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Sexual Harassment Training

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Hosted by:



Presented by:

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SPEAKER



Alexandra “Alexa” Clauss is an attorney and Shareholder with Primmer Piper Eggleston & Cramer PC in Burlington, Vermont. Her practice is devoted to advising employers on laws affecting the workplace and a wide range of human resources issues.

She is a frequent speaker on HR topics, and she conducts workplace trainings, employee handbook reviews, and internal investigations. Alexa received her Bachelor of Commerce from McGill University and her J.D. and Sports Law Certificate from Tulane University Law School. She is admitted to practice in Vermont, New Hampshire and California. She has been selected as a Super Lawyers® Rising Star® in Employment & Labor each year since 2014.

Please Note

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Hypothetical 1

Jeff supervises Claudia. Claudia tells him that a co-worker keeps asking her out and making other remarks that make her uncomfortable at work. To Jeff, the situation doesn't sound like sexual harassment. Claudia is known around the office to be quite a flirt. Jeff thinks Claudia is being overly sensitive and exaggerating the situation.

Hypothetical 2

Rebecca often tells her administrative assistant, Brody, who has been working for her for about six months, how attractive she finds him. Brody does not respond. Rebecca assumes he is flattered and continues saying things like, "You should wear tighter shirts so I can see your muscles" and "I bet you're really good in bed."

When Brody learns that another administrative assistant hired after him earns more, Brody asks Rebecca for a raise. Rebecca says that she will consider it if Brody goes out to dinner with her. Brody makes it clear that he wants to keep their relationship professional and would prefer not to go out with her. Rebecca says she understands and that they could talk more about it over dinner.

While having lunch with a friend in Human Resources, Brody mentions that his boss will only consider a raise if he goes out with her, which he is dreading because she constantly makes comments that make him feel uncomfortable.

Sexual Harassment Training



- Review applicable law and definitions;
- Requirements for sexual harassment policies;
- Reporting and investigations; and
- Supporting a harassment-free culture.

Enforcement Data

- The Equal Employment Opportunities Commission (“EEOC”) reports that in FY 2017, it received 6,696 sexual harassment charges and recovered damages totaling \$46.3 million.
 - This number does not reflect litigation results – it’s EEOC only
- Failure to proactively address sexual harassment in the work place can result in:
 - Costly litigation
 - Loss of productivity
 - Negative publicity
 - Damage to employee moral
 - High turnover

Non-Exhaustive List of Laws that Prohibit Employment Discrimination

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act
- Americans with Disabilities Act, Americans with Disabilities Act
- Rehabilitation Act
- Pregnancy Discrimination Act
- Equal Pay Act
- Family and Medical Leave Act
- Immigration Reform and Control Act of 1986
- National Labor Relations Act
- Title II of the Genetic Information Nondiscrimination Act
- Vermont's Fair Employment Practices Act
- Vermont's Parental and Family Leave law
- Vermont's Sexual Harassment law
- Vermont's Accommodations for Pregnancy-Related Conditions law

Discrimination Prohibited Based on

- Race
- Color
- Religion
- Ancestry
- National origin
- Place of birth
- Sex
- Gender
- Sexual orientation
- Gender identity
- Crime victim status
- Pregnancy
- Disability
- Having a positive test from an HIV-related blood test
- Need for health insurance
- Credit history
- Jury or witness service
- Use of earned sick time
- Age (40+ federal / 18+ Vermont)
- Veteran status
- Military service or obligation
- Genetic information
- Citizenship
- Immigration status
- Section 7 rights
- Nursing mothers
- Use of FMLA or Vermont Parental and Family Leave
- Request for a flexible working arrangement
- An employee's disclosure of the amount of his/her wages or inquiring about the wages of other employees
- Workers' compensation history
- Asserting a claim for workers' compensation
- Assertion of rights under Vermont's social media account privacy law

Sexual Harassment

- Sexual harassment is a form of sex discrimination that violates **Title VII of the Civil Rights Act of 1964** (Title VII) and the **Vermont Fair Employment Practices Act** (“FEPA”).
- Title VII prohibits discrimination on the basis of sex (including pregnancy and gender nonconformity), race, color, religion, national origin.
- Under FEPA, all employers must:
 - Ensure a workplace free of sexual harassment.
 - Adopt a policy against sexual harassment with required elements.
 - Prominently post in the workplace a document providing at a minimum the elements of the employer’s sexual harassment policy.
 - Provide each employee with a written copy of the policy.

