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Ready or Not Here It Comes: Hot Employment Issues to Watch in 2019

I. Training: Harassment

A. Progressive state laws

1. Currently, California, New York, and Connecticut require businesses (some with 50 or more and some regardless the number of employees) to provide sexual harassment training to its employees.

2. Businesses with 15 or more employees in Maine must provide training to all workers at the start of their employment.

3. In other states, such as Massachusetts, Rhode Island, Texas, New Jersey and Vermont, employers are encouraged—but not required—to provide training.

B. Training Requirements

For states that require training, such as New York, the training must:

- Be interactive
- Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights
- Include examples of conduct that would constitute unlawful sexual harassment
- Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment
- Include information concerning employees' rights of redress and all available forums for adjudicating complaints
- Include information addressing conduct by supervisors and any additional responsibilities for such supervisors. See N.Y. Labor Law 201-(g)(2)

In order for training to be "interactive", some form of employee participation is required. Examples given of such participation include:

- if the training is web-based, it has questions at the end of a section and the employee must select the right answer;

- if the training is web-based, the employees have an option to submit a question online and receive an answer immediately or in a timely manner;
- in an in-person or live training, the presenter asks the employees questions or gives them time throughout the presentation to ask questions;
- web-based or in-person trainings that provide a Feedback Survey for employees to turn in after they have completed the training.

Also, noteworthy, is that there is no requirement to train (or provide a copy of the harassment prevention policy) to third-party vendors or other non-employees, though employers are encouraged to provide the policy and training to anyone providing services in the workplace. Additionally, there is no minimum number of training hours required per year for employees therefore there is no minimum length of time for each training session.

II. Sexual Harassment Policy

All employers are encouraged to adopt comprehensive policies regarding harassment and discrimination in the workplace. California and New York require employers to retain policies regarding the prevention and intolerance of sexual harassment.

A. New York

Every employer in New York State is required to adopt a sexual harassment prevention policy. An employer that does not adopt the model policy must ensure that the policy that they adopt meets or exceeds the following minimum standards.

The policy must:

- prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights
- provide examples of prohibited conduct that would constitute unlawful sexual harassment
- include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws
- include a complaint form
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
- clearly states that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue
- clearly states that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

B. California

Employers are required to adopt a harassment, discrimination, and retaliation prevention policy that:

- Is in writing.
- Lists all current protected categories covered under California's Department of Fair Employment and Housing Act.
- Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act.
- Creates a complaint process.
- Provides a complaint mechanism that doesn't require an employee to complain directly to his or her immediate supervisor.
- Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally.
- Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation.
- States that the employer will keep the investigation confidential to the extent possible but does not promise complete confidentiality.
- Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.
- Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

III. <u>Prevention of Litigation</u>

Early resolution process and procedure may be advantageous. Arbitration agreements are being struck down by Courts. At will employees cannot sign an Arbitration agreement since that is a contract. Also, cannot limit statute of limitations nor rights to damages. Curtails expert costs and fee shifting.

IV. <u>Relevant cases and examples</u>

A. <u>Hostile Work Environment</u>

1. <u>Texas</u>: Currently pending: *Jane Doe v. United Airlines* (2018). The action was filed in August 2018 in the U.S. District Court for the Western District of Texas. The suit alleges sexual harassment by a male United Airlines pilot towards a female United Airlines flight attendant. The pilot posted several nude photographs of the flight attendant on internet website. The flight attendant initially asked the pilot to take the postings down. The pilot refused and continued for at least four (4) years to post pictures on the internet. United Airlines has policies and procedures in place pertaining to sexual harassment. The flight attendant followed said procedures and complained to United Airlines supervisors, the human resource department, and general counsel about the pilot's actions. Despite the complaints, United Airlines did not take any action. The matter is ongoing.

2. <u>Florida</u>: *EEOC v. Pizza of Florida, Inc. d/b/a ABC Pizza* (2003). The EEOC contended that the sexually harassing conduct, created by the restaurant's manager, was primarily directed towards two sisters who were ages sixteen (16) and seventeen (17) at the time they were

employed with ABC Pizza. The conduct included inappropriate touching as well as egregious verbal comments. The matter ultimately settled for $325,000. The settlement decree also required ABC Pizza to (i) establish a written policy prohibiting sexual harassment, (ii) hold annual anti-harassment training for all managers and supervisors, (iii) establish a clear reporting procedure and record retention policy, and (iv) certify to the EEOC every six (6) months that it is in compliance with aforementioned the terms of the decree.

