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Sexual Harassment 2.0: A Guide to the New Rules

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Most employers and workers believe they know all about sexual harassment law. And for a long time, they were right. But recent changes—particularly in New York City—are significant and far-reaching. Businesses that want to steer clear of litigation must educate themselves anew, get the right policies in place, spread awareness throughout their organizations, and handle every accusation with authority.

In the ever-changing world of employment law, the rules concerning sexual harassment have stayed relatively stable. Title VII of the Civil Rights Act of 1964 bans employment discrimination based on race, color, religion, sex, or national origin. Sexual harassment became defined as one form of discrimination based on sex. And for a couple of decades, it was big news. High-profile cases became front-page stories.

Employers and HR managers dutifully attended educational seminars. They held internal employee workshops and passed out pamphlets. Sexual harassment became a seemingly-settled issue, because there were few big changes to the law—until now.

Partner Andrew W. Singer, Esq. and Jason B. Klimpl, Esq. of Tannenbaum Helpert Syracuse & Hirschtritt LLP visited TemPositions' HR Roundtable Series on Thursday, September 30 to talk about sexual harassment in 2010. Singer warned that while sexual harassment may feel like old news, it's important for HR professionals to treat it once again as a hot, current topic.

The name of Singer and Klimpl's presentation was "The Respectful Workplace." But as Singer pointed out, it could just as easily have been called "Sexual Harassment 2.0." Judicial decisions made in 2009 will soon result in a flood of new cases as entire new categories of behavior become actionable. It's time for employers to be vigilant about sexual harassment again.

What is Sexual Harassment?

Employers in New York City were familiar with two statutes that addressed sexual harassment. The Civil Rights Act, a federal law, applies in all US states. But the New York State Human Rights Law (NYSHRL)—the first human rights law passed by any state—was even more strict. Together, they created powerful protections for workers in New York State.

Title VII makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions or privileges of employment because of such individual's race, color, national origin, sex or religion; or to limit, segregate or classify employees, or applicants for employment, in any way which would deprive them, or tend to deprive, any individual of employment opportunities, or otherwise affect his or her status as an employee because of such individual's race, color, national origin, sex or religion.

NYSHRL includes even more workers, and New York continues to add protected categories. As of today, the law prohibits workplace and employment discrimination based on age, race, creed, color, national origin, sexual orientation, military status, genetic predisposition, disability, sex, domestic violence victim status, arrest or conviction record, or familial or marital status.

Over time, the law defined two basic types of sexual harassment: demanding sexual favors (often known as *quid pro quo* sexual harassment) and creating a hostile environment. The first type is very straightforward, while the second has sometimes been controversial.

It is unlawful for a supervisor to offer advancement or privileges on the condition that a subordinate provide sexual favors. It is similarly unlawful for the supervisor to threaten to remove opportunities or privileges if sexual favors aren't granted. In one case, a female plaintiff asked her male boss for a promotion. He told her that if she "brought [her] kneepads to the interview," she would receive it. This is a classic example of *quid pro quo* sexual harassment.

It is also unlawful for any employee to create an environment that is hostile, intimidating or abusive to anyone else because of their sex. In one case, a male supervisor made repeated remarks about a female subordinate's menstrual cycle, and these remarks and others were sufficient for a court to hear her case.

There can be disagreement about what makes a workplace hostile, Singer noted. Women are more often offended by racy jokes, while men tend to consider them harmless workplace banter. A lone male working in a predominantly-female company may feel belittled by casual man-bashing, even if the women see it as equally harmless.

But the courts don't care if most employees are comfortable, Singer told attendees. They will protect the worker who is offended—as long as their sex is the reason for their discomfort. And while women were the victims in many landmark cases, it's important to note that the law protects both sexes.

Important Changes to Existing Law

Both Title VII and NYSHRL require plaintiffs to meet a high standard to have a case against their employer. Sexually harassing behavior has to be "severe and pervasive." This standard kept many cases from proceeding in the courts.

But in 2009, the New York Court Appellate Division clarified that a different standard exists under the New York City Human Rights Law (NYCHRL). Under this statute, abuse no longer needs to be severe and pervasive. Conduct merely has to be "more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"

And today, in proving sexual harassment under the NYCHRL, a plaintiff need only prove that they were “treated less well than someone else because of their gender.”

