



Preventing and Remediating Workplace Harassment

Presented by:
Attorney Name
 Phone: (xxx) xxx-xxxx | Email: xxx@fisherphillips.com

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Why Are We Here?


- The law requires Harassment Prevention Training
- Company's policy focuses on prevention
- Strict liability for managers as company representatives
- To give you the tools to handle tough situations

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Why Should You Care?


- Supervisors are personally liable
- Supervisors are personally sued in discrimination cases 90% of the time!



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What Does It Mean to Be Personally Liable?

- Your home, car, bank account are at risk
- Your wages may be garnished
- You may have to pay an attorney to defend you



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Who Must Receive the Training?

- Who must receive the training?
 - Supervisors - includes anyone who:
 - Directs the work of another employee
 - Hires, fires, or disciplines another employee
 - Makes recommendations regarding the above
 - New supervisors must receive training within six months of assuming new supervisory position

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The Law – AB 1825

- Requires **specific subject matters** be covered during a two-hour interactive presentation.
 - Anti-Harassment
 - Anti-Discrimination
 - Anti-Retaliation
 - Anti-Bullying
 - Gender Identity (new)

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California Employment Lawsuits Filed in One Day 

- 45 cases filed in **ONE** day
- Of them, 18 personally named supervisors or employers personally named




40%
of these cases
personally named
the supervisors or
employers

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Other Costs 

- Negative publicity
- Disruption of work due to trial or deposition
- Loss of employment



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Why is sexual harassment STILL such a big problem these days? 



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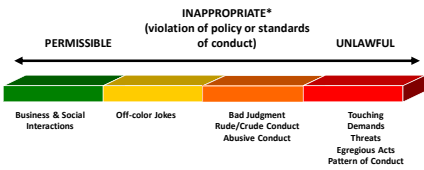
Why is sexual harassment STILL such a big problem these days?

- It is very easy to cross lines.
 - Intimate working environments; friendships
- Power of supervisors over non-supervisors
- Blurring/crossing professional boundaries
- Poor management
- Job insecurity
- Personal/marital problems



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Conduct of a Harassing Nature



* Note: Even if not unlawful, conduct may violate standards of conduct and warrant discipline.

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Prohibited Harassment Defined

What makes harassment unlawful?

Conduct based on a _____ category

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Protected Categories

FEDERAL LAW includes...

- Race
- Color
- Religion
- National origin
- Gender/sex (*includes pregnancy*)
- Age (*if 40 or above*)
- Disability (*mental/physical*)
- Veteran status
- Family leave

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Protected Categories

STATE/LOCAL LAW adds others such as...



- Sexual orientation
- Gender identity/transgender status
- Marital status
- Age (*with lower age limit*)
- Family relationships
- Injured workers
- Workers' compensation
- Domestic violence leave
- Crime victims
- Expunged juvenile records
- Lawful off-duty activities

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Unlawful Harassment?

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Unlawful Harassment?

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RED ZONE




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Sexual Harassment




- Two Broad Categories
 - *Quid Pro Quo*
 - Hostile Working Environment



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Zero Tolerance Policy




Harassment in the workplace is prohibited, regardless as to whether it reaches the "legal standard" of harassment.

The Company will take all reasonable steps to prevent harassment from occurring, and will take prompt and appropriate action when it knows or suspects that inappropriate actions has occurred.

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Zero Tolerance Policy



A or B?

Having a *zero tolerance policy* means the employer has a policy that:


A. Tolerates no unlawful harassment;

or

B. Tolerates no conduct that might be construed as unlawful harassment.

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Non-Harassment Policy





- Your obligations under the Non-Harassment Policy:
 - Appropriate conduct at all times
 - Report work-related harassing conduct
 - Cooperate in investigations
 - If you have a question, ASK!
 - REPORT ANY AND ALL VIOLATIONS TO HR and UPPER MANAGEMENT**

...no exceptions, no excuses

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Quid Pro Quo Harassment

- Any unwelcome sexual advances, requests for sexual favors, or any other verbal or physical conduct of a sexual nature when:
 - Submission to such conduct is made either explicitly or implicitly a **term or condition of an individual's employment**.
 - Submission to, or rejections of, such conduct by an individual **is used as the basis of** employment decisions affecting such individual.
- Very Uncommon Claim





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Hostile Work Environment

WHAT IS A "HOSTILE WORK ENVIRONMENT"?
Unwanted harassing conduct due to protected status;

- Harassing conduct was so severe, widespread, or persistent that a reasonable individual in the employee's circumstances would have considered the work environment to be hostile or abusive;
- Employee considered the work environment to be hostile or abusive; and
- The conduct was a substantial factor in causing employee's harm.




