

Addressing Sexual Harassment for Housing Providers: Organization, Staff, and Residents



Welcome and Introductions



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Adapting to the Changing Landscape



Sexual Harassment: The Center of Our News Cycle

Woman says Franken groped, kissed her without consent in 2006

Louis C.K. Is Accused by 5 Women of Sexual Misconduct

'House of Cards' employees allege sexual harassment, assault by Kevin Spacey

The Harvey Weinstein cover-up: How censorship, settlements and silence kept the allegations out of the news

The Numbers

- In 2015, the Huffington Post conducted a survey of more than 2,000 females and more than **33%** reported that they had been victims of sexual harassment.
- A December 2017 New York Times survey revealed that **35%** of males *admitted* to engaging in workplace conduct that would qualify as objectionable behavior or sexual harassment within the last year.
- Expect to see an increase in harassment complaints and lawsuits in the coming months.

Legal Developments

- The legal landscape is already changing.
- For example:
 - On December 6, 2017, a bipartisan group of lawmakers introduced legislation to prevent employers from enforcing mandatory arbitration agreements in instances where employees allege workplace sexual harassment or gender bias.
 - Various states are considering legislation which would prohibit confidentiality requirements in agreements resolving harassment allegations.
 - The new tax law does not allow settlements or attorneys fees relating to sexual harassment claims to be deductible if there is a non-disclosure agreement.
 - The EEOC will issue new guidance on harassment soon.

Daunting Studies for Employers

- Studies demonstrate that:
 - (1) jury members are likely to believe an employee alleging retaliation because they can relate to a similar workplace experience and
 - (2) female jury members and female judges are more likely to believe that certain behavior constitutes sexual harassment because they have endured or witnessed similar conduct.
- With sexual harassment at the center of our news cycle, juries may be more likely to believe and sympathize with individuals complaining of sexual harassment, especially because of the power dynamics of the high-profile celebrities who have resigned or been discharged.

Revisit and Improve Your Program Now

Preventing Litigation Later

- Employers should be proactive, and prepare now for the potential increase in workplace harassment claims by revisiting workplace anti-harassment programs and insuring that they are truly effective.
- Paper policies are not enough!
- **Keep in mind:** Every employer in the news recently for harassment allegations likely had a policy that was written by experienced HR executives and reviewed by counsel.

Strong Workplace Practices Can Protect You from Liability

- Your workplace harassment program should be:
 - Reviewed; and
 - Enhanced
- By doing so, you will adapt to the changing landscape, improve the working environment for all, and protect against potential litigation.
- And, it's the right thing to do.

Strong Workplace Practices (continued)

- An anti-harassment program can be an affirmative defense to a harassment claim in certain circumstances.
- This defense is only available when the program is *effective*:
 - (1) an employer exercises reasonable care to prevent and (2) correct promptly any sexual harassing behavior, and (3) the employee fails to take advantage of any preventive or corrective opportunities provided by the employer to avoid the harm.

The IHOP Example

- IHOP's anti-harassment program included:
 - Requiring all employees to watch an anti-harassment video
 - Requiring all employees to notify a supervisor and manager about any "unwelcome" conduct
 - Requiring all employees to sign a waiver disclaiming that they would engage in harassing behavior
 - The workplace contained a poster stating that upper-level management should be contacted for harassing behavior
 - IHOP conducted an internal investigation and subsequently fired the alleged harasser.
- E.E.O.C. v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 435 (7th Cir. 2012)
- IHOP was liable for harassment because its anti-harassment program, although sound on paper, ***was not so in practice.***

Understanding Employment Harassment

The Types of Harassment Claims

- Quid Pro Quo
 - “This for that” – supervisory conduct/strict liability
- Hostile Environment
 - 4 Part Test:
 - Because of an individual’s protected status (age, race, sex, national origin, disability, etc.);
 - That a reasonable person of that protected status would find offensive;
 - Severe or pervasive;
 - Creates an intimidating or offensive work environment.

What is Harassment?

- Harassment is a form of discrimination.
- Harassment can take many forms and be based on many protected classes.
 - Sexual harassment is a common type of harassment, *but it is not the only type.*
- Protected classes under federal law include sex, age, race, disability, national origin, religion, and genetic information.
 - Many states and municipalities include others, such as marital status, gender identity and expression, sexual orientation, etc.
 - Federal law may be evolving on the sexual orientation.

What is Harassment (continued)?

