

**AMERICAN STAFFING ASSOCIATION & NEW YORK STAFFING ASSOCIATION
SEXUAL HARASSMENT PREVENTION TRAINING**

New York State and New York City

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**“THE RESPECTFUL WORKPLACE”
INFORMATION PRESENTED**

DISCLAIMER: The information contained in this presentation does not represent legal advice, which should come from a legal adviser with knowledge of specific facts and circumstances.

INTRODUCTION: The American Staffing Association (ASA) is a national trade association for staffing firms, and a critical part of its mission is to provide education about the employment laws that apply to staffing firms and temporary workers.

Prevention of harassment in all its forms is a top priority of the staffing industry, and ASA staffing firm members are committed to promoting both a lawful and mutually beneficial relationship with workers placed on temporary assignments with clients. In that regard, you should know that staffing firms have a legal obligation to comply with all applicable employment laws. You should also know that—just like other types of employees—temporary employees are protected by employment laws, including those pertaining to harassment. In many cases, if not most, temporary workers simultaneously will have two employers—their staffing firm and the client to which they are assigned to work—as each employer will have the right to control, or will exercise control, over certain aspects of their relationship with the temporary worker. Thus, both will likely be deemed joint employers under the law. This means that neither the staffing firm nor the client can engage in unlawful harassment. Each must comply with relevant federal, state, and local laws. Therefore, temporary workers are protected from unlawful harassment committed by the staffing firm’s employees as well as the client’s supervisors and other employees.

ASA and your staffing firm take harassment seriously. Not only can such conduct be unlawful, but it can adversely affect self-esteem, morale, and productivity. Therefore, to the extent you believe you have experienced unlawful harassment while on assignment, you should report such conduct to your staffing firm immediately. We also encourage you to have a candid conversation with your staffing firm about the prevention of harassment and your rights under the law.

We thank you for your participation in this very important program, in which you will learn more about the subject of harassment, including what constitutes unlawful harassment and your rights as an employee.

SECTION 1: WORKPLACE HARASSMENT OVERVIEW

- Every person is entitled to work in an environment of respect that is free of harassment and discrimination.
- In order to better understand sexual harassment, it is important to first address workplace harassment generally.
- Workplace harassment is a form of unlawful discrimination prohibited under various federal, state, and local laws where the harassment is due to an individual’s status as a member of a protected class and affects the individual’s employment.
- Federal, state, and local law prohibit harassment and discrimination in employment on the basis of several protected classes, including but not limited to
 - Race; color; religion; creed; age; national origin; sex; gender (including gender identity and expression); sexual orientation; pregnancy; disability; alienage or citizenship status; veteran or military status; familial status; marital or partnership status; caregiver status; unemployment status; predisposing genetic characteristics; arrest or conviction records; and status as a victim of domestic violence, stalking, or sex offenses.
- This training will focus on harassment based on sex and gender, but harassment based on any other protected class is equally unlawful.
- Federal, state, and local laws that prohibit workplace harassment:
 - Title VII of the Civil Rights Act of 1964 (“Title VII”) is a federal law that prohibits harassment based on an employee’s race, color, religion, sex, and national origin.
 - The New York State Human Rights Law (“NYSHRL”) and the New York City Human Rights Law (“NYCHRL”) generally provide broader protections to employees in comparison to federal law, and include protections for a number of additional classes and characteristics, many of which are identified above.

- Employers cannot consider protected classes in connection with an employee’s
 - Hiring
 - Placements
 - Assignments
 - Duties
 - Transfer
 - Promotion or demotion
 - Training opportunities
 - Access to employer resources
 - Compensation, benefits, or leave
 - Termination or layoff
- Staffing firms may not discriminate against any temporary employee or applicant in making placements and may not invite or honor discriminatory job orders or client requests.

Your Thoughts: It would be unlawful for a staffing firm to place only female employees as greeters at a restaurant in order to satisfy the client’s specific request for attractive females. True or False?

