Harassment and Hostile Workplace: What HR Directors Need to Know*

prepared for

presented by

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PREVENTION
POLICY

1. Non-discrimination pledge is insufficient
POLICY

2. Need a policy (or policies) specific to harassment:
   a. Scope
      i. Sexual harassment
      ii. Other kinds of unlawful harassment (race, ethnicity, age, disability, etc.)
         - Define broadly
         - Include “catch all”
POLICY

2. Need a policy (or policies) specific to harassment:  (continued)

b. Options
   i. One policy
   ii. Two linked policies
POLICY

3. Include practical examples (focusing on inappropriateness and not illegality), such as:
   a. Linking any employment decision, benefit, etc. to a subordinate colleague’s submission or refusal to submit to sexual advances [Always illegal]
   b. Asking for sex and other sexual advances or propositions (even if no demand or threat)
   c. Sexually explicit or suggestive conversations, comments, questions, stories, etc. (whether mixed gender or same gender)
POLICY

3. Include practical examples (focusing on inappropriateness and not illegality), such as (continued)
d. Comments with regard to appearance of a sexual or suggestive nature or at inappropriate times or frequency
e. Racial, ethnic or religious “jokes” or “jokes” which make fun of, belittle or stereotype any other protected group
f. Terms of “endearment”
g. Hate symbols, such as a noose or a swastika
3. Include practical examples (focusing on inappropriateness and not illegality), such as (continued)
   h. Verbal or non-verbal innuendo
   i. Hostility because of protected group status
   j. Micro-aggressions, such as “you don’t sound black”
POLICY

4. Make clear policy’s application to:
   a. Electronic communications, include e-mail, text messages, social media, etc.
   b. Off-duty but work-related events
   c. Non-employees
      i. Cannot let employees harass them
      ii. Cannot let them harass employees
COMPLAINT PROCEDURE

1. Make explicit complaint procedure is available to employees to use to raise concerns about:
   a. All kinds of unlawful harassment (discrimination and retaliation, too)
   b. Conduct by employees and non-employees alike
COMPLAINT PROCEDURE

2. Points of contact
   a. Supervisory by-pass provision (minimum requirement)
   b. Multiple points of access (recommended)
      i. EEO diversity
      ii. Operational diversity
      iii. Geographic diversity
COMPLAINT PROCEDURE

3. Non-retaliation statement
   a. Coverage
      i. Complainants
      ii. Witnesses
      iii. Others participating in the investigatory process
      iv. Individuals associated with the complainant
COMPLAINT PROCEDURE

3. Non-retaliation statement (continued)
   b. Prohibited Acts (if retaliatory motive)
      i. Tangible employment actions
      ii. Material changes to terms and conditions of employment
      iii. Retaliation independent of the workplace
COMPLAINT PROCEDURE

4. Confidentiality
   a. Important but not absolute
   b. Need to know exception
COMPLAINT PROCEDURE

5. Corrective actions

a. Make clear applies to not only unlawful but also inappropriate conduct, even if not unlawful

b. Include reference to discipline, up to and including termination of the employment or other relationship
COMPLAINT PROCEDURE

6. Appeals procedure
   a. How: limited “written” requirement
   b. Provide limited wording necessary (if require writing on appeal)
   c. To whom? Senior official or outsider designated by employer
COMPLAINT PROCEDURE

7. Disseminate (along with policy) to:
   a. All employees
   b. New hires
SUPERVISORY RESPONSIBILITIES

1. Refrain from
   a. Unlawful harassment*
   b. Other inappropriate conduct of nature described above, even if not unlawful

*Although this session focuses on harassment, these responsibilities generally apply equally to unlawful discrimination and retaliation.
SUPERVISORY RESPONSIBILITIES

2. Report to HR all complaints of unlawful harassment or other inappropriate conduct of nature described above, even if employee:
   a. Requests that nothing be done
   b. Asks for absolute confidentiality
   c. Does not use legal buzz words

Note: Do not investigate on own.
SUPERVISORY RESPONSIBILITIES

3. Respond proactively to possible unlawful harassment or other inappropriate conduct of nature described above, even in the absence of a complaint
   a. Silence equals tacit support
   b. Consult with HR to discuss remedial action
SUPERVISORY RESPONSIBILITIES

4. Remedy unlawful harassment and other inappropriate conduct of nature described above (even if not unlawful)
   a. Consult with HR
   b. Focus on inappropriateness, not illegality
SUPERVISORY RESPONSIBILITIES

5. Refrain from unlawful retaliation
   a. Applies to:
      i. Complainants
      ii. Witnesses
      iii. Others who participate in the investigatory process
      iv. Others who are associated with the complainant (e.g., spouse)
SUPERVISORY RESPONSIBILITIES

5. Refrain from unlawful retaliation (continued)
   b. Covers not only tangible employment actions but also
      i. Other material terms and conditions of employment
      ii. Retaliation independent of the workplace
SUPERVISORY RESPONSIBILITIES

5. Refrain from unlawful retaliation (continued)
   c. Fact that complaint lacks legal merit is almost never a defense to unlawful retaliation
DATING GUIDELINES

1. Risks in a supervisor dating a “subordinate” in today’s legal climate:
   a. Legal
   b. Employee relations
DATING GUIDELINES

2. Approaches to risk:
   a. Dissuade in training
   b. Require report by supervisor to Human Resources
   c. Prohibit
DATING GUIDELINES

3. If require a report and/or prohibit:
   a. Focus on employment relationship rather than intimate relationship
   b. Apply to all intimate associations, regardless of marital, civil union or domestic partner status
   c. Enforce consistently
EMPLOYEE EDUCATION

1. Focus on:
   a. Right to be free from inappropriate/offensive behavior
   b. Responsibility to speak up if uncomfortable/offended
EMPLOYEE EDUCATION

2. With regard to inappropriate behaviors:
   a. Define broadly
   b. Focus on inappropriateness, not illegality
EMPLOYEE EDUCATION

3. With regard to responding to inappropriate behaviors:
   a. Direct confrontation
      i. Offer strategies
      ii. But make clear direct confrontation is an option, not a requirement
EMPLOYEE EMPOWERMENT VEHICLES

1. Complaint procedure
2. Annual policy reminder
3. Appraisal instrument
4. Exit interview
CROSS-REFERENCES

1. Code of conduct/disciplinary policy
2. Performance appraisal instrument
3. E-mail and Internet policies
4. Social Media policy
5. Travel and reimbursement policies
6. Investigation Guidelines