

An investment in knowledge pays the best interest.
- Benjamin Franklin

HUMAN RESOURCES INTELLIGENCE

August 29, 2011

Sexual Harassment: Posting Alone Won't Stand Up in Court

Just publishing a policy statement on employee sexual harassment is not a sure foil for lawsuits or liability. Some employers believe and act as if the U.S. Supreme Court's rulings that an employer has a complete defense to liability for certain sexually harassing conduct if the company can show that it took reasonable steps to prevent and correct the harassment; and that the employee failed to take reasonable advantage of these opportunities provided by the employer.

An anti-harassment policy poster on the premises or in an employee manual is not enough to avoid liability. Recent decisions suggest that an employer can meet its burden to show that it took reasonable efforts to "prevent and correct" harassment only if it also trains and actively involves management in the enforcement of the policy.

In a recent case, *Winchester v. National Mutual*, the court held that the employee could proceed to trial since the only step taken by the company to "prevent or correct" the harassment was the publication of an anti-harassment policy. Com-

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Good common sense suggests that employers take steps to avoid liability by re-issuing their policies, reviewing the policies with all managers, and holding training programs designed to increase awareness of the illegality of harassment.

Writing and posting a policy alone will not meet the new standards articulated by the courts. ❖

Alphabet Soup—Stay Out of It... It's Hot!

Under the rubric of "what you don't know CAN hurt you," we would like to share with employers some of the recent "alphabet soup" of regulations that local, state and federal labor regulators have cooked up, including complex, time-consuming and costly employment-related rules, regulations and fil-

ing requirements requiring unerring compliance. Violators potentially face significant penalties and fines and, in some cases, even prison. Yes, be concerned for real.

Continued on the next page...



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Alphabet Soup continued...

COBRA

Failure to comply properly is subject to monetary penalties and lawsuits, and is jointly enforced by the IRS, the Department of Labor, and the Department of Health and Human Services. The IRS may assess an excise tax penalty in the amount is \$100 per day of noncompliance for each individual to whom the failure relates. The DOL may bring a civil action against an employer to enforce these requirements. HHS can impose civil penalties up to \$100 per violation, with the total amount imposed on a person for all violations of an identical requirement during a calendar year not to exceed \$25,000. Criminal penalties may apply, and plan participants and beneficiaries may bring private lawsuits.

ERISA

The Employee Retirement Income Security Act of 1974 establishes minimum standards for pension plans in private industry and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans. Penalties for the failure to file annual reports are assessed at a rate of \$300 per day up to a maximum of \$30,000 per year for each plan year filing. The assessment is cumulative: for example, if you failed to file the 1990 annual report for 5 years the penalty for that one filing could be as much as \$150,000. Even if filed, but deemed to be done so incorrectly, it may be rejected, potentially subjecting the plan administrator to civil penalties not to exceed \$1000 per day.

WTPA

The Wage Theft Prevention Act amends New York Labor Law to provide new protections for employees in New York, as well as stiffer penalties for employers who fail to pay their employees overtime or the minimum wage.

Specifically, the Act now permits liquidated damages of up to 100% of the total amount of wages due. This means that employees may be entitled to recover twice what they are owed in wages and overtime.

ADA

The Americans with Disabilities Act of 1990 is a wide-ranging civil rights law that prohibits, under certain circum-

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stances, discrimination based on disability. It affords similar protections against discrimination to Americans with disabilities as the Civil Rights Act of 1964, which made discrimination based on race, religion, sex, national origin, and other characteristics illegal.

Failure to comply affords such remedies as available under Section 505 of the Rehabilitation Act of 1973. Courts may order entities to make facilities accessible, provide auxiliary aids or services, modify policies, and pay attorneys' fees.

CHIPRA

The Children's Health Insurance Program Reauthorization Act of 2009 requires employers with group health plans in states that provide the premium assistance subsidy to provide written notice to their employees informing them of such subsidies.

Failure to comply with this notice requirement may result in penalties of up to \$100 per day, per violation, with respect to any employee.

ADEA

The Age Discrimination in Employment Act of 1967 forbids employment discrimination against anyone over the age of 40 years in the United States.

Failure to comply can result in reinstatement and back pay for employee or damages if reinstatement is not feasible and/or employer's violation is intentional.

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