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Sexual Harassment in the #MeToo Era – Be Prepared or Pay the Price

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If you are old enough to remember the Clarence Thomas Supreme Court confirmation hearings during which Anita Hill testified that Clarence Thomas had made several sexually explicit comments to her when she worked for him at the EEOC, you are old enough to remember the onslaught of sexual harassment lawsuits that followed.

Today, there is a new onslaught of sexual harassment litigation arising out of the #MeToo movement, and it has been fueled further by the aftermath of the Kavanaugh confirmation hearings. Sexual harassment is not about sex, from a plaintiff's standpoint. It is about power, and understanding that can be the first step to understanding how to protect yourself and your business against it. If you are wondering why there is such an onslaught of litigation now, the answer is multifaceted, but here are a couple of the reasons:

First, young adults were educated differently about sex and sexual harassment than older adults were. This has created a culture clash because young adults find completely unacceptable behavior that many older adults didn't think twice about when they were young.

Second, statistically, one in six women will be raped in their lives. Even more women will be the subjects of sexual assault or sexual harassment. This statistic is staggering and gives rise to two questions: 1) Why is rape, sexual assault and sexual harassment so prevalent in our society? and 2) What can you do to protect your business investment from loss arising from it?

Alison Armstrong, an educator and teacher, who teaches about the differences between men and women, attributes much of our most self-destructive behavior to instinct. She points out that women think men are just hairy women, while men think women are just emotionally indulgent men, while nothing could be further from the truth. Men and women have very different perspectives and very different instincts. She explains that our instincts come from cave man and cave woman days. Cave man was a hunter. He was single focused and took what he wanted. Sometimes what he wanted was a cave woman. Cave woman was fearful of cave

man, because he was bigger and stronger and she was smaller and weaker. These cave man and cave woman instincts have been trained out of all of us to some extent, but some of us to a lesser extent than others. Understanding that aggressiveness and fear have more to do with human nature than with who is right and who is wrong, can go a long way to taking the charge out of the issue, and getting us focused on what is important when someone makes an allegation of sexual harassment; and what is important is investigation and training.

Sexual Harassment Training

Creating an environment that feels safe to workers will prevent sexual harassment lawsuits. This is probably not going to happen by having your supervisors take a two-hour online course every two years, unless they are already well trained. Having someone explain where these issues come from, how to spot them, and how to handle them, will. A manager's manual giving detail they can refer to is also important. Here is what the law requires per the Department of Fair Employment and Housing's website with respect to sexual harassment training:

Employers must provide sexual harassment prevention training in a classroom setting, through interactive e-learning, or through a live webinar. E-learning training must provide instructions on how to contact a trainer who can answer questions within two business days.

Any training must explain:

- The definition of sexual harassment under the Fair Employment and Housing Act and Title VII of the federal Civil Rights Act of 1964;
- Statutes and case law prohibiting and preventing sexual harassment;
- Types of conduct that can be sexual harassment;
- Remedies available for victims of sexual harassment;
- Strategies to prevent sexual harassment;
- Supervisors' obligation to report harassment;
- Practical examples of harassment;
- The limited confidentiality of the complaint process;
- Resources for victims of sexual harassment, including to whom they should report it;
- How employers must correct harassing behavior;
- What to do if a supervisor is personally accused of harassment;
- The elements of an effective anti-harassment policy and how to use it;

- “Abusive conduct” under Government Code section 12950.1, subdivision (g)(2).

Finally, any training must include questions that assess learning, skill-building activities to assess understanding and application of content, and hypothetical scenarios about harassment with discussion questions.

This is all good, but it is not enough. Make sure your sexual harassment training includes gender identity, transgender, gender transition and related issues. Sexual harassment is unwelcome conduct based on sex or gender, and many of the toughest issues faced by employers today arise when an employee is transitioning to another gender or identifies with a gender other than their birth gender. Employers in California are required to call a person by the pronoun and name they ask to be called by (however paychecks and tax forms should still use legal names). California law also requires that all employees be allowed to use the restroom for the gender with which they identify. Restrooms in college campuses across the country are moving to gender neutral restrooms and Europe has had them for a long time. This is the direction in which we are moving in California. Many people don't understand why anyone would want to change their gender identity, but the reasons are usually deeply personal and are only a very small part of who the person is. Teaching people to respect everyone, whether you understand them or not, is key.

