

**NEW YORK MUNICIPAL
INSURANCE RECIPROCAL**
Insuring Our Own Future.

A NYMIR Guide to Employment Practices

Second Edition





The New York Municipal Insurance Reciprocal
Insuring Our Own Future

A NYMIR GUIDE TO EMPLOYMENT PRACTICES

This complimentary guide to Employment Practices Liability was written by Lisa Ceraulo, Esq., Claims Counsel, Wright Risk Management Company, Inc.; Jennifer Latner, Esq., and Dessy Legatos, Esq., Claims Counsel, Wright Risk Management Company, Inc.; and Robert Bambino, CPCU, Director of Risk Management, New York Municipal Insurance Reciprocal.

The writers are most appreciative of the reviews submitted by the following persons, primarily with regard to the material concerning employee manuals: Paul Eldridge, County of Putnam; John Galligan, New York Conference of Mayors; Richard Herbek, Village of Croton-on-Hudson; Pam O'Brian, Town of Brighton; and Marilyn Riers, City of Saratoga Springs.

This complimentary guide to Employment Practices was compiled for research and discussion purposes only. The appropriate experts should be consulted when making employment-related decisions.

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Questions concerning this resource should be directed to Robert Bambino, Director of Risk Management, 1.800.696.4705, extension 1403.

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MANAGING EMPLOYMENT PRACTICES

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Introduction

Employment practices liability — claims involving employment-based harassment and discrimination — are a major liability concern for municipalities in New York and around the country. Over the past decade, there has been a growing trend of complaints to the Equal Employment Opportunity Commission (EEOC) by current and former employees. In addition, the number and complexity of lawsuits against municipalities and public officials has increased. Unfortunately, these trends show no sign of abating. Although public attitudes towards this exposure ebb and flow, and the interpretations of the law by courts and agencies change also, we believe that the employment practices liability (EPL) exposure will continue to be a formidable management challenge for municipalities and municipal managers.

This Handbook is designed to raise our subscribers' awareness of the employment practices liability exposure, provide practical, common-sense ways to treat and control the issue and encourage a proactive approach toward human resource management.

Looking Forward

We expect these exposures to continue to increase. A report issued by the Employment Policy Foundation provides interesting statistics regarding the American workforce in the 21st century. The report indicates that the ethnic, racial, age, and gender composition of the workforce will change due to three forces: tight labor markets, changes in labor force participation, and changes in demographics and immigration. The end result — a more diversified workforce, specifically, a smaller percentage of Caucasians and males and a greater percentage of older workers, women and minority workers (particularly Hispanics and Asians). What is the by-product of these changes? A greater percentage of employees falling within one or more legally protected classes — making it easier to initiate lawsuits that usually seek monetary damages.

Cost of EPL Claims

There is a large cost associated with EPL-related complaints and litigation:

- **Indemnification payments:** money expended for claims settlements, judgments, EEOC fines and penalties and other related costs that may not be insurable.
- **Cost of defense:** attorney fees and other costs related to the initial complaint investigation, funds expended for EEOC and Division of Human Rights hearings, cost of attorneys, investigators and experts for the defense of litigation.
- **Indirect costs:** costs related to mandated remedial actions, decreased productivity, and lost staff time.
- **Reputation risk:** the negative effect on a municipality's reputation as a result of EPL-related litigation that is covered in the media.

The Equal Employment Opportunity Commission

The EEOC is the federal agency charged with the enforcement of various federal laws that protect certain classes of employees against illegal acts in the workplace. The laws they enforce include¹:

Title VII of the Civil Rights Act of 1964

Prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

The Age Discrimination in Employment Act (ADEA) of 1967

Prohibits employment discrimination against individuals 40 years of age and older.

The Equal Pay Act (EPA) of 1963

Prohibits discrimination on the basis of gender in compensation for substantially similar work under similar conditions.

Title I and Title V of the Americans with Disabilities Act (ADA) of 1990

Prohibits employment discrimination on the basis of disability in the private sector and state and local governments.

Section 501 and 505 of the Rehabilitation Act of 1973

Prohibits employment discrimination against employees with disabilities by employers who are recipients of federal funds.

¹ See pages 18 - 20 for an outline of who is protected by major employment discrimination laws, what is prohibited, who can be held liable, and damages available.

How Extensive is the Problem?

From 1998 to 2001, the total number of charges filed with the EEOC have increased, along with the amount of monetary benefits awarded to complainants by the EEOC.

Year	# of Complaints	Monetary Awards*
1999	77,444	\$210.5 million
2000	79,896	\$245.7 million
2001	80,840	\$247.8 million
2002	84,442	\$257.7 million

*Monetary benefits do not include amounts received through litigation.

Not surprisingly, the amount of benefits awarded to complainants increased annually during this four-year period.

Changes in the number of complaints by the most common forms of discrimination are as follows:

Discrimination	Increase in Complaints 1999 to 2002
Title VII	16%
Equal Pay Act	17%
Age	31%
Disability	-10%

In 2002, most complaints were for charges of race, sex, age and disability discrimination.

NYMIR Public Officials Liability Claim Experience

At this time, NYMIR has approximately 10 years of EPL related loss experience. The leading causes of loss for our members are:

- Civil Rights Violations
- Illegal Harassment
- Discrimination

What are the Primary Reasons for Public Officials Liability Claims?

A review of POL claims reveals the following deficiencies with employment policies and procedures:

- Inadequate anti-harassment and discrimination policies.
- Inadequate and/or inaccurate documentation of employee evaluations.
- Poor complaint handling and investigative procedures.



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GENERAL GUIDELINES FOR HANDLING A SEXUAL HARASSMENT COMPLAINT

While this section specifically addresses sexual harassment, the same guidelines would apply to a complaint of any form of prohibited discrimination.

What is Sexual Harassment?

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

- Submission to the advances is either explicitly or implicitly a term of employment; or
- Submission or rejection is used as a basis for an employment decision; or
- Conduct has a purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive work environment.¹

Liability Standards

Harassment by Supervisor

If an employee suffered *tangible employment action* (i.e., demotion, loss of benefits, less favorable assignment, etc.), the employer is *strictly liable* to the victimized employee for an actionable hostile environment claim created by a supervisor with immediate (or successively higher) authority over the employee.²

Where no tangible employment action is taken, liability will be imposed against the employer unless it can demonstrate an affirmative defense showing that:

- the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; *and*
- the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid the harm (i.e., file a complaint).

Harassment By Non-Supervisor

- **Co-Worker**

An employer will generally be liable for harassment by a co-employee if the employer provided no reasonable avenue of complaint, or knew of harassment but did nothing about it.

- **Non-Employee**

If harassment is by a non-employee (independent contractors or vendors, for example), liability against the employer may be imposed, depending on the ability to control or remedy the conduct.

Practical Implications of Case Law for Employers

The following measures should be in place or be taken by all employers:

- An effective policy in place prohibiting harassment (consistently followed), and dissemination of the policy;

1. Hostile environment claims are a form of discrimination actionable under Title VII. It is not required that there be economic or tangible discrimination. To be actionable, the conduct complained of must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Meritor Savings Bank v. Vinson*, 477 US (1986).

2. *Faragher v. City of Boca Raton*, 118 S. Ct. 775 (1998); *Burlington Industries v. Ellerth*, 118 S.Ct. 2257 (1998).

- An effective complaint procedure communicated to all employees;
- Training of the workforce and complaint intake personnel. Employees should understand what conduct is prohibited and know the official policy and its application;
- Prompt response to complaints, with a thorough investigation ;
- Prompt remedial action if the evidence substantiates the complaint. Remedial action must be reasonably calculated to end harassment.
- Follow-up to ensure that there are no further complaints and that there is no retaliation.

Conducting an Investigation

What triggers the need for investigation?

The following actions call for an immediate investigation:

- A formal complaint
- An informal complaint (written or unwritten)
- An EEOC/NYS DHR charge
- Reasonable suspicion of harassment

Consider investigating complaints of conduct that might not rise to the level of actionable harassment, but perhaps violates policy or is otherwise unacceptable. This may present an opportunity to control the situation before it escalates.

Investigation must be **prompt** and **thorough** and should be conducted, even if the behavior has ceased by the time the complaint is made.

Consider interim preventative measures while the investigation is conducted (i.e., temporary re-assignment or leave). Such measures, however, should not penalize the complainant. Re-assign or put the complainant on leave only if requested.

Selecting the Investigator

An investigation can be conducted internally by an appropriate person within the municipality, or by a private investigator or an attorney.

Considerations in the selection of an investigator include:

- His/her familiarity with policies and procedures
- Impartiality
- Attorney-Client privilege

If the investigation is conducted internally, the investigator should be trained. The accused should not be involved in conducting the investigation.

If counsel is chosen to perform investigation, there may be a waiver of attorney-client privilege. The attorney who performs investigation may become disqualified from representing the employer if litigation ensues. If the investigation is done internally, counsel can serve as advisor and consultant to investigator.

The Investigation

The following are guidelines for conducting an investigation. They are only guidelines — requirements will vary depending on the circumstances.

Plan the investigation, but be flexible as additional information is obtained. Generally, the complainant, the accused and eyewitnesses will be interviewed. Consider interviewing, as well:

- Other witnesses with relevant information, whether identified by the complaining employee or the accused;
- Authors of relevant documents;
- Supervisor of the complaining employee and/or alleged offender;
- People whom the complaining employee and/ or alleged offender have asked you to interview.
- Limit interviews to only those reasonably determined to have relevant information.

In general, the complainant should be interviewed first. The order of the remaining interviews may vary. Be prepared to re-interview witnesses if necessary after additional information is obtained.

Consider having an assistant to take notes and serve as a witness to all conversations, although only one person should do the questioning.

Conduct the interviews in a setting that protects privacy and confidentiality.

The Investigation File

The investigation file typically includes:

- Copies of all relevant company policies;
- Relevant documents from the personnel file of the complaining employee and from the files of the accused and co-workers or other employees where appropriate;
- Records of prior complaints made by the complaining employee;
- Any prior complaints against the accused;
- A written plan of the investigation;
- A chronology of events.

Update the plan and chronology as necessary during the investigation.

During the investigation, add notes of interviews, signed statements from the complaining employee, the accused, and any witnesses, and the investigator's final report.

Interview Guidelines

Advise the employee that:

- His/her time and cooperation are appreciated.
- The matter under investigation is serious, and the organization has an obligation to investigate the claim.
- The employer has a firm policy prohibiting retaliation against any participant in the investigation, and that any perceived harassment should be reported immediately.

- No conclusions will be drawn until all facts have been obtained and analyzed.
- All employees are expected to cooperate fully in the investigation of any complaint of inappropriate behavior, and that cooperation includes maintaining confidentiality of information provided, and refraining from discussing the complaint or investigation with other employees or outside individuals.
- You cannot promise complete confidentiality, but information will be disclosed only to those with a genuine need to know.
- You cannot accede to a complainant's request that the complaint not be acted upon.
- Ask open ended questions--*who, what, where, when and why*.
- Provide complainant/accused/witness ample opportunity to tell their side of the story.
- Avoid accusatory/confrontational questions.
- Be professional, serious and impartial.
- Avoid opinions, commentary and jokes.
- Stay focused –but be prepared to explore issues or complaints which come to light in the investigation.
- Focus on the conduct of the complainant to the extent necessary to determine if the allegedly offensive conduct was welcomed.

Note that the employee may have a right to have a union representative present.

- Develop questions to corroborate or refute information provided by other witnesses or evidence, without necessarily disclosing the source (e.g., if your position is accurate, then how would you explain...?)
- Avoid telling the witness what other witnesses have said (with the exception of the accused).
- Do not preclude an individual from terminating the interview. Do advise him or her that the organization will make a decision based upon information gathered and his/her unwillingness to cooperate.
- Save the tough questions until the end--if they are asked immediately, it may cause the interviewee to become defensive.
- Ask witness if there is anything else of which you should be aware.

