



# Avoiding Workplace Harassment, Guns in Communities, and Other Hot Legal Topics

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# Harassment Still a Problem

Employees should be expected to conduct themselves in a professional and business-like manner, but unfortunately workplace harassment continues to be a common occurrence and no organization is immune.

# What is Workplace Harassment?

Equal Employment Opportunity Commission defines harassment as unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. (Protected categories under the Civil Rights Act, Age Discrimination in Employment Act, Americans with Disabilities Act).

# Illegal Workplace Harassment

Harassment where

- 1) enduring the unwelcome conduct becomes a condition of continued employment, or
- 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

# Illegal Workplace Harassment

Retaliation against individuals for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

# Usually Not Illegal Harassment

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people, be made a condition of employment or be in retaliation to employee's lawful actions.

# Common Types of Unwelcome Conduct

- Offensive Jokes
- Slurs
- Epithets
- Name-calling
- Physical Assaults
- Sexual Advances
- Threats
- Intimidation
- Ridicule
- Mockery
- Insults
- Touching

# Conduct Alone May Not Be Illegal

- Unsolicited conduct that was undesirable
- Made a condition of employment or basis for an employment decision or
- Creates a hostile environment that would be considered offensive to a reasonable person or
- In retaliation for employee's lawful complaints or conduct

# Employer Liability

The EEOC says that an employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.

# Employer Liability (Cont.)

The employer may also be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

# Healthcare Settings

## HEALTHCARE CREATE SPECIAL ISSUES

- Interactions with:
  - Supervisors
  - Peers
  - Subordinates
  - Patients and their families
  - Physicians and other independently contracted providers
  - Other contracted staff

# Healthcare Settings

Employer has duty to provide safe work environment for all its employees.

\*Harassment can come from others who are not supervisors.

# Healthcare Settings

Question is whether employer knows or should have known about the hostile work environment yet allowed it to persist.

Gardner v. CLC of Pascagoula, LLC

Fifth Cir., June 29, 2018

# Gardner v. CLC of Pascagoula, LLC

Many cases of third-party harassment are from restaurants, bars, and casinos.

Gardner involved repetitive harassment of a nurse by a resident of an assisted living facility. The resident had diminished mental capacity from a variety of ailments, including dementia. The nurse complained several times to her supervisor, who brushed aside her complaints.

# Gardner v. CLC of Pascagoula, LLC

The Gardner decision recognized that inappropriate comments and incidental contact are common amongst patients with reduced cognitive ability, and it is not objectively reasonable to expect that it will never happen. However, the Court found that the facility must take steps to protect its employee from significant physical contact or violence.

# Gardner v. CLC of Pascagoula, LLC

The Court noted that the facility could have assigned a security escort or additional staff, reassigned the employee, moved the resident to an all-male facility, used medication to control the resident, or discharged the resident. It looked to prisons for guidance.

# Lessons from Gardner

- The employer must look at the work environment and listen to staff.
- Staff must feel that it is safe to communicate their concerns.
- Once a complaint is filed, it should be promptly addressed and, if necessary, the problem should be promptly corrected.

# Lessons from Gardner

The employer should objectively document the information it learns and the steps to ameliorate it.

Part of our goal is to prevent litigation, not just win lawsuits. Litigation is expensive and disruptive.

# Online Harassment

In general, most people would consider online harassment to be the use of email, instant messaging, SMS texting, and websites to bully or otherwise harass an individual or group through personal attacks. Basically the same type of harassment that may occur in face to face situations, but now is done remotely.

# Online Harassment

The advancement of technology has not only increased the ease with which someone may conduct harassing behavior against a fellow employee, it has also introduced new methods of harassment such as revenge porn and catfishing.

# Policy Approach Still Generally Similar

While changes in technology have opened up new opportunities for harassing behavior, the general premise and approach to addressing harassment in the workplace has not really changed. Online harassment can be captured in the scope of an employer's general policies and procedures meant to address harassment.

# Key Components of a Policy

- Firmly prohibits workplace harassment
- Encourages victims to come forward
- Promises and delivers prompt and effective response to employee complaints
- Ensures fair and professional treatment of all employees
- Promotes a respectful work environment

# Have a Workable Policy

Having a policy that just sits on the shelf is not enough.

Sometimes, it is worse to have a policy than to not have one, because having a policy shows that the employer knows what should happen.

If you have a policy (and you should), it should be a workable policy.

# Have a Workable Policy

When considering whether to take action against a harasser, some employers worry that they will be sued by the harasser.

Remember that doing nothing can also lead to litigation.

