

# Assessing Sexual Harassment Response and Prevention Strategies After #MeToo

A TAASA White Paper

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Like many, we have been simultaneously saddened and energized by the national reckoning with sexual harassment and assault, which has crystalized under the banner of Tarana Burke's hashtag #MeToo. Many women and men have been affirmed in their experiences of sexual harassment and abuse for the first time, and we, as a society, seem prepared to confront this problem more frankly and openly than in the past. Unquestionably we are moving in the right direction.

Yet, as a new year begins, we also sense a mood of uncertainty about what's next. What might a sustained commitment to eliminating sexual harassment look like? What have we already accomplished in 2017, and how might those accomplishments guide our actions going forward, in terms of policy reforms, cultural norms, or both?

Now is a pivotal moment to intensify our focus on this problem, not to shy away. Simply put, the strong anti-discrimination policies many institutions have in place are necessary, but not sufficient, to end harassment and abuse. Sexual harassment tends to be an intractable problem because it is symptomatic of an array of overlapping power imbalances. These include but are not limited to sexism and hostility toward gender nonconformity; the license to abuse power in the absence of transparency and accountability; professional, financial, and societal incentives to look away from "open secrets;" and inadequate public understanding of all the above. Indeed, widespread sexual harassment has persisted even after decades of anti-harassment policy development, with particularly alarming prevalence among transgender and gender nonconforming workers and students.<sup>1</sup> As Professor Joanna L. Grossman of the Dedman School of Law at Southern Methodist University writes, existing law only takes us so far:

"[D]espite more than thirty years of doctrinal development and broad proclamations about its interference with equal employment opportunity, sexual harassment remains disturbingly common and unaddressed . . . We are left instead with a somewhat confused doctrine that rewards the proliferation of policies and procedures, but never inquires whether they have had the desired effect."<sup>2</sup>

In sum, ending sexual harassment and exploitation requires shining a light, not only on abusers when they do harm, but also on the conditions that tolerate, or even encourage, abuse.

## Three Components of Effective Sexual Harassment Prevention Strategies

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- Leadership & Accountability
- Organizational Policies
- Training

Therefore, this paper is not intended as a summary of current legal compliance criteria, nor does it focus narrowly on recommendations for institutional sexual harassment policies. Instead, it outlines considerations for developing holistic prevention and response strategies. Those considerations fall into three key areas: (1) leadership and accountability, (2) organizational policy, and (3) training.

We offer this white paper in an effort to assist institutional officials, firms, policymakers, and any individuals seeking concrete steps to foster environments in which people can work, learn, and thrive free of sexual harassment and assault. To those organizations and individuals, we also extend our tremendous thanks and commitment to work in partnership in the long-term effort to eliminate sexual violence.

## Leadership & Accountability

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According to the Equal Employment Opportunity Commission, “[t]he cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated.”<sup>3</sup> Although a clear, comprehensive sexual harassment policy is an essential component in preventing harassment, any policy’s effectiveness is ultimately a function of the cultural norms that leaders foster in their organizations.

Research indicates a “strong relationship between environmental norms and individual harassment.”<sup>4</sup> Regardless of the strength and content of an express policy, “harassment is more likely to occur in workplaces where it appears to be permissible.”<sup>5</sup> Failure to acknowledge and punish sexual harassment conveys both that the behavior is acceptable and that reporting harassment does not effectively end it. Moreover, when supervisors or others in positions of authority commit sexual harassment, the behavior can have a compounding effect on the workplace culture—lower-level employees conclude the behavior is permissible for them as well.<sup>6</sup>

To prevent or counteract a permissive workplace environment, leaders should consider the following concrete steps:<sup>7</sup>

- Acknowledge that the sexual harassment policy alone cannot prevent harassment and enthusiastically enlist the help of managers and staff to foster a zero-tolerance environment, free from harassment and retaliation.
- State, frequently and unambiguously, that harassment and retaliation will not be tolerated, regardless of any individual’s status or authority.
- Assess the organization’s harassment risk factors and take proactive steps to minimize or eliminate those risks.
- Impose prompt, consistent discipline that is proportionate to the severity of the harassment or retaliation every time it is found to have occurred.
- Institutionalize evaluation, at regular intervals, of the effectiveness of strategies to prevent and address harassment, including reviewing preventative measures, complaint data, and corrective actions taken; partner

**Eliminating sexual harassment is not equivalent with mere legal compliance.**

with researchers to assist in evaluation.

