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## The Legal Intelligencer

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# What In-House Counsel Need to Know About Workplace Bullying

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2012-10-17 12:00:00 AM

We all remember the adolescent bully who made grade school and high school an unbearable experience for many. But what happens when your playground nemesis grows up to become your co-worker or, even worse, your boss?

The issue of bullying has garnered a great deal of recent attention. These days, bullying goes beyond mere playground teasing or taunting. In addition to "old-school" bullying, children and teenagers are now using technology as a means to get their messages across. So-called "cyberbullying" can occur through text messages, emails or social media sites. The targets of these tactics are often depressed and suffer severe anxiety and other health problems. In extreme cases, bullying has even caused teenagers and college students to take their own lives. In reaction, many states and local governments have enacted ordinances combating bullying in schools, as well as criminal statutes intended to punish those who engage in the act.

As it turns out, bullying is no longer reserved for children and teenagers in school. According to a study conducted by the Workplace Bullying Institute (WBI), an organization of psychologists and therapists committed to preventing abuse at work, bullying in the workplace is experienced by 35 percent of the U.S. workforce (approximately 53.5 million Americans). Moreover, numerous studies show that bullying can have a lasting impact both on the recipient of the bullying (the "target") as well as the company itself. In response, the WBI drafted the Healthy Workplace Bill, which has been proposed in 21 different states since 2003, and is currently pending in New Jersey. Although, to date, no state has passed legislation governing the issue, claims of workplace bullying are on the rise. At the very least, employers and corporate counsel need to take notice of what some are calling a "silent epidemic" in order to develop the appropriate policies and adequately train their workforces.

### Proposed Legislation

Recognizing the absence of a direct legal remedy governing bullying taking place in the workplace, Suffolk University Law School professor David Yamada, with the support of the WBI, drafted and proposed the Healthy Workplace Bill. The proposed legislation benefits both employers and employees. With respect to

employers, the bill provides a precise definition of "abusive work environment" and gives employers a reason to sanction and/or terminate employees who create or foster such an environment. Additionally, employers are protected against vicarious liability where they have appropriate internal correction and prevention policies in place. Employees, on the other hand, are given a means of legal redress to combat bullying at work. In addition to suing the bully as an individual, the employee is permitted to bring suit against an employer that does not have appropriate policies in place, so long as the employee can establish actual harm to his or her health through a licensed health or mental health professional.

### **Bullying in the Workplace**

Workplace bullying, according to the WBI, is defined as "repeated, health-harming mistreatment of one or more persons ... by one or more perpetrators that takes one or more of the following forms: verbal abuse; offensive conduct/behaviors (including nonverbal) which are threatening, humiliating or intimidating; and workforce interference — sabotage — which prevents work from getting done." Workplace bullying includes instances of:

- Shouting or swearing at an employee;
- Singling out an employee;
- Blaming an employee without factual justification;
- Excluding or ostracizing an employee from company activities;
- Practical joking;
- Threatening an employee;
- Spreading rumors or gossip about an employee; or
- Sabotaging an employee's work.

According to a joint survey conducted by the WBI and Zogby International, this type of behavior is not uncommon. In fact, 35 percent of the U.S. workforce reported being bullied at work, with an additional 15 percent witnessing it. This is a total of 50 percent experiencing bullying in the workplace. According to *The New York Times*, 60 percent of workplace bullies are men who target male and female employees equally. Female bullies, on the other hand, are more likely to bully other females. Even more surprising to many is that bullied employees are not the weak, "loner" types. To the contrary, targets are often the most skilled, bright and experienced employees in the workgroup. As such, they pose a threat to bullying co-workers and bosses who refuse to recognize others' talents or share credit where credit is due.

This type of bullying can have a serious, long-lasting impact on affected employees. It can trigger numerous stress-related health complications, including hypertension, autoimmune disorders, depression, anxiety and post-traumatic stress disorder. In addition to serious health concerns for the individual employee, there are real concerns facing the company as a whole. According to [bullyingstatistics.org](http://bullyingstatistics.org), bullying in the workforce causes high turnover, low productivity, lost innovation and difficulty hiring quality employees. *Psychology Today* reported that workers stressed by bullying performed 50 percent worse on cognitive tests. According to *Time Business*, bullying affects not only the targeted employee, but also the co-workers who witness it and are just as likely to search for new jobs. It has been estimated that bullying costs businesses a total of \$200 billion per year. Despite these concerns, the WBI reported that 40 percent of incidents are never reported to employers and, for those incidents that are, 62 percent are ignored.

### **To Regulate or Not to Regulate?**

Not surprisingly, there is debate over whether regulation is needed to combat this issue. The major forces

opposing regulation, which include state chambers of commerce as well as the National Federation of Independent Business, argue that existing laws against harassment and discrimination adequately address workplace bullying. According to an NFIB press release, the proposed legislation is "needless and meddlesome and will lead to higher costs." Moreover, the organization warned, the bill will lead to "baseless accusations and cost business owners time and money dealing with unnecessary lawsuits." Rather, opponents argue, employers should handle these issues on their own, without the interference of the legislature or courts.

On the other hand, proponents of the legislation insist that the current legal landscape is not adequate to protect those facing this issue. One potential method for recovery is to incorporate bullying claims into other discrimination claims, such as those for hostile work environment. Such claims arise where there is unwelcome conduct that has the purpose or effect of unreasonably interfering with an individual's work performance. These claims usually arise, for example, where an employee is the recipient of repeated sexual harassment or racial discrimination. Proponents of the legislation argue that hostile work environment claims fall short, as they only protect those who are in a protected class, i.e., a certain gender, race, religion or national origin. If you are not within one of the protected classes, being bullied by someone outside that protected class, a hostile work environment claim will fail.

Another potential avenue of recovery may be through a cause of action for breach of contract for the violation of certain policies within a company's employment handbook. Those advocating legislation argue that breach of contract claims fail because not all employers have express anti-bullying policies in their guidelines or handbooks. According to these proponents, bullying is a real problem in the workplace, especially given the power structure prevalent in many companies. This is especially true in the current economic downturn, where employees no longer have the luxury to leave a bad work environment in search of something better.

#### **Lessons for Employers and In-House Counsel**

Regardless of whether or not you believe regulation is necessary, the statistics show that workplace bullying is real. This is true even if your company has not yet received reports of it occurring within the confines of your workforce. Its effects are serious, both for bullied employees and for the companies for which they work. Employers and in-house counsel should keep the following advice in mind:

- **Create an anti-bullying policy.** Corporate counsel should work closely with management to develop a strong and clear anti-bullying policy. This policy should define workplace bullying and inform employees of the consequences that will take place when the policy is violated. A clear protocol should be developed and set forth, indicating the exact measures to be taken when someone is bullied or witnesses a co-worker being bullied. This policy should reflect the company's overall commitment to a safe and healthy working environment. It may be helpful to base your company's policy on the WBI's proposed legislation for guidance.

- **Train your employees.** In addition to training on sexual harassment and discrimination, employees should receive training on workplace bullying. They should know how to recognize when they, or others, are being bullied in the workplace. They should also know the exact protocol to follow when they experience or witness bullying taking place. This includes how to make a report and to whom it should be given. Training is especially necessary for supervisors or those in high managerial positions. Employees should know and understand that they have the full support of the company's top management.

In addition to combating workplace bullying and protecting against potential claims, following these guidelines will establish a safe, healthy and professional workforce for your employees. Within such an environment, your workforce will be more productive, which is beneficial both for the employees themselves as well as the bottom line of your company as a whole. •

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