

Sound Policies and Timely Investigations

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Topic: HR Risk and Employment Practices

Employer liability for sexual harassment continues to attract the media's attention. Multi-million dollar judgments and recent Supreme Court rulings have generated renewed interest in the topic. Consequently, employees have a growing awareness of the availability of legal remedies for perceived sexual harassment. Every nonprofit should commit to thoroughly investigating any and all [sexual harassment] complaints in a timely fashion, keeping detailed logs of the process used.

Few nonprofits can afford the tremendous distraction or financial consequences of a suit alleging sexual harassment. While any employment related complaint takes time and energy away from meeting the needs of the nonprofit's constituents, sexual harassment cases can be especially draining and damaging to an organization. Every nonprofit manager ought to be aware of these trends and take the appropriate actions to minimize the possibility of a sexual harassment complaint and potential lawsuit. Although no measures will completely insulate your organization from charges of harassment, there are a number of steps every nonprofit can undertake to reduce the risk. Key risk management strategies include having a clear anti-harassment policy, and having an effective internal investigation and dispute resolution procedure in place.

The first step, if not done already, is to review your anti-harassment policy and update it, using the following as a guide:

1. Is the policy written broadly to prohibit all unlawful workplace harassment such as harassment based on religion or national origin?
2. Is the policy written in plain, easy-to-understand language?
3. Does the policy list examples of what is and what is not sexual harassment?
4. Does the policy list several persons with whom a complaint can be filed and indicate how to contact them? Does this section contain a provision allowing the employee to bypass his or her supervisor in the event the supervisor is the harasser?
5. Does the policy avoid any language that might discourage complaints (such as requiring complaints to be submitted in writing or made to a high level manager)?
6. Can employees in remote locations or field offices easily avail themselves of the protections afforded by the policy?
7. Does the policy prohibit retaliation?
8. Does the policy promise confidentiality to the maximum extent possible?
9. Does the policy require an immediate investigation of allegations and state that the employee complaining of harassment will be informed of the results of the investigation?

Plan Implementation

Any risk management or organizational policy that gathers dust on a shelf is of little use as a preventative or defensive measure. To ensure the implementation of your updated policy, consider the following:

- Disseminate the policy widely to all locations, including field offices and any temporary work sites.
- Ensure that every employee receives a copy of the policy by having each person sign an acknowledgement form.
- Have a system for informing any new hires or transferred employees about the policy.

- Provide anti-harassment and sensitivity awareness training to all employees, making attendance mandatory.
- Offer a separate training program for supervisory personnel.
- Inform supervisors that satisfactory job performance requires the ability to prevent and correct harassment situations promptly.
- Ensure and monitor that all supervisors understand and follow their responsibilities when a complaint is made or they become aware of any harassing behavior. Make sure they know how to respond when the complainant asks specifically that nothing be done.
- Make certain that your policy requires employees to report observed or experienced harassment involving non-employees.

Prompt, Thorough Investigations Required

When faced with a complaint from a victim alleging *quid pro quo* harassment, most nonprofit managers are confident about the need to investigate and resolve the complaint in a timely fashion. This may not be the case in a more likely scenario, when someone other than the victim makes the complaint, or when the complainant requests that his or her name be withheld or that no action be taken.

Under the new legal standard, in order for an employer to limit liability, the employer must prove that an employee failed to take advantage of the complaint mechanisms in place at the organization.

Investigating Complaints

It is impossible to thoroughly investigate an incident if the complainant refuses to cooperate or name names. Make sure your staff knows that there will be no retaliation for participation in an investigation, and that complaints must provide enough details, such as the names of those involved, so that a thorough investigation can be conducted.

- Investigate any and all complaints of harassment — whether or not the complainant is the alleged victim.
- Begin sexual harassment investigations immediately — and always within 24 hours after a complaint is made.
- Separate the alleged victim from the alleged harasser during the investigation to minimize any potential for continuing harm.
- Make certain that you complete your investigation and take remedial action within two to three weeks of the initial complaint.
- Make sure you inform the complainant about the conclusions of the investigation. This is particularly important when an investigation does not yield evidence of illegal conduct, but does yield evidence of unprofessional conduct. The “victim” needs to know what disciplinary steps were taken, otherwise the victim will believe that his or her complaints were not taken seriously and be more likely to call an attorney.
- Keep detailed records of complaints, including notes on the steps taken in response to any complaint. These records will become evidence in mounting an affirmative defense.
- It’s a good idea to involve an outside facilitator, such as legal counsel, in any internal investigation, since employees may be more comfortable speaking candidly to an objective outsider.

