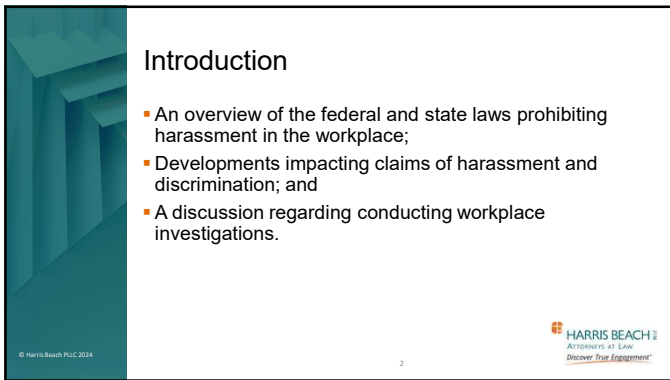




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Notable NYS Anti-Discrimination Laws

- New York Executive Law § 296 (New York State Human Rights Law)
- New York State Civil Rights Law § 40-c
- New York Labor Law § 201-d
- Additional laws, rules and/or regulations may apply depending on the particular circumstances (e.g., local laws).

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Notable Federal Anti-Discrimination Laws

- Title VII of the Civil Rights Act of 1964 ("Title VII")
- Americans with Disabilities Act ("ADA")
- Age Discrimination in Employment Act ("ADEA")
- Genetic Information Non-Discrimination Act ("GINA")

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Q: Can you explain the interplay between the NYSHRL and federal anti-harassment laws?


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Harassment and Discrimination Under the NYSHRL




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Conduct Must be Because of Protected Class or Characteristic

- The NYSHRL is the principal statute prohibiting unlawful discrimination, harassment, and retaliation in the workplace based on protected characteristics.
- Protected characteristics include:
 - age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, pregnancy, disability, predisposing genetic characteristics, familial status, marital status, status as a victim of domestic violence, arrest records and criminal convictions, and citizenship and immigration status.




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The Standard for Establishing Harassment Under the NYSHRL

- Conduct no longer needs to be "severe or pervasive" to be unlawful harassment.
- Harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in a protected category.
- What is not unlawful harassment? Something that the law considers a "petty slight" or "trivial inconvenience."



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There are Many Forms of Harassment and Discrimination

- Harassment and discrimination can look different and occur in a variety of circumstances.
 - Threats or inducements for job benefits,
 - Comments, gestures, jokes,
 - Offensive printed materials (e.g., magazines, cartoons),
 - Contact, touching,
 - Off duty and off premises,
 - E-mails/text messages, postings or messages on blogs, Instagram, Snapchat, Facebook, X, etc.
 - All too often employees do and say things electronically that they would not say in person or in any other form of written communication.

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Who Can Harass Who?

- Male → Female
- Female → Male
- Male → Male
- Female → Female
- Supervisor → Subordinate
- Subordinate → Supervisor
- Vendor/Visitor → Employee
- Employee → Vendor /Visitor

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Q: How might harassment and discrimination occur in a remote work environment?

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Conduct Must be “Because of” a Protected Class or Characteristic

- The harassment laws do not generally protect people from rude or uncivil people/behavior.
- Example:
 - Jane is very rude to Dan. She is brief when she answers his questions. She rolls her eyes at him and talks about him behind his back. This behavior doesn't necessarily constitute unlawful discrimination and/or harassment. The law looks at *why* the alleged perpetrator is treating someone in a particular manner and if that is based on a protected class.
- All levels of management and supervisors must inform HR so that an investigation is conducted, and the underlying reason is measured.

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Third-Party Harassment

Example: A vendor comes into the Company's cafeteria on a regular basis.

- Sometimes he gets a bit touchy-feely with the Company's cafeteria workers and they complain to their supervisor.
- The supervisor does nothing, because she doesn't want to lose a good vendor relationship.
- Is this okay? **No!!!**
- Even if it costs business, the supervisor needs to step in and take action to protect his/her employees.
- This can be very difficult to navigate with constituents and vendors, but employers are required to STOP inappropriate/illegal behaviors.

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Retaliation

- “Retaliation” refers to negative action taken against someone who reports sexual harassment.
- Retaliation is completely prohibited.
- Making a good-faith complaint of harassment is protected.
 - Even if an investigation determines no harassment occurred, the individual reporting it cannot be retaliated against.

