

# WMAACA

## Diversity, Equity, and Inclusivity

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## Overview of Training

- World Around Us Is Changing...Managers Must Adapt
- Education and Expectations
- S & H and Anti-Discrimination/Harassment Policies
- Distractions Lead to Adverse Safety/Liability to Company/Managers
- Techniques and Processes to Manage these Uncomfortable Situations
- Employment Discrimination/Harassment
  - Race, color, sex, religion, national origin
  - Hostile Work Environment/Bullying and Harassment
  - Disability or Age or Pay
  - Safety and Health
- ADA
- Summary of Basic Principles

## What this Training Is About...My Uncle Steve



Responding to uncomfortable workplace situations presented by our surroundings regarding a heightened awareness in the country about issues such as race, sex, diversity, culture, harassment, bullying, workplace violence, and fairness/equity by applying sound management principles to ensure a safe and healthy workplace and to mitigate liability to the company and managers.

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## Why Should **Employer** Deal With Uncomfortable Workplace Situations?

- Because it is the Right Thing to Do...
  - To reaffirm Employer's policies by establishing expectations of acceptable conduct...**or there are no rules.**
  - To provide tools to managers to mitigate distractions caused by uncomfortable workplace situations which can adversely affect the safety and health of employees...**must stay focused in identifying hazards.**
  - To provide tools to managers to mitigate risk and liability to themselves and to the company...**or lose control of the situation.**

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# DEI Terminology

Term	Definition
Ally	To unite or form a connection or relation between
Bias	An inclination of temperament or outlook especially a personal and sometimes unreasoned judgment
Color Blind	Not influenced by differences of race
Diversity	The inclusion of different types of people (such as different races/cultures) in a group or organization
Discrimination	Prejudiced or prejudicial outlook, action or treatment
Equity	Freedom from bias or favoritism
Inclusion	The act or practice of including and accommodating people who have historically been excluded (e.g., due to race, gender, sexuality or disability)
Intersectionality	The complex, cumulative way in which effects of multiple forms of discrimination combine, overlap or intersect in the experience of marginalized groups
Microaggression	A comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group (e.g., racial minority)

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# DEI Terminology

Term	Definition
Oppression	Unjust or cruel exercise of authority or power.
People of Color (POC)	A person who is not white or of European heritage.
Prejudice	An irrational attitude of hostility directed against an individual group, race or their "supposed characteristics".
Privilege	A right or immunity granted as a particular benefit, advantage or favor.
Race	Any one of the groups that humans are often divided into based on physical traits regarded as common among people of shared ancestry.
Social Justice	Fairness in terms of the distribution of wealth, opportunities and privileges within a society.
Stereotype	A widely held but fixed and oversimplified image or idea of a particular type of person or thing.
Unconscious Bias	Social stereotypes about certain groups of people that individuals form outside their own conscious awareness.
Systemic Racism	The formalization of a set of institutional, historical, cultural and interpersonal practices within a society that put one social or ethnic group in a better position to succeed, and at the same time disadvantages other groups in a consistent and constant manner, such that disparities develop between the groups over.

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# Educate and Reaffirm Expectations

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If you don't know where you are going, you will never get there...

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## Starting Point - Safety and Health Policy

- The Safety and Health Policy contains straight-forward language understood by all,
  - “It is the policy of Employer to provide a safe, accident-free, and healthy work environment for everyone. It is the policy of Employer to ensure and maintain a working environment free of harassment, intimidation, and discrimination.”
- This policy covers much more than just safety and health issues including how employees are treated because of who they are, what they believe in or say, and how they act while at the workplace.

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## Starting Point – Anti-Harassment Policy

- Company's anti-harassment policy should define prohibited types of discrimination, harassment and retaliation
- Policy must be clear that such conduct by anyone in the Company will not be tolerated
- Policy should specify the penalties, up to and including termination, for violations of the policy
- Policy must:
  - spell out the procedures for filing complaints of discrimination, harassment and retaliation,
  - designate specific (preferably managerial) employees who are responsible for receiving and investigating complaints, and
  - include reassurances that employees who file complaints will be protected from retaliation or reprisals
- The policy must be communicated in writing (with receipt) to all employees
- All employees must understand the policy and be aware of the employer's commitment to the policy

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## Outcome of this Management Training is to...

- Improve knowledge and skills about how to manage situations that arise in the workplace according to the Employer policies.
- Reaffirm Employer's policies with managers of what is acceptable conduct in the workplace.
- Reaffirm that all managers have a Responsibility to inform employees about the policies and acceptable conduct.
- Reaffirm that all managers have the Authority to take corrective action for violations of the policies and acceptable conduct in a respectful and fair manner.
- Ensure managers understand their role in holding themselves and others Accountable to the Employer policies and acceptable conduct.

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# The Laws

The existing laws are many, so a basic understanding of how they all fit together is important to assist managers in managing Compliance...

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## Employment and H&S Laws that Regulate Your Business

Laws	How These Laws Protect Employee Rights
The Fair Labor Standards Act (FLSA) of 1938	Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. Effective 7/24/2009, NE workers are entitled to a minimum wage of not less than \$7.25/hour. OT pay at a rate not less than 1.5 times the regular rate of pay is required after 40 hours of work in a workweek.
Civil Rights Act of 1964, Title VII	Legislation that outlawed discrimination in terms of conditions of employment based on race, color, sex, religion, or national origin. Employers with 15+ employees are covered.
Equal Pay Act of 1963, as amended in 2009	Federal legislation that requires that men and women performing substantially equal work be paid equally
Age Discrimination in Employment Act of 1967	The ADEA protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment. Age may be a bona fide occupational qualification (BFOQ). Employers with 20+ employees are covered.

