Don't Be a Headline:

Workplace Harassment Prevention and Training for Staffing Firms

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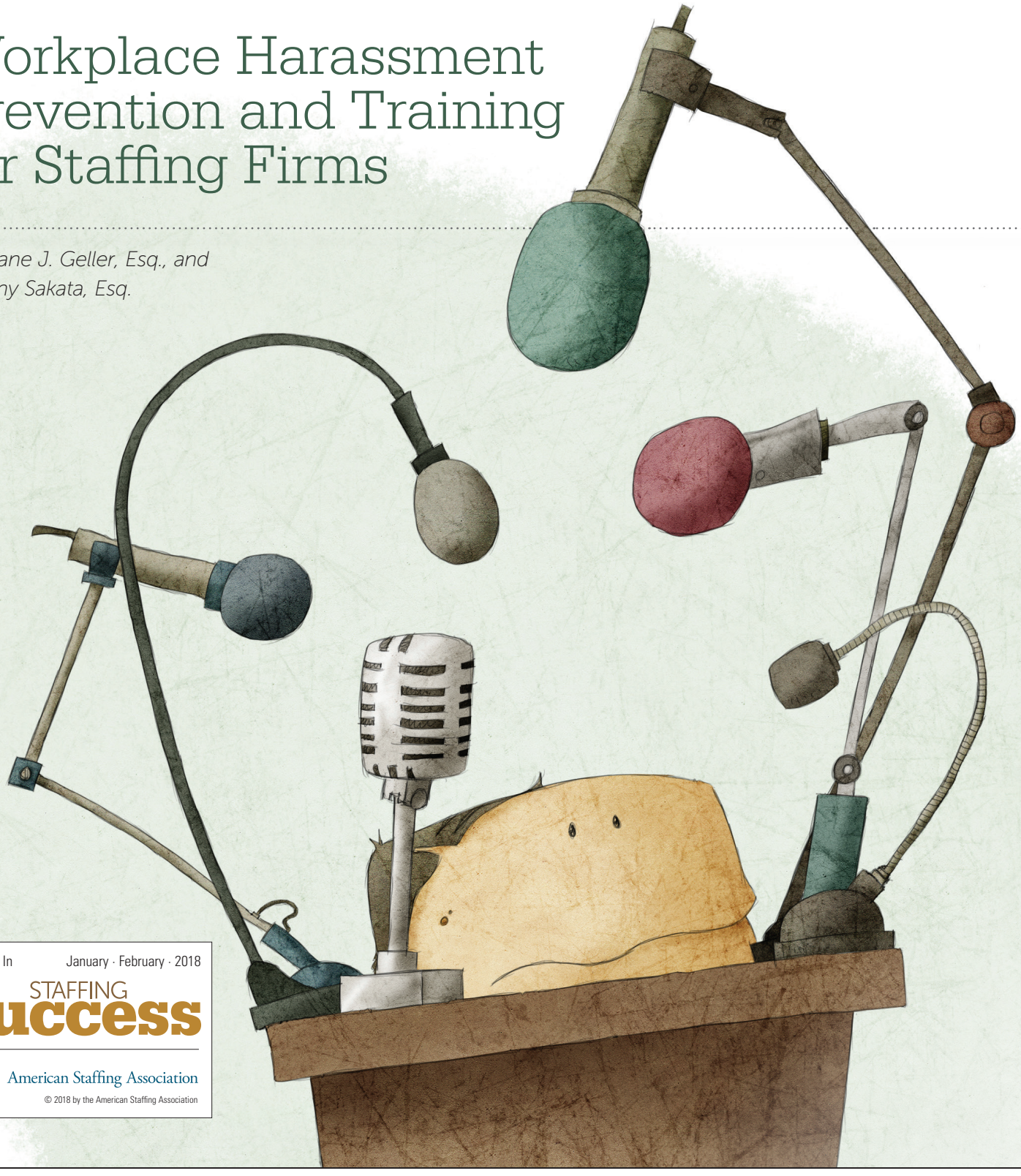

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Employees have the **right to work** in environments **free from harassment and discrimination**—which means employers without the **right policies in place** could run afoul of the law.

Sexual harassment claims against prominent celebrities, politicians, and television personalities have dominated the news lately. However, the reality is allegations of sexual and other types of illegal harassment can arise in every type of workplace. Since the majority of harassment incidents go unreported, the extent of their prevalence can only be guessed. In addition to being personally damaging to employees, harassment issues can harm workplace morale, undermine productivity, increase turnover, and create significant legal liabilities for staffing firms and their clients. Individuals can also be subject to suit.

"Harassment" does not just mean sexual harassment—unlawful workplace harassment can be based upon race, color, religion, sex (including gender identity and pregnancy), national origin, age, disability, genetic information, sexual orientation, parental status, or any other characteristic protected by applicable law.

Employees have the right to work in an environment free from harassment and discrimination; they must be clearly instructed that they have an affirmative responsibility to refrain from harassment and discrimination and are to report such behavior if it happens to them or they witness it happening to someone else. Supervisors need to understand their responsibility to respond to harassment and discrimination in a timely and appropriate manner.

