nerej
CELEBRATING 55 YEARS

Sexual harassment in the workplace an employer's primer to being proactive - by Scott Regan

February 16, 2018 - Construction Design & Engineering

Scott Regan

In the current climate, all employers—including developers and construction companies—need to take steps to educate their workforces about and protect them from sexual harassment. In many cases, existing policies and training are inadequate and should be updated. As employers make this issue a priority, this primer will be useful.

What is sexual harassment?
At its core, sexual harassment is a form of sexual discrimination that is unlawful under Title VII of the Federal Civil Rights Act of 1964 and the Mass. Fair Employment Practices Act, Mass. General Laws, c. 151B. These laws make it illegal for any employee to sexually harass another employee.

Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that interferes with an individual's ability to work because it creates a humiliating, hostile, or sexually offensive work environment. In addition, sexual harassment includes using an individual's acceptance or rejection of such conduct to make employment-related decisions, e.g., refusing to promote an employee if he or she does not acquiesce to a sexual advance. Though not every inappropriate comment, joke, gesture, etc., constitutes sexual harassment, it is imperative for an employer to promptly and properly respond to every complaint of sexual harassment.

How can employers be proactive?
The best way to eliminate sexual harassment in the workplace is to prevent it from occurring and/or take appropriate steps to correct harassment. Mass. General Laws, G. L. c.151B, §3A, which is stricter in many ways than its federal corollary, mandates employers with at least six employees to have well-developed policies against sexual harassment and to follow appropriate investigatory procedures. Even if an employer has fewer than six employees, however, one may still bring a claim for sexual harassment under G.L. c.214, §1C. Consequently, all employers should consider the policies and practices discussed herein.

Where an employer is legally required to have a sexual harassment policy, the policy must include, among other things, (i)the legal definition of sexual harassment in Mass., which is found in G.L. c.151B §3A; (ii)a description of the procedures an individual may follow if he or she believes that he or she has been subjected to sexual harassment in the workplace, e.g., filing a complaint internally and/or with the Mass. Commission Against Discrimination and/or the U.S. Equal Employment Opportunity Commission; (iii)providing a general overview of the employer's investigatory procedures; and (iv)confirming that any retaliation against an individual who complains about sexual harassment or cooperates in an investigation related thereto is unlawful and unacceptable to the employer.

In addition, Mass. law encourages employers to provide to their staff certain education and training concerning sexual harassment. Such education and training might prove particularly important, as Mass. law allows employers to be held directly liable for misconduct by persons with supervisory authority over a complainant and other third parties.

The potential for an individual to subject an employer to liability is one of many incentives for employers to take sexual harrassment policies, training, and enforcement seriously.
As indicated above, and under certain circumstances, Mass. law allows for the imposition of liability on an employer based on an employee's actionable sexual harassment, e.g., if the offending employee is a supervisor of the complainant and/or if the employer had knowledge about another third party's actionable behavior. In fact, Mass. law is so broad that employers may be liable for the sexual harassment of their employees by certain non-employees, such as customers, suppliers, independent contractors, or other third parties.

On the one hand, an employer's ability to show the existence and enforcement of cogent policies and practices could mitigate and/or eliminate an employer's legal liability.
On the other hand, an employer may face additional liability or scrutiny if he or she fails to take measures to prevent and/or address sexual harassment in the workplace. Unfortunately, it is all too common for an employer to overlook an individual's seemingly minor sexual misconduct or complaints related thereto until faced with a legal claim, which could subject an employer to punitive damages and other harm.

What should employers do when they receive a complaint of sexual harassment?
An employer should promptly investigate the complaint, even if the complainant asks that the complaint not be investigated. In doing so, the employer should designate a neutral, high-ranking, and competent individual to investigate the allegations objectively. An objective investigation should include but is not limited to (i) researching whether there is a prior history of complaints against the alleged harasser and (ii) interviewing the proper individuals, e.g., the complainant, accused harasser, and witnesses. An employer should endeavor to protect confidential information obtained during the investigation.

Depending on the fact-specific circumstances of each case and the employer's policies, an employer might consider interim measures, such as separating the alleged harasser from the complainant. If so, it is often good practice to move the alleged harasser away from the

complainant--and not vice versa--to avoid the appearance of retaliating against the complainant. An employer could also (i) place the alleged harasser on administrative leave, (ii) instruct the alleged harasser to stop the alleged conduct, and/or (iii) take other steps consistent with the company's policies and handling of other complaints.

In addition, the employer should thoroughly document the investigation and prepare a final investigatory report concerning the findings. The employer should not place such documents in an employee's personnel file. Instead, they should be placed in a separate file clearly designated as "Confidential."

The employer must ultimately determine what, if any, disciplinary/remedial action is necessary based on the investigation, policies, and proper handling of other cases.

Do not retaliate

An employer must not--under any circumstances--retaliate against an employee who files or cooperates in an investigation. In Massachusetts, underlying retaliation claims can survive even if a sexual harassment claim is ultimately found to be without merit in a legal proceeding. Thus, employers should be steadfast in prohibiting retaliatory behavior both in policy and in practice.

Scott Regan, Esq. is an associate of Fletcher Tilton PC Attorneys, Worcester, Mass.