



Employment Law Note

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Is Your Business Prepared for the #MeToo Movement?



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Over the last several months, the phrases “#MeToo” and “#Time’sUp” have become synonymous with a call to action to stand up to sexual harassment in the workplace. Although the #MeToo movement does not appear to be slowing down, the Equal Employment Opportunity Commission’s (“EEOC” or “Commission”) recently released charge statistics for fiscal year 2017 (that is, the total number of discrimination charges filed with the EEOC) reflecting a slight decrease in the number of sexual harassment claims made with the Commission.

Employers should not presume, however, that a decrease in the number of charges reported by the EEOC means that the #MeToo movement won’t affect their organizations. The EEOC’s fiscal year ended on September 30, 2017, right before the wave of allegations against movie mogul Harvey Weinstein came to light and the #MeToo movement took off. Since the Weinstein scandal, the EEOC has seen four times the number of visitors to its website, and it is likely that there will be a substantial increase in the number of sexual harassment charges the Commission receives in fiscal year 2018. Notably, despite a decline in the number of sexual harassment charges received by the EEOC in fiscal year 2017, the amount of monetary relief recovered from charging parties filing sexual harassment charges during that timeframe was at its highest level since 2010. The consequences of failing to prevent or ignoring sexual harassment are significant, including millions of dollars in litigation and settlements, diverted company resources, low employee morale, high turnover, increased sick leave and low productivity.

Coinciding with the #MeToo movement, the EEOC has taken steps to address the continuing problem of workplace harassment. In October 2017, the Commission launched a new training and outreach program for employers centered around respect in the workplace. In November 2017, the EEOC opened a new online portal to make it easier for complainants to sign in and file charges. Further, the Commission expects to release enforcement guidance on sexual harassment in the near future.

The EEOC’s Proposed Enforcement Guidance on Unlawful Harassment

In 2015, the EEOC received almost 28,000 charges of discrimination alleging workplace harassment (6,822 charges involved sexual harassment). As the number of harassment claims had remained relatively constant over the previous five years, the Commission formed a task force that spent a year studying the issue. In June 2016, the task force issued a report which concluded that sexual harassment remains a significant workplace issue. Notably, the task force found that current common harassment training offered by employers is often ineffective in deterring such conduct in the workplace and recommended that employers tailor anti-harassment training to meet the particular needs of the company.

The task force also issued proposed enforcement guidance as a companion piece to their report, which was the EEOC’s first guidance on unlawful harassment in more than 20 years. It is important to note that the guidance relates to harassment based on several protected bases, not just sexual harassment. The proposed guidance provides a detailed explanation of

the EEOC's position on the three components of an unlawful harassment or hostile work environment claim:

- 1) Covered bases and causation: Was the conduct based on the complainant's legally protected status?
- 2) Hostile work environment threshold: Was the conduct sufficiently severe or pervasive to create a hostile work environment?
- 3) Liability: Is there a basis for holding the employer liable for the hostile work environment?

The guidance also offers recommendations as to preventative steps employers can take, including developing a harassment prevention strategy that includes engaged leadership, consistent accountability, strong harassment policies, easily accessible and trusted complaint procedures, and regular harassment training that is tailored to the employees in the audience. Once the enforcement guidance is finalized it will be instructive with respect to how the EEOC is likely to evaluate, investigate, and prosecute administrative complaints filed with the Commission. However, the guidance will not have the force of statutory or regulatory authority, and its ultimate impact will largely depend on how much deference courts pays to it.

Key Takeaways

- Look for the EEOC's proposed enforcement guidelines regarding harassment to be finalized in the near future.

- Anticipate an increase in employee complaints of harassment and discrimination, given that these issues have received so much attention recently, particularly with the #MeToo movement.
- Review and revise anti-harassment, anti-discrimination, and anti-retaliation policies that include clear language to communicate standards of behavior in the workplace among colleagues, vendors, and clients. These policies should provide multiple channels for employees to report incidents of perceived harassment, discrimination, and retaliation. Establishing and maintaining such policies are a key component in an employer's ability to assert effective defenses to harassment claims.
- Remind employees of company policies and reporting obligations and maintain documentation of employees' acknowledgement and understanding of such policies and reporting obligations.
- Update training and policies on training tailored to your particular organization and require employees to undergo such training on a periodic basis.
- Consider specialized training for Human Resource employees and managers to ensure that employee complaints of harassment, discrimination, retaliation, and other inappropriate behavior are adequately investigated, documented and, if necessary, corrected.

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