Important Content Note:

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration’s (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

Policies and Protections Related to Employee Harassment and “Bullying” in the Workplace and Whistleblower Retaliation

Offensive behavior and inconsiderate treatment of colleagues can occur in any workplace. Although they are mission-driven organizations, health centers are not immune from the consequences, including financial liability, which can result from inappropriate behavior among employees, including bullying or harassment.1 Bullying or harassment can come in many forms, including but not limited to offensive or derogatory jokes, racial or ethnic slurs, pressure for dates or sexual favors, unwelcome comments about a person’s religion or religious garments, or offensive graffiti, cartoons or pictures. Activities that could be considered bullying include aggressive or violent behavior, intimidating actions, exclusion or isolation, other acts of degradation or humiliation, or threats of any of these.

If an employee complains of harassment and the health center takes inappropriate action against the employee, it may expose the organization to charges of retaliation. In addition, if appropriate action is not taken, the complainant may choose to report wrongdoing (whether substantiated or not) to external sources, such as regulators, law enforcement agencies or the media.

1 For purposes of this Information Bulletin, bullying and harassment will be referred to collectively as harassment.
Harassment and retaliation can have significant negative effects on a health center. This Information Bulletin will:

♦ Give examples of conduct that may constitute harassment, bullying, or whistleblower retaliation;

♦ Provide examples of the negative effects that can result from harassment and retaliation, including legal and other consequences;

♦ Recommend steps that a health center can take to minimize instances of harassment and whistleblower retaliation, as well as protect itself from potential liability.

HARASSING AND BULLYING CONDUCT

Harassment constitutes a broad scope of conduct and the determination of whether an employee is being harassed rests not with the employer, but rather is based on the reasonable perspective of the target of the harassing conduct. Organizations may be held liable 1) where a supervisor or manager harasses an employee or 2) where a supervisor or manager fails to act when he or she is aware that one employee may be harassing another. Thus, it is extremely important to:

♦ Encourage employees to report instances of alleged harassment to the appropriate health center staff, and

♦ Act promptly on complaints to demonstrate that the health center takes alleged employee harassment seriously.

Examples below should not be seen as an exhaustive list of conduct that could be considered harassment.

Sexual Harassment

An example of sexual harassment is when a supervisor threatens to have a subordinate transferred to a lower paying job unless the subordinate agrees to go on a date with or provide sexual favors to the supervisor.

Note that this type of sexual harassment can occur in the context of a male supervisor and a female subordinate, a female supervisor and male subordinate, and same sex supervisor and subordinate. Sexual harassment also can occur among peers, such as when one employee continually disrupts another employee’s work with pornographic materials sent by email, interoffice mail, by hand, or otherwise.

Other Forms of Harassment

In addition to federal protections, state and local laws may prohibit harassment based on the following characteristics—though not all are protected by law in every jurisdiction—race, color, religion, sex, national origin, age, disability, veteran status, familial/marital status, pregnancy, appearance and sexual orientation. The U.S. Equal Employment Opportunity Commission (“EEOC”), the federal agency responsible for enforcing the federal laws pertaining to discrimination in the workplace on the basis of age, disability, national origin, pregnancy, race/ color, religion, sex, and genetic information, has issued numerous guidances that further describe harassment.3

2 Under certain circumstances, a health center may also be at risk for liability if it fails to act or acts inappropriately in instances where an employee harasses a patient. This Information Bulletin does not address patient harassment, focusing solely on harassment of employees.

3 See http://www.eeoc.gov/laws/types/harassment
Examples of these types of harassment include:

♦ Mocking someone about their appearance, whether verbally, in writing, by drawing or caricature, or otherwise;

♦ Unwanted comments about someone’s religious beliefs;

♦ The exclusion of individuals of a certain race from group activities;

♦ Demeaning comments about a class of people—such as women or men—directed at a member of that group;

♦ Physical intimidation; and

♦ The circulation by email of off-color jokes and photographs.

Although the offender may feel that his or her comments or conduct is harmless or “all in good fun,” the target may feel that the mockery is harassment where his or her appearance is a proxy for national original, race, color, ethnicity, religion, sex, age, or disability. For example, if the target is obese, the inappropriate conduct could constitute harassment based on disability. It is important to note that, according to the EEOC, the victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.

NEGATIVE EFFECTS OF HARASSMENT ON A HEALTH CENTER

Low Morale and Loss of Productivity

The loss of productivity that accompanies dissatisfaction in the workplace can often be observed in environments of harassment. People who do not feel comfortable at their jobs, whether they are the individual being harassed or simply a witness to such behavior, may respond with tardiness, absenteeism, or a drop in performance generally.

