

Sexual Harassment at Work

Under U.S. law, employers (including ophthalmology practices) of 15 or more employees must comply with Title VII of the Civil Rights Act of 1964, which includes prevention and response to sexual harassment. In addition, many states and cities have anti-discrimination laws that may apply to smaller practices as well. Accordingly, regardless of size, it is critical that you ensure that your practice implements policies and procedures to ensure compliance with sexual harassment laws. Here's an introduction to compliance with sexual harassment law.

Who the Law Applies To

As further discussed below, liability for sexual harassment can have significant consequences. Though your practice should act ethically because it is the *right* thing to do, failure to follow the law can also prove very costly. It is critical that you stay up-to-date on these laws and comply with the requirements imposed by those laws applicable to your practice to avoid potential liability.

- Practices with 15 or more employees: Federal and (most likely) state law apply to how your practice prevents and, if necessary, responds to sexual harassment.
- Practices with 14 or fewer employees: Federal law does not apply. However, state and local law may apply. Make it a priority to review the laws that apply to your practice.

Even if no law applies to your practice, the Academy expects all of its members to conduct themselves with integrity. Review CEO David W. Parke's recent [EyeNet editorial on sexual harassment](#).

What Sexual Harassment Entails

The Equal Employment Opportunity Commission's [Guidelines on Discrimination Because of Sex](#) define two types of sexual harassment:

1. **Quid Pro Quo** - Where employment decisions or expectations (e.g., hiring decisions, promotions, salary increases, shift or work assignments, performance expectations) are based on an employee's submission to or rejection of unwelcome sexual conduct. Quid pro quo harassment can include:
 - a) Demanding sexual favors in exchange for a promotion or a raise;
 - b) Disciplining or firing a subordinate who ends a romantic relationship; and
 - c) Changing job or performance expectations after a subordinate refuses repeated requests for a date.
2. **Hostile Environment** - Where verbal or non-verbal behavior in the workplace: (1) focuses on the sexuality of another person or occurs because of the person's gender, (2) is unwanted or unwelcome and (3) is severe or pervasive enough to affect the person's work environment. Behaviors that can create a hostile environment when unwanted or uninvited include:

- a) Off -color jokes;
- b) Comments about body parts or sex life;
- c) Suggestive pictures, posters, calendars or cartoons;
- d) Leering, staring or gestures;
- e) Repeated requests for dates;
- f) Excessive attention in the form of text, calls or gifts; and
- g) Touching (e.g., brushes, pats, hugs, shoulder rubs or pinches).

Ways to Prevent Sexual Harassment

The EEOC guidelines encourage employers to take steps necessary to prevent sexual harassment from occurring. These steps begin with your practice affirmatively raising the subject to employees and explicitly expressing its strong disapproval for such conduct.

You should also develop appropriate disciplinary actions for harassers and inform employees of their rights and the procedure for raising the issue with the appropriate individuals.

Lastly, you should train all staff on workplace sensitivity and inappropriate behaviors. Attached is a sample Harassment Policy that you can use to implement the EEOC's suggestions.

Your Obligation to Respond to Harassment

Whenever your practice becomes aware of potential sexual harassment, either through a complaint, anonymous report or otherwise, you must take several steps.

1. Promptly conduct a thorough investigation.
2. If and when the investigation confirms the report, take action to:
 - a. Immediately end the harassment;
 - b. Restore any lost employment benefits or opportunities to the victim;
 - c. Prevent the harassment from recurring; and
 - d. Discipline the harassing supervisor or employee consistent with the severity of the conduct.

Liability for Sexual Harassment

Your practice's liability for sexual harassment will depend on the position of the harasser and your practice's knowledge of the harassment.

Harassment by supervisors

Generally, your practice will always be held liable for harassment by an individual in a supervisory role when such harassment results in a negative employment action (e.g., termination, failure to promote/hire, and loss of wages).

If the harassment results in a hostile work environment, your practice can avoid liability if you can prove that:

1. Your practice exercised reasonable care to prevent and promptly correct any harassing behavior; and

2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by your practice.

Non-supervisory or non-employee harassment

With regard to non-supervisory employees and non-employees, your practice is liable for harassment if:

1. Your practice has control over such individuals (e.g., independent contractors or customers on the premises);
2. Your practice knew or should have known about the harassment; and
3. Your practice failed to take prompt and appropriate corrective action.

If found liable, your practice's sanctions may include mandatory remedies including:

- Remedies to the aggrieved employee (e.g., job placement, promotion);
- Payment of compensatory damages for emotional harm suffered and out-of-pocket expenses incurred by the victim (e.g., back wages, job search costs); and
- Payment of punitive damages intended to punish your practice, especially when your practice's actions prove reckless and/or malicious.

Local Sexual Harassment Laws

Separate from Title VII, practices may be subject to and face liability under state and/or local non-discrimination and/or harassment laws. These laws may have a lower employee threshold, thereby affecting practices with fewer than 15 employees. For this reason, you must apprise yourself of the state and local laws that apply to your practice.

