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The Case For Getting Aggressive With Workplace Bullies

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Every parent is familiar with the word "bullying." It has now also become an important employee relations issue for businesses. Though there is no current federal or state law explicitly prohibiting workplace bullying, many states are considering legislation that would make bullying conduct illegal and create remedies for aggrieved employees. But even without workplace anti-bullying legislation, there is good reason for employers to address bullying concerns in the workplace. First, if unchecked, employees may assert claims related to bullying by sweeping the conduct into allegations of violations under existing laws. Second, the conduct is prevalent and persistent and, as such, clearly impacts the workplace.

In fact, over the past few years, a number of our investigations into workplace conduct have yielded conclusions not of harassment but of bullying, another insidious form of conduct with equally negative repercussions. But when faced with a conclusion of bullying, many employers are hesitant to take action, for various reasons. For some, their policies just do not prohibit such conduct, and they are concerned about moving the marker of offenses warranting discipline without a policy to rely upon. For others, penalizing employees for conduct that is somewhat undefined is a culture change. And in the rare case, the distinction between bullying conduct and inappropriate managerial activity is blurred. Yet the bullying atmosphere can lead to the same results as harassing behavior – employee issues and litigation.

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What Is Bullying?

The Workplace Bullying Institute defines workplace bullying as "repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators" that may take one or more of the following forms: verbal abuse; offensive conduct that is threatening, humiliating or intimidating; or work interference.[1] Workplace bullying encompasses a broad array of conduct, including swearing, teasing, malicious gossip, unwarranted and invalidated criticism, exclusion and isolation, shouting, threats, taking credit for another's work, and work sabotage.

Clearly, it does not take an expert or institute to conclude that bullying behavior in the workplace is bad for business. In brief, bullying behavior can foster more unprofessional behavior, increase gossip, distract from work, and require management time in responding to complaints. And bullying can take a physical and mental toll on employees in the form of anxiety, panic attacks, high blood pressure, cardiovascular complications, depression and migraines (just to name a few). A less able work force will yield less work and require more time out of the office. Thus, even without the costs and time resources devoted to legal claims, bullying behavior will likely have a negative impact on a company's bottom line.

What Is The Healthy Workplace Bill?

The Healthy Workplace Bill, drafted by Suffolk University law professor David Yamada, provides for a private right of action against employers and individual employees for abusive conduct in the workplace (the bill does not use the term "bullying"). Variations of the bill have been introduced in at least 25 states since 2003.[2] In fact, 11 states currently have active bills, including New Jersey, New York and Pennsylvania.[3] The legislation in the Metropolitan area differs, however.

For example, a version of the Healthy Workplace Bill was introduced in the New Jersey Senate in early 2012. Senate Bill No. 333, "The Healthy Workplace Act," prohibits an employer from subjecting an employee to "abusive conduct" or permitting "an abusive work environment." The New Jersey bill defines "abusive conduct" as "the malicious conduct of an employer or employee in the workplace that a reasonable person would find hostile, offensive or unrelated to an employer's legitimate business interest." Abusive conduct includes, without limitations, "repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance." A single act is not considered abusive conduct under the bill "unless it is especially severe and egregious." Additionally, the proposed legislation defines "abusive work environment" as "a workplace in which an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm to the employee."

Under the New Jersey bill, employers are also afforded the chance to avoid liability for abusive work environment claims if they "exercised reasonable care to prevent and promptly correct the abusive conduct and the aggrieved employee failed to take advantage of appropriate preventative or corrective opportunities provided by the employer." This affirmative defense is analogous to the defense familiar to employers as being available in defending against a hostile work environment claim under Title VII of the Civil

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Rights Act of 1964.

A version of the Healthy Workplace Bill re-introduced in the New York State Senate early this year permits a chance for employers to avoid liability if the bullying complaint is based on (1) an adverse employment action reasonably made for poor performance, misconduct or economic necessity; (2) a reasonable performance evaluation; or (3) an employer's reasonable investigation about potentially illegal or unethical activity.

Under the New York bill, if an employee succeeds in establishing an abusive work environment claim, he or she may be awarded reinstatement, removal of the offending party from the plaintiff's work environment, reimbursement for lost wages, front pay, medical expenses, compensation for pain and suffering, compensation for emotional distress, punitive damages and attorney fees.

Pennsylvania's version of the bill, House Bill No. 1179, was recently introduced for the 2013-2014 session and limits employer liability for an abusive work environment claim that did not include an adverse employment action. In such a case, emotional distress damages and punitive damages may be awarded only if the conduct was "extreme and outrageous." It is worth noting, though, that the damages limitation does not apply to individually named employees.

Will Employees Seek Redress For Workplace Bullying Claims Under Existing Laws?

