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Protection and Prevention in the Age of #MeToo

Panelists address essential questions on preventing and mitigating sexual harassment lawsuits in the workplace

BY HARRIS NEWMAN

U.S. companies spent nearly \$2.2 billion last year on employment practice liability insurance; by 2019, that number could climb to \$2.7 billion. Twenty-First Century Fox's \$90 million settlement last December marked one of the largest payouts ever in a derivative lawsuit. The Equal Employment Opportunity Commission (EEOC) reported nearly 30,000 harass-

ment cases filed in 2016 (also noting the issue is underreported). With these trends, the likelihood of a sexual harassment complaint seems imminent for organizations, and has put company leaders and board members understandably on edge.

To address concerns, *Oregon Business* partnered with The Partners Group, Tonkon Torp and HR Answers to host a seminar titled, "Employment Practice Liability: Coping with the growing risks of workplace

misconduct." Hosted by Mercy Corps on June 21, the seminar focused on key issues of workplace sexual harassment, such as how to assess risk, steps to handle cases as they arise, and how to protect organizations and boards against lawsuits.

The three panelists were Roxanna Jessen, Account Executive with The Partners Group, who specializes in commercial insurance and employment practice liability; Haley Morrison, partner with Tonkon Torp, who counsels primarily on harassment and discrimination cases; and Laurie Grenya, co-President of HR Answers, who provides Human Resources training and consultations. The panel was moderated by *Oregon Business* editor, Linda Baker.

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The #MeToo movement has created a 'fever pitch,' empowering employees to come forth and disclose harassment cases at an unprecedented rate. "This movement has generated so many claims...these aren't going away any time soon," said Jessen. Her company, The Partners Group, sees harassment insurance claims come in nearly every day. "Now, it's not a matter of 'if' a complaint comes in, but 'when.'"

Amongst this fervor, all three panelists agreed this cultural shift has caused a positive, albeit difficult, transformation of company culture. "I don't think the standards of behavior have changed," said Morrison. "Now, we're just talking about it." The #MeToo movement has necessitated a firmer definition of what's appropriate in the workplace, a deeper need for transparency and open communication, and an increased alertness from managers and

company leaders to attend to what's happening on a daily basis.

However, this fast-growing movement has led many employers to become "paralyzed with caution". Multi-generational teams, collegial work cultures, and employees with various sensitivities have complicated the line between what's merely inappropriate or what constitutes harassment. As an employer, how do you draw that distinction?

According to Morrison, harassment laws are clearly defined; employers should seek counsel to understand which behaviors constitute a legal problem. However, many issues which "toe the line" are merely symptoms of a hostile work environment. The most effective action is catching instances early on; instead of worrying what constitutes harassment, she advises leaders to engage with employees on any issue and always lend a sympathetic ear. "Even if you don't agree with the person, it's about being able to have an open dialogue," said Morrison. "When you can say, 'I hear you, I know this is important—what can we do to help you now?,' then the employee feels heard, and you have a lower risk of it becoming a bigger issue."

What often happens is the build-up of tension over time, where continued minor slights can eventually spin out of control. "Many cases are only difficult if you let them become difficult," said Grenya. Boundaries can get continuously pushed back—or be lacking altogether—which eventually create a toxic workplace. "These are every day occurrences that keep saying, 'a little more is okay'. If you stop them early on, you can avoid bigger issues."



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LAURIE GRENYA



High level of audience interaction and questions

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Oregon & SW Washington employers gather to learn in person.

This is also reflected in cases where the complaint was filed years after the original event took place. “Sometimes it’s the culture that persists, not the employee or behavior that he or she is upset about,” said Morrison. “When they’re bothered by something that happened 20 years ago, it’s often because the behavior still permeates the culture.”

Having multiple outlets for these open dialogues is critical. Employees sometimes feel trapped in who to turn to—companies may say they have an “open-door policy”, but management is absent or inaccessible when they’re most needed. Or, even worse, the person perpetrating the offense is the manager.

Companies must have multiple supervisors trained to recognize and handle com-

plaints. Employees must direct complaints not to peers or lower-level supervisors, but to those who can intervene effectively. “To qualify for insurance coverage, these outlets must be defined in the company’s sexual harassment policy, in clear and simple verbiage,” said Jessen.

That said, if harassment is known by the company and not properly disclosed, then the company is legally “on notice”. As Jessen added, “Insurance may not cover a company who was aware of harassment but did not take steps to address it.” And it’s the obligation of the manager or employee to follow through if he or she hears a complaint. “Everyone is responsible for this,” said Grenya. “It’s not just a management exercise—every employee needs to engage

and report. If you’ve experienced it, you report it.”

These complaints don’t necessarily have to be in writing, as Grenya added, “Any way people are comfortable to share information is fine.” However, once the complaint is disclosed it’s recommended to document on paper, as attorneys often prefer complaints in writing.

Also raised was the issue of companies holding out-of-office events—such as ones involving alcohol—and not realizing the potential implications that can ensue. While going out is okay, an instance may take place at the bar which then spills over into work. “Often people say, ‘It didn’t happen at work, so it’s not an issue.’ No, it is an issue,” said Grenya. “If whatever’s happening at the

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HALEY MORRISON



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ROXANNA JESSEN

bar is violating work, then we have a problem.” Companies need to establish clear behavioral expectations for these events, managers especially. She added: “You can still be friends with employees, but you need to keep that line clear.”

Similarly, many companies are unaware that third-party incidents also constitute harassment. Third parties can be the perpetrator or the victim of a harassment case, and can include vendors, customers, delivery drivers—anyone who enters the premises or engages with company employees. Jessen quickly identified third party cases as the most overlooked aspect of assessing risk. “Employment practice policy does not automatically cover these instances,” she said. “It’s important to make sure they’re defined by your third-party policy.”

Other questions raised by the audience were in regards to gender-specific bathrooms (Grenya’s solution: non-gender specific restrooms throughout the building); management’s latitude in intervening (“If the person hasn’t complained, then let it go,” said Morrison); relationships between co-workers (group consensus: while not



illegal, they require an immediate, upfront conversation); and, most especially, where and when to obtain the best insurance coverage and legal protection.

Companies can insure themselves by applying for Employment Practice Liability Insurance (EPLI), which covers various claims on discrimination and harassment. Policies are not uniform, so Jessen recommends having them professionally reviewed. The Partners Group can assist with preparing insurance applications, assessing risk, filing claims, and educating on other prevention and protection measures. They also connect companies with an underwriter best-suited for their particular corporation, which helps secure the lowest possible premium.

Beyond having a complete insurance policy, companies can outsource HR experts to develop or refresh their employee handbook. HR Answers offers comprehensive role-play and training seminars for various

group and company sizes. Often they will partner with attorneys, such as Tonkon Torp, for handling specific legal questions.

In addition to improving company culture, these preventive measures show insurance underwriters that precautions are actively being taken, which can help reduce premium costs.

Ultimately, sexual harassment is a multi-faceted issue. It affects every company uniquely and will require different precautionary measures. However, having a healthy grasp on your team’s culture and practicing proactive conflict resolution can greatly mitigate potential issues. “The reality is, you cannot ‘politically correct’ everything” said Grenya. “But you have to know your culture. And if you think you know it, you don’t.” ■

The Partners Group Commercial Insurance Division offers a wide depth and breadth in commercial insurance options, including complete access to carriers and products necessary to serve company’s needs, with offices in Portland, OR., Bellevue, WA., and Bend, OR. To inquire about coverage or services, please visit their website, www.tpggrp.com.

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Other hot employment practice topics were brought up as well.

