Compliance in an Uncertain World
Improving Your Human Resources Practices Through An Era of Change

5.10.17
Overland Park, KS
Complying with the New Developments in Employment Law

Dave Wing
“Employee” Status Under the FLSA

• Facts
  • Exotic dancers at two clubs
  • Six years ago, the club was sued for alleged FLSA violations.
  • After that suit and with advice of counsel, the owner required all
dancers to sign contracts specifically designating the dancers as
independent contractors.
  • Patrons directly paid all dancers a “performance fee” and tips.
  • The owner: (1) required dancers to sign in on arrival; dictated
  dancers’ schedules; (2) imposed written guidelines dancers were
  required to follow (violation could lead to penalties, including
  suspension and dismissal); (3) controlled the atmosphere,
  clientele and advertising; and (4) set pricing.
“Employee” Status Under the FLSA

• Are the dancers “employees” under the FLSA?
  • Yes?
  • No?

☐ Employee
☐ Independent Contractor
Sexual Harassment & Retaliation

• Facts:
  • Ryan is an associate producer for a videogame developer.
  • Members of his working group begin teasing Ryan about his supposed interest in a female employee.
  • Ryan complains, is reassigned to a different working group, and is directed to immediately report harassment.
  • Between July 18 and 27, a member of his new working group grabs Ryan on the buttocks on three occasions and once between the legs.
  • Ryan ultimately filed a formal complaint on July 30.
  • On July 31, Ryan and another employee are written up for a DVD malfunction that occurred during a presentation.
  • Ryan complains of retaliation for reporting sexual harassment.
  • The supervisor withdraws the write-up and apologizes for misunderstanding.
  • One day later, Ryan is fired for failing to immediately report incidents of harassment, fixating on his co-workers’ performance, and insubordination.
Sexual Harassment & Retaliation

- Is this sexual harassment?
  - Yes?
  - No?

- Is this retaliation?
  - Yes?
  - No?
Unwelcome Hugging

• Facts
  • Vicky is a female county correctional officer.
  • Over the course of a 12 year period, the male County Sheriff greeted Vicky with hugs on more than one hundred occasions and a kiss at least once.
  • The County Sheriff was the Vicky’s supervisor and the highest ranking officer in the department.
Unwelcome Hugging

• Is this a sexually hostile work environment?
  • Yes?
  • No?
Sexual Orientation

• Facts
  • Kim is a part-time, adjunct professor, at a Community College.
  • She is openly lesbian.
  • Kim was repeatedly denied consideration for full-time teaching positions and her part-time contract was not renewed.
Sexual Orientation

• Is sexual orientation protected under Title VII?
  • Yes?
  • No?
Age Discrimination

• Facts
  • Tim is a 54-year-old man who enrolled in a technology program that required the completion of an internship.
  • He accepted a full-time, paid internship and was joined by three other interns in their early twenties.
  • The employer criticized Tim’s work, especially those tasks requiring physical skill or dexterity.
  • Despite the criticisms, the employer’s 49-year-old vice president offered Tim a full-time position after his graduation.
  • The employer, however, believed Tim was not improving and did not have the skills to meet the challenges required of the position, like independent troubleshooting.
  • The employee was fired after six months of employment.
Age Discrimination

- Is this age discrimination?
  - Yes?
  - No?
Pregnancy Discrimination

• Facts
  • Female corrections officer at a county jail notified her employer, the county, that she was pregnant.
  • CO’s pregnancy was a high risk pregnancy and she provided a written authorization from her doctor requesting light duty work.
  • The County’s light duty policy only allowed employees who were injured on the job to go on light duty.
  • County originally denied request and informed CO she could be reevaluated or utilize accrued time.
  • Later that day, a Lieutenant told CO he would assign her to light duty positions if she obtained a revised doctor’s note stating that she was able to work; CO submitted a new note and was assigned to light duty tasks for a time, but by August, was gradually required to work with inmates again.
  • At month six of her pregnancy, CO came upon two inmates fighting and one bumped her as he ran past. As a result of the incident, CO left work and did not return until after she gave birth.
  • When CO returned to work, she sued alleging that the denial of her request for an accommodation amounted to pregnancy discrimination in violation of Title VII.
Pregnancy Discrimination

• Is this pregnancy discrimination?
  • Yes?
  • No?
Disability Discrimination & The Direct Threat Defense

• Facts
  • Eileen was a DMV Field Agent Examiner who had been diagnosed with an anxiety disorder.
  • Performance was great with driving exams, poor with money and records.
  • Eileen had a breakdown at work in a public area. She attempted to harm herself, made suicidal comments and lay on the floor kicking and screaming.
  • Based on this behavior, a fitness-for-duty evaluation, and information Eileen provided, the employer, the Wisconsin DOT, deemed the employee unfit for duty and discharged her.
Disability Discrimination & The Direct Threat Defense

• Does the Direct Threat Defense apply?
  • Yes?
  • No?

• Was there an FMLA violation?
  • Yes?
  • No?
Public School Teachers & Free Speech

• Facts
  • Employer, Chicago Board of Education, had a written policy prohibiting teachers from using racial slurs in the presence of students, no matter the purpose.
  • Employee, a sixth grade public school teacher, noticed his students passing a note in class. The note contained music lyrics that included the “n-word”.
  • The teacher wanted to use this as a well-intentioned but poorly executed teachable moment to emphasize the harmful nature of such words.
  • The principal of the school was present for the lesson and suspended him for the policy violation.
  • The teacher sued for violation of his 1\textsuperscript{st} Amendment rights.
Public School Teachers & Free Speech

• Was the employee’s speech protected the First Amendment?
  • Yes?
  • No?
Medical Examinations and & the ADA

• Facts
  • Employer, a motor carrier, hired Bob as a commercial truck driver.
  • Bob was bound by the regulations issued by the U.S. DOT’s Federal Motor Carrier Safety Administration (“FMCSA”), which require drivers to receive medical examinations from FMCSA-certified examiners every two years.
  • Employer began a sleep apnea program based primarily on recommendations of two FMCSA advisory committees.
  • Employer informed the employee that an in-lab sleep study was scheduled for him due to his BMI being over 35.
  • Bob’s personal healthcare provider stated he did not need a sleep study.
  • Bob refused to participate in the sleep study and the employer stopped assigning him work.
Medical Examinations and & the ADA

- Does requiring Bob to submit to a sleep study for apnea violate the ADA?
  - Yes?
  - No?
Reasonable Accommodations

• Facts
  • Janna worked as customer service representative at a call center.
  • Janna had diabetes and was insulin dependent.
  • Employer allowed Janna to take breaks or eat or drink to raise her blood sugar and to remove herself from active work as needed.
  • Janna left phone service on an account after the customer had canceled the service. This is a terminable offense known as “cramming.” She was placed on a Last Chance Agreement.
  • Janna later inappropriately hung up on at least two customers but when questioned about it claimed that she didn’t remember taking the calls and she had been experiencing low blood sugar levels.
  • Call center support manager heard this, did a dance and said, “I finally got that bitch.”
  • Janna was suspended and then terminated by 3d level supervisor who found terminating a call is two-step process, Janna never reported feeling ill that day and never took a break because of illness, Janna interacted appropriately with co-workers before and after the dropped calls, and LCA gave Janna a motive to lie about reason for dropped calls.
Reasonable Accommodations

- Did the employer violate the ADA?
  - Yes?
  - No?
Adverse Employment Action

• **Facts**
  - Shannon and Allen worked as EMTs for Subcontractor Metro.
  - Shannon sued claiming sexual harassment, discrimination and retaliation charges against Metro and its Contractor ARS and also reported illegal conduct to state agency that triggered investigation. Allen supported these actions with declarations, witness statements and public statements.
  - In 2012, ARS terminated its Metro and in turn, Metro’s EMTs.
  - Subcontractor’s replacement Kurtz began exclusively hiring former Metro EMTs but neither ARS nor Kurtz told Shannon and Allen it was doing so.
  - Kurtz hired every former Metro EMT – except Shannon and Allen.
  - Shannon and Allen sued ARS and Kurtz. ARS settled.
Adverse Employment Action

• Does the action by Kurtz of preventing an individual from applying constitute adverse employment action?
  • Yes?
  • No?
Washington Update – What’s Happened So Far and What to Expect

• Executive Action and Trump Policy

• Administrative Regulations and Enforcement Initiatives

• Federal Legislation

• U.S. Supreme Court
Executive Action

• Regulatory Freeze (Jan. 20, 2017)

• Delay of Fiduciary Rule for Financial Professionals (Feb. 3, 2017)

• Rescission of “Blacklisting” Rules for Federal Contractors (Mar. 27, 2017)

• Religious Liberty (May. 4, 2017)
Trump Policy

• Immigration

• Tax Reform

• Paid Maternity Leave

• Transgender Rights and Discrimination
Administrative Regulations and Enforcement Initiatives

- Department of Labor
  - Secretary Acosta
  - Budget Cuts
  - Emphasis on Compliance over Enforcement?
  - Joint Employer
Administrative Regulations and Enforcement Initiatives

