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EMPLOYER NEWSLETTER
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WHAT EMPLOYERS SHOULD DO TO PREVENT AND RESPOND TO ALLEGATIONS OF SEXUAL HARASSMENT

On October 5, 2017, the *New York Times* published a story recounting lurid allegations of sexual harassment against Harvey Weinstein and payoffs to his victims. Since then, the "Weinstein effect" – and aggressive media reporting and the social media "#MeToo" -- have inspired a flood of sexual harassment allegations against powerful men in politics, entertainment and media.[1]

As an employer, what should you know and do to prevent devastating publicity and possible liability from allegations of workplace sexual harassment?

What is Sexual Harassment?

The U. S. Equal Employment Opportunity Commission (EEOC) defines sexual harassment in seven (7) succinct sentences:

> *"It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.*
>
> *Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.*
>
> *Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.*
>
> *Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).*
>
> *The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer."*[2]

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[1] Politicians: Rep. John Conyers (D. Mich.), Sen. Al Franken (D. Minn.), Sen. Candidate Roy Moore (R. Ala.). Entertainment: Harvey Weinstein, Kevin Spacey, Louis C.K.. Media: Mark Halpern, Charlie Rose, Garrison Keillor, Matt Lauer.

[2] https://www.eeoc.gov/laws/types/sexual_harassment.cfm. For the first time in 20 years, the EEOC intends to issue new guidelines and regulations regarding workplace sexual harassment and discrimination. The Office of Management of Budget is currently reviewing them, which are expected to be released soon.

What Should My Business Do to Prevent Liability for Sexual Harassment?

Since 1998, the U. S. Supreme Court has made clear that the employer has the burden to show that it "exercised reasonable care to prevent sexual harassment" in legal proceedings. Thus, to comply with that obligation and to avoid sexual harassment lawsuits and liability, we urge employers to do the following:

- Establish Anti-Harassment Policies and Procedures. If your company has an employment manual, it should be reviewed to ensure that it contains an anti-discrimination and sexual harassment policy statement. The policy, at a minimum, should (1) define sexual harassment and other forms of prohibited conduct; (2) tell the employee where to go if he/she has a concern or complaint; (3) assure the employee that the company will not retaliate for reporting the concern; (4) explain how the company will investigate and attempt to resolve the complaint; and (5) provide a complaint form and encourage the employee to write down what happened. An employee's written statement shortly after the alleged incident will help the company investigate the complaint and will commit the employee to a version of the story.

- Train Employees and Supervisors. Simply establishing an anti-harassment policy on paper is not sufficient by itself. All employees should attend training seminars conducted by human resource professionals with an excellent working knowledge of sexual discrimination and harassment laws or by an experienced employment law attorney. In the sessions, employees should receive general training about workplace sexual harassment laws, the company's specific policies prohibiting discrimination and harassment, and the procedures the company will follow when investigating such matters. Supervisors' training sessions should include all of the above plus emphasize the importance of communicating complaints through proper channels and how the company will conduct internal investigations.

- Investigate All Complaints. The employer must investigate all complaints of sexual harassment - no matter how improbable or trivial they may seem. One of the main lessons from a Supreme Court case, *Oncale v. Sundowner Offshore Services,*[3] is that employers must take seriously and investigate promptly all complaints about sexual harassment and discrimination no matter how unique, unbelievable or hyper-sensitive the complaining party may seem. Sexual harassment investigations are serious and, if litigation results, will be a key focus of the company's defense (if handled properly) or a key part of the plaintiff-employee's case in chief (if handled improperly). All parties, victim(s), alleged harasser(s), and witnesses, if any, should be interviewed. The interviews should be conducted by a neutral person with an excellent working knowledge of sexual harassment laws and company policies and procedures. The findings and conclusions of the investigation should be kept confidential and shared only with those within the company

[3] Joseph Oncale was sexually assaulted on several occasions by his supervisors and coworkers while working on an oil rig off the coast of Louisiana. When Mr. Oncale complained about the harassment, his disbelieving employer essentially told him that "boys will be boys" and that he should expect workplace hazing from his all-male co-workers. Mr. Oncale then filed suit in federal court under Title VII of the 1964 Civil Rights Act which prohibits discrimination based on a person's sex. Months later his suit was dismissed because both he and his harassers were male. Mr. Oncale appealed, and his case eventually reached the U.S. Supreme Court, which ruled in his favor.

who will evaluate the information and make final decisions. More often than not it is a good idea to work closely with legal counsel, whose communications are shielded by the attorney-client privilege.

- Audit Company Policies and Procedures. The company should constantly evaluate its internal policies and procedures. Employment law is rapidly evolving and the company's policies and procedures should be reviewed at least annually.

Thus, we recommend that you work with an experienced employment law attorney who can help you develop sound policies, practices, employee training, and ensure that evaluations of your compliance efforts are confidential and protected by the attorney-client privilege.

If we can be of help, please contact Mr. Clark at (480) 844-0039 or etc@clarkfirm.com.