

# Frequently Asked Questions About Sexual Harassment of Transgender and Non-Binary Individuals in the Workplace

Harassment based on gender identity or expression is a form of sexual harassment. Regardless of the genders of the people involved, it is never appropriate for someone in the workplace to harass another person because of their gender identity or expression.

When harassment happens at work, it is never your fault—you are not responsible for someone else's behavior and it isn't your responsibility to make it stop. Your employer, on the other hand, is responsible for keeping your workplace safe. If you believe that you have experienced or are currently experiencing workplace sexual harassment because of your gender identity or expression, it is your right to demand that your employer make it stop.

## What Is Workplace Sexual Harassment?

Sexual harassment is a type of illegal employment discrimination. It is against the law to harass a person at work, or someone applying for a job, because of certain characteristics, including gender identity and expression. (Other protected characteristics are sex, sexual orientation, pregnancy, age, disability, race, color, national origin, religion, and more.)

Examples of sexual harassment include:

- Unwelcome sexual advances or requests for sexual favors
- Verbal/physical harassment of a sexual nature
- Offensive comments about a person's sex or gender, or sex or gender generally
- Repeatedly and intentionally using the wrong name or pronouns for a person
- Denying access to an appropriate restroom

## Are Transgender/Non-Binary Employees Protected From Workplace Sexual Harassment?

Yes, trans/non-binary<sup>1</sup> employees are protected from workplace sexual harassment, just like all other employees. Federal courts, the Equal Employment Opportunity Commission, and

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<sup>1</sup> FORGE honors and recognizes the complexity and multiplicity of gender identities and expressions, as well as acknowledging the diverse language used by people whose gender, or lack thereof, does not align with societal norms. This resource uses the words *transgender*, *trans*, and *non-binary* in their broadest meanings, inclusive of those whose identities lie outside of these often-limiting terms.

other agencies have said that workplace harassment because of an employee's gender identity or expression is sexual harassment.

These courts and agencies have recognized for many years that harassment that happens because someone doesn't fit traditional gender stereotypes of masculinity or femininity is a type of sexual harassment. Workplace harassment against trans/non-binary people is always rooted in other people's belief that trans/non-binary people are not acting how a man or woman "should" act, therefore making it sexual harassment.

Many people are not aware that the harassment they're experiencing in the workplace is abusive and may be against the law. Trans/non-binary employees, who are at a high risk of harassment on the streets and elsewhere, particularly may not recognize that harassment at work is both wrong and illegal.

You always have an absolute right to work in a workplace free from sexual harassment.

## **Does Harassment Have to Be "Sexual" to Be Illegal?**

No, sexual harassment does not have to be sexual in nature; sexual harassment laws apply to many different types of conduct.

Many people think that sexual harassment law only applies when an employee is subjected to unwelcome sexual behavior by their boss or another employee, like being told they need to have sex in order to get or keep their job. This kind of behavior is unquestionably illegal, and so are other verbal, visual, or physical harassment of a sexual nature, like a supervisor commenting on your appearance by saying you look "hot," a coworker showing you images or messages that have sexual content, or a supervisor or coworker touching you in a sexual manner.

However, illegal sexual harassment includes **MANY** other behaviors that are not sexual, as detailed below. Sexual harassment is about power and intimidation more than it's about sexual behavior; it includes treating others in a hostile, offensive, or intimidating way because of their sex, gender identity, or gender expression.

## **What Types of Behavior Are Illegal?**

Harassment law protects employees from harassment that is **hostile, offensive, or intimidating** and so **severe or pervasive** that it interferes with their ability to do their job.

**"Severe" harassment** means behavior so serious that even one incident is considered illegal. Severe sexual harassment in the workplace includes:

- Physical assault
- Sexual assault

“Pervasive” harassment means behavior that is repeated and occurs frequently, often building over time. Sexual harassment law recognizes that many repeated incidents of harassing behavior have a cumulative negative effect on employees. Pervasive sexual harassment includes:

- Repeatedly using an incorrect name and/or incorrect pronouns for you
- Repeatedly failing to acknowledge or respect your gender identity or expression
- Failing or refusing to provide access to an appropriate restroom based on your gender identity
- Repeated offensive jokes, pranks, slurs, taunts, insults, offensive images or pictures, or written messages
- Shunning (ignoring you or refusing to work with you)
- Following you or excessively staring at you
- Interfering with your access to or disturbing your locker, desk, or workspace
- Many other offensive, hostile, or intimidating behaviors

It is always illegal when a supervisor requests or demands that you participate in sexual activity in order to keep your job; to receive a promotion, a raise, or a better schedule; or to receive perks, like a corner office or a gym membership. It is never acceptable for anyone at work to request, demand, suggest, or imply that you must participate in any kind of sexual activity to keep your job, to receive employment-related benefits or advancement, or to remain physically safe at work.

