Employment Law Advisor

Sexual Harassment Policies in Massachusetts

September 09, 2011

Massachusetts law requires covered employers to adopt and distribute sexual harassment policies containing specific provisions. Beyond this legal requirement, the use of a well-crafted, properly disseminated policy, combined with other preventive efforts, can significantly reduce an employer's exposure to harassment claims. This Employment Law Advisor discusses employers' statutory obligations and offers several practical suggestions to enhance existing employer policies and practices.

Massachusetts Requirements

Massachusetts General Laws Chapter 151B section 3A ("the Statute") requires that employers of six or more employees implement a sexual harassment policy that includes:

- a statement that sexual harassment in the workplace is unlawful;
- a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of a complaint of sexual harassment;
- a description and examples of sexual harassment;
- a statement of the range of consequences for employees who are found to have committed sexual harassment;
- a description of the process for filing internal complaints of sexual harassment and the work addresses and telephone numbers of the persons to whom complaints should be made; and
- the identity of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact such agencies.

Employers are required to provide their sexual harassment policy to employees *annually* and to all new employees *upon hire*.

Policy Drafting Tips

Some of the required elements listed above are self-explanatory; however, the Statute provides little guidance on best practices to create an effective, employer-friendly policy. Moreover, the Massachusetts Commission Against Discrimination (MCAD) model policy, though generally well-crafted, has some drawbacks. Below are some suggestions for an effective policy:

Include the statutory definition of sexual harassment and provide specific examples of sexual harassment.

The legally safest "description" of sexual harassment is the definition contained in the Statute itself:

> "Sexual harassment means sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when: (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment

> decisions; or (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment."

The policy should also contain examples of sexually harassing conduct to help explain this legalistic definition. Good policies will include a non-exhaustive list of examples of conduct that may create a sexually "hostile environment." Such examples typically include sexual talk and innuendo, sexually related posters and objects, leering and comments. Additionally, sexual harassment policies should include examples of "quid pro quo" sexual harassment, such as requests for sexual favors in return for job benefits (e.g., promotions, pay raises or continued employment).

Provide a clear complaint procedure with multiple options for complaints.

Even with a sexual harassment policy in place, employers are not insulated from liability for sexual harassment claims, particularly when the policy does not provide an effective method for employees to complain about sexual harassment. Sexual harassment policies often break down when an employee cannot complain about harassment because the perpetrator is the employee's supervisor or a high-level executive. To avoid this problem, a good policy should provide at least two avenues for complaint, such as: (a) the human resource director; (b) the employee's direct supervisor; (c) the chief executive or chief operating officer; or (d) a sexual harassment committee. These choices should include both males and females.

Require that the employee take further action if dissatisfied with the employer's response.

One of most common and problematic issue employers face in sexual harassment cases arises when an employee follows the employer's sexual harassment complaint procedure but the employer's response is insufficient and the harassment continues. One strategy to avoid this problem is to impose an obligation on a complaining employee to escalate the complaint to higher levels if the employee is dissatisfied with the employer's response. Regardless, an employer should always follow-up on any complaints to ensure that the complaining employee is satisfied with its response (and employers should always document the follow-up).

Broaden the policy to prohibit all forms of harassment based on a protected characteristic.

Although the Statute only requires a *sexual* harassment policy, there is good reason to implement a policy that prohibits all forms of harassment based on a legally protected characteristic. Harassment claims based on other protected categories, including age, disability, national origin, religion, race, and sexual orientation, continue to rise. By making clear that the employer prohibits harassment based on such characteristics and requiring that all types of harassment complaints be made pursuant to this policy, the employer will be in a much better position to defend a harassment claim based on these grounds.

Do not include a statement about filing a legal claim or the statute of limitations.

The Statute requires only that employers identify the state agency (MCAD) and federal agency (EEOC) responsible for handling sexual harassment complaints. There is no legal obligation to state that complaints may be filed with these agencies or that the deadline for filing such complaints is 300 days from the date of the harassment, as provided in the MCAD model policy. In our view, providing this information may encourage employees to go directly to governmental agencies with their claims. While employees are always free to do so, policies should be written to encourage employees to complain internally. Accordingly, we recommend that employers using the MCAD model delete this language (and only provide the names, addresses and telephone numbers for the responsible agencies).

Protect employees from retaliation.

The Statute requires that sexual harassment policies contain a statement that it is unlawful to retaliate against an employee who files a sexual harassment complaint or cooperates in the investigation of a sexual harassment complaint. Given the dramatic rise in retaliation claims in

recent years and the serious potential for punitive damages that accompany these claims, employers should take additional steps to prevent retaliation, including training managers and supervisors concerning their non-retaliation obligations, providing employees information about the anti-retaliation policy and internal avenues for redress, and carefully reviewing any proposed adverse action against a complaining employee or supporting witness.

Document employee receipt of the harassment policy.

In harassment litigation, the plaintiff often claims that he or she was unaware of the employer's policy and complaint procedure. Employers should obtain signed receipts from all employees acknowledging receipt of the harassment policy. In workplaces where all employees use computers, electronic receipts of email delivery can establish receipt. Moreover, the employer's policy should be posted in a conspicuous location and on the employer's intranet (if available).

Anti-Harassment Training

The best way to ensure that an employer has an effective complaint procedure is to train supervisors and staff. Harassment training has multiple advantages, as it will substantially reduce exposure to legal claims and potentially eliminate the risk of punitive damages claims. Training programs also send a strong message that the employer will not tolerate workplace harassment and encourages employees to raise issues internally. Further, a good training program will instruct supervisors – an employer's first defense against harassment claims – on the appropriate way to handle complaints and workplace harassment. Training programs also help sensitize employees to the fact that certain workplace conduct, however seemingly innocuous, can have significant negative effects on co-workers.

For more information on this topic, please contact a member of the Employment Law Group.