

# GOOD SENSE GOVERNANCE

Legal Affairs & Association and MLS Governance

February 2018

## HARASSMENT PREVENTION

### IN A NUTSHELL

1. Harassment is illegal under both federal and state law, and associations have a legal responsibility to maintain an environment free from harassment.
2. Associations need carefully crafted anti-harassment policies for both employees and volunteer leaders to fulfill its legal obligation to maintain a harassment free environment, and reduce liability.
3. Associations should conduct regular sexual harassment prevention training for employees and volunteers leaders.

### NUTS AND BOLTS

Under Federal law, workplace harassment is a form of discrimination that violates Title VII of the Civil Rights Act of 1964, and is defined as unwelcome verbal or physical behavior that is based on race, color, religion, sex (including pregnancy), gender/gender identity, nationality, age (40 or over), physical or mental disability, or genetic information. Harassment becomes unlawful when the conduct becomes so severe or pervasive that a reasonable person would consider the workplace intimidating, hostile or abusive. Harassment is also unlawful when the conduct becomes a prerequisite to maintaining an individual's employment or results in a change, either positive or negative, to an employee's position, salary or terms of employment.

In addition to federal law protections, state law may include additional categories of protected characteristics, such as marital status, political affiliations and source of income.

Sexual harassment is a specific form of harassment recognized by courts as a form of sex discrimination. The Equal Employment Opportunity Commission defines sexual harassment as:

*Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:*

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

There are two forms of sexual harassment: **quid pro quo** and **hostile environment**. **Quid pro quo** harassment occurs when a manager or other authority figure offers or merely hints that they will give an employee something, such as a raise or a promotion, in return for satisfaction of a sexual demand. A single incident of quid pro quo harassment may constitute unlawful harassment.

**Hostile environment** harassment, on the other hand, is frequent or pervasive unwanted conduct that unreasonably interferes with an individual's employment or creates an abusive, intimidating, hostile or offensive work environment. In general, one isolated incidence will not constitute hostile environment harassment.

Sexual harassment can occur in a variety of circumstances, and includes both verbal and non-verbal conduct. Sexual harassment is not limited to interactions between members of the opposite sex, and may include situations involving two women or two men, and the victims of sexual harassment may be male or female.

In order to effectively prevent and address all types of harassment, and diminish the potential legal liability that comes with failure to address harassment, associations should be sure have anti-harassment policies in place – including one for employees, and one for association leaders. Maintaining two separate policies provides a method for all employees and association volunteers (for example, directors and committee members) to know what conduct is expected, and where to report potential problems.

In creating a new policy or reviewing an existing anti-harassment policy, associations should ensure their policies contain the following:

- 1) **A Clear Definition of Harassment.** The policy should include a definition of harassment based on both federal law, as well as any applicable state law variations. The association could also consider including a non-exhaustive list of examples of conduct considered illegal and inappropriate under the policy.
- 2) **Where to Report Incidents of Harassment.** The association's policy should include multiple avenues for victims to report harassment. For employee policies, human resources personnel, an employee's supervisor, or even the association executive are all appropriate reporting avenues to consider including in the policy. For association leadership policies, the association may consider including the association's officers, a member's committee chair or even the association executive as potential avenues to make a harassment complaint.
- 3) **Investigative Process.** The policy should clearly outline the steps the association will take to investigate complaints made under the policy. In all cases, it is important that the association promptly and thoroughly investigate each complaint, and maintain thorough record keeping and communication with the alleged harasser and the victim throughout the process.
- 4) **Potential Disciplinary Action.** The policy should outline the potential disciplinary action that will be taken when a violation of the association's policy occurs. The potential consequences of prohibited harassment may include any discipline allowed by federal or state law, up to and including termination from employment or removal from the association volunteer's position.
- 5) **Clear Statement of Non-Retaliation.** Under Title VII of the Civil Rights Act, it is illegal to retaliate against an individual who files a discrimination complaint, and a non-retaliation statement is a critical element of an effective policy. A non-retaliation statement communicates to victims making good-faith reports of harassment that they will not experience any negative consequences for making such a report, even when an investigation reveals no harassment occurred. This not only creates an environment where victims feel comfortable reporting inappropriate behavior without fear of negative consequence, but also places the association in a position to promptly address issues of harassment and avoid potential liability down the road.

And finally, the best-laid policy is only as good as the training and enforcement behind it. Once the association has its policies in place, the association should be sure to conduct regular training for all of its employees and volunteer leaders.

## **ASSOCIATION ACTION**

1. Review state and federal harassment laws with legal counsel.
2. Create an employee anti-harassment policy, and train all employees on it.
3. Create a volunteer leader anti-harassment policy, and train all volunteers on it.
4. Promptly investigate all complaints of harassment.