You don't have to be the target of the harasser's behavior for the conduct to be considered illegal workplace harassment. You or anyone else in the workplace who is negatively affected by harassing behavior has the right to oppose it and to demand that it stop. And, importantly, even if the harassment doesn't affect your paycheck, it is still illegal.

## **Who Is Prohibited From Engaging in Workplace Sexual Harassment?**

Nondiscrimination laws protect employees from harassment by a range of people who may be in your workplace: business owners, members of boards of directors, managers, supervisors, coworkers, and supervisees. In many situations, sexual harassment law also applies to your employer's customers or clients, or another third party in the workplace, such as regular delivery people.

The gender of the person engaging in the harassment and the gender of the recipient do not matter. For example, a female-identified employee (trans or not) could sexually harass another female-identified employee, a male-identified employee (trans or not), a non-binary employee, or an employee of another gender.

## When Might Sexual Harassment Laws NOT Apply?

There are some circumstances in which harassment law may not prohibit behaviors you are experiencing, even if the behavior is wrong, abusive, or interfering with your ability to do your job. Unfortunately, courts have decided that behavior such as offhand or inadvertent comments only made once or a few times, or other single, isolated incidents, are not enough to be considered illegal under sexual harassment law.

Also, in order for harassment law to apply, an employee must be able to demonstrate that their gender identity or gender expression (or another protected characteristic) is the reason the harassment is happening.

However, even if the harassment you are experiencing is not considered illegal, it remains your employer's job to prevent and stop harassment from occurring in your workplace.

## Should My Employer Protect Me From Workplace Sexual Harassment?

Yes, your employer is obligated to prevent and stop workplace sexual harassment, by implementing steps such as:

- A written policy prohibiting workplace sexual harassment
- A written nondiscrimination policy
- Sexual harassment training for all employees (including supervisors)
- A complaint and investigation process that is fair, confidential, and discourages retaliation
- Treating any reports or evidence of workplace sexual harassment with the utmost seriousness

If you experience harassment by a supervisor that results in a negative employment action that affects your paycheck, such as losing your job, being demoted, losing a promotion, or losing earnings, your employer is automatically liable for the harassment.

If you experience harassment by a coworker or harassment by a customer, client, or third party that your employer can exercise control over, your employer is liable for the harassment if your employer knew (or should have known) about the harassment and failed to act promptly and take appropriate corrective action to stop it.

If you make a report of workplace sexual harassment to your employer, your employer is obligated to investigate your report. Similarly, if you report workplace sexual harassment to a

supervisor, they are obligated to inform their own boss or human resources department so that an investigation can take place.

## **What Can I Do About Workplace Sexual Harassment?**

### **1. Do Not Participate.**

While it can be tempting to fight back, avoid participating in hostile, offensive, or intimidating behavior of anyone at work, even if they are targeting you for harassment. If you harass your harasser, there could be serious consequences for you, including losing your job.

Additionally, harassment is only illegal if it is unwanted. Returning the harassment can be misinterpreted as a sign that you welcomed or consented to the behavior.

### **2. Tell Them to Stop.**

If you are experiencing harassment, it is important to make it clear that the behavior is unwanted and unwelcome. You can do this by talking in person, over the phone, or through an email or instant message. Consider what method you are most comfortable using and what will best ensure your sense of security and safety.

### **3. Write It Down.**

Even if this is the only action that you take, it is a very important one. You may think that you will later remember everything that has happened to you, but memories fade quickly. Keep notes in a dedicated notebook at home that you don't use for anything else (because you might have to share it if you take legal action later).

When you experience an instance of harassing behavior, make a note at home at the end of the day. Include as much information as you can, such as the date, approximate time, names of individuals involved, names of witnesses, and what happened and who said what.

You should also save any items and any copies of documents, like email messages, notes, photos, or drawings, that help show that harassment is happening.

### **4. Make a Report.**

If you are unable to stop the harassment, it may be time to report the behavior to your supervisor or human resources office. If your supervisor is the person harassing you, you may instead report to your supervisor's boss or to human resources.

Check your employee handbook or learn about your employer's policy against discrimination and harassment. That policy should instruct you on how to make a report and it should also explain your employer's complaint and investigation procedures.

An investigation into your complaint should be conducted by your employer as soon as possible and with as much confidentiality as possible. Ask your supervisor or human resources director how they will protect your confidentiality during the investigation process.

They will likely need to share your name with the person you are complaining about, in order to give that person an opportunity to respond to your claims. Other witnesses will likely also be told your name and information about your complaint, for the same reasons. Employees who are not involved should not be informed about your complaint or the investigation.

At the end of the investigation, your employer should inform you about any determination it is making, and about the actions that it will take to stop the harassment. Don't expect your employer to share information with you about any discipline or other consequences for your harasser—that person also has a right to confidentiality about their employment.