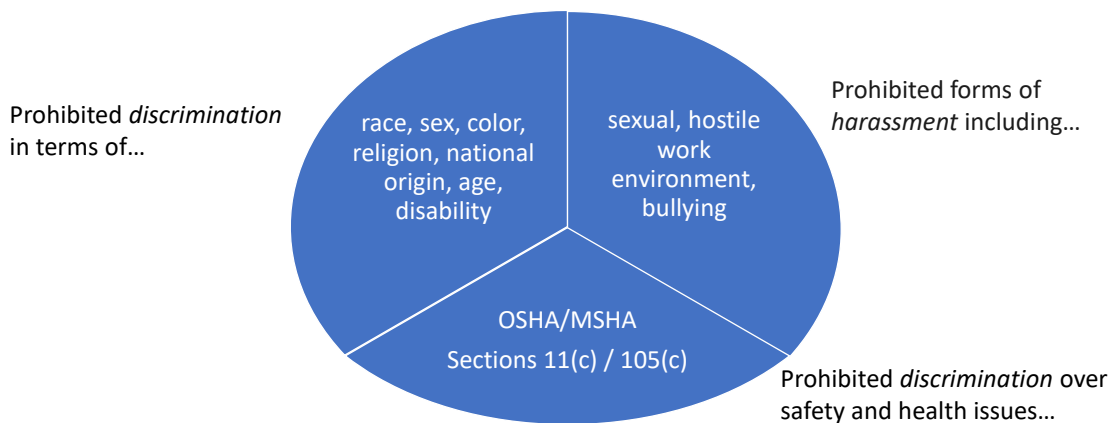
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## Employment and H&S Laws that Regulate Your Business

Laws	How These Laws Protect Employee Rights
Federal Mine Safety and Health Coal Act of 1969, as Amended in 1977	Section 105(c) – Prohibits retaliation against miners for protected activity.
Occupational Safety and Health Act of 1970	Section 11(c) – Prohibits retaliation against workers for protected activity.
Pregnancy Discrimination Act of 1978	Amended Title VII to include pregnancy discrimination in the definition of sex discrimination.
The Americans with Disabilities Act of 1990	Employers cannot discriminate against an otherwise qualified individual with a disability. Employers with 15+ employees are covered.

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## Prohibited Discrimination and Harassment



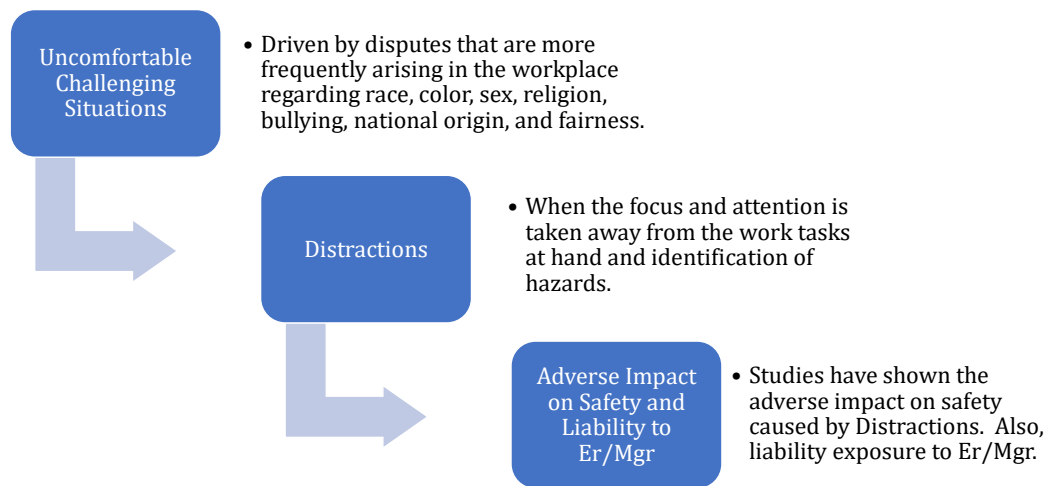
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# Challenges > Distractions/Stress > Adverse Impacts

The relationship between distractions (not doing a good hazard assessment) is proven and increase in injuries is proven...

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## Employer's Concern is the "Unsafe" and "Increased Liability" Chain of Events



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## Distractions Adversely Affects Safety

- Research conducted on construction workers suggest that workplace distractions can adversely affect hazard recognition, safety risk perception, and safety performance (Namian et al 2018)
  - Researchers have reviewed and analyzed construction accidents reports to gain a deeper understanding of the causes of accidents. In more than 70% of the cases, workers' unsafe behavior has been identified as an important contributing factor (Rasmussen 1997; Haslam et al. 2005).
  - Past research has also revealed that workers often indulge in unsafe behavior when they are unable to recognize workplace hazards (Carter and Smith 2006). In fact, past studies have shown that over 42% of construction injuries are associated with worker-related factors including poor hazard recognition (Haslam et al. 2005).
  - However, when workers can identify and manage hazards and the associated safety risks, most construction accidents are preventable (Albert and Hallowell 2012).

