



A PRESENTATION  
TO FSASC

# Avoiding Liability in the Workplace

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April 5, 2024

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## Agenda

- This presentation covers:
  - Key Employment Laws
  - The responsibilities of supervisors and managers through various phases with employment process.
  - Practical Ways to Avoid Workplace Liability
  - Q & A

## A Motto to Live By...

- "Without Human Resources, there is no bottom line..."



## AI Will Not Prevent or Replace HR Issues

- Employee relations issues are as old as work itself
- The type of issues may change, but basic human nature does not
  - Types of discrimination and protected conduct continue to evolve
  - Changing attitudes toward presents new challenges
    - Remote work, even where physical presence is required
- Increased emphasis on employee rights and ability to move between employers



## Basic Keys to Avoiding Liability

- "Top Down" and widespread commitment to creating a respectful workplace that provides equal employment opportunities for all.
- Understanding and complying with applicable laws that prohibit discrimination, harassment and retaliation.
- Laws are intended to ensure individuals are not discriminated against or harassed in the workplace based on any protected categories
- Take the laws and your internal policies seriously. The laws and policies strictly prohibit and do not tolerate unlawful discrimination or harassment or retaliation



## Types of Behavior at Issue

- Discrimination based on membership in protected class
- Harassment
- Retaliation because someone engaged in or complained of discrimination or harassment
- "Bullying"
- Workplace violence
- Leave/Absence/Attendance issues



## Key Employment Laws



### Quick Summary of Relevant Laws

- **Title VII of the Civil Rights Act of 1964** (Title VII), which prohibits discrimination based on race, color, religion, sex (including gender, pregnancy, sexual orientation, and gender identity), marital status and national origin
- the **Age Discrimination in Employment Act** (ADEA), which prohibits discrimination against individuals aged 40 and over based on their age
- the **Americans with Disabilities Act** (ADA), which prohibits discrimination based on **disability**
- **Section 1981 of the Civil Rights Act of 1866**, which prohibits discrimination based on race, color, and ethnicity
- the **Equal Pay Act** (EPA), which prohibits sex-based wage discrimination against men or women performing substantially equal work in the same establishment
- the **Genetic Information Nondiscrimination Act** (GINA), which prohibits discrimination based on genetic information
- the **Uniformed Services Employment and Reemployment Rights Act** (USERRA), which prohibits discrimination based on past, current, or prospective service in the uniformed services
- **Florida Civil Rights Act – overlaps with Title VII, ADEA, ADA**



## Additional Legal Protections for Employees

- Leave laws (FMLA, ADA)
  - Mental health, Long COVID, pregnancy
  - Medical leave, parental leave, sick leave
- Whistleblower protections (SOX, Florida Private Employers Whistleblower Act)
- Health & Safety (OSHA)



## Employer Liability for Discrimination and Harassment and Retaliation

An employee's discriminatory or harassing or retaliatory actions may be imputed to employer in certain circumstances and lead to getting sued.

An employer is **strictly liable** for discrimination and retaliation by supervisors if it results in a tangible employment action (such as termination or demotion).

An employer may be held liable even without any tangible employment action if the employee can prove **hostile work environment** harassment.



## Potential Liability if Violations

- Back pay and interest
- Reinstatement
- Front pay
- Compensatory damages (capped under Federal law, no cap under Florida law)
- Punitive damages (capped under Federal law and Florida law)
- Liquidated damages
- Attorney's fees

Does not include cost of defense (and typically employer cannot recover attorneys' fees if wins)

**KEY TAKE AWAY – Lawsuits Are Expensive**



## Policies



## Do you have a Discrimination/No Harassment policy

- Example: **EQUAL EMPLOYMENT OPPORTUNITY/ NO DISCRIMINATION/ NO HARASSMENT POLICY**
- Does it mirror federal and state law requirements?
- How do employees have access to it?



## Example

### ***Equal Opportunity Employer***

*It is the Company's policy to provide equal employment opportunity in all aspects of the employer-employee relationship and all privileges and conditions of employment. The Company may not unlawfully discriminate on the basis of race, color, religion, sex (including pregnancy, childbirth, or related medical condition), national origin, ancestry, age, physical or mental disability, legally protected medical condition, or veteran status or any other basis made unlawful by applicable federal, state or local law, ordinance or regulation. The Company also makes reasonable accommodations for disabled employees who request an accommodation for qualifying medical conditions, unless undue hardship would result.*



## TAKE AWAYS

Employers are required to provide equal employment opportunities throughout employment life cycle:

- Recruitment; Interviewing and Selection; Hiring.
- Compensation.
- Informal Coaching and Feedback.
- Formal Performance Appraisals.
- Career Progression and Development (Promotion/Training).
- Work Environment Culture.
- Terminations.
- "Post" Termination.



