Oops, He (or She) Did It Again! Implementing a Best-in-Class Harassment-Free Workplace Program to Help Your Company Stay Out of the Headlines

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While much has been written about workplace harassment, this article provides a refresher of the nuts-and-bolts aspects of an effective harassment prevention program—from preventive measures such as policies and procedures and management/employee training programs to key considerations and best practices to keep in mind should you find your company conducting an investigation, including important confidentiality considerations. Consistent adherence to these principles should help employers reduce the number of claims and better defend those that are brought.

Sex sells. And draws clicks, too, on Facebook, Twitter, or the countless other sites people visit to get their news. Whether it was the salacious details surrounding Anita Hill's allegations about Clarence Thomas decades ago or the more recent accusations that cost Bill O'Reilly his Fox News gig, it does not take much to get people talking about sexual misconduct in the workplace. Much has already been written about the risks of coddling superstar employees and overreliance on confidentiality provisions in settlement agreements that may not be as airtight as some think. This article, however, is intended simply as a refresher of the basic, nuts-and-bolts aspects of an effective harassment prevention program. While faithful adoption of these suggestions is not a magic talisman for warding off all claims, regular and reliable adherence to

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these steps will put employers in a better position to defend and possibly reduce the number of claims.

POLICIES AND PROCEDURES

It goes without saying that employers should regularly review and update their policies and procedures to ensure compliance with the latest laws and trends. Do not limit the policy to simply sexual harassment. Make sure that your policy covers harassment based on *any* protected status, including gender, age, race, religion, national origin, disability, sexual orientation, gender identity, or disability as well as any other status protected by law. Such policies should be written in words that employees can readily understand. Include the harassment policy in your company's handbook, post copies in the workplace and make it available on your company's intranet so employees have access to it at all times. (Some employers even reprint their basic anti-harassment policy on every employee's pay stub.) Consider the languages commonly spoken by employees and whether there are segments of the workforce that do not read or understand English. If so, invest in translation services and confirm that employees understand the option to have the policy translated for them, if needed. The anti-harassment policy should provide multiple avenues of complaint, ideally including your company's human resources department, a toll-free telephone number, and the ability to submit complaints online. Do not require that employees put their complaints in writing, as this mandate can deter complaints. Regardless of the avenues provided, giving employees the ability to make complaints anonymously can limit the ability of claimants to later argue they failed to complain out of a fear of retaliation.

MANAGEMENT AND EMPLOYEE TRAINING

Whenever possible, conduct mandatory (separate) training sessions for employees and management. Employees should hear how seriously the company takes workplace harassment, understand what sort of behaviors are prohibited, and be told how to lodge a complaint as well as what to expect once a complaint is received. It is important to dispel myths and emphasize the company's commitment to preventing both harassment and retaliation. Whether the company uses internal trainers or a third party, many clients prefer to involve attorneys (either internal or external) when training managers. Lawyers can credibly describe the legal risks for the organization when managers fail to adequately respond to harassment situations and emphasize the potential for personal liability, which can be particularly persuasive. Managers must understand how to spot issues in the workplace that need to be investigated, even when they do not rise to the level of a formal

complaint, such as comments made by departing employees during an exit interview, reports from vendors or other third parties, "watercooler talk," and anonymous complaints. Whenever possible, senior leaders should attend these sessions, affirming the company's commitment to a harassment-free workplace. While video/online training may be the only feasible option for many employers, live sessions give employees and managers alike the opportunity to discuss nuances, ask questions, and raise concerns. Quite often, issues will surface during or immediately after management training, providing the opportunity to take proactive steps. Your human resources department should doggedly track attendance to ensure that every employee completes the training in a timely manner and to ensure that sign-in sheets are used for live sessions. Last but not least, the training should include a review of the company's policy, emphasizing that the company prohibits all types of harassment. The trainer(s) should be sure to include and discuss case studies so the attendees get a clear and practical picture of what is not acceptable behavior and how, as managers, they must respond. Employees should also be encouraged to speak up when they witness inappropriate behavior and to feel empowered to address situations in the workplace directly that make them uncomfortable.

INVESTIGATIONS—KEY CONSIDERATIONS

There are a host of considerations regarding how to conduct an effective investigation—enough to justify an entire article. Every investigation should be prompt and thorough (ideally commenced within 24 to 48 hours of the complaint being made), leaving no stone unturned. Keep in mind that even if the employee is a chronic complainer, some form of an investigation should be conducted in response to every complaint. Ideally, one or more individuals should be trained in how to conduct investigations and have experience in actually conducting them. Senior HR leadership should maintain oversight over the matter to ensure that it is being handled appropriately. Developing and adopting internal investigation protocols, with recommended timelines, is another best practice to consider. If the company does not have a qualified investigator on staff, or if that person is fully occupied, consider retaining a professional investigator or outside attorney. Once the investigation is completed, it is essential that someone close the loop with the complaining employee. While that rarely should include disclosing the specific action taken against the accused (since that is typically a confidential personnel matter between the company and the accused harasser), the complainant should be assured that appropriate steps have or will be taken. Encourage the complainant to immediately let the company know if the original issue recurs or they believe that they are being retaliated against. To the extent that the investigation concludes with a finding that company policies were violated, it is essential that the company

take appropriate remedial action against the offender. Zero tolerance is an important yet misunderstood concept. While action should indeed be taken whenever a violation occurs, that does not mean termination is always the appropriate action. And employers should make sure not to "punish" anyone who made a good-faith report, even if found to be unsupported. (And be mindful of subtle ways in which a complainant may feel ostracized for having come forward.) Every situation is unique and requires a careful and thoughtful response.