The employer must balance how best to prevent litigation by either party.

# Reporting Recommendations

- Have a clear mechanism for reporting complaints
- Investigate all complaints
- Be discrete and maintain confidentiality
- If warranted, try to take prompt, corrective action
- Include the employee in any preventive or corrective opportunities
- Do not retaliate!

# Taking Corrective Action

- You must make sure:
  - The victim is not adversely affected
  - The harassment stops immediately and does not occur again. The key is prompt, effective measures which are reasonably designed in order to stop the inappropriate conduct.

# Taking Corrective Action

- You must also be careful to:
  - Correct the effects of the harassment
  - Follow up to make sure the problem is solved

NOT MEETING THESE BASIC REQUIREMENTS WILL  
LEAD TO CLAIMS AND POSSIBLE LIABILITY

# Best Practices

- Discourage touching
- Monitor interoffice relationships
- Implement harassment training at all levels
- Do not stereotype

# Best Practices

- Treat everyone with dignity and respect
- Follow policies 24/7
- Avoid comments about an individual with respect to physical appearance, race, age, gender or religion
- Use common sense

# Director & Officer Decision-Making: A Gun Policy Case Study



# Presentation Overview

- ✓ **Duties of Directors and Officers**
- ✓ **Decision-making Process**
- ✓ **Gun Policy Considerations as Case Study**
- ✓ **Protections for D&Os in Making Business Decisions**

**The goal of this presentation is to describe a board's process and considerations involving policy-making, not to suggest or validate any specific policy position.**



**vs.**



**Key Decision**

# Start With Traditional Corporate Governance Duties

- Care
- Loyalty
- Good Faith
- Obedience (non-profit organizations)

**Develop a decision-making process based on duties.**

# Duty of Care

- The duty of care requires that directors and officers inform themselves of “all material information reasonably available to them,” prior to making a business decision. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).
- Directors must “act in an **informed** and **deliberate** manner” prior to making a business decision. *Id.* at 873.
- Typically, an ordinary person in similar circumstances standard.

# What Does That Mean?

- **Directors must actively participate by attending meetings of the Board;**
- **Evaluate reports and information;**
- **Review and supervise the performance of executives;**
- **Obtain and consider all reasonably relevant and available information;**
- **Evaluate corporate actions;**
- **Establish a process for decision making;**
- **Consider advice of experts and professionals;**
- **Ask questions; and**
- **Establish committees, if needed, but maintain the direction and control of any committees.**

# Case Scenario

- **Gather relevant information.**
- **Establish a working committee.**
- **Hold meetings with board, residents, safety experts, etc.**
- **Be attentive and ask questions.**
- **Seek advice of professionals.**
- **Discuss and deliberate.**
- **Vote.**



# Duty of Loyalty

- Director must “protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would cause work injury to the corporation, or to deprive it of profit or advantage . . . .”  
*Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).
  - Avoid self-interest or interest of others
  - Usurpation of corporate opportunities
  - Parent/Sub/Creditors context with overlap directors

# Loyalty – Case Scenario

- **Director or officer has a personal interest in the transaction itself (resident board member has a gun or has been victim of violence);**
- **Director or officer has personal bias for pro-/anti-gun laws;**
- **Parent/subsidiary financial interests;**
- **Personal liability and litigation concerns.**

# Best Practices for Loyalty Concerns

- Assume that an “appearance” of an interest equals an interest;
- Establish a written conflict of interest policy;
- Recusal of interested director from Board discussions;
- Document decision-making process;
- Have interested transaction approved by majority of non-interested directors.



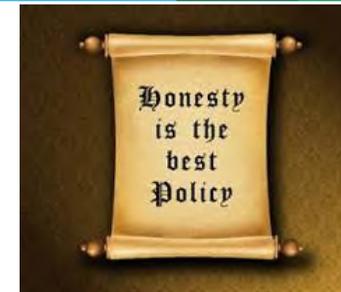
# CONFLICT ≠ No Transaction

- Conflict is NOT fatal to a decision
  - Disclose material facts of the director(s)' interest(s) in writing to the full Board; and
  - Majority of non-interested directors approve the transaction

OR

- Transaction is fair and reasonable to corporation.
  - Rely on advisors, i.e., Fairness opinion
  - 8 Delaware Code § 144; VA Stock Corporation Act § 13.1-691.