- Allocate sufficient resources for effective harassment prevention strategies, including sufficient staff time for participation.
- Solicit feedback from employees, students, or others about the sexual harassment policy, complaint system, and training, by anonymous surveys or other means to protect employees from retaliation.
- Personally acknowledge, publicly or privately, individuals for efforts to foster a workplace in which sexual harassment is not tolerated, such as those who appropriately report complaints or who aggressively address harassment by peers or subordinates.
- If appropriate, establish a harassment policy for one's own department or office that is more encompassing or protective than the organization's overarching harassment policy.

In short, actions speak louder than words. It is incumbent on the leaders of any institution or organization to earn the trust of individuals whom a sexual harassment policy is meant to protect. Creating workplaces and learning environments free from harassment has as much, if not more, to do with attitudes toward harassment as the policies prohibiting it. Effective leaders are those who have a positive influence on attitudes within their organizations.

At this pivotal moment, when many are reassessing their roles in preventing and responding to sexual harassment, we urge organizational leaders to begin with this premise—eliminating sexual harassment is not equivalent with mere legal compliance.

## Organizational Policy

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A clear policy prohibiting sexual harassment and an accompanying complaint system that is effective, accessible, and protects individuals from retaliation are essential to eliminating sexual harassment from any workplace or educational setting. The Supreme Court, in fact, has found that one of the core purposes of Title VII is “to encourage the creation of antiharassment policies and effective grievance mechanisms.”<sup>8</sup>

Though organizational officials have fairly broad discretion to determine the specific details of their policies and complaint systems, many components have been widely identified as best practices. Notably, organizations themselves also benefit from adopting such practices. Signaling to employees or students that sexual harassment complaints are taken seriously and ensuring an accessible complaint process can lead to earlier, less costly resolutions of such complaints.<sup>9</sup>

A comprehensive harassment policy includes, but might not be limited to, the following:<sup>10</sup>

- A statement that the policy applies to individuals at all levels of the organization, as well as to other relevant third parties, such as customers, clients, business associates, interns, or volunteers; if appropriate, a statement that the policy applies to certain geographical locations other than a main site or campus
- Clear descriptions and examples of sexual harassment and retaliation, including harassment on the basis of actual or perceived sexual orientation or gender identity, continual or intentional mis-gendering, and stereotyping on the basis of sex
- A clear description of the complaint system, including multiple, easily accessible reporting

avenues and, if possible, an avenue for individuals to share information about harassment without filing a complaint, such as a phone line or web page

- A process to investigate and resolve complaints without actual or perceived bias on the part of investigators, fact-finders, or those determining appropriate corrective action
- Measures to ensure no actual or perceived bias or conflict in investigations and disciplinary determinations, including, if appropriate, contracting with independent third-parties
- A statement of a reasonably prompt timeframe within which complaints will be resolved, except under extraordinary circumstances
- Clear descriptions of possible interim measures to ensure the safety and well-being of complainants, including, for example, workplace safety plans, permanent or temporary adjustments to complainants' or respondents' schedules or work stations, use of security escorts, protocols for handling civil protective orders by security and management, availability of administrative leave, and referrals to community-based support resources.
- A clear statement that retaliation against individuals filing complaints, participating in investigations, or taking any actions protected under anti-discrimination laws is strictly prohibited and will be punished
- A process to determine whether a complainant, witness, or other individual has been subjected to retaliation and to impose sanctions on those responsible for retaliation
- A statement that the organization will investigate complaints regardless of whether they are received from organizational affiliates or from third parties
- If applicable, an express protocol for investigating and determining sanctions for harassers who may be subject to special ethics rules in addition to ordinary anti-discrimination policy, such as elected officials
- An assurance that information obtained during an investigation, including the identities of complainants and witnesses, will be kept confidential to the extent permitted by law and consistent with a thorough and impartial investigation
- An assurance that complainants will be given timely advance notice before any disclosure of information related to the complaint, if such disclosure is necessary to ensure workplace safety or other legitimate purpose
- An assurance that the organization will take immediate corrective action proportionate to any harassment found to have occurred
- A process to notify complainants and respondents of the resolution of complaints, including, whenever possible, the specific preventative or corrective action taken
- A process to ensure individuals responsible for receiving, investigating, or resolving complaints are adequately trained, neutral, and independent from outside influence

