



A Look at the Proposed Addition of Sexual Harassment Regulations to the Minimum Standards Governing Nevada Gaming Licensees:

Any Questions?

By Maren Parry

How Can Gaming Laws Regulate Sexual Harassment?

The Nevada Gaming Control Act (“Act”) found in NRS Chapter 463 empowers the Nevada Gaming Commission (“Commission”), with the advice and assistance of the Nevada Gaming Control Board¹ (“Board”), to adopt, amend or repeal regulations consistent with the policy, objects and purposes of the Act “as it may deem necessary or desirable in the public interest”² The Gaming Control Act enumerates certain topics for which the Commission is required to adopt regulations, but the Board and Commission also have the discretion to seek to implement regulations that their members deem appropriate for carrying out the policy objectives and purposes of the laws governing gaming in the State of Nevada. Through these laws and regulations, the Board holds significant power to investigate conduct it deems unsuitable for applicants or licensees,³ and the Commission has absolute power to limit, revoke or suspend a license for any cause it deems reasonable.⁴

Specifically, Regulation 5 covers the “Operation of Gaming Establishments” and includes direction on what conduct constitutes unsuitable methods of operation and the grounds for the initiation of disciplinary action. Its introductory provision sets forth an overarching policy to require that all gaming establishments be operated “in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada,” and warns that willful or persistent use or toleration of unsuitable methods of operation constitute grounds for license revocation or disciplinary action.⁵ Grounds for disciplinary action are further explained in Regulation 5.011 and include (but are not limited to) broad topics such as “[f]ailure to conduct gaming operations in accordance with proper standards of custom, decorum and decency, or permit any type of conduct in the gaming establishment which reflects or tends to reflect on the repute of the State of Nevada and act as a detriment to the gaming industry” and failure to comply with or make provision for compliance with all federal, state and local laws and regulations, as well as more specific admonitions regarding gaming by those who are intoxicated, decency in advertising, association with unsavory individuals or institutions, and cheating.⁶

On March 1, 2018, the newly-appointed Chairwoman of the Board issued a Notice to Licensees,⁷ which identified sexual harassment as one of the most frequent complaints raised in the workplace and attached a checklist that included elements that may be considered as part of the development of minimum internal control standards to ensure that licensees have policies in place to prevent sexual harassment in a licensee's business operations.⁸ The March 1st notice was followed by another announcing that on May 3, 2018, the Board would hold a workshop "to receive public input on proposed amendments to Nevada Gaming Commission Regulation 5 regarding, without limitation, sexual harassment prevention and workplace response."⁹



With this broad power and authority under existing law, why do we need sexual harassment to be addressed specifically in Regulation 5?

Through its announcement of an investigation in response to allegations of sexual misconduct by Steve Wynn¹⁰ and the Board's circulation of the checklist, it can be argued that the Board has already made its statement to the industry that sexual harassment will be investigated as an unsuitable method of operation subject to enforcement action under existing regulations. The addition of sexual harassment guidelines as an enumerated item within the regulations would serve to make this statement more substantial and specific, as well as cementing sexual harassment prevention as a minimum internal control standard subject to the Board's periodic review and evaluation. If adopted, the failure to comply with the guidelines found in the proposed regulations would constitute "an unsuitable method of operation and provide grounds for disciplinary action."¹¹

What exactly do the proposed changes seek to add to the existing regulations?

The public notices from the Board state that the proposed revisions intend to add the requirement that licensees implement comprehensive written plans to address the prevention of sexual harassment in their workplaces and appropriate responses to complaints.¹² Under the proposal, the amended regulation would require the plan to include,

among other things: "an unequivocal statement that sexual harassment will not be tolerated . . . ;" demonstration of the organization's commitment to diversity, inclusion and respect; descriptions of prohibited conduct (with examples); submission of reports of sexual harassment to the licensee's compliance committee (if one exists); and identification of persons within the organization to whom reports should be submitted (with alternatives).¹³

The plan would be required to provide that complaints and information gathered as part of an investigation are to be kept confidential to the fullest extent possible (including identities), that licensees are to take immediate and proportionate corrective action in response to complaints, prohibit retaliation in response to complaints, and protect individuals who submit complaints or provide information related to a complaint as a witness.¹⁴ In addition to the reporting policies, the plan would be required to address mandatory sexual harassment prevention training for employees, an annual review and assessment of the policies to ensure effectiveness, a plan to remedy deficiencies and repeated problems, including an annual survey asking employees to report whether they are victims of harassment or are aware of harassment taking place.¹⁵



What was the reaction to the proposal? Can anyone really be against the concept of adding additional protections against sexual harassment?

Although the proposal to change the regulations to add protections related to sexual harassment received significant media attention, the May 3rd workshop was fairly short.¹⁶ Representatives of a number of licensees were in attendance, but few chose to speak. Culinary Union members reported episodes of harassment from both employers and patrons to the Board members, especially noting their experiences in seeking redress through their employers when the perpetrator was a "high roller" with elevated expectations for how such a patron was to be treated by the licensee.