• DOL White-Collar Exemptions to Overtime Rules

  • DOL Appeal of Injunction halting Higher Salary Thresholds

  • Revert to Old Rules or Issue New Rules?
Administrative Regulations and Enforcement Initiatives

• EEOC
  • Leadership
  • Emphasis
  • EEO-1 pay data reporting requirements – pay equity
Administrative Regulations and Enforcement Initiatives

• NLRB
  • Leadership
  • Quickie Elections
  • Joint Employers
  • Handbook Policies
Federal Legislation

- Affordable Care Act / American Health Care Act
- Paid Family Leave?
- Committee Priorities on Workplace Issues
- Comp Time in the Private Sector
U.S. Supreme Court Cases

- Arbitration Agreements with Class Action Waivers
  (cert. granted – case to be heard in Fall Term 2017)
- Sexual Orientation Covered by Title VII?
- Tip Pooling?
- Joint Employment?
- Public Sector Mandatory Union Dues
State Developments

• Missouri
  • Right to Work
    • Effective Aug. 28
    • Applicable to New and Revised Contracts After Aug. 28
    • Constitutional Initiative
    • Referendum to Overturn Statute
    • Election Nov. 2018???
State Developments

• Missouri
  • Expert Witness Standard
  • MHRA and Work Comp Retaliation “motivating factor”
  • Work Comp MMI
  • Unemployment Comp and Severance Pay
  • Arbitration of Employment Claims
State Developments

- Kansas
  - Budgets
  - Bullets
State Developments

- Oklahoma
State Developments

• Colorado
Civility in the Workplace:
How to Handle Harassment Policies, Training, and Investigations Under New and Conflicting Federal Agency Guidance

Sue Willman, SHRM-SCP, SPHR
CURRENT EEOC

- Maximum number of members – 5
  - Each with 5-year term (or recess appt.)
  - Staggered terms
- Current number of members – 4

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CURRENT EEOC

- General Counsel:
  - Current Vacant
  - Jim Lee (Deputy GC) in charge (40 yrs. at EEOC)

- Expect AC Lipnic to try and slow Obama EEOC agenda, but she’s outnumbered until Trump fills the vacancy and replaces Yang on 7-1-17

- Once full EEOC in place (expected by Labor Day 2017), GC will probably have limited litigation authority (under Obama, the GC was given substantial litigation authority)
EEOC HARASSMENT INITIATIVES

- Select Task Force on the Study of Harassment in the Workplace
- Proposed Enforcement Guidance on Unlawful Harassment
EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE
BACKGROUND

● Purpose:
  ● Identify strategies to prevent and remedy workplace harassment

● Timeline and Activities:
  ● January 2015 to June 2016
  ● Definition of “Harassment” Used
  ● Review of Existing Data/Studies
  ● Public and Closed Meetings
  ● Report with Recommendations
DATA AND LITERATURE REVIEW

- Almost 1/3 of charges filed with EEOC in fiscal year 2015 included an allegation of workplace harassment (thus, it’s a persistent problem)
- Anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace
- Is robust data and academic literature on sex-based harassment, but very limited data on harassment based on other protected categories – recommend more research
DATA AND LITERATURE REVIEW

- 75% of harassment victims don’t report it – instead, they:
  - Avoid the harasser
  - Deny or downplay gravity of situation
  - Attempt to ignore, forget or endure it

- It costs employers - $164.5 million recovered by EEOC for workers alleging harassment
PREVENTION OF HARASSMENT

Holistic approach to prevention, consisting of:

- Leadership
- Policies
- Reporting Procedures
- Training
- Creativity
LEADERSHIP RECOMMENDATIONS

- Commitment to intolerance of harassment (but avoid “zero tolerance” terminology)
- Identify risk factors and minimize risks
- Conduct climate surveys
- Devote sufficient resources to prevention
- Enforce policy and enforce consistently
- Impose accountability for both prevention and enforcement through use of metrics and performance evaluations
ENVIRONMENTAL RISK FACTORS

- Homogenous workforce
- Workforce with some workers who don’t conform to workplace norms
- Cultural and language differences in the workplace
- Coarsened social discourse outside workplace
- Workforce with many young workers
- Workplaces with “high value” employees
- Workplaces with significant power disparities
ENVIRONMENTAL RISK FACTORS

- Workplaces that rely on customer service or client satisfaction
- Workplaces where work is monotonous or consists of low-intensity tasks
- Isolated workspaces
- Workplace cultures that tolerate or encourage alcohol consumption
- Decentralized workplaces
POLICY RECOMMENDATIONS

Comprehensive Anti-Harassment Policy:
● Clear explanation of prohibited conduct based on all protected categories (including social media considerations), with examples
● Clear assurance of “no retaliation” for being a complainant, witness or participant in investigation
● Clearly described complaint process with multiple, accessible avenues for making a complaint
POLICY RECOMMENDATIONS

- Commitment to prompt, thorough, and impartial investigation
- Assurance of immediate and proportionate corrective action for legally-actionable harassment
- Assurance of appropriate response even if the conduct is not legally-actionable harassment but which, if left unchecked, may lead to same
Communication of Policy:
● In clear, simple words
● In all languages used in the workplace
● On regular basis (especially reporting and anti-retaliation provisions)
● Clear statement that mistreatment on social media carries the weight of any other workplace interaction
PROCEDURE RECOMMENDATIONS

Reporting Procedure/System:

- Provides for complaints from:
  - Those who have *experienced* harassment
  - Those who have *observed* harassment
- Provides choice of “complaint handlers” (multi-faceted methods for reporting complaints)
- Provides assurance that complaints will be taken seriously
- Be alert to any possibility of retaliation and take steps to prevent
PROCEDURE RECOMMENDATIONS

Investigation Procedure/System:
- Devote sufficient resources for investigations
- Well-trained, objective, and neutral investigators
- Timely investigations and responses
- No presumption of guilt
- Documented investigation steps and report
- How to access an employee’s social media content when warranted
- Protection of privacy of all parties and commitment to confidentiality to greatest extent possible
TRAINING RECOMMENDATIONS

Types of Training:

● Compliance training
● Workplace civility training
● Bystander intervention training
TRAINING RECOMMENDATIONS

Compliance Training Content for All Employees:
● Clear explanation of:
  ● Legal definition of harassment
  ● Conduct that does not meet the definition but could later become “unlawful” harassment
  ● What conduct never constitutes harassment
● Very customized to the specific realities of that workplace (with examples/scenarios tailored to that worksite, organization and/or industry)
● Employee rights and responsibilities
● Reporting, investigation, and enforcement procedures
TRAINING RECOMMENDATIONS

Compliance Training Content for Supervisors:

- Include everything on prior slide
- Methods for dealing with harassment that is:
  - Observed (appropriate intervention)
  - Reported to them
  - About which they have knowledge
- When to report up the chain of command
TRAINING RECOMMENDATIONS

Compliance Training Structure for All Employees:

- Demonstration by senior leader of leadership’s commitment (e.g., opening statement, attend, video, etc.)
- Done regularly (more often than once a year)
- Varied and dynamic in style, form, and content
- Conducted by qualified, live, and interactive trainers
- Utilizes examples and scenarios
- Allows for questions or other active engagement by participants
- Routinely evaluated for effectiveness and whether it changed employees’ behavior
TRAINING RECOMMENDATIONS

Compliance Training – Other Recommendations:

- EEOC should require training that complies with the foregoing slides as part of settlement agreements, conciliation agreements, and consent decrees.
- EEOC should require employer’s cooperation to allow EEOC to assess the climate and level of harassment in employer’s workplaces pre- and post-implementation of compliance trainings.
- EEOC should compile resource guide with checklists and training modules.
TRAINING RECOMMENDATIONS

Workplace Civility Training:
● Should become part of employer’s holistic harassment prevention program
● Should focus on promoting respect and civility in workplace, rather than eliminating unwelcome behavior based on protected characteristics
● Would likely include skills-based components:
  ● Interpersonal skills training
  ● Conflict resolution training
  ● Effective supervisory techniques training
TRAINING RECOMMENDATIONS

Workplace Civility Training - Caveats:

● EEOC had not defined “civility”

● EEOC acknowledges that such training and any broad workplace “civility code” might violate the NLRA and that EEOC and NLRB need to confer and attempt to harmonize NLRA and EEO statutes
Bystander Intervention Training:
● Has been used as a violence prevention strategy, especially by colleges and high schools to prevent sexual assault
● Might be effective in workplace
  ● Could create a sense of collective responsibility to “do something”
  ● Could give employees skills and confidence to intervene to stop harassment
● Could empower employees to act
TRAINING RECOMMENDATIONS

Checklists for Employers:

- Leadership and Accountability
- Anti-Harassment Policies
- Reporting Systems and Investigations
PROPOSED EEOC ENFORCEMENT GUIDANCE ON UNLAWFUL HARASSMENT
BACKGROUND

● Purposes:
  ● Consolidate all EEOC guidance and interpretation of the laws on unlawful harassment in one document
  ● Serve as companion piece to the Task Force Report

● Timeline and Activities:
  ● Issued in proposed format on January 10, 2017
  ● Public comments due by March 21, 2017
    ● About 120 comments received
  ● Current and future status unknown
OVERVIEW OF CONTENT

