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Strategies for Preventing Sexual Harassment

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For many years, employers have sought to prevent sexual harassment in the workplace by implementing anti-harassment policies, training, grievance procedures, and monitoring systems. However, the effectiveness of these measures has been called into question in recent months by the litany of news reports of sexual harassment and assault by public figures at a number of large and sophisticated employers,¹ suggesting that, notwithstanding these practices, sexual harassment continues to occur at higher rates than previously had been acknowledged. Employers rightfully have turned to the employment bar seeking advice on what more they can do, beyond what the law may require, to further the goal of preventing sexual harassment in the workplace.

A starting point for any employer would be a loud and clear statement from senior leadership that establishes or bolsters the employer's dedication to the core value of respect for the individual. By establishing or bolstering that core value, employers can then choose from a toolkit of options appropriate to the employer's particular circumstances that promote a workplace culture focused on merit and individual performance, rather than on prohibited criteria such as sex. By promoting a respectful and performance-based culture, we believe employers are best able to identify and quickly address behaviors that constitute or may lead to sexual harassment (or bullying, or any other inappropriate conduct for that matter), and ideally before such behaviors become severe or pervasive.

In this article, we provide some suggestions regarding how employers might want to assess their workplace cultures, and then we offer thoughts regarding common issues leaders should consider in seeking to improve their cultures.

Fact Gathering

There is no "one-size-fits-all" solution to the problem of sexual harassment in the workplace. But experience shows that every employer has strengths and weaknesses in how it addresses the issue, and employers should seek to build upon their strengths and aggressively address their weaknesses. Towards that end, employers should gather as much data as reasonably possible and seek advice from counsel and consultants to further expand the base of knowledge and understand the particular problems they face and possible solutions. For example, employers may wish to conduct interviews of select employees, focus groups, upward reviews, or an employee survey

to gain diverse perspectives on how the organization could improve. If available, employers should review the results of exit interviews of departing employees and, if not already included, add to the list of questions posed whether the employee had any concerns with how the company addressed misconduct in the workplace. Employers who offer severance benefits may wish to include in their separation agreements a clause stating that the departing employee has disclosed all improper conduct of which the employee is aware. Such a clause may prompt departing employees to disclose potentially valuable information not previously reported.

Another important source of information is the corporation's human resource records. Employers should review existing records of employee complaints to assess whether they expose any weaknesses in specific offices or of specific individuals who may be causing disproportionate levels of grievances. To the extent an employer has not formulated a regular practice of monitoring and acting upon such weaknesses, it should consider having a senior HR manager periodically conduct such an internal self-assessment. Employers also should review existing complaint channels—for example, complaints received by supervisors, by HR, and through a hotline—to confirm that the organization documents and investigates all complaints consistently and timely.

After obtaining the relevant data from one or more of the above sources, employers should focus carefully on anecdotes of inappropriate behavior and seek to identify weaknesses, perceived or actual, in the employer's practices for responding to such behaviors. However, employers should be mindful of the possibility of creating potentially discoverable documents and, prior to implementing any proposal outlined above, be committed and prepared to act on the information learned to make this process worthwhile.

Implementing Change

Following whatever fact-gathering process is appropriate for a particular employer, the employer

should carefully assess, ideally with counsel, what steps it should take to improve existing practices and/or to remedy any actual or perceived weaknesses. What follows are a few issues that arise with some frequency, and which we believe employers should carefully consider as they determine what changes they believe will prove most effective.

A significant challenge in preventing workplace harassment is the misperception that different standards apply to different individuals depending on the perceived value someone brings to the organization. Some employees, including managers, may come to believe that the employer will excuse inappropriate behavior by a "friend of the CEO" or a "rainmaker" who produces a significant amount of business for the company. The touchstone here is the company culture, because the type of culture fostered by senior management will dictate how employees interact in the workplace. Leaders need to reflect thoughtfully with their senior HR colleagues on questions such as: Are any senior executives perceived to be untouchable? How has the organization responded in the past to the "superstar harasser"? These are the types of culture issues that create risks, even if not rising to the level of a violation of law. Candid self-assessment and honest answers to these questions are an important predicate to corrective action.

Of course, if senior leaders tolerate misconduct by a top performer, that single act can significantly hamper an employer's efforts to build a culture of meritocracy and respect, regardless of other measures the employer has taken to prevent workplace harassment. If employees, correctly or incorrectly, perceive that management tolerates inappropriate workplace behavior from certain individuals, they may become reluctant to report misconduct, thus causing inappropriate behavior to persist or become more pervasive. Leaders committed to making their workplace one in which everyone thrives based on their own merits must make clear that everyone is governed by the same rules, regardless of any individual's position, tenure, or economic contributions to the organization.