Employer Practices Liability Insurance

Given the potential for liability under Federal, state and/or local law, you may consider purchasing an employer practices liability insurance policy. Different from medical malpractice insurance, this type of policy covers your practice against claims made by employees alleging discrimination (i.e. sex-based discrimination), wrongful termination, harassment and other employment-related issues (i.e. failure to promote).

You can often purchase this kind of policy as a rider on your current general liability policy or as a stand-alone policy. The cost will depend on a variety of factors, including practice size, history of employee claims and whether your practice has implemented and enforces preventive rules and regulations.

Takeaways

As with all other employers, ophthalmology practices must take workplace sexual harassment seriously. Keep the following key takeaways in mind to prevent and appropriately respond to sexual harassment issues:

- Ensure that your practice has more than one person available to receive complaints so that the victim is not expected to report claims to his/her harasser.
- Take all claims seriously.

- Maintain the information received through a complaint as confidential as possible.
- Conduct investigations promptly and thoroughly.
- Consider hiring an outside company or individual that can investigate in a neutral and unbiased manner.
- Ensure that you take appropriate disciplinary action against the harasser.
- Document the complaint, investigation and remedial actions taken and keep the victim apprised of the progress.
- Ensure that no retaliatory actions are taken against the victim or any other individual making a claim of harassment.

Sample Harassment Policy

Harassment Prohibited

The practice strictly prohibits and does not tolerate harassment against employees or any other practice-related individual that may be on the practice premises from time to time (e.g., patients, independent contractors, vendors) because of race, religion, creed, national origin, ancestry, sex (including pregnancy), gender, age, physical or mental disability, citizenship, genetic information, past, current or prospective service in the uniformed services, or any other characteristic protected under applicable federal, state, or local law.

Sexual Harassment

All practice employees are prohibited from harassing other employees and practice-related individuals based on that individual's sex or gender and regardless of the harasser's sex or gender.

Sexual harassment is defined as any harassment based on someone's sex or gender. It includes harassment that is not sexual in nature (for example, offensive remarks about an individual's sex or gender), as well as any unwelcome sexual advances or requests for sexual favors or any other conduct of a sexual nature, when any of the following is true:

- Submission to the advance, request or conduct is made either explicitly or implicitly a term or condition of employment;
- Submission to or rejection of the advance, request or conduct is used as a basis for employment decisions; or
- Such advances, requests or conduct have the purpose or effect of substantially or unreasonably interfering with an employee's work performance by creating an intimidating, hostile or offensive work environment.

The practice will not tolerate any form of sexual harassment, regardless of whether it is:

- Verbal (e.g., epithets, derogatory statements, slurs, sexually-related comments or jokes, unwelcome sexual advances or requests for sexual favors);
- Physical (e.g., assault or inappropriate physical contact);
- Visual (e.g., displaying sexually suggestive posters, cartoons or drawings, sending inappropriate adult-themed gifts, leering or making sexual gestures); or
- Online (e.g., derogatory statements or sexually suggestive postings in any social media platform including Facebook, Twitter, Instagram, Snapchat, etc.).

This list is illustrative only, and not exhaustive. No form of sexual harassment will be tolerated. Harassment is prohibited at the workplace, at employer-sponsored events and outside of the workplace where such behavior impacts the workplace environment (i.e. social media posts to or about an employee or other practice-related individual).

Other Types of Harassment

The practice's anti-harassment policy applies equally to harassment based on an employee's or practice-related individual's race, religion, creed, national origin, ancestry, age, physical or mental disability, citizenship, genetic information, past, present or prospective service in the uniformed services, or any other characteristic protected under applicable federal, state, or local law.

Such harassment often takes a similar form to sexual harassment (e.g., verbal, physical, visual, online) and includes any harassment that creates an intimidating, hostile or offensive work environment.

Complaint Procedure

If you are subjected to any conduct that you believe violates this policy or witness any such conduct, you must promptly speak to, write or otherwise contact your direct supervisor or, if the conduct involves your direct supervisor, the office manager or one of the physician owners. If you have not received a satisfactory response after reporting any incident of what you perceive to be harassment, please immediately contact the office manager or one of the other physician owners. These individuals will ensure that a prompt investigation is conducted.

Your complaint should be as detailed as possible, including the names of all individuals involved and any witnesses. The practice will directly and thoroughly investigate the facts and circumstances of all claims of perceived harassment and will take prompt corrective action, if appropriate.

Additionally, any manager or supervisor who observes harassing conduct must report the conduct to the office manager or one of the physician owners so that an investigation can be made and corrective action taken, if appropriate.

No Retaliation

No one will be subject to, and the practice prohibits, any form of discipline, reprisal, intimidation or retaliation for good faith reporting of incidents of harassment of any kind, pursuing any harassment claim or cooperating in related investigations.

Violations of This Policy

Any employee, regardless of position or title, whom the practice determines has subjected an individual to harassment or retaliation in violation of this policy, will be subject to discipline, up to and including termination of employment.