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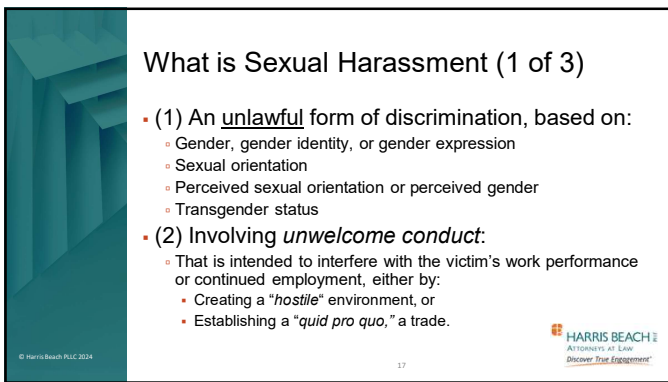
Sexual Harassment



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What is Sexual Harassment (1 of 3)

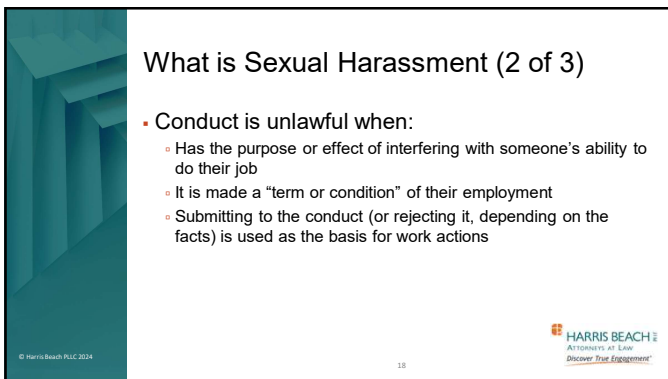
- (1) An unlawful form of discrimination, based on:
 - Gender, gender identity, or gender expression
 - Sexual orientation
 - Perceived sexual orientation or perceived gender
 - Transgender status
- (2) Involving *unwelcome conduct*:
 - That is intended to interfere with the victim's work performance or continued employment, either by:
 - Creating a "*hostile*" environment, or
 - Establishing a "*quid pro quo*," a trade.



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What is Sexual Harassment (2 of 3)

- Conduct is unlawful when:
 - Has the purpose or effect of interfering with someone's ability to do their job
 - It is made a "term or condition" of their employment
 - Submitting to the conduct (or rejecting it, depending on the facts) is used as the basis for work actions



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What is Sexual Harassment (3 of 3)

- **“Hostile environment”**
 - Intimidation based on sex, gender, etc. Can happen from comments, jokes, insults, etc.
 - Can also be *physical*. A physical action can trigger a hostile environment. (For example, an inappropriate and unwelcome grab).
- **“Quid pro quo”**
 - “This for that” or “trade”
 - Pressuring an individual to do something based on their sex, gender, etc.
 - For example: offering a better work assignment to a coworker only if the coworker agrees to go on a date with them.

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Q: How am I supposed to know if conduct is unwelcome or offensive to another individual?

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Who can be sexually harassed in the workplace?

- Almost anybody.
- Harassment is not limited to men-and-women. It could be:
 - Woman harassing a man
 - Man harassing another man
 - Etc.
- Harassment not limited to *employees* either.
 - Can involve organization members harassing non-organization individuals *in* the workplace, and vice-versa.

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Where can sexual harassment occur?

- “Workplace” harassment can take place anywhere an individual has work responsibilities.
 - Off-site events.
 - Organization-sponsored events.
 - Rule of thumb:
 - If you’re representing the organization, consider it the “workplace.”
- Harassment can also occur through digital communications (e.g., texts, DMs, social media, phone calls, etc.)

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Supervisors and Managers

- Supervisors and managers are held to a higher standard under the law.
 - Position of authority.
 - Power imbalances between supervisors/managers and other staff members.
- By law, supervisors and managers are *required* to report any harassment they see or that they are informed of, even if they believe it’s trivial or the individual targeted does not want it reported.

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Aiding and Abetting

- A failure to report or address discriminatory conduct can subject a supervisor to personal liability for aiding and abetting the discrimination under New York State law.
- The employee must first prove the underlying discrimination.

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Q: What happens if a hostile work environment is made by a supervisor?

