

DuaneMorris®

www.duanemorris.com

Eliminating Sexual and Other Harassment

prepared for

National Conference of State Legislatures



presented by

Jonathan A. Segal, Esq.

Marc Scheiner, Esq.

©2018 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.

Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi | Ho Chi Minh City | Shanghai | Atlanta | Baltimore
Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka | Duane Morris LLP – A Delaware limited liability partnership

Part I:
**Importance of Creating Culture Free of
Harassing Behaviors**

Importance of Creating A Culture Free of Harassing Behaviors

1. Prevent harm to all individual(s)
2. Institutional credibility
3. Individual reputations
4. Productivity
5. Legal liability and legal fees

Part II:
**12 Ways to Strengthen
Your Harassment Policy**

12 Ways to Strengthen Your Anti-Harassment Policy

1. Need a policy specific to sexual (and other forms of) harassment

12 Ways to Strengthen Your Anti-Harassment Policy

2. Avoid legal definitions in your policy: “sexual harassment is....”

12 Ways to Strengthen Your Anti-Harassment Policy

3. Focus on inappropriateness, not illegality (“unacceptable, even if not unlawful in and of itself”)

12 Ways to Strengthen Your Anti-Harassment Policy

4. Provide plain speak examples that will resonate in your workforce

12 Ways to Strengthen Your Anti-Harassment Policy

5. Make clear broad scope of policy's application (discussed in detail later)

12 Ways to Strengthen Your Anti-Harassment Policy

6. Provide multiple options for individuals to raise concerns about harassing conduct

12 Ways to Strengthen Your Anti-Harassment Policy

7. Consider offering 3rd party reporting vehicle by which individuals may elect to provide anonymous complaints

12 Ways to Strengthen Your Anti-Harassment Policy

8. Include robust retaliation provision

12. Ways to Strengthen Your Anti-Harassment Policy

9. Maintain as confidential as possible the identity of complainant, witnesses and target to the extent consistent with prompt, thorough and impartial investigation

12 Ways to Strengthen Your Anti-Harassment Policy

10. Implement corrective action (prompt and proportionate and designed to prevent further unacceptable conduct) if there is unlawful or unacceptable conduct, even if not unlawful

12 Ways to Strengthen Your Anti-Harassment Policy

11. Consider requiring a disclosure provision if someone has an intimate relationship with someone over whom he or she has direct or indirect supervisory or institutional power

12 Ways to Strengthen Your Anti-Harassment Policy

12. Tie your policy to your culture

Part III

Unacceptable Conduct

A. Legal Background

1. Two types of unlawful harassment
 - a. Tangible employment action (e.g., Quid Pro Quo)
 - b. Hostile work environment based on any “protected group”

A. Legal Background

2. Examples (only) of protected groups:

- a. Age
- b. Disability (physical or mental)
- c. Gender identity
- d. National origin
- e. Race/color
- f. Religion
- g. Sex/pregnancy
- h. Sexual orientation

- B. Examples of Unacceptable Conduct
(Even if Not Unlawful In and Of Itself)
1. Sexual assault (or attempting same)
 2. Denying a subordinate any term, condition or benefit of employment because of his or her refusal to submit to sexual advances of a supervisor (or someone else)
 3. Conditioning any term, condition or benefit of employment on an employee's submission to sexual advances

- B. Examples of Unacceptable Conduct
(Even if Not Unlawful In and Of Itself)
4. Asking for sex and other sexual advances or propositions, even if no demand or threat
 5. Engaging in any form of sexual activity (including exposing oneself or simulating sexual activity)
 6. Repeated request for “dates,” after individual has declined prior request

- B. Examples of Unacceptable Conduct
(Even if Not Unlawful In and Of Itself)
7. Racist, sexist or other hate-based graffiti
 8. Hate symbols that relate to any protected group, such as a noose or a swastika
 9. Hate slurs/epithets that relate to any protected group, such as the “N” word and the “C” word

Poll 1

A sexually-suggestive conversation at work is okay, so long as (i) between friends, (ii) both are fine with it and (iii) no one overhears it.

- A. True
- B. False

B. Examples of Unacceptable Conduct (Even if Not Unlawful In and Of Itself)

10. Sexually explicit or suggestive conversations, comments, questions, stories, etc. (whether mixed gender or same gender)

Poll 2

Telling a co-worker that he or she looks “attractive” is sexually harassing.

- A. True
- B. False

B. Examples of Unacceptable Conduct (Even if Not Unlawful In and Of Itself)

11. Comments with regard to appearance of a sexual or suggestive nature or at unacceptable times or frequency
12. Unwelcome and/or unacceptable touch, such as:
 - Pinching, massaging, rubbing or brushing against someone;
 - Blocking someone's freedom of movement; or
 - Excessive, inappropriate or unwelcome kisses and hugs

Poll 3

You can joke with a colleague about gender, race or religion but only if you are of the same gender, race or religion.

