

Tackling sexual harassment risks in the workplace: Part three

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In part one of this three-part series, we summarized the key legal elements of workplace sexual harassment and highlighted lessons from recent cases. Part two discussed how to conduct effective investigations when allegations of sexual harassment arise. In this third and final part, we will address risk management measures – including robust policies and procedures and tailored training programs - designed to help prevent workplace sexual harassment from occurring in the first place.

Read our series on workplace sexual harassment

Part one: Key legal elements and recent cases

Part two: How to conduct effective investigations

Part three: Critical harassment prevention measures

Prevention is better than a cure

It is crucial that employers focus their attention on harassment prevention efforts sooner rather than later to ensure that there is a clear framework in place. The framework must be communicated clearly, supported by senior management, to the point where it is trusted by employees, and used by them without fear of retaliation.

One of the benefits of taking proactive steps to prevent sexual harassment is that it may provide a defence for unlawful acts of sexual harassment committed by employees during the course of employment. However, in designing and implementing anti-harassment measures, an employer's motivation should be to prevent harassment from occurring in the first place, rather than being overly focused on legal liability. Based on our experience in handling and advising on harassment related matters, preventing harassment from occurring is far preferable to dealing with the dangers and consequences of it arising (see part one of this series for examples).

Examples of reasonably practicable measures to be taken by employers are discussed below. These measures include implementing an effective policy against harassment, establishing reporting channels, conducting effective training and periodically reviewing and considering the effectiveness on the anti-harassment framework in place. These actions can help employers to demonstrate their commitment to countering harassment in the workplace and providing a safe working environment for its employees and other stakeholders.

In some jurisdictions, implementing measures to prevent workplace sexual harassment has become a legal requirement. The recently amended Law of the People's Republic of China on the Protection of Women's Rights and

Interests, effective from January 1, 2023, has prescribed the employers' responsibility of preventing sexual harassment and consequences of failing to do so. It expressly requires employers to take reasonable measures as aforementioned to prevent and stop sexual harassment of women. An employer's failure to take preventive and prohibitive measures which results in sexual harassment against women, if serious enough to amount to public interest infringement, may result in public interest litigation against the employer initiated by the Procuratorate and/or punishment against the employer, senior management and directly responsible supervisor of the perpetrator.

Anti-harassment policy

The first step in establishing a robust framework to combat workplace harassment is to put in place a clear and effective policy against harassment. According to a recent survey by the Hong Kong Equal Opportunity Commission (HKEOC) (see HKEOC's publication "A Territory-wide Representative Survey on Sexual Harassment in Hong Kong 2021"), "[w]orking in a company or organisation with no anti-sexual harassment policy and measures increased one's likelihood to experience sexual harassment at work. In other words, anti-sexual harassment policy and measures had a role to play to protect one from experiencing workplace sexual harassment."

In general, anti-harassment policies should cover the following:

Clear policy statement	The policy should contain an unambiguous statement that harassment will not be tolerated.
Definition of harassment	A definition of harassment which reflects applicable laws and regulations should be included in the policy. In particular, employees should be made aware of more subtle types of harassment through the inclusion of examples which clearly demonstrate the range of conduct that may constitute harassment. The policy should also reference online and remote forms of harassment, given the increased prevalence of alternate work arrangements.
Roles and responsibilities	The policy should provide for sufficient internal resources to effectively deal with complaints of sexual harassment including, for example, clearly defined roles and responsibilities within the organization; appropriate escalation avenues; and an obligation for employees in supervisory positions to escalate allegations of sexual harassment (via the appropriate channels) when made aware of them.
Process and guidance for reporting of harassment	Clear avenues and procedures for escalating reports of harassment (either by the victim or a third party who has witnessed the conduct) should be set out in the policy. It is important that these reporting channels are viewed as confidential and trusted.
Investigation process and procedures	Part two of this series provided guidance on how to conduct effective investigations. To the extent possible, the investigation process should be clearly documented and communicated to employees in the policy or a similar document to engender trust in the system. Employers may consider including a commitment on response times to its employees.

Disciplinary actions	<p>The policy should clearly explain the serious consequences of workplace sexual harassment. Common disciplinary actions include verbal and written warnings, public reprimand, loss of privileges (e.g. discretionary bonuses), performance improvement plans, re-training, demotion, a temporary pay cut, suspension, and termination. Clear standards correlating possible disciplinary actions with the seriousness and nature of the harassment can also be included.</p>
Anti-retaliation	<p>Employees must be assured that they will not suffer retaliation in cases where they make a good faith complaint against a co-worker. To this end, a strong anti-retaliation statement should be included in the policy, together with appropriate disciplinary measures for retaliation. Regardless of whether a jurisdiction imposes anti-retaliation requirements, the employer should consider including protections in its policy for employees who do any of the following: make a complaint of sexual harassment, either internally or with any anti-discrimination agency; testify or assist in a proceeding involving sexual harassment; oppose sexual harassment by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of harassment; reporting that another employee has been sexually harassed; and/or encourage a fellow employee to report harassment.</p>

The anti-harassment policy should be easily accessible by employees, for example, on the company's intranet. Employees should also be made aware of such policies when they join the company, as well as on a periodic basis during their employment.