## What Is Discrimination?

Taking some employment action that has the purpose or effect of treating an employee (or group of employees) differently than a similarly situated employee (or group of employees) based on a protected characteristic (typically a material tangible difference)

- Unfair treatment
- Compensation
- Promotion
- Retention
- Termination
- Discipline
- Leave management





## What Is Discrimination? (cont.)

Discriminatory misconduct can sometimes be overt, such as the use of racial slurs, but it can also be subtle or even concealed.

Examples include:

- An African-American employee is repeatedly passed up for a promotion even though he is clearly the most qualified.
- A manager does not hire a female applicant because he is concerned she will get pregnant and take a leave of absence.
- A manager makes an assumption that an older worker wants to retire and therefore selects him for a position elimination.



## What is Harassment?

Harassment is a type of discrimination. It is often referred to as a "hostile work environment."

Harassment defined as:

- unwelcome conduct based on one's protected class where enduring the offensive conduct becomes a term or condition of employment; or
- the conduct is so severe or pervasive that it creates an environment that a reasonable person would consider to be intimidating, hostile, or abusive.

Sexual Harassment also includes *Quid pro quo* harassment and applies where a supervisor seeks sexual favors either:

- In return for a job benefit (for example, a promotion or raise).
- To avoid a job detriment (for example, a demotion or pay cut).

Harasser's intent irrelevant

**Remember, one instance of severe conduct can be enough.**



## Who Can Be a Harasser?

- Supervisors.
- Co-workers.
- Customers.
- Clients/vendors.
- Individuals or groups doing business with the company or on the premises.
- Men can harass women.
- Women can harass men.
- Men can harass men.
- Women can harass women.
- Minority can harass another minority (same race or not)



## Harassment Not Limited to the Workplace

Harassment (sexual or other type) can occur outside the workplace, for example during:

- Annual sales meetings or conferences.
- Business trips.
- Holiday parties.
- Sporting events.



## What Is Retaliation?

- Taking some employment action that has the purpose or effect of treating an employee differently because they engaged in protected activity
  - Refusal/failure to hire
  - Unfair treatment (such as isolating, unfavorable assignments)
  - Compensation
  - Promotion
  - Retention
  - Termination
  - Discipline
  - Leave management



## TAKE AWAYS

Do not have a practice or culture of tolerating harassment of any kind at the workplace, including sexual harassment [or bullying].

Foster a work environment where everyone is treated with dignity and respect.

This means being an employer that does not allow conduct that:

- Has the purpose or effect of creating an intimidating, hostile, or offensive work environment or otherwise adversely affects an individual's employment opportunities.
- Explicitly or implicitly requires sexual conduct in exchange for some employment benefit.



## Example of Complaint Policy

### **Complaint Procedure**

*Every employee has a right to redress for unlawful discrimination or harassment. Employees are encouraged to report any incidents of discrimination or harassment forbidden by this policy immediately so that complaints can be quickly and fairly resolved.*

*If an employee believes he/she is being or has been unlawfully discriminated against or harassed on the job or believes the comments, gestures or actions of any employee, including members of management, supervisors and co-workers, as well as by any person doing business with or for [name of employer], to be offensive, or of a nature to impair the employee's working ability or emotional well-being, the employee should use the following procedure:*



## Example Complaint Policy (cont.)

### **Complaint Procedure**

*A complaint, in writing, should be made to any Manager or the President or COO as soon as possible after any incident believed to be prohibited is conducted.*

*The complaint should include the details of the incident or incidents, the names of the individuals involved and the names of any witnesses.*

*All allegations of unlawful discrimination or harassment will be thoroughly and objectively investigated. This investigation will be completed with as much confidentiality as is possible and a determination regarding the allegations will be made and communicated as soon as practicable.*



## Example Policy (cont.)

### **Complaint Procedure**

*If the Company determines that inappropriate conduct has occurred, [name of employer] will take effective remedial action. Any employee determined by [name of employer] to be responsible for such conduct will be subject to appropriate disciplinary action, up to and including termination of employment. Appropriate action will also be taken to deter any future such conduct. Whatever action is taken will be communicated to the employee who initiated the complaint. [Name of employer] may not retaliate against any employee for making a complaint and does not tolerate retaliation by management employees or co-workers.*



## Why does this matter?

- Having a policy prohibiting discrimination and harassment, a complaint procedure, and a mechanism to remedy the problem creates a defense for employers.
  - This is known as the *Faragher* defense
  - Why is this defense important?
    - It recognizes that bad behavior will occur at the workplace. The employer's response determines liability.



