JULY 20, 2017 | DISCRIMINATION, HARASSMENT & RETALIATION

Workplace Harassment 101

One lesson companies of all sizes can learn from the sexual harassment claims that Uber is facing is that an employer needs to set clear restrictions on harassment and make a conscious effort to hold employees accountable to those workplace standards. In particular, sexual harassment has been a significant issue in the workplace since men and women began working alongside each other. However, it wasn't until 1964, when Congress passed Title VII of the Civil Rights Act, that discrimination and harassment in the workplace was explicitly prohibited at the federal level. Since then, several more anti-discrimination laws at both the state and federal level have been passed and countless judicial opinions denouncing unrestrained work culture and impermissible acts have been published. So why is this still a hot button issue in the workplace over 50 years later?

Some may be of the opinion one complaint of workplace harassment is not a big deal because it is not reflective of the entire workforce or the values of the company generally. While this may be true in some cases, it is important to investigate any such complaints because the root of the problem may be broader, such as poor workplace culture, weak management, and/or ineffective workplace policies restricting harassing behavior. The recent high-profile cases that have surfaced within just this last year – Uber and Fox News to name a few – serve as a reminder an employer's workplace culture and actions in addressing complaints of workplace harassment can have a significant impact on employee perception and behavior, and reduce the potential for costly and damaging lawsuits.

Employers should be acutely aware that the modern-day workforce is becoming more diverse, which in turn requires greater tolerance, respect, and sensitivity when dealing with workplace issues, especially discrimination and harassment. For example, the workplace behavior highlighted in AMC's hit series "Mad Men" – a modern day TV series depicting American business in the 1960's – must be viewed as far from the norm in 2017. In fact, workplace decorum and culture today should be quite the opposite.

While managers and executives cannot be expected to know every single thing that occurs during the day-to-day operations of a company, it is critical that they hold employees accountable and maintain a professional workplace that is inclusive and respectful of all employees. Employers should have robust policies and procedures in place that expressly prohibit discrimination and harassment, and ensure that they are reinforced through strong leadership and educating employees. Such a workplace culture should limit the potential for a costly and damaging lawsuit as well as strengthen the company's defenses against potential harassment claims, increase employee morale and productivity, and protect against unfavorable publicity that severely damages an

employer's reputation, or, in extreme cases, could force it to shut its doors.

Management, Leadership, and Workplace Culture

A company's culture is the cornerstone to a positive workplace environment for all employees. The more congenial and inclusive a company's work environment, the more productive its employees. In our experience, a positive workplace culture, is most effectively established through a top-down approach.

The behavior and actions of a company's leadership should reflect the ideals of the company and serve as a guidepost that employees will ultimately follow. Employers need to have strong leaders that can translate their influence into productivity and enable employees' success. Interactions between managers and their subordinates should reflect an employer's values and commitment to providing a harassment-free work environment. Management should be trained to immediately respond to complaints when they are received, and should be cautioned against any appearance of retaliatory behavior in response.

Employers should be vigilant when making hiring decisions, particularly in regards to management who will positioned as the voice of a company, and resist the rush to fill a position quickly. To maintain a positive workplace culture, every single employee should be hired for reasons that are compatible with the company's mission and values. The benefits of taking your time in hiring the right employee outweighs the costs of high turnover or a lawsuit.

Implement Effective Workplace Policies

Workplace discrimination and harassment can cost employers millions of dollars every year through low employee morale and productivity, and expensive lawsuits. Creating a positive workplace culture that is led and staffed by like-minded individuals can be further reinforced by strong policies and employee training.

The content of discrimination and harassment policies should clearly explain the kinds of conduct that are prohibited, explicitly announcing that the company does not permit and will not tolerate harassment or discrimination based on sex, race, color, religion, national origin, age, disability, citizenship, familial status, pregnancy, veteran status, genetic information and/or any other legally protected status provided under applicable state law. For example, the DC Human Rights Act makes discrimination and harassment illegal under 19 protected categories, including personal appearance, sexual orientation, and gender identity or expression.

Discrimination and harassment policies should also explain that they apply to acts committed by anyone in the workplace, including executives, managers, coworkers and non-employees, and that employees will not be retaliated against for reporting harassment. To further explain how the policy operates, employers should include definitions and examples of harassment, an explanation of an employee's right to a workplace free of discrimination and harassment, a clear statement that the company has zero tolerance for such conduct, and an anti-retaliation provision related to reports of discrimination or harassment.

