



# **FROM SEXUAL HARASSMENT TO WAGE THEFT: ISSUE SPOTTING FOR LAWYERS WORKING WITH LOW-WAGE WORKERS IN THE AGE OF #METOO.**

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# Introduction and Outline

Low-wage workers are particularly vulnerable to discrimination and abuse stemming from a lack of power and control in their workplace, and may experience intersecting forms of discrimination. Understanding how to identify and screen for a wide range of potential claims allows us to be better advocates and more fully serve our clients.

- Introduction
- Sexual Harassment
- Workplace Rights and Wage Theft
- Protections for Immigrant Workers
- Q&A



We're passionate champions of policies and laws that help women and girls achieve their potential throughout their lives – at school, at work, at home, and in their communities. We're committed advocates who take on the toughest challenges, especially for the most vulnerable women – and we make change happen. We're proud to have been on the frontlines of virtually every advance for women for more than 40 years, benefitting their families, their communities, and the nation.



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Please help us by answering the five multiple choices questions in the bar on the right of your screen.

1. Which best describes where you work?
2. In which geographic area do you practice law?
3. In what areas of law do you practice?
4. Are you a part of the Legal Network for Gender Equity?
5. How did you hear about this webinar?

# Sexual Harassment

Sexual harassment is an expression of power used to exert control over people with less power and status – particularly women, women of color, immigrants, and LGBTQ people.

- While harassment occurs across all economic sectors, women, and particularly women of color and immigrant women, are overrepresented in low-wage jobs.
  - These jobs typically lack legal protections including fair and predictable schedules, access to health insurance, and paid time off, leaving workers additionally vulnerable to exploitation.
- Workers in low-wage jobs, such as food service, hospitality, and agriculture, frequently face sexual harassment at high rates.
- High rates of sexual harassment are also present in male dominated workplaces that have traditionally excluded women, including for example, construction, security guards and some science related professions.

# Title VII Prohibits Discrimination Based on Sex

Title VII makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex.

- 1975: Carmita Wood denied unemployment insurance on grounds that her resignation after years of sexual advances and groping by her boss was for “personal, non-compelling reasons”
- 1977: D.C. Circuit court holds that sexual harassment constitutes sex discrimination under Title VII. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977)
- 1981: D.C. Circuit court holds that a “hostile environment” constitutes sex discrimination under Title VII. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981)
- 1986: Supreme Court holds that sexual harassment was sufficiently “severe or pervasive” to create a “hostile work environment”, violating Title VII ban on sex discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)



# Legal Overview: Title VII Sexual Harassment

Sexual harassment is a form of sex discrimination. When it occurs on the job it violates the laws against sex discrimination in the workplace, including Title VII of the Civil Rights Act of 1964.

Sexual harassment is unwelcome behavior that happens to you because of your sex. But for your sex, you would not have been targeted. It includes:

- Unwelcome sexual advances
- Request for sexual favors, or
- Hostile verbal or physical conduct that targets someone based on gender, whether or not sexual overtures are involved

# Legal Overview: Title VII Sexual Harassment

- Only covers employers of a certain size, with 15 or more employees
- Only protects employees and excludes independent contractors, unpaid interns, and others
- Filing time is limited from 180 to 300 days, depending on location
- Court-created legal standards:
  - Sexual harassment constitutes a violation of Title VII as a form of sex discrimination where:
    - “Quid pro quo” harassment occurs
    - “Hostile work environment” is created by “severe or pervasive” sexual harassment”

# Legal Overview: Title VII Sexual Harassment

## Administrative Exhaustion:

- Potential plaintiffs must file a charge with the EEOC
- Can file in court with a “right to sue” letter
  - Must file within 90 days of receiving the letter

## Available Recovery:

- Backpay and frontpay (taxed)
- Compensatory and punitive damages are capped by employer size:
  - Cap of \$50,000 for employer’s size of 15 to 100 employees.
  - Cap of \$100,000 for employer’s size of 101 to 200 employees.
  - Cap of \$200,000 for employer’s size of 201 to 500 employees.
  - Cap of \$300,000 for employer’s size of more than 500 employees.

