2019 Legal and Legislative Update: What We Know, What We Anticipate, and What We Can Do

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SEXUAL HARASSMENT AND DISCRIMINATION
Sexual Harassment and the EEOC

• FY2018 Data
  • Sexual harassment charges = 12% increase
    • (first increase in 5 years)
  • Sexual harassment litigation = 41 cases filed by EEOC
    • 50% increase over previous year
  • Reasonable cause findings = 1,200
    • 23% increase
  • Successful conciliation proceedings = nearly 500
    • 43% increase
  • EEOC recovery for victims = approximately $70 million
    • 22% increase
  • Website visits to EEOC harassment page more than doubled
State Action on Sexual Harassment

- **New York:**
  - Mandatory adoption and distribution of written sexual harassment prevention policy
  - Prohibition of non-disclosure provisions in settlement agreements for sexual harassment claims (unless complainant requests)
  - Prohibition of mandatory arbitration agreements related to any claims of sexual harassment
  - Extension of sexual harassment protections to non-employees (vendors, contractors, consultants, etc.)
  - Annual sexual harassment prevention training
State Action on Sexual Harassment

• California:
  • STAND Act – prohibits non-disclosure provisions in settlement agreements involving sexual harassment or sex discrimination
  • Mandatory training to all supervisory and non-supervisory employees by 2020 (now includes smaller employers)
  • “Mother of all #MeToo Bills”
    • Unlawful for employer to require employee to sign a release or non-disparagement (does not apply to settlement agreements; severance agreements may still be impacted)
    • Restriction on fees and costs recoverable by employer if successful
    • Expansion of liability of third-parties
    • “Bystander intervention training” (optional)
State Action on Sexual Harassment

• **Washington:**
  • Prohibits employers from requiring employees to sign, as a condition of employment, a nondisclosure agreement preventing the employees from disclosing sexual harassment or sexual assault occurring in the workplace or between employees
    • Exception – employees and employers may agree to include confidentiality provisions in settlement agreement
  • Specific protection against retaliation employees who report sexual harassment
    • Already covered by previous state laws
The Takeaway

Expect more scrutiny and state legislation aimed at reducing an employer’s ability to keep complaints of sexual harassment muted through NDAs, arbitration agreements, confidentiality agreements, and/or settlement agreements.
What Can You Do?

1. Make Sure Your Policies Match Modern Standards
2. Distribute Your Policies in a Thoughtful Way
3. Train Your Managers
4. Promptly Investigate Issues and Complaints
5. Consistently Enforce Standards
• TRANSGENDER/TRANSITIONING
  • Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.
  • 6th Circuit Court of Appeals (Ohio, Kentucky, Tennessee and Michigan)
  • First circuit to rule that Title VII extends to transgender and transitioning employees
    • “necessarily discrimination on the basis of sex”
DISCRIMINATION

• SEXUAL ORIENTATION
  • Zarda v. Altitude Express, Inc.
  • 2nd Circuit Court of Appeals (New York, Connecticut, and Vermont)
  • Title VII extends to sexual orientation
    • 7th Circuit Court of Appeals (Illinois, Indiana, and Wisconsin) previously reached same conclusion in 2017
  • “Sex” is necessarily a factor in sexual orientation
  • Gender stereotyping is prohibited under Title VII
DISCRIMINATION – STATE

• New York
  • Gender Expression Non-Discrimination Act (GENDA)
  • Effective February 24, 2019
  • Prohibits discrimination on the basis of gender identity and gender expression
    • “person’s actual or perceived gender-related identity, appearance, behavior, expression or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.”
Overtime Rule 1.0

• **May 2016**: Exemption regulations released (known in media as “the overtime rule”) – to be effective December 1, 2016
  • *Minimum threshold raised from $455/week to $913/week*
    (annualizes to $23,660/year to $47,476/year)
  • *Amount “updated” every three years*

• **November 22, 2016**: Court preliminarily blocks rule nationwide
  • *Some 84% of employers had already taken steps to comply*

• **December 2016**: Obama DOL launches appeal to salvage rules

• **January 20, 2017**: New occupant in White House
The End of Overtime Rule 1.0?

Judge strikes down overtime rule

- USDOL says – We aren’t going to fight
- District Court ruled that USDOL “exceeded its authority” by essentially eliminating duties test for those paid less than $913 per week
- Appeals court then dismissed effort to overturn 2016 injunction
Overtime Rule 2.0

Proposed Rule In A Nutshell

• The proposed minimum salary threshold is $679 per week (which annualizes to $35,308 per year).
• The proposed rule provides for one threshold regardless of which exemption, industry, or locality, subject to a few exceptions that already exist.
• The additional total annual compensation requirement for the highly-compensated employee exemption has a proposed entry level of $147,414 per year.
• No changes were proposed to the duties tests for the exemptions.
• No “automatic” updates were proposed.
• The unnecessary 90/10 approach with respect to certain non-discretionary pay has been teed up again.
The Future of Overtime Rule 2.0

The Second Time Around

• We want some tweaks in the Final Rule, but Overtime Rule 2.0 was written with the benefit of all the prior feedback and litigation. Will likely look a lot like the proposal.

