

Checklist From Effective Practices for Addressing Discrimination & Harassment in the Tribal Workplace

This is a compilation of the checklists from *Effective Practices for Addressing Discrimination & Harassment in the Tribal Workplace*. The checklist is intended to start a conversation about being more effective in preventing and eliminating discrimination and harassment in tribal workplaces. Since tribal laws, policies and protocols are unique in addressing workplace misconduct, there is no checklist that can comprehensively address this topic. Therefore, this checklist is not the answer to discrimination and harassment in the tribal workplace but hopefully it will help tribal leaders, human resources professionals, administrators and lawyers engage in this important conversation in a meaningful manner.

Can I rely on this checklist as legal advice?

No.

This checklist does not provide legal advice and does not form a relationship between client and lawyer. Do not rely on any aspect of this checklist without first seeking competent legal advice.

Respectful Recommendation

If a tribal employer utilizes this checklist as a stick to measure its discrimination and harassment practices and protocols, only engage in that analysis with the benefit of the attorney-client privilege. Most tribal employers have in-house lawyers that can assist in assessing where the tribe's policies and protocols meet and exceed best practices and those policies and protocols that need improvement. If that assessment is performed with the assistance of legal counsel with an eye toward the preservation of the attorney-client privilege, the assessment can be protected by privilege. Consultation with your lawyer regarding the protocols necessary to create and preserve privilege is a good idea. When privilege is created and preserved, the assessment of the tribe's discrimination and harassment policies and protocols can be performed under the protections that privilege provides. If the assessment is not performed under the protection of privilege, the assessment could be used by a victim of discrimination or harassment arguing that the tribe was aware of the shortcomings of certain aspects of its discrimination and harassment policies and protocols but failed to fix them. A judge, jury or grievance panel would likely hold the tribe accountable for that failure.

Discrimination and Harassment Checklist

The checklists from *Effective Practices for Addressing Discrimination & Harassment in the Tribal Workplace* are consolidated here. Before using the checklist to evaluate tribal best practices, review the tribe's:

Constitution (equal protection and due process)

Discrimination and harassment laws

Relevant resolutions

Policies and procedures

Investigation policies and procedures

Training

Number of complaints last 5 years

Number of investigations last 5 years

Cases in tribal court

When policies last updated

When training last updated

Additionally, please consider the respectful recommendation to audit the tribe's discrimination and harassment best practices with the tribe's lawyers. If the audit is performed with the protection of the attorney-client privilege, that mitigates the risk of a claim that the tribe failed to enhance its protocols in reaction to an audit. Moreover, it is a best practice to have the benefit of the advice of legal counsel throughout the audit process.

Policies

General Considerations

_____ The tribal employer has created a list of protected traits and characteristics (protected class list).

_____ The tribal employer's protected class list is aligned with the tribe's values and objectives.

- _____ The protected class list is the same as other sovereigns (federal or state) because it was a conscious and informed decision.
- _____ A conscious and informed decision takes into consideration the risks, benefits, values, consequences and myriad other factors.
- _____ A conscious and informed decision has the benefit of the views of leadership, tribal elders, administrators, directors, human resources and lawyers.
- _____ The employer addresses discrimination and harassment in a written *policy*.
- _____ The employer addresses discrimination and harassment in a written *procedure*.
- _____ The policy is written in a manner that is clearly understood by employees.
- _____ The policy is endorsed and approved by tribal leadership.
- _____ The policy is updated as needed and there is a procedure for updating the policy.
- _____ The forms, instructions and procedures that work with the policy are updated when the policy is updated.
- _____ Managers understand the policy and will enforce it.
- _____ Managers role model good behavior under the discrimination and harassment policies.
- _____ Managers have at least a fundamental understanding how human resources processes discrimination and harassment complaints.
- _____ Tribal employers promulgate three policies working together
 - _____ Discrimination & Harassment
 - _____ Sexual Harassment
 - _____ Bullying

General Discrimination and Harassment

- _____ The policy explicitly prohibits discrimination and harassment.
- _____ The policy defines discrimination.