Negative Public Image

One of the more significant risks to an organization, especially for health centers, that may result from harassment is damage to the organization’s public image. Harassment lawsuits, whistleblower suits, government investigations, and even gaining a reputation as an unpleasant place to work can lead to a negative public image for the organization. In the context of a health center, this can result in fewer patients, fewer volunteers, fewer providers, and fewer offers of financial support.

Lawsuits

Litigation stemming from a harassment claim can lead to significant financial liability for a health center, accompanied by the damage to the health center’s reputation. Lawsuits alleging harassment can be based on a variety of federal and state laws. At health centers with 15 or more employees, Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in all aspects of employment on the basis of certain employee characteristics, known as “protected classes:” race, color, religion, sex, or national origin. Other
federal and state laws and regulations offer additional protections from discrimination against various classes of individuals. For example, the **Age Discrimination in Employment Act** ("ADEA") protects individuals over the age of 40 from certain discriminatory acts, while the **Americans with Disabilities Act** ("ADA") protects persons with disabilities. Similarly, the **Genetic Information Nondiscrimination Act of 2008** ("GINA") prohibits the use of genetic information in making employment decisions such as hiring, firing, promotion, compensation, and other terms and privileges of employment. In 1986, the Supreme Court of the United States extended Title VII’s prohibition against discrimination to sexual harassment and defined two types of harassment for which the employer may be liable: quid pro quo harassment and hostile work environment harassment.

**Harassment – Quid Pro Quo**

Quid pro quo harassment typically occurs where a **superior’s improper conduct toward an employee** is directly related to the terms and conditions of the employee's position with the employer, such as termination, demotion, and offering or refusal of a promotion or raise, a poor evaluation, reduction of job responsibilities, etc. Where supervisors engage in quid pro quo harassment, both the supervisor and the employer can be held liable for the job-related consequences of the harassment.

Quid pro quo harassment is not limited to conduct of a sexual nature. For example, a medical director may suddenly find fault with a physician’s work performance and begin to threaten poor performance reviews because the physician ignored the medical director’s overtures to participate in group prayers. In this case, the harassing conduct – the unwanted insistence to participate in a religious activity – could support a claim based on discrimination on account of religion.

**Harassment – Hostile Work Environment**

An employer can be held liable where **improper conduct by other employees in the workplace** unreasonably interferes with an individual’s work performance or creates a severe or pervasive intimidating, hostile, or offensive work environment. Health centers should be aware that a hostile work environment can be created not only by supervisors or co-workers, but also by sources from outside the organization, such as vendors or patients.

For example, a pharmaceutical manufacturer sales representative who frequently visits a health center to detail new products raises his voice and uses racial epithets to intimidate a receptionist into allowing him into the health center to meet with physicians. This interferes with the receptionist’s ability to fulfill her job responsibilities and thereby creates a hostile work environment. If a health center manager is aware of this conduct but refuses to take action to prevent this from happening, claiming that the representative does not work for the health center and therefore cannot be told what to do, the health center may be held liable for the job-related consequences of the representative’s actions.

Where an employer—through its managers—becomes aware of harassment that is severe and pervasive enough to create a hostile or offensive work environment and does not take corrective action that is likely to stop the recurrence of the harassment, both the harassing parties and the organization may be held liable, even if the harassed individual does not suffer any specific detrimental

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4 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Since this case, the prohibition on sexual harassment has been expanded to include a prohibition on harassment of employees in any of the protected classes identified above.
change in the terms and conditions of his or her employment. Specifically, the employer may be liable to the employee for compensatory damages. These damages can include out-of-pocket expenses such as costs associated with a search for a new job free from the harassing environment, medical expenses incurred in treating stress or other conditions resulting from the harassment, and compensation for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life). Damages may also include lost pay and benefits if the victim was forced to terminate his or her employment on account of the hostile conditions in the workplace.

As an example of the potential consequences, a court judgment of over $1 million was imposed on an organization for failing to protect an African American female from persistent racial and sexual harassment and bullying by a white male coworker. This hostile work environment ultimately resulted in her being physically assaulted by him. The female employee experienced escalating offensive verbal conduct and gestures made by the male coworker over a period of two months. Although four levels of the organization’s management were aware of the escalating hostile work environment, the company failed to take effective steps to stop it. The large monetary award was intended to demonstrate the severe consequences that can result from tolerating egregious harassment.

