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Anti-Harassment: Compliance Update and Best Practices

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TOPICS INCLUDE:

- Harassment Policies are Good Business
- Sample Model of Compliant Harassment Policy
- What is a Reasonable Time to Heal as an Accommodation under the ADA?

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Why Workplace Harassment Policies are Good Business

Why Workplace Harassment Policies are Good Business

Many employers know that they ought to have a workplace harassment policy. What they don't know is why they need one.

Of course, no one should be subjected to harassment in the workplace. That's a given.

Why Workplace Harassment Policies are Good Business

And if a policy prevents workplace harassment, it has served an important purpose. But in addition to protecting employees, workplace harassment policies make financial sense: An anti-harassment policy that is publicized and used can shield employers from legal liability created when employees harass other employees. Anti-harassment policies are good business.

Why Workplace Harassment Policies are Good Business

The automaker Nissan recently used its harassment policy to defeat a lawsuit. An African-American female project manager alleged that Nissan subjected her to a hostile work environment because of her sex and race. The plaintiff alleged that her supervisor sexually assaulted her by continuously touching her, rubbing her shoulders and back down to her buttocks, and making her uncomfortable. The supervisor also allegedly got the plaintiff to his hotel room on a false pretense, and then sexually assaulted her. The plaintiff additionally asserted that the supervisor made offensive remarks in the workplace.

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Why Workplace Harassment Policies are Good Business

The plaintiff waited three months to report her supervisor's conduct to Nissan's Human Resources Department. Seven days after receiving plaintiff's complaint, Nissan completed an internal harassment investigation under its policy and decided to terminate the supervisor. The supervisor resigned before Nissan terminated his employment.

Why Workplace Harassment Policies are Good Business

The federal court held that Nissan had exercised reasonable care by promptly investigating the plaintiff's complaint and recommending the supervisor's termination. Moreover, by waiting three months to file her complaint under Nissan's harassment policy, the plaintiff had unreasonably failed to take advantage of available preventive opportunities. In short, Nissan's enforcement of its anti-harassment policy shielded it from legal liability for the harassment by one of its employees.

Why Workplace Harassment Policies are Good Business

Having and enforcing workplace anti-harassment policies can protect an employer from legal liability whether the harasser is a co-worker or a supervisor. If the harasser is the victim's coworker, then the employer is liable only if it was negligent in controlling the working conditions.

Why Workplace Harassment Policies are Good Business

An employer is negligent in controlling the working conditions if the plaintiff shows that the employer's response to the plaintiff's complaints manifested indifference or unreasonableness in light of the facts the employer knew or should have known.

Why Workplace Harassment Policies are Good Business

A plaintiff most often shows manifested indifference by showing his or her employer failed to take prompt and appropriate corrective action where it knew or should have known about the harassment. The simplest way an employer can show appropriate corrective action in a given case is with prompt enforcement of its anti-harassment policy.

Why Workplace Harassment Policies are Good Business

Employers can shield themselves from liability in cases where the harasser is a supervisor. If the harasser is a supervisor—someone who is empowered by the employer to take tangible employment actions against the victim—then the employer is strictly liable if the supervisor's harassment culminates in a tangible employment action.

Why Workplace Harassment Policies are Good Business

Actions that effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits can constitute tangible employment action.

Why Workplace Harassment Policies are Good Business

But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

Why Workplace Harassment Policies are Good Business

Generally, the employer's adoption, publication, and use of an anti-harassment policy can establish the first element of an employer's affirmative defense.

Why Workplace Harassment Policies are Good Business

An effective harassment policy should at least: (1) require supervisors to report incidents of sexual [or other protected class] harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy.

Why Workplace Harassment Policies are Good Business

The EEOC recommends that employers should require that supervisors and managers understand their responsibilities under anti-harassment policies and complaint procedures and put on periodic training to help achieve that result.

Why Workplace Harassment Policies are Good Business

The EEOC recommends that training explain the types of conduct that violates the policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation. Periodic training – at least once every 18 months – will help the employer establish the first element of the defense.

Why Workplace Harassment Policies are Good Business

If an employee unreasonably failed to take advantage of the anti-harassment policy, especially the preventive and corrective measures found in the employer's promulgated and disseminated anti-harassment policy, by not timely reporting the harassment, the employee's claim will fail.

Why Workplace Harassment Policies are Good Business

According to the Supreme Court and the EEOC guidance, employers with small workforces may not be required to maintain formal anti-harassment policies.

Why Workplace Harassment Policies are Good Business

But even for small employers, concise policies can still shield employers from legal liability. The risk of not maintaining a formal policy, and instead relying on the “small employer” defense, is an expense that prudent employers should avoid.

Why Workplace Harassment Policies are Good Business

An employer is not relieved of its obligation to exercise reasonable care to *prevent* harassment simply because it can prove that it promptly corrected any sexual harassing behavior.

