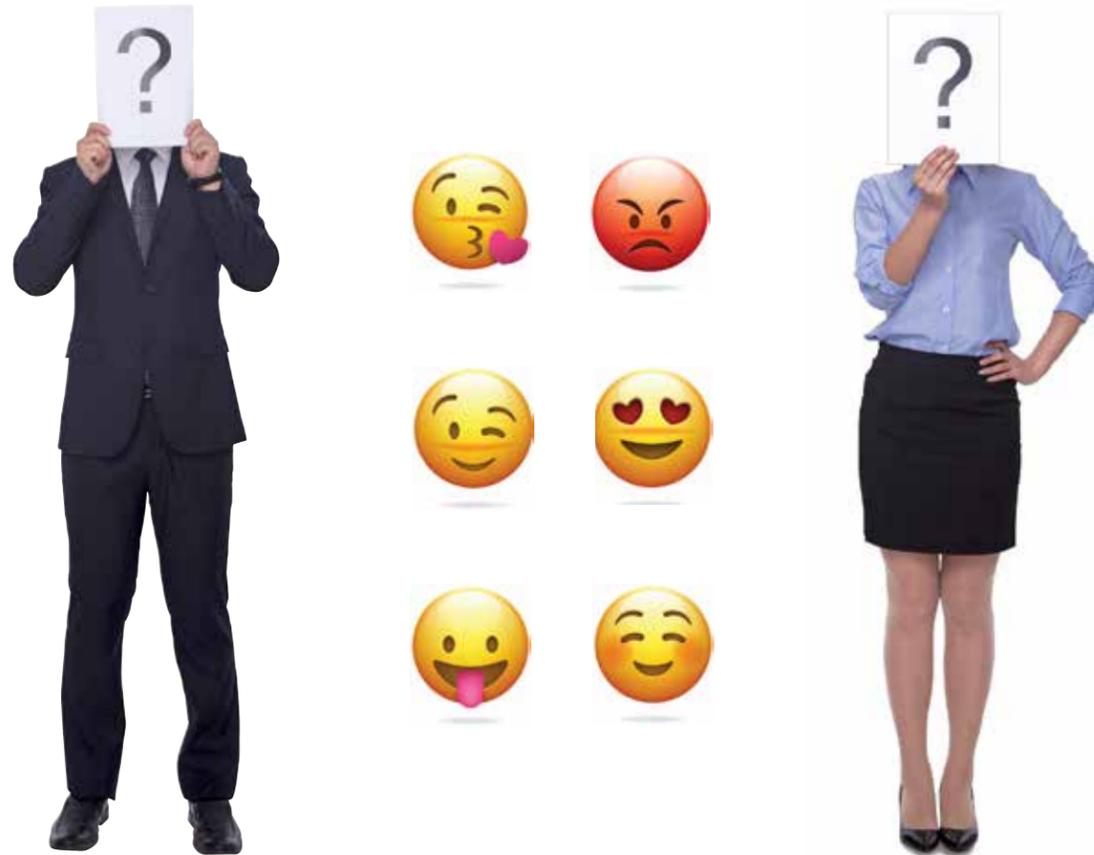


- Make sure these policies also address after-hours electronic communications with employees, particularly those who are non-exempt workers.
- Explicitly reference emojis and other symbols in the company's anti-harassment and nondiscrimination policies (again, some examples showing the symbols would be helpful).
- As part of the training of supervisors and managers, reinforce their obligations to escalate any report of harassment, including inappropriate emoji use.

While I do not think we are at the point where it is necessary for companies to conduct emoji-awareness seminars, it is appropriate to insist that all employees remain professional in their internal and external communications, so that the meaning of the communication is not misconstrued. The overarching lesson for employees is that their workplace communications are not the same as their casual conversations with friends. Professional, businesslike conversations are less likely to haunt employers.

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Are Your Company's Harassment Policies Current?

Help for Navigating Workplace Pitfalls in the Age of

#MeToo

Are Your Company's Harassment Policies Current? Help for Navigating Workplace Pitfalls in the Age of #MeToo

What's acceptable behavior in the workplace is evolving, and what once might have been considered harmless banter could now be your next lawsuit. How long has it been since your company updated its harassment policies? In today's world, where the "MeToo" movement has taken the spotlight, it is definitely time to take another look at this important subject.

Following is a sample policy for workplace harassment and non-discrimination which you may use to develop and/or update your own company's policies. Also included, some recent articles written by ILMA's general counsel, Jeff Leiter, highlighting information about harassment claims and potential problems in how employees communicate that could lead to a harassment claim.

As always, when updating company policies, make sure to consult your legal counsel.

