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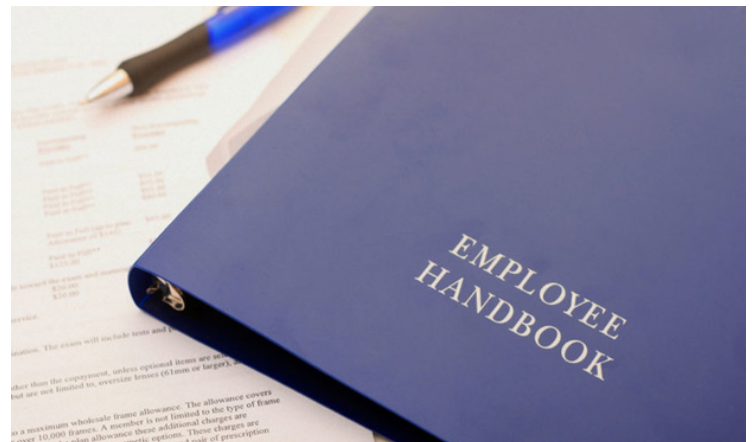
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Can Companies Lower Their Risk of Sexual Harassment Claims?

Corporations today must ask themselves not only if they are doing enough to avoid liability with regards to harassment claims but also if they are doing enough to combat the culture of harassment that exists in many workplaces.

By **Joanna Garelick Goldstein and Lisa Parlo** | February 08, 2018

Sexual harassment in the workplace violates federal, state, and local laws, and yet the conduct continues to contaminate our working lives. Since the U.S. Supreme Court's 1998 landmark rulings in the *Faragher* and *Ellerth* cases, companies have issued policies banning the conduct, have established training exercises to help employees identify and report misconduct, and have refashioned their internal complaint procedures to provide effective remedies. Yet the misconduct still persists seemingly unabated.



Perhaps one reason that harassment remains so widespread is that employees and employers are up against a weighty foe—overtly sexual messages that are force-fed daily in our society on the Internet, social media, TV, movies, in print publications and advertising. Those messages have the effect of convincing generations of employees that what passes for everyday sexual flirtation isn't a problem. These messages are hard to avoid and shape our attitudes and behaviors without us even realizing it. So how do employers eliminate sexual harassment from their 9 a.m.-5 p.m. workspace when it is so pervasive in our lives between 5 p.m.-9 a.m.? This is not an easy switch to flip at the door of your company.

Corporations today must ask themselves not only if they are doing enough to avoid liability with regards to harassment claims but also if they are doing enough to combat the culture of harassment that exists in many workplaces. While avoiding liability is important, it cannot be the only consideration when creating corporate anti-harassment policies and procedures. Each company must ask: What are we doing to provide our employees with a harassment-free workplace, and not merely address the individual instances of harassment when they arise? Company leadership must make absolutely clear to their employees, management and non-management alike, what behavior is not to be tolerated at any cost. This may mean that businesses need to define the "gray areas" of harassment, many of which have existed for as long as there have been women and men sharing the workplace. These gray area behaviors may not have been viewed as actionable sexual harassment in earlier times, but in today's culture they may land an employee, and therefore a company, in legal trouble. Comments about a woman's appearance or her sex life, for instance, may have been tolerated by women in the past but may not be acceptable any longer.

Companies have to do more, at every level, to diversify their workplaces and provide safe work spaces so that people of all genders, races and sexual orientations feel comfortable. This change needs to happen now. It is no longer acceptable for any business, regardless of the industry, to ignore the new reality. That is, employees are going to demand harassment free workplaces and the law will back them up. In fact,

Justice John Roberts of the Supreme Court noted in his year-end statement that even the judiciary was not immune to claims of sexual harassment and he convened a task force to investigate the problem.

When addressing the issue, companies should consider a three-pronged approach. The first prong is renewed education and training. By providing clear, explicit, guidelines to employees, companies can reduce harassment claims. Such training needs to be individualized to specific industries and perhaps even to specific companies in order to provide for safe work spaces while also allowing individual corporate culture to flourish. For example, NBC has allegedly instituted new rules which include rules about etiquette when hugging a co-worker. In the face of their recent public relations nightmare, such rules may be absolutely necessary for a company so clearly in the public eye. However, it is not enough that a company puts forth new guidelines without developing a new corporate culture where harassment is not tolerated at any level, no matter how “important” the offender. Simply put, employees at all levels of the corporate structure must receive training on the harassment guidelines.

Management level employees must attend sexual harassment training with their employees; their presence at such trainings serves a dual purpose. First, this signals to the lower level employees that sexual harassment is a serious issue within the corporation because even the management team is using their valuable time to attend the training. Second, it reiterates the rules and guidelines to management reminding them and the employees that no one is exempt from the sexual harassment rules of the company. Companies also must examine their fraternization policies and decide when, if ever, office relationships need to be reported or even prohibited.

The second prong of the equation involves creating companywide enforcement policies regarding how sexual harassment claims are handled. There must be policies in place so that employees know that their claims are being heard and taken seriously. It is the lack of action by businesses that often land companies in trouble. Policies have to be

promoted and enforced at all corporate levels—including when the offending employee occupies a powerful position within the corporation. No offending employee should be protected.

The third prong of the equation is that companies should attempt to avoid problems by reviewing hiring practices in view of what is acceptable company policy. Businesses that are more diverse, with more women occupying positions of power will begin to change the landscape for harassment within a company. In addition, by carefully weeding out candidates whose past behavior indicates questionable conduct or judgment and by hiring a more diverse workforce a company can curtail harassment within its ranks. Currently, many employers investigate a candidate's social media for indications that they won't fit into the corporate culture prior to hiring the person. They should also be looking for signs of sexually predatory behaviors or attitudes. Corporations are certainly within their rights to ask if a prospective employee has been sanctioned for sexual harassment. In fact, Congress is now asking potential judicial nominees about their sexual harassment history. Further, by hiring a balanced and diverse workforce, and promoting women to management positions, companies will change the landscape where harassment may have once flourished.

Many companies have goals to become more diverse and promote women, but now is the time to meet those goals and not simply aspire to them. Recently, a group of powerful women in the entertainment industry formed an organization named "Time's Up." In addition to creating a legal fund, Times Up is also working towards creating a more balanced workplace by pushing the notion that gender and racial equality can be achieved by the year 2020. If other industries follow suit and work towards such a model, harassment in all industries can be greatly reduced.

Finally, in addition to the actions taken by companies with respect to their own employees, good corporate citizens may want to take extra steps to help reduce the sexual overtones in our society. Companies may choose to revisit their own branding to ensure that they include messages that are not hypersexual. Second, your employees

are not the only ones who will listen when you teach that harassment is unacceptable. Children of your employees are the future CEOs of our country. When this next generation of leaders visit your workplace on “Take Your Child to Work Day,” consider doing activities which emphasize respect—consider a discussion on workplace etiquette and the intellectual encouragement that should be given to co-workers and friends. If children are confronted only with these positive messages in the workplace, harassment may be diminished.

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