

# Sex Harassment: The Cause of Action, Investigation, and Confidential Settlement

Wednesday, April 4, 2018

Presented By the IADC Diversity and Inclusion Committee, Employment Law Committee, and White Collar Defense and Investigation Committee

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# Presenters



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# CAUSE OF ACTION: OVERVIEW

# ANTI-DISCRIMINATION LAWS

1. Title VII
2. Title IX
3. State law equivalents

# TYPES OF HARASSMENT

1. Quid pro quo
2. Hostile work environment

# PRIMA FACIE CASE

1. Based on sex
2. Conduct is unwelcome
3. Severe or pervasive
4. Attributable to Employer



# EMPLOYER VICARIOUS LIABILITY

1. Co-worker
2. Supervisor
  - a) No tangible employment action
  - b) Tangible employment action
3. Third Party Harasser

# BEWARE OF RETALIATION

1. Filing an internal complaint
2. Filing an EEOC Charge
3. Participating in a workplace investigation
4. Opposing employment practices the employee reasonably perceives to be unlawfully discriminatory

# INVESTIGATION

# INITIAL CONSIDERATIONS

1. Employee safety
2. Paid or unpaid suspension of alleged harasser pending investigation
3. Setting expectations about confidentiality of investigation

# INVESTIGATION

- Prompt
- Thorough
- Fair

# DOCUMENT GATHERING

1. Personnel Files (harasser & complainant)
2. Complaint (e.g. hotline complaint; direct report to HR/Supervisor)
3. HR/Supervisor Notes of the Complaint/Interviews. Essentially, the notes of whomever took and processed the Complaint

# DOCUMENT GATHERING

4. Relevant Emails/Texts/Social Media
5. HR Policies (Anti-Harassment Policy, Professional Conduct Policy; Code of Business Conduct; Equal Opportunity Policy; No Retaliation Policy)
6. Employee Handbook
7. In Unionized Environment

# WHO CONDUCTS THE INTERVIEWS – CLIENT OR COUNSEL?

1. Who is the alleged harasser?
2. Do you want counsel to defend lawsuit?



# WITNESS IDENTIFICATION

1. Preliminary Round
  - a) Complainant
  - b) Peripheral Witnesses
  - c) Alleged Harasser

# INTERVIEW LOCATION

1. Larger Employer (Workplace Location) vs Smaller Employer (Off Site)
2. Security Risks
3. Confidentiality of Interviews

# THE INTERVIEWS

## Preliminary Considerations

1. Order of Interviews
2. Recording & Consent (state and federal laws)
3. Style, Tone & Goal
4. Attendance of Support Person or Counsel at Alleged Harasser's or Complainant's Interview

# PRELIMINARY CONSIDERATIONS

1. Upjohn Warning
2. Anti-retaliation Policy

# UPJOHN WARNING (EXAMPLE 1)

My name is XX. I am an attorney at the law firm of XX. I have been at firm for XX years. One of my area of practice includes labor and employment matters and internal investigations. **[Employer]** has asked me to conduct an internal investigation into some assertions made about **[Alleged Harasser]**.

My law firm and I do not represent you individually. I am talking with/interviewing you because you are employee of **[Employer]**. This interview is confidential; however, I will be sharing the information that I discover with **[Employer's]** Legal Department. Of course, **[Employer]** could share the information that I discover.

## UPJOHN WARNING (CONT'D)

Because the interview is confidential, I ask that you keep it confidential. My purpose is to learn the truth and gather the facts and provide that information to **[Employer's]** Legal Department. I am not here to find fault. I am looking for the facts.

Please feel free to share information with me. **[Employer]** has a no retaliation policy.

Do you understand? Do you have any questions?

NOTE TAKING: I take a lot of notes. So if I am silent, it is because I am writing.

Tell me about **[Alleged Harasser]**.

## UPJOHN WARNING (EXAMPLE 2)

I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.

I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.

Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or

# UPJOHN WARNING (CONT'D)

state agencies, at its sole discretion, and without notifying you.

