Creating Respectful Workplaces in a #MeToo World

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Program Agenda

• How we got here
• Emerging trends
• Role of leadership
• Common mistakes in policy drafting and implementation
• What EEOC says about harassment training
U.S. EEOC Select Task Force Report (June 2016)

Report issued to “reboot workplace harassment efforts” because “too many people in too many workplaces find themselves in unacceptably harassing situations when they are simply trying to do their jobs.”
It’s not just about sex...

Effective harassment prevention extends to all legally protected characteristics

- Race, color
- Religion
- National origin
- Age
- Disability
- Veteran status
- Other legally protected characteristics
Emerging Trends

- Lower tolerance for inappropriate but not unlawful behavior
- Stale claims not discounted
- Public disclosures and reputational impacts driving prevention (regulatory agencies, courts not so much)
- StopIt and other reporting apps
- Outsourcing investigations to outside subject matter experts
- Outlawing confidential settlements, arbitration and other secrecy efforts
- Executive employment agreement Cause clauses under scrutiny
Leadership Matters

• Workplace culture has greatest impact on whether harassment occurs or not
• Leadership must take a visible role in committing to harassment prevention
  ○ Everyone notices what the C-suite notices
  ○ Employees must believe that leaders are authentic in demanding a harassment-free workplace
• Leadership must commit time and money to prevention efforts (paid for in the budget and scheduled on the calendar)
• Essential elements
  ○ Policy content
  ○ Training
  ○ Incident response
  ○ System accountability
• Organization liability standards
Leadership Matters

• Workplace cultures that tolerate harassment have more of it, and workplaces that do not tolerate it, have less of it.

• If leadership values a workplace free of harassment, it will model respectful behavior, prohibit the conduct as a matter of policy, take swift, effective and appropriate responses when it occurs, and ensure the everyone feels safe reporting it.

• Leaders who do not model respectful behavior, who are tolerant of demeaning conduct or remarks by others, or who fail to support harassment prevention with necessary resources may foster a culture conducive to harassment.
Prompt effective remedial action - Accountability

Workplace culture is manifested by what behaviors are formally and informally rewarded.

Accountability must extend to:

• Offenders for their conduct
• Supervisors and managers for monitoring and stopping unacceptable conduct by subordinates
• Investigators for investigations and corrective actions
Organization Liability Standards

- **Executives**: No Affirmative Defense (per EEOC)

- **Supervisors**: Tangible Act - No Affirmative Defense
  - No Tangible Act - Affirmative Defense IF Reasonable Prevention and Prompt Effective Remedial Action
  - Employee Unreasonably Failed to Take Advantage of Employer Corrective Opportunities

- **Coworkers**: Defense: Once Knew or Should Have Known Took Prompt Effective Remedial Action
Policy Drafting and Implementation

- Policy written and distributed to all employees
- Communicated to employees on a regular basis and through a variety of methods
- Signed acknowledgement by all employees that policy has been read and understood
- Policy statement should be limited to:
  - a statement that unlawful harassment is prohibited
  - a definition and examples of conduct that is unacceptable
  - a requirement that employees immediately report all perceived unlawful harassment to one of the expressly designated individuals
  - a statement that all reports of unlawful harassment will be investigated and, if unlawful harassment is found, appropriate remedial action including discipline will be taken
  - a statement that retaliation for reporting unlawful harassment or participating in an investigation is prohibited.
Statement that unlawful harassment is prohibited

SHOULD include:

- Prohibition of harassment on basis of ALL protected characteristics: *race, color, religion, sex (including pregnancy, gender identity, transgender status and sexual orientation), national origin, age, disability, genetic information, veteran status or other characteristic protected by applicable law*

- Categories of individuals covered: *management (including the president and other executives), supervisory personnel, co-workers, or nonemployees (including contractors, customers, or vendors)*
Statement that unlawful harassment is prohibited

Should NOT include:

• statements about how supervisors and managers should respond to harassment reports
• description of the investigative procedure
• outline of appropriate remedial action
Statement that unlawful harassment is prohibited

Sample language

Harassment of any employee in the workplace by management (including the president and other executives), supervisory personnel, co-workers, or nonemployees (including contractors, customers, or vendors) on the basis of race, color, religion, sex (including pregnancy, gender identity, transgender status and sexual orientation), national origin, age, disability, genetic information, veteran status or other characteristic protected by applicable law is a form of discrimination that violates the law and company policy.

