

# Sexual Misconduct Definitions

## Dating Violence

Under the Violence Against Women Act (2014), Dating Violence is defined as:

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

(1) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) For the purpose of this definition--

(i) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

(ii) Dating violence does not include acts covered under the definition of domestic violence.

## Domestic Violence

As used in the Family Violence Protection Act:

D. "domestic abuse":

(1) means an incident of stalking or sexual assault whether committed by a household member or not;

(2) means an incident by a household member against another household member consisting of or resulting in:

(a) physical harm;

(b) severe emotional distress;

(c) bodily injury or assault;

(d) a threat causing imminent fear of bodily injury by any household member;

(e) criminal trespass;

(f) criminal damage to property;

(g) repeatedly driving by a residence or work place;

(h) telephone harassment;

(i) harassment; or

(j) harm or threatened harm to children as set forth in this paragraph; and

(3) does not mean the use of force in self-defense or the defense of another;

## Sexual Harassment

Sexual harassment includes, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

## Stalking

A. Stalking consists of knowingly pursuing a pattern of conduct, without lawful authority, directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual.

B. As used in this section:

(1) "lawful authority" means within the scope of lawful employment or constitutionally protected activity; and

(2) "pattern of conduct" means two or more acts, on more than one occasion, in which the alleged stalker by any action, method, device or means, directly, indirectly or through third parties, follows, monitors, surveils, threatens or communicates to or about a person.

C. Whoever commits stalking is guilty of a misdemeanor. Upon a second or subsequent conviction, the offender is guilty of a fourth degree felony.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted of stalking to participate in and complete a program of professional counseling at the person's own expense or a domestic violence offender treatment or intervention program.

## Sexual Assault

### Criminal Sexual Penetration

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Aggravated criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under thirteen years of age with an intent to kill or with a depraved mind regardless of human life. Whoever commits aggravated criminal sexual penetration is guilty of a first degree felony for aggravated criminal sexual penetration.

D. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:

(1) on a child under thirteen years of age; or

(2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

E. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

- (1) by the use of force or coercion on a child thirteen to eighteen years of age;
- (2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;
- (3) by the use of force or coercion that results in personal injury to the victim;
- (4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;
- (5) in the commission of any other felony; or
- (6) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of the Criminal Sentencing Act [31-18-12 NMSA 1978].

F. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion not otherwise specified in this section.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

G. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

- (1) not defined in Subsections D through F of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or
- (2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

### Criminal Sexual Contact

A. Criminal sexual contact is the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts.

B. Criminal sexual contact does not include touching by a psychotherapist on his patient that is:

- (1) inadvertent;
  - (2) casual social contact not intended to be sexual in nature; or
  - (3) generally recognized by mental health professionals as being a legitimate element of psychotherapy.
- C. Criminal sexual contact in the fourth degree consists of all criminal sexual contact perpetrated:
- (1) by the use of force or coercion that results in personal injury to the victim;
  - (2) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons; or
  - (3) when the perpetrator is armed with a deadly weapon.
- Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.
- D. Criminal sexual contact is a misdemeanor when perpetrated with the use of force or coercion.
- E. For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

## Consent

Consent is an affirmative informed decision to willingly engage in mutually agreed upon sexual activity. Consent requires a clear affirmative act or statement by each participant to each sexual act in a sexual interaction. Relying solely on non-verbal communication can lead to miscommunications about one's intent. Confusion or ambiguity may arise at any time during a sexual interaction. Therefore, it is essential that each participant makes clear his or her willingness to continue at each progression of the sexual interaction.

Consent may not be inferred from silence, passivity or lack of active response alone. A person who is asleep, unconscious or otherwise unaware of what is happening is unable to give consent. Furthermore, a current or past dating or sexual relationship is not sufficient to constitute consent in every instance, and consent to one form of sexual activity does not imply consent to other forms of sexual activity. It is the responsibility of the person initiating the sexual activity to obtain consent from their partner. Being intoxicated or under the influence of other drugs does not diminish one's responsibility to obtain consent.

Sexual activity will be considered "without consent" if no clear act or statement is given. In some situations, an individual's ability to freely consent is taken away by another person or circumstance. Examples include, but are not limited to, when an individual is incapacitated, scared, physically forced, intimidated, coerced, mentally or physically impaired, passed out, threatened, isolated or confined.

The use of alcohol or drugs can limit or prevent a person's ability to freely and clearly give consent. If a person is under the influence of alcohol or drugs such that they do not understand the fact, nature or extent of the sexual situation, there is no consent. If the person initiating the sexual activity is also under the influence of alcohol or other drugs, that does not diminish their responsibility to obtain consent, and is not a defense to charges of violation of this policy. Because it may be difficult to discern whether one's sexual partner is incapacitated, people are strongly encouraged to err on the side of

caution; e.g. when in doubt, if you and/or your partner have consumed alcohol and/or other drugs, assume that the other person is under the influence and therefore unable to give consent to sexual activity.

In addition to alcohol or other drugs, if a person's mental, physical or psychological disability (temporary or permanent) impairs his or her ability to make an informed decision to willingly engage in sexual activity, there is no consent.

In New Mexico, the age of consent is 17 years old. If an adult (an individual over the age of 18) has sex with a minor between the ages of 13 and 16, the adult may be prosecuted for 4th degree criminal sexual penetration.