SEXUAL HARASSMENT
REDUCING THE EXPOSURE TO LITIGATION

THE PROBLEM
Sexual harassment is one of the most frequent and most feared employee complaints. The potential for significant disruption in the workplace, litigation, and high settlement costs is a very real problem for all employers. Sexual harassment claims are a growing concern to the Michigan Municipal Liability and Property Pool. Two United States 1998 Supreme Courts decisions (Faragher v. City of Boca Raton and Burlington Industries v. Ellerth) underscore the need for having and enforcing clear and understandable policies and procedures for supervisors, managers and employees.

This bulletin provides Pool members with a summary of applicable laws, a definition of sexual harassment, and guidelines for developing and implementing effective written policies and procedures.

STATE AND FEDERAL LAWS
Both Title VII of the Federal Civil Rights Act and Michigan’s Elliot-Larsen Civil Rights Act prohibit sexual harassment. These laws define sexual harassment as:

Unwelcome sexual advances and requests for sexual favors. The definition includes other verbal or physical conduct or sexual communication when:

- The person doing the harassing states or implies that the other person must submit to harasser’s requests for sexual favors to obtain employment.
- The person doing the harassing states or implies that the failure to submit to requests for sexual favors can lead to employment decisions that might negatively affect the employee. For example, the employee might not receive a raise or a promotion.
- Such conduct or communication substantially interferes with an individual’s employment.

In 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines including a description of the two most frequent forms of sexual harassment:

*Quid Pro Quo* sexual harassment occurs when an individual in a position of authority explicitly or implicitly makes any of the following a condition of employment:

- Submission to unwelcome sexual advances, or
- Requests for sexual favors, or
- Verbal or physical conduct or sexual communication.

*Hostile Work Environment*. Sexual harassment occurs in the workplace when verbal and/or non-verbal actions create an intimidating, hostile or offensive working environment. The use of sexually explicit language by employees is an example.

THE CASES

The *Faragher* case illustrates almost every mistake an employer can make in dealing with sexual harassment. Although the City of Boca Raton had a sexual harassment policy, it failed to communicate it to employees of the Marine Safety Division. Supervisors in the Division often made lewd remarks and offensive remarks about women to female employees. Faragher, one of these employees, was one of the victims. One supervisor
said that he would never promote a female to the rank of lieutenant; another threatened Faragher with cleaning the toilets for a year if she did not date him. Faragher, as well as other female employees, mentioned the conduct to a manager. However, the manager did not feel it was his place to do anything so he never reported the incidents to upper management. Although Faragher never considered her confidences a formal complaint, the Supreme Court concluded that Boca Raton did not take reasonable care to prevent its supervisors’ harassing conduct. A key to a successful harassment program is full communication and thorough training so that all employees know their rights and responsibilities.

Kimberly Ellerth (Burlington Industries v. Ellerth) left her position as a salesperson with Burlington Industries after fifteen months of employment. During that time, she had been the victim of repeated offensive conduct by a mid-level manager. The manager had the authority to hire and promote employees subject to approval from upper management. He used this authority in his attempts to receive sexual favors by threatening to withhold tangible job benefits if Ellerth did not submit to him.

The manager never acted on his threats and, in fact, Ellerth received a promotion. In addition, Ellerth never reported the manager’s conduct even though she knew that Burlington had a policy against sexual harassment.

The Supreme Court had to decide whether an employee could sue for harassment even when the harasser never acted on his threats. The decision? The Court ruled that employees who refuse unwanted sexual advances or requests for sexual favors may sue for damages even though they did not suffer any loss of tangible job benefits. In addition, the employee does not have to demonstrate the employer’s negligence or fault for the supervisor’s actions.

The Court, however, did provide employers with a means of mounting a valid defense against such claims:

1. The employer must show that it took reasonable care to prevent and to take prompt corrective action against any sexually harassing behavior.
2. The employee failed, without reasonable cause, to report the harassment or to take advantage of the employer’s stated policies and procedures for preventing or correcting incidences of sexual harassment.

