HIDDEN COSTS OF UNLAWFUL WORKPLACE DISCRIMINATION & HARASSMENT

JOINT MEETING OF ALASKA BAR SECTIONS ON ETHICS & COMPLIANCE & CORPORATE COUNSEL

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Bonnie holds a BA in International Relations with distinction from Stanford University. She received her J.D. from Stanford Law School, where she served as an Associate Editor for the Stanford Law Review. Bonnie is a Truman Scholar for Alaska. She is licensed in Alaska and California (inactive). She was the first woman partner at Hartig, Rhodes, Norman, Mahoney & Edwards, P.C., served as Corporate Counsel for GCI, the Chief Legal Officer for The Alaska Wireless Network, LLC, and most recently as General Counsel for Calista Corporation. When she is not practicing law, she is showing her Grand Champion Havanese, volunteering at West High’s Debate, Drama and Forensics’ program, or serving on UAA’s Truman Scholar Selection Committee. Bonnie is Co-Chair of both the Alaska State Bar Corporate Counsel and Ethics & Compliance Sections.

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Faith holds a BA in Art History & Music with honors from University of CA Santa Cruz. She received her J.D. With Distinction, Order of the Coif from University of the Pacific McGeorge School of Law where she served on the Pacific Law Review. She is licensed in Alaska, California and Florida. She has worked in private practice, in house for ASRC and, for the last seven years, in house for Doyon, Limited. When she is not practicing law she works as a professional artist in stained glass, bead work and paints portraits & landscapes in acrylics. Faith serves on the Executive Committee of the Alaska Bar Ethics & Compliance Section and a long time member of the Corporate Counsel and Labor & Employment Sections.
IS ALL DISCRIMINATION IN THE WORKPLACE UNLAWFUL?

- No, to “discriminate” is to make a choice or distinction
- ANCSA permits Native Corporations to give shareholders an employment preference
UNLAWFUL HARASSMENT & DISCRIMINATION

UNLAWFUL HARASSMENT includes employees enduring a hostile, intimidating or offensive workplace ("hostile environment") because of their membership in a protected class:

- Generally includes unwelcome, personally offensive or hostile conduct that interferes with work
  - Conduct may be statements (verbal or in writing) and physical behavior, affecting victim and / or bystanders
  - Conduct must be objectively and subjectively pervasive, altering terms/conditions of employment

UNLAWFUL DISCRIMINATION occurs when employees suffer unlawful treatment due to their status as a member of a protected class
EXAMPLES OF ALASKA STATE, LOCAL & FEDERAL ANTI-DISCRIMINATION & ANTI-HARASSMENT LAWS

- Alaska Human Rights Law (AS 18.80)
- Anchorage Equal Rights Ordinance (Title 5 Anchorage Municipal Code)
- Title VII of the Civil Rights Act of 1964
- Americans With Disabilities Act of 1990
- Age Discrimination in Employment Act of 1967
PROTECTED CLASSES IN ALASKA

- **Federal:** Race, Color, Religion, National Origin, Sex, Pregnancy, Citizenship, Disability, Veteran Status, Genetic Information, Age
- **State:** Marital Status, Parenthood
- **Anchorage:** Sexual Orientation, Gender Identity
HOW CAN VICTIMS RESPOND?

- File Code of Conduct Claim with HR/Legal
- File Complaint with State or Federal Agencies
- File Litigation, Arbitration or Mediation Claim – Individual or Class Action
- Ask for a Civil Investigation
- Ask for a Criminal Investigation (stalking/physical assault)
- Publicly Blog or Post on Social Media/Give Media Interviews
COMPLIANCE WITH ANTI-DISCRIMINATION AND ANTI-HARASSMENT LAWS IS:

- Legally Mandated
- Ethically & Morally Sound
- Basic Fairness & Good Business Practice
- Enforceable by Fines, Penalties & Judgments
- Good Common Sense Risk Management
WHY DO MOST BUSINESSES EXIST?

- Generate Wealth for Owners or to Meet a Charitable Purpose
- Provide Employment for a Workforce or Volunteer Opportunities
- Corporate Values, Vision, Mission
Qui pro quo harassment- when a company supervisor (ability to hire/fire) offers/hints a hiring decision/raise/promotion/refraining from a reprimand will be granted in return for satisfaction of a sexual demand

Courts look for proof that the sexual harassment resulted in a “significant” employment action, such as being fired or suspiciously passed over for promotion

Remedies may include damages for lost wages/benefits/employment opportunities/emotional distress/restoration of job/ potentially punitive damages if egregious (although uncommon)

Think- Harvey Weinstein-exposed by Ronan Farrow of the New Yorker
HARVEY WEINSTEIN DEBACLE

Potential Exposures - “Culture of Silence/Complicity”

