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Key Methods to Help Prevent Workplace Sexual Harassment Claims

BY AMY R. FOOTE

According to results from a Siena College Poll on sexual harassment released in January, “nearly half the women in New York state said they’ve been victims of sexual harassment” and “about 70 percent of respondents agree that sexual harassment in the workplace is a significant problem.” These eye-opening findings illustrate that the workplace sexual harassment crisis is not waning. Hope for reform remains strong amid recent social and legal changes, signaling a cultural sea change might be on the horizon. First, there is the social media uprising, which began to gain steam in 2017, with the birth of the #MeToo movement, and followed by the establishment of the

AMY R. FOOTE is a partner with global advisory firm StoneTurn. She has advised public and private sector clients on compliance issues, commercial disputes, governance issues, and complex litigation and investigations, and frequently writes about workplace discrimination issues and sexual harassment.



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#TimesUp organization in 2018. These important initiatives are instrumental in driving change, giving victims a voice to call out publicly the inappropriate conduct of harassers in order to help transform the standards and culture in work environments.

On the legal front, 10 states enacted or attempted to pass anti-sexual harassment legislation in 2018, as the sexual harassment social media campaigns took off. New York’s regulations are by far the most stringent,

requiring all city and state employers to adopt a written sexual harassment prevention policy and institute annual anti-harassment training for all employees. As the first state to pass such comprehensive anti-sexual harassment legislation, all eyes will likely be on the impact of these new laws on employers, in-house and outside counsel, and the role they play in improving the work environment for employees.

Considering that sexual harassment lawsuits filed by the EEOC

increased by 50 percent in 2017, wherein damages paid by employers rose from \$47 million to \$70 million, it is likely that New York-based employment attorneys could see an uptick in costly legal actions with more employees empowered to file sexual harassment claims. Given that these claims can take up to a year or more to be settled, and legal costs can reach hundreds of thousands if a defendant loses a summary judgment motion, it is imperative that legal teams ensure they understand new regulations, as well as alternate prevention methods, and encourage company executives CEOs, compliance officers, and HR leadership to invest sufficient resources in preventing and putting an end to sexual harassment in the workplace.

Defining Sexual Harassment in Policies And Training

The term “sexual harassment” encompasses myriad actions and/or statements, which can be perpetrated by any employee, or even a vendor, of an organization. Therefore, understanding and educating a workforce about what exactly constitutes sexual harassment via a written sexual harassment policy is an important element of the New York state and New York City anti-harassment laws. Employers can either write their own

policies, or adopt the state’s model sexual harassment prevention policy and complaint form. Companies that opt to draft their own written policies will likely need assistance from an employment legal team to ensure the policies are compliant and meet the minimum standards as required under the law. Policies should make clear that off-color jokes, sexually-suggestive compliments about bodies or apparel, unwelcome and insis-

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tent invitations, vulgar language, overly familiar touching, standing inappropriately close, and conversations and innuendoes to sex acts or sexuality may qualify as forms of harassment. Additionally, policies should state that sexual harassment can take the form of verbal conversation, texts, emails, social media postings, and shared photographs, and can be perpetrated by a supervisor, subordinate,

employee, intern, independent contractor, temporary or contract worker, vendor, client, visitor or customer.

New York’s new laws also require all employers to provide annual sexual harassment prevention training to all employees working in the state, including part-time, seasonal and temporary employees. To help employers, the state created a model training script, slides, and case studies that employers can adopt wholesale or use to tailor their own live training or interactive online/video training that meets the law’s minimum standards.

Since state-specific requirements can be both comprehensive and complex, many companies will likely seek out the advice of a legal team to ensure the requirements are being met. Therefore, sexual harassment trainings, required to be completed by Oct. 9, 2019, need to include the following requirements: they should be one to two hours in duration; trainings need to be conducted annually, within 90 days of an employee’s initial hire, and in person by a supervisor or a third-party expert; these sessions must be provided in the language the employee speaks; and trainings need to be interactive (though the law does not specify exactly what constitutes as “interactive”), as

well as customized to the company's specific work environment and to the roles of the employees being trained (i.e., separate trainings should be conducted with managers and supervisors, since they have distinct duties under the law and are in a unique position to identify and prevent sexual harassment).

Other Methods for Preventing Workplace Sexual Harassment

New York's sexual harassment laws impact all public and privately-owned companies, from large corporations to recent start-ups to corner bodegas. The curation of written policies and trainings is an obligatory first step in addressing these issues, but there are other prevention methods that employment attorneys should recommend to clients to prevent harassing behavior and potentially costly litigation. These include:

(1) Harassment Audit: Legal teams should recommend that a harassment audit be conducted to protect against potential sexual harassment and resultant claims. The audit could include culture surveys, interviews with HR professionals, interviews with executives, and anonymous online surveys of employees. Companies should consider using an independent third-party expert to conduct the audit

to encourage open communication and avoid the appearance of conflicts of interest.

(2) Bystander Training: To empower employees to combat harassment in the workplace and, thereby, reduce the likelihood of sexual harassment claims, attorneys can suggest that companies invest in bystander training, which, if conducted effectively, can enable all employees to stop harassment safely by calling out harassers, disrupting harassing conduct, and offering victims support.

(3) Employment Practices Liability Insurance (EPLI): Most companies obtain EPLI to buffer against the potentially exorbitant costs of sexual harassment litigation. Since not all policies are created equal, attorneys should work with companies to ensure they are selecting the right coverage to meet their business needs and work environment. For example, most policies cover companies and their employees, including directors, officers and senior management, for claims brought by past, present or future employees alleging wrongful employment acts and decisions. Not all EPLI policies, however, cover claims brought by third parties, such as clients and vendors.

Additionally, while there is no recordkeeping requirement under the new New York state laws (although

there are requirements under New York City laws), legal teams should also recommend to clients that they keep track of employee attendance at these trainings to protect themselves against a sexual harassment claim if one is filed. Finally, the new regulations also extend the statute of limitations for workplace sexual harassment from one year to three years, meaning there is more time for claims to be filed against employers. Given this extended time for filing a claim, coupled with the outrage about this ongoing issue within our country's social fabric, it is likely that more sexual harassment claims could be filed in 2019 and beyond.

Ultimately, New York's recently enacted anti-harassment laws illustrate just how important this issue is to employees and employers alike, shining a light on the impact that sexual harassment can have on the lives of the victims and the integrity of the company. While there is no one-size-fits-all solution to the problem of workplace harassment, employment attorneys can help to protect their clients from these types of costly litigations by suggesting a more meaningful and proactive approach that focuses on prevention of harmful behavior, including the methods mentioned above.