• We can expect a quick turnaround, comparatively, from the government.

• What remains to be seen is what interested parties might do once there is a Final Rule, but that is a few months out.
The Waiting Game

Do Not Panic!

• **Context:** Remember, this doesn’t apply to all salaried employees nor does it require a traditional salary per se – just as the law does not now.

• **Perspective:** This is a process. Do not run out and make changes tomorrow based on a *proposal*, but do start evaluating what 2020 might look like if this is what USDOL ultimately adopts.

• **Experience:** You’ve been through this before. You likely already know where to focus this time around. But ...
Facts Change

• Regularly Reconsider Exemption Status:
  
  • Work evolves over time – sometimes away from exempt status, sometimes towards it.

  • New positions continually introduced – no assumptions about exemption status!
Minimum Wage – State Action

• Increase to $15.00:
  • Illinois
    • $9.25 (effective 1/1/2020; fully implemented by 1/1/2025)
  • New Jersey
    • $10.00 (effective 7/1/2019; fully implemented by 1/1/2024)
  • Massachusetts

• Increase to $12.00:
  • Missouri
    • $8.60 (effective 1/1/2019; fully implemented by 1/1/2023)

• Numerous bills pending in other states
• Cities/Counties continue to implement where there is no state action
Dodging A Bullet? New EEO-1 Form Scrapped or Alive?
LEAVE LAWS
State Leave Laws

• **New Jersey**
  • Expansion of New Jersey Family Leave Act (effective June 30, 2019)
  • Act provides 12 weeks of job-protected leave in 24 month period
  • Previously only applied to employers with 50+ employees
    • Expands coverage to employers with **30+** employees
    • Allows leave for adult child, sibling, grandparent, grandchild domestic partner, foster parent any individual related by blood, or any other individual with a close association equivalent to a family relationship
    • Bonding with child conceived through a gestational carrier agreement
    • Bonding on an intermittent basis (weeks or days) without employer consent
    • Only 15 days notice needed (except for continuous bonding leave which requires 30 days)
State Leave Laws

• **Michigan**
  • Michigan Paid Medical Leave Act (effective March 29, 2019)
  • Act provides employees opportunity to accrue paid sick leave at the rate of at least 1 hour of leave for every 35 hours worked up to 40 hours per benefit year
  • Applies to employers with 50+ employees
  • Available to part-time and full-time employees
  • Excluded:
    • “White collar” overtime-exempt employees
    • Seasonal employees scheduled for fewer than 25 weeks per calendar year
    • Employees covered by a CBA
  • Employees may carry over up to 40 hours per year
State Leave Laws

- **Washington**
  - Paid Family Medical Leave Act (effective January 1, 2019)
    - Contributions begin January 1, 2019; benefits available in 2020
    - Act provides up to 12 weeks of paid leave for “qualifying events” (employee’s own serious health condition or to care for a sick family member)
    - Up to 2 additional weeks for certain pregnancy complications
    - Available to employees who have worked 820 hours for a covered employer in the prior 4 out of 5 complete calendar quarters before the need for leave
State Leave Laws

• Massachusetts
  • Covered employees are eligible for up to 12 weeks for family leave and 20 weeks for medical leave (combined 26 week maximum in any year)
  • Broad definition of “family”
  • Employers cannot require employee to exhaust other forms of available PTO prior to or during leave period
  • Former employees remain eligible for leave within 26 weeks of separation
  • Paid leave = maximum of $850.00 weekly
  • Contributions begin July 1, 2019
  • Benefits begin January 1, 2021
USDOL Opinion Letter

• March 14, 2019
• “An employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave”
• Must notify the employee of designation within 5 days of employer obtaining enough information to make the determination
• Applies even if the employee would prefer to defer the designation
• Bottom line – available paid leave must run concurrent with FMLA and counts toward the available 12 weeks
PERSONNEL AND CONDUCT POLICIES
NLRB
now...
General Counsel’s Dec. 1, 2017 Memo

• Mandatory submission to Advice.
  • Regional directors must submit certain issues and cases to the Division of Advice prior to taking action.
  • Including many Obama-era cases that overturned precedent.

• Listed examples:
  • Joint emoyer standard.
  • Use of employer’s e-mail.
  • Common employer handbook rules.
  • Off-duty access to employer’s property.
  • Boundaries of protected concerted activity.
  • Conflicts between NLRA and other statutes’ requirements.
Concerted Protected Activity

• Workplace gripes may be protected by Section 7
• The Obama Board had extended protection to virtually any complaint made to management in presence of co-workers
• On January 11, NLRB returned to more stringent standard
• Alstate Maintenance, LLC now limits protection to group complaints, or those seeking to initiate group action
• Majority explained that, “individual griping does not qualify as concerted activity solely because it is carried out in presence of other employees.”
• Must be made for purpose of mutual aid or protection.
Handbooks and Work Rules

  - A facially neutral work rule is unlawful if employee could reasonably construe it as prohibiting protected concerted activity.

