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Department of Justice Launches New Initiative to Combat Sexual Harassment in the Workplace

MARCH 5, 2018

On February 28, 2018, the Department of Justice's (DOJ) Civil Rights Division announced a new Sexual Harassment in the Workplace Initiative (SHWI) that will focus on combating workplace sexual harassment in the public sector. The DOJ Civil Rights Division enforces Title VII of the Civil Rights Act of 1964 (Title VII) against state and local government employers. Through its new initiative, the DOJ seeks to hold state and local governments accountable for sex discrimination, including sexual harassment, which Title VII prohibits. This effort may also be directed at private government contractors through an executive order that gives the Department of Labor (DOL) authority to investigate employment discrimination under Title VII, and make referrals to DOJ for further investigation and enforcement.

Summary of the New Initiative

Title VII prohibits employment discrimination and retaliation on the basis of race, color, national origin, sex (including pregnancy), and religion. Sexual harassment is prohibited under the law because it is a form of sex discrimination. Complaints under Title VII are filed with the Equal Employment Opportunity Commission, and upon referral the DOJ Civil Rights Division has authority to pursue enforcement actions against state and local government employers. The Division also has authority to initiate investigations and pursue enforcement actions against state and local government employers where a “pattern or practice” of employment discrimination is believed to exist.[1]

The SHWI promises a renewed focus on sexual harassment in the DOJ's enforcement of sex discrimination under Title VII.[2] It also prioritizes the development of effective remedial measures, including identifying changes to existing employer practices and policies that will result in safe work environments.[3]

First Enforcement Action

In the press release announcing the SHWI, the DOJ also announced its first related enforcement action: a civil lawsuit against the City of Houston alleging that the Houston Fire Department (HFD)

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violated Title VII by allowing the sexual harassment of two female firefighters. The DOJ's complaint alleges that the harassment culminated in death threats and vulgar slurs written on the walls of fire station work and living spaces and on personal possessions. This conduct continued, the complaint alleges, despite at least nine complaints to management. The DOJ seeks monetary relief on behalf of the two female firefighters, as well as injunctive relief requiring HFD to develop and implement policies that prevent sex discrimination and retaliation.[4]

Implications for Private Government Contractors

Executive Order 11246 (EO 11246) prohibits certain federal government contractors and subcontractors from engaging in employment discrimination prohibited under Title VII. EO 11246 (which is also the source of covered contractors' affirmative action obligations) is administered by the DOL's Office of Federal Contract Compliance Programs, and, upon referral, the DOJ has authority to investigate and pursue enforcement actions against private contractors and subcontractors in federal court.

The SHWI may signal the DOJ's commitment to enforce Title VII more aggressively, with a focus on the eradication of sexual harassment in the workplace.[5] Pursuant to EO 11246, and consistent with the priorities expressed in the SHWI, the DOL may also begin to increase referrals of sexual harassment allegations involving private contractors and subcontractors for further DOJ investigation.

In an effort to prevent violations of Title VII and protect against government scrutiny and DOJ referral under EO 11246, private contractors should review their policies and practices, and where not already in place, consider taking the following steps:

- Ensure that companywide nondiscrimination policies include clear policies on sexual misconduct, harassment, and retaliation, and that these policies are distributed to all employees.
- Implement a clear and effective complaint process for employees to escalate issues of sexual harassment, discrimination, and retaliation in the workplace. The avenues for lodging a complaint should be made clear to all employees.
- Establish a written protocol for responding to complaints, including when and how they should be escalated.
- Maintain sufficient human resource capabilities to appropriately process, track, and respond to complaints.
- Provide mandatory training to employees—including management—on preventing sexual harassment and misconduct. Training should be administered during new employee onboarding, and to all employees on a regular basis. Training should include programs to help managers and other employees recognize potential issues and learn how to elevate them when necessary. Attendance should be tracked and reported to human resources and company management.

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WilmerHale is currently assisting clients in their responses to sexual harassment and misconduct

allegations, as well as in DOJ investigations into potential discrimination on the basis of protected characteristics. We also conduct reviews of our clients' internal hiring, firing, and recruiting policies and responses to specific incidents to ensure compliance with anti-discrimination statutes, assist clients with implementing affirmative action plans and responding to OFCCP audits, and provide discrimination and harassment prevention training. We will continue to monitor developments at the DOJ for relevance to our client matters.

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[1] *See, e.g.*, The Department of Justice, Overview of Employment Litigation (updated Oct. 25, 2017), available at https://www.justice.gov/crt/overview-employment-litigation.

[2] The Department of Justice: Office of Public Affairs, "Justice Department Launches Initiative to Fight Sexual Harassment in the Workplace (Feb. 28, 2018) available at https://www.justice.gov/opa/pr/justice-department-launches-initiative-fight-sexual-harassment-workplace.

[3] *Id.*

[4] The Department of Justice: Office of Public Affairs, "Justice Department Files Lawsuit Against City of Houston for Sex Discrimination and Retaliation" (Feb. 28, 2018) available at https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-city-houston-sex-discrimination-and-retaliation.

[5] The Department of Justice: Office of Public Affairs, "Justice Department Launches Initiative to Fight Sexual Harassment in the Workplace" (Feb. 28, 2018) available at https://www.justice.gov/opa/pr/justice-department-launches-initiative-fight-sexual-harassment-workplace.

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