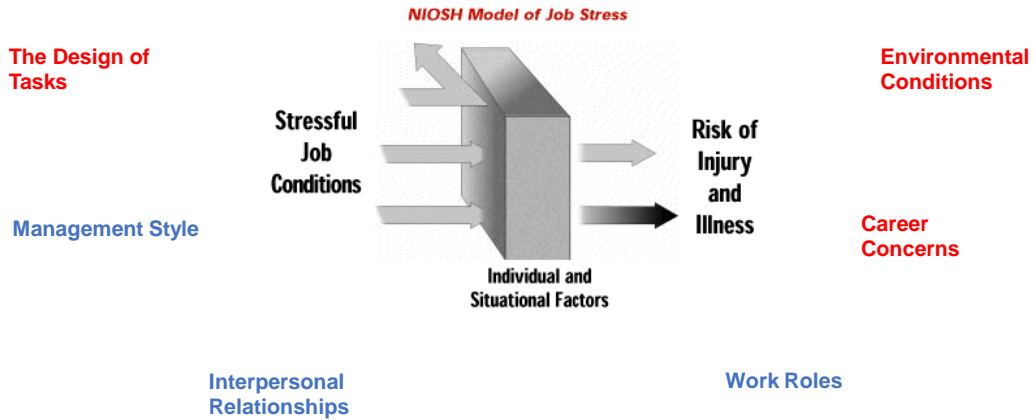
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## Stress Adversely Affects Safety

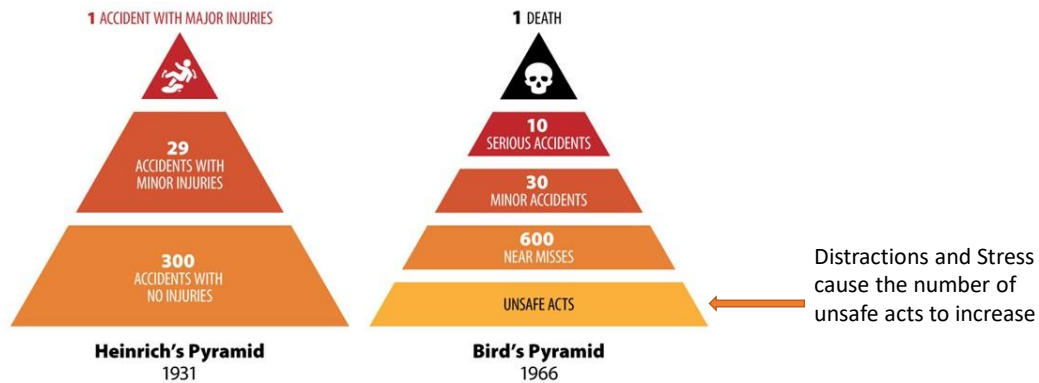
- The connections between workplace safety, mental health, and abusive behavior in the workplace has continued to be loose despite data supporting the idea that bullying in the workplace is a safety issue. NIOSH search results provides more than 60 articles connected to bullying, and more than 17,000 around workplace violence.
- Victims of abusive behavior in the workplace have been shown to have an increased rate of insomnia, burnout and anxiety/depression in the victim (Rodríguez-Muñoz, et al, 2020; Jahnke, et al, 2019), injuries (Jahnke, et al, 2019) and musculoskeletal disorders (Bailey, et al, 2015; Vignoli, et al, 2015), while bystanders alike are more likely to experience emotional exhaustion, burnout and anxiety/depression (Sprigg, et al, 2019).
- There is a link between mental health distress and increased safety risks – experiencing mental health distress can adversely affect risk recognition and actions of workers both off and on the job (Goetzel et al., 2018; Shadloo et al., 2016).

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# Factors > Create Job Stress > Risk of I/I



## The Direct Impact of Distractions and Stress



## Challenges > Distractions/Stress > Impacts

- These Distractions/Stress are revealed through,
  - Incidents and Injuries / Complaints of Discrimination
  - Lost time to the work process
  - Costs of government investigations
  - Resources to address these issues – people time
  - Mental anguish to all employees involved
  - Costs to defend employee safety or discrimination complaints
  - Monetary awards to employees
  - Civil penalties from the various agencies (company and supervisor)

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## Direct Costs

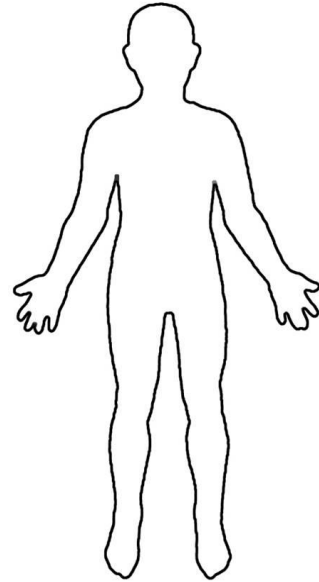
- **Direct Costs** include medical expenses and indemnity payments for wage loss, both paid and reserved for each claim. Direct Costs are paid by those companies who self-insure. Companies who purchase workers' compensation insurance would have these direct costs paid by the insurance company. However, the cost impact for mines with workers' compensation insurance would largely be through increased premiums and eligibility to participate in group policies.

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## Direct Costs

- **Direct Costs:**

- |                   |                     |
|-------------------|---------------------|
| • Shoulder strain | \$60,000            |
| • Back strain     | \$10,000 to \$1.5MM |
| • Hand/Finger     | \$500 - \$125,000   |
| • Fractured hand  | \$22,500            |
| • Hernia          | \$23,000            |
| • Knee            | \$56,000            |
| • Sprained ankle  | \$820               |
| • Foot            | \$186,000           |



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## Indirect Costs

- Indirect costs usually account for majority of the true costs of an injury and these costs may be uninsured and unrecoverable. The indirect costs are costs to the employer beyond those covered by workers' compensation.
  - Indirect cost estimates can include:
    - Any benefits paid to injured workers for absences not covered by workers' compensation
    - The wage costs related to time lost through work stoppage associated with the worker injury
    - The overtime costs of other workers necessitated by the injury
    - Administrative time spent by supervisors, safety personnel, and clerical workers after an injury
    - Training costs for a replacement worker
    - Lost productivity related to work rescheduling, new employee learning curves, and accommodation of injured employees
    - Clean-up, repair, and replacement costs of damaged material, machinery, and property
    - Increased workers' compensation insurance premiums

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## Indirect Costs

- Indirect cost estimates generally do not include:
  - The costs of OSHA fines and any associated legal action
  - Worker pain and suffering
  - Co-worker moral
  - Loss of key employee
  - Loss of good will from bad publicity
- Some studies have shown that Indirect Costs are 4 times greater than Direct Costs!!

