

# Sexual Harassment in the Workplace

*Considerations in 2019 and Beyond*

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# What Are We Doing Here And Why Is It Important?

- Colleges and universities are committed to providing safe, positive, and productive work environments, free of discrimination and harassment, where employees respect diversity and treat each other with courtesy, consideration, respect, and dignity.

# What Are We Doing Here And Why Is It Important?

- Employers need to drive cultural change regarding sexual harassment and focus on respect and dignity in the workplace.
- Leaders must understand that expectations are being set regarding appropriate workplace conduct and that they have responsibility both for meeting those expectations and ensuring that subordinate employees likewise meet those expectations.

# What Are We Doing Here And Why Is It Important?

- Review
  - Recent #MeToo developments and the related impact on sexual harassment charges
- Discuss
  - The laws that apply to workplace conduct
  - Definitions and examples of sexual harassment
- Understand
  - An employer's role and responsibility for preventing sexual harassment and ensuring a professional workplace

# What Are We Doing Here And Why Is It Important?

- When workplace culture becomes toxic and breaks down, there are consequences at every level of the company.
  - Job satisfaction goes down.
  - Productivity is affected.
  - People quit, or get fired.
  - Some misconduct can have serious legal repercussions.
- The #MeToo movement is among the most prominent examples of what can happen when there is a toxic workplace, as well as the wide-ranging consequences of misconduct.

# #MeToo Movement and Impact

# #MeToo Complaints

- “Me too” complaints are complaints that others have experienced the same or similar conduct or actions as those alleged by a particular person
- Typically related to the same accused person(s)
- Designed to show a pattern or practice of misconduct



# #MeToo Movement

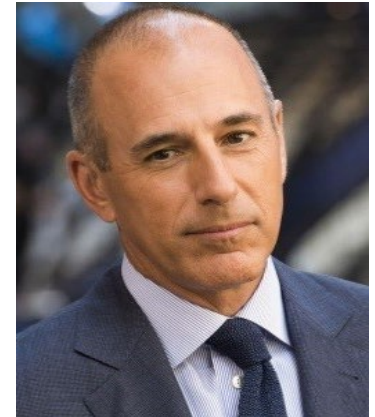
- Social media movement
- Exposed a culture of tolerance, payoffs, and cover-ups in certain fields, e.g., entertainment, sports, politics
- Brought a new and unprecedented era of awareness regarding sexual harassment and sexual assault
- Increased the focus on transparency

# #MeToo Movement

- #MeToo movement and complaints have had a game-changing impact on the political and employment environment
- Heightened need for training, discussion and cultural change regarding sexual harassment
- Have to look at workplace conduct and address matters that go beyond what is legally prohibited by law

# #MeToo Claims – No One Is Above The Law

- Matt Lauer – accused of inappropriate sexual behavior including exposing himself and giving a colleague a sex toy
  - Terminated from the *Today Show*
- Al Franken (former US Senator) – accused of sexual harassment, joke/inappropriate touching, resigned from his Senate seat



# #MeToo Claims – No One Is Above The Law

- Chef Mario Batali – fired from show and had to step away from business
- Steve Wynn – lost \$463M, resigned from powerful post with RNC
- Roger Ailes – had to step down as head of Fox News
- Harvey Weinstein – disgraced Hollywood mogul, now under criminal investigation
- Shaun White – had to settle lawsuit

# #MeToo Claims – Common Threads

- Significantly more attention on people in power and alleged abuses of that power
  - Complaints long went unheeded, but now coming out
  - Others knew about misconduct but kept silent – until now
  - Often non-disclosure agreements were involved
- Harassment allegations ruin lives, careers and reputations

# EEOC Response to #MeToo Movement

- EEOC's 2018 sexual harassment data shows:
  - EEOC charges alleging sexual harassment increased (as compared to 2017)
    - FY 2018 – 13,055 involved allegations of sex-based harassment; 7,609 involved allegations of sexual harassment
    - Up from 2017 – 12,428 involved allegations of sex-based harassment; 6,696 involved allegations of sexual harassment
  - EEOC filed **66** harassment lawsuits, **41** of which included allegations of sexual harassment – more than a **50%** increase from 2017

# EEOC Response to #MeToo Movement

- EEOC recovered approximately **\$56.6 million** for victims of sexual harassment, up from \$47.5 million in 2017
- Reasonable cause findings increased
- Visits to EEOC website more than doubled

