Sexual Harassment Investigations in New York

By Randi May and Amory McAndrew
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Since New York introduced new laws to combat sexual harassment in 2018, all employers in the state are required to implement written anti-sexual harassment policies that include a procedure for investigating sexual harassment complaints. Employers should do everything they can to fortify these investigations from scrutiny by the complainant, the subject of the investigation or witnesses involved in the investigation.

Employers should be particularly concerned about the extent to which they keep investigations confidential. The New York law specifically requires that sexual harassment investigations include a procedure for "the timely and confidential investigation of complaints that ensures due process for all parties." N.Y. Labor Law §201-G (a)(iv). Today's employers are thus confronted with the task of balancing the often-competing privacy and due-process interests of all parties, without the benefit of years of precedent. In doing so, they should give special attention to the following concerns.

Confidentiality

The New York state model anti-sexual harassment policy includes language that "the investigation will be kept confidential to the extent possible." This is consistent with the position of the federal Equal Employment Opportunity Commission on the confidentiality of investigations. But that, along with New York law, must be balanced against the National Labor Relations Act (NLRA), which has been read to prohibit employers from imposing blanket confidentiality instructions because such instruction could infringe on employees' rights to engage in concerted activity. Rather, under the NLRA, employers can make an investigation confidential only when a substantial business justification outweighs the adverse effect on employees' interests in discussing workplace concerns.

The D.C. Circuit has found that the obligation to comply with federal and state antidiscrimination statutes and guidelines requiring confidentiality in many investigations *could* constitute a legitimate business justification for requiring confidentiality in some, but not all, internal investigations. *Hyundai Am. Shipping Agency v.* N.L.R.B., 805 F.3d 309, 314 (D.C. Cir. 2015); *Banner Health Sys. v. Nat'l Labor Relations Bd.*, 851 F.3d 35, 40–41 (D.C. Cir. 2017). Significantly, recently the National Labor Relations Board (NLRB) general counsel asked an administrative law judge to reverse the Board's previous finding on this topic, asserting that the current rule is "impractical and dismissive of an employer's legitimate and substantial need to conduct confidential investigations." *Securitas Sec. Servs. Usa & Ryan Patrick Murphy, an Individual*, No. AUSTIN, TX, 2019 WL 4139070 (Aug. 30, 2019)).

Notably, because the NLRA does not give §2(11) supervisors the right to engage in concerted activity, employers may, and often do, instruct them to maintain strict confidentiality during an investigation.

How New York courts will interpret the 2018 law's requirement that employers conduct "timely and confidential" investigations remains to be seen. In the current climate, with heightened scrutiny over "hush money" payments, which will soon extend to all

discrimination claims in New York, it seems reasonable to anticipate that whether by common law or statute, New York will disfavor strict confidentiality admonitions regarding investigations even if the current rule under the NLRA were abandoned. The New York statute prohibits settlement agreements from including confidentiality or nondisclosure provisions except at the complainant's request, and more broadly, New York public policy seems to encourage open discussion of sexual harassment allegations and concerns in the workplace. How to balance open workplace discussion with maintaining the integrity of ongoing investigations continues to be a challenge.

Employee Questions

Understandably, employees often are concerned about what will happen during an investigation, and are particularly concerned about retaliation. Accordingly, they may ask difficult questions of the company and those investigating the complaint. Some examples include: Who else knows about the investigation? Who else knows I will be meeting with you? Where should I tell my supervisor I'm going when I meet with you? Who will know what we discuss? Who else will be interviewed?

Often respondents who know or suspect that their conduct is the subject of an investigation ask hard questions as well. They also wish to know who else knows about the investigation, who will be interviewed and who will be briefed on the results of the investigation or receive a written report. Answering these questions while trying to maintain confidentiality, often before an interview even commences, is a challenge.

Retaliation

Addressing concerns about retaliation, New York law requires that sexual harassment prevention policies "clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful." N.Y. Labor Law §201-G.

Unlawful retaliation is any action that might discourage a reasonable person from making or supporting a sexual harassment claim or participating in the investigation of such a claim. An individual cannot be retaliated against for complaining of sexual harassment, regardless of whether the complaint is written or spoken, formal or informal, or made to a government anti-discrimination agency as opposed to the employer. Employees are protected from retaliation even when reporting that a party other than themselves has been sexually harassed, or encouraging another to report harassment. Even if it is ultimately determined that the alleged harassment did not violate the law, an employee is protected from retaliation as long as his or her report was made in good faith.

It is important that the workforce is made aware of this so that accusers feel comfortable coming forward, and others—like witnesses—feel comfortable participating in investigations. It is not just employees who are protected from retaliation (and sexual harassment), but also interns (paid or unpaid) and non-employees such as independent contractors.

A sound anti-sexual harassment policy will detail examples of both retaliatory conduct and protected activity. It should also make clear that any individual who retaliates may be subject to disciplinary action.

When a report of sexual harassment is received, the reporter should be reminded of the employer's policy against retaliation and informed that he or she is covered by its protections. All participants in an investigation, in fact, should be informed that retaliation is prohibited and may have consequences. It is good practice to discuss with interviewees what constitutes retaliatory conduct and protected activity, using examples outlined in the written policy.

Nonetheless, employers inevitably face retaliation claims in connection with investigations. Heightened confidentiality protections could help prevent such claims.

Requests To Apologize

Often the subject of the investigation wishes to apologize to the target of the offensive behavior. For example, an employee who did not realize that her comment at a

happy hour was distasteful might wish to express remorse to those who took offense. One option is to talk with the target or complainant about whether he or she would like to receive an apology. It may be advisable to have an appropriate representative from human resources or management present for an in-person apology or review a written apology. Of course, if the employer believes that the apology is not genuine but rather a chance for confrontation or excuses, such an interaction should not be permitted. This is particularly the case if the apology may be perceived as a form of retaliation. For example, if the apology was demeaning, seemed insincere or sarcastic, or subjected the target or complainant to embarrassment, he or she could have a claim for retaliation. Finally, if the investigation was conducted in such a way that the subject does not know who the reporter or complainant was, then confidentiality should not be compromised for the purposes of an apology.

Conducting internal investigations into alleged sexual harassment while the law continues to evolve presents challenges for employers and their investigators. Admonitions regarding confidentiality should be made on a case-by-case basis, taking into consideration the competing interests of safeguarding the privacy of those concerned, protecting against retaliation and conducting a thorough and fair investigation. New York's law is aimed at preventing sexual harassment, encouraging the reporting of possible sexual harassment by employees, and mandating it by managers. Employers and human resources departments should consider the law's purpose when deciding how to handle interviews and be open to changing and revising their procedures as the law evolves.

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