## TAKE AWAYS

- Complaints should be reported immediately so that the company has an opportunity to address the situation.
- Employees have various avenues of reporting conduct that they feel is harassing, including informing either:
  - direct supervisor,
  - the supervisor of your direct supervisor,
  - to Human Resource's personnel or
  - the President



## TAKE AWAYS (cont.)

As an employer you must take every complaint seriously and:

- Conduct a prompt and thorough investigation.
- Address inappropriate behavior.
- Take disciplinary action when appropriate.
- Deal with confidentiality issues.



## Best Practices



### Guidelines for Leaders

- Be consistent in how you manage employees!
  - Treat similarly situated employees similarly.
  - If the employee can show he or she has been treated differently than other employees in similar circumstances, the risk of liability increases.
  - Legitimate reasons for differences in treatment (i.e., prior discipline, historical performance issues, length of service, etc.) must be clear, compelling, and **documented**.



## Guidelines for Leaders

- Foster an open environment.
- Know your policies and apply them consistently (i.e. no favoritism).
- Seek involvement of HR early on.
  - Immediately report harassment or discrimination to HR.
  - Medical, disability, leave-related issues.
  - Documented Discipline or Corrective Action.
- Do not ignore problems and act promptly.
- Above all else: Create respect by respecting others as professionals.



## Establishing Performance Expectations

### Performance Reviews

- Don't be afraid to be truthful. If there are problems, discuss them. A cautious, inaccurate review is worse than no review.
- Be as objective as possible. Avoid speculation and commentary about non-work-related reasons for performance problems.
- Make sure the words you use accurately describe performance.





## Establishing Performance Expectations

### Potential Concerns with Performance Reviews

- Rating employees within a narrow band or range which dilutes differences in performance among employees.
- Recency trap: rating employees based on the past few weeks rather than over the entirety of the appraisal period.
- Annual review process lacks substance.
- Saving all feedback for the annual review.
- “Grade inflation” (i.e. better reviews and comp than warranted).
- Favoritism.



## Best Practices - Performance Management

- Based on behavior and performance, not personalities.
- Nothing requires a company to accept poor quality/poor quantity of work from any employee.
- Be reasonable, flexible and patient, but do not accept persistent poor performance.
- Failure to manage low performers can lead to morale problems with high performers (“group project” mentality).



## Best Practices - Performance Management

- Define the performance deficiency.
- Refer to specifics or a pattern of conduct.
- Be constructive.
- Explain the big picture -- how this conduct impacts coworkers/organization.
- Don't avoid taking action.
- **Timeliness is key.**



## Best Practices - Corrective Action

- Spell out the consequences if the employee does not improve.
- Offer assistance (additional training, etc.).
- Make the employee responsible.
- Be cautious of potential consistency issues.
- Note previous discussions, the direction for the future and, whenever possible, get the employee's agreement.



## Risks of Termination

- Evaluation of Risk Factors

- High level employees (high earners)
- Employees in protected classes
  - age, sex, race, disability, etc.
- Long-service employees with “good” records



*"Don't think of it as getting fired. Think of it as finally being recognized for your incompetence."*

- Managers are often in a hurry to terminate poor performers.
- Managers don't want to wait for counseling, warnings, documentation because “the business can't wait”.

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## Why Should You Care?

- Thorough, accurate performance reviews and well-executed corrective action mitigate legal risk.
- Improve job performance.
- Assist employee retention and promotion.
- Help avoid and successfully defend litigation.
- Smooth termination process.
- Improves employee morale because process is perceived as fair.
- More likely to have employee related decisions approved.

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## The Top Mistakes Managers Make

- Not confronting/documenting performance issues.
- Rewarding poor conduct/bad behavior with comp.
- “Looking the other way” for top performers.
- Treating out-of-office settings to lesser standard of conduct.
- Poor documentation.



