SEXY HARASSMENT: PROTECTING YOUR BUSINESS AND EMPLOYEES

Harvey Weinstein. Kevin Spacey. Charlie Rose. Louis C.K. Roy Moore. Al Franken. John Conyers. Matt Lauer. When will it end? The list grows daily. Women and men are coming forward with allegations of sexual harassment and abuse, and some of the allegations are truly shocking. Although we normally presume that an accused person is innocent, in many of these cases the alleged perpetrators either have admitted to the conduct or, at least, have failed to deny it. In the case of Senator Franken, there are photos. With allegations of sexual harassment in the spotlight, agencies and companies are issuing statements and conducting research about sexual harassment. For example, the Equal Employment Opportunity Commission (EEOC) issued a “What You Should Know: What to Do if You Believe You Have Been Harassed at Work” statement. It outlines steps for employees to take if they believe they have been subject to harassment.

The allegations against these high profile individuals have also sparked a resurrection of the #metoo campaign on social media. The campaign called on those who had been sexually harassed or sexually assaulted to share their stories with the hashtag “#me too.” Men and women all over the world have shared stories through the campaign. Because of the #metoo campaign, the new allegations that have been appearing in the news almost daily, and a renewed attention on sexual harassment in the workplace, employers likely will see an increase in employee sexual harassment complaints in the coming months.

Studies show that sexual harassment in the workplace is very costly. In addition to the hundreds of millions of dollars paid out in settlements every year, sexual harassment causes low employee morale, high job turnover, increased sick leave, decreased productivity, and reputational loss. The good news is there are ways to help reduce these costs.

Make Sure Your Harassment Policy is Up to Date and Has Been Communicated Recently

The policy must include a notice that sexual harassment is unlawful and that it is unlawful to retaliate against someone who reports sexual harassment or participates in an investigation into harassment. Additionally, among other things, the policy should define sexual harassment and outline the employer’s internal complaint and investigation procedure. Each time the policy is distributed, employers should obtain a signed acknowledgment form from the employee indicating that they have received, read, understand, and agree to abide by the policy.

Conduct Harassment Training for Management/Supervisors If You Haven’t Done So Within the Past Year

The EEOC has provided some helpful guidance about effective harassment training. Among other things, the EEOC recommends that the training be live and interactive if possible, or computer-based and interactive if live training is not possible. The CEO or other top person in the company should provide full, public support for the training and a harassment-free workplace. The substance of the training should not just recite the legal definitions related to workplace harassment, but should provide real-world examples tailored to the employer’s particular work environment. Management/supervisor training also should include specific guidance on what the manager/supervisor should do if he or she receives a complaint or becomes aware of an issue and should include a component on retaliation.

Conduct Harassment Training for Non-Management Employees

Employee training does not have to be as in-depth as the training for management, but it should cover the following topics: (1) the type of behavior that can get an employee in trouble (or, conversely, that would be considered “harassment” in violation of company policy if the employee is subjected to it); (2) what the employee should do if the employee believes he or she may have been a victim of harassment, and (3) what retaliation is, that it is prohibited, and how to lodge a retaliation complaint.

Refine Your Complaint and Investigation Process

As discussed above, an employer’s sexual harassment policy should outline where and how employees can bring internal complaints of harassment and what the investigation procedure is. If either of these processes is unclear in your policy, now is the time to revisit them and develop a more straightforward complaint process and investigation procedure. Although complaints can be brought to an employer’s attention in a number of different ways (e.g., third party, observation, etc.), employers...
should be aware that an employee is not legally required to follow the complaint procedure outlined by an employer's policy so long as the employer becomes aware of the complaint through some other means. Employers also should provide the names of two employees, preferably one male and one female, to which employees can bring their complaints of harassment. And, lastly, the employer should inform all employees that they will not be retaliated against for reporting harassment in good faith.

With regard to the investigation process, it must be a prompt and thorough process that involves a private interview with the person filing the complaint, the accused, and any witnesses. Additionally, employers should review any other evidence including, but not limited to policies and emails. Employers also should specify who will be responsible for investigating allegations of sexual harassment in the procedure outlined in the policy.

What to Do with a Sexual Harassment Complaint

Conduct a prompt and thorough investigation into the allegations as outlined above, document the investigation including, but not limited to taking notes during interviews, writing up an investigation report, and determining what, if any, discipline is appropriate.

Once the investigation is complete, follow up with the complaining party regarding the outcome without sharing specifically what, if any, discipline the accused will face. Follow through on any disciplinary measures or other recommendations, and in the weeks and months following, continue to follow up with the complaining party to confirm that all of the inappropriate conduct has stopped.

Employers should also remember that their workplaces are not courts of law, and so employers are not bound by any "proof beyond a reasonable doubt" standard before imposing discipline. Even when an investigation doesn't reveal any hard "proof" of harassment, employers can impose discipline if they believe improper conduct occurred.

The best position for an employer to be in is one in which none of its employees are engaging in sexual harassment. Distribution of the policy and annual training help to eliminate harassment in the workplace, but when someone does report it, an employer must also be prepared to promptly investigate and stop the conduct to limit its legal liability.

One of the most effective ways to curb harassment in the workplace is to take strong action in response to misconduct and make clear to employees that inappropriate conduct will not be tolerated.