- Personal - Harvey Weinstein to women he sexually harassed or assaulted
- Personal - Board Members- failure to make “reasonable inquiry” prior to contract renewal- Duty of Care = reasonable person standard under AS 10.06.450(b) for Business Judgment Rule protection. Failure to act considered a Corporate decision—“willful blindness”

Corporation – brand/stock value damage; investor and victim claims; failure to investigate & take corrective action when “on notice:”

- HR Dept.’s weak response- “It’s his company. If you don’t like it, you can leave.”
- Board “assumed” consensual affairs and “no corporate assets spent” on 3-4 known settlements BUT 16 execs/assistants participating in journalist’s investigation witnessed or had knowledge of unwanted advances at workplace events
- Board approved contract renewal as no "pending" complaints
Business Blowback - U.S. Film Academy may bar Weinstein’s films from Oscars’ ceremony - box offices revenues will be affected

- British Film Academy “indefinitely suspends” Weinstein, as “alleged behavior completely unacceptable and incompatible with BAFTA’s values”

Outside Counsel - by letter, previously assured Board “legally safe” to retain as “no unresolved complaints or litigation threats” - apparent failure to urge investigation prior to false legal assurance - contact E&O carrier

- Governmental civil or criminal investigations seem likely to occur
- The failure to “see” by choosing not to investigate allowed executive’s continued harassment to exacerbate both liability and number of victims

All “whistleblowers” to New Yorker stated their fear of retaliation
HIDDEN IMPACTS OF UNLAWFUL DISCRIMINATION IN THE WORKPLACE

- Recruitment
- Retention v. Higher Turnover
- Inefficient & Distracted Workforce
- Hurts Morale & Emotional Damage to Individuals
- Less Competitive - Business Reputation - Brand
- Exposure to Discrimination Charges & Lawsuits

In 2012 – American businesses lost an estimated $64 billion as a result of unlawful discrimination
REFRUITMENT & RETENTION

- Refuse to hire the most qualified worker - that worker will be hired by competitors
- The cost to replace a departing employee can run between $5,000 -$10,000 for an hourly worker, and $75,000 - $211,000 for an executive
- Loss of valuable operational and institutional knowledge
- Chilling effect on business reputation
- Departing employees are hired by competitors
INEFFICIENT & LESS COMPETITIVE WORKFORCE

Estimated cost of lost productivity due to hostile work environment to US economy: $1.4 Billion annually

- Higher rates of absenteeism
- Less loyalty to employer
- Fewer promotions - loss of diversity perspective
- Increased mental and physical health problems
ALASKA NATIONAL GUARD: A Scandal Corrected Through Ethics

► One woman, Major General Laurie Hummel, turned around an entrenched culture of harassment, assault, drug dealing and fraud.

► Investigation revealed that for years, leaders hired friends rather than the most qualified officers, leading to a “powerful insider club,” with a “yoke of oppression” and toxic leadership.

► ADN reported that Hummel’s successful solution was founded on ethics training on character and ethical fitness, to address scandal and a culture of corruption.
HIGH COST OF DEFENDING CLAIMS & LAWSUITS

- **ASCHR or AERC**: $5,000 to $18,000 to defend a successful “no cause” case
- **Conciliation for an individual case**: $25,000 and up
- **Class Action Conciliation**: $1,000,000
- **Individual Lawsuit**: $250,000 through trial in Alaska
- **Lost internal legal/executive time on defense**
- **Director/Officer duty to protect assets**
- **Fiduciary duties of care and loyalty**
PRACTICE TIPS

- Make bystander reporting mandatory in your company’s Code of Conduct, to reduce coverups engendered by a culture of complicity and silence.

- Include in your Code of Conduct that the anti-retaliation rules do not protect “whistleblowers” who are in fact knowingly making false statements.

- Create a Compliance Plan that complies with the DOJ’s “Filip Factors” and compliance checklist (2 handouts).

- Monitor the policy’s effectiveness from your hotline reports, with anonymous qualitative surveys, and focus groups.
EMPLOYMENT LIABILITY PRACTICES INSURANCE COVERAGE

- Consider the nature of your business and what the ELP policy covers and excludes
- The time you will spend reporting and arguing with your carrier
- If you do get them to defend/pay a case, expect your retention to rise rapidly
ETHICS, COMPLIANCE & RISK MANAGEMENT

Key Takeaways:

- Foster a business culture that welcomes diversity
- Adopt and follow a strong Anti-Discrimination, Anti-Harassment & Anti-Retaliation Policy
- Train your workforce on what behavior is required & that retaliation is prohibited
- Mandatory Reporting – post ways to report and hold Supervisors accountable
- Investigate every concern that is reported
- Take and document consistent corrective action
- Treat workers fairly, consistently and with respect
QUESTIONS?

THANK YOU FOR ATTENDING!