Because Burlington had a policy in place and Ellerth did not use it, the Court sent the case back to the lower court to determine if Burlington could prove its defense.

The Court decisions in Faragher v. City of Boca Raton and Burlington Industries v. Ellerth

- Do not redefine sexual harassment,
- Do not make employers liable for sexual harassment in their workplaces even when they are unaware of the prohibited conduct, and
- Do not impose absolute liability even when the employer takes appropriate corrective action upon discovering sexual harassment.

However, if an employee is the victim of quid pro quo harassment and the employee loses some tangible job benefit, the courts may hold the employer liable for all damages. This is true even if the employee does not complain about the supervisor’s offensive conduct.

In a case of quid pro quo harassment where the employee does not suffer any loss of employment benefits or opportunities, the courts may treat such claims as cases if hostile work environment. This will allow the employer to mount a defense on a variety of grounds:

- The employer had a policy and procedure but the employee failed to use it.
- The harassment was not severe or pervasive.
- The employee submitted a complaint and the employer promptly acted to correct the situation.

The decisions make clear the need for employers to follow the types of guidelines employment specialists have championed for years.
PREVENTION IS THE BEST POLICY

Prevention is the best approach to eliminating sexual harassment. To implement a preventive program, employers should, at a minimum, develop written policies and procedures and communicate them to the entire work force. These policies should:

- State that the policy applies to all employees regardless of employment status.
- Provide a clear definition of sexual harassment. The policy should avoid “legalese” and, where appropriate use examples to clarify the definition.
- Inform employees that sexual harassment is unlawful.
- State that top management supports the policies and procedures and will not tolerate sexual harassment. Top management should make its support visible by attending employee-training sessions.
- Encourage employees to report any physical or verbal action that they feel is harassment.
- Publish a procedure that tells employees how to lodge a complaint. The procedure should list at least two people to whom employees can bring complaints. Where possible, provide a male and a female to whom employees can come.
- Include a statement that the employer will promptly investigate all complaints. The investigation team should have both male and female representatives.
- Indicate that disciplinary action up to and including discharge will occur.
- Include measures to protect the complainant from retaliation.

The policy statement should not:

- Promise to investigate a complaint within a certain number of days.
- State that only particular individuals will investigate allegations of harassment.
- State that employees must submit complaints in writing or within a certain time. If employers require complaints on writing and then fail to follow up, they are, in fact, documenting their own failure.
- Guarantee confidentiality. However, the policy should assure employees that the employer will try to release information only to those individuals who have a need to know.

IMPLEMENT THE POLICY PROPERLY

Written policies and procedures do not guarantee that a prohibited behavior will not occur or that if it does, it will not be litigated. However, employers can take specific steps to increase the effectiveness of the policy. They should:

- Train all employees on the desire to eliminate all instances of sexual harassment. Brief talks by knowledgeable individuals, videos, handouts, and posters are acceptable forms of training. Employers should document such training. Training should make clear to all employees that the organization strongly disapproves of sexual harassment. Provide appropriate training to employees, supervisors and managers.
- Design a reporting system so that your employees do not have to confront their alleged harassers. Make both the process and the people to whom employees should submit complaints accessible. Employees should be able to make either verbal or written complaints.
- Document the determination of harassment in the harasser’s personnel file. Employers should maintain investigation documentation in a separate file. It does not belong in either the complainant’s or the harasser’s personnel file.
- Discuss harassment incidents and complaints with an attorney versed in state and federal employment laws before taking any disciplinary action.

TAKE REMEDIAL ACTION WHEN NECESSARY

Even with a stated policy and firm guidelines, sexual harassment can occur. If an employee makes a complaint of sexual harassment complaint, the employer should:

- Take immediate steps to correct the known hostile or offensive work environment. Document all actions.
- Investigate the complaint of sexual harassment promptly and thoroughly. Make sure the investigation team has both male and female members.
- Resolve valid complaints through counseling, discipline, transfer, or termination. Discipline should be appropriate and may range from reprimand to dismissal.
- Take action to make the individual who was subject to harassment comfortable with the resolution of the complaint and with his or her position in the organization.
- Prevent the misconduct from recurring.
- Follow up to assure that the sexual harassment has not resumed and that the victim has not suffered retaliation.