Even in the absence of bullying legislation, employers should be mindful that bullying-type behavior puts them at risk for suits under already existing laws. Specifically, employees with claims emanating from bullying behavior may seek recourse and establish liability under federal, state and local laws prohibiting discrimination, harassment and retaliation.[4] Plaintiffs looking to bring claims under these laws, however, must demonstrate a connection between the alleged mistreatment and his or her membership in a protected class, such as race, religion, color, national origin, sex or disability. That being said, all employees belong to some kind of protected class. Absent other redress, employees victimized by bullying may find it easy to at least state a claim under these laws.

In the face of workplace bullying, potential plaintiffs may also rely on the tort of intentional infliction of emotional distress, generally recognized under state law. To establish the claim, most states require a plaintiff to prove that the defendant acted intentionally or recklessly and exhibited extreme and outrageous conduct that caused the plaintiff emotional distress. Though it is often difficult for a plaintiff employee to prove "severe and outrageous" conduct on the part of the defendant employer, it is certainly not impossible.

Moreover, an employer who hires or retains an employee who threatens or exhibits violent conduct may be liable for negligent hiring, supervision and/or retention. Other potential claims encompassing bullying behavior include negligent infliction of emotional distress (not recognized in every state), defamation (the focus is on what the alleged bully is saying and to whom) and assault (generally not actionable by employees in the workplace because of worker's compensation laws).

Why Should Employers Consider Preventative Action?

Regardless of whether anti-workplace bullying legislation is enacted in your company's jurisdiction, employers must be thinking about how to address bullying behavior. A company that takes a proactive stance on bullying behavior will benefit – and not only from avoiding potential liability in the event legislation is enacted or under existing legislation or common law. Simply put, a positive workplace atmosphere equals good business. A professional and respectful workplace leads to increased performance and productivity; decreased absenteeism, employee turnover and benefits costs; good publicity; and improved client relations.

If it has not done so already, your company should consider revising or updating its current policies by adding an anti-bullying policy to its existing anti-harassment and anti-discrimination policy. Your policies should reflect the workplace culture your company is striving for and clearly define the type of conduct that is expected of employees and supervisors alike. An anti-bullying policy should include a precise definition of bullying, clear and concrete examples of prohibited conduct and a well-outlined complaint procedure to be followed in the event a bullying complaint arises. To ensure both employees and supervisory employees have an understanding of your company's anti-bullying policy, employers can and should conduct mandatory company-wide training. Adequate and effective training should teach employees proper workplace conduct, how to recognize instances of bullying, how to respond effectively and utilize the company's complaint procedure, and how to resolve conflict.

When properly conducted in a format that imparts practical, relevant information, training will result in understanding of and compliance with your company's desired conduct, which is, at a minimum, civil and professional workplace behavior. Quite simply, employees who understand policies and have been provided with concrete and clear guidance are more likely to police themselves and their co-workers.

Further, if your company enacts a policy prohibiting bullying behavior, it must be committed to enforcement. Any complaints must be investigated promptly and thoroughly. Such an investigation gives "teeth" to policies and communicates to employees that the policy is not just "for show." Remember, the goal is to make your company's anti-bullying policy matter. A properly conducted investigation sends a message to employees that the company is committed to ensuring the fair and ethical treatment of its employees and will take their complaints seriously.

Finally, your company must act upon the results of any investigation into bullying behavior. When the investigation substantiates the complaint, effective corrective action should be taken quickly thereafter. Uniform and consistent application of the employer's policies is important – similar violations should result in similar discipline. Moreover, even an unsubstantiated complaint could reveal something about the work environment that requires an employer's attention. For example, the investigation may reveal that the accused bully would benefit from training to improve his or her management or communication style. Also, a proper investigation followed by prompt remedial action can provide an employer with an effective defense to subsequent litigation.

Regardless of the state of anti-bullying legislation, workplace bullying warrants attention. Employers wishing to encourage the most professional and productive workplace possible should consider creating and implementing a policy that affords recourse and remediation for conduct that falls short of harassment and discrimination but nevertheless can have serious repercussions on the workforce and workplace alike.

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1 http://www.healthyworkplacebill.org/problem.php.

2 Since 2003, variations of the Healthy Workplace Bill have been introduced in California, Connecticut, Florida, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Washington, West Virginia and Wisconsin. http://www.healthyworkplacebill.org/states.php.

3 The 11 states with currently active versions of the Healthy Workplace Bill are Florida, Hawaii, New Hampshire, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, Vermont, Wisconsin and West Virginia. http://www.healthyworkplacebill.org/states.php.

4 Under federal law, the primary sources of these protections are: Title VII of the Civil Rights Act of 1964 (Title VII), The Americans with Disabilities Act of 1990 (ADA), The Age Discrimination in Employment Act of 1967 (ADEA), The Genetic Information Nondiscrimination Act (GINA), and The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).