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## **Sexual Harassment Law Basics**

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*A manual brought to you by David Scott Peters*

The restaurant business by nature is susceptible to claims of sexual harassment. Restaurants are venues of entertainment, which are highly social settings, include odd hours and alcohol, and are full of young people managing younger people.

As your restaurant coach I'm your partner in making your business successful, including protecting you from unwarranted accusations and nasty legal battles of all kinds, and that includes sexual harassment.

I've partnered with Lindsay Jones, Esq., to bring you this manual because sexual harassment is a very real problem in business today. This manual outlines what you can do to protect yourself and your employees in the face of it, as well as avoid time spent defending yourself in court and the costs associated.

Lindsay gives you everything you need to put together your own sexual harassment policy, grievance procedure, investigation guidelines and forms to validate the information has been provided. It is succinct and easy to implement. Included is a breakdown of Title VII of the Civil Rights Act, which applies to any employer with 15 or more employees.

In addition, Lindsay has provided you with samples of the following:

- A. Sexual harassment policy and grievance procedure
- B. Acknowledgement form to use in training and hiring to show employees received your sexual harassment policy
- C. Guidelines for investigating accusations of sexual harassment

As a business owner with assets and liability, it's pertinent you have a sexual harassment policy in place — an unquestionable, well-publicized policy.

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Please understand this manual is not off-the-shelf ready by itself. It covers the federal law, but doesn't take into consideration your state's sexual harassment laws. Please consult with your attorney to make your policy and grievance procedure comply with your state's requirements as they vary from state to state.

I've developed this piece to protect your employees, and more importantly to me, to protect you. The more steps you take to prevent sexual harassment, the harder it will be for anyone to harm your business, or in a worst-case scenario, take it away from you.

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# Sexual Harassment Law Basics

by Lindsay E. Jones, Esq.<sup>1</sup>

*The cautious seldom err. - Confucius*

## Overview

Most employers are aware that they may be held liable for sexual harassment perpetrated by their employees, but few employers are aware of the cautions they can put in place to minimize both (1) sexual harassment in their workplace, and (2) exposure to liability if harassment does occur. While there is no absolute way to prevent someone from suing over allegations of sexual harassment, these materials will outline important steps for every employer to ensure the most protection.

First, a disclaimer: Employers should be aware that if they have 15 or more employees they are governed by the federal law that prohibits sexual discrimination and harassment, Title VII of the Civil Rights Act. They should also know that every state has its own laws prohibiting sexual harassment. In addition, even if employers have just one employee they could be vulnerable to so-called common law tort claims (i.e. assault, battery and negligent infliction of emotional distress) in cases of sexual harassment. This article only discusses federal law. Therefore, employers should contact an attorney licensed in their state to ensure that their policies comply with all relevant laws and that their policies are as current as possible.

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\* Lindsay E. Jones, Esq., an employment law attorney at Gust Rosenfeld P.L.C. in Phoenix, Arizona prepared these materials. If you have any questions about their content, please feel free to contact Lindsay directly at [ljones@gustlaw.com](mailto:ljones@gustlaw.com) or 602-257-4200. These materials are not a substitute for legal advice, and are only intended to provide a general overview of the law. In addition, legal requirements may vary by state and jurisdiction and the law is continually changing. Therefore, prior to implementing any of the information presented you should contact an attorney in your jurisdiction for the most current and location appropriate advice.

Finally, Title VII is designed to help cautious employers because it encourages the creation and implementation of Anti-Harassment Policies and effective Grievance Procedures. Therefore, under certain circumstances, the existence of these policies and grievance procedures will limit an employer's liability. Thus the second focus of these materials is a discussion of what every employer should have in place to prevent and address sexual harassment.

### **Sexual Harassment under Federal Law**

Title VII is the federal law prohibiting discrimination based on race, gender, sex, pregnancy, and national origin. 42 U.S.C. §2000e et. seq. This federal law applies to all employers with 15 or more employees. In general, federal law does not prohibit all conduct of a sexual nature in the workplace. Instead, it prohibits only unwelcome sexual conduct that is or impacts a term or condition of employment. Federal law broadly requires employers to protect their employees from unwelcome sexual conduct in all employment contexts. Thus, employers must address and prohibit unwelcome sexual conduct perpetrated by a (1) co-worker, (2) customer, (3) vendor or (4) supervisory employee.

#### ***“Unwelcome Sexual Conduct”***

It can be difficult to discern when sexual conduct is unwelcome. Because every situation is different there is no easy legal definition of this concept. In general, unwelcome sexual conduct is any physical or verbal conduct of a sexual nature, which the employee did not solicit or incite, a reasonable person would objectively consider undesirable offensive, and the employee actually did consider it undesirable or offensive. Importantly, the law recognizes the difficulty in determining whether the conduct is unwelcome, and therefore, it provides limited protection from liability to employers who act quickly to

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stop any such alleged conduct and investigate. This is why it is so important to take all allegations of sexual harassment seriously and address them immediately.

### ***General Types of Sexual Harassment***

Although Title VII prohibits discrimination on the basis of sex, it does not mention the word “harassment.” Instead, courts have gradually recognized that harassment which alters conditions or terms of employment is a violation of Title VII. Basically, there are two types of sexual harassment:

#### **Quid Pro Quo** – something for something

Quid pro quo harassment is a demand that an employee provide sexual favors or participate in unwelcome sexual conduct to gain an employment benefit or to avoid an adverse employment action.

#### **Hostile Work Environment**

A hostile work environment is created when sexual harassment is severe or pervasive enough to alter the conditions of the victim’s employment and create an abusive working environment. These claims are intensely fact-based. Thus, when a court evaluates whether the alleged unwelcome sexual conduct created a hostile work environment it will examine the following factors:

- whether the conduct was verbal or physical
- how frequently it occurred
- whether the conduct was hostile or patently offensive
- whether the alleged harasser was a co-worker or a supervisor
- whether others joined in perpetrating the harassment and
- whether the harassment was directed at more than one individual.

## Preventing & Handling Sexual Harassment...

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Importantly, whether and how an employer may be liable for sexual harassment also depends on the following:

- A. who perpetrated the sexual harassment;
- B. whether the victim suffered a tangible employment action (discharge, refusal to promote, etc.);
- C. whether the employer had a policy and grievance procedure; and
- D. whether the employer investigated and promptly remediated the harassment.

All of these distinctions carry legal significance. If the perpetrator of the sexual harassment is not a supervisor, but is instead, a co-worker or non-employee, the employer has an affirmative defense to any lawsuit brought by the victim if it can show it has an effective policy against harassment, grievance procedure and that it promptly investigated the claims and remediated the harassment.

This affirmative defense is also available to employers if the harassment was perpetrated by a supervisor, but didn't involve a tangible employment action. A tangible employment action is hiring, firing, promotion, transfer of location, transfer of job duties, etc. Given the availability of this defense in these circumstances, employers should have a written policy and grievance procedure, train employees about the policy and procedure, and implement a system to promptly investigate and remediate any allegations of sexual harassment.