Rethinking discrimination and harassment policies and trainings

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Oregon's Workplace Fairness Act (Senate Bill 726) will take effect on Oct. 1, 2020. It expands the statute of limitations for filing a discrimination or harassment claim from the current one-year standard to a new five-year deadline (from the date on which the alleged unlawful practice occurred). The act also makes it illegal for an employer to enter into an agreement with a current or prospective employee that contains a nondisclosure provision, a non-disparagement provision, or any other provision that prevents the employee from disclosing or discussing conduct that constitutes covered discrimination that includes but is not limited to sexual assault.

The only exceptions to this new blanket rule are that those provisions are still permissible if: (a) the employee alleging a violation of those laws requests one or more of those provisions be included in the agreement; or (b) the employer reaches a good faith determination that the employee who is being asked to sign the agreement engaged in discriminatory or harassing conduct. The act also requires that any agreement containing a nondisclosure, non-disparagement or no rehire provision, provides the employee with at least seven days to revoke his or her signature, and empowers employers to void severance and separation agreements entered into between the company and a manager, if the employer determines in good faith that the manager's discriminatory or harassing conduct was a "substantial contributing factor" in causing the separation from employment.

New written policy requirements

The Workplace Fairness Act also requires every Oregon employer to adopt a written policy containing procedures and practices for the reduction and prevention of discrimination and harassment, including sexual assault. In particular, every employer must have a written policy that: (a) provides a process for reporting prohibited conduct; (b) includes the name of one person and one alternate who are responsible for receiving reports; (c) includes information about the relevant statute of limitations; (d) reaffirms that an employer cannot require employees to sign a nondisclosure agreement (and defines nondisclosure agreements); (e) states that an employee who is aggrieved may request a nondisclosure or non-disparagement provision in the agreement, and may revoke the agreement within seven days of signing it; and (e) advises employees to document incidents of discrimination and harassment.

The written policy must also explicitly prohibit discrimination and sexual assault, be made available to employees and provided to new hires, and be provided in writing whenever an employee brings forth a complaint or allegation of discrimination or harassment. The Bureau of Labor and Industries is in the process of developing a model policy for employers' use.

In short, an employer will now be required to not only have a written policy, but also actively educate its employees about prohibited conduct, and encourage documentation of all incidents of discrimination and harassment. While these policy requirements may be familiar to companies with employees working in California, they will likely force just about every Oregon employer to review their handbooks and policies to ensure that all of the mandatory points are covered.

What are you teaching your employees?

Although the Workforce Fairness Act does not mandate that employers provide discrimination and harassment trainings, employers would be wise to update trainings as they work to incorporate revised written policies.

Traditional trainings often focus too much on examples that rotate around obviously prohibited conduct and end up dividing attendees into either victims or violators. Further, those trainings are frequently reduced to a list of things employees should not say or do, leaving employees without the tools to effectively interrupt and stop improper conduct when it occurs around them.

Trainings are more effective in preventing future misconduct when they focus on how every employee should be an "active bystander" and speak up if and when inappropriate conduct occurs. Employers should educate employees on raising concerns in a timely and productive fashion. I have also found that having employees practice what they would say if something inappropriate happens in their presence equips them with concrete tools they can implement should inappropriate conduct occur in the workplace.

Likewise, employers should ensure that their trainings include some discussion of the role of power dynamics and consent. I always talk about "consensual dating" in the workplace, and how those relationships can turn into problematic situations for one or both people involved.

One of the lessons we can learn from the #MeToo movement is that individuals in positions of power need to be extremely careful about when and if consent exists. The fact that a subordinate did not say "no" is not sufficient to prove consent. Instead, there must be an affirmative "yes." Perhaps more importantly, can a CEO prove that a receptionist or janitor consented to his or her sexual advances? Or will the CEO's argument in favor of establishing consent be undermined by the nature of that power dynamic and whether the receptionist or janitor felt that he or she had to say yes in order to keep his or her job and opportunities for advancement within the company intact?

Although the Workplace Fairness Act stops short of requiring Oregon employers to provide training on specific subjects, employers would be wise to take this opportunity to not only update their written policies, but also consider how their training programs should be updated to ensure they remain current on cutting-edge issues, such as power dynamics, consent and the role of active bystanders in ensuring a professional and respectful work environment.

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