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## How Can Managers Address these Challenges/Situations?

So, what are techniques and processes managers can deploy to identify poor conduct and intervene to correct employee conduct before it causes adverse impacts to safety and health and liability to the company and managers...

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## National Safety Council DEI Commitment Statement

- **We believe that you can't be safe if you don't feel safe.** Feeling safe requires a commitment to equitable policy implementation and promoting diversity in the safety profession. We must cultivate our own diverse, inclusive, and equitable work environment to deliver on our mission to save lives, from the workplace to anyplace.

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## Prevention of Workplace Discrimination/Harassment

- Affirm/Establish Expectations:
  - Communicate Employer's S & H and anti-discrimination/harassment policies during training and give every employee a written copy of your policies (in a language they understand).
  - Give concrete examples of what is and is not acceptable conduct.
  - Set an example by following company policies – walk the walk!
  - All employees have **PERMISSION** to approach another; to discuss constructively; to seek resolution
- Issue Identification:
  - Be Aware of what is going on the workplace – Engage employees/Listen.
  - Encourage employees to report if they witness or are victims of inappropriate conduct and make sure there is a safe reporting channel.
  - Pay attention to workers' well-being.
  - Watch for warning signs that an employee is experiencing harassment (withdrawal or avoidance of co-workers, increased absences, ongoing stress-related ailments, decreased self-esteem).
  - Seek assistance if unsure how to handle situation.

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## Prevention of Workplace Discrimination/Harassment

- Document Employee Concerns or Complaints and Conduct Investigation:
  - Upon receipt of a complaint and conduct a thorough, objective and unbiased investigation (possibly by attorney to protect work product and especially if managers are involved).
- Application of the Policy
  - Employer must take steps to enforce the policy immediately following a fair and unbiased investigation.
  - You must be Credible when gathering information; Consistent with your response; Clear in your response; Constructive in your response.
  - Any disciplinary action that could have EEOC, Section 105(c) or Section 11(c) implications should be carefully considered, well-documented, and undertaken only with witness present.
  - Such matters should be kept confidential, to extent practicable, to avoid potential defamation suits.
  - A record of all disciplinary action should be maintained, even prior to the receipt of a complaint, so that an employee's performance can be documented in the event that the employer and/or managers must support their non-discriminatory decisions.

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## Prevention of Workplace Discrimination/Harassment

- When you Observe or Hear of Unacceptable Language or Conduct, the Manager has a **DUTY** to Immediately Address using Constructive Feedback:
  - Convey your positive intent which is built on trust.
  - Describe specifically what you have observed.
  - State the impact of the behavior or action.
  - Ask the other person to respond.
  - Focus the discussion on solutions.
- Provide coaching/training/learning opportunities.
  - “**RAA**” – Responsibility (handshake agreement), Authority (support of management), Accountability (do your job to avoid risks of I/I and liability)
- Third parties performing services at the worksite (e.g., contractors, staffing agency workers) must also adhere to the anti-harassment/discrimination policies.

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## Common Terms in the Workplace

Common Terms to Describe Conduct	What These Terms Mean in the Workplace
Disparate Treatment	When an employee is treated differently from others due to race, color, religion, gender or national origin.
Disparate Impact	The discriminatory effect of apparently neutral employment criteria.
Hostile Work Environment	Repeated behavior that causes an employee to feel uncomfortable, disrespected or threatened, to the point where it affects the person's ability to do his or her job.
Bullying and Harassment	Offensive behavior that is systemic, repeated, and involves mistreatment of another at work.
Workplace Violence	Any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the worksite. This includes everything from threats and verbal abuse to physical assaults and homicide and can cause psychological harm as well.

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## Common Terms in the Workplace

Common Terms to Describe Conduct	What These Terms Mean in the Workplace
Sexual Harassment	Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that the employee is required to accept as a condition of employment, the employee's response to such conduct is used as a basis for employment decisions, or such conduct creates a hostile working environment.
Religious	Harassment because of an individual's religious beliefs (or lack thereof) that creates a hostile work environment is prohibited under Title VII.
Disability	A physical impairment that substantially limits one or more of the major life activities of such individual. An applicant or worker must be able to demonstrate her/his ability to meet all legitimate physical demands necessary to perform the job. Like worker compensation restrictions except these conditions are permanent.
Reasonable Accommodation	May be required for disability and religion and consider size of employer workforce and number of employees requiring accommodation, nature of jobs that present conflict, cost, administrative requirements, what alternatives did employer consider.

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## Common Terms in the Workplace

Common Terms to Describe Conduct	What These Terms Mean in the Workplace
Job Stress	Job stress can be defined as the harmful physical and emotional responses that occur when the requirements of the job do not match the capabilities, resources, or needs of the worker.
Worker Characteristics v Working Conditions	Differences in individual characteristics such as personality and coping style are most important in predicting whether certain job conditions will result in stress. In other words, what is stressful for one person may not be a problem for someone else.