# Relevant State and Local Protections

Some states and municipalities have stronger employment discrimination protections. Additional protections may include:

- A different standard for showing harassment than “severe or pervasive”
- Expanding coverage to more individuals, including independent contractors
- Longer timeframes to file a charge with a local agency
- Explicit protections for LGBTQ individuals
- Requiring employers to conduct anti-harassment training

# Title VII Prohibits Retaliation

It is illegal for employers to take adverse action against individuals who engage in protected activity. Note: the underlying conduct need not meet the legal test for discrimination in order to bring a retaliation claim.

- Protected Activity
  - Opposition to Discrimination or Harassment – i.e. speaking up against discrimination or conduct you believe violates civil rights protections
  - Participation: Taking part in investigations or lawsuits as a witness or plaintiff
- Notice to the Employer
- Adverse Action

Retaliation may look different in each workplace:

- Discipline, threats, increased scrutiny
- Transfer to a less desirable position or increasing difficulty of work assignments
- Verbal or physical abuse
- Threats to or make reports to immigration authorities or police

# Sexual Harassment and Employer Liability

If the harasser is a supervisor, the employer is liable unless there is an affirmative defense.

- An employer is legally responsible if the harasser was your supervisor (the person with authority to hire you, fire you, etc.) and based decisions about your job on your responses to the employer or supervisors sexual advances.
- If your supervisor created a hostile work environment, the company is also liable, unless the company took care to prevent and correct harassment, and you unreasonably failed to use the employers procedures.
- This is known as the *Faragher-Ellerth* defense. *Burlington Indus. v. Ellerth*, 524 US 742 (1998); *Faragher v. City of Boca Raton*, 524 US 775 (1998)
- The Supreme Court has narrowed the definition of supervisor to those who can make “tangible employment actions” *Vance v. Ball State Univ.*, 570 US 421 (2013)

# Coworker and Third Party Sexual Harassment

- If the harasser is a “low-level supervisor” or a client or a customer the employer may be liable.
  - The employer is liable only if management knew or should have known about the harassment and did not take prompt remedial action.
    - *Erickson v. Wisconsin Dep’t of Corr.*, 469 F.3d 600, 605–06 (7th Cir. 2006) (“[F]or purposes of Title VII hostile work environment liability based on negligence, whether the potential harasser is an employee, independent contractor, or even a customer is irrelevant: The genesis of inequality matters not; what *does* matter is how the employer handles the problem. . .)

# Title VII and LGBTQ Workers

The Supreme Court has recognized that same-sex harassment is a form of sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)

Circuit Courts have recognized that LGBTQ individuals who are discriminated against based on sexual orientation or gender identity are also protected by federal law prohibiting sex discrimination.

- *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (sexual orientation discrimination is a subset of sex discrimination for purposes of Title VII)
- *EEOC v. R.G.*, 884 F.3d 560 (6th Cir 2018) (discrimination based on transgender and transitioning status is sex discrimination under Title VII)
- *Hively v. Ivy Tech.*, 853 F.3d 339 (7th Cir 2017) (discrimination based on sexual orientation is sex discrimination under Title VII)



# Intersectional Discrimination

Women of color, women with disabilities, LGBTQ individuals, immigrant women and others who face multiple forms of oppression frequently experience sexual harassment that is intertwined with other forms of prejudice.

- *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (“Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination ‘even in the absence of discrimination against [Asian] men or white women’”)
- *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F. 2d 1025, 1034 (5th Cir. 1980) (“discrimination against black females can exist even in the absence of discrimination against black men or white women”)

# Considerations for Sexual Harassment Intake Interviews

Talking about sexual harassment can be difficult. It can create feelings of shame even if the person knows she or he did not do anything to deserve the abusive treatment.

Ensure that the individual knows that you are seeking out these details so you have all the information you need to determine if there is a legal claim. It may be helpful to say that the legal standards are hard ones to meet and just because there may not be a live legal claim - that doesn't mean what happened was okay.

- How long ago did the events take place?
- Have you experience unwanted sexual attention?
  - Describe the events in detail and the timeframes
- What measures did you take afterward?
  - Did they follow the employer's policies? Go through a grievance process?
  - If the individual does not complain internally, they could lose a court case on that basis alone
- Was there any negative action following a complaint of harassment?
  - Always ask about retaliation.

# Considerations for Sexual Harassment Intake Interviews

These are general tips to keep in mind.

Talking about sexual harassment and abuse can re-traumatize an individual. Proceed mindfully, but do gather the information you need to assess the claim.

