

What is sexual harassment in the workplace?



An overview of sexual harassment in the workplace and the legal duty of employers to protect their employees.

Sexual harassment within the workplace is in the main governed by labour law. In terms of the Labour Relations Act, 1995 (Act No. 66 of 1995) (LRA), a Code of Good Practice (COGP) was issued to specifically deal with sexual harassment. This COGP was issued under Notice 1367 of 1998.

The importance of sexual harassment for employers was emphasized in recent labour court rulings, specifically the legal duty of employers to protect their employees in this regard and the legal consequences should they fail to do so. Employers that fail to comply with the necessary legislation risk getting caught up in unnecessary legal action and disputes.

What is sexual harassment?

The COGP defines sexual harassment as ***'unwanted conduct of a sexual nature'***. According to the COGP, sexual attention becomes sexual harassment if:

- the behaviour is persistent (although a single incident may be regarded as sexual harassment)
- the recipient has made it clear that the behaviour is considered unacceptable and offensive
- the wrongdoer should have known that the behaviour is/was regarded as unacceptable.

Forms of sexual harassment

Sexual harassment includes physical, verbal or non-verbal conduct.

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Physical conduct

This form of sexual harassment includes all unwanted physical contact. A strip search by or in the presence of someone of the opposite sex may amount to sexual harassment due to the unwanted physical nature of such a search.

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Verbal conduct

Verbal conduct will include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed at them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.

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Non-verbal

Unwelcome gestures, indecent exposure and the unwelcome display of sexually explicit pictures and objects are all forms of non-verbal sexual harassment.

Where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours it will also be seen as sexual harassment. This is called “quid pro quo” harassment.

It is extremely important for employers to be adequately prepared when it comes to dealing with sexual harassment and knowing how to prevent it from happening in the workplace. The person against whom the offence was committed may choose to follow either an informal or formal procedure.

Additional sick leave

The Code of Good Practice suggests that where an employee’s *existing sick leave* has been exhausted, the employer should consider granting additional sick leave in cases of serious sexual harassment where the employee requires trauma counselling.

Other important legislation that deals with sexual harassment is contained in the Protection from Harassment Act, 2011 (Act No. 17 of 2011) (PHA). Whilst the main message in the PHA is similar to that found in the COGP, the PHA will serve to broaden the explanation of what will be unacceptable and what may be seen as sexual harassment.

It is advisable for all businesses to have a formal policy on Sexual Harassment in place. SERR Synergy *assist businesses by providing such a policy amongst other required policies and procedures*. Please feel free to contact our offices for any legal assistance pertaining to this.

About our author: Audrey Cloete obtained her LLB degree from the North-West University Potchefstroom in 2003. She completed her articles with the main focus on Criminal Law and is also an admitted Conveyancer. Audrey joined SERR Synergy in 2015 where she currently works as a Legal Compliance Advisor.

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