# EEOC Response to #MeToo Movement

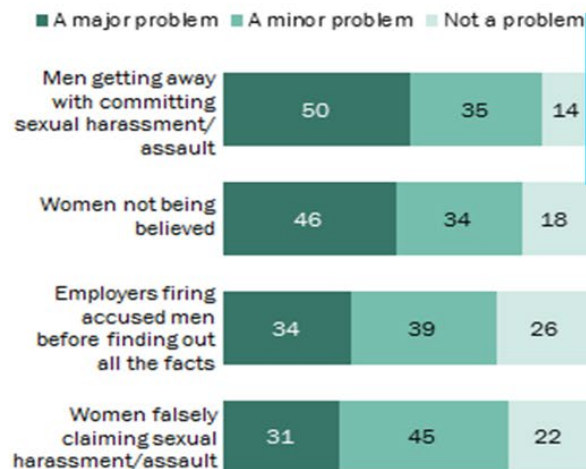
- In a 2016 study, 85% of female participants reported experiencing some type of workplace harassment
  - Harassment not limited to male to female
  - Not limited to “traditional” roles either

# Public Perception

Research suggests public perception is far more concerned that the complainant will not be believed than that false claims will be lodged.

## Americans more concerned about men getting away with sexual harassment than men being fired prematurely

% saying each is \_\_\_ when it comes to sexual harassment and assault in the workplace today



Note: Share of respondents who didn't offer an answer not shown.  
Source: Survey of U.S. adults conducted Feb. 26-March 11, 2018.  
"Sexual Harassment at Work in the Era of #MeToo"

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#MeToo

## Mixed views on implications of increased focus on sexual harassment

% saying the increased focus on sexual harassment and assault ...

Has made it \_\_\_ for men to know how to interact with women in the workplace

■ Harder ■ Not much difference ■ Easier



Will lead to \_\_\_ for women in the workplace

■ More opportunities ■ Not much difference ■ Fewer opportunities



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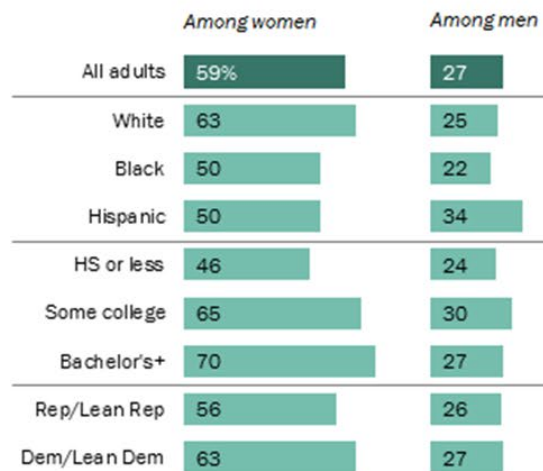
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# Public Perception

69% of women reporting they were harassed stated the harassment took place at least in part in the workplace.

## About six-in-ten women say they have been sexually harassed

*% saying they have ever personally received unwanted sexual advances or verbal or physical harassment of a sexual nature*



Note: Whites and blacks include only non-Hispanics. Hispanics are of any race. "Some college" includes those with an associate degree and those who attended college but did not obtain a degree.

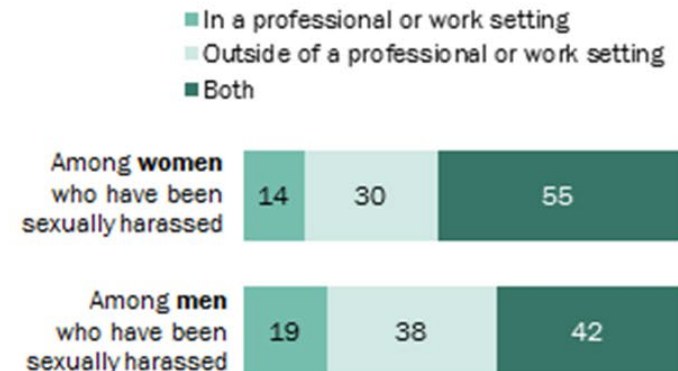
Source: Survey of U.S. adults conducted Feb. 26-March 11, 2018. "Sexual Harassment at Work in the Era of #MeToo"

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#MeToo

## More than half of women who have been sexually harassed say it has happened both in and outside of work

*% of those who say they have ever received unwanted sexual advances or verbal or physical harassment of a sexual nature saying this happened ...*



Note: Share of respondents who didn't offer an answer not shown.

