



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 AND 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 organization's primary goals due to the substantial time involved with internal investigations or outside legal proceedings.

While 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 elements of sex, race, religion, national origin, age, disability, sexual orientation, and gender identity. The characteristics of sex and race are often cited as biases in formal investigations and court claims.

A discrimination claim requires some tangible adverse employment action by the employer toward the person claiming discrimination. Examples of such activities include failing to interview a particular applicant or current employee for a position, not promoting or demoting a current employee, disciplinary measures against an employee, or even changes to an employee's schedule. The person claiming discrimination must also demonstrate that the adverse employment action was significantly motivated by the person's protected characteristic. This may be accomplished by showing 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.

Sexual 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 negatively. These behaviors may be verbal comments, physical touching, pictures, emails, or texts, or refusing to work with specific individuals.

“Sexual Harassment” is defined to include “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature” under the following conditions:

- Submission to the conduct or communication is made a term or condition to obtain employment.
- Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual’s employment
- The conduct or communication has the purpose or effect of substantially interfering with an individual’s employment

To establish a *prima facie* case of a hostile work environment based on sexual harassment, plaintiffs must show the following:

- The employee belonged to a protected group;
- the employee was subjected to communication or conduct based on sex;
- the employee was subjected to unwelcome sexual conduct or communication;
- the unwelcome sexual conduct or communication was intended for or, in fact, did substantially interfere with the employee’s employment or created an intimidating, hostile, or offensive work environment; and
- the person causing the harassment is an employee of the employer (*respondeat superior*).

Sexual harassment may take two forms. One, known as quid pro quo, involves making accepting sexual advances a condition of employment decisions. The other form involves sexual conduct that a reasonable person would find to create an intimidating, hostile, or offensive work environment. A claim of sexual 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.

It is essential to note the conduct/communication was “on the basis of sex” – meaning the person would not have been the object of harassment but for sex.

PREVENTION

Regarding harassment and discrimination, prevention provides the organization with the most significant protection from legal liability and other negative consequences. As with many workplace issues, prevention involves developing a sound policy, implementing the policy with all organization members, periodic employee training on policy requirements, including reporting avenues, and consistently and fairly enforcing the policy.

Developing 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, an attorney familiar with employment issues should always review the final policy 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 that reviews the policy thoroughly, lead by top-level management or the organization's human resources department. The purpose of the training is to ensure that the policy has been communicated to all organization members and that everyone understands what is and is not acceptable workplace conduct in the future. This is when the organization begins to set the tone for how it will enforce the policy.

Questions should be encouraged so trainers can clarify any confusion or misunderstanding about the policy's requirements. However, care should be taken when responding to employees who may believe sexual harassment and discrimination aren't really serious issues and attempt to pick the policy apart by coming up with hypotheticals that would seem to require extreme or unreasonable actions by management. In such instances, rather than getting lured off-point or into making softening statements regarding policy, trainers should make clear that the bottom-line is: this is the organization's policy and if an employee cannot conform their behavior to the policy, management will take disciplinary actions 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. Disciplinary action is one of the most challenging managerial tasks, especially for mid-level managers, towards employees who were their peers not long ago. However, it is essential to limit liability. No employee or member of the organization is above the law, regardless of their position or specialized expertise. 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.

Outside contractors or vendors must also comply with this policy when entering your workplace. Violations of the policy by salespeople or delivery personnel must be reported to their employer, the behavior must be corrected, or the business relationship must be ended.

POLICY

Several resources are 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 implementation.

Aside from the standard language stating that harassment and discrimination are not allowed at the organization, the policy should include certain items:

- Examples – a non-exclusive list of specific types of behavior should be provided so employees and management will know what conduct violates the policy.
- Reporting – the procedure to report incidents of harassment and discrimination should be spelled out clearly and explicitly encouraged. All employees should know to whom they should report any suspected incidents of harassment or discrimination and alternative reporting avenues if they feel proper steps are not being taken to address the reported issues.
- 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 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 if the person feels that proper steps are not being taken to address the issue. This may involve a procedure to report to someone outside 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 violating the law continue because of retaliation).
- Exit interviews – these should be performed to assess whether 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 case 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 recommended to conduct this training periodically for all employees in the organization (every 2 to 3 years). Refresher policy training is also recommended for individuals who violate the policy.

RESPONSIBILITIES

It is the employer's responsibility, meaning all levels of management, to prohibit discrimination and harassment in the workplace. All employees should be encouraged to report any discrimination and harassment to the proper personnel within the organization. Employees should expect management to promptly and thoroughly investigate all complaints and take appropriate steps to prevent further policy violations. Management and employees must understand that any 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 work themselves out is unacceptable. A single comment or inappropriate action by a co-worker may not create significant liability for the employer. However, letting policy violations continue without addressing them will create liability for the organization – even when not reported immediately by employees.

**Contact MML Risk Management Services Staff/
or your Loss Control Consultant for more information.**

	Important Phone Numbers	
MML Risk Management Services		734.662.3246 or 800.653.2483
Loss Control Services		800.482.0626

Note:

***This document is not intended to be legal advice.
It only identifies some of the issues surrounding this topic.
Public agencies are encouraged to review their procedures with an expert
or a competent attorney who is knowledgeable about the subject.***

ADDITIONAL RESOURCES:

MML Risk Control Solutions – Disciplining and Discharging Legally

https://mml.org/insurance/risk_resources/pdf/risk_solutions/disciplining_discharging_legally2017.pdf

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

https://mml.org/insurance/risk_resources/pdf/risk_solutions/RCS_Discrimination_in_Employment_2023.pdf

Law Enforcement Action Forum – Fall 2018 newsletter

#MeToo Movement – What are the Takeaways?

https://mml.org/insurance/risk_resources/publications/leaf_newsletter/2018-fall.pdf

LEAF Manual, Chapter 15c – Workplace Harassment Policy

https://mml.org/programs-services/risk-management/leaf/leaf_lerc/chapters-n15/

LEAF Manual, Chapter 32 – Employee Sexual Misconduct

https://mml.org/programs-services/risk-management/leaf/leaf_lerc/chapters-n32/