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Why Workplace Harassment Policies are Good Business

Employers hoping to shield themselves from legal liability must remember that the defense does not apply if they merely maintain an anti-harassment policy—the employer must actually *publicize it* and *use it*. Having an anti-harassment policy is much like having Arnold Schwarzenegger's 1,523-page tome "The Encyclopedia of Modern Bodybuilding"—merely owning it will not benefit you; instead, you must do the exercises.

Why Workplace Harassment Policies are Good Business

The best anti-discrimination policy in the world will not help the employer who, rather than fulfill its duty to act on complaints about a serial harasser, lets the known harasser continue to injure new victims.

Why Workplace Harassment Policies are Good Business

Management lawyers and the plaintiff's bar know that merely maintaining an anti-harassment policy may not be enough.

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Why Workplace Harassment Policies are Good Business

As an example, FedEx had an anti-harassment policy and managers had annual online diversity inclusion training. But after the plaintiff reported discrimination, the employer never opened an investigation, which was required by the policy. FedEx's corporate human resources manager testified that FedEx did not follow its own policy. The consequence of FedEx not following its own policy cost it $300,000 in punitive damages.

Why Workplace Harassment Policies are Good Business

In another example, an employer waited ten days after it learned that the harasser had sexually touched the plaintiff, which was not the harasser's first offense. Then rather than terminating the harasser, it suspended the harasser for one to two days *with pay*. The court found in favor of the plaintiff.

Why Workplace Harassment Policies are Good Business

Employers who do not create anti-harassment policies risk losing a vital legal defense in employment discrimination cases.

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Sample Harassment Policy

Sample Harassment Policy

WORKPLACE HARASSMENT POLICY

ABC Company is committed to providing a work environment that maintains employee equality, respect and dignity. In keeping with this commitment, ABC Company maintains a strict policy prohibiting any form of unlawful employee harassment based on race, color, age, religion, sex, pregnancy, marital status, familial status, disability, national origin, sexual orientation, veteran status, status with regard to public assistance or activity in a local human rights commission, or other applicable status protected by federal, state or local laws. Harassment, whether verbal, physical or environmental, and whether in the workplace or in outside work-sponsored settings, is unacceptable and will not be tolerated.

Sample Harassment Policy

Sexual harassment is illegal under federal, state and local laws, and applies equally to men and women. It is defined in the Equal Employment Opportunity Commission (EEOC) Guidelines as any unwelcome sexual advance, request for sexual favor, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. These behaviors may include but are not limited to: subtle or overt pressure for sexual favors; derogatory or vulgar statements regarding one's sexuality or gender; unnecessary touching, patting, pinching or attention; innuendoes, suggestions or jokes; turning work discussions into sexual topics; or displaying sexually suggestive visual materials.

Sample Harassment Policy

If you believe that you have been subjected to or have witnessed any form of harassment, you should immediately contact an appropriate manager, supervisor or Human Resources staff. If the complaint is regarding a manager or supervisor, contact Human Resources. The complaint will be immediately and thoroughly investigated in a professional manner. There will be no retaliation against any employee who files a complaint in good faith or who assists in providing information relevant to a claim of harassment, even if the investigation produces insufficient evidence to support the complaint. If the facts and results of the investigation substantiate the complaint, then the appropriate corrective action will be taken, up to and including termination.

Confidentiality will be maintained throughout the investigatory process to the extent practicable and appropriate under the circumstances, to protect the privacy of persons involved. Investigation may include interviews with the parties involved and, where necessary, individuals who may have observed the alleged conduct or who may have relevant knowledge.

Sample Harassment Policy

This policy applies to all employees (managers, supervisors and staff), whether related to conduct engaged in by fellow employees, supervisors, or someone not directly connected to ABC Company (e.g., outside vendors, consultants, clients, etc.). ABC Company will make every reasonable effort to ensure that its entire population is familiar with this policy and is aware that every complaint received will be investigated and resolved appropriately. ABC Company encourages reporting of all perceived incidents of sexual harassment, regardless of who the offender may be. Every employee is encouraged to raise any questions or concerns with Human Resources.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct, and we will take such action as is appropriate under the circumstances. Such action may range from counseling to termination of employment and may include such other forms of corrective action as we deem appropriate under the circumstances and in accordance with applicable law.

Sample Harassment Policy

ABC Company recognizes that false accusations can have serious effects on innocent persons. If an investigation results in a finding that a person who has accused another of a violation of this policy has maliciously or recklessly made false accusations, the accuser will be subject to appropriate corrective action, up to and including termination.

In addition to the above, if you believe you have been subjected to sexual harassment, you may file a formal complaint with the appropriate government agency. Using our complaint process does not prohibit you from filing a complaint with these agencies.

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How Much Time is a Reasonable Time to Heal?

The Status and Future of a Medical Leave of Absence as a Reasonable Accommodation

Introduction

Employees taking time off work to obtain treatment for or to manage a medical condition is a recurring subject for employers. For many employers, an employee's absence is a non-issue when it is short in duration.

Introduction

Also, if the employee has sufficient paid time off, vacation, or sick time to cover their absence, most employers pay it no mind. The concept of time off becomes more complicated, however, when an employee's medical condition requires weeks or months of time away from work. What do employers do then?

