

RISK COMMUNIQUÉ

Sexual Harassment – Employee Practice Exposure

It is extremely important for the entity to implement and disseminate a clear no tolerance policy for sexual harassment and inform all employees of the available avenues of internal complaint.

The entity must also prepare itself to promptly investigate all sexual harassment allegations and take appropriate remedial action to ensure harassment stops and discipline is administered.

This Risk Communiqué offers guidelines, sample policies and procedures so your entity can help provide a safe and productive environment for all employees.

Updating Your Harassment Policy & Reporting Procedures

The first step is to review and update your anti-harassment policy and reporting procedures. Consider the following guidelines for assistance:

1. *Is the policy written in plain, easy-to-understand language?*
2. *Does the current policy define sexual harassment?*
3. *Does the policy list examples for what may constitute sexual harassment?*
Examples of harassment include, but are not limited to:
 - Unwelcome sexual advances or request for favors.
 - Verbal or physical conduct of a sexual nature that adversely affects the employee's employment terms or conditions.
 - Conduct that unreasonably creates an intimidating, hostile or offensive work environment.
 - Express or implied offers of any business-related (i.e. raises or promotions) or non-business related benefits (i.e. gifts or trips) in exchange for sexual favors.
 - Threatening or taking adverse work-related action against an employee because that employee denied sexual advances or requests for sexual favors.
4. *Is same gender harassment prohibited?*
It is a common misconception for people to think that males cannot sexually harass other men, as that is just "locker room" behavior. Similarly, it is illegal for women to harass other women.
5. *Is third-party harassment prohibited?*
Harassment committed by non-employees is strictly prohibited and not tolerated.
6. *Identifiable and understandable reporting procedure?*

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7. *Are several safe avenues of internal reporting available to all employees?*
8. *Does the policy avoid any language that might discourage complaints?*
For instance, employees should not be required to directly confront the person(s) that may be the source of the complaint before utilizing any of the available internal reporting avenues. Also, requiring employees to submit a complaint in writing or to be made to the chief officer may seem too cumbersome or threatening to the employee.
9. *Does the policy prohibit retaliation against individuals that make good faith allegations, or otherwise participate in an investigation?*
10. *Does the policy ensure confidentiality to the maximum extent possible?*
11. *Does the policy state that an investigation will take place and that the employee complaining of harassment will be informed of the results of the investigation?*

Plan Implementation

Any policy that gathers dust on a shelf is a little use as a preventative or defensive measure. Recent court rulings have made it clear that a policy ignored is tantamount to a finding of liability. To ensure the implementation of your updated policy, consider the following:

- Widely disseminate the policy to all locations.
- Each employee should sign an acknowledgement form indicating: (1) receipt of the policy, (2) comprehension of the no tolerance policy for sexual harassment, and (3) knowledge of the internal reporting procedures.
- Institute a system for informing any new hires or transferred employees about the policy.
- All employees review the policy annually at a minimum.
- Train all supervisory personnel to properly deter, identify, address and stop sexual harassment.
- Make sexual harassment prevention and proper handling of complaints an essential job function for all supervisory personnel, and make these conditions part of those supervisor's performance evaluation.
- Ensure that a labor and employment attorney periodically reviews the policy.

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What is an Investigation?

An investigation is when one or more people try to determine the actual facts to the complaint. Interviews with all parties of the complaint should be completed. These people should also interview any witnesses. After the interviews the individual(s) conducting the investigation should make a determination as to the facts. If warranted, the determination should include disciplinary action.

Characteristics of Good Investigation

Investigation procedures should be in place and followed for allegations of harassment. Remember that juries look at an entity's internal response processes and ask questions like, "Was the employee treated fairly?" and "Does the entity take reported risks seriously?"

1. *Investigate all complaints of harassment* – whether or not the complainant is the alleged victim.
2. *Begin sexual harassment investigations immediately* – and always within 24 hours after a complaint is made.
3. Consider separating the alleged victim from the alleged harasser during the investigation to minimize any potential for continuing harm or retaliation.
4. *Who in the entity is responsible for investigating allegations /incidents of harassment?*
Have individuals been designated to respond to incidents and allegations of wrongful acts?
Proactively establishing an "investigation team" shows reasonableness.
5. *Persons on the internal investigation / response team should reflect the diversity of the workforce.*
6. *Those responsible for internal investigations should be trained on the investigation procedures.*
Ideally, an entity should have proactive training of its internal investigators, before ever dealing with an actual allegation.
7. *Documentation process / forms for investigations.*
Utilizing consistent forms for investigation demonstrates fairness for all involved in an allegation. A goal is to prevent various supervisors from using their own methods of documentation and investigation. Record keeping is crucial for a solid defense in the event of litigation.
8. *Are non-retaliation measures taken to protect all parties involved in an investigation?*
The accuser, accused and all others directly concerned with an allegation of wrongdoing should be kept informed as to the investigation process and ultimate findings. Part of that constant communication is to make sure all parties are not being retaliated against in any way.

