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EMPLOYMENT LAW: WHAT YOU NEED TO KNOW IN 2018

BY MARGO WOLF O'DONNELL

How to handle claims of harassment and discrimination, and in particular, sexual harassment, is the top employment question of 2018. I tell my clients that rather than waiting for a lawsuit to happen, there are several things that my firm and I can help you do now to prevent or mitigate such claims. These include putting in place solid anti-harassment and anti-discrimination policies and procedures and conducting effective workplace investigations. The companies I have worked with to successfully implement these policies and procedures have all taken the following twelve steps:

1. Make sure your anti-harassment and anti-discrimination policies have understandable procedures in place for employees to report their complaints. These policies should specify how an employee can report a complaint and to whom the complaints can be made. The policies should explicitly state that employees can report their complaints to multiple individuals. That way if the supervisor or other designated individual is the accused, the complainant still has a means of fully and truthfully reporting his or her complaint. You may also consider allowing employees to report complaints anonymously via a hotline or email. Although anonymous complaints can be more difficult to investigate, they give your company the opportunity to remedy issues that might not have been reported. We can review and/or draft your policies for you to ensure they are compliant with the law and best practices.
2. Make sure your anti-harassment and anti-discrimination policies clearly state that there will be no retaliation for bringing a complaint in good faith. Then, make sure this policy is enforced. Once employees make complaints, proceed with caution before making any changes to the terms or conditions of their employment. We can counsel you on issues that arise with employees once they lodge complaints with you.

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3. Make sure your anti-harassment and anti-discrimination policies prohibit romantic relationships between supervisors and subordinates. That way, if you become aware of such relationships, you can change the reporting structure without worrying that there will be a claim of unfair treatment for such an action.
4. Make sure that you investigate all complaints of discrimination, whether written or oral, and even those that are anonymous (via blogs or tweets or through a hotline). You and your company should follow up on all complaints that come to your attention, even through rumor or innuendo. We can help you put together a customized plan for your investigation.
5. Make sure that you have a set procedure for investigating all complaints. I find that an investigation works best if it starts with an interview of the complainant. After the complainant is interviewed, proceed next with interviews of any other individuals who might have knowledge. Investigations should usually end with an interview of the accused. Along the way, do not promise confidentiality. In response to requests for confidentiality during the investigation, you can simply state that you will keep the investigation as confidential as possible, but business needs may require that it be reported to certain individuals.
6. Make sure that any questioning in an investigation is done by more than one individual. Often these investigations can result in a dispute as to what was said after the fact. If the company has two individuals present during the interviews, it helps resolve any subsequent disagreements.
7. Make sure you that you ask questions to elicit the most complete story of what occurred: who, what, where and how are good starting points. Ask the complainant and other witnesses to identify any documents that might be relevant and the identity of all individuals who might

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have knowledge. End your interview of the complainant with the question of what they think should be the end result of the investigation. In all interviews, try not to express opinions regarding the facts elicited; those statements could be used against you in subsequent litigation. We can help you draft the questions for the investigation.

8. Make sure that you close the loop with the complainant after the investigation is completed. There is no need to disclose the specific action taken with respect to the investigation to the complainant, the complainant should be informed that appropriate steps have been and will be taken based on the findings of the investigation. Assure the complainant that the investigation was thorough and complete. Encourage the complainant to follow up with management with any other issues. Touch base with the complainant on a set timeframe – 15, 30 and 60 days after the complaint is probably sufficient, unless the complainant demands more and these requests are made in good faith.
9. Make sure that you take appropriate remedial action if you determine that a company policy was violated. Such actions could include separating the complainant and the accused in the workplace (staggering their hours, moving their offices); disciplining the accused; or terminating the accused. If terminating the accused is deemed the appropriate response, think about what claims, if any, the accused might have against the company and consider getting a release in return for a payment. We can help draft an enforceable release.
10. Make sure that you do not ignore bad behavior based on the fact that the accused is a rainmaker high producer or high earner. Taking action against those individuals proactively can be difficult, but is essential to ensure that your company is free from the risk of damaging litigation.

11. Make sure that you document all steps that you take in an investigation. Be sure to write down only the facts and not opinions relating to the investigation. Leave your determination to the end. Keep in mind that the investigation report could be discoverable in litigation.
12. Make sure that your employees are trained and schedule a live training soon. Having a third party, such as an employment attorney or consultant, conduct a live anti-discrimination and anti-harassment training can help prevent future claims and demonstrates the commitment of your company to keeping your workplace free of unfair treatment. We conduct these trainings on a regular basis, we know what to include in order to ensure that the training is complete and effective.

Companies that take the steps outlined above have a better chance of preventing or mitigating unwanted claims of harassment and discrimination. While there may be some time and cost involved in taking these preventative steps, just like there is time and cost involved in carefully reviewing subcontracts, significant time and money are saved when needless lawsuits are prevented allowing you to focus on your business. ▀



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