Expanded definition of sexual harassment may be wave of future

Laws recently enacted by the state of New York may signal a new standard for deciding what constitutes sexual harassment.

THE LAW Title VII of the Civil Rights Act bars discrimination against employees based on their sex. Under the law, harassment is considered a form of discrimination.

The law holds employers responsible for the actions of managers and supervisors under a legal principle known as *respondeat superior*. Employers are ultimately responsible for employees who harass and discriminate if they knew or should have known the behavior was occurring.

Courts have generally held that the harassment must be "severe or pervasive" in order for victims to win any damages. Critics claim that standard lets harassers off the hook and keeps victims from coming forward with their claims.

WHAT'S NEW In a move that may foreshadow tougher laws, the state of New York has enacted what many consider to be the most stringent anti-harassment statutes yet.

Claimants no longer need prove that the harassment was "severe or pervasive."

New York employers will have to develop new anti-harassment policies and training. The laws also open an avenue for independent contractors to bring sexual harassment charges.

The new laws apply to both public- and private-sector employers. Private employers that fail to comply will be ineligible to bid on state contracts.

The laws also affect how employers handle sexual harassment complaints. In most cases, employers will be unable to enter into confidential settlements. Recent federal tax changes prevent employers from deducting payouts made under confidential settlements of sexual harassment cases.

Employers will also be limited in requiring harassment complaints to be arbitrated. Plaintiffs will be more likely to get a hearing before the New York Human Rights Commission or the federal EEOC. Both bodies run conciliation services designed to settle charges before going to court. The impetus for employers to settle in these venues will be stronger than ever before.

Public employee wrongdoing

The new laws also establish a public fund to pay settlements when the perpetrator is a state employee. That doesn't mean the employee is off the hook. Within 90 days of the start of payments, the state may attach the perpetrator's paycheck to obtain reimbursement.

Outlier or roadmap to the future?

The New York laws are the first to move beyond the “severe and pervasive” standard and provide protections for independent contractors. Changes in other states may be on the horizon.

Last year 32 states debated some sort of sexual harassment legislation. In all, 125 sexual harassment-related laws were proposed in state legislatures across the country.

New York joins five other states and the District of Columbia in requiring at least some private employers to provide sexual harassment training. New York is one of 18 states that require state employees to have sexual harassment training.

HOW TO COMPLY One criticism leveled at the New York legislation was that it failed to clearly define sexual harassment. Defenders counter that a flexible definition is necessary to protect victims.

In other words, sexual harassment as a concept is evolving. Employers and employees need to learn the new language of sexual harassment.

The words once used to dismiss or trivialize harassment can now safely be redefined as harassment. Terms such as “innocent fun,” “horseplay” and “boys will be boys” fit this category.

The New York laws and their future progeny will drastically remake the workplace harassment landscape. The people at whom harassing behavior is directed now get to characterize it as harassment if they choose to. The perpetrators and apologists have lost the right to define misbehavior as innocent.

Employers have an obligation to listen to accusers. Investigations should start from the viewpoint that the accuser has at least as much credibility as the accused until evidence dictates otherwise.

Getting ahead of the curve

For employers in states other than New York, this legislation should be a wake-up call. Employers should review their anti-harassment training to ensure it speaks the new harassment language. Employers that do not currently provide anti-harassment training should start it.

This is also a good time to review your anti-harassment policies. Work with your attorney to ensure they comply with all applicable laws and court decisions. Employers that operate in multiple jurisdictions should probably adopt the toughest standard required in any of them.

Employers should ensure their employees know where to file harassment complaints. There must be at least two avenues open for harassed employees to file complaints.

Employers should establish who will conduct workplace investigations when a complaint is filed. Whether the investigation is conducted internally or externally, the investigator must know how to remain impartial and what information may be kept confidential.

Finally, be prepared to address all kinds of harassment. Harassment based on race, color, religion, national origin and disability are equally illegal. Whatever policies are put in place for sexual harassment apply to those forms as well.

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