

# **Sexual Harassment: Understanding #MeToo, #TimesUp, and Workplace Legal Compliance**



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## **Sexual Harassment: Understanding #MeToo, #TimesUp, and Workplace Legal Compliance**

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VOGEL LAW FIRM – KrisAnn Norby-Jahner, Attorney at Law

### **INTRODUCTION**

The #MeToo movement and the continuation of it, #TimesUp, have been associated with a nationwide flurry of sexual harassment allegations and scandal. These movements seek to address inequalities in the workplace (and elsewhere), specifically as they relate to sexual harassment and other gender-related discriminatory practices. The unlawfulness of sexual harassment is not a new concept, but it is critical as an employer in 2018 that you understand (1) the law behind the #MeToo and #TimesUp movements; (2) the complaint process that an employee may initiate; (3) an employer's obligation when receiving a complaint or observing unlawful conduct; (4) how to conduct a workplace investigation; and (5) that preventing sexual harassment in the workplace is key for promoting a safe, healthy, and legally-compliant work environment. This handout provides our "Top 5 Tips."

### **1. UNDERSTAND THE LAW.**

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on several protected classes, including sex, race, color, national origin, and religion. In 1986, the United States Supreme Court held that Title VII specifically prohibits sexual harassment. Sexual harassment means unwelcome verbal, visual, non-verbal, or physical conduct of a sexual nature or based on someone's sex that is severe or pervasive and affects working conditions or creates a hostile work environment. The North Dakota Human Rights Act mirrors federal law, and both state and federal courts have identified specific illegal conduct that qualifies as sexual harassment, discrimination, and retaliation.

### **2. UNDERSTAND THE COMPLAINT PROCESS.**

Any employee who witnesses or experiences sexual harassment in the workplace has a right (and sometimes an obligation) to complain to the harasser and/or the employer. Red flags should raise any time there is workplace conduct of a sexual nature or based on sex, including inappropriate comments about a person's clothing, behavior, relationships or body; sex-based jokes; sexual favors requests; promotion denial based on someone's sex; rumors about a person's sex life; threats for refusing sexual advances; physically blocking someone's movement; inappropriate or unwanted touching; staring at a person's body; sex-based gestures; displaying or distributing sex-base pictures, drawing, posts, e-mails, etc. Employees should always report this type of behavior to their employer, and any employee who does report in good faith is protected from retaliation under both federal and state law.

Employees who experience sexual harassment also have a right to file a complaint with the Equal Employment Opportunity Commission ("EEOC") or the North Dakota Department of Labor ("DOL"). Employers will be asked to respond to inquiries from the investigating agency, and the agency will provide a final report of its findings at the conclusion of the investigation, at which point the employee may file a complaint in a

court of law. Sexual harassment complaints must be made to the EEOC within 300 days of the alleged incident(s).

### **3. UNDERSTAND THE EMPLOYER'S OBLIGATION.**

An EEOC or DOL investigation *does not* relieve the employer from the obligation to conduct its own investigation into identified illegal behavior and to take reasonable steps to prevent and/or stop sexual harassment in the workplace. Absent taking those steps (i.e., having a clear sexual harassment policy, complaint procedures, ongoing workplace training, etc.), employers can face significant liability. A supervisor's workplace harassment may create employer liability when the harassment causes a significant change in employment status, such as firing, failing to promote, demotion, etc. If the supervisor's harassment does not significantly change the victim's employment status, but rather creates a hostile work environment, the employer is liable unless it can prove: (1) the employer exercised reasonable care to prevent and promptly correct unlawful behavior; and (2) the victim unreasonably failed to take advantage of preventative or corrective avenues provided by the employer. When the harasser is a co-worker, an employer is liable only if it knew or should have known about the harassment and did not act.

Employers need to implement clear anti-harassment policies and complaint procedures *and* properly train supervisors on how to follow those policies and recognize potential legal violations. Ongoing anti-harassment training should be a standard in ensuring that employee complaints are received, unlawful behavior is identified, and proper investigation procedures and actions ensue.

### **4. UNDERSTAND A WORKPLACE INVESTIGATION.**

An employer can do much to alleviate legal liability by promptly responding to employee complaints and conducting a workplace investigation. Workplace investigations may be conducted internally by human resources or other individuals (who are not involved in the alleged behavior); or investigations may be conducted by outside, neutral entities. Workplace investigations generally involve employee interviews, evidence gathering, fact corroboration, and the issuance of a final workplace investigation report that identifies whether sexual harassment occurred and possible remedial action. Remedial action may include training, discipline, or termination of an employee who has harassed another or has violated company policy.

### **5. UNDERSTAND THAT PREVENTION IS KEY!**

Overall, employers should understand that prevention is the key to ensuring that their work environments remain legally compliant and are healthy, safe, and hostile-free. Employers can be proactive in preventing sexual harassment by ensuring they have clear (updated) sexual harassment policies that are regularly communicated to employees. In addition, ongoing training in the workplaces ensures that all employees understand what is and is not acceptable in the workplace and under the law.