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## Now Let's Look Inward

Let's evaluate what we have seen in the workplace, maybe have been part of, or maybe have been victim of conduct that was not RIGHT...

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## Introspective Exercise

- Think about situations you have observed or participated in that may have come close to the line or even crossed the line based on what you KNOW today.
- Think about how you would handle those situations you observed or participated in based on what you KNOW today.
- Before you answer either of those questions, place yourself in the “boots” of the person on the receiving end of the comments or conduct.
- Maybe you have been in the “boots” of someone receiving harassment. How did you feel?

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# Harassment

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Prohibits harassment against anyone because of race, sex, color, religion, national origin, age, and disability that is so severe or pervasive that a “reasonable person” would consider it abusive or intimidating to the point it affects the employee’s ability to perform work...

## Prohibited Harassment

- **Harassment** is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- **Harassment** becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- **Harassment** includes verbal/written, physical or visual conduct.

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## Examples of Prohibited Sexual Harassment

- **Sexual** - Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that the employee is required to accept as a condition of employment, the employee's response to such conduct is used as a basis for employment decisions, or such conduct creates a **hostile working environment**.
- **Quid Pro Quo Sexual** - Harassment where the employee's response to the sex-related harassment is considered in granting employment benefits ("this for that").

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## Unlawful Hostile Work Environment Harassment?

- **Hostile Work Environment Harassment** is repeated behavior that causes an employee to feel uncomfortable, disrespected or threatened, to the point where it affects the person's ability to do his or her job.
  - between manager/subordinate
  - between co-workers of same rank
  - by persons of different or same sexes
  - can affect workers who are not the direct targets of the behavior, by making them uncomfortable enough to affect their job
- Factors to consider:
  - The frequency of the actions
  - The severity of the actions
  - Whether the actions are physically threatening or humiliating
  - Whether the actions unreasonably interfere with an employee's work performance

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## Workplace Bullying

**Workplace Bullying:** Defined as "Offensive behavior that is systemic, repeated, and involves mistreatment of another at work." Examples include,

- Bullying by a group of co-workers is "mobbing"
- Public criticism
- Cyberstalking, hostile e-mails or voicemails
- Insults or offensive remarks
- Intimidation
- Teasing, practical jokes,
- Finger pointing or invasion of space
- Spreading malicious rumors
- Shouting, yelling, angry outbursts

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## Workplace Bullying (Subtle Forms)

- Removing tasks imperative to job responsibilities
- Giving targeted workers the “silent treatment” and shunning
- Giving unmanageable workloads and impossible deadlines
- Arbitrarily changing tasks
- Purposely withholding pertinent information
- Bullying is driven by the perpetrator’s need to control the targeted individual
- It can be health-harming for the target and prevents work from being done

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## “Unwanted Behaviors” Can = Harassment

- Leering & wolf whistles
- Indecent exposure
- Sexual innuendo
- Comments about co-worker’s body
- Tales of sexual exploitation or pornography
- “Accidental” brushing against sexual body parts or sexual sneak attacks (grabbing)
- Lewd and threatening letters, emails, voicemails, social media posts
- Inappropriate invitations
- Nude posters in the workplace
- Pressure for dates or stalking
- Unwelcome touching and hugging
- Discriminatory comments insulting graffiti, jokes, cartoons
- Hostile put-downs of women, disabled workers, or minorities or sabotaging work
- Exaggerated mocking “courtesy”
- Public humiliation
- Hooting, sucking, lip smacking and animal noises
- Use of ethnic, racial or sexist slang or profanity

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## “Unwanted Language” Can = Harassment

- “No way Jose”
- Get the tool since you are “at the bottom of the totem pole”
- Stop “Crying like a little bitch” every time I give you a job task
- Put on your “big boy pants”
- “That leather jacket is so gay”
- Verbal threats, intimidation, ridicule, or mockery, insults or put-downs
- “Put makeup on and you will be a good looker”
- Suck it up buttercup
- Foul language in ordinary communications such do as “just do what the f--- I tell you to do”
- Ethnic slurs, epithets, or name calling

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## Harassment of Whom - Reasonable Person or Victim?

- Courts generally use a “reasonable person” standard to determine whether the challenged conduct is sufficiently severe and hostile but can use the “reasonable victim”.
- What is important is that what YOU think is acceptable or unacceptable conduct does not matter!!!
- ACME can be held liable if the harasser was acting as an agent of the employer.

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## Constructive Discharge Cases

- Employee can claim that s/he was constructively discharged if they can show,
  - intentional discrimination existed;
  - the employer deliberately made working conditions intolerable; and
  - aggravating factors justified the employee's conclusion that s/he had no option but to end their employment.
- Yelling and bullying in the workplace becomes illegal harassment when an employer's actions are severe enough that they interfere with the employee's ability to perform his or her job.
- The employer's conduct must be worse in severity or pervasiveness than harassment as the minimum required to prove a hostile working environment.

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## The New Wave of Harassment

- Managers must be aware of digital harassment as growing issue – stay alert to how new technologies can be abused, consider blocking social websites or closely monitoring use of company-owned equipment to reduce problems and limit liability.

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## Company/Manager Liability for Harassment

(1) quid pro quo sexual harassment by a *manager or supervisor* because such conduct is related to their job status, or supervisor participates in creating an HWE.

(2) employer will be liable if it knew of, or should have known of, the harassing conduct and failed to take reasonable steps to stop it.

