

MEA LEGAL UPDATE

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ATTORNEYS AT LAW



**THE TIMES, THEY ARE A
CHANGIN'... BIG TIME**

THE EEOC

- EEOC's acting chair expressed a desire to capitalize on the #MeToo movement to create significant and sustainable change with respect to sexual harassment. So...
- The EEOC just filed seven sexual harassment/hostile work environment cases across the country.

THE EEOC

- Five of the lawsuits allege harassment by a direct supervisor, manager, or owner
- Six of the lawsuits were brought behalf of one or a group of female employees
- One lawsuit alleges sexual harassment of a male employee by his male co-worker
- One lawsuit: Failure to distribute policy, train
- One lawsuit: Failure to properly investigate.

EEOC GUIDANCE: NATIONAL ORIGIN

- Political climate: national origin discrimination increasing, EEOC is focusing
- Cannot use certain recruitment practices targeting of a particular national origin group.
- Cannot rely on the discriminatory preferences of coworkers or customers
- Can you screen out candidates who lack a Social Security number? Could disproportionately affect certain nationalities. EEOC: allowed to work if they can show that they have applied.

EEOC GUIDANCE: NATIONAL ORIGIN

- Use a variety of recruitment methods to attract as diverse a pool of job seekers as possible
- Identify your company as an equal opportunity employer
- Implement clearly-defined criteria for evaluating performance
- Distribute a policy prohibiting harassment based on national origin and train employees regarding their rights and obligations under the policy.

APPARENTLY, THEY WERE SERIOUS: EEOC FILES MULTIPLE HIRING PRACTICE CLAIMS

- Focus: hiring and recruitment practices that “discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities.”
- Focus: tools employers use to screen applicants
- Lawsuit: ADA violation for asking about prescription medicines
- Lawsuit: ADA violation based on refusal to consider explanation that applicant failed drug test due to prescription pain killer she took for back pain.

APPARENTLY, THEY WERE SERIOUS: EEOC FILES MULTIPLE HIRING PRACTICE CLAIMS

- Lawsuit: ADA violation, employee terminated after disclosing participation in a medication-assisted treatment program for opiate addiction.
- Lawsuit: ADA violation, physical exams with tests unrelated to job requirements, or which go beyond “essential functions”
- Lawsuit: ADA violation, failure to hire deaf applicant based on safety concerns; applicant was never asked if he could perform any of the essential functions of the position with or without accommodation.

SEASONS 52: A MENU OF VIOLATIONS

- EEOC brought age discrimination claim. Result: \$2.85 million plus mandated changes in hiring practices.
- Hiring rate for over 40 much lower than under 40
- Testimony: Seasons 52 hiring managers asked age or made age-related comments during interviews.
- "Seasons 52 girls are younger and fresh"
- "We are not looking for old, white guys"
- "Most of the workers are younger"
- "We are looking for someone with less experience."

EEOC GUIDANCE: RETALIATION

- 50% +/- of all claims include a retaliation count
- Guidance stresses no-tolerance position: May not retaliate against employee who files claim for discrimination, participates in a discrimination proceeding, opposes unlawful discrimination. Includes harassment and ADA claims.
- Change: Expands what it means to oppose employer practices
- *Must* implement policies, train.

THE DEPARTMENT OF LABOR

- ❑ Obama administration proposed rule: must pay overtime unless employee makes over \$47,476.
- ❑ Court invalidated. But ...
- ❑ DOL says it will issue a new proposed rule by **January 2019**
- ❑ Likely target: exempt employees paid below \$40,000
- ❑ You will likely have at least 6 months' notice.

SPEAKING OF OVERTIME ...

- **Pending PA proposal:** \$31,720 effective 1-1-20, and increasing *significantly* thereafter.
- New PA case on paying non-exempt employees on a salary basis
 - ▣ You can do it, *if you do it right*. Different method of calculation.