Under federal and New York State law, a company may have a defense if it can prove its good-faith efforts to limit harassment, i.e., including anti-sexual harassment statements in employee handbooks, posting policies where employees will see them, and making reasonable efforts to foster a workplace free of sexual harassment.

This defense does not apply to the NYCHRL. Companies will be held responsible for what their workers do, even if they’ve done their best to discourage inappropriate behavior. It’s no longer enough for companies to say, “We tried.”

Altogether, Singer explained, these are enormous changes. A plaintiff no longer has to prove a staggering level of abuse to have a case. There are many more types of actionable abuse. And well-meaning companies can no longer use their good intentions (and actions) as a shield. Employers who don’t get up to speed, and fast, face serious consequences.

The Hard Costs of Sexual Harassment

Harassment claims, Singer reminded attendees, are costly. And they’re expensive, even if the company prevails. Plaintiffs’ attorneys are paid typically only if they win. But defense counsel gets paid either way—and if the company loses, it may have to pay the plaintiffs’ legal fees as well as its own.

Juries also don’t like sexual harassment. They feel for victims, almost as if they’ve suffered a form of sexual assault. They’ll punish offenders as stridently as the law allows, and the law does give them some room.

Title VII makes companies liable for compensatory damages, with some caps, when their managers harass workers—but also when fellow employees fail to report the abuse. (Companies don’t always know when abuse is occurring, but the anti-discrimination laws are unforgiving when the court feels the employer “should have known.”) Companies are liable even when non-employees, like delivery drivers or independent contractors, come into the workplace and harass workers.

Sometimes damages are simply comprised of back pay and/or lost earnings, but juries can award punitive damages if they find the abuse “egregious.” And they often do.

In NYC, punishments are even more severe. NYCHRL puts fewer caps on compensatory damages than Title VII, and the company can end up paying civil penalties to the city itself.

NYC also empowers plaintiffs to sue co-workers who engage in harassment. As Singer put it, the law sees these workers as “aiding and abetting” the abuse.

The Soft Costs of Sexual Harassment

Everyone fears the costs of litigating...and losing a case. But as Singer explained, it’s important for companies to recognize that lawyers’ fees and damages aren’t the only repercussions to fear.

Sexual harassment poisons a workplace. And even if a company is lucky enough to avoid being sued, it will suffer nonetheless if it doesn't actively prevent abuses.

Sexual harassment tends to be very personal—and it is experienced personally by everyone involved. The victim's productivity can take a nose dive. Being abused can lead them to be absent more frequently and to be distracted when they are at work. Co-workers who witness the abuse are similarly affected. And offenders become upset too, especially when they find themselves being formally investigated for misconduct.

Singer noted that sexual harassment can also affect recruitment. If a prospective employee starts meeting people around the office, and they learn that sexual harassment is taking place without the company seeming (or wanting) to act, they may think twice about joining the organization.

Accusations and court cases only disrupt business practices further. Internal investigations take time for HR to conduct. Leadership gets distracted from core business goals and operations. The parties involved are thrown into an emotional whirlwind, along with their witnesses, co-workers and any friends they may have in the workplace.

And never forget, Singer reminded attendees, how much the government likes to issue press releases whenever it protects workers from abuse. For the governmental anti-discrimination agencies involved, sexual harassment cases provide a perfect PR moment. But these high-profile cases are a spectacle few businesses can afford.

Preventing Sexual Harassment in the Workplace

The best way to deal with sexual harassment, Singer counseled, is to prevent it from happening in the first place. HR must ensure that every worker, supervisor and manager understands the new rules around sexual harassment, and crystal-clear policies must be put in writing.

It's of course essential to put the policy in the employee handbook. But it's also important to spread it around. Post the policy, send out memos, and make sure HR provides training to managers on an ongoing basis. Employees who perceive that their company takes sexual harassment seriously will be less tempted to toe the line. And managers who can spot a bad situation while it's still developing are a great first line of defense.

Because workers know more about sexual harassment today than they did 20 years ago, they may not indulge in blatant *quid pro quo* sexual harassment or create aggressively hostile environments. But it's now even easier for plaintiffs to bring cases under the NYCHRL, so companies have to protect workers from every possible form of abuse.

