Employer Best Practices Related to Anti-Harassment & Discrimination Policies & Claims

JULY 27TH, 2020
In Illinois, employers are required to provide sexual harassment prevention training for all employees

State of Illinois Training Resources:

State of Missouri Training Resources:
https://labor.mo.gov/mohumanrights/Discrimination/sex
Why is it important to have a written anti-harassment policy and a process for fielding complaints?

1. Maintains professional and appropriate work environment/corporate culture, key for company growth

2. Helps to establish a solid affirmative defense against claims that are made

3. Helps protect the bottom line, so long as there is a written policy in the employee handbook and training is documented

4. Clients demand a proactive policy - key to employee retention
Clayco trains on this policy at point of hire (through AXIS training) and every two years refreshing all employees.
Best Practices for Employers

1. Have a written anti-harassment policy
   • Policy should be clear and state that violations may result in termination of employment
   • See Clayco’s policy below

CLAYCO AND AFFILIATES - HARASSMENT-FREE WORKPLACE POLICY

It is the policy of Clayco Inc. and its affiliates (the “Company”) to provide a work environment that is free of any unlawful discrimination, including harassment that is based on any legally protected status. The Company believes in respecting the dignity of every employee and expects every employee to show respect for all of our employees, customers and suppliers. This policy forbids any unwelcome conduct that is based on an individual’s race, color, religion, sex, age, national origin, ancestry, disability, sexual orientation, marital status, military status, genetic information, or any other protected status. This policy forbids any employee, manager, supervisor, officer, customer or supplier to harass any employee, applicant, or contractor as prohibited by federal, state or local laws and as further prohibited by the Company.

Prohibited Conduct
Harassment can take many forms. The conduct prohibited by this policy, whether verbal, physical, or visual, includes any unwelcome conduct that is inflicted on someone because of that individual’s protected status. Among the types of unwelcome conduct prohibited by this policy are: epithets, slurs, jokes, pranks or negative stereotyping; threatening or intimidating acts; unwanted physical contact; obscene or harassing telephone calls, texts, instant messages, e-mails, letters, notes or other forms of communication; the circulation or posting of written or graphic materials that show hostility toward individuals as it relates to their protected status; and any conduct that may create a hostile work environment. This policy forbids, and the company will not tolerate, harassment regardless of whether it rises to the level of a legal violation and will take appropriate disciplinary action (up to and including termination) against any employee who violates this policy. The Company also prohibits general and visual harassment, including derogatory words, electronic communications (including emails, instant messages and texts), written or graphic material that is placed on walls, bulletin boards or elsewhere on the premises or that is circulated in the workplace that shows hostility or aversion towards any race, color, religion, sex, age, national origin, veteran status, marital status, familial status or disability, or any other legally protected status.
Sexual Harassment

Sexual harassment is an issue that deserves special mention and is not tolerated by the Company. Harassing conduct based on gender often is sexual in nature but sometimes is not. This policy forbids harassment based on gender regardless of whether the offensive conduct is sexual in nature. Any unwelcome conduct based on gender is also forbidden by this policy regardless of whether the individual engaged in harassment and the individual being harassed are of the same or of different genders.

Unwelcome sexual advances, requests for sexual favors, and other verbal, physical or visual conduct based on sex constitute unlawful sexual harassment when (1) submission to such conduct is made an implicit or explicit term or condition of employment, (2) submission to or rejection of the conduct is used as the basis for any employment decision, or (3) the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

This policy forbids harassment based on gender regardless of whether it rises to the level of a legal violation. Examples of gender-based harassment forbidden by this policy include (1) offensive sex-oriented verbal kidding, teasing or jokes; (2) repeated unwanted sexual flirtations, advances or propositions; (3) verbal abuse of a sexual nature; (4) graphic or degrading comments about an individual’s appearance or sexual activity; (5) offensive visual conduct, including leering, making sexual gestures, the display of offensive sexually suggestive objects or pictures, cartoons or posters; (6) unwelcome pressure for sexual activity; (7) offensively suggestive or obscene letters, notes or invitations; or (8) offensive physical contact such as patting, grabbing, pinching, or brushing against another's body.

Any violations of this policy may be reported to the Company’s Anonymous Reporting Hotline at 877 472 2110.
How AutoZone Avoided Liability in a Sexual Harassment Case

The U.S. Court of Appeals for the 6th Circuit, in the Autozone case, and the Supreme Court, have held that liability cannot be imputed to an employer for a manager’s alleged sexual harassment when:

1. The misbehaving manager/supervisor lacked decision-making authority over the employee (no firing or disciplinary authority); or

2. Even if decision-making authority over an aggrieved employee, the employer may escape liability for sexual harassment if:
   a. Employer exercised reasonable care to prevent and promptly correct sexually harassing behavior and
   b. the aggrieved employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.
How AutoZone Avoided Liability in a Sexual Harassment Case

The court found that AutoZone exercised reasonable care to both prevent and correct sexual harassment:

- The company not only posted an effective anti-harassment policy in the workplace, but also included the policy in its employee handbook, which it required every employee to read and acknowledge.

- The court stated that AutoZone was not responsible for their failure to read the handbook and that the company “exercised reasonable care by requiring employees to acknowledge their responsibility to read the policy by signing a form to that effect.”

- Further, the company took prompt and effective action after learning of the complaints, including transferring Paul and terminating him after conducting an investigation.

- While the company did its part to prevent and correct sexual harassment, the employees failed to take advantage of preventive or corrective opportunities in a reasonable amount of time. The employees’ undue delay in reporting the harassment meant 2-½ months went by before the company was informed of Paul’s actions.
Best Practices for Employers (continued from slide 4)

2. Have a clear reporting mechanism
   - Clayco - Reporting to immediate supervisor or next level supervisor/manager up to COO
   - Hotline for complaints published in the policy

3. Actions to document
   - Employees’ receipt of the policy (or employee handbook) at the time of hiring and when EHB is updated annually

4. Complaints received, how they were investigated, and any action taken by the company to reasonably address the complaint
   - Be careful to protect the privacy of the complaining party and the party that is the target of the complaint
   - Ensure any investigation is fair and impartial – get the facts

5. Action taken by the company in response to the complaint
   - Investigation including meeting with all parties involved and witnesses – confidential interviews by a neutral party
   - Document the internal investigation (discoverable unless investigation is by counsel)
   - Range of actions from Apology By Offending Party + Private Retraining for milder inadvertent or unintentional violations to Termination for certain extreme or intentional/willful violations
   - Management messaging of commitment to a safe workplace