The Complainant

Get the facts: who, what where, when, why and how. For example, ask:

- What happened?
- Who was involved?
- When/where did it occur?
- Who was present?
- Who did or said what? In what order?
- Was this an isolated incident?
- Are there any documents to support your claim (i.e., e-mails, letters, notes or a diary)?
- Are there other employees with the same or similar concerns?
- What is your relationship with the alleged offender?

- Have you ever had any problems with the accused before?
- What was your response to the incident?
- What might the accused say about the allegations?
- Who else may have relevant information?
- Do you have any suggestions on how the problem should be handled?

Thank the employee for raising the complaint. Assure the employee that he or she will be kept advised of the status and result of the investigation.

The Accused

Inform the alleged offender of the investigator's impartiality, the goal of conducting a complete and fair investigation, and that no conclusions will be drawn until the investigation is complete. Allow him or her to explain the facts and identify any witnesses. In addition to the *who, what, where, when and why* questions, it may be helpful to ask additional questions.

For example:

- How did the complainant respond to the alleged conduct?
- Did the complainant engage in similar conduct toward the alleged offender?
- Did the complainant indicate that the conduct was unwelcome?
- How does the offender view the conduct of the complaining employee?
- Has the alleged offender used profanity in conversations with other employees? If so, obtain specifics. Has he or she ever been asked to refrain?
- Has he/she gone out with the complainant socially?
- How did the complainant react to the conduct of the accused?

If the accused denies the allegation, ask why he or she thinks the complainant might lie — this may uncover another motive on the part of the complainant.

Witnesses

- Provide a brief explanation of the nature of the matter you are investigating (i.e., a claim of sexual harassment).
- Inform the interviewee why he or she has been included in the investigation.
- Determine whether he or she has observed the incident(s) in question, and explore whether the witness has experienced similar conduct and, if so, obtain specifics.
- Ask the *who, what, where, when and why* questions.
- Ask for names of other witnesses or if there are any supporting documents.

Concluding the Interview

Conclude all interviews by summarizing the prohibition against retaliation. Instruct the employee to report any further incidents or perceived retaliation immediately, and remind the employee to keep the matter confidential.

Documentation

Notes:

Take detailed notes of interviews. Review and finalize them immediately upon completion of the interview. In scheduling, allow time between interviews to complete notes.

Notes should be limited to facts relayed, and to observations. Note if a witness is evasive and note body language (i.e., avoids eye contact). Do not include opinions or conclusions.

Ensure legibility. The date, time, place and names of those present should be at the top of all notes. The investigator should sign and date the notes.

Statements:

Consider having the complainant, the accused, and key witnesses confirm, by dated signatures, the accuracy of the information provided, and the receipt of instructions given to them. If an employee is reluctant to provide a written statement or sign a statement prepared by the interviewer, documentation of the information obtained and instructions given can be in the form of statements signed by the interviewers.

The employer-generated confirmation memo should include some or all of the following acknowledgements:

- identity of the investigators
- confirmation that the employee is comfortable with the impartiality of the investigators
- confirmation of the issues
- confirmation that the information provided is true and complete
- prohibition against retaliation
- outline of the expectations of the employee (confidentiality, cooperation, prompt reporting of developments or further problems).

Concluding the Investigation

After interviewing the appropriate witnesses and reviewing any pertinent documents, prepare an investigative report/summary with a factual conclusion. While there may not be 100% certainty, be sure the conclusion is reasonable and supported by evidence.

Often, to some degree, arriving at a conclusion will involve a credibility determination. Consider:

- How the interviewee reacted to the allegations
- Body language and tone of voice
- Credibility of his/her version of the events
- Whether the person was forthcoming or evasive
- Corroborating evidence
- Circumstantial evidence
- Motivation
- Prior issues with the employee's behavior

At the close of the investigation, inform the complainant of the result of the investigation and of what, if any, action has been taken. You do not need to provide specific details. Advise the accused of the findings and permit him or her the opportunity to respond.

Corrective Action

Determine the appropriate action. The offending employee can be discharged if a violation of policy definitely occurred and there are not mitigating circumstances. Consider warnings and counseling if no clear violation occurred or if evidence is inconsistent and cannot be reconciled. If the claim cannot be substantiated at all, reiterate the policy and document that the policy was disseminated. An employer is not required to abide by the complainant's request, but should consider it.

The most severe course of action is not necessary. Take into account various factors including the severity of the conduct and the employee's past history.

The corrective action should be reasonably calculated to end the harassment. If the conduct is not severe, counseling or a verbal warning may suffice. However, if the behavior recurs, more severe disciplinary action will be warranted.

Consult counsel with any questions or issues with respect to bringing disciplinary charges against an employee, and be aware of the requirements of Civil Service Law and of the controlling collective bargaining agreements before taking action, such as placing a written reprimand in the employee's file.

*Maintain confidentiality by keeping records of an investigation separate from employee personnel files. Personnel files **may, however,** indicate the conclusion and action taken. Only communicate information obtained during an investigation to those who have a legitimate need to know.*

Always follow up to insure the conduct does not recur, and to ensure that there is no retaliation against the complainant or witnesses.



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KEY PROVISIONS OF MAJOR EMPLOYMENT DISCRIMINATION LAWS

Summary of Major Discrimination Laws

The following is a brief summary of the key provisions of several employment discrimination laws to which municipalities and their Boards, and in some cases, employees and officials, are subject. These are the laws under which NYMIR claims counsel most commonly see employment-related claims.

Title VII of the Civil Rights Act

Who is Protected?

- All Employees

What is Prohibited?

- Employment discrimination on the basis of race, color, religion, sex (including pregnancy) or national origin.
- Prohibition on discrimination includes a prohibition of harassment based upon any of the above-stated protected characteristics. *(For a more detailed discussion of harassment, see Page 10.)*
- Retaliation against an individual for filing a charge of discrimination, participating in an investigation or opposing discriminatory practices.

Some employment actions which may trigger claims under Title VII are:

- Failure to hire
- Termination
- Discipline
- Failure to promote
- Demotion
- Transfer
- Application of benefits policies
- Tenure Decisions
- Harassment

Title VII's prohibition on discrimination also includes a prohibition on harassment based upon any of the protected categories listed under "What is Prohibited?"

Who Can be Held Liable?

- Municipalities
- Municipal Boards
- Individuals (e.g., Board Members, supervisors, etc.) *cannot be held liable for violations of Title VII but this does not mean that plaintiffs may not institute legal action against individuals. Rather, such claims would be subject to dismissal.*

Damages Available

- Back pay
- Compensatory Damages up to \$50,000 for municipalities with up to 100 employees, \$100,000 for those with between 101-200 employees, \$200,000 for municipalities with between 201-500 employees and \$300,000 for municipalities with over 500 employees.
- Punitive Damages (available only in cases in which the employer has engaged in intentional discrimination with malice or reckless indifference to the federally protected rights of an aggrieved individual).
- Front pay
- Injunctive relief for intentional discriminatory employment practices.

New York State Human Rights Law (HRL)

Who is Protected?

- All Employees

What is Prohibited?

- Employment discrimination based upon age, race, creed, color, national origin, sex, disability¹, sexual orientation, genetic predisposition or carrier status or marital status.
- The HRL's prohibition on discrimination also includes a prohibition on harassment based upon any of the protected characteristics set forth above.

Who Can Be Held Liable?

- Municipalities and Municipal Boards
- Individuals who aid and abet the discriminatory practices or actions
- Individuals with the power to hire and fire

Damages Available

- Compensatory damages
- Back pay
- Front pay

42 U.S.C. Section 1983 (Civil Rights Act of 1871)

Who is Protected?

- All employees

What is Prohibited?

- Conduct which violates a right secured by the Constitution of the United States, and which was committed by a person acting under color of state law.

- Section 1983 has been interpreted by Courts as prohibiting harassment based upon a person's status in an identifiable, suspect class (*e.g., race, gender, religion, marital status or sexual orientation*). (*For a more detailed discussion of harassment, see Page 10.*)

Who Can be Held Liable?

- Municipalities but only if the plaintiff can show that the conduct complained of was part of a custom or policy of the municipality or was carried out by an official with policy-making authority;
- Employees/Officials acting in their official capacity but only if the plaintiff can show that the conduct complained of was part of a custom or policy of the municipality or was carried out by an official with policy-making authority; or
- Employees acting in their individual capacity. However, public officials will be entitled to what is known as qualified immunity from claims if:
(1) their conduct does not violate a clearly established constitutional right or
(2) it was objectively reasonable for them to believe that their conduct did not violate those rights.

Municipal Board members acting in their official capacities often are immune from claims under Section 1983.

Damages Available

- Compensatory damages
- Punitive Damages
(1) Punitive damages may **not** be assessed against a **municipality** under Section 1983.

(2) Punitive Damages *may* be assessed against **individuals** under Section 1983.

- Equitable relief (e.g., reinstatement)

Common Section 1983 Claims

Claims alleging violation of the First Amendment Guarantee of Free Speech and/or Association:

- Retaliation for union activity
- Retaliation for political activity

Claims alleging violation of the Fourteenth Amendment right to due process

- Termination or discipline without a hearing
- Deprivation of employee's property right

Claims alleging employment discrimination in violation of the Fourteenth Amendment guarantee of equal protection – this requires that an individual show that he or she was treated selectively as compared with similarly situated individuals based upon his or her membership in a suspect class, such as his or her race or gender or based upon an intent to prevent the individual from exercising constitutional rights, or based upon a malicious or bad faith intent to injure.

Age Discrimination in Employment Act

Who is Protected?

- Employees over the age of 40¹

What is Prohibited?

- Employment discrimination based upon age.
- The ADEA's prohibition on discrimination also includes a prohibition on harassment based upon age. (*For a more detailed discussion of harassment, see Page 10.*)

Who Can be Held Liable

- Municipalities and Municipal Boards
- Individuals (e.g. Board Members and supervisors) cannot be held liable for violations of the ADEA but this does not mean that plaintiffs may not institute legal action against individuals. Rather, such claims would be subject to dismissal.

Damages Available

- Back pay
- Front pay
- Attorneys fees
- Liquidated damages for willful violations
- Injunctive relief

Americans With Disabilities Act

Who is Protected?

- Employees who are “qualified individuals with a disability” -- those who have a disability and with or without a reasonable accommodation can perform the essential functions of the position that he or she holds or desires.

An employee is “disabled” under the ADA if he or she has a physical or men-

1. Note that while the ADEA protects only individuals over the age of 40 from age discrimination, the New York State Human Rights Law (*see page 18*), protects all individuals over the age of eighteen from age discrimination.

tal impairment that substantially limits one or more life activities, he or she is regarded as having such an impairment, or he or she has a record of having such an impairment.²

What is Prohibited?

- Discrimination against a qualified individual with a disability.
- Discrimination against a non-disabled individual because of his or her association with an individual with a disability.

What is Required?

The ADA imposes an affirmative obligation upon employers to reasonably accommodate qualified individuals with disabilities, but only to the extent that such an accommodation would allow the individual to perform the essential functions of his or her position, or the position that he or she is applying for.

Employers are not required to provide accommodations which would cause an undue hardship to the employer.

Who Can be Held Liable?

- Municipalities and Municipal Boards
- Individuals (e.g., Board Members and supervisors) cannot be held liable for violations of the ADA but this does not mean that plaintiffs may not institute legal action against individuals. Rather, such claims would be subject to dismissal.