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Sexual Harassment Training and Policy Requirements


- Employers are required to adopt a sexual harassment prevention policy.
 - Employers who do not adopt the State's model policy must ensure their policy meets or exceeds the State's "minimum standards."
- Employers must also train all employees on sexual harassment prevention annually.
 - The training must meet minimum standards set by NYS
 - It must be "interactive"

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Developments Impacting Claims of Harassment and Discrimination

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Statute of Limitations Extended Under the NYSHRL

- Effective February 15, 2024
- New York extended the statute of limitations from one (1) to **three (3) years** for all claims resulting from unlawful discriminatory practices under the NYSHRL
- The statute of limitations for causes of action (except claims of sexual harassment) that occurred before February 15, 2024 remains one (1) year.

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Height and Weight are Protected Characteristics Under the NYCHRL

- Unlawful to discriminate based on "body size"
 - Height
 - Weight
 - Combination of height and weight
- Amended law went into effect on November 26, 2023
- Limited exceptions
 - Where required by law
 - Certain jobs

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NYS Hotline for Complaints of Workplace Sexual Harassment

- 1-800-HARASS-3 (1-800-427-2773)
- Open during regular business hours and staffed by pro bono attorneys "experienced in providing counsel related to sexual harassment matters."
- Division staff will provide the callers with information about filing a sexual harassment complaint with the agency and, if the caller is interested in discussing their case with an attorney, the hotline will provide them with the name(s) and contact information of an attorney who is experienced in providing counsel related to workplace sexual harassment and who has volunteered to provide limited pro bono assistance.*


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Prohibition on Releasing Personnel Files of Employees


- Employers are prohibited from disclosing an employee's personnel file because the employee has:
 - opposed any practices forbidden under the NYSHRL; or
 - filed a complaint, testified, or assisted in any proceeding under the NYSHRL.
- Exception:
 - Where disclosure is made in the course of commencing or responding to a complaint in any judicial or administrative proceeding.

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State and Municipalities Designated as “Employers” of Staffers Serving Under an Elected Official

- New York Executive Law § 292(5) provides:
 - (a) the state of New York shall be considered an employer of any employee or official, including any elected official, of the New York state executive, legislature, or judiciary, including persons serving in any judicial capacity, and persons serving on the staff of any elected official in New York state,*
 - (b) a city, county, town, village or other political subdivision of the state of New York shall be considered an employer of any employee or official, including any elected official, of such locality's executive, legislature or judiciary, including persons serving in any local judicial capacity, and persons serving on the staff of any local elected official.*

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Key Updates to the State’s Model Sexual Harassment Policy

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1. Other Forms of Discrimination

- The policy suggests that its guidelines and procedures are applicable to harassment based on other protected characteristics, not just sexual harassment.
- For example:
 - "While this policy is focused on sexual harassment and gender discrimination, the methods for reporting and investigating discrimination based on other protected identities are the same."
 - "Though the focus of this policy is on sexual harassment and gender discrimination, the New York State Human Rights law protects against discrimination in several protected classes[.] The prevention policies outlined above should be considered applicable to all protected classes."

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2. Focus on Gender Diversity

- The policy discusses the importance of understanding gender diversity for purposes of identifying sexual harassment.
- For example:
 - "Understanding gender diversity is essential to recognizing sexual harassment because discrimination based on sex stereotypes, gender expression and perceived identity are all forms of sexual harassment."

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3. Remote Work

- The policy acknowledges that sexual harassment can occur when employees are working remotely.
- For example:
 - "Remarks made over virtual platforms and in messaging apps when employees are working remotely can create a . . . hostile work environment."
 - "Sexual or discriminatory displays or publications anywhere in the workplace [are unlawful]. . . This also extends to the virtual or remote workspace and can include having such materials visible in the background of one's home during a virtual meeting."

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4. Bystander Intervention

- The policy encourages any employee witnessing harassment as a bystander to report it.
- It also outlines 5 standard methods for bystander intervention:
 1. Interrupt the harassment and distract the individual being harassed
 2. Ask a third-party to intervene
 3. Take notes of the harassment
 4. Check in with the victim after the incident
 5. Confront the harasser

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6. The Sexual Harassment Hotline

- The policy specifically references the NYS DHR's sexual harassment hotline.
 - "Call the DHR sexual harassment hotline at 1(800) HARASS3 for more information about filing a sexual harassment complaint. This hotline can also provide you with a referral to a volunteer attorney experienced in sexual harassment matters who can provide you with limited free assistance and counsel over the phone."