In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.

Do you have any questions?

Are you willing to proceed?

American Bar Association's White Collar Crime Committee Working Group,  
<https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf>



# PRELIMINARY CONSIDERATIONS

- a) Identification of Complainant and Other Interviewees (NO)
- b) Fact & Document Gathering
  - (1) Witness Documents, Notes, Calendars, E-mails,
  - (2) Text Messages
  - (3) Let the company/employer know what documents witnesses have given you
- c) Yours and Witness' Contact Information
- d) Post-Interview Availability of Interviewer

# THE WRITTEN REPORT

1. Investigative Summary?
2. Notes?
3. Hybrid?

# STATUS UPDATES TO THE CLIENT

1. Oral or Written?

# THE ATTORNEY-CLIENT PRIVILEGE

1. Protecting Privilege
  - a) Limiting Engagement Letter
  - b) Mark Written Summary/Notes: Confidential; Attorney-Client Privileged Attorney Work Product
  - c) Limited Privileged Communications
  - d) Regular Outside Counsel
  - e) Inhouse Counsel

# BEWARE OF FUTURE WAIVER OF PRIVILEGE ATTORNEY-CLIENT PRIVILEGE

1. Privilege Belongs to Employer
2. Privilege Can Be Waived
3. Potential For Waiver Impacts the Entire Investigation
4. Limited Waiver

# POTENTIAL REMEDIES IF HARASSMENT CONFIRMED/NOT CONFIRMED

1. Termination
2. Other options sufficient to end harassment
3. Reminder of anti-harassment and anti-retaliation policies
4. Communicating outcome to complainant

# DEFENDING LITIGATION

1. Responding to the EEOC Charge
2. Affirmative Defenses
  - a) Faragher-Ellerth Defense
  - b) Equal Opportunity Harasser
  - c) Failure to exhaust administrative remedies

# LITIGATION HOLD

Trigger?

Separate Counsel & Joint Defense Agreements:  
Yea or Nay?



# SETTLEMENTS

## A. Timing of settlement

1. EEOC mediation
2. EEOC Conciliation
3. Post-MSJ
4. Pre-Trial

# EFFORTS TO BAN BIDDING ARBITRATION OF HARASSMENT CLAIMS

- Ending Forced Arbitration of Sexual Harassment Act of 2017.
- February 2018 letter from each state's Attorney General to Congress demanding amendment to FAA to prohibit mandatory arbitration provisions in workplace sexual harassment claims.

# CONFIDENTIALITY & TAX IMPLICATIONS & LEGISLATION

1. Confidentiality
2. Tax Implications
  - a) Confidentiality vs Tax Deductibility: Tax Cuts and Jobs Act (effective January 1, 2018)
    1. “Payments related to sexual harassment and sexual abuse – No deduction shall be allowed under this chapter for –
    2. \*any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement; or  
\*attorney’s fees related to such a settlement or payment
  - b) Catch 22 For Employer: Agree to Confidentiality to Lose Deductibility or No Confidentiality and Get Deductibility

# CONFIDENTIALITY & TAX IMPLICATIONS & LEGISLATION

- c) What IF?
  1. Sexual Harassment Only Cause of Action
  2. Weak and Unsupported Sexual Harassment Cause of Action Coupled with Other Strong Claims
  3. No Sexual Harassment Cause of Pled, But Broad Release Includes All Potential Claims?
  4. Later Release of Confidentiality
- d) Potential Fixes
  1. Dismiss Sexual Harassment Claim Before Settlement
  2. Settle the Harassment Claim First

# LEGISLATION

- a) Preventing the Enforcement of NDAs
- b) Voiding Contracts
- c) Invalidating Settlement Agreements
- d) Compelling Disclosure of NDAs
- e) Altering Federal Legislative Procedures for Handling of Harassment Claims

# BEST PRACTICES

1. Employee Handbooks
2. Effective anti-harassment policy
3. Signed acknowledgment of receipt of policy
4. Employee Training
5. Promote compliance

# Questions for Presenters?



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