Because an organization's express sexual harassment policy is often the first place an employee turns after experiencing harassment, it is crucial that the policy is easily accessible and clear. The policy should be available in all languages commonly spoken by covered individuals, as well as in braille and audio recording.

By articulating a zero-tolerance philosophy and describing a complaint process that is unbiased, regardless of a respondent's status or authority, the written policy can serve as the embodiment of the leadership's commitment to a harassment-free workplace.

## Training

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Finally, for even the strongest policy to be effective, people must understand it. Therefore, an essential component of a sexual harassment prevention strategy is comprehensive, evidence-based training.

**Employers should be hesitant to accept the use of mere training videos.**

It is important to recognize that training cannot serve as a substitute for conspicuous engagement by senior leadership or the consistent demonstrated fairness and effectiveness of the sexual harassment policy, as described above. Nevertheless, training serves an important function by ensuring all employees or students receive basic information about harassment protections and by providing a venue to ask questions.

One area in which training has been shown to be particularly effective is educating people on what conduct constitutes sexual harassment.<sup>11</sup> Coupled with clear definitions and examples set out in a policy, training can help employees or students name their own experiences of harassment, abuse, or assault and, in turn, facilitate better reporting. The authors of one study explained as follows:

“Having the words, a name, a category (even if the category is flawed as any box or set of boxes must be) enables women to recognize and recall what happens to them with less shame, guilt, or embarrassment. A social context in which the telling does not shame or blame the teller makes telling more likely.”<sup>12</sup>

Training is also particularly useful to educate employees on how to engage the complaint system and what their rights are within that process. One explanation frequently given for not reporting harassment is that the person harassed was simply unaware of the complaint process.<sup>13</sup>

In addition, to be effective training must be conducted in a manner that reflects evidence-based adult learning methods, including interactive engagement and sufficient dosage. Research indicates that the common reliance on training videos is probably “not effective in changing long-term attitudes and belief systems associated with the propensity to harass”<sup>14</sup> and that “employers should be hesitant to accept the use of mere training videos if they truly want to lessen and eradicate sexual harassment at their workplaces.”<sup>15</sup>

Thus, training serves a valuable purpose, provided that it is implemented as a component of a holistic sexual harassment prevention strategy. The EEOC recommends that sexual harassment training be:<sup>16</sup>

- Overtly championed by senior leaders
- Repeated and reinforced regularly
- Provided to covered individuals at every level and location of the organization, with specially tailored information for supervisors and managers related to preventing, identifying, reporting, intervening in, and correcting harassment, and an explanation of the consequences for failing to fulfill their responsibilities related to harassment and retaliation

- Provided in a clear, easy to understand style and format
- Provided in all languages commonly used by covered individuals and with accommodations for individuals with sign and hearing impairments
- Tailored to the specific setting, including, for example, workplace-specific examples of prohibited conduct and retaliation and examples of conduct that, if left unchecked, might rise to the level of prohibited harassment or retaliation
- Tailored to the details of the particular organization's policy and complaint process, including reporting protocols; various individuals' rights and responsibilities if they experience, observe, or become aware of sexual harassment; and the range of possible consequences for harassment and retaliation
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants
- Conducted in a manner offering attendees opportunities to ask questions about the training, harassment policy, complaint system, or any related rules or expectations
- Routinely evaluated by participants and revised as necessary

## The Path Ahead

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As innumerable accounts by women and men have starkly illustrated in recent months, sexual harassment and assault are prevalent. Countless women, men, boys, and girls endure it at work and in school, frequently remaining silent for fear of ostracization by friends and colleagues, of receiving less meaningful assignments, of lost opportunities for advancement, of being branded as a troublemaker, of imperiling professional references, or of any combination of other subtle or overt retaliation. Ultimately, many quit their jobs or cut short their educations—the material, discriminatory result that sexual harassment law is intended to prevent.

