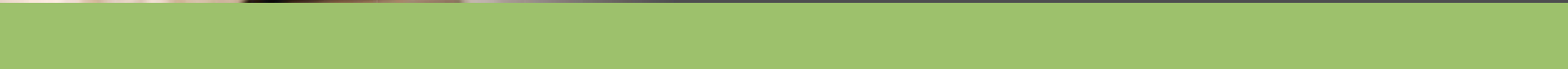




# Protecting Your Organization Against Discrimination & Harassment

The effects of discrimination and harassment, how to properly handle issues when they arise, and awareness and training for proactive prevention.



# Protecting Your Organization Against Discrimination & Harassment

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**How does an organization begin to recognize, prevent, resolve and mitigate discrimination and harassment allegations or claims? How do you protect against retaliation in these matters? How do you train your workforce to know discrimination and harassment when they see it and take necessary action to prevent it in the first place?**

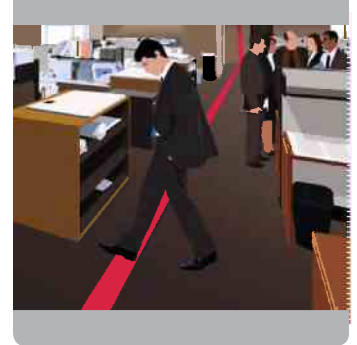
Acts of discrimination and harassment cost companies millions of dollars. And that cost goes beyond monetary losses; damage to brand identity and reputation, negative employee morale, difficulty retaining top employees and loss of goodwill within the industry can also result. For organizations of any size, combating discrimination and harassment is incredibly important but not necessarily easy.

The inherent ambiguity and various points of view present in these situations makes it difficult to manage, as what may seem an innocent gesture or comment to one employee may be interpreted as offensive to another. A common phrase or action embraced by one sector of your employee base may be unknown and therefore unfriendly to another. Small differences can cause significant reactions.

## Negative Consequences

The negative consequences of discrimination and harassment are destructive financially but also disrupt employee morale, degrade brand/corporate image and damage overall goodwill. A single discrimination charge or lawsuit can significantly impact an organization's productivity to the point of failure.

Ironically, discrimination doesn't discriminate. Organizations of all sizes, in all industries and with all kinds of workforces, are not immune and must work diligently to protect themselves. According to a *2011 Annual Workplace Class Action Litigation Report*<sup>1</sup>, the monetary value of settlements of the top 10 private plaintiff employment discrimination class-action lawsuits paid or entered into in 2010 totaled \$364.7 million – more than four times the amount in 2009 (\$84.4 million). The 2012 version of the same report<sup>2</sup> finds that in 2011, there were several major class action rulings by the U.S. Supreme Court and that more lawsuits seem likely based on the current economic climate. Collective action litigation is continuing to be a source of significant financial exposure for employers, and the Supreme Court's rulings will impact litigants for many years to come. Another interesting stat: according to recent U.S. Equal Employment Opportunity Commission (EEOC) statistics<sup>3</sup>, the most prevalent types of discrimination charges are racism and sexism, which are often considered (erroneously so) by the mainstream to be less-serious offenses.



## Significant EEOC Settlements and Jury Verdicts

There were a sizeable number of multi-million dollar settlements and some noteworthy jury verdicts involving the EEOC in 2011. According to the EEOC, in FY 2011 a total of 277 merits suits were resolved resulting in \$90.9 million in monetary recovery. Broken down by types of discrimination charges, Title VII claims were involved in 215 resolutions; ADA claims in 42; ADEA claims in 26; and EPA claims in two resolutions.

With respect to monetary recovery for direct, indirect and intervention lawsuits by statute, the EEOC secured \$54.3 million in Title VII resolutions; \$27.1 million in ADA resolutions; \$8.4 million in ADEA resolutions; and \$1.1 million in resolutions involving more than one statute.<sup>4</sup>

The headlines concerning companies caught in the crux of harassment and retaliation suits will continue to appear on a regular basis. But organizations have the weighty responsibility to protect their employees, which starts with preparing your workforce to deal with these situations. There are five keys to protecting your workforce and your organization:

1. Clearly defining potential incidents and establishing a baseline
2. Implementing a comprehensive education and training program
3. Establishing a thorough internal complaint procedure for reporting allegations
4. Creating a plan to protect involved parties from retaliation
5. Developing guidelines for immediate investigations and corrective actions

Executing in these five key areas supports an organization's strong approach to establishing a discrimination and harassment-free workplace environment. In the event of a complaint, the execution of these elements will help an organization to limit damage and rebound quickly.

