HARASSMENT IN THE WORKPLACE
SEXUAL HARASSMENT
REDUCING THE EXPOSURE TO LITIGATION

Harassment is a very real problem for employers. Sexual harassment seems to be the area that causes particular problems in the workplace. It has the potential to ruin careers, disrupt the workplace, and cause litigation with potentially high settlement costs. The behavior also damages trust between employees and the employer and is a very real problem for all employers. Employment Practice Liability has long been a priority concern for the Michigan Municipal Liability and Property Pool. Even with the Pool’s efforts to educate and coach its members in the requirements of the law and employment best practices, sexual harassment remains a costly and fractious event.

The good news is the awareness and education efforts are having an impact. According to EEOC statistics, comparing 1997 to 2010, the complaints filed with the EEOC and their partners have reduced by twenty-five percent. Education has been a significant contributor to the statistic, but the courts in defining what employers can do to reduce their exposure and costs has also played a role.

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 to combat harassment.

SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION THAT VIOLATES 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 from persons of either sex. 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 the 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.

▪ The person doing the harassing could be supervisor, co-worker, a representative of the employer, or a non-employee who has access to the workplace.

▪ Such conduct or communication is unwelcome and 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. Examples are employees who; use sexually explicit language; offensive humor; or touching another in an inappropriate manner. Hostile work environment takes place when cumulative unwelcome comments or behavior unreasonably alters an employee’s terms or conditions of employment, creating a “hostile” or offensive work environment. For employment law purposes, these comments or behaviors must be discriminatory in nature; i.e., based on race, religion, sex, national origin, age, disability, gender, veteran status, etc. Employers should note that typically the behaviors have to be recurring and so severe in nature that the employee feels they are unable to perform their job responsibilities.

Many court cases have dealt with issues of sexual harassment and a hostile work environment. In one case, the United States Supreme Court unanimously ruled that if a workplace is permeated with behavior that is severe or pervasive enough to create a discriminatorily hostile or abusive working environment, Title VII is violated regardless of whether the plaintiff suffered psychological harm. In another case, the Sixth Circuit Court of Appeals found that it was discriminatory when the unwelcome conduct, even though it was not sexually explicit, included sabotaging of the female employees work, and ignoring and isolating her in the workplace was based on the supervisors dislike for her because of her gender.

The court cases have focused the EEOC on other forms of harassment in the workplace as being discriminatory and may lead to a violation of the law. The EEOC states that harassment violates federal law if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, disability, genetic information, or because the employee opposed job discrimination. Harassment does not include simple teasing, offhand comments, or isolated incidents that are not extremely serious unless it is sufficiently frequent or severe to create a hostile work environment or result in a “tangible employment action,” such as hiring, firing, promotion, or demotion.

**Avoiding Incidents of Harassment**

Harassment has taken on a much broader definition than sexual harassment and includes frequent or severe discrimination, hazing, offensive touching, horseplay, bigotry, cursing, continually berating or bullying. When evaluating the workplace for where things went wrong, allowing harassment to occur, it is wise to examine the relationship between middle management and their employees because it sometimes overrides the priorities set by top management. As an example, when questioned after an employee files a complaint, mid-level managers generally acknowledge that they are aware their employer has a policy against harassment and discrimination. They often respond that, even though they were aware of the offending behavior, the victim did not complain to them, so they figured the behavior was acceptable and inoffensive. These same people do not believe or understand it is their responsibility to enforce harassment or discrimination rules. Of course, problems become much greater if top-level management embraces the same behavior and participates in the harassing behavior.

As an example of how these problems manifest themselves, in some organizations there is the existence of blatant harassment and discrimination. Participants often refer to what they do as horsing around, kidding, BS'ing, playing pranks or just having a little fun. They think that is fine, as long as everyone involved, especially the butt of the joke or cartoon, thinks that it is funny. Unfortunately, relationships can change and what people may have thought was funny may become something they consider offensive. The bottom-line is that as long as management allows an environment that accepts or tolerates this type of activity in the workplace, then it is only a matter of time before a problem arises. By then it is too late.

**It Is a Matter of Law**

On the federal level Title VII of the Federal Civil Rights Act and, in Michigan, the Elliott-Larsen Civil Rights Act, MCL 37.2102, prohibit harassment and discrimination. People have the right to be in the workplace and not be subject to inappropriate or offensive behavior.

Since people have that right, it is top management’s responsibility to make sure harassment or discrimination does not happen. Two 1998 United States Supreme Court decisions, Faragher v. City of Boca Raton, 524 U. S.775 — (1998) and Burlington Industries, Inc. v. Ellerth, 524 U. S. 742—— (1998)
underscore the need for having and enforcing clear and understandable policies and procedures for supervisors, managers and employees. Additionally, in Michigan, *Chambers v Trettco, Inc.*, 463 Mich 297; 614 NW2d 910 (2000) establishes that a supervisor's knowledge assigns knowledge to the employer.

These cases dealt with sexual harassment and established that management is liable if a person of authority in an organization knows of or is the perpetrator of harassment or discrimination. This translates to top-level management being responsible for the actions of their employees. To avoid being vicariously responsible, organizations must ensure that employees receive training on what types of behavior are appropriate in the workplace. Management must document the training. If employees submit complaints of harassment, management must investigate and take prompt remedial action if the investigation substantiates the complaint. Documentation is essential.

It also means that management must consistently follow-up with their mid-level managers and supervisors to ensure that they are meeting organizational expectations about not participating in or tolerating inappropriate behavior by any employee. All employees, but particularly offending employees, must know that top-level management will provide swift and severe punishment to anyone who allows, participates, or ignores inappropriate behavior.

This places the responsibility to monitor the behavior of the employees squarely on the shoulders of mid-level managers and supervisors. They have the most in contact with employees. They also are the people who feel the pulse of the organization and know when someone is having trouble. Waiting until someone complains is no longer good enough. Moreover, even if they do not want to do something about it, if employees make a complaint, the person receiving it, regardless of rank, must forward the complaint to a superior.

**The Best Protection**

Top management has to invest in the training and development of their staff. Having rules and policies are important, but the additional components of training and supervision to ensure compliance with the organizations’ rules and policy are essential. Top management can no longer assume that the operation is functioning properly. They must perform and document some form of quality assurance to confirm mid-management and supervisory staff are meeting their expectations. They and their mid-level managers and supervisors must enforce organizational rules and policies.

Municipal executives must not tolerate their mid-level people sitting idly by while employees participate in inappropriate behavior or engage in such conduct themselves. This must be a priority because it is one of the more costly and destructive problems that the municipal employer faces -- damage from within due to inattentiveness and failure to enforce the rules or the law.

**PREVENTION IS THE BEST POLICY**

Prevention is the best approach to eliminating 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 in 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. 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, 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.*

Further guidance on harassment can be found in the 1999 Guidance on Employer Liability for Unlawful Harassment by Supervisors; the 1980 Guidelines on Sexual Harassment; the 1990 Policy Statement on Current Issues in Sexual Harassment; the 1990 Policy Statement on Sexual Favoritism; and the 1994
Enforcement Guidance on Harris v. Forklift Sys., Inc. These can all be found on EEOC’s web site (www.eeoc.gov).

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

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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 a competent 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.

Does your organization:

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 investigative 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.)

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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 800/482-2726.
➢ Contact the Michigan Department of Civil Rights at 313/256-2663.
➢ Contact the Equal Opportunity Commission at 800/669-3362.

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