The problems of sexual harassment and misconduct in the workplace have been making headlines for more than a year. Employee benefit funds should have the proper policies and procedures in place to ensure such issues are adequately addressed whether harassment takes place at the fund office or off-site meetings.

Time's Up for Sexual Harassment and Misconduct: Protecting Fund Employees and the Fund

by | **Lisa M. Gomez** and **Melissa S. Woods**

benefits MAGAZINE


TIME'S
UP

The #MeToo and Time's Up movements have sparked a cultural shift in the workplace. Greater awareness is being placed on the problem of sexual misconduct[1] in the workplace and the negative psychological, health and work productivity consequences of these experiences. This has resulted in more open dialogue among employees and, in some jurisdictions, stricter legal requirements for employers.

While it is impossible to tell how many workplaces are increasing their efforts to combat sexual misconduct, anecdotal evidence suggests that employers are looking at misconduct as a risk that must be addressed. Despite these efforts, many employers and employees report continued uncertainty about what constitutes sexual misconduct and what can and should be done about it.

Adding to the uncertainty are new state and local laws popping up around the country addressing sexual harassment.[2] For example, in April 2018, New York State passed a budget including several significant requirements directed at both public and private employers to combat sexual misconduct in the workplace. In May 2018, the Stop Sexual Harassment in New York City Act was signed into law, establishing additional policy changes. Now, New York City employers must be familiar with the new state and city requirements to ensure compliance with each.

What is clear is that these legislative changes were enacted to underscore that every employee,[3] independent contractor, intern and volunteer is entitled to work in an environment that is free from sexual misconduct.

Lately it appears that organizations are more willing to go above and beyond legal requirements to ensure a workplace free from sexual misconduct. Understanding that self-regulation is a must in the current climate, entities are taking the position that even if the behavior does not rise to the level of illegal sexual harassment, it will not be tolerated. For example, SAG-AFTRA is proactively addressing workplace harassment in the entertainment industry by voluntarily creating new workplace policy. Its Four Pillars of Change initiative has introduced a clear code of conduct on harassment with scenario-specific guidance detailing prohibited behavior and vowing to protect members.[4]

Employee benefit funds that are employers and have their own staff must be sure to protect fund employees from harassment and to protect the fund as an entity from liability. In doing so, funds should look not only at the conduct of their employees, but also at the conduct of the fund trustees with respect to fund employees.

Trustees serve in a position of authority with respect to fund employees and must take care and act appropriately when dealing with staff at all times. Funds should consider how to prevent sexual harassment both in the fund office and at off-site meetings and conferences, which can introduce circumstances that may lead to uncomfortable situations as trustees and employees gather at hotels, social events and the like.

What happens if a trustee and a fund employee go to a social business event and the trustee makes sexual advances toward the employee during or after the event? What if a supervisory employee asks to go back to a co-worker's hotel room during a meeting or conference? Employers must position themselves to address these issues should they arise.

What to Do? Employer's Liability and Prevention

Generally, employers are strictly liable for harassment of an employee by an owner, manager or high-level supervisor. The employer will be liable if it was negligent about preventing or stopping harassment and if a supervisor or manager fails to report a complaint or knowledge of alleged harassment. Proactive employers, including funds as employers, will achieve the best results in the changing legal landscape by following these steps.

Step One: Adopt an Antiharassment Policy

As an initial matter, funds should have a policy recognizing that sexual

learn more

Education

Institute for Apprenticeship, Training and Education Programs—Preconference
January 13, 2019, Miami, Florida
Visit *www.ifebp.org/apprenticeshipinstitute* for more information.

From the Bookstore

Trustee Handbook: A Guide to Labor-Management Employee Benefit Plans, Eighth Edition
Lawrence R. Beebe. International Foundation. 2017.
Visit *www.ifebp.org/trusteehandbook* for more details.

harassment[5] is unlawful. The policy signals to all persons at the fund that sexual misconduct will not be tolerated and that respect and dignity in the workplace will be promoted. In addition, an effective policy should:

- Define sexual misconduct with examples appropriate for the fund so that employees will know what actions are prohibited
- Encourage employees to report sexual misconduct that they experience or are aware of
- Acknowledge that the policy prohibiting misconduct applies anywhere work is being conducted or employees gather (e.g., off-site, work-related conferences or retirement celebrations) and among anyone at the workplace (e.g., employees, vendors, members)
- Identify who should receive reports of sexual misconduct (whenever possible, both a male and a female contact should be identified, as well as a member of the board of trustees, when the accused is an executive or another trustee[6]) and a sample complaint form to identify the information needed
- Require employees to cooperate with an investigation of sexual misconduct
- Notify supervisory and management staff that they must report any complaint they receive, observe or become aware of.