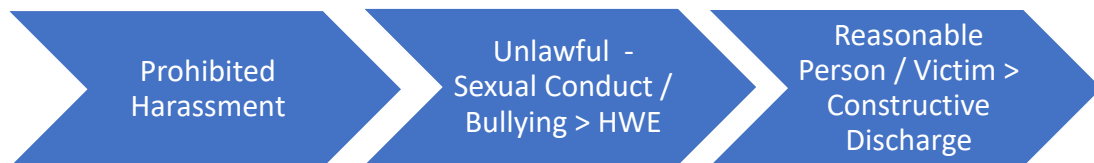
(3) employer may even be liable for harassment by *nonemployees* if the employer had some control over the harasser and failed to take reasonable steps to stop it once the employer became aware of, or should have been aware of, the harassment.

Note: harassers may *be personally liable* under state EEO laws or common-law tort claims, which may include compensatory/punitive damages plus employment-related damages and legal fees.

Company Liability	Manager (1)	Non-Mgr (2)	Non-EE (3)
Sex Harassment	✓	✓	✓
HWE	✓	✓	✓

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## Summary of Harassment



- B/c of race, sex, color, religion, national origin, age, disability
- Quid pro quo - sexual
- Verbal/Written, Physical, Visual
- Can involve employees of different or same rank or sex

- Enduring, offensive conduct that is so severe / pervasive that it creates a work environment that intimidating, hostile, and abusive

- Reasonable person / victim is the legal standard.
- It is not about YOU, but about how the other person feels.
- No option but to end employment – Constructive discharge.

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## Let's Discuss What you MAY hear and see in the Workplace

- How to Handle Situations?
  - Someone (could include employee, vendor, contractor) uses the “N” word?
  - Hourly employee makes a sexual slur regarding a fellow employee’s wife?
  - Nasty jokes are being told at the lunch table with or without female employees present?
  - A supervisor verbally abuses an hourly employee in front of others about some equipment damage caused by employee?
  - Certain group of employees speak in native language and sneer and laugh at other non-similarly speaking employees?

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## Situations You May Be Faced With...

- Supervisor (S1) uses foul language, but not directed to any protected class, when giving instructions to employees. Several employees have asked S1 to stop using such language because they find it offensive. S1 was heard to say to other employees that these employees “acted like babies” and continued to make rude comments about the employees. YOU as a peer/colleague have observed S1’s behavior. What should you do?
- What if you report to S1?
- What if S1 reports to you and you hear him make these comments?

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# Discrimination

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Prohibits discrimination against anyone because of race, sex, color, religion, national origin, age, or disability...

## Overview – Discrimination

- Various legislation has outlawed discrimination in terms and conditions of employment based on race, color, sex, religion, national origin, age, or disability.
- Prohibits the refusal or failure to hire any individual, the discharge of any individual, *or* the discrimination against any individual *with respect to* compensation, terms, conditions, *or* privileges of employment because of that individual's race, color, sex, religion, national origin, age, or disability.

## Prohibited Discrimination if in a Protected Class

- **Race** – skin color, hair texture, or certain facial features or being associated with someone of a race
- **Sex** – female (including pregnancy), (LGBT) lesbian, gay, bisexual, transgender
- **Color** – skin tone, complexion, pigmentation
- **Religion** – all aspects of religious observance
- **National Origin** – physical, cultural, linguistic characteristics b/c of where you come from
- **Age** – certain applicants and employees 40 or older
- **Disability** – an otherwise qualified individual with a disability

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## Discriminatory “Adverse Action” is Shown By...

- **Disparate Treatment** - When an employee is treated differently from others due to race, color, sex, religion, national origin, age, or disability. (e.g., not providing promotion opportunities to an ethnic background or a race even though they are competent, or not giving promotions to employees > 40)
- **Disparate Impact** - The discriminatory effect of apparently neutral employment criteria. (e.g., specific job skill requirement for a job that adversely affects a particular protected class without valid business reason such as must have a college degree or must be able to meet difficult physical demands.)

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## Discriminatory “Adverse Action” Takes the Form of...

- An employer is forbidden from considering race, sex, color, religion, national origin, age, or disability when making an employment decision that could be considered “adverse” by the employee.
- These include, but are not limited to:
  - Termination or suspension,
  - lay-offs versus transfer to another plant,
  - not being considered for promotion,
  - demotion,
  - shift or duty reassignment,
  - reduction in pay,
  - loss of overtime availability,
  - transfer to a different worksite, and
  - “blacklisting” an employee by giving him/her a bad reference.

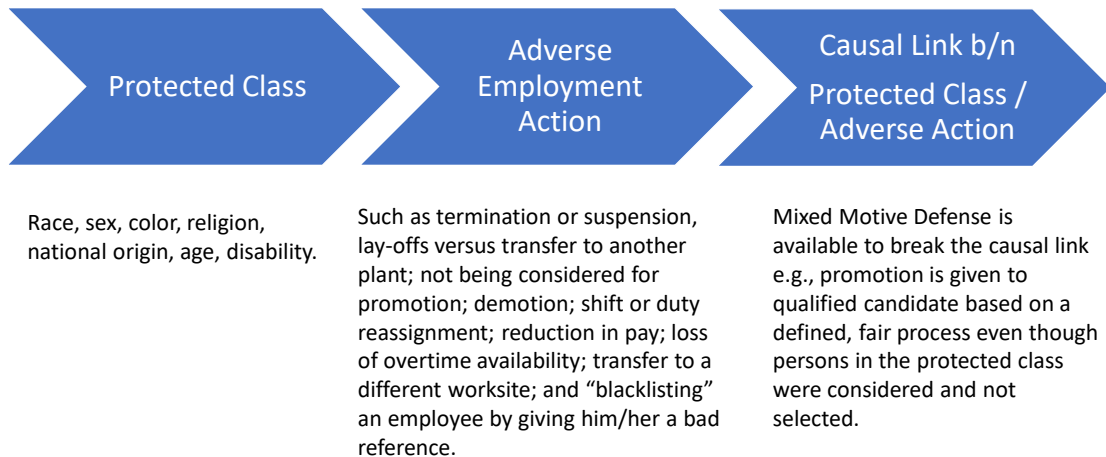
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## How is Discrimination Proven?

