Employee Relations
LAW JOURNAL

What Employers Need to Know About Delaware's New Anti-Sexual Harassment Law

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A new law expands the Delaware Discrimination in Employment Act to add a section on sexual harassment. In addition, a recent federal court case makes compliance even more important for Delaware employers (as well as those in New Jersey and Pennsylvania). This article provides a brief summary of Delaware's new anti-harassment law and the case, along with compliance tips for employers.

Delaware recently enacted H.B. 360, addressing sexual harassment prevention in the workplace. This new law expands the Delaware Discrimination in Employment Act (DDEA) to add a section on sexual harassment. The statute defines sexual harassment, addresses employer liability and defenses, and creates employee notification and mandatory training requirements. The law went into effect on January 1, 2019.

A recent federal court case, *Minarsky v. Susquehanna County, et al.*, makes compliance even more important for Delaware employers (as well as those in New Jersey and Pennsylvania). A brief summary of Delaware's new anti-harassment law and the *Minarsky* case follows, along with compliance tips for employers.

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COVERAGE UNDER DELAWARE'S NEW ANTI-SEXUAL HARASSMENT LAW

Delaware's anti-sexual harassment law applies to any employer employing four or more employees within Delaware at the time of the alleged violation of the law. "Employee" is broadly defined to include state employees, unpaid interns, applicants, joint employees, and apprentices. The training requirements apply to employers with 50 or more employees in Delaware. Independent contractors and applicants are not counted towards meeting the 50-employee threshold for training.

Definition of Sexual Harassment

The definition of sexual harassment in Delaware's new law mirrors the definition under federal law. Sexual harassment is defined to include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an employee's employment;
- submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or
- such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive working environment.

Employer Liability and Defenses

Employers will be responsible where "a supervisor's sexual harassment results in a negative employment action" for the employee. "Supervisor" is broadly defined as any individual who "is empowered by the employer to take an action to change the employment status of an employee or who directs an employee's daily work activities." Likewise, "negative employment action-" is broadly defined as "an action taken by a supervisor that negatively impacts the status of an employee." These broad definitions are likely to be interpreted to encompass a wide range of individuals and actions and may expand liability for employers beyond what is provided for by federal law.

Employers will also be held liable for the actions of non-supervisory employees where "the employer knew or should have known of the non-supervisory employee's sexual harassment of an employee and failed to take corrective measures." Employers may avoid liability for the actions of non-supervisory employees if the employer can show that:

- The employer exercised reasonable care to prevent and correct any harassment promptly; and

- The complaining employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

To take advantage of this defense, employers should, at a minimum, have strong anti-harassment policies and procedures for reporting and investigating sexual harassment claims.

The new law also prohibits retaliation. Employers will be responsible for any negative employment action taken against an employee in retaliation for the employee:

(1) Filing a discrimination charge;

(2) Participating in an investigation of sexual harassment; or

(3) Testifying in any proceeding or lawsuit about sexual harassment of an employee.

Notification Requirements

The Delaware Department of Labor will be creating an information sheet on sexual harassment and publishing it on its website. Employers are required to distribute the information sheet, either physically or electronically, to new employees at the commencement of their employment and to existing employees by June 30, 2019.

Mandatory Training

Employers with 50 or more employees in Delaware must provide interactive training and education to their employees regarding the prevention of sexual harassment. The training for all employees must include the following:

- The illegality of sexual harassment;
- The definition of sexual harassment using examples;
- The legal remedies and complaint process available to the employee;
- Directions on how to contact the Delaware Department of Labor; and
- The legal prohibition against retaliation.

All supervisors must receive additional interactive training including:

- The specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment; and
- The legal prohibition against retaliation.

Employers are required to provide existing employees and supervisors with the required training by December 31, 2019. New employees and supervisors must receive the training within one year of their commencement of employment. Re-training must be provided every two years thereafter.

If employers have already provided training to their employees that would satisfy the training requirements prior to January 1, 2019, no additional training is required until January 1, 2020.

THE *MINARSKY* CASE

The *Minarsky* case mentioned above highlights the importance of the #MeToo movement and its widespread effects. In *Minarsky*, the U.S. Court of Appeals for the Third Circuit[1] reversed a district court's decision that had dismissed a former employee's claims of sexual harassment. In reaching its conclusion, the court cited statistics regarding the overwhelming number of women who have experienced sexual harassment in the workplace and that three out of four women have not reported it for various reasons.

In *Minarsky*, Sheri Minarsky claimed that her supervisor had harassed her for more than three and a half years, but that she did not report it because she was afraid that she would lose her job and be unable to pay for her daughter's cancer treatments; that her supervisor would become more abusive to her if she made a report; and that nothing would be done in response. Her supervisor had been informally reprimanded on two prior occasions for his conduct toward other women. After another

employee reported the supervisor's harassment of Minarsky, the supervisor was terminated.

The court found that despite the fact that the employer had an anti-harassment policy and reporting procedures in place, and despite the employee's failure to report three and a half years of alleged harassment by her supervisor, it would not dismiss the case. The court found that it was an issue for the jury to decide whether the employer's anti-harassment policy and prior informal reprimands of the supervisor were sufficient to show that it had exercised reasonable care to prevent and correct promptly any acts of sexual harassment, and whether the employee's non-reporting of the harassment were reasonable under the circumstances. The court stated that a mere failure to report one's harassment is not unreasonable as a matter of law. The analysis of whether a failure to report is reasonable is highly specific to the circumstances, and the passage of time is just one factor in the analysis.

WHAT TO DO NEXT

Employers will need to prepare for and conduct the training required by Delaware's new anti-sexual harassment law. Employers should determine whether they meet the threshold number of employees required for the mandatory training provisions, evaluate any sexual harassment training they have already provided their employees, and arrange for additional training to meet the law's broad training requirements Delaware employers should also review their sexual harassment policies to make sure they comply with the new law and periodically check the Delaware Department of Labor's website for publication of the forthcoming notice that must be distributed to all employees. However, employers in Delaware (and Pennsylvania and New Jersey) should keep in mind that having a strong anti-harassment policy and procedure for reporting sexual harassment alone is not enough to defeat an employee's sexual harassment claim.

In *Minarsky*, the court found that despite the fact that the employer had these policies and procedures in place and the employee failed to report the harassment, it was up to a jury to decide whether the employee's failure to report was reasonable under the circumstances. Therefore, it is especially important for employers to foster a culture that encourages employees to report what they experience and what they may see or hear and ensures that they will receive fair treatment and be free of reprisal.

Also, in *Minarsky*, the court found that even though the supervisor was terminated, this may not be enough to show that the employer acted reasonably, because he had already received two prior informal reprimands regarding his inappropriate behavior towards other female employees. While a zero tolerance policy may backfire, a "two strikes

and you're out" policy, where there is more than one complaint about an employee, may be an effective tool for employers to implement.

NOTE

1. The U.S. Court of Appeals for the Third Circuit is the federal appellate court covering Delaware, Pennsylvania, New Jersey, and the U.S. Virgin Islands.