


Harassment: Prevention and Correction
presented by
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Legal Background

1. Two types of unlawful harassment
 - a. Quid pro quo
 - b. Hostile work environment on account of any protected group

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Legal Background

2. Examples of “protected groups” under federal, state and/or local law

- Age
- Citizenship
- Disability/handicap (physical or emotional)
- Gender Identity or Expression
- Genetic Information
- Marital Status
- National Origin/Ancestry
- Pregnancy
- “Protected” Complaints
- “Protected” Leave
- Race/Color
- Religion/Creed
- Sex
- Sexual Orientation
- Veteran’s Status/Military Status

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Importance of a Workplace Free of Unlawful Harassment

1. Legal liability

- a. Economic damages
- b. Pain and suffering
- c. Punitive damages
- d. Personal liability

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Importance of a Workplace Free of Unlawful Harassment

2. Legal fees
3. Fairness
4. Employee relations
5. Productivity
6. Public relations
7. Client relations
8. Values

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Federal and State EEO Statutes

1. Title VII of the Civil Rights Act of 1964
2. Americans with Disabilities Act
3. Age Discrimination in Employment Act
4. Missouri Human Relations Act
5. Other state/local Fair Employment Practices laws

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Examples of Unacceptable Conduct (even if not unlawful)

1. Linking any employment decision, benefit, etc. to a subordinate's submission or refusal to submit to sexual advances [Always illegal]
2. Asking for sex and other sexual advances or propositions (even if no demand or threat)
3. Sexual flirtations, bantering, etc.

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Examples of Unacceptable Conduct (even if not unlawful)

4. Engaging in sex while at work
5. Repeated request for dates

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Examples of Unacceptable Conduct (even if not unlawful)

6. Sexually explicit or suggestive conversations, comments, questions, stories, etc. (whether mixed gender or same gender)
 - a. Personal desires/experiences
 - b. Questions of/about others
 - c. Business expressions which contain sexual innuendo/metaphors
 - d. Repeating sexual content found in pop culture

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Examples of Unacceptable Conduct (even if not unlawful)

7. Questions or comments of an inappropriate nature about an employee's actual or perceived sexual orientation
8. Comments with regard to appearance of a sexual or suggestive nature or at inappropriate times or frequency
9. Sexual or physical assault [Always illegal]

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Examples of Unacceptable Conduct (even if not unlawful)

10. Unwelcome and/or inappropriate touching, such as patting, pinching or brushing against someone
11. Sexual or suggestive “jokes”
12. Racial, ethnic or religious “jokes” or “jokes” that make fun of, belittle or stereotype any other protected group

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Examples of Unacceptable Conduct (even if not unlawful)

13. Mimicking or making fun of someone’s accent, disability, diction, gestures, manner of speech or religious, racial or ethnic attire or dress
14. “Joking” about or making fun of historical tragedies (e.g., slavery) or violent crimes (e.g., rape)
15. Obscene, sexual or suggestive materials, cartoons, objects, etc., including calendars and other pin-ups

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Examples of Unacceptable Conduct (even if not unlawful)

16. Racist, sexist or other hate-based graffiti
17. Hate symbols, such as a noose, a swastika and a KKK symbol
18. Hate slurs/epithets that relate to any protected group, such as the “N” word and the “C” word

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Examples of Unacceptable Conduct (even if not unlawful)

19. Nicknames that relate to any protected group, such as “Grandpa” and “Token”
20. Stereotypic comments, such as “they all are...” or “you don’t sound...”
21. Derogatory/unwelcoming messages (e.g., “Speak English or Go Home” sticker)

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Examples of Unacceptable Conduct (even if not unlawful)

22. Cursing and other foul language
23. Verbal or non-verbal innuendo of a sexual, suggestive or threatening nature
24. Hostile behavior targeted at employee because of his or her membership in any protected group

Prohibitions Apply To:

1. Off-site work, social and other events
2. Organization-sponsored events
3. Written, oral, electronic and all other forms of communication
4. Vendors and other non-employees

Non-Defenses to Unacceptable Conduct

1. There was no intent to make anyone uncomfortable
2. The conduct was not directed at the complainant or any particular individual
3. It was only a “joke”
4. The conduct occurred off duty
5. The conduct occurred off premises

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Non-Defenses to Unacceptable Conduct

6. The party engaging in the inappropriate conduct is not our employee (e.g., vendor)
7. The party who is uncomfortable is not our employee (e.g., client)
8. We are peers
9. We are of the same gender, race, etc.