Introduction

To some employers, the answer lies with the Family and Medical Leave Act (FMLA). If the employer is subject to the FMLA, and the employee is eligible for leave, then the employer is obligated to provide the employee with up to 12 weeks of unpaid leave and reinstatement to his or her position upon returning from leave. But the FMLA is not the answer for many employers or every situation involving a medical leave of absence.

Introduction

What if the employer is not subject to the FMLA or the employee does not qualify for FMLA leave?

What if the employee's medical condition persists after their FMLA leave is exhausted and they are unable to return to work?

These issues present the greater complication. In these situations, when is an employer required to provide an employee with a leave of absence (or additional leave) and for how long?

The Reasonable Time to Heal Doctrine

The so-called “reasonable time to heal doctrine” is a catchall used by many employment lawyers to describe an employer’s obligation to accommodate an employee who is unable to work because of a disability by providing the employee time off work to get better. This doctrine originated under Michigan state law in the early 1990s. That doctrine’s existence, however, was short lived.

The Reasonable Time to Heal Doctrine

Most state courts have determined that the law does not require that an employer allow a disabled employee a reasonable time to heal. As a result, an employer's duty to make reasonable accommodation under federal and most state laws does not extend to granting the plaintiff a medical leave until such time as he would be able to perform the requirements of his job.

The Reasonable Time to Heal Doctrine

So the question at hand is settled under state law.

But what about federal law and, specifically, the Americans With Disabilities Act (ADA)?

That answer, on the other hand, is anything but settled or clear.

Leaves of Absence as a Reasonable Accommodation under the ADA

The ADA is a comprehensive statute that touches nearly every employer in the United States (an "employer" for purposes of the ADA means a person or entity engaged in an industry affecting commerce who has 15 or more employees).

Leaves of Absence as a Reasonable Accommodation under the ADA

In relevant part, the ADA prohibits employers from discriminating against a qualified individual on the basis of a disability by not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual where such an accommodation does not cause the employer an undue hardship.

Leaves of Absence as a Reasonable Accommodation under the ADA

To be qualified, an employee must be able to perform the essential functions of their position with or without a reasonable accommodation.

Leaves of Absence as a Reasonable Accommodation under the ADA

A reasonable accommodation may include:

job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Leaves of Absence as a Reasonable Accommodation under the ADA

It is undisputed that a medical leave of absence is not a reasonable accommodation identified in either the text of the ADA or its corresponding regulations. This is not, however, a blanket prohibitive.

Leaves of Absence as a Reasonable Accommodation under the ADA

Instead, the only textual authority providing as much comes from interpretive guidance issued by the Equal Employment Opportunity Commission (EEOC). There, the EEOC asserts that other accommodations under the ADA *could* include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.

Leaves of Absence as a Reasonable Accommodation under the ADA

The EEOC's opinion is not binding. That opinion may be entitled to respect. Regardless of whether the EEOC's opinion is entitled to respect or not (a debate for another day), most federal courts still recognize that a medical leave of absence may be a reasonable accommodation under certain circumstances.

Leaves of Absence as a Reasonable Accommodation under the ADA

Unsurprisingly, this principle is not without some criticism seeing as the ADA is an antidiscrimination statute, not a medical leave entitlement.

The contrary argument is that it perhaps goes without saying that an employee who isn't capable of working for so long isn’t an employee capable of performing a job’s essential functions. After all, reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work.

Leaves of Absence as a Reasonable Accommodation under the ADA

When does a medical leave of absence qualify as a reasonable accommodation – and how much time is reasonable – is a bit murky.

Leaves of Absence as a Reasonable Accommodation under the ADA

The ADA was designed to eliminate discrimination against individuals with disabilities so that they could become productive members of the workforce. However, when the requested accommodation has no reasonable prospect of allowing the individual to work in the identifiable future, it is objectively not an accommodation that the employer is required to provide. When an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation.

Leaves of Absence as a Reasonable Accommodation under the ADA

After 20 years of bouncing around in federal courts, it is now settled, at least for the time being, that the ADA was designed to eliminate discrimination against individuals with disabilities so that they could become productive members of the workforce.

To be qualified under the ADA, an employee must be able to perform the essential functions of his or her job with or without reasonable accommodation.

Leaves of Absence as a Reasonable Accommodation under the ADA

A reasonable accommodation does *not* include removing an essential function for the position, let alone all of them, for that is *per se* unreasonable.

And, most importantly, an employee who does not come to work cannot perform any of his job functions, essential or otherwise.

Leaves of Absence as a Reasonable Accommodation under the ADA

This leads to the ultimate conclusion that:

An employee who needs long-term medical leave cannot work and thus is not a qualified individual under the ADA.

Resources:

- Model EEO Programs Must Have an Effective Anti-Harassment Program: https://www.eeoc.gov/federal-sector/model-eeo-programs-must-have-effective-anti-harassment-program
- Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors: https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors
- Q&As for Small Employers on Employer Liability for Harassment by Supervisors: https://www.eeoc.gov/laws/guidance/questions-answers-small-employers-employer-liability-harassment-supervisors

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