Victor O. Schinnerer & Company, Inc.

Management Advisory

Employer Liability for Sexual Harassment

During strong economic times, professional service firms often develop a sense of teamwork and a mission that obscures many of a firm's legal responsibility to its employees. When the pace of business diminishes, however, employees sometimes refocus on their working conditions, opportunities for advancement and issues that affect an employee on a personal level.

One of the areas of growing risk for construction-related professional service firms is claims of inequality in pay, status and stability that are based on charges of sexual harassment. Sexual harassment is defined as "any unwelcome sexual conduct that is a term or condition of employment or that creates an intimidating, hostile or offensive work environment." The legal basis of this is Title VII of the Civil Rights Act of 1964, which imposes a duty on employers to maintain a workplace free from discriminatory ridicule and insult. Sexual harassment claims based on alleged actions by co-workers and supervisors have become common.

United States Supreme Court decisions have made employers subject to vicarious liability for unlawful harassment of employees by supervisors. The court holds that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. With *quid pro quo* sexual harassment—when submission to sexual conduct is explicitly or implicitly a term or condition of an individual's employment—employers are strictly liable for the unlawful conduct.

Any employment action qualifies as "tangible" if it results in a significant change in employment status. An individual qualifies as an employee's supervisor if: the individual has authority to undertake or recommend tangible employment decisions affecting the employee or has authority to direct the employee's daily work activities. The question of liability arises only after there is a determination that unlawful harassment occurred.

Employer liability also exists in "hostile work environment" cases. If the plaintiff shows that he or she belongs to a protected class, was subject to unwelcome sexual harassment based on the plaintiff's sex that was so severe and pervasive that it altered the employment conditions, and that the employer knew, or should have known, of the harassment and failed to take proper remedial action, the employer will be held liable. Federal law does not prohibit simple teasing, offhand comments or isolated incidents that are not "extremely serious." Instead, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment."

The employer may avoid liability or limit damages by showing that it exercised reasonable care to prevent and promptly correct harassing behavior. To adequately prevent sexual harassment, a firm should have an effective training program that educates employees about their rights and the employer's commitment to a harassment-free working environment. The firm can escape liability if the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the firm.

In order to prevent and correct harassment, firms should implement a written enforcement procedure that encourages employees to report harassment to management before it becomes severe or pervasive. Moreover, the employer should assure employees that it will protect the confidentiality of harassment complaints to the highest extent possible. This policy should state that the employer will not tolerate retaliation against anyone who complains of harassment or who participates in an investigation. Smaller businesses may be able to discharge their responsibilities through a less formal exchange. If an employer maintains regular contact with all employees, this complaint procedure information can be verbally disseminated at staff meetings.

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