THE NLRB

- ❑ YOU ARE GOVERNED BY THE NLRB WHETHER OR NOT YOU ARE UNIONIZED
- ❑ Social media: Common sense is returning
- ❑ May 2018 ruling: Can you ban **moonlighting**?
- ❑ DO NOT justify policy by reference to company interests or image: employees have rights to associate, pursue interests that may lead to improvement of working conditions
- ❑ DO reference bona fide issues with ability to satisfy job requirements, safety and security.

THE NLRB: HANDBOOKS

- Formerly: Any rule that might dissuade employees from expressing workplace views was prohibited
- June 7, 2018: New approach, more employer-friendly, but nuanced: must serve a legitimate business purpose.
- **PROBABLY OK:** Rules requiring civil, cooperative behavior, no offensive language, no insults
- **PROBABLY OK:** Rules against insubordination, conduct that adversely affects operations
- **PROBABLY OK:** Rules protecting confidential, proprietary and customer information or documents.

THE NLRB: HANDBOOKS

- **PROBABLY OK:** Rules against defamatory emails about products or customers, misrepresentations about products, services or employees,
- **PROBABLY NOT OK:** Rules that require confidentiality with respect to wages, benefits, working conditions
- **NOT OK:** The rule materially compromises core protected rights, such as blanket prohibition about criticisms of employer among employees, concerted walk-outs, protests, picketing, presentation of petitions or grievances.

THE NLRB: DON'T GET TOO COMFORTABLE

- Non-union employee complained about poor working conditions at Houston city council public meeting
- Terminated
- May 4, 2018: NLRB (Republican majority) rules that employee's conduct was protected concerted activity, awards damages
- Message: the NLRB *will* aggressively prosecute cases involving **non-union** employees that engage in protected concerted activity.

CONGRESS

- ❑ Tax cut act prohibits tax deductions for payments or settlements “related to sexual harassment or sexual abuse” and for related attorneys’ fees if the payment is subject to a nondisclosure agreement
- ❑ Forces employers to choose between confidentiality and tax deduction
- ❑ Suppose it is the employee who wants the confidentiality?

SEXUAL ORIENTATION/ TRANSGENDER RIGHTS

- EEOC: Title VII covers LGBT discrimination
- DOJ: LGBT rights *not* covered by Title VII, but “sexual stereotyping” *is* covered
- Circuit Courts: Split, but there is a trend...
- State and local laws are filling the gaps
 - ▣ Not PA, but there are ordinances in Philadelphia, Pittsburgh, Lancaster, Scranton, Harrisburg...
- Recent PA federal court decision: Sexual stereotyping = Title VII = LGBT rights are protected
- Ticketed for Supreme Court, but in meantime...

IMPORTANT MISCELLANY

- NJ expands “ban the box” law (even including ban on online search for an applicant’s criminal record)
- PA federal court allows ADA claim based on stress caused by “gender identity disorders” (gender dysphoria)
 - ▣ Failure to accommodate request to use bathroom, assign nametag, pattern of antagonism...
- PA Supreme Court: terminated employees are not entitled to inspect their personnel file, no matter how recently they were terminated.



THE #ME TOO CULTURE SHIFT: MINIMIZING YOUR EXPOSURE

HARASSMENT POLICIES: THE *STARTING POINT*

- Make it understandable, not boilerplate, no “legalese”
- Do not limit to just sexual harassment
- Address more than just illegal conduct
- Provide examples of prohibited conduct
 - ▣ Beyond quid pro quo
 - ▣ The following are examples of conduct that is prohibited even if not unlawful (touching, jokes, comments, emails, social media ...)
- To whom does it apply (not just employees)
- Where does it apply (not just on premises).

NEW YORK: IS THIS A TREND?

- April 12, 2018 law ...
- NY employers can be liable for harassment of **non-employees**, such as contractors, vendors, consultants, others providing services pursuant to a contract.
- NY employers prohibited from using nondisclosure clauses in harassment settlements, unless the complainant requests. Also, 21/day, 7/day provision.
- NY employers may not require mandatory arbitration of claims of workplace sexual harassment.

