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Law Firm Harassment Prevention And Correction In The #MeToo Era

presented by

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(Not THAT Michael Cohen)

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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

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/Familial status
- National origin/Ancestry
- Pregnancy
- “Protected” Complaints
- “Protected” Leave
- Race/Color
- Religion/Creed
- Sex
- Sexual Orientation
- Veteran’s Status/Military Status

Importance of a Workplace Free of Unlawful Harassment

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

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

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. Virginia Human Rights Act
5. Other state/local Fair Employment Practices laws

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.

Examples of Unacceptable Conduct (even if not unlawful)

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

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

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]

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

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

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

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)

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

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.

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

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

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

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

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

Supervisory Responsibilities

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

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

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/complicity
 - b. Consult with Human Resources/Administrator to discuss corrective action

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)

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

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

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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