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Cuomo Harassment Scandal Offers Lessons For Employers

By **Vin Gurrieri**

Law360 (March 1, 2021, 10:43 PM EST) -- New York Gov. Andrew Cuomo frequently touted his state's aggressive expansion of legal protections for workplace sexual harassment victims as the #MeToo movement gained steam. But recent allegations against him by former staffers show that powerful leaders still have a lot to learn.

Cuomo has found himself at the heart of a political firestorm as two women have accused him of sexual harassment in the workplace, including former aide Charlotte Bennett, whose allegations were detailed Saturday in *The New York Times*. She claims that Cuomo asked her invasive personal questions about her love life and whether she was willing to date older men — remarks she took as a sexual overture.

The governor responded to Bennett's allegations by acknowledging he made jokes and "teased people" at work about their personal lives in what he believed to be "a good natured way," but that he "never intended to offend anyone or cause any harm."

Brenda Feis of Feis Goldy LLP, a boutique firm that represents employees, managers and executives, pointed out the dissonance of Cuomo **working** for years to push the #MeToo movement forward while also allegedly "engaging in practices that men just continue to subject subordinates to."

"The more things change, the more they stay the same," Feis said. "There is a certain irony in the fact that this is the same governor who led the country in passing legislation not even two years ago ... that strengthened protections for women who had been sexually harassed."

Inappropriate Humor and the Empire State

In Cuomo's case, one of the lessons to be learned is how much of a problem risqué or suggestive humor is in the workplace, particularly when there is a power imbalance at play, attorneys say. The accounts by Cuomo's accusers included several such incidents.

Bennett, who is four decades Cuomo's junior and served as an aide to the governor and health policy adviser in his administration, claims in part that he made remarks about not being able to hug anyone amid the COVID-19 pandemic and asked her who she'd last hugged. Former aide Lindsey Boylan accused Cuomo of harassing her multiple times between 2016 and 2018 in an essay published on Medium days before Bennett's allegations went public, including a claim that he remarked to her, "Let's play strip poker," and that he once planted an unwanted kiss on her following a briefing.

Cuomo's administration has said Boylan's allegations of inappropriate behavior "are quite simply false." But in a statement responding to Bennett's claims, Cuomo tacitly admitted to saying things that "have been misinterpreted as an unwanted flirtation" and that may have been "insensitive or too personal."

Feis called Cuomo's attempt to justify his actions as good-natured and playful banter "another reflection of how so many men in power don't understand how their ... behavior is being received," while calling the governor's response "tone-deaf."

But beyond that, a problem Cuomo may face — and that other accused harassers in New York also confront — is that his explanation "just doesn't fly as a matter of law," according to Orrick Herrington & Sutcliffe LLP partner Mike Delikat, who represents employers.

"Leaders need to set the right tone at the top," Delikat said. "It's not relevant that he did not believe or intend the discussion to be offensive. It's what the person believes on the other [side]."

Under federal law pertaining to harassment and hostile work environments, the offending conduct must be "severe or pervasive" to qualify as illegal, but laws in New York City and New York state set the line for acceptable conduct far higher.

"It's not the 'severe or pervasive' standard, it's whether or not someone is really offended and only a mere annoyance or trivial remark is excused," Delikat said, while adding that "it's kind of tough to justify sex talk of any kind."

For individuals in private businesses, the safest course of action when it comes to off-color jokes is simply making sure they're not made at all, said Marc Bernstein, a management-side partner at Paul Hastings LLP and chair of the firm's New York employment law department.

"Don't do it, because whenever you joke about something, you already are taking risks in terms of whether someone might be offended," Bernstein said. "In a work environment, the recipient of the joke may not have wanted the joke and it may be unwelcomed."

Independent Investigation Takes Center Stage

Another key lesson for employers that was highlighted by the Cuomo sexual harassment scandal is making sure that top officials — a CEO or a C-suite, executive, for example — who are accused of harassment are kept far away from any investigation of their conduct so they can't pull any strings.

After Bennett's accusations came to light, Cuomo initially floated the name of a retired federal judge to lead an investigation of the claims against him. That led to a back-and-forth with New York Attorney General Letitia James, who, with the support of other top politicians in the state, including Sen. Kirsten Gillibrand, sought an independent investigation that her office would oversee.

The situation **culminated Monday** when Cuomo issued an "official referral" with subpoena power that James had requested, which authorized her office to look into the allegations against the governor and hire an outside law firm to carry out the probe.

"This is not a responsibility we take lightly as allegations of sexual harassment should always be taken seriously," James said in a statement Monday. "As the letter states, at the close of the review, the findings will be disclosed in a public report."

For companies facing sexual harassment claims against a top leader, Delikat said one of the key lessons they can glean from the Cuomo scandal is that the accused doesn't get to decide who will conduct an independent investigation of the allegations against them or how the company will respond.

If the accused is a CEO, Delikat noted that the company's board or an appointed special committee of directors "must take the lead" on such a probe, and that it's vital for the public to know that the investigation will be "impartial, prompt and thorough."

Bernstein offered a similar sentiment, saying the improper influence of an accused leader shows the importance of hiring an outside firm or a professional investigator to carry out the task.

"If it's the most senior person or a fairly senior person, companies may want to have someone outside the company, like a law firm or some other type of professional investigator, fully investigate the allegations," Bernstein said. "The target of the investigation should really have no say whatsoever in how the investigation is conducted."

--Editing by Abbie Sarfo.

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