- Claimant (Employee) must show that,
  - They are in a protected class (race, sex, color, religion, national origin, age, or disability).
  - They suffered an adverse employment decision or employment action.
  - There was a casual link between the employee being in a protected class and the adverse employment decision.
- Employer’s Mixed-Motive Defense: When an employer can prove that, without considering an illegal factor, the same employment decision would have been made, the employer is not liable (e.g., terminated for fighting or being AWOL).

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## Summary of How Discrimination is Proven



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## Situations You May Be Faced With...

- You have an opening for a supervisory position, and you want to promote from the hourly ranks. You have 4 applicants: white male, white female, Hispanic, and African American. How do you approach this hiring decision to hire the most qualified candidate?
  - Job description – is education level preferred or required, skill levels, etc.
  - Align job requirements with each applicant’s skill level – assessment by prior supervisors using objective criteria such as communication skills, decision-making skills, technical skills, etc.
  - Provide the same opportunities to each applicant during the process such as an interview or resume submission.
  - Use objective decision matrix criteria to support any decision. Years of experience and tenure are objective criteria.

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## Situations You May Be Faced With...

- A black male < 40 years of age hourly employee (EE 1) walks into the workplace and confronts a white male > 40 years of age hourly employee (EE 2) involving an alleged statement EE 2 made at the bar on Saturday night about EE 1's race. The employees are not friends outside of work. The incident goes on for several minutes and digresses to minor pushing and shoving with conflicting stories on who pushed first. The matter is placed under control by fellow hourly employees, with no one hurt. The manager gets wind of it before the shift starts. This is the first time either employee has been involved in something like this. The employees will interact during the shift. Before the shift begins, what should the supervisor do? How should this matter be handled to avoid a claim of discrimination by either employee.
  - Interview each employee separately-take notes? Bring employees together and get agreement from the employees that they can work together safely and that the issue will not arise again during the shift. Agree to meet after the shift. If they cannot agree to work together safely, then what do you do?
  - The employees need reminded that physical behavior or fighting is an unsafe act that violates the S&H policy and not allowed at the worksite no matter the reason.
  - Issue a verbal warning to both and place in the file.

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## Safety Whistleblower Protections

This is straight-forward; you cannot discriminate against an applicant or employee for a protected safety or health activity...Period!

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## MSHA Safety Whistleblower Protections

- Section 105(c) of Mine Act prohibits retaliation against miners for protected safety activity. The miner must file the complaint within 60-days
- Relief includes temporary reinstatement and “make whole” relief
- If MSHA finds a violation, it can issue penalties of up to \$74,775 against company AND individual supervisors involved in discrimination (plus review for criminal prosecution)

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## OSHA Safety Whistleblower Protections

- OSHA: Section 11(c) of OSH Act prohibits retaliation against workers for protected safety activity. The employee must file a complaint within 30-days.
- However, as of 2016, if an employer takes adverse action against an employee over injury reporting, then OSHA issue citations and penalties of up to \$134,937 for violations, plus relief to the worker (economic/reinstatement) with a 180-day filing deadline.
- OSHA also enforces whistleblower protections under environmental statutes and for DOT laws (commercial drivers, rail etc.)

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## What Is “Protected” Activity?

- Raising safety and health (or environmental) complaints with management
- Making complaints to OSHA/MSHA/EPA/DOT
- Giving statement to government inspectors during inspections or investigations
- Even where the employee has not made a complaint or statement, s/he can be protected if management THINKS that the worker is an informant or a complainant
- A complainant is protected even if the agency investigates and determines that no violation exists!
- An employer cannot act because a worker exercised any other statutory rights under the OSH Act or Mine Act (e.g., the right to be compensated while serving as the “employee rep” during inspections, or worker reported an injury/illness)
- An employer cannot discriminate against a worker who refuses to work under an alleged unsafe or unhealthful condition, or who refuses to operate equipment that s/he believes is unsafe

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## What is “Adverse Action”

- An employer is forbidden from considering any protected activity or complaints by a worker when making an employment decision that could be considered “adverse” by the employee or which constitutes “reprisal.”
- These include, but are not limited to:
  - Termination or suspension,
  - lay-offs versus transfer to another plant,
  - demotion,
  - shift or duty reassignment,
  - reduction in pay,
  - loss of overtime availability,
  - transfer to a different worksite, and
  - “blacklisting” an employee by giving his/her a bad reference.