# Duty of Good Faith



- **“To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation.” *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 755 (Del. Ch. 2005), *aff’d*, 906 A.2d 27 (Del. 2006).**
- **Three primary examples of a lack of good faith:**
  - **“consciously and intentionally disregarding their responsibilities” by adopting a “we don’t care about the risks” attitude concerning a material corporate decision;**
  - **“intentionally act[ing] with a purpose other than that of advancing the best interest of the corporation;” or**
  - **“acts with the intent to violate . . . law.”**

# Non-Profit Duty of Obedience



- **Directors and officers must further the mission of the non-profit;**

**“There is no mission without a margin.”**

- **Comply with filing deadlines to maintain non-profit status; and**
- **Familiarize themselves with governing documents to ensure obedience to the stated mission.**

# Can A Gun Ban Be Imposed?

- Generally, private parties, including property owners, have the right to ban firearms from their premises;
- Constitutional Rights – Right to Bear Arms is not applicable to private conduct
  - Enforcing Constitutional right to bear arms requires “state action” or action of government officials.
  - Sufficiently close nexus to the State?
  - Financial assistance typically is insufficient to establish nexus, i.e. Medicare, Medicaid.
  - State regulation and oversight also insufficient.



# State Rights

- A state-specific analysis must be completed.
  - Some states, *i.e.*, Colorado, Kansas, Texas, and Virginia, expressly protect a property owner's right to ban firearms.
  - Other states, such as Maryland, are silent, which means the common-law right to admit or exclude people from property governs.
  - Some states, *i.e.*, Kentucky, Alaska, Louisiana, Minnesota, Ohio, limit a private party's authority to restrict firearms in certain instances.
  - Many states require signage that varies for open carry and concealed carry, *i.e.*, Colorado, Kansas, Pennsylvania, Texas.

# Contractual Rights



- **Housing or Care Agreements**
  - Is there a right to promulgate reasonable rules?
  - Does the agreement allow for retroactive changes to policies?
    - **EXAMPLE:** Community currently has in place operational policies and procedures. Community may revise or restate such existing operational policies and procedures and develop and implement such new operational policies and procedures as Community may deem necessary or appropriate in its sole discretion. Such new, revised or restated policies and procedures may be retroactive in application.
  - **Detrimental reliance or promissory estoppel**

# Common Law Considerations

- Basic tenet of law: A property owner is not ordinarily liable to a tenant or guest for injuries from a hazardous condition that comes into existence after the resident has taken possession.

EXCEPTION: If property owners maintain requisite level of control over property.

- E.g., common areas, pre-existing defective conditions, contractual obligation providing for control or safety.
  - Case study: Known vicious dog maintained by tenant in violation of lease term providing for tenant's eviction for violation. Court held the terms of the lease granted a property owner a large measure of control for preventing a dog bite.
- Duty to protect residents may also arise from fact-based foreseeable acts.

# Types of Potential Claims Against Management

- Breach of fiduciary duty;
- Negligence;
- Fraud and misrepresentation;
- Promissory estoppel and detrimental reliance;
- Conspiracy;
- Unfair trade practices; and
- Etc., etc., etc.

# Who Can Sue for Breach of Fiduciary Duties

- Corporation
- Shareholders for direct claims
- Shareholders for derivative claims
- State Attorneys General (non-profit)
- IRS (non-profit)
- Member (non-profit)
- Creditors, but only for a derivative claim
  - Exception: LLC rights need to be examined in connection with the Operating Agreement.

# Protections from Liability

- Business Judgment Rule
- Indemnification Rights
- Exculpation Provisions
- D&O Insurance

# Business Judgment Rule

- **Rebuttable presumption**
  - that when making a business decision, the directors of a corporation acted
    - on an informed basis
    - in good faith
    - in the honest belief that the action was in the best interest of the company
- **Does not apply to interested directors or claims for breach of loyalty or good faith.**
- **If rebutted, director or officer must demonstrate fairness of transaction.**
- **Generally applies to officers.**

# Virginia Standard

- **In Virginia, the standard of care for directors when making a business decision is codified at Virginia Stock Corporation Act, § 13.1-690**

**The statute requires directors to perform their duties:**

- 1) in good faith;**
- 2) in a manner reasonably believed by the director to be in the best interest of the corporation; and**
- 3) with the care that an ordinarily prudent person in a similar situation would use under similar circumstances.**

# Indemnification

- **Most states allow for-profit and non-profit companies to indemnify directors and officers for liability and costs to defend.**
  - **Protection is generally provided for in**
    - **Articles of Incorporation;**
    - **Bylaws;**
    - **Employment agreements or stand-alone contracts; or**
    - **By vote of the Board, shareholders, or member.**
- **Requires good faith conduct, honesty, and with respect to any criminal action or proceeding, no reasonable cause to believe the conduct was unlawful.**

