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IT'S TIME TO DUST OFF DEALERSHIP POLICIES AGAINST DISCRIMINATORY HARASSMENT! *By Kelley E. Kaufman*

Does your dealership have a policy against discrimination and harassment? Does it cover all forms of discriminatory harassment? Does it prohibit discrimination on the basis of genetic information or sexual preference? Does it provide employees with multiple contacts to report complaints or concerns? If you answered “no” to any of these questions, it is time to dust off your dealership employee handbook and review your dealership employment policies to ensure that they reflect the current state of the law!

Clear policies can define what is expected of employees and what they can expect from the dealership. They also can promote consistent treatment among dealership employees and the uniform handling of internal procedures, such as complaint and reporting mechanisms. Importantly, however, a discriminatory harassment policy (like all policies in your dealership employee handbook) must be up-to-date. Recent legal developments affect a wide variety of employment policies – and discriminatory harassment is no exception.

Must your dealership implement a discriminatory harassment policy? Yes!

In order to promote a workplace free from all forms of discriminatory harassment, and to minimize your dealership’s liability under anti-discrimination laws, the dealership must develop and communicate clear policies against discriminatory harassment. Implementing and maintaining such policies can not only help to reduce the occurrence of discrimination and harassment in the dealership workplace, but also can provide the first line of defense against legal liability if such harassment does occur.



The Courts have made clear that employers will be held liable for co-worker harassment only if the employer “knew or should have known” that harassment was taking place, yet failed to take prompt action to remedy the situation and bring an end to the harassment. With respect to allegations of supervisory harassment, however, the United States Supreme Court has made clear that employers will be automatically liable for such conduct unless they can establish an affirmative defense. The affirmative defense requires your dealership to demonstrate that it exercised reasonable care to prevent and correct promptly any discriminatory or harassing behavior; and the employee unreasonably failed to take advantage of the protective or corrective procedures or to otherwise avoid harm.

What does this defense mean for your dealership? The dealership must implement a policy that prohibits all forms of discrimination and harassment and provides an adequate reporting and investigation procedure for employees to follow. In addition, your dealership must provide discriminatory harassment training for all supervisors and managers – and the dealership may wish to consider providing such education to all employees.

What must the dealership include in its policy against discriminatory harassment?

There are a number of key points that your

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dealership should make to present a strong policy against discriminatory harassment.

- Highlight your dealership's policy of equal employment opportunity and establish the protected classes.

Many employers institute policies that focus exclusively on sexual harassment. This is insufficient. There are a large number of anti-discrimination laws that apply to your dealership – including federal and state laws, as well as local ordinances – that prohibit discrimination based upon a variety of “protected classes.” You likely are familiar with the major federal laws, including: Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, national origin and religion; the Americans with Disabilities Act, which prohibits discrimination based upon mental or physical disability; and the Age Discrimination in Employment Act, which prohibits discrimination based upon age (40 or older). The Pennsylvania Human Relations Act provides similar prohibitions at the state level.

Do your dealership employment policies prohibit discrimination and harassment based upon genetic information or sexual preference? They should! In 2011, the Genetic Information Nondiscrimination Act (“GINA”) became effective. GINA prohibits employers from discrimination based on genetic information, which includes an employee's family medical history. The Employment Nondiscrimination Act (“ENDA”) is a piece of legislation currently pending with Congress. If passed, ENDA would prohibit discrimination against gay, lesbian and bisexual employees.

Remember to check for local ordinances that also might impact your policies. For example, the City of Philadelphia recently amended its Fair Practices Ordinance in March 2011, which now prohibits discrimination on the basis of genetic information, familial status, and domestic or sexual violence victim status, in addition to marital status, sexual orientation, and the other protected classes identified above.

The legal landscape is constantly changing. Make sure your dealership references all legally-protected classes in the dealership's discriminatory harassment policy (and the dealership's Equal Employment Opportunity statement)!

- Describe prohibited conduct and provide examples.

Clearly identify in the dealership's policy what types of conduct will be considered discrimination or harassment. It is important to note that the dealership is identifying conduct which will violate the dealership's policy – not the laws listed in the previous section. Often, an employee's conduct may be unacceptable for the workplace, even though it might not rise to the level of unlawful harassment. Your dealership is not in a position to decide what is lawful or unlawful – only what violates your dealership's policy.

A strong policy will clearly identify both sexual and discriminatory harassment. The EEOC has provided guidelines as to the type of conduct that will amount to sexual harassment. The dealership can also provide examples. Sexual harassment might include unwelcome sexual advances or propositions, unwanted touching, or preferential or derogatory treatment based

on gender. Discriminatory harassment might include using insulting or degrading language that would reasonably offend members of a given protected class, distributing or displaying any written or graphic materials that would be offensive to members of any protected group, and using racial,

religious or ethnic epithets.

Remember: It is important to define clearly what conduct the dealership expects from dealership employees – and what conduct is prohibited. This provides employees with a set of guidelines to follow and lets the employees know what the dealership's expectations are.

- Set up an appropriate complaint or reporting procedure designating alternate contacts for employees.

