

Preventing Sexual Harassment: Lessons from Hollywood, the Governor's Mansion, and the Boardroom

By **Julie Levinson Werner** and **Lauren M. Hollender**

The fall from grace in the #MeToo era continues; this time, it's Governor Andrew Cuomo. This past week the New York State Attorney General released a report concluding that Cuomo had sexually harassed multiple women and engaged in a pattern of unwanted touching and inappropriate comments in violation of state and federal laws. The 165-page report found a culture within the executive chamber that contributed to "conditions that allowed the sexual harassment to occur and persist" and an environment that normalized and overlooked the Governor's inappropriate conduct. The report serves as a cautionary reminder to employers to actively confront and combat sexual harassment in the workplace. While not all bad behavior can be avoided, an employer should be proactive and knowledgeable about how to handle misconduct when it occurs. Below is a checklist to help employers prevent sexual harassment claims and minimize the risk of related litigation.

Know the Law

Sexual harassment is actionable under federal law when conduct taken because of an individual's gender is "sufficiently severe or pervasive to alter the conditions" of that individual's work environment. Determining whether conduct is sufficiently "severe or pervasive" requires a factfinder to assess the totality of the circumstances. Under the federal standard, a single instance of misconduct is unlikely to create a basis for liability unless it is sufficiently egregious.

However, the legal standard for sexual harassment claims is significantly lower under state and local laws. For example, in New York, an employer can be held liable if an employee can prove she was treated "less well" at least in part because of her gender. Under this standard, even a single comment or action may be actionable in the proper context. Once a plaintiff establishes a claim, an employer may avoid liability only if it is able to prove the alleged

harassment amounted to nothing more than "petty slights or trivial inconveniences."

Implement and Enforce Policies and Procedures Prohibiting Sexual Harassment

It is imperative that an employer implement and enforce policies prohibiting sexual harassment. Companies should:

- Post required notices in the workplace. Employers are required to comply with federal, state, and local requirements to advise employees of their rights to be free from discrimination and harassment in the workplace. Given the increase in remote working arrangements, employers should consider posting these notices on their intranet or through other electronic channels.
- Create and maintain a policy prohibiting unlawful harassment in the workplace that:
 - Is immediately available to employees upon hire and included in the employee handbook.
 - Identifies the name and contact information of the person to whom employees can make complaints of discrimination and harassment. Ideally employees should have access to at least one male and one female reporting contact and one person who is not their immediate supervisor.
 - Encourages employees to report incidents promptly either orally, in writing, or through use of an employee hotline.
 - Requires supervisors to report all harassment complaints and any harassment that they observe or know of, even if no one is objecting to the harassment.
 - Includes a complaint form (required in New York).
 - Describes the procedure for the timely and confidential investigation of complaints.
 - Explains the investigation process.
 - Prohibits retaliation against anyone who complains of sexual harassment or testifies

or assists in a harassment investigation or proceeding.

- Enforce policies consistently for all employees.
- Refer all sexual harassment complaints to designated individuals who should:
 - Have written guidance or training on how to effectively conduct and document investigations.
 - Oversee the investigation process or coordinate with outside counsel.
 - Be capable of testifying about the process should litigation follow.
- Obtain acknowledgments: either a signed acknowledgment or proof of electronic receipt from each employee who receives the policy.

Train Employees

Anti-harassment training is an important way to communicate an employer's commitment to preventing unlawful harassment and a valuable tool for providing awareness about acceptable workplace behavior. Annual training is mandatory in New York and strongly encouraged in other locations. Employers should:

- Design training that is compliant with federal, state, and local laws.
- Provide examples of conduct that can be considered sexual harassment, including the more subtle grounds for potential hostile work environment claims.
- Train supervisors on their additional responsibilities to receive and report complaints and to serve as role models.
- Explain how and to whom employees can make complaints of sexual harassment and the employer's anticipated investigation process.
- Provide an opportunity for employees to ask questions and seek additional guidance.

Promptly Investigate Complaints

An employer is legally required to timely investigate allegations of harassment so that it can take appropriate corrective action where necessary. A prompt response can potentially reduce an employer's liability exposure. Employers should:

- Schedule interviews of the complaining and accused employees and witnesses.
- Conduct investigation interviews in a private place, away from other employees and management.
- Explain the employer's anti-retaliation policy to every person interviewed as part of the investigation, and encourage them to report any retaliatory behavior they experience.
- Take interim steps to separate the complaining and accused employees, if possible, while the investigation is ongoing.
- Keep investigation details confidential to the extent possible.
- Document the investigation, and reach a conclusion that is supported by the evidence.

Take Prompt Corrective Action

Once an investigation is completed, the employer must take appropriate corrective or disciplinary action:

- If the results of the investigation are inconclusive, the employer should notify the participants accordingly but also remind them of the company's policies and consider other proactive measures to reduce risk of future incidents between the parties.
- If the employer determines that its anti-harassment policy has been violated, the company must take appropriate action to effectively end the harassment and provide a reasonable response to the inappropriate conduct. Document the employer's response in writing, and follow up with the complainant to let the person know the situation has been addressed.

Avoid Shareholder Derivative Suits

Avoiding a shareholder class action or derivative lawsuit is another good reason to protect against workplace misconduct. Shareholder suits have been filed against a number of companies based on workplace harassment and sexual misconduct allegations over the past few years. Some of these cases are class actions for securities fraud that accuse management of lying to investors about the extent of sexual harassment taking place at the company or the robustness of the company's systems for policing and addressing such misconduct. Stockholder derivative litigation, on the other hand, generally involves allegations that a company failed to safeguard against misconduct, causing a decrease in company value. In some lawsuits, shareholders allege that corporate boards have ceded too much oversight to management, allowing harassment and discrimination claims to persist, or have willfully ignored company misconduct. Boards of directors need to be thoughtful and proactive in establishing mechanisms to address corporate culture, as well as the representations they make about it, to avoid an additional layer of legal liability.

Lowenstein Sandler's Employment Practice Group represents employers with respect to claims of sexual harassment, discrimination, retaliation, and other alleged violations of labor and employment laws. Group members routinely draft and review employer policies, conduct independent investigations of harassment claims, and present diversity and anti-harassment trainings. We would be pleased to assist as needed.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

JULIE LEVINSON WERNER

Partner

T: 212.419.5864 / 973.597.2550

jwerner@lowenstein.com

LAUREN M. HOLLENDER

Counsel

T: 973.597.2530

lhollender@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

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