

How to avoid harassment claims

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A hospitality workplace can attract an environment for harassment claims, so hoteliers should know how to avoid and limit their liability risks.

Highlights

- Employers should have a written policy prohibiting all types of harassment.
- Provide mandatory anti-harassment training to employees.
- Taking preventative steps does not mean harassment and discrimination will not occur.



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Hospitality industry workplaces are petri dishes for sexual harassment and discrimination claims—and plaintiffs' attorneys anxiously await the easy pickings that result when employers fail to recognize the unique challenges of their environment. With proper training and handling of complaints, hotel employers can avoid many hostile environment claims and greatly minimize settlement costs in others.

Hostile work environment harassment includes speech or conduct that is severe or pervasive enough to create a hostile or abusive work environment based on race, religion, sex, national origin, age, disability, veteran status or, in some jurisdictions, sexual orientation, political affiliation, citizenship status, marital status or personal appearance, for the plaintiff and for a reasonable person. Many hostile environment harassment claims involve allegations of offensive speech and/or physical touching, vandalism or discriminatory job assignments.

The people-friendly focus of hotel venues attracts and generally encourages the type of gregarious, even flirtatious personalities that can easily cross the line into objectionable conduct. In addition, the often long and late hours, high stress, tight working conditions and proximity to alcohol and/or beds increase the likelihood of a deviation from acceptable behavior. The industry's high turnover rate also leaves employers with little time and opportunity to thoroughly train all employees.

With the substantial challenges hotel employers face, and because harassment claims often stem from a series of events or actions, employers might not understand how best to prevent a claim or limit exposure to such

claims. Some might simply throw up their hands and assume claims are unavoidable. However, developments in hostile work environment case law indicate employers greatly decrease their risk of liability by taking certain actions before and after an alleged incident of harassment occurs.

When employers are liable and how to limit liability

Employers are liable for actionable hostile environment sexual harassment committed by those in a supervisory role. If no tangible employment action has been taken (such as demotion or undesirable reassignment) the defending employer might raise a defense to liability. To successfully raise the defense, the employer must establish two things: the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While proof that an employer had an anti-harassment or anti-discrimination policy with a complaint procedure is not necessary in every instance as a matter of law, the fact as to whether such a policy existed at the time of the alleged harassment will be addressed in any case when litigating the defense. An employer who is able to assert that such a policy and complaint procedure existed at the time of the offense will have a significantly lower risk of exposure than an employer without such a policy in place.

When assessing employer liability with respect to a hostile work environment claim, the courts also consider the remedial actions, if any, the employer took in response to receiving notice of alleged acts of harassment. Courts consider evidence of remedial actions in instances where the alleged harassment was at the hands of either a supervisor or nonsupervisory employee. In nonsupervisory cases, the employer is liable only if it was negligent, that is, only if the employer knew or should have known of the harassment and failed to take reasonable corrective action.

Preventive and remedial measures to limit liability

It is imperative that employers take affirmative steps to prevent and remedy harassment in the workplace. Such steps make good business sense and are simply the right thing to do. The following are two steps that every employer should take to prevent harassment and discrimination in the workplace.

1. Have a written policy prohibiting all types of harassment.

- The policy should be distributed to every employee upon hire.
- Utilize and maintain documented acknowledgement from all employees that they have received the policy, read it and understand it.
- Do not limit the policy to sexual harassment; include all forms of discriminatory conduct.
- The policy should provide instructions for reporting incidents of harassment/discrimination.
- Do not limit the contact person for reporting incidents of harassment to the alleged victim's direct manager or management chain; consider utilizing a designated individual/position as a contact person.
- The policy should include a notice that confidentiality will be maintained.
- The policy should include a statement that any employee who reports incidents of harassment or discrimination, or who participates in a related investigation, will not experience retaliation as a result.

2. Provide mandatory anti-harassment training to your employees, particularly managers and supervisors.

- The training can be done internally or an employer can utilize outside services.
- Document every individual's participation in the training.
- The training should include all forms of harassment/discrimination.
- Periodic retraining or updates are advisable.
- Because of high turnover in the hospitality industry, employers find it difficult to train employees on Equal Employment Opportunity matters. Consider creative training opportunities, including initial training at orientation, online training and/or cooperative training with other employers in the area.

Taking preventative steps does not mean harassment and discrimination will

not occur in the workplace. While ignorance can create liability risks, awareness instead presents an opportunity to act. Not only are the following investigatory and remedial steps necessary to avoid liability, they also indirectly work to prevent harassment and discrimination as well.

Following are some tips regarding the investigation process and remedial action.

The investigation

- Do not honor a complainant's request that the employer not do anything about it.
- The investigation must be timely, within days or weeks.
- An unbiased person(s) should conduct or lead the investigation.
- Document every allegation of harassment or discrimination at the outset; have the victim prepare a statement or sign a statement prepared by the employer.
- Investigate every allegation, no matter how trivial some might appear.
- Every potential witness should be interviewed or contacted.
- Stress non-retaliation to all involved.
- Maintain records of the investigation.
- Reach a "conclusion" even if the conclusion is that the complaint can neither be refuted nor substantiated (i.e. "inconclusive").

Remedial action

- Relay findings and the steps taken, if any, to the complainant.
- An employer need not conclude that harassment or discrimination occurred. If the investigation is inconclusive, then the employer should remind all involved persons of the employer's prohibitions against harassment and discrimination and encourage future questions or complaints.
- Avoid punishing the complainant in other than the clearest of

instances where complainant engaged in inappropriate conduct.

- The punishment should fit the crime.
- Consider non-disciplinary steps, including retraining or additional anti-harassment training and issuance of a letter reiterating the employer's anti-harassment policy.

Dedication to these practices can help hoteliers minimize exposure and even avoid many harassment claims. Perhaps more importantly, they also improve employee morale and professionalism.

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