Source: Survey of U.S. adults conducted Feb. 26-March 11, 2018. "Sexual Harassment at Work in the Era of #MeToo"

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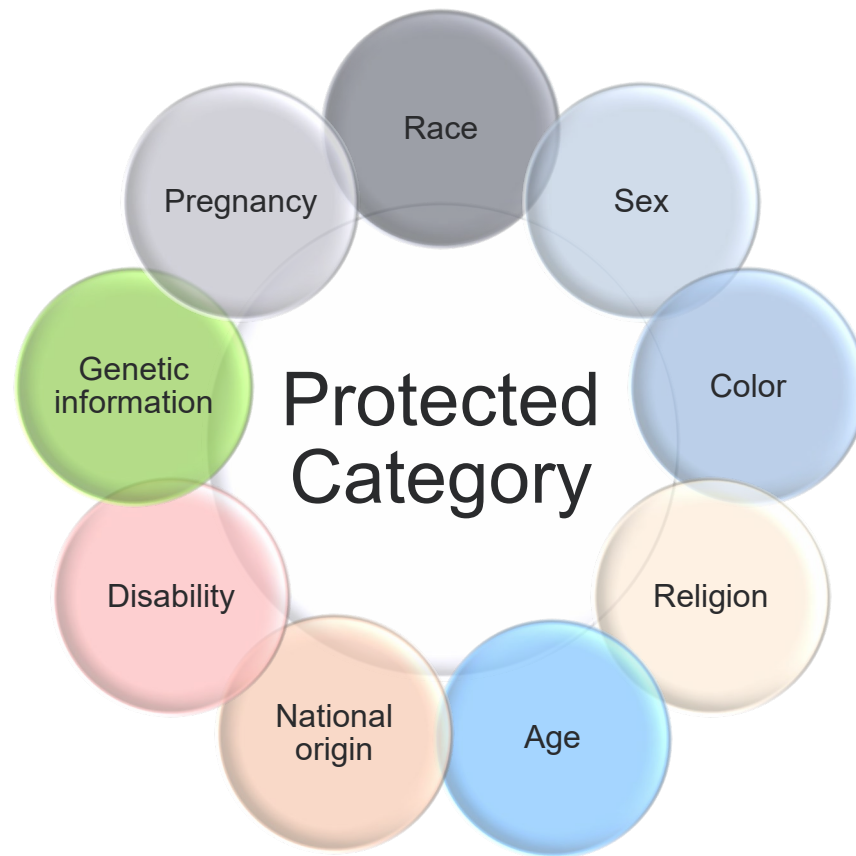
# Society of Human Resource Management (SHRM)

- SHRM released a survey in October 2018
  - 1034 Executives
    - 1/3 said they changed their behavior to avoid perception of sexual harassment
  - 1022 Managers
    - 1/4 said they changed their behavior

# The Law on Sexual Harassment at Work

# Federal Law – Definition of Harassment

Harassment is unwelcome conduct that is based on:



# State Law – Definition of Harassment

State law protects workers from harassment in the workplace because of:

- Race
- Color
- Creed
- Ancestry
- National origin
- Age (40 and older)
- Disability
- Sex
- Arrest or Conviction Record
- Marital Status
- Sexual Orientation
- Membership in the Military Reserve

# Sexual Harassment Laws :

## *Who, What, Where, When, How, Why*

1. Who is covered?
2. What conduct is covered?
3. Where does the law apply?
4. When does the law apply?
5. How does the law work?