Step Two: Implement Effective Training

A fund's policy should be accompanied by annual, effective training (i.e., live, in-person, requiring participation from the audience) to help ensure that the policy is understood. At a minimum, supervisory and managerial staff should make an appearance at the training to reinforce the seriousness with which the fund views this issue. Many organizations also conduct a separate training with the supervisory and managerial staff to facilitate in-depth conversations about appropriate methods for responding to harassment claims as discussed below.

In addition, effective training should include various scenario-specific discussions about how misconduct might arise in the specific workplace and how it should be addressed. For example, employees must be advised that protections exist beyond conduct amongst employees and extends to conduct occurring between an employee and a vendor or an employee and a client. Similarly, employees must be advised that conferences, off-site meetings, off-site celebrations and the like are protected by the workplace policy prohibiting sexual misconduct.

Recently, conference organizers have begun identifying and publishing contact information for individuals responsible for receiving reports of misconduct occurring during conferences. Employees can either seek out the individual identified by the conference organizer or report the incident to their employer or an appropriate governmental agency. In addition, employees must be advised to refrain from engaging in activities that can make a colleague uncomfortable before the situation escalates to actionable harassment.

Step Three: Take Appropriate Action to Respond to Harassment Claims

When an employee, vendor, client or trustee makes a formal or informal report of misconduct, the fund should take immediate steps to stop the alleged behavior, protect involved parties and begin an investigation. Promptly responding to a complaint will not only yield the best information and evidence, but it also can enhance the employer's credibility. Since every complaint has the potential to become a lawsuit, employers should investigate every case with an eye toward presentation to a tribunal.

To the extent possible, allegations of misconduct should be addressed with a well-organized and consistent approach using previously established policies and procedures for resolving complaints. Ideally, every organization has guidelines and practices that have been distributed to all staff and can be reviewed to make an initial assessment about whether misconduct has occurred. One of the first considerations may be the need to take immediate measures for the protection of the accused or the alleged victim. Actions such as a leave of absence, transfer or schedule change may be necessary. However, the complainant should never be involuntarily burdened, because that can appear to be retaliation for lodging a complaint.

In addition, the fund must protect the confidentiality of accusations to the best of its ability. The fund must balance the need for a prompt and thorough investigation with sensitivity toward the parties involved. Undisciplined conversation[7] about the accusations can fuel workplace gossip, ruin the reputation of the accused, and decrease productivity and performance of the workforce.

If the initial assessment reveals facts that, if true, would constitute misconduct, the fund should conduct an in-

takeaways

- Employee benefit funds that are employers and have their own staff must protect their employees from harassment and must protect the fund from liability.
- Funds should scrutinize the conduct not only of their employees but also of the interaction trustees have with employees. Policies should address conduct in the workplace and at off-site meetings and conferences.
- Generally employers are strictly liable for harassment of an employee by an owner, manager or high-level supervisor.
- Funds should have an antiharassment policy that defines sexual misconduct and encourages employees to report it. The policy should be accompanied by annual training.
- When an employee, vendor, client or trustee makes a formal or informal report of misconduct, the fund should take immediate steps to stop the alleged behavior, protect involved parties and begin an investigation.
- An employment practices liability insurance (EPLI) policy can offer protection against damages as well as defense costs for a claim of sexual harassment.

vestigation. Investigations can help identify and resolve internal problems before they become widespread or escalate into unlawful harassment. When choosing an investigator, the fund should ensure that the individual will assist the fund and its trustees in crafting an objective investigation and making appropriate recommendations to remedy the misconduct. The investigator should possess all of the following characteristics:

- Strong interpersonal skills to build rapport with parties involved
- Prior investigative knowledge and working knowledge of employment laws
- An ability to investigate without actual or perceived bias, which could eliminate anyone who has a personal relationship with the involved parties
- Attention to detail.

In addition, the investigator should be in a position to maintain confidentiality, be respected within the organization and have the ability to act as a credible witness if necessary. Organizations generally use the resources of experienced human resources (HR) professionals, internal security, legal counsel or third-party (nonlawyer) investigators.

There are advantages and disadvantages to each type of investigator. For example, organizations often assign the responsibility for investigations to HR professionals because of their specialized training, familiarity with the employees, knowledge of the organization and awareness of employment laws. The disadvantage is that employees may associate HR too closely with management and therefore may not perceive them as neutral in the investigation.