**Employee Options**

In addition to filing a claim against the harassing party, individuals who feel that they were harassed may bring charges under state or federal law against the organization and supervisors who failed to respond adequately. Before filing a federal lawsuit for harassment, a potential plaintiff must file an administrative complaint with the EEOC. Where state laws apply to the claim, the EEOC frequently defers to state equal employment agencies that enforce state laws protecting these classes, allowing the state agency to address the complaints under state and local, rather than federal laws.

The EEOC has the authority to investigate charges of harassment against employers who are covered by federal non-discrimination laws and to resolve violations through settlement, mediation or lawsuit. If the EEOC receives a charge of harassment that reveals a potential violation of law and cannot settle the charges, the EEOC may decide to file a claim in federal court or may decline to pursue the action further. Where the EEOC does not identify a potential violation of law or chooses not to take further action, the EEOC will provide the individual who filed the charges with a "Notice-of-Right-to-Sue," which permits the individual to file suit in federal or state court.

**WHISTLEBLOWERS AND RETALIATION**

Health center employees, including targets of harassment as well as those who are not the direct target of harassment, may feel compelled to report offensive conduct to appropriate officials within the health center, such as a supervisor, a compliance officer, or another member of management. Individuals who report potential wrongdoing, whether they are the victims of the improper conduct or witnesses to it, are sometimes known as whistleblowers.

It is very important that health center managers do not retaliate or take actions that can be perceived as retaliation against a whistleblower. Retaliation not only exposes the health center employer to financial liabilities, including compensation of back pay and
punitive damages to the whistleblower, but it also reduces the likelihood that any health center employee would report other instances of wrongdoing.

Retaliation is prohibited by federal and state laws, which provide protections for whistleblowers in order to encourage the reporting of violations. Title VII of the Civil Rights Act includes whistleblower protection that prohibits employers from taking action that would deter a reasonable person from asserting rights guaranteed by Title VII.\(^5\) While discharge is perhaps the ultimate form of retaliation, other actions, such as demotion, suspension, removal of responsibilities, threats, isolation from regular employee activities, or any other manner of discrimination in the terms and conditions of the whistleblower’s employment can be perceived as retaliatory action.

Other examples of employer retaliation include:


- Terminating an employee who has complained of sexual harassment to avoid an investigation of the alleged conduct, and

- Terminating an employee who reported witnessing inappropriate behavior.

**Allowable Disciplinary Action** – An employer can take disciplinary or remedial action against an employee who has reported wrongdoing, provided such action is a legitimate response to conduct unrelated to the harassment and not penalty for having made a report against alleged wrongdoing. An employer may impose disciplinary actions against a whistleblower if he/she has violated the law or health center policies or has poor job performance. However, it is critical to have well documented reasons for such action so as not to leave the health center open to a charge of retaliation. For example, if a health center terminated a whistleblowing employee for poor performance when that employee’s recent performance evaluations were positive, the center could be at risk for a claim of retaliation.

Retaliation can lead to the development of a workplace culture that punishes the reporting of questionable conduct, which will surely inhibit an employer’s ability to take corrective action before it is faced with potentially severe legal and financial consequences.

**STEPS TO MINIMIZE HARASSMENT AND WHISTLEBLOWER RETALIATION**

In order to reduce a health center’s potential exposure for harassment, the health center must take steps to deter such conduct and, if it occurs, to discover and address the conduct.

1. **Adopt a policy prohibiting harassment and retaliation.**

The first step a health center should implement is to adopt a policy against harassment and retaliation that reflects the center’s practices and procedures as well as state and local laws. See the following example for an anti-harassment policy.\(^6\)


6 The authors of these materials include attorneys at the law firm of Feldesman Tucker Leifer Fidell LLP. The sample documents offer general guidance based on federal law and regulations, and do not necessarily apply to all health centers under all facts and circumstances. These materials do not replace nor substitute for advice from qualified legal counsel.
Example for Anti-Harassment and Retaliation Policy

Ethics and integrity are the responsibility of each individual. Therefore, [insert health center name] requires that all employees, contractors, agents, officers, members of the board of directors, and other individuals doing business with or related to the business of [insert health center name] behave, at all times, in a professional and courteous manner.

Harassment of any individuals associated with [insert health center name], including, but not limited to employees, contractors, agents, officers, members of the board of director, patients, vendors or other visitors to [insert health center name] on the basis of race, color, national origin, religion, sex, gender, genetic information including family medical history,7 sexual orientation, age, physical or mental disability, pregnancy, military status, or any other characteristic protected by law, including sexual harassment (all as defined and protected by applicable law) is unacceptable and will not be tolerated by [insert health center name].

