CLIENT ALERT

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THE QUIET REVOLUTION IN EMPLOYMENT LAW

YESTERDAY'S BEST PRACTICES ARE TODAY'S NECESSITIES

The basic expectations of what employers must do to provide a safe work environment has been changing. Court decisions have gradually turned the law of employment discrimination on its head, even though statutes such as Title VII of the Civil Rights Act and Connecticut's Fair Employment Practices Act have remained essentially unchanged. The procedures adopted as "best practices" have now come to be the minimum requirement. Employers who do not respond to this change, and revise their policies and procedures accordingly, are at substantial risk.

Until the mid-1990's, most employers believed they were doing what they should to protect against discrimination claims by adopting and disseminating anti-bias policies, and responding promptly and effectively to violations when they occurred. Then along came two Supreme Court cases in 1998 that started a change in approach. At first, these cases seemed like good news for employers. They began with the premise that an employer who had an effective program of compliance with anti-discrimination laws could establish a defense against liability in certain situations.

First, an employer with an effective compliance policy may obtain some protection from "vicarious liability" for the actions of supervisors. That is, if an employee engages in discriminatory behavior (such as sexual harassment) in spite of clear policies, regular training, and other preventive measures, the employer may have a valid defense in court, as long as the victim has not suffered some tangible employment action, such as firing, loss of a promotion or other benefit, or the like. Second, an effective compliance program may protect an employer against punitive damages. This is particularly significant because such awards may far exceed a bias victim's actual economic damages, and are not covered by most insurance policies.

The Supreme Court also said that employees who feel they are victims of discrimination have an obligation to minimize their damages. Therefore, if an employer has an effective and accessible mechanism for reporting and resolving such claims, and an employee unreasonably fails to take advantage of such preventive or remedial measure, the courts will not allow recovery of damages that could have been avoided. Again, this doctrine seems to be good news for employers.

However, recently the various preventive measures that used to be considered "best practices" among more sophisticated employers, are now essential for virtually all employers. Instead of being viewed as proactive steps to limit potential liability, such measures are now considered obligatory. Failure to take such steps actually counts against an employer. In fact, the absence of an effective compliance program may even form the basis for an award of punitive damages, on the theory that failure to utilize effective counter-measures demonstrates a "reckless indifference" to the problem of employment discrimination in all its forms.

So what constitutes an effective compliance program? There are three basic elements that are now generally recognized by the courts. One is development, implementation and publication of anti-harassment and discrimination policies and procedures. The second is development, implementation and publication of effective complaint, investigation and appeal procedures. The third is effective training of all employees with respect to these policies and procedures. Each requires some explanation.

A comprehensive policy should cover all forms of harassment, discrimination and retaliation, not just sexual harassment. Definitions and examples of prohibited harassment should be included. Similarly, all forms of discrimination should be covered, not just age, race and sex. Failure to mention other protected categories, such as religion, marital status or pregnancy, has led to punitive damage awards in cases where discrimination on such grounds has been proven. It is particularly important to include a prohibition against retaliation for making or supporting a charge of harassment or discrimination. It is not uncommon for an employer to successfully defend against a discrimination claim, only to be found liable for retaliation against the employee who made the claim.

A good, comprehensive policy is all but useless if it is not accompanied by an effective enforcement mechanism. This includes, at a minimum, a clear statement of how and to whom a complaint should be made (including effective alternatives if the person complained about is the employee's supervisor); provision for a prompt, impartial and thorough investigation, during which the complainant is insulated from the offending individual or work environment; and assurance of confidentiality, to the extent possible. Many employers turn to lawyers or consultants to conduct investigations in significant cases, to assure objectivity and avoid internal politics.

The policy and the complaint procedure should be adequately publicized. Inclusion in the employee handbook and the institutional website is just the beginning. Other steps can include workplace posting, employee newsletters, and even printing on the back of employee pay stubs. Publication upon adoption is not enough. Periodic reminders are important, and updates regarding amendments are essential. By far the most effective method of disseminating anti-discrimination policies, however, is employee training.

In Connecticut, employers are required to provide sexual harassment training to supervisors. But what about training on other forms of harassment and discrimination? Any why not provide training to rank and file employees? They certainly can be trained to not engage in improper conduct, to recognize it, to report it, and otherwise to support management's efforts to address it. Finally, distributing handouts is not training. An employer is expected to provide two hours of training to supervisors on sexual harassment alone. Obviously, comprehensive training on other forms of discrimination requires an investment of at least that much time and effort.

The bottom line is that the elements of an effective compliance program (as discussed above), which used to earn points for an employer in the defense of a discrimination claim, are now considered so basic that their absence costs an employer points, and may even be seen as evidence that the employer actually intends to discriminate. Therefore, this is a good time for prudent employers to take a long, hard look at their anti-discrimination policies and procedures, and beef them up to meet today's higher expectations. Failure to do so is not just poor personnel policy, it's bad business.[1]

QUESTIONS OR ASSISTANCE?

If you have any questions about The Quiet Revolution in Employment Law, please do not hesitate to contact:

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[1]This alert for labor and employment clients of Shipman & Goodwin LLP is inspired by a comprehensive and detailed article entitled *The "Quiet Revolution" in Employment Law & Its Implications for Colleges and Universities,* written by D. Frank Vinik, Ellen M. Babbitt and David M. Friebus, and published in the Journal of College and University Law.