NEW YORK: IS THIS A TREND?

- October 9, 2018: Must distribute written anti-harassment policies, must conduct annual anti-harassment training for all employees, based on models to be developed.
- January 1, 2019: Employers who wish to bid on certain state contracts will be required to affirm that the employer has implemented a written policy addressing sexual harassment in the workplace and that it provides annual sexual harassment prevention training to all of its employees.

THE IMPORTANCE OF A DATING POLICY

- Sexual harassment incubator
- Relationships between managers/subordinates
 - ▣ Mandatory reporting? “Love contract”? At what stage?
 - ▣ Prohibit? Allow, but require change in reporting structure?
- Relationships between co-workers
 - ▣ Mandatory reporting? “Love contract”? At what stage?
- Relationships with clients, vendors
 - ▣ Pressure to continue relationship to avoid loss of business?
 - ▣ Ethics issues
- Dating and harassment policies should be next to each other.

WORDS MUST BECOME ACTIONS

- Demonstrated C-level buy-in
- Training
- *Consistent* enforcement at all levels
- Dealing with issues at the earliest stages
 - ▣ Warnings
 - ▣ Serves a preventive purpose
 - ▣ Establishes justification for more serious discipline

EEOC *PROPOSED* GUIDANCE ON HARASSMENT TRAINING

- Harassment training key criteria:
 - ▣ Championed by senior leaders.
 - ▣ Repeated and reinforced regularly.
 - ▣ Provided to employees at every level and location
 - ▣ Provided in all languages commonly used by employees.
 - ▣ Tailored to the specific workplace and workforce.
 - ▣ Conducted by qualified, live, interactive trainers or, if live training is not feasible, designed to include active engagement by participants.
 - ▣ Routinely evaluated by participants and revised.

THE COMPLAINT POLICY/PROCEDURE

- You can be right, even if you were wrong
- If you have a *proper* complaint procedure that is published and consistently respected ...
- If an employee does not use it, for no good reason, at a point in time when the company could have done something about the issue... *you can win, even if there was wrongdoing*
- If the employee does use it, and you *properly* respond ... *you can win, even if there was wrongdoing*
- Does not apply to “quid pro quo” cases.

THE INVESTIGATION POLICY/PROCEDURE

- Once the complaint is made, standardized procedures **must** be implemented **immediately**. No ad libbing.
- Thank you, We take this seriously, will advise HR.
 - Non-HR personnel out. No heroes. HR/Counsel **only**.
 - Acknowledge the complaint in writing
- **Compliant** investigation procedure **must** begin immediately.
- This **must** be handled by an investigator who understands the investigation, documentation requirements.
- After results received, make the call, determine next steps **with the advice of counsel**.

WHO DO YOU BELIEVE?

- What if they did not resist?
- What if they did not report misconduct at the time?
- What if there is no corroboration?
- What if there is a history of conflict?
- What if there *appears* to be a pattern?
- What do you do if the alleged harasser is at the top of the food chain?

BE VERY CAREFUL ...

- How do you deal with the accused and accuser while the investigation is ongoing? Protect, but no hint of pre-judgment or retaliation
- Do not promise confidentiality, but maintain confidentiality on a strict “need to know” basis
- The **defamation** risks
 - ▣ Publicity
 - ▣ Pre-judgment
 - ▣ Getting it wrong
- The post-decision obligations.

SEVEN ABSOLUTE MUST-DO'S

- ❑ The right kind of policies
- ❑ Executive buy-in
- ❑ Periodic training *from top to bottom*
- ❑ A compliant, publicized, respected complaint procedure
- ❑ A compliant, independent, respected investigation mechanism
- ❑ A confidentiality/non-defamation protocol
- ❑ Real-time expert advice and direction.