**NOTE:** Harassment law requires that employees use employer-provided methods for trying to stop harassment before filing a complaint or a lawsuit. It is in your interest to make a report of the harassment to your employer, if possible. If you do not report the harassment, but later complain to an agency or court, your employer will argue that it could not stop the harassment because it didn't know about it.

## **5. Take Legal Action.**

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Both federal and state law require you to file a charge of discrimination, harassment, or retaliation with a federal or state agency before you may file a lawsuit in court. Depending on the state in which you live, the deadline for filing a charge of discrimination is 180 days (around 6 months) or 300 days (around 10 months) after the last harassing act occurred.

The Equal Employment Opportunity Commission (EEOC) accepts complaints that federal discrimination, harassment, or retaliation laws are being violated. Contact your nearest EEOC field office to learn about deadlines for making a complaint and to learn whether you are protected by any state or local laws: <https://www.eeoc.gov/field/>.

Some forms of harassment, such as physical and sexual assault, are criminal acts in and of themselves. Physical and sexual assaults are always crimes, even when they happen at work. The U.S. Transgender Survey, in 2015, found that of the 15% of trans or non-binary people who experienced sexual harassment, 1% of those were physically attacked and another 1% were sexually assaulted.<sup>2</sup>

Employees who experience assault should consider reporting the crime to local law enforcement as well. Many trans/non-binary people may not feel comfortable or safe working with local law enforcement as a result of the rocky and sometimes violent relationship between police and trans communities and individuals. We know that many trans/non-binary people continue to have negative experiences with police. The U.S. Transgender Survey (2015) also found that 20% of trans and non-binary people reported that they were verbally harassed by police, 4% were attacked physically, and 3% were sexually assaulted.

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<sup>2</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

Trans/non-binary individuals can consider seeking support in working with police from an advocate, trusted friend or coworker, or lawyer (if they have one). Know that, in some states, survivors of sexual assault have a legal right to have an advocate with them at all times when working with the police or going to the hospital for an examination or treatment.

These resources may be useful to those who experience physical or sexual assault in the workplace:

- State laws and victims' rights: <https://apps.rainn.org/policy/>
- FORGE publications for survivors of sexual assault: <https://forge-forward.org/publications-resources/anti-violence-publications/>

## Who Can Help Me?

If you have reported workplace sexual harassment to your employer and it continues, or if you are unable to make a report at work for any reason, consider seeking assistance outside of your workplace. There are a number of sources of support for you:

### 1. FORGE

Advocates at FORGE are able to help you understand your rights, offer advice for dealing with harassment, and provide referrals to trans-knowledgeable attorneys. Contact FORGE at <https://forge-forward.org/about/contact-us/>

### 2. TIME'S's UP Legal Defense Fund™

TIME'S UP™ has a project to assist with sexual harassment, sex discrimination, and more. If they are able to help, they will provide names of attorneys for you to contact. (In some limited cases, they may be able to provide representation in harassment cases free of charge.) Fill out their online intake form at <https://nwlc.org/legal-Assistance>.

### 3. Free or Low-Cost Legal Services

There may be free or low-cost legal services available locally, depending on where you live and your income level. To learn about local legal services, check with your local bar association (association of lawyers): <http://StateBarAssociations.org>.

### 4. Private Attorneys

You may also seek assistance from a private attorney. Be prepared to pay a consultation fee and to discuss your ability to pay for their services over time. Many employment lawyers will work on a contingency-fee basis, meaning that they won't charge you up front, they will work without payment, and they will only get paid if you receive an award of money. Find an attorney by contacting your local bar association (association of lawyers): <http://StateBarAssociations.org>.

## **A Note About Workplace Sex Discrimination Against Trans/Non-Binary Employees**

In addition to gender-related sexual harassment, it is also illegal for an employer to fire, refuse to hire, or discriminate in any way against an employee based on the employee's gender identity or gender expression.

The law protects employees who are (or are perceived to be) trans, non-binary, and/or gender nonconforming. Employers are prohibited from discriminating in recruitment and hiring, work assignments, pay, leave or benefits, promotions, licensing or union membership, training, layoffs and firing, and other employment-related actions.

In order to have legal recourse, you must be able to show that your gender identity or expression was the reason for a negative employment action (typically an action that negatively affects your pay). The best way to show that you are experiencing sex discrimination because of your gender identity or expression is to observe other coworkers who are in similar positions with similar credentials and responsibilities, but who are not trans/non-binary. Are they treated differently than you are? Are they receiving better treatment, without a reasonable explanation? If non-trans employees are experiencing different treatment, it could be a sign that illegal discrimination is occurring.

To get help with possible employment discrimination, see "Who Can Help Me?" above.

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