- _____ The policy defines harassment.
- _____ The policy addresses the scope of the words sex and gender.
- _____ The policy requires the intersection of negative workplace behavior with the protected class list.
- _____ If an employee welcomes behavior that violates the policy, that may preclude a claim, but it is still a violation of the policy.
- _____ The policy provides examples of behaviors and conduct that violate the policy.
- _____ The protected class list in the discrimination and harassment policy mirrors the tribal employer's EEO protected class list.
- _____ The policy directs employees to report allegations of discrimination or harassment.
- _____ The policy gives employees multiple avenues to report allegations of discrimination or harassment.
- _____ The procedure offers the employee or witness an opportunity to document their allegations.
- _____ The policy requires managers to address discrimination or harassment in the workplace.
- _____ The policy clearly articulates the consequences of violating the rules.
- _____ The policy addresses confidentiality and need-to-know.
- _____ The policy defines and protects third parties.
- _____ The policy prohibits retaliation.
- _____ The policy distinguishes between serious misconduct and behavior that is annoying.

Sexual Harassment

- _____ The policy explicitly prohibits sexual harassment.
- _____ The policy defines sexual harassment.
- _____ The policy defines quid pro quo.

- _____ The policy defines hostile work environment.
- _____ The policy addresses the scope of the words sex and gender.
- _____ The policy requires the intersection of negative workplace behavior with the sex or gender.
- _____ If an employee welcomes behavior that violates the policy, that may preclude a claim but it is still a violation of the policy.
- _____ The policy provides examples of behaviors and conduct that violate the policy.
- _____ The policy directs employees to report allegations of sexual harassment.
- _____ The policy gives employees multiple avenues to report allegations of sexual harassment.
- _____ The procedure offers the employee or witness an opportunity to document their allegations.
- _____ The policy requires managers to address sexual discrimination or harassment in the workplace.
- _____ The policy clearly articulates the consequences of violating the rules.
- _____ The policy defines and protects third parties.
- _____ The policy prohibits retaliation.
- _____ The policy distinguishes between serious misconduct and behavior that is annoying.

Bullying

- _____ The policy explicitly prohibits bullying.
- _____ The policy defines bullying.
- _____ The policy provides examples of behaviors and conduct that violate the policy.
- _____ The policy clearly articulates the consequences of violating the rules.
- _____ The policy addresses retaliation.

Training

A. Orientation

- _____ Training starts with employee orientation.
- _____ The discrimination, harassment, bullying and retaliation policies are reviewed during orientation.
- _____ There is an opportunity for employees to ask questions about the policies during orientation.
- _____ Orientation is a good opportunity for employees to accept employer policies by signing an acknowledgement.

B. Manager Reminders

- _____ Managers understand that training is the manager's responsibility.
- _____ Training on "human resources" like discrimination and harassment are the manager's responsibility along with human resources.
- _____ Managers should include a short training reminder during weekly or bi-weekly meetings with department employees. For example, the manager could take 3 to 5 minutes at a weekly meeting to discuss the manager's lack of tolerance for harassment in the workplace and engage employees on the topic.
- _____ When managers see low level misconduct the manager addresses it knowing that tolerating low level misconduct frequently leads to more serious misconduct.
- _____ Managers are role models and their influence on the workplace is likely bigger than understood by the manager.
- _____ Managers address discrimination, harassment, bullying and retaliation regardless of where the manager witnesses the conduct.
- _____ Managers document what they see and what they do.
- _____ Managers understand that human resources is their partner and act on that.
- _____ Managers understand that when they address misconduct in the workplace it is another form of training.

_____ Managers are interested in talking about discrimination and harassment when approached by employees.

C. Organization Training

As an organization, employees should receive mandatory discrimination, harassment and bullying training on a regular basis.

_____ All employees receive yearly training.

_____ Training goals are identified.

_____ The trainer is qualified to train in the area of discrimination and harassment.

_____ There is a 6-month deadline to get full-time employees trained.

_____ Seasonal and temporary employees are trained.

_____ No requirement to train employees working less than 30 days or 100 hours.

_____ The employer has a policy regarding training for independent contractors, volunteers and unpaid interns.

_____ The employer has considered a maximum number of participants in a session.

_____ The employer requires a one-hour minimum training for non-managerial employees.

_____ The employer requires a two-hour minimum training for managerial employees.

_____ The employer has considered whether leadership attends the training sessions.

_____ The training is mandatory.

_____ Details regarding the training are kept including, date of training, name of trainer, sign-in sheet, copies of certificates of completion, type of training, training materials and any recording of the training.

