

# Top Risks for Today's Nonprofits

**Employment  
Practices Liability  
Coverage**

**IN THE AGE OF "ME TOO"**

**WHITE PAPER**

# Employment Practices Liability Coverage in the Age of “Me Too”

Sexual harassment claims can plunge a thriving nonprofit into notoriety overnight. From Silicon Valley to the Olympics, workplace harassment allegations are in the spotlight. Nonprofits and their board members must take bold steps to discuss these issues and find solutions to uncover and handle these allegations.

Investigating, defending and settling sexual harassment incidents can cost millions of dollars. Taking these cases to trial can be difficult, and any media coverage puts pressure on defendants to settle these claims. No nonprofit wants to find itself defending a sexual harassment claim.

This white paper will review the current state of Employment Practices Liability (EPL) insurance in the nonprofit insurance marketplace. Employment Practices Liability coverage helps to protect employers for their liability in wrongful acts that arise out of employment, defending the organization when claims arise and paying damages when necessary.

The recent “Me Too” movement has drawn national attention to the problem of workplace sexual harassment. While most underwriters report that sexual harassment claims have not risen dramatically, rate pressure will follow if claims escalate as many insurance experts predict.

In this paper, we will explore some of the challenges facing today's nonprofits and highlight some essential areas for sexual harassment training and loss prevention. We will discuss available coverages and liability limits. Whether you are new to writing nonprofit accounts or seasoned, this white paper will alert you to some of the challenges facing nonprofits today.

Collaborating with a reliable insurance provider who has a solid foundation in handling these delicate issues can help ensure you offer clients the most appropriate employment practices, policies and coverage.

## *Sexual Harassment in the Workplace*

Although the term “sexual harassment” was coined in the late 1970s, the Equal Employment Opportunity Commission (EEOC) did not arrive at a legal definition until 1980.<sup>1</sup> Sexual harassment as a legal concern, therefore, has been a risk management issue for a few short decades. Between 1980 and 1986, complainants filed only 16 cases.<sup>2</sup> In 1986, the US Supreme Court included sexual harassment protection under the 1964 Civil Rights Acts and complaints increased. A 2016 EEOC report estimated up to 85 percent of women report facing sexual harassment at some point in their employment. With the advent of the “Me Too” movement, the topic of widespread sexual harassment has become a “must-address” concern for today’s nonprofits. As the Council of Nonprofits pointed out in 2017, a dramatic shift occurred when Time magazine named “The Silence Breakers” who spoke out against sexual harassment as their Person of the Year.<sup>3</sup> Can your clients’ organizations withstand a silence-breaking event?

Managing sexual harassment not only makes sense from a reputational standpoint, the Occupational Safety and Health Administration (OSHA) believes that sexual harassment poses a danger for today’s organizations. While there is no specific federal OSHA regulation governing sexual harassment, the General Duty Clause of the OSHA Act requires that “each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>4</sup>

Of course, a sexual harassment policy can help reduce the risk of a sexual harassment incident and a resultant suit. However, preventing sexual harassment involves much more than simply posting a policy and providing annual training. In fact, managers have found training ineffective in preventing sexual harassment. Creating new norms around sexual harassment, including creating a “psychologically safe” workplace, would allow and even encourage the reporting of sexual harassment.<sup>5</sup> Such a culture would protect the reporter and would help managers confront, discipline, or terminate those in the workplace who threaten psychological safety in the culture.<sup>6</sup>

Insurance specialists like Charity First who provide employment practices coverage, utilize carriers that offer critical pre-claim assistance. A free helpline offers unlimited consultation with human resources professionals. Online resources such as policies and procedures are available, as well.

## ***Bullying Behaviors in the Workplace***

According to the Department of Homeland Security, workplace violence acts mainly occur as verbal or non-verbal threats, bullying, harassment, or non-life threatening physical assault.<sup>7</sup> Bullying can occur in many forms, from shaming employees to physical intimidation, including stares, sneers, invading personal space, or stalking. Verbal abuse, including spreading rumors about employees, is another example of bullying.

Bullies are not just front-line employees. They are often managers and supervisors, those with authority over others who, theoretically, should know better. Setting up subordinates to fail, denying training and setting impossible deadlines—these are examples of supervisory mistreatment.