- Anyone – male or female, young or old, black or white – can be a victim of harassment.
- Anyone can be an harasser – supervisor, employee, third party.
- Harassment can be expressed verbally, physically or by any other means of communication.
- Harassment can be male/female, female/male, male/male or female/female.

Understanding Harassment in Housing

Fair Housing Act Overview

- Protects tenants, homebuyers and borrowers from discrimination because of their race, color, religion, sex, familial status, national origin or handicap
- Protects tenants and homebuyers from quid pro quo and hostile environment harassment per a 2016 HUD rule
- Applies to sexual harassment (harassment because of sex) but also harassment due to other protected characteristics
- Perpetrator may be of the same protected characteristic; harassment just has to be because of a protected characteristic

Fair Housing Act: Quid Pro Quo Harassment

- Quid pro quo harassment: Unwelcome request or demand to engage in conduct where submission to the request or demand is a condition related to sale or rental of dwelling or a residential real estate transaction or services/facilities in connection with the foregoing.
- Includes situations in which a person acquiesces to the request.

Fair Housing Act: Hostile Environment Harassment

- Hostile Environment: Unwelcome conduct based on protected characteristic that is severe enough to interfere with rental/services/availability of housing
- Totality of circumstances examined
 - Nature of conduct
 - Context of incident(s)
 - Severity, scope, frequency, duration and location of conduct
 - Relationship of involved persons
- Perspective: reasonable person in same position

Fair Housing Act: Hostile Environment Harassment

- No need to show psychological/physical harm
- No physical contact required
- May be written, verbal, or otherwise
- Can be single incident if sufficiently severe
- Can be caused by employer, employee **or other tenants**

Fair Housing Act: Owner/Management Liability

- Direct liability: A person is liable
 - For his/her own violations of FHA
 - For failing to end discriminatory conduct where s/he knew/should have known of conduct
 - For failing to end discriminatory conduct of third party s/he controls or has responsibility for
- Take prompt action to correct/end discriminatory housing practice. Cannot penalize/harm aggrieved person.

Fair Housing Act: Owner/Management Liability

- Vicarious liability: An owner/manager is vicariously liable for discriminatory conduct of agent or employee, regardless of whether he knew/should have known of conduct.
- **No Title VII affirmative defense** to an employer's vicarious liability for hostile environment harassment by a supervisory employee

Auditing and Enhancing Your Program

What Should an Audit Include?

- Audit the anti-harassment program to ensure it includes:
 - A revised, updated policy
 - Communication and commitment
 - Periodic and compelling training
 - Easy to use complaint procedure and clear reporting channels
 - Prompt and thorough investigations
 - Appropriate remedies
 - A firm no retaliation pledge

Revising Your Policy

- The policy should be straightforward, and easy to understand. It should encourage employees to come forward, and be clear that all complaints will be taken seriously, and investigated, and all offending behavior addressed.
- Outline what constitutes harassment and provide real world examples.
- Prohibit more than just what is illegal – require *professional behavior*.
- *No Bullying?*

Revising Your Policy (continued)

- Include conduct that occurs *outside* of the office such as formal events (travel, conferences, client entertainment, etc.) and informal events (softball games, impromptu office parties, lunches, or dinners).
- “Bystanders.” Ask every employee to report and intervene. A professional and respectful workplace requires the efforts of everyone.
- Require supervisors and managers to report and intervene. They are responsible for the workplace atmosphere.

Communication and Commitment

- Periodic dissemination of the policy with signed acknowledgements.
- Add a firm commitment from senior leadership that the policy will be applied to *every employee*, and all who have access to your workplace, and *violations will be addressed promptly*.
 - A cover letter from the CEO
 - “Town-hall” style meetings

Training

- Consider longer live, interactive training with outside trainers. This will have a greater impact on an audience.
 - Senior executives should attend and participate.
 - This sets an example for others.
- Consider annual or other periodic training, and offer separately tailored programs to rank and file employees, and to executive/managers.
- New hires
- Limit the size of the group trained to allow for participatory learning.

Reporting Channels

- Reporting is encouraged, not discouraged.
- Limit the universe of those to whom complaints should be made so that they are received and handled by those who can responsibly and competently do so. But give employees enough choices to be comfortable complaining.
- Consider a “hot line.”
- Additional training to staff who will receive and investigate complaints.
- Where do complaints about the CEO go?

Investigations

- All complaints should be investigated *promptly* and *thoroughly*.
- Careful thought should be given to who will conduct those investigations. Consider the pros and cons of internal and external investigators.
- Investigative plan.
- Findings of fact & credibility determinations.
- Communications with accuser, accused & witnesses.
- Follow-up.

