

# TRENDING EMPLOYMENT LAW ISSUES: Sexual Harassment in the Workplace

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Lesley M. Muchow  
NAR Deputy General Counsel and Vice President of  
Legal Affairs and Antitrust Compliance



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# The Law



## Title VII of the Civil Rights Act of 1964

### Covered Employers

15 or more employees

## State and Local Employment Discrimination Laws

### Covered Employers

1 or more employees\*

*\* Varies by jurisdiction, please check applicable state and local laws.*

# Sexual Harassment by the Numbers

According to EEOC charge data from FY 2018 – FY 2021

**78.2%**

of sexual harassment charges filed by women.

**43.5%**

included a retaliation charge.

**\$300 M**

recovered for individuals with sexual harassment claims.

Source: *Sexual Harassment in Our Nation's Workplaces*. Office of Enterprise Data and Analytics (OEDA) Data Highlight No. 2. U.S. Equal Employment Opportunity Commission (EEOC), Washington, DC, April 2022.

# Sexual Harassment

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- Form of discrimination
- Unwelcome verbal or physical behavior, such as sexual jokes, innuendos, unwelcome sexual advances, and other verbal or physical harassment of a sexual nature.



## ***Hostile Work Environment***

*“The air at work is full of sexual references and it is impacting me.”*

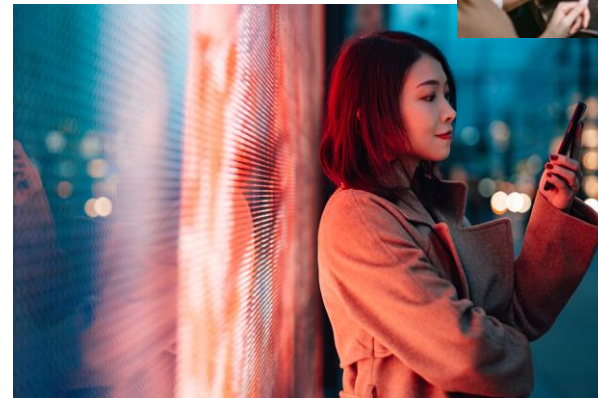


## ***Quid Pro Quo***

*“You do something for me, and I’ll do something for you.”*

# Where Can It Occur?

- ✓ In the office
- ✓ At meetings and events
- ✓ Social gatherings
- ✓ Online



# Employer Responsibilities

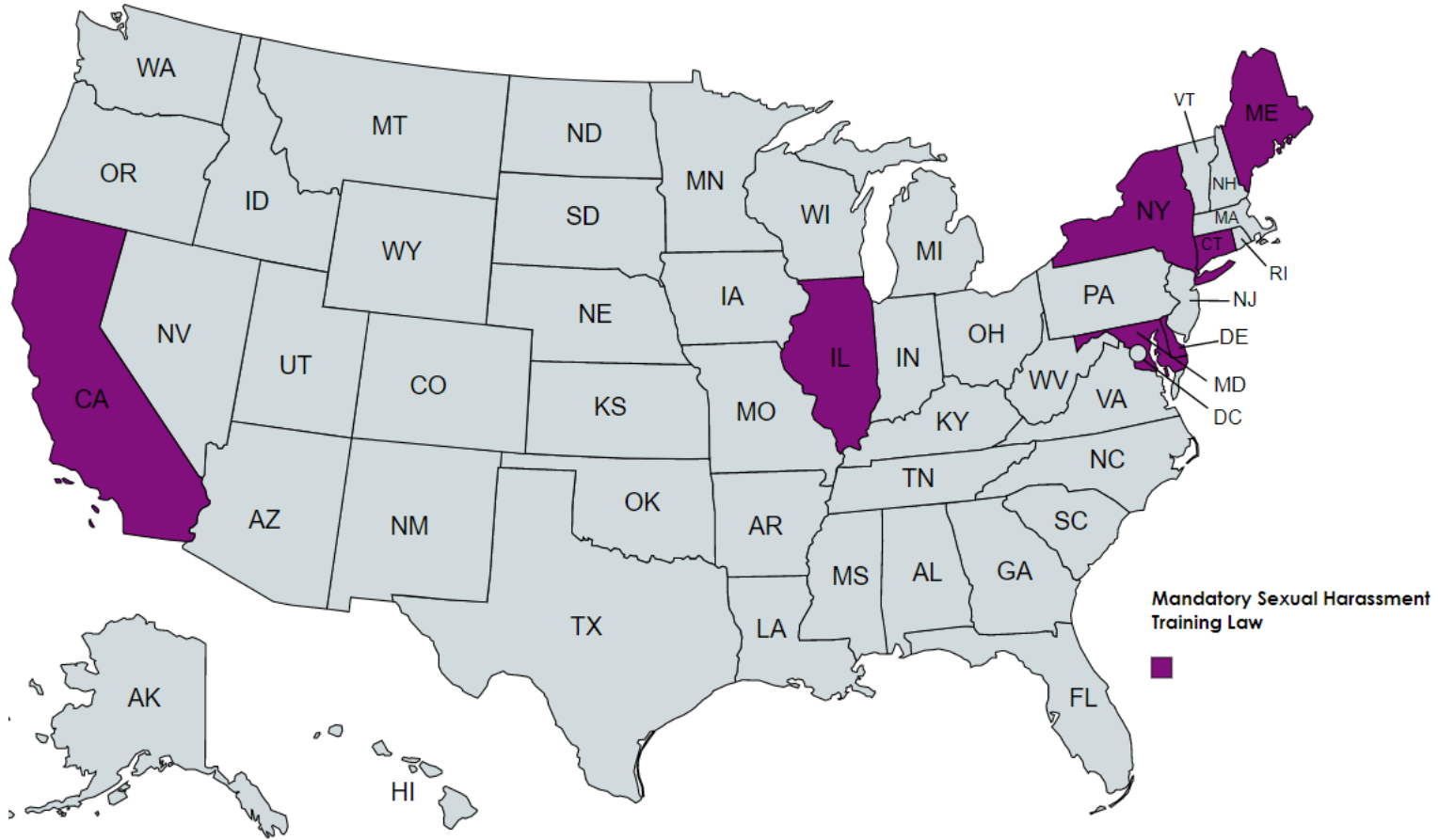
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- Maintain environment free from harassment and discrimination
- Implement an anti-discrimination policy
- Promptly investigate all claims of harassment
- Protect workers from additional harassment
- Protect workers from retaliation for making complaints
- Conduct regular employee training

# Antidiscrimination Policy

- Statement against discrimination, including a specific policy against sexual (and other forms of) harassment.
- Include non-exhaustive list of examples of sexual harassment
