

Maine Association of School Business Officials

Common Employment-Related Mistakes

by

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1. Obligations to Prevent Workplace Harassment

Maine employers have legal obligations to fulfill sexual harassment awareness and training. If an employer already has a policy in place, it should also consider renewing that commitment to a harassment free workplace and ensuring compliance with training requirements.

All Maine employers must have the following:

- a poster that provides, at a minimum, the following information: the illegality of sexual harassment; a description of sexual harassment, utilizing examples; the complaint process available through the commission; and directions on how to contact the commission. The law requires that the text of the poster not exceed 6th-grade literacy standards. The required poster is available on the Maine DOL website.
- an annual notice given to all employees that includes at a minimum the following information: the illegality of sexual harassment; the definition of sexual harassment under state law; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation. The statute requires that the notice be delivered “in a manner to ensure notice to all employees without exception, such as including the notice with an employee's pay.”

Employers with 15 or more employees have additional obligations:

Such employers must conduct an education and training program for all new employees within **one year of commencement** of employment that includes:

- federal laws and federal regulations, including the Maine Human Rights Act and the Civil Rights Act of 1964 ;
- a description of sexual harassment, utilizing examples;
- the internal complaint process available to the employee;
- the legal recourse and complaint process available through the commission;

- directions on how to contact the commission; and the protection against retaliation.

Employers must also conduct additional training for supervisory and managerial employees within one year of commencement of employment that includes at a minimum the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.

A recent amendment to the law provides for the creation of a compliance checklist by the Maine DOL covering these education and training obligations.

The law states that employers must use the checklist to develop a sexual harassment training program, although employers may find this is not a “checklist” in the sense that it provides a listing of specific direction for the training. The checklist is found on the Maine DOL website.

The new law also requires that employers keep a record of the training, including all employees who have received the required training. The training records must be maintained for a period of at least three years.

The law now imposes penalties for violations of the posting, notification, education, and training requirements.

2. Failure to Maintain Appropriate Personnel Files

By state law, personnel file information includes 1) formal and informal evaluations and reports relating to character, credit, work habits, compensation and benefits; and 2) nonprivileged medical records or nurses station notes. Personnel files must be maintained in a confidential manner. Upon written request, the employer must allow an employee or duly authorized representative an opportunity to review and copy personnel file; the review and copying must take place at the location where the personnel files are maintained and during normal office hours unless, at the employer's discretion, a more convenient time and location for the employee are arranged. The cost of copying any other material requested during that calendar year is paid by the person requesting the copy. A newer section of the law states that in each calendar year, the employer has to give employee, at no cost, an entire copy of his or her personnel file when requested AND when requested, one copy of all the material added to the personnel file after the copy of the entire file was provided.

Personnel file records may be maintained in any form including paper, microfiche or electronic form. If they are maintained in a form other than paper, the employer has to have available to the employee equipment necessary to review and copy.

An employer who fails to provide copy of the file within 10 days of receipt of the request without good cause is subject to a civil forfeiture of \$25 for each day that the failure continues to a cap of \$500; may also have to reimburse the employee, former employee or

the Department of Labor for costs of suit including a reasonable attorney's fee if the employee prevails.

State law requires that application forms be kept for at least one year from date of last communication or action. For employees, the employer must maintain the entire file for the period of employment. It is wise to maintain the file for at least six years after termination. If a discrimination claim is filed, keep the entire file until final disposition of the claim.

3. Failing to Follow Disciplinary/Termination Policy

Employers should be sure they are following their own published disciplinary/ termination policy prior to terminating an employee. Issues to consider include whether the employer has kept adequate documentation of the problems leading to the termination; whether the employee has been made aware of the problem(s); whether the employee has had a chance to correct the problem(s), if applicable; and whether the employer is applying its policies consistently to all employees.

4. Violating Employee Rights After Termination

There are many ways to violate an employee's rights even after termination. Some examples include failing to respond to an employee's request for written reasons for termination in a timely manner or failing to respond to a former employee's request for a copy of his or her personnel file in a timely manner. See 26 M.R.S.A. §§630, 631. Employers should also be aware of issues surrounding final paychecks, which includes paying the employee any unpaid wages to which he or she is entitled and not making unlawful deductions from the check. See 26 M.R.S.A. §§626, 629. This also includes understanding the circumstances in which an employee is and is not entitled to unemployment benefits and be able to make an informed decision about whether or not to dispute such a claim and when and if to have counsel present at any appeal hearing.

5. Failing to Properly Apply Laws Addressing Workplace Accommodation

Both federal law, the Americans with Disabilities Act, and state law, the Maine Human Rights Act, require covered employers to provide workplace accommodation for employees with qualifying disabilities.

The laws generally protect individuals with disabilities who are otherwise qualified for the job by prohibiting discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment and applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

A covered employer is required to provide a reasonable accommodation for a physical or mental disability of an otherwise qualified applicant or employee, unless the employer can demonstrate that a reasonable accommodation does not exist or would impose an undue

hardship on the employer's business. Generally, a reasonable accommodation means modifications or adjustments to a job application process or work environment that would allow a qualified individual with a disability to perform the essential functions of the position or enjoy the privileges and benefits of employment. Examples of types of reasonable accommodations include job restructuring, part-time or modified work schedules, reassignment to a vacant position, or use of assistive devices.

An employer is not required to provide the best possible accommodation or even the accommodation that the employee requests. Instead, the employer has the discretion to choose between effective accommodations.

Issues with accommodations: is it a disability; does it require accommodation; how do you accommodate; do you have to take employee at his word regarding the need for a non-obvious reasonable accommodation or can you require more? Specific types of requests: leave, alternate schedules, dress code exemptions, service animals.