Some restrictions may feel heavy-handed, Singer conceded. But as he put it plainly, "People in the workplace, unfortunately, are not your friends first. They are your coworkers—and you have to treat them differently than you would treat your friends."

Sexually Offensive Advances

Sexually offensive advances are common, but companies shouldn't assume they'll be tolerated. Singer described one case in which a plaintiff complained that her co-worker "leered" at her. He

recommended that she wear shorts to a company picnic to look more attractive. The court found that his pattern of behavior met the standard, even though there was no *quid pro quo*.

Managers' ears should perk up if they hear subordinates commenting on each other's clothing. Statements like, "Your pants look tight" and "Your boots look very S&M" have spawned actual cases. Sexual jokes are also inappropriate. They're often interpreted as come-ons.

Offensive advances can also take the form of unwanted physical contact. Many plaintiffs complain about being cornered in narrow hallways, doorways or other confined areas that force them to make contact with their abuser's body in order to leave. Touching, grabbing and even hugging should raise red flags. Insist that your employees respect one another's personal space.

Offensive Language

Verbal epithets and offensive language can't be tolerated, even in casual work environments. These include sexual jokes and innuendo, and any similar comments that reference gender.

Workers like to relax, and unfortunately, indulging in offensive language is often how they do it. All too quickly, bawdy atmospheres become a sub-culture within the company. And when accused, offenders often say, "That's just how we are," or, "We're just kidding around, no one takes it seriously." They insist the victim is the one with a problem—they're "too touchy."

The trouble with offensive language, Singer explained, is that no one wants to be the first to complain about it. Offended parties see that other workers tolerate the language, and they often stay silent—until they erupt with emotion. At that point, the problem may be too big to fix.

So letting banter get risqué, even in the interest of workplace bonding, is a serious business risk. The courts don't care about the intent behind jocular speech, and companies should keep that in mind as they nurture their internal cultures. Remember that a single sexual joke sets a precedent. Once the bar for professional conduct is lowered, it can be very hard to raise again.

Pornography

Pornographic materials can't be permitted in the workplace. And as Singer pointed out, what constitutes pornography can't be up for debate. Pinups from the *Sports Illustrated Swimsuit Issue* are not appropriate, even though the women are partially clothed. Similarly, calendars with scantily-clad male firefighters or police officers are unacceptable.

Online pornography is also dangerous. One plaintiff sued her employer because her supervisor used her computer to view pornography—even though she never saw it herself. In another case, a plaintiff complained that her boss was viewing pornography that was visible to her, reflected in a glass wall behind him.

To be safe, employers should maintain a highly conservative standard. Anything that could conceivably offend anyone should be removed. Courts have ruled that if it affects a worker's performance, the simple presence of pornography constitutes a hostile work environment.

Email

Nothing disappears from workplace computers, Singer reminded attendees, and emails can provide particularly damning evidence against harassers. In one case, a co-worker asked the plaintiff in an email if she wanted to have “HGTWM” (“horizontal good time with me”). This proved to be critical evidence in her hostile workplace lawsuit.

Emails can also create a hostile environment for third parties. Administrative assistants regularly access their supervisors’ email accounts, and if they witness other employees exchanging sexual jokes, that may constitute a hostile work environment.

Personal email accounts like Yahoo and Gmail are trickier to police, but some mention of these accounts should exist in every company’s sexual harassment policy. Singer recommended informing employees that they’re expected to maintain professional standards when contacting co-workers through personal email accounts.

Courts don’t like excessive snooping on private activities (see “Social Media,” below), but companies generally have the authority to monitor their employees’ use of company computers and e-mail systems—which would give HR access to personal accounts. Just clearly disclose the employer’s right to engage in such monitoring. Employees who have been fairly warned are less likely to protest when they get caught.

Social Media

Courts and employers are still trying to figure out how to handle social media channels like Facebook and MySpace. But it’s important for companies to understand that if workers are sexually harassed through these sites, the company may still be liable.

Just a few years ago, employers could block these sites from workplace computers. But social media’s role in workers’ professional lives has expanded, and for many companies, this is no longer a practical solution. HR managers now routinely scan Facebook profiles. Many employees use social media to nurture relationships with professional contacts. Access makes sense—but a clear code of conduct is essential.

