



DELAWARE

EMPLOYMENT LAW LETTER

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SEXUAL HARASSMENT

Your obligations when an employee engages in serious misconduct

by Lauren E. Moak

Penn State University has put the issue of sexual harassment and abuse back in the news. What are your obligations when the individual being harassed isn't an employee but a member of the public? While it's an issue employers deal with less frequently than the harassment of employees, you have an obligation to protect the public from discriminatory treatment or other serious misconduct by your employees.

'We are shocked by what happened'

Because of Penn State's high profile in the world of college football, the story of Jerry Sandusky has spread like wildfire through the nation's news media. Sandusky was an assistant coach at Penn State from 1969 to 1999. In November 2011, he was indicted on 40 counts of child sexual abuse. At least 20 of the alleged incidents occurred while he was still employed by the university.

In addition, Penn State's athletic director and its vice president for business and finance were indicted on charges of perjury and failing to report abuse. Allegedly, both men either observed or were informed of Sandusky's alleged misconduct and failed to protect the victims. The allegations are so egregious that most of us are left shaking our heads, wondering how anyone could allow such a thing to happen.

'We are obligated to protect the public?'

Yes! You have both a legal and an ethical obligation to protect the

public from discriminatory treatment by your organization's employees. We can all agree that sexual harassment and abuse are never acceptable. As a result, you have an ethical obligation to report alleged misconduct so it can be investigated by the appropriate authorities. In fact, you may be subject to criminal and civil liability if you fail to respond to reports of harassment or other serious misconduct.

The criminal implications of failing to respond to reports of harassment or abuse are clear. As in the case of the Penn State managers who were indicted and later terminated for their misconduct, you can be charged with perjury, obstruction of justice, and other crimes related to intentionally hiding an employee's bad acts from investigating authorities. Penn State is, of course, an extreme case. What most employers should be concerned with is civil liability.

Civil liability for failing to respond to reports of harassment or abuse can take many forms. Among other things, you may be sued for negligent hiring and/or negligent supervision if you're aware of an employee's past harassing behavior and don't act appropriately to prevent future misconduct. Further, employers that are subject to the Delaware Equal Accommodations Law (DEAL) may be held liable for discrimination against the public.

DEAL applies to employers that offer goods or services to the general public, including hotels, restaurants, stores, and other businesses that typically are open to the public. During the civil rights movement, "equal accommodations" laws were passed across the country with the intent of providing equal accommodations to African Americans. Ironically, those laws now prohibit discrimination based on the same characteristics that are protected under employment discrimination statutes.

'We are unsure what to do'

If your employees interact with the public, you should have a policy covering the investigation of allegations of misconduct received from nonemployees. While your current antiharassment policy doesn't apply to the public, a similar reporting and investigatory process can be applied to those complaints. Once a complaint is received about *any* employee, it should be escalated to a designated manager for investigation. The investigation should be prompt, thorough, and confidential to the extent possible.

If the investigator has reason to believe that unlawful conduct occurred, the employee should be subject to appropriate discipline and the conduct should be reported to appropriate authorities, including, but not limited to, the police. Employees who fail to report complaints of misconduct to a designated manager also should be subject to appropriate discipline.

And remember, while you generally will be held liable only for an employee's on-duty conduct, it's perfectly acceptable to discipline an employee for off-duty conduct that violates company policy.

Bottom line

No one supports sexual harassment or abuse, and everyone agrees that harassers and abusers should be punished. Yet every couple of years, there's a story of an employer hiding the misconduct of one of its high-profile employees — in part because harassment claims are treacherous for any business and we hate to suspect the worst of someone we know.

You should take the opportunity provided by the Penn State scandal to remind yourself that you have both ethical and legal obligations to listen to and investigate harassment allegations from the public. Failure to do so can have widespread ramifications from both a legal and public relations perspective.

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