




2017 **aalrr** WebTrain
Management Performance Series



Part 1 – October 10
Employment Discrimination, Diversity & Harassment

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A Professional Law Corporation

**Meet
 Bob Wenzel
 & Jonathan
 Judge...**


Robert Wenzel became a lawyer after a career in human resources which affords him a unique insight into the daily operational issues facing employers when dealing with employees. He is a well-known speaker to various organizations around the country on labor and employment issues. He has conducted hundreds of training sessions, briefings and seminars and lectured at numerous conventions.

Jonathan Judge counsels employers in labor law and various employment litigation matters, including wrongful termination, discrimination, wage & hour, harassment, WARN Act, and Patient Protection and Affordable Care Act/Healthcare Reform. He represents employers before the NLRB, DFEH, EEOC, the California Division of Labor Standards Enforcement, and in arbitration. Mr. Judge also advises employers on personnel policies and employee handbooks.


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Agenda

- Discrimination
- Diversity
- Harassment & Abusive Conduct



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Discrimination

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Claims Continue

- Employment discrimination claims have continued to rise in recent years.
- In 2016, the United States Equal Employment Opportunity Commission received **91,503 discrimination complaints**.



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Record Verdicts


FY 2016 EEOC Performance Report

The U.S. EEOC reported on its enforcement efforts during fiscal year 2016, which ended Sept. 30:

- EEOC secured more than 482 million for victims of discrimination in private, state and local government, and federal workplaces.
- EEOC filed 86 lawsuits alleging discrimination during fiscal year 2016. This included 55 individual suits and 13 suits involving multiple victims or discriminatory policies (versus discriminatory treatment), of which 18 were systemic suits.


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Discrimination Claims



- Costly to Defend
- Increase Liability Exposure
- Impact on Overall Business Operations
- **Sensitive/Complicated Issues**

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Federal Discrimination Law

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Federal Law

Federal Law

- Title VII of the Civil Rights Act of 1964 ("Title VII")
- Civil Rights Act of 1991
- The Age Discrimination in Employment Act of 1967 ("ADEA")
- The Americans with Disabilities Act of 1990 ("ADA")
- The Genetic Information Non-Discrimination Act of 2008 (GINA)
- Lilly Ledbetter Fair Pay Act of 2009
- The Equal Pay Act of 1963 ("EPA")
- The Family Medical Leave Act of 1993 (FMLA)
- Pregnancy Discrimination Act of 1978
- Rehabilitation Act of 1973

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Title VII - What Does it Protect?

- Prohibits discrimination in the workplace for both employees and applicants of employment based upon "protected characteristics"

Applicable To...

Employers (with 15 or more employees for each working day in 20 or more weeks during the year in question), employment agencies, labor organizations, and joint labor management committees controlling job training programs

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What are "Protected Classes"?

Federal
Title VII
ADEA
ADA
GINA

- ☒ Race
- ☒ Color
- ☒ Religious Creed
- ☒ Sex
- ☒ National Origin
- ☒ Age
- ☒ Disability
- ☒ Genetic Information

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EEOC LGBT Protections

- EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.
- Examples of Claims:
 - Failing to hire an applicant because she is a transgender woman,
 - Firing an employee because he is planning or has made a gender transition,
 - Denying an employee equal access to a common restroom corresponding to the employee's gender identity, or
 - Harassing an employee because of gender transition, such as failing to use the new name that the employee now identifies with.

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Discrimination

Forms of Discrimination

- Disparate Treatment
 - Intentional
 - Retaliation
- Disparate Impact

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Discrimination

Disparate Treatment

- Prima Facie Case
 - Protected Status
 - Qualified
 - Adverse employment action
- Legitimate Non-Discriminatory Reason
- Pretext
- Mixed Motive

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Discrimination

Disparate Impact – Elements

- Existence of disparity.
- Disparity is caused by a specific employment device, policy or practice.
- Challenged policy was not justified by business necessity.
- Alternative and less discriminatory measures were available to the employer.


