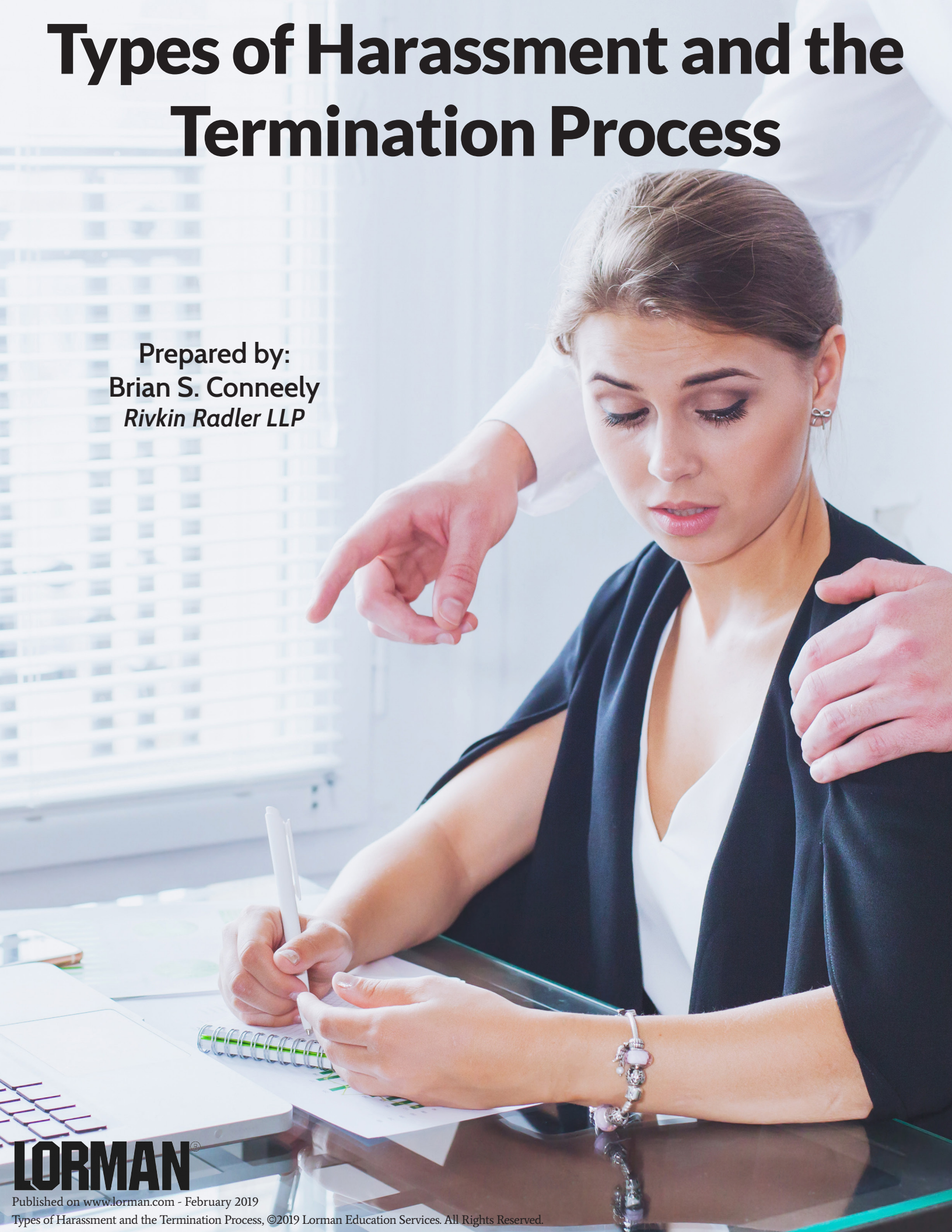


Types of Harassment and the Termination Process

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TYPES OF HARASSMENT

A. Types

- Sexual harassment: It involves unwanted and unwelcome, words, deeds, actions, gestures, symbols or behaviors of a sexual nature that make the target feel uncomfortable. Gender and sexual orientation harassment fall into this category.
- Religious harassment: Verbal, psychological or physical harassment used against targets because they choose to practice a specific religion. Religious harassment can also include forced and involuntary conversions.
- Racial harassment: The targeting of an individual because of their race or ethnicity. The harassments include words, deeds and actions that are specifically designed to make the target feel degraded due to their race of origin or ethnicity.
- Disability harassment
- Age harassment
- Psychological harassment: Humiliating or abusive behavior intended to lower a person's self-esteem or cause them torment. This can take the form of verbal comments, actions or gestures.
- Stalking: The unauthorized following and surveillance of an individual to the extent that the person's privacy is unacceptably intruded upon, and the victim fears for their safety.
- Retaliation

B. Physical Actions

- A co-worker touching a person's body, hair, or clothing
- Someone standing close to or brushing up against a person
- A co-worker touching, leaning over, or cornering someone
- Someone giving a neck or shoulder massage
- Someone grabbing someone's arm, patting them or pinching them

C. Verbal Actions

- Co-workers, supervisors and/or owners referring to another as a "girl", calling someone "babe", "sweetheart", "sweetie", "honey", "hon"
- Someone making comments about a person's body, clothes, looks, anatomy or manner of walking

- Work discussions turning onto sexual topics, telling sexual jokes or stories, discussing someone's love life, sexual fantasies or preferences
- Co-workers, supervisors, managers or owners repeatedly asking a person for a date even after that person has said NO
- Co-workers spreading rumors or gossip about a person

D. Non-Verbal Actions

- Looking a person up and down or staring or leering at them
- Physically blocking a person's path
- Making sexual gestures with the tongue or hands or other body movements
- Following a person around
- Giving unwanted personal gifts
- Displaying of sexually-suggestive items, such as calendars, pictures or comics
- Making facial expressions, such as winking, kissing sounds, licking lips
- Downloading, distributing or viewing inappropriate sites or e-mails

DEFINITIONS OF SEXUAL HARASSMENT

A. Sexual Harassment – Legal Definitions – Sec. 1604.11