In addition to the above, sexual harassment cases frequently involve a quid pro quo in the recruitment or promotion process. So it is also very important for an employer to establish transparent criteria for hiring and promotion so as to prevent senior executives from potentially abusing the opportunity to hire and promote individuals for improper purposes. These provisions can be included in the anti-harassment policy and/or as part of HR policies and procedures.

Effective reporting channels

Establishing effective reporting channels through which employees can confidentially make complaints against co-workers for inappropriate conduct is a critical element of a successful anti-harassment compliance program. This includes, for example:

- *An independent channel* - such as to the HR department, or a dedicated team - outside of an employee's usual reporting lines is usually preferred, to alleviate an employee's fear of retaliation.
- *Discreet handling of the details of a complaint* - details should be revealed only on a need-to-know basis. Maintaining as much confidentiality as possible will help guard the integrity of the process and preserve the complainant's trust.
- *Follow-up actions* - a reporting channel is only as effective as an employer's follow-up actions. Appropriate disciplinary measures should be taken for cases where inappropriate behavior has been confirmed. If no effective follow-up action is conducted, or seen to be conducted, employees may lose faith in the system and be deterred from reporting future inappropriate conduct.

On the flip side, employees must be given adequate protection against false complaints. While well-founded allegations are often raised via anonymous complaints, such anonymity can create difficulties when it comes to conducting a proper investigation. While there may be good reasons for keeping a complainant's identity confidential from other staff, anonymous complainants should be encouraged to provide assistance to the investigation team as required.

If it is determined during an investigation that an individual has knowingly raised an untruthful claim of alleged harassment, appropriate disciplinary action should be taken against the complainant. This is a tricky area and employers should ensure they have a clear procedure for assessing, on a case-by-case basis, whether a complaint is raised in bad faith. Employees raising complaints in good faith, even if unsubstantiated, should not be penalized.

Conducting effective training

All new employees must attend training covering the employer's anti-harassment policy in detail, to ensure they are fully aware of the company's expectations. There should also be regular refresher training and policy reminders issued to existing staff.

Some jurisdictions mandate the provision of anti-harassment training to employees. Even if not mandatory, it is good practice to make resources available to employees to enable them to understand and prevent sexual harassment in the workplace. While the training should follow the employee's anti-harassment policies, the sessions may go beyond the policies and provide practical guidance to employees. For example, training sessions may cover:

- The meaning of sexual harassment, common examples of acceptable and impermissible conduct, how to recognize instances of sexual harassment, and how to act in the workplace to prevent allegations of sexual harassment;
- How to handle situations involving harassment, including both as a victim and as a bystander, and how to report harassment (i.e. reporting channels/procedures);
- The employer's investigation procedures, in what circumstances employees may be invited to participate in such investigations, and the disciplinary process (including a description of the range of disciplinary actions that can be taken); and
- Legal rights of employees, and any internal and external channels they can access to seek help.

For multi-national companies, training should be customized to ensure that local legal and regulatory requirements are met. Training should be conducted in multiple languages where appropriate.

In terms of which employees should attend training, permanent and temporary employees are usually required to attend, while independent contractors are often (but should not be) excluded. It may also be considered beneficial for the board, senior management and supervisory employees to attend separate training sessions focusing on their role as a person in a position of power and influence. The specialized training should cover, amongst other things, setting the tone from the top, avoiding allegations of abuse of power, and dealing with allegations of sexual harassment escalated to them.

The training sessions themselves can take a variety of forms – from in person sessions to online and on-demand training. Training sessions should be as interactive as possible – including the use of, for example, case studies and quizzes – to ensure that employees are engaged and understand the content of the trainings. Attendance at trainings should be recorded and measures should be put in place to follow-up on non-attendance. In some jurisdictions or industries, employers may be required to report attendance at such training sessions to their regulators.

Internal audits and reviews

An employer's internal policies and procedures focused on dealing with sexual harassment should be periodically reviewed, either by the employer's own internal control functions (e.g. compliance or internal audit) or externally by a

qualified independent third party. The reviews enable management to understand how their anti-harassment framework is working and to identify any gaps in the process.

The audits/reviews should include, for example, an analysis of the resolution of historical complaints, as well as an assessment of historical and current patterns of complaints or incidents (e.g. by location, business unit or specific personnel). Deficiencies should be identified and a mitigation plan promptly implemented and monitored.

Employee feedback on the company's anti-harassment procedures should be collected regularly, usually on an anonymous basis. Surveys can help employers to gauge the level of perceived sexual harassment within the workplace, as well as to assess employees' understanding of the firm's anti-harassment policies and procedures.

Conclusion

Clear anti-harassment policies, regular training, trusted reporting channels, and effective follow-up actions all contribute to building a robust anti-harassment culture in the workplace. However, these measures must be supported by senior management and the board in order to create and inspire a culture of respect within the workforce. To foster a positive culture, the company's leaders must set the tone from the top, providing a good example for employees, and ensuring that there are robust controls in place (such as those described above) to provide a safe working environment.

The question of whether an employer has put in place controls robust enough to reasonably prevent an act of harassment arising is one of fact. Our experience in these matters has shown that taking proactive risk management measures to prevent harassment from occurring in the first place leads to better outcomes, particularly when compared to an approach which only addresses acts of harassment after they have been discovered and investigated. The lesson is that prevention is always better than the cure.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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