Idaho Association of Counties Midwinter Legislative Conference

AVOIDING DISCRIMINATION & HARASSMENT CLAIMS IN 2018-
FEBRUARY 7, 2018
Avoiding Gender Discrimination Claims
Fox Complaints of Harassment & Discrimination
Hollywood accusations...
The latest...
Avalanche of Claims

# MeToo
What Do These Claims Have in Common?

- Claims of discrimination and/or harassment brought by multiple employees
- Claims ignored – HR and Legal turned a blind eye
- “SUPERSTARS” protected
- Cronyism at play
- Blatant retaliation aimed at women who brought claims
What else?

- Millions of dollars spent in defense costs
- Millions of dollars spent on settlements
- Low morale/bad reputation
- Distraction and inefficiency in the workplace
- Stress for all involved as witnesses
The Numbers Don’t Lie!
Discrimination Claims in Idaho

- 171 sex discrimination claims in 2017
- Up from 139 in 2016
- 36% of all IHRC claims received
2018 trend...

According to IHRC Director Dr. Ben Earwicker, on a local level, harassment claims have gone up 7% since October 1, 2017.
On a National Level – EEOC Claims

• 12,428 harassment claims in 2017
• 996 Equal Pay Act claims in 2017
Enforcement Priority

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High Risk Workplaces

2. Young workforces.
3. Workplaces with “super stars” or “high value” employees.
4. Workplaces with significant power disparities.
5. Workplaces where work is monotonous or tasks are low-intensity.
6. Isolated workplaces.
7. Workplaces that encourage alcohol consumption.
8. Decentralized workplace with main office far away.
What can you be doing now?

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What Would a Jury Think?
Can you show...

1. You have good, updated policies.
2. All of your employees know your policies.
3. Employees are regularly trained on the policies.
4. Policies are uniformly applied.
5. You take care of your employees.
6. Employees are treated fairly.
Keys to a Solid Legal Defense

- Legitimate, non-discriminatory reason
- Show that male and female comparators were not performing substantially the same work
- Show legitimate reasons for pay differences – tenure, performance, etc.
- Show women are treated fairly, workplace is professional, employer recognizes and enforces anti-discrimination and anti-harassment laws
Training
1. Supervisor Training

- Do your supervisors know the law?
- Do your supervisors understand your policies?
- Are they consistently enforcing rules and policies?
- If not, it’s time to train.
- They need to spot issues!
Supervisors need to know how to deal with harassment they observe, that is reported to them, or of which they have knowledge.

Need clear instructions on how to report it up the chain of command.

Need to set the example and the tone.
One example of why training may be needed – what’s the law on gender identity & sexual orientation?
Gender Identity & Sexual Orientation

- According to IHRC statistics, 6 sexual orientation claims, 2 gender identity claims in 2017
- No activity by Idaho legislature – no hearing on Just Add the Words
- BUT….new IHRC director, Ben Earwicker
What’s the law in Idaho?

- 9th Circuit found years ago that the language in Title VII barring discrimination “on the basis of sex” already covers gender identity and sexual orientation.
- But now there’s a circuit split.
- Idaho Human Rights Act has the same language
- Idaho Human Rights Commission and Idaho Supreme Court pronouncements - defer to federal court interpretations
Gender Identity and Sexual Orientation – Idaho Law

Idaho Human Rights Act Does Not Clearly Prohibit
BUT:
- Local Ordinances Prohibit in 13 Cities
- Changing Federal Law
- Agency & Federal Law Interpretations Expanding (and Retracting!)
- Changing Social Norms
2. Employee training

- EEOC wants all employees trained on a repeat basis
- Training needs to describe illegal harassment
- Needs to educate employees about rights and responsibilities
- Should cover reporting procedure
- Should explain consequences of unacceptable conduct
All training is not created equal
EEOC training guidelines

1. Should be supported at the highest level.
2. Conducted by qualified, live trainers.
3. Should include examples tailored to the specific workplace and specific workforce.
Are your policies in compliance?
Policies

- Is your handbook up-to-date?
- Is your anti-discrimination policy in conformance with EEOC guidelines?
All anti-harassment policies are not created equal.

1. Needs to say harassment based on any protected class will not be tolerated.
2. Needs examples of prohibited conduct.
3. Should describe reporting system, with promise to investigate.
4. Should strive to maintain confidentiality, to the extent possible.
5. Must require immediate action.
6. Must prohibit retaliation.
7. Must be written in clear, simple words, in all languages of workforce.
Reporting System and Investigations

1. Employer’s policy must provide for prompt and thorough investigation.
2. Employer must take this promise seriously.
3. Workplace environment must make employees feel safe to report.
4. Investigators must be trained and neutral.
5. Investigators must know how to document and create a report.
6. Procedures must be in place to prevent retaliation.
7. Due process – no presumption of guilt. Instead, investigation must be mechanism for determination.
8. Must include communication to complainant and respondent.
What does it mean to promptly investigate a claim?
Who should investigate?
Elements of an Investigation

- Documents/ Evidence
- Interviews
- Report
- Resolution/ Corrective Action
- Debriefing Complainant/ Respondent
- Documentation
Interviewing Considerations

- Fairness
- Order
- Outline
- Location
How do you create a culture where employees feel comfortable reporting a problem?

- The era of assuming harassment and discrimination are HR issues is over.
- Management needs to participate in training and to set the example of what is expected of all employees.
- Civility and respect must be demanded. Consider respectful workplace policy and related training.
Thank you!

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Avoiding Discrimination and Harassment Claims in 2018: New Tools, Resources and Guidelines Every Employer and HR Professional Needs To Avoid Liability in the Wake of #MeToo

- February 27, 2018 • 9 - 12 a.m.
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