The ADA's prohibition on discrimination also includes a prohibition on harassment based upon disability. *(For a more detailed discussion of harassment, see Page 10.)*

Damages Available

- Back pay
- Compensatory Damages up to \$50,000 for municipalities with up to 100 employees, \$100,000 for those with between 101-200 employees, \$200,000 for municipalities with between 201-500 employees and \$300,000 for municipalities with over 500 employees.
- Punitive Damages are available only in cases in which the employer has engaged in intentional discrimination with malice or reckless indifference to the federally protected rights of an aggrieved individual. Recent case law calls into question whether punitive damages can ever be imposed against public employers for

2. Note that the definition of "disability" under the Human Rights Law is much broader than the definition of the term under the Americans With Disabilities Act (ADA) discussed above. Under the Human Rights Law, a disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological condition which prevents the exercise of normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, a record of such impairment, or a condition regarded by others as such an impairment." However, the HRL provides protection only for those individuals with disabilities which do not, upon the provision of reasonable accommodations, prevent the individual from performing his or her job in a reasonable manner.



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Controlling Wrongful Termination Claims

Controlling Wrongful Termination Claims

Wrongful termination refers to employment actions where an employee claims he or she was improperly removed from his or her position as a result of an unlawful act. The unlawful acts cited typically involve:

- discriminatory termination, or termination that is based on an employee's age, race, sex, national origin, disability, sexual orientation, or other protected characteristic;
- terminations due to an employee's reporting of an illegal activity of the employer;
- the filing of a workers' compensation or disability claim;
- breach of the Civil Service or Public Officer's Law;
- breach of a collective bargaining agreement or personal employment contract.

The Cost of Wrongful Termination Litigation

Employees bringing wrongful termination claims may seek the following types of damages:

- Lost Wages & Benefits
- Emotional Distress and Bodily Injury
- Punitive Damages
- Injunctive Relief, such as reinstatement, or promotion to the position sought after
- Attorneys' Fees

Special Considerations for Public Sector Employers

Most public employees are afforded protection under Civil Service or Public Officer's Law, collective bargaining agreements or employment contracts.

Protection like this creates certain

duties for the employer who wants to discipline or terminate an employee. Procedures must be followed before such a step can be taken, as listed here:

Preventing Wrongful Termination Claims

- Follow Civil Service Law and Public Officer's Law prior to terminating any employee protected by these laws.
- Follow the terms of collective bargaining agreements and employment contracts which govern terminations.
- Document employee misconduct and poor performance in order to create a record of the reasons for termination and to minimize an employee's chances of prevailing on a claim that his or her termination is unlawful.
- Investigate all incidents of misconduct.
- Discipline progressively.
- Involve the municipal counsel as needed.

Questions to Ask Prior to Terminating an Employee

1. Could the termination be viewed as discriminatory in nature? The following federal and state statutes offer protection to certain individuals:

Title VII of the Civil Rights Act of 1964

To review the terms of this Act, go to <http://www.eeoc.gov/policy/vii.html>

Age Discrimination in Employment Act

This Act can be read at <http://www.eeoc.gov/policy/adea.html>

Family and Medical Leave Act of 1993

This act is explained in relationship to Title VII and the Americans with Disabilities Act at <http://www.eeoc.gov/policy/docs/fmlaada.html>

Title One of the Americans with Disabilities Act (ADA) of 1990

The terms of Title I of the ADA can be read at <http://www.eeoc.gov/policy/ada.html>

Civil Rights Act of 1991

Refer to this site for the terms of this act: <http://www.eeoc.gov/policy/cra91.html>

New York State Executive Law, Article 15, (Human Rights Law)

Article 15 is indexed and can be referenced at the following site <http://www.nysdhr.com/hrlaw.html>

2. Were promises made to the employee regarding job security? Promises like this can create an implied contract between the employee and the municipality.

3. Could the termination be construed as retaliatory in nature? A discharge can be perceived as retaliatory in nature if the employee was recently involved in an activity perceived to be problematic for the employer. For example, "whistle blowing;" testifying in favor of another employee against the municipality; applying for excused leave; instituting a sexual harassment or discrimination claim or applying for workers' compensation.

4. Was an impartial investigation completed? It is a mistake to fire and then investigate.

5. Have all grievance and disciplinary procedures been followed?

6. Were all progressive and corrective discipline efforts documented? Did the employee and union receive a copy of documents as required by law or agreement? Were verbal warnings or counseling discussions documented? Do performance appraisals demonstrate poor performance? Is an employee with otherwise good evaluations now being fired for poor performance?

If a termination does take place, remember that it should be conducted in private. Not ensuring this may subject the employee to ridicule and embarrassment.

Wrongful Termination Problem Areas

There are several situations that call for special scrutiny when wrongful termination claims are made:

- Termination of an employee with a disability covered by either the Americans with Disabilities Act or the New York State Human Rights Law;
- Employees over the age of 40;
- Employees who have applied for or taken leave under the Family and Medical Leave Act;
- Employees who have applied for or are receiving workers' compensation or disability benefits;
- Employees approaching full vesting in pension or other retirement plans;
- Employees who have been especially vocal about politics or other matters of public concern;
- Employees engaged in romantic relationships with coworkers or supervisors;
- Employees who are members of a protected class under Title VII or the New York Human Rights Law.



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Strategies for Successful Hiring: Preventing Discriminatory Interviewing

Strategies for Successful Hiring: Preventing Discriminatory Interviewing

Proper interviewing is a critical part of the hiring process. The interview is usually the first face-to-face meeting between an applicant and an employer. The interview process gives both parties an opportunity to gather information about the other and ask questions that will help them with their decision to either offer or accept a position. However, if not managed properly, an interview can increase the likelihood of employment-related complaints or litigation against the employer.

NYMIR's past Public Officials Liability (POL) claims experience includes cases where applicants, denied positions for bona fide reasons, have sued subscribers claiming that they were denied a position because of a personal characteristic – such as race, gender, religion, marital status, age, disability, arrest record, political affiliation, veterans status, national origin or sexual orientation – and not for legitimate reasons. These cases typically claim that elements of the hiring process (such as interview questions, or requests for information on the application) that demonstrate the municipality's discriminatory intents.

Litigation claiming refusal to hire based on protected status is typically filed in federal or state court, claiming monetary damages (such as emotional distress, back or front pay and lost benefits) or injunctive relief, typically an appointment to a position or promotion. In some cases, punitive damages are sought as well.

Experienced HR administrators and line managers usually ask questions that are fair and job-related and merely help to determine if the applicant has the skills, talents, intelligence, capabili-

ties and experience to perform the job in a professional and competent manner. However, in some cases (perhaps in an attempt to learn more about the applicant) interviewers pose questions that are discriminatory in nature. Interviewers may also employ questions that could be problematic since they indirectly steer the interview into a discussion about the applicant's race, gender, religion, marital status, age, disability, arrest record, political affiliation, veterans status, national origin or sexual orientation. Looking at this from a different perspective, any question with discriminatory implications is an inappropriate question, which may leave the applicant with the perception that they weren't hired because of discrimination, whether or not, that is the case. In these cases, there is the likelihood of a complaint to the Equal Employment Opportunity Commission (EEOC), or the NYS Division of Human Rights (NYS-DHR) or alleging failure to hire because of the applicant's race, gender, religion, age, marital status or other characteristics. Avoiding these types of questions and being mindful to small talk during the interview is the smart way to go.

Risk Management Controls

Federal and state law requires employers to conduct interviews in a fashion that is fair and nondiscriminatory. As a general rule, interview questions and inquiries on employment applications should be:

- Job Related
- Consistent
- Objective and Verifiable

The chart below illustrates acceptable and non-acceptable questions by category. All inquires must be job-related, and employed consistently to avoid being viewed as biased.¹

Refusal to Hire Based on Protected Status

Category	Questions to Avoid	What You May Ask
Age	What is your age? How old are you? What is your date of birth?	Do you meet the minimum age requirement for working in New York State? Are you 18 years of age or older? Yes or No.
Affiliations and Clubs	What organizations or groups are you a member of?	Are there professional or trade organizations that you belong to that you consider relevant to this position?
Credit History	Do you have a credit record? Have you ever been bankrupt?	No questions.
Criminal Convictions	Have you ever been arrested? If so, what was the charge?	Have you ever been convicted of a crime? ²
Citizenship	Where were you born?	Are you legally authorized to work in the US?
Disabilities	Do you have any health problems? Do you have a disability? Do you take prescription drugs?	Will you be able to perform in a safe manner the essential functions of this job? Can you demonstrate how you would perform the following job-related functions?
Family Size	Do you have children? What are your family plans? Are you pregnant?	No questions.
Marital Status	Are you married? Have you ever been divorced?	No questions.
National Origin	You have an unusual name. Where are you from? What country were you born in? What is your ethnic background?	No questions.
Religion	Where do you worship? What religion are you?	No questions.
Schedules	Questions concerning work availability regarding weekends are allowed if they are relevant to the position.	This is your likely work schedule. Can you work these hours? Is there any reason why you could not travel? (If job related)
Sex/Gender		No questions.
Worker's Compensation	Have you ever filed a workers' compensation claim? If so, what was the nature of the claim?	No questions.

Please see the list of permissible interview questions on the next page. These can be used as a guide for formulating questions that will help evaluate applicants in a fair and non-discriminatory manner.

-
1. We recommend having your employment application and interview questions reviewed by your municipal attorney to see if they pass muster.
 2. Convictions must be evaluated in terms of the nature, severity and date of the offense, and how it relates to the position.
-

Permissible Interview Questions

Prior Employment

- What did you like/dislike most about your previous jobs?
- Reasons for termination of previous employment.
- Who were your supervisors at your previous jobs?
- How did they rate your work performance?
- Explain the gaps in your employment.

Scheduling

- When are you available for work?
- What hours are you available for work?
- Are you available on weekends? (If applicable)
- Can you travel?

Job Skills

- What skills do you have in terms of the job requirements? (Follow up with a thorough explanation of the job.)
- Can you demonstrate how, with or without reasonable accommodation, you would perform job-related functions? (This question must be asked of all applicants in the same job category, regardless of disability.)

Prior Work Issues

- Did you have a problem following the rules of any of the companies you worked for?
- In your opinion, were these rules fair?
- Did you get along with the people you worked for?

Wages

- Do you feel the compensation for this position is fair?
- Did you think your compensation from previous positions was fair?

Miscellaneous

- Why do you want to work here?
- Why do you want this position?
- What are your career interests?

Employment Applications

Questions on employment applications can also create problems if they contain inappropriate questions. We recommend reviewing your municipality's employment application to determine if there are inappropriate questions or requests for any of the following information or material:

- Graduation date from high school or college.
- Request for a photograph with the employment application.
- Questions about physical characteristics (hair/eye/skin color), height and weight.
- A job offer may be conditioned on the results of a medical examination, provided that the examination is required for all entering employees in the same job category regardless of disability, and that information obtained is handled according to confidentiality requirements specified in the Americans with Disabilities Act (ADA). After an employee starts work, all medical examinations and inquiries must be job related and necessary for the conduct of the employer's business.

A carefully prepared application can help reduce the likelihood of employment-related claims by including language that may afford a defense in the event of litigation.

- Verification Statements – that are signed by the applicant and attest to the truthfulness and accuracy of the information provided on the application. This statement should also indicate that the applicant can be fired (subject to the restrictions of the Civil Service Law and collective bargaining agreements, if applicable) if the information is false or misleading.
- Authorizations for Reference Checks – that allow the municipality to perform a background check on the applicant.
- Equal Opportunity Employer – language that the organization is an equal opportunity employer is also needed. For example: *The municipality is committed to a policy of equal employment in all areas of hiring, recruitment and all personnel practices*
- Not a Contract of Employment – language that the applicant understands that the application is just that and not a contract of employment.