- Answer: True. Staffing firms may not discriminate against any temporary employee or applicant in making placements and may not invite or honor discriminatory job orders or client requests. A staffing firm’s clients also may not discriminate in their selection of candidates.

What Is Sexual Harassment?

- Sexual harassment is a form of gender discrimination and is unlawful under federal, state, and local law. It is a common form of workplace harassment.
- Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity, and the status of being transgender.
- Sexual harassment includes unwelcome conduct, either of a sexual nature or which is directed at an individual because of that individual’s sex or gender, when
 - Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment
 - Such conduct is made either explicitly or implicitly a term or condition of employment
 - Submission to or rejection of such conduct is used as the basis for employment decisions

Your Thoughts: Sexual harassment is a form of gender discrimination. True or False?

- Answer: True.

SECTION 2: TYPES OF SEXUAL HARASSMENT

- There are two main types of sexual harassment: (1) “quid pro quo”; and (2) “hostile work environment.”
- These two categories stem from case law interpreting harassment claims and are not from statutory language. They are helpful in understanding what behavior constitutes unlawful harassment and there is often overlap between the categories.

Quid Pro Quo (“This in Exchange for That”)

- The first type of sexual harassment—quid pro quo—occurs when an individual’s employment or opportunity for advancement is made contingent upon submission to, or participation in, sexual conduct.
- Quid pro quo sexual harassment includes adverse actions (for example, a demotion or reduction in salary) or denial of employment opportunities (for example, more desirable assignments are given to others) if sexual favors are refused.
- Examples:
 - “If you have sex with me, I will give you a promotion.”
 - “If you don’t date me, you will be demoted or lose your job.”
 - “If you have sex with me, I will get you a good assignment.”

Your Thoughts: If an employee agrees to the quid pro quo offer, it is not considered harassment. True or False?

- Answer: False. An employee’s seemingly voluntary participation in sexual acts does not necessarily mean a situation of harassment does not exist. Although not obvious to co-workers, employees may at times act out of fear of retaliation by a manager who makes sexual advances.

Hostile Work Environment

- The second type of sexual harassment—hostile work environment—occurs when behavior or actions connected to sex or gender (such as unwelcome advances, jokes, or offensive language) have an adverse impact on working conditions.
- The behavior or actions do not have to occur at the workplace to constitute hostile work environment sexual harassment but must merely affect the workplace.
- Hostile work environment harassment is more frequently alleged than quid pro quo harassment and is more subjective. Proving hostile work environment harassment does not require tangible job consequences or financial injury.
- Under federal law, hostile work environment claimants must show that the conduct rose to a “severe or pervasive” level, thereby altering the conditions of the claimant’s employment.
 - Courts have interpreted this standard to mean that the conduct must be severe or frequent to rise to the level of hostile work environment harassment.
 - The more severe the conduct is, the less frequent it must be.
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 - For example, if a supervisor rests his or her hands on an employee’s shoulders on one occasion, that alone may not be severe enough to constitute a hostile work environment.
 - However, if a supervisor makes comments about wanting to massage an employee’s shoulders once a week for several weeks, that may be frequent enough to constitute hostile work environment.
- Until recently, New York State law followed the “severe or pervasive” standard for hostile work environment sexual harassment claims. However, pursuant to 2019 legislation, New York State has rejected the “severe or pervasive” standard and will instead follow the more liberal New York City standard.
- Under the New York City Human Rights Law, employees need to show they have been treated “less well” than other employees because of their sex or gender to prove hostile work environment sexual harassment—an easier burden to meet in comparison to the “severe or pervasive” test.