Whether investigating a coworker or a supervisor, it can be difficult to determine if behavior rises to the level of bullying. However, organizations must tackle bullying head on. They must develop strong policies, including a reporting structure employees can use without fear of reprisal. Further, they must actively monitor workplace behavior to ensure managers do not demean, undermine, or degrade employees. Some EPL policies may exclude acts where management was aware but failed to act, so encouraging your insureds to report incidents can help protect them from uncovered claims.<sup>8</sup>

## ***How to Monitor and Prevent Sexual Harassment in Nonprofits***

Many nonprofits work with a disadvantaged and challenged population. Here are some ways sexual harassment can occur in any nonprofit setting.

## Staff member to client

Good judgment is essential in staff members, and one interview with a candidate may not determine his or her ability to think critically. The ability to think critically can be taught, and organizations should be sure to include training in this vital area of employee performance. Today's group homes employ a heavy population of college students and other young people as caregivers. The Bureau of Labor Statistics (BLS) in 2018 listed the median age of social and human service assistants at 42.1 years.<sup>9</sup> Some employees may not be mature enough to comprehend fully how their actions can affect their charges, much less their own futures.

According to Easter Seals, group homes face extreme levels of employee turnover, with one Oregon group home averaging 85 percent annual turnover. Other studies place the annual attrition percentage at between 57 to more than 100 percent.<sup>10</sup> In this situation, annual training for harassment would not be enough. Thorough initial training with an emphasis on a zero-tolerance policy toward harassment, including frequent reminders on the topic, will help your insureds curb incidents and quickly manage them if they occur.

## Staff member to coworker

Staff to coworker is probably the most reported type of harassment. Incidents can range from telling bawdy jokes or stories replete with sexual innuendoes to outright "quid pro quo" harassment. Quid pro quo harassment is a "this for that" type of offer. "I'll promote you if you sleep with me" or otherwise acquiesce to inappropriate behavior is quid pro quo behavior, which can translate to strict liability in many cases.<sup>11</sup>

## Volunteer or donor to client or staff member

Volunteers must give and receive the same level of respect that the nonprofit requires of its employees. Make sure that you provide volunteers with the same training as your employees, that you hold volunteers to the same standards and that they understand the reporting structure, no matter their age or influence in the organization.

According to a recent article in the *Journal of Philanthropy*, two-thirds of those who experienced sexual harassment on the job said it stemmed from donors. While only seven percent of male fundraisers experienced sexual harassment, 25 percent of female fundraisers reported

experiencing harassment during their careers.<sup>12</sup> Clearly, organizations must address the obvious power differential between wealthy donors and fundraisers. While approaching a generous donor or influential volunteer about alleged harassment may endanger donations, nonprofit managers cannot ignore these situations for fear of making waves with an influential volunteer or donor.

Age can play a factor in claims, as well. What could be appropriate behavior to an older volunteer, for example hugging a younger employee, may seem entirely inappropriate to that younger employee. Teenagers volunteer at high rates according to the Bureau of Labor Statistics.<sup>13</sup> They often have a different set of standards for appropriate behavior than older volunteers. The expression, “perception is reality,” is true in harassment claims. One standard will not fit all, and managers must account for these differences.

## *The Nonprofit and Its Mission—Protecting Its Legacy*

No matter how noble your purpose, administrative bodies, courts and juries will hold a nonprofit to the same standards as any profit-based organization. Because nonprofits rely on the public trust to further their mission, one unethical or egregious act can seriously damage the organization in the eyes of the public. Well-designed and consistently followed internal controls are a major part of preventing sexual harassment and bullying.

Your insureds’ workplace policies should address bullying and sexual harassment. Assisting them to update their policies and procedures can help ensure they manage potential litigation landmines, which demonstrates to underwriters that their organization takes the matter seriously.

Glassdoor, an online organization that allows employees or former employees to review publicly their workplaces, suggests the following five steps to combat sexual harassment.<sup>14</sup> These steps also apply to bullying and can help your clients provide a safer work environment.

1. Implement a strong policy against harassment, including bullying – If you have a policy in place, review it in light of today’s trends. Hire outside help if needed. Often, employees will listen to outside experts before they will listen to their own managers.

