National Tooling & Machining Association
NTMA PRECISION

Business Management Advisory

For Precision Custom Manufacturers

LR26 **File: LABOR RELATIONS**

NEW REQUIREMENTS FOR EQUAL EMPLOYMENT OPPORTUNITY AFFIRMATIVE ACTION AND SEXUAL HARASSMENT

SUMMARY

In 1988 Congress passed the Civil Rights Restoration Act, which significantly expands the requirements on certain private businesses under various civil rights laws. This statute goes beyond the requirements of Executive Order 11246, under which many government contractors must have an Affirmative Action Program designed to assure compliance with equal employment laws. A previous Business Management Aid, entitled "Equal Employment Opportunity: What it Means and How it Affects Your Business," provides guidelines to help NTMA members formulate an acceptable Affirmative Action Compliance Program.

This year has also seen further developments in the area of sexual harassment. The Equal Employment Opportunity Commission (EEOC) has clarified its Guidelines on Discrimination Because of Sex. Accordingly, NTMA members should be aware of the steps they should take to avoid liability in sexual harassment claims.

BACKGROUND LEADING UP TO THE NEW LAW

Before shop and plant management can address the changes brought about by the Civil Rights Restoration Act, it might be helpful to review the existing laws which apply to employers. The majority of federal equal employment opportunity policies, practices and regulations are overseen and coordinated by the EEOC.

- Title VII of Civil Rights Act of 1964 - prohibits employment discrimination on the basis of race, color, sex, religion or national origin.
- Age Discrimination in Employment Act - prohibits arbitrary age discrimination in hiring, discharge, pay, promotions, fringe benefits and other aspects of employment and prohibits retaliation.
- Equal Pay Act - prohibits sex discrimination in the payment of wages to women and men performing substantially the same work in the same plant.
- Americans with Disabilities Act - prohibits discrimination against disabled individuals.

In addition to these statutory requirements, other laws and forms of regulation affect you, including the Pregnancy Discrimination Act, regulations governing employee selection and testing, regulations prohibiting discrimination against Vietnam era veterans, and even regulations affecting your responsibilities to state and local fair employment agencies. As you can see, the list of employer concerns in the equal employment opportunity area is long - and can create serious legal problems for the shop or plant that fails to establish reasonable internal mechanisms to protect itself.

Other BMAs may give you assistance in moving ahead constructively to carry out your responsibilities. If you need to know how to go about developing and maintaining a formal, written Affirmative Action Program, consult the BMA entitled, "Equal Employment Opportunity: What it Means and How It Affects Your Business." In order to establish sound procedures for recruiting and hiring employees in accordance with equal employment opportunity requirements, you will find helpful guidance in the BMA entitled "Current Issues in Hiring Practices."

THE CIVIL RIGHTS RESTORATION ACT

Against the existing backdrop of equal employment opportunity regulations, Congress passed controversial legislation during 1988 that will increase your need to pay attention to possible areas of discrimination at your facilities. Are you covered by the new law? You are, if your company or any part of it receives any form of federal assistance or if you are a federal contractor / subcontractor.

How do you know if you are receiving federal assistance? Sometimes this is not an easy question to answer. Several examples which constitute federal assistance include hiring a student in the federal work-study program or participating

in any federally assisted job training program. Be sure to remember that, for purposes of this inquiry, the entire corporation, partnership or business entity is considered.

What does the new law require you to do, if you are covered? The short answer is that it expands many of the existing equal employment opportunity laws and regulations, which will impose added costs on the company, for compliance, insurance and litigation. Here, too, if the company is covered, then compliance with the new law means that every plant or shop, warehouse, and administrative office in the same locality or region must comply, including other parts of the company's entire business beyond its machining and tooling operations.

The following list identifies what actions you may be required to take if you are covered under the new law.

- Comply with the handicapped access provisions of the law for both customers and employees by:
  - Making your plants, shops, off ices and other facilities accessible to disabled persons by installing ramps, curb cuts, and widening walk spaces and rest rooms, or possibly making major structural changes (depending on the size of your business).
  - Providing equipment in your plants, shops, offices and other facilities that has been adopted for use by disabled persons, e.g. handicapped rest room stalls, accessible pay telephones.
  - Providing aids for deaf and blind persons, including braille material, audio tapes, readers, and sign language interpreters.
  - Forcing you to retain or employ persons with AIDS, or persons who are drug abusers or alcoholics, unless you can show that the person would constitute a "direct threat" to the health or safety of others in the facility or that the person would be "unable to perform" the job.
- Conduct affirmative action in order not to discriminate against customers or employees on the basis of race, national origin, age (and in job training cases, on the basis of sex).
- Maintain documentation for federal civil rights officials, file reports with appropriate federal agencies, and submit to random compliance inspections at your facilities even where there is not an allegation of discrimination against you.