Hostile Work Environment: Behaviors Possibly Considered Harassment

- Behaviors and actions associated with a hostile work environment generally fall into 3 categories: (1) visual, (2) verbal, and (3) physical. Of course, harassing behavior could also be a combination of all or any of the three.
- Harassing behavior can be visual. For example:
 - Sexual displays in the workplace, such as pictures, calendars, or objects
 - Staring, ogling, or leering
 - Making inappropriate gestures
 - Harassing communications through social media, email, text and instant messaging
- Harassing behavior can be verbal. For example:
 - Spoken sexual advances or requests for sexual favors
 - Whistling; making catcalls, kissing sounds, or other sexually oriented noises
 - Telling vulgar or off-color jokes
 - Making comments about appearance, sexuality, or sexual experience
 - Bullying, yelling, and name-calling
- Harassing behavior can be physical. For example:
 - Feeling or touching a person without that person’s consent (which can also constitute sexual assault)
 - Unwanted kissing, hugging, touching, pinching, poking, or rubbing against a person
 - Exposing oneself
 - Standing by a person so closely that the person feels uncomfortable
 - Blocking or impairing a person’s movement in any way
 - Interfering with, destroying, or damaging a person’s workstation or otherwise interfering with the individual’s ability to perform their job, or sabotaging an individual’s work
- These are just a few examples. There are other behaviors and actions that may be considered harassment.

Your Thoughts: Sexual harassment can only occur at the workplace or during working hours. True or False?

- Answer: False. Sexual harassment can occur outside of the workplace and/or during nonworking hours, if the harassment impacts or has consequences within the workplace.

- Below is a list of **danger zones**. Be aware of the increased potential for harassment in these settings.
 - Business trips
 - Holiday parties
 - Social events
 - Telephone and text messages
 - Email, instant messaging, social media, and online chatrooms
 - Personal conversations and relationships

Scenario: Bill is the general manager of ABC Staffing Firm and Becky's supervisor. About once per week, Bill offers to promote Becky to a manager position if she agrees to go on a date with him. Each time Becky refuses and tells Bill that she has a boyfriend. Bill decides to promote Becky to manager anyway. While in her new manager position, Bill frequently threatens to demote Becky if she does not go out with him. Although Becky is scared for her job, she continues to refuse Bill's requests and tries to avoid Bill at work. Bill has not taken action on his threat. He does not demote her.

- Question: Is this quid pro quo harassment, hostile work environment harassment, or neither?
 - Answer: Hostile work environment harassment. Although this situation has the appearance of quid pro quo harassment given Bill's offers and threats in exchange for dates from Becky, Bill's threats were not fulfilled. This is hostile work environment harassment because Bill's acts are connected to Becky's gender and have adversely impacted Becky's work environment.

Fact Pattern: Jack is a recruiter and Diane is a temporary employee with XYZ Staffing Firm. Jack and Diane are friends as well. During nonwork hours, Diane frequently messages Jack on Facebook and sends him sexually explicit photos and memes she receives from other friends. Diane finds them funny, but they make Jack feel uncomfortable. Jack asks Diane to stop, but she does not. Jack has difficulty working with Diane because of it.

- Question: Is this quid pro quo harassment, hostile work environment harassment, or neither?
 - Answer: Hostile work environment harassment. Diane's off-duty conduct has created an uncomfortable work environment for Jack.

SECTION 3: HARASSMENT SITUATIONS

- Who can be the victim of sexual harassment?
 - The law protects all employees—including part-time, full-time, and temporary employees, and interns—as well as certain independent contractors against workplace sexual harassment.
 - Sexual harassment can occur between any individuals, regardless of their sex or gender.
 - Keep in mind that a victim of sexual harassment need not be an intended target.
 - For example, an employee who constantly overhears sexually charged jokes or stories between co-workers may be the victim of sexual harassment even though he or she was not the intended target.
- Who can be the harasser or perpetrator?
 - Almost anyone can be the harasser—including a co-worker, a supervisor or manager, and any third party (such as a vendor or client).
 - Accordingly, it is possible for temporary employees on assignment to be harassed by employees of the client.
 - If a temporary employee on assignment at a client experiences harassing behavior, the temporary employee should immediately notify his or her staffing firm employer.