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Discrimination


Defenses to Disparate Impact Discrimination

- Statistical Evidence (Two standard deviations)
- Business Necessity | Job Related
- Alternatives with a Lesser Impact
- Bona fide occupational qualification (Hire a male attendant in the men's locker room)


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EEOC Enforcement Plan FY 2017 - 2021

- The EEOC Strategic Plan directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities and (2) integrates all components of EEOC's private, public, and federal sector enforcement. The purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.
- SEP Priorities
 - Eliminating Barriers in Recruitment and Hiring.
 - Protecting Immigrant, Migrant and Other Vulnerable Workers.
 - Addressing Emerging and Developing Issues.
 - Enforcing Equal Pay Laws.
 - Preserving Access to the Legal System.
 - Preventing Systemic Harassment.


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Discrimination

Disparate-Treatment

- *EEOC v. Abercrombie & Fitch Stores, Inc.* (U.S. Supreme Court (2015)):
- To prevail in a disparate-treatment claim under Title VII an applicant need only show his or her need for an accommodation was a motivating factor in the employer's decision, not that the employer actually knew of his or her need.




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The ADEA - *The Basics*

- The ADEA prohibits discrimination on the basis of age against any individual employee over the age of 40.
- Applies to employers with 20 or more employees in each of 20 or more calendar weeks during the current or preceding calendar year.

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The ADA - *The Basics*

- The ADA prohibits discrimination in the workplace against employees suffering from a physical or mental impairment which substantially limits one of more major life activities.
- The ADA prohibits discrimination in the workplace against employee "regarded as" disabled.
- Applies to employers engaged in an industry affecting commerce with 15 or more employees working on each work day in 20 or more calendar weeks.

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The ADA - *The Basics* (Continued)

- What is a major life activity for purposes of the ADA? Major life activities include, but are not limited to...
 - Caring for oneself
 - Performing manual tasks
 - Seeing, hearing, eating, breathing
 - Sleeping, walking, standing
 - Lifting, bending and
 - Speaking, learning, reading, concentrating, thinking, communicating, and working

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The ADA - *The Basics* (Continued)

- Examples which have routinely met the definition for disability include...
 - Deafness, blindness
 - Intellectual disability
 - Partially or completely missing limbs
 - Mobility impairments requiring the use of a wheelchair
 - Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy and
 - Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia

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The ADA Does NOT Protect

- Having green eyes
- Having poor judgment
- Being left-handed
- Kleptomania
- Having brown hair

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The Genetic Information Non-Discrimination Act

Prohibits the use of employee's genetic information in hiring, refusing to hire, terminating, discharging, or in any other way affecting compensation, terms, conditions, benefits of employment, or health insurance coverage.

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GINA

- In May 2013, the EEOC filed, and immediately settled, its first ever lawsuit alleging discrimination under GINA.
- EEOC Statistics FY 2010-2016 GINA Charges Filed:

FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
201	245	280	333	333	257	238
0.2%	0.2%	0.3%	0.4%	0.4%	0.3%	0.4%

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California Law

California Law

The California Fair Employment and Housing Act ("FEHA")

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The FEHA - *The Basics*

- Applies to employers (**with 5 or more employees**), employment agencies, labor organizations, apprenticeship programs leading to employment, and other applicable employment agencies

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What Are “Protected Classes”?

