



**“What Would You Do If ...” A Refresher on
Discrimination, Harassment, and Retaliation**

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You Need Contingency Plans For HR Issues

- Anticipate predictable HR issues
- Plan your initial response
- Educate the possible first responders
- Identify your advisors/experts
- Successfully resolve the issues
- Minimize or avoid legal liability

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Overview Of This Session

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- Interactive scenarios
- Focusing on practical day-to-day actions
- With commentary on legal backdrop
- Your questions and comments encouraged

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What would you do if ...

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Wanda, who is Black, works in the packing house loading boxed vegetables onto trucks. On Wanda's first day, one of the truck drivers, who is White and is employed by a third party trucking company, was very rude to her.

Since then, this driver has attached mean jokes or cartoons about Black people to the documentation that he leaves with Wanda. After the third incident, Wanda reports this to you. What should you do?

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What would you do if ...

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A: Nothing because the driver does not work for the farm and therefore the farm is not responsible for his conduct?

Wrong! Employers may be held responsible for harassment, even when the harasser is not an employee, if the employer knew about the harassment (or should have known) and did not try to stop it.

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What would you do if ...

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B: Ask Wanda if she has confronted the driver and if she says no, tell her that you cannot do anything for her until she confronts him?

Wrong! While Wanda could confront the driver, she is not required to do so before you can take action. Remember, once the employer knows or should know about the potential harassment, there is an obligation to investigate and take action.

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What would you do if ...

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C: Contact the trucking company, tell them about the harassment, and insist that it stop immediately?

Correct. The farm could also request that a different delivery person handle the farm's pickup. This is probably the best approach since it will completely remove Wanda from contact with the driver.

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No Retaliation

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Unbeknownst to you, the driver was a second cousin to the supervisor of the packing house. Shortly after the harassment issue, Wanda comes to complain that her supervisor has suddenly become much harsher with her and has started giving her undesirable tasks like cleaning the bathrooms. She doesn't understand why this is happening.

What should you do?

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No Retaliation

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About a year later, Wanda's performance and attendance really start to fall off. Her supervisor has documented objective performance issues. He indicates that he has had numerous conversations with Wanda about her performance, but has not formally disciplined her. When you call Wanda in to discuss, she gets angry and claims that you are both just picking on her because of her complaint about the driver.

What should you do?

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What would you do if ...

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Michael is a domestic worker who is in his first season working with your H-2A workers. In his first month, he has had 5 absences – each time he has called with a reasonable excuse, but only about 30 minutes before work starts. His last minute call-ins are really disruptive to the operations – disturbing crew schedules and delaying start times for the entire operation.

After his fifth occurrence, you tell him that he is terminated for violating your attendance policy.

What are the risks?

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What would you do if ...

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- Does it matter what your job order says?
 - Job order references “attendance policy” in employee handbook – not attached to job order.
 - Job order says that “Excessive absences will not be permitted. This is regular, everyday work for which employees are expected to be present, able and willing to perform every scheduled workday. This is not sporadic or “day work.” Excessive or repeated tardiness is not acceptable. Any absence from work must be reported by 6:30 A.M.”

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Be Consistent!

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- Later that season, Juan, who has been an H-2A employee for the last 5 seasons and a consistently good worker misses 3 days in a 3 week period under similar circumstances.
- You give Juan a warning that he needs to show up for work.
- He misses 2 more days at which time you give him a final warning and tell him that you are only doing this because he is a long-term dedicated employee and you consider his absences to be an aberration.

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What would you do if ...

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Mary and Rhonda work in the office. Mary is a devout Christian who keeps religious figurines on her desk. Rhonda is a professed atheist who regularly talks about how much she disagrees with Christians.

Both women try to avoid talking religion, but they both know the other's feelings and at times there is palatable tension.

One day Mary comes to work and is asking all of the other office employees to purchase raffle tickets for her granddaughter's church group. Rhonda decides she has had enough. She feels this action is alienating and hostile. She is threatening to quit and sue for a "hostile work environment."

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"Hostile Work Environment"

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- Based on a protected characteristic.
- Objectively *severe and pervasive* enough to create a work environment that a *reasonable person* would find hostile or abusive.
- Hostile work environment cases are often difficult to recognize, because the particular facts of each situation determine whether offensive conduct has crossed the line from "**ordinary tribulations of the workplace**, such as the sporadic use of abusive language... and occasional teasing," to unlawful harassment.