Fact or Fiction?

- Sexual harassment can occur between any individuals, regardless of their sex or gender.
 - Fact.
- A victim of sexual harassment may not be the intended target.
 - Fact.

- A temporary employee could be the victim of harassing behaviors from someone at the client company.
 - Fact.

Harassment Against Other Protected Classes

- As discussed at the beginning of this training, courts also recognize workplace harassment claims based on other protected classes—such as an individual’s race, age, national origin, disability, and religion.
- For example, quid pro quo harassment can occur if an employer makes an employee’s employment contingent upon renouncing his or her religious beliefs.
- Examples of hostile work environment harassment based on protected classes other than sex or gender include
 - Making racial slurs
 - Teasing workers about their age
 - Mocking an employee’s religious observances
 - Making derogatory remarks about an employee’s accent
 - Harassing an employee based upon a disability

Your Thoughts: Sexual harassment is worse than harassment based on race.

- Answer: False. Harassment against other protected classes is also unlawful.

SECTION 4: A MANAGER’S ROLE IN ADDRESSING HARASSMENT AND PREVENTING RETALIATION

- Supervisors and managers are held to a higher standard of behavior. They are
 - Required to report all harassment or discrimination reported to them or which they observe
 - Expected to model appropriate behavior
- A supervisor’s actions can create automatic liability for the employer.
- Supervisors and managers must promptly report any harassment, discrimination, or retaliation that they witness or become aware of through their employer’s internal complaint procedure.
- Supervisors and managers will be subject to discipline for failing to report suspected harassment or discrimination and for engaging in any form of retaliation.
- Supervisors and managers may be held personally responsible for unlawful harassment under New York State and New York City law.

Scenario: XYZ Staffing Firm’s written antiharassment policy states that temporary employees should report complaints of harassment to their supervisor at the staffing firm or another member of management, and supervisors must report harassment to the human resource director. While out socially, Jennifer, a temporary employee of XYZ Staffing Firm on assignment at a client, tells Lisa, her staffing firm supervisor, that one of the client’s workers has been making sexual gestures toward her. However, Jennifer requests that Lisa not say anything. She wants to keep it “off the record” and “not cause trouble.”

- Question: Must Lisa report Jennifer’s complaint to XYZ Staffing Firm’s human resource director—yes or no?
 - Answer: Yes. As a supervisor, Lisa has a duty to take action and report the harassing conduct of which she is now aware, even though Jennifer asked her not to.
- Question: Is XYZ Staffing Firm required to take action if it becomes aware of sexual harassment by a client’s supervisor against one of the staffing firm’s temporary employees—yes or no?
 - Answer: Yes. XYZ Staffing Firm has a duty to ensure its temporary employees are free of unlawful harassment in the workplace.
- Question: Must the client also take action against the supervisor—yes or no?
 - Answer: Yes. The client is responsible for ensuring third parties at its premises are not subject to sexual harassment.

Retaliation

- Unlawful retaliation occurs when an employer takes an adverse employment action against an employee for engaging in a **protected activity**. Retaliation is prohibited under Title VII, the New York State Human Rights Law, and the New York City Human Rights Law, among other laws.
- Protected activities include
 - Reporting in good faith an instance of harassment or suspected harassment.
 - Participating in an investigation.
 - Testifying in connection with a complaint.
 - Opposing or rejecting harassment or discrimination.
- Adverse employment actions can include
 - Termination
 - Demotion
 - Failure to promote
 - Reassignment to a less desirable position or assignment
 - Relocation to a less desirable workplace
 - A negative performance review or disciplinary actions
 - Denial of opportunities
 - Change in work schedule
 - Reduction in work hours
- If warranted and not triggered in anyway by protected activity, a negative employment action is not retaliatory merely because it occurs after the employee engages in a protected activity.