3. California: *EEOC v. Goodwill Industries of the Greater East Bay, Inc. and Calidad Industries, Inc.* (2017). Six (6) female staff members, including female staff members with developmental disabilities, were subjected to sexual harassment in the form of inappropriate physical contact by their direct supervisor. At least two (2) of the women complained to two (2) other managers. These two (2) managers reported the conduct to upper level management who failed to action. As a result, the women filed a complaint with the EEOC. The matter settled. The brief terms of the settlement decree required Goodwill/Calidad (i) to pay $850,000 to the claimants, (ii) to revise their EEO policies and complaint and investigation procedures, (ii) to institute supervisor accountability policies concerning discrimination issues, (iv) conduct comprehensive training of their workforce; and (v) to hire a consultant to monitor any responses to future complaints. The companies were also required to provide reports to the EEOC regarding adherence to the decree's terms.

4. California: *Haberman v. Cengage Inc.*, (2009). Plaintiff employee brought suit against her employer and two former supervisors for sexual harassment and several other claims. Her sexual harassment claim was based exclusively on several alleged comments made by the two supervisors over a three (3) year period. Comments included statements such as "Wow. You look so pretty" and asking plaintiff whether she had any friends who just wanted to have sex with [supervisor]. Defendant filed for summary judgment and was granted it on the basis that the conduct was not severe or pervasive.

B. Quid Pro Quo

1. New York: *Marjorie Lee Thoreson v. Penthouse International Inc. and Robert Guccione*. Plaintiff brought suit for sexual harassment against her former employer. Plaintiff alleged that Guccione, founder and chairman of Penthouse International Inc., coerced her into engaging in sexual relationships with two (2) men in furtherance of advancing his businesses. Plaintiff was thereafter terminated when she refused to travel to Japan to engage in behavior which she alleged would be humiliating and degrading. Plaintiff was awarded $60,000 in compensatory damages. Plaintiff was also awarded $4 million in punitive damages which was thereafter vacated by the Appellate Division because such relief was not specifically provided by the New York statute.

Hot issues

I. **Transgender**

The LGBT community has achieved civil rights victories nationwide over the past few years. United States Supreme Court case *Obergefell v. Hodges*, 576 U.S. 135 (2015) - legalized same-sex marriage.

Repeal of the controversial HB-2 bill in North Carolina, commonly referred to as the "Bathroom Bill", requiring all citizens to use the bathrooms designated for the gender assigned at birth.

Federal employment law does not expressly prohibit sexual orientation discrimination or harassment. Although Title VII of the Civil Rights Act of 1964 ("Title VII") explicitly makes it an "unlawful employment practice for any employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, . . . because of such individual's race, color, religion, sex, or national origin," it does not mention sexual orientation.

Absent any specific legislation, the conflicting case law that currently exists only complicates the issue further.

II. **Family Leave**

New Jersey, New York, California, and Rhode Island currently offer paid family leave. Florida and Texas do not have state laws regarding family leave and therefore only follow FMLA.

A. Federal: Family Medical Leave Act

In order to be eligible for leave under FMLA, the following factors must be met**:** (i) employer employees at least fifty (50) employees within seventy-five (75) miles; (ii) employee has been employed for twelve (12) months with employer; (ii) Employee has worked at least 1,250 hours during the 12 months that preceded the leave's start date.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons under the same terms and conditions as if the employee had not taken leave.

Eligible employees are entitled to (12) twelve weeks of leave in a twelve (12) month period for: (i) the birth of a child and to care for the newborn child within one year of birth; (ii) the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; (iii) to care for the employee's spouse, child, or parent who has a serious health condition; (iv) a serious health condition that makes the employee unable to perform the essential functions of his or her job; (vi) any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" **or**

Twenty-six (26) weeks of leave during a single twelve (12) month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

B. New Jersey*:* New Jersey Family Leave Act (NJ FLA)

In order to be eligible under NJ FLA, the following factors must be met**:** (i) employer employs at least fifty (50) people; (ii) employee has been employed for twelve (12) months with employer; (ii) Employee has worked at least 1,000 hours during the 12 months that preceded the leave's start date.

Under FLA, employees are able to request up to twelve (12) weeks of leave in a twenty four (24) month period for: (i) care for a newborn child or adopted child so long as leave is taken within one (1) year of the birth or adoption; (ii) care for a spouse, child, parent or partner who is suffering from a serious health condition.

Note: no leave for self-care

C. New York: NY Paid Family Leave

In order to be eligible for NY Paid family leave, the following must be met: Full-time employees, must work 20 or more hours per week for a minimum of twenty-six (26) consecutive weeks of employment to be eligible. Part-time employees (less than 20 hours per week) are eligible after working 175 days, which do not need to be consecutive.

