SEXUAL HARASSMENT PREVENTION STRATEGIES

By Edward J. Steve

The list goes on—Harvey Weinstein, Matt Lauer, Dr. Larry Nassar, and former New York Attorney General Eric Schneiderman to name a few. The #MeToo movement has created a national awareness of sexual harassment issues. The statistics are alarming, as studies have found 81% of women and 43% of men have reported experiencing sexual harassment or assault.

Companies, and individuals in some states like Massachusetts and New York, can be held liable for sexual harassment claims. A 2015 study showed 19% of employment disputes resulted in defense and settlement costs averaging $125,000 paid by insurance, and 81% of internally resolved matters averaged 275 days of time, energy, and resources to handle. Recent sexual harassment settlements included a $10 million payment by Ford to Chicago workers, and Twenty-First Century Fox has paid out more than $45 million for claims against Roger Ailes.

But the consequences can go far beyond monetary costs. The emotional and physical impact on victims can be devastating. And employers' failure to prevent harassment can result in poor morale, turnover, and reputational harm.

Sexual Harrassment Definition

Sexual harassment is described as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Both the victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex. In addition, harassment does not need to necessarily be of a sexual nature. It can include offensive remarks about a person's sex, such as making offensive comments about women or men in general. Sexual harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment. Employers, however, can take steps to help prevent harassment and bolster their defense of any legal claims.

Review Your Anti-Harrassment Policies and Complaint Procedures

To promote a culture of respect and to defend against potential legal claims, employers should have anti-harassment policies that are distributed and readily available to employees. Policies should contain a definition of sexual harassment; examples of prohibited conduct; a prohibition against retaliation; multiple avenues to report (managers/supervisors, human resources/employee relations, hotlines, etc.); an explanation of the investigation process; a commitment to maintain confidentiality to the extent

feasible; and a statement that the company will take prompt corrective action when it is found that harassment has occurred.

Some states have specific policy requirements. For example, under recently enacted New York legislation effective Oct. 9, 2018, a sexual harassment prevention policy must provide examples of prohibited conduct; provide information on state and federal laws concerning sexual harassment and the remedies available to victims; include a standard complaint form; include a procedure for a timely and confidential investigation of complaints that ensures due process for all parties; inform employees of their rights and all available forums for adjudicating complaints administratively and judicially; state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and indicate that retaliation is prohibited. New York also recently added protections for non-employees (vendors, contractors, etc.) as New York employers may now be liable if the employer knew, or should have known, about harassment of non-employees and failed to take "immediate and appropriate corrective action." New York is scheduled to provide sexual harassment prevention guidance and a model policy by Oct. 9, 2018.

Similarly, Maine employers are required to post and provide employees with an annual notice stating the illegality of sexual harassment; the definition of sexual harassment under state law; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the Maine Human Rights Commission; directions on how to contact the Commission; and the protection against retaliation.

Other states like Massachusetts have similar policy requirements and a model policy. Employers should ensure compliance with their respective state laws and implement an anti-harassment policy—even if not legally mandated.

Conduct Harassment Prevention Training

Employers should also consider conducting sexual harassment prevention training designed to set the standard for workplace interactions focused on inclusion and respect. Some states like New York, Maine, and Connecticut require training. Effective Oct. 9, 2018, New York employers must provide an annual "interactive" training that includes an explanation of sexual harassment and examples of prohibited conduct; information on state and federal laws concerning sexual harassment and remedies available to victims; a section addressing conduct by supervisors and additional responsibilities for such supervisors; and information on employees' rights and all available forums for adjudicating complaints administratively and judicially.

New York is scheduled to provide a model sexual harassment prevention training module by Oct. 9, 2018.

For Maine workplaces with 15 or more employees, employers must conduct an education and training program for all new employees within one year of commencement of employment that includes the illegality of sexual harassment; the definition of sexual harassment; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the Maine Human Rights Commission; directions on how to contact the Commission; and the protection against retaliation. Employers must also conduct additional training for supervisory and managerial employees within one year of commencement of employment that includes (at a minimum) the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.

Connecticut employers with 50 or more employees must provide two hours of training to all supervisors within six months of their assumption of a supervisory position. The training should be in a "classroom-like" setting and include the federal and state statutory provisions prohibiting sexual harassment; the definition of sexual harassment; examples of prohibited conduct; a description of the available remedies; a statement that individuals who commit acts of sexual harassment may be subject to both civil and criminal penalties; and a discussion of prevention strategies.

On the Horizon

Numerous states have proposed legislation to address workplace sexual harassment, including Vermont, New Jersey, Virginia, California, and Florida. Proposed legislation includes banning non-disclosure provisions in sexual harassment settlements, prohibiting arbitration of sexual harassment claims, and policy and training requirements. We recommend continued monitoring of legislative developments to ensure compliance in this ever-evolving area.

Conclusion

Although employers must continue to comply with applicable laws, an employer's best defense against sexual harassment claims is to create a culture of collaboration, inclusion, and, most of all, respect. Promoting workplace standards that promote respective interactions will not only assist with harassment prevention, but also improve employee morale and satisfaction. LC

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