**California
FEHA**


✓ Race	✓ Gender
✓ Color	✓ Gender Identity and Expression
✓ Religious Creed	✓ Age
✓ Sex	✓ Military and Veterans
✓ National Origin/Ancestry	✓ Pregnancy/ Child Birth/ Breastfeeding
✓ Physical/Mental Disability	✓ Sexual Orientation
✓ Medical Condition	✓ Perception & Association
✓ Genetic Information	
✓ Marital Status	

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Discrimination Fact Patterns

Case Study 1:

- Luis Castro–Ramirez worked as driver for Dependable Highway Express (DHE)
- Informed DHE when hired that he needed to be home at certain times to care for his son who needed dialysis
- Luis Castro–Ramirez was assigned a new supervisor in 2013




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Discrimination Fact Patterns

Case Study 1:

- Castro-Ramirez requested earlier routes
- Supervisor denied requests even though customer requested Castro-Ramirez’s services during the earlier shift
- Supervisor scheduled Castro-Ramirez to work shifts that prevented him from administering dialysis to his son




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Discrimination Fact Patterns

Case Study 1:

- DHE terminated Castro-Ramirez after he did not work the scheduled shift
- Court held DHE must reasonably accommodate applicant or employee who is associated with person with disability
- *Castro-Ramirez v. Dependable Highway Express* (California Court of Appeal (2016))



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Fair Employment & Housing Council Regulations

- **“Sex Stereotype”** – an assumption about a person’s appearance or behavior, or abilities based on social expectations or generalizations.
- **“Transgender”** – refers to a person whose gender identity differs from the person’s sex at birth.
- **“Transitioning”** – process that some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned at birth.


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Fair Employment & Housing Council Regulations (Working Conditions)

- Equal access to “facilities” without regard to the sex of the employee.
- Permit employees to use “facilities” that correspond to the employee’s gender identity or gender expression.
- Transiting employees shall not be required to undergo, or provide proof of, any particular medical treatment to use “facilities” designated for use by a particular gender.
- Employers and other covered entities with single-occupancy “facilities” shall use gender-neutral signage.

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AB 1732




- Effective March 1, 2017, businesses in California with single-user restrooms will be required to label such restrooms as "all gender" facilities.
- Requirement applies to facilities with no more than 1 "water closet" and 1 urinal, with a locking mechanism controlled by the user.

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Discrimination Fact Patterns

Case Study 2:

- Michaelin Higgins-Williams worked as a clinical assistant
- In June 2010 complained she was stressed due to interactions with supervisor and regional manager
- Sutter Medical Foundation (SMF) granted Higgins-Williams leave under FMLA




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Discrimination Fact Patterns

Case Study 2:

- Higgins-Williams returned to work in August
- Higgins-Williams claimed supervisor treated her negatively
- Higgins-Williams requested leave to transfer to work for another manager



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Discrimination Fact Patterns

Case Study 2:

- SMF terminated Higgins-Williams in February 2011
- Higgins-Williams sued for failure to accommodate disability
- Court held stress related to a supervisor's standard oversight is not a disability
- *Higgins-Williams v. Sutter Medical Foundation* (CA Court of Appeal (2015))



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Agenda

- Discrimination
- Diversity
- Harassment & Abusive Conduct



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Diversity



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Building Blocks of the Respectful Workplace

Equality

Accepting Differences

Appreciating Diversity

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Building Blocks of the Respectful Workplace

Equality

- All persons have an equal right to work.
- Each person should have an equal opportunity to make the best use of his or her abilities without regard to race, color, religion, sex, national origin, ancestry, physical or mental disability, age, medical condition, marital status, military service, sexual orientation, gender, or any other basis protected by law.

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Building Blocks of the Respectful Workplace

Accepting Differences

- We all work with people who are different from us. They may look different, sound different, and even behave differently. They may practice a different religion or come from a different cultural background.
- These differences do not prevent us from having an equal right to work.

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Building Blocks of the Respectful Workplace

Appreciating Diversity

- The variety of experience, viewpoints, abilities, and ways of thinking found in today's workforce is an advantage for an organization.
- Diversity adds depth and strength to the workplace.

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What is Diversity?


Diversity	Culture	Bias	Stereotypes
Differences.	A pattern of daily life learned by a group of people. Includes languages, communication styles, rules for interaction with others, arts, customs, holidays, celebrations, food, religion, and clothing.	An unfavorable attitude toward individuals or groups based on their race, gender, age, ethnicity, physical ability, or other characteristics.	Exaggerated beliefs, oversimplifications, or generalizations about a person or group. Lumping individuals into groups has a negative effect of limiting one's ability to accept differences that may exist within a group.

