

Workplace-Bullying Laws on the Horizon?

By Roy Maurer

Since 2003, 25 states have introduced workplace bullying legislation that would allow workers to sue for harassment without requiring a showing of discrimination.

Critics contend that these laws would encourage frivolous lawsuits. Could they protect workers from bullying while not opening up employers to scores of meritless claims or imposing a civility code on the workplace?

“In fact, workplace bullying may lead to the boldest proposed change in U.S. employment law since the passage of Title VII of the Civil Rights Act,” said Lori Armstrong Halber, a partner in the Philadelphia office of Fisher & Phillips.

“We all agree with the concept that there shouldn’t be jerks in the workplace, but the issue is whether we can legislate that,” said Rick Grimaldi, a partner in the Philadelphia and Washington, D.C., offices of Fisher & Phillips. “The whole concept is difficult to get your head around when you think about how expansive this could be. Every disgruntled employee becomes a potential plaintiff.”

Presently, bullying by itself does not violate Title VII or any other anti-discrimination law.

Employees can sue companies for creating a “hostile work environment,” which can include bullying as harassment, but the harassment usually is tied to a protected category, such as race, sex, religion or national origin. Anti-bullying advocates are pushing legislation to protect workers who are not in a protected class. Other countries—England, Sweden, Australia—already have such laws.

But how do you define bullying? asked Armstrong Halber. “In an effort to avoid litigation, employers would be mediating all sorts of employee interactions. They’d be hearing things like ‘He was mean to me,’ and ‘She doesn’t like me.’ ”

What we’re talking about is legislating civility, Grimaldi explained. “Other employment laws were designed to provide equal opportunity to classes of people who historically were not afforded those opportunities. In that respect, legislating civility would appear to be a new employment law phenomenon.”

Bullying Behavior at Work

According to the [Healthy Workplace Campaign](#) (HWC), bullying is four times more prevalent than illegal discrimination; yet it’s still legal in the United States.

The campaign describes workplace bullying as repeated health-harming mistreatment that takes one or more of the following forms:

- Verbal abuse.

- Offensive behaviors that are threatening, humiliating or intimidating.
- Work interference or sabotage that prevents work from getting done.

Some of the most common tactics used by workplace bullies, according to the Workplace Bullying Institute:

- Falsely accusing someone of errors the person didn't actually make.
- Hostile staring or nonverbal intimidation.
- Unjustly discounting the person's thoughts or feelings in front of others.
- Using the "silent treatment."
- Making up rules for specific people.
- Disregarding and discrediting satisfactory work despite evidence.
- Harshly and constantly criticizing the person.
- Starting, or failing to stop, destructive rumors or gossip about the person.
- Encouraging people to turn against the person being tormented.
- Singling out and isolating one person from other co-workers, either socially or physically.
- Publicly directing gross and undignified behavior at the victim.
- Yelling, screaming or throwing tantrums in front of others to humiliate someone.

According to the HWC: "In its more severe forms it triggers a host of stress-related health complications, such as hypertension, auto-immune disorders, depression, anxiety and post-traumatic stress disorder. The person's immediate job and often career are disrupted."

Half of the companies surveyed by the Society for Human Resource Management (SHRM) in 2011 reported incidents of workplace bullying. The survey found that 27 percent of HR professionals themselves had been victims.

"Bullying in the workplace can have a wide range of impact on employees," said Evren Esen, manager of the Survey Research Center at SHRM. "According to HR professionals' perceptions, decreased employee morale and increased employee stress were among the top observed outcomes. However, increased employee turnover, decreased trust in management and increased employee absenteeism were also reported."

Regulating Bullies

While there is no workplace anti-bullying law in the United States, at either the federal or state level, 25 states have proposed variations of the [Healthy Workplace Bill](#), crafted by Suffolk University law professor David Yamada for the HWC. The measure would prohibit workplace harassment without the necessity of demonstrating that such harassment is based on a protected class.

“Employers are inadequately addressing workplace bullying voluntarily,” said Gary Namie, director of the Workplace Bullying Institute and lead advocate for the bill. For example, Namie said, “bullying costs are high, though preventable, and yet, employers do not act rationally and cut costs by eliminating the problem. Instead they suffer through turnover, absenteeism and excessive legal-defense expenses simply to defend the destructive individuals.”

Ask any HR executive at a large firm if he or she has the authority to reprimand or fire a senior vice president who bullies employees, Namie said. “The organization eats the costs.”

“Employers react to laws with internal policies,” he added. “The true purpose of the Healthy Workplace bill is to get employers to prevent bullying with policies and procedures that apply to all employees. The bill gives good employers incentives to do the right thing by avoiding expensive litigation.”