Harassment includes, but is not limited to:

♦ Acceptance of improper conduct as a condition for not imposing a negative employment action, such as termination, demotion, writing a poor evaluation, or reduction of job responsibilities or pay;

♦ Offensive or unwelcome behavior, such as:
  – Jokes;
  – Racial or ethnic slurs;
  – Epithets or name or name calling;
  – Physical assaults or threats;
  – Ridicule, mockery, insults, or “put-downs;”
  – Pressure for dates or sexual favors;
  – Unwelcome comments about a person’s religion or religious garments;
  – Graffiti;
  – Cartoons or pictures;
  – Intimidation; and
  – Interference with work performance

Furthermore, retaliation in any form against individuals who report or otherwise participate in efforts to address harassment or discrimination will not be tolerated. Retaliation includes any negative employment action or harassment directed at an individual in response to that individual’s reporting of, or participation in efforts to address harassment, retaliation or other wrongdoing.

Individuals associated with [insert health center name] must report any harassment or discrimination promptly to his or her supervisor, who will notify the [Human Resources Director]. If the individual is uncomfortable discussing the issue with his or her supervisor, he or she may notify the [Human Resources Director, the CEO, Compliance Officer, or another member of senior management, who will notify the Human Resources Director]. [Insert health center name] will maintain confidentiality to the extent possible given [insert health center name]’s responsibility and duty to investigate any reports of harassment or discrimination.

Any individual associated with [insert health center name] who is found to have violated this [policy against harassment and retaliation] will be subject to disciplinary action, up to and including termination.

7 GINA defines genetic information to include an employee’s family medical history.
2. Establish an infrastructure to implement expectations and publicize consequences for violating expectations.

Once a policy against harassment and retaliation has been adopted a health center can establish an infrastructure to implement the health center’s expectations for proper conduct (as set forth in the policy against harassment and retaliation) and to publicize the consequences for violating these expectations. This infrastructure should be coupled with the creation of a corporate culture that supports the infrastructure. Such corporate culture should:

♦ Assure that employees receive training on the center’s non-harassment policies;
♦ Promote compliance with health center policies;
♦ Encourage the reporting of potential violations of such policies by making reporting a condition of employment; and
♦ Ensure that employees feel comfortable reporting harassment through a strong and explicit statement of non-retaliation.

More importantly, a health center should reinforce its policies by consistently taking swift and appropriate action to address harassment in accordance with its policies.

None of the steps taken by a health center to establish a culture of compliance will succeed if the tone of such culture is not set by health center leadership. All of the policies and procedures, as well as training requirements relating to harassment and retaliation that apply to health center employees, should apply equally to board members and senior management. Board members and managers who show no interest in enforcing or complying with the health center’s policies against harassment and retaliation or who are not treated consistently with such policies because of their positions can significantly limit the ability of the organization to deter and address harassment and retaliation.

3. Integrate the anti-harassment policy with the center’s compliance program.

An effective anti-harassment policy can be structured to include many of the elements of a health center compliance program or can be incorporated within the health center’s general compliance program. In either case, to address harassment issues, a health center compliance program should include at least the following elements, implemented as appropriate to meet the health center’s specific needs.8

Developing an Employee Handbook and Standards or Code of Conduct

A health center should have an employee handbook or manual and standards (or a code) of conduct that sets forth, in writing, the expectations of the health center for its employees, including the health center’s policy against harassment and retaliation.9

For more information on compliance programs, see NACHC’s updated Risk Management Information Bulletin #23, Evaluating Your Corporate Compliance Program, to be published in March 2015.

For more information on employee handbooks, see NACHC’s Human Resources Series information Bulletin #11 – Developing a Health Center Employee Handbook, December 2014.
Defining Hiring Practices

Well-defined, carefully considered hiring practices are an important first step in avoiding potential problems. An essential qualification of any health center position is the ability to maintain proper decorum and appropriate behavior, which includes not harassing or bullying others.

Providing New-Hire Orientation and Regular Training

A health center should provide new-hire orientation and training that includes the expectations of the health center for its employees. Providing regular “refresher training” for health center employees, reminding them of key policies such as the non-harassment policy and disciplinary procedures, is critical.

Trainings should not only explain the non-harassment policy, but also give examples on how employees should and should not act within the workplace. Employees also should be informed of how to identify potential harassing conduct as well as how and to whom to report it. Health centers should train employees on where to get information should they have a question about the center's policies and procedures.

