

Reproduced with permission from Daily Labor Report, 57 DLR 13, 3/23/18. Copyright © 2018 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

## Sexual Harassment

### **Workplace Harassment—and ERISA to the Rescue**

BY DAVID MCFARLANE AND SAMUEL W. KRAUSE

Supreme Court Justice Ruth Bader Ginsburg recently joined a rising chorus of voices across the country speaking about personal experiences of workplace harassment. A recent ABC News – Washington Post poll found that 33 million women in the U.S. had experienced sexual harassment and that 14 million women have been sexually abused in the workplace. Let that sink in for a moment (ABC News – Washington Post October 12-15, 2017, Langer Research Associates).

In that same poll, nearly 95% of women reported that the harasser usually went unpunished. And while 75% of Americans see workplace harassment as a societal problem (ABC News – Washington Post October 12-15, 2017, Langer Research Associates) and nearly 90% believe that “a zero-tolerance policy for sexual harassment is essential to bringing about change in our society” (IPSOS/NPR poll October 10-11, 2017), employers are left wondering how to better confront, eradicate and fairly remedy the harms arising from workplace harassment. The timing is urgent. The question is simple – what do we do?

The answer is a robust combination of internal and external steps that, linked together, will provide a solid framework for employers to make the workplace safer and considerably more productive. Studies show that morale and productivity suffer where there are systemic workplace harassment problems (not to mention the bad publicity and legal and settlement costs). Building a multifaceted approach to combating workplace harassment is a win for the employer and a win for employees. One of the more interesting facets of this approach may be found in the Employee Retirement Income Security Act (ERISA) - a federal law enacted in 1974 to provide protections for employee benefit plans. By establishing an employer-funded benefit plan to provide payment or reimbursement for certain therapy, counseling, psychological and other medical or specified costs to those suffering from workplace harassment, employers may find another effective tool to encourage employees to report workplace harassment while also helping to remedy harm. Employees, in turn, may well view such a plan as a progressive effort by

their employer to help stem and heal the effects of harassment.

Employers have long provided workplace retirement, health and welfare benefits for their employees and have continued to offer creative and beneficial benefits for their workforce. In addition to providing better economic, health and lifestyle options for their employees, offering a robust and progressive benefits program often provides a competitive corporate advantage. Latest trends in employee benefits include genetic testing, breast-milk delivery services, pet insurance, student loan repayment, wedding reimbursement, home purchase loans, holistic medical coverage, and home-delivered meals. In addition to these benefits, employers might consider adding a customized tax-effective workplace harassment protection plan under ERISA that is available to any employee who is subjected to harassment.

#### **Independent Third-Party /“Ombudsmen” Concept**

Hiring an independent third party or “ombudsman” as part of an employer’s harassment prevention strategy is gaining certain attention. A recent report by CEB/Gartner found that only 7% of respondents who had witnessed or experienced sexual harassment reported it via a hotline. The report suggests that the best approach may be to provide multiple paths for employees to report harassment, including a path that might not include human resources. An employer may instead want to hire an “ombudsmen” to “provide a clear break in the chain of command, when it comes to reporting harassment” (“Corporate Sexual Harassment Hotlines Don’t Work. They’re Not Designed to”. Quartz at Work, May 2, 2017).

Recent start-ups have latched on to the idea and are developing products and solutions that feature an “ombudsman” or other third-party conduit (“Gretchen Carlson: How to Encourage More Women to Report Sexual Harassment,” The New York Times, October 10, 2017). However, the delicate interaction between employer, employee, and ombudsman would need to be carefully considered from a variety of angles in order to best protect and balance the interests of all stakeholders as the approach is a novel one.

## **Me Too**

Workplace harassment takes many different forms. The “me too” movement focuses on the most pervasive type of harassment in the workplace – sexual harassment. But harassment or bullying can be based on other personal attributes or characteristics including race, sexual orientation, gender identity, national origin, disability and age. Unfortunately the problem isn’t new or arguably worse now than before. What has changed is the silence which once surrounded it. The silence of those who are subject to harassment is ending as they find their individual and collective voices. The silence of employers who either did not know about the problem, or who fell short of addressing it, is being broken on a daily basis. More powerfully, it’s society that now demands that those in positions of power and influence over others be held to the same legal and cultural standards that apply to us all.