Because of the severity of these actions, and the further likelihood that the company can expect an influx of discrimination charges to be brought by employees, applicants for employment, and even customers, it is recommended that your company seek advice of counsel in structuring a compliance plan to meet requirements you may have. One way to handle your obligations is to review thoroughly your company's personnel and employment policies to assure that they meet the new law.

EEOC SEXUAL HARASSMENT GUIDELINES

Since 1980, the EEOC has had guidelines to assist employers in preventing sexual harassment violations, which are considered to be prohibited discrimination under the Civil Rights Act of 1964. These guidelines make it clear that unwelcome sexual advances, requests or sexual favors, as well as other forms of verbal or physical conduct or a sexual nature, can constitute harassment.

Three possible situations will result in a finding of sexual harassment.

1. When submission to such conduct is made a term or condition of employment, either directly or indirectly;
2. When submission to or rejection of such conduct is used as a basis for an employment decision (e.g., hiring, firing, promotion, raise); and
3. When such conduct has the purpose or effect of unreasonably interfering with an employee's performance or creating an intimidating, hostile or offensive work environment.

The EEOC has recently set forth criteria for its field staff to evaluate charges of sexual harassment. That memorandum describes the first two charge categories listed above as "quid pro quo," where a person's advancement or job security is involved. The third category has been called "hostile environment"

Under these categories, patterns of sexual harassment can occur in a variety of circumstances and may encompass a number of variables of which the prudent employer should be aware. The EEOC looks at the record in each case, including the context in which the alleged incident occurred.

In order to understand what steps your company should take to protect itself and its employees, you should review a few of the EEOC's basic guidelines in evaluating sexual harassment complaints.

- Either a man or a woman may be the victim of sexual harassment, or either may be the harasser.
- The harasser does not have to be the victim's supervisor; he/she may be a co-worker, a supervisor but not of the victim, an agent of the employer, or even a non-employee.
- The victim and the harasser may be of the same sex, where, for example, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex in the same way. (Remember, it is discriminatory treatment that is at issue.)
- The victim does not have to be the person to whom the unwelcome sexual conduct is directed, but may be affected by conduct toward another co-worker which creates a hostile environment.
- Concrete economic injury to the victim is not required, for example, where a hostile environment results from the sexual conduct.
- It is up to the victim to prove that the harasser's conduct is unwelcome, but this is almost always overcome by making a statement directly to the harasser or using the employer's grievance procedure, if one is available.

Several important points for the employer emerge from this list. An employer generally will not be held responsible for

harassment by a co-worker or non-employee unless it knew or should have known about the conduct and failed to take corrective action to stop it. Also, the employer usually is not responsible for harassment by a supervisor, again unless the company knew or should have known and failed to act. There is a growing number of hostile environment cases recognizing the imposition of strict liability if the harasser is a supervisor. Where the employer usually runs into trouble is when it does not have an explicit policy against sexual harassment, when it fails to tell its employees about such a policy, or when it does not provide a grievance procedure. In those circumstances, the EEOC generally finds that there is no shield from liability for the employer's lack of knowledge.

Accordingly, it behooves the employer to develop a policy and an internal complaint procedure, so that an employee who feels that (s)he has been the victim of sexual harassment can bring it to the company's attention. It is also important to provide an alternate reporting mechanism, and to expressly prohibit retaliation for filing a bonafide complaint of sexual harassment or participating in a complaint investigation. By publicizing your grievance procedure, through the employee handbook or other visible means, you will be providing yourself counter-arguments to allegations that your company condones sexual harassment. However, as a further word of caution, you should recognize that even a strong policy and grievance procedure will not insulate your company if it fails to take appropriate steps to correct sexual harassment once you become aware of the problem. Your company's attorney should guide you in establishing an effective program for dealing with this area of discrimination law.

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