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Addressing Workplace Sexual Harassment in the #MeToo Era

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Stories of high-profile individuals in politics, media, entertainment and hospitality alleged to have engaged in sexual harassment, or worse, have been breaking at an unprecedented rate. In the wake of these allegations, millions of women from diverse backgrounds and industries have recounted stories of workplace sexual harassment or abuse on social media, using the hashtag "#MeToo" to demonstrate the prevalence and scope of the problem. An October 2017 NBC News/*Wall Street Journal* poll reported that 48 percent of women working in the United States say they have personally experienced an unwelcome sexual advance or verbal or physical harassment at work. Yet, according to an Equal Employment Opportunity Commission study conducted in 2016, approximately 90 percent of individuals who said they experienced workplace harassment never formally complained about it. As more women speak out, employers can expect more legal action.

The impact on businesses, and their officers and directors, could be dramatic and costly. For example, in addition to settlements paid to victims, companies terminating executives who have engaged in sexual misconduct may still be bound to pay them significant severance. Furthermore, public exposure of a company's tolerance of workplace sexual harassment could result in difficulty retaining and attracting talent, customer defections, lost revenue and profit, decreased investor confidence, and lower stock prices. Indeed, the plaintiffs' bar is looking for opportunities to bring shareholder derivative actions alleging that failure to properly recognize and address sexual harassment resulted in financial and reputational harm to a corporation.

These recent events present an opportunity for employers to re-evaluate how to avoid harassment in their workplaces, starting with a strong corporate culture of professionalism and respect.

Sexual Harassment and the Law

The law recognizes two primary types of sexual harassment: quid pro quo and hostile work environment. Quid pro quo harassment occurs when some type of employment benefit is made contingent on an employee performing sexual favors, or conversely, when an employee is threatened with negative work consequences for refusing to confer sexual favors. Hostile work environment harassment occurs when unwelcome sexual conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The U.S. Courts of Appeals for the Third and Ninth Circuits have held that the severity and pervasiveness of alleged sexual harassment should be looked at from the perspective of a reasonable woman, with the Ninth Circuit in *Ellison v. Brady* reasoning that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." It remains to be seen whether the reasonable woman standard will be adopted by the U.S. Supreme Court, which, to date, has only gone so far as to rule in the male-on-male harassment case *Oncale v. Sundowner Offshore Services, Inc.* that the severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position.

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With respect to employer liability, the Supreme Court held in the landmark cases of *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* that an employer is always liable for a supervisor's harassment that culminates in a tangible employment action (*e.g.*, hiring or firing, promotion or failure to promote, undesirable reassignment, or a significant change in employee benefits). If, on the other hand, no employment action is taken in connection with the harassment, the employer may raise an affirmative defense by establishing that (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to otherwise avoid harm.

The first of these elements generally requires an employer to establish, disseminate and enforce an anti-harassment policy and complaint procedure. An employer may satisfy the second element by pointing to the employee's failure to utilize its established harassment complaint procedure. However, if the employee had reason not to resort to the complaint mechanism, the burden lies with the employer to prove that such belief or perception was not reasonable. In addition, the U.S. Court of Appeals for the Second Circuit, in *Townsend v. Benjamin Enterprises, Inc.*, joined the Fifth, Seventh and Ninth circuits in ruling that the *Faragher-Ellerth* affirmative defense is not available when an alleged sexual harasser holds a sufficiently high position within an organization so as to be considered the organization's proxy or alter ego. Moreover, in *Zakrzewska v. The New School*, the Second Circuit held that New York City employers are subject to strict liability under the New York City Human Rights Law for sexual harassment committed by supervisory employees (regardless of whether there is a tangible employment action) and the *Faragher-Ellerth* defense does not apply at all to New York City Human Rights Law claims. Further, notwithstanding the general consensus among federal courts that supervisors may not be held individually liable for workplace sexual harassment under Title VII of the Civil Rights Act, individual liability may be imposed on supervisors under certain state and local laws.

Takeaways

Many employers have adopted anti-harassment policies and complaint procedures and are conducting various forms of training. It also is advisable to:

- **Set the Tone at the Top.** Top management must set the example. If other managers or employees believe, rightly or wrongly, that senior management tolerates harassment, they may be more likely to engage in or allow unprofessional or unlawful conduct in the workplace.
- **Encourage Employees to Speak Out.** Employers should establish a multichannel complaint process that allows employees to bring harassment complaints to various members of management and to human resources personnel, not just to one specific individual who may be the alleged harasser. Because many employees fear retaliation, particularly when the alleged perpetrator is a powerful person in the organization, it also is advisable to have a mechanism that allows employees to make anonymous complaints of sexual harassment. Moreover, a strong and well-known practice against retaliation can create an environment in which employees are willing to come forward with sexual harassment complaints.
- **Avoid and Report Bad Conduct.** All employees can be encouraged to speak up if they witness sexual harassment. In some instances, co-workers may be in a position to intervene or redirect an errant employee. In others, co-workers may prefer to report the situation, especially if the offender is a senior employee or high performer. Training employees how to avoid, respond to and report these situations can be invaluable.
- **Ensure Prompt, Thorough and Independent Review of Complaints.** All harassment complaints, no matter when or against whom they are raised, should be promptly investigated. Employers should ensure that those responsible for looking into these types of complaints have experience conducting such investigations and possess the necessary independence and authority to do so in an impartial and thorough manner. Where the complaint involves high-ranking or key individuals, it may be prudent to delegate the investigation to an external third party.
- **Take Immediate and Appropriate Remedial Action.** While a confidential settlement agreement with a claimant might resolve an instance of workplace sexual harassment, employers should not stop there. (Note that under the newly enacted federal tax law, settlement of a claim related to sexual harassment or sexual abuse is not deductible as a business expense if such settlement is subject to a nondisclosure agreement.) Importantly, employers should take appropriate remedial action to send a message that, regardless of the person's seniority in the organization, the conduct is not acceptable and will not be tolerated. For a first-time offender, the penalty may be a reduced bonus, mandatory training and/or a memo for the personnel file about the incident. If the individual's actions are severe or repetitive, however, suspension or termination of employment may be appropriate. Employers may be reluctant to cut ties with a key employee who has

otherwise been of value to the company. However, recent scandals show that they are increasingly willing to do so.

- **Expand For-Cause Termination Provisions to Include Violation of Sexual Harassment Policies.** Employers are advised to consider whether sexual harassment is adequately addressed in the termination provisions of executive employment agreements and severance plans. Companies should not be encumbered with financial impediments (such as large severance packages) to terminating executives who engage in sexual harassment.

In this #MeToo era, employers and executives should anticipate an increased willingness to speak out about sexual harassment, which will undoubtedly lead to more litigation and public embarrassment. Employers would be well-served to consider the long- and short-term impact these situations can have on business performance and revenues, including recruiting and retaining employees, and maintaining shareholders and customers. As the spotlight continues to shine in this area, it is time to look past policies on paper and assure a professional tone starting at the top carries throughout the organization.