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Hostile Work Environment


BEWARE OF THE TRICKY LANGUAGE: severe **or** pervasive

Hypos:
Slap on the butt once?
Asking someone on a date?
Asking someone on a date every day for a month?
Talking about your own sexual history?
Whistling, cat-calls?



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Hostile work environment: "unwanted conduct"



- TWO STANDARDS
 1. Objective: "a reasonable individuals in the employee's circumstances would have considered the work environment to be hostile or abusive"
 2. Subjective: "That employee considered the work environment to be hostile or abusive"


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YELLOW AND ORANGE ZONE

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Four Categories of Harassing Behavior



California puts harassing behavior into four categories:

- Verbal harassment
- Physical harassment
- Visual harassment
- Sexual favors

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Hypothetical



Lately, whenever Paul sees Jim in the hallway, he says "Hey, Jimbo, when are we going away to Vegas together?" At first it did not bother him but after Paul said it again in earshot of some other employees, Paul complained. He said he is afraid his girlfriend will hear rumors that he and Paul are planning a trip to Las Vegas together or that other employees will think he likes men. When you ask Paul about it he says, "Come on, I was joking. Surely a little joke like that isn't illegal!"

Has Paul violated his company's no-tolerance policy?

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Verbal Harassment



- Repeatedly asking for a date
- Comments/questions about sex life
- Asking intimate or embarrassing questions
- Boasting of sexual conquests
- Innuendo
- Crude jokes, references to body parts or anatomy
- Vulgar language
- Sexist nicknames



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Hypothetical



Debbie loves curse words. She has never heard a bad word that she didn't like to repeat. Whenever something doesn't go her way, she yells loudly, "What the %\$@)! Who the \$#%& does that guy think he is?" She never directs her comments at anyone, but she uses foul language every single day. An employee on her team complains.

Is Debbie's conduct illegal?



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Physical Harassment



- Massaging neck, shoulders
- Touching clothing or hair
- Elevator eyes
- Kissing
- Hugging
- Patting
- Brushing up against
- Adjusting one's clothing

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Hypothetical



Jerry's concept of personal space is different from the average person that he works with. He often comes to Chris' work area to talk about work issues and catch up on their weekends. Instead of standing a couple feet away, he stands right next to Chris. Chris complains to HR that Jerry has brushed up against him. When questioned, Jerry laughs and says "oh, yeah. My wife tells me that I'm in people's space all the time."

Where did Jerry go wrong?

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Visual Harassment



- Posters or calendars
- Cartoons or other offensive pictures or photos
- Offensive screen savers or having offensive images on computer screen
- Obscene gestures
- Magazines


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Hypothetical



Kevin enjoys looking at porn websites during his lunch break in his office with the door closed. He is careful not to let anyone else see what he is doing.


Is this a problem?



Instead, what if he's reading Maxim (aka "The Ultimate Guys Guide") every day in the break room?


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Hostile Work Environment Issues



Off Site Conduct/Communication with Sexual Content

- Do you have a duty to respond?
- Investigate?
- How do you cull the behavior?




Harassment by Non-Employees


- *What do you do if you can't discipline them?*
- *How do you protect your employee and your business?*

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Potential Legal Remedies



- Wage loss
- Emotional distress
- Injunctive relief
- Punitive damages



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Responding to Complaints



- **Even when an employee requests no action, the employer must respond**
- Even when an employee makes "off the record" reports, the employer must respond
- Even when there is no "complaint" the employer must investigate
- Just **witnessing** the conduct is enough to require a response by the employer

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Preventing Harassment



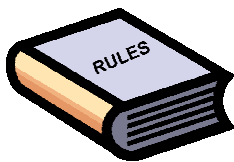
- The "litmus test:" If you are not sure about a remark, a joke or particular conduct, ask yourself this:
 - Would I say these things or do these things if my spouse and children were present?
 - Would I say this if I knew that it was being recorded?
 - Would I want to repeat it in a court of law?
- If the answer is **no**, then don't say it or do it.

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Preventing Harassment



- Make sure you are familiar with the company's policies regarding harassment and discrimination
- Communicate that the company prohibits harassment in the workplace
- Don't tolerate inappropriate conduct or comments by others – tolerating it will mean you condone it to your subordinates.
- Don't engage in inappropriate conduct yourself – you can subject the company to greater liability than subordinates, and engaging in or joining in inappropriate conduct also communicates that you condone it.





