Sidestepping Sexual Harassment Allegations at Startups

An article that appeared on SFGate, "*Techies flock to Mission Control, S.F. members-only sex club*,"[1] discusses the activities of some tech workers in San Francisco, including several described startup founders, all in their 20s and 30s, which if discussed in the workplace, could quickly lead to situations that might result in sexual harassment claims. While the article discusses an extreme example, other activities and conversations that may seem relatively inoffensive have the potential to lead to allegations of harassment and costly litigation.

A startup may begin with a few friends working on an idea together. In such a collaborative environment, the lines between supervisors and subordinates and employees' personal and professional lives, may blur. Coworkers may go to a bar together for drinks after work. They may also engage in joking or teasing or discuss with each other aspects of their personal lives, such as romantic and family relationships. Nothing is inherently wrong with this, but the potential for legal headaches arises when that group of coworkers includes a mixture of supervisors and subordinates and especially if it includes a startup's founders. Employees may interpret certain comments or questions about their romantic or family lives as harassing, and the scene is set for a lawsuit.

This concern is not wholly unique to startups, as demonstrated by a lawsuit filed in March 2015 against tech giant Facebook, Inc. by a former employee who alleges, in part, that a Facebook employee who "was in a position of power" over her made harassing comments to her based on sex including "asking [her] why she did not just stay home and take care of her child instead of having a career." *Hong v. Facebook, Inc., et al*., Case No. CIV 5322943 (pending in San Mateo Superior Court).

The California Fair Employment and Housing Act ("FEHA"), California Government Code section 12940, *et seq*., makes it unlawful for an employer to "harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract" because of sex or gender.[2]

Employers may be directly liable to sexual harassment victims in civil actions under FEHA if the harassment is by an employee, or even a non-employee, where the "employer, or its agents or

supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[3] As a result, a startup that works out of a coworking space could be liable for the harassment of its intern by an employee of another startup who shares the same office space.

Employers are also strictly liable for sexual harassment if the harasser is an agent or supervisor of the employer, regardless of whether the employer knows about it.[4] An employer may also be liable for punitive damages for sexual harassment by an employee in certain circumstances, "if the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded" or was personally guilty of the conduct. For a corporate employer to be liable for punitive damages, this action by the employer must have been by "an officer, director or managing agent of the corporation."[5] At a newly incorporated startup, it would not be surprising to find the corporation's officers, directors and managing agents working closely with most of its employees. This may increase the potential damages that could be awarded to a successful plaintiff in a sexual harassment lawsuit under FEHA.

Startup founders should be particularly mindful of their interactions with their employees, including how their comments or questions regarding employees' private lives may be interpreted. They should also be mindful of how other individuals interact with their employees while their employees are working and should seek to develop a company culture and work environment where employees feel respected as professionals. Doing so can help prevent sexual harassment allegations or reduce the potential liability for any such claims should they arise.

[1] Nellie Bowles, "Techies flock to Mission Control, S.F. members-only sex club," http://www.sfgate.com/bayarea/article/Techies-flock-to-Mission-Control-S-F-5267323.php (March 1, 2014).

[2] Cal. Gov't Code section 12940(j)(1); The FEHA's prohibition of harassment applies to all employers with at least one employee or independent contractor in California, and for purposes of this law, "'harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire." *Id*.

[3] Cal. Gov't Code section 12940(j)(1)

[4] *State Department of Health Services v. Superior Court* (McGinnis) (2003) 31 Cal.4th 1026.

[5] Cal. Civ. Code section 3294(b).

For more information, please contact:

Robert A. McFarlane, Partner
415-995-5072
rmcfarlane@hansonbridgett.com