● Focus is solely on what constitutes “unlawful” harassment
● Includes EEOC’s interpretation of the law (even though some courts disagree in certain areas)
● Includes section on “promising practices” that incorporates the recommendations of the Select Task Force on policies, reporting and investigation procedures, and training (including reference to the checklists on same that are a part of the Select Task Force Report)
AREAS OF CONCERN

- Expansion of protected categories
- Elimination of “unwelcome” as part of definition of “unlawful harassment?”
- Exceptions to requirement that employee must utilize employer’s reporting procedure
- “Dissemination” of policy v. “access”
- Requirement to address conduct that doesn’t rise to the level of being “unlawful” harassment
- Inclusion of “promising practices”
NLRB’S POSITION ON ISSUES RELATED TO HARASSMENT AND CIVILITY
### CURRENT NLRB

- Maximum number of members – 5
  - Each with 5-year term (or recess appt.)
  - One term expires each year
- Current number of members – 3

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CURRENT NLRB

• General Counsel:
  • Currently Richard Griffin (Democrat)
  • Fixed 4-year term
  • Expires 11-3-17

• Decisions are case-based:
  • Will take time to undo Obama-era decisions once there is a Republican majority on the NLRB/a new General Counsel is appointed
  • Expect NLRB to be aggressive and pro-union and pro-employee until then
KEY ISSUES

● Employer requirements for respect and civility in the workplace

● Employer requirements that internal investigations be kept confidential by complainant, alleged wrongdoer, witnesses, and others who know of the investigation

● Employer requirements that employer’s e-mail system be used only for business purposes
WORKPLACE CIVILITY RULES

William Beaumont Hospital
363 NLRB No. 162 (Apr. 13, 2016)
Lutheran Heritage Village – Livonia
343 NLRB 646 (Nov. 19, 2014)

- NLRB: A workplace rule (and particularly a facially-neutral and overly broad or general one, and including a general civility rule) violates the NLRA if an employee would reasonably construe it as restricting the employee’s ability to exercise his/her Section 7 rights to discuss terms and conditions of employment.

- EEOC: Employers should require civility in the workplace and conduct workplace civility training.
**WORKPLACE CIVILITY RULES**

*Pier Sixty, LLC*
362 NLRB No. 59 (Mar. 31, 2015)
Confirmed by 2nd Circuit (Apr. 21, 2017)

- **NLRB:** An employee’s profanity-laced and vulgar attack of a supervisor (and his mother and family) posted on Facebook is protected under Section 7 of the NLRA because it was not so abusive or egregious as to lose Section 7 protection.
Cooper Tire & Rubber Co.
Case No. 08-CA-087155 (Jun. 5, 2015)
On Appeal to 8th Circuit

- **NLRB**: Racial insults, while offensive, are permitted under the NLRA if they do not reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights and if the comments don’t raise a reasonable likelihood of imminent physical confrontation.
WORKPLACE CIVILITY RULES

Chipotle Services LLC (Chipotle Mexican Grill)
364 NLRB No. 72 (Aug. 18, 2016)

- NLRB: A policy of prohibiting employees from making disparaging, false or misleading statements about or relating to the company, its employees, suppliers, customers, competition, or investors violates Section 7 of the NLRA.
INVESTIGATION CONFIDENTIALITY

**Banner Health System**
362 NLRB No. 137 (June 26, 2015)
358 NLRB No. 93 (July 30, 2012)

- **NLRB:** An employer policy requiring confidentiality in investigations is a violation of Section 7, except where employer can prove that corruption of the investigation would likely occur without confidentiality.

- **EEOC:** Harassment policies and investigation procedures must respect privacy of the parties and ensure confidentiality of the complaint and parties to the extent possible.
USE OF WORK E-MAIL SYSTEM

Purple Communications, Inc.
361 NLRB No. 126 (Dec. 11, 2014)

- **NLRB**: Employers are required to allow employees to use employer’s e-mail system during non-work time to discuss terms and conditions of employment and exercise Section 7 rights.

- **EEOC**: Conduct that occurs within the work environment and is conveyed using work-related communications systems (e.g., employer’s e-mail system) can give rise to a harassment claim.
EMPLOYER OPTIONS
John (a non-supervisor) works on the same team with Mary (a non-supervisor). During the course of working together on a project, John made extremely cruel and belittling comments to Mary several times. He called her “stupid,” “cranky,” “scatter-brained,” “passive-aggressive,” and “emotional.” Others overhear the comments. Mary believes the comments were gender-based and she files an internal harassment complaint.

- Is unlawful harassment involved in this scenario?
- Is incivility involved?
- Were John’s comments protected under § 7 of NLRA?
- Should you discipline John?
- If you don’t, does Mary have a harassment claim?
EMPLOYER OPTIONS

Considerations:
● Extent of potential liability under laws enforced by EEOC v. laws enforced by NLRB
● Employer’s risk profile – risk tolerance v. risk aversion
● Employer’s desire for respectful interactions v. relatively unrestricted communications/free speech
● Challenge in defining “civility,” “bullying,” and other similar terms for workplace purposes
EMPLOYER OPTIONS

Options:

A  Maintain current policies/training and “wait and see” what new NLRB does (in 2018 and after)
B  Review and revise current policies/training to remove any NLRA risk
C  Expand current policies/training to include civility requirements
D  Hold supervisors to higher standard of civility and be more lenient on civility issues with non-supervisors
The Plaintiff’s Perspective: How Plaintiffs’ Lawyers Turn Your Non-Compliance into Discriminatory Motives

Kelly A. Campbell
Rosemary Orsini
Problematic Policies

Facts:

• Edith, age 56, thirty-eight year veteran of the telecommunications industry
• Big Telecom new supervisor, Greg, younger
• New Requirement: nearly 2 hour, one-way trip to report in to work
• Handbook: not a contract of employment
• A social media policy
Problematic Policies

Plaintiff’s Counsel Perspective:

- Hard worker, oldest female in the state working in her position
- 38 years without a write-up
- Asked for same accommodations under the policy
- National company
- Policies either violated or ignored
Problematic Policies

Defense Counsel Perspective:

• Unilateral change of conditions
• Multiple calls, messages, and e-mails
• The forced short term disability, Supervisor went through a junior HR clerk
• Termination paperwork completed, preserved after the fact
• He treats all of his employees equally, no exceptions
Problematic Policies

Legal Principles / Issues:

• Age discrimination, gender discrimination, and retaliation
• Handbook as a contract
• Big Telecom did not follow policy in disciplining Edith
• Failure to travel to “check-in”
• “Not qualified” for the job
• Big Telecom retaliated?
• Violation of Big Telecom’s social media policy
Problematic Policies

Who do you think will win in front of a jury?

A. Edith
B. Big Telecom
Problematic Policies

Outcome of Litigation:

Settlement, after a summary judgment decision split on the issues.
Problematic Policies

Keys to Avoiding Litigation:

• Consistent application of policy
• Document employee’s limitations and requests
• Follow your disciplinary policy
• Review the employee handbook, don’t “over-promise”, employer retains flexibility and discretion
• Do not unilaterally file a worker’s compensation claim
Digital Sexual Harassment

Facts:

- Christy was a female administrative assistant.
- For two years, Christy’s supervisor e-mailed her daily with pornographic or offensive, misogynistic content.
- The male supervisor was top sales representative.
- Christy complained, and he would stop for a while.
- Supervisor would stand behind her and demand she open the e-mail and watch.
- Christy was scared, her family needed her income.
Digital Sexual Harassment

Plaintiff’s Counsel Perspective:
• Christy was smart, accomplished
• Beaten down by repeated (and verifiable) sexual harassment
• She had multiple samples of the e-mails
• She had receipts from trips
Digital Sexual Harassment

Defense Counsel Perspective:

- Company’s sexual harassment policy required report of inappropriate behavior to supervisor or HRM
- HRM located in different state
- Christy did not report the e-mails to HRM for two years
Digital Sexual Harassment

Legal Principles / Issues:

- Policies for monitoring e-mail and other electronic forms of harassment
- Following policy
Digital Sexual Harassment

Will it matter to a Jury that Christy did not report the inappropriate e-mails to the HRM when she received them?

A. Yes
B. No
Digital Sexual Harassment

Outcome of Litigation:

Settled after discovery was complete and the extent of harassment became clear.
Digital Sexual Harassment

Keys to Avoiding Litigation:

• Don’t value the bottom line (and a good salesperson) over your legal obligations.

