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**SUMMER/FALL  
2018**

## Effective Protection from Harassment Claims Requires a Three Part Defense

**H**arassment claims have re-entered the national spotlight in the wake of the #MeToo movement. For decades, employers have had anti-harassment policies and conducted training in an attempt to protect themselves, but with a new generation of employees entering the workforce, many of whom have very different perceptions of “harassment” from those addressed in long-standing policies, it is critical that employers seize the opportunity to revise their anti-harassment policies to ensure that expectations are clear and everyone in the workplace understands just what is and is not harassment. Employers should take a 3 step approach to evaluating and upgrading their anti-harassment policies.

### **PART 1: UPGRADE THE COMPANY'S ANTI-HARASSMENT POLICY**

A few basic upgrades can substantially strengthen the company's policy and protection of the employer:

- Cover all forms of harassment in one policy: Anti-harassment policies should cover more than sexual harassment and should include the many other bases of discrimination which are prohibited by law including race, age, disability, ethnicity, religion, etc. Employers who have an anti-sexual harassment policy but not a policy prohibiting harassment on other protected bases are walking into a blizzard with a coat but no boots.
- Eliminate “legal” definitions and terms: Employers lose the protection of their anti-harassment policy if employees can claim credibly that they could not understand the policy and did not know what it was, what it covered, or how/when the policy applied to them. Consider including “real life” examples of unacceptable conduct in the context of your company's work and culture. The examples do not have to be specific or explicit, but should be enough to give the reader a fair understanding. A policy stating that “posting explicit pictures, using hate speech, telling jokes which make fun of someone on the basis of their ethnicity is prohibited” gives examples which “paint a picture” without themselves violating the policy or making employees uncomfortable.
- Do not focus solely on what is legally prohibited: By the time harassment becomes legally actionable, the harassment either needs to be “pervasive” or “severe” and by that time, the harassment undoubtedly has had a major negative impact on the workplace. Anti-harassment policies which focus solely on what the legal standard of “harassment” is when read to a jury at the end of a court trial fail to protect employers who want to try to prevent claims from arising and hurting their business. There are many forms of conduct which, in an isolated incident, do not amount to a legal claim of harassment but are not acceptable and those “isolated” incidents, if those incidents are not dealt with promptly and effectively, will become more pervasive and later constitute an environment of “pervasive harassment” before the employer realizes what has happened. Demeaning, hostile, “hateful,” or other forms of conduct or remarks meant to harm or insult another are not acceptable regardless of whether the legal standard of harassment can be proven, and an effective anti-harassment policy must be clear on that point.
- Examples of sexual harassment remain important: Including examples of “classic” sexual harassment still should appear in an anti-harassment policy (i.e. requiring an employee to submit to sexual advances in order to get a promotion), but the policy also should include prohibitions against conduct which could result in a hostile work environment such as sexual banter, sexual jokes, texting inappropriate pictures, and inappropriate touching. Ensure that the policy is gender neutral.
- Ensure that the scope of prohibited conduct is sufficient to protect the company: Make sure that the anti-harassment policy prohibits wrongful conduct by any representative of the company regardless of title and also applies to third parties whom interact with the company such as vendors and clients.



### **Spotlight on Employer Rights...**

Principal Kimberly L. Russell, Esquire, founded the Employers' Legal Defense Institute (ELDI) to promote the interests and defense of employers who face ever increasing challenges and risks in complying with workplace laws and defending themselves against employee claims. Through the ELDI, employers can be proactive in setting expectations of employees, train management to protect the employer, and mount a vigorous and effective defense to claims which may arise. For more information on ELDI services and training contact Ms. Russell at (610) 941-2541 or [krussell@kaplaw.com](mailto:krussell@kaplaw.com).