Supervisors must also be trained on how to treat employees with respect and in accordance with applicable non-discrimination laws, and should be trained (with regular refreshers) on how to respond to allegations of harassment.

Reporting Mechanisms

Every health center should adopt a process by which employees can report concerns to management. Through training, employees should be taught to identify the types of behavior that are unacceptable and that should be reported. Additionally, health centers should encourage all individuals associated with the health center, including board members, employees, vendors, patients, and visitors, to report any apparent harassment or bullying that they observe to their supervisor or to other appropriate internal authorities, such as the compliance officer or another member of management. There also should be an alternative means of reporting for individuals who would otherwise be required to report to the individual who is harassing or bullying them or who are uncomfortable reporting to their supervisors for any reason. Each employee should know exactly where he or she can bring a complaint, not only for him or herself, but also on the behalf of other employees.

Responding to Allegations

In order to reinforce the health center's message that harassment and other disruptive behavior will not be tolerated, the health center must appropriately respond to all allegations of potential violations of its policies and procedures. Failing to respond appropriately to alleged misbehavior can:

♦ Cause the individual making a report to question the health center's commitment to maintaining a harassment-free workplace;

♦ Render the health center's message regarding the importance of proper behavior meaningless; and/or
Increase the likelihood that future whistleblowers, who, expecting an inadequate response if they were to report internally, might file a complaint with the EEOC or a state or local equal employment agency.

There is no established protocol that dictates how a health center should respond to a complaint, nor a specific timeframe for responding. Rather, a health center must determine, based on the facts and circumstances, how best to proceed in order to determine whether inappropriate conduct occurred and to promptly remediate the situation. However, it is critical that a center take complaints seriously.

Health centers, particularly those that are not accustomed to conducting investigations in response to alleged wrongdoing, should seek the advice of qualified legal counsel regarding appropriate steps that the health center should take to investigate whether harassment or retaliation occurred. Steps that counsel may recommend include, but are not limited to:

1. Conduct interviews of individuals with potential knowledge of the matter
2. Review relevant documents
3. Engage qualified legal counsel to conduct an investigation, so that communications with counsel may be protected by the attorney-client privilege.

The extent to which any communications and information developed during an investigation may be protected by the attorney-client privilege depends on the particular facts and circumstances. Any investigation in which a health center desires to protect communications under the attorney-client privilege should be undertaken only after consultation with qualified legal counsel and in accordance with direction provided by counsel.

If a health center determines, based on the investigation, that inappropriate conduct took place, appropriate disciplinary action should be imposed.

**Taking Disciplinary Action**

The consistent implementation of a disciplinary action policy is an essential aspect of proper response to identified harassment or other disruptive behavior. Failure to treat individuals in a consistent manner for offensive conduct can weaken the health center’s message regarding the importance of proper behavior, and can be tantamount to failure to respond at all.

The health center’s response to a documented instance of harassment should be aimed at preventing the misconduct from recurring, including, in particular, taking appropriate disciplinary action against the responsible party or parties. Disciplinary action may include (as appropriate to the nature and seriousness of the offensive behavior):

- A verbal or written warning,
- Suspension from employment,
- Demotion, or
- Termination.

A disciplinary action policy should set forth firm guidelines for imposing disciplinary actions, while being flexible enough to allow for mitigating circumstances. While the policy should provide for disciplinary measures that can be tailored to the circumstances, the health center should have the authority under the policy to terminate an employee immediately, should the circumstances call for such action.
In addition or as an alternative to taking disciplinary action, the health center should consider other remedial actions, such as requiring additional training on employer-employee relations and separating the harasser from the complainant in terms of workspace.

**Documenting Actions and Efforts**

Documentation of a health center’s actions and efforts to prevent and remediate harassment and retaliation begins with the implementation of a policy against harassment and discrimination and other written standards, policies, and procedures, as described above. However, a health center also must document its efforts to put these written standards into practice. Health centers should proceed cautiously, with the advice of qualified legal counsel, in determining how much information to record throughout the process of deterring and addressing harassment.

**CONCLUSION**

Workplace harassment and retaliation may take several forms, all of which could have serious consequences for a health center. There are various steps for minimizing risk of harm to the health center resulting from such inappropriate conduct, but there is no one-size-fits-all solution to harassment and retaliation in the workplace. Establishing an infrastructure and culture that deter misbehavior, promote reporting of inappropriate conduct, and appropriately address any instances of harassment or retaliation will help a health center to successfully avoid the consequences of such conduct.