# Who is Covered?

# Who is Covered?

## **The Law Applies To and Protects:**

- Employees

## **By policy, others may be protected:**

- Clients and vendors
- Visitors and others in the workplace

# Who Can Harass?

Man v. Woman

Woman v. Man

Same Sex

Superior v. Subordinate

Subordinate v. Superior

Colleague v. Colleague

Third Party

# Who Can Be a Victim of Harassment?

Man or Woman

Any sexual orientation

Any gender identity

Acquaintances or strangers

Third Parties

# What Conduct is Covered?

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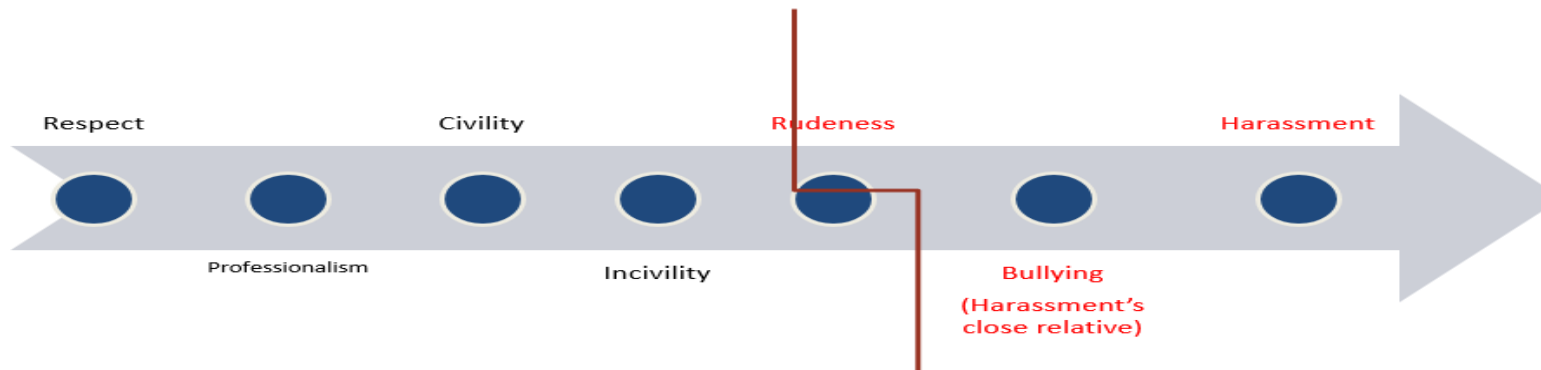
Discrimination or Harassment Based on:

- Sex
- Gender
- Sexual Orientation
- Gender Identity

# What Conduct is Covered?

The concept of harassment is expanding:

## Spectrum of Workplace Behavior



Note: Increasing overlap between Rudeness + Bullying + Harassment

# What Conduct is Covered?

- Harassment is a course of workplace conduct that, generally speaking, annoys, threatens, intimidates, alarms or puts a person in fear for his/her safety or otherwise negatively affects the working experience
  - Requires establishing that the conduct is both objectively **and** subjectively offensive or otherwise inappropriate
  - Objective component based on a “reasonable person” standard
- Harassment more logically understood as conduct that exploits, insults, shows hostility towards or makes fun of an individual or group **because of his/her protected status**
  - Remember this is what it means legally

# What Conduct is Covered?

- **To be “Harassment” under the law, the conduct must:**
  - Have the purpose or effect of creating an intimidating, hostile, or offensive work environment;
  - Have the purpose or effect of unreasonably interfering with an individual’s work performance; or
  - Otherwise adversely affect an individual’s employment opportunities.

# Two Types Of Sexual Harassment

- *Quid Pro Quo*
- Hostile Environment
- “Tangible employment actions” are not an element of either type of harassment
  - What this means is that the mere act of harassment is what creates problems
  - Distinct from other types of discrimination which require some type of employment action

# “Quid Pro Quo” Sexual Harassment

- “*Quid pro quo*” – Latin phrase meaning “something for something”
- Harassment in which:
  - Submission to or satisfaction of a sexual demand is made either explicitly or implicitly a term or condition of employment
- The essence of *quid pro quo* harassment is that a supervisor relies on his or her actual or apparent authority to extort sexual consideration from an employee

# “Quid Pro Quo” Sexual Harassment

## Quid Pro Quo

- A job benefit (or punishment) is directly tied to a sexual favor
- Submission is condition of employment
- Involves a disparity of power



# “Quid Pro Quo” Sexual Harassment

- The typical *quid pro quo* scenario involves:
  - a sexual proposition with a threat that if the employee refuses, he or she will be terminated or lose some job-related benefit; or
  - a promise of better treatment if the employee submits to sexual advances

# “Quid Pro Quo” Sexual Harassment

- Only individuals either with some form of supervisory authority over a worker or an apparent ability to influence a worker’s terms of employment can engage in *quid pro quo* harassment, since it requires the harasser to have the authority to grant or withhold job benefits
- The request or threat need not be express, it is enough that:
  - the individual making the unwelcome sexual advance has actual or apparent authority over the employee; and
  - a link to employment benefits can be inferred under the circumstances

# “Quid Pro Quo” Sexual Harassment

- If a reasonable person in the employee’s position would believe that submission was necessary to save their job or to receive employment benefits, that is enough to qualify as harassment
  - The alleged harasser’s subjective intent is irrelevant
  - we focus on the perspective of the employee
- An employee’s submission to a supervisor’s request is not determinative

