NCSL LEGISLATIVE SUMMIT

SEXUAL HARASSMENT:
GETTING IT RIGHT ON POLICY, TRAINING AND INVESTIGATION

Moderator: David Byerman, Legislative Research Commission, Kentucky
Speaker: Patti Perez, VP of Workplace Strategy, Emtrain, California
Panelists:
Alf Brandt, California State Assembly
Lori Mathis, Maryland General Assembly
PREVENTION: FOCUS ON A HEALTHY WORKPLACE CULTURE

- Not just about compliance; culture should go beyond the minimum legal requirements
- Align all policies/procedures/protocols with values
- Authenticity and transparency are key ingredients
- Special considerations/realities for legislative bodies?
  - Learning lessons from California, Maryland and Kentucky
PREVENTING SEXUAL HARASSMENT: POLICIES

- Harassment prevention policy
  - What need to be covered
  - What else should be covered

- Policy on reporting concerns/complaints
  - Should include reporting procedures and complaint process
PREVENTING SEXUAL HARASSMENT: TRAINING

• What doesn’t work:
  • When presented as a mandatory, check-the-box activity
  • Content focus is only on legal issues, no nuance
  • Use of scare tactics
  • Focusing only on what NOT to do
  • Viewed as blaming or punitive
• By contrast, what does work:
  • Aligned with mission and valued (authentic)
  • Not a magic bullet, a piece of the prevention puzzle
  • Focus on prevention AND resolution
  • Focus on skills building: conflict resolution, communication, EQ, etc. to positively affect behavior
**Green**

Respectful, positive, productive

This type of behavior is respectful, positive, and productive. We are always striving for a Green-hued workplace.

If you see actions in this color, you're dealing with fabulous employees. Give people a high five and appreciate your workplace.

---

**Yellow**

Stressful, irritating, demotivating

Yellow behavior isn’t harassment, but is slightly problematic. This kind of behavior can be the result of poor management skills, poor communication, lack of teamwork, or other deranging actions.

If you experience Yellower interactions, remind your coworkers that we’re all striving for a Green workplace.

---

**Orange**

Disrespectful, alienating, demoralizing

Orange behavior can be a form of “color” remarks to affect that approach the territory of unlawful harassment. From bullying to comments/jokes based on protected characteristics (race, gender, disability, etc.), Orange behavior must be addressed because it makes people feel excluded and can easily become red/unlawful behavior.

If you see Orange actions, get guidance from HR.

---

**Red**

Unlawful, toxic, destructive

If determined to be severe or pervasive, any comments and actions based on protected characteristics fall into unlawful harassment. When there is Red activity, the workplace is unproductive, uninviting, and hostile.

If you find yourself in Red territory, it's time to call in your organization’s HR or legal teams to help eliminate harassment and get the workplace back on track.
TRAINING: DESIGN AND DELIVERY

• Use data on front end to plan content
• Design and delivery by a subject matter expert (SME). What does that mean?
  • Legal knowledge (doesn’t have to be an attorney)
  • Practical knowledge (policies, investigations, conflict resolution)
  • Bonus: understands behavioral science principles to affect behavior
• Make it a program not a course
• Decide methodology (live, online, combination)
• Decide who you will train, create a calendar
• Will you provide additional training on other prevention topics?
• How often and how long are sessions?
• How will you reinforce these skills?
TRAINING: CONTENT

• Legal topics (yes, but shouldn’t be the only focus)
  • Definitions, elements of unlawful harassment, protected categories
  • Nuance in your state laws, if applicable
  • Complaint mechanisms – internal and external
• Practical/business topics
  • Civility and communication
  • Use nuanced examples to show varying degrees of “bad” behavior AND how to de-escalate
  • Bystander intervention
  • Use real-life examples, if possible
• Special topics for supervisors
  • Explain the problem with their action AND their inaction
  • Reiterate prohibition against retaliation
“Two truths and Two Lies”

1. In order for behavior to be deemed unlawful harassment, it must be severe or pervasive.

2. If an investigation uncovers behavior that is unprofessional but not unlawful, the company is under no obligation to remedy the situation.

3. In order to be deemed unlawful, the objectionable behavior must be based on a protected category.

4. It’s okay to let small insults go since intervening too early leads to hurt feelings and claims of being “overly sensitive.”
INTERACTIVE TRAINING: USE REAL-LIFE EXAMPLES

• OBVIOUS examples of harassing behavior don’t help (and in fact, might be counterproductive)
• Start with learning objectives (we have an issue with nipping behavior in the bud, with retaliation, supervisors better understanding their role) and choose examples based on that
• The question I ask before designing a course is: “What do I want the participants to say as they’re walking out of session?”
• Use nuanced stories, preferably from real life: an anonymized investigation you conducted, or something from the news
Marianne complains that Thurston asked her why she didn’t tell him his fly was open…twice. She says she finds this “creepy” because he is old enough to be her father, talks about his preference for young women all the time, and because she doesn’t think it’s her job to monitor his fly. Ginger investigates and finds no harassment. Her fix is to tell Thurston to stop talking about his fly.
Which of these answers is correct?

A. Thurston says he learned a lot from the investigation - he learned he should stay away from Marianne who is clearly “hyper sensitive.”

B. Thurston retaliates against Marianne by disciplining her for spending too much time chatting with coworkers and for arriving to work late.

C. Thurston stops talking about his fly.

D. Marianne leaves the company.
Do not use “plug and play” online training solutions...learners must be active participants

Use engaging scenarios to keep learner interest

Allow learners to ask questions, have them answered by experts, and view Q&A from other learners
HARASSMENT PREVENTION TRAINING: USE DATA

- Use before training to plan
- Use after training to track Q&A, hot spots, blind spots
- Analysis should provide a road map for next steps and for continuous learning
“FIXING” SEXUAL HARASSMENT: TOP TEN INVESTIGATION MISTAKES

1. Failing to identify a problem and therefore not investigating (not taking complaint seriously so essentially starting with your conclusion that nothing happened)
2. Turning the investigation into a witch hunt
3. Affinity bias – taking information from those who are like you more seriously
4. Confirmation bias – only looking at information that validates your assumption
5. Failing to identify, explore all information (following all leads)
6. Failing to analyze and weigh the evidence
7. Failing to make credibility assessments
8. Failing to reach a conclusion
9. Reaching a legal conclusion
10. Failing to use information to design and execute an effective remedy
“FIXING” SEXUAL HARASSMENT: REMEDIAL MEASURES

- Research shows the single most important factor that determines whether there is harassment in the workplace is ORGANIZATIONAL TOLERANCE.
- Tools to decide how to remedy situation (when misconduct found):
  - "Rate" misconduct
  - Look to past actions for guidance
  - Understand your decision will now create precedence
  - As yourself? Is remedy equal to wrongdoing and will it make behavior stop?
  - “Rate” the individual who engaged in misconduct – how likely is it that a particular measure will have an impact? If the answer is “very unlikely” then you’ve selected the wrong remedy.
  - What message is your decision sending? (Back to organizational tolerance)