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Cape Cod Human Resources Association

General Counsel Employment Law Report

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November 12, 2019

Ben Franklin and Mandatory Sexual Harassment Training by State

Ben Franklin was a renaissance man. If such an awareness existed, he might have noticed sexual harassment here or in France. It did not and he did not. Yet his wise words of preparation still apply to today's hot topic. In the wake of #MeToo and #TimesUp, several states have beefed up their sexual harassment laws to require mandatory sexual harassment prevention training. Delaware, Maine, and New York already have the requirement to perform this type of training, and California, Connecticut, Illinois, and Washington are following their example. This means that almost 20% of the employees in the US live in a state that requires sexual harassment training.

Training should illustrate which actions and words are not acceptable in the workplace, and which actions give rise to a complaint: if that seems awkward to do in house, hire a pro. But don't avoid it, because it's important. Sexual harassment training is essential in educating employees and supervisors on the illegality of harassment, how to report harassment, and remedies available. Training must cover the complaint process and how to intervene if the conduct does not yet rise to the level of illegal harassment.

Many of the new laws require additional training for supervisory employees, especially on how to report supervisory employees for harassment, the supervisory employee's obligation to report harassment, and how to intervene as a bystander.

Some states, such as California, also require the training to cover harassment based on gender identity, gender expression, and sexual orientation.

Sexual Harassment Training is required for the following employers:

- California: Employers with at least 5 employees must provide biannual training effective January 1, 2020. The training requirement has been postponed to January 1, 2021 for employers of seasonal, temporary or other employees hired to work for less than 6 months.
- Connecticut: All supervisory employees must be given sexual harassment training. If an employer has at least 3 employees, training is required annually by October 1, 2020.
- Delaware: Employers with at least 50 employees must train new employees within 1 year of hire, and biannually afterwards.
- Illinois: Employers with at least 15 employees must provide annual training effective January 1, 2020.

- Maine: Employers with at least 15 employees must provide training within 1 year of hire.
- New York: Employers must provide annual interactive training starting this month. In NYC, training must take place within 90 days of hire.
- Washington: Employers in the hotel, motel, retail, or security guard industries must provide training to all employees on preventing harassment.

Like we always say, training is a best practice, the old ounce of prevention. We at Foley & Foley can assist you –not just in times of crisis when a sexual harassment claim has come forward. We can work with you to create clear policies, procedures, and training programs that prevent sexual harassment.

We can help.

Zero Tolerance & Putting the Human in HR

Many organizations have zero tolerance policies on a wide range of issues–violence, racial slurs, bullying to name a few–and that is a good thing. Zero tolerance sends a clear message that the offending behavior is so serious it will not be tolerated under any circumstances. Unless Cher gets involved.

You probably saw and read (or ignored) the news about the school security guard in Madison, WI who was fired for using the n-word under a zero tolerance policy. Problem was, the security guard used the word to call it out after it was hurled at him and a school administer by an angry student. The security guard admonished the student to refrain from using the word, and used the word to state that. The zero tolerance policy was given as the reason for the termination. What could they do?

A lot. In this case student protest and national attention–including a tweet from Cher and an offer to pay the security guard's litigation costs– created enough embarrassment for the school district to change its mind. The security guard was brought back. But even with a zero tolerance policy, the employer could and should have investigated the context for the use of the prohibited word. Policies are frameworks and should be followed but not blindly. That is what the human resource function does–puts the human dimension on the problem.

The best practice is a clearly communicated policy and consistent, rational application. We can help.

Oh and that Cher song ear-worm you have now? You're welcome.

Festivus and Religious Accommodation for the Rest of Us

It is always a good day when you can use a Seinfeld reference and who doesn't love Festivus? The invented holiday on December 23rd for those who do not celebrate traditional ones like Christmas or Hanukkah. The Airing of Grievances is all fun and games until an employee asks for time off to celebrate. Then what?