Amendments to Vermont's Sexual Harassment Law

- **H.707, amendments to 21 VSA 495h (most of it took effect on July 1, 2018)**
 - Employers have obligation to ensure working relationship free of sexual harassment for all workers;
 - Requires that any changes to a sexual harassment policy be provided to all employees in writing;
 - Encourages (but not require) employers to conduct sexual harassment education and training programs for all employees on an annual basis;
 - Prohibits employment agreements from:
 - Restricting employees from opposing, disclosing reporting, or participating in a sexual harassment investigation; or
 - Waiving rights or remedies with respect to a sexual harassment claim
 - Establishes requirements for settlement agreements relating to sexual harassment claims, including that it must not prohibit the employee from working for the employer or an affiliate; and
 - Creates a right for the Vermont Attorney General or the Human Rights Commission to “enter and inspect any place of business” with 48 hours’ notice and question the employer representative responsible for investigating and receiving sexual harassment to ensure compliance.

What is Sexual Harassment?

- Any harassment based on someone's sex, gender, or sexual orientation.
- Any unwelcome sexual advance, request for sexual favors or verbal or physical conduct of a sexual nature, when any of the following is true:
 - Submission to the advance or conduct is made explicitly or implicitly a condition of employment.
 - Submission to or rejection of the advance or conduct is used as a component of the basis for employment decisions affecting that individual.
 - The conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Types of Sexual Harassment

Sexual harassment exists in two forms:

- ***Quid pro quo.***
 - “This for that”
 - Where a supervisor seeks sexual favors in return for a job benefit (for example, a promotion or raise) or to avoid a job detriment (for example, a demotion or pay cut).
- **Hostile work environment.**
 - Harassment in the workplace that is unwelcome, based on sex or gender, attributable to the employer, and severe or pervasive enough to change the conditions of employment and create an abusive environment.

Types of Remedies in Sexual Harassment Claims

- Back pay.
- Front pay.
- Emotional distress damages.
- Punitive damages.
- Attorneys' fees and costs.
- Reinstatement.
- Civil penalties.

Supervisor Liability for Sexual Harassment

Supervisors should understand their potential civil liability for misconduct. In Vermont, supervisors can be held individually liable for violations of anti-discrimination laws, such as sexual harassment.

Examples of Sexual Harassment

Sexual harassment comes in many forms and is not limited to physical actions. Harassment also includes verbal or non-verbal conduct that rises to the level of being "severe or pervasive."

When they come within the applicable definition, examples of sexual harassment may include:

- Physical actions, such as:
 - Touching or brushing against an individual's clothing, body, or hair.
 - Initiating unwanted sexual activity, such as kissing, touching, or hugging.
 - Rubbing or touching anyone sexually in the presence of another.
 - Exposing oneself.

Examples of Sexual Harassment

- Standing or sitting too close to someone
- Patting a person on the buttocks, breasts, thighs, or genitals
- Following someone inappropriately
- Giving unwelcome gifts
- Leering or staring
- Blowing into someone's ear
- Making sexual gestures
- Displaying or sending sexually suggestive objects/pictures
- Blocking/impeding individual's movement
- Blowing kisses



Examples of Sexual Harassment

- Initiating unwelcome flirtations, advances, or propositions
- Repeating requests for a date with someone who has not expressed or returned an interest
- Telling unwelcome jokes or stories, often with sexual innuendo
- Making or using derogatory comments, epithets, slurs, or jokes
- Making graphic verbal commentaries about an individual's body
- Use of belittling expressions such as "honey," "dear," "little lady," etc.

Who Can Be a Harasser?

- A harasser may be:
 - A Supervisor
 - A Co-worker
 - A Customer
 - A Client
 - A Vendor
 - Male or a female



Does Motive Matter?

- Harassment may be unlawful regardless of intent
- “I was just joking” is not a defense
- “Sexual desire” is not an element of a valid claim

Who Can Be a Victim?

- The recipient of unwanted attention, advance, or conduct.
- The victim does not necessarily have to be the target of the harassment—it could be anyone affected by the offensive behavior.



Where Can Sexual Harassment Occur?

- Not limited to the workplace.
- Sexual harassment can occur outside the workplace, for example during:
 - Annual meetings.
 - Business trips.
 - Holiday parties.
 - Sporting events.
 - On social media.

Preventing and Addressing Workplace Harassment

- EEOC's 2016 Select Task Force on the Study of Harassment in the Workplace identified five core principles that have generally proven effective in preventing and addressing harassment:
 - Committed and engaged leadership;
 - Consistent and demonstrated accountability;
 - Strong and comprehensive harassment policies;
 - Trusted and accessible complaint procedures; and
 - Regular, interactive training tailored to the audience and the organization.

