

A Practical Approach to Mitigating Risk Related to Workplace Harassment and Pay Equity



When it comes to creating a safe, inclusive, equitable campus, culture is the bottom line. But changing the culture and transforming the mindset of an enterprise as large, complex and multifaceted as a higher education institution certainly doesn't happen overnight — it's a slow and steady journey.

While helping their colleges and universities navigate this bigger change over the long term, there are also things HR can do in the short term to help reduce risk, ensure fairness, and support institution-wide efforts to create a culture of respect and inclusion.

Lynn Clements, formerly with the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs and current director of regulatory affairs at Berkshire Associates, recently presented a CUPA-HR webinar on how the #MeToo and

pay equity movements are impacting employers, including higher education, and how HR can act in a strategic way to help their organizations not only respond to but also proactively address these issues.

Sexual Misconduct and Harassment

The last several months have brought a tidal wave of well-publicized allegations of workplace sexual harassment and abuse. These allegations span industries and demographics, and they run the gamut from sexual assault, misconduct or harassment at an individual level to accusations against an entire organization that it was complicit in allowing the abuse or harassment to happen. Out of this increase in reports of alleged wrongdoing and the continuing conversation around sexual abuse and harassment, two nationwide movements have sprung up: #MeToo and Time's Up. And out of these movements have come increased scrutiny on employers to root out the bad apples,

address sexual misconduct allegations in a timely and thorough manner, and ensure a safe and compliant work environment. According to Clements, there a couple of key components of the Time's Up and #MeToo movements of which employers should be aware. One is a legal defense fund, managed by the National Women's Law Center, for low-income women who have experienced harassment but don't have the means to litigate, which means employers may see more and more litigation as this defense fund ramps up. The other is an increased focus on advocacy, with a call for changing employment laws or contracts that make it difficult to bring claims against an alleged perpetrator (for example, non-disclosure agreements and mandatory arbitration provisions). "Some states and localities are starting to act on this and are considering laws banning such agreements and provisions in workplaces," she says.

So, what does this mean for employers? According to Clements, "Now is the time to audit your practices, policies and procedures related to workplace harassment in order to evaluate vulnerable work environments and examine risky employment practices." In addition, she recommends employers review confidentiality and mandatory arbitration provisions of employment agreements to ensure they comply with state law; conduct organization-wide anti-harassment training and reinforce messaging around the topic; and evaluate investigative procedures to ensure they address contemporary issues and ensure accountability.

Identify Your Vulnerable Populations

Clements recommends taking a close look at your workplace's vulnerable populations to ensure they are educated on what harassment looks like, what is and is not acceptable behavior, and how to report misconduct. These vulnerable populations include:

- Young workers, who typically don't have a lot of experience in the work world;
- Low-wage service positions — more than 20 percent of EEOC's harassment cases over the past decade have involved low-wage service positions (individuals in these types of jobs typically don't have the means to litigate and/or they are afraid of losing their job if they report);
- Women who work in male-dominated fields; and
- Power imbalance situations (for higher ed, this includes the faculty-grad student relationship).

Audit Your Harassment Policies

According to a 2017 NBC News poll, nearly half of working women in the U.S. say they have experienced harassment in the workplace. And according to a 2015 survey by *Cosmopolitan* magazine of more than 2,200 working women between the ages of 18-34, one in three said they had been sexually harassed at work — but less than 30 percent reported it.

Clements offers some guidance around how employers can audit their harassment policies to ensure that reporting is safe, easy and encouraged:

- Make sure your organization's policies, procedures and training address all forms of actionable harassment, not just sexual harassment.
- Ensure that policies clearly prohibit retaliation and that witnesses are also protected from retaliation (even if the EEOC deems a harassment claim is not actionable, many times retaliation claims that come out of these harassment claims are deemed actionable).
- For higher ed specifically, clearly spell out what kinds of interactions are appropriate between faculty and students.
- Confirm that your policy covers inappropriate behavior by third parties.
- Have multiple avenues for filing complaints, including formal and informal mechanisms.
- Decide how you will address harassment allegations involving a repeat offender — determine the line between progressive discipline and the need to terminate.
- Distribute your harassment policy to all employees at the beginning of employment and on a periodic basis thereafter, ideally requesting some sort of acknowledgment from employees that they received the policy, read it and understand it.

Provide Training

Clements recommends revisiting who provides and attends harassment training. "It's not sufficient anymore for just supervisors to attend," she says. "The audience should be broader than that." It's also important for senior campus leaders to attend training. If they're not, she says, "think about the message that sends to staff and faculty." Avoid

“canned” and generic training. Instead, she suggests, employers should evaluate their areas of weakness and train around those areas and the issues specific to that particular workplace or industry. The EEOC strongly encourages unconscious bias training and bystander training as well, and prefers employers conduct sexual harassment training in-person as opposed to online.

Conduct Effective Investigations

The number one rule here, Clements says, is to investigate every harassment complaint, no matter how “minor.” Here are some ways to ensure investigations are fair, thorough and effective:

- Define the purpose and scope of the investigation, in writing.
- Determine whether the investigation should be conducted by an internal or external resource.
- Investigate promptly, but don’t rush to judgement.
- Maintain confidentiality to the greatest extent possible.
- Ensure investigators are trained on unconscious bias; on all organizational policies and procedures related to workplace harassment and reporting; and on how to conduct a thorough investigation and write comprehensive reports.
- Ensure that the due process rights of the accused are protected (there have been a few counterclaims in court recently that the accused did not get due process).
- Document your investigation carefully — an outside party should be able to reconstruct the entire investigation from your report.