## Documentation Best Practices

- To write or not to write?
- Why/When/How



## Why Document?

- Memory
  - Speculation can replace fact without documentation
  - Prevents later “he said, she said”
- Credibility
  - Critical to defending legal actions against Company by employees
  - Provides “visible” support to testimony
  - Notes are more difficult to confuse than witnesses
- Fairness
  - Establish fair treatment, particularly when employee acknowledges receipt
  - Record of basis for decisions (promotion, termination, etc.)
  - Supports compensation decisions



## When to Document – Performance

### The good. . .

- Record of basis for promotion, qualifications, etc.
- Record of fair treatment – rebut the “out to get me” narrative

### . . . and the bad

- Record of basis for later discipline/termination – if needed
- Record of employee acknowledgement of problems
- Be critical when warranted – avoid “Midwestern nice” trap
- Can be formal performance review or counseling as-needed – but be consistent

## When to Document – Discipline

- What counts?
  - Counseling (even if verbal, make a record it happened)
  - Written warnings
  - Termination
- Documentation ensures discipline has:
  - Substantive fairness (reason for taking action)
  - Procedural fairness (carried decision out properly)



## When to Document

- Documentation Reminders:
  - There are no “off the record” notes or conversations
  - “Shadow files” are not a safe harbor
  - All computer files are written documents
  - E-mails are written documents
  - Text messages are written documents
  - Keep medical information separate and confidential
    - If you come into this info, immediately contact HR



## How to Document

- Contemporaneously
  - You cannot go back and create records later (operates as an admission of wrongdoing)
- Consistently
  - Do not treat similar employees/situations differently
  - Do not “target” an employee with documentation
- Clearly
  - Objective notes with “who, what, where, when” facts
  - Avoid subjectivity
- Confidentially (when needed)
  - Investigation files



## Take Aways

- Bottom line:
  - Know the law
  - Know the rules
  - Apply them consistently
  - Lead by example
  - Involve HR
  - Understand the employment relationship is a lifecycle
  - Keep consequences in mind before taking action



# Hypotheticals



## Hypothetical 1

Jeff is a supervisor and Claudia, one of his direct reports, 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 wears tight clothes and short skirts and is known around the office to be quite a flirt. Jeff thinks Claudia is being overly sensitive and exaggerating the situation.

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What are Jeff's responsibilities, if any?





## Answer to Hypothetical 1

Jeff must report Claudia's complaint to Human Resources.

- Supervisors must report all employee complaints to Human Resources.
- Jeff's subjective opinion of the situation is not relevant.
- Supervisors have a duty to maintain a respectful workplace and not permit inappropriate behavior to go unchecked. If uncertain about appropriate activities or behavior, supervisors should consult Human Resources.
- Supervisors should also support the company in its responsibility to investigate complaints of discrimination. At the end of the investigation, supervisors should work with Human Resources to implement any disciplinary action.



## Hypothetical 2

Brian sometimes makes comments to his administrative assistant, Alice, about how attractive she is. She never says anything when he makes these comments. One day, Alice requests a raise. Brian says that he will consider the request if she goes out to dinner with him. Alice makes it clear that she wants to keep their relationship purely professional and would prefer not to go out with him. Brian says he understands.

Alice mentions casually to a friend in Human Resources that Brian has been making inappropriate comments and that he would only consider a raise if she went out with him. Human Resources investigates the comments and Brian and gives a written warning. Several months later Brian gives Alice an unfavorable performance evaluation. Alice's prior evaluations were always stellar.

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Does Brian's act constitute retaliation?



## Answer to Hypothetical 2

Likely Yes.

- Harassment reporting is a protected activity.
- Assuming that there is documented performance issues prior to the Alice's protected activity, Brian's poor evaluation certainly would seem to be retaliatory.



## Hypothetical 3

- Wanda, who is Black, works in the main office. On Wanda's first day, a customer, who is White, was very rude to her. Since then, the customer's rude behavior continues, including some comments that could be considered racist.
- Does the customer's conduct violate your policy? If so, what should Wanda do?



## Answer to Hypothetical 3

- Yes.
  - Employers may be held responsible for harassment, even when the harasser is not an employee, if the employer knew about the harassment and did not try to stop it. The company could, for example, contact the vendor company, tell them about the harassment, and insist that it stop immediately. TMM could also request that a different person be assigned to deal with the customer..
- Wanda should:
  - tell the customer that she finds his behavior offensive, and that it must stop immediately.
  - report the harassment to her supervisor or Human Resources immediately. Once the company knows Wanda is being harassed because of her race, it has a responsibility to stop the harassment and to protect her from further harassment.



## Other Issues You May See:

- How do I accommodate an employee with a disability?
  - Obligation to accommodate / duty to have an “interactive dialogue.”
- How do I balance leave requests with obligation not to discriminate?
  - This includes FMLA leave.



## Other Issues You May See:

- What if an employee has a medical marijuana card?
- How do I respond to threats of workplace violence?
- What about mental health issues?
- Can employees bring guns to work?

