

**If You Weren't Afraid Before,
You Should Be Now!**



**CHANGES TO THE TEXAS
SEXUAL HARASSMENT
LAWS**

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**COVID Continues to
Create Challenges**

Battle of Executive Orders:

President Biden – vaccines mandated for 100 or more employees, except for health and religious exceptions

Governor Abbott – Employers in Texas cannot mandate vaccines for anyone claiming health, religious or conscience objection

What does an Employer Do?

Mandate but allow all exceptions outlined in Governor Abbott's Executive Order

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**Amendments to
TX Labor Code Chapter 21**

Texas law governing unlawful employment discrimination has been amended – specifically with regard to discrimination in the form of SEXUAL HARASSMENT. Effective Sept. 1, 2021, the law will:

- Apply to ALL employers regardless of size
- Allows potential individual liability
- Require “immediate and appropriate” responses to claims
- Have an expanded statute of limitation from 180 days to 300 days for only sexual harassment claim



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Amendments to TX Labor Code Chapter 21

The amendments:



- Apply only to SEXUAL HARASSMENT claims
- Will not apply to other protected classes such as age, race, national origin, religion, disability, or even non-sexual gender discrimination / harassment
- Will not apply to any type of retaliation claims

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Sexual Harassment Defined by Statute (Quid Pro Quo)

An unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature when:



- Submission is made a term or condition of employment (explicitly or implicitly);
- Submission or rejection is used as the basis for a decision affecting the individual's employment; or

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Sexual Harassment Now Defined by Statute (Hostile Environment)



An unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature when:

- It has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The statutory definition somewhat mirrors current caselaw, but with differences likely to be litigated.

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Expansion to ALL Employers



- Like Title VII, the Texas Labor Code previously applied only to employers with 15 or more employees.
- Now, employees will be able to bring sexual harassment claims against small Texas employers, even those with only 1 employee.

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Individual Liability

- Like Title VII, the Texas Labor Code previously did not provide individual liability for sexual harassment claims.
- Now, the definition of employer includes an individual who acts directly in the interests of an employer in relation to an employee.
 - Owners, managers, supervisors, HR representatives, coworkers, and contractors face potential individual liability.



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Unlawful Employment Practice Under Amendment to State Law

A violation occurs when the employer or agents or supervisors of the employer:

- Knew or should have known that the conduct was occurring; and
- Failed to take “immediate and appropriate” corrective action.



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Federal and Prior State Caselaw

There is an affirmative defense to hostile environment cases of supervisor harassment without a tangible employment action, if (a) the employer exercised reasonable care to prevent and correct promptly the harassing behavior; (b) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.

When the hostile environment is created by a non-supervisor, such as a coworker or a third party, then the plaintiff must prove that the employer knew or should have known of the harassment but failed to take prompt remedial action designed to stop it.



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Statute of Limitations

Previously, to sue under the Texas Labor Code, a plaintiff had 180 days to file a Charge of discrimination with the Texas Workforce Commission; while to sue under federal law, a plaintiff had 300 days to file a Charge with the EEOC (or local deferral agency).

Now, a plaintiff has 300 days to file a Charge of sexual harassment with the Texas Workforce Commission.



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Bohreer's Best Practices



- Adopt and distribute a policy addressing sexual harassment
 - Include the statutory definition of sexual harassment
 - Include a user-friendly reporting procedure
 - Include reporting routes other than line of authority
 - Immediately investigate and take appropriate action even if the alleged policy violation is raised outside the defined reporting process

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Bohreer's Best Practices

- Employers with 15 or more employees should adopt and distribute such a policy, that in addition,
 - Addresses all forms of unlawful discrimination / harassment
 - Prohibits retaliation
 - Provides a process for reporting retaliation

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Bohreer's Best Practices



- All employers should implement mandatory training on sexual harassment to be presented periodically (annually, if not bi-annually).
 - Staff training should include the definition of harassment (including same-sex) and the employer's reporting process.
 - Training for supervisors and management should include the risks of potential individual liability, and what to do if they have any reason to suspect possible sexual harassment.

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Bohreer's Best Practices

- Employers must learn what to do in the event of any report or complaint of sexual harassment.
 - How to investigate the report
 - How to document the investigation
 - How to respond once the investigation is complete.



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