

#MeToo Impact for ACCT PVMs and Operators

The recent tidal wave of sexual harassment allegations, lawsuits and public outcry against inappropriate behavior in the workplace by the rich and famous also has a direct impact on ACCT members even if there are no allegations of inappropriate behavior against your organization and staff due to a heightened awareness among employees.

As employers, the goal is to provide a work environment free of harassment so each employee is contributing their best to the goals and outcomes of the organization. Managers and owners need to implement a pro-active risk management strategy to prevent sexual harassment and a hostile work environment for their employees, vendors, and customers/guests including a plan to respond to related allegations and understand the costs of such claims.

The below article by Gary Nesbit, Chair of the ACCT Risk Management & Insurance Committee addresses the key issues facing by ACCT Members, including:

- Impact and Strategies for ACCT Members
- Definition of Sexual Harassment
- Examples of Sexual Harassment
- Risk Prevention Strategies
- Risk Financing Strategies
- Balancing of Risk Management Strategies
- Awareness Followed by Action

Impact and Strategies for ACCT PVMs and Operators

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Definition of Sexual Harassment

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The U.S. Supreme Court has defined sexual harassment as taking one of two forms.

“**Quid pro quo**” harassment is one in which submission to the harassing conduct is made a condition of employment.

A much more common form, known as a “**hostile environment**” involves conduct so “severe or pervasive” that a reasonable person would not tolerate it.

Generally, a single action may not trigger a charge of sexual harassment, but in today’s environment, a single act may be considered as severe or pervasive. The victim of sexual harassment may file suit under federal or state anti-discrimination law and seek financial damages and their attorney fees from your organization. A sexual harassment claim can be filed against your organization for actions done by your employees or based on the actions of vendors and subcontractors that you allow to interact with your employees.

Examples of Sexual Harassment

Inappropriate jokes, words, gestures, or references to clothing, looks, body parts, and/or comments that are sexual in nature. This includes same-sex and opposite-sex connotations.

Inappropriate touching, hugging, kissing, or interfering with an employee to move on or do their job.

Repeated requests for dates, personal favors, and/or un-welcomed flirting.

Sending, posting, texting, emailing items that are sexual or harassing in nature.

Viewing pornography or other suggestive or hateful or harassing material online or on a smartphone or company devices even if it is done in a private office.

Displaying sexually suggestive or harassing themed objects, pictures or posters in the workplace.

Risk Prevention Strategies

The first and most important strategy as owners and managers is to communicate and actively demonstrate in their own behaviors that sexual harassment and that hostile behaviors are not practiced or tolerated. This means a zero tolerance for inappropriate jokes that are sexual, or racial, or religious, or crude that would make a person uncomfortable, including not allowing sexualized pictures in the workplace and if they do occur, corrective action is taken immediately. No inappropriate parties or any “quid pro quo” behaviors for sexual or personal favors are tolerated.

Second, actively communicate to your staff your organization’s policies on preventing and addressing sexual harassment including a hostile work environment. Your policy needs to be in writing and clearly communicated to each new employee, your existing employees regularly (annually) and to your vendors and subcontractors.

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Your organization policy needs to address and define your organization's position on the following (this is not an all-inclusive list):

Sexual harassment policy: is it written and does it describe what is not acceptable behavior;

General harassment policy: what it is and what is not acceptable behavior;

Frequency and scope of anti-harassment training;

How a person who is being harassed or whom witnesses harassing behavior is to respond to the inappropriate behavior;

How to report incidents of harassment and how investigations are conducted and by whom including an alternative if the investigator is the one responsible for the inappropriate behavior;

Prohibition on an employee in a supervisory role from dating a subordinate employee and the step required should a relationship form;

Consequences for sexual or harassing behavior including consequences for supervisors who do not act on reports of harassing behaviors.

Prohibition on retaliation against individuals who report harassing behaviors.

Third, ensure that your policies and procedures related to preventing sexual harassment and/or a hostile work environment are put into practiced consistently each day.

Risk Financing Strategies

The two primary ways of risk financing a Sexual or Hostile Work Environment charge are:

1) Self-insurance; and

2) Employment Practices Liability insurance (EPL) that often includes a deductible or self-insured retention.

Most often, it is a combination of these two methods.

Self-insurance: the cost of defending (legal fees) and any settlement costs are paid for out of organization's funds. Depending on the magnitude and scope of the charges, legal fees, and the number of individuals filing claims this option by itself could bankrupt or severely cripple the organization financially.

Internal and external reputational losses are often incurred by an organization facing sexual harassment with their staff and customers. Reputational losses can be a real financial loss that is most often borne by the organization directly. Loss of a business's reputation among employees, customers/guests, and the public can take years to restore.

EPL insurance: provides the organization with liability insurance covering wrongful acts arising from the employment process, which includes sexual harassment or a hostile work environment. Often an EPL insurance policy requires a deductible or self-insured retention which the employer funds along with loss prevention services such as training, policy resources, and access to defense attorneys who specialize in handling EPL claims.

Balancing of Risk Management Strategies

Maintaining the balance of EPL coverage including policy limits and retentions along with preventive strategies such as training, policies, and enforcement is critical. Heavy emphasis on prevention strategies is essential but inadequate EPL limits or too high retention levels may jeopardize the financial health and viability of the organization. Overspending on high EPL limits with low retentions may take funds away from implementing effective training and policies that would prevent sexual harassment and/or a hostile work environment.

Awareness Followed by Action

As the #MeToo movement gains focus, the standards defining harassment claims and the number and cost of these claims is growing. Just in the past two years, states have expanded the regulatory definition of sexual harassment; extended the statute of limitations; limited the application of non-disclosure agreements; and set requirements for businesses to the prevention of sexual harassment.

It is imperative to review one's policies, procedures, practices and the enforcement of these internal policies that are designed to prevent sexual harassment or a hostile work environment.

A formal review of one's EPL coverages, limits, retentions, coverage definitions, and exclusions needs to be done annually with your insurance agent or broker; especially as insurance carriers are actively seeking to craft their EPL policies, policy limits and retentions, and to improve their underwriting selection criteria to this changing legal and social environment.