Sexual Harassment Policies (Vermont Employers)

- Under FEPA, an employer's policy against sexual harassment must include:
 - A statement that sexual harassment in the workplace is unlawful.
 - A statement that it is unlawful to retaliate against an employee for:
 - Filing a complaint of sexual harassment; or
 - Cooperating in an investigation of sexual harassment.
 - A description and examples of sexual harassment.

Sexual Harassment Policies (Vermont Employers)

- Under FEPA, an employer's policy against sexual harassment must also include:
 - A statement of consequences for employees who commit sexual harassment.
 - If an employer has more than five employees:
 - A description of the process for filing internal complaints about sexual harassment; and
 - The names, addresses, and telephone numbers of the person or persons to whom complaints should be made.
 - The complaint process of the appropriate state and federal employment discrimination enforcement agencies, and directions about how to contact those agencies.

Sexual Harassment Policies (Vermont Employers)

- Employers must provide a copy of their sexual harassment policy to employees upon hire.
- If the employer makes changes to its sexual harassment policy, it must provide a written copy of the updated policy to employees.

Harassment Often Goes Unreported

- The EEOC reported roughly **three out of four** individuals who experienced harassment never talked to a supervisor, manager, or union representative about the harassing conduct.
 - -Select Task Force on the Study of Harassment in the Workplace (June 2016)



Why?

- Disbelief
- Inaction
- Blame
- Social retaliation
- Professional retaliation



What to do if you experience or witness harassment

- Report as soon as possible.
 - Harassment cannot be stopped if the employer doesn't know about it
- An avenue for reporting harassment should be set forth in an employer's sexual harassment policy.

What to do if you experience or witness harassment (cont.)

- Follow the employer's reporting procedures to report workplace harassment if you believe you experience or witness it it
 - The employer can't help if it doesn't know!
- Cooperate in any investigations
- Refrain from harassment
- Refrain from retaliation

Responding to a Report of Sexual Harassment

When handling sexual harassment complaints from employees:

- Demonstrate your willingness to hear and objectively discuss complaints.
- Let the employee know the employer takes complaints of sexual harassment very seriously and is committed to providing a workplace free from such behavior.
- Tell the employee the employer will promptly investigate.
- Tell the employee that confidentiality will be respected as much as possible but cannot be assured in order to investigate fully and properly.
- Tell the employee that good faith reports of harassment will not result in retaliation
- “Retaliation” is a legal term for a negative employment action in response to legally protected activity, such as reporting sexual harassment. Employers must refrain from retaliating against any employee who reports sexual harassment.

Responding to a Report of Sexual Harassment (cont.)

Investigations should be performed by HR or an outside investigator, in coordination with the employer's legal counsel

- Supervisors must be available for interviews and provide as much information as possible.
- Supervisors must make employees available for interviews.

Once an investigation has been completed, if disciplinary action is to be taken, make sure that:

- The victim is not adversely affected.
- The improper behavior stops and does not recur.

Interviewing the Complaining Employee

An interview with the following employees should seek to obtain the following information.

- Please explain **what** happened to you that you believe was sexual harassment; Then for event/circumstance:
 - **Who** was involved;
 - **When** these events took place;
 - **What** makes you believe that this event is sexual harassment (unless obvious);
 - **How** you became aware of this possible sexual harassment (if reporting harassment of others);
 - Any additional facts that would help explain the context in which the situation arose.
- Has the employee made any previous reports of this or similar behavior?

Other Interviews

- Witnesses: gather information from witnesses that corroborates, substantiates, or disproves the allegations.
- Accused: allow the alleged harasser respond to the allegations
- Create separate investigation file and document the interviews and investigation.

Inappropriate Behavior NOT Confirmed

- Inform complainant and accused that allegations of inappropriate behavior were not confirmed.
- Remind the employees named in the complaint that allegations of discrimination, harassment and retaliation are taken seriously, and provide the employees with a copy of the written policies.
- Consider other proactive measures.

Inappropriate Behavior Confirmed

- Consider range of corrective action appropriate to situation.
- Impose appropriate disciplinary action.
- Inform complainant investigation has occurred and appropriate action has been taken.
- Thank the employee for coming forward and advise that any future incidents of perceived harassment or retaliation should be reported immediately.

Supporting a Harassment-Free Culture

- We've talked about what not to do, how to respond when there's a complaint—now let's discuss what we should do to support a harassment free culture in the first place

Supporting a Harassment-Free Culture

- It's not rocket science: treat people with the respect and dignity with which you expect to be treated



“Have a seat and we’ll discuss
your concern about my lack of respect.”