Sample Harassment and Non-Discrimination Policy

ABC, Inc. strives to maintain a workplace that fosters mutual employee respect and promotes professional conduct and harmonious, productive working relationships. As a company, we believe that discrimination, harassment and retaliation in any form constitute misconduct that undermines the integrity of the employment relationship in which people are treated with dignity, decency, and respect. Employees and non-employees should be able to enjoy a safe, yet stimulating work environment free from all forms of discrimination, including but not limited to sexual and other forms of harassment. The accomplishment of this goal is essential to ABC Inc.'s mission.

ABC Inc.'s policy prohibits conduct that constitutes unlawful harassment, discrimination, and retaliation by supervisors, managers, and co-workers, as well as by third parties, such as customers and vendors. Harassment of any sort -- verbal, physical, visual -- will not be tolerated, particularly against employees in protected classes. These classes include, but are not necessarily limited to race, color, religion (including dress and grooming practices), sex (including pregnancy, childbirth, breastfeeding or related medical conditions), age, sexual orientation

(including gender identity or expression), national origin or ancestry (including language use restrictions), disability, medical condition, genetic information, marital status, military and/or veteran status, or any other protected status defined by law.

ABC Inc.'s policy also prohibits discrimination, harassment, disrespectful or unprofessional conduct based on the perception that anyone has any of those characteristics, or who is associated with a person who has or is perceived as having any of those characteristics. In addition, ABC, Inc. prohibits retaliation against individuals who raise complaints of discrimination or harassment or who participate in workplace investigations. All such conduct violates Company policy.

This policy applies to all employees and to all individuals who may have any contact with any Company employee, such as customers, vendors, apprentices, interns, and independent contractors. It applies during normal working hours, at work-related or sponsored functions, and while traveling on Company or work-related business. There will be no recriminations for anyone who in good faith alleges illegal harassment.

The Role of Emojis in Workplace Harassment

By Jeff Leiter

This is an important year for employers as we continue to learn about more high-profile sexual harassment incidents and allegations. As more of these cases come to light, more conversations in businesses across America have begun to turn inward and reflect on the actions and expectations of their own employers and employees.

In addition to looking closely for sexual misconduct in the workplace, employers need to be aware of the proliferation of employees' use of emojis in business communications and their likelihood to convey problematic connotations. As emoji use increases in the workplace, so do the chances of inappropriate use. Emojis, often viewed simply as innocuous slang, gain new connotations as their use increases, which can lead to allegations of sexual harassment, discrimination, threats and the like.

There has been an uptick in references to emojis in workplace lawsuits as evidence of a hostile workplace. According to news reports, emojis or emoticons were cited in 33 reported federal and state court decisions in 2017, up from 25 in 2016 and 14 in 2015.

Emojis mean different things to different people — and the meanings often depend on the sender's intention and the recipient's interpretation. There even exists an online emoji encyclopedia (www.emojipedia.org) to help folks like me decipher many of the symbols. With a bit of searching, it is easy to see how the use of emojis in business communications can lead to all sorts of problems.

Extreme care must be taken concerning emojis used in electronic business communications with overseas or international customers in particular; certain hand gesture-related emojis could mean one thing in the U.S. and something else entirely to a recipient in Europe or China. In some instances, an emoji intended to convey

warmth or friendship could be interpreted as offensive or showing a lack of competency.

As the business world continues to talk more openly about all instances of sexual harassment, the dialogue about the numerous connotations of emojis, many of them sexual in nature, in business communications also continues to grow.

Consider an emoji depicting a smiley face making a wink. Could it be considered a proposition in the context of the conversation? I've recognized almost 70 emojis on emojipedia.org that could easily be used to convey sexual connotations. Even if not sexual in nature, emojis can create other workplace issues. What happens if an employee sends an emoji to another worker in which the skin color of the person depicted is off? Is it an offensive or an ethnic slur?

How about emojis that could be interpreted as threats? Does the use of a gun emoji next to the name of a person convey the possibility of harm to that person?

So, where does all this leave us? Obviously, consideration of a company's particular culture is an important starting point. At the same time, it is not practical to search employees' smartphones and other devices for emoji use. It is suspect enough to monitor workers' Facebook or Twitter usage.