# “Quid Pro Quo” Sexual Harassment

- Examples of *quid pro quo* sexual harassment include:
  - A supervisor promising an employee a raise if she will go out on a date with him
  - A supervisor telling an employee she will be fired if she doesn't sleep with him
  - A supervisor informing an employee that his continued success and advancement are dependent upon his agreeing to her sexual demands
  - More subtle links between better job performance and an employee's favorable response to a supervisor's advances

# “Quid Pro Quo” Sexual Harassment

- *Quid pro quo* harassment is a type of harassment critical for employers to understand
  - Supervisory employees may be reasonably perceived to have the ability to influence conditions of employment
  - This may be the case even if the employee is not within a particular leader’s reporting structure

# “Hostile Environment” Sexual Harassment

- Hostile environment has become the more commonly alleged form of harassment
- Hostile environment harassment occurs when **unwelcome (1) sexual conduct (2)** creates an intimidating, hostile or offensive working environment that **affects the terms or conditions of employment (3)**
  - The unwelcome conduct must be either **severe OR pervasive**
  - Occasional/sporadic conduct is not actionable
  - Motive is irrelevant

# “Hostile Environment” Sexual Harassment

## Hostile

- Conduct creates an intimidating, hostile or offensive work environment
- Single incident NOT necessarily hostile work environment but can violate policy
- Based on sex/gender/or other protected characteristic
- Unwanted and unwelcome
- Severe or pervasive
- Intent v. impact
- Key: Reasonable person

# “Hostile Environment” Sexual Harassment

- The complainant does not have to be the person to whom the inappropriate conduct was directed
  - Can be anyone who has knowledge of and is affected by the conduct
- Gender does not matter – victims and harassers can be of any gender and of different or same sexes
- Harassers can be both supervisors and non-supervisory co-workers

# “Hostile Environment” Sexual Harassment

- Sexual jokes, pranks and lewd or suggestive comments
- Suggestive or obscene gestures
- Commentary about people's bodies or sexual prowess or deficiencies
- Discussing sexual exploits with co-workers
- Display or dissemination of sexually oriented or obscene materials (e.g., e-mails, photos, internet websites)
- Leering or ogling at others
- Commentary on another's clothing
- Commentary on gender roles
- Kissing, caressing or pinching colleagues
- Touching colleagues' hair
- Massaging colleagues' necks or shoulders
- Leaning over or brushing up against colleagues
- Invading another employee's personal space

# Non-Sexual Harassment

- Always in the nature of “hostile environment”
- **Unwelcome conduct** that creates an intimidating, hostile or offensive working environment, based on protected categories, that **affects the terms or conditions of employment**
  - The unwelcome conduct must be either **severe** OR **pervasive**
  - Occasional/sporadic conduct is not actionable
  - Motive is irrelevant

# Non-Sexual Harassment

- Jokes, pranks and/or suggestive comments
- Profanity (especially sexual)
- Derogatory language
- Gestures
- Display or dissemination of offensive materials
- Wearing inappropriate/offensive clothing
- Commentary on historical roles
- Critical (and inappropriate) comments about job performance
- Blocking someone's path
  - Realize comments and actions need not be overt/obvious to be problematic

# Harassment is a Matter of Degree

- Harassing or not?

- Employee A compliments Employee B's clothing.
- Employee A looks Employee B up and down before complimenting Employee B's clothing.
- Employee A uses a suggestive tone when making the compliment.
- Employee A touches Employee B's clothing when making the compliment.
- Employee A blocks Employee B from leaving a room while giving the compliment.

# Unwelcome

- For conduct to be deemed **unlawful** harassment, it must not only be intimidating or offensive, it must also be **unwelcome**.
- But whether or not conduct is unwelcome is not always clear . . .

# Unwelcome

## What is **Unwelcome Behavior**?

- Behavior by subordinates, peers, or superiors that is deemed offensive or unwelcome by an employee.
- What is welcome to one person may be unwelcome to another: it's not *just* a joke if it's unwelcome.
- Remember third parties! Welcome comments or behavior between two co-workers may be unwelcome to other co-workers. This is still unwelcome behavior.

# Severe or Pervasive

- For conduct to be deemed unlawful sexual harassment, it must also be **severe or pervasive** enough to interfere with the recipient's work performance and be intimidating or offensive to a reasonable person.