The legislation does the following:

- Precisely defines an “abusive work environment” as a high standard for misconduct.
- Requires proof of health harm by licensed health or mental-health professionals.
- Protects conscientious employers from vicarious liability risk when internal correction and prevention mechanisms are in effect. “This is the primary goal of the Healthy Workplace bill—to provide employers the incentive to do what is right for them and avoid litigation at the same time,” said Namie.
- Gives employers a reason to terminate or sanction offenders.
- Requires plaintiffs to use private attorneys.
- Plugs the gaps in current state and federal civil rights protections.
- Allows the bully to be sued as an individual.
- Offers affirmative defense provisions that preserve managers’ rights to discipline and terminate employees for cause, as long as the conduct is not abusive.

A Look at One State’s Anti-Bullying Bill

One of the [most recent iterations of the Healthy Workplace Bill was introduced in Massachusetts in January 2013](#). If an employer or employee is found to have created an abusive work environment, the bill would permit a court to order any relief that was “deemed appropriate, including, but not limited to: reinstatement of the bullied employee, removal of the offending party from the complainant’s work

environment, back pay, front pay, medical expenses, compensation for pain and suffering, compensation for emotional distress, punitive damages and attorney's fees."

According to the measure, an abusive workplace environment is one where "an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm or both."

The Massachusetts bill distinguishes between targets of bullying who have and have not been subjected to an adverse employment action.

Businesses cannot be penalized if the complaint is based on an adverse employment action taken because of poor performance, misconduct or economic necessity; a reasonable performance evaluation; or "an employer's reasonable investigation about potentially illegal or unethical activity."

Organizations can escape liability by showing they exercised "reasonable care to prevent and correct promptly any actionable behavior and the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer."

Fostering a Culture of Respect

Proponents of anti-workplace-bullying legislation say that without laws on the books, employers will condone bullying as a means to an end. However, critics argue that companies already address workplace bullying because this behavior is detrimental to their business by affecting employee morale, quality of work, and turnover.

Smart employers recognize that workers who feel respected are more productive and invested in the success of the enterprise, said Grimaldi.

"Broader respect in the workplace concepts that cover what could be considered bullying behavior in interactions between employees and co-workers, as well as supervisors and employees, should be included in employers' anti-harassment and discrimination policies," he advised.

Armstrong Halber agreed and said that employers' training should focus not only on avoiding legal liability but creating a respectful workplace. "Good employers recognize that while it's often not possible to change the way people think, they can be encouraged to respect differences and interact in ways that de-escalate potentially explosive situations," she said. "Good employers also recognize that the yelling, screaming or threatening supervisor is more often than not ineffective and creates a failure to communicate."

Instituting an Anti-Bullying Policy

According to the SHRM survey, 56 percent of companies have some form of anti-bullying policy that is commonly mentioned in an employee handbook or code of conduct. Responses to workplace bullying include firing, suspension or anger-management training.

An anti-bullying policy, which might be added to a larger anti-harassment policy, should define bullying, provide examples of such behavior and communicate a reporting procedure.

[SHRM's workplace bullying sample policy](#) includes a definition of bullying, a statement about the purpose of the policy, and examples of bullying behavior, such as using verbal or nonverbal threatening gestures, spreading rumors and gossip about an individual, and hindering someone's ability to work.

Most companies' equal employment opportunity policies are broader than what the law calls for, so they would tend to cover the actions of the equal opportunity jerk, Grimaldi observed.

"Rather than impose civility and respect in the work environment, it's a cultural thing that you want to work from the inside out," Grimaldi said. "That's why we believe that training and respect-based programs resonate, because it fosters a culture that becomes embedded, and that's what you're looking to do."

Along with consistently enforcing anti-harassment policies, businesses must provide training, said Armstrong Halber. Everyone on staff needs to have that communication and education. "I would say in-person training is more effective than Web-based training," she said. And training line managers is key. "A lot of those people have been promoted to their position because they're good at what they do, but they don't necessarily have management training. I would say that they're the most important set of individuals that need this type of training."

But anti-bullying-legislation advocates see the Healthy Workplace bill as the only way to offset the lack of legal protections.

"Employers need to recognize the magnitude of the problem and quit minimizing it, believing they already address it with other programs like conflict resolution when they do not," said Namie.

"Abuse in the workplace is the last form of abuse not considered taboo in the U.S.," he said. "In practice, workplace bullying is domestic violence at work, where the abuser is on the payroll. The longer we delay, the more workers who don't deserve denigrating abuse suffer."

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