• Had the company handled the situation in the beginning, instead of protecting the harasser, the situation would have been different.
Locker Room Talk

Facts:

• Leslie, a lesbian, worked as the assistant to the shop manager in a trucking company

• Leslie was open, salty-tongued, shared vulgar videos with other employees

• Male employees felt free to make vulgar comments and jokes about gay and lesbian people

• Shop manager was a nice guy

• Unwilling to confront people

• Leslie, fired for another outburst in a disagreement with the manager about job assignments

• Allegations of disparate treatment and inappropriate remarks
Locker Room Talk

Plaintiff’s Counsel Perspective:

• Allegedly disparate treatment and inappropriate remarks
• Fired because of sexual orientation
Locker Room Talk

Defense Counsel Perspective:

• HR manager knew nothing about the locker room talk until the EEOC charge was filed
• Leslie had not complained while she was on the job
• EEOC charge phase, Leslie gave 5 specific examples
• Complaint gave 12 specific examples of inappropriate behavior
• Deposition gave 17 specific examples of inappropriate behavior
Legal Principles / Issues:

• Disparate treatment of employees in protected categories (Colorado law includes sexual orientation)

• Allowing or failing to counteract an atmosphere of sexual orientation-based harassment, because of failure to investigate and enforce anti-harassment policies
Do you think Leslie will lose her lawsuit because she was just as salty-tongued as the males in the workplace?

A. Yes
B. No

Do you think Leslie will lose her lawsuit because she never complained?

A. Yes
B. No
Outcome of Litigation:

Although the employer’s witnesses were solid and the employer might have prevailed at trial, the case settled during the discovery process.
Locker Room Talk

Keys to Avoiding Litigation:

• Enforcing the employer’s anti-harassment policies
• Educating the whole work force, not just supervisors
• Workplace free of discriminatory remarks and attitudes
Blind Nurse Case

Facts:

• Nancy, age 50, was a registered nurse working in a hospital for 20 years

• When hired by the hospital, she was blind in one eye and could only see 20/60 in the other

• Nancy was responsible for all aspects of patient care, except blood draws

• Although able to do so she put her face within a few inches of the location of the blood draw

• Hospital accommodated her disability by allowing the other nurses to draw blood
Blind Nurse Case

Facts:

- Job description did not specify drawing blood was an essential function
- New director of nursing no longer allow Nancy to avoid doing blood draws
- Added blood draws as an essential function of the job
- Required Nancy to prove proficient in blood draws
- Hospital terminated Nancy’s employment
- No reasonable accommodation interactive process conducted
Blind Nurse Case

Plaintiff’s Counsel Perspective:

• Sympathetic aspect of the employee done everything right
• Did not have any of the negative aspects in an ADA case
• Could establish that blood draws were not an essential function of the job
• Or, she could perform with reasonable accommodations.
• Large employer
Blind Nurse Case

Defense Counsel Perspective:

• Hospital had budget cut by 35% in less than 9 months.
• Management decided, without input from new Director of Nursing, to impose greater cuts on nursing department
• 80 nurses, now had to perform same amount of work with 45 nurses.
• Director needed all nurses to fill all roles.
• Patient “customer” complaints that Nancy “did not seem to know what she was doing”.
• HR noted that Nancy performed the blood draws with the same level of accuracy as other nurses.
Blind Nurse Case

Legal Principles / Issues:
• Nancy had a disability
• Employer should not concentrate on whether Nancy has a disability
• But, rather can they accommodate her
• Determination of the essential functions of the job
• Employer changing the essential functions of the job
Blind Nurse Case

Legal Principles / Issues:

• Can Nancy perform the function with a reasonable accommodation?

• Is Employer required to allow Nancy to be excused based on her 20 year history?

• Can awkwardness be a legitimate non-discriminatory reason for terminating?

• Must the employer engage in the interactive process to determine if there are reasonable accommodations available?
Blind Nurse Case

Is Employer required to allow Nancy to be excused based on her 20 year history?

A. Yes
B. No
Blind Nurse Case

Outcome of Litigation:

• Case settled for full back pay, front pay, attorney fees paid to Plaintiff’s counsel and an additional amount of compensatory damages.

• Employer spent approximately $200,000 defending the case.
Blind Nurse Case

Keys to Avoiding Litigation:

• Maintain and update job descriptions
• Understand and document employee’s limitations
• Take your duty to accommodate seriously
• Use the opportunity to talk with the employee.
• The interactive process should be your friend, not your enemy.
• Disabled employees will generally reward an employer that is loyal to the employee.
• Only think about termination if you have exhausted all resources.
• Consult counsel before terminating employee.
Cat’s Paw

Facts:
- Six Long term employees of a bank were laid off.
- All were female and over the age of 50.
- Two employees terminated because they received the lowest evaluations.
- They both still received raises.
- Both employees were prohibited from providing input on their evaluations.
- Supervised by a male manager who had only been in his position for six months.
- “Women in the pit.”
- Privileges given to males and not females.
- Both employees complained about discrimination to HR
- Both employees were terminated less than a month after speaking to HR
Cat’s Paw

Plaintiff’s Counsel Perspective:

• Only females were laid off
• Large employer
• Policies in place regarding sexual discrimination
• Terminated both employees after they complained of discrimination
• Performance evaluations failed to follow policies
• Recently promoted manager did not make decisions to terminate
• Management committee accepted the Manager’s evaluations of the two employees with little question
Cat’s Paw

Defense Counsel Perspective:

• New evaluation system put in place
• Nobody understood the software or how employees received their “score”
• Immediate manager did not participate in decision to terminate employment
Cat’s Paw

Legal Principles / Issues:

- If you have policies, follow them
- If you learn of discrimination, you need to investigate it
- If you are terminating someone, based on a manager’s evaluation, be sure to ask questions
Cat’s Paw

If you are on the Jury, who wins?

A. Six female employees
B. Company
Cat’s Paw

Outcome of Litigation:

Case settled for full back pay, compensatory damages and attorneys’ fees.
From Gatherers to Hunters

• Plaintiffs’ attorneys have “evolved” and are not just waiting for clients to walk in their door with grievances (“gatherers”), but are actively seeking representative Plaintiffs in order to sue employers for statutory and regulatory violations (“hunters”).

• Unlike previous cases, the specific details regarding the individual or representative Plaintiff are not the emphasis for “hunters.”
From Gatherers to Hunters

• “Hunter” Plaintiffs’ attorneys focuses:
  • **First – the Law**: The statute or regulation that will be the basis of the claim
    • Generally prefer laws provide for recovery of attorneys’ fees, liquidated damages, per violation penalties, punitive, double, or even treble damages, etc.
  • **Then – The Employer**: Companies that are not in compliance with the laws Plaintiffs’ counsel is focused on
    • Prefer companies with deep pockets.
    • For class and collective actions, larger employers.
  • **Finally – the Plaintiff**: After they have chosen its cause of action and targeted a specific employer, then Plaintiffs’ counsel needs a representative plaintiff to bring the lawsuit.
From Gatherers to Hunters

Plaintiff’s Counsel Perspective:

- **It’s easier:** Proving technical violations of statutes/regulations is much cleaner and easier than litigating fact intensive discrimination and retaliation claims.

- **It pays better:** Choosing claims that provide for attorneys’ fees, per violation penalties, treble damages, etc. is a better and much more secure paycheck than getting 1/3 a jury award.

- **It is empowering:** Plaintiffs’ attorneys don’t have to wait for their next case to walk in the door. Instead, they can choose the claims and companies they want to pursue, and then only need to find an employee willing to participate in the lawsuit.
From Gatherers to Hunters

Defense Counsel Perspective:

• With the evolution of the “Hunter” Plaintiffs’ counsel compliance is more important than ever.

• The cases are problems for the employer for the same reasons they are favored by Plaintiffs’ attorneys. They are:
  • Difficult to defend if there is a violation or non-compliance;
  • Costly to defend, especially they are able to bring a class or collective action; and

• High Risk as the available damages for many of the claims provide for the recovery of damages not generally available in typical tort claims.
From Gatherers to Hunters

Keys to Avoiding Litigation:

• **Don’t be a target:** Plaintiffs’ attorneys prefer employers that are fast and loose with their policies, don’t have routine management training, have old and outdated policies, and that don’t pay attention to changing laws.

• **Be proactive:**
  • Conduct regular audits of your policies.
  • Review and update your employee handbooks.
  • Conduct regular management training.
  • Follow and comply with state and federal changes to employment laws.
  • Seek legal advice before policies are implemented, rather than when the lawsuit is filed.
Mastering the FMLA/ADA: Preventing Abuse and Avoiding Pitfalls

Sue K. Willman, JD, SHRM-SCP, SPHR
Overview

• The most significant compliance concerns that we see with FMLA and ADA issues are:
  • Missed FMLA requests.
  • Missed ADA accommodation requests.
  • Failure to properly document the FMLA and/or ADA processes.
  • Failure to properly address overlapping FMLA/ADA issues.
Hypothetical

• Sarah started her employment with the company in January 2017. In January 2018, Sarah began experiencing anxiety and having panic attacks which required her to miss work for days at a time. Sarah looks around the handbook and the office but doesn’t see any type of policy that would allow her to take some time off to address her condition.
  • Should Sarah be able to find some information regarding leave in the handbook or at the office?
Recommended Leave Policies

- FMLA Poster (Required)
- FMLA Leave Policy
- Non-FMLA Leave Policy
- Accommodation Policy
Best Practices: Leave Policies

- **FMLA Leave Policy**
  - Include all of the requirements for eligibility and qualifying conditions.
  - Spell out other expectations (e.g. benefits while on leave).
  - State the method for calculating the FMLA leave year.
  - Address substitution of paid leave.