Harassment on the basis of sex is a violation of Title VII. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

** The principles involved here also apply to race, color, religion, disability, age, national origin or other protected categories.*

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

An employer may also be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII and developing methods to sensitize all concerned.

Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

B. Other Definitions of Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature is sexual harassment if:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
 - Submission to or rejection of such sexually-related conduct is used as a basis for decisions affecting employment;
 - Such conduct has the purpose or effect of unreasonably interfering with work performance or creating an intimidating or offensive working environment; or
 - I would not want my spouse, girlfriend, boyfriend, daughter, son or parent subject to such conduct or behavior.

C. What Forms Can Sexual Harassment Take?

- Sexually explicit graffiti, posters or calendars.
- Extreme vulgar and offensive sexually related remarks.
- Abusive language, depictions of sexually explicit behavior and incidents of indecent exposure by co-workers.
- Offensive physical contact.

D. Who Is The Harasser?

- Supervisors.
- Co-workers.
- Non-employees.

E. Where Can Sexual Harassment Occur?

- At the workplace.
- Off-premises at Firm-sponsored events.
- Off-premises at private sites.

KEY POINTS TO REMEMBER FOR AN INTERNAL INVESTIGATION

A. Duty to Investigate: Upon notice of a claim of discrimination or harassment, an employer has an affirmative duty to promptly investigate under Title VII

- *Watts v. New York City Police Dep't*, 724 F. Supp. 99, 107 (S.D.N.Y. 1989): Once an employer is apprised of the occurrence of such offensive conduct in the workplace, Title VII does impose an affirmative duty on that employer to investigate charges, e.g., *Bundy v. Jackson*, 205 U.S. App. D.C. 444, 641 F.2d 934, 943, 947 (D.C. Cir. 1981) (Title VII liability where employer had notice of harassment but did “virtually nothing to . . . even investigate”).
- *Malik v. Carrier Corp.*, 202 F.3d 97 (2nd Cir. 2000): Employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking but required by law.
- *Hill v. Children’s Vill.*, 196 F. Supp. 2d 389, 399 (S.D.N.Y. 2002): Once an employer learns of potential discrimination or harassment, Title VII imposes a duty on the employer to conduct a prompt and thorough investigation of these charges.
- New York City Commissions of Human Rights recommends commencement of *investigation* of a harassment complaint within 24 hours of receipt of complaint.

