5 Effective Ways to Upgrade Your Anti-Harassment Policy

Now is not the time for outdated procedures

Good policies—including your anti-harassment policy—can help shape the workplace culture. Here are five general recommendations for HR professionals to consider as they revisit their organizations' existing anti-harassment policies.

Don't Be Limited to Sexual Harassment

Every anti-harassment policy should cover sexual harassment. But we cannot forget that other kinds of harassment are equally unlawful and must be addressed, too.

Simply stated, harassment based on any protected status is prohibited. This would include race, ethnicity and religion.

Imagine the question you'll be asked at a deposition in a lawsuit from one of your employees if your policy addresses sexual harassment but not race: "Why do you think sexual harassment is worse than racial harassment?" There's no good answer.

Avoid the question by making sure your policy is not limited to sexual harassment.

Avoid Legal Definitions

All of us have seen policies that quote regulations published by the Equal Employment Opportunity Commission (EEOC). The legal definition is fine for lawyers but, without more context, provides inadequate notice to employees.

You must include real-life examples of unacceptable conduct in your policy, examples that will resonate in your organization's culture.
Sometimes, employers struggle with how much detail to provide. I get it. You don't want to make individuals uncomfortable with a policy that was designed to make the working environment more comfortable.

Why not make this concern explicit in the policy? State that your intent is not to make anyone uncomfortable but instead is to make clear what is unacceptable so that employees have a comfortable working environment.

Even with this disclaimer, please be thoughtful on how you describe prohibited conducted. For example, every policy should include the phrase "hate words." But I would never use the actual words.

However, you can give examples without spelling them out. For example, you might say: "Use of hate words, such as the 'n-word.' "

Don't Focus on What Is Prohibited

In order for harassment to be unlawful under federal law, it must be, among other factors, severe or pervasive. The more severe it is, the less pervasive it need be. The converse is true.

However, employers do not want to wait until conduct is unlawful before prohibiting (or responding to) it. The goal is to prevent and remedy harassing conduct before it rises to the level of illegality.

Therefore, it is recommended that, within a policy, employers lead off the examples of prohibited conduct with something like: "The following behaviors are unacceptable and therefore prohibited, even if not unlawful in and of themselves."

The law sets a minimum. You want to make clear that you will not tolerate unacceptable conduct, even if it is not unlawful.

On a related note, it is dangerous to start your list of prohibited conduct with something like: "Sexual harassment includes but is not limited to … " This is problematic for multiple reasons.

First, the conduct at issue may not be harassment as a matter of law. Mocking a disabled employee's walk is harassing behavior based on disability. But, at least under federal law, if there is nothing more, it is probably not enough in and of itself to create a hostile work environment.

Second, if your prohibitions are framed in terms of legal wrongs, your corrective actions may need to be, too. And here you risk defamation claims.

That is, the conduct may not be severe or pervasive enough to violate federal law. But it may be bad enough to meet your judgment as to what is unacceptable, and therefore, it may be prohibited. Why apply a standard to conduct you may not be able to prove?

Drill Down on Sexual Harassment

Of course, you will want to include quid pro quo harassment and give an example of what that means—for example, requiring an employee to submit to sexual advances as a condition of a promotion.

But you also will want to include examples of conduct that does not constitute quid pro quo harassment that may nonetheless give rise to a hostile work environment. Common examples include sexual bantering, sexual "jokes" and inappropriate touching.

However, do not limit your examples to the strictly sexual. In particular, do not forget to include examples that involve pregnancy as well as gender-biased statements, such as stereotypes about women or men.

It is not just comments about someone's sexual desirability that may give rise to a hostile work environment. Comments about someone's perceived lack of attractiveness can give rise to a hostile work environment. Sexual objectification—favorably or negatively—is unacceptable.

Consider the Scope of the Prohibitions

It is helpful to make it clear how the prohibitions apply. Here are a few suggestions:

- First, make clear that the prohibitions apply to employees and nonemployees alike. Your employees cannot subject nonemployees with whom they work to prohibited conduct, and they should use the complaint procedure if a nonemployee with whom they work engages in such conduct.
- Second, be careful not to suggest that the policy applies only in the workplace. At a very minimum, make clear that the policy applies to company-sponsored social events.

The policy should make explicit that the prohibitions apply not only to the spoken or written word but also to e-mail, text messages and social media posts. I have observed a steady rise in the number of cases of harassment involving text messages and social media, so employees should be put on notice.

Of course, some social media may be strictly private. That is rare but possible. Consider language to the following effect: The harassment policy applies to social media posts, tweets, etc., that are about or may be seen by employees, customers, etc.

Yes, the employee's Facebook account may be configured as private. But if co-workers are friends and see the posts, the posts are fair game for corrective action.

Of course, a strong anti-harassment policy is only half the equation. The other half is a robust complaint procedure, which will be addressed in an upcoming column.

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