- **Non-FMLA Leave Policy**
  - Clearly set forth eligibility and qualifying conditions.
  - State that this leave is not job-protected leave (unless otherwise required by law).
  - Ensure that non-FMLA leaves do not result in leaves more favorable than non-FMLA leaves.
Best Practices: Accommodation Policy

• Include an EEO statement regarding disabilities, religious beliefs, and pregnancy.

• Set forth the obligation of the employee to request a reasonable accommodation and to whom that request should be made/and not made (e.g. request to HR but not to supervisor).

• Set forth the obligations and expectations for the interactive process, including what documents are going to be used and the duty of both the employer and employee to cooperate in the process.

• State the consequences of failing to cooperate or engage in the interactive process.
Best Practices: Accommodation Policy

• Include a statement that the company may contact health care providers to verify a disability, the need for accommodation, other relevant information.

• State the employee’s status while the company processes the request for an accommodation.

• List some types of accommodations that may be considered.

• Explain that not all accommodations are reasonable.

• Summarize the process that will be used to identify and select a reasonable accommodation.

• Set forth the employee’s right to refuse an offered accommodation and the consequences thereof.
Hypothetical

- Sarah has not yet notified HR or her supervisor of her need for leave. Sarah has another anxiety attack and calls in to talk to her supervisor two hours after the start of her shift and tells him that she needs to be off of work because of her anxiety attack. The company’s policy, which is consistently followed, requires all employees to call in at least 30 minutes prior to the start of the shift. Sarah tells the supervisor that she did not call in 30 minutes before her shift because she could not find her phone.
  - Can the supervisor issue discipline in this situation?
FMLA Notice Expectations

- Employees have to provide sufficient information to put the employer on notice that they have a potential need for FMLA leave but it can be verbal.

- **Timing of notice:**
  - If request is foreseeable, must request at least 30 days in advance, or if not practicable, the same work day or next work day after the need for leave becomes known to the employee.
  - If unforeseeable, the employee must comply with the employer’s call-in policy (subject to an “unusual circumstances” exception).

- Employers **can** require employees to comply with policies regarding providing notice of leave/absence.
Best Practices: FMLA Notice Expectations

• For purposes of both FMLA and ADA it is important to have documented call-in procedures.

• Employers can and should hold employees responsible for calling in per the procedure.

• If the employee is already on intermittent FMLA leave when the employee calls in, make sure that the employee is required to state whether or not the FMLA qualifying condition is the reason for the absence.
Sarah is upset about the disciplinary action and contacts HR to discuss it. At this point, Sarah expresses to HR that these are no longer minor anxiety attacks but that she is now depressed and cannot get out of bed. Sarah tells HR that she needs at least eight weeks of leave to obtain in-facility treatment. HR tells her that the most important thing is to take care of herself and not to worry about anything else at this point. HR designates the leave as FMLA on the internal system but does nothing else.

- Should HR have provided Sarah with any documentation?
Required FMLA Documentation

• Provide Notice of Eligibility and Rights and Responsibilities within 5 business days of notice of need for leave.

• Request for medical certification (optional, but important procedure to include in FMLA policy) within 5 business days of notice of need for leave.
  • Employee must respond within 15 calendar days.
  • If information is missing or the answers are insufficient, the employer must request specific information and employee has 7 calendar days to cure.

• Designation Notice
  • Employer must provide to employee within 5 business days of obtaining enough information to determine if there is a FMLA qualifying reason.
Best Practices: FMLA Documentation

- Train supervisors and managers on identifying a request for FMLA leave (more than once).
- Train supervisors and managers on the notice requirements and potential consequences of failing to meet the notice requirements.
- Train supervisors and managers to notify HR of FMLA absences and to work closely with HR on such issues.
Best Practices: FMLA Documentation

• Provide additional documentation outside of the required documents:
  • Cover letters with all FMLA documentation
  • “Reminder letter” one to two weeks prior to the end of the FMLA leave of the expected return to work date

• Consider how to best document the employer’s efforts to send FMLA paperwork
  • U.S. Mail
  • Certified Mail
  • E-mail
Hypothetical

- Sarah takes eight weeks of leave, which was covered under the initial certification. Sarah contacts HR at the end of eight weeks and says that her physician says she can return to work but she does not feel like she is “stable.”
  - Should HR require Sarah to return to work?
Hypothetical

• Sarah obtains a new certification and takes an additional four weeks of FMLA leave. Sarah has not contacted HR at all during the additional four week period but HR learns from co-workers that Sarah has been sending “dark” texts and telling her co-workers that she is no more stable than she was the day she left.
  • Should HR reach out to Sarah?
FMLA: Communications with Employee

- Employers can require employees on FMLA to provide periodic status reports (including intent to return to work).
- If the employer requires periodic status reports, the employer must notify the employee of this requirement on the FMLA Notice of Eligibility and Rights and Responsibilities.
- The use of status reports should be as consistent as possible with employees while taking in the specifics of the leave situation.
Best Practices: FMLA Communications

• Employers should log all communications with the employee including date, time, and the name of the person communicating with the employee.

• If the employer suspects that the employee will need additional leave under the ADA, the employer should send a Post-FMLA/Potential ADA Leave Accommodation Notice.
Best Practices: FMLA Communications

- The Post-FMLA/Potential ADA Leave Accommodation Notice should include the following:
  - The date FMLA leave started and the date the leave will expire.
  - A request that the employee inform HR regarding the ability and date of return to work.
  - Whether a fitness-for-duty will be required for return to work following the FMLA leave (as noted in the Designation Notice).
  - If the employee is unable to return to work at the expiration of FMLA leave due to his/her own medical impairment, he/she may request a leave extension as an ADA accommodation.
  - The interactive process will be used to determine if the post-FMLA leave is a reasonable accommodation under the ADA that will not create an undue hardship on the employer.
  - The employee may be asked to provide additional medical information to support the continuing need for leave.
The day before Sarah is supposed to return from FMLA leave (after exhausting her 12 weeks of FMLA leave), she contacts HR and states that she really doesn’t think it is “safe” for her to return to work at this point because she is so depressed. Sarah expresses that her doctors are changing her medication and she believes she will feel better in a week.

Should HR tell her that she has to return to work once her FMLA expires?
FMLA/ADA Overlap

- FMLA leave is an entitlement. Leave as an ADA accommodation is not automatic or guaranteed.
- An FMLA eligible employee may take FMLA leave even if they could continue working with an ADA accommodation other than leave.
- The ADA does not require a formal request for accommodation but the employee must provide sufficient information to put the employer on notice of the need for leave.
Best Practices: FMLA/ADA Overlap

• When the employee exhausts FMLA, the employer has to look at whether the ADA entitles the employee to additional accommodations and then engage in the interactive process.

• Non-FMLA leave as an accommodation:
  • Should be considered as a potential accommodation for the employees’ own medical condition.
  • Extensions of FMLA qualified leave are not always a reasonable accommodation.
Hypothetical

• HR responds to Sarah and states that the company is willing to discuss the need for leave further with her but that they need more information regarding her need for leave before they will approve the request.
  • Is this an appropriate response?
The Interactive Process

• Both the employer and the employee are required to participate in the interactive process and have “meaningful” communications/dialog.

• When to engage in the interactive process:
  • After HR determines the individual is ineligible for FMLA, HR should begin the ADA interactive process to determine if there is a disability, if an accommodation is required, and if leave is a reasonable accommodation.
  • When an employee takes FMLA leave, HR should determine (if possible) before the end of the FMLA leave period, whether employee will be able to return to work at the expiration of leave and/or whether there will be any restrictions.
The Interactive Process

- Evaluate whether there is an ADA covered disability.
- Research and identify possible accommodations.
- Determine if any measures will provide the accommodation or eliminate the need for it.
- Evaluate the reasonableness and effectiveness of each possible accommodation.
- Evaluate if proposed accommodations will cause undue hardship.
- Determine what, if any, accommodation will be offered.
- Offer the accommodation or notify that none were deemed reasonable or appropriate under the circumstances.
Best Practices: The Interactive Process

• Document the entire process.
• Notify the employee in writing of the decision.
• In analyzing the potential extension of leave beyond the FMLA as an accommodation under the ADA, determine (if possible) what length of leave would amount to an undue hardship.
  • Will the employee recover during the leave?
  • Will the recovery occur within the reasonably identifiable future?
  • Is it reasonable to hold a job open?
Hypothetical

• Sarah is appalled by HR’s request for additional medical information as she just provided a new FMLA certification. Sarah says that the request is making her depression and anxiety worse. Sarah becomes very irritable and refuses to provide the requested medical information.
  • Does HR have to continue in the interactive process?
Employee Duties

- Make need for accommodation known.
- Answer relevant questions regarding the medical condition/impact on ability to perform essential functions.
- Provide medical verification or HIPPA consent.
Best Practices: Employee Duties

• Train managers on the employee’s duties and how to respond to questions.
• Document the request for accommodation.
• Use a Request for Accommodation Questionnaire.
• Use a Medical Questionnaire and HIPAA consent form.
Hypothetical

- HR goes through the interactive process and seeks additional medical information. In the additional medical information, the physician states that Sarah is able to resume working but that currently her depression and anxiety are triggered when she is required to travel or drive. The physician indicates that they are continuing to work with various medications to address this issue and he anticipates that she will be able to return to working in the office in a month or two.
  - Does HR have to provide the additional non-FMLA leave that Sarah has asked for?
Offering Accommodations

• Employers are not required to provide the specific accommodation that the employee requested as long as the accommodation the employer is offering is reasonable and effective.

