

Set clear boundaries and definitions for harassment



Photo by Kimberly Simpson

“With the proliferation of social media, ability to work from remote locations, increased use of email, texting and other forms of communication, it has become increasingly challenging for employers to keep pace with the ever-changing law,” says Linda Prestegaard, partner at Phillips Lytle LLP, who specializes in labor and employment law.

Training programs must be ongoing and evolve with changing laws

By HAVERLY M. ERSKINE

With sexual assault charges making an unfortunate appearance as an issue in the U.S. presidential race, it seems clear that anti-harassment policies should be a front-burner topic for employers.

Although not all employers are legally obligated to have such policies, the Equal

Employment Opportunity Commission’s position is that it is “critical” for every employer to develop and distribute a written no-harassment policy.

“A non-discrimination and anti-harassment policy is one of the most important human resources policies that an employer can have in its arsenal to defend against potential harassment and/or discrimination claims,” says Linda Prestegaard, partner at Phillips Lytle LLP, who specializes in labor and employment law.

Strong anti-harassment policies and training programs help to encourage safe working environments, prevent discrimination and harassment, and serve as the basis

to protect against legal claims, which can cost companies millions of dollars. For those reasons, employers often seek expert consultation.

“Companies should have a work environment that is free from harassment, whether it is based on protected classes such as age, race, religion, gender, national origin, disability or sexual harassment,” says Joanne Schneider, area vice president of human resources consulting for Arthur J. Gallagher & Co.

The laws against discrimination and harassment in the workplace include the protected categories from federal laws such as Title VII of the Civil Rights Law of 1964,

the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

In addition, as Prestegaard explains, different states have different laws; additional laws apply to employers that are federal contractors; and there are laws that actually depend on the location of the employees and/or the number of employees, such as the New York State Human Rights Law.

For example, New York law prohibits discrimination based on the categories protected by federal law and adds sexual orientation, marital status, domestic violence victim status, and military status, among other categories. Employers should also be aware that New York recently added familial status as a protected category.

“To further complicate matters,” Prestegaard says, “many municipalities and some counties have ordinances or laws against discrimination that may also apply to the employer.”

Besides making clear which categories are protected, according to Prestegaard, a strong anti-harassment policy should include a definition of sexual harassment, a statement of prohibited conduct that includes the employer’s prohibition against engaging in discriminatory or harassing behavior based on any category protected by law, examples of prohibited conduct, a detailed complaint procedure with multiple contact options, a statement of prompt action that doesn’t compromise confidentiality, and a statement regarding the disciplinary process. There also should be details outlining how any retaliation for reporting harassment is prohibited and how the policy is to be applied when non-employees are involved.

Furthermore, Schneider says, these policies should be made readily available and referred to often: Write about them and post them in addition to putting them in the employee handbook.

“If an employer does all of these, their liability in case of a claim could be lessened,” says Schneider, who has over 20

years of experience in this field.

This is called an affirmative defense; that is, the company has taken the appropriate measures to deter harassment in the workplace.

Schneider notes that the definition of those protected under sexual harassment has expanded in recent years, and more claims are being filed accordingly.

“Also, there has been a rise in female-to-male harassment as more women move into management positions and are supervising males,” says Schneider.

Albeit a major piece, policy is just one component of an effective anti-harassment program. Workplace training is the other. After all, the best way to eliminate discrimination in the workplace is to prevent it from happening in the first place.

All new hires should receive a copy of the employer’s policy against harassment and discrimination during new hire orientation. Furthermore, best practices would include some type of hands-on training, either online-based or in person, by an HR representative or specified trainer.

Ann Wallace Pettinella is a consultant who works with employers to create effective development and training programs. When it comes to anti-harassment and discrimination training, Pettinella cannot emphasize enough that training be more than a “check the box” exercise; it must become part of a larger culture that does not tolerate harassment.

Pettinella, director of organizational development and training at AJG, says that a strong non-harassment culture “be created and modeled by the top management of the company.”

“All managers have a very important role to ensure that the policy is followed by everyone at all levels,” she adds.

According to Pettinella, harassment training typically consists of two programs: manager training and general workplace training. The topics common to both programs can include:

- The diverse workplace;

■ Definitions of harassment/hostile environment;

■ Harassment and the law: EEOC;

■ Harassment policy of the company;

■ Intention vs. perception;

■ Reasonable person standard;

■ Third-party harassment;

■ Digital harassment and social media responsibility;

■ Respect and responsibility; and

■ Handling harassment.

A good training program will include additional sessions for managers only that make clear their unique role and responsibility in maintaining a harassment-free workplace.

Employers and employees must also be aware that prohibited conduct may occur either on or off the employer’s premises and may occur during working hours or during nonworking hours.

“With the proliferation of social media, ability to work from remote locations, increased use of email, texting and other forms of communication, it has become increasingly challenging for employers to keep pace with the ever-changing law,” says Prestegaard.

With regard to social media, “This has opened up a wide array of avenues for workplace harassment to occur,” Pettinella says.

Both Pettinella and Prestegaard agree that ongoing anti-harassment training for all employees at all levels is a wise choice. What was policy during one’s new hire orientation even just a few years ago has most likely changed with the times.

Ongoing training should be conducted on an annual or biannual basis by a trainer from human resources, a labor or employment attorney or both. This continuing training helps to establish an employer’s expectations of workplace conduct and sends a strong message about the company’s dedication to creating a safe environment for employees.

Haverly M. Erskine is a Rochester-area freelance writer.