Is HR to blame? Not really. It’s more a perception problem - that HR is there to protect the interests of the employer over the interests of the employee. HR departments can only deal with the tools they have been given. Often, those resources are spread too thin and the department not given the priority it should be given compared to profit and power centers within the corporation. That, however, is all about to change.

### **So, what to do?**

#### **Step 1 - Keep What Works**

(a) While 71% of organizations require sexual harassment training, less than half consider the training as effective (i4cp Report “HR & the Weinstein Effect”, December 15, 2017. See also SHRM January 31, 2018 “Harassment-Free Workplace Series”). That perception has got to change. Effective training programs that educate, raise awareness and sensitize the workforce and society in general about topics such as sexual harassment, gender equality, unconscious bias, and diversity are essential and should be strengthened. Training programs and internal anti-harassment policies and procedures should be immediately reviewed and strengthened with the assistance of external advisers. Internal compliance reviews often help maintain the status quo. Outside experts can provide an independent and critical eye to help fix or enhance current policies and procedures – and shareholders will soon be demanding it. Recent shareholder legal actions – even from retirement plans – seek damages from corporations who they maintain failed in their duty to address the problem of sexual harassment which ultimately caused a drop in stock value once the scandal became public.

Employers and their HR departments have been given the opportunity – and hopefully the financial resources and C-Suite support – to review and analyze both their current resources in combating workplace harassment and their overall workplace culture. With the help of an array of good outside advisors, current programs and policies can be strengthened to better protect both the employer and employees.

(b) Hotlines provide an outlet to those who desire to report harassment anonymously. Hot lines can provide referral and other services and often will report back to an employer when a particularly hostile, pervasive or individual-specific pattern emerges. As noted above, however, some have begun to question the effectiveness of hotlines. Yet no matter the level of sophistication or usefulness, hotlines are one essential tool in helping combat workplace harassment.

#### **Step 2 – Embolden Reporting – The Weak Link**

We are all well aware of the term “early-detection” when it comes to our physical health and we understand the concept of catching warning signs before they develop into cancers or other serious conditions. It’s no different when trying to curb workplace harassment. Early detection means early reporting. And yet the basic issue in trying to address, cure and remedy the problem is that reporting of harassment is low. In fact, nearly 3 out of 4 incidences of sexual harassment in the workplace goes unreported, according to the Equal Opportunity and Employment Commission (“Select Taskforce on the Study of Harassment in the Workplace”, June 2016). Why? The answer is fear. Fear of not being believed. Fear of retaliation. Fear of losing a job. Fear of being ignored. Fear of the harassment getting worse. Fear of “rocking the boat” and making things more difficult for co-workers. Fear of being ostracized by peers for stepping forward.

So how does an employer try to better encourage reporting in order to disrupt the disrupter? There are three ways, none of which are mutually exclusive: 1) offer an incentive, 2) engage a neutral outside third party, or 3) undertake an independent review of the current workplace.

Let’s start with an independent review. There are several good external advisers that focus on analyzing specific workplace cultures and whether there is reluctance to report harassment - and if so, why. As noted above, others have proposed an ombudsman-type approach where workers can speak to a neutral third party to report incidences of harassment. Several start-up companies are addressing this need – one that even provides a direct reporting line to the board of directors. In some instances where the outside adviser is provided with specific incidences of harassment, the adviser reports the incident directly back to the employer. In other situations, the adviser reports on anonymous tips where it may see a trend involving one or more individuals or overall workplace culture issues. The difference between these start-ups and traditional hotlines appears not only to be the degree of anonymity they may provide to workers but also the level of services they can offer. For example, certain start-ups will connect the worker with an on-line counselor or provide additional counseling resources to provide assistance.

The third way to encourage reporting of harassment may simply be to offer an incentive – such as funds to pay for or reimburse certain counseling, mental health or other rehabilitative services. Establishing an employer-sponsored and funded benefit plan for employees who report incidences of harassment could encourage more employees to come forward. In short, it puts the employee in charge of her or his own healing program. The plan – referred to as the “Workplace Harassment Prevention and Protection Plan” or “WHIPP Plan” – would provide a cost-neutral benefit to the employee without the limitations, deductibles or other hurdles often associated with other types of benefit coverage. From the employer’s perspective, it helps demonstrate their engagement in assembling an array of tools to help eradicate and remedy a workplace ill, and it acts as an additional resource for those who are subjected to workplace harassment.

