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#METOO

WHAT IT MEANS FOR YOUR BUSINESS



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According to the U.S. Equal Employment Opportunity Commission (EEOC), the number of workplace sexual harassment claims filed in the wake of the #MeToo movement has risen dramatically.

The EEOC, which is responsible for enforcing civil rights laws in U.S. workplaces, reported receiving an increase in sexual harassment complaints of more than 12 percent in the 12 months ending Sept. 30, 2018.

During that same period, the EEOC filed 41 lawsuits involving alleged sexual harassment – a 50 percent increase over the preceding year.

Even with that, the issue of workplace harassment is far underreported to the EEOC. Based on a 2016 report by the agency, nearly 70 percent of people harassed at work do not file a charge with the EEOC – particularly, it would seem, by those who work for small businesses.

Part of the reason for the lack of reporting in small businesses is perhaps because, unlike their larger counterparts, small companies are less likely to have a formal sexual harassment policy on their books. According to a CNBC/SurveyMonkey Small Business Survey of more than 2,000 small-business owners, half of organizations with fewer than 50 employees have a formal sexual harassment policy. And, among companies with fewer than five employees, only 39 percent have such a policy. On the other hand, among companies surveyed with 50 or more employees, 85 percent reported having a formal sexual harassment policy.

So, what does all this mean to a business owner, especially the owner of a small business?

Receiving a complaint from an employee who alleges to have been sexually harassed while on the job is both a serious and delicate matter. Sexual harassment can range from frequent, inappropriate sexual suggestions to coerced sexual relations, from insulting or derogatory comments to physical assaults. Sexual harassment is undesirable, inappropriate sexual attention at work, including:

- Unwelcome, unwanted, and/or uncomfortable sexual advances or conduct
- Requests for sexual favors

- Other verbal or physical conduct of a sexual nature

Harm caused by any harassment – sexual or otherwise – is often extreme, including humiliation, loss of dignity, psychological (and sometimes physical) injury, and damage to professional reputation and career.

There are many actions and behaviors that leave no doubt that harassment has occurred. But, where behavior is not so blatant, the question of defining how a reasonable person would interpret the behavior becomes very important.

Harassing behavior is determined by the perspective of the person who is the target of harassment and the perspective of any witnesses. The perception of the alleged harasser that there was no intent to offend another person does not legitimize that person's behavior. Lack of intent is not a defense to a claim of harassment.

Employers must determine how to respond to a harassment charge, how to investigate the allegation, and what guidelines will be used to assess the validity of the claim.

At the end of the day, the employer's response to the charge can have a dramatic effect on whether or not the employer is found liable for the alleged behavior if the complaint reaches litigation. For a small-business owner, the situation could be magnified if the owner's company is similar to the two-thirds of those small business in the Small Business Survey who reported having no official human resources professional, leaving the owner responsible for receiving and investigating harassment claims.

Federal law exempts companies with fewer than 15 employees from being required to have a sexual harassment policy in place. However, because individual state laws vary regarding sexual harassment policy requirements and the potential damages to a company's financial situation and reputation, it's in the best interest of all businesses – regardless of size – to implement a formal sexual harassment policy.

Certainly there are times when misunderstandings occur among employees, but harassment of any kind in the workplace should not be tolerated. To help protect your business and your employees in the event of a sexual harassment claim, you should develop and implement

a company-wide program that addresses workplace harassment. The program should include policies that outline workplace conduct. And, it is your company's legal duty to communicate those policies and ensure all employees understand and adhere to them.



Your employees should feel they can report harassment without threat of retaliation. Your program should include reporting procedures that include at least two channels through which employees can report harassment for situations in which one of the channels is compromised or is involved in the alleged harassment.

Also included in your program should be a workplace harassment education program where all employees – from the CEO on down – are required to attend and sign not only proof of participation but an agreement of understanding and willingness to comply with company standards. The education program should be an annual requirement of employment. Such a program can demonstrate to a court that your company makes a concerted effort to prevent harassment in the workplace.

The education program should include training of specified employees who will receive sexual harassment claims and who will conduct investigations to determine whether or not the allegations are valid.

Should a claim of sexual harassment occur, those trained employees should:

- Protect private information in the event the complaint becomes subject to litigation
- Consider any conflicts of interest between the employer, alleged harasser, investigator, and others involved in the investigation
- Seek legal guidance
- Maintain confidentiality throughout the investigation among all parties involved

- Keep written records of at least the following:
 - Details of the complaint
 - Preliminary investigation plan
 - Responses to the complaint
 - Witness statements
 - Adjustments or amendments made
 - Investigators' findings
 - Conclusions as a result of investigations
 - Discipline administered
 - Harasser monitoring efforts

Detailed record keeping is vitally important. As the saying goes, "If it isn't documented, it didn't happen." In other words, regardless of what actions you take following a harassment claim, it's of little consequence if not appropriately documented.

If a lawsuit is brought against your company, you will need to provide proof of the facts in the form of documentation. Your company will need to offer proof that proper steps were taken to avoid problems, to educate employees about their rights, and that when the issue took place, the company responded quickly and appropriately.

INSURANCE CONSIDERATIONS

Most General Liability insurance policies DO NOT cover employment practice-related claims. So, it is essential for companies to consider an Employment Practice Liability Insurance (EPLI) policy to protect from lawsuits brought by employees, directors, and officers, volunteers, and even third parties.

Even lawsuits that are thrown out of court or won by your company can be expensive because of the high cost of securing legal defense.

Having a properly written EPLI policy will protect your company along with a defense counsel specializing in employment practice law.

To learn more about coverages from VGM Insurance Services or to speak with one of our business insurance experts, call us at **800-362-3363**, or email us at info@vgminsurance.com.