Key Concepts

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Agenda

- Discrimination
- Diversity
- Harassment & Abusive Conduct




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Harassment | Abusive Conduct

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- Harassment complaints cost employers on average \$523 per employee each year.  
-  • Harassment victims experience a 10% decline in their productivity. 

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Why the Impact on Productivity?

- ▲ Higher absenteeism
- ▲ Increased accidents because of distractions
- ▲ Increased turnover and training
- ▲ Increased Employee exchanges
- ▼ Lower self-worth and self-confidence
- ▼ Lower employee satisfaction
- ▼ Decreased energy and morale

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Verdicts for harassment victims average \$1,000,000

- The average cost to investigate and defend an employment claim is over \$300,000

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The Law – State and Federal

The California Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act of 1964 (Title VII) prohibit sexual harassment in the workplace.

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Agency Definitions

DFEH and EEOC Guidelines <ul style="list-style-type: none"> • Quid Pro Quo • Hostile Work Environment 	What is... <ul style="list-style-type: none"> • Quid Pro Quo? 	THIS FOR THAT <ul style="list-style-type: none"> • Submission to unwelcome sexual conduct as a term or condition of employment
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Explicit
 A male supervisor holds a female employee and kisses her and tells her that he would make sure her job was protected.

Implicit
 A female supervisor suggests that a female subordinate be more "friendly" with the male president of the company.

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What is a Hostile Work Environment?

“Unwelcome sexual conduct that unreasonably interferes with an individual’s job performance and creates an intimidating, hostile, or offensive work environment.”

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Severe or Pervasive?

The environment must be sufficiently severe or pervasive to alter conditions of the victim’s employment and create an abusive working environment.

Was the Conduct...

- Verbal or physical?
- Repeated?
- Hostile or patently offensive?

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Severe or Pervasive?

The environment must be sufficiently severe or pervasive to alter conditions of the victim’s employment and create an abusive working environment.

Was the Harasser...

- A co-worker or supervisor?

Was the Harassment...

- Directed at more than one individual?


Did others Join...

- In perpetrating the harassment?

A single isolated incident of offensive sexual conduct is normally **NOT** enough to prove a hostile environment.

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Prevention of Abusive Conduct



You're a !#% ^!*

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Prevent Abusive Conduct

Caution! *What is Abusive Conduct?*

"... conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. [It] may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."

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A Better Definition

What is Abusive Conduct | Bullying?

- Repeated, usually intentional, health-harming mistreatment of one or more persons (targets) by perpetrators(s) that takes one or more of the following forms:
 - Verbal abuse
 - Offensive conduct and behaviors which are threatening, humiliating or intimidating
 - Work interference or sabotage which prevents work from getting done
- May also include real or perceived imbalance of power, evident enjoyment by the aggressor and sense of oppression by the target.

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Prevent Abusive Conduct

Caution!

What is Abusive Conduct?


A single act shall not constitute abusive conduct, unless the act is "especially severe or egregious."

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Harassment Fact Patterns

Case Study 3:

- Hirst worked as a phlebotomist for a company that had a contract with the City of Oceanside
- Hirst was harassed by officer who supervised blood draws and who used graphic sexual comments towards Hirst
- Jury awarded Hirst \$1,000,000
- City appealed claiming Hirst was not an employee




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Harassment Fact Patterns

Case Study 3:

- Court concluded FEHA covered Hirst as a "person providing services pursuant to a contract"
- Hirst v. City of Oceanside* (California Court of Appeal (2015))



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Whether an employee (*or another individual*) makes a written complaint, a verbal complaint, or a report from a third party, or you witness inappropriate behavior, the most important thing is to **RESPOND!**

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If an Employee Complains to You...