Staffing firms should be aware of their obligations to prevent harassment through well-crafted policies, procedures, and proper and regular training, and the legal obligation to promptly investigate and address any reported incidents.

Which laws are at issue?

Federal laws prohibiting harassment include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Pregnancy Discrimination Act, and the Genetic Information Nondiscrimination Act. State laws offer additional protections for workers. These laws all view harassment as a form of discrimination.

The U.S. Equal Employment Opportunity Commission has policy and enforcement guidance on sexual harassment in the workplace. The EEOC defines workplace sexual harassment as unwelcome sexual advances, or conduct of a sexual nature, which unreasonably interferes with the performance of a person's job or creates an intimidating, hostile, or offensive work environment. Sexual harassment can range from persistent offensive sexual jokes, to inappropriate touching, to posting offensive material on a bulletin board or social media platforms.

Illegal harassment can be committed by (or involve) managers and supervisors, co-workers, vendors, consultants or clients, men or women (same sex or opposite sex), and other people with whom the staffing firm or employee has a business interaction.

Why is training important?

Workplace harassment training is arguably the best practice in preventing harassment and discrimination. The EEOC states that while effective training can reduce workplace harassment, ineffective training can be unhelpful or even counterproductive. The EEOC notes that "one size does not fit all" and training is most effective when tailored to the specific workforce and workplace, and to different groups of employees. When trained effectively, middle managers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.

There are two types of sexual harassment. Quid pro quo is the type in which submission to the conduct is

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ASA members have access to an online training video, specifically designed for staffing companies, that aims to educate temporary and contract employees about workplace harassment issues as well as their rights and responsibilities. Go to ***americanstaffing.net/workplaceharassment*** (make sure you're logged in) and request a customized page for your company.

Formal sexual harassment training is **not required under federal law,** but having performed such training will aid in **the defense of lawsuits.**

made either explicitly or implicitly a term or condition of employment. An example of quid pro quo harassment would be a supervisor threatening to terminate an employee if he or she does not accede to sexual advances. Usually this type of sexual harassment, by its nature, happens between someone in a position of power and a subordinate. The other type is hostile work environment. This is when conduct has the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile, or offensive work environment.

The company generally has strict liability for quid pro quo harassment. This is because supervisors are deemed acting on behalf of the employer. However, in hostile work environment situations, the U.S. Supreme Court in the companion cases, often referred to as *Faragher* and *Ellerth*, articulated an affirmative defense available to employers that creates an incentive for employers to implement and enforce strong zero-tolerance policies prohibiting harassment and effective complaint procedures. The rulings also create an incentive for employees to alert management about harassment before it becomes severe and pervasive.

Therefore, if an employer has a policy prohibiting harassment and exercises reasonable care to prevent and correct promptly any sexually harassing behavior, and an employee unreasonably fails to report harassment under the policy, the *Faragher-Ellerth* affirmative defense may be available to help an employer avoid liability. Effective training for all employees, and a policy that meets the *Faragher-Ellerth* requirements, are important pieces of this affirmative defense.

What training is required?

Formal sexual harassment training is not required under federal law, but having performed such training will aid in the defense of lawsuits.

California and Connecticut require training for supervisors within six months of hire or promotion. Employers in Maine with 15 or more employees must provide worker training on recognizing and preventing harassment, including descriptions of prohibited behavior and procedures for reporting potential violations, within a year of an employee's hiring, and supervisors are required to receive additional training within a year of taking a management position.

As of Jan. 1 of this year, employers in California with 50 or more employees must also provide supervisor training on policies that prohibit harassment based on gender identity, gender expression, and sexual orientation. The training must include specific examples of such harassment and must be presented by trainers with knowledge and expertise in these areas.

What type of training should staffing firms offer?

Workplace harassment prevention training should involve traditional compliance training, as discussed in detail below. Bystander intervention training (training aimed at educating and empowering co-workers to intervene when they witness harassment behavior) and workplace civility training are also helpful in preventing claims.

Training should not be limited to just supervisors and managers—internal employees and temporary employees alike should be made aware of and understand the policies and procedures in place.

Depending on a staffing firm's size and structure, training might be conducted in-person or offered via online/virtual formats. On-demand, online formats may make more sense for temporary workers, who may not be available for in-person, on-site training, and in those circumstances where in-person training may only be offered on regularly scheduled annual or biannual intervals. Training should be conducted upon hire or promotion whenever possible.

Ideally, supervisors and nonsupervisory or temporary employees should be trained separately so that participants are comfortable speaking freely. Moreover, while there is some overlap, the training content will likely differ depending upon the types of employees, and will include unique and specific tools for each employee group.

Training should be conducted by a knowledgeable human resources manager, a consulting firm with expertise in this area, or outside employment law counsel.

What should training include?

Training, in any format, should be conducted in a language that employees can understand and include a discussion of the following:

Laws prohibiting harassment: Training should include discussion of the above-referenced laws, which protections these laws offer, and what sorts of activities (including harassment and retaliation) constitute a violation.