To reduce the risk of an adverse court decision, it makes sense to limit or discourage business use of emojis to the greatest extent possible. Eliminating all emoji use might be difficult. Nonetheless, here are some steps that can be taken to manage the risks associated with emoji usage:

- Make sure your electronic communications policies discuss the use of emojis, including emoji examples.

on conducting an effective sexual harassment investigation, recognizing that immediate intervention minimizes the injury to the victim and sends a clear message to employees that harassment is not tolerated:

- Employees should be able to report complaints of sexual harassment directly to the person with ultimate responsibility for enforcing the company's policies against unlawful harassment. Employees should feel that their complaints will be handled promptly and effectively, rather than simply "passed up the chain."
- Don't sit on complaints. Investigations should start right away and should be completed as soon as possible. Any delays, and the reasons for the delays, should be documented.
- The Equal Employment Opportunity Commission (EEOC) has guidelines on how to conduct an effective inquiry into harassment claims, including how to reach credible determinations, protective measures to take during the investigation and specific questions to ask during the investigation. Use the EEOC guidance.
- Ask the complaining employee to identify any witnesses, and interview co-workers of the accused. They can provide relevant information about prior similar sexually harassing conduct.
- Consider taking temporary remedial measures during an investigation. The EEOC guidelines and case law suggest that during a sexual harassment investigation, the employer separate the complaining employee from the accused employee until the investigation is finished. However, keep in mind that an involuntary transfer or increase in the workload of the complaining employee might be seen by a jury as retaliation.

- Speaking of retaliation, it should be made clear and documented to the complaining employee, the accused and anyone who is interviewed as part of the investigation that the company will not tolerate any form of unlawful harassment or retaliation against the individual who made the claim or anyone who participated in the investigation of the claim.
- Confidential complaints can put the employer on notice. Some employees might say to a supervisor, "Just keep this between us." The supervisor should explain to the employee that while the company will do everything possible to keep the matter confidential, it must investigate every complaint. While absolute confidentiality cannot be promised, the employee should know that it is the company's intent to provide confidentiality to the extent practical.
- When documenting an investigation, keep in mind that every sentence could be parsed during cross-examination at a trial. Written reports should be objective to the maximum extent possible. Ask witnesses to sign their statements.
- Consistency is key — all complaints, even ones you consider minor, should be investigated thoroughly, and similar incidents should result in similar discipline. Senior executives or management should not be protected.

Sexual harassment is a difficult subject, and it is not fading away. Don't be an ostrich who puts its head in the sand. In my experience, and in talking with other attorneys, I have not seen many situations that do not warrant an investigation. Again, the EEOC guidance is very helpful, and as always, speak with your counsel.

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What Is Harassment?

Workplace harassment can take many forms. It may be, but is not limited to, words, signs, gestures, derogatory comments, slurs, offensive jokes, cartoons, pictures, emojis, posters, e-mails, e-mail jokes or statements, pranks, bullying, intimidation, threats, physical assaults or contact, or violence. Harassment is not necessarily sexual in nature. It may also take the form of other vocal activity including derogatory statements not directed to the targeted individual but taking place within their hearing. Other prohibited conduct includes displaying written material such as photographs, calendars, cartoons, articles of a harassing or offensive nature, and taking retaliatory action against an employee for discussing or making a harassment complaint.

Because of its delicate nature, and without diminishing our commitment to eliminating all forms of harassment in the workplace, one aspect of our policy requiring further explanation is our prohibition of any form of sexual harassment in the workplace. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature, and abusive conduct of a non-sexual nature based on an individual's sex.

No supervisor or other employee shall threaten or insinuate, either explicitly or implicitly that another employee's refusal to submit to sexual advances will adversely affect that person's employment, work status, evaluation, wages, advancements, assigned duties, or any other condition of employment or career development. Similarly, no employee shall promise, imply or grant any preferential treatment in connection with another employee or applicant engaging in sexual conduct.

Sexual harassment also includes unwelcome sexual flirtations, advances or propositions, verbal abuse of sexual nature, subtle pressure

or requests for sexual activities, unnecessary touching of an individual, graphic or verbal commentaries about an individual's body, sexually degrading words used to describe an individual, a display in the workplace of sexually suggestive objects or pictures, sexually explicit or offensive jokes, or physical assault. As a result, you shall not make any inappropriate gestures, including visual staring. Any logos or graphic sworn by employees must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message. Do not use racial slurs or insults.

According to the Equal Employment Opportunity Commission (EEOC), sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . submission to or rejection of such conduct is used as the basis for employment decisions . . . or such conduct has the purpose or effect of . . . creating an intimidating, hostile or offensive working environment." Sexual harassment is a form of unlawful employment discrimination under Title VII of the Civil Rights Act of 1964 and is explicitly prohibited under ABC, Inc.'s policy.

Procedures in Cases of Harassment

Any ABC, Inc. employee who believes that she or he has been subjected to unlawful harassment of any kind has the responsibility to report the harassment immediately to her or his supervisor. If the employee is uncomfortable reporting the harassment to her or his immediate supervisor (whether because the supervisor has committed the harassment, or for any other reason whatsoever), the employee must report the harassment to the next higher level of management above the immediate supervisor or, if the employee prefers, to the Human Resources.