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EMPLOYEE HANDBOOK BASICS

Why Employee Handbooks are Important

An employee handbook is a reference manual; a guide that administrators and employees can use as a means of communicating the policies, procedures and legal practices that govern the workplace. It's not a substitute for the federal, state, or local laws governing the workplace.

A handbook is a valuable communications tool that effectively serves as a rule-book for the employee-employer relationship. Although there isn't a standard handbook that is suitable for every municipality, good handbooks contain the employment policies, procedures and practices that govern the workplace environment, as well as policy statements that are required to demonstrate compliance with various laws. Handbooks may also contain employee benefits, discipline policies and wage programs for employees not covered by a collective bargaining agreement. At a minimum, employee handbooks demonstrate a municipality's employment philosophy; they can also be interpreted as a contract with employees. As expected, they are critical if an employment-related lawsuit is brought against the municipality. Therefore, handbooks are a way to formally document the employee-employer relationship.

In addition to the above, handbooks help administrators improve the workplace in the following ways:

- Clearly drafted policies and procedures help administrators and supervisors alleviate inconsistency in the workplace, in effect maintaining fairness when implementing and enforcing policies. They emphasize the municipality's commitment to treating all employees fairly, without regard to race, sex, national origin, religion, disability, sexual orientation or political affiliation.
- Well-written handbooks help sustain productivity in the office, explain expectations and help develop and maintain the municipality's public image in the community. It can also project a positive image of what the work environment is like.
- An employee handbook is a good way of orienting new employees. For existing employees, a handbook serves as a resource guide when there are questions or if work-related information is needed.
- Through updates, new policies and procedures can be formally communicated to staff.
- A well-written handbook will answer most routine questions, saving time and improving consistency.

When should a municipality create a handbook? Although there is no single rule, if a municipality has from 10-12 employees it is a good idea to develop a handbook. Subscribers with less than 10 employees can probably handle human resource policy through memos and meetings.

Common Problems

All publication containing municipal policies and procedures, including employee handbooks, can establish liability. Historically, loosely written and impractical personnel policies have become grounds for litigation, used against employers. However, this should not dissuade municipal officials from adopting handbooks. When planned and drafted carefully – with input from municipal counsel and human resource administrators or consultants – the benefits outweigh the risks.

Common Problems Found in Employee Handbooks

Poorly Written. A poorly written handbook with spelling and grammatical errors will reduce its effectiveness and reduce overall credibility. The same is true if it is written in “legalese,” which can discourage employees from using the material. As much as possible, common, everyday language is preferable.

Not Distributed. Not providing all employees with the handbook defeats the main purpose of having the book – communicating the municipalities’ workplace practices and policies. Likewise, updates should be widely distributed as well.

Out of Date. Handbooks must be up-to-date and current. If regular review and editing does not occur, actual workplace policies may be in practice but not in the handbook, creating inconsistencies.

Not Compliant. Employee handbooks must comply with all applicable Federal and local laws. Failure to check for legal compliance may jeopardize the benefits of the handbook and create liability.

Inconsistent. The content of the handbook must be consistent with the actual practices of your office and applicable laws.

Topics Typically Covered In Employee Handbooks

No two employee handbooks are the same; a well-written handbook will not only address applicable federal and state laws, but local workplace issues as well. Since each municipality conducts its daily activities differently, the employee handbook should be tailored to the specific philosophies of the municipality.

Generally, an employee handbook should contain the following:

Message from the Chief Municipal Officer

Welcoming new employees, explaining the purpose of the handbook, its contents and applicability within the workplace.

Information about the Employer

Information about the municipality; its history, mission and service goals.

Following these messages, there should be several sections containing information about workplace topics and issues, as outlined below.

Preamble/ Legal Disclaimer

Language explaining the effect of the handbook. For example, statements concerning the municipality’s right to modify or change its policies; the handbook doesn’t create contractual rights between the municipality and employees; these policies are guidelines and do not promise specific treatment.

Federal and State/Local Discrimination and Harassment Laws

Generally, policies addressing statutory workplace issues, such as equal employment opportunities, non-harassment, Americans with Disabilities Act, and the Family Medical Leave Act, if applicable.

Outline of Civil Service Policies and Procedures

Specific policies or references to the New York Civil Service Law, such as appointments, classification and salaries, probation, examinations, reinstatement, staff reductions, transfers, disciplinary procedures, resignation, permanent and non-permanent appointments, probationary terms and veterans and exempt volunteer firefighters' rights.

Your Pay

Municipal policies concerning salary, such as paydays, direct deposit, change of address, deductions and salary records.

Your Benefits

Information about benefits provided by the employer, for example: eligibility, insurance options, NYS Retirement System (Medicare, Social Security), unemployment insurance, military leave and workers' compensation benefits, if covered.

On-the-Job

Municipal policies that address employee behavior and workplace rules. For example, policies that deal with violence in the workplace, appearance and conduct, internal complaint procedures, code of ethics, use of employer and personal motor vehicles and equip-

ment, e-mail and Internet use, internal investigations, reference checks, smoking policies, accidents and emergencies, outside employment, political activity and safeguarding confidential information.

Health & Safety

Rules for employees concerning workplace safety. For example: reporting unsafe conditions, using personal protective equipment, maintaining required licenses and certifications, building security, complying with municipal safety policies, participating in training programs and cooperating with safety representatives. This section also contains the required policies addressing the Right-to-Know Act, Blood Borne Pathogens, Lock-Out-Tag-Out, etc.

Attendance & Leave

Municipal policies addressing time off, such as attendance records, work schedules, absences, tardiness, overtime, vacations, holidays, sick time, paid leave, and jury duty.

Non-Represented Employees

Contains the policies and procedures for employees not covered by a collective bargaining agreement.

Sample Checklist for Creating or Reviewing an Employee Handbook

Getting Started

- Allocate internal resources
- Set a budget
- Identify new and existing needs
- Identify topics
- Gather existing handbook for review
- Gather current benefits information and employee policies

Finalizing the Content

- Reorganize handbook if needed
- Write final copy
- Make sure insurance/benefit information is correct
- Make sure all mandated information is included
- Refer to administration for formal approval

Developing the Handbook

- Select new topics for inclusion in new/revised handbook
- Select existing topics that need revision
- Determine if outside experts are needed
- Prepare first draft

Handbook Distribution

- Are copies given to all employees?
- Do new employees get the handbook on the first day?
- Are receipts obtained confirming distribution?
- If feasible, is there an electronic or web-based version?
- Are updates distributed?

Reviewing the Handbook

- Assemble a review committee
- Identify new laws
- Get input from outside experts
- Have Counsel review changes
- Set a completion date for all corrections and additions
- Send handbook out for final review

Training

- Is the handbook used during orientation and employee HR training?
- Is the handbook used during supervisors' training?
- Is the handbook used for remedial training?



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Sample Human Resources Forms & Policies

Sample HR Policies and Forms

On the next pages are policies and forms you may use to review against your own existing policies and forms, or use to draft policies you may not yet have in place. Simply fill in your municipality information in the blank spaces.

The policies and forms are also available on the CD in MS Word format. Click the “MS Word” link below each item below to open the file.

1. Handbook Legal Disclaimer
2. Receipt of Employee Handbook
3. Discipline Procedures for Non-Represented Employees
4. Outline of Topics for a Workplace Health & Safety Manual
5. Family Medical Leave Act Policy (Required by law to be included in an employee manual if the employer has one.)
 - ▶ Application for Family or Medical Leave
 - ▶ Medical Certification Statement
 - ▶ Notice of Intention to Return from Leave
6. COBRA Continuation Rights
7. Sexual Harassment Policy
 - ▶ Complaint of Alleged Discrimination
8. Harassment and Discrimination Policy
 - ▶ Complaint of Alleged Discrimination
9. Municipal Policy for Use of Computers, Internet and E-Mail
 - ▶ Municipal Computer, Internet and E-Mail Use Agreement

Sample Handbook Legal Disclaimer

The ___(Municipality's)___ handbook is intended to serve as a general guide, both for new employees during orientation, and for all employees as a reference. The Employee Handbook should not be regarded as a contract with the ___(Municipality)___ and, except where governed by law or collective bargaining agreement, the ___(Municipality)___ reserves the right to change the policies described in the Handbook.

Employment policies and practices for employees governed by a collective bargaining agreement may, in some cases, be different from the policies in the Handbook. Therefore, those employees should refer to their respective union contracts for further information.

Receipt of the Employee Handbook Form

I have received a copy of the ___(Municipality's)___ Employee Handbook. I understand that I am responsible for reading it and retaining it for my reference. I agree to abide by the policies and procedures as described in the Handbook. I understand that the policies, procedures and benefits described in the Handbook may be changed, modified or deleted at any time. I understand that this Handbook or any other communications by a management representative are not intended to create a contract of employment. I understand that if I have questions regarding the content of interpretation of this handbook, I must bring them to the attention of the (Human Resources Director/Manager/Administrator, etc.)

Name: _____

Employee Signature: _____

Date: ___/___/_____

Sample Discipline Procedures for Non-Represented Employees

The (Municipality) expects its employees to conduct themselves in a manner that is conducive to a healthy, safe and productive working environment, and in a manner which promotes a positive image of the municipality with its customers and community. Inappropriate conduct that threatens these expectations will not be tolerated by the (Municipality) and may result in discipline, including discharge.

Discipline for inappropriate behavior may include one or more of the following actions:

1. Verbal warning
2. Written warning
3. Demotion
4. Suspension without pay
5. Loss of accrued paid leave (Not applicable to persons covered under Section 75 of the Civil Service Law)
6. Dismissal

The type of discipline that will be imposed depends on various factors, including the nature and severity of the employee's conduct, the employee's prior work record, the employee's civil service rights, if applicable, and other relevant facts and circumstances. Each case will be judged on its own merits, and the municipality reserves the right to respond in any manner it considers appropriate. Nothing herein requires the (Municipality) to utilize any of the above-listed actions prior to taking any other disciplinary action. If an employee is disciplined, but not terminated, the reasons for the discipline will be discussed with the employee so that the employee has an opportunity to correct the problem.

Outline of Topics for a Workplace Health & Safety Manual

Statement of Policy

Contains an explanation of the municipality's philosophy and goals concerning workplace health & safety, usually written by the chief municipal officer.

Introduction to the Manual

Explains the purpose and contents of the manual.

Fundamental Principles and Goals

Essentially, the main goals and objectives of the health and safety program. For example:

Administration's intent to initiate programs to prevent injuries and illnesses, monitor and revise programs once they are established, creating a safe and healthful work environment, advise employees and others of health and safety standards, communicate information, maintain required records, provide adequate training and comply with all required safety practices, standards, laws and regulations.

Assignment of Responsibilities

The roles and responsibilities of the chief municipal official, the municipal board, human resource officer, safety coordinator and other municipal managers to manage the health and safety program.

Record Keeping

Maintaining required record keeping and documentation of training, maintenance and self-inspections.

Employee Involvement

Essentially, conducting mandated employee training, communicating health and safety related information, and including health and safety topics in new employee orientation. Also included in this section are rules regarding the use of personal protective equipment and disciplinary procedures for violation of health & safety rules.

Health and Safety Rules

Health and safety rules are designed specifically for the types of operations conducted by the municipality. For example:

- General Principles
- Use of Tools and Equipment
- Office Safety
- Motor Vehicles and Mobile Equipment

Specific Hazard Safety Programs

Hazard programs are the protocol for each major operation or activity conducted by the municipality. The extent of the program depends on the size of the municipality and the extent of their operations. Examples of hazard programs initiated by municipalities include:

- Fleet (Motor Vehicle)
- Emergency Management
- Office/Facilities
- Hazardous Materials Communication
- Energy Source Lockout
- Confined Space Entry/Respirator Program
- Forklift Safety Program
- Bloodborne Pathogens

Safety Program Elements

This section usually includes information concerning the accident investigation committee, use of material safety data sheets, workplace violence prevention, injury management and insurance and workers' compensation information.