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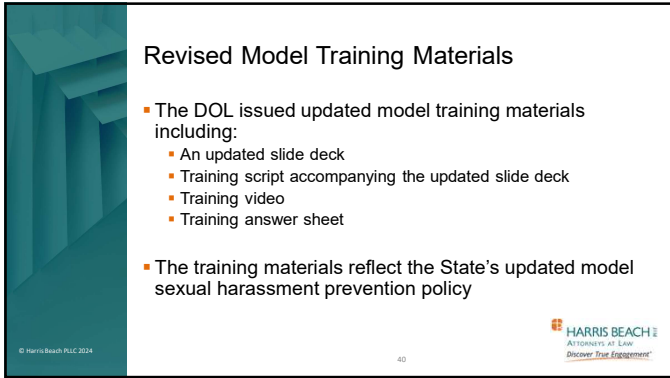
7. Other Updates to the Model Policy

- Emphasizes sensitivity for victims
- Provides additional examples of sexual harassment, discrimination, and retaliation
- Expands on external remedies

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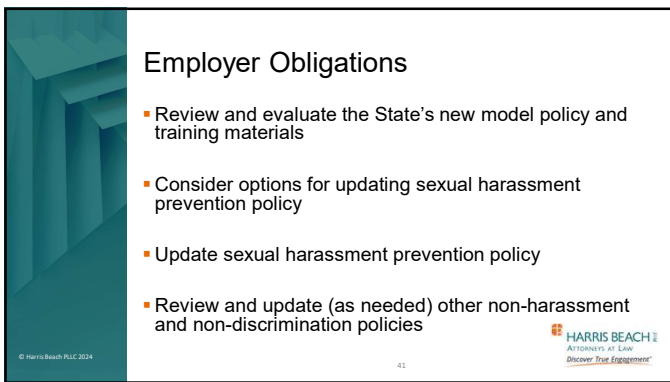
Revised Model Training Materials

- The DOL issued updated model training materials including:
 - An updated slide deck
 - Training script accompanying the updated slide deck
 - Training video
 - Training answer sheet
- The training materials reflect the State's updated model sexual harassment prevention policy

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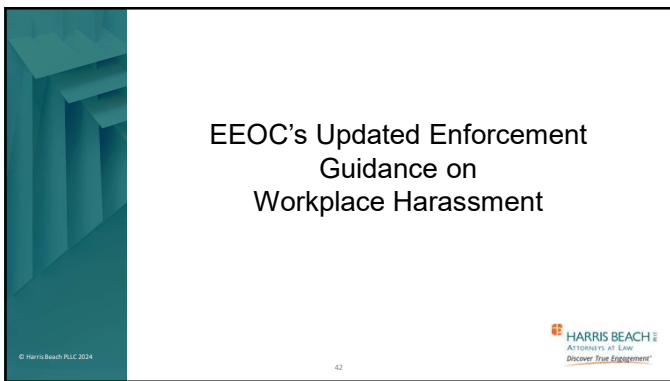
Employer Obligations

- Review and evaluate the State's new model policy and training materials
- Consider options for updating sexual harassment prevention policy
- Update sexual harassment prevention policy
- Review and update (as needed) other non-harassment and non-discrimination policies

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**EEOC's Updated Enforcement
Guidance on
Workplace Harassment**

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Background

- On April 29, 2024, the EEOC released a long-anticipated update to its enforcement guidance on harassment in the workplace.
- The updated guidance replaces five prior guidance documents on workplace harassment issued by the EEOC between 1987 and 1999, and highlights several notable changes in the law since that time.
- It includes 70+ examples/hypothetical scenarios.

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Who Should be Aware of the Updated Guidance?

- The guidance “serves as a resource for employers, employees, and practitioners; for EEOC staff and the staff of other agencies that investigate, adjudicate, or litigate harassment claims or conduct outreach on the topic of workplace harassment; and for courts deciding harassment issues.”

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Key Highlights of the Guidance: Sex-Based Harassment

- Sex-based harassment includes conduct based on an individual’s sexual orientation or gender identity, including how that identity is expressed.
- Examples:
 - “Outing” an employee (*i.e.*, disclosing that individual’s sexual orientation or gender identity without their consent).
 - “Misgendering” an employee.
 - Denying an employee access to a bathroom or other sex-segregated facility consistent with the person’s gender identity.