• Types of accommodations to consider:
  • Different equipment
  • Modified schedule
  • Remote working
  • Additional leave
  • Reassignment**
Best Practices: Offering Accommodations

• Provide a written response to the request for accommodation.
  • State what accommodation under the ADA the employer is offering or that the request for an accommodation under the ADA was denied (and explain why).
  • Provide all details regarding the accommodation and any expectations.
  • Include a statement that the accommodation will be revisited periodically.

• Require that the employee sign the written response to indicate that the employee received the response.

• If the employee refuses to sign, document refusal to sign.
Hypothetical

• HR offers Sarah the accommodation of working from home. Sarah accepts the temporary accommodation. Sarah returns to work and works for two months remotely. Sarah then expresses a desire to return to work at the facility. Sarah’s supervisor tells her that he is concerned that she might “lose it” in the office one day and that it is probably better if she continues to work remotely for everyone’s sake.
• Does the manager’s statement create a potential issue for the employer?
Liability from Manager Actions

• FMLA and ADA issues can be frustrating for managers.
• Stray remarks regarding FMLA and ADA issues create potential liability for the company.
• Companies need to assess these situations to determine if a fitness for duty or safety threat exists (and go through the direct threat analysis) instead of assuming that there are fitness for duty or safety risks.
Best Practices: Liability from Manager Actions

• Employers **must** train managers on:
  • The basics of FMLA and ADA.
  • How to spot FMLA and ADA requests.
  • What to do when they receive a potential FMLA or ADA request.
  • What information should and should not be included in evaluations or disciplinary actions.
  • What to do when they have a concern about a mental health issue in the workplace.

• Document that the training sessions have occurred.
Best Practices for Compliance Investigations: How to Prepare for the Worst but Achieve the Best Result

Patrick McInerney
Brian Peterson
Overview of Topics to Be Covered

- Types of Investigations
- Scope of Agency Investigative Powers
- Attorney-Client Privilege & The Work Product Doctrine
- Response Plans and Document Retention Policies
- Top 10 Tips for Conducting Interviews
Types of Investigations
Company Investigations

In Response to Internal Complaints

In Response to Civil Litigation

As Part of a Regularly Scheduled Audit
Company Investigations

• Conducted by Employees of the Company
• More Control Over Investigative Process
• More Flexibility In Resolving the Situation
• Conduct during internal investigations may be subject to later external scrutiny
• Critical to have deliberate protocols and procedures in place BEFORE the investigation begins.
Government Investigations

As a Part of A Criminal Investigation

In Response to Formal Complaint filed with Government Agency-Whistleblower or Qui Tam

In Response to a Random Incipient Event
Government Investigations

- Conducted by Government Agents/Investigators
- Less Control Over the Investigative Process - Early Contact and Process Management Are Important
- Early Decision: Outside Counsel?
- Protecting the Attorney-Client Privilege is Critical
- Potential Conflicts of Interest Must be Analyzed
Scope of Agency

Investigative Powers
OSHA

• The power to enter and investigate places of employment.

• The power to inspect records that employers are legally required to maintain under the OSH Act.

• The power to require witnesses to give testimony and produce evidence under oath.

• The power to privately question non-managerial employees.
Pop Quiz!

• **Facts:** Oliver the OSHA Investigator makes an unannounced visit to a factory owned by World Wide WidgetMaker, Inc. to conduct a safety inspection and interview several employees.

• **Question:** Can the owners of World Wide WidgetMaker, Inc. refuse to let Oliver into the factory?
  • Yes?
  • No?
Employer’s Rights During OSHA Inspections

• Employers can prevent the investigator from entering the premises and require them to obtain an ex parte inspection warrant before proceeding with the inspection. (But it is typically not advisable to do so).

• A representative of the employer has the right to be present and accompany the investigator during the inspection.

• Counsel for company may attend interviews with managerial level employees.
EEOC

- The power to investigate charges of discrimination.
- The power to issue requests for information.
- The power to issue administrative subpoenas compelling the disclosure of requested information.
- The power to conduct off-site witness interviews.
- The power to interview employees during on-site visits.
Employer’s Rights When Responding to EEOC Info Requests

• Similar to discovery requests, Employers can object to EEOC information requests.
• But the best practice is to be as cooperative as possible.
• For example:
  • Object to a request seeking “information on all employees,” but agree to produce the information for a smaller group of relevant comparator employees.
  • Object to temporally overbroad requests (e.g. 10 years), but agree to produce the information for a more reasonable time period (e.g. 2 years).
  • Object to requests that seek information regarding legal theories that are not alleged in the relevant charge(s) of discrimination, but agree to produce information related to the allegations actually stated in the charge(s).
Employer’s Rights During EEOC Investigatory Interviews

• Unless the employee objects and asks for a private interview, an employer representative may be present during on-site interviews of non-managerial employees.

• Managerial employees have the right to have corporate legal counsel present during an investigatory interview.
Department of Labor
Wage & Hour Division ("WHD")

- The power to investigate and gather data regarding the wages, hours, and other conditions and practice of employment
- The power to enter and inspect places of employment and records regarding wages, hours, and other terms/conditions of employment
- The power to question employees
- The power to subpoena witnesses and documents
Employer’s Rights During WHD Investigation

• Investigations must be reasonable in scope and relevant in purpose such that compliance is not unduly burdensome.
  
  • Employers may ask the investigator to specifically identify the problems being investigated.
  
  • Employers may object to certain aspects of document requests and seek to provide a set of information that is more reasonably limited.
  
  • Employers may ask that interviews be conducted at a certain time so as not to disrupt normal business operations.
Major Themes of Responding to External Government Investigations

• All the major governmental agencies have subpoena power.

• Objections: overly broad, unduly burdensome; therefore, negotiate scope and timing of production.

• Employers must be prepared to produce information that is relevant and reasonably tailored to determining whether the law is being complied with.
Attorney-Client Privilege & The Work Product Doctrine
“Confidential” vs. “Privileged”

- **Confidential Information:**
  - Information relating to the representation of a client that is not publicly available or generally known.

- **Privileged Information:**
  - Confidential communications made for the purpose of facilitating the rendition of professional legal services between:
    - The client and its lawyer
    - The client’s representative and its lawyer
    - The client’s representative and a representative of its lawyer
    - The client or its lawyer and the lawyer representing another person/entity in a matter of common interest
Privileged Information Is a Subset of Confidential Information
Why is the distinction between “confidential” and “privileged” information important?

• Regulatory agencies with subpoena power can force a company to disclose confidential information.

• Regulatory agencies with subpoena power cannot force a company to disclose privileged information. Subject to a few narrowly tailored exceptions, privileged information is absolutely protected from involuntary disclosure.
What’s “Privileged” in an Internal Investigation?

• Communications by an employee to counsel/agent of counsel privileged if:
  • Counsel acting as counsel
  • Employee directed by superior to cooperate
  • Employee knows that cooperation necessary to secure legal advice for the corporation
  • The information communicated was unavailable from upper management and related to the employee’s scope of authority/conduct, and
  • Communication was understood to be confidential when made AND is not disclosed exc. to those who “need to know.”
The Work Product Doctrine

- Documents or information prepared in anticipation of litigation or for use at trial by a party or a party’s “agent” are privileged.

- An “agent” includes the party’s attorney, consultant, surety, indemnitor, and/or insurer.

- This doctrine is used to protect the mental impressions, legal theories, and overall analysis of potential legal liability from disclosure.
Who is the “client” for privilege purposes when the client is a corporation?

• An attorney’s client is typically a corporate entity, although the company acts only through individuals.

• Determination of the “client” is critical for preserving the privilege and for avoiding conflicts, especially when information about individuals is valuable.

• Preplanning is important in anticipating client identification and conflict issues.
The Upjohn Rule

• Protects communications used in internal investigations; does not protect the underlying facts.

• Critical elements:
  • I represent the company; I’m not your lawyer;
  • I’m gathering information so I can advise the company;
  • This is confidential and privileged, and the privilege belongs to the company;
  • The company may decide to waive the privilege and disclose the information we learn in the investigation; and
  • The company requests that you keep the substance of our interview confidential.
Best Practices for Maintaining Privilege

- Do not include legal analysis, personal opinions, or commentary in your investigatory notes. Focus on documenting specific facts and allegations.

- Do not hold important meetings regarding the investigation without including in-house counsel or outside counsel.

- Written documents containing analysis of or commentary on an investigation should be specifically addressed to in-house counsel and/or outside counsel (or should at least have them CC’ed).

- To the extent possible, avoid discussing any aspect of the investigation via e-mail.
Cooperation & Conflicts

• A company that “cooperates” with a government agency during an investigation may receive favorable treatment under the Sentencing Guidelines (“cooperation credit”).

