



Liability & Property Pool Workers' Compensation Fund

RISK CONTROL SOLUTIONS

A Service of the Michigan Municipal League Liability and Property Pool and
the Michigan Municipal League Workers' Compensation Fund

SEXUAL HARASSMENT & DISCRIMINATION IN THE WORKPLACE

Explanation

Harassment and discrimination in various forms continue to create substantial liability for employers across many sectors of the economy – no less so for local government. Harassment and discrimination are prohibited under federal and state law and may be enforced by state or federal agencies, or through the courts by individual plaintiffs. Aside from the potential legal liability, harassment and discrimination can negatively impact an organization's operations by damaging employee morale, generating bad publicity, and keeping employees from their daily work and the primary goals of the organization due to the substantial time involved with internal investigations or outside legal proceedings.

While the terms harassment and discrimination are often used interchangeably by the public and the media, they are distinct legal claims with key distinguishing elements. Both harassment and discrimination involve conduct by either the employer or one's co-workers that is motivated, at least in part, by a bias towards what are known as protected characteristics. These may vary by the different state or federal laws involved in certain circumstances, but mainly include the characteristics of sex, race, religion, national origin, age, and disability. The characteristics of sex and race are the most frequently cited biases in formal investigations and court claims.

A claim of discrimination requires some type of negative employment action taken by the employer towards the person claiming discrimination. Examples of such actions include the failure to interview a particular applicant or current employee for a position, not promoting, or demoting, a current employee, disciplinary measures taken against an employee, or even changes to an employee's schedule, among others. The person making a claim of discrimination must also be able to demonstrate that the negative employment action was, at least partially, motivated by the person's protected characteristic. This may be accomplished by demonstrating direct statements of the employer and its agents regarding one of the protected characteristics or by demonstrating that members of a group having those characteristics are treated differently than those not having those characteristics.

Harassment generally requires behavior by either the employer, its agents, or a co-worker relating to the person's having one of the protected characteristics that a reasonable person would find to be objectionable to the point of altering the person's work environment in a negative way. These behaviors may be verbal comments, physical touching, pictures, emails or texts, or a refusal to work with certain individuals. Sexual harassment may take two forms. One, known as quid pro quo, involves making the acceptance of sexual advances a condition of employment decisions. The other form involves conduct that a reasonable person would find to create an intimidating, hostile, or offensive work environment. A claim of harassment may be made by a man or woman against another man or woman, not just by a woman against a man. Claims may also be brought by persons who only observe objectionable behavior and are not the direct target of the behavior. Conduct by non-employees may also create liability for an employer.

Prevention

When it comes to harassment and discrimination, prevention provides the organization with the greatest protection from legal liability and other negative consequences. As with many workplace issues, the basis of prevention involves developing a sound policy, implementing the policy with all members of the organization, periodic training for all employees on policy requirements, including reporting avenues, and consistently and fairly enforcing the policy.

The development of an anti-harassment or anti-discrimination policy will likely involve numerous discussions between departmental levels of an organization. While many samples of such policies may be available as a starting point, the final policy should **always** be reviewed by an attorney familiar with employment issues before it is implemented.

Once a policy is finalized, all members of the organization (employees, management, elected officials, and even outside parties in some cases) should be trained on it. This means more than just printing out a copy of the policy and placing it in everyone's mailbox. Ideally, this should involve a face-to-face, group training session by top-level management or the organization's human resources department that reviews the policy thoroughly. The purpose of this training is to make sure that the policy has been communicated to all members of the organization and everyone understands what is and is not acceptable workplace conduct going forward. Questions and comments should be encouraged so that there are no misunderstandings on what the policy requires. This is the time when the organization begins to set the tone for how it will enforce the policy. Presenters and trainers may feel pressured to soften the policy in the face of employees who take the position that this really isn't such a serious issue and then want to pick apart the policy by coming up with a number of hypotheticals that would seem to require extreme or unreasonable actions by management to enforce the policy. While questions and comments should not be discouraged, the bottom-line stance should be that this is the organization's policy and if any member of the organization is not able to conform his or her behavior to it, disciplinary actions will be taken by management to enforce it as required by the law.