Sometimes speaking up about misconduct in the workplace is easier said than done, particularly when an employee is concerned about the potential negative consequences that reporting could have on his/her career. For example, if a senior leader hears someone engaging in so-called “locker-room banter” or telling inappropriate jokes, instead of acknowledging or addressing the issue on the spot, or soon thereafter in a confidential setting, s/he may be inclined to simply let the moment pass to avoid the potential for conflict. Employers should encourage leaders to take action in response to inappropriate behavior in the moment to dispel any fear of negative repercussions. However, this type of behavior may not come easily to all managers. Companies should therefore consider including in their training programs a specific focus on bystander intervention. If, after a manager has received sufficient training, s/he repeatedly declines to address workplace misconduct, the employer should consider whether counseling is appropriate, or, if the behavior persists, taking disciplinary action. The behavior of senior leaders as cultural beacons to promptly identify and report on incidents of inappropriate behavior is one of the most critical lines of defense and protection against legal claims. In a truly healthy workplace culture, all employees, and especially leaders, must believe that they have an obligation to stand up and do the right thing, and that senior management will support them for doing so.

There may be times when an employer’s goal of establishing a culture of respect appears to conflict with other important goals, such as maintaining valuable client relationships. For example, a customer may not appreciate being asked to refrain from making inappropriate comments to female employees, so bringing this to his attention may result in a deterioration of that relationship. In such cases, an employer may seek the advice of outside counsel and/or consultants for recommendations on addressing the potentially many competing interests at play to ensure its leaders take actions consistent with the organization’s obligations as well as its guiding principles. But regardless of the many factors at play in determining how best to address

inappropriate workplace behavior, for the employer to reach that point, senior leaders must be role models for the organization by raising the misconduct as an issue to be addressed.

Employers also should be attentive to any backsliding by leaders in mentoring, sponsorship, or mere interaction in the workplace between men and women. The Chief Judge of the U.S. District Court for the Southern District of New York cautioned an audience in December about what is sometimes known as the “Graham Rule”—“that a man should make sure he is never alone in a room with any woman other than his wife for any reason—including perfectly legitimate business reasons.”² Judge McMahon said such a rule denies opportunities to women “for mentoring, for networking, [and] for assignment to the best deals.”³ Given the profound ramifications a lack of mentoring, networking, and sponsorship can have on women’s careers, avoiding interactions with women undercuts the goal of establishing a culture of respect and equal opportunity.

This behavior also may inhibit an employer’s goal of preventing sexual harassment. Women today continue to have disproportionately fewer leadership roles in business.⁴ Commentators have suggested that having more women in power would reduce the instances of sexual harassment.⁵ Of course, many employers have recognized and sought to rectify the imbalance in senior leadership, and it has proven to be a difficult challenge. Companies should continue working to find ways to promote more women into leadership roles, including by encouraging those currently in leadership to be equally open to working with and sponsoring both men and women. One strategy could be seeking to promote gender parity at all networking, business development, and other business-related social events. Senior leaders could take the same approach when creating teams, committees, or any other group tasked with a particular project or assignment. Actions like this taken by an organization’s senior leadership demonstrate to the workforce at large that the goal of establishing a culture of respect is one of leadership’s

top priorities. And if it is a priority for leadership, it will hopefully become a priority for all employees.

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¹ See e.g., Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME (Jan. 26, 2018, 4:21 PM), available [here](#).

² Colleen McMahon, SDNY Chief Judge Colleen McMahon Takes on Sexual Harassment, N.Y.L.J. (Dec. 12, 2017, 8:39 PM), available [here](#).

³ *Id.*

⁴ See, e.g., Madeline Farber, *Board Diversity at Fortune 500 Companies Has Reached an All-Time High*, FORTUNE (Feb. 6, 2017), available [here](#) (noting that, despite an increase in diversity, men held almost 80% of the board seats of Fortune 500 companies in 2016).

⁵ See, e.g., Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do.*, N.Y. TIMES (Dec. 11, 2017), available [here](#) (“Research has continually shown that companies with more women in management have less sexual harassment.”); Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, HARVARD BUS. REV. (Nov. 15, 2017), available [here](#) (“We already know how to reduce sexual harassment at work, and the answer is actually pretty simple: Hire and promote more women.”).

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