Most people consider these accounts personal, and they may not know that their employer may be liable for certain social media activity. It’s therefore critical to inform them that online harassment “counts,” and that the company forbids inappropriate messages, images, etc.

One attendee raised the issue of stealthily finding out employee passwords to monitor social media activity. But Singer advised against it. Some expectation of privacy is reasonable. And attorneys, judges and juries don’t like it when companies do anything underhanded.

Singer described one case in which a group of restaurant chain employees started a blog to air grievances about their employer. It was a private site, accessible only by invited guests. But one employee told a manager (who was a friend) about the site. Before long, the worker had surrendered the necessary login information. Some workers were fired, and others disciplined.

But the employees sued the company under privacy laws— including the federal Stored Communications Act—and won. The company claimed they had a worker’s consent to view the site. But because the worker feared she “would have gotten in trouble” if access wasn’t provided,

a jury decided the employee was coerced. The company ended up being punished for taking action against its workers based on private activities.

The lesson isn't to ignore social media, Singer warned. It's to publish a clear policy that can be defended. He advised attendees to evaluate how workers use social media professionally and then include a clear policy in the employee handbook. Let employees know exactly what they can and can't do. Detail the negative consequences of violating the policy. Be unambiguous about the company's intolerance for online sexual harassment.

Accumulation of Evidence

It's important for the company's policy on sexual harassment to address all these factors, Singer explained, because a single type of evidence rarely makes an entire case. A plaintiff's attorney will show the court an email, combine it with stories of unwanted touching and offensive language, and finish up with evidence of pornography in the offender's workspace. The sexual harassment policy has to cover every base to keep a case from accumulating.

Judges and lawyers have to interpret the law. And they can get creative when they don't like the way an employee or a company has behaved, especially when it comes to sexual harassment. The best defense is to insist on indisputably professional behavior in the workplace, Singer said. Don't give the courts a chance to create a new precedent with your company's name on it.

Handling Accusations of Sexual Harassment

Even when companies work diligently to keep sexual harassment out of the workplace, misconduct will occur, and HR will have to field accusations from workers. But not every accusation will result in a court case. The key, Singer said, is to investigate every charge thoroughly and professionally.

"Lawsuits are filed by angry people," he said. "HR's job is to take away their anger and show them that the company takes their grievance seriously."

Courts find companies liable in very specific circumstances. For example, the court may consider that the company did not have an effective process in place for complaints, that the company took too long to start investigating after the victim complained, or that the company did not do enough to protect employees from a worker with a history of sexually harassing others. By keeping these three pitfalls in mind, companies can mitigate the risk of liability.

1. Set Up a Multi-Level Grievance Process

Workers should have multiple options for reporting abuses. If only one person in HR is designated as the contact for sexual harassment concerns, employees have many reasons to feel uncomfortable. What if the contact is the abuser? What if they are uncomfortable discussing their experience with that individual? Remember, sexual harassment is personal. Offer employees a variety of ways to bring sexual harassment concerns to management.

It's not enough to have an "open-door policy," Singer explained. One company lost a case because it did not have a specific policy for sexual harassment grievances. The company told its

employees that they could talk to management at any time, about anything. But the court ruled that this was too broad. Companies must specify a grievance process for sexual harassment.

And give victims plenty of time to bring forward their accusations. (It's not reasonable to require victims to report incidents within 48 hours, for example.) Victims often need to work up the nerve to complain, and Singer recommended putting no restrictions on them. Once they do speak up, however, the company must immediately leap to action.

2. Aggressively Manage Past Offenders

Employees with a prior history of sexual harassment are bad news, Singer said. It's best not to hire them in the first place, and he prefers that his clients terminate existing employees the first time they are determined to have harassed others. But VIPs and major stars in the industry can be hard to dismiss, especially if company leadership prizes them.

If you have to have a past offender in the company, watch that employee closely. If necessary, isolate their workspace and redistribute work to keep sensitive parties separated. The company has few defenses if they are aware of an employee's history and that employee offends again.

