

A No Spin Approach to a Fair and Balanced Approach to Preventing Workplace Harassment

Mr. Richard Fader of Ft. Lee, New Jersey asks: “With the departure of Bill O’Reilly from Fox News, is there a ‘no spin zone’ that we can take away from his conduct in preventing workplace harassment?” Workplace harassment can paralyze a company’s operations and result in significant costs. Twenty-First Century Fox recently disclosed that it had incurred costs of \$10 million “related to settlements of pending and potential litigations” during its fiscal third quarter in the aftermath of sexual harassment allegations at Fox News. Prevention and appropriate response, Mr. Fader, are the best approach to avoiding workplace harassment claims.

A fair and balanced approach to both prevent and correct workplace harassment includes the following:

- ✓ Distribute to all employees a workplace harassment policy (the “policy”) that complies with both California and federal anti-discrimination laws. The policy should be sufficiently comprehensive to address all forms of harassment (not just sexual harassment) based upon all protected classes.
- ✓ The policy must be communicated to all employees at the time of their hire and should also be posted or otherwise made easily available to everybody in the workplace.
- ✓ All employees should be given an acknowledgement to sign in which they confirm that they have read and understand the policy, and that any questions they had were satisfactory responded to by the employer. That acknowledgement should be kept in each employee’s employment file.
- ✓ The policy must contain an effective step-by-step complaint process which provides that the employee bringing the complaint has the opportunity to bypass the alleged harasser, especially when the purported harasser supervises or otherwise has some form of workplace control over the complaining employee.
- ✓ The policy must contain an anti-retaliation provision, safeguarding that the employees are aware that they will not be retaliated against for complaining internally, filing lawsuits or criminal charges, or participating in an investigation. Failure to include this component could fatally undermine the entire policy.
- ✓ The policy must state that the employer cannot guarantee confidentiality. This is so because the employer must share with certain other individuals within the company some or all of the allegations during the course of undertaking the required investigation. It is suggested that the policy state that, to the extent possible, harassment complaints will be kept confidential and that the company will not share the allegations with those who do not have a reason to know them.
- ✓ Anybody within the company whose job description includes any form of supervision or control should be trained in preventing the various forms of harassment both at the time of hire and every two years thereafter.
- ✓ Though seemingly counterintuitive, employees should not be required under the policy to put their harassment complaints in writing. For some, the act of having to reduce to

writing the allegations could be equally or more humiliating and thus could cause the unintended consequence of compounding the harassment.

- ✓ Immediately, immediately, immediately respond to all harassment complaints by promptly conducting both a thorough and unbiased investigation. To enhance the neutrality of the investigative process, an outside third party such as an attorney should undertake and control the investigation, providing a written report to those who have the need to know within the company.
- ✓ Upon the company's receipt of the externally conducted investigation finding substantiated harassment, the company must undertake appropriate remedial action by engaging discipline appropriate to the substantiated conduct and continuing to monitor the harasser's conduct toward others if not otherwise terminated.
- ✓ Finally, and perhaps most importantly, create a work culture in which everybody is sensitive to workplace harassment and that with an "open door" practice, everybody feels safe to protect the company by engaging the complaint process.

While there are no guarantees, Mr. Fader, to completely avoid any workplace harassment, creating a comprehensive policy which is uniformly applied should help to reduce the risks of such claims.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law or the means in which to comply with the law to reduce the risk of liability and claims. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are compliant with applicable state and federal law. Please feel free to reach out to the author at jroth@TheRothLawFirm.com with any questions or comments.