ABC, Inc. is committed to taking all reasonable steps to prevent harassment, and will make every reasonable effort promptly and complete-

ly to address and correct any harassment that may occur. However, the ABC, Inc. cannot take prompt and effective remedial action unless each employee assumes the responsibility of reporting any incident of harassment immediately to an appropriate supervisory employee.

Every report of harassment will be investigated promptly and impartially. The complainant and the accused will be informed of the results of the investigation. If ABC, Inc. finds that its policy has been violated, it will take appropriate corrective and remedial action, up to and including discharge of offending employees.

Reporting Without Fear of Retaliation

No ABC, Inc. employee will be retaliated against for reporting harassment. This no-retaliation policy applies whether a good faith complaint of harassment is well founded or ultimately determined to be unfounded. No ABC, Inc. officer, director, manager or supervisor is authorized, or permitted, to retaliate or to take any adverse employment action whatsoever against anyone for reporting unlawful harassment.

Confidentiality

During the complaint process, the confidentiality of the information received, the privacy of the individuals involved and the wishes of the complaining person will be protected to as great a degree as is possible. The expressed wishes of the complaining person for confidentiality will be considered in the context of the company's legal obligation to act on the charge and the right of the charged party to obtain information. In most cases, however, confidentiality will be strictly maintained by the company and those involved in the investigation. In addition, any notes or documents written by or received by the person(s) conducting the investigation will be kept confidential to the extent possible and according to any existing state or federal law.

Corrective Action

If through the investigatory process ABC Inc. determines that harassment or other prohibited conduct has occurred, effective remedial action will be taken in accordance with the circumstances involved. Any employee determined by the Company to be responsible for harassment or other prohibited conduct will be subject to appropriate corrective and/or disciplinary action, up to, and including termination. The corrective action issued will be proportional to the severity of the conduct. The alleged harasser's employment history and any similar complaints of prior unlawful discrimination and/or harassment will be taken into consideration. ABC Inc. also will take appropriate action to deter future misconduct.

Alternative Legal Remedies

Nothing in this policy may prevent the complainant or the respondent from pursuing formal legal remedies or resolution through local, state, or federal agencies or the courts.

Reasonable Accommodation

Discrimination can also include failing to reasonably accommodate religious practices or qualified individuals with disabilities where the accommodation does not pose an undue hardship. To comply with applicable laws ensuring equal employment opportunities to qualified individuals with a disability, ABC Inc. will make reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee unless undue hardship would result.

Any job applicant or employee who requires an accommodation in order to perform the essential functions of the job should contact a Company representative with day-to-day personnel responsibilities and discuss the need for an accommodation. ABC Inc. will engage

in an interactive process with the employee to identify possible accommodations, if any, that will help the applicant or employee perform the job. An applicant, employee or intern who requires an accommodation of a religious belief or practice (including religious dress and grooming practices, such as religious clothing or hairstyles) should also contact a Company representative with day-to-day personnel responsibilities and discuss the need for an accommodation. If the accommodation is reasonable and will not impose an undue hardship, ABC Inc. will make the accommodation.

ABC Inc. will not retaliate against you for requesting a reasonable accommodation and will not knowingly tolerate or permit retaliation by management, employees or co-workers.

Disclaimer: The materials presented here are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem, specifically regarding implementation of workplace harassment policies.

Investigating Sexual Harassment Claims: Don't Be an Ostrich

By Jeff Leiter

2017 has been a busy year for employment lawyers. Hollywood has been rocked almost daily over the past few months with allegations ranging from unwanted sexual overtures to outright assaults made against well-known producers, directors and actors. As I write this column, a Senate candidate in Alabama has denied allegations of sexual misconduct made by at least seven women who said the events happened when they were teenagers and he was a prosecutor in his early 30s. Have we forgotten the sexual harassment allegations against Fox News' Roger

Ailes, or the sexual harassment lawsuits settled involving the network's then-talk show host Bill O'Reilly?

In many of these cases, the individuals named have been trailed for years by rumors of sexual harassment and assault. According to many news reports, the alleged behaviors have been open secrets to many people within the individuals' industries and social circles. It appears that nondisclosure agreements, payments and legal threats kept many victims from stepping forward with their accounts.

Workplace sexual harassment claims likely will increase throughout the near future. So,



employers must take all reasonable steps to prevent workplace harassment from occurring, and they must promptly take action against any sexually harassing behavior that has occurred. There is good case law that even a relatively informal investigation can satisfy an employer's legal obligations, provided the investigation is conducted promptly and in a good-faith effort to reach the truth of what occurred. The key to minimizing or avoiding liability is for the employer to take action that is reasonably likely to prevent the recurrence of the harassment.

While I have not done a detailed analysis of the case law in every state, here are my tips