# KS News

WELCOME! **Sean M. Daru** has joined Kaplin Stewart as an Associate in the Real Estate Transactional and Corporate Business Planning



Department. The majority of Mr. Daru's practice involves acquisitions, sales, financing and leasing transactions. Sean began his legal career as a summer and junior associate for a regional firm in California, where he is licensed, engaged in general litigation with an emphasis in appellate work. Sean attended the University of Pennsylvania Law School as a Levy Scholar where he served as Articles Editor for the Journal of Law and Public

Affairs and Executive Editor for the Journal of Law and Social Change. Sean pursued his undergraduate studies at Regis University in Denver, CO, where he obtained degrees in Accounting, Religious Studies, and Philosophy *summa cum laude*. Mr. Daru may be reached at [sdaru@kaplaw.com](mailto:sdaru@kaplaw.com) or 610-941-2538.

Kaplin Stewart was a **Proud Sponsor of the 2018 Legal Aid Golf Classic** held at Bluestone Country Club in Blue Bell, PA on June 22, 2018. All proceeds were matched by the Montgomery Bar Association and donated to Legal Aid of Southeastern PA (LASP). Our contribution allows the Montgomery Bar Foundation to fulfill their mission to provide free legal services to ensure that the leverage of the law is available to the most vulnerable members of our community.

The sixth grade class of East Norriton Middle School proudly posed for a photograph with Kaplin Stewart attorney Pamela Tobin after successfully completing their mock trial on June 8, 2018. Ms. Tobin has been teaching civics lessons to sixth graders in Norristown middle schools for over five years.



## The Philadelphia Stormwater Tax – And How To Mitigate It

If you are a property owner in the City of Philadelphia, you know that the City's response to increased pressure to address the myriad of stormwater management deficiencies throughout Philadelphia was to institute a stormwater utility fee for all non-residential properties. The fee, which has now been rolled out City-wide, is calculated based on the ratio of impervious surface to gross property area; thereby increasing operational costs for non-residential property owners and placing properties developed decades ago at a severe competitive disadvantage to newer developments that incorporated stormwater management practices into their design when constructed.

Collection of the "stormwater tax" is intended to help the City offset its costs in treating and managing stormwater throughout the City. Additionally, however, by increasing property management costs through the stormwater tax, the City hopes to incentivize non-residential property owners to voluntarily undertake stormwater improvements at older developments throughout the City; thereby decreasing their impervious ratios and reducing the tax owed. In an effort to assist property owners in undertaking these often costly improvements, the City has established a grant program, operated by the Philadelphia Water Department (PWD) in partnership with the Philadelphia Industrial Development Corporation (PIDC). Through the grant program, a property owner or tenant (as well as community groups, vendors, and non-profit organizations, with the property owner's permission) can apply to receive a grant to offset the cost of the stormwater retrofit projects on non-residential properties. Grants can cover up to 100% of the cost to design and construct stormwater retrofit projects. Once completed, the property owner realizes a reduction in its stormwater tax based on its newly reduced impervious ratios.

The City has earmarked more than \$15 million per year for retrofit grants. The process, perhaps not surprisingly, is somewhat difficult to navigate, and the awarding of a grant requires the property owner and the applicant to enter into a series of agreements with the City, PWC, and PIDC regarding the operation, maintenance, and oversight of the retrofit facilities. But, property owners who receive grants reap the benefit of upgrading their stormwater management facility – and decreasing their stormwater tax – without bearing the burden of the cost to do so. Care to learn more? Contact me.



**Amee S. Farrell, Esquire,** is a principal of the Land Use and Zoning Department. Mr. Farrell can be reached at (610) 941-2547 or via email at [afarrell@kaplaw.com](mailto:afarrell@kaplaw.com).

- **Conduct outside of work must be covered:** Conduct with co-workers outside of work can quickly pervade the workplace and create major liability for employers. Anti-harassment policies must cover conduct at company-sponsored social events and social media posts which would violate the policy if said in the workplace. If social media posts can be seen by co-workers, even if the social media account is otherwise marked “private,” those posts and their consequences can infect the workplace. Anti-harassment policies should apply to social media posts which are about or may be seen by employees, customers, and clients. At a bare minimum, such a policy puts employees on notice that their social media posts may be the basis of discipline when their “private” posts create a problem at work.