Checklists, Forms and Other Material

Checklists and other material used with the health and safety manual.

Family and Medical Leave Act Policy

Scope

This policy is applicable to all requests for family and medical leaves of absence under the Family and Medical Leave Act of 1993 (FMLA).

Eligibility

To be eligible for FMLA leave and benefits, an employee must have worked for the Municipality for at least 12 months and at least 1,250 hours during the 12 month period preceding the commencement of the leave.

Leave Entitlement

Eligible employees may take up to 12 weeks of unpaid, job-protected leave during a rolling 12 month period measured forward from the date the employee's first FMLA leave begins for one or more of the following reasons: (i) the birth of a child; (ii) the placement of a child for adoption or foster care; (iii) the care of an immediate family member (spouse, child or parent) with a serious health condition; or (iv) a serious health condition that makes the employee unable to work.

For purposes of this policy, "serious health condition" is an illness, injury, impairment or physical or mental condition that involves:

- a. any period of incapacity or treatment in connection with or consequent to in-patient care (i.e. an overnight stay in a hospital, hospice or residential medical care facility);
- b. any period of incapacity requiring absence from work, school or other regular daily activities of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - (1) treatment two or more times by a health care provider; or
 - (2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the healthcare provider.
- c. any period of incapacity or treatment for such incapacity due to a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic incapacity.
- d. any period of incapacity due to pregnancy or prenatal care.
- e. any period of permanent long term incapacity due to a condition for which treatment may not be effective, and requiring the continuing supervision of a health care provider.

Relation of Policy to Collective Bargaining Agreements

To the extent a collective bargaining agreement provides greater family and medical leave rights to an employee than the rights established under this Policy, the rights granted to the employee in the collective bargaining agreement will govern the family and medical leave of the employee. If an employee is entitled to family and medical leave under this Policy and under a collective bargaining agreement, the employee's family and medical leave will be deemed to have been taken concurrently under both this Policy and the collective bargaining agreement.

Advance Notice

An employee requesting a leave pursuant to the FMLA must submit the attached leave request to his or her immediate supervisor at least 30 days before the date the leave is expected to begin. The Municipality recognizes that unexpected emergencies can arise where it is not possible to provide 30 days' notice of the intended leave. In such situations, employees are expected to provide as much advance notice as is practicable. If no advance notice is possible, notice is required as early as practicable. If an employee fails to give 30 days' notice for foreseeable leaves with no reasonable excuse for delay, the Municipality may delay the taking of the FMLA leave until 30 days after the date the employee provides notice to the Municipality of the need for the leave.

Medical Certification

In cases where an employee is requesting a medical leave because of the employee's own serious health condition or that of a spouse, child or parent, the Municipality will require the employee to submit the attached medical certification, verifying the need for the leave. The Municipality, at its own expense, may require the employee to receive a second opinion from a health care provider designated and approved by the Municipality. If this opinion conflicts with the first opinion, the Municipality, again at its own expense, may request a third opinion from a health care provider mutually agreed upon by both the Municipality and the employee. The third opinion will be binding on both parties. If an employee fails to provide the completed medical form within fifteen (15) days, the employee's leave may not be granted until thirty (30) days after the employee has provided the proper medical certification.

A. Employee's Own Medical Condition:

For the employee's own medical leave, the certification must include the following information from the employee's attending physician:

- a. the date on which the serious health condition began;
- b. the probable duration of the serious health condition;
- c. the diagnosis and treatment of the serious health condition; and
- d. a statement that the employee is unable to perform the essential functions of his or her position.

B. Medical Leave to Care for Family Member:

If the leave is being requested to care for a spouse, child, or parent with a serious health condition, the written certification must include the following information from the family member's attending physician:

- a. the date on which the serious health condition began;
- b. the probable duration of the serious health condition;
- c. the appropriate medical facts regarding the condition; and
- d. a statement that the employee is needed to care for the spouse, child, or parent, with an estimate of the amount of time that the care will require.

Medical Recertification

Employees who are on a leave because of their own serious health condition or to take care of a spouse, child or parent with a serious health condition may be required to submit to the Municipality the attached medical recertification of the need to remain on the leave when the Municipality, in its discretion, deems recertification is warranted. All recertifications are at the expense of the employee.

Substitution of Paid Leave

An employee taking leave pursuant to FMLA will be required to first use any paid vacation, personal, and/or sick leave (as appropriate for the particular leave) accrued prior to the commencement of the leave. Such paid leave time shall count toward the maximum of 12 workweeks of leave permitted by this policy. The remainder of the leave, if any will be unpaid. The employee will be notified in writing of any leave days that will be counted towards the maximum twelve weeks of FMLA leave.

Any unpaid leave available under a collective bargaining agreement or other Municipality policy must also be used and will be counted towards an employee's FMLA entitlement.

Intermittent and Reduced Schedule Leave

FMLA leave time may be taken intermittently (or on a reduced schedule basis) whenever the leave is medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work. Intermittent leave cannot be granted for the birth or placement of a child. If the need for intermittent leave is foreseeable, based on planned medical treatment, the employee is responsible for scheduling the treatment in a manner that does not unduly disrupt the Municipality's operations, subject only to the approval of the health care provider.

When an employee requests intermittent leave or reduced schedule leave, the Municipality reserves the right to transfer the employee temporarily to an alternative position which better accommodates recurring periods of absence. The position to which the employee is transferred will be equivalent in pay and benefits to the one that the employee held prior to the transfer.

Return to Work Certification

All employees taking medical leave to care for their own serious health condition will be required to submit the attached fitness-for-duty certification signed by their health care provider before returning to work, stating that the employee is able to resume his or her position.

Status of Benefits While on Leave

While an employee is on medical or family leave pursuant to this policy, he/she will continue to be covered under the Municipality's insurance plans in effect at the time and so chosen by the employee, so long as the employee continues to pay whatever employee portion of the premium costs is required under Municipality policy and/or the applicable provisions of any applicable collective bargaining agreements. If paid leave is used for any portion of the family or medical leave, employee premiums will be deducted from the leave payments in accordance with the practice applicable to an employee not on leave. Therefore, those employees using vacation or other paid days toward their FMLA entitlement will maintain the benefit coverage in place for those employees using such days for a non-FMLA purpose.

At the time an employee begins unpaid family or medical leave, he/she shall receive written instructions detailing the time and manner in which the employee premiums are to be paid. Failure to pay these premiums by the end of the grace period stated in the written instructions shall result in the loss of insurance coverage so chosen by the employee.

An employee who fails to return to work for at least 30 calendar days following the expiration of the unpaid family or medical leave shall be required to reimburse the Municipality for the portion of the health care premiums paid by the Municipality during the unpaid leave unless the employee can establish that the failure to return was due to the continuation, recurrence or onset of a serious health condition which meets the criteria for leave under this policy or was due to other circumstances beyond the employee's control.

Restoration of Position and Benefits

The employee on family or medical leave is not entitled to the accrual of any seniority or employment benefits during any period of leave except as expressly stated herein or as otherwise provided by an applicable collective bargaining agreement or by law. At the conclusion of an employee's medical or family leave, the employee will be returned to the position that the employee held prior to taking the leave. If that position is not available, the employee will be placed in a position that is equivalent in pay, conditions and other terms of employment to the employee's prior position. When the employee returns to active work following the family or medical leave, any benefits that have lapsed during the leave shall be reinstated as if the employee had remained actively employed during the leave, except that the employee shall not accrue any additional benefits or seniority during the time of the leave. The number of calendar days taken as unpaid leave will be added to the

employment anniversary date for purposes of calculating seniority and other employment policies of the Municipality.

Key Employees

Under certain circumstances, the Municipality may deny job restoration to key employees. A key employee is a salaried employee eligible to take leave under this Policy who is among the highest paid ten percent of all the employees – both salaried and nonsalaried, eligible and ineligible under this Policy – who are employed by the Municipality. The Municipality may refuse to reinstate key employees after using FMLA leave if it determines that substantial and grievous economic injury would result from reinstatement. If this determination is made, the employee will be notified in writing and given an opportunity to end the leave and return to work. If the employee remains on leave, he or she will not have a right to be restored to employment.

Reservation of Rights

The Municipality will comply with all legal requirements for providing family and medical leave to eligible employees. To the extent the law permits employer discretion, the Municipality hereby expressly reserved the right to modify, change or eliminate any provision of this policy with respect to any employee or group of employees and does not intend to create a contractual commitment to any employee by issuing this policy.

Nothing in this policy shall be deemed to limit an employee's or the Municipality's rights or obligations with respect to leave for disability under New York Civil Service Law.

APPLICATION FOR FAMILY OR MEDICAL LEAVE

Name: _____

Department: _____

Current Address: _____

Start Date of Anticipated Leave: _____

Expected Date of Return to Work: _____

Reason for Leave (Explain):

NOTE: A leave request based on an employee's serious health condition or the serious health condition of an employee's spouse, child or parent, must be accompanied by a verifying medical certification from a physician.

I hereby authorized the (Municipality) to contact my physician to verify the reason for my requested leave or for any other information concerning my requested family and medical leave.

I understand that a failure to return to work at the end of my leave period may be treated as a resignation unless an extension has been agreed upon and approved in writing by the (Municipality) .

Signature: _____ Date: _____

APPROVED BY:

Supervisor: _____ Date: _____

Municipality Manager: _____ Date: _____

MEDICAL CERTIFICATION STATEMENT

1. Employee's Name: _____

2. Patient's Name (if other than employee): _____

3. Diagnosis: _____

4. Date condition commenced: _____

5. Probable duration of condition: _____

6. Regimen of treatment to be prescribed (indicate number of visits, general nature and duration of treatment, including referral to other provider of health services. Include schedule of visits or treatment if it is medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal schedule of hours per day or days per week):

a. By Physician or Practitioner: _____

b. By another provider of health services if referred by Physician or Practitioner:

IF THIS CERTIFICATE RELATES TO CARE FOR THE EMPLOYEE'S SERIOUSLY ILL FAMILY MEMBER, SKIP ITEMS 7, 8 AND 9 AND PROCEED TO ITEMS 10 AND 14 ON NEXT PAGE. OTHERWISE CONTINUE.

Check Yes or No in the boxes below, as appropriate.

7. Is inpatient hospitalization of the employee required?
 YES NO

8. Is employee able to perform work of any kind? (If "No", skip item 9)
 YES **NO**
9. Is employee able to perform the functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)
 YES **NO**
10. Signature of Physician or Practitioner: _____
11. Date: _____
12. Type of Practice (Field of Specialization, if any): _____

FOR CERTIFICATION RELATING TO CARE FOR THE EMPLOYEE'S SERIOUSLY ILL FAMILY MEMBER, COMPLETE ITEMS 13 THRU 17 BELOW AS THEY APPLY TO THE FAMILY MEMBER AND PROCEED TO ITEMS 10-12 ABOVE.

13. Is inpatient hospitalization of the family member (patient) required?
 YES **NO**
14. Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation?
 YES **NO**
15. After review of the employee's signed statement (See Item 14), is the employee's presence necessary or would it be beneficial for the care of the patient: (This may include psychological comfort.)
 YES **NO**
16. Estimate the period of time care is needed or the employee's presence would be beneficial:

17. When Family Leave is needed to care for a seriously ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced leave schedule:

Employee Signature: _____ Date: _____

NOTICE OF INTENTION TO RETURN FROM LEAVE

Name: _____

Supervisor: _____

Date Leave Commenced: _____

Date of Planned Return: _____

I understand that my restoration to employment is subject to the following conditions:

1. As a condition of restoration, each employee must provide a written certification from his or her health care provider that the employee is able to resume working.
2. Every attempt will be made to restore an employee returning from leave to his or her original position. If the employee's original position is unavailable, the employee will be placed in an equivalent position with equivalent pay and benefits.
3. Any employee returning from family and medical leave shall not be entitled to the accrual of any seniority or employment benefits during the period of leave.

