VENABLE LLP

Addressing and Preventing Inappropriate Behavior in Your Workplace – Webinar Audience Q&A

TAKING STOCK AND BEING PROACTIVE

Q: Do the presenters recommend annual training on sexual harassment?

A: Yes. We recommend an annual training that addresses workplace conduct and boundaries, including sexual harassment and other forms of harassment.

Q: In New York, is there any legal obligation to provide sexual harassment training?

A: No, but we advise employers to conduct training once a year even though it is not required by law in New York. Training promotes confidence in policies and can help employers defend against harassment allegations and any claims that the employer failed to foster a harassment-free workplace. Additionally, and perhaps most importantly, we feel strongly that thinking and talking about these issues now helps promote better choices later.

Q: Should sexual harassment be covered by a separate policy?

A: Harassment in general can be addressed in one policy.

Q: Is it fair to say that asking a coworker to meet for a drink or dinner is no longer acceptable?

A: No, we don't agree with that statement. We advise clients that it is acceptable to have co-workers socialize, and enjoy a drink and/or dinner together. In fact, good employee relations may include such encounters and promote trust, confidence, teamwork, and collegiality if everyone acts professionally at all times.

Q: What if the harassment of one employee by another is not at work but on social media and is not work related?

A: This is still a topic that should be addressed if brought to the employer's attention. Harassment that occurs outside of the workplace could have continuing effects at work and, gone unaddressed, can present workplace morale and liability problems.

Q: What if you don't have an alternative position for your employee that can be used to move them away from a client harasser?

A: If there is evidence to believe there has been some inappropriate behavior, do whatever you can to prevent the client harasser from working with the employee pending the outcome of the investigation. These options can and will vary, depending on the facts at hand.

Q: If there is not a non-fraternization policy, can we reprimand a director-level person who sleeps with interns, even absent a complaint? Should we first and foremost draft a no-fraternizing policy, and are there limits to that, that is, are there times when a no-fraternizing policy is too onerous and invades employees' privacy?

A: In answer to the first question, yes, of course. Any director-level person should refrain from such behavior, and condoning it can only lead to problems for the entity. It may then be advisable to have a no-fraternizing policy. Generally speaking, such policies are always an option for employers; however, it truly depends on the culture of the individual organization and the employer's willingness and ability to enforce such a policy.

Q: What do you think about arbitration clauses in [job] offer documents?

A: These are good tools for preventing litigation of claims, but they must comport with the case law, which may be evolving in the coming months, after a pending U.S. Supreme Court case is decided.

RESPONDING TO COMPLAINTS AND CONDUCTING INVESTIGATIONS

Q: Does the interviewer have a legal or ethical obligation to tell the accused that he/she would be advised to obtain legal representation before agreeing to an interview?

A: No. It can be helpful to indicate that any interview is voluntary and that the interviewee can get counsel if they so choose.

Q: Do you have to ask all parties the same questions?

A: There is no requirement to ask each witness the same questions. In fact, each witness interview outline should be tailored to the witness' role in the investigation. As you learn facts during the interview, you will need to ask follow-up questions that may not be contained in your outline.

Q: Should you record interviews?

A: There are advantages and disadvantages of recording an interview. One significant disadvantage may be that it will have a chilling effect on the interviewee. If so, it's probably better not to record the interview. The advantage of course is getting an accurate record of what is said during the interview. If recorded, the interviewee should be told the interview is being recorded.

Q: How would you go about handling a complaint from an employee who works for you, where the alleged offender works for a different contractor or the government?

A: This type of claim should still be investigated, in that the employer would typically have a contractual relationship with the third party, and the behavior must be addressed as inappropriate.

Q: What is your suggestion for someone who makes a report but then during the investigation becomes hesitant and wishes to withdraw the complaint? In most situations, there is already evidence that validates the report, so it appears that the accuser is trying to back down because things have reached an uncomfortable level once others are involved.

A: In such a scenario, the employer should, to the best of its ability without the complainant's cooperation, conduct an investigation, take steps to prevent the recurrence of misconduct to the extent it is able, and remedy the effects, if appropriate. We would need more facts to better answer this question.

Q: When you make a "recommendation," does that mean a recommendation as to the punishment or disciplinary action that should be taken?

A: Yes. Prompt remedial action should be taken to address any findings of harassing behavior as a result of a complaint and investigation. This recommendation, when implemented, can serve as an affirmative defense against sexual harassment in some settings. Additionally, please note that some situations do not call for traditional "discipline" as a response, but may be better suited for alternate remedies, such as individual training.

Q: What type of liability does the investigator have?

A: When the internal investigator is an employee of the company, liability generally flows from the employer because an employee's cause of action is rooted in the contract of employment and the investigator is not a party to that contract. However, an employee technically could file a claim of negligence, intentional infliction of emotional distress, etc. against the investigator. This would likely be difficult to prove because the employee would need to demonstrate that the investigator owed a duty to the employee.

Q: In the webinar you discussed whether an ombudsman could be appointed – someone who is more independent than an HR department – to respond to and investigate complaints. Who pays the ombudsman?

A: A company would, but such arrangements are seen as more independent in some settings, and such an arrangement can help the employees feel more comfortable in reporting.

Please contact the panelists if you have additional questions or to discuss any of these points further. A recording of the webinar is available through this link.

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