Harassment is prohibited and will not be tolerated. No personnel are immune from this policy.
Definition and examples of conduct that is unacceptable

Sample language

Unlawful harassment may include:
(1) Verbal, nonverbal, or physical conduct that shows aversion, denigration, or hostility because of race, color, religion, national origin, sex (including pregnancy, gender identity, transgender status and sexual orientation), age, disability, veteran status or other protected characteristic when it creates an intimidating, hostile, or offensive working environment; unreasonably interferes with an individual’s work; or adversely affects an individual’s employment opportunities.
(2) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to the conduct is made either explicitly or implicitly a term or condition of an individual’s employment; submission to or rejection of the conduct is used as the basis for employment decisions; or the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment. Sexual harassment can include conduct between members of the same sex.
Definition and examples of conduct that is unacceptable

Sample language

Examples of types of behavior that may violate this policy include:

Verbal/written:
Offensive comments, including slurs or ridicule of another’s culture, accent or appearance;
Humor, jokes or teasing about protected class characteristics, including comments about the individual’s body;
Intentional or persistent failure to respect an individual’s gender identity (e.g., intentionally referring to the individual by a name or pronoun that does not correspond to the individual’s gender identity);
Threatening, intimidating or abusive words or acts;
Rumors about other employees;
Whistling.

Sexual harassment also includes propositions, innuendo, flirtation, suggestive or sexist comments, or continued advances or other unwelcome conduct after the conclusion of a consensual relationship.
Definition and examples of conduct that is unacceptable

Sample language (con’t)

Visual/graphic/non-verbal:
Pictures, posters, signs, cartoons, computer transmissions/email/social media or online postings/texts;
display of objects;
graffiti;
vandalism;
exclusion.

Physical: Touching, pinching, patting, brushing the body, assault, impeding access.
Requirement that employees immediately report all perceived unlawful harassment to one of the expressly designated individuals

• **Require** that all employees *immediately* report perceived harassment by following the employer’s reporting procedures.
• Identify the individuals to whom harassment reports should be made and provide information on how or where these individuals may be reached.
  ◦ *Supervisors and managers are not good choices to include.*
Requirement that employees immediately report all perceived unlawful harassment to one of the expressly designated individuals

Sample Language

*If you believe that you are being unlawfully harassed or retaliated against or you observe or otherwise become aware of such conduct in the workplace, immediately report the incident to one of the following individuals:_______________________ .*

*This procedure does not require reports to be made to your supervisor or to anyone who you believe is participating in the conduct. Instead, you may choose from the above-listed individuals the person with whom you would be most comfortable speaking. Supervisors and managers who become aware of perceived harassment or retaliation must immediately report such matters to_________________________.*
A statement that all reports of unlawful harassment will be investigated and, if unlawful harassment is found, appropriate remedial action including discipline will be taken.

Sample Language

All reports of perceived unlawful harassment will be investigated, and, if it is found to have occurred, appropriate disciplinary action up to and including termination of employment will be taken.
Statement prohibiting retaliation

SHOULD include:

• Express statement that retaliation against any employee who reports perceived harassment or who participates in an investigation as a witness or in any other capacity is prohibited.

• Requirement that all perceived retaliation be reported in accordance with the policy reporting procedure.
Statement prohibiting retaliation

Sample Language

Retaliation against employees who report perceived unlawful harassment, or who participate in investigations as witnesses or in other capacities, also violates the law and company policy. Such retaliation is prohibited and will not be tolerated and must be reported immediately according to the reporting procedure below.
Reasonable prevention efforts - EEOC view on training

- General Considerations
- Employees
- Supervisors and Managers
Reasonable prevention efforts-EEOC view on training

General
• Senior leaders should open and attend the entire session/prepare introductory video and send pre-session memo emphasizing training and commitment
• Should be tailored to particular workplace, not one-size fits all
• Qualified, interactive and instructor led training (online is not recommended unless interactive and customized to workplace)
• Should be conducted regularly; one and done is not effective
Reasonable prevention efforts-EEOC view on training

Employee

• Educate employees about the conduct that is unacceptable, and include conduct not rising to level of actionable harassment but that if left unchecked could rise to that level
  ○ Consider workplace civility training and bystander intervention training

• Training should cover the consequences of engaging in unacceptable conduct, including that action will be proportionate to the conduct

• Training should cover how to report conduct and the complaint and investigation process and emphasize no retaliation
Reasonable prevention efforts-EEOC view on training

Manager

• Employee session PLUS
• What to do/say when they witness unacceptable conduct (including conduct if left unchecked could rise to level of actionable harassment)
• What to do/say when unacceptable conduct is reported to them
Final Thoughts

• Time to review and “reboot” your policies, practices and training
• Refocus on authentic leadership toward a respectful workplace culture
• Be mindful of less tolerance for unacceptable behavior and the impact of social media on the organization’s reputation
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