B. Pre-Investigation Steps

- Understand and Assess the Severity of the Claim
- Interim Actions
- No Retaliation
- Proper Notifications
- Gather and Preserve Evidence

- Organize and Plan the Investigation
- Select a Proper Investigator
- Conflicts of Interest
- Joint Representation
- Proper Notice
- Privileges
- Ethical Considerations

C. The Investigation

- The goal of an investigation is to obtain all of the relevant facts so that the employer can determine a response and properly resolve the complaint.
- Interviewers
- Set-Up of Interviews
- Witnesses
- Interview and Questioning Issues
- Place of Interviews
- Writings
- Timing
- Documentary Evidence
- Once the investigative report has been finalized, the employer must decide a course of action.
- Assume all documents, including the report will be discoverable

D. Corrective Action

- Suspension
- Termination
- Transfer
- Demotion
- Stay in touch with both parties throughout and after the investigation.
- Both the complainant and the respondent should be told the results of the investigation
- Make a record of any response.
- Make sure there is no retaliation

THE TERMINATION PROCESS

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A. Checklist For Use Before Recommending Termination

- Are you sure that you know all the facts accurately?
- Is the rule which has been violated clear? In writing?
- Did the employee know the rule or should he/she reasonably have known it?
- Is this employee receiving the same or similar treatment others have received for the same offense?
- Have you considered the employee's prior disciplinary record?
- Have preliminary steps been followed? (Documentation, planning, consult H.R.)
- What is the employee's length of service?
- Does the employee have a "reasonable and believable" excuse for the infraction of the rule?
- What proof is there of a violation of a rule or policy?
- Does the "punishment" fit the crime?

B. Other Factors In Determining The Proper Discipline

- Investigate thoroughly.
- Be consistent. Look at prior discipline of other employees.
- Explain discipline.
- Document discipline.
- Follow through to see if the discipline has had desired effect.
- Be prepared – be sure of facts; investigate; be sure of the rule.
- Set the stage – time and place.
- Treat discipline as a business problem, not a personal one.
- When it's over, follow up positive or negative results.
- Be consistent.
- Consider time span between incident and discipline.
- Determine frequency and nature of problem.
- Look at extenuating factors.
- Learn history of the company's disciplinary practices in the problem area.

C. Termination Issues

- Employment At Will
- Employment Agreements
- Collective Bargaining Agreements
- Potential NonCompete Issues

- Whistleblower and Retaliation Issues
- COBRA
- WARN
- Exit Interview – Two Management Representatives
- Payment of Final Wages or Commissions
- Reimbursement of Expenses
- Vacation, Sick, Severance Pay
- Return of Property
- Computers, Blackberries, Cell Phones
- Protection of Confidential Information
- Writings
- Documentation
- Internal investigations

D. Releases and Separation Agreements

- Consideration
- Older Workers Benefit Protection Act
- Knowing and Voluntary
- Return of Property
- Confidentiality
- NonDisparagement
- Benefits
- Legal Requirements

A recent SHRM article described claims by some employees relating to IBM termination policies which allegedly, taken together, violate ADEA.

1. Releases contained no OWBPA lists of ages of employees in decisional unit in layoffs of two or more employees. No waivers of age discrimination claims but other claims are waived and are subject to arbitration and no class action claims.
2. No WARN notices due to carefully timed layoffs
3. Requiring all employees to report to work sites

E. Post-Termination Issues

- Defamation
- Retaliation
- Alumni Programs
- LinkedIn
- Facebook

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