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LABOR UPDATE

Recent Developments in Labor and Employment Law

SEXUAL HARASSMENT POLICIES: THE FIRST, BEST, AND (sometimes) ONLY TOOL FOR DEFENDING SEXUAL HARASSMENT SUITS

This summer, the U.S. Supreme Court issued two decisions which imposed significant new responsibilities on employers to prevent and deal with sexual harassment in the workplace. These decisions held that an employer can be held liable when supervisors sexually harass workers, even if the employee does not report the harassment and suffers no tangible employment loss such as termination or demotion. The employee does not even need to prove that the employer was negligent in preventing the harassment. Lower courts across the country have applied these rulings to racial and religious harassment cases as well.

However, the Court did not leave employers defenseless in such cases. The Court held that employers could be absolved of liability for harassment committed by a supervisor if (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. However, this defense is not available where the harassment results in a tangible job action such as termination or demotion. In addition, courts throughout the country have applied these rulings to other types of harassment claims such as racial and religious harassment

So what does this mean to the employer? It means that companies must now take unprecedented steps to educate employees on what constitutes harassment and what to do if it occurs. There are many different methods which can be combined to accomplish this goal.

Anti-Harassment Policy

The first line of defense for the employer is a clear and comprehensive sexual harassment policy, including a definition of what constitutes sexual harassment, a method of

reporting harassment, and a way for the employee to bypass his or her supervisor or other contact person if that person is the alleged harasser. The policy must be distributed to all employees and new hires and should be posted conspicuously at the employer's facilities.

Harassment and Sensitivity Training

A sexual harassment policy is only the first step in protecting the company from allegations of harassment. The employer should hold an initial meeting for all employees to explain the new policy, pledge the company's commitment to providing a harassment-free workplace, and answer any questions which employees may have. Employees can also be presented with hypothetical situations to ensure that they understand what harassment is and how to deal with it.

Periodic Training Sessions

Over time, employers may wish to update their harassment policies and remind their employees of their commitment to the harassment program. In addition, new employees need to be brought educated and trained as to the company's firm stand against harassment in the workplace. Therefore, it is recommended that employers conduct regular follow-up training seminars.

Investigation Procedures

After an employee makes a harassment complaint or if management discovers a situation where harassment may be occurring, it is vital that a prompt, detailed and well-documented investigation follows. This will not only root out and correct any ongoing harassment but will also send a powerful message to employees that harassment will not be tolerated.

Other Techniques

Depending on the nature of an employer's business and working environment, a company may want to take additional steps to limit exposure to a sexual harassment suit, such as:

- Implement a harassment hotline employees can call with complaints or questions;

- Conduct intensive pre-hire background investigations of all supervisors including histories with past employers.

The lawyers of Peters & Lyons, Ltd. are prepared to help you update your present

harassment program or assist you in building one from the ground up. We have drafted dozens of individual harassment policies, conducted harassment and sensitivity training seminars, and assisted in the investigation and litigation of many sexual harassment cases. The adage "An ounce of prevention is worth a pound of cure" is most appropriate when dealing with sexual and other types of harassment. Proper planning and training can prevent most instances of harassment and minimize problems if they do occur. To discuss what Peters & Lyons can do for your company, please call one of our attorneys.

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CHICAGO COMPANY PUTS EEOC TESTING PRACTICE ON TRIAL

In a significant role reversal, the Legal Assistance Foundation of Chicago, a non-profit agency which represents minorities, and two of its employees, are being forced to defend themselves against fraud charges. These allegations arose from the Foundation's use of testers to apply for local positions and check for possible discrimination.

In 1995, the Foundation received a grant from the EEOC to send out testers to Chicago area companies. These testers, one black and one white, would apply for the same job using similar, but fake, credentials. If the less qualified white tester was hired for a position, the Foundation claimed that this was evidence of discrimination. Shortly after the testing program began, two Foundation testers applied for a receptionist position with a Chicago-based security company. One tester, a black woman, submitted an application, sat for an interview, and was told she would be contacted again for a second interview. The second tester, a white woman, allegedly submitted an application with similar qualifications and was offered the job after her initial interview.

Based on the company's selection of the white, slightly less qualified, candidate, the Legal Assistance Foundation filed suit on behalf of the testers in federal court alleging that the hiring decision amounted to race discrimination. However, in September, the judge dismissed the suit, ruling that testers cannot sue for discrimination since they did not actually want the job. In addition, the testers applied using false qualifications, something which would disqualify even legitimate applicants. The Foundation is appealing this dismissal.

However, the company then chose to turn the tables on the Foundation and sue it and the two testers. According to the lawsuit filed last month, presenting fake qualifications and feigning interest in a job constitutes fraud. The company claims that legitimate applicants were turned away after it was decided to hire the tester. In addition, the company claims its hiring practices were unfairly labeled as discriminatory based on the results of a single set of testers. The suit seeks money damages.

Testing has been widely used to ferret out housing discrimination for over a decade and its legality has withstood numerous challenges. However, testing in an employment

setting raises many problems. First, an employment decision is often a highly subjective one. Employers need to base a hiring decision on more than a grade point average or years of industry experience. Second, resumes often cannot convey an applicant's personal skills, enthusiasm or personality. However, these all factor into the hiring decision. For these reasons, many legal and human resources experts believe the use of testers in employment discrimination will be short lived and of limited utility.

However, the Foundation and the EEOC both still support the use of testing programs to find employment discrimination. The EEOC sponsors a similar testing program in Washington, D.C. and plans to expand the program to New York and San Francisco. Obviously, these plans will be put on hold until the Foundation's appeal is decided sometime this summer.

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BITS AND PIECES

The share of American workers belonging to unions continued to shrink over the past year even though union membership grew by almost 100,000 workers. Continuing a twenty year slide, unions' share of the private workforce fell from 9.7 percent in 1997 to 9.5 percent in 1998, according to the U.S. Bureau of Labor Statistics. Although unions organized about 400,000 new workers, this growth was counterbalanced by layoffs, retirements and the general shrinkage of blue-collar union positions.

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John Bothe is a race announcer at the Meadowlands, one of the country's premier horse racing tracks. He is also a compulsive gambler but hasn't placed a bet in over seven years. When track officials informed Bothe that he would be handicapping races on the track's daily closed-circuit television show, he was concerned that his new duties could reignite his passion for gambling. However, the track told Bothe that he would lose salary and benefits if he refused the new assignment. So Bothe is suing the track alleging that his compulsive gambling is a disability and the track is discriminating against him!

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The Equal Employment Opportunity Commission is suing Wal-Mart over questions contained in its employment applications. These questionnaires ask applicants whether they would need any accommodation to perform the required duties of the job sought. Wal-Mart takes the position that the question is designed to determine whether an applicant's needs can be accommodated before they accept a position. However, the EEOC claims that it is illegal to make any inquiry about a disability before a job offer is made. A California court is expected to decide the matter this summer.

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

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