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9. Complete your investigation and take remedial action as soon as practicable, preferably within two to three weeks of the initial complaint.
10. Make sure you inform the complainant about the conclusions of the investigation. The “victim” needs to know what disciplinary steps are taken, otherwise the victim may believe that his or her complaints were not taken seriously.
11. Consider involving a third-party investigator and / or facilitator. Employees may be more comfortable speaking candidly to an objective person from outside the entity.

Sample Anti-Harassment Policy

The [] prohibits and does not tolerate sexual harassment in the workplace or during any Entity-related activity. The [] provides internal procedures for victims of sexual harassment to report sexual harassment and disciplinary penalties for those who commit sexual harassment. No employee, third party, or board member, no matter his or her title or position has the authority to commit or allow sexual harassment.

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and any other verbal, physical, or visual conduct of a sexual nature that unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive working environment.

The [] prohibits and does not tolerate any employee, board member or visitor, male or female, to harass an employee or to create a hostile or intolerable working environment by exhibiting, committing or encouraging:

- Direct or implied threats that submission to sexual advances will be a condition of employment or continued service with the [];
- Sexual explicit or pornographic material such as posters, calendars, pictures, or objects;
- Unwelcome advances, including, but not limited to, requests, comments or innuendoes regarding sex, sexual jokes, gestures, statements, e-mail or voicemail messages, leering, or stalking;
- Physical conduct that is sexual in nature, including, but not limited to touching, pinching, patting, brushing, massaging someone’s neck or shoulders and / or pulling against another’s body or clothes; and
- Physical assaults on other employees, including but not limited to rape, sexual battery, or any attempt to commit such acts.

The [] will take all allegations of sexual harassment seriously and determine what constitutes sexual harassment based on a review of the facts and circumstances of each situation. The [] will make every effort to ensure that those named in the report, or are too closely associated with those involved in the report, will not be part of the investigative team. The [] reserves the right and provides notice that third parties may be used to investigate harassment claims.

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Even conduct that is intended to be “innocent” may still constitute sexual harassment if it falls within the terms of this policy. If any member expresses concern that your behavior may be violated this policy, please respect his / her concerns. Regardless of your intent, how others interpret your behavior is important.

This policy is not meant to interfere with or discourage friendships among employees. However, employees must be sensitive to acts or conduct that may be considered offensive by other employees.

The [] prohibits retaliation made against any employee who lodges a good faith complaint of sexual harassment, or who participates in any related investigation. The [] recognizes that making false accusations of harassment in bad faith can have serious consequences for those who are wrongly accused. The [] prohibits deliberately making false and / or malicious harassment allegations, as well as deliberately providing false information during an investigation. Anyone who violates this rule is subject to disciplinary action, up to and including termination.

Reporting Procedure

If you are aware of sexual harassment taking place, you must immediately report to your direct supervisor. If you feel uncomfortable doing so or your direct supervisor is the source of the complaint, condones or ignores the harassment, immediately report to your supervisor’s supervisor.

If neither of these alternatives is satisfactory to you, then you should immediately direct your reports to the [], any [], or [insert other available avenues of reporting here]. You are not required to directly confront the person who is the source of your report before notifying any of those individuals listed. Nevertheless, you are required to make a reasonable effort to make the harassment known to the [].

Sample Form Acknowledging Receipt and Understanding of Anti-Harassment Policy

I acknowledge that I have received and read the anti-harassment policy and have had it explained to me. I also acknowledge that I understand that no employee or third party, up to and including a Board member has the authority to commit sexual harassment.

I understand that it is my responsibility to abide by all rules contained in the policy. I also understand how to report incidents of harassment as set forth in the anti-harassment policy, including not retaliating against any employee exercising his or her rights under the policy.

**Employee’s Printed
Name:**

**Employee’s Signature
and Date:**

Date of Annual Review:

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