Scenario: Jim, a temporary employee of XYZ Staffing Firm on assignment at a client, rejects the sexual advances of Jackie, a supervisor with the client. Jim reported the situation to his staffing firm and the staffing firm addressed it with the client's HR director. Through the investigation process, Jackie learns of the accusation. Feeling embarrassed, Jackie requests that XYZ Staffing Firm remove Jim from the assignment and replace him with another employee.

- Question: Is Jackie retaliating against Jim—yes or no?
 - Answer: Yes. This is a clear case of retaliation. Jim was released for reporting the instance of harassment in good faith. This is unlawful. Unlawful retaliation occurs when an employer takes an adverse employment action against an employee for engaging in a protected activity. Reporting harassment is a protected activity.

Scenario: On Oct. 3, Devon, one of six temporary employees assigned to a project at Client EGC, complained to his staffing firm supervisor that Client EGC's general manager had been treating him differently than the female employees on the assignment. On Oct. 4, the project unexpectedly ended due to a loss of funding. As a result, Devon and five other temporary employees' assignments were ended.

- Question: Was Devon retaliated against—yes or no?
 - Answer: No. This is not a case of retaliation. In this situation, adverse action was not taken against Devon due to engaging in protected activity. Rather, the assignment ended due to lack of funding. If warranted and not triggered in any way by protected activity, a negative employment action is not retaliatory merely because it occurs after the employee engages in a protected activity.

SECTION 5: TAKING ACTION AGAINST HARASSMENT

- Employees should immediately report any instance of harassment or discrimination to their staffing firm employer by following the internal complaint procedures as set forth in their employer's written antiharassment policy.
- Employers have provided or will provide their employees with a written form, which can be used to make complaints. The complaint form should be submitted to the contact listed in the employer's policy, but employees can also make verbal complaints.
- Internal Complaint of Harassment:
 - When a good faith complaint of harassment is made, the employer should promptly begin a thorough and impartial investigation.

— The investigation will be kept on a “need to know” basis, but complete confidentiality cannot be promised. Any employee may be required to cooperate in an investigation as needed.

- Below you will find a general investigation protocol. However, the investigation process will vary from case to case given the specific circumstances of each situation. For example, if the conduct occurs at the client site, the staffing firm may coordinate the investigation with its client.
 - (1) The complainant may be asked to complete a written complaint form (if one has not already been completed).
 - (2) The employer will conduct a prompt review of the allegations and take any appropriate interim actions.
 - (3) The employer will take steps to obtain and review relevant documents, communications, and records.
 - (4) The employer will interview key parties and witnesses.
 - (5) The employer will create a written document or report of the investigation.
 - (6) The complainant and the accused will be promptly notified of the outcome of the investigation and corrective actions, if any, will be implemented.
- Anyone who engages in harassment, discrimination, or retaliation will be subject to remedial and/or disciplinary action.

Your Thoughts: If a temporary employee is harassed while on assignment at a client, the staffing firm is responsible for conducting an investigation of the alleged harassment. True or False?

- **Answer:** True. The staffing firm (i.e., the direct employer of the temporary employee) is obligated to conduct an investigation. The client may also conduct an investigation.

External Reporting

- Employees may also choose to pursue legal remedies with governmental entities, such as
 - The U.S. Equal Employment Opportunity Commission (EEOC)
 - The New York State Division of Human Rights (NYSDHR)
 - The New York City Commission on Human Rights (NYCCHR)
 - EEOC:
 - An individual can file a complaint with the EEOC at the federal level.
 - A complaint must generally be filed with the EEOC before an individual can bring a court proceeding asserting federal claims.
 - For more information, visit eeoc.gov.
 - NYSDHR:
 - A complaint alleging a violation of the New York State Human Rights Law may be filed either with the New York State Division of Human Rights or in New York State Supreme Court.
 - For more information, visit dhr.ny.gov.
 - NYCCHR:
 - A complaint alleging a violation of the New York City Human Rights Law may be filed with New York City Commission on Human Rights or in court.
 - For more information, visit www1.nyc.gov/site/cchr/enforcement/complaint-process.page.