_____ The documents are kept for six years.

_____ Training is interactive.

_____ Effective interactive training includes a range of options from in-person classrooms to the use of technology.

The training session for everyone includes:

- _____ Explain why discrimination, harassment and bullying training is important.
- _____ A copy of the relevant policies is distributed to the participants.
- _____ Explain the key definitions.
- _____ A preference employer can also be an equal opportunity employer.
- _____ Provide examples of common misbehavior or violations of the policies.
- _____ Discuss the employer's directive that violations of the policies shall be reported.
- _____ Discuss the multiple avenues that a violation can be reported.
- _____ The consequences of policy violations are addressed.
- _____ Retaliation is defined and prohibited.
- _____ Retaliation must be reported.
- _____ There should be time set aside within the training for conversation.
- _____ Discrimination & Harassment is not tolerated in whom to interview, hire, promote or train; and who gets the best evaluations, how people are treated disciplined or terminated.
- _____ Address discrimination & harassment stereotypes like women clean rooms and men are security guards.
- _____ Address discrimination & harassment antiquated language like "Hey honey" typically directed at women.

The training session for managers also includes:

- _____ A clear understanding of these policies.
- _____ How to address these policies with employees in 1 on 1s.
- _____ How to address these policies in department meetings.
- _____ How to handle a complaint conversation with a victim or witness.

- _____ The manager as role manager.
- _____ The consequences for managers that do not manage under these policies.
- _____ The manager's understanding that she has a responsibility in her department and outside her department.
- _____ The limits of sovereign immunity.
- _____ The legal rationale for the absence of federal law and the application of tribal laws and policies.
- _____ How to address allegations of misconduct that are off the clock or not in the workplace.
- _____ How to not re-victimize the victim.
- _____ To address retaliation.
- _____ Understand the fundamentals of what happens when a complaint is made to human resources.
- _____ The importance of clear note taking.

Enforcement

A. Victims Report to Managers

- _____ The meeting should be private.
- _____ The manager should not be distracted by email, texts and other work.
- _____ The manager should take notes with the assumption those notes will be scrutinized.
- _____ These meetings should not be delayed.
- _____ The manager should assume the employee is recording the meeting.
- _____ The manager should not consent to an employee recording the meeting and shall direct the employee to stop recording if recording is detected.
- _____ If the employee has been physically harmed as a result of the incident, the manager should not delay getting medical attention if needed.

- _____ If the manager is aware of the subject of the meeting prior to its start and the manager would benefit from the presence of human resources, invite human resources.
- _____ Managers do not have all the facts as a result of this first meeting therefore do not judge. Do not tell the alleged victim that they are a victim and do not assert that the alleged perpetrator is a perpetrator. Do not label the facts as discrimination, harassment, hostile work environment, quid pro quo or bullying. You are there to gather the facts.
- _____ The alleged victim has rights.
- _____ The alleged perpetrator has rights.
- _____ Thank you for bringing the complaint to me.
- _____ I want to understand the facts and circumstances. What happened?
- _____ Seek facts. Opinion is generally not helpful.
- _____ Seek facts in a non-judgmental manner. This is not a cross examination or investigation.
- _____ If the witness or alleged victim's allegations appear serious, transition the meeting to human resources by inviting human resources to your meeting space or inviting you and the witness/victim to human resources.
- _____ The witness or alleged victim are not decision makers.
- _____ Alleged victims are not re-victimized. A management decision might be necessary to ensure that further alleged misbehavior does not occur.
- _____ Managers should consult with human resources before making that decision.
- _____ Managers are immediately aware of the potential for retaliation going forward.
- _____ The manager cannot promise confidentiality but will respect the expectation of privacy.

B. Human Resources Intake

- _____ The employer has a clear policy as to how a victim, witness or manager reports discrimination or harassment.

