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Employers' concerns about sexual misconduct in the workplace have grown more acute following the recent wave of sexual harassment scandals, and for good reason. The upsurge of workplace sexual harassment allegations triggered by 2017's #MeToo movement has rippled into 2018 and sexual harassment continues to be in the national spotlight.

What employers might not realize is that the de-stigmatization of speaking out against sexual harassment in the workplace has potentially broader implications. Employees are now more likely to take a harder line against all types of workplace offenses. Victims of sexual harassment and other workplace misconduct have been emboldened to speak up. We are in the midst of a cultural transformation of sorts and employers must be prepared to manage their organizations accordingly.

On January 25, 2018, the Equal Employment Opportunity Commission released its fiscal year 2017 enforcement and litigation data. Notably, sex discrimination and harassment charges account for only 30.4% of all charges filed in 2017, and were one of *several* areas experiencing an uptick in charge activity. Retaliation accounted for 48.8% of all charges filed in 2017, race discrimination was 33.9%, and disability discrimination was 31.9%. These data, coupled with the assertions of the #MeToo movement, suggest that there may be other, more pervasive offenses occurring in the workplace (such as race and disability discrimination) that could readily become the focus of the next wave of de-stigmatization.

In planning for 2018 and beyond, employers should take proactive steps to prepare their organizations for the potential wave of discrimination claims, and ensure that they are effectively reacting and responding to complaints that have been lodged.

Proactive Steps

- **Take a stand.** Acknowledge the #MeToo movement, your company's support of its message, and the need to fight sexism and other biases inside and outside of the workplace. Knowing that this has become a priority for your company's culture will heighten your employees' awareness of potential misconduct (and its seriousness) and serve to foster respect and professionalism in your workplace.
- **Take a hard look at documented policies.** Anti-discrimination and anti-harassment policies are tools for identifying the rules for your workforce, your company's commitment to following them, and conveying the company's culture. Some considerations when reviewing policies include:
 - Are policies adequately defined? Do they provide examples of sexual and other unlawful harassment? For example, do they make clear that sexual harassment does not require physical touching but could also include jokes and comments (even if well-intentioned)?
 - Do policies explain that harassment can be perpetrated by anyone, regardless of their gender, race, or other protected category? For example, sex- or race-based harassment can occur between two people of the same sex or race, respectively.

- Do they address off-duty conduct that violates company policy? For example, do they explain that sexual harassment of another employee outside of the office and/or after hours (e.g., on Facebook) still violates company policy and is grounds for disciplinary action?
- Do they address how the company handles harassment and/or discrimination by third parties, such as vendors, contractors, or customers?
- **Review complaint-reporting procedures.** Are there adequate/multiple reporting channels? If an employee is instructed to report any misconduct to his or her supervisor (who may be the perpetrator), this could create a chilling effect on the employee's willingness to make a complaint.
- **Consider conducting an audit of complaints.** An audit of complaints received for a given time period can reveal whether complaints are taken seriously and appropriately investigated. It can also identify any vulnerabilities. For example, complaints filed more frequently at certain locations or amongst the same teams might suggest that further training is necessary. Surveying employees in those locations might shed light on the nature of the conduct that is the subject of the complaints so that it can be appropriately addressed and mitigated.
- **Reconsider your approach to training.** Anti-discrimination and anti-harassment training is typically focused on compliance rather than culture change, and often only provides employees with obvious examples of unlawful workplace conduct rather than the subtler conduct that more commonly occurs. As a result, many employees lack the tools necessary to identify and respond to comments or conduct that violates company policy. Because complaints are most frequently made to an employee's direct supervisor, it is critical that they are appropriately and adequately trained. Hands-on, interactive training, particularly for members of management, is often more effective than training videos that employees view at their desk.
- **Set (or reset) your tone at the top.** Empower your managers to create a culture that prohibits inappropriate behavior and encourages employees to speak up while feeling safe about reporting concerns. Ensuring that managers understand and emphasize the importance of respectful and professional relationships in the workplace not only helps to prevent misconduct, it can also result in increased morale, productivity, and engagement. Reiterate that managers must lead by example and are the eyes and ears of the company when it comes to appropriately addressing misconduct.
- **Act swiftly.** If the #MeToo movement has sparked rumblings in your company that it might have its very own headline-making actor whose bad behavior (whether related to gender or any other protected class) is known, but has not been formally reported through a complaint. Immediately investigate, address, and correct it with the appropriate disciplinary action and/or training.

Reactive Steps

- **Investigate complaints promptly and thoroughly.** If you receive a complaint of harassment or discrimination of any kind, time is of the essence. You must conduct a thorough investigation and take measures to ensure that the conduct at issue ceases. Below are some key components to consider when conducting investigations:
 - Time is of the essence. Courts have found that delays of as little as one month between receipt of a complaint and initiation of an investigation were not sufficiently prompt and warranted an award of punitive damages. Date all notes taken as part of an investigation - whether from an interview or on the final report.

- Preserve all evidence related to the complaint. This includes everything from emails and text messages to paper documents. If the complaint becomes the subject of litigation, failure to preserve documents can result in monetary penalties and/or a judge or jury drawing an adverse inference against your company.
 - Planning an investigation is just as important as conducting it. Does your company have investigation guidelines, protocols, or best practices? These tools can be helpful in ensuring that investigations are consistent and thorough.
 - Ensure that the individual assigned to the investigation has the skill set necessary to conduct a thorough and effective investigation. Using untrained investigators can result in poor questioning of witnesses, interviewing the wrong witnesses, and/or incomplete interview notes and investigative reports. Ineffective or inexperienced investigators are certainly not ideal witnesses when it comes to litigation. If you are not confident that your company can handle the investigation internally, consider engaging a third party to conduct the investigation.
 - When documenting witness interviews, stick to the facts. Do not make credibility determinations. However, it is important to document non-verbal cues suggesting a witness is not credible (e.g., Jane was avoiding eye contact and had her arms crossed during the entire interview).
 - Prepare a final report documenting the steps taken during the investigation, including the witnesses interviewed, documents gathered and reviewed, conclusion drawn, and action taken after the investigation is complete.
 - Investigation-related documents are frequently key exhibits during employment litigation. Investigators must bear in mind that anything they prepare should be easily understood by a third party (e.g., judge or juror) who was not involved in the investigation.
- **Review previous complaint investigations.** Because investigations are so critical, employers may consider conducting an audit of recent complaints to ensure that the related investigations were thorough and well documented.

The #MeToo movement may be the sign of a changing tide, and it is more important than ever that employers work proactively to establish a professional, respectful workplace. Taking a preemptive approach to this cultural transformation not only reduces the legal risk to your organization, but also clarifies performance and behavioral expectations, which are critical to maintaining and retaining a strong, productive workforce.



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