- Method for reporting violations of the policy
- Anti-retaliation policy
- Investigation process for complaints
- Consequences for policy violations
- Training requirements for staff

# Anti-Harassment Training







## What is Bystander Intervention in Sexual Harassment?

**Bystander intervention** involves safe and positive actions that may be carried out by a person, or a group of people to **prevent harm or intervene** where there is a risk or perceived risk of sexual harassment to another.

# Bystander Intervention Includes:



**1**

Recognizing situations of potential sexual harassment

**2**

Understanding institutional structures and cultural conditions that facilitate sexual harassment

**3**

Overcoming barriers to intervening, identifying safe and effective intervention options

**4**

Taking action to intervene

# Investigation Best Practices

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- When: Affirmative duty to promptly investigate all complaints that the employer reasonably knew or should have known about
- Who: Experienced human resource professional or attorney
- How:
  - Maintain confidentiality to the extent possible
  - Interview the complainant and the alleged harasser
  - Interview anyone with knowledge of the facts surrounding the complaint
  - Gather information to help either substantiate or negate the complaint, such as emails, text messages, social media posts.
- Conclude:
  - Written report documenting the investigation and conclusions
  - Take appropriate remedial action
  - Check in with complainant periodically

# Employer Liability

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- Liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.
- Vicariously liable for supervisors' actions
  - Always liable when hostile work environment results in tangible employment action, such as hiring, firing, failure to promote, reassignment of significant duties
  - Presumed liable for supervisor's harassment in hostile work environment when no tangible employment action
    - Affirmative defenses available

# Employer Affirmative Defense

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- ✓ Employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.
- ✓ Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise.