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Complaint Procedures

The Company will initiate appropriate corrective action depending on the outcome of the investigation, which may include, but is not limited to:

- o Reprimand
- o Suspension without pay
- o Reduction in pay
- o Termination
- o Additional training; or
- o Individual counseling






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Retaliation Prohibited

Examples of retaliation may include:

- Termination
- Selective discipline
- Assignment of less favorable work
- Failing to award a deserved promotion
- Layoff out of order
- Ostracism or shunning
- any other adverse employment actions that (1) have a detrimental effect on an employee and (2) are substantially influenced by improper retaliatory motives





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Retaliation - Example

Arnie complained about his boss Karen's constant use of profanity and racial slurs in her speech. Since being informed of Arnie's complaint, Karen has avoided Arnie. She does not speak to him if she passes him in the hallway, and she avoids dealing with him on work matters. Arnie is now complaining to you that his ability to do his job is impaired by Karen's refusal to speak to him.

What should you do?



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Retaliation – Another Example



In September, Sharon, an administrative assistant, complained that a manager was making sexually-suggestive comments to her. He was reprimanded and transferred to a different team and you took his place. You discover that Sharon falsified her time records. Some other employees who have committed time card fraud have been terminated and some have been given a second chance.

What should you do? What are the risks associated with terminating her?

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OFFICE ROMANCE



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WHAT ARE THE POTENTIAL ISSUES



What was once a fairy tale romance could create harassment issues.


HYPOS:

- Can harassment result from asking an ex out time and time again?
- Does the fact that the relationship was consensual at one time preclude a harassment claim?
- What should managers do to rectify the situation?
- What should you do if you find out to employees are dating?

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Off Duty Conduct

- Happy hours and socializing
- Social networking is the newest hot topic for employment litigation
- Facebook, Twitter, etc., present opportunities for harassment and publication of incriminating statements



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Off Duty Conduct

What can get you in trouble?

- Supervisors posting messages that are harassing or show bias
- Supervisors visiting employees' social networking sites and ignoring information that may affect the workplace, or improperly using information on the site

Tips for supervisors:

- Don't "friend" employees unless everything on your site is appropriate for **very public consumption**
- Don't post information on the Internet that could be used against the company
- Don't review social networking sites for employment purposes – leave it to HR



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What about third party harassment?


Liability even extends to acts either by or against non-employees. Like who?

- Customers
- Vendors
- Independent Contractors

*What do you do if you can't discipline them?
How do you protect your employee and your business?*

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No Bully Zone



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What is Workplace Bullying?

- Actions (by an individual or group) that are:
 - Repeated
 - Unreasonable (out of context for situation)
- And cause:
 - An intentional impact on the target (i.e., humiliation, degradation, offense, intimidation) or
 - Dangerous results to the target (i.e., risk to safety and/or mental or physical health issues)




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Examples of Bullying


The Obvious

- Shouting/raising voice
- Ignoring or interrupting
- Invading personal space



Less Obvious

- Isolating or mobbing
- Manipulating ability to do work (unreasonable deadlines, overloading/underloading)
- Taking credit for work of others




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Legal Exposure

Bullying *can* lead to other legal claims...

- Disability discrimination
- Workers compensation stress claims
- Intentional infliction of emotional distress claims
- "Harassment" if tied to protected category


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Addressing Bullying

- **Commitment from leadership**
 - Make it clear to all employees that a bullying management style is not consistent with the organization's mission and values
- **The bully must embrace becoming a part of solution**
 - Solicit feedback and be open to change
 - Identify Action Plan
 - Make meeting expectations a part of performance review; hold accountable.

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The Transgender Work Opportunity Act

- Requires sexual harassment training to include harassment based on *gender identity, gender expression, and sexual orientation*.



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General Requirements



- It is unlawful to deny employment to an individual based wholly or in part on the individual's sex, gender, gender identity, or gender expression.
- Employers must permit employees to perform jobs or duties that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.

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Unlawful Inquiries



- Employers may not inquire about or require documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment.
- Inquiries that directly or indirectly identify an individual on the basis of sex, gender identity or gender expression are generally unlawful.
- Employer may ask employees to provide such information solely on a voluntary basis.

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Restrooms and Other Facilities




- Employees must be permitted to use restrooms and other facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.
- "Facilities" includes locker rooms, dressing rooms, dormitories, and similar facilities.
- Single-occupancy restrooms must have gender-neutral signage, such as "Restroom," "Unisex," "Gender Neutral," "All Gender Restroom," etc. ("Porta-Potty" exception for non-flush toilets.)



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Restrooms and Other Facilities




- To protect the privacy of all employees, employers shall provide locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy.
- Transgender employees may not be required to use single-user restroom.

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Restrooms and Other Facilities




- Employees need not undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender.
- Employer may make a reasonable and **confidential** inquiry of an employee for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.



