

Employer risk alert: Holiday harassment

It's that time of year again: Update your handbooks and conduct your harassment training — and get it done before the office holiday party.

Every employer in New York State, regardless of size, is required to provide harassment training to each of its employees every year. This is not news. What is often unheard of, however, are the many and unexpected ways that you as an employer can end up exposed to liability when you fail to provide that training.

Loose lips

Holiday party refreshments usually include adult beverages of some kind. Adult beverages can lead to childish behavior, or at least behavior that is less inhibited than workplace conduct. And while everyone knows that you are not supposed to grope or grab (or really touch at all — just keep your hands to yourself at work), sometimes the biggest problem lies with people who suddenly feel comfortable speaking their mind after the cocktail hour.

Dirty jokes, racial slurs, and comments about people's appearance are bases for harassment lawsuits and can be just as much of a problem for employers as physical contact.

While under the federal standard ("severe

and pervasive") such an indiscretion might slide, the New York standard is much lower and sometimes a single comment can be enough to impose liability. Especially if employees are not trained to recognize and address it.

Dirty dancing

Actions speak louder than words. But in the sexual harassment arena, they come with the same penalties. And while people have the right to enjoy themselves, seemingly innocent behavior can go too far fast — and staff needs to know those limits, the consequences, and their affirmative obligations to intervene, under the law.

This is also important because, as mentioned below, their behavior impacts those witnessing it, and employers are responsible to those employees as well.

Drunk dialing

Exposure to liability does not end because the party does.

When people are dealing with colleagues, they are, for the purposes of the human rights laws that govern harassment, always at work, and all the same rules apply.

That means that social media posts when you are connected with co-workers, and text messages sent from home late at night to a personal cell, for examples, pose the same threats as words spoken in person at the office.

The group effect

Colleagues getting cozy at work is a problem. This is no less true at the office party.

Legally, it may be found hostile and harassing to those witnessing it. Often more problematic, though, is that if employees perceive favoritism because of the relationship, it opens their employer up to charges of disparate impact and discrimination.

Red flags

There are situations that come across my desk again and again that, just like sexual harassment and the holiday season, are predictable. The problem is that if employees are not educated on the law, they do not recognize them, and allow situations to fester and exacerbate.

A common such error recently pre-

sented itself. A supervisor refused to escalate a report of sexual harassment.

Why? She believed that, because the incident had not occurred at the office, it was not her responsibility. She was flat out wrong.

A work event off premises — or off continent — or even off planet — is a work event. The behavior at that event, regardless of time zone or address, is covered by the rules of the workplace. That includes the prohibited behavior as well as the rules for following up on it. And the law includes mandatory reporting.

The penalties

In addition to opening employers up to lawsuit liability, failure to provide training comes with monetary fines.

For the state, the Department of Labor enforces the penalties for failure to comply. Failure to provide the annual training can lead to penalties of up to \$100 per person per violation. Violations include not only failure to conduct the training, but also for failure to provide a policy, and/or to provide a complaint form.

In the city, the Commission on Human Rights enforces their penalties which can amount to as much as \$250,000.

The commission also hears cases of discrimination whereas in the state, it is the Division of Human Rights. At those hearings, failure to provide the required training, policy, or complaint form can lead to adverse inferences and presumptions that there has been discriminatory behavior, and those forums have the power to impose fines and award damages.

Some closing advice

Get the policy drafted and distribute it. Include a complaint form that meets all the requirements, including at least two people to whom employees can report complaints.

And Do The Training. But not just to avoid the penalties. Spend the little time it takes to make sure people understand the rules and the stakes. Some of them are subtle but can inadvertently cost dearly.

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