Avoiding claims of sexual harassment and possible litigation requires adopting and enforcing a strong policy, training all employees on prohibited behaviors, and taking all claims of harassment seriously.

As with all human resource issues, seek professional advice when you receive a claim of harassment. Preventing sexual harassment is not only a legal requirement, but also a business necessity. The absence of harassment helps to create a safe and business like atmosphere for all employees and results in better productivity.

If you need additional information regarding this topic, contact the League’s Loss Control Services or MML Risk Management Services.

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<tr>
<th>Important Phone Numbers</th>
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<tr>
<td>MML Risk Management Services</td>
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<tr>
<td>MML Loss Control Services</td>
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<tr>
<td>Michigan Department of Civil Rights</td>
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<td>Equal Opportunity Commission</td>
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Note:
This document is not intended to be legal advice. It does not identify all the issues surrounding the particular topic. Public agencies are encouraged to review their procedures with an expert or an attorney who is knowledgeable about the topic.
Sexual Harassment Prevention Self Assessment

With good reason, many employers fear complaints of sexual or other types of harassment. Such complaints create the potential for significant disruption in the workplace and for litigation and high settlement costs. Preventing any form of harassment, but especially sexual harassment, should be a major concern for employers. You can reduce your exposure to such complaints and thereby reduce claims paid by the Michigan Municipal Liability and Property Pool by assessing your employment practices.

1. Have a written sexual harassment policy?
   - Yes ☐
   - No ☐

   The written policy should:
   - Define harassment clearly and state that it is unlawful;
   - State that top management will not tolerate any form of harassment;
   - Provide a complaint procedure with at least two complaint routes;
   - State that violations will result in discipline up to and including discharge;
   - Explain that all claims will be investigated;
   - Provide employees with sufficient confidentiality and prevent retaliation;
   - Be openly communicated to and understood by employees.

2. Provide training to supervisors and other management employees?
   - Yes ☐
   - No ☐

   A training program should:
   - Identify prohibited behaviors.
   - Instruct management on:
     - Properly investigating and documenting incidents.
     - Taking appropriate remedial action.
     - Enforcing the harassment policy.

3. Take all claims of harassment seriously by properly investigating each one?
   - Yes ☐
   - No ☐

   An investigation of an incident should:
   - Be completed as soon as possible.
   - Include all witnesses to the incident.
   - Be documented in an investigative file.
   - Be conducted by an impartial individual.
   - Follow a written investigation procedure.
4. Take corrective actions on all confirmed instances of harassment?
   Yes ☐  No ☐

Corrective actions should:
- Be documented in the personnel file of the guilty employee;
- Be consistent with prior corrective actions for similar offenses;
- Follow normal disciplinary procedures;
- Be appropriate for the violation. They may be more stringent for supervisors and managers.

Conclusions

If you were able to honestly answer “yes” to all four questions and your organization is following most or all of the suggested practices, then your organization has reduced its exposure to future employee liability claims. You should congratulate yourself.

If you are unable to answer “yes” to any one or more of the four questions, your organization has an obvious exposure to an employee liability claim. Missing components of one or more of the four recommended practices may also indicate a deficiency in your current program. You should take one or more of the following actions:

- Correct any deficiency that may exist.
- Contact your attorney for advice.
- Contact MML Risk Management Services at 734/662-3246 or 800/653-2483.
- Contact Loss Control Services at 800/482-0626.
- Contact the Michigan Department of Civil Rights at 313/256-2663.
- Contact the Equal Opportunity Commission at 800/669-3362.

NOTE:
This document is not intended to be legal advice or implied to identify all employment practices related exposures. Public agencies are encouraged to contact their attorney for assistance in implementing these or other changes.