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5 Workplace Scenarios That Could Spell Legal Trouble

By Vin Gurrieri

Law360 (June 4, 2018, 11:22 PM EDT) -- Egregious examples of workplace harassment and discrimination often generate headlines, but more often there is a gray area of behavior that leaves workers and businesses alike wondering if a line has been crossed that will lead to litigation.

In the wake of the sexual harassment scandal involving Harvey Weinstein that spurred the #MeToo movement as well as other high-profile workplace harassment and discrimination scandals involving public figures like Matt Lauer and Roger Ailes, employers are more than ever attuned to the potential legal pitfalls that could be lurking in their workplace environment.

But while businesses and employees generally understand that extreme behavior of the sort that Weinstein and Ailes were accused of is out of bounds, they often become flummoxed by more murky situations in which perceptions of what is appropriate can vary wildly from person to person.

"When we conduct training ... we say everyone in the room probably already knows that there's a clear line that you can't cross in the workplace; there's certain things you cannot do and you cannot say, most people get that by now," said Adam Santucci of McNeese Wallace & Nurick LLC. "Where folks find themselves in trouble is in those gray areas where it's not so clear that I have crossed a line, or I'm about to cross a line, or I've crossed somebody else's line."

James Morris, a partner at Rutan & Tucker LLP similarly said that when it comes to ambiguous conduct and "low-grade misbehavior," business leaders have taken the heightened sensitivity surrounding workplace harassment and bias issues to heart and many are seeking to better address behavior they might not have paid such close attention to in the past.

"Many things in this area of the law are in the eye of the beholder, and so I think it's important for an employer to try and make sure it encourages people to stay on the good side of the line rather than tiptoeing right up to whatever the line is," Morris said. "I think the things that make the newspapers or end up becoming matters of public comment are the extreme cases, but I think it certainly is a wise thing to do for people to be thoughtful and careful about how they comport themselves in the workplace and outside the workplace."

Here, attorneys offer five examples of socially accepted workplace behavior that can in fact be legally problematic.

1. A person greets his or her colleagues before the start of a meeting with hugs and kisses on the cheek.

One of the most common gray-area scenarios one that attorneys say can be extraordinarily difficult for employers, since it is nearly impossible for them to prevent, even if it sometimes leads to workers being placed in awkward positions.

On the one hand, Santucci said that such greetings may not be an issue at all if, for example, the people involved have long known each other and have a mutual understanding that such conduct is acceptable and wholly welcomed.

But where it can become a problem, he said, is when "one person feels a little bit differently about the other person."

"Those instances [are] where you've got to err on the side of caution," Santucci said. "The pendulum has swung so far over to the side of being conservative in the workplace that it's not even worth the risk. If you have any doubts at all, go with the handshake and not a hug."

Morris similarly said situations involving overly familiar touching or greetings "can be very open to misinterpretation and should be avoided in the workplace," since it leaves individuals who are known for offering such greetings "subject to varying interpretations of intentions."

A key rule of thumb Morris believes should be observed, for men, is to "keep your hands in your pockets except for handshakes," and don't do or say anything "that you wouldn't do or say in front of your mother."

That sort of approach, Morris said, can give "a pretty good visual at least for most people as to rules of the road to observe."

2. A worker offers a colleague a ride home after work.

Although the offer of a lift is on its face often a benign act of politeness, attorneys said it also offers an instructive example of how perception can muddy workplace interactions when other issues like questionable overall behavior come into play.

"In and of itself, I don't think it's a gray area at all," Morris said. "I think it's an area in which anyone who puts themselves in an isolated situation could find himself or herself made the subject of rumors or made the subject of a bad-faith claim."

Morris noted that bad-faith harassment claims are rare except in cases where "there's something else going" on with an individual, such as a person with a known propensity for giving hugs or kisses.

"I think we now have taken ourselves to a terrible place in society when one coworker has to wonder whether an ordinary gesture of goodwill like offering a ride home to a coworker may be misinterpreted or may put the person in the position of having a claim made against [them] for an ordinary gesture of kindness. I think that's really regrettable," Morris said. "I hope we don't get to a place where people stop extending decent human courtesies toward one another out of concern that liability claims may soon follow."