Bystanders

- Bystanders are individuals who witness harassing, discriminatory, or retaliatory conduct but are not the direct victim of such conduct.
- Bystanders play an important role in helping to ensure that any unlawful or inappropriate conduct is addressed by the employer and can help victims feel supported.
- In addition to following the employer’s internal complaint procedures for reporting unlawful or inappropriate conduct, there are other ways bystanders can help a victim.
- For example:
 - Bystanders can confront the harasser and let the harasser know that the conduct is inappropriate and must stop.

- Bystanders can engage in distracting, disruptive, or interrupting behavior to divert the attention of the harasser or otherwise help stop the inappropriate conduct.
- Bystanders should be firm, clear, and concise when confronting a harasser, and may follow up with victims to see if the harassing behavior or conduct has stopped.
- It is important to note that managers or supervisors who are bystanders *must* take action.
 - As previously discussed, managers or supervisors who witness harassing or other unlawful conduct have a duty to take action and report it.
- While any employee witnessing harassing or other unlawful conduct is encouraged to take action and report it, managers and supervisors who witness such behavior must do so.

Your Thoughts: Bystanders are required to take action to stop harassment.

- Answer: False. While not all bystanders are required to take action under the law, they are encouraged to do so. Supervisors and managers who are bystanders *are* required to take action.

Scenario:

- While at work, Bob noticed that Jeff was teasing Dan on the basis of Dan’s sexual orientation. Bob overheard Jeff say, “Dan, even though you’re gay, you need to act more like a man.” Bob was personally offended by Jeff’s comments, confronted Jeff, and told him his comments were inappropriate and must stop.
- Barbara, who manages the three men, saw Bob confront Jeff. Barbara thought that Bob was overreacting and stopped taking Bob to client meetings because she did not like how he confronted Jeff.
 - Question 1: Jeff said to Dan, “Dan, even though you’re gay, you need to act more like a man.” Is this harassment by Jeff against his co-worker Dan—yes or no?
 - Answer: Yes. Jeff teased Dan because of his sexual orientation. Jeff also engaged in gender stereotyping by telling Dan that he needs to “act more like a man.”
 - Question 2: Bob was personally offended by Jeff’s comments, confronted Jeff, and told him his comments were inappropriate and must stop. Was there harassment by Jeff against Bob—yes or no?
 - Answer: Yes. Even though Bob was not the intended target, Bob overheard Jeff’s comments regarding Dan’s sexual orientation and gender expression, which were offensive to Bob.
 - Question 3: Did the supervisor, Barbara, retaliate against Bob—yes or no?
 - Answer: Yes. Bob engaged in a protected activity by confronting Jeff and opposing his harassing comments, and Barbara retaliated against Bob by no longer taking Bob to client meetings because Bob confronted Jeff.
 - Question 4: Can Barbara (supervisor) be held personally liable for her conduct—yes or no?
 - Answer: Yes. Since Barbara is a manager, she can be held personally liable under New York State and New York City law.

SECTION 6: SUMMARY

- You have the right to a harassment-free workplace.
- You should read and become familiar with your employer’s antiharassment and antidiscrimination policies and ask questions if there are points you do not understand.
- If you are subjected to or become aware of harassing, discriminatory, or retaliatory conduct, report it promptly to the appropriate contact or contacts listed in your employer’s policy, and follow the complaint procedures.
- If you have not received a satisfactory response to your complaint, follow the complaint procedures and report it to another contact or manager at your employer.
- You are encouraged to use the written form provided by your employer for reporting complaints, but verbal complaints may also be made.
- If you have any questions about your employer’s policy or this training, bring them to the attention of your employer. This is an important topic, and questions are encouraged.
- By following the guidelines covered in this training and by ensuring open communication between management and employees, we can help create and maintain harassment-free and respectful workplaces.

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