Employees may request up to eight (8) weeks of leave and receive 50% of their average weekly wage under this Act to: (i) bond with a newly born, adopted or fostered child; (ii) care for a close relative with a serious health condition; or (iii) assist when a family member is deployed abroad on active military service.

Note: no leave for self-care

D. California: CA Family Rights Act

Eligibility (i) Employer must employ 50 or more employees; (ii) employee must have worked for the employer for 12 months; (iii) Employee must have worked at least 1,250 hours in the year prior to the leave

Employees may take up to twelve (12) weeks of leave in a twelve (12) month period: (a) for the birth, adoption, or foster placement of a child; (b) for the employee's own serious health condition, or (c) to care for a family member with a serious health condition.

E. California: CA New Parent Leave Act

Eligibility: (i) Employer must employ twenty (20) to forty nine (49) employees (ii) employee must have worked for the employer for 12 months; (iii) Employee must have worked at least 1,250 hours in the year prior to the leave.

Employers must provide eligible employees with up to twelve (12) weeks of leave to bond with a new child.

F. Rhode Island: RI Parental & Family Leave Medical Act

Eligibility: (i) Employer must employ fifty (50) or more employees; (ii) Employees must work thirty (30) hours a week or more; (iii) employees must have been employed continuously for at least twelve (12) months.

Employer must provide eligible employees with up to thirteen (13) weeks of leave in a twenty four (24) month period for: (i) Birth of a child of an employee; (ii) Placement of a child 16 years of age or less with an employee in connection with the adoption of such child by the employees; or (iii) "Serious illness" of the employee or the employee's parent, spouse, child, mother-in-law, or father-in-law. (Serious Illness is defined to mean a disabling physical or mental illness, injury, impairment or condition that involves in-patient care in a hospital, nursing home, or hospice, or out-patient care requiring continuing treatment or supervision by a health care provider).

III. **Gender Equality**

Aimed at combating wage disparities based on gender, these laws generally prohibit employers from asking job applicants about their prior or current compensation and relying on salary history to set pay levels. New Jersey, California, Delaware, Massachusetts, Oregon, New York City, Philadelphia, Puerto Rico and San Francisco have passed such laws.

IV. **Legalized Marijuana**

A. Medical v. Recreational

1. Medical Marijuana: is used for medical purposes. The two main chemicals used in the medicinal application of marijuana are: (1) Tetrahydrocannabinol (THC). This is the psychoactive compound in marijuana — i.e. the element that produces the high; and (2) Cannabidiol (CBD). This substance does not produce any psychoactive effects.

2. Recreational Marijuana: is used without medical justification. Recreational marijuana usually has more THC content than the medicinal variety, as this is what provides users with the “high”.

Thirty-three (33) states have adopted medical marijuana use laws including California, New York, Florida and Texas. Nine states and Washington, D.C. have legalized recreational marijuana.

B. State Laws

1. California

a. Medical use: Compassionate Use Act and Proposition 64 allow residents over the age of 21 to use marijuana for medical purposes. Medical purposes cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. The law requires users to get a doctor’s written authorization to use marijuana.

b. Drug Testing: California Constitution's right to privacy generally protects against random testing unless there's a "reasonable suspicion" that the employee is under the influence. Reasonable suspicion might include decreased productivity and focus, bloodshot eyes, slurred speech or the odor of marijuana or alcohol on the person.

2. Florida

a. Medical Use: FL allows residents to use marijuana for medical purposes following approval of a physician for cancer, epilepsy, glaucoma, HIV, AIDS, Crohn's disease, Parkinson's disease, multiple sclerosis, post-traumatic stress disorder, amyotrophic lateral sclerosis (ALS), terminal illnesses, or "other debilitating medical conditions." FL Constitutional Amendment 2.

b. Drug Testing: Employers may drug test employees with advanced notice to the employee

c. Policies: FL does not limit an employer's right to maintain drug-free workplace policies and procedures, nor does it mandate that an employer accommodate the use of medical marijuana in the workplace.

3. Texas

a. Medical Use: Texas Compassionate Use Act permits residents to use medical marijuana of low-THC levels as prescribed by a physician for intractable epilepsy. Cannabis products are considered low-THC if they contain at least 10% CBD, but not more than 0.5% THC.

b. Drug testing: Currently no law requiring or prohibiting drug testing in the workplace

4. New York

a. Medical Use: NY Compassionate Use Act allows residents to use marijuana for "severe, debilitating, or life threatening" medical conditions following approval of a physician. Severe, debilitating, or life threatening medical conditions include cancer, HIV, AIDS, ALS, Parkinson's, MS, Epilepsy, IBD, Crohn's, Chronic Inflammatory Demyelinating Polyneuropathy, Neuropathies, Huntington's Disease

b. Drug Testing: Currently no law prohibiting employers from drug testing employees

Note: Drug testing cannot determine the amount of THC or CBD present in an individual. It can only detect whether or not the chemicals are present.

