Handling Sexual and Other Harassment Claims in a Post-#MeToo World

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Agenda:

- The legal context of harassment claims.
- How did we get here? A brief history of sexual harassment law.
- A corporate compliance approach to addressing sexual harassment claims.
- A 14-Step action plan every employer should consider adopting.
- Conclusion, takeaways, and questions

The Legal Context of Harassment Claims:

The federal anti-discrimination laws created protected classes of individuals who could file claims based on 4 primary theories of discrimination:
- disparate treatment;
- disparate impact;
- harassment; and
- retaliation
The Legal Context of Harassment Claims:

Two theories can be used to prove unlawful harassment:
- quid pro quo; and
- hostile work environment.

Employer Liability for Harassment:

Co-Worker Harassment: The employer is liable only if it knew or should have known about the harassment but failed to act.

Supervisor Harassment: If the harassment results in a tangible employment action such as termination or demotion, the employer is held strictly liable even if it did not know about the supervisor's harassment.

However, when the supervisor's harassment does not result in a tangible employment action, the employer can raise an affirmative defense by showing: (1) it exercised reasonable care to prevent and correct sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of this protection. (Translation: if an employer has a compliant anti-harassment policy with a complaint procedure and the employee does not file a complaint, the employer can defeat the employee's claim.)
The beginning:

1964 Title VII of the Civil Rights Act is passed which prohibits employment discrimination based on race, color, sex, or national origin. The EEOC enforces Title VII.

1975 The term “sexual harassment” arose from a conscious-raising session that Cornell Professor Lin Farley held with a group of her students. Farley’s book, “Sexual Shakedown: The Sexual Harassment of Women on the Job” (1975) introduced the public to the concept of sexual harassment for the first time.

How did we get here? A brief history of sexual harassment law:

A brief history of sexual harassment law (continued)

The 1980’s:

1980 The EEOC Guidelines on Discrimination Because of Sex

1984 Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993)(Interpreting Section 703 of Title VII, the court established the criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defined the circumstances under which an employer may be held liable, and suggested affirmative steps an employer should take to prevent sexual harassment.

A brief history of sexual harassment law (continued)

The 1980’s:

1986 Meritor Savings Bank v. Vinson, 477 U.S. 57. The Supreme Court for the first time recognized that sexual harassment is a violation of Title VII. The Court cited the EEOC’s 1980 Guidelines as support.
A brief history of sexual harassment law (continued)

The 1990’s:

1990 The EEOC’s Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism discusses potential employer liability when an opportunity or benefit is denied to one employee and given to a supervisor’s paramour or to an employee who submits sexual advances or requests.

1991 The Civil Rights Act of 1991 modified Title VII to add more protection against discrimination in the workplace. The CRA allows harassment and discrimination plaintiffs the right to a jury trial in federal court. Also, for the first time, it gives plaintiff’s the right to collect compensatory and punitive damages, subject to a cap based on the size of the employer.