



INTERNATIONAL LAWYERS NETWORK



SEXUAL HARASSMENT IN THE WORKPLACE



This guide offers an overview of legal aspects of sexual harassment in the workplace in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this paper in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.



SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: MASSACHUSETTS COMPANIES NEED TO KNOW

In 2017, following public allegations against notable figures such as Hollywood producer Harvey Weinstein, the #MeToo movement took on national prominence. A movement of empowerment, #MeToo aims to strengthen sexual harassment laws and policies by bringing acts of sexual harassment to light and holding perpetrators of sexual harassment accountable. Though the movement has held the spotlight for less than two years, it has influenced public perceptions of the prevalence and severity of sexual harassment in the workplace and elsewhere.



This article will examine the quantifiable impact of the #MeToo movement in the Commonwealth of Massachusetts, provide an overview of the Commonwealth's legal framework related to workplace sexual harassment, summarize the legislative response to the #MeToo movement, and conclude by contemplating the future of workplace sexual harassment law in Massachusetts.

Data Demonstrating the Impact of the #MeToo Movement in Massachusetts.

An increase in both the number of sexual harassment complaints filed with the Massachusetts Commission Against Discrimination and the amounts awarded by the Commission demonstrate the influence of the #MeToo movement in the Commonwealth. During the period from 2015 to 2017, reports show an average of 271 sexual harassment claims per year. In 2018, that number jumped to 320. In January and February of 2018, the Commission reported a 400% increase in sexual harassment complaints compared to those same months in 2017. These claims of sexual harassment were overwhelmingly attributed to employment situations.

In addition, Commission data shows an increase in the average emotional distress award from \$38,000 in 2016 to \$71,250 in 2018. At the same time, jury awards of punitive damages in sexual harassment cases have increased dramatically.

Current Workplace Sexual Harassment Law: An Overview

Massachusetts has an extensive legal framework for addressing sexual harassment in the workplace. While Massachusetts General Laws chapter 214, section 1(c) provides an affirmative right to freedom from sexual harassment, the Massachusetts Fair Employment Practices Act, Massachusetts General Laws chapter 151B, prohibits discrimination on the basis of sex, including sexual harassment, in workplaces with six or more employees. While Massachusetts law incorporates federal standards under Title VII, Massachusetts goes farther with its application to smaller employers, sexual harassment policy requirements, breadth of liability, and robust enforcement.

Under Massachusetts law, employers must adopt and distribute annually a written policy against sexual harassment and complaint procedure, which states, at a minimum, that sexual harassment in the workplace is unlawful and that retaliation against an employee for filing a complaint is prohibited. It is further recommended that each policy express the employer's commitment to adequate investigation



of sexual harassment claims. The Massachusetts Commission Against Discrimination has published a model policy including additional elements such as: (i) a definition and examples of sexual harassment; (ii) a statement of the potential consequences for committing sexual harassment; and (iii) information about the state and federal agencies in which sexual harassment claims may be filed.

Under Chapter 151B, employers are vicariously liable for the sexual harassment of employees by managers and supervisors. Massachusetts courts have consistently found employers strictly liable for sexual harassment committed by their agents against employees. Employers may also be held liable for sexual harassment committed by co-workers, and even non-employees, if the employer knew or should have known about the harassment and failed to take remedial action.

Chapter 151B also provides for individual liability of supervisors, co-workers, and non-employees for engaging in sexually harassing conduct, for aiding and abetting sexual harassment and for retaliation against a complainant or other employee for participating in protected activity under the statute.

Regardless of whether an employee brings an internal complaint with their employer, they must file a claim under Chapter 151B with the Massachusetts Commission Against Discrimination before filing a lawsuit in state or federal court. Massachusetts employs a 300-day statutory period from the date of a sexual harassment incident to file a complaint, subject to expansion under the continuing violations doctrine in certain cases.

Upon a finding of probable cause by the Commission, a case may proceed to an administrative hearing. The Commission is authorized to award compensatory damages, including backpay and emotional distress damages, and mandatory attorney's fees and costs. The Commission is also empowered by statute to assess civil penalties and order reinstatement in instances of unlawful termination.

Alternatively, once a case has been pending in the Commission for at least ninety days, a claimant may withdraw their case from the Commission and pursue litigation in state or federal court subject to a three-year statute of limitations. In a sexual harassment lawsuit under Chapter 151B, the complainant may seek compensatory damages, punitive damages, and equitable relief. If the court finds in favor of the complainant, it must award reasonable attorneys' fees and costs.

The Legislative Response

Over the past few years, the legislature has proposed a number of bills on topics related to the #MeToo movement. This article will focus on the most notable examples.

In 2018, to augment the resources of the Massachusetts Commission Against Discrimination, the Senate and House considered granting the Massachusetts Attorney General pre-litigation investigative powers for sexual harassment cases similar to those the Attorney General wields in the consumer protection arena. The Senate halted the bill's progress with a study order, but both chambers have re-filed this proposed legislation.

2019 has seen a greater number of proposed bills in the sexual harassment area, both continuing prior legislative efforts and establishing new legislative priorities that would significantly impact the law relating to workplace sexual harassment.



One of the new bills requires employers to provide annual sexual harassment prevention training to their employees and to certify to the Attorney General that they have met training requirements. Each employee would receive their first training within 6 months of hire. Under the bill, training sessions must be at least two hours long and, among other things, must educate workers about employers' legal responsibilities and employees' rights of redress. A second new bill in 2019 would void sexual harassment-related non-disclosure provisions in employment contracts and settlement agreements. However, under this proposed legislation, provisions that shield the victim's identity may be included in settlement agreements at the victim's request.

What Can Massachusetts Expect in the Future?

The #MeToo movement has had a significant impact in the Commonwealth. The Massachusetts Commission Against Discrimination is seeing more sexual harassment complaints and issuing larger emotional distress damages awards, while the courts in Massachusetts are issuing higher punitive damage awards. Based on current trends, it appears that increases in complaints and award amounts will continue for the foreseeable future. At the same time, the legislature is working to impose new requirements on employers, increase protections, and expand the state's role in the investigative process. Given the multiple bills pending in this area, it is likely that Massachusetts will soon enact new legislation strengthening the current legal framework, in response to the #MeToo movement.

The growing number of complaints and larger awards, together with Chapter 151B's policy requirements, broad liability and a complainant-friendly framework provide motivation for Massachusetts employers to be vigilant about compliance. Massachusetts employers must take seriously their responsibilities to maintain and enforce anti-harassment policies, to investigate complaints, and to remedy sexual harassment when it occurs. As the effects of the #MeToo movement increase in scope and the legal framework develops further, the pressure on employers to commit resources to maintaining harassment-free workplaces will only grow.

For more information, contact Tamsin R. Kaplan (tkaplan@davismalm.com) at ILN member, Davis Malm & D'Agostine P.C. Additional credit for this chapter given to Taylor Lovejoy.