Finally, these policies should also clearly explain the complaint procedure and an employee's duty to report harassment to the appropriate supervisor, upper level management, or Human Resource Officer, who is responsible for handling employee complaints. The reporting procedure should encourage employees to report complaints promptly, remove all potential obstacles from the reporting process by providing clear instruction on

how to report alleged discrimination or harassment, provide several ways in which employees can make a report of harassment (i.e., if your harasser is your supervisor, contact Human Resources directly to complain), and reassure employees that the company will investigate the complaint diligently.

Harassment Training and Enforcing Harassment Policies

Placing a policy in a handbook is a necessary first step to disseminate anti-discrimination and harassment policies and limit the potential liability, however, policies are only effective to the extent that they are followed by employees and enforced by the employer. Therefore, it is equally important to provide appropriate training to employees and supervisors on the company's discrimination and harassment policies and the reporting procedures.

In addition to detailing the content of an anti-discrimination and harassment policy and emphasizing the company's expectations and workplace culture, training should provide a comprehensive overview of the procedures to report complaints of discrimination or harassment. Specific training on the roles and responsibilities of employees on how to report complaints of discrimination and harassment validates an employer's commitment to enforcing its policy.

Similarly, as mentioned above, supervisors, Human Resource officers, and other company officers who handle and investigate employee complaints, should be trained on their responsibilities to enforce the policy. Supervisors are important to the reporting procedure because they are typically the first line of defense, and their actions can be a major factor for liability purposes. Therefore, training for supervisors and company officers responsible for handling employee complaints should emphasize their role in monitoring workplace behavior, upholding company values and workplace culture, and properly addressing employee complaints.

Training your workforce on your discrimination and harassment policy is also essential to defending harassment claims. The Supreme Court holdings in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) generally require employers to create and implement zero tolerance policies to prevent, deter and remedy complaints of harassment. Employers are automatically liable for a hostile work environment created by a supervisor if the harassment results in a tangible employment action, such as a demotion or termination. An employer also is liable for a supervisor's actionable harassment even if no tangible employment action occurs, unless the employer can establish the affirmative defense developed in the aforementioned case law.

To establish the affirmative defense, employers must demonstrate that they have satisfied two elements:

1. the employer exercised reasonable care to prevent and promptly correct harassment; and
2. the employee unreasonably failed to take advantage of any opportunities provided by the employer or to avoid harm otherwise.

However, even the best harassment policy and complaint procedure may not satisfy the affirmative defense if the employer fails to enforce its policy. Employers must ensure that the policies and procedures set forth in the employee handbook are consistently enforced throughout the company. This is, again, where comprehensive training plays an important role. Additionally, documenting the investigation, outcome, and any corrective action is important to demonstrate that the policy is followed. If the conclusion of the investigation is that harassing

and/or discriminating conduct occurred, appropriate discipline should be applied to the offending party that aligns with the company policy.

Additionally, although Title VII does not specifically require that employers provide discrimination and harassment training, some states specifically require harassment training. For example, in California (Cal. Gov. Code § 12950.1) and Connecticut (Conn. Gen. Stat. § 46a-54(15)(B)), employers with 50+ employees must provide two hours of sexual harassment training to all supervisory employees within 6 months of being hired. Additionally, California law requires two hours of re-training on sexual harassment to supervisory employees every two years. Employers should consult applicable state law and ensure that they are following any specific state or local requirements when it comes to harassment and training your employees.

Conclusion

Ultimately, sexual harassment is still a very real problem in the modern-day workplace. Employers need to provide employees the appropriate channels to report harassment, free of retaliation, and make a commitment to upholding its zero-tolerance policy. Although creating effective policies and conducting employee training can be expensive, the cost of taking preventative measures to avoid exposure for claims of discrimination and harassment pales in comparison to the costs of defending a lawsuit and the damages that could be assessed. Finally, promoting and enforcing a workplace culture free of harassment will pay dividends in worker productivity. Given the recent string of news stories highlighting workplace harassment at major companies throughout the United States, there is no better time for employers to evaluate their workplace culture, and take the appropriate steps to ensure that employees and management alike are committed to promoting and upholding a positive workplace free of harassment.