“By putting in place well-defined and consistent practices, policies and procedures related to harassment and reporting, HR can help their organizations build a solid foundation of respect and inclusion,” says Clements.

Equal Pay

Pay equality is another movement that is gaining ground in the U.S., and an issue that employers that strive to be inclusive should be addressing head on. Says Clements, “There is a continued focus on equal pay at both the state and federal levels, and private litigation in this area is growing.”

According to Clements, a flurry of state and localities have revised pay discrimination laws since 2016. These revisions include changing the scope of who should be compared when looking at pay; narrowing defenses employers can use to explain raw wage differences; requiring employers to explain “entire pay” differences; banning inquiries about salary history in the application and hiring processes; and creating affirmative defenses for conducting proactive salary equity studies. “With the increased focus on equal pay for equal work, employers must look closely at their pay structures and their compensation strategies and adjust them as needed,” she says.

A good first step is to evaluate your legal risks and vulnerabilities as an organization. Clements recommends asking the following questions:

- How similar are we to other organizations who have lost or settled a pay equity case? Do we have the same susceptibilities?
- When is the last time we analyzed compensation data for pay discrimination?
- Do we have all the data we need to do an analysis? (If not, make it a priority to start collecting more pay-related data.)
- How many employees receive pay from multiple sources, and how can we evaluate that pay to ensure it is fair?
- Are employees voicing complaints about pay inequity?
- Are there pay compression concerns? (OFCCP has been very interested in this particular issue as of late.)
- How much of our explanation for pay differences is tied to assignment, promotion, performance history, department or similar factors? When have we last examined the fairness of these processes? (Many of the recent equal pay cases that have progressed to litigation have been related to promotion, performance or assignment discrimination.)

Related to this last point, Clements suggests it might be a good idea to analyze your organization’s performance-related data to determine if certain groups consistently receive lower overall performance ratings than others. If so, she says, it’s time to reexamine your organization’s performance review system to evaluate fairness (and possibly consider unconscious bias training for managers).


After pinpointing potential legal risk areas and vulnerabilities, Clements recommends doing a pay equity study for positions and areas of concern. She advises following the approach below:

First, determine what the budget is for pay equity salary increases. Next, determine what you will look at related to pay — base pay only, or base pay plus merit increases, bonuses, overtime pay and/or other factors. Then, gather all of the data that you believe influences pay. Start with time with institution and time in job; job level/grade/salary band; department/school/college; and geographical differences (analyze this data first because it's easy to gather and in and of itself may explain a lot of raw wage differences). If you need to dig further, gather data in educational attainment/certifications; prior experience; performance history; and other relevant factors. It's also important to know what data you're missing and think about how you might begin collecting that data going forward. Next, analyze the positions of concern, and refine these analyses as you gain insight into how pay decisions are being made.

Be strategic when implementing pay adjustments. It's important to think about timing, communications and messaging and to have a plan in place for how to address back pay requests that are almost certain to roll in as

a result of the study and its findings. Finally, evaluate system changes that can help remedy the kinds of pay equity issues you uncovered in your analyses and that can help prevent future concerns. For example, if you find that starting pay is a reason for a lot of your wage differences, decide whether your organization will rely on salary history when setting pay (if that's still permitted in your state). Think about how you can enhance early communications about salary levels or monitor/limit late-stage negotiations around pay. Train all managers on pay equity considerations and develop a clear process for documenting exceptions.

The Best Defense Is a Good Offense

Employers have both a legal and a moral obligation to ensure safe, respectful, equitable and compliant workplaces. While reactionary measures are sometimes required when it comes to pay equity and workplace harassment, proactive action is paramount. By evaluating policies, procedures and processes, and leading and championing change where it's needed, HR organizations can help create a culture where all employees feel safe, valued, respected and included. 

The information in this article is not intended to provide legal advice and should not be relied upon as such.

Helpful Resources

Sexual Assault, Misconduct and Harassment

- **Sexual Harassment Resources Web Page** (www.cupahr.org/knowledge-center/harassment)
- **CUPA-HR On-Demand Webinar: Delivering Engaging, Informative, Impactful Sexual Harassment Training** (www.cupahr.org/events/webinars)
- **Training Video: Higher Ed-Specific Harassment Scenarios** (www.cupahr.org/knowledge-center/essentials)
- **EEOC Checklists and Chart of Workplace Harassment Risk Factors** (https://www.eeoc.gov/eeoc/task_force/harassment/checklists.cfm)

Equal Pay

- **Compensation Programs/Plans Toolkit** (www.cupahr.org/knowledge-center/toolkits/compensation-programsplans)
- **How to Use Benchmarking to Ensure Competitive Pay for Faculty** (www.cupahr.org/benchmark-faculty-salaries)
- **CUPA-HR Research Briefs on Pay and Representation of Women and Minorities in the Higher Ed Workforce** (www.cupahr.org/surveys/research-briefs)