## Establishing a Clear Foundation

The first step is establishing for your employee base what behavior is and is not acceptable, and the best place to do that is in your written Code of Conduct. Your Code should contain a non-harassment policy and step-by-step instructions on what to do if an employee learns of violations to that policy. You must acknowledge that as human beings, we all see the world differently, which means discrimination and harassment can be tricky. Rarely will allegations fall squarely into a "safe" or "red alert" category, but they will often be in a gray area. Employees, be they managers, subordinates or executives, can accidentally offend someone purely because of a lack of knowledge or sensitivity. Employees should be educated as to what constitutes discrimination and/or harassment and how to appropriately respond to these situations should they arise in the workplace environment.

Your employees spend more than one-third of their day and half their waking hours working for your organization. A close-knit group of employees shares more than just business problems and solutions. They become familiar with one another's personal lives and in many cases develop a family-like relationship. While this can be beneficial for the overall productivity of a company, it can also inadvertently lead to discrimination or harassment situations, because it can be difficult to see when a line is being crossed.

Another challenge is that your physical workplace environment may be informal or include areas like cafeterias, break rooms and other areas that lead to a relaxed environment, which can lead to relaxed standards. It's critical that you establish a culture that is in keeping with the company's values and morals so that the integrity of the company is not compromised and inappropriate behavior is not tolerated under any circumstances.

The U.S. Equal Employment Opportunity Commission enforces Federal laws prohibiting employment discrimination. These laws protect employees and job applicants against employment discrimination when it involves:

Unfair treatment because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

Harassment by managers, co-workers, or others in the workplace, because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

Denial of a reasonable workplace accommodation that the employee needs because of religious beliefs or disability.

Retaliation because the employee complained about job discrimination, or assisted with a job discrimination investigation or lawsuit.

– [www.eeoc.gov](http://www.eeoc.gov)

## Education and Training

Once you establish your policy, you must train your employees to understand and abide by it. Strong training programs contain a glossary and specific examples that define the relevant terminology, such as:

- **Disparate Treatment**, which is defined as treating people in a protected group differently from other people not in a protected group who are similarly situated. Under the law, it requires proof of discriminatory motive or intent. An example of disparate treatment is the unequal or inconsistent enforcement of work rules.
- **Disparate Impact**, defined as treating people the same if the effect is to disadvantage a protected group. Unlike Disparate Treatment, it does not require proof of intent to discriminate. An example of disparate impact is paper-and-pencil tests as part of hiring/interview practices or height and weight requirements.

A comprehensive education program should include learning assessments, skill-building activities, hypothetical scenarios and discussion questions.

A training program should not be viewed as a “once and done” exercise. New hires should be trained immediately and the entire organization should be trained at least annually. Furthermore, as employees grow with your organization and get promoted from individual contributors to managers, their discrimination and harassment training should to expand and change accordingly.

Organizations should offer a variety of training methods, including in-person, classroom discussions and interactive online training. In addition to the training, organizations should also distribute periodic reminders to its employees of the non-harassment policy and reinforce the organization’s strict adherence to the policy in its entirety.

Web-based training (commonly referred to as “e-learning”) has become popular because it offers many benefits, including mobility and cost-effectiveness. E-learning courses today can include scenarios that allow for participant feedback and can highlight and define terminology. While many organizations use traditional video-based training with live characters, organizations are seeing greater benefits in animated training because it is more interesting and employs “gamification” techniques and social media metaphors, making it very relevant for tech-savvy or millennial workers.

When it comes to something as critical as discrimination and harassment training, it’s imperative to remember this important tenet: don’t bore your employees. Instead, engage them with interactive exercises so they retain and apply this important content, and train them often. As times change, so does the working environment and related demographics. It is important that whichever mode of training you choose, the material presented should be in keeping with the most current state and federal mandates.



### Comprehensive Employee Education

Discrimination and harassment training should cover the various facets of these issues and give employees and supervisors the information they need to recognize and prevent discrimination and harassment in the workplace, while emphasizing the personal responsibility to watch for and report misconduct before harm is done.