3. Investigate Thoroughly—and Immediately

Never ignore a complaint. As soon as the company becomes aware of a grievance, the law requires it to act. Be aware, Singer warned, that the victim may not want the matter to escalate. But the company has no choice. It must immediately launch a speedy, competent investigation.

Competence is as important, if not more important, than speed. The HR associate who handles the investigation must be properly trained, because an inept investigation will only cause the victim more distress. This can increase the chances for a lawsuit.

Most victims want the matter handled confidentially, but this isn't always possible. To investigate, HR must interview the offender, witnesses, and others who may have knowledge of the events. There's therefore no way to keep the investigation secret. Assure the victim you will keep the matter as confidential as possible, but make no promises that no one will find out about it.

It might seem overhasty, Singer said, but take immediate measures to correct the accused's behavior—even before you decide whether or not an accusation has merit. Speak to the offender about their actions. Separate the accused and the victim in the workplace. Consider suspending the offender until the investigation is complete. Require them to attend educational seminars if they want to stay with the company.

It's critical to demonstrate sensitivity to the victim, Singer stressed. Remember, angry workers are the ones who sue. And by taking strong actions to protect the accuser from the accused, you may keep a lawsuit from springing up. Offenders will not like this. But in New York, they generally can't sue the company for defamation over a poorly-run investigation conducted in good faith.

Acting quickly doesn't mean rushing to judgment, Singer noted. The company shouldn't take one side of any story as the absolute truth. But once the victim's immediate need for protection is met, HR can focus on conducting a deliberate, methodical investigation.

It's important to document the process carefully. Track all interviews by date and time, and proceed logically through the evidence. Put an HR professional in charge of writing down all findings. (Absolutely do not invite witnesses, the victim or the accused to prepare their own written statements.) Put every detail about the investigation into a single, clear report. This record, Singer explained, is your attorney's first, best tool.

Once the investigation is complete, the company must make a judgment about whether or not abuse occurred. And if it did, leadership must decide what to do. Most companies choose prudently to terminate the offender if the victim has provided reasonable evidence. But separating and/or transferring workers can also provide remedy.

It's important to note that companies are not obligated to notify any employee about the results of an investigation. Keeping the ordeal as confidential as possible is a strong safeguard against suits. There's no need for the victim or the offender to suffer public embarrassment. Singer recommended telling the involved parties that the company conducted a thorough investigation, and the matter has been resolved.

Attendees were surprised to learn that under New York law, personnel files are generally private company property. Many assumed that if the victim or the accused asked to see their personnel file to discover the investigation's outcome, the company should provide it.

But sharing these files can set a dangerous precedent, Singer explained. Once you've shown one employee their file, others may claim some form of discrimination if you later refuse to show them theirs. New York employers have no legal obligation to share these files, with certain exceptions, such as regarding employee health. If a plaintiff's attorney would like to see a personnel file, he said, they should get a subpoena.

Of course, not all employees will be content with the company's investigation. And some will sue. All the company can do, in that case, is provide their attorney with their report detailing the internal investigation and hope that a judge or jury finds in their favor.

Employers often get upset when they feel they've treated a worker fairly, but they still end up in court. Too bad, Singer said. Employers can't sue workers who bring frivolous suits against them. In fact, the law protects workers who make charges, testify, or participate in workplace investigations of sexual harassment.

As irritating as unfounded lawsuits are, workers need this protection. The courts want every victim and witness to come forward. Employees who fear retaliation won't share their true impressions, and this will not help companies conduct good investigations.

It's particularly easy for employees in New York City to prove retaliation. NYCHRL forbids companies from retaliating against workers "in any manner." If a victim, an offender or a witness of sexual harassment can prove they suffered any "adverse employment action"—right down to losing minor privileges or having their desk moved to a less desirable spot—the company may find itself in more hot water.

Dealing with sexual harassment is messy, Singer said in closing. But companies can do a lot to keep harassment from occurring—and to keep uncomfortable moments from escalating to the courts. Publish a clear policy, and communicate it to every level of employee with conviction. When accusations do arise, be sensitive, act quickly and investigate thoroughly. If you take these steps, he assured attendees, many cases of sexual harassment will be over before they start.

***Nothing in this article is intended to be legal advice
rendered in response to a specific set of facts.***

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