2. Build a diverse workforce – Diverse teams perform better and can act as governors against harassment.
3. Address any reports or rumors of harassment or bullying promptly – Ignoring reports of harassment is a sure way to create or increase liability in an employment claim or suit.
4. Initiate company-wide harassment training – While your clients may have trained recently, the “Me Too” movement has spotlighted this problem. It is not going away in the near future. Training confirms your insureds’ commitment to cultivating a safe workforce and can reduce liability if an incident occurs that becomes a legal matter.
5. Cultivate a healthy culture – While this may sound easy, it is probably the hardest step of all. All managers and supervisors must ask themselves: “Am I part of the problem?” Pre-hire investigations, including social media searches and solid background checks, can help, but any employee can slide into bad habits that border on harassment. Front-line employees do not create your insureds’ culture; managers develop, model and cultivate their organization’s culture.

In short, inadequate training, understaffing, lack of intervention when needed and termination of or adverse action toward a complainant will lay the groundwork for a successful claim. In addition, publicity surrounding negative events that occur in nonprofits can seriously damage a nonprofit’s mission.

The economic circumstances of nonprofits can limit the amount of training they provide. A good resource in your community may be recently retired human resources professionals who might provide voluntary training or agree to review your clients’ current policies to identify weaknesses. The [Nonprofit Risk Management Center](#) offers nonprofits a great deal of information and assistance.

## *Insurance Coverage for Sexual Harassment*

According to one industry expert, EPL coverage grew out of the Clarence Thomas and Anita Hill hearings, but is today a “mature market.”<sup>15</sup> EPL insurance providers intend to cover sexual harassment as part of wrongful employment practices. Insurance carriers predict “a wave”

of Employment Practices Liability claims in light of recent sexual harassment allegations in all industries.<sup>16</sup> Nonprofits are no exception.

One insurance insider calls the “Me Too” movement “a tipping point.” According to one 2016 article, US companies had a 10.5 percent chance of an employment charge. The odds may now be significantly higher. To protect the organization, the best protection is a robust EPL policy.

Charity First’s EPL policy applies in cases of harassment, including defending allegations of mental anguish and emotional distress. EPL policies cover the mental anguish and emotional distress component of sexual harassment allegations. In addition, they cover the financial damages resulting from adverse employment actions taken against the victim, such as demotions or terminations. When physical misconduct is involved, the misconduct may trigger the general liability policy, as well. Employment practices policies cover the employees who may have committed the act of harassment or discrimination as well as the organization, which knowingly or unknowingly allowed the harassment or discrimination to occur. EPL policies even extend coverage to acts of harassment or discrimination committed against the organization’s employees by non-employees, but only when the organization is aware of such acts and has not intervened to protect the employee.

The general liability policy is where to look for coverage when the victim alleges physical symptoms, physical touching, or other claims that involve physical contact. When harassment or sexual overtures turn physical, your EPL policy may not defend the allegation. Charity First offers a liability policy that includes a sexual abuse and molestation endorsement that covers these types of incidents. It contains its own occurrence limit and aggregate limit for sexual abuse and molestation, which does not erode the limits of the liability claims for other liability-related occurrences that may occur, such as a fall on the premises.

When both the EPL and the general liability policies are involved, for example in allegations of sexual abuse, the “Other Insurance” provisions in both policies may apply. Not all liability policies cover sexual abuse and molestation. Your clients’ current liability policy exclusions for intentional acts or other allegations may preclude coverage. The liability insurance carrier would determine coverage after an exhaustive investigation.

No matter which insurance provider you use, specific wording in these complex policies can mean the difference between a claims acceptance and a claims denial. Reading the forms is critical to ensuring you offer your clients the coverages they need.

Given today’s climate, insurers will closely monitor and possibly amend policy language as



claims continue to escalate, according to some insurance experts. Charity First's insurance programs offer broad coverage to help protect your clients against sexual harassment claims.

When reviewing coverage options, another factor is critically important. Does the EPL policy provide defense "inside" or "outside" of limits? When the policy covers defense costs within the limit of liability, they erode the limit available to pay losses on behalf of the organization. For example, if the limit of liability is \$1 million and the cost of defense is \$200,000, the organization has only \$800,000 to protect them against any covered settlement or judgment. When the policy covers defense costs outside the limit of liability, the full \$1 million is preserved for payment of the settlement or judgment. This can be invaluable to the organization because defense costs can be quite high. Even if an allegation is false, a nonprofit must investigate and manage the complaint, and its carrier must investigate and provide a defense. These claims can be protracted and very costly to defend. Defense outside limits is a big plus to offer your clients.