As noted above, a dealership's affirmative defense to discriminatory harassment claims requires protective or corrective procedures. Clearly identify a complaint mechanism in your dealership policy, complete with multiple reporting contacts to which employees can bring concerns of discriminatory or harassing treatment. Designating alternate reporting contacts is important, as is designating appropriate contacts, such as trustworthy management-level employees who will act promptly and effectively upon receiving a complaint or upon learning of potentially-harassing or discriminatory conduct in the workplace.

It also is important to note that employers should avoid making direct supervisors a point of contact. Often, the employee's





supervisor may also be the alleged harasser. By directing employees to different or alternate contacts, your dealership can avoid potential conflicts and allegations that the employee was unable to make.

- Explain the investigation process.

Explain the investigation process in your dealership policy. Begin with a suggestion that employees should (but are not required to) submit a complaint in writing, identifying any necessary witnesses and the employee's desired resolution to the complaint. Advise employees that confidentiality will be maintained to the extent possible, but note that certain information might be disclosed (i.e., to a complaining party and witnesses) in order for the dealership to conduct a thorough and adequate investigation.

The dealership should also clearly outline the consequences if a violation is found. The dealership must take prompt and appropriate remedial action to bring the harassment to an end – most often, this amounts to some form of discipline, up to and including immediate termination. Even if the dealership does not find the complained-about conduct to rise to the level of termination, it is advisable to issue a written notice and (re) educate all parties involved about the dealership's policy against discriminatory harassment. The dealership can provide for disciplinary consequences in the event that a complaint is found to have been made in bad faith.

Clearly prohibit any retaliation for making a complaint or for participating in an investigation.

It is very important that the dealership policy notifies employees that retaliation will not be tolerated. Highlight the fact that the dealership will not tolerate any form of retaliation against any individual for making a report of harassment – or for participating in an investigation.

The dealership policy should also re-emphasize that employees should promptly report any concerns of retaliatory conduct. Include a clear statement that, if harassment persists or retaliation occurs, the victim should immediately inform an officer of the dealership so that appropriate action may be taken. Again, identify the consequences for such prohibited retaliatory conduct.

Take action now to minimize your dealership's potential liability in the future!

If the dealership has not implemented a policy against discriminatory harassment, or if the dealership's policy is incomplete or outdated, there is no time like the present to take action. In addition, remember that conducting dealership

supervisor and management-level training to ensure consistent and appropriate investigation and response to complaints is key. It is important that these employees understand what is required of them under the dealership's policy – and that the dealership will take appropriate action when necessary.

Remember: Strengthening the dealership's policies and procedures can help maximize the dealership's legal position in the event that a current or former employee files a complaint of discriminatory harassment or retaliation. ■



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IMPORTANT TAX ALERT

By Elizabeth P. Mullaugh

As of January 1, 2011, the federal estate tax came back into full effect with a \$5 million exclusion. At the same time, the exclusion from federal gift tax was raised to \$5 million so that the exclusions are once again unified. The result of this is that each person may transfer during his life or at his death a total of \$5 million before tax is imposed. Estate Tax will be imposed on transfers in excess of \$5 million, at a flat 35% tax rate. As in the past, there are deductions for certain transfers to spouses and charitable organizations.

The above changes represent a temporary legislative compromise that will expire as of December 31, 2012, after which, if nothing is done, the federal estate tax will revert to pre-2001 levels, i.e., a \$1 million exclusion from both estate and gift tax. Therefore, we recommend that clients consider reviewing their estate plans now to ensure that their current plans do not result in unintended consequences under current law and also to take advantage of any opportunities that may be available to utilize the expanded exclusions from tax.

If you are interested in reviewing your estate plan, please contact any member of the McNeas Automotive Dealership or Asset Planning and Federal Taxation groups.



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McNees Automotive Dealership Law Group

The Automotive Dealership Law Group of McNees Wallace & Nurick exists to serve the special needs of car and truck dealers throughout Pennsylvania and surrounding states.

Since our formation in 1989, we have assembled an outstanding group of lawyers who understand the unique legal problems which affect dealers and who also understand and are interested in the businesses of our dealer-clients.

We are available to assist dealers with any of the broad range of legal problems encountered in today's highly regulated business environment. From buy/sells to franchise terminations; from environmental to employee relations; from consumer complaints to problems with PennDOT; from formation of a new dealership to successor planning; from taxes to tags—we can help.

We will work with your regular local attorney, whenever it is efficient to do so. We will be pleased to provide an estimate of legal fees for a project before you engage our firm.



SAVE THE DATES

for this year's edition of the McNees Auto Dealer Practice Group Seminar:

Philadelphia, November 3, 2011

Automobile Dealers Association of Greater Philadelphia

Pittsburgh, November 10, 2011

Greater Pittsburgh Automobile Dealers Association

Topics to include:

- **Industry trends and issues for dealers**
 - Overview of current trends and issues impacting the new vehicle dealer industry
- **Regulatory and enforcement issues**
 - Focusing on current enforcement trends and potential issues to address prior to an audit or to avoid a complaint being filed
- **Succession planning**
 - Overview of current estate, wealth transfer & tax laws
- **Recent developments in employment law**
 - Addressing top employment law issues affecting dealerships today and how to deal with them

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