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Names and Pronouns




- If an employee requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, an employer must honor that request.
- An employer may use an employee's gender or legal name as indicated in a government-issued identification document where necessary to meet a legally-mandated obligation, but otherwise must identify the employee in accordance with the employee's gender identity and preferred name.
- An employer shall not discriminate against an applicant based on the applicant's failure to designate male or female on an application form.

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Dress Codes and Grooming

- Employers may not to impose physical appearance, grooming or dress standards which are inconsistent with an individual's gender identity or gender expression unless required by business necessity.
- Basic rule: You can apply dress and grooming standards but employees may choose which gender's standards they will follow.



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Responding to Complaints and Correcting Harassment

Walking through the investigation process

- ...
- What went right
- ...
- What went wrong

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Cast of Characters


- Complainant: Nancy, Client Relations Specialist
- Accused: Brian, Sales VP
- HR VP: Jim
- HR Manager: Angela
- President: Michelle

Let's See What Happens . . .

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What Are Potential Business Problems?


- Potential Lawsuit
- Potential Offensive Work Environment
- Potential Loss (Firing) of Very Valuable Sales VP and the Clients/Revenue He Controls
- Potential Loss of Nancy as Valuable Employee



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How Should Jim Proceed?


- Brian said - "Don't Let Her Sidetrack Issue"
 - Proceed with Disciplinary Discussion?
- Switch to Investigation?
 - Group Discussion?
 - Interview Nancy?
 - Interview Brian?
- Let's See How Jim Handled It . . .



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How Did Jim Do?

- Took Control Over Situation
- Message to Nancy
- Message to Brian
- Presence of Angela for Nancy Interview
- Let's See the Interview of Nancy . . .



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What Did Jim and Angela Accomplish?



- Connection With Nancy
- Nature/Severity of Offensive Conduct?
- Pressured Relationship?
- Threats After Breakup?
- Anyone Notice What Nancy Had In Front of Her?
 - Let's see

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Great Work by Jim



- Interview Took Turn for Worse
 - Nancy Pushes Back
- Dangerous Question About Need for An Attorney
 - Jim's Excellent Response
 - Jim Brought Her Back (Hopefully)
- **Basics – Always Ask**
 1. Recordings, Witnesses, Documents, Photos, Emails, Texts
 2. "Anything else that would help in investigation"
- Let's see how interview concludes . . .

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Conclusion of Nancy Interview



- Question:
 - What do you think would be fair outcome?
- Explanation of What Will Happen Next
- Sends Nancy Home With Pay
- Maintain Contact with Nancy

- So What Does Brian Say . . .

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General Observations



- Brian Wants to Know What She Said
 - Jim Properly Resists
- Consent Defense
 - Importance?
 - Strength?

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Legitimacy of President's Issues



- "New blond girl. . . She looked like trouble"
 - But she also said no tolerance for sexual harassment
- "Is he guilty?" "Did he do it?"
 - Jim -- "Good summary of evidence -- No way to tell"
- "Why assume she's the one telling the truth?"
 - Because safest thing to fire Brian – True?
 - Okay to consider revenue/profits/keep people employed?

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WHAT DID JIM DO WRONG?




Jim committed a common but major error in the investigation process...anyone know?

HE HAD NO DOCUMENTATION OF THE INVESTIGATION OR EVIDENCE!

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Time for Decision - You Make the Call



- On Brian
 - Fire
 - Final Warning
 - No Discipline
- On Nancy
 - Fire
 - Discipline
 - No Discipline
 - Transfer
 - Promotion

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Is Story Over?



- Maybe
- Still Risk of Lawsuit? Why?
 - Can Still Assert Claim
 - Future Alleged Harassment/Retaliation
 - Continuing Violation Theory
- Minimize Risk
 - Follow Up Regularly With Nancy
 - Keep Eye on Brian
 - Training/Vigilance

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Closing Observations/Lessons



- Sexual Harassment Complaint is an Opportunity to Solve a Business Problem
- Act Fast/High Priority
- Treat Complainant With Respect and Appreciation
- Focus on Finding a Solution that Ensures Professional Work Environment, Avoids a Lawsuit and Promotes Business Interests

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Responding To Complaints

- Retaliation is forbidden by law
 - An employee who reports harassment or discrimination may not be retaliated against in any fashion
 - An employee may not be questioned or criticized for bypassing the "chain of command" when reporting harassment

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What to take away...

- Appropriate conduct at all times while at work or engaged in work-related activities
- Report inappropriate conduct
- If it's you, STOP!



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Presented by:
Attorney Name
 Phone: (xxx) xxx-xxxx
 Email: xxx@fisherphillips.com

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