

Question & Answer Summary

May 20, 2010 Webinar

Sexual Harassment: Legal Trends and Recent Developments

On May 20, 2010, Miller Law Group presented our webinar on “Sexual Harassment: Legal Trends and Recent Developments.” We examined California’s sexual harassment training requirements and discussed best practices for preventing and addressing workplace harassment, including how to conduct harassment complaint investigations. We also examined recent federal and California cases and trends regarding unlawful harassment. The following are answers to frequently asked questions by webinar attendees.

Q. IS SEXUAL HARASSMENT ILLEGAL FOR ANY SIZE COMPANY?

A. Yes. While the federal anti-harassment statute applies to employers with 15 or more employees, California law prohibiting harassment applies to employers with one or more employees.

Q. CAN AN EMPLOYER BE LIABLE FOR THE HARASSING ACTIONS OF CUSTOMERS OR VENDORS?

A. Yes. Under both California and federal anti-harassment laws, an employer can be held liable if certain third parties harass one of its employees and the employer does not do enough to prevent or stop the harassment. Thus, if an employee complains that she is being sexually harassed -- whether by a customer, client, vendor, delivery person, a contractor’s employee, or a worker from a temp agency -- the employer should take the complaint seriously, investigate immediately, and attempt to prevent any future harassment. Where feasible, consider providing vendors and other non-employee business associates with a brief written policy regarding the ethical conduct and practices you expect to govern the relationship, including a statement specifically prohibiting sexual, racial, and other harassment. This practice can go a long way toward preventing harassment problems in such relationships.

Q. WHAT ARE AN EMPLOYER’S OPTIONS WHEN AN EMPLOYEE REPORTS A HARASSMENT PROBLEM BUT TELLS THE EMPLOYER THAT SHE WANTS TO KEEP IT CONFIDENTIAL AND DOES NOT WANT AN INVESTIGATION?

A. Once an employee complains or “expresses concerns” to human resources, a supervisor, or management, the employer has a legal duty to investigate and stop the harassment; inaction could lead to liability. The employer can assure the employee that it will investigate as

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discreetly as possible and will disclose sensitive information on a need-to-know basis only; however, the employer should never promise to keep the matter completely confidential. The employer can also explain its commitment to a harassment-free workplace, and that an investigation and corrective action is necessary to promote such a workplace. The company should also assure the employee that the company will not retaliate against him/her.

Q. WE UNDERSTAND THAT UNDER FEDERAL LAW, AN EMPLOYER IS ALWAYS LIABLE FOR SEXUAL HARASSMENT BY A SUPERVISOR THAT RESULTS IN A “TANGIBLE EMPLOYMENT ACTION.” COULD SOMETHING AS MINOR AS A SCHEDULE CHANGE, OR PERHAPS A WRITE-UP FOR PERFORMANCE, BE CONSIDERED A TANGIBLE EMPLOYMENT ACTION?

A. Under Title VII, the federal anti-harassment law, employers are automatically liable for supervisor sexual harassment that culminates in a tangible employment action. If supervisor harassment did not result in a tangible employment action, an employer may be able to avoid liability if it can demonstrate that it exercised reasonable care to prevent and promptly correct any harassing behavior, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities or to avoid harm otherwise.

Determining what is or is not a “tangible employment action” must be done on a case-by-case basis. Generally, according to the U.S. Equal Employment Opportunity Commission (EEOC), an employment action qualifies as tangible “if it results in a significant change in employment status.” Some common examples include hiring and firing, failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, and compensation decisions. Furthermore, the EEOC takes the position that altering an employee’s duties in a way that blocks opportunity for promotion or salary increases amounts to a tangible employment action, as does significantly changing an employee’s duties in his or her existing job regardless of whether the individual retains the same salary and benefits.

Conversely, an employment action will not reach the threshold of “tangible” if it results in only an insignificant change in employment status. Some typical examples of employment actions that fall into this category include minor schedule changes, reassignment to a comparable office on a different floor, and routine performance evaluations. On the other hand, a schedule change or a performance write-up could be a tangible employment action if it impacts salary, benefits, duties or prestige.

California employers should keep in mind that California law holds employers automatically liable for supervisor sexual harassment, regardless of whether the harassment culminated in a tangible employment action.

Q. MUST AN EMPLOYER FIRE AN ALLEGED HARASSER, OR CAN WE IMPOSE OTHER DISCIPLINE?

A. It depends. According to the EEOC, an employer should make clear that it will take immediate and appropriate corrective action whenever it determines that harassment has occurred. Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. On the other hand, employers also need to consider that overly punitive measures could subject the employer to legal claims by the harasser such as for wrongful discharge. To balance these competing concerns, it is important that disciplinary measures be proportional to the seriousness of the offense. For example, if the harassment is minor, perhaps involving only a small number of “off-color” remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be sufficient to resolve the problem. But for harassment that is severe or persistent, suspension or discharge may be appropriate. Some other forms of discipline that may be effective, depending on the circumstances, include a strong reprimand, suspension, demotion, or a transfer to a different position. If the employer takes action short of termination, however, it is critical that it diligently follow up to make sure the harassment has stopped. Employers should also consider providing additional training or counseling to the harasser to ensure that he or she understands why the conduct was unacceptable.

Q. UNDER CALIFORNIA’S MANDATORY SEXUAL HARASSMENT TRAINING LAW, A.B. 1825, WHICH SUPERVISORS MUST RECEIVE TRAINING?

A. A.B. 1825 requires employers that have 50 or more employees to train “supervisory employees.” A supervisory employee is anyone with the authority to hire, transfer, suspend, layoff, recall, promote, assign, reward, or discipline other employees. Additionally, someone with the responsibility to direct other employees, adjust grievances, or effectively recommend that action is considered a supervisory employee, so long as the exercise of that authority requires independent judgment and is not merely routine or clerical. While A.B. 1825 only requires employers to train supervisory employees who are located in California, the best practice is to also include supervisors who may be physically located in other states but who supervise employees in California.



Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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