Overview

Charges of workplace discrimination and harassment can produce costly litigation and/or large settlements. As in-house counsel, mitigating this risk is a top priority. Taking into consideration the applicable statutes and case law, a properly formed anti-discrimination and harassment policy can severely limit an employer’s liability. Below are some guidelines for achieving that goal.

Anti-Discrimination and Harassment Laws

**U.S. Federal Anti-Discrimination and Harassment Laws**

Federal law prohibits workplace discrimination based on a wide range of characteristics, from the well known (age, disability, race, sex), to the lesser known (genetic information, pregnancy, citizenship). There are five core laws to stay familiar with:

- Title VII of the Civil Rights Act
- Pregnancy Discrimination Act (PDA)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- The Genetic Information Nondiscrimination Act (GINA)

Also of importance is the Lilly Ledbetter Fair Pay Act of 2009—applying to all protected categories under Title VII, the ADEA, the ADA and the Rehabilitation Act—which states that an individual subjected to pay discrimination may file a charge within 180 days of any of the following:

- When a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- When the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- Each time the individual receives compensation that is based in whole or in part on such compensation decision or other practice (the “paycheck rule”)

Many states and localities have enacted laws protecting additional characteristics from on-the-job discrimination and harassment. These include: sexual orientation, marital status, military status, creed, genetic predisposition or carrier status, familial status, physical appearance, educational status, ancestry, and handicap or family responsibilities.

**Sexual Harassment**

While sexual harassment in the workplace is not a recent problem, legal liability for it is. In 1991 Congress amended Title VII to permit victims of sexual harassment to recover damages under federal law, and the U.S. Supreme Court broadened the reach of this law in a 1993 case to allow for a lesser showing of injury. As a result, sexual harassment in the workplace presents a clear and present danger to businesses. Organizations must act now or face increasing risk of liability.
Sexual harassment is defined as “unwelcome verbal, visual, or physical conduct of a sexual nature that is severe or pervasive and affects working conditions or creates a hostile work environment.” Title VII recognizes two different sets of legal grounds for sexual harassment claims:

- “Quid pro quo” claims involve a person in authority, usually a supervisor, demanding sexual favors of a subordinate as a condition of getting or keeping a job benefit;
- “Hostile environment” claims involve sexual comments or jokes that interfere with an employee’s work performance or create a work environment that is hostile, offensive or threatening.

Under Title VII, covered employers must: 1) take reasonable care to prevent sexual harassment, and 2) take reasonable care to promptly correct sexual harassment that has occurred. It should be noted that not all conduct of a sexual nature is proscribed, only unwelcome conduct. Consensual relationships are not a violation and social invitations from supervisors and co-workers are generally acceptable.

**Employer Liability**

As a general rule, the actions of supervisory employees are considered actions of the employer. Thus, if a supervisor engages in discrimination, harassment or retaliation, the organization can be held “strictly liable” for those actions should they culminate in a tangible employment action—that is, a significant change in the victim’s employment status—such as discharge, demotion, reassignment, or a significant change in benefits. When harassment by a supervisor does not result in a tangible employment action the employer can raise an affirmative defense to liability in which it must prove that:

- the employer exercised reasonable care to prevent and correct promptly any harassment; and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In particular, companies need to train their supervisors to deal with discrimination and harassment claims. All responses by a supervisor are considered the organization’s response.

Furthermore, an employer can be liable for discrimination or harassment by a co-worker, non-supervisory employee, or third party if: 1) no reasonable avenue for complaint is provided, or 2) the employer knew (or should have known) of the unlawful conduct but unreasonably failed to stop it.

**European Union Law**

The Racial Equality Directive 2000/43/EC implemented the principle of equal treatment between people irrespective of racial or ethnic origin. The directive contains definitions of direct and indirect discrimination and harassment and allows for positive action measures to be taken, in order to ensure full equality in practice.


**United Kingdom Law**

In an effort to simplify its complicated and vast array of anti-discrimination laws, the UK passed the Equality Act 2010. The Act prohibits employer discrimination and harassment on the basis of gender, race, disability, sexual orientation, religious belief and age. Harassment in the UK is defined as unwanted conduct with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
Canadian Law

The Canadian Human Rights Act—covering federal government departments, agencies and Crown corporations, as well as business and industries under federal jurisdiction—proscribes discrimination and harassment in the workplace on 11 grounds: race, color, national or ethnic origin, age, religion, sex, marital status, family status, disability, pardoned conviction, and sexual orientation. In addition to federal law, all provinces and territories have their own legislation, which prohibits discrimination within their respective jurisdiction.

International employers should familiarize themselves with the intricacies of international labor law while keeping in mind the guidelines for formulating a comprehensive discrimination and harassment policy.

Formulation of Discrimination and Harassment Policies

Managing Company Risk

The Supreme Court (Ellerth and Faragher) and the EEOC have suggested employers "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise, and how to raise, the issue of harassment under Title VII, and developing methods to sensitize all concerned." First, develop a comprehensive, detailed written policy on sexual harassment. Second, distribute the policy to all workers, supervisors, and even some non-employees. At a minimum, a policy should include:

- An express commitment to eradicate and prevent discrimination and harassment;
- A definition of sexual harassment including both quid pro quo and hostile work environment;
- A non-exhaustive list of prohibited conduct;
- An explanation of penalties (including termination) the employer will impose for substantiated sexual harassment conduct;
- A detailed outline of the grievance procedure employees should use;
- A statement that the company will not retaliate against employees who complain under the policy;
- Additional resources or contact persons available for consultation;
- An express commitment to keep all complaints and personnel actions confidential.

Reporting Discrimination and Harassment

As indicated by the federal courts, an employer greatly improves its position by having grievance procedures that encourage employees to come forward with complaints. It is crucial that a victim not be required to address complaints to a supervisor who is involved, condones, or ignores the harassment.

Because women lodge the majority of sexual harassment complaints, companies may want to consider involving a female employee in their assessment of a claim. That way, female victims may be more willing to come forward, thus enhancing an employer's ability to take prompt and effective remedial action.

Upon receipt of a complaint, a prompt and thorough investigation should be made and corrective action taken if any policies were violated. The complaint should be kept confidential to the extent possible and the victim must be protected from retaliation.

Prohibit Retaliation

Any type of backlash to a discrimination or harassment claim is also against the law. Retaliation can take many forms, but often involves reassigning an employee to a less desirable position or forcing a victim to take a leave of absence. A proper discrimination and harassment policy should safeguard the rights of the accuser, as well as those of the accused, until a thorough investigation can be performed. However, a policy should also provide for sanctions in the event of a
frivolous or bad faith claim.

Additional Resources

- Enforcement Guidance: Employer Liability for Unlawful Harassment by Supervisors

Have an idea for a quick counsel or interested in writing one?

- Submit your ideas by filling out our online topic proposal form.

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