Under Title VII, an employee must accommodate sincerely held religious beliefs unless doing so would create an undue hardship for the employer. As straight forward as that reads, accommodating religious beliefs can be tricky. Under Title VII religion is broadly defined, and courts and the EEOC have extended it to "new, uncommon, nor part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical and unreasonable to others." (Oh and accommodation does not just apply to time off: religious dress or grooming can be in the mix.) As long as the employee has a belief in a religion with ideas about "life, purpose and death," it passes muster as a religion requiring accommodation.

What if your Festivus practicing employee's belief does not seem "sincerely held" to you? Tread cautiously here unless you have solid information to the contrary. Like the time my colleague sat behind an employee taking his religious day at the Red Sox game. Otherwise the accommodation should be granted unless…

To do so creates an undue hardship. Would security or safety be at issue? Can the accommodation be made with de minimis cost (Latin *and* Seinfeld in one post!)? If so the accommodation should be granted. Do you have rules or a collective bargaining agreement with procedures for requesting time off? You can enforce those procedures if they are done evenly.
Don't despair. There is a lot of joy to be had in the holiday season. And you can call us. We can help.

McDonald's: Not Everyone is Lovin' It

McDonald's has been under pressure to beef up its anti-harassment policies and create a better work environment. In September, dozens of local officials from 31 states wrote an open letter demanding an end to harassment and employees staged walk outs. McDonald's has launched a large scale sexual harassment program, including an anonymous hotline. Now McDonald's C-suite Execs are dropping like fries. Recently two higher ups left. Then the CEO was terminated after admitting to a "consensual" relationship with an employee. Yesterday, the Chief People Officer resigned. It looks like the only happy thing at McDonald's is their kids' meal.

OK, fast food puns aside, McDonald's has a serious problem. While the franchise is trying to address systemic harassment of employees, its CEO has a relationship with one. Never ever a good idea. McDonald's has a policy prohibiting such relationships. Yet even without a policy, the power difference between a CEO and an employee calls the question: can that relationship actually be consensual? The actions by the ex-CEO might explain why McDonald's has a huge harassment problem.

The biggest lesson from the #Metoo movement: culture starts at the top. If the CEO does not follow the company rules, that message resonates above all else. Regulations and training lose their power. Case in point–Harvey Weinstein behaved egregiously in a state that had the most stringent sexual harassment laws at the time, California. In McDonald's case, all the sweeping programs in the world (which began just weeks ago!) could not succeed if the CEO flouted the rules.

As McDonald's itself has said: The Simpler the Better. Everyone has to play by the same rules.

If you would like us to help you with policies or training, we can help.

Profanity on the Job Examined

The National Labor Relations Board recently asked for briefs to consider a thorny issue: are profanity and slurs protected speech under the NLRA? Historically the NLRB has allowed very saucy language by workers as part of their protected activity rights under Section 7. While more states and case law address workplace bullying and hostility, the NLRB has continued its long-standing practice of protecting some awful speech. A few examples of the NLRB standards include allowing racist language on the picket line and an employee telling a manager to shove his idea up his…rhymes with pass. Under state and federal laws, employers must protect employees from harassing and discriminatory language *and* allow the same language by an employee if the activity is protected under Sec 7. Is your head about to pop off yet?

Let's do a quick refresh of Sec 7 concerted protected activity:

- Applies to all employees, union or not
- Must be for the "mutual aid or protection" of a group of employees or a representative of employees
- Factors considered when evaluating protected activity: place, subject matter, nature of outburst and whether outburst provoked by unfair labor practice.

In the past, the NLRB has construed these standards broadly. Will that change? The hope is the Board's call for briefs will ~~knock some sense into them~~ alleviate the rock and a hard place prior decisions have created for employers. Fingers crossed.

Of course the best practice is to have well drafted policies clearly outlining acceptable speech and behavior, which are uniformly enforced– like our clients do. No? Call us. We can help.

General Counsel's Office Hours

Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.