Investigating Sexual Harassment Claims

Understanding how to conduct a proper investigation into a sexual harassment claim is also key. An investigation needs to be fair to both the accuser and the accused. The standard for investigations was set by the California Supreme Court in *Cotran v. Rollins Hudig Hall International*, 17 Cal. 4th 93, which was a case in which a thorough investigation was done concluding that allegations of sexual harassment were true. The employer terminated the employment of the employee who was accused based on their findings during the investigation. When the allegations later were proven to be false, the terminated employee sued for wrongful termination and breach of contract. The lower court found the employer liable for wrongful termination, but on appeal, the Supreme Court overturned the decision finding that the employer was protected from any claim of wrongful termination because they had conducted an adequate investigation and their termination decision was the result of “fair and honest reasons regulated by good faith on the part of the employer which [were] not trivial, arbitrary, capricious, unrelated to business needs or goals or pretextual” based on an objective standard. The Court further held that the investigation had come to “a reasonable conclusion... supported by substantial evidence gathered through an adequate investigation that include[d] notice of the claimed misconduct and a chance for the employee to respond.” *Id.* at 108

In *Nazir v United Airlines*, 178 Cal. App. 4th 243 the California Court of Appeals found that an investigation was inadequate and incomplete if all potential witnesses were not interviewed. An inadequate investigation can be used as evidence of pretext in California, meaning that it can be evidence that the reason given was not

the real reason for the action taken. *Mendoza v. Western Medical Center Santa Ana* 222 Cal App 4th 1334.

Sexual harassment investigations can be tricky because the accused has a right to know who is accusing them and the allegations, but the accuser typically does not want to be identified for fear of retaliation. It is important for the employer to recognize that retaliation could become an issue exacerbating the potential damages and protect the accused against the possibility that it could occur. Moving the accused to a new location to potentially harass more employees is not a good solution. Investigation needs to be handled with open-ended questions and often requires hiring a neutral third party so bias cannot be alleged. This is especially important if the allegations could lead to a large damage award, such as when the allegations are against a supervisor or involve sexual conduct or allegations of emotional distress.

What You Can Do to Protect Yourself and Your Business

This article cannot cover everything, but below are several important steps that can and should be taken to make sure you are protecting yourself and your business:

1. Make sure you have updated your employment policy manual to include the new forms of gender discrimination based on gender identity, transgender and gender transition and that your employment policy manual emphasizes being respectful of all employees and customers.
2. Make sure employees understand and follow the employment policy manual.
3. Make sure you have a clear and reasonable dress code that is spelled out in your employment policy manual, and followed.
4. Make sure that managers know that promotion should not be based on characteristics of femininity or masculinity.
5. Make sure your managers know that bathroom access to a restroom must be allowed based on gender identification, not birth gender and that if a person wants to be called by a different name, they are to be called by that name (although their pay checks should still show their legal name).
6. Make sure managers know to take sexual harassment claims seriously and know how to handle a claim of sexual harassment.
7. Make sure managers know that employees must be protected from sexual harassment by customers.
8. Investigate all sexual harassment allegations with open-ended questions and a neutral investigator if the allegations are serious. If you are not sure what is serious enough to warrant an outside investigator, contact your attorney for advice.
9. Make sure managers know the do's and don'ts of job interviews.
10. Teach managers to pay attention to what is going on with employees and to manage inappropriate conduct before it becomes a sexual harassment claim. Make sure all employees know that sexual harassment will not be tolerated by demonstrating that it will not be tolerated.

11. Make sure managers understand that sexual harassment is not always by men against women. It can be by women against men, or by someone of one gender against the same gender. Make sure managers also know it is also more prevalent against those who are transgender or gender neutral.

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