- Obama-era Board found many common work rules unlawful under Lutheran Heritage:
  - No profanity or abusive behavior toward co-workers (“workplace civility” rules);
  - No disclosure of “confidential” information;
  - No photography or surreptitious audio or video recording in the workplace;
  - No conducting “personal business” on the employer’s premises;
  - No “false, disparaging [or] misleading” statements about the employer online;
  - Employees must behave in a “positive and professional manner”; and
  - No unauthorized use of employer logos, insignia, and other trademarks.
Handbooks and Work Rules

• Why did Obama Board decide such rules were unlawful?
  • Too broad and ambiguous.
  • Workers are under-educated and have no common sense.
  • Without examples, they can’t understand what is allowed.
  • “Chilling effect” on exercise of Section 7 rights.

  • Facially neutral work rule is unlawful if, when reasonably interpreted, it potentially would interfere with Section 7 activity.
  • NLRB now will evaluate: (i) nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.
    • The nature and extent of the potential impact on Section 7 rights; and
    • The employer’s legitimate justifications for having the rule.
Category 1: Lawful To Maintain:

- no recording, no photography rules;
- civility rules;
- rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- disruptive behavior rules;
- rules protecting confidential, proprietary, and customer information or documents;
- rules against defamation or misrepresentation;
- rules prohibiting the use of company logos or intellectual property;
- rules requiring authorization to speak on behalf of the company; and
- rules banning disloyalty, nepotism, or self-enrichment.
Category 2: Warrant Individualized Scrutiny:

• Depends on the reasoning behind a rule to determine if it can lawfully remain in a handbook.

• Examples:
  • Confidentiality rules broadly encompassing “employer business” or “employee information”;
  • Rules regarding disparagement or criticism of employer; and
  • Rules banning off-duty conduct that might harm the employer.
Category 3: Unlawful To Maintain:

• Confidentiality rules specifically regarding wages, benefits, or working conditions; and

• Rules against joining outside organizations or voting on matters concerning an employee’s employer.

• If you have one of these policies, Regional Director will issue a Complaint as they are per se unlawful
What Happened?

Trump administration has impacted flow of immigrants into the U.S.

• Southern border crossings have decreased
• H1-B visa annual cap case filings declined, 1st time in 5 years
  199,000 received in 2017, 15.7% decrease from 2016
• Confusion over several travel bans; country-specific travel ban in place (for now)
Where Are We Now?

• New I-9 form required as of **September 18, 2017**

• Increased chances of ICE raid or I-9 scrutiny as evidenced by **significant increase** in 2018

• Ramped-up enforcement activity

**Takeaway:** Self-audit of immigration forms and processes continue to be best practice
What’s Next?

• **Mandatory E-Verify** on the horizon in the near future?
• “**Extreme Vetting**” of certain visa applicants coming to the U.S.
• **Travel ban** litigation at SCOTUS
• **DACA** resolution uncertain?
MEDICAL AND RECREATIONAL MARIJUANA
Medical Marijuana

Each state law varies regarding employer obligations and worker rights

29 states plus D.C. – and growing
Status of Law -- Federal

Still a Schedule I drug under the federal Controlled Substances Act, which means according to the Feds:

(1) high potential for abuse,
(2) no currently accepted medical use in treatment in the US, and
(3) lack of accepted safety for use of it.
Marijuana In The Workplace

• Employers do not need to allow use or possession at work
• But what about offsite use and positive drug tests?
• Employers won decisions in California (2008), Oregon (2010), Washington (2011), Montana (2012), Colorado (2015), and New Mexico (2016) –do not have to accommodate medical marijuana use

Barbuto v. Advantage Sales & Marketing
(Massachusetts July 27, 2017)

• Employees might be entitled to accommodations
• Employers must engage in interactive process
Recreational Marijuana

• 7 states and D.C. now permit recreational marijuana (Colorado, Washington, Oregon, Alaska, California, Massachusetts, and Nevada)

• Zero-tolerance policies and practices may still be permitted

• How to handle inquiries from employees?

• What if you want to have a more relaxed standard?
  • *Consider safety-sensitive positions and federal obligations before acting*
1. Marijuana is still federally an illegal drug
2. Employers can still enforce drug policies and drug test employees;
3. So far, courts have not treated marijuana the same as traditional prescription drugs; and,
4. So far, employers do not need to accommodate marijuana.
Drug Testing - During Employment:

WATCH OUT FOR PRIVACY - LEGAL OFF-DUTY ACTIVITY LAWS:

• While you may prohibit use in the workplace, current technology does not match the law. Most drug tests detect THC in the system for several days and cannot detect current inebriation. However, clinical trials are underway.

• TO WATCH - Many states (including CA) have Legal Off Duty Conduct Laws protecting legal off duty conduct.
Final Questions

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