Most who elected to comment gave general support for the concept, but asked that the Board consider the practical aspects of some of the proposals in relationship to existing

laws, or the burden that it could possibly place on smaller licensees without a defined human resources department. The exception was attorney Jen Sarafina of the Kamer Zucker Abbott law firm, who indicated that her firm (although not retained by a specific licensee to comment at the workshop) opposed the adoption of sexual harassment regulations as an interested firm that regularly represents licensees in an employment law context. Ms. Sarafina questioned the project and called the discussion “a knee-jerk response to media coverage of allegations that have not been tested or proven by any court or agency.”¹⁷ She cited existing regulation at the federal level by the U.S. Equal Employment Opportunity Commission, and state regulation by the Nevada Equal Rights Commission, both of which already have regulations in place to combat sexual harassment in the workplace.¹⁸

Where does it go from here?

Laws already exist to address sexual harassment and there is an entire industry dedicated to producing training materials to disseminate company-specific policies to employees and to confirm rapt attention through employer-tracked follow-up quizzes. Is there something special about the gaming industry that warrants an additional level of regulation beyond what is already found in state and federal law? Is the additional layer of regulation necessary in the industry because “What happens here stays here,” and because entertainment experiences are designed with a focus on throwing caution to the wind and exploring something normally considered out of the question? The answer is not yet clear, but the conversation has begun and continues to develop. At the time of publication of the 2018 edition of the *Nevada Gaming Lawyer*, the Board had not yet voted to send a proposed set of sexual harassment regulations to the Commission for possible adoption, and there is no guarantee that the Commission will vote to adopt changes to existing Regulation 5 if amendments are sent to the Commission for a vote. These efforts are easy to brush off as a convenient response to the #metoo movement by the first female Chair of the Board, but perhaps the real question should be, “So what if it is?”



Nevada has led the world in developing a regulatory structure that has allowed gaming not only to prosper within its borders, but to expand across the globe as well. Nevada continues in this leadership role by validating the importance of preventing sexual harassment in the gaming workplace and reiterating the role of positive company leadership and of legitimate adherence to policies to protect workers. The effort gives the industry the opportunity to give additional attention to current policies designed to prevent sexual harassment with a very clear window into the expectations of the current

Chairwoman on how those policies should be written, maintained and enforced. Adopted or not, the proposal to add sexual harassment provisions to Regulation 5 has sent the message to licensees that the gaming industry is not exempt from the impact of the #metoo movement and that the industry’s unique nature does not change the right of every employee to be treated with respect.



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- ¹ Nev. Rev. Stat. 463.145(1), (3).
- ² Nev. Rev. Stat. 463.150.
- ³ Nev. Rev. Stat. 463.1405(1) states, in relevant part, “[t]he Board shall investigate the qualifications of each applicant . . . , and shall continue to observe the conduct of all licensees . . . to ensure that licenses are not issued or held by, nor is there any material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified, disqualified or unsuitable persons, or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations.”
- ⁴ NRS 463.1405(4) states that “[t]he Commission has full and absolute power and authority to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or fine any person licensed, registered, found suitable or approved, for any cause deemed reasonable by the Commission.”
- ⁵ Nev. Gaming Comm’n Reg. 5.010.
- ⁶ *Id.* 5.011.
- ⁷ See Nevada Gaming Control Board Industry Notice 2018-11 (March 1, 2018), “Verification of Policies, Procedures and Training Related to Sexual Harassment in the Workplace – Minimum Standards.” (<https://gaming.nv.gov/Modules/ShowDocument.aspx?documentid=12958>).
- ⁸ <https://gaming.nv.gov/modules/showdocument.aspx?documentid=12961>.
- ⁹ See Nevada Gaming Control Board Industry Notice #2018-35, “2018-03R (April 30, 2018): Notice and Agenda of Public Regulation Workshop of the Nevada Gaming Control Board to Solicit Comments for Possible Amendments to Nevada Gaming Commission Regulation 5 Regarding, without Limitation, Sexual Harassment Prevention and Workplace Response.” (<https://gaming.nv.gov/Modules/ShowDocument.aspx?documentid=13152>)
- ¹⁰ <https://www.reviewjournal.com/business/casinos-gaming/steve-wynn-to-be-investigated-by-gaming-control-board/>.
- ¹¹ Proposed Amendments to Nev. Gaming Comm’n Reg.5, Requirements Regarding Implementation of Sexual Harassment Policy by Licensees (draft date, April 2, 2018). (<https://gaming.nv.gov/modules/showdocument.aspx?documentid=13154>).
- ¹² See Nevada Gaming Control Board Industry Notice # 2018-43 2018-03R (May 31, 2018): “Notice and Agenda of Public Regulation Workshop of the Nevada Gaming Control Board to Solicit Comments for Possible Amendments to Nev. Gaming Comm’n Reg. 5 Regarding, Without Limitation, Sexual Harassment Prevention and Workplace Response” (<https://gaming.nv.gov/Modules/ShowDocument.aspx?documentid=13273>); see also proposed Nev. Gaming Comm’n Reg. 5.250(4).
- ¹³ Proposed Nev. Gaming Comm’n Reg. 5.250(2)(a)-(d).
- ¹⁴ *Id.* 5.250(2)(e)-(i).
- ¹⁵ *Id.* 5.250(2)(j)-(n).
- ¹⁶ <https://www.reviewjournal.com/business/business-columns/inside-gaming/sexual-harassment-regulation-uncertain-for-nevada-gaming-industry/>.
- ¹⁷ <https://www.kzalaw.com/Knowledge-Center/Employer-Reports/KZA-Weighs-In-On-Gaming-Control-Boards-Proposed-Regulation-Regarding-Sexual-Harassment.shtml>.
- ¹⁸ *Id.*