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Proactive Evaluation of Sexual Harassment Prevention Policies

Recent highly publicized instances of alleged sexual harassment and sexual assault in the workplace across a variety of industries have caused many employers to re-evaluate their policies and procedures regarding sexual harassment. While most large employers have anti-harassment and anti-discrimination policies in place, many may not have considered how those policies measure up to current best practices. This client alert suggests some actions and policies that employers should consider when evaluating their sexual harassment policies and procedures.

Fostering a Culture of Respect in the Workplace

As a starting point, employers should make their commitment to a diverse and inclusive workplace clear in their employment policies and in actual practice. Setting an appropriate tone and culture “from the top” is critical to fostering an organizational culture in which sexual harassment is not tolerated and in which respect and civility are promoted. Corporate leaders should be consistent in creating, implementing and communicating policies and practices that achieve that goal.

The U.S. Equal Employment Opportunity Commission (the “EEOC”) *requires* that employers take reasonable steps to prevent (or, failing that, promptly correct) harassment. Employers should review their sexual harassment policies and practices to ensure that their policies are comprehensive and in line with current law, that they are sufficiently communicated to their employees, and that there are proper controls in place to ensure compliance with those policies. Incidents of sexual harassment should be addressed in real time, and employers should promote a culture in which good faith reporting of perceived or experienced instances of sexual harassment is not stigmatized.

Crafting Appropriate Sexual Harassment Policies

Employers should regularly assess their policies and procedures to prevent and deal with sexual harassment. In assessing those policies, employers should keep in mind that local, state and federal laws apply. If your company operates in multiple jurisdictions, ensure that your policies are compliant in all of the applicable jurisdictions.

In assessing your policies, keep in mind the following:

- Consider whether the policies include the EEOC’s definition of sexual harassment and provide a sufficiently broad description of sexual harassment, including a non-exhaustive list of examples of inappropriate behavior that are realistic, tailored to your workforce and easy to understand.

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- Consider whether the policies expressly apply to incidents of sexual harassment that occur at the workplace and at any work-related setting outside of the workplace. Policies should cover anyone who employees come in contact with during the course of their employment, such as suppliers, vendors, clients or customers.
 - Consider whether the policies make clear that sexual harassment may involve individuals of the same or different genders.
 - Consider making clear that every employee shares responsibility for keeping the company free from sexual harassment, discrimination, and retaliation.
 - Consider making explicit that non-consensual sexual or romantic interactions between employees are prohibited.
 - Consider whether employees have multiple avenues in which, and parties to whom, they may report complaints of misconduct (even anonymously), including within their supervisory chain, in Human Resources and, if possible, through a confidential channel independent of those two avenues, such as a hotline.
 - Consider whether the policies provide for a clear, timely investigation process to be followed, one in which a written record is kept of the interviews conducted and of conclusions and decisions reached. Complaints should be handled consistently across all employees, to the greatest extent possible.
 - Assess whether the confidentiality protections available to an individual reporting sexual harassment are explained in a realistic manner. The policies should make clear when information will be disclosed, *e.g.*, in order to enable an effective investigation, and when required by law.
 - Consider whether the policies provide for an explicit prohibition of any form of retaliation against any employee who in good faith reports perceived or experienced misconduct or who cooperates in an investigation of any such misconduct, and make clear that any violation of the policy against retaliation may be grounds for discipline, including termination, as appropriate.
 - Consider whether the policies discuss – and remind employees of – whistleblower protections.
 - Consider whether the policies make clear what the consequences could be for employees found to have committed sexual harassment.

Creating Other Policies that May Intersect with Sexual Harassment Policies

In addition, employers should consider implementing and/or updating other policies that may intersect with their sexual harassment policies both to augment sexual harassment prevention initiatives and to ensure that clear guidance is provided to employees.