Managers should be specially trained on how to appropriately handle complaints of discrimination, as these employees serve as role models for the organization. They should be held accountable for reporting and effectively addressing incidents of misconduct and must take immediate and appropriate corrective action when faced with these situations. Remember that in a court of law, the facts that make up a lawsuit do not impact a jury nearly as much as the manner in which the company reacted to it.

## Internal Incident Reporting Options

It's absolutely crucial that your employees are aware of the organization's reporting options should they become a victim or witness any type of discrimination or harassment in the workplace. There should be several options offered to employees for reporting these alleged incidences, including an anonymous 24/7/365 employee complaint hotline, if possible. Be sure they are aware of the toll-free number to your hotline, how to report an incident anonymously (if preferred) via a webform, and also how to contact the appropriate HR representative if they prefer an in-person meeting.

In addition, having solid reporting options in place shows your employees you are trustworthy and committed when it comes to protecting them against discrimination and harassment policies. Effective incident reporting programs, where thorough information is gathered confidentially, provides for effective escalation, investigation and follow-up. Then, once an allegation has been brought to the attention of management, the company must be able to effectively and efficiently manage an investigation to conclusion and remediation if necessary, as will be discussed in a later section.

Clearly, the organization should take all allegations of discrimination and harassment seriously, and no allegation should ever be ignored. Failure to effectively address incidents of misconduct, and to take immediate and appropriate investigation and corrective action, places the organization at an even greater risk for damage and litigation.

## Protection from Retaliation

Employees are often afraid to come forward or "blow the whistle" for fear of retaliation. Many employees are even more hesitant if they themselves are victims of discrimination or harassment. In these cases, it is often difficult to remain anonymous, thus creating greater exposure than reporting a corporate malfeasance under anonymity.

Retaliation is a very serious issue and is prohibited under Title VII of the Civil Rights Act of 1964. It is critical to train your employees as to what specific behaviors would constitute retaliation under the law. Managers should also be trained as to ways in which to avoid taking retaliatory measures once a complaint or charge of discrimination has been filed. Many people recognize overt forms of retaliation (e.g. termination), but there are more subtle forms as well, such as isolating the person or reducing his or her work-related

### Title VII of the Civil Rights Act of 1964

Title VII makes it illegal to discriminate against someone on the basis of race, color, religion, national origin or sex.

Title VII also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business.



responsibilities. Retaliation makes bad situations worse but can be avoided with the right combination of policies, procedures and proper training.

According to the *2012 National Business Ethics Survey* (Ethics Resource Center)<sup>5</sup>, retaliation against employee whistleblowers has sharply risen. In 2011, 22 percent of employees who reported misconduct say they experienced some form of retaliation in return. That compares to 12 percent who experienced retaliation in 2007 and 15 percent in 2009. The *Little Mendelson Whistleblower Survey*<sup>6</sup> found that organizations are increasingly concerned about the potential impact of whistleblower claims on their organizations; however, the level of concern has not fully peaked as companies are still adapting to the new regulatory environment created by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. In fact, the same survey reports that 73 percent of respondents identified whistleblowing and retaliation as emerging risk areas, and 96 percent are either very concerned or moderately concerned about potential whistleblower claims.<sup>7</sup>

Again, it is paramount that organizations avoid taking any adverse action against an employee or complainant and that the entire workforce understands that retaliation is not tolerated.

## Immediate Investigations and Corrective Actions

While just the suggestion of discrimination and harassment happening in your organization can cause brand damage and media scrutiny, you can either help or hurt your organization by how you handle it and the preventive actions taken to lessen the risk of occurrences in the future. Quickly identifying key individuals, determining disciplinary actions, and initiating additional training or other corrective actions can lessen the impact.

If an allegation is made, organizations must take immediate steps to rectify the situation, which starts with establishing and following guidelines for proper and thorough investigations. Once the details of the allegation(s) have been determined, an immediate investigation should be launched. No incident should be considered too small or irrelevant to warrant an investigation. Of course, some matters may not need additional action; for instance, if the incident or allegation is false or misleading. Organizations must quickly and efficiently identify the nature of the incident and move to the investigation phase, which means determining if the matter requires that it be taken to a third-party consultant or handled by in-house investigators. Then, information gathered from the investigation must be analyzed and reports distributed to all pertinent parties.