- Consider maintaining a referral list for mental and emotional health resources.
- Cultural context may influence perception of and response to trauma.
- Recognize that triggers may make it difficult to connect with a client, set aside enough time to conduct the intake without rushing.
- Do your best to make the client comfortable, consider the physical space.
- Explain things in advance: tell the client how much time you have, what you will ask about, that you will be taking notes, offer to make a copy of the notes.
- Notice and acknowledge before moving on to the next question (“that sounds really difficult, no one should have to go through that at work). There are many ways to do this without confirming or denying that the person has a legal claim.
- Clients experiencing PTSD may have difficulty remembering dates and times, or consistently responding to e-mail, or preparing documents.
- Educate yourself as an attorney on how trauma interacts with behavior and memory, and tailor your practices to the needs of your clients.

# NWLC Resources

- Join the Legal Network for Gender Equity: <https://nwlc.org/join-the-legal-network/>
- Apply for funding for workplace sexual harassment cases through the TIME'S UP Legal Defense Fund: <https://nwlc.org/times-up-legal-defense-fund/attorney-application-for-financial-support-from-the-times-up-legal-defense-fund/>
- Non-profit grant funding for outreach and know your rights sexual harassment work **\*\*deadline June 29, 2018\*\***: <https://nwlc.org/times-up-legal-defense-fund-outreach-grants-funding-application/>
- #MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability: <https://nwlc.org/resources/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability/>
- FAQ on Sexual Harassment: <https://nwlc.org/resources/faq-about-sexual-harassment-in-the-workplace/>



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# Workplace Rights and Wage Theft

*An Overview for Attorneys New to the Representation of Low-wage Workers*

June 26, 2018

# Overview of Related Workplace Violations

- Minimum Wage
- Overtime
- Independent Contractor Misclassification
- Safety and Health



# Overview of Wage Theft

- What is wage theft?
  - When employer pays workers less than they are legally owed for their work
  - Usually a violation of the Federal Labor Standards Act, but also can look to state or local law to remedy wage theft allegations
- Magnitude of the problem
  - Minimum wage violations affect up to 2.4m workers
  - Resulting in loss of \$8b annually
- Nexus with other workplace issues
  - Young workers, women, people of color and immigrant workers are more likely to suffer wage theft violations



# Minimum Wage Violations

- Minimum wage governed by Fair Labor Standards Act
  - Current minimum wage: \$7.25
  - Current tipped minimum wage: \$2.13
- Also must check state and locality to check minimum wage
  - Fight for \$15 and raise the wage movements nationwide
- Minimum wage intake questions
  - What is your rate of pay?
  - How often are you paid?
  - Are you paid for all of your hours worked?
- Referral for Minimum wage violations to State or Local DOL, U.S. DOL-Wage & Hour Division, Legal Aid, Local Bar Association and prosecutor's offices (check with your jurisdiction)

# Overtime Violations

- FLSA rule
  - Hours over 40 for non-exempt employees compensated at time and a half
  - Biggest issue: who is eligible for OT?
    - Two issues—salary test and duties test
    - Non-exempt include management, skilled employees, farmworkers, seasonal workers, etc.
- Overtime intake questions
  - Are you paid a different rate for your hours over 40?
  - What are you paid for hours over 40?
- Preservation of evidence for meeting with attorneys
  - Encourage workers worried about these issues to track their own hours
  - Keep text/written records of wage rate, hours worked and amounts paid
- Referral for Overtime violations to State and Local DOL, U.S. DOL, State Attorneys General offices, NELA, Legal Aid and local bar association

# Misclassification

- Misclassification as an independent contractor is part of on-going issues with wage theft
- Common occupations with misclassification issues
  - Home care, trucking, construction, gig economy jobs
- Misclassification has implications for overtime, unemployment and workers compensation and other benefits
  - Questions to consider
    - Is the worker an employee or an independent contractor?
    - Who signs the workers paycheck?
    - Who directs the work?
    - Who supervises the work?
  - Determining employee status will also be helpful for moving forward with sexual harassment or retaliation complaints
- Standards differ between various areas of law, which makes this area complicated: FLSA, worker's compensation, unemployment insurance all vary and also each state, so after initial consultation if these issues come up, referral is preferred