Employee Signature: _____ Date: _____

I have examined and can certify that _____ is fully able to resume working.
(employee)

Health Care Provider's Signature: _____ Date: _____

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT (COBRA) CONTINUATION RIGHTS

If you are a participant in the (Municipality's) group medical plan, you and your covered qualified beneficiaries (spouse and/or dependent children) have the right to continue participation in this plan in certain circumstances when coverage would otherwise be lost due to a "qualifying event." These rights are established and governed by the Consolidated Omnibus Budget Reconciliation Act of 1986 (commonly referred to as "COBRA").

There are several qualifying events that create COBRA continuation coverage rights for you and your qualified beneficiaries. These include loss of your job (for reasons other than gross misconduct) and a leave of absence or reduction in hours that would otherwise cause you to lose coverage in the (Municipality's) plan. These qualifying events entitle you and any covered beneficiaries to elect continuation coverage that will usually last for eighteen months from the date of the qualifying event. This eighteen month continued coverage period can be extended to twenty-nine months in certain circumstances involving your or a covered dependent's Social Security disability.

Other qualifying events provide continuation coverage for only your covered qualified beneficiaries. These include: your death, your divorce or legal separation, your entitlement to Medicare benefits, and a dependent child losing dependent status. In these circumstances, the qualified beneficiary may elect continued coverage, which will usually last for thirty-six months from the date of the qualifying event. Note that you have the responsibility to notify the Personnel Director in the event of a divorce, legal separation or a child losing dependent status.

When the (Municipality) becomes aware that a qualifying event has occurred, it will send a specific notice of COBRA continuation coverage rights. Upon receipt of that notification, you or your qualified beneficiaries will have 60 days to decide whether to elect continuation coverage. The premiums for continued coverage would generally be 102% of the applicable premium for the insurance (which will increase to 150% for extended coverage due to a Social Security disability).

A more detailed summary of COBRA continuation coverage rights is set forth in your new employee orientation packet. In addition, if you have any questions concerning COBRA continuation coverage, please contact the Personnel Director.

SAMPLE SEXUAL HARASSMENT POLICY

MUNICIPALITY'S POLICY AGAINST SEX DISCRIMINATION AND SEXUAL HARASSMENT

SECTION 1: PURPOSE

- A. Scope of Policy
- B. Policy Objectives

SECTION 2: DEFINITIONS

SECTION 3: POLICY

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 - 2. Making a Complaint
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SECTION 11: EFFECTIVE DATE AND POLICY DISSEMINATION

SECTION 1: PURPOSE

(Municipality) believes in the dignity of the individual and recognizes the rights of all people to equal employment opportunities in the workplace. In this regard, (Municipality) is committed to a policy of protecting and safeguarding the rights and opportunities of all people to seek, obtain and hold employment without subjugation to harassment or discrimination in the workplace. It is (Municipality's) policy to provide an employment environment free from harassment and discrimination based on sex.

A. Scope of Policy

This Policy applies to all _____ employees and all personnel in a contractual or other business relationship with _____ Municipality including, for example, applicants, temporary or leased employees, independent contractors, vendors, consultants, volunteers and visitors. Depending on the extent of _____ Municipality's exercise of control, this Policy may be applied to the conduct of non-employees with respect to unlawful harassment and/or discrimination of _____ employees in the workplace. This Policy applies with equal force on Municipality's property as it does at Municipal -sponsored events, programs, and activities that take place off Municipal premises.

B. Policy Objectives

By adopting and publishing this Policy, it is the intention of the (Municipality's) Board to:

- (1) notify employees about the types of conduct that constitute sexual harassment and discrimination prohibited by this Policy;
- (2) inform employees about the complaint procedures established by the Municipality that enable any employee who believes (s)he is the victim of harassment or discrimination to submit a complaint which will be investigated by the Municipality;
- (3) clearly advise all supervisory staff, administrators, and employees that sexual harassment and discrimination is strictly prohibited and no such person possesses the authority to harass or discriminate; and
- (4) notify all employees that the Municipality has appointed a Compliance Officer who is specifically designated to receive complaints and ensure compliance with this Policy.

NOTE: The names and office location of each Compliance Officer designated to receive and investigate complaints for the (Insert Dates) year are listed below at the end of this Policy

SECTION 2: DEFINITIONS

“Prohibited Discrimination of Employees” Prohibited discrimination of employees can take the form of any negative treatment of an employee, by either a Municipality employee or official, or a third party engaged in activities sponsored by the municipality which: (a) negatively impacts a employee’s employment opportunities and/or employment benefits; *and* (b) is based upon the employee’s sex. Prohibited discrimination of employees can also take the form of harassment even where there is no tangible impact upon the employee’s employment opportunities and/or employment benefits. The phrase “prohibited discrimination” as used in this Policy includes all forms of prohibited sex discrimination, and “Sexual Harassment” as defined below:

“Sexual Harassment”

Sexual harassment is prohibited including, but not limited to inappropriate forms of behavior described by the Equal Employment Opportunity Commission as follows:

- (1) Submission to such conduct is 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 is used as the basis for employment decisions affecting such individual (e.g., promotion, transfer, demotion, termination); or
- (3) Such gender-based conduct has the purpose or effect of unreasonably interfering with an individual’s work performance, or of creating an intimidating, hostile or offensive working environment.

Specific forms of behavior (Municipality) considers sexual harassment are set forth below. Every conceivable example cannot be delineated herein, and thus the descriptions below should not be interpreted in any way as being all-inclusive.

Verbal

Abusive verbal language including jokes, comments, teasing or threats related to an employee’s sex, sexual activity and/or body parts whether or not said in that person’s presence including, but not limited to: sexual innuendos; slurs; suggestive, derogatory, or insulting comments or sounds; whistling; jokes of a sexual nature; sexual propositions; threats; comments on a person’s appearance that make the person feel uncomfortable because of his or her sex; continuing to ask someone for dates or to meet after work after the person has made it clear that he or she does not want to go; sexually oriented comments about an employee’s anatomy that are unwelcome, unreasonably interfere with an employee’s work performance, or create an intimidating, hostile or offensive work environment; and unwelcome sexual advances or demands for sexual favors.

Nonverbal

Abusive written language showing or displaying pornographic or sexually explicit objects or pictures; graphic commentaries; luring or obscene gestures in the workplace; staring at a person’s body in a sexually suggestive manner; sexually-related gestures or motions; sending sexually graphic material through the Municipality e-

mail system or other electronic communication devices (e.g. voice mail) or using the Municipality's mail or computers to view such material.

Physical

Unwelcome physical conduct, including but not limited to: petting, pinching, grabbing, holding, hugging, kissing, tickling, massaging, displaying private body parts, coerced sexual intercourse, assault, persistent brushing up against a person's body, unnecessary touching and flashing or other unwelcome physical conduct.

While a single incident of these types of behavior may not create a hostile learning environment, if such behavior is severe, persistent or pervasive, or if submission to such conduct is made either explicitly or implicitly a term or condition of employment or receipt of employment benefits, such conduct constitutes prohibited sexual harassment.

SECTION 3: POLICY

(Municipality) prohibits harassment and discrimination based sex and will not tolerate any form of unlawful discrimination or harassment. (Municipality) will take all steps necessary to prevent and stop the occurrence of unlawful discrimination and/or harassment in the workplace.

All employees, including but not limited to, (Municipality) officials and supervisory personnel, are responsible for ensuring a work environment free from prohibited harassment and discrimination. All employees will be held responsible and accountable for avoiding or eliminating inappropriate conduct that may give rise to a claim of sexual harassment or sex discrimination. Employees are encouraged to report violations to one of the Compliance Officers listed in Section 10 of this Policy in accordance with the Complaint Procedure set forth in this Policy. Officials and supervisors must take immediate and appropriate corrective action when instances of prohibited harassment and/or discrimination come to their attention to assure compliance with this Policy.

Each employee is assured pursuant to Section 6 of this Policy, that retaliation against an individual who makes a complaint or report under this Policy is absolutely prohibited and constitutes, in and of itself, a violation of this Policy.

Any questions regarding the scope or application of this Policy should be directed to one of the Compliance Officers listed in Section 10 of this Policy.

SECTION 4: POLICY ENFORCEMENT

A. Complaint Procedure for Employees

1. Notification Procedure: Prompt reporting of complaints or concerns is required so that timely and constructive action can be taken before relationships

become strained. Reporting of all perceived incidents of prohibited discrimination and/or harassment is essential, regardless of the offender's identity or position. An employee or other individual who feels aggrieved because of harassment or discrimination shall contact his or her supervisor or a Compliance Officer listed in Section 10 of this Policy, or another administrator.

2. Making a Complaint: If the complainant prefers, s/he may report the matter directly to her/his supervisor. If the complainant feels uncomfortable reporting the harassment to her/his supervisor, s/he should immediately report the matter to any other member of management. (Municipality) will not tolerate violations of this policy and strongly encourages victims of sexual harassment to report such harassment as soon as it occurs.

Complainants are expected to cooperate with the Municipality's investigation procedures by providing all relevant information relating to the complaint, as are other supervisory and non-supervisory employees having relevant or related knowledge or information.

B. Time for Reporting a Complaint

Prompt reporting of all complaints is strongly encouraged. All employees should be aware that appropriate resolution of complaints and effective remedial action oftentimes is possible only when complaints are promptly filed. Furthermore, complaining parties should be aware that statutes of limitations may constrain the time period for instituting legal actions outside of this Policy.

C. Confidentiality and Privacy

In recognition of the personal nature of discrimination and/or harassment complaints and the emotional impact of the alleged acts, the Municipality shall keep complaints as confidential as is consistent with a thorough investigation, applicable collective bargaining agreements, and other laws and regulations regarding employees. For the protection of all individuals who make complaints or are accused of prohibited harassment and/or discrimination, every witness interviewed during an investigation under this Policy will be advised of the confidentiality requirement and instructed not to discuss the complaint, the investigation, or the persons involved. To the extent complaints made under this Policy implicate criminal conduct, the Municipality may be required by law to contact and cooperate with the appropriate law enforcement authorities.

SECTION 5: INVESTIGATION

The Municipality will investigate all allegations of discrimination and harassment prohibited by this Policy as promptly as possible.

SECTION 6: PROHIBITION AGAINST RETALIATION AND ABUSE OF THE POLICY

Retaliation is strictly prohibited by this Policy and by law against anyone who in good faith reports a suspected violation of this Policy, who assists in making such a complaint, or who cooperates in a harassment or discrimination investigation. Retaliation means taking any adverse action in response to a complaint being made.

Complaints of retaliation should be brought directly to a Compliance Officer, or another administrator. Such complaints will be promptly investigated. If retaliation is found, the person retaliating will be subject to corrective action up to and including termination from employment, or in the case of a non-employee, an appropriate remedy up to and including termination of the business relationship.

SECTION 7: APPEALS

Any complainant or accused party who wishes to appeal the procedures which the Municipality followed in investigating a written complaint filed under this Policy, may do so within ten (10) days of receipt of the appellant's notification of the investigation outcome. Untimely submissions shall not receive consideration. Such appeal must be made in writing to the Board of Education by submission to the Clerk. The appellant shall be entitled to present evidence as to why the investigation procedures were flawed, improper, or otherwise not in compliance with this Policy. The Board's consideration and review of any such appeal shall be conducted confidentially in executive session. Following a review of that evidence, as well as the information obtained in the investigation process and conclusions derived there from, the Board of Education, or its designee, shall render a decision. The Board's decision shall be final. The appellant shall be notified of the decision in writing.