# Real Life Example

- Female employee sued former employer, alleging workplace sexual harassment by her former supervisor in violation of Title VII.
- Employer maintained and distributed an anti-harassment policy, which the court found to be “compelling proof” that employer exercised reasonable care in preventing and promptly correcting sexually harassing behavior.
- While the employee told coworkers and the CEO’s son, there was no evidence that those conversations were reported to management and employee failed to avail herself of the available complaint procedures by never telling management herself.
- Employer discovered behavior during an independent and separate investigation and supervisor terminated within a week of discovering and confirming the behavior.
- Takeaways:
  - ✓ Maintain and distribute an anti-harassment policy
  - ✓ Promptly investigate complaints.
  - ✓ Take appropriate remedial measures.

See *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001)

# How to Protect Against Sexual Harassment Claims:

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 **Maintain and Publicize Policy**

 **Conduct Regular Training**

 **Promptly Investigate**

 **Take Prompt Corrective Action**

 **Document and Maintain Records**

 **Maintain Member Policies**

# Member Policies



## NAR Member Code of Conduct


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This NAR Member Code of Conduct applies to all (1) NAR-related activities, meetings, and events, whether held in public or private facilities (including those sponsored by organizations other than NAR and held in conjunction with NAR activities, meetings, or events), and (2) NAR member communications, whether written or verbal, related to NAR business or with NAR staff.

In the following video, NAR General Counsel and Chief Member Experience Officer Katie Johnson reviews the NAR Member Code of Conduct, which applies to all NAR-related activities, meetings, events, and communications.

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**NAR CODE OF CONDUCT AND ANTI-HARASSMENT POLICY**

**NAR Commitment:**

NAR is committed to providing a productive and welcoming environment that is free from discrimination, harassment, and retaliation. Members are expected to act with courtesy and mutual respect toward each other, NAR staff, service providers, speakers, and event participants and to comply with the Member

## Statement of Appropriate Event Conduct

The National Association of REALTORS® (NAR) is committed to providing a positive and rewarding experience for everyone associated with an NAR event. In addition to NAR members' adherence to the NAR Member Code of Conduct, all attendees agree to abide by this Statement of Appropriate Event Conduct by virtue of their attendance at an NAR event.

All attendees (including without limitation NAR members, guests, speakers, exhibitors and vendors) are expected to conduct themselves professionally, to use good judgment and be respectful at all times while present at an NAR event. This includes an attendee's conduct while physically present at an NAR event, as well as an attendee's conduct on any virtual platform associated an NAR event.

NAR does not tolerate any inappropriate behavior, including harassment or discrimination in any form. Examples of inappropriate behavior include, but are not limited to, harassing or defamatory verbal or written comments, display or use of graphic images or language, destruction of property, threats, intimidation, unwanted physical contact, unwanted sexual conduct whether physical or verbal or non-verbal, and any conduct, statements or images that denigrates or shows hostility toward an individual or group based on a protected characteristic.

Any attendee should immediately report any behavior they believe in good-faith violates this Statement of Appropriate Event Conduct to Lesley Muchow, NAR Deputy General Counsel or Heidi Henning, NAR Vice President, Meetings and Events. Please include as much detail as possible, such as the date, time, location and a description of the incident being reported. Any attendee who believes they are in immediate danger should report the incident directly to the police via 911.

NAR reserves the right to take any necessary and appropriate action against any attendee who violates this Statement of Appropriate Event Conduct, including, but not limited to, immediate removal from the event, prohibition from attendance at future NAR events, removal from a committee appointment, and expulsion from membership.

We value your attendance and thank you for your cooperation and commitment to ensuring a positive event experience for all.



# THANK YOU.

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NARdotRealtor



nar.realtor

[lmuchow@nar.realtor](mailto:lmuchow@nar.realtor)

312.329.8834

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