Best Practices for Conducting the Investigation

- Determine and clarify the scope of the investigation based on the complaint and any related information;

- Determine who will conduct the investigation; select an experienced, fair, unbiased, and knowledgeable investigator;

- Determine who will be the point of contact for the investigator on behalf of the company (e.g., who should be "kept in the loop"), note that the fewer who are informed, the less vulnerable the company will be to retaliation claims;

- Draft an internal investigative plan with appropriate time line (with a goal of "prompt but thorough");

- Issue document preservation notices, suspend automated data-deletion cycles, update and consider the need to expand such notices as information develops;

- Consider any particular safety measures that are appropriate to protect employees or prevent witness or evidence tampering (e.g., whether the accused harasser needs to be placed on administrative leave while the investigation is being conducted);

- Carefully consider all privilege issues, including issuing *Upjohn* warnings to employee witnesses, consider whether joint defense agreements are needed, note that if an attorney is selected as the investigator, a waiver of the attorney-client privilege can result;

- Gather and review all applicable documents/information;

- Identify the list of witnesses who must be interviewed, carefully considering former employees and third parties;

- Determine the order in which witnesses will be interviewed, usually the complainant is first and the accused is last, but circumstances may dictate a different order;

- Prepare witness interview outlines in advance of each interview and take careful notes during interviews (consider having another person attend the interviews to record notes), and make sure notes list date, persons present, location, and start/stop times;

- Do not promise absolute confidentiality;

- Document any employee's refusal to cooperate;

- Start with general questions before moving to specific questions, avoid leading questions;

- Ensure that each witness is asked to share any information that they feel the interviewer needs to know about the matter but which was not specifically asked, also be sure to ask witnesses whether they are aware of others with information on the topic who may need to be interviewed, and whether they have any documents that may bear on the topic;

- Emphasize the company's non-retaliation policy to each witness;

- Determine if additional interviews should be conducted, or any witnesses should be re-interviewed, and whether additional documents must be gathered and reviewed;

- Review all interview notes, documents, and information gathered, make credibility determinations and draw conclusions, note that the standard for determining internal misconduct is simply whether there is a reasonable, good-faith basis for the conclusion reached (not as high as the civil or criminal standards used in court);

- Determine whether any remedial action should be recommended in light of the findings (including possible additional workplace training or targeted training/coaching for the accused);

- Consider all factors in recommending remedial action (e.g., whether company policies were violated, severity of the conduct, whether the accused was truthful, what his or her employment history/record is, whether there are mitigating

circumstances, how similar situations have been handled previously);

- Prepare a written report that describes key background information, summarizes the investigatory steps, makes key factual findings and conclusions (tied to company policy), does not contain legal advice and states the remedial action taken by the company;

- Final steps should include meeting separately with the complainant and accused (or ensuring a company representative does so), possible communications to other employees, ensuring all investigatory documents are retained in a confidential file (but not drafts), and checking in with complainant (in 30, 60, and 90 days) to ensure no retaliation or additional issues have occurred.

A Few Words about Confidentiality

Historically, it was a best practice of conducting internal investigations to issue an admonishment to every employee witness interviewed to maintain the details of the investigation in the strictest of confidence and not discuss the investigation with coworkers. Indeed, many employers maintained workplace policies that prohibited employees from revealing confidential information about a workplace investigation, and even threatened violators with discipline or termination. Over the past few years, however, a series of decisions and policy statements from the National Labor Relations Board (NLRB), the U.S. Equal Employment Opportunity Commission (EEOC), the Securities Exchange Commission (SEC), and other federal and state enforcement agencies prompted employers to tread carefully when it comes to imposing "gag orders" on their employees regarding matters of workplace concern.

The NLRB, for instance, has repeatedly invalidated confidentiality rules in employee handbooks, finding that prohibiting employees from revealing matters under investigation in the workplace chills such employees' rights under Section 7 of the National Labor Relations Act to engage in protected concerted activities intended to address matters of shared concern, such as a biased or harassing supervisor. Similarly, the EEOC has opined in public statements that "broad policies that impose discipline on those who do not abide by strict confidentiality requirements are likely to run afoul of the anti-retaliation provisions of Title VII and/or the other federal EEO statutes [the EEOC] enforce[s]." The EEOC has acknowledged, however, that an employer that merely suggests that those involved in an internal investigation of discrimination keep the matters discussed confidential (i.e., to protect the integrity of the investigatory process) is less likely to be found to have violated EEO

laws. The SEC has also weighed in on employer-imposed confidentiality mandates, finding that it is a violation of the Securities Exchange Act of 1934 for an employer to require an employee to obtain the employer's consent before disclosing information about an internal investigation, as such a requirement would chill employees' whistleblower rights to report potential illegality to the SEC.

In light of these recent pronouncements and decisions, employers are encouraged to review their policies, handbooks, and standard confidentiality agreements to ensure that employees are not prohibited from participating or cooperating with government investigations or otherwise joining together with each other to address concerns relating to the terms and conditions of their employment. Blanket clauses that mandate strict confidentiality in connection with internal investigations should be eliminated, and employers should consider adding language that exempts good-faith whistleblowing to government agencies from workplace confidentiality requirements. Finally, when closing an investigatory interview with an employee witness, while the investigator might choose to explain how the integrity of the investigatory process will be preserved if the employee refrains from broadly disseminating information about the matter among other employees while the investigation is pending, strict insistence on absolute investigatory confidentiality is no longer a best practice.

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