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Scenario

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Jorge, a Honduran citizen living in the United States, accepted a summer job with a landscaping company. On his first day, Jorge accidentally broke a lawn mower. The customer yelled at Jorge, called him "stupid," and complained that "foreign kids" like Jorge were "stealing jobs from hard-working Americans." Jorge did not see the customer again during the rest of the summer. Did the customer harass Jorge?

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Scenario

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A: No. The customer has a right to free speech, even if what he says is offensive.

Incorrect. The customer may have a right to "free speech," but he does not have the right to harass Jorge based on his national origin.

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Scenario

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B: No. Although the customer's conduct was offensive and was directed at Jorge because of his national origin, it was not serious or frequent enough to be illegal harassment.

Correct. For workplace harassment to be illegal, it has to be severe (serious) or occur frequently. It may be both severe and frequent. But one instance of harassing conduct, by itself, is generally not illegal, unless the conduct is very serious, such as a physical assault.

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Scenario

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C: No. Because Jorge is not an American citizen, he is not protected by U.S. employment discrimination laws.

Incorrect. People who are not citizens of the United States are protected by the U.S. employment discrimination laws while they are working in the United States for an employer covered by these laws.

H-2A job orders include a commitment to adhere to federal, state, and local laws.

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Scenario

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D: Yes. It is illegal to harass someone at work for any reason.

Incorrect. Not all workplace harassment is illegal. The laws make it illegal to harass someone because of a protected characteristic or protected activity. It is not illegal to harass someone for other reasons - for example, because of a picture he posted on his Facebook page or because she roots for a particular sports team.

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Pregnancy Scenario

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Jeanie was offered a job as a harvester. At the end of her interview, she mentioned that she was pregnant, but said that she was able to do the job and excited about the opportunity. When Jeanie called to get her start date, the farm manager said he had hired someone else. He said he was afraid that Jeannie would hurt her baby working outside and carrying heavy boxes of vegetables. He invited her to reapply after she had her baby. Did the manager discriminate against Jeanie?

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Pregnancy Scenario

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A. No. The manager did not discriminate against Jeanette because he invited her to reapply after she gave birth, and refused to hire her only out of concern for the health and safety of Jeanette and her baby.

Incorrect. It is illegal to refuse to hire Jeanie because she is pregnant. It does not matter whether the manager's decision was based on concern for the health and safety of Jeanie and her baby.

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Pregnancy Scenario

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B. Yes. The manager discriminated against Jeanie when he refused to hire her because she is pregnant.

Correct. As long as she can perform her duties, the manager cannot refuse to hire her because she is pregnant.

But what if he “knows” that she won’t be able to perform the job duties?

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Scenario

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For weeks you have been telling Barb that her attendance needs to improve. In the course of issuing her a written warning, she says she is really sorry but her “condition” has been flaring up lately.

- What do you do now?
- What documents or policies do you review?

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Scenario

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A few weeks later, Barb tells you she needs a two-hour lunch to get treatment for her “condition.”

- What do you do now?
- What documents or policies do you review?

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Request For Accommodation

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- The burden is on employer to recognize accommodation request
- No formalities required
- Accommodation requests need not come directly from employee
 - Spouse
 - Parent
 - Physician

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Request For Accommodation

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- There must be an individualized inquiry and an interactive process to determine what accommodations are appropriate and needed
- Recognize and handle accommodation requests
 - Do not say accommodation cannot be provided!
 - Refer to HR or other appropriate resource
 - Protect confidentiality
 - Ensure employee who receives an accommodation is not mistreated by co-workers

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Timing Of Requests

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- Reasonable accommodation requests may be made at any time
- An employee does not lose the right to request an accommodation because she or he did not do so during the application stage
- Employees may make more than one request for reasonable accommodation

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Reasonable Accommodation Examples

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- Making existing facilities accessible to disabled individuals
- Acquiring or modifying equipment or devices
- Job restructuring
- Part-time or modified work schedules
- Reassigning to a vacant position
- Adjusting or modifying examination, training materials, or policies

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The Interactive Process

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- Failure to engage in the interactive process has significant legal consequences
- Some courts have held such failure is a *per se* ADA violation
- Some courts have found employers' failure to engage in the interactive process constitutes evidence of bad faith

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