## *What Liability Limits Should Your Clients Choose?*

Employment Practices Liability limits that your clients carried in the past may be insufficient in light of today's climate. Because of the media attention surrounding sexual harassment, claim settlement costs may be significantly higher, both in terms of claims defense costs and in settlement. While insurance experts predict an increase in claims resulting from the "Me Too" movement, these claims have not yet materialized. Very often, a year or so after a big event like "Me Too," the media turns to new events.

Presently, however, the plaintiff bar is leveraging the movement to demand higher settlements. Rick Betterly, author of the Betterly Report, which reviews specialty coverages such as D&O and EPL, believes that EPL claims will not settle as easily as they did in the past given today's current climate.<sup>17</sup> One industry veteran went even further, predicting in a recent Insurance Journal article, "a flood of claims from employees or former employees at companies in every industry of every size."<sup>18</sup>

While many of these claims settle in mediation, settlement amounts for EPL claims may increase. When your client's reputation is at stake, you want a carrier that will push to close

these claims and help them avoid adverse publicity. Relying on a wholesaler that specializes in EPL can help.

In the past, many nonprofits with budgets under \$250,000 have typically chosen liability limits of \$1 million. Charity First offers up to \$5 million in limits. Larger multinational charities may have limits reaching \$10 million or more.

Nonprofit managers would rather spend their limited budgets assisting others and fulfilling their principled mission rather than buying insurance. In today's world, EPL coverage is not an extravagance, it is a necessity.

## **Closing Thoughts**

Nonprofit operations and their exposures can be complex, and unless you have been writing nonprofits for a long time, you may not be very familiar with their coverage needs. Working with an insurance provider who specializes in nonprofit management policies can help protect you as well as your clients.

If your clients consider insurance as only a line item in their budget, that can be a costly mistake. As an experienced broker, you can help nonprofit managers choose the best coverage, the safest liability limits and the best rates.

A comprehensive employment practices policy protects a nonprofit's assets and is one way to help ensure that your clients attract top-notch senior management candidates and board members.

## **About Charity First**

Charity First is a wholesale brokerage, underwriter, and program manager specializing in nonprofit organizations, social service agencies, and religious institutions.

***For additional information about Charity First, please contact Frank Tarantino at [frank\\_tarantino@charityfirst.com](mailto:frank_tarantino@charityfirst.com) or (800) 352-2761.***

## Notes

<sup>1</sup> ["How common is sexual harassment?"](#) *The Economist*, November 18, 2017.

<sup>2</sup> Ibid.

<sup>3</sup> ["Hot topics to help you plan for what's ahead in 2018."](#) *National Council of Nonprofits*, December 7, 2017.

<sup>4</sup> ["Sexual Harassment and OSHA: Is Sexual Harassment a 'Recognized Hazard'?"](#) *EHS Daily Advisor*, June 3, 2012.

<sup>5</sup> ["How common is sexual harassment?"](#) *The Economist*, November 18, 2017.

<sup>6</sup> ["14 Ways You Can Improve Psychological Safety At Work."](#) *Forbes*, November 15, 2017.

<sup>7</sup> ["Violence in the Federal Workplace: A Guide for Prevention and Response."](#) Department of Homeland Security, April 2013.

<sup>8</sup> Ibid.

<sup>9</sup> ["Labor Force Statistics from the Current Population Survey."](#) *Bureau of Labor Statistics*, 2017.

<sup>10</sup> ["Staff turnover rate at group homes."](#) *Easterseals blog*, 2010.

<sup>11</sup> ["Quid Pro Quo Harassment: Everything You Need to Know."](#) *Upcounsel*.

<sup>12</sup> ["Sexual Harassment Is Widespread Problem for Fundraisers, Survey Shows."](#) *The Chronicle of Philanthropy*, April 5, 2018.

<sup>13</sup> ["Volunteering in the United States, 2015."](#) *Bureau of Labor Statistics*, 2015.

<sup>14</sup> ["What Companies Must Learn from #MeToo: 5 Steps to Squelch Sexual Harassment in the Office and Beyond."](#) *Glassdoor*, October 25, 2017.

<sup>15</sup> Ibid.

<sup>16</sup> ["Sexual Harassment: Employment Liability Tipping Point."](#) *Insurance Journal*, January 8, 2018.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

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