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Non-Defenses to Unacceptable Conduct

10. The employee never specifically complained about the conduct, comments or behavior
11. The employee has participated in the conduct, comments or behavior
12. The employee initiated the conduct, comments or behavior

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Non-Defenses to Unacceptable Conduct

13. The employee invited the behavior by virtue of his or her conduct or attire
14. There was no physical touching
15. I abuse everyone
16. That's how she/he is
17. I am a very important person
18. The unacceptable conduct is not unlawful

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Non-Defenses to the Failure of a Supervisor to Take Corrective Action

1. Any of the “non-defenses” to unacceptable conduct
2. I don’t like conflict
3. If I ignore it, it will stop
4. Other supervisors tolerate the same kind of behavior

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Non-Defenses to the Failure of a Supervisor to Take Corrective Action

5. I am not sure what to do
6. I don’t have time to address it
7. I want to be liked/fit in
8. I am not sure when to intervene
9. The person engaging in the unacceptable conduct will become defensive or hostile

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What If You Realize that You Said or Did Something that You Should Not Have?

1. Don't:
 - a. Ask if anyone is offended
 - b. Apologize only to the person you think is most likely to be offended
2. Do:
 - a. Indicate that it was not your intent to offend
 - b. Apologize to all for the effect
 - c. Consult with Human Resources

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Supervisory Responsibilities

1. Refrain from
 - a. Unlawful discrimination, harassment and retaliation
 - b. Other unacceptable conduct, even if not unlawful

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Supervisory Responsibilities

2. Report all complaints of unlawful discrimination, harassment or retaliation or other unacceptable conduct to Human Resources/Administrator, even if employee:
 - a. Requests that nothing be done
 - b. Asks for absolute confidentiality
 - c. Does not use “legal buzz words”
 - d. Is speaking with you as a friend
 - e. Concerns appear minor

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Supervisory Responsibilities

3. Respond proactively to possible unlawful discrimination, harassment or retaliation or other unacceptable conduct, even in the absence of a complaint
 - a. Silence equals tacit support
 - b. Consult with Human Resources/Administrator to discuss corrective action

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Supervisory Responsibilities

4. Remedy unlawful discrimination, harassment and retaliation and other unacceptable conduct (even if not unlawful)
 - a. Consult with Human Resources/Administrator to determine what corrective action is appropriate under circumstances
 - b. Correction action may include discipline up to and including discharge
 - c. Focus on inappropriateness not illegality (conduct does not have to be unlawful to result in corrective action)

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Supervisory Responsibilities

5. Refrain from unlawful retaliation
 - a. Applies not only to complainants but also to witnesses and others who participate in the investigatory process

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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. Retaliatory comments (expressed or implied)
 - iii. Retaliation independent of the workplace

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Supervisory Responsibilities

5. Refrain from unlawful retaliation (continued)
 - c. Fact that complaint lacks legal merit is not a defense to unlawful retaliation