C. Note that: Federal law still considers marijuana an illegal Schedule I drug under the Controlled Substances Act. In late August 2013, the U.S. Department of Justice announced an update to their marijuana enforcement policy. The statement read that while marijuana remains illegal federally, the USDOJ expects states to create "strong, state-based enforcement efforts.... and will defer the right to challenge their legalization laws at this time." The department also reserves the right to challenge the states at any time they feel it is necessary.

1. Generally state law protections for users of medical marijuana are not preempted by federal laws such as the Drug-Free workplace Act (DFWA). Pay particular attention to whether the various state laws legalizing medical marijuana contain employee-friendly protections or, on the contrary, contain anti-retaliation provisions which prohibit adverse employment actions based on lawful medical marijuana use.

2. A Federal District Court in Connecticut ruled the federal Drug Free Workplace Act, which many employers including federal contractors rely on for policies on drug testing, does not actually require drug testing and does not prohibit federal contractors from employing people who use medical marijuana outside the workplace in accordance with state law. *Noffsinger v. SSC Niantic Operating Co., LLC d/b/a Bride Brook Health & Rehabilitation*, 338 F. Supp. 3d 78 (U. S. Dist. Ct. Conn. 2018). Specifically, the Court stated:

> The DFWA requires federal contractors like defendant to make a "good faith effort" to maintain a drug-free workplace by taking certain measures, such as publishing a statement regarding use of illegal drugs in the workplace and establishing a drug-free awareness program. *See* 41 U.S.C. § 8102. Defendant states that it adopted its substance abuse policy in order to comply with the DFWA, such that any actions it takes in accordance with that policy are outside the scope of liability under § 21a-408p. I do not agree that the DFWA required defendant to rescind plaintiff's job offer. The DFWA does not require drug testing. *See Harris v. Aerospace Testing All.*, 2008 WL 111979, at *4 (E.D. Tenn. 2008). Nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law. That defendant has chosen to utilize a zero-tolerance drug testing policy in order to maintain a drug free work environment does not mean that this policy was actually "required by federal law or required to obtain federal funding."

D. Policies / Handbooks

Changes are afoot at the NLRB as well. The Obama NLRB struck down a number of handbook policies, applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under Lutheran, the board set out a test for when the rule of any employer—unionized or not—will violate the National Labor Relations Act (NLRA). This rule included examination of whether employees would reasonably construe the rule's language to prohibit protected, concerted activity. The rule has been applied to strike down social media and confidentiality policies under the Obama board. But Lutheran was overturned and now that it has been overruled, employers should expect to receive more latitude with policies that are neutral on their face, such as confidentiality policies.

D. Retaliation

1. Interactive Process – the buzz word "accommodation" creates an employer obligation Investigation.
2. Internal process and procedure should be efficient, prompt and confidential.
    - Adequate investigation may identify wrongdoing, avoid or minimize employer liability, reduce damages, and protect future victims.
3. The choice of an investigator is of utmost importance.
    - Investigator's comments and behavior are subject to scrutiny
    - Conduct suggesting retaliatory motives or bias will undermine credibility of the investigation and defeat the affirmative defense provided by *Faragher* (below)
4. Baker v. City of Oceanside (CA case) (1994): $1.2 million verdict where employer's investigator failed to complete investigation and clear plaintiffs for over a year in violation of policy requiring investigation and notification of results in a timely manner

E. Affirmative Defense to Vicarious Liability

- U.S. Supreme Court established that employer may negate liability in sexual harassment matter by asserting an affirmative defense. *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*. Although employers are subject to vicarious liability for unlawful harassment by supervisors, employers should be encouraged to prevent harassment and employees should be encourage to avoid or limit the harm from harassment.
- The court in *Faragaher* established that an affirmative defense to vicarious liability can be invoked where employer shows that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, while employee unreasonable failed to avail him/herself of preventative or corrective opportunities provided by employer." See also *Montero v. AGCO Corp*.

F. Latest Equal Employment Opportunity Commission trends

1. EPL is a $1.2 billion industry
2. Fee shifting is causing claims to be excessive.

3. Control early – mediation is an option but when is the right time.
4. Settlement options.