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TRENDS IN EMPLOYMENT PRACTICES LAWS AND LITIGATION: THE INTERSECTION OF STATUTORY MANDATES AND SOUND RISK MANAGEMENT

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In order to provide sound risk management employers must be aware of the relevant risks and have a well conceived plan for dealing with such risks. It is axiomatic that the cornerstone of such a plan is effective communication between the employer and its employees. Most employers fall down in this regard because of their failure to educate their frontline supervisors. This failure is two fold: 1) basic communication training (i.e., how to deal with an unproductive or problematic employee); and, 2) legally mandated training (i.e., sexual harassment and other forms of discrimination). Effective communication is already essentially required under the Americans with Disabilities Act ("ADA") and is becoming a requirement in dealing with sexual harassment in the workplace.

The ADA mandates that employers engage in an informal "interactive process" to determine any necessary reasonable accommodation to permit a disabled employee to perform the essential duties of his/her position. There is a marked similarity between the ADA's "interactive process" and the training and investigation required for dealing with sexual harassment issues.

By way of brief background, the United States Supreme Court has recognized the inequity of holding an employer liable for the sexual harassment suffered by a co-worker (in the absence of an adverse employment action such as demotion, discharge, transfer, etc.) where the employer is unaware that such harassment ever occurred, *Faragher v. City of Boca Raton*, (1998). The Court, however, only grants such a defense if the employer maintains an appropriate complaint and investigation procedure that is well promulgated and actually used by the employer. Consequently, in order to assure that such programs are well promulgated and effectively used, training of an employer's staff is looked to by courts and the Equal Employment Opportunity Commission ("EEOC") to

determine whether the employer's program is effective, *Tomassi v. Insignia Financial Group, Inc.*, (S.D.N.Y.,2005.)

Three states have mandated that employers provide sexual harassment training. Most recently, California enacted Cal. Gov. Code § 12950.1, which requires employers of 50 or more persons (including independent contractors) to provide two hours of interactive sexual harassment training to all supervisory employees on a bi-annual basis. Connecticut and Maine already had similar statutes affecting similarly sized and even smaller public and private employers. Other states, such as Illinois, require that employers provide information to employees, but do not mandate an interactive training session and states like Colorado, Massachusetts, Rhode Island and Vermont encourage, but do not yet require, employers to provide training.

Employees are often more informed than their employers. They may have already contacted counsel, the EEOC or a state agency. Such a disadvantage for the employer is readily counteracted by sound training, the retention of competent counsel and the documentation of employee actions throughout employment. The scenario of the poorly performing or malingering employee using discrimination laws as protection for poor performance is readily defended by the well documented employee personnel file. In sum, employee discipline must be written and supervisors must be trained in how to prepare same.

The sum and substance of the mandated interactive process in ADA matters and the interactive training "requirements" in sexual harassment matters is essentially the same. In order to reduce the risk of employment litigation, there must be open, effective and informed communication between employers (especially supervisors) and employees. Well informed communication with employees is not only becoming statutorily required, it is necessary to properly manage the risks attendant to employment practices litigation and the avoidance thereof.