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**Key Highlights of the Guidance:
Sex-Based Harassment**

- Sex-based harassment under Title VII also includes harassment based on pregnancy, childbirth, or related medical conditions.
- Examples:
 - Issues related to lactation, using or not using contraception, or deciding to have, or not to have, an abortion.

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**Key Highlights of the Guidance:
Race-Based Harassment**

- Race-based harassment does not need to directly implicate skin color.
- Examples:
 - Harassment based on traits or characteristics linked to an individual's race, such as the employee's name, cultural dress, accent or manner of speech, and physical characteristics, including appearance standards (e.g., harassment based on hair textures and hairstyles commonly associated with specific racial groups).

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**Key Highlights of the Guidance:
Technology-Related Issues**

- Conduct within a virtual work environment can contribute to a hostile work environment (e.g., comments made during a video meeting or typed in a group chat, or imagery that is visible in an employee's workplace while in a video meeting).
- Conduct that is conveyed using work-related communications systems, accounts, devices, or platforms can also contribute to a hostile work environment.
- Conduct that does not occur in a work-related context (e.g., electronic communications using private phones or social media accounts) can contribute to a hostile work environment if it impacts the workplace.

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**Key Highlights of the Guidance:
Cross-Bases Issues**

- Harassment based on the perception that an individual has a particular protected characteristic is covered by federal EEO laws even if the perception is incorrect.
- The EEO laws also cover “associational discrimination” (*i.e.*, harassment because the employee associates with someone in a different protected class, or harassment because the employee associates with someone in the same protected class).
- Harassment that is based on an employee’s protected characteristic is covered even if the harasser is a member of the same protected class.

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**Recommendations for Effective
Workplace Anti-Harassment Policies**

- For an anti-harassment policy to be effective, it should generally have the following features:
 - define what conduct is prohibited;
 - be widely disseminated and comprehensible;
 - require that supervisors report harassment when they are aware of it;
 - offer multiple avenues for reporting harassment, thereby allowing employees to contact someone other than their harassers;
 - clearly identify accessible points of contact to whom reports of harassment should be made and include contact information; and
 - explain the employer’s complaint process, including the process’s anti-retaliation and confidentiality protections.

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**Recommendations for Effective
Workplace Anti-Harassment Trainings**

- For training to be effective, it should generally have the following features:
 - Explain the employer’s anti-harassment policy and complaint process;
 - Describe and provide examples of prohibited conduct under the policy;
 - Provide information about employees’ rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited;
 - Provide supervisors and managers with information about how to prevent, identify, stop, report, and correct harassment;
 - Be tailored to the workplace and workforce;
 - Be provided on a regular basis to all employees; and
 - Be provided in a clear, easy-to-understand style and format.

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Considerations for Employers

- Review the EEOC's updated enforcement guidance on workplace harassment.
- Review your anti-harassment policies and trainings for compliance with the guidance.
- Consider conducting an annual review of harassment and discrimination policies and trainings.
- Employers in states with mandated sexual harassment training requirements (like NYS) may consider conducting broader trainings.

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Conducting Workplace Investigations

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Why Conduct an Investigation?

- May have a legal obligation to investigate
- An internal investigation allows an employer to:
 - Determine what happened, who was involved, and why it occurred
 - Reinforce the company's position on what it will and will not tolerate
 - Minimize turnover and degradation of employees
 - Counteract negative publicity and public embarrassment should that complaint be publicized
 - Decrease the employer's vulnerability and serve as a helpful source of information to defend against a lawsuit
 - Encourage individuals to come forward with their issues and concerns

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When is the Duty to Investigate Triggered?

- Certain complaints must be investigated
 - Legally obligated to investigate complaints of harassment, discrimination, and/or retaliation.
- A formal, written complaint is not required to trigger the duty to investigate
- Do not be in the position to say you knew, or should have known, of misconduct but did not investigate or address it

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When is the Duty to Investigate Triggered? (Cont.)

- An employer's duty to investigate may be triggered by the following:
 - Formal or informal complaint
 - Grievance
 - Notice of litigation (where the factual basis of the claim has not yet been investigated)
 - Rumors or suspicion of misconduct

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Responsiveness and Promptness

- Enhances the employer's credibility with employees
- Helps the employer to identify and resolve problems before they become widespread
- Protects all involved parties

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**Preparing for the Investigation:
Review and Follow Policies and Procedures**

- Adhere to company's standard practices
- Identify any policies or procedures that may apply to investigation
- Failure to follow adopted policies and procedures may result in liability

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**Preparing for the Investigation:
Take Interim Steps to Safeguard the Workplace**

- After a complaint is made and/or while the investigation is underway, an employer must take appropriate steps to safeguard the workplace.
- The employer must not take any action which is retaliatory against the complainant, or which could appear to be retaliatory.