BE CAREFUL: LEAVE AS ADA ACCOMMODATION

- Initial request or add-on to FMLA leave
- EEOC: Required “when it enables an employee to return to work following the period of leave” and there is no other available accommodation
 - ▣ There is disagreement among courts – in flux
- For how long?
 - ▣ Indefinite – NO
 - ▣ 30 days – maybe/probably, unless real hardship
 - ▣ More than that – depends on circumstances, up in air
- **Important: the interactive dialogue.**

COMMON ADA TRAPS

- ❑ Employee returns from leave with restrictions
- ❑ “No fault” attendance policies
- ❑ No reduced, no flexible schedule policy
- ❑ Mandatory overtime policy
- ❑ No telecommuting policy
- ❑ Pregnancy (and pre-pregnancy) interactive dialogue and reasonable accommodation
- ❑ Medical marijuana: stay tuned.

THE GDPR

- ❑ European Union General Data Protection Regulation (GDPR): major changes to data privacy laws for employers dealing with candidates/employees in the EU
- ❑ May require significant changes to HR procedures
- ❑ Records of recruiting, applicant processing
- ❑ Storage of candidate personal data before deletion
- ❑ Candidate consent to data retention
- ❑ Compliant software contracts...

PAY EQUITY LEGISLATION

- Clear trend: narrow the wage gap between men and women, majority and minority applicants and employees.
- If there is a pay gap, employer must prove lawful basis
- Increasing: Ban on asking for or using pay history. New Jersey (just added treble damages), Massachusetts, Vermont, Connecticut, New York City, Delaware, Oregon, California, Philadelphia (can ask, can't use... be careful).
- EEOC takes position that salary history cannot justify pay gap, courts are starting to agree
- Recently: \$2.7 million settlement against a law school.

PA: INTERESTING SOCIAL MEDIA CASE

- Policy: Employees who identify themselves with employer in social media are expected to promote and protect employer's interests
- Tweet by a VP of HR, political commentary, issues
- Tweet identified only her job title and general geographic area, not employer, though employer easily discoverable through a Google search
- Terminated for violation of social media policy
- PA Supreme Court: Strictly apply the policy language. Even though employer easily discoverable, not included in Tweet, so no policy violation.

IMMIGRATION AND CUSTOMS ENFORCEMENT AUDITS

- ICE ANNOUCEMENT: Planning a nationwide increase of Form I-9 audits this summer, *and will focus on criminal cases against employers* (as well as deportations).
- Seven months into ICE 2018 fiscal year: worksite investigations have doubled, arrests have nearly quadrupled compared to 2017 fiscal year.

DOES RELIGION SUPERSEDE LAW?

- DOJ 10-6-17: “Except in the narrowest of circumstances, no one should be forced to choose between living out his or her faith and complying with the law.”
- EEOC: Business cannot defend otherwise discriminatory conduct by arguing such conduct was consistent with its religious beliefs.

BASED ON YOUR RELIGION, CAN YOU...

- ❑ Hire/pay/promote based on religion, nationality?
- ❑ Refuse to hire LGBT people in violation of state law?
- ❑ Refuse to hire/promote/equally pay women?
- ❑ Refuse to comply with ACA, ERISA?
- ❑ Fire unmarried women who become pregnant?
- ❑ Refuse to accommodate other religious practices?
- ❑ *Masterpiece Cakeshop* case: Can a business that invites the public refuse, on the basis of religious beliefs, to provide service based on sexual orientation in violation of state law? Supreme court punted, issue still open.

THE SUPREMES

- Upheld class action waivers in arbitration agreements. Result: employees cannot band together, must each file individually (so long as arbitration procedure is fair and impartial).
- Caution: state and local laws.
- Rejected argument that exemptions from overtime should be narrowly interpreted.
- Caution: 5-4, may be limited to auto dealer context. Stay tuned.



SO WHAT DO
YOU DO?





THE LONG TERM SOLUTION

- “Legal audit” of employment practices
- Triage: Fix what needs immediate fixing
- Implement preventive medicine...
- Forms and procedures: automate and mechanize
- Complaint and investigation procedure
- Train supervisors, managers and executives
- Real-time advice *before* it’s too late
- Implement **documentation** strategies
- Monitor, refresh and revise.



QUESTIONS?