_____ The employer has a complaint process to ensure that complaints receive

_____ (1) confidentiality to the extent possible

_____ (2) a timely response

_____ (3) impartial and timely investigations by qualified personnel

_____ (4) documentation and tracking for reasonable progress

_____ (5) appropriate options for remedial actions and resolutions.

_____ (6) timely closures.

_____ The human resources department has a complaint form to be completed by the victim, witness or manager reporting discrimination or harassment.

_____ Human resources has a protocol for documenting its meetings with alleged victims, perpetrators and witnesses.

_____ Human resources has a protocol when a witness or alleged victim refuses to complete or sign a written complaint.

_____ Human resources has a protocol for creating and storing files related to allegations of discrimination, harassment and bullying.

_____ Those files are not stored within any employee's personnel file.

_____ Once a report is submitted to human resources, there is a protocol for processing the complaint.

_____ Timely and independent investigation.

C. Respectful Recommendations for Leadership

_____ Understand your policy.

_____ Understand the process from complaint to decision.

_____ Do not violate the policy.

_____ Do not engage in behavior that is close to violating the policy.

_____ If you see a violation do something.

- _____ Do not publicly criticize the policy or its application.
- _____ Do not publicly criticize the chain of command or the human resources team.
- _____ Let the system work.
- _____ Wait your turn if you are part of the process.
- _____ Respect the need-to-know policy.
- _____ Help create a positive workplace culture.
- _____ Promote and participate in meaningful training.

D. Decision in Response to the Facts

- _____ The employer is willing to enforce workplace rules.
- _____ The employer enforces its rules when the rules are broken whether the participants consent to the misbehavior or not.
- _____ The employer takes prompt action.
- _____ The employer's reaction to the incident is based on the facts as applied to the rules.
- _____ The employer's reaction to the incident is proportional.
- _____ For allegations of a hostile work environment, employers should review the totality of the circumstances including
 - _____ Nature of the conduct (physical, verbal, both)
 - _____ Identity of the alleged harasser (supervisor, coworker, non-employee)
 - _____ Whether the conduct was physically threatening or humiliating or merely annoying
 - _____ The frequency, severity and pervasiveness of the conduct
 - _____ The context in which it occurred
 - _____ Whether the conduct was unwelcome (uninvited and offensive to the complaining employee)

- _____ Whether the conduct unreasonably interfered with an employee's work performance
- _____ Proportional is measured by numerous ingredients including, but not limited to, the offender's history with the employer, the severity of the incident, the impact on the victim, whether the misbehavior was intentional and the clarity of the relevant policy.
- _____ The human resources team is consulted prior to a decision to utilize corrective action.
- _____ In some cases, in-house legal counsel is consulted prior to a decision to utilize corrective action.
- _____ The decision to utilize corrective action is made by the Respondent's chain of command without undue influence from Tribal Council, Board or Commission.
- _____ In reacting to the incident, the employer has considered a range of tools either independently or in combination, including (in no order of preference):
 - Transferring the offender to another work area.
 - Reinforcing the employer's strong policy through training and monitoring.
 - Termination of employment.
 - Suspension from employment.
 - Noting the corrective action in the Respondent's employee file.
 - Warning the Respondent that further harassment, discrimination or retaliation will result in termination.
- _____ If the victim was penalized by the harassment (loss of pay for example), the victim is restored.
- _____ The employer respects the expectation of privacy from the victim of discrimination or harassment.
- _____ The employer respects the expectation of privacy from the perpetrator of discrimination or harassment.

- _____ The employer respects the victim's need to know that his or her complaint was taken seriously, investigated and acted upon.

- _____ The employer actively monitors the workplace to determine if anyone retaliates against the victim of discrimination or harassment.

- _____ The employer actively monitors the workplace to determine if anyone retaliates against the witnesses to discrimination or harassment.

- _____ The employer maintains employee misconduct investigation files for the duration of the longer of the employee's employment or six years from the alleged incident.

- _____ The employer evaluates its policies and protocols with an eye toward potential improvement at the conclusion of an investigation and corrective action (if any).