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## OSHA/MSHA Work Refusals

***The OSH Act and Mine Act do NOT entitle employees to just walk off the job because of potential unsafe or unhealthful conditions but . . .***

- When an employee is confronted with either leaving or performing assigned tasks that expose him to serious injury or death, worker is protected from discrimination related to a “good faith” work refusal.
- The condition causing the employee's apprehension of death or injury must be the type that would cause “a reasonable person, under the circumstances then confronting the employee, [to] conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.
- The employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

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## OSHA GDC & Workplace Violence

- OSHA: “any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the worksite”
- This includes everything from threats and verbal abuse to physical assaults and homicide, and can cause psychological harm as well
- OSH Act states that employers have a general duty to provide a workplace “free from recognized hazards that are causing or likely to cause death or serious harm to employees” (Section 5(a)(1) – the “General Duty Clause”)
- OSHA CPL on Workplace Violence enforcement directs OSHA inspectors to cite the GDC if there is evidence employer recognized the existence of a potential workplace violence hazard affecting his employees, and if there is a feasible means of preventing or minimizing such hazards

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## Summary of How Discrimination is Proven



Employee complaints to management of unsafe conditions or actions, raising complaints with or giving statements to regulatory agencies, or refusing to work under good faith belief of unsafe or unhealthy conditions

Such as termination or suspension, lay-offs versus transfer to another plant; not being considered for promotion; demotion; shift or duty reassignment; reduction in pay; loss of overtime availability; transfer to a different worksite; and “blacklisting” an employee by giving him/her a bad reference.

Mixed Motive Defense is available to break the causal link e.g., discipline issued over pushing a manager, not the safety complaints filed with MSHA regarding the dusty bagging operation.

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## OSHA/MSHA - Common Terms in the Workplace

Common Legal Terms	What These Terms Mean in the Workplace
Protected Activity	Employee complaints to management of unsafe conditions or actions, raising complaints with or giving statements to regulatory agencies, or refusing to work under good faith belief of unsafe or unhealthy conditions.
Adverse Action	Cannot consider Protected Activity when making employment decisions such as termination, lay-offs, demotion, shift of duty assignment, reduction in pay, loss of OT availability, transfer to another worksite, and bad reference.
Prima Facie Case	Miner/worker engaged in protected activity, suffered adverse employee action, and casual link between protected activity and adverse action.
Mixed-Motive	When an employer can prove that, <u>without considering an illegal factor</u> , the same employment decision would have been made, the employer is not liable.

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# Americans With Disability Act

Employers cannot discriminate against an otherwise qualified individual with a disability...

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## Americans With Disabilities Act

- Americans with Disabilities Act (ADA) covers employers with 15+ employees
- Employers cannot discriminate against an otherwise qualified individual with a disability
  - **Qualified Individual with a Disability:** An individual with a disability who is able to perform, with reasonable accommodation, the requirements of the job in question, despite the disability
- Disability is broadly defined as:
  - A physical or mental impairment that substantially limits one or more of the major life activities of such individual
  - A record of such an impairment; or
  - Being regarded as having such an impairment
  - The individual claiming to be qualified has the burden of demonstrating his or her ability to meet all physical requirements legitimately necessary for the performance of duties
- Retaliation against any individual because the individual has:
  - opposed any act or practice unlawful under the ADA is prohibited
  - filed a charge or participated in any manner in a proceeding under the ADA is prohibited

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## Individuals Protected by the ADA

- **Covered**

- Individuals can establish that they are “regarded as having such an impairment” if they show that they have been subjected to discriminatory treatment because of an actual or perceived physical or mental impairment, whether the impairment limits or is perceived to limit a major life activity
- When determining whether an impairment substantially limits a major life activity, the court is not to consider the ameliorative effects of mitigating measures, assistive devices or aids, other than eyeglasses or contact lenses

- **Not Covered**

- The 2009 amendments to the ADA specifically state that the “being regarded as having an impairment” aspect of the definition of disability shall not apply to impairments that are transitory (defined as an impairment with an actual or expected duration of six months or less) and minor
- Employees who use illegal drugs are not protected by the ADA, nor are alcoholics who use alcohol at the workplace or who are under the influence of alcohol at the workplace
- ADA protection does not apply to an individual who is a transvestite, nor are homosexuality, bisexuality, or sexual behavior disorders (such as exhibitionism or trans-sexualism) considered disabilities

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## Medical Exams and Tests

- The ADA limits the ability of an employer to test for or inquire into the disabilities of job applicants and employees
  - Employers are prohibited from asking about the existence, nature, or severity of a disability
  - An employer may ask about the individual’s ability to perform the functions and requirements of the job
- Currently, tests for COVID-19 or workplace screening is permitted by EEOC under ADA – watch for future changes
  - Be aware of HIPAA protections and Genetic Information Non-Discrimination Act (GINA)
- Employers are not permitted to require preemployment medical examinations of applicants
  - Once an offer of a job has been extended to an applicant, employers can require a medical exam, provided that such an exam is required of all entering employees
  - Current employees are similarly protected from inquiries or exams, unless those requirements can be shown to be “job-related and consistent with business necessity”
  - Drug testing is permitted under ADA (but watch for OSHA constraints post-accident)

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## Duty of Reasonable Accommodation

- Reasonable accommodation may be required for *disability & religion*
- EEOC Guidelines says the following factors will be considered in determining what a reasonable accommodation is and whether it results in undue hardship to the employer:
  - Size of the employer's work force and number of employees requiring accommodation
  - Nature of the job(s) that present a conflict
  - Cost of the accommodation
  - Administrative requirements of the accommodation
  - Whether the employees affected are under a collective bargaining agreement
  - What alternatives are available and have been considered by the employer

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## Summary of Basic Management Principles: Keep in Mind That...

- **...discrimination in terms and conditions of employment based on race, color, sex, religion, national origin, age or disability is PROHIBITED**
- **...racial, ethnic, religious, age, disability, and/or sex harassment and bullying can constitute an illegal hostile work environment and is PROHIBITED**
- **...the conduct is viewed from the point of view of a REASONABLE PERSON or the VICTIM but not from YOUR point of view**
- **...all employees must be treated with RESPECT and FAIRLY regardless of their conduct**
- **...managers must address "unwanted language" and "unwanted behaviors" immediately and according to a FAIR process**

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# THANK YOU!

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