# Severe or Pervasive

- Things that cause heightened concern:

Frequency

Severity

Threatening or Humiliating

Interfering with Work Performance

Affecting Psychological Well-Being

Harasser is a Superior

# Severe or Pervasive

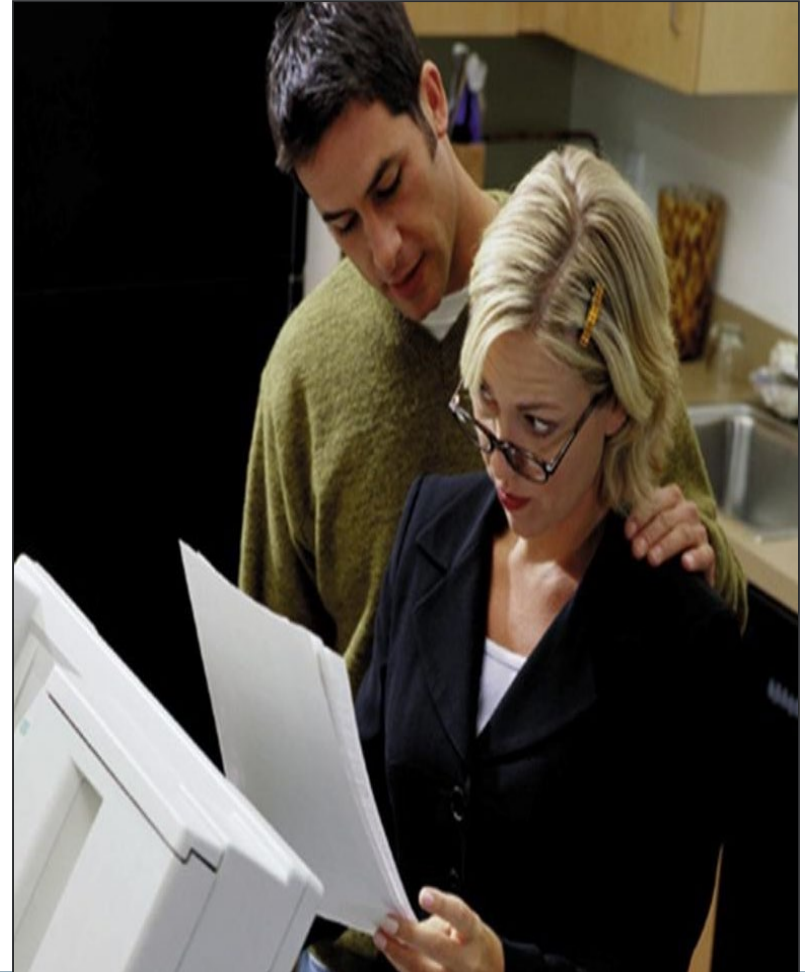
You enter an employee's work area for a meeting. A picture of a shirtless man and woman in a bikini is in plain view during the meeting.

- Is this unlawful harassment?
  - Generally petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.
  - BUT they can add up and, along with other things, contribute to an overall hostile work environment!

# Risky Behavior - Humor



# Risky Behavior - Touching



# Risky Behavior – Alcohol use/Partying

- There is no free pass for inappropriate behavior at employment-related functions allegedly “fueled” by alcohol
  - You are responsible for your own professional, non-offensive behaviors, comments and conduct, *regardless* of whether you choose to drink alcohol



# Risky Behavior – Electronic/Social Media

- Emails
- Links to jokes/videos
- Inappropriate internet access
- Screen savers
- Text messages

# Takeaway

- **Remember: harassment is in the eye of the beholder.**
  - What might be acceptable to one worker might be offensive and unwelcome to another.
  - The “reasonable person” standard applies when determining if conduct is harassing.
  - Meaning no harm does not save a person.

# Where and When Does The Law Apply?

# Where and When?

## ■ The Work Environment Includes:

- School/office
- Lunches
- Business trips
- Conferences
- Retreats
- Parties/gatherings
- Social media



# Where and When?

## *Anytime, Everywhere*

### **Where and When Do the Law Apply?**

- **When:** Any time working or attending work events/gatherings
- **Where:** Any place working or attending work events/gatherings
  - Work facilities
  - Client or vendor sites
  - Hotels, restaurants, bars
  - Planes, trains, automobiles
  - Bowling event
  - Golf outing

# How Does The Law Work?

# How does it work?

## *Respect in the Workplace*

- Most employers have policies that go beyond what the law requires.
- Employers want to prevent sexual harassment and they also want to create a pleasant and safe working environment.
- Employees should be expected to treat all others with **COURTESY** and **RESPECT**, and should exhibit professionalism and integrity at all times.
- Just because behavior may not be unlawful harassment, doesn't mean it should be acceptable.