- 1 **Listen** objectively and impartially
- 2 **Ask** for the whole story or ask the employee to write down the complaint
- 3 **Observe** their behavior and demeanor
- 4 Ask who, what, when, where, why and how **questions.**
- 5 Ask the employee to **demonstrate** if possible
- 6 Ask the employee if **others witnessed** the incident

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If an Employee Complains to You...


- 7 Take thorough **notes**
- 8 Make the employee feel **comfortable and reassure** the employee that you will handle the situation.
- 9 Remind the employee that **retaliation** will not be tolerated and to bring any additional issues to your attention.
- 10 **Respond** according to company policies and procedures
- 11 Never promise **confidentiality**– assure the employee that only those individuals who need to know about the complaint will be informed.
- 12 **Involve** Human Resources

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Harassment Fact Patterns

Case Study 4:

- Britney Austin worked for Deluxe Financial Services Corp. in Minnesota
- Austin was assigned the male sex at birth and presented as male when hired by Deluxe




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Harassment Fact Patterns

Case Study 4:

- Austin informed her supervisor that she was transgender and began to present as a woman at work
- Deluxe refused to let Austin use the women's restroom



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Harassment Fact Patterns

Case Study 4:

- Supervisors & co-workers subjected Austin to a Hostile Work Environment, including hurtful epithets and intentionally using the wrong gender pronouns to refer to her
- Deluxe settled with the EEOC and agreed to pay Austin \$115,000
- EEOC also required Deluxe to enter into a consent decree requiring a letter of apology and annual training to supervisors and employees regarding sex-stereotyping, gender identity and transgender status
- *EEOC v. Deluxe Financial Services Corp.* (EEOC, 2016)

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If You Witness Inappropriate Behavior...

- 1 **Approach** the employee and discuss how the behavior is inappropriate
- 2 **Determine** if the receiving party was offended
- 3 **Investigate** if this was an isolated incident
- 4 **Document** any conversation you have with employees regarding inappropriate behavior
- 5 **Inform** HR and/or management of the behavior and your discussions

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How Can You Limit Liability?

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graph TD
    A[Model Respectful Behavior] --> B[Communicate Policies]
    B --> C[Coach Employees]
    C --> D[Listen and Respond]
    D --> E[Do Not Allow Retaliation]
    
```

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How Can You Limit Liability?

```

graph LR
    A[Model Respectful Behavior] --> B[Communicate Policies]
    B --> C[Coach Employees]
    C --> D[Listen and Respond]
    D --> E[Do Not Allow Retaliation]
    
```

- Be a good role model
- Don't engage in offensive or harassing behavior
- Don't seek sexual favors
- Don't discriminate on the basis of sex, race, age, or other factors

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How Can You Limit Liability?

Model
Respectful
Behavior

Communicate
Policies

Coach
Employees

Listen and
Respond

Do Not
Allow
Retaliation

- Communicate company policies clearly and consistently to employees
- Familiarize yourself with those policies and enforce them
- Employees must know that they will be protected from harassment

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How Can You Limit Liability?

Model
Respectful
Behavior

Communicate
Policies

Coach
Employees

Listen and
Respond

Do Not
Allow
Retaliation

- Prevention is easier than repairing the damage that may come from a lawsuit
- Realize that harassing behavior may start as little comments but can escalate into creating a hostile work environment

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How Can You Limit Liability?

Model
Respectful
Behavior

Communicate
Policies

Coach
Employees

Listen and
Respond

Do Not
Allow
Retaliation

- Complaints give us the opportunity to take action and correct the situation before it escalates into a conflict, unexplained resignation or a civil lawsuit.

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How Can You Limit Liability?


Model
Respectful
Behavior
Communicate
Policies
Coach
Employees
Listen and
Respond
Do Not
Allow
Retaliation

- As required by law, there must be NO retaliation allowed.
- Employees must be able to make complaints without fearing further harassment or for their safety.

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Agenda


- Discrimination
- Diversity
- Harassment & Abusive Conduct



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Thank You

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