



EmployersCouncil.org

2018 Employers Council Blue Book

The Employment Law Resource[©]

Excerpt on Sexual Harassment

Published by Employers Council, Inc.

COLORADO SPRINGS
6005 Delmonico Dr., Suite 250
Colorado Springs, CO 80919
Main 719.667.0677
Toll Free 800.884.1328

DENVER
1799 Pennsylvania St.
Denver, CO 80203
Main 303.839.5177
Toll Free 800.884.1328

LOVELAND
5250 Hahns Peak Drive, Suite 140
Loveland, CO 80538
Main 970.223.4107
Toll Free 800.884.1328

SALT LAKE CITY
175 West 200 South, Suite 2005
Salt Lake City, UT 84101
Main 801.364.8479
Toll Free 800.884.1328

SCOTTSDALE
7975 N. Hayden Rd., Suite D-280
Scottsdale, AZ 85258
Main 602.955.7558
Toll Free 800.437.9262

Chapter 5 / Discrimination

C. Sexual or Other Unlawful Harassment

Title VII of the Civil Rights Act of 1964 (Title VII) does not specifically mention sexual harassment. However, in 1980, the EEOC issued guidelines stating sexual harassment in the workplace is a form of sex discrimination and is therefore illegal.

The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- Such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.

Clearly, it is sexual harassment for an employer or manager to make unwelcome sexual advances or to demand sexual favors in return for job benefits, promotions, or continued employment. Further, pervasive conduct of a sexual nature may be a basis of a sexual harassment claim. Examples include:

- Posting sexually explicit photos that offend employees;
- Telling sexual or demeaning jokes based upon gender;
- Commenting inappropriately on an employee's appearance;
- Requiring employees to dress in scanty attire;
- Repeatedly requesting dates from a person who is not interested; or
- Claiming that one gender is inferior or cannot work as well as the other gender.

In short, any hostile or offensive behavior that has a sexual component can constitute sexual harassment if unwelcome.

Harassment isn't just about sex. Other forms of illegal harassment include conduct which is directed at an individual based on race, color, national origin, religion, age, or disability that has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.



Discrimination:
[Unlawful Harassment](#)

1. Hostile Work Environment Harassment under Title VII and Related Acts

Hostile work environment can be created by anyone employees come into contact during the course of the work day. It can go from “top down” where supervisors create a hostile work environment for their subordinates; “bottom up” where subordinates create a hostile work environment for supervisors; “side to side” where coworkers create a hostile work environment for each other; or “outside in” where non-employees such as customers or vendors create a hostile work environment for employees.

Each of the below four elements of hostile work environment must be met for a claim to be legally sustainable:

Conduct
Based on a
Protected Status

The conduct complained of must be related in some manner to the person’s protected status such as race, color, national origin, religion, age, disability, or sex. If the behavior is not based on one of these protected characteristics, Title VII or the related Acts offer no protection for the complaining employee.

Unwelcome
Conduct

Whether conduct is “unwelcome” is a subjective test, which means the conduct must be viewed from the perspective of the complaining employee. Conduct is unwelcome when it is unsolicited, uninvited, and when the employee views the conduct as undesirable or offensive.

Unreasonably
Offensive Conduct

This is an objective test. If a reasonable person would consider the behavior unreasonably offensive to alter a term or condition of employment or create a hostile or abusive work environment, the conduct is unreasonably offensive.

Severe or
Pervasive Conduct

Whether the conduct is severe or pervasive depends on the nature and the frequency of the conduct. The EEOC and courts will consider the record as a whole and the totality of the circumstances in determining whether conduct is sufficiently severe or pervasive.

2. Complying with the Law

An employer may be liable for illegal harassment if executives or supervisors participated in the harassment or if they knew, or should have known, that it took place and failed to act. The employer has a legal duty to take necessary steps to prevent illegal harassment. This involves issuing and enforcing a strong anti-harassment policy and complaint procedure, and conducting training for all employees.

In addition to constantly reevaluating their policies against harassment and discrimination and educating their workforce, management must be prepared to respond to complaints and conduct an effective investigation of the allegations. Employers should investigate all complaints promptly and thoroughly and keep their investigations as confidential as practicable, without promising complete confidentiality. How well prepared you are and your responses to complaints may well lead to a greater willingness on the part of employees to bring complaints and concerns to management instead of immediately choosing to contact an attorney. In addition, a proper investigation may serve as the basis of a legal defense, prevent further harassing behavior, and sometimes can help resolve disputes before a lawsuit is filed. By contrast, poorly conducted investigations may negatively impact employee morale, cause bad publicity, churn up gossip, and result in increased legal exposure.

After an investigation, an employer should take immediate and appropriate corrective action to ensure conduct will not recur. Disciplinary action against the offending supervisor or employee, ranging from a written warning to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. Often, additional sexual harassment training for supervisors and employees is prudent corrective action.

If you learn of workplace conditions that create an uncomfortable work environment, such as the presence of pornographic materials, take decisive steps to eliminate the offending conditions. If an employee challenges you by asking, “Who is offended by this?” the best answer may be, “Me!”

You must also take corrective action if an employee is being illegally harassed by non-employees who visit the workplace such as clients, patients, vendors, or suppliers.



If you need an attorney to investigate a claim of illegal harassment or workplace misconduct, contact our [Workplace Investigation Services](#).



Workplace Investigations:
[Addressing Employee Participation and Cooperation](#)
[Corrective Action Considerations](#)
[Overview](#)
[Post Investigation Communications and Recommendations](#)
[Precautionary Measures Including Investigatory Leave](#)



[Investigations in the Workplace](#)

Of course, avoiding a lawsuit is just one reason to crack down on sexual harassment. Any harassment has a negative impact on employees, causing anxiety and unhappiness. You cannot expect high morale and productivity in a workplace where illegal harassment is tolerated.

Steps to
Prevent and
Correct
Harassment

1. Publish a clear, written policy against harassment.
2. Disseminate the policy to all employees.
3. Include harassment in supervisory training programs and orientation sessions for employees.
4. Establish a complaint or grievance procedure with a mechanism to circumvent the immediate supervisor.
5. View all complaints as serious, and investigate every complaint thoroughly and with as much confidentiality as possible.
6. Ensure employees that no retaliation will result from a complaint.
7. Confront the alleged harasser with the negative accusations and get his or her version of the event.
8. Take prompt and effective corrective action reasonably calculated to end the harassment.
9. Impose discipline, if warranted by the results of the investigation, up to and including termination.
10. Follow up to determine if the harassment has actually stopped.

 Arizona (p.15)



Onsite training for supervisors and employees is critical to prevent sexual harassment as well as other types of illegal harassment. Call us for more information about this class or search our online seminar catalog at EmployersCouncil.org.



Harassment Prevention for Employees
[Harassment Prevention for Managers and Supervisors](#)
[Harassment Prevention in California—Managers and Supervisors](#)