Nothing set forth in the Appeal Process above shall be construed to in any way confer upon either the complainant(s) or the person(s) accused of violating this Policy any right to appeal the Municipality's determination as to appropriate disciplinary and/or corrective action to be taken on meritorious complaints. In this regard, the Municipality at all times retains sole discretion to determine the appropriate disciplinary and/or corrective action to be taken with regard to a meritorious complaint.

SECTION 8: RECORD KEEPING

The Municipality shall maintain a written record of all complaints of sex discrimination and/or sexual harassment for a period of at least six years. The Municipality shall also document the steps taken with regard to investigations, as well as conclusions reached and remedial action taken, if any. The Municipality shall also maintain these documents for, at a minimum, six years.

The Municipality records regarding alleged discrimination shall be maintained separate and apart from personnel records.

SECTION 9: QUESTIONS

Any questions by employees of the Municipality about this Policy or potential harassment or discrimination should be brought to the attention of one of the Municipality's Compliance Officers or the chief elected official, HR Manager or municipal manager. The names, addresses, and telephone numbers of the Municipality's Compliance Officers are listed in Section 10 of this Policy.

SECTION 10: COMPLIANCE OFFICERS

Name	Office Location
Telephone Number	Mail Box Location
Name	Office Location
Telephone Number	Mail Box Location
[Add others as needed]	

SECTION 11: EFFECTIVE DATE AND POLICY DISSEMINATION

The effective date of this Policy shall be _____, 200__. The Chief Municipal Office shall ensure that this Policy is adequately disseminated and made available to all employees of the Municipality. This Policy shall be distributed at the beginning of each year with or as part of the (Insert any annual publication(s) to employees that may be appropriate). In addition, copies of this Policy and Complaint Form shall be maintained in the office of each Compliance Officer; the HR Manager, and (Other Parties) as well as the Municipality's Policy Book that is available at the _____.

Upon the effective date of this Policy, the provisions of this Policy shall supersede and replace all prior Municipal policies and regulations regarding employee discrimination and harassment, and related complaint procedures with the exception of the "(Municipality's) Policy Against Sex Discrimination and Sexual Harassment."

COMPLAINT OF ALLEGED SEXUAL DISCRIMINATION

This form is to be filed as a part of the Formal Procedure in order to initiate a complaint of alleged discrimination or harassment prohibited by the (Municipality)'s Policy against Sex Discrimination and Sexual Harassment.

Your Name: _____

Address: _____

City/State/Zip: _____

Home Phone Number: _____

Cell Phone Number: _____

Time(s) and Date(s) incidents of discrimination (and/or harassment) took place:

Have you also filed this charge with a Federal, State, or Local Government agency?

Yes No

Name(s) and office address of the individual who allegedly discriminated against you or harassed you. If more than one, list all.

Name: _____

Office/Location: _____

Describe the incidents which occurred and your reason for concluding that it is/was discriminatory (use extra sheet if necessary).

Describe briefly what you would consider to be appropriate resolution of the conduct described above. (The Municipality at all times retains sole discretion and authority to determine the appropriate disciplinary and/or corrective action to be taken with regard to meritorious complaints. This question should not be construed in any way to constitute a forfeiture of that discretion or authority.)

Identify all persons who witnessed the incidents described above:

I swear or affirm that I have read the above complaint and that it is true to the best of my knowledge, information and belief.

Complainant's Signature

Date

Received by:

Date

HARASSMENT AND DISCRIMINATION POLICY

SECTION 1: PURPOSE

(Municipality) believes in the dignity of the individual and recognizes the rights of all people to equal employment opportunities in the workplace. In this regard, (Municipality) is committed to a policy of protecting and safeguarding the rights and opportunities of all people to seek, obtain and hold employment without subjugation to harassment or discrimination in the workplace. As with discrimination based on sex and sexual harassment, it is (Municipality) policy to provide an employment environment free from discrimination and harassment based on race, color, creed, religion, national origin, disability, political affiliation, age, arrest record, gender orientation and veteran or marital status.

A. Scope of Policy This Policy applies to all (Municipality) employees and all personnel in a contractual or other business relationship with (Municipality) including, for example, applicants, temporary or leased employees, independent contractors, vendors, consultants, volunteers and visitors. Depending on the extent of (Municipality) exercise of control, this Policy may be applied to the conduct of non-employees with respect to unlawful harassment and/or discrimination of (Municipality) employees in the workplace. This Policy applies with equal force on (Municipality) property as it does at (Municipality) sponsored events, programs, and activities that take place off Municipal premises.

B. Policy Objectives By adopting and publishing this Policy, it is the intention of the (Municipality) Board to:

- (1) notify employees about the types of conduct that constitute discrimination or harassment prohibited by this Policy;
- (2) inform employees about the complaint procedures established by the Municipality that enable any employee who believes (s)he is the victim of discrimination or harassment to submit a complaint which will be investigated by the Municipality;
- (3) clearly advise all supervisory staff, administrators, and employees that discriminatory treatment based on race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status of employees is strictly prohibited and no such person possesses the authority to harass or discriminate; and
- (4) notify all employees that the Municipality has appointed a Compliance Officer who is specifically designated to receive complaints of discrimination based on race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status, and ensure compliance with this Policy.

NOTE: The names and office locations of each Compliance Officer designated to receive and investigate complaints are _____.

SECTION 2: DEFINITIONS

“Prohibited Discrimination” Prohibited discrimination of employees can take the form of any negative treatment of an employee, by either a municipal employee or official, or a third party engaged in sponsored activities which: (a) negatively impacts an employee’s employment opportunities and/or employment benefits; *and* (b) is based upon the employee’s race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status. Prohibited discrimination of employees can also take the form of harassment even where there is no tangible impact upon the employee’s employment opportunities and/or employment benefits. The phrase “prohibited discrimination” as used in this Policy includes all forms of “prohibited harassment” (defined below).

“Prohibited Harassment” Harassment can constitute a form of prohibited discrimination under this Policy if it is unwelcome and has the purpose or effect of unreasonably interfering with an individual’s work performance, or creating an intimidating, hostile or offensive working environment. Such harassment of employees is prohibited by this Policy if it is based upon race, color, creed, religion, national origin, disability, age, sexual orientation, arrest record, and veteran or marital status. In this regard, individuals subject to this Policy should be mindful that conduct or behavior that is acceptable, amusing or inoffensive to some individuals may be viewed as unwelcome, abusive or offensive to others.

“Prohibited Behavior” While it is impossible to list all of the possible forms of unlawful harassment, the following is a list of *examples* of conduct that may constitute harassment:

- Using slurs or derogatory terms based on race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status
- Telling derogatory jokes or stories based on race, color, creed, religion, national origin, disability, political affiliation, age, arrest record, and veteran or marital status
- Displaying graffiti or other derogatory or insulting writings based on race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status
- Making degrading comments about a person and/or his or her appearance based on race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status
- Demeaning or criticizing an individual because of his or her race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status
- Sabotaging, damaging, or interfering with an individual’s work because of that individual’s race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status
- Threatening or intimidating an individual because of his or her race, color, creed, religion, national origin, disability, political affiliation, age, sexual orientation, arrest record, and veteran or marital status

As set forth above, this list is not intended to be all-inclusive. Furthermore, while a single incident of these types of behavior may not create a hostile working environment, if such behavior is severe, persistent or pervasive, or if submission to such conduct is made either explicitly or implicitly a term or condition of employment or receipt of employment benefits, such conduct constitutes prohibited discrimination and/or harassment.

SECTION 3: POLICY

As with discrimination based on sex and sexual harassment, (Municipality) prohibits discrimination based on race, color, creed, religion, national origin, disability, age, arrest record, and veteran or marital status and will not tolerate any form of unlawful discrimination or harassment. (Municipality) will take all steps necessary to prevent and stop the occurrence of unlawful discrimination and/or harassment in the workplace.

All employees, including but not limited to, (Municipality) officials and supervisory personnel, are responsible for ensuring a work environment free from prohibited discrimination and harassment. All employees will be held responsible and accountable for avoiding or eliminating inappropriate conduct that may give rise to a claim of sexual harassment or sex discrimination. Employees are encouraged to report violations to one of the Compliance Officers listed in Section 9 of this Policy in accordance with the Complaint Procedure set forth in this Policy. Officials and supervisors must take immediate and appropriate corrective action when instances of prohibited discrimination and/or harassment come to their attention to assure compliance with this Policy.

Each employee is assured pursuant to Section 6 of this Policy, that retaliation against an individual who makes a complaint or report under this Policy is absolutely prohibited and constitutes, in and of itself, a violation of this Policy.

Any questions regarding the scope or application of this Policy should be directed to one of the Compliance Officers listed in Section 9 of this Policy.

SECTION 4: POLICY ENFORCEMENT

A. Complaint Procedure for Employees

1. Notification Procedure Prompt reporting of complaints or concerns is required so that timely and constructive action can be taken before relationships become strained. Reporting of all perceived incidents of prohibited discrimination and/or harassment is essential, regardless of the offender's identity or position. An employee or other individual who feels aggrieved because of harassment or discrimination shall contact his or her supervisor or a Compliance Officer listed in Section 9 of this Policy, or another administrator.

2. Making a Complaint If the complainant prefers, s/he may report the matter directly to her/his supervisor. If the complainant feels uncomfortable reporting the harassment to her/his supervisor, s/he should immediately report the matter to any

other member of management. CHRO will not tolerate violations of this policy and strongly encourages victims of sexual harassment to report such harassment as soon as it occurs.

Complainants are expected to cooperate with the Municipality's investigation procedures by providing all relevant information relating to the complaint, as are other supervisory and non-supervisory employees having relevant or related knowledge or information.

B. Time for Reporting a Complaint

Prompt reporting of all complaints is strongly encouraged. All employees should be aware that appropriate resolution of discrimination complaints and effective remedial action oftentimes is possible only when complaints are promptly filed. Furthermore, complaining parties should be aware that statutes of limitations may constrain the time period for instituting legal actions outside of this Policy.

C. Confidentiality and Privacy

In recognition of the personal nature of discrimination complaints and the emotional impact of alleged discrimination, the Municipality shall keep complaints as confidential as is consistent with a thorough investigation, applicable collective bargaining agreements, and other laws and regulations regarding employees. For the protection of all individuals who make complaints or are accused of prohibited discrimination, every witness interviewed during an investigation under this Policy will be advised of the confidentiality requirement and instructed not to discuss the complaint, the investigation, or the persons involved. To the extent complaints made under this Policy implicate criminal conduct, the Municipality may be required by law to contact and cooperate with the appropriate law enforcement authorities.

SECTION 5: INVESTIGATION

The Municipality will investigate all allegations of discrimination and harassment prohibited by this Policy as promptly as possible.

SECTION 6: PROHIBITION AGAINST RETALIATION AND ABUSE OF THE POLICY

Retaliation is strictly prohibited by this Policy and by law against anyone who in good faith reports a suspected violation of this Policy, who assists in making such a complaint, or who cooperates in a harassment or discrimination investigation. Retaliation means taking any adverse action in response to a complaint being made.

Complaints of retaliation should be brought directly to a Compliance Officer, or another administrator. Such complaints will be promptly investigated. If retaliation is found, the person retaliating will be subject to corrective action up to and including termination from employment, or in the case of a non-employee, an appropriate remedy up to and including termination of the business relationship.

SECTION 7: APPEALS

Any complainant or accused party who wishes to appeal the procedures which the District followed in investigating a written complaint filed under this Policy, may do so within ten (10) days of receipt of the appellant's notification of the investigation outcome. Untimely submissions shall not receive consideration. Such appeal must be made in writing to the Municipality by submission to the Clerk. The appellant shall be entitled to present evidence as to why the investigation procedures were flawed, improper, or otherwise not in compliance with this Policy. The Municipality's consideration and review of any such appeal shall be conducted confidentially in executive session. Following a review of that evidence, as well as the information obtained in the investigation process and conclusions derived there from, the Municipality, or its designee, shall render a decision. The Municipality's decision shall be final. The appellant shall be notified of the decision in writing.

