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Navigating Harassment Claims

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How to Get to Win-Win

Traditionally, HR compliance has involved ensuring that companies are operating in accordance with the alphabet soup of laws governing the employment relationship, including FLSA, OSHA, ERISA and the NLRA, among others. The most urgent issue, however, may be one where the role of HR is less clearly defined – HR’s role in addressing sexual harassment and other abusive behavior in the workplace. How HR professionals manage the potentially competing interests of employer and employee may be the compliance issue of the coming decade. This article discusses how to create the conditions where everybody wins.

“I was worried that HR would look out for the company and that would leave zero space for looking out for me,” says one woman, who was far too fearful to report her harassment to her HR department. “I worried I would be blackballed from ever getting a promotion or being trusted by the company.[1]”

Employees quite naturally feel there is little upside in reporting bad behavior, as the quote above illustrates. At the same time, organizations are at risk of not only severe reputational damage, but also legal liability for any unlawful behavior, and they cannot address it if they don’t know about it. This creates a strange impasse that HR professionals frequently aren’t prepared to mediate.

This, in a nutshell, is the dilemma facing both employees *and* employers as they grapple with the new consciousness surrounding sexual harassment and hostile work environments more broadly. And it has put human resources and compliance professionals in the crosshairs of a movement that shows no signs of abating.

The Supreme Court established that employers have an obligation to create an environment that is safe for employees by including sexual harassment in Title VII protections. In 1998, they issued three separate decisions advancing a framework for prevention and correction, providing employers an affirmative defense for any allegations.[2]

This affirmative defense, colloquially called the *Faragher-Ellerth* defense, is a two-part strategy in which employers can avoid liability by proving they exercised reasonable care in preventing or correcting harassment, and the victim unreasonably failed to take advantage of those preventive or corrective opportunities.

In practice, this has meant that employers must have a policy with respect to hostile work environments and workplace harassment and that it can show that employees were trained on the policy. However, this framework has been less than optimal, as evidenced by the deluge of harassment and hostile work environment claims that have flooded the airwaves in the last year.

As we've seen too often in the news recently, many organizations have managed this challenge on a continuum ranging from bad to just stupid. For example, it is hard to imagine a more irresponsible approach than creating an actual contractual provision that prohibits a person's termination so long as they paid contractual "fines" and reimbursed any costs the company incurred due to the bad behavior.[3] The Weinstein Company's quick demise is an object lesson in the idiocy of contractually acquiescing to this kind of outrageous behavior.

Similarly, Fox News is the absolute archetype in how NOT to manage a culture of hostility. After more than two years of platitudes about change and reform, the company's official and unofficial treatment of women seems to be so endemic to the institution that one wonders if it can be cured.[4]

Needless to say, failure to act is costing companies millions of dollars. In 2017 alone, Fox News paid over \$50 million in settlements that have been made public.[5] It is anyone's guess how many settlements are still secret. And in the last five years, the EEOC received more than 42,000 claims of sexual harassment and has levied fines of over \$255 million. Stuningly, this number includes neither monetary awards achieved through litigation nor state claims.

The unfortunate truth is that the issue of sexual harassment in the workplace is frequently seen as putting the employer and employee on opposite sides, with HR professionals left to sort out the ethical dynamics. What gets lost here is that it should be clear that *protecting employees also protects employers*.

This does not have to be a matter of competing interests – employer versus employee. Rather, if employers are able to create systems and processes that encourage and incentivize positive and ethical interactions, many of these issues will never arise. As noted in a recent *New York Times* article, "The reality is, the problem is systemic, and we have to address it at a systemic level." [6] Fortunately, there are proactive measures employers can take to demonstrate their commitment to an environment free from harassment and hostility.

As a first step, it's a good idea to engage an outside consultant to take the temperature of the workplace so the management team can get a sense of the environment as it currently exists. Any business worth its salt regularly engages outside auditors to scrutinize financial, technological and safety practices. What executives and owners are now realizing is that no well-run business can afford to ignore the risks associated with harassment and abuse in the workplace either. Frequently, this kind of scrutiny can fall to internal HR departments, but attempting to do this internally is a fool's errand, as there will be incentives, both overt and subtle, to sugarcoat the findings.

Once there is clarity as to the current state, proactive and public steps can be taken to prevent, mitigate and correct any existing or potential risk factors. A comprehensive communications effort that reinforces policies, processes and training for all employees is vital. Placing a policy in the employee handbook is not enough; providing training during employee orientation alone is insufficient; the effort must be visible, continual and a clear priority.

The importance of visibility for this effort cannot be overstated. It should begin at the top, with executives demonstrating their support and endorsement by introducing the effort and participating in training with staff. Employees must see that bad behavior will not be tolerated at any level, and that coming forward is not only appropriate, but encouraged. This is especially important, but most fraught, when the bad actors are in positions of power – owners, executives, rainmakers and others who hold significant sway within the organization.

A great way to demonstrate the employer's encouragement and to create distance from the perceived pressure of an internal powerbroker is the use of an independent complaint hotline. Employees frequently feel more comfortable raising issues with someone who is not a formal representative of the employer, and the hotline can also be a great symbol of the commitment

to workplace improvement. “The purpose of a hotline is to encourage reporting ... the hotline process must be publicized to the employee population... in training, in the employee manual and via postings on the company website/intranet or public locations.” [7] The added benefit of an independent hotline is that it provides qualitative and quantitative data allowing for external auditors to measure and analyze the policies and processes to ensure they are effective deterrents.

If the #MeToo movement has not yet struck fear in the hearts of organizations as a risk they must get ahead of, they aren’t paying attention. Fortunately, it is never too late to commit to creating a culture and work environment where everyone feels valued and safe.

[1] Smith, T. (2017, November 15). When It Comes To Sexual Harassment Claims, Whose Side Is HR Really On? Retrieved March 25, 2018, from <https://www.npr.org/2017/11/15/564032999/when-it-comes-to-sexual-harassment-claims-whose-side-is-hr-really-on>

[2] *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998) (finding that same sex harassment is actionable under Title VII); *Faragher v. City of Boca Raton*, 118 S.Ct 2275 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

[3] Sullivan, B., (2017, November 15). Kevin Spacey and Harvey Weinstein Employment Agreements Say a Lot About Hollywood. Retrieved March 25, 2018, from <https://www.forbes.com/sites/legalentertainment/2017/11/15/kevin-spacey-and-harvey-weinstein-employment-agreements-say-a-lot-about-hollywood>

[4] Wemple, E. (2018, March 09). Opinion | Another woman has settled a claim with Fox News. And another woman is now out of a job. Retrieved March 25, 2018, from https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/03/09/another-woman-has-settled-a-claim-with-fox-news-and-another-woman-is-now-out-of-a-job/?utm_term=.2a8b033abd6c

[5] Steel, E. (2017, August 15). Costs for Fox’s Harassment Settlements Rise to \$50 Million. Retrieved March 26, 2018, from <https://www.nytimes.com/2017/08/14/business/media/fox-harassment-settlements-cost.html>

[6] Kantor, J. (2018, March 23). #MeToo Called for an Overhaul. Are Workplaces Really Changing? Retrieved March 25, 2018, from <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>

[7] Jacobs, A. N. (2017, May 23). Faragher/Ellerth to Fox News; The More Things Change, The More They Stay the Same. Retrieved March 25, 2018, from <http://www.epspros.com/news-resources/whitepapers/2017/faragher-ellerth-to-fox-news-the-more-things-change-the-more-they-stay-the-same.html>

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