# How does it work?

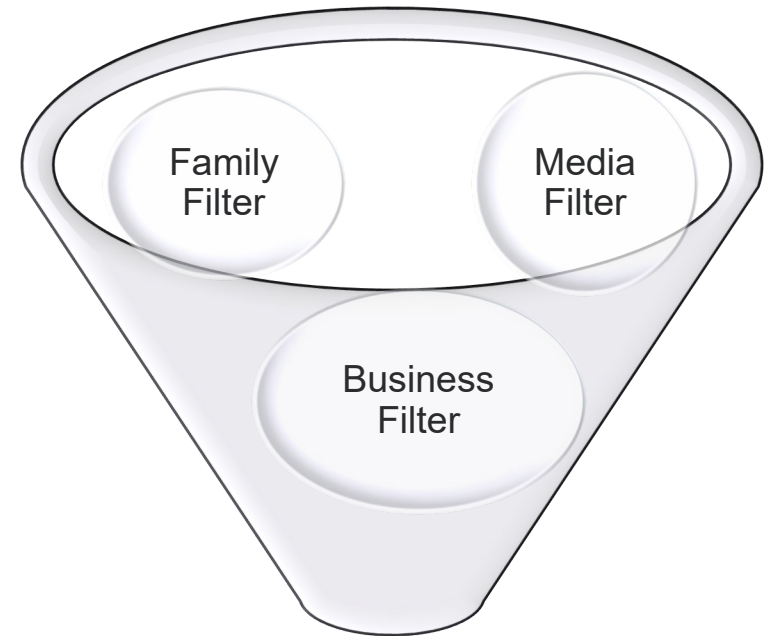
## *Respect in the Workplace*

- The **GOLDEN RULE** does NOT necessarily apply when it comes to behavior in the workplace.
  - Is a starting point only.
  - Individual preferences are not the measure to live by.
  - Instead, do unto others as a reasonable person would want done unto them.
- Examine own behavior
- Be conscientious of co-workers and conscious of comments and body language and their affect on others.

# How does it work?

## *Respect in the Workplace*

- To ensure that behavior does not cross any boundaries, use filters!
- **Family filter:** If you wouldn't say or do it in front of your grandmother, don't say or do it at work.
- **Business filter:** Keep all interactions appropriate for the workplace. Are you doing or saying something that you wouldn't do or say in front of your boss?
- **Media filter:** Would you be pleased to have your behavior reported in the paper, or shown on video tape or on the news? If not, don't do it at work.



# How does it work?

## *Resolution/Reporting Process*

- Employees deserve a safe work environment and no one should be made to feel uncomfortable at work.
- Every incident of known or perceived harassment must be reported.
  - Employees should be encouraged to report harassment so it can be investigated and addressed.
  - Leaders and supervisory personnel must act if they have any notice of potential harassment, even if there is no actual report
    - Must act promptly
- Employees should also be encouraged – but not required – to speak up and to tell a potential harasser that the behavior is unwelcome.

# How does it work?

## *Investigation/Resolution*

- It is absolutely critical to the integrity of the process that the investigation be objective, fair and reasonable.
- Investigators must resist the urge for “witch hunts” and ensure fair treatment of both the accuser and the accused.
- Confidentiality can be maintained to the extent practicable but information must be shared as necessary to conduct a thorough investigation.
- All employees should be encouraged to fully cooperate in any investigation; leaders and supervisory employees can be required to participate.

# How does it work?

## *Investigation/Resolution – Reluctant Reporters*

### ■ Heard this before?

- “I just thought you should know but please don’t tell anyone”
- “No one can know it was me who complained”
- “It will only make things worse”
- “It’s too embarrassing to talk about”
- “I don’t want to get anyone in trouble”

### ■ Response:

- Don’t promise not to tell – you are obligated to report it
- Don’t promise confidentiality
- Do tell them there will be no retaliation
- Do remind them of the importance of the issue
- Do tell them they can speak to someone with whom they feel comfortable

### ■ Talk to HR

# How does it work?

## *Investigation/Resolution*

- Leaders have an affirmative role in driving change, particularly given the realities of the working environment
- They must be actively on the lookout for harassment “red flags”
  - Be aware of what is going on in the working environment
  - Do not wait to “see what happens” if you observe anything questionable
  - Do not ignore the issue to see if it will go away
  - Use common sense in how you address situations
    - There are no “magic words,” only good judgment

# How does it work?

## *Investigation/Resolution*

- Don't promise not to tell – you are obligated to report it.
- Don't promise absolute confidentiality.
- Do tell them there will be no retaliation.
- Do remind the individual of the importance of the issue and of speaking up.
- Do tell them they can speak with someone with whom they feel comfortable discussing the situation.
- Avoid taking sides – your job is not to be an advocate; all investigations need to be as objective as possible.

