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LAW OFFICE OF SUSAN WINER ZEME

EMPLOYMENT LAW NEWS

Employers have some new obligations in 2005. Those with 50 or more employees must offer prescribed training on sexual harassment. In practice, all employers should provide training – a court is unlikely to excuse an employer whose supervisor acted badly, simply because the company employs only 10. Also included below are some suggestions for handling an internal claim, and a "heads up" about a few other timely issues. . .

Sexual harassment training is now required for many companies. Current law requires all employers with 50 or more employees to provide sexual harassment training to all supervisors. "50 employees" includes those out of state and independent contractors, making it difficult for employers to avoid the requirement. Two hour training sessions must be presented by a professional with expertise in preventing harassment, discrimination and retaliation. The training must include an interactive component, and be repeated every two years. New supervisors must receive the training within six months of employment, even if the training for others is not yet due to be repeated.

Looking at the bright side, this training should help employers prevent claims by educating their supervisors. This is as important as ever, as the State Supreme Court recently confirmed employers' strict liability for sexual harassment by supervisors. The Court also agreed to limit damages for employees who fail to report harassment, which gives the employer an opportunity to correct the situation. The Court emphasized its desire to reward employers who act reasonably to prevent and correct harassment.

The lesson is this: all employers **must** have effective policies and procedures to educate their staff about sexual harassment, prohibit it, and advise employees how to get help. The legally mandated training sessions must be given every two years, and more often when new supervisors come on board. Further, the employer's handling of a complaint is every bit as important as avoiding one in the first place.

An employee makes a claim – now what? Employees who make claims for harassment and discrimination have different goals – some truly desire in good faith to maintain and improve their

employment situation. The response should always assume that the employee is of this type, and try to remedy the situation. Other employees simply want a way out.

With the first type of employee, the employer's handling of an internal complaint will make the difference between a positive resolution and an unnecessary disaster. In the second scenario, avoiding a formal claim may be impossible, but the employer's response can make the difference between a quick resolution, and protracted litigation. These comments apply to complaints of harassment or discrimination on the basis of any legally protected characteristic, including gender, race, religion, disability, age and others, but focus on sexual harassment. (Complaints of generalized "harassment" – that is, "my boss is a 'you know what'!" probably do not invoke the discrimination laws. Nonetheless, they should be approached seriously, until clear no legally protected interest is involved.)[1]

The employer must always investigate an employee's claim. What constitutes an appropriate investigation depends on the circumstances, and the specific allegations. The first step is obtaining a written statement from the complaining employee. In most cases, this should be handled by a female supervisor, unless the employee prefers to describe the situation to someone else. If the employee resists putting her problem in writing, or allowing an investigation, it should be explained that the employer cannot take effective action without a formal statement, and her cooperation.

Once the employee submits a report, the employer must determine what action is appropriate. For serious allegations, the employer should use an outside investigator. While protecting confidentiality, witnesses should be interviewed, and relevant data recorded. The employer must then evaluate the facts and determine what remedy is called for. If harassment or discrimination **has** occurred, effective action must be taken to end the misconduct, and make the victim whole. This might include formal discipline or termination of the offending party, separating the parties, or merely an apology, depending on the specifics. The complaining party should be informed that appropriate remedial action is being taken, while respecting the privacy of the perpetrator. The complaining employee should be instructed to advise management if she experiences further difficulty, and that the company prohibits retaliation. If **no** misconduct is found, the complaining party should be so informed, and asked to let management know if she has further difficulty. The alleged wrongdoer should be treated with good faith, and reminded of the company's policy against retaliation.

Of course, the initial investigation may not be the end, and the employer should remain informed by checking in with both employees periodically. These inquiries will help to diffuse hostility, and possibly avoid a formal claim. The investigation, and every subsequent inquiry and response should be documented, for possible use defensively.

Because every situation is so different, this is only a very general description of what kind of investigation might be appropriate; employers faced with a complaint should consult with knowledgeable counsel for specific advice. However, by acting pro-actively in response to a complaint, employers can often resolve even the most sensitive claims informally, and avoid litigation.

[1]Yes, it is technically legal, though not encouraged, for the boss to act like a "you know what," so long as he is indiscriminate.

A few additional highlights:

Employees returning from disability leave: When an employee takes a leave of absence because of an injury or medical condition, the employer often is faced with a quandary upon his return, or attempted return, to work. If the position has been filled, must the new employee be displaced? If the employee needs light duty, must a new position be created? The answer to both questions is generally "no." A recent case involved a bartender who took disability leave, prompting the employer to fill his position. He requested light duty upon his return, but the two existing light duty positions had been filled by senior employees. The employee's claim for disability discrimination was dismissed, because the law require neither creation of a new position, nor displacement of other employees.

Wage claims: A pending bill would require employers to present a complete defense to an employee's administrative wage claim before the Division of Labor Standards Enforcement, or risk being barred from presenting any defense at a subsequent court hearing. Until further notice, employers should vigorously defend these claims at the administrative level, despite the possibility they might have to repeat the defense at a future court hearing.

Exemptions from overtime are hard to come by. Recent cases have held that insurance sales people, electrical engineers, and loan originators, are non-exempt employees, and thus entitled to overtime pay. While at first glance, these employees might seem to be exempt administrative or professional workers, they fail to meet the complex and detailed criteria for exemption. A generally applicable rule is that production employees, or those who make or sell the product or service that the business exists to produce or sell will **not** be exempt. The exemptions depend not only on the duties of the employee, but on the nature of the employer's business. Exemptions **must** be evaluated carefully, on a case by case basis.

Altering time cards is a hot issue: Numerous lawsuits have resulted from employers' practices of reducing employees' hours to avoid paying overtime. The illegality of this practice is nothing new, but the Department of Labor is pursuing employers who do it with increased vigilance.

Appearances matter: Employers can require their female employees to wear lipstick! A female bartender (Yes – this is the second bartender mentioned, for those readers paying attention) sued the casino where she worked, for gender discrimination because of its requirement that she wear makeup and nail polish to work. She refused, and was terminated for failing to comply with the grooming requirements. The court held that "separate but equal" appearance standards, depending on the employees' gender, are not necessarily illegal. The court's ruling was based in part on finding that male employees were subject to a different, but relatively equal burden with respect to maintaining their appearances.

For more information on these or other employment law issues, or for sexual harassment training, please contact Susan Zeme, Esq., at (510)652-6895, or susan@swzeme.com.