Employer Can Be Liable for Harassment by Clients, Customers

In an Alaska case, the U.S. Court of Appeals for the Tenth Circuit upheld a judgment of more than \$200,000 against a restaurant franchise in favor of an employee who was sexually harassed by customers. The court ruled that the employer was responsible and legally liable for sexual harassment of one of its employees by a customer. The court said: “[A]n employer may be found liable for the harassing conduct of its customers. The focus of the inquiry in a hostile work environment claim, as the name suggests, is on whether the workplace is permeated with discriminatory intimidation, ridicule, and insult...An employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a nonemployee, since the employer ultimately controls the conditions of the work environment.” (*Rena Lockard v. Pizza Hut, Inc.*, U.S. Court of Appeals for the 10th Cir., December 14, 1998). This case illustrates that a well-written sexual harassment policy is not enough to shield an employer from liability. The policy must be followed carefully. In this case, the manager ordered the plaintiff to resume her duties after he witnessed several customers harassing the employee and did not make any attempt to protect the employee

from further harassing conduct.

Recap

1. Have a written anti-harassment policy that includes sexual harassment and communicate the policy to all staff.
2. Require staff to report violations of the policy, and remain alert for violations which may go unreported but which the employer will still be responsible for.
3. Provide more than one avenue for your employees to register complaints under the policy. An employee should never have to complain to the alleged harasser.
4. If a charge or allegation is made, conduct an immediate investigation. If necessary contact independent legal counsel to assist with the investigation. Talk to everyone identified by the employee and the alleged harasser as witnesses.
5. Limit the potential for continuing harm by separating the victim from the alleged harasser.
6. If necessary, suspend the alleged harasser with or without pay pending the outcome of your investigation.
7. Based upon the results of your investigation, take appropriate disciplinary action up to and including termination and referral of criminal conduct to law enforcement authorities.
8. Meet with the employee to inform him or her that you have concluded the investigation and have either been unable to substantiate the claim or have taken disciplinary action.

Some employers wonder whether they are bound to take the action requested by a victim of harassment. The answer is no. You do, however, need to take effective action to stop any harassment. In doing so, you should follow to the letter any written policies you have adopted. Never punish the complaining employee by requiring him or her to transfer to a different position or forego favorable working conditions.

If, after investigation, you find that there is no support for the complaint, you should meet with the employee to explain the reasons why you are not taking disciplinary action. You are not required to share confidential information about one employee with another. You should, however, make sure that you have conducted your investigation in a manner satisfactory to the complaining employee.

Sexual harassment is a serious issue that should concern every nonprofit. Workplaces hiring predominantly one gender are not immune. Same sex harassment is illegal. The law continues to evolve and liability or even an allegation of harassment can have adverse effects on an organization. The burden is on the employer to prove that it has a comprehensive and effective anti-harassment policy that is easy for employees to use. Every nonprofit should commit to thoroughly investigating any and all complaints in a timely fashion, keeping detailed logs of the process used. Finally, remember to always seek the advice of local employment counsel before adopting any changes to your anti-harassment and complaint policies and procedures.

Sample Anti-Harassment Policy

This organization is committed to maintaining a work environment that is free of harassment. Harassment of any kind is absolutely prohibited.

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that adversely affects the employee's employment terms or conditions or creates an intimidating, hostile or offensive working environment. No employee or member of management, up to and including the executive director, has the right or authority to offer any benefits, including, but not limited to, tangible items, whether business-related, such as raises and promotions, or nonbusiness-related, such as gifts, trips, or any other item, in exchange for sexual favors. In the event an employee receives an offer in exchange for sexual favors, the employee should immediately notify his or her supervisor, or in the event his or her supervisor is the person making the offer, the employee should immediately contact the human resources manager or executive director.

If you experience or observe conduct which you believe is in violation of this policy, you must inform your supervisor, the human resources manager, or the executive director of your concern. The organization will immediately investigate any allegation of harassment, and it will take prompt and effective remedial action to remedy the harassment. To the extent possible, the confidentiality of both the complaining party and the

harasser will be protected during the investigation process. At the conclusion of the investigation, the complaining party will be informed about the conclusions of the investigation, as well as an opportunity to discuss future procedures.

Harassment will not be tolerated, and if the investigation substantiates that illegal harassment has occurred, the offending employee shall be disciplined appropriately, up to and including discharge. Employees who make false or misleading accusations or statements in the course of an investigation under this policy will be disciplined, up to and including termination of employment.

Sample form acknowledging receipt 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, up to and including the executive director, has the authority to offer me anything, whether work-related or personal, in return for sexual favors. I understand that it is my responsibility to be familiar with the information contained in the policy and I am expected to abide by the rules and requirements contained in the policy with regard to the reporting of harassment, including the obligation to report violations of the policy and not to retaliate against any employee for exercising his or her rights under the policy.

Employee's Printed Name

Employee's Signature and Date

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