The final step, and the point where most organizations continue to fall short, is the consistent and prompt enforcement of the policy at all levels of the organization. All levels of management, from the chief executive, to department heads, to mid-level managers and supervisors, are responsible for understanding the policy and then holding employees accountable when they see or receive reports of behavior that falls short of the stated policy. Even outside contractors or vendors must comply with this policy when coming into your workplace. Violations of the policy by salespeople or delivery personnel must be reported to their employer and the behavior corrected or the business relationship must be ended. Disciplinary action is one of the most difficult managerial tasks, especially for mid-level managers towards employees who were their peers not long ago, but it is essential to limiting liability. No employee or member of the organization is above the law, regardless of his or her specialized expertise or position within the organization. When an employee brings a reasonable claim of discrimination or harassment to management and sees no action taken to address the problem, legal claims are likely to follow.

Policy

As stated previously, there are a number of resources available to obtain sample policy language concerning harassment and discrimination. A simple Google search can provide employment policies from other municipalities that may serve as the *starting* point for your organization. Again, any policy developed should be reviewed by an attorney familiar with employment issues before it is implemented.

Aside from the standard language stating that harassment and discrimination are not allowed at the organization, there are certain items that should also be included in the policy.

- Examples – a non-exclusive list of specific types of behavior should be provided so employees and management will know what conduct is a violation of the policy.
- Reporting – the procedure to report incidents of harassment and discrimination should be spelled out clearly and explicitly encouraged.
- Confidentiality – to the extent possible, reports of harassment and discrimination should be kept confidential. While the employee making the complaint should be informed of the steps taken by the employer to investigate, specific disciplinary actions that are taken against the offending employee(s) should not be shared.
- Multiple avenues – there should be more than one person to whom a report may be made in the event that the person feels that proper steps are not being taken to address the issue. This may involve a procedure to report to someone outside of the organization (the municipal attorney, for example, may receive reports and follow up).
- Retaliation – retaliation by co-workers or management for making a claim should be treated the same as the original claim itself (in fact, many claims that the EEOC investigates and finds not to be a violation of the law continue on because of retaliation).
- Exit interviews – these should be performed in order to assess whether or not harassment or discrimination were factors in the employee's decision to leave the organization. While this may not completely prevent a future claim, it can mitigate the enforcement actions taken by the EEOC or the courts in the event of a successful claim.

All new employees or members of the organization should be trained on these policies and procedures when they join the organization. It is also a recommended practice to conduct this training periodically for all employees in the organization (every 2 to 3 years). Refresher training on the policies is also recommended for individuals that violate the policy.

Responsibilities

It is the responsibility of the employer, meaning all levels of management, to prohibit discrimination and harassment in the workplace. All employees should be encouraged to report any instances of discrimination and harassment to the proper personnel within the organization. Employees should expect that all complaints will be promptly and thoroughly investigated by management and proper steps will be taken to prevent further violations of the policy. Management and employees must understand that any kind of retaliation towards the person making the complaint will be treated the same way.

Unnecessary delay by management in beginning an investigation or not reporting instances of discrimination or harassment in the hopes that things will just work themselves out is not acceptable. A single comment or inappropriate action by a co-worker may not create significant liability for the employer, but letting violations of the policy continue on without addressing them will create liability for the organization – even when not reported immediately by employees.

For more information, contact the League's Loss Control Services, or MML Risk Management Services.



Important Contact Information

MML Risk Management Services	734/662-3246 or 800/653-2483
Loss Control Services	800/482-2726

Note: This document is not intended to be legal advice. It does not identify all the issues surrounding this particular topic. Public agencies are encouraged to review their procedures with an expert or a competent attorney who is knowledgeable about the topic.

Additional Resources:

Law Enforcement Action Forum – Fall 2018 newsletter

http://www.mml.org/insurance/shared/publications/leaf_newsletter/2018-fall.pdf

LEAF Manual, Chapter 15c – Harassment Policy

<http://www.mml-leaf.org/index.php>

LEAF Manual, Chapter 32 – Sexual Misconduct

<http://www.mml-leaf.org/index.php>

MML Risk Control Solutions – Disciplining and Discharging Legally

http://www.mml.org/insurance/shared/pdf/risk_solutions/disciplining_discharging_legally2017.pdf

MML Risk Control Solutions – Reducing Your Exposure to Claims of Discrimination in Employment

http://www.mml.org/insurance/risk_resources/pdf/risk_solutions/discrimination_in_employment2017.pdf

MML Risk Control Solutions – Sexual Harassment: Reducing the Exposure to Litigation

http://www.mml.org/insurance/risk_resources/pdf/risk_solutions/sexual_harassment2017.pdf