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Expert Analysis

When Sexual Harassment Is Also a Crime

By **Mark W. Lerner**

And **Jessica T. Rosenberg**

Sexual harassment in the workplace has traditionally been a matter for civil enforcement, through actions brought by private plaintiffs or by governmental agencies such as the Equal Employment Opportunity Commission or state or city Commissions on Human Rights. But when the harassing conduct potentially violates criminal laws, employers need to consider that the matter may involve other agencies and implicate the criminal law and process.

Indeed, top law enforcement officials have recently demonstrated their intent to scrutinize, and criminally prosecute, workplace sex-related crimes. On Jan. 25, 2018, Manhattan District Attorney Cyrus R. Vance Jr. announced the formation in his office of a new "first-of-its-kind" task force—dubbed the Work-Related Sexual Violence Team—led by an experienced sex-crimes prosecutor. In doing so, Vance stated that it is not enough for perpetrators of criminal sexual misconduct to lose their jobs or reputation, and encouraged anyone who becomes aware of potentially criminal sexual misconduct, including Human Resources employees and company executives, to report such conduct to police.

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Further, on Feb. 11, 2018, New York State Attorney General Eric T. Schneiderman filed a lawsuit against The Weinstein Company (TWC) and its corporate parent, Harvey Weinstein and Robert Weinstein, seeking injunctive relief, damages and restitution for victims of alleged sexual harassment by Harvey Weinstein. The case was filed pursuant to NY Executive Law §63(12), which empowers the Attorney General to investigate and bring enforcement actions against "persistent fraud or illegality in the carrying on … of business." Although civil, one cause of action in the lawsuit alleges that all respondents "repeatedly and persistently violated New York Penal Law provisions prohibiting forcible touching, sexual abuse, [] coercion, unlawful sexual misconduct, criminal sexual acts, and attempts to commit same," stating that "[The Weinstein Company] is liable for such misconduct" (citations omitted). This is the same law the Attorney General recently used to pursue fantasy sports websites for allegedly engaging in gambling in the state.

MARK W. LERNER *is a partner at Kasowitz Benson Torres and chair of its employment litigation and practices group.* JESSICA T. ROSENBERG *is a partner in the group. Special Counsel* JOSHUA D. FULOP *assisted in writing this article.*

What is the overlap between civil sexual harassment and criminal law? In the civil context, workplace sexual harassment is actionable under federal law and state and local laws in New York. It generally occurs when unwelcome sexual conduct affects hiring or other employment decisions, or creates an intimidating, hostile, or offensive work environment. While under the NY State Human Rights Law, conduct must be "severe and pervasive" to create a hostile work environment, NY City Human Rights Law is more expansive, and applies when an employee is treated "less well" because of his or her gender so long as the offense exceeds "petty slights and trivial inconveniences." Sexual harassment can include non-criminal conduct, such as sexual comments or jokes, comments about appearance, invading a co-worker's personal space, requests for dates, or in a quid pro quo situation, suggesting that a job benefit might be conferred for complying with a supervisor's inappropriate request.

However, sexual harassment can also include criminal conduct. For example, if the allegations include touching or grabbing someone else's body, the conduct could amount to the crime of "forcible touching" under NY Penal Law §130.52, which is defined as occurring when a person intentionally and for no legitimate purpose "forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire." Another criminal law that could be invoked is sexual abuse in the third degree, Penal Law §130.55, which occurs when a victim is subjected to sexual contact without consent. Employers may also find an employee making allegations that resemble a stalking offense (Penal Law §130.52), which includes engaging in an intentional course of conduct, for no legitimate purpose, that is reasonably likely to cause a victim to "fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease that conduct."

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Quid pro quo sexual harassment, where a supervisor conditions a benefit, or threatens a detriment, in exchange for sexual conduct also potentially implicates criminal law. Coercion under Penal Law §135.60 occurs when the offender instills a fear that if a sexual demand is not complied with, the offender will harm the victim's health, safety, business, calling, career, financial condition, reputation, or personal relationships.

How should an employer respond when workplace sexual conduct may be potentially criminal? First, as with any claim of sexual harassment, employers must learn the extent of the offending conduct by conducting a thorough investigation. Moreover, the increased risk of governmental scrutiny reinforces the requirements with which employment lawyers should be familiar: the preservation of documents and other information; the collection of physical evidence; the preservation of audio or security tapes; and the documentation of witness statements. A subpoena in a criminal investigation may call for such material, and the premature loss or destruction of it will certainly prompt questions from a prosecutor.

Second, increased governmental scrutiny increases the likelihood that a matter will become public. In a criminal action or an action similar to the Attorney General's

case against TWC, the employer will not have the opportunity to avoid publicity by reaching a confidential settlement with the complainant alone. Nor will an agreement to arbitrate workplace-related disputes confidentially keep the matter out of a public forum. Rather, the governmental authorities will determine at least in the first instance the public nature of the matter. The employer may want to prepare itself for a public proceeding early on by retaining a media consultant, preparing its employees for press and other inquiries, and considering a public statement by the company.

Third, employers must think about sexual harassment complaints not in isolation, but with the possibility in mind that their handling of multiple matters will be scrutinized as a single enforcement inquiry. This is not entirely new, since class actions and federal and state agency enforcement actions could put an employer's larger handling of these matters under scrutiny. But with the government's new interest in enforcement, consistent professionalism in their handling becomes more important.

Fourth, an employee who notifies the employer that he or she intends to file a police report, or requests assistance with filing a police report, should be treated with sensitivity. Conversely, many plaintiffs, like many employers, will prefer the matter be resolved confidentially. Because the confidentiality of settlements has generated some controversy, including in Congress, which just barred the tax deductibility of payments made pursuant to confidential settlements of sexual harassment claims, employers may wish either to opt against confidentiality or, where confidentiality is preferred by all parties, consider including in the documentation a statement from the accuser affirmatively requesting confidentiality and attesting to a lack of coercion. See Tax Cuts and Jobs Act, §13307 (enacted Dec. 22, 2017) ("Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection With Sexual Harassment or Sexual Abuse"), codified at 26 U.S.C. §162(q).

Finally, while sexual acts have not traditionally been imputed to business organizations for purposes of criminal liability, NY Penal Law §20.20 imposes criminal liability on business organizations when, among other things, a criminal offense is "engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation." Prosecutors are required to follow strict guidelines and obtain high-level approval in connection with charging organizations with crimes. See, e.g., Memorandum of the Chief Assistant District Attorney Daniel R. Alonso to All Assistant District Attorneys (New York County) dated May 27, 2010, "Considerations in Charging Organizations." As approaches change, we may see prosecutors consider charging an organization in a severe enough case where Penal Law §20.20 is implicated.

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