Identifying unlawful harassment: Detailed examples of both quid pro quo and hostile work environment situations should be provided. For example, do not just state that "offensive comments" are not permitted; instead, articulate what specific conduct can give rise to a hostile work environment, including gossip, jokes, slurs, requests for dates, personal questions, and inappropriate "compliments." It may be helpful to also identify acts that are *not* examples of harassment to give context to attendees. Training should also identify *who* can commit harassment—this includes fellow employees, managers, supervisors, vendors, and clients; for temporary workers, client employees and supervisors are among those who can commit harassment and give rise to a complaint.

Staffing firm's antiharassment and antidiscrimination policies: Training should include a thorough review of the staffing firm's policies, and an opportunity to ask questions about any policy or procedure. Policies should make it clear that the staffing firm has a zero-tolerance standard for discrimination, harassment, or retaliation based on any protected characteristic.

Complaint procedures: Employees should have more than one avenue for complaints. Examples include a hotline, human resources department, managers and supervisors, owner, and even a board of directors. Remind trainees that complaints do not have to be in writing, and even if a complainant states that he or she does not want the company to do anything, the staffing firm must investigate. Supervisors, managers, and other employees who interact with temporary employees must be trained to be alert to comments made both in passing and with the caveat, "I don't want to report this issue." A confidential conversation can later be the basis for a successful discrimination or harassment complaint. All conversations must be reported and anyone trying to share an issue "in confidence" must be told that it will be addressed and investigated without any retaliation against the reporting party.

Retaliation: Training should make clear that it is against the law and against company policy to retaliate against or intimidate an employee for engaging in protected activities, including complaining about discrimination, unfair treatment or harassment, and participating in an investigation or proceeding.

Hypothetical situations: Presenting hypotheticals based on real-life examples of the variety of conduct that could give rise to a harassment claim will assist employees in better understanding their rights and responsibilities. While training on harassment prevention usually focuses on what employees should *not* do, consider hypotheticals that also focus on what employees *should* do.

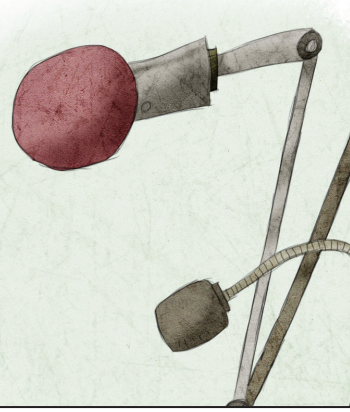
Investigations: If the training is aimed at supervisors, it must include detailed steps on how to handle any complaint of harassment. Managers must report harassment complaints immediately to human resources, or a member of senior management as identified in the staffing firm's policies. Prompt investigation is required but an affirmative decision needs to be made as to the most qualified person to conduct such investigation. Although not defined in the law, an investigation is likely considered "prompt" if it begins within a few days—but no more than one week—from receipt of a complaint. Training topics on investigations include who to speak with (i.e., victim, harasser, harasser's supervisor, witnesses); how and when to maintain confidentiality; how to document the complaint and investigation efforts; how to invoke remedial action (i.e., written warning and reprimand, probation, suspension, counseling, and/or termination); and any required post-investigation steps, such as following up with the complainant to ensure the conduct has ceased.

What are the staffing-specific issues?

Supervisor and management training should articulate that, depending on the circumstances, staffing firms, clients, or both may be liable for unlawful harassment. Court decisions make clear that both the staffing firm and client can be liable for a client employee's actions if the staffing firm and client knew of the harassment and failed to take timely corrective action to remedy the situation. Therefore, depending on the circumstances, firms may need to ensure the client is aware of misconduct and insist that the client investigate and take corrective actions as well.

Depending on the facts, staffing firms should also interview other temporary workers on assignment at the client site to determine whether they are having any issues with the individual who is the subject of a complaint.

According to the EEOC, a staffing firm should not replace a temporary employee removed by a client for discriminatory reasons, and should not assign other employees to that work site unless the client has undertaken corrective and preventative measures to ensure that the alleged discrimination does not reoccur. Otherwise, the staffing firm



could be liable, along with the client, if a temporary employee later assigned to that client is subjected to similar discriminatory conduct.

How can a firm avoid claims?

Detailed policies and adequate training are the first line of defense against claims of discrimination and harassment. Staffing firms also should consider other ways to improve their workplace culture to create and maintain a positive, respectful, and inclusive work environment.

To better understand modern workplace harassment and appropriate responses, EEOC commissioners Chai R. Feldblum and Victoria A. Lipnic published a report titled "Select Taskforce on the Study of Harassment in the Workplace" in June 2016. The EEOC's report, based upon the work of a select taskforce of which the American Staffing Association was a member, suggests additional measures to supplement the above tactics and build a harassment-free culture.

Finally, staffing firms should consult with knowledgeable employment law counsel when implementing workplace harassment prevention training and prior to investigating any claim of harassment or discrimination. ■

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Brittany Sakata, Esq., is associate general counsel for the American Staffing Association. See Sakata in a recent ASA Legal Line video on the topic of workplace harassment issues for staffing firms. Go to *asacentral.americanstaffing.net/legalline*.