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Preventing Claims of Harassment & Discrimination

PRESENTED BY:

Joshua E. Holt
Smith, Currie & Hancock LLP



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About the Speaker

Josh Holt is an associate in Smith Currie's Tysons office. Josh concentrates his practice in the area of construction law. His practice includes advising and representing construction owners, architects, engineers, general contractors, subcontractors, and suppliers on both public and private projects.

Josh also has experience representing clients in complex employment litigation and white-collar investigations. He has counseled clients on compliance with state and federal employment laws and handled matters involving a wide range of claims including wrongful termination, discrimination, breach of contract, tortious interference, and defamation.

Josh received a Bachelor of Arts degree from Amherst College. He received his law degree from Boston University School of Law.



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Smith, Currie & Hancock LLP

Which Employers are most at risk?

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- Risk factors for harassment claims:
 - Homogenous workforces
 - Workforces with many young workers
 - Isolated workspaces
 - Cultural and language differences in the workplace
 - Workplaces that rely on customer service or client satisfaction
 - Decentralized workplaces
- Additional risk factors:
 - Workplaces where work is monotonous or consists of low-intensity tasks
 - Workplace cultures that tolerate or encourage alcohol consumption
 - Workplaces with significant power disparities
 - Coarsened social discourse outside the workplace

**From the June 2016 Report by the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace*

Additional Factors Applicable to all Employers

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- Increased attention on discrimination and harassment
 - The Me Too movement
 - The Black Lives Matter movement
- COVID-19 imposing new burdens on Employers and Employees
 - Increased tensions
 - Significant changes:
 - Cut hours
 - Reduced wages
 - Vaccine mandates

Takeaway #1

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- You do not want to be the target of an EEOC complaint
 - Resolving a complaint is costly
 - Opens the door to further complaints

Takeaway #2

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- The best way to avoid an EEOC complaint is to establish a healthy workplace culture
 - Prevents complaints from arising in the first place
 - Enables you to respond more effectively if/when a complaint is filed

What is the EEOC?

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- The federal agency responsible for enforcing federal laws prohibiting employment-related discrimination:
 - Title VII of the Civil Rights Act of 1964 (“Title VII”)
 - The Equal Pay Act of 1963 (“EPA”)
 - The Age Discrimination in Employment Act of 1967 (“ADEA”)
 - The Americans with Disabilities Act of 1990 (“ADA”)
 - The Genetic Information Nondiscrimination Act of 2008 (“GINA”)

- Make it illegal to discriminate against a job applicant or employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information
- Apply to Employers with 15 or more Employees
 - Does not include independent contractors
 - But beware of misclassified employees

Federal Anti-Discrimination Laws

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- Harassment is considered a form of discrimination
 - 2 categories:
 - Qui pro quo
 - Hostile environment

- Also prohibit retaliation against a job applicant or employee for asserting their rights (i.e., engaging in “Protected Activity”)
 - “Protected Activity” includes:
 - Asking questions to uncover potential discrimination
 - Resisting sexual advances
 - Filing a complaint
 - Cooperating in an investigation
 - Creates additional incentives to be deliberate and proactive in responding to complaints

- All but the Equal Pay Act require an Employee to file a complaint with the EEOC before pursuing a private lawsuit against his/her Employer
 - The EEOC is the gatekeeper for discrimination claims
 - Any complaint will come through the EEOC first

- An Employee files a Charge of Discrimination
 - A mandatory step before the Employee can file suit
 - A one-page document – minimal details
 - Must be filed within:
 - 300 days of the employment action in states with laws prohibiting the alleged conduct
 - 180 days of the employment action in all other states

- The EEOC notifies the Employer of the Charge
 - Will invite the Employer to submit a Position Statement
 - The Employer's primary opportunity to respond to the allegations of the complaint
 - Early in the process
 - Important to have as much information as possible
 - May invite the Employer to engage in mediation

- The EEOC investigates the Charge
 - Can be a lengthy process
 - Requests information from the Employer
 - Employment policies
 - Personnel files for the individuals involved
 - Records of any internal investigations
 - Employment statistics
 - Narrative responses to questions about specific allegations
 - Interviews the accused, witnesses, other employees
 - If the employee is not a part of management, the Employer may not be permitted to have a representative present

- The EEOC makes a Reasonable Cause Determination
 - If the EEOC determines that there is insufficient support for the claim –
 - The EEOC issues the Employee a Right to Sue Letter
 - The Employee has 90 days to file suit
 - If the EEOC determines that there is reasonable cause to believe that discrimination occurred –
 - The EEOC issues the Employer a Letter of Determination
 - Recent efforts to increase transparency, but still offers minimal information
 - Offers the Employer a chance to conciliate the matter (i.e., settle)