# Health and Safety Resources

- In the event of discrimination/harassment, OSHA resources are also available
- Workers may file an OSHA Discrimination Complaint Under Section 11(c) within 30 days<sup>1</sup>
- Also may file an OSHA Safety and Health Complaint within 6 months of hazard<sup>2</sup>
- Follow up on the Filing of the OSHA Complaints (if there is a state-run OSHA office, call both the state-run office and the federal regional office)
- Also may file a Workers' Compensation Complaint Alleging Retaliation or Unlawful Discrimination

# Wage and Hour/Misclassification Red Flags during initial client interview

- Worker does not know name of Employer
- Worker is paid off the books
- Worker is unsure of pay rate
- Worker has issues with being paid in a timely fashion
- Worker has issues with being paid post-complaint
- Worker has issues with hours post-complaint
- Worker has issues with other conditions in workplace post-complaint
- Worker is an hourly employee but paid a lump sum weekly or bi-weekly, i.e. pay does not fluctuate

# Resources

**National Employment Law Project:**

Najah A. Farley, Staff Attorney, [nfarley@nelp.org](mailto:nfarley@nelp.org)

**Department of Labor Wage & Hour Division Offices:** <https://www.dol.gov/whd/local/>

**Directory of State Labor Agencies:** <https://employment.findlaw.com/legal-help-and-resources/state-labor-agencies.html>

**UC Berkeley Inventory of City and County Minimum Wage Ordinances:** <http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/>

**National Wage & Hour Clearinghouse** ([www.just-pay.org](http://www.just-pay.org))

**National Employment Lawyers Association Membership Directory:** <http://exchange.nela.org/memberdirectory/findalawyer>

**EPI Survey on Wage Theft:** <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/>

**NELP Resources on wage theft and independent contractor misclassification:** <http://www.nelp.org/publication/winning-wage-justice-strategies-for-effective-local-wage-law-enforcement/>

<http://www.nelp.org/publication/independent-contractor-vs-employee/>





# Immigrant Workers

*Retaliation and Protecting Immigrants in Litigation*

June 26, 2018



# The FLSA & Retaliation Against Immigrant Workers

## 29 U.S.C. § 215(a)(3)

**(a)**After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person— . . . **(3)**to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [this chapter](#), or has testified or is about to testify in any such proceeding, or has served or is about to serve on an [industry](#) committee; . . .



# The FLSA & Retaliation Against Immigrant Workers

- **Courts have found that reporting undocumented workers to government agencies after workers engaged in protected activity can constitute unlawful retaliation under the FLSA.**

*See, e.g.:*

- *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F.Supp.2d 1056, 1059 (N.D. Cal. 2002) (denying a motion to dismiss claim of unlawful retaliation where the undocumented worker plaintiff alleged that the employer had reported the worker to Immigration and Naturalization Services (INS) in an act of retaliation for his wage claim, which resulted in his detention by INS, noting that a previous district court in California had concluded that “reporting an illegal alien *with* a retaliatory motive was prohibited conduct under § 215(a)(3)”)(emphasis in original)
- *Centeno-Bernuy v. Perry*, No. 03-CV-457, 2009 WL 2424380 (W.D.N.Y. Aug. 5, 2009) (granting summary judgment on plaintiff workers’ claim of retaliation under the FLSA based on defendant reporting plaintiffs to INS, Homeland Security, and the New York State Attorney General’s Office, accusing their lawyers of harboring terrorists, and continuing the accusations even after a preliminary injunction, explaining that the court could not discern any “rationale for defendant’s behavior other than a desire to attract the attention of government authorities to locate an deport plaintiffs so that they could not prosecute their FLSA claims”)
- *Perez v. ACME Universal, Inc.*, No. CV 12-00008, 2014 WL 1378241 (D. Guam Apr. 8, 2014) (denying motion to dismiss retaliation claim, finding that defendants’ alleged contacting of immigration authorities, who detained one employee, along with other alleged retaliatory conduct, could have dissuaded a reasonable employee from making or supporting an FLSA complaint)

# The FLSA & Retaliation Against Immigrant Workers

- **Courts have found that an employer's threat to report a worker to immigration authorities may support a retaliation claim under the FLSA.**

