

H.B. 360: Delaware General Assembly's Apparent Response to “#MeToo” Movement

THE #METOO MOVEMENT has sparked worldwide attention with its efforts to bring awareness and an end to sexual assault and harassment. The apparent impact can be seen not only in Hollywood but also right here in Delaware with the passage of House Bill 360, which broadens protections for Delaware workers against sexual harassment. The bill is aimed at combatting sexual harassment in the workplace while ensuring the safety and dignity of all Delaware workers, including state employees, unpaid interns, applicants, joint employees, and apprentices. HB360 applies to all Delaware employers with four or more employees and includes the State, the General Assembly, State agencies and labor organizations. It awaits the Governor's signature.

Sexual Harassment Is an Unlawful Employment Practice

HB360 defines sexual harassment as an unlawful employment practice when the employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, verbal or physical conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term of the employee's employment; (2) submission to or rejection of such conduct is used as the basis for employment decisions; or (3) such conduct unreasonably interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment. Additionally, HB360 makes clear that an employer is responsible for sexual harassment of an employee when: (1) a supervisor's sexual harassment results in a negative employment action (i.e., termination, failure to promote or hire, loss of wages or benefits) for an employee; (2) the employer knew or should have known of the non-supervisory employee's sexual harassment and failed to take appropriate corrective measures; or (3) a negative employment action is taken against an employee in retaliation for the employee filing a discrimination charge, participating in a sexual harassment investigation, or testifying in any proceeding about sexual harassment of an employee. Notably, however, HB360 provides an affirmative defense for employers who can demonstrate efforts to promptly prevent and correct any sexual harassment and can prove that the employee unreasonably failed to take advantage of those efforts.

Delaware Department of Labor's Information Sheet

The proposed legislation tasks the Delaware Department of Labor (DDOL) with creating an information sheet on sexual harassment that employers must distribute to new employees at the time of hire and current employees within six months of the bill's enactment. The information sheet details the illegality, definition, and examples of sexual harassment; the legal remedies and prohibitions against retali-

tion; and the DDOL's complaint process and contact information. Failure to provide the information sheet to employees will not in and of itself result in liability for the employer in connection with a sexual harassment allegation.

Mandatory Anti-Sexual Harassment Training

HB360 requires employers with 50 or more employees to provide employees who have been employed for at least six consecutive months with interactive training on certain topics within one year of the bill's enactment and to new employees upon their hire. Additionally, employers must train supervisors on preventing and correcting sexual harassment within one year of the bill's enactment or within one year of becoming a supervisor.

DDOL's Enforcement Authority and Remedies

The DDOL is empowered to investigate employment practices; make, revise and rescind rules or regulations to enforce HB360; and commence civil litigation for any violation. Any person aggrieved by a violation of HB360 can file a charge of discrimination within 300 days of an alleged unlawful employment practice. In cases where the DDOL has either dismissed the charge, issued a no cause determination or upon the parties failed conciliation efforts, the DDOL will issue a Delaware Right to Sue Notice allowing the charging party to file suit against the employer.

Delaware is not alone in its efforts to change the workplace culture in businesses. California, Connecticut, and Maine require some form of sexual harassment training for private sector employers. Additionally, the U.S. Equal Employment Opportunity Commission recently reconvened its Select Task Force on Harassment. The task force, which initially included attorneys, policy advocates, and scholars, has already filed seven lawsuits accusing manufacturers, franchisees, and other businesses of ignoring employee sexual harassment claims.

HB360 takes effect on January 1, 2019, giving businesses time to prepare for the mandatory training requirement. To be prepared, employers should begin to initiate planning discussions regarding the mandatory training. ■



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