• “Compliance” means doing exactly what the law requires and nothing more. “Cooperation” involves more than mere compliance. It means “providing material assistance to the government in its investigation and prosecution.”
Cooperation & Conflicts

• To get cooperation credit and further its own interests, a company may have to become directly adverse to high-level executives and managers.

• The 2015 Yates Memo formalized that a corporation cannot receive “cooperation credit” unless it identifies all individuals responsible for the misconduct under investigation.
  • Complicates the process of internal investigations, individual counsel decisions, etc.

• The issues raised by the “cooperation credit” situation demonstrate the value of an independent board of directors and well-designed corporate governance rules.
Response Plans & Document Retention Policies
Investigation Response Plans

• An Investigation Response Plan is similar to a detailed check list
Investigation Response Plans

- An Investigation Response Plan should clearly answer two basic questions

1. Who should be the main person responding to the government investigation?
2. What steps does the company need to take internally in order to properly respond?
Response Planning – Who Should Respond?

• Outside Counsel
  • Expertise, perception of independence, signals to government agents/regulators.

• Individual Counsel
  • Based on available information, do employees/officers require individual counsel? Is pool counsel sufficient?

• Board Notification and Direction

• Contact with the Government - cooperation
Response Planning – How To Respond?

- Identify Key Witnesses
- Identify Where Relevant Records Are Stored
- Interview Key Witnesses
- Gather Important Documents
- Reassess Situation Once All Relevant Information Gathered
Document Retention Policies

• A policy that clearly establishes the rules for retaining, maintaining, and appropriately disposing of company records.

• Goals:
  • Consistency
  • Privacy and Security
  • Compliant with past, current, and future litigation obligations
Top 10 Tips for Conducting Investigative Interviews
Top Tip # 1: Plan Ahead

• Adopt and implement a standard set of procedures for conducting investigative interviews before they are actually needed.
Top Tip # 2: Get IT Involved Early

- Almost all investigations will involve gathering information from an IT system. Get IT involved early so you can have access to the relevant information as quickly as possible.
Top Tip # 3: Appoint a Scribe

- Designate a person who will document the dates on which important meetings and conversations occurred. The scribe’s notes can subsequently be used to create a high level chronology.
Top Tip # 4: One Person per Interview

- Always interview one person at a time.
Top Tip # 5: Date Your Documents

• Date all of your documents so that you can easily prove when they were drafted.
Top Tip # 6: Just The Facts

• State the facts in your investigatory notes. Do not give opinions, analysis, or legal conclusions.
Top Tip # 7: Follow Up

• Give the relevant individuals status updates as the investigation progresses. To the extent possible, tell the relevant individuals how the issue was resolved.
Top Tip # 8: Save & Centralize Your Work

- Create a safe and centralized place where all the relevant documents will be stored for future reference.
Top Tip # 9: Use Attorney-Client Privilege

• Shield sensitive analysis and discussions from future disclosure by involving in-house or outside counsel.

got privilege?
Top Tip # 10: Draft Memo to File

• With the assistance of counsel, draft a memo to the file documenting the investigation, the response, and the ultimate resolution.
The Many Sides of Technology In the Workforce: Using Technology as a Tool While Avoiding Distractions and Legal Pitfalls

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OVERVIEW

- The Reinvention of Human Resources.
- Revolutionizing Human Resources with New Technology.
- What Has Really Changed?
- Human Resource Analytics.
- Managing the Effects of Technological Changes.
- Legal Concerns.
The Reinvention of Human Resources
The Reinvention of Human Resources

Considerations:

• Human Resources Management has historically adapted to the needs of the Human Resources Department and the Company, instead of to its employees.

• Employees expect more personalized standard.

• Employees want HR transactions to be on same level they see in day to day life.

• Business owners want to use technology to improve cost but don’t see the potential pitfalls from a human resources perspective.

• Employees are overloaded with information, especially in workplace
The Reinvention of Human Resources


• Millennials take different approach to recruiting than past applicants.

• More Likely To:
  • Know little about the company as compared to past generations.
  • Find out about company through social media.
  • Follow company on social media.
  • Care significantly more about company’s culture and values.
  • Not accept job based on not knowing what organization is like, applying and not hearing back, and not understanding the role.
The Reinvention of Human Resources

Communicating With Millennial Applicants.

• They expect immediate response.

• Use alternative forms of communicating, e.g.: text, LinkedIn, etc.

• Expect company to highlight best employees, company’s value and mission, and activities outside the workplace on social media and press materials.
The Reinvention of Human Resources

Social Media Use Is Expanding and Changing Rapidly in Recruitment Context.

• Employees look at social media in connection with seeking job opportunities.
• Use social media to find “the employer of choice.”
• Culture is top factor pulling in top younger talent.
• Employees want company’s culture to align with their values.
The Reinvention of Human Resources

Existing Training Methods Do Not Work on Younger Generations. Employers must:

• Update communication of training platforms and corporate learning systems.

• Develop learning systems that fit with preferred use experience.

• Example: more like Buzz Feed and You Tube, less like a Course Catalog.
The Reinvention of Human Resources

Work Environment and Productivity Changes.

• Technology has made work harder, not easier in many respects.
• Average U.S. worker now spends 25% of day reading or answering e-mail.
• The work environment is a major productivity and engagement driver.
• People are overloaded with information, especially in workplace.
• New approaches to work environment expected: Examples:
  • People work best in small teams.
  • New office designs - companies knocking down walls, adding coffee bars and creating open offices.
The Reinvention of Human Resources

Many Possibilities for Modernizing Employee Communications with Human Resources:

• Real time content tailored for employee needs.
• HR App that gives suggestions to maximize total rewards programs based on other similar users.
• 401(k) App gives nudge to review your contribution or investment decisions based on age and current rate of return.
• Benefits enrollment system gives suggestions on how to best utilize your company-sponsored spending accounts based on selected coverage options.
• Accessible from mobile phones.
Revolutionize Human Resources with New Technology

Digital Human Resources – A Shift to “Apps”

• Employees don’t use “the web” like they used to.
• They interact with technology through mobile apps.
• Mobile apps can take advantage of location, sounds and other sensors.
• HR’s function in today’s world is remote, even if partially centralized.
• HR will benefit from reaching employees via smartphone.
Revolutionize Human Resources with New Technology

Digital Human Resources – Shift to Apps (Continued)

• Focus should be on making HR tools easier for employees to use.

• All mobile Human Resources platform is now possible.

• Extended use for competency management, development, coaching, assessment, skills development, reward and recognition.
Revolutionize Human Resources with New Technology

Attendance Tracking

• New technologies are available to capture employees clocking in and out of work.

• Present new challenges for parties to consider how best to accurately keep track of time working.

• Examples:
  • Kronos – Automates clocking in and out process.
  • GPS programs – Allow employees to clock in by activating feature on their phone where movements from arrival to departure at work are tracked with a program.
  • Shyft App – Employees can post their availability and trade shifts with other employees.
Revolutionize Human Resources with New Technology

Private Exchanges

- “Amazon” of health benefits.
- Example – Liazon is leading technology platform.
- Gives the employee a platform in which to address their individualized needs.
- Specific to employee and their families.
- Makes employee more knowledgeable about the benefits received.
- Employer see a buy down effect.
- Average of $300-500 cost savings per employee.
Revolutionize Human Resources with New Technology

“Device Free” Workplaces

• Google engineers envision time when people will not type on smartphones or computers at all.
• Speech recognition capability will extend beyond the home, into businesses.
• Employees will speak to their devices as some do with Siri.
• Companies will rely on neural networks.
What Has Really Changed?
The Reinvention of Human Resources

What’s Really New with These Human Resources Applications?

• Focus has been on making Human Resources tools easier for Human Resources Department for last 15 years.

• Old tools feel more administrative.

• New tools feel more like Facebook, YouTube, Instagram.

• All mobile HR platform is now possible.
What Has Really Changed?

What’s Really New with These Human Resources Applications? (Continued)

• Feedback is embedded.
• As management tools – create tremendous flow of comments, suggestions, insights and feedback.
• Rely on vertical feeds instead of panels.
• Extensive use of video based learning as primary media.
• Use gamification everywhere.
• Analytics is embedded.
• Simple – minimalist in design. No training to learn to use.
What Has Really Changed?

- Examples of Human Resources Applications:
  - BetterWords
  - Reflektive
  - Globoforce
  - Limeaid
  - Virgin Pulse
  - Taleo
  - SuccessFactors
  - Cornerstone
Human Resources Analytics
Human Resources Analytics

Artificial Intelligence

• What is It?
  • Branch of computer science dealing with the simulation of intelligent behavior in computers.
  • The capability of a machine to imitate intelligent human behavior.

• Examples:
  • Siri
  • Alexa
Human Resources Analytics

Using Artificial Intelligence in Recruiting

• Greater level of maturity of Artificial Intelligence tools in recruiting space than other areas of HR.