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1. **Michael S. Cohen** concentrates his practice in the areas of employment law training and counseling. Mr. Cohen has trained and counseled employers throughout the country on subjects including harassment prevention; workplace diversity; discipline and discharge; hiring and recruiting practices; performance evaluations; FMLA, ADA and FLSA compliance; leave of absence policies; performance management; workplace privacy; sexual orientation and gender identity in the workplace; substance abuse testing; workplace violence; records retention; conducting background checks; teens in the workplace and managing attendance problems. He has conducted trainings for executives, directors, managers, supervisors and employees in many industries, including financial services, healthcare, pharmaceutical, manufacturing, retail, real estate development, law firms and human services. Mr. Cohen also has conducted trainings for executives, deans and faculty in several institutions of higher education and secondary education. He has conducted more than 150 trainings in the last year. Mr. Cohen has conducted investigations into claims of harassment and discrimination and has drafted employee handbooks, employment agreements, non-compete agreements and post-termination agreements. He has represented clients throughout the country in EEO and other administrative proceedings. Mr. Cohen has been cited as a national authority on employment issues by The New York Times, The Associated Press, USA Today, MSNBC.com, The New York Daily News, New York Newsday, The San Francisco Chronicle, Law National, Law.com, HR Magazine, HR Executive Magazine, HR Executive Online, SHRM On-Line, Employment Law 360, Inside Counsel Magazine, What's Working in Human Resources, Workforce Management Magazine, Human Rights Campaign On-Line, Yahoo! Sports, The Sporting News, The Newark Star-Ledger, The Houston Chronicle, The New Orleans Times-Picayune, The Pittsburgh Tribune-Review, The Syracuse Post-Standard, The Ann Arbor News, The Harrisburg Patriot News, The Mobile Press Register, The Flint Journal, The Desert Sun, The Courier-Post, The Honolulu Advertiser, The Stamford Advocate, The Huntsville Times, AM New York, The Workplace Substance Abuse Advisor, Legal Issues in Collegiate Athletics, Talent Management, BusinessInsurance.com, AZcentral.com, Fort Worth Star Telegram, Honolulu Star-Bulletin, The Columbus Dispatch, The Myrtle Beach Sun News, Richmond Times Dispatch, Detroit News and Business & Legal Reports, Inc. Mr. Cohen is a 1997 magna cum laude graduate of Temple University Beasley School of Law and a cum laude graduate of the University of Pennsylvania.
2. **Admissions** - Pennsylvania; New Jersey
3. **Education**
 - a. Temple University Beasley School of Law, J.D., magna cum laude, 1997
 - b. University of Pennsylvania, B.A., cum laude, 1993
4. **Selected Speaking Engagements**
 - a. "Dear Helga Returns (Again) With New and More Complicated HR Problems: 5th Anniversary Edition – Top 5 Lists!" SHRM Annual Conference, New Orleans, LA, June 19, 2017
 - b. "Time to Go Back to School – Handbook Updates for 2017," "Dear Helga Returns With More and Complicated HR Problems," Association of Legal Administrators Regional Legal Management Conferences, Las Vegas, NV, Nashville, TN, September 8, 2017, October 13, 2017
 - c. "Managing Diversity and Inclusion: Religion and LGBTQ Issues in the Workplace," "Five Ways to Enhance Your Hiring Process," Association of Legal Administrators Human Resources
 - d. "A Practical Look at Updating Your Handbook: Change with the Laws," "Dear Helga Returns (AGAIN) with New and More Complicated HR Problems," SHRM Annual Conference, Washington, DC, June 19-20, 2016
 - e. "The Minefields of All Minefields – Wage and Hour Issues in Law Firms," "Embracing Diversity by Preventing Harassment," Association of Legal Administrators Business of Law Conferences, New Orleans, LA; Atlanta, GA; Las Vegas, NV, September-October, 2015
 - f. Speaker, "Devaluing Diversity" and "Creating an LGBTQ-Friendly Work Environment," SHRM Diversity Conference, Boston, Massachusetts, October 26-27, 2015
 - g. Speaker, "Dear Helga Returns (Again) With New And More Complicated HR Problems," SHRM Annual Conference, Las Vegas, Nevada, June 29, 2015
 - h. Speaker, "Human Resources 101," Association of Legal Administrators Annual Conference, Toronto, Ontario Canada, April 20, 2014
 - i. Speaker, "Motivating Employees in the New Economy," Association of Legal Administrators Annual Conference, Toronto, Ontario Canada, April 20, 2014
 - j. Speaker, "Background Checks – Criminal, Credit and Social Media," SHRM National Legislative and Employment Law Conference, Washington, DC, March 17, 2014
 - k. Speaker, "Helga's Back And You're Never Going To Believe What Her Employees Did This Time," and "Creating an LGBT-Friendly Workplace," SHRM Annual Conference, Orlando, Florida, June 24-25, 2014
 - l. Speaker, "HR 101: Basic Training," "HR 201: Inspire, Motivate and Achieve Results," and "HR 301: Mission Possible – Conducting Internal Investigations," Association of Legal Administrators Annual Conference, Toronto, Ontario, May 20-21, 2014
 - m. Speaker, "Background Checks-Criminal, Credit and Social Media," SHRM Employment Law and Legislative Conference, Washington, D.C., March 17, 2014
 - n. Speaker, "Dear Helga: You're Never Going To Believe What My Employee Did" and "Time To Go Back To School – Updating Your Employee Handbook," SHRM Annual Conference, June 16-17, 2013, Chicago, Illinois
 - o. Speaker, "What's Your Site – Social Media in Hiring" and "Documenting Performance – Yes It Does Matter," SHRM Talent Management Conference, May 16-17, 2012, Las Vegas, Nevada
 - p. Speaker, "Out of the Closet and Into Your Workplace – Sexual Orientation and Gender Identity" and "Background Checks – The Law Has Changed," Lehigh Valley SHRM Annual Conference, October 5-6, 2012, Bethlehem, Pennsylvania
 - q. Speaker, "Time to Go Back to School – Updating Your Employee Handbook" and "The ABCs of the FMLA and ADA," Association of Legal Administrators National Conference, May 24-25, 2011, Orlando, Florida (#1 Rated Speaker at Conference)
 - r. Speaker, "Get Ready to Hire Again" and "Diversity and the Law," Association of Legal Administrators National Conference, May 4-5, 2012, Boston, Massachusetts (#1 Rated Speaker at Conference)