# How does it work?

## *Investigation/Resolution*

- Any type of “red flag” situation creates an obligation for responsive action
  - Take context-appropriate action
  - Pass the responsibility baton to the experts
- Make a record of what occurred and what you did in response
  - Not only protects you and the employer

# How does it work?

## *Investigation/Resolution*

- With regard to documentation:
  - Have the person write down their allegation and include as much detail as possible
  - Ask: Who, What, Where, When, How? Are there any other witnesses?
  - Save all evidence, things like emails, texts, recordings, notes, etc.

# How does it work?

## *Investigation/Resolution*

- Where warranted, an employer must take prompt corrective action that is calculated to correct and eliminate prohibited conduct.
- Whole range of potential corrective actions
  - One on one coaching
  - Change in reporting relationship
  - Relocation
  - Training
  - Discipline – verbal through termination
- The results of the investigation should generally be communicated to the complaining party.

# How does it work?

## *Retaliation Prohibited*

- To encourage reporting and resolution, all employers should have clear non-retaliation policies.
- **Employers must not retaliate against or threaten:**
  - **Anyone who, in good faith, reports discrimination or harassment**
  - **Anyone who participates in an investigation**

# How does it work?

## *Retaliation Prohibited*

What can count as retaliation?

- Denial of promotion / pay increase
- Transfer to a “lesser” position
- Undesirable schedule change
- Lessening or worsening job duties
- Increased “monitoring”
- Poor performance appraisals
- Poor references
- Excluding employee from meetings / activities
- Denying previously approved leave
- Changing communications with an employee (“silent treatment”) or refusal to communicate
- Other adverse actions against the employee or someone close to the employee

# How does it work?

## *Retaliation Prohibited*

- Retaliation in response to any type of complaint or investigation presents legal problems and chills the promotion of cultural change
  - Employers must understand heightened sensitivities
- Sometimes best to address the issue directly
  - Incredible way to show maturity/leadership and even diffuse the situation
  - Take guidance from HR where there are questions

# How does it work?

## *Retaliation Prohibited*

- Violators of the anti-retaliation rules should be subject to disciplinary action, up to and including termination
- Any individual who believes that he or she is the victim of prohibited retaliation – or who has witnessed or has knowledge of such retaliation – should be encouraged to report it via the employer's regular complaint procedures

# Other Considerations

# Other Reasons to Care About The Law

## **Represent the employer**

- Workplace free from discrimination and harassment
- Reputational impacts – integrity and professionalism
- Potential costs (distractions, loss of productivity, lawsuits)

## **Personal responsibility**

- Leader's job; personal and professional credibility on the line

## **Supervisor responsibility**

- May be individually liable
- Conduct may be imputed to the employer

# 10 Lame Excuses

1. I didn't mean to offend anyone.
2. He/she laughed at my inappropriate joke.
3. He/she never told me to stop; he/she never said no.
4. We weren't even at work.
5. It was after hours; I was on my own time.
6. I only meant for my buddy to hear; I didn't know he/she was listening.
7. I didn't mean to send that email to him/her.
8. I excluded him/her from the meeting or outing so that he/she couldn't accuse me of harassment or because the client insisted.
9. How is that harassment? I am the same gender as he/she is.
10. He/she told me to keep it confidential and not to tell anyone.

# 10 Best Practices

1. Civility, tolerance and respect for others should be the guide.
2. Don't base employment decisions on someone's protected characteristics.
3. Don't tell or send inappropriate jokes or stories – beware of the rumor mill!
4. Don't use slurs or derogatory terms when talking or referring to others.
5. Avoid the ridiculing or negative stereotyping of persons or groups.
6. Stay away from nude/salacious pictures – internet, porn, selfies.
7. Don't behave in ways that exclude other people (i.e., meetings, social work-related events or outings, and even conversation).
8. Don't assume what others may or should be thinking or feeling.
9. Don't believe that individuals are invincible in every way; own up to mistakes and don't be afraid to challenge inappropriate behaviors.
10. If you see something, say something.

# Questions?

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