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Hollywood Has Shined a Spotlight on Sexual

Harassment: Now What?

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Harvey Weinstein may actually have caused more people to talk about sexual harassment in the workplace than Anita Hill did. While the topics of discussion may range greatly, in corporate America one common question keeps rising to the top: What should a company do when presented with an allegation of sexual harassment or a sexual relationship between co-workers? To answer that question properly, you need to start with three basic questions:

- What is sexual harassment?
- What is an employer's responsibility as it relates to sexual harassment?
- What should an employer do about consensual, sexual relationships?

Definition of Sexual Harassment

Sexual harassment falls into two categories: *quid pro quo* (i.e., something for something) sexual harassment and hostile work environment. At its core, sexual harassment consists of unwelcome (meaning not consensual) sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature where the conduct impacts an employee's employment, unreasonably interferes with the employee's work performance, or creates an intimidating, hostile or offensive work environment. With both types of harassment, the victim and harasser can be any gender (i.e., they can be of the same or differing genders.)

With *quid pro quo* harassment, the harasser is in a position of power or influence over the victim. An example would be if a boss offers a subordinate a promotion in exchange for a sexual act.

To create a hostile work environment, the conduct needs to be frequent or severe and of a sexual nature. The repeated and regular distribution of nude photographs by email may rise to the level creating a hostile work environment, while a single email containing a sex joke may not. Isolated

or infrequent incidents do not create a hostile work environment unless the conduct in question is severe. With hostile work environment, anyone can be the harasser or the victim.

Responsibilities of Employees and Employers

Federal, state, and local laws mandate that employers of a certain size are obligated to provide a workplace that is free of harassment on account of any protected trait, including sex.

Employees share in that responsibility. Specifically, the law acknowledges and recognizes that employers cannot possibly know what every employee is doing in the workplace. The law, therefore, imposes an obligation on the employees to report peer-to-peer hostile work environment conduct so that an employer can address the conduct.

To fulfill its obligation, an employer can do the following:

- **Establish workplace policies:** An employer should have workplace policies that ensure that the workplace complies with applicable law, including prohibiting all types of harassment. These policies also should prohibit retaliation against employees that make workplace complaints and/or participate in workplace investigations. The policies also should provide several different reporting options for employees to make harassment complaints.
- **Train:** An employer should train its employees about the law of harassment as well as the applicable workplace policies and procedures.
- **Intake Reports:** An employer should provide means for employees to report sexual harassment through different channels. Some companies have ethics hotlines where employees can report complaints by email or telephone 24/7 (including anonymously).
- **Investigate Complaints:** An employer should investigate all reports and complaints of sexual harassment no matter what the employer thinks of the merits of the complaint.
- **Fix Problems:** The law requires employers to take corrective remedial action to ensure that the sexual harassment will stop. The corrective action needs to be proportionate to the conduct. Just as it is not necessary to sentence a jaywalker to death, a written warning and additional harassment training may be enough to correct the behavior of an employee engaging in sexual banter at work.

What to Do About Love?

Prudent employers typically have a good system in place for dealing with uninvited sexual advances. Many employers, however, are less sure-footed on what to do about consensual, sexual relations at work. Even though consensual relationships cannot constitute harassment, there are business reasons for employers to be concerned. For example, consensual relationships within the same reporting chain can create conflicts of interest, or at least the appearance of impropriety or favoritism. Likewise, when relationships end or are ending, harassment issues could arise if the relationship becomes nonconsensual for at least one party. A prudent employer has several options for tackling cupid in the workplace:

- **Employers can implement an anti-fraternization policy.** This policy forbids employees from dating or having similar relationships with other employees. If an employer elects this option, it needs to be prepared to enforce the policy no matter who violates it. This means the employer may be faced with terminating a high-performing employee once it discovers he or she is having a forbidden relationship at work. Most employers implement a modified version of this policy. These policies typically forbid dating or similar relationships within reporting chains (e.g., a supervisor and a subordinate).
- **Employers can implement a “Love Contract” practice.** With this approach, if employees are in a consensual relationship, a company workplace policy requires the employees to report the relationship (confidentiality) to the Human Resources Department. In addition to adjusting reporting chains and other necessary actions arising from the relationship, the HR Department also has the employees confirm, in writing, that the relationship is consensual, so that the employer has a clear record that the relationship does not constitute harassment. The challenge with this approach is that many find it to be an invasion of privacy and persons having extramarital affairs are reluctant to self-report.
- **Employers can implement a conflict of interest policy.** This policy requires supervisors to report conflicts of interest, including personal relationships with subordinates, to the Human Resources Department before the supervisor

makes any employment decisions (e.g., reviews, raises, bonuses) about the subordinate.

While the topic of harassment is top of mind thanks to Hollywood, it is a good time to revisit training procedures, workplace policies and complaint/investigation procedures to assess whether any improvements need to be made to prevent, or at least deter, sexual harassment at work. A harassment free work environment is not only legally required; it creates a healthier, more productive workplace for all.

April Boyer is a partner and Mallory Cooney is an associate in K&L Gates' Miami office, where they counsel and represent employers in connection with the firm's labor, employment & workplace safety practice.