- Employers should ensure that they have clear policies regarding the appropriate use of company communications such as emails, instant messaging systems, work phones, and any other systems. Employers should make clear to employees that the company has a right to review and access messages and information on company technology systems, and that such information may be reviewed from time to time, as the company sees fit.
- Consider implementing a policy regarding consensual relationships in the workplace, particularly between employees in a supervisory, managerial or reporting relationship, keeping in mind that a broadly worded prohibition against “fraternization” in the workplace may run afoul of state or local privacy laws, or provisions of the National Labor Relations Act. Such policies, if not properly tailored, can be considered to discourage protected labor activity by prohibiting employees from meeting to discuss unionization or collective bargaining.

Review Insurance Policies and Employee Indemnification Clauses

Employers should consider whether the insurance coverage they have in place appropriately covers the company in the case of sexual harassment or discrimination lawsuits, and whether they may want to obtain further insurance coverage. Further, employers should evaluate the company’s employment and compensation contracts and consider whether they include sexual harassment as a “for cause” termination reason, and if so, whether the company expressly declines to indemnify in such situations.

Providing Appropriate Training on Sexual Harassment

Employers should also provide employees with detailed, easy-to-understand training on sexual harassment policies and prevention, including training specific to executives, management, human resources personnel, and varied segments of their workforce. Employers should train senior management and, if applicable, directors and officers, on how the sexual harassment policies and investigation procedures work and what role they should play in that process. For instance, if certain corporate officers are designated as individuals capable of receiving complaints of sexual harassment, employers should train them on how to deal with those complaints.

Employers should also consider training personnel on sensitivity to gender issues as well as on principles of diversity and inclusion. Some employers may also find it appropriate to provide employees with

training on workplace civility and bystander intervention as part of a comprehensive approach to preventing sexual harassment in the workplace.

Regularly Reassessing Sexual Harassment Policies and Practices

Reassessment, republishing and redistribution of sexual harassment policies should be undertaken on a regular basis. Employers should also consider whether they wish to require employees to sign a written acknowledgement regarding these policies.

Keep Abreast of Developments

Employers should endeavor to keep up to date on developments in this rapidly evolving area. Suggestions and ideas developed today could one day become best practices, or even new law. Employers should also be mindful that even longstanding practices for responding to sexual harassment claims are being reconsidered. For instance, some companies are rethinking the use of arbitration agreements for sexual harassment claims, and questioning the enforceability and desirability of confidentiality provisions in sexual harassment settlements.¹

The EEOC has recently suggested that employers consider a reward system linked to the reporting of instances of sexual harassment. The EEOC report suggested rewarding managers in divisions where sexual harassment complaints *increase*, at least initially.² The EEOC suggests that rewarding managers for low complaint levels can actually have the unintended and undesirable effect of suppressing reporting. The report posits that if employees are filing complaints of sexual harassment, then that indicates that the employees have faith that their complaints are being taken seriously and will be handled appropriately.

¹ For example, on January 2, 2018, New York Governor Andrew Cuomo announced a legislative package to combat workplace sexual harassment, particularly in cases involving public officials, which would “prevent public dollars from being used to settle sexual harassment claims against individuals, void forced arbitration policies in employee contracts [that prevent sexual harassment cases from consideration in law enforcement investigations and court trials], and mandate that any companies that do business with the state disclose the number of sexual harassment adjudications and nondisclosure agreements they have executed.” Press Release, New York State Office of the Governor, “Governor Cuomo Unveils 18th Proposal of 2018 State of the State: Combat Sexual Harassment in the Workplace,” (January 2, 2018), *available at* <https://www.governor.ny.gov/news/governor-cuomo-unveils-18th-proposal-2018-state-state-combat-sexual-harassment-workplace>.

² U.S. Equal Employment Opportunity Commission, “Select Task Force on the Study of Harassment in the Workplace,” (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686303.

Conclusion

Employers are encouraged to work with in-house and outside counsel to assess the strength and efficacy of their current sexual harassment prevention policies and practices, and to regularly benchmark those policies and practices against best practices and developments in the law.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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