3. One colleague tells another: "Hey, I just want to let you know that your workouts have been paying off!"

Another situation that often arises among coworkers that can lead to a line being crossed is when an employee makes a comment to a colleague about their physical appearance.

In this example offered by Santucci, which he has used in training seminars for employers, the male employee who made the comment believed he was being complimentary to the female employee who had worked to lose weight. But she perceived the comment as going too far.

Although the comment arose out of a desire of the male employee to praise his colleague's weight loss, Santucci said it is a prime example of a situation in which perceptions among the parties involved can vastly differ and create a problem for the employer.

"What we say about that situation is it probably doesn't violate [a company] policy — it's not a sexual advance, it wasn't sexually inappropriate — but we want to educate the employees involved that came into this gray area, she found it uncomfortable, [and] in the future don't make comments about body or appearance and everything will be OK," he said, adding that employers can then make clear to the female employee in this hypothetical to report any future comments should they occur so further action can be taken.

Where employers get into legal trouble is not adequately addressing harassing conduct if it continues, noting that an employer's obligation under the law is to make any inappropriate conduct stop once it comes to their attention or risk a judge later deeming the ongoing conduct "severe and pervasive" enough to support a legal claim.

"If harassment continues after it's been brought to [an employer's] attention, that's where legal liability can attach," he said.

4. A manager overseeing a team meeting restates his subordinate's ideas in a more "articulate" fashion.

Philippe Weiss, who leads Seyfarth Shaw LLP's compliance services and training subsidiary Seyfarth Shaw at Work, offered this example from the firm's training materials of what he calls "gateway conduct," or workplace conduct that if left unaddressed will likely escalate and lead to behavior that is egregious.

When a boss or manager habitually restates or reframes the ideas employees present verbally, Weiss said, at the very least it gives workers the perception that they aren't credible communicators, which negatively impacts morale and potentially leads them to question their future at a company.

But in some cases where male managers get into the habit of restating ideas spoken by female employees or even talking over them, Weiss said it can cross over into gender discrimination.

"In a way, that's the worst message to send, which is 'this employee cannot contribute, cannot succeed, maybe cannot survive on her own without me being a spokesman for her,'" Weiss said. "In that context, it has a gender impact, and we see it with surprising frequency."

Weiss noted that conduct as described in this hypothetical won't often lead to a singular claim, but that it can send a signal to workers that they are less valued and hinder their willingness to speak up — which itself may lead to them not advancing their careers at the company.

If, for example, a woman who is constantly talked over or whose contributions are minimized by a male superior is later overlooked for an opportunity, Weiss said, that aggrieved employee could have grounds for seeking legal redress and may be more likely to do so, as they become more aware of potentially improper behavior.

"It's the psychology of how the employee feels that leads them to knock on the court's door," Weiss said. "What you do is create a negative foundation where people are primed to complain or feel offended when something that is ... more actionable [and] more linked to a direct legal risk happens."

5. A male employee, in an attempt at a playful joke, blocks a female colleague's path through a door.

In another example offered by Weiss courtesy of Seyfarth Shaw at Work's materials, Weiss said the person who acts as the blocker will usually believe this to be a safe workplace prank. But the person who is on the receiving end of the conduct may, in fact, feel uncomfortable or even threatened by it, he said.

"The problem is the perception of the person being blocked is 180 degrees different, because sometimes that person has experiences outside of work where they've been intimidated, or they've been bullied and then ... it's shocking and somewhat distressing and disheartening to have that happen at work as well," Weiss said. "The fact is the term 'just joking' is never a good defense to anything in the workplace. It just basically means you probably shouldn't have said that or done that and you're admitting it."

But more broadly, Morris said that while it's not practical for employers in modern-day work settings to police all conduct between employees, businesses should still strive to "set a tone from the top" and have company leaders set an example for how others are expected to behave.

"If it were possible [to police all behavior], it would be highly intrusive and very oppressive, so I think it's a fool's errand even to try that," Morris said. "A great deal has to do with [the] culture an employer sets, both in terms of a positive tone being set by way of a written policy ... but also by having low to no tolerance for misbehavior. I think that's the way a lot of misunderstandings or actual claims arise, is when people feel that an organization looks the other way on issues that should be addressed head-on regardless of who the actors are."

--Editing by Philip Shea and Alanna Weissman.

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