investigation without consulting with counsel first
- Do not try to keep interviewees at an interview site against their will
TYPES OF INTERVIEWS

- In-person vs. telephone
- Majority of investigators demonstrate a preference towards *in-person* interviews
- Tendency to rely upon demeanor and body language
- Studies show, however, that demeanor and visual cues may be highly misleading
- Pros and cons
As an impartial fact-finder, the investigator’s role is to gather information from witnesses in an objective and neutral manner.

The goal is not to try to “catch them in a lie.”

Consider the PEACE method.
QUESTIONING

- **PEACE method**
  - Studies confirm its effectiveness to obtain the most accurate information.
  - The witness is asked to tell their story, without interruption.
  - Active listening
  - Follow up with probing questions

“People think it's soft and sort of touchy-feely, but it’s not. It’s very serious. It requires that people do their research and know their case very well.”
PEACE METHOD

- Planning and Preparation
- Engage and Explain
- Account
- Closure
- Evaluation
DEMONSTRATING TRANSPARENCY

- Mandated Transparency
- Best Practices
STATE LEGISLATURES TACKLE THE ISSUE IN CERTAIN STATES

- **State Transparency Obligations**
  - **Louisiana**
    - Requires agencies to compile annual reports documenting the number of employees who have completed training requirements, number of sexual harassment complaints filed in the last year, and details about spending associated with settlements and training.
  - **Washington**
    - Records related to investigation of sexual harassment will be released publicly if investigation and appeal is completed if case is deemed “in the public interest” involving a senator.
  - **Maryland**
    - Requires employers to electronically submit information to the Commission on settlements regarding sexual harassment settlements.
DEMONSTRATING TRANSPARENCY – BEST PRACTICES

- Transparency to the complainant about the results
- Transparency to the accused
- Transparency to others in the workplace
- Transparency to the public
DEMONSTRATING TRANSPARENCY

- Publish and share clearly written policies around bias and harassment and make consequences for violation clear
- Accountability and commitment to preventing and addressing harassment
- Reputation and public relations
- Public reporting on sexual harassment instances
- Mandatory arbitration
- Encouraging reporting
- Keep and publish metrics on gender diversity, women's leadership, pay disparities, and harassment claims
- Training
BACKGROUND BEST PRACTICE EXAMPLES
YOUR LEGAL DUTY TO INVESTIGATE

- When a sexual harassment complaint is made:
  - Regardless if complainant wants the matter investigated or not
  - Even if it appears to be fabricated by complainant
- When no complaint is made, yet employer is aware of, or suspects, inappropriate conduct
- When management becomes aware of inappropriate conduct
- Telling alleged wrongdoer to “stay away” from complainant is insufficient for an investigation
INVESTIGATION OBLIGATION

- To conduct a fair investigation in circumstances that require it
- To do so in a timely manner
- Ensure the investigation is conducted in an impartial manner
- The findings should be rational and explained in a logical written report
OBJECTIVE OF INVESTIGATING

- Without interviews, there is no investigation
- The goal of every interview is to obtain the best information possible
  - Maximize the comfort of the party/witness being interviewed
CHECKLIST

- Identify the need for investigation – policy/legislation violation
- Assess the goals of the investigation
- Assess the potential pitfalls of the investigation
- Select the appropriate investigator
- Address privilege issues early
- Partner with counsel where appropriate
- Identify who will make decision re: proper remedial action of policy violation
- If interviewing a union member, make sure to arrange for representation of requests
CHECKLIST

- Identify documents to be reviewed
- Identify potential interviewees and their relationships to the matter under investigation, prepare an outline of questions, decide the order of interviews
- Determine the format for recording information from witnesses
- Review policies that may be implicated/violated
- Determine whether some immediate remedial measures need to be implemented at the inception of the investigation
- Determine whether investigative record will be discoverable should litigation be initiated
- Determine whether to implement safeguards to preserve potential relevant evidence
POTENTIAL PITFALLS OF AN INVESTIGATION

- **Inaction**: Ignoring the complaint
- **Delay**: Failing to investigate promptly
- **Faulty record-keeping**: Creating inadequate or sloppy records
- **Poor investigative techniques**: Failing to investigate thoroughly
- **Potential for retaliation**: Failing to prevent adverse personnel actions against employees who make complaints

- **Ignoring the evidence of misconduct by doing coming to an incorrect conclusion**
- **Lack of confidentiality in the investigation process**
- **Failing to diffuse a problem as it grows due to not appropriate remediation**
- **Lack of follow up**: Failure to disclose with complainant and witnesses, and decisions
CONSEQUENCES OF INVESTIGATION PITFALLS

- Inadvertent or incorrect admission by corporation of wrongdoing
- Internal divisiveness
- Disruption of business operations
- Adverse publicity
- Retaliation issues
- Defamation, privacy and/or infliction of emotional distress issues
- Fail to verify a meritorious claim
- Fail to identify false charges
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 trust of employees and upper management
- Adept at interviewing
- Able to interview witnesses and witnesses of emotions
- Is a credible and effective advocate for litigation result
- Does not judge the accuser
USING OUTSIDE INVESTIGATORS

When to use:
- When high-level executive or official 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 serious response and commitment
- To avoid difficult privilege issues
PREPARGATION FOR INTERVIEWS

- Identify documents to be reviewed with witnesses
- Identify potential interviewees and their relationship to the main investigation
- Decide the order of and appropriate location for the interviews
- Determine the format for recording witnesses comments & with a neutral witness present to record interview
- Prepare an outline that includes opening remarks and “must...
IDENTIFY DOCUMENTS TO BE REVIEWED

- Notes regarding complaint
- Organization rules, policies, procedures, and instructions
  - Employee handbooks or sexual harassment policies
  - Grievance procedures or progressive discipline policies
- Managers’ notes and files
- Prior investigation files
- Personnel files of those involved
- Memoranda or notes about the incident(s)

- Physical evidence
- Records of prior complaints
- Records of prior complaints of the alleged perpetrator
- Statements obtained
- Relevant business records
  - Emails, time cards, tape recordings, phone messages
IDENTIFY POTENTIAL INTERVIEWEES

- Selection of witnesses should be based on relevance
- Individuals whom observed firsthand any of the incidents being investigated
- Individuals that are deemed to have relevant information to the investigation (i.e., parties confided in them)
- Be prepared to justify why a witness was not interviewed (i.e., employee)
COMMUNICATION TO PARTIES

- Communication to parties (complainant and respondent) will include communication to witnesses.
- Consider whether by phone or e-mail.
- Include caution at outset to maintain strict confidentiality, speaking to anyone, even about the fact that an investigation is underway.
- Participation is an expectation, not an option.
Two critical issues in every investigation:

1. Confidentiality

2. Reprisal/retaliation

Parties and witnesses need to be advised both at the outset interview of these issues

- Breaches of confidentiality subject to disciplinary action
- Reprisal is strictly prohibited by policy and law
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 or interview
- Check spelling and grammar, discrediting of interview or litigation
- Indicate notes are complete
- Determine whether it is necessary anything to add
- Document reason(s) for any efforts to address
NOTE TAKING: “DO NOT”

- Do not include your own interpretations, beliefs, assumptions, or conclusions
- If you note things during an interview that may impact a credibility determination, record observations in a separate document
- “Joe Friday” method – “Just the facts…”
- Not an open-ended fishing expedition
Thank You

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