

Leadership Response to Sexual Harassment Complaints: A Step-By-Step Guide to Minimizing Your Risk of Liability

The following article is published with permission from Theresa Sidebotham of [Telios Law PLLC](#). Telios Law PLLC serves businesses, individuals, ministries, and churches, representing them in a wide variety of litigation, appeals, and alternatives to litigation, as well as giving legal advice on a variety of issues.

With all the attention that sexual harassment is getting in the media, you may be looking to shore up your organization's policies and procedures. Not sure where to start? This blog post provides a step-by-step overview of common steps in leadership responses to sexual harassment complaints. That being said, every situation is different, many are tricky, and you may want to check with your counsel.

BEFORE THE COMPLAINT OCCURS

- 1. Foster a culture of respect and transparency.** Fostering an organizational culture where sexual harassment is not allowed to fester is just good business. Ministries have Biblical mandates and the idea of a higher calling, which are quite contradictory to unsavory sexual ethics. For secular organizations, a work environment where people can focus on their jobs rather than combatting harassment is not only more efficient, but complies with the law.
- 2. Have a sexual harassment policy and procedures in place.** In an ideal world, you will have already taken steps to put in place a sexual harassment policy that everyone knows about, is trained on, and understands. But we know that often these issues don't get the attention they deserve until someone is faced with an actual, real-life crisis. The recent media attention may give you a window to address this before the organization facing the crisis is yours. This blog focuses on what to do once you have received a complaint of sexual harassment, but it is equally important to take the opportunity to evaluate your current procedures to ensure you are setting yourself up to effectively respond to complaints when they inevitably come.
- 3. Know how to recognize when you've received a complaint.** Complaints do not always come in the form of written allegations on the organization's designated form, even if that is what your policy says. It is important to ensure that leaders and other management are trained to recognize when a complaint is being made. A complaint may be indirect, or even sound like casual conversation. Make sure everyone understands when to pursue it further.

WHAT TO DO WHEN YOU RECEIVE A COMPLAINT

1. Provide assurances to the reporter. Recognize the complaint and let the reporter know you will address it, and that he or she should not fear retaliation. Don't promise absolute confidentiality if that is not possible, but do assure the person that it will be kept on a need-to-know basis. Then, make good those assurances.

2. Take interim remedial steps pending investigation. If at all possible, take steps to ensure that ongoing harassing ceases. Depending on the severity of the allegations, you may also decide to put the alleged harasser on administrative leave pending an investigation. For missionaries or overseas workers, furlough might be required in some situations. It may also be possible to reassign the person complaining temporarily or permanently, but it is important that any new position not be less desirable or in any way a demotion, or it can be perceived as retaliation.

3. Perform an initial evaluation of the complaint to determine the scope of the internal investigation. Evaluate the complaint. Does it allege severe sexual misconduct—such as sexual assault? Does it involve a pattern of activity or many allegations that have all come to a head in this one complaint? Decide on the scope of the investigation. In addition, you may also need to decide whether the investigation can be handled in-house, or whether it is better performed by an outsider, which is usually a law firm because of the many legal issues that are likely to arise. An outside firm may be a good choice if one or more of the following factors are in play:

- The alleged harasser is a leader or has a role in management.
- There are conflicts of interest with an in-house investigation (for example, the HR director has a relationship with the alleged harasser or the alleged victim) or there are other issues creating an appearance of bias.
- The allegations are very serious and may need to be handled with expert care.
- The complaint is likely to lead to legal liability.
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Your in-house counsel or outside general counsel can also be helpful in assisting you in deciding how an investigation should proceed. Sometimes in-house counsel may perform an investigation, if he or she has that type of training and bias does not seem to be an issue. If a law firm is to actually conduct an investigation, it must be a different firm from your defense counsel, because it cannot then defend you.

4. Conduct the internal investigation. Without delay, conduct the internal investigation. After all the evidence has been gathered, the investigator should determine appropriate findings. These may be a written statement of findings, which is probably advisable to demonstrate the organization exercised due diligence in its investigation. Depending on whether a law firm is involved, advice on what to do next may or may not be given.

5. Take prompt corrective action. Take appropriate disciplinary action against the harasser if the allegations are founded. If not, some follow-up steps are probably still wise, such as training, making sure the reporter does not experience retaliation, etc.

6. Decide what to say to various stakeholders. This may include the media, those involved, witnesses, co-workers, and for religious organizations, a sending church or pastor. Make sure you follow up with the complaining party and the alleged harasser—this can be done in a variety of ways, but those directly involved should be clear about the organization having dealt with the matter.

7. Ensure no retaliation occurs. Even if the allegations are unfounded, it is important to ensure that no retaliation occurs against a reporter who makes a good faith complaint. If it becomes necessary to take an adverse employment action against someone who has recently filed a complaint of sexual harassment, whether for a bad faith allegation or other performance reasons, consult legal counsel.

8. Documentation. Document all steps taken to demonstrate the organization's prompt response to the complaint for future litigation.

WHY YOU SHOULD TAKE SEXUAL HARASSMENT COMPLAINTS SERIOUSLY

Risk of Liability to the Organization

Complaints of sexual harassment, if not dealt with by the organization, can lead to liability—most often, administrative complaints to the EEOC or state agency or lawsuits (both of which cost a lot to defend) and maybe large payouts to those impacted. By promptly and thoroughly responding to complaints of sexual harassment, and taking prompt corrective action where necessary, the organization sets itself up to take advantage of a key defense to liability in the event a sexual harassment lawsuit comes later. Ignoring complaints or allowing sexual harassment to remain pervasive in an organization is a sure-fire way to end up investigative by an administrative agency or in court.

Personal Liability of Leadership

As a general matter, a corporation is a distinct legal entity from its directors, and thus, its directors are not normally personally liable for the corporation's debts and other liabilities. In some cases, however, directors can be held personally liable in connection to their corporate work. In extreme cases, an organization's board of directors may even face a breach of fiduciary claim that could create personal liability for the individual directors.¹ These cases are very rare, but are a reminder that it is better to take prompt, effective action than to brush things under the rug.