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Would You Bet Your Business on Untrained Employees?

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Why do franchisees need to train their employees on harassment, discrimination and retaliation? Because we live in a social media/YouTube world where outrageous conduct and the lack of direct personal communication skills dominate the culture of the generation at the entry level of most workplaces. We also live in a climate where many hourly workers and supervisors were born, educated and obtained their cultural values outside the United States and our educational system. As a result, these younger workers may have little common sensitivity to conduct that older generations recognize instinctively as inappropriate in the workplace.

For starters, some states, including California, Maine, Connecticut and New Jersey, have their own requirements for mandatory sexual harassment training. Failing to train in those states can lead to fines and penalties, and to strict liability in the event of employee lawsuits. Court decisions in a number of other states have issued guidance making training virtually mandatory under judicial interpretation of those states' laws. These courts have created a presumption against the employers on alleged violation of state labor law that correlates to federal Title VII if the employer fails to train its employees.

Most states do not require training and impose no automatic penalty for failure to conduct such employee anti-harassment training, but considering the defensive benefits and the downside of failure to perform training, many employment lawyers now consider it to be virtually mandatory.

Initially, proper training can greatly assist in defending harassment claims. Most employment lawyers agree that the best insurance against harassment conduct and claims is an effective anti-harassment policy. In order for policy to meaningfully benefit liability risk reduction, the policy must be effective and employees must be made aware of it. According to the EEOC, "The employer should provide training to all employees to ensure they understand their rights and responsibilities concerning workplace harassment." (*Employment Guidance: Vicarious Liability for Unlawful Harassment by Supervisors 6/18/99*).

One of the biggest fears for any franchisee is a punitive damages award. When a lawsuit verdict makes the newspaper headlines, it is usually because of punitive damages, which are intended to punish the employer and can be large. Fortunately, the Supreme Court has crafted a very strong defense for employers to use against punitive damage claims. Proper training can give employers an important defense in harassment cases, known as the *Kolstad* defense, after the Supreme Court case that created it (see *Kolstad vs. American Dental Ass'n*, 527 U.S. 526 [1999].)

Kolstad allows an employer to avoid an award of punitive damages (the multimillion dollar type of award) even if sexual harassment is proven, and even if a compensatory damage award is made to the employee. In order to take advantage of this defense, an employer needs to show that it engaged in "good faith efforts to implement an anti-discrimination policy." Generally, employers qualify for the *Kolstad* defense by adopting a comprehensive anti-harassment policy, and providing adequate harassment training for at least every management-level employee. Providing harassment training for all employees helps strengthen the defense.

Some courts, like the Seventh Circuit Court of Appeals in *EEOC v. IHOP of Racine*, have found that canned, generic training such as common videotaped training does not qualify for the Kolstad good-faith effort defense. In that case, the franchisee-employer was subjected to only $5,000 in compensatory damages, but $100,000 in

punitive damages for its failure to adequately train its employees. Accordingly, policies and canned video training alone are not enough. Attorneys familiar with the relevant state's laws where the franchisee does business should be consulted to ensure that materials comport with the state's laws, and provide interactive training.

Case law from around the country has shown that employers pay the price for not having adequate training. For example, in *Bains v. ARCO Prods. Co.*, employees were originally awarded $1 million in compensatory damages and $5 million in punitive damages for failing to train on harassment. *405 F.3d 764 (9th Cir., 2005)*. Similarly, in *Swinton v. Potomac Corporation*, an appellate court upheld a trial court's ruling that a lack of manager training justified a punitive damage award of $1 million in a single plaintiff case. Having a policy alone is not sufficient. *270 F.3d 794 (9th Cir., 2001).*

This area of training cannot be supported by franchisors. Under recent rulings, franchisors undertake the risk of direct liability to franchisee employees if the franchisor conducts, supervises or prescribes the training. Under the indemnity clauses in most franchise agreements, this risk boomerangs back on franchisees. While on appeal to the California Supreme Court, the appellate court decision in *Patterson v. Domino's Pizza* caused the franchise community to pause and reflect on franchisor involvement in franchisee HR issues. *143 Cal.Rptr.3d 396 (Cal. App. 2 Dist. 2012).*

In sum, franchisees and employers in general need to provide appropriate, state-specific and interactive training to at least all of their management-level personnel. Additionally, a comprehensive anti-discrimination policy must be adopted, publicized and enforced for all employees at every level. Performing these two relatively simple, inexpensive steps is an extremely wise investment to avoid costly punitive damages awards in the future.