Nothing set forth in the Appeal Process above shall be construed to in any way confer upon either the complainant(s) or the person(s) accused of violating this Policy any right to appeal the Municipality's determination as to appropriate disciplinary and/or corrective action to be taken on meritorious complaints. In this regard, the Municipality at all times retains sole discretion to determine the appropriate disciplinary and/or corrective action to be taken with regard to a meritorious complaint.

SECTION 8: RECORD KEEPING

The Municipality shall maintain a written record of all complaints of illegal discrimination and/or harassment for a period of at least six years. The Municipality shall also document the steps taken with regard to investigations, as well as conclusions reached and remedial action taken, if any. The Municipality shall also maintain these documents for, at a minimum, six years.

The Municipality records regarding alleged discrimination shall be maintained separate and apart from personnel records.

SECTION 9: QUESTIONS

Any questions by employees of the Municipality about this Policy or potential discrimination should be brought to the attention of one of the Municipality's Compliance Officers or the chief elected official, HR Manager or municipal manager. The names, addresses, and telephone numbers of the Municipality's Compliance Officers are listed in Section 9 of this Policy.

SECTION 10: COMPLIANCE OFFICERS

Name	Office Location
------	-----------------

Telephone Number	Mail Box Location
------------------	-------------------

Name	Office Location
------	-----------------

Telephone Number	Mail Box Location
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SECTION 11: EFFECTIVE DATE AND POLICY DISSEMINATION

The effective date of this Policy shall be _____, 200__. The Chief Municipal Office shall ensure that this Policy is adequately disseminated and made available to all employees of the (Municipality). This Policy shall be distributed at the beginning of each year with or as part of the [insert any annual publication(s) to employees that may be appropriate]. In addition, copies of this Policy and Complaint Form shall be maintained in the office of each Compliance Officer; the HR Manager, and [Other Parties] as well as the (Municipality) Policy Book that is available at the _____.

Upon the effective date of this Policy, the provisions of this Policy shall supersede and replace all prior (Municipality) policies and regulations regarding employee discrimination and harassment, and related complaint procedures with the exception of the (Municipality) Policy Against Sex Discrimination and Sexual Harassment.

COMPLAINT OF ALLEGED DISCRIMINATION

This form is to be filed as a part of the Formal Procedure in order to initiate a complaint of alleged discrimination or harassment prohibited by the (Municipality) Policy Against Discrimination and Harassment.

Your Name: _____

Address: _____

City/State/Zip: _____

Home Phone Number: () _____

Cell Phone Number: () _____

Status (Circle one): Instructional Staff Non-Instructional Staff Other

Time(s) and Date(s) incidents of discrimination (and/or harassment) took place:

Have you also filed this charge with a Federal, State, or Local Government agency? Yes _____ No _____

Name(s) and office address of the individual who allegedly discriminated against you or harassed you. If more than one, list all.

Name: _____

Office/Location: _____

Describe the incidents which occurred and your reason for concluding that it is/was discriminatory (use extra sheet if necessary).

Describe briefly what you would consider to be appropriate resolution of the conduct described above. The (Municipality) at all times retains sole discretion and authority to determine the appropriate disciplinary and/or corrective action to be taken with regard to meritorious complaints. This question should not be construed in any way to constitute a forfeiture of that discretion or authority.)

Identify all persons who witnessed the incidents described above:

I swear or affirm that I have read the above complaint and that it is true to the best of my knowledge, information and belief.

Complainant's Signature

Date

Received by

Date

POLICY FOR USE OF COMPUTERS, INTERNET AND E-MAIL

Terms and Conditions for Computer, Internet and E-Mail Use

Each affected employee must carefully read, and agree to abide by, the following (Municipality) approved Acceptable Use Policy for (Municipality) provided e-mail and Internet access before signing. Conformance to this Policy should be considered to be a term and condition of affected employee's employment. Abuse of e-mail and Internet access privileges or other non-conformance to this Policy may be cause for disciplinary action up to and including discharge.

The Internet offers many resources to (Municipality) employees for the efficient exchange of information and the timely completion of assigned responsibilities. The use of Internet facilities and e-mail by any employee, volunteer or contractor must be consistent with this Acceptable Use Policy.

This policy document delineates acceptable use of the Internet and (Municipality) computer hardware and software by employees, volunteers, and contractors while using Government-owned or leased equipment, facilities, Internet e-mail addresses, or domain names registered to the (Municipality).

The following Internet and/or computer users are covered by this policy:

1. Authorized full and part-time employees of the (Municipality).
2. Volunteers who are authorized to use the (Municipality) resources to access the Internet.
3. Contractors who are authorized to use (Municipality) owned or leased equipment or facilities.

Employees, volunteers and contractors who are not authorized to access the Internet as part of their official duties, may not access the Internet using (Municipality) facilities under any circumstances. It is expected that users who are authorized to access the Internet as part of their official duties, will do so to improve their job knowledge; to access scientific, technical, and other information on topics which have relevance to their assignments; and to communicate with their peers in other Government agencies, academia, and industry. Users should be aware that when access is accomplished using Internet addresses and domain names registered to the (Municipality), they might be perceived by others to represent the (Municipality). Users are advised not to use the Internet for any purpose which would reflect negatively on the (Municipality) or its employees.

If an authorized user violates any of these provisions, his or her access privileges may be terminated and future access may be denied and may be cause for disciplinary action up to and including discharge. The signature at the end of this document is binding and indicates the party who signed has read the terms and conditions carefully, understands their significance, and agrees to abide by those terms and conditions.

The (Municipality)'s Data Processing Coordinator, with general guidance from the Director of Finance (or other named officials) shall serve as the System Administrator for this Policy.

Acceptable Use of Internet Access and e-mail for (Municipality's) Authorized Users

The purpose of the Internet is to support research and enhance worker productivity by providing access to resources and communications. The use of your account must be in support of (Municipality)'s business goals and objectives. The use of the Internet may not be used in violation of any local, state, federal, or international laws, regulations, or other government requirements. This includes, but is not limited to: theft or infringement of copyrights, trademarks, trade secrets, or other types of intellectual property; fraud; forgery; theft or misappropriation of funds, credit cards, or personal information; and threats of physical harm; harassment. Non-business communications and access to information for non-business related activities is not authorized.

E-mail messages must be drafted in a professional, business manner and shall use appropriate language. E-mail messages sent to (Municipality) employees in a mass mailing must be approved by the sender's supervisor prior to delivery.

Privileges

The use of the (Municipality)'s computer resources including e-mail and Internet access, is a privilege, not a right, and inappropriate use may result in a cancellation of those privileges and may be cause for disciplinary action up to and including discharge. The (Municipality) Board or the (named official) may request the System Administrator to deny, revoke, or suspend specific user access privileges, when use that violates these policies has been determined.

Inappropriate Use of (Municipality) computer resources

- a) Participating or engaging in activities that violate the law.
- b) Creating, storing, viewing or transmitting information which is fraudulent, harassing, embarrassing, sexually explicit, obscene, or defamatory.
- c) Participating in any activity which constitutes harassment under the (Municipality)'s Harassment Policy or under state or federal law or regulations.
- d) Reading, deleting, copying or modifying e-mail messages sent to others without their permission.

- e) Promoting political or religious positions.
- f) Operating a personal business, or any use for personal gain.
- g) Using or installing any software or peripheral equipment not approved in advance by the System Administrator.
- h) Engaging in any activity which would compromise the security of the (Municipality)'s network and computer resources such as any attempt to harm or destroy data through the upload or creation of computer viruses, hacking, monitoring or using systems without authorization.

Security

Security is a high priority and the following must be adhered to:

- a) Do not use another individual's account.
- b) Do not give your password to any other individual.
- c) Attempts to log into the network as any other user will result in cancellation of user privileges.
- d) Any user identified as a security risk may be denied access to the (Municipality)'s computer resources.

(Municipality) Rights

- a) The (Municipality) retains the right to monitor employees' use of Computer Resources (including computers, the Internet and e-mail) to assure compliance with applicable laws, rules and regulations, as well as the (Municipality)'s Use Policy. This includes, but is not limited to, accessing stored information, reviewing logs of incoming and outgoing information and messages, as well as the content of that information. There can thus be no expectation of privacy with respect to an employee's use of the Internet.
- b) The (Municipality), through the System Administrator, reserves the right to record the location of all Internet sites accessed by users.
- c) The (Municipality), through the System Administrator, reserves the right to block access to or from any Internet resources.
- d) The (Municipality) will not be responsible for any damages. This includes but is not limited to the loss of data resulting from delays, non-deliveries, viruses or service interruptions. Use of any information obtained is at the user's risk. Any computer connected to the (Municipality) network should have anti-virus software installed.

(MUNICIPALITY'S) USE POLICY FOR COMPUTERS, INTERNET AND E-MAIL AGREEMENT

By signing this agreement, I agree to abide by all the above provisions and relieve the (Municipality) of any liability, obligation or responsibility for any loss that may arise from my use of the (Municipality)'s computer facilities including Internet access, e-mail and network use.

Signature

Date

The above signed employee has been given authorization to utilize E-mail Internet access for (Municipality) business-related purposes.

System Administrator

Date



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Links to EPL Resources

Links to EPL References

As of the creation of this document, these links are active and enable you to conduct further research as you review or prepare your Employee Manual or investigate in depth a particular issue or component of your own planning.

ADA – EEOC Web Site

<http://www.eeoc.gov/facts/fs-ada.html>

Employment Policy Foundation

<http://www.epf.org/>

Equal Employment Opportunity Commission (EEOC)

<http://www.eeoc.gov>

- Laws Regulations and Policy Guidance
<http://www.eeoc.gov/policy/index.html>
- Federal Laws Prohibiting Job Discrimination: Questions & Answers
<http://www.eeoc.gov/facts/qanda.html>
- The ADA: Your Responsibilities as an Employer
<http://www.eeoc.gov/facts/ada17.html>

FMLA – US DOL Web Site

<http://www.dol.gov/esa/regs/compliance/whd/1421.htm#1>

NYS Division of Veterans Affairs

Assistance and protection for citizen-soldiers deployed for active duty

<http://www.veterans.state.ny.us/milfam.htm>

NYS Governor’s Office of Employee Relations

Information on the Omnibus Transportation Employee Testing Act of 1991

<http://www.goer.state.ny.us/train/onlinelearning/DFW/103.4.html>

NYS Office of Human Rights

<http://www.nysdhr.com/>

- Human Rights Law
<http://www.nysdhr.com/hrlaw.html>

US Department of Education

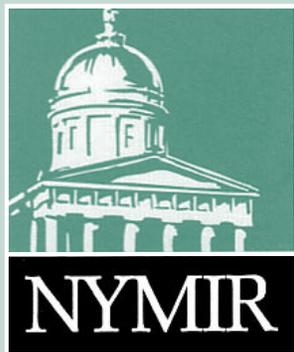
<http://www.ed.gov>

- Office for Civil Rights
<http://www.ed.gov/about/offices/list/ocr/index.html?src=oc>

US Department of Labor

Information on Continuation of Health Coverage — COBRA

<http://www.dol.gov/dol/topic/health-plans/cobra.htm>



**NEW YORK MUNICIPAL
INSURANCE RECIPROCAL**

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The New York Municipal Insurance Reciprocal

24 Aviation Road, Suite 204

Albany, New York 12205

T: 518.437.1171

F: 518.437.1182

www.NYMIR.org