#### **Step 3 – Investigate and Address Issue – Outside Counsel is Essential**

Investigations are, perhaps above all else, key to identification and resolution of workplace harassment. If anything has rapidly shifted in these last 6 months, it's the recognition that external legal analysis and investigation are essential to getting to the root of problem – be it a few individuals or a culture of predators. And once investigation is complete, it must be followed up with decisive action – both in terms of addressing the wrongdoer and to help remedy the harm caused.

#### **Step 4 – Remedy**

As noted above, one potential remedy is for an employer to establish an ERISA-based plan to provide funds that would allow an employee to self-direct their own healing in response to workplace harassment. Why ERISA? Aside from the fact that any employee benefit plan with a funding and administrative mechanism automatically falls within its confines, ERISA sets up a fiduciary obligation by law for the plan administrator (employer) to act solely in the best interests of plan participants. Whether self-funded or self-funded with stop-loss insurance, such a plan would alleviate the need for the employee to work through the hurdles of out-of-pocket expenses, deductibles and other limitations of coverage under traditional health and welfare plans in light of the particular nature of this workplace harm. It is designed to complement, not replace, other workplace benefits like Employee Assistance Plans (EAPs). In short, it is another employee benefit offered by an employer who already provides a variety of health, retirement, fringe and other welfare plans. This plan, however, has one specific purpose – to help heal those who have suffered from workplace harassment. With careful design, these plans can stand alone from traditional health savings and reimbursement arrangements and offer employers and employees a tax-beneficial benefit structure with the protections of a federally mandated law like ERISA. Included in those protections are specific appeal procedures, notice and limited reporting requirements amongst other safeguards of ERISA plans.

As mentioned above, the plan itself could be designed to work solely with HR or with a neutral external third-party agency. Providing a “neutral” route of reporting to HR may help ease worries that HR is more closely aligned to the interests of the employer than the workers. The third-party agent could also provide advice, resources or information about the employer's policies to the employee, and even follow up with the employer regarding the status of an employee's claim. The terms of the plan could be drafted to ensure that receipt of benefits confers no admission or other acceptance of liability by the employer. Employers could also decide whether to offer the plan's benefits only after an investigation found a credible incident of harassment or it could be offered more broadly upon the initial report of an incident of harassment. The gatekeeper of that deci-

sion could be HR or the neutral third-party agency. In either case, an appeal of any denial would be addressed under the appeal mechanism established by ERISA.

Similarly, issues of confidentiality could be addressed under the plan, although they would likely not differ significantly from the current situation where an employee reports a situation to HR or an official third-party representative reports a situation on behalf the employee. The matter becomes more nuanced when an employee reports an issue of harassment to an official third-party representative but doesn't want his or her name revealed to the employer. Regardless whether the reporting path is directly to HR, via a neutral third-party agency/ombudsman or an anonymous hotline, the plan could be tailored to address a variety of concerns. The involvement of legal counsel in such design is essential.

#### **Step 5 – Monitor**

As is a common thread in recent pension and other benefit plan litigation under ERISA, a plan sponsor must be sure to meet its fiduciary responsibilities in acting in the best interests of plan participants – particularly its duty to monitor. That means the board of directors or responsible committee of individuals needs to review – with some regularity – both the cost and effectiveness of plans and the services provided by third-party providers. Arguably, that same duty to consistently monitor should apply to workplace harassment prevention plans, policies, training programs and third-party providers. Whether the plan sponsor meets this duty by retaining consultants, attorneys or better supporting HR to undertake such reviews, taking these steps helps reduce the employer's liability and better protects its workforce.

***David McFarlane** is a partner in Crowell & Moring's Los Angeles office. He has more than 20 years of experience in the U.S. and Canada advising on pensions, employee benefits, executive compensation, national and international corporate transactions, bankruptcy reorganizations, securities laws, corporate governance, deferred compensation, and structured finance matters related to the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, and the Affordable Care Act (ACA).*

***Samuel W. Krause** is a counsel in the firm's Los Angeles office. Sam has more than 20 years of experience writing, speaking, and advising on pensions, employee benefits, executive compensation, national and international corporate transactions, bankruptcy reorganizations, securities laws, corporate governance, deferred compensation, and structured finance matters related to the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, and the Affordable Care Act (ACA). Prior to entering private practice, Sam was an investigator for the New York Regional Office of the arm of the U.S. Department of Labor that is responsible for ERISA.*