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What ABA's Position On Harassment Means For Employers

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The American Bar Association recently adopted Resolution 302, which "urges all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity."

Resolution 302 was unanimously passed by voice vote of the ABA's House of Delegates, the 601-member governing body of the country's largest legal association, after further edits by employment lawyer Mark Schickman to strengthen its language.

In the #MeToo era, Resolution 302 is a reminder to all employers of harassment policy best practices, and should be of particular interest to employers in the legal industry.

What is the Effect of Resolution 302?

Though nonbinding, Resolution 302 could impact employers in the legal industry in particular, which the Bureau of Labor Statistics estimates employed over 1.1 million people as of December 2017. This includes not only law firms, but also research services, forensic companies, couriers and legal recruiting firms.

Because the ABA is the "national voice of the legal profession," Resolution 302 may operate as a standard of the profession similarly to how American Medical Association guidelines have been used in malpractice cases. Thus, employers in the legal industry that lack written policies, or have policies lacking the minimum points in Resolution 302, could be vulnerable in future harassment lawsuits, particularly under tort causes of action.

Indeed, the concept of "reasonable care" has long been recognized in harassment lawsuits under the Faragher/Ellerth defense.[1] Whether and how Resolution 302 will alter the standard of "reasonable care" for employers remains to be seen.

What Are the Main Requirements of Resolution 302?

Resolution 302 contains nine points that an anti-harassment policy should include. Some have long been part of any such policy, such as inclusion of remedial actions, prohibition on retaliation and communication to all employees. However, some interesting points include:

· The inclusion of gender identity, sexual orientation and the "intersectionality of sex with race and/or ethnicity" as a basis for prohibited harassment and retaliation. Though more courts are finding sexual orientation to be included by Title VII protections, it remains primarily an issue of state legislation. The "intersectionality of sex with race" is a growing area of research, though the term first appeared around 1989.

· The application of the policy to work-related functions. Though already a best practice for employers, explicitly adding this provision to Resolution 302 broadens the potential opportunities for employees to report harassment, and thus, claim hostile work environment.

· The requirement that an investigation report be provided to the complainant. Many employers prefer to keep their findings confidential, particularly if third-party witnesses were interviewed. Requiring disclosure of the report to the complainant can have adverse impacts on the confidentiality and integrity of the investigation. Though employers should generally not guarantee confidentiality, the results of most investigations typically do not come out unless litigation ensues.

· The inclusion of at least one anonymous reporting method for employees, and review by a government agency if independent review is desired. Many employers already have an anonymous reporting method, such as a hotline, in addition to other reporting mechanisms. For smaller employers, however, an anonymous reporting mechanism might be burdensome. For those, there are third-party services that can provide the infrastructure outside of the organization. Most employers do not currently encourage their employees to seek review by a government agency for obvious reasons.

What Best Practices Can Be Learned from Resolution 302?

Regardless of whether companies are in the legal industry, Resolution 302 raises some important practices for any employer.

These best practices include:

· Be ready, yesterday. While the #MeToo movement has increased the number of employees willing to step forward, incidents of harassment have always existed in large numbers, according to the Select Task Force study prepared by the U.S. Equal Employment Opportunity Commission in June 2016. Specifically, the Select Task Force found that 25 to 85 percent of women experienced sexual harassment in the workplace, but "gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8 percent of the time; and sexually coercive behavior was reported by only 30 percent of the women who experienced it."[2]

· Have effective training. The Select Task Force found what some have already known for years, that training is not always effective. To make training more effective, good lawyers or human resources professionals should incorporate the most recent social science and organizational psychology on the issue. Among other factors, research has shown that training will not be effective if the employees perceive the organization to be unethical, believe that sexual harassment is tolerated, feel that training is

a "mark the box" exercise rather than a real expression of the company's expectations, or are approached with a "you're naughty" attitude rather than a "here's how to be productive and cohesive" attitude.

· Have a written policy. Though this may seem obvious, according to a year-long research initiative of the Society for Human Resource Management (SHRM), approximately 6 percent of companies with HR professionals did not have such a policy. More fascinating statistics are available on SHRM's website.

· Distribute the policy widely, including to executives and the board of directors, if applicable. Per the SHRM study, while 94 percent of HR professionals confirmed that their company had a written policy, a shocking 22 percent of nonmanagement employees said they were unsure if their company had a written policy.

· Require a signed acknowledgement. Per the SHRM study, only 73 percent of companies documented policy acknowledgement from employees. The employee's acknowledgement and the policy itself are exhibits A and B in any lawsuit or administrative charge.

· Have and enforce a reporting mechanism. Indeed, a reporting mechanism has long been recognized as a key component of any written policy under Faragher.[3] But, a reporting mechanism that does not follow up on complaints made is almost worse than lacking a reporting mechanism altogether.

· In the event of resolution, consult your lawyer about Section 162(q) of the tax law that went into effect for payments made after Dec. 22, 2017. Confidentiality and how to structure payments in a favorable way should be part of the conversation with your counsel.

Notes

[1] See, e.g., Weger v. City of Ladue, 500 F.3d 710, 719 (8th Cir. 2007) ("Although having an effective anti-harassment policy is not in itself dispositive, distribution of a valid anti-harassment policy provides compelling proof that [an employer] exercised reasonable care in preventing and promptly correcting sexual harassment.") (quotations and citations omitted).

[2] Id. at 8, 16.

[3] See, e.g., Alkhawaldeh v. Nairn Concrete Servs., No. 14-2140, 2015 U.S. Dist. LEXIS 71044, at *43 (E.D. La. June 2, 2015) ("[t]he lack of any specific complaint procedure to address harassment […] may make a written policy inadequate to meet the first prong of the Ellerth/Faragher defense").

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