- The EEOC attempts to conciliate the matter
 - The EEOC makes an initial proposal
 - Typically includes:
 - Monetary compensation
 - Training requirements
 - Monitoring and/or reporting
 - The parties negotiate the terms
 - If the parties reach an agreement, the matter is resolved
 - If not, the EEOC decides whether to pursue litigation against the Employer
 - If the EEOC declines, the Employee can file suit on his/her own

Reasons for avoiding an EEOC complaint

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- Costly to resolve:
 - Monetary compensation to the Employee
 - Legal fees
 - Disruptive to operations
 - Negative effect on employee morale
 - Reputational harm

- Opens the floodgates
 - Other employees may file complaints
 - The company is on the EEOC's radar
 - May discover additional complaints
 - May discover additional compliance issues
 - The company may be subject to monitoring and/or self-reporting requirements

- #1 - Know your workforce
 - Assess the risks:
 - What is the general makeup, in terms of gender, race, etc.?
 - What is the breakdown by position?
 - How are benefits distributed?
 - Do any Employees require accommodations?
 - Are your Employees being properly vetted?
 - What is the relationship with subcontractors?
 - Allows you to address problems proactively
 - Allows you to effectively respond to complaints

- #2 - Establish clear, robust anti-discrimination policies
 - Set the tone
 - Make it clear to your Employees that discrimination will not be tolerated
 - Should include at least a description of:
 - Unacceptable types of behavior
 - The consequences
 - The reporting process
 - The investigation process
 - Should be tailored to your company
 - Make the policies widely available to your employees
 - In the Employee Handbook, posted at jobsites

- #3 - Establish clear, objective employment policies
 - Neutral, objective criteria that drive employment decisions
 - E.g., hiring, time off, transfers, raises, termination
 - Allowing decisions to be made on an individual basis creates risk
 - Discrimination
 - Quid pro quo harassment
 - To the extent possible, decisions should be made, or at least reviewed, by upper management
 - Ensures a degree of consistency

- #4 - Train your Employees on the policies
 - Demonstrate how the policies work in practice
 - Educate your employees on what constitutes unacceptable behavior
 - The training should include:
 - Concrete examples
 - Sample scenarios
 - Should be tailored to the specifics of the Employees' work environment
 - Should be reinforced on a regular basis and modified as necessary

- #5 - Train your Managers on recognizing and responding to problems
 - They are the ones implementing the policies in the first instance
 - They are the ones interacting with employees on a day-to-day basis
 - The first line of defense
 - Can stop problems before they get out of control
 - Incorporate these responsibilities into regular performance evaluations

- #6 - Establish clear reporting structures
 - Should be clearly stated in the company's Anti-Discrimination Policies
 - Employees should know whom they can speak to about any concerns
 - Provide multiple alternatives
 - Assure Employees that:
 - All complaints will be taken seriously
 - Information will be kept confidential
 - There will be no retaliation
 - Encourage open communication
 - May deter inappropriate behavior
 - Allows you to address problems internally
 - Allows you to address problems early

- #7 - Establish an investigative process
 - Should be clearly stated in the company's Anti-Discrimination Policies
 - Want to be prepared to act quickly when a complaint comes in
 - May deter inappropriate behavior
 - Allows you to address problems internally
 - Allows you to address problems early
 - Avoids potential missteps that could lead to a retaliation claim
 - Should be led by someone outside the chain of command
 - Helps in preparing an effective Position Statement

- #8 - Establish clear disciplinary standards
 - Should be clearly stated in the company's Anti-Discrimination Policies
 - Demonstrate to your employees that you take the issue seriously
 - May deter inappropriate behavior
 - Allows you to address problems internally
 - Allows you to address problems early
 - Apply the standards consistently
 - Helps in preparing an effective Position Statement

- #9 - Document everything
 - Before a complaint comes in:
 - Pay rates, job assignments, employee requests and responses, training certifications, performance evaluations, disciplinary actions
 - After a complaint comes in:
 - What was done to investigate, what was discovered, what actions were taken in response and why?
 - Helps in preparing an effective Position Statement
 - Provides the evidence needed to refute the complaint
 - Shows the EEOC that the matter is under control

- #10 - Reassess your policies and practices
 - Should be done regularly as a matter of course
 - At the very least, after every complaint
 - What is working? What is not working?
 - Update policies, processes, and training accordingly



Questions?

Joshua E. Holt

703.506.1990

jeholt@smithcurrie.com