But despite its prevalence, sexual harassment is also preventable. Like more extreme forms of sexual violence, its prevalence is a function both of conditions that permit people to exploit others with impunity and of the behavioral expectations we assign in a given environment. When abusers face consequences and the people they abuse do not, we will have succeeded.

Now is an important moment. We have an unprecedented opportunity to build meaningful protections from harassment and retaliation, to implement processes that are truly unbiased, and, in doing so, to earn the trust of the people they are intended to protect. If we wish to build on the progress that has already been made, we must commit to long-term strategies to improve the cultures of our workplaces and institutions. It plainly will not be sufficient to rely on the same policies and prevention approaches that have brought us to this point.

This paper represents general considerations for strategizing such a long-term organizational commitment and, as such, cannot encompass the specific needs and constraints of any one firm or institution. Therefore, TAASA enthusiastically offers our assistance in examining specific policies, practices, or prevention strategies throughout Texas.

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The Texas Association Against Sexual Assault is the unifying voice to end sexual violence in Texas. As the statewide coalition of rape crisis centers, advocates, and survivors, we are committed to fostering a culture that respects the fundamental rights and dignity of all Texans.

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<sup>1</sup>Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* at 3, 33, Washington: Nat'l Ctr. for Transgender Equality and Nat'l Gay and Lesbian Task Force (2011)(finding "near universal harassment on the job (90%) among transgender and gender nonconforming workers and 78% of students expressing gender nonconformity while in grades K-12 experienced harassment).

<sup>2</sup>Joanna L. Grossman, *Looking Forward, Moving Back: A Retrospective on Sexual Harassment Law*, 95 BOS. L. REV. 1029, 1047 (2015).

<sup>3</sup>U.S. Dept. of Labor, Equal Employment Opportunity Commission, "Promising Practices for Preventing Harassment" (Nov. 20, 2017).

<sup>4</sup>Juanita M. Firestone & Richard J. Harris, *Changes in Patterns of Sexual Harassment in the U.S. Military: A Comparison of the 1988 and 1995 DoD Surveys*, 25 ARMED FORCES & SOC'Y 613, 623 (1999).

<sup>5</sup>Theresa M. Beiner, *Sex, Science, and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 298 (2001).

<sup>6</sup>*Id.*

<sup>7</sup>See generally EEOC, *supra* note 1.

<sup>8</sup>*Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998).

<sup>9</sup>Beiner, *supra* note 3, at 302 (citing James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC. 301, 304 (1998)).

<sup>10</sup>See generally EEOC, *supra* note 1.

<sup>11</sup>See, e.g., Gerald L. Blakely, et al., *The Effects of Training on Perceptions of Sexual Harassment Allegations*, 28 J. APPLIED SOC. PSYCH. 71, 73, 77 (1998).

<sup>12</sup>Louise S. Kidder, *Recalling Harassment, Reconstructing Experience*, J. SOC. ISSUES, Spring 1995, at 62.

<sup>13</sup>See, e.g., Alexa Ura, Morgan Smith, Jolie McCullough, and Edgar Walters, "At the Texas Capitol, victims of sexual harassment must fend for themselves." *The Texas Tribune*. Nov. 13, 2017. Updated Nov. 14, 2017 (quoting one former staffer regarding the Texas House of Representatives grievance process: "I didn't even know that was a process that existed.")

<sup>14</sup>Elisa L. Perry, et al., *Individual Differences in the Effectiveness of Sexual Harassment Awareness Training*, 28 J. APPLIED SOC. PSYCH. 698, 716 (1998).

<sup>15</sup>Beiner, *supra* note 3, at 301.

<sup>16</sup>See generally EEOC, *supra* note 1.