## PART 2: STRENGTHEN THE ANTI-HARASSMENT COMPLAINT PROCESS

Equally as important as the anti-harassment policy is the process which employees are expected to follow if the employee feels that he/she is being subjected to or has witnessed harassing conduct. A few reminders:

- **Clarify who can raise a complaint:** If harassing conduct is occurring in the workplace, any witness to that conduct must be able to bring the complaint. The person being harassed may be embarrassed or fearful of retaliation and the longer the conduct occurs, the worse the conduct will become and the greater the risk to the company. The policy must be clear that anyone who is subjected to, witnesses, or otherwise becomes aware of conduct which violates the policy should report the conduct.
- **Have multiple ways to report a complaint:** Effective policies must give employees several alternative persons to whom employees can report improper conduct. Employees must be able to report to their supervisor, a human resources representative, any other member of management, etc., at the employee’s discretion. Consider having an anonymous “tipline”, message board, or email address where complaints can be reported. If employees feel that they cannot report the conduct because they are forced to report it to the person involved or the person who let the conduct continue, the employee will simply say that the policy is “ineffective” and the employer will lose the protection of the policy.
- **Investigate complaints in a fair manner:** Investigate all sides of a complaint, and make it clear in the policy that if the company determines that a complaint is knowingly false, appropriate action will be taken. It is important that the company protect the rights of all parties to a complaint and all employees and witnesses should feel that they are treated fairly in the investigation of a complaint. The company may not always take the action an employee might want in response to a complaint, and it is important that the employee feels that the complaint was taken seriously regardless of the outcome.
- **Take strong corrective action:** The policy must state that appropriate corrective action will be taken, and taken promptly, if inappropriate conduct occurred. Regardless of whether the action meets the legal definition of harassment, inappropriate conduct should be prohibited and acted upon. The policy should state that violations of the policy will result in “appropriate” corrective action. That action could include termination of an employee, termination of a vendor or client relationship, or other action as determined by the circumstances.

## PART 3: HAVE A STRONG PROHIBITION AGAINST RETALIATION

Even if a complaint of harassment is determined to have no merit and no action is taken in response to the complaint, if an employee is subjected to retaliation for having made the complaint, the company can be subject to the same, if not greater, liability. The main reason that employees cite for not reporting improper conduct is the fear of retaliation. An anti-harassment policy must have a strong anti-retaliation provision to begin to combat that excuse for non-reporting, and the company must put that anti-retaliation policy into practice. A few critical points:

- The anti-retaliation provision must protect not just the employee subjected to the improper conduct, but also witnesses and anyone participating in the investigation of the complaint.
- The policy must not only protect an employee from retaliatory termination but also from other forms of less obvious adverse consequences such as isolation in a

- department, the supervisor’s refusal to meet with an employee, removal from an important committee, or “bad mouthing” the employee whether at work, with clients, or on social media.
- The policy must state that even if the underlying complaint does not have merit or result in discipline, it is not acceptable for a supervisor or any other company representative to engage in retaliation.
- The policy must state that employees and witnesses are free to report retaliation in the same manner as they could report an initial complaint of harassment, giving the employee/witness the discretion as to how to report in a manner which makes the employee/witness most comfortable.
- The anti-retaliation policy must be communicated to all involved including the accusers, the accused, and witnesses throughout the investigation of a complaint. In addition to stating that retaliation is prohibited in the anti-harassment policy, it is critical that the person conducting the investigation of an harassment complaint communicates to every individual participating that retaliation is not tolerated. Supervisors must understand what constitutes retaliation so that they take care not to engage in retaliation without realizing it. Supervisors who are accused of harassment may want to avoid a reporting employee so as to prevent further accusations but doing so may be seen as retaliation. In addition to protecting employees and witnesses, supervisors must protect the company and themselves.

The “universe” of harassment and discrimination claims remains full of pitfalls for employers, but a strong anti-harassment policy can provide a strong foundation for an effective defense and minimize tremendous risk.



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Unless otherwise expressly stated herein, all discussions and opinions are based upon the law of the Commonwealth of Pennsylvania and the State of New Jersey.

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