Remedies

- Penalties/punishment must be reasonably calculated to remedy the complained of behavior. Termination is not always required but the punishment must be meaningful in every case.
- Follow-up in every case, to ensure the behavior has stopped and no retaliation has occurred.

Fair Housing Act: Remedies

- Need to stop the harassment
- Tenant-on-tenant harassment:
 - Establish anti-harassment policy and complaint procedures;
 - Verbal and written warnings;
 - Enforce lease provisions/evict;
 - Other tenant sanctions related to tenants who harass or permit guests to harass;
 - No-trespass orders; and
 - Report conduct to the police.

Fair Housing Act: Remedies

- Employee harassment of tenants:
 - training, warnings, or reprimands;
 - termination or other sanctions; and
 - reports to the police.
- Follow up with the victim after corrective action to confirm effectiveness. If housing provider knows or should have known that the corrective action was ineffective, there is a duty to take additional corrective actions.

No Retaliation

- Retaliation is the most common claim in EEOC complaints. They are difficult and expensive to defend and can undercut even the best anti-harassment programs.
- Supervisors and staff who will receive and investigate complaints must be educated about retaliation and trained as to how it can be avoided.
- The policy *must* also include a no retaliation pledge, and it must apply across the board.

No Backlash

- Be careful of a potential backlash.
- A supervisor cannot decide to avoid working with an accuser in order to avoid the potential for harassment complaints.
- That is retaliation or discrimination.
- The policy and training must make this clear.

Defamation and Transparency: Understanding the Risks After You Take Action

Defamation Elements

- Defamatory
- Statement of Fact
- Materially False (Not Substantially True)
- About the Plaintiff
- Published to Third Parties
- Defendant at Fault
- Causing Injury to Plaintiff



Implications

- Not What You Say . . . What You Convey
- Reasonably Understood, But Unstated, Implication
- Consider The Context

Examples of Implications

- Juxtapositions
 - “The HR Manager is no longer with the agency. We are committed to a diverse workplace that treats all people equally.”
 - “We cannot comment on personnel decisions. But, the agency is committed to a safe work environment.”
 - “After investigating repeated reports of sexual harassment in the office, we have terminated the Human Resources Manager.”
- Ambiguous Words and Phrases
 - “Boss was terminated after inappropriate sexual contact with an intern.”

Fault

- Private Figures – Negligence
- Public Figures – Higher Standard
 - Knowing Falsehood
 - Entertain Doubts About Truth

Privileges

- Vary by State
- Absolute Privilege
- Qualified Privilege
 - Proper Occasion, Proper Motive, Proper Manner
 - Only Necessary Recipients
 - Only Necessary Information

Other Kinds of Claims

- Publication of Private Facts
- Breach of Contract

Governance Issues

Matters of Oversight and Crisis Management

- Oversight
 - Although a Board of Directors should not be involved in day to day operations, including responding to most harassment complaints,
 - neither should the Board avoid its oversight duties and let lapse its fiduciary obligations.
- Crisis Management
 - Situations may also rise to the level of crisis that requires Board oversight and may include Board management.
 - Communications and disclosure if dealing with a public company or agency becomes paramount.

Don't Fall Asleep at the Wheel

- Consider the Board of Trustees at Penn State University and its involvement with the harassment allegations against Jerry Sandusky.
- After the University hired Freeh Sporkin & Sullivan to investigate (“Freeh Report”), it was determined that the Board:
 - “failed in its duties to oversee the President and senior University officials in 1998 and 2001 *by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable.*”
- The Freeh Report subsequently issued recommendations that the Penn State Board of Trustees review how it operates.

Oversight

- Fiduciary Obligations
- Tone at the Top and Matters of Integrity
- Responsibility for Reputation
- Level of Management Involvement

Questions?

Follow-up to today's presentation will be posted on our blog *Housing Plus* at www.housingplusblog.com.

A copy of these slides and a recording of the presentation will be available at www.ballardspahr.com/housing.

Upcoming Events

Conferences

- *Ballard Spahr | CSG Advisors 8th Annual Western Housing Conference, April 13, Denver*
- *Ballard Spahr National Housing Symposium, November 9, Washington, D.C.*

Webinars

- *The Impact of Tax Reform on Tax Credits, February 21*
- *Update on HOTMA Reforms, March 13*
- *Mod-Rehab RAD Conversions, May TBD*

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Thank you for your time!

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