# Exculpatory Provisions

- **A provision that limits or eliminates liability**
  - **Bylaw or articles of incorporation provision**
  - **Eliminates personal liability of a director**
  - **Only covers duty of care, not loyalty or good faith**
  - **Only prospective application, not retroactive**
- **In Virginia, exceptions are set forth under Virginia Stock Corporation Act, § 13.1-692.1.**

# Traditional D&O Insurance

- **Coverage Types**
  - Side A is executive liability for losses of individual directors and officers;
  - Side B is company coverage to reimburse the company to the extent it indemnifies the individuals;
  - Side C is company entity coverage to pay for losses incurred by the company for its own exposure and harm.
- **Exhausting policies**
  - Defense costs reduce the policy limit.
  - Compare non-eroding policies where payment of defense costs does not reduce the limits of coverage
- **Generally “claims-made” policies that pay based on the date of the claim**
  - Contrast with “occurrence” policies that pay based on the date of harm.

# Notice

- **Claim**
  - **Complaint**
  - **Demand**
  - **Pre-Suit Notice of Facts and Circumstances**
- **Definitions**
  - **Wrongful Act**
  - **Loss**
- **Provide Notice of Claim to Insurer Promptly**
- **Important to Preserve Coverage During Policy Period**
  - **Some policies provide for grace period**

# Endorsements

- It is critical to review the endorsements to the policy.
- These “customize” the general policy terms.
- They can provide for additional coverage or further limit coverage.
- In context of gun policies, endorsements may:
  - Eliminate coverage for bodily injury;
  - Eliminate coverage for specific named entity claims;
  - Limit coverage for specific claims.

# Care Agreement Considerations

- **Limitation of Liability Clause –**
  - Will not exculpate intentional harm or gross negligence
  - Unequal bargaining power
  - Void if against public policy.
    - “an admission agreement shall not include a general waiver of liability for the health and safety of residents.”
    - “pre-injury release provisions are contrary to public policy and therefore void.”

- **Example:**

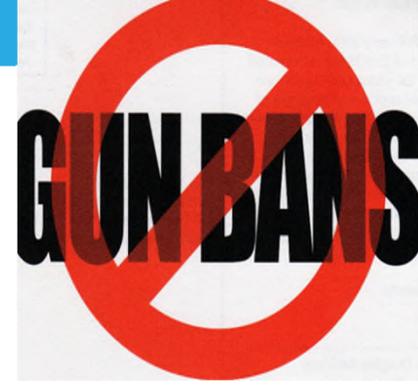
**TO THE EXTENT ALLOWED BY APPLICABLE LAW, [INSERT PARTY], AND THEIR PRESENT AND FUTURE TRUSTEES, DIRECTORS, OFFICERS, MANAGEMENT, ATTORNEYS, EMPLOYEES, AND AGENTS SHALL HAVE NO LIABILITY, DIRECTLY OR INDIRECTLY, TO YOU UNDER OR IN CONNECTION WITH THIS AGREEMENT OR OBLIGATIONS AND/OR DUTIES OWED AT LAW TO YOU FOR ANY DIRECT, INDIRECT, CONSEQUENTIAL INCIDENTAL, EXEMPLARY, SPECIAL, OR PUNITIVE DAMAGES OR COSTS, AND YOU, YOUR SUCCESSORS AND ASSIGNS HEREBY WAIVE ANY AND ALL SUCH LIABILITY.**

# Care Agreement Considerations, (Cont.)

- The sponsors should not reserve the responsibility to *enforce* the gun policy.
- *Having the ability* to enter the living unit to enforce rules and policies is different from having the *responsibility* to enter the living unit to enforce.
- It's typical to include an acknowledgement in the Agreement by the residents that the sponsor has the authority to enter the unit to enforce the community's policies and procedures; the text should not state that the sponsor is specifically responsible for doing so.



# Policy Considerations



- What types of firearms/ammunition/weapons are prohibited?
  - What's the rationale for the Policy?
- Are firearms/ammunition prohibited in any areas?
  - Common areas (inside or outside)
- Can firearms/ammunition be transported in the community?
- How are firearms/ammunition to be transported in the Community?
- Can residents possess firearms/ammunition in their residences?
  - Independent living, assisted living, comprehensive care
- How are firearms/ammunition to be kept?
- Will Management monitor this Policy?
- What are the consequences for violation of the Policy?
  - Termination of contract; Reporting to authorities
- How will residents be informed of the Policy?

QUESTIONS?

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