*See, e.g.:*

- *Bartolon-Perez v. Island Granite & Stone, Inc.*, 108 F. Supp. 3d 1335, 1341 (S.D. Fla. 2015) (partially denying defendant's summary judgment motion on retaliation claim, finding that the threat of calling immigration and intimidation Plaintiff experienced, which included a request to fill out an I-9 form, were "sufficiently 'severe' such that [p]laintiff ha[d] shown enough evidence to sustain a claim for retaliation in the form of a constructive discharge") (citation omitted)
- *Aponte v. Modern Furniture Manufacturing Company, LLC*, 2016 WL 5372799, at \*18 (E.D.N.Y., 2016) (finding that employer's threats to report one plaintiff and his son "to the immigration authorities would, by themselves, dissuade a reasonable employee from participating in th[e] lawsuit" and ultimately holding that the plaintiff met *prima facie* burden of establishing retaliation under the FLSA)

# The FLSA & Retaliation Against Immigrant Workers

- **Courts have found that inquiring into a worker's immigration status can also constitute retaliation.**

*See, e.g.:*

- *EEOC v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006) (barring employer from asking information about employees' immigration status until the termination of the Title VII-related case, finding that it was not plausible that the employer who asked intervenor-plaintiffs to fill out employment applications, including an I-9 form, would suddenly discover for the first time that its employees were deficient with regards to immigration law requirements)
- *Bartolon-Perez v. Island Granite & Stone, Inc.*, 108 F. Supp. 3d 1335, 1341 (S.D. Fla. 2015) (partially denying defendant's summary judgment motion on retaliation claim, finding that the threat of calling immigration and intimidation Plaintiff experienced, which included a request to fill out an I-9 form, were "sufficiently 'severe' such that [p]laintiff ha[d] shown enough evidence to sustain a claim for retaliation in the form of a constructive discharge") (citation omitted)

# The FLSA & Retaliation Against Immigrant Workers

- **Courts have found that third parties may be held liable for immigration-related retaliation under the FLSA.**

*See, e.g.:*

- *See, e.g., Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tenn. 2009) (denying county department's motion to dismiss, concluding that the plaintiffs had sufficiently alleged that the county had worked in concert with the employer to arrest plaintiffs and then reported plaintiffs to ICE because the plaintiffs had complained about their pay)
- *Arias v. Raymondo*, 860 F.3d 1185 (9th Cir. 2017) (denying a motion to dismiss a retaliation claim, finding that a retaliation claim against an employer's attorney could proceed where the attorney had asked ICE to take plaintiff worker into custody at a scheduled deposition)

# Undocumented Immigrant Workers & Discovery

- **Attorneys should resist questions from the outset pertaining to alienage (e.g., “Where are you from?”).**
- **Attorneys should consider seeking a Protective Order.**
- **Attorneys should consider using the Fifth Amendment.**
- **It is a good practice to use a worker’s real name (as opposed to aliases) in the complaint.**

# Undocumented Immigrant Workers & Trial

- **Attorneys should consider barring the introduction of immigration status/alienage evidence at trial through a motion *in limine*.**
- **Attorneys should consider using the Fifth Amendment, if necessary.**

# What to Do *Before* Retaliation

**Give client a palm card explaining right to remain silent.<sup>1</sup>**

## **KNOW YOUR RIGHTS!**

If you are stopped by immigration or the police:

- ✓ Hand this card to the officer, and remain silent.
- ✓ The card explains that you are exercising your right to refuse to answer any questions until you have talked with a lawyer.

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### **To: Immigration or Other Officer**

Right now I am choosing to exercise my legal rights.

- I will remain **silent**, and I refuse to answer your questions.
- If I am detained, I have the right to contact an attorney **immediately**.
- I refuse to sign anything without advice from an attorney.

Thank you.

# What to Do *Before* Retaliation

1. Give client a palm card explaining right to remain silent.<sup>1</sup>
2. Give client a letter to show immigration authorities instructing them to refer all questions to you.
3. Advise clients to not use incorrect SSN with agencies.
4. Ask agency to allow client to attend meetings or hearings by phone or video conference.
5. If an employer threatens to retaliate, inform the employer that retaliation is illegal.



# Resources

- **National Employment Law Project:**

Laura Huizar, Staff Attorney, [luhizar@nelp.org](mailto:luhizar@nelp.org)

- **Materials**

[Protecting Injured Immigrant Workers From Retaliation](#)

(NELP Fact Sheet)

[What to Do if Immigration Comes to Your Workplace](#)

(NELP & NILC Guide)

[NILC Know Your Rights Palm Cards](#)

[Copy of MOU](#) between DHS and Labor Agencies

- **National Wage & Hour Clearinghouse ([www.just-pay.org](http://www.just-pay.org))**

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# Questions?



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