Similarly, internal security professionals have training in investigation methods that allow them to obtain information from sources that other investigators may overlook. Conversely, because of their training and potentially assertive style, internal security representatives may be viewed as intimidating by employees and therefore may be less productive. Legal counsel investigators, both in-house and outside counsel, are another popular option. However, lawyers also can be perceived as intimidating, which can restrict employees' willingness to provide open, truthful information.

Finally, third-party, nonlawyer investigators are commonly used when an organization does not have an internal employee who has the necessary qualifications or time to conduct the investigation or if the accused is amongst senior leadership. Organizations may need to extend the investigation time line to allow time to educate the third party about the workplace and the individuals involved.

Step Four: Insure Against Sexual Harassment Liability

Funds should make sure that they have insurance coverage to protect against losses and exposure related to a claim for sexual harassment made against an employee or trustee of the fund. An employment practices liability insurance (EPLI) policy can offer protection against damages as well as defense costs for a claim of sexual harassment.

Trustees, as part of their fiduciary duty to the fund, should explore what types of coverage are available and discuss with the fund's broker what policy limit would be appropriate considering the size of the fund and the level of protection sought. EPLI policies also should be reviewed to ensure that all potential individuals (i.e., employees and trustees) are insured and that protection is available both for incidents that occur in the workplace as well as at off-site meetings or conferences.

Conclusion: Implement Best Practices

The most important aspect of any sexual harassment prevention policy is prompt and consistent policy implementation. In order to do so, we suggest implementing the following best practices.

- Clearly identify inappropriate conduct.
- Establish mechanisms for reporting misconduct.
- Communicate policy changes to employees as early as possible. In the absence of thorough communication explaining individual rights and obligations, employees will begin to form their own sets of expectations regarding appropriate behavior, which may not be aligned with business needs or legal requirements. Comprehensive, consistent and prompt guidance will assist in creating respect and dignity in the workplace and limit false interpretations shared around the lunch table.
- Involve legal counsel in the development and finalization of the sexual harassment prevention policy. An attorney with specific expertise in labor and employment law can provide legal advice tailored to an organization, based on all applicable considerations and requirements.
- Explore insurance options for protection against liability related to sexual harassment complaints.

By taking a proactive, thoughtful approach to preventing and addressing sexual misconduct, trustees can protect fund employees and the fund as an organization from this complex problem.

Endnotes

1. This article uses the term *sexual misconduct* to refer to all behavior ranging from inappropriate activity of a sexual nature to illegal sexual harassment.
2. In 2018, Alaska, Arizona, Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Washington collectively have introduced more than 130 pieces of legislation concerning the prevention of sexual misconduct.
3. Throughout this article, the term *employee* is used to include independent contractors, interns and volunteers. Employers should consult the law in their jurisdiction to determine the categories of covered individuals.
4. An overview of the Four Pillars of Change initiative can be found at www.sagaftra.org/files/call_to_action_final.pdf (last viewed September 11, 2018).
5. Generally, *sexual harassment* is defined as unwelcome conduct of a sexual nature that has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.
6. Identifying multiple people eliminates the possible conflict of the accused being the sole person handling complaints.
7. Note that employees have a right to discuss discipline and/or ongoing disciplinary investigations involving themselves or co-workers. An employer is allowed to restrict those discussions only when the employer has a legitimate and substantial business justification that outweighs the employee's rights. It is the employer's responsibility to determine whether witnesses need protections, evidence is in danger of being destroyed, testimony is in danger of being fabricated or there is a need to prevent a cover-up. Only if the employer determines that corruption of its investigation would likely occur without confidentiality can the employer prohibit employees from discussing the matter amongst themselves.

bios

Lisa M. Gomez is a partner with Cohen, Weiss and Simon LLP, where she specializes in employee benefits law, representing boards of trustees of many multiemployer pension and welfare plans and training programs as well as federal employee health benefit plans, plans covering city employees and single employer plans. She is the former union co-chair of the American Bar Association (ABA) Labor and Employment Law Section Committee on Employee Benefits and was previously co-chair of its Subcommittee on Jointly Administered Plans and its Subcommittee on Civil Procedure. Gomez works with fund clients on all aspects of compliance, participant communications, service provider agreements and fund administration. She holds degrees from Fordham University Law School and Hofstra University.

Melissa S. Woods is of counsel at Cohen, Weiss and Simon LLP, where she heads up the sexual harassment prevention practice and specializes in litigating labor and employment matters before governmental agencies and state and federal courts on behalf of unions and individual employees. She has extensive experience investigating allegations of discrimination and harassment and creating and conducting antidiscrimination and antiharassment training programs. Woods is a former co-chair of the Equal Opportunity Committee of the American Bar Association Labor and Employment Section. She holds degrees from Wesleyan University and George Washington University School of Law.

pdf/1118