Them Too: Customer Misconduct Can Lead To Sexual Harassment, Too

Insights
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As discussed in ***#MeToo: A New Spotlight On An Old Problem***, sexual misconduct and harassment is at the forefront of national conversation as never before. And, as this companion article cautions, given this heightened sense of awareness, you should be more vigilant than ever and ready to respond appropriately to ***any*** complaint about or knowledge of conduct that could constitute sexual harassment, regardless of where it originates.

Your dealership's obligation to take appropriate action in response to a harassment complaint extends beyond complaints about the actions and conduct of its employees. Rather, the obligation to protect your employees also extends to complaints about or knowledge of inappropriate conduct by third parties, including customers, vendors, and visitors. And, as demonstrated by several recent cases described below, an employer's failure to respond appropriately to allegations of harassment by a non-employee can lead to significant legal liability.

What Do You Need To Know About Third-Party Harassment?
Just this year, a federal appeals court ruled that the victim of alleged inappropriate conduct by a patient at a healthcare facility would have the opportunity to present her case to a jury. The focus of the case and the jury's attention likely will not be on the alleged inappropriate conduct by the patient, but instead will be on the employer's alleged failure to protect her from the patient's inappropriate behavior once it became aware of the conduct. The court stated that while the nature of a workplace is an important consideration, where the harassment is known by management and actively ignored, the employer may be held liable.

In another case alleging third-party harassment, a jury awarded $200,000 to an employee after finding that two customers had repeatedly sexually harassed her. The jury found that, despite the employee's complaints to management about the customers' inappropriate comments, unwelcomed touching, and groping, the employer failed to take appropriate action. A federal appeals court recently upheld the $200,000 jury award, noting that where the employer knows or should have known of the harassing conduct and fails to take immediate or appropriate action, the employer may be held liable.

And in yet another case, a different appeals court upheld a substantial jury verdict for an employee who alleged sexual harassment by a customer. The court in that case also concluded that the

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employer's response to the employee's complaint was inadequate.

When Are You Responsible For The Behavior Of Third Parties?

The short answer is that your dealership may be liable for harassment by a third party when you know or have reason to know about it and fail to appropriately and effectively respond. Significantly, the cases described above are not so much about the alleged harasser's conduct but more about the employers' response to knowledge of that conduct—which the courts found inadequate. The basic rule is that while the employer may not be able to control completely the actions of all employees or other third parties on the premises at all times, the employer does have complete control over its response to the complaint. And when that response is inadequate, legal liability is a possibility.

The decisions described above are not surprising nor restricted to a particular industry. Dealerships, too, can be found liable for a customer's or other third party's sexual harassment of an employee whenever they act "reckless in permitting, or failing to prevent the harassment." This means that once an employee complains or the dealership becomes aware of an incident of sexual harassment, you cannot remain idle, even if the bad actor is a not an employee. Instead, you should promptly investigate and take proper action, which may include "firing" the customer or other third-party offender.

Another important point: when investigating a complaint involving a third party, don't get caught up on the "sex" in sexual harassment. While your employee's complaint of sexual harassment must occur *because of their sex* to be actionable in a court of law, the complained-of conduct does not necessarily need to consist of pressure for sex, intimate touching, or deeply offensive sexual comments in order to get you in legal hot water. Complaints about demeaning or terrorizing conduct directed at an employee may also satisfy the "because-of-sex" requirement depending on the particular allegations.

Bottom Line

A dealership can be held responsible if a customer or other third party sexually harasses a dealership employee. As the cases show, the fact that the alleged harasser is not an employee is not a defense if you knew or should have known about the conduct and failed to take appropriate action. Therefore, you should treat a complaint of sexual harassment by a customer with the same force as you would if the alleged harasser were a co-worker or supervisor, which may include "firing" the customer or other third party.

As stated in ***#MeToo: A New Spotlight On An Old Problem***, your policies are your first line of defense, managers must be well-behaved and well-trained on sexual harassment, complaints must be promptly investigated, and appropriate action must be taken. With the spotlight on harassment shining brightly, failing to protect employees may come with significant consequences.

If you have specific questions about what to do when an employee complains about harassment from a customer, contact your Fisher Phillips attorney for legal advice.

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