HARASSMENT/EQUAL EMPLOYMENT OPPORTUNITY POLICIES

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On June 21, 1999, the Equal Employment Opportunity Commission ("EEOC") released a Guidance to implement a pair of Supreme Court decisions issued last summer in which the Court held that strict liability, (i.e., liability whether or not the company is aware of what is going on), attaches to sexual jokes, remarks, touching or other conduct by a supervisor and to a supervisor's unfulfilled threats of an adverse job action, if these actions are severe or pervasive and create a hostile work environment to a reasonable person. The Court also set forth an affirmative defense available in some cases in which employers have promulgated and implemented an effective sexual harassment policy.

The EEOC Guidance advises that these Supreme Court standards, and sexual harassment law generally, should be applied to all areas of prohibited discrimination, which is consistent with a growing trend in the case law to treat other forms of harassment, e.g., harassment based on race, color, sex, religion, national origin, protected activity, age or disability, in the same manner as sexual harassment. In addition to the recent direction from the courts and EEOC, a significant number of states have enacted legislation which requires the adoption of detailed policies prohibiting sexual and other harassment, the posting of signs, creation of employee notification procedures and training and education of employees with regard to sexual harassment.

The EEOC Guidance, the Supreme Court decisions and the state legislation suggest that employers must take pro-active steps to prevent and remedy all forms of harassment and discrimination in order to defend successfully litigation in this area. In circumstances where a supervisor has created a hostile work environment, the Supreme Court held that an employer has an affirmative defense to avoid liability if two criteria are met: (1) the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior; and (2) the complaining employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer to otherwise avoid harm. This affirmative defense is obviously of great importance for employers and mitigates the otherwise harsh effect of the strict liability rule applicable to conduct by supervisors. However, the affirmative defense is not available if the harassment results in a tangible job loss, e.g., termination, demotion, failure to promote, undesirable reassignment, compensation decisions, etc.

Based on the emerging trends in the law and in order to avoid strict liability, employers should adopt, promulgate and enforce a thorough written policy prohibiting sexual harassment and other forms of discrimination and harassment in the workplace. Those employers who

have existing policies need to review and revise them in light of the legal developments in this area as many policies which were satisfactory in prior years may no longer provide effective protection.

At a minimum, a policy should include:

- A statement that harassment and discrimination will not be tolerated;
- Definitive examples, specific to the company or industry, of conduct that constitutes harassment and discrimination;
- A description of the complaint process that includes a choice of channels for reporting harassment or discrimination;
- Information on how the company will handle the complaint which should include a prompt, thorough and neutral investigation;
- Assurance that the company will maintain confidentiality to the extent reasonably possible;
- A statement that the company will take appropriate corrective action to remedy any violation of the policy; and
- A statement prohibiting any employee from retaliating against individuals who bring a complaint or participate in the investigatory process.

In addition to promulgating an effective policy, we recommend that employers provide sufficient education to employees about sexual and other forms of harassment, the policy and complaint procedure, such that no reasonable employee would fail to use the policy and procedures the employer has put in place. The goal is to establish a system of education, reporting, and investigation that is so readily available and effective that it would be clearly unreasonable not to use it. While some employers hesitate to provide employees with so much information about harassment and discrimination out of fear that such public discussion will generate complaints, employers should understand that, particularly with the specter of strict liability in this area, bringing forward complaints early for immediate resolution is one of the best ways to insulate against liability and the high costs (expense, time, publicity) of litigation of harassment claims. In addition, early complaints can often be resolved without the necessity of draconian remedies such as discharge.

Hence, employers should communicate the policy effectively to all employees and create and maintain documentation that each employee was provided and familiarized with the policy and how to file a complaint. This can be done by:

- Providing clear coverage of sexual and other harassment issues in new employee orientation;

- Including the harassment/discrimination policy and the complaint procedure in an employee handbook;

- Posting the policy and procedure in a central location;

- Updating and reissuing the policy and procedure at least annually;

- Using e-mail and websites to publicize and remind employees about the policy and related training, along with traditional postings; and

- Providing additional coverage of sexual/other harassment policies and procedures in employee publications.

Moreover, the policy should be distributed to temporary employees, consultants, employment agencies used by the company, vendors and subcontractors.

Employers also should make a reasonable effort to train all employees, particularly managerial and supervisory employees, about the policy and about what sexual harassment is and provide periodic refresher training sessions. This training should:

- Include a thorough presentation of the policy and the type of conduct that is prohibited by the policy;

- Stress that managers and supervisors are to set the tone for the workplace by setting good examples;

- Emphasize the prohibition against retaliating against people who report sexual harassment and that early reporting of perceived sexual harassment can often rectify the problem without the necessity for drastic remedies;

- Emphasize the variety of opportunities for employees to raise issues -- that it is easy for employees to report perceptions of discrimination or harassment;

Finally, employers are well-advised to apply their discrimination and harassment policy and procedure in a consistent manner so that it is demonstrated to be an effective means of redress for employees. When a complaint is made, there should be a prompt, thorough and impartial investigation into the alleged harassment. It may be advisable to take measures to ensure that further harassment does not occur, for example, strongly advise the alleged harasser not to retaliate or engage in harassing behavior, perhaps reschedule the work time of the alleged harasser or place the alleged harasser on a leave of absence. The depth of the investigation will depend on the circumstances and facts alleged. Fact-finding should be conducted by an impartial individual experienced in questioning witnesses, who does not report to the alleged harasser, and who will objectively gather information and propose findings and recommendations. Finally, employers should consider monitoring the efficiency and effectiveness of the policy by conducting environmental surveys, office walk-throughs, and

exit interviews, and maintaining a confidential file of complaints and periodically reviewing the files for recidivism.

Establishing effective sexual and other harassment policies and training employees about these policies will most certainly pay dividends by enabling employers to avoid the uncertainties and unresolved issues, not only in sexual harassment, but also in cases involving any other type of discriminatory harassment. If the employer has taken all of the steps outlined above, an employee who fails to use the complaint mechanism and chooses instead to "suffer in silence" should not be able to recover from the employer compensatory damages resulting from the harassment. However, if an employee has a good reason for not using the complaint procedure (e.g., because of alleged threats, or a valid perception that a policy was not effective or useful, or that it is inconsistently applied), failing to use those procedures may not necessarily be unreasonable, and will not bar the employee from recovering damages.

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If you have any questions regarding the foregoing, please feel free to contact Tonianne Florentino at (212) 455-3293. You may also feel free to call any other member of our Labor and Employment Group if you would like to discuss any issues raised in this memorandum.

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