Keep in mind that the process of conducting a thorough workplace investigation is often complex and intense. Managers may be tempted to avoid addressing certain situations when they occur for a variety of reasons, including the loss of valuable time and the extensive research that is often involved in effectively conducting an investigation. Some are simply unfamiliar and/or uncomfortable with the investigative process. Those managers who are inexperienced in the process may be wary of initiating an investigation around something

very personal and complex and will need the full support of your organization to do so. This is where education and training are paramount. Of course, there may be some situations where it may be best to hire an outside professional consultant to conduct the investigation. Whatever the reason, the failure of management personnel to effectively address incidents of misconduct and take immediate and appropriate corrective action places the organization at an even greater risk for litigation.

Regardless of which road you decide to take, it is recommended that you put an investigations workflow in place for your discrimination and harassment investigations, so your organization can be assured that the appropriate outcome is reached.

In addition, taking the proper steps during an investigation builds workforce confidence in the organization's anti-discrimination / anti-harassment policies and helps to establish a solid set of procedures that outline exactly what employees should expect of an investigation. The proper investigation process will also have a direct impact on how the matter is remediated or resolved.

This reiterates the philosophy that a comprehensive training program and targeted communications can raise employee awareness on the basics of discrimination and harassment, including the do's and don'ts of creating a respectful workplace and the legal implications of violating the law.

## Summary

Almost every organization faces the all too common and misunderstood workplace foe at one time or another: discrimination and harassment. Because these issues can account for huge losses in terms of turnover and productivity, employee morale, litigation and penalties, even corporate reputation, organizations must work to protect themselves from these issues, and awareness and training are keys. When organizations present these issues to their employees, explaining the issues as well as the risks, they stand a better than even chance of avoiding undue litigation and penalties.

## Best Practice Investigation Steps:

Once an allegation/complaint of discrimination and/or harassment has been lodged, it is incumbent upon the employer to conduct an investigation into the allegations. There are five basic steps to responding appropriately to an EEO investigation:

### **Step One: Launch an immediate investigation.**

This step demonstrates the employer's good faith efforts to resolve the issue. Since every investigation is different, an employer must be able to accurately determine what type of investigation is needed in order to achieve a successful outcome.

### **Step Two: Determine whether an internal investigation or an external investigation is needed.**

Your organization must perform an honest assessment as to whether your organization has adequately trained its investigators. Errors in determining how to go about conducting the investigation can result in increased costs, adverse publicity and the creation of evidence that could be used against the company in court.

### **Step Three: Decide who will conduct the investigation.**

The interviewer must possess the expertise to delve into the core of the allegation through effective questioning. The interviewer must also be well versed in using summarization techniques and immediately address any fear of retaliation.

### **Step Four: Evaluate the investigative information.**

The interviewer must complete three things. First, determine the actual facts of the case; second, evaluate the credibility of witnesses; and third, provide a thorough analysis of the information provided.

### **Step Five: Report the findings of the investigation.**

If there is legal risk, share the findings with legal counsel and limit its circulation. The employer should advise the person making the complaint (along with any other individuals who are directly involved in the investigation) as to the outcome of the investigation as well as any corrective action to be taken by the employer.

Simply put – it’s all about educating and engaging all of your employees to be a part of the solution rather than a part of the problem. Once that has been accomplished, you have effectively “armed” your organization with the tools and techniques to maintain the highest possible level of respect in the workplace while mitigating the risks posed by discrimination.

The solution to combating discrimination and harassment charges isn’t easy, but when tackled by your organization in a comprehensive manner – from a strong baseline harassment policy to proper training and the adoption of good practices by leadership – situations can be avoided. And if they do occur, incidents can be properly managed to minimize damages.

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#### REFERENCES:

<sup>1</sup> *Annual Workplace Class Action Litigation Report: 2011 Edition*, Seyfarth Shaw LLP

<sup>2</sup> *Ibid*

<sup>3</sup> The U.S. Equal Employment Opportunity Commission (EEOC) , <http://www.eeoc.gov>

<sup>4</sup> *Annual Report on EEOC Developments: Fiscal Year 2011*, Littler Mendelson, P.C., January 2012

<sup>5</sup> *2012 National Business Ethics Survey*, Ethics Resource Center

<sup>6</sup> *Littler Mendelson Whistleblower Survey*, November 2011

<sup>7</sup> *Ibid*



## ABOUT THE NETWORK

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