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GUEST OPINION

Examining the Impact of #MeToo on Workplace Policies

In the wake of the #MeToo movement, sexual misconduct and harassment is at the forefront of national conversation as it never has been before. Sexual harassment claims have exploded in the past year, demonstrating that employers need to be more vigilant than ever when it comes to addressing issues of harassment in the workplace. The Equal Employment Opportunity Commission, the agency responsible for enforcing federal anti-discrimination laws, saw a 12% increase in the number of sexual harassment charges filed in fiscal year 2018, the first substantial increase in five years. The EEOC recovered \$70 million for sexual harassment complainants, \$22 million more than in 2017. These statistics, coupled with the news of sexual harassment allegations within high-profile organizations, are a constant reminder that sexual harassment remains a challenge for employees and employers in every industry.



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Every credit union should use the current heightened awareness to reinforce its commitment to preventing sexual harassment in the workplace, and reexamine current policies and procedures to ensure they provide effective means of encouraging reporting and resolution of sexual harassment allegations. Having appropriate preventive and corrective mechanisms that respond promptly and effectively to end

harassment, and provide reasonable assurance it will not recur, can significantly reduce potential liability and mitigate risk.

When Is the Last Time You Reviewed Your 'No-Harassment' Policy?

Be certain your no-harassment policy very plainly informs employees that harassment is prohibited, and update the policy to include all the categories protected both by federal law as well as the law of states and localities where your credit union has employees. The policy should include examples of prohibited conduct that take into account the use of new technologies, like social media and communication apps, and state that it applies to harassment by employees, as well as members, vendors and other third parties. The policy should apply not just to conduct in the workplace, but also to activities connected with the workplace, such as travel, conferences, work-related social

gatherings and interactions at a business member's worksite. Your no-harassment policy should also encourage complaints, identify multiple avenues for employees to report concerns if they feel the policy was violated, establish penalties for violators and prohibit retaliation against employees who report concerns. Policies should be communicated clearly and must be accessible to all employees. For example, employers can use the policy as a point of emphasis in any new hire orientation, post it in open and obvious locations, and redistribute it annually to all employees.

Drafting and Distributing a Policy Is Not Enough

The EEOC's 2016 Report on Sexual Harassment in the Workplace advises that training should be "conducted and reinforced on a regular basis for all employees." If training is only conducted once, employees may conclude that preventing harassment is not a high priority. Conversely, if training is held regularly, it will send a message to your employees that preventing harassment and maintaining a respectful workplace is important.

Sexual harassment prevention has become so prevalent that workplace training is required by

several states, including in California, Connecticut, New York, Maine and Delaware. Colorado, Massachusetts, Michigan, Ohio, Rhode Island, Tennessee and Vermont have laws that "encourage" employers to provide harassment training, and more states have introduced legislation that requires sexual harassment training for all employees.

With harassment frequently front-page news, training is no longer a nice-to-have but a must-have. Effective training is a powerful tool that will help shape a positive organizational culture that will ultimately produce a productive work environment and climate for success for all employees. If your credit union has employees in a state that mandates training, you must, of course, comply with at least the law's minimum standards. But regardless of local law, it is highly advisable for your organization to require harassment training for every employee from top leadership to entry-level positions. Your management team is a critical component in preventing sexual harassment. Your commitment to maintaining a harassment-free workplace is best expressed by having a senior manager open the training session and attend for the duration. Managers and supervisors should

also be trained not only on what is and is not harassment, but also on their duty to respond and report the concern higher up the chain of command. In many ways, managers serve as the credit union's eyes and ears. Therefore, they must be diligent to pick up on and react to even the smallest clues that unlawful harassment may be occurring. Managers must be held accountable in a meaningful, appropriate and proportional manner for responding to a complaint of harassment and penalized for failing to do so.

Responding to a Sexual Harassment Complaint

Once you learn of a complaint of sexual harassment, whether by formal or informal means, you must respond promptly and conduct any necessary investigation of the facts. There is no such thing as an "off-the-record" complaint. Also, there is no one-size-fits-all approach to investigating complaints. The allegations and facts specific to each situation will dictate what to do and how to do it. If the nature and severity of the claims call for it, counsel should be consulted and consideration should be given to engaging an outside investigator. Most importantly, you must take every sexual harassment complaint seriously.

Most of the time, this will mean speaking to the accused, accuser and any witnesses; obtaining relevant documentation and documenting the findings.

Longstanding EEOC guidance provides that the process for resolving complaints of sexual harassment “should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.” However, in the #MeToo era, some employees argue that stringent confidentiality requirements interfere with their rights under anti-discrimination laws and serve to cover up claims. As a result, care must be taken when requiring confidentiality, and when considering discipline of an employee who speaks to counsel or other employees about a claim of harassment.

Effective Remedial Action Is Required

If a violation of your no-harassment policy has occurred, you must take immediate and appropriate corrective action sufficient to stop the behavior and ensure it will not occur again. Options include written warnings,

mandatory professionalism classes, behavioral improvement plans, suspensions and demotions. In some situations – where an employee’s conduct has been especially objectionable or where there have been multiple offenses – the only reasonable response may be termination. If the bad actor is not an employee, this could mean “firing” a member or ending a relationship with a third party. You must be sure to document whatever action you decide and follow up with the employee who made the complaint.

Whether the harasser is terminated or not, you must be on guard for any signs of retaliation. The employee who complained should be informed that your credit union will not tolerate retaliation, and you should follow up with that employee multiple times to make sure there has been no retaliation.

Understanding Restrictions on Confidentiality Agreements

One of the targets of the #MeToo movement has been non-disclosure agreements entered into as an element of settlements of

sexual harassment claims. Critics argue that the use of “secret settlements” by high-profile executives like Harvey Weinstein leave them freer to victimize other individuals. One result has been a change to federal tax law to eliminate the deductibility of monies paid to settle sexual harassment claims. Laws in New York, California and New Jersey directly restrict the enforceability of non-disclosure agreements. This trend is likely to continue. In the wake of the #MeToo movement, failure to have an effective program to prevent workplace harassment can result in long-term harm to employees, damage to a credit union’s reputation, and jeopardy to its members’ assets. Every credit union’s goal should be #MeToo – #NotHere. Critical to achieving that goal is the review and revision of policies and procedures to ensure the effectiveness of your anti-harassment program.

Note: Although this article addresses sexual harassment, the same principles apply to harassment based upon race, religion, age, national origin, gender identity and all other protected characteristics. ■