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Supporting a Harassment-Free Culture

- The Golden Rule: Treat others as you would like to be treated.
- Platinum Rule: Treat others as they would like to be treated.

Supporting a Harassment-Free Culture

- Communication is the key to implementing the Platinum Rule.
- Communication can also help head off and disrupt harassment. You do not need to be confrontational to make a positive difference

Supporting a Harassment-Free Culture

- If you observe inappropriate behavior, here are some possible courses of action:
 - If you overhear an offensive joke that you think might make or has made a co-worker uncomfortable, note that it was not appreciated, such as “That joke wasn’t funny.”
 - Remember, most victims and harassers will interpret silence as acquiescence

Supporting a Harassment-Free Culture

- You can make the harasser aware of their behavior without making accusations. Consider: “Were you aware of how you came off in that conversation?”
- If other by-standers were present, consider asking: “Did you notice that? Am I the only one who sees it this way?”
 - Research suggests that even if they are unlikely to report problematic conduct themselves, people tend to interpret silence by others as approval.

Supporting a Harassment-Free Culture

- Talk to the victim of harassment
 - One of the main reasons harassment is not reported is because the victim is concerned that colleagues who have remained silent acquiesce in the behavior
 - If you've observed harassment, consider pulling the victim aside and telling them: "I noticed that happened. Are you OK with that?"

Supporting a Harassment-Free Culture

- BUT, beware of being paternalistic or “re-victimizing” victims of harassment.
- If you choose to confront a harasser, use “I” statements; do not ascribe feelings or reactions to other people

Supporting a Harassment-Free Culture

- Listen to your co-workers.
 - Be present. Make eye contact. Remember the Platinum Rule
- Help each other.
 - People who respect each other help each other.
- If you make a mistake, apologize for learn from it
- If someone offends you, be honest and respectful when dealing with that

Supporting a Harassment-Free Culture

- Consider how your words and actions will impact others and how they might be received before speaking/acting
- Pay attention to how respectful you are in communications
 - Rate yourself periodically to identify areas for improvement

Hypothetical 1

Jeff supervises Claudia. Claudia tells him that a co-worker keeps asking her out and making other remarks that make her uncomfortable at work. To Jeff, the situation doesn't sound like sexual harassment. Claudia is known around the office to be quite a flirt. Jeff thinks Claudia is being overly sensitive and exaggerating the situation.

What are Jeff's responsibilities, if any?

If a coworker overheard this, what could s/he say to Claudia?

Hypothetical 2

Rebecca often tells her administrative assistant, Brody, who has been working for her for about six months, how attractive she finds him. Brody does not respond. Rebecca assumes he is flattered and continues saying things like, "You should wear tighter shirts so I can see your muscles" and "I bet you're really good in bed."

When Brody learns that another administrative assistant hired after him earns more, Brody asks Rebecca for a raise. Rebecca says that she will consider it if Brody goes out to dinner with her. Brody makes it clear that he wants to keep their relationship professional and would prefer not to go out with her. Rebecca says she understands and that they could talk more about it over dinner.

While having lunch with a friend in Human Resources, Brody mentions that his boss will only consider a raise if he goes out with her, which he is dreading because she constantly makes comments that make him feel uncomfortable.

Hypothetical 2 (cont.)

Human Resources investigates the comments and interviews Rebecca. Angry and embarrassed, Rebecca transfers Brody to a nighttime word processing position where she won't have to see him at work.

Is Rebecca sexually harassing Brody?

What, if anything, should Brody do or say in response to his boss' constant comments? Does Brody have to say something?

What if another supervisor heard Rebecca say she would only consider a raise if he goes out with her?

Does Rebecca's transfer of Brody constitute retaliation?

What if Brody tells Human Resources he doesn't want her to do anything about this?

Best Practices For Prevention

- **Culture** – committed and engaged leadership.
- **Communication** - make known to all.
 - Notices.
 - Policy.
 - Complaint procedure.
 - Designate more than one complaint recipient.
 - Training for supervisors and employees.
 - Supervisors—immediately report any complaints received or any incidents witnessed.
- **Consistency** - enforce policy consistently.
 - Impose corrective action where appropriate.
 - Supervisors must be models of good behavior and not participate in any harassing behaviors.
 - Culture of zero tolerance for unlawful harassment/discrimination.
 - Don't let inappropriate behavior go unchecked.

THANK YOU!

Questions? My Contact Info

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