

NEW TOOLS TO COMBAT UNLAWFUL HARASSMENT

Law talk from Epstein Becker Green, P.C.



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The ongoing national dialogue continues to focus on the topic of workplace harassment, and employers and owner/operators would be well served to evaluate whether they are using all of the tools at their disposal to minimize the legal and reputational risks associated with a harassment claim. Owner/operators have always needed to strike a balance between overly restrictive workplace rules, which depress employee morale and potentially run afoul of worker rights, and overly permissive workplace rules which allow unprofessional, and potentially illegal conduct, such as sexual harassment. The National Labor Relations Board's (the "Board") recent decision in *Boeing Co.*, 365 NLRB No. 154 (2017) dramatically

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changed the law to remove a major impediment to workplace civility policies and training. The hospitality industry is uniquely well suited to take advantage of this change in the law.

THE CHANGE IN THE LAW

At the highest level of abstraction, Boeing Co. allows employers to promulgate and enforce workplace civility policies. In other words, policies prohibiting conduct which is unprofessional, unkind, unpleasant, but legal. Under prior law, the Board prohibited policies if “employees would reasonably construe the language to prohibit” the discussion of their terms or conditions of employment, without considering the employer’s countervailing interest in enforcing the policy. This rule produced results which persons unfamiliar with the issue could rightly view as bizarre or even perverse. The Board invalidated employer prohibitions of (1) conduct that “impedes harmonious interactions and relationships”; (2) “false, vicious, profane, or malicious statements toward or concerning the...[employer] or any of its employees”; and (3) “loud, abusive or foul language,” to name a few examples, as violating employee rights to discuss workplace issues with one another. The Board permitted employers to prohibit unlawful harassment but interfered with employer efforts to set a higher bar for workplace civility.

In Boeing Co., the Board reversed course, and decided to consider the employer’s interest in enforcing a policy, rather than merely whether the policy could be understood to interfere with employee rights. This framework explicitly permits employers

to enforce “rules requiring employees to abide by basic standards of civility.”

UNIQUE CHALLENGES IN THE HOSPITALITY INDUSTRY

Preventing unlawful harassment can be particularly difficult for hospitality industry employers where the work environment is replete with features identified by the EEOC as potential risk factors for harassment, including: (1) workplaces with a large number of tipped workers; (2) workers that are physically isolated, such as janitors

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working alone on the night shift and housekeepers working in individual hotel rooms; and (3) workplaces where alcohol is consumed.

Unlike other workplaces such as a business office where almost everyone will be an employee subject to employer control, owner/operators need to contend with inappropriate

conduct by customers and patrons. Of course, customers are not susceptible to disciplinary measures which can be imposed on employees.

It is therefore unsurprising that the hospitality industry regularly ranks first in lists of industries with the highest incidence of sexual harassment. The accommodation and food services industry accounts for 7.2 percent of the total workforce but accounts for 14.23 percent of sexual harassment charges filed with the EEOC.

EFFECTIVELY ADDRESSING HARASSMENT

In facing these challenges, owner/operators should consider implementing and enforcing workplace civility policies and implement workplace civility training. One of the key findings of the EEOC’s Select Task Force on the Study of Harassment in the Workplace was that a lack of workplace civility created a much greater likelihood of legally actionable harassment.

Owner/operators can take advantage of the Boeing Co. decision to make it clear to employees that they are obligated to treat each other with respect, and to expect to be treated respectfully by others. Bystander intervention training, teaching employees to recognize potentially harassing conduct, and intervening to de-escalate a situation, are promising tools to address improper conduct by customers. The best way to avoid unlawful harassment is to take steps to prevent it. **HT**



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