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**Preparing for the Investigation:
Select Investigator/Define Scope**

- Identify who should conduct the investigation (and who should not)
- Define the scope of the investigation
 - Identify the potentially relevant laws/policies.
 - Understand that in some instances, the allegation may involve a policy violation but not necessary a legal violation.
 - Be flexible.
 - Consider long-term implications.


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**Preparing for the Investigation:
General Tips**


- Determine whether a formal or informal investigation is needed.
 - There is no "one size fits all" approach to investigations
- Tips for any investigation:
 - Don't delay
 - Be thorough
 - Stay organized
 - Keep a record

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**Preparing for the Investigation:
Witness Interviews**


- Prepare a list of witnesses
- Identify other individuals who may have relevant information but may not need to be interviewed
- Ensure that all possible sources of information are identified
- Reserve a location for interviews
- Determine when the interviews will take place
- Prepare interview questions in advance

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Conducting Remote Investigations

- Consider benefits and challenges of conducting remote investigations
- If conducting the investigation remotely, anticipate actions interviewees may take that you may want to avoid
 - Surreptitious recording
 - Screen capture
 - Having others present

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Conducting the Investigation

- Interview: complainant, accused, witnesses, and other parties
- Conduct separate interviews for each person
- Document the interviews
 - Keep interview notes and summaries
 - Record warning statements and directives given to witnesses

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**Conducting the Investigation:
Preserve Relevant Evidence**

- Determine what information is relevant to the investigation and secure it
- Conduct a broad search for relevant documents, but keep those involved in the search to a few trusted individuals
- Duty to preserve once litigation is "foreseeable"
 - Sanctions may be imposed for destroying relevant information once an investigation is commenced

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**Conducting the Investigation:
Explain the Purpose of the Interview**

- Be as open as you can about the purpose of the meeting, but do not disclose more information than necessary
- Be prepared for witness questions such as "why me?"
- Build a relationship with the witness and attempt to make him/her feel comfortable speaking with you
- Inform the witness of the prohibition against retaliation

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**Concluding the Interview:
Best Practices**

- Ask the witness whether there is anything that you haven't asked that he/she thinks you should know
- Ask whether anything needs to be further detailed or clarified
- Tell the witness to contact you if he/she recalls additional details or information
- Direct the witness to maintain the confidentiality of the investigation

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Confidentiality Considerations

- Keep the investigation and the results of the investigation as confidential as you can under the circumstances
- **Do not promise complete confidentiality.** Promise that the matter will be kept confidential only to the greatest extent possible under the circumstances
- People inevitably talk. Ask witnesses not to disclose the nature of the investigation to other employees
- Have a plan in place to address questions that may come up regarding the investigation

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Drafting an Investigation Report

- List the documents reviewed and witnesses interviewed
- Include a chronology of the investigation
- Include summaries of:
 - The allegations
 - The interviews (witness testimonies and evaluations of their credibility)
 - The findings
- Include discussion of conclusions drawn about allegations based on facts
- Remember: the report could end up as an exhibit in a future proceeding

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Take Appropriate Corrective Action

- What is appropriate? Consider:
 - Was the accused trained on policies?
 - How serious was the violation?
 - Has the accused been guilty of similar violations in the past?
 - How have similar incidents been treated in the past?
 - Are there mitigating or aggravating circumstances?

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Document the Discipline Imposed

- Incorporate all the relevant facts
 - Assume the document will be read by an unfamiliar third party (e.g., a judge or government agency)
- General structure of disciplinary/counseling documents
 - Purpose
 - Relevant background such as previous misconduct or warnings
 - Provide detailed fact statement of the current issue
 - Include specific instruction on what the employee is expected to do/not do on a going-forward basis
 - Mention the potential for "further disciplinary action, up to and including termination"
- Have employee sign/date documents or document refusal to sign

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Close the Investigation

- Draft an investigation summary
- Follow-up periodically on subsequent dates to ensure the misconduct has stopped and corrective action/warnings are being observed
 - Be sensitive to ongoing working relationships
 - Consider necessary activities to restore a comfortable work environment
- Retain investigation documents in separate files

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Questions?

- Thank you for your participation.

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