- A. True
- B. False

B. Examples of Unacceptable Conduct (Even if Not Unlawful In and Of Itself)

13. Sexual, suggestive or gender-biased “jokes”
14. Racial, ethnic, pregnancy or religious “jokes” or “jokes” that make fun of, belittle or stereotype any other protected group
15. Mimicking or making fun of someone’s accent or disability

B. Examples of Unacceptable Conduct (Even if Not Unlawful In and Of Itself)

16. Sexual or suggestive materials, cartoons, objects, e-mails etc., including calendars and other pin-ups
17. So called “terms of endearment,” such as “sweetheart,” “babe,” etc.
18. Verbal or non-verbal innuendo of a sexual or suggestive nature, such as leers, catcalls, whistles, etc.

B. Examples of Unacceptable Conduct (Even if Not Unlawful In and Of Itself)

With regard to the examples of unacceptable conduct:

1. The fact that the parties engaging in the unacceptable conduct are “fine” with it is not a defense to the unacceptable conduct
2. Alcohol is a high “risk factor” and it, too, is not a defense to unacceptable conduct
3. Nothing is intended to limit the constitutional rights of employees to speak out on matters of public concern

Poll 4

On a business trip, women and men should stay in separate hotels to avoid any potential risks of sexual harassment.

- A. True
- B. False

C. Broad Scope of Prohibitions

1. Not just “physical” workplaces but also professional meetings, business trips and social events
2. Social media, e-mail, texts, etc.
3. Non-employees, such as lobbyists, constituents, contractors, etc.

D. Unacceptable versus Illegal

1. Conduct does not need to violate the law to violate your legislature's policy.
2. In some cases, conduct in and of itself will violate the law, such as examples 1, 2 and 3 in section B.
3. Not all conduct that may offend someone violates this policy or the law

Part IV: Responsibilities of Those With Power

A. Who Has Power?

1. Not based on title; need to look to direct or indirect
 - a. Supervisory authority
 - b. Influence
2. Examples Only
 - a. Legislator/member
 - b. Chief of Staff
 - c. Office Manager
 - d. Division Director
 - e. Staff Director
 - f. Caucus Director

B. Responsibilities

1. Refrain from unlawful harassment and other unacceptable conduct of the nature described before, even if not unlawful in and of itself

B. Responsibilities

2. Report to your organization's point person--or person who has HR authority--all complaints of unlawful harassment or other unacceptable conduct of the nature described before, even if the employee/3rd party asks you not to report it and/or to keep it confidential

B. Responsibilities

3. Respond proactively “in the moment” to unlawful harassment or unacceptable conduct of the nature described before that you see or hear, even in the absence of a complaint; then, report to your organization’s point person or person who has HR authority

B. Responsibilities

4. Remedy unlawful and other unacceptable conduct of the nature described before (even if not unlawful); work with your organization's point person or person who has HR authority with regard to corrective action

B. Responsibilities

5. Refrain from unlawful retaliation

a. Prohibition applies to

- i. Complainants
- ii. Witnesses
- iii. Others who participate in the investigatory process
- iv. Others who are associated with complainant (e.g., spouse)

B. Responsibilities

5. Refrain from unlawful retaliation (continued)

b. Prohibited retaliation includes:

- i. Tangible employment actions
- ii. Other material terms and conditions of employment, such as assignments
- iii. Retaliatory harassment (ostracism)
- iv. Retaliation independent of the workplace

B. Responsibilities

5. Refrain from unlawful retaliation (continued)

- c. Important: fact that complaint lacks legal merit is not a defense to unlawful retaliation

Poll 5

Before raising any official concerns about harassing behavior, you should talk with the person who offended you first; it may not have been his or her intent to make you uncomfortable.

- A. True
- B. False

Part V: Raising Concerns

Raising Concerns

- A. We strongly encourage you to use your organization's complaint procedure if you have any concerns
- B. You can raise a concern if you have experienced, witnessed or otherwise become aware of harassing or other unacceptable conduct (bystander)
- C. Not sure with whom to raise concerns? Check with someone with HR authority.
- D. Every complaint must be investigated promptly, thoroughly and impartially

Raising Concerns

- E. Confidentiality must be maintained to the maximum extent possible (disclose only on need to know basis to investigate and/or to take corrective action)
- F. No legislative body should engage in or tolerate retaliation of any kind by anyone
- G. Appropriate corrective/disciplinary action—prompt and proportionate—must be taken not only if there is unlawful behavior but also if there is harassing behavior that is harmful, even if not bad enough to be unlawful.

Duane Morris®

www.duanemorris.com



Thank you!

©2018 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.

Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Shanghai | Boston | Houston | Los Angeles | Hanoi | Ho Chi Minh City | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka | Duane Morris LLP – A Delaware limited liability partnership