• Progress in using Artificial Assistants used to help improve the candidate experience.
  • Uses natural language technology to ask questions of candidates based on job requirements, answers applicant questions, and updates on hiring status.
  • Answers questions around the clock through SMS, Facebook, Skype, email or through browser window.
  • Facilitates engagement with applicants and improves candidate experience.
  • Inroads being made in vendors’ video-interviewing platforms.
Examples of Artificial Intelligence in Recruiting:

- **Hire IQ** – Uses voice analytics.
- **Engage Talent** – Combines news data with workforce data to determine the odds that people already holding certain jobs may be looking elsewhere.
- **RAI** – Uses natural language similar to Amazon’s Alexa.
- **SenSay Analytics** – Uses bots to detect and respond to emotions.
- **Talla** – Designed to answer HR service desk questions.
Human Resources Analytics

Big Data

• Analysis of large amounts of mostly human-generated data to support longer-duration use cases.

• Tools that exploit large datasets and machine learning techniques altering how employers manage workforces.
What Does “Big Data” Mean in Employment Context?

- Radically altering how employers manage their workforces.
- Using highly granular data about individual workers, plugs into algorithms claim to predict future job performance.
- Affects who gets interviewed, hired, or promoted.
- Examples:
  - Employers using data about workers’ health habits to predict health risks in their employees.
Human Resources Analytics

Types of Data Used for HR Analytics:

• **Health Data**
  • Used to evaluate programs’ effectiveness, determine gaps in coverage or benefits and improve programs.
  • Need to obtain consent.
  • Ensure enough participation to avoid pinpointing data.
  • Look at organization as a whole, not subgroups.
  • Don’t focus on particular characteristics like conditions, age, pregnancy, etc.

• **Predictive-Performance Analytics**
  • Use internal data to assess potential employee turnover.
  • But…same data can be used to influence firing and promotion decisions.
  • Although seems proactive…recipe for unfair actions and lawsuits
Human Resources Analytics

Pros and Cons

• Pro: Fairer decisions by relying on neutral data.
• Con: Risk of building algorithms based on inaccurate, biased or unrepresentative data.
• Can produce outcomes biased on protected characteristics.
Human Resources Analytics

Internet of Things ("IoT")

• Technology architecture connecting technologies together to perform actions by using many different technologies in a specific way to do something new.

• Estimated that almost 60% of the market will end up in corporate or business applications.
Human Resources Analytics

• Examples of IoT Outside of Workplace:
  • Cameras that watch traffic.
  • Stress gauges monitoring bridges.
  • Thermostats that monitor and regulate temperature.

• Examples of IoT Inside of Workplace:
  • IoT sensors placed throughout a factory to monitor productivity or issues.
People Analytics

- HR strategists originally conceived “people analytics” as a way to correlate information such as employee engagement, performance ratings, and other work-related activity.
- IoT technology fundamentally changing the practice.
- Now possible to gather data about workplace activity that was previously invisible to managers and employees.
Examples of IoT Used for People Analytics:

• Use wireless access points and team codes to help workers find empty desks near colleagues.

• Data broken down by task type helps individuals understand when they perform certain tasks best and schedule meetings when group most likely to be engaged.

• Kiosks outside of conference rooms allow for immediate rating of the quality of a meeting on a 1-5 scale.

• Managers can see aggregated performance data for a team.

• Automated adjustments to cooling and heating based on presence.

• Mapping tone of voice and rate of gesture allows managers to see when they are helping promote employee engagement versus hurting team cohesion.
Human Resources Analytics

Wearables in the Workplace

- **Fitness Trackers:**
  - Allow employees to share calories, steps and other fitness activities.
  - Creates competitions for healthy living and exercise.

- **Sociometric badges are on the horizon:**
  - Use information about employee tone of voice and motion to understand what causes stress at work.
  - Creates a “mood meter” to help rearrange the office, make meetings better, and identify leadership behaviors that improve engagement.
  - Growth of disciplines such as organizational network analysis and people analytics emerging as new employer tools
Human Resources Analytics

Purposes of Wearables in the Workplace

• Offer new ways to measure productivity and safety
• Give insurers ability to track health indicators and habits
• Collect data on health and movement

Concerns:

• Mandated use of on-the-job wearables likely legal, but raises ethical and legal headaches
Human Resources Analytics

Implementing Wearables

- Almost 75 percent of employees already believe employer is capturing data about them without their knowledge.
- Managers cannot discipline on telematics data alone. Need to understand how to use the data.
- Need to identify specifically what problem you are trying to solve, what data you need, and then limit information gathered in more precise way.
- Promises of confidentiality notwithstanding, what is employer supposed to do with potentially compromising data is in the system?
- How can employer prove information never invoked in annual review or adverse actions?
Human Resources Analytics

Wearables in the Workplace

• **Best Practices**
  - Hire third-party provider to maintain data and only receive anonymized data
  - Have a policy stating job related reason for collecting the data and limits on its use.

• **New and Unexpected Uses:**
  - Proactively detecting health issues through sensors.
  - ADP, Cornerstone and SAP developing new application platforms.
Case Study on Sociometric Badges

- **Deloitte Study:**
  - Volunteers wore sociometric badges measuring location, voice and movement.
  - Devices could hear voice tones and deduce when people under stress.

- **Results:**
  - Cross-disciplinary teams are higher-performing and more engaging than when service lines work alone.
  - Offices with more windows and more light promote more “happy people”
  - Large conference rooms are more conducive to positive meetings.
  - People tend to prefer to work in smaller groups, and working physically closer to others increases enjoyment and productivity.
  - Deloitte used findings to redesign all major offices and teams.
Managing the Effects of Technological Changes
Managing the Effects of Technological Changes

Hiring Concerns

- Many managers “Google” applicants.
- Considered “best practice” or natural “due diligence.”
- Risk of finding posts in which applicant protected information.
- Some sites give candidate the ability to determine whether you’ve reviewed his or her web page.
- Search not unlawful per se, but fuels discrimination claim.
- Accusation of unlawful consideration even if not hired for legitimate reasons.
- Maintain policy prohibiting managers from casual web searches.
Managing the Effects of Technological Changes

Spying Concerns

- With devices that record audio, video or location data, employers will need a firm policy on when to switch them off.
- Ability to track employee’s precise location and physiological activity could have a chilling effect on protected concerted activity under NLRA.
- Have policy disabling tracking or requiring surrendering devices outside of working time.
- For workplaces where there is a union, wearable technology and any form of surveillance system should be mandatory subject of bargaining.
Managing the Effects of Technological Changes

Burnout

• Too many technological advances are contributing to employee burnout at worse rates than it's ever been.
• Average workweek is 47 hours.
• Answering calls or emails outside of work is the new norm.
• Constant pressure to adapt to new technology, e.g. – conference-booking software or robotics.
• Organizations take some steps to manage employee burnout, but do little to proactively manage burnout.
• Fuels absenteeism, saps productivity, sabotages retention efforts.
Managing the Effects of Technological Changes

Communication Policy

• Successfully integrating Millennials into workforce requires a high degree of texting and substantial emailing. New workers need clear expectations.

• Important to develop policies on the methods workers should use to communicate.

• Address what is appropriate in what circumstances.

• Explain types of employee and manager communications are permissible by text, email, phone and in-person meetings.
Managing the Effects of Technological Changes

Cyber Security - Role of HR

- Average person discriminates between untrustworthy and truthful messages at a level only slightly better than chance.

- Cyber security training needed.

- Work with insurance brokers and legal counsel to ensure adequate coverage.

- Data Breaches: Prepare Incident Response Plan.
Legal Concerns Prompted By Changing Technology
Legal Concerns

General Challenges

• Data is the lifeblood of AI. Biggest barrier to true AI is lack of good data and biggest organizational risk is not understanding context of that data.

• Still an open question whether data analytics help or hinder workplace diversity.

• As employers turn to productivity data to justify raises, promotions and firings, such data becomes key in employer = employee litigation.
Legal Concerns

EEOC Perspective

• Chairperson Jenny Yang’s Recent Remarks:
  • “Big Data has the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions.” BUT…
  • “At the same time, it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity.”

• EEOC is watching. Likely area of enforcement focus in the future.
Legal Concerns

Discrimination Laws Implicated

- Examples: ADA, ADEA, GINA, Title VII
- Disparate Treatment: Unlawful differential treatment could be based on big data analytics.
- Disparate Impact: Use of big data analytics to screen job applicants or take other adverse action in a way having a disparate impact on protected group.
Legal Concerns

ADA Considerations

• Technology presents ADA challenges for employers in virtually any industry.

• Example:
  • Customer service representative claims that he needs to work from home due to an unusual sensitivity to scents in the workplace or due to anxiety.
  • Twenty-five years ago, it’s unlikely he could have performed the essential functions of his position at home.
  • With today’s technology, question of whether the employer is willing to invest in an at-home workstation to accommodate him.
  • Many factors affect whether this investment is required as a “reasonable accommodation” under the ADA (e.g. cost, size of employer, etc.)
Legal Concerns

National Labor Relations Act Considerations - Social Media

• Intersection of technology and the NLRA frequent issue in past few years.

• NLRB has issued series of opinions limiting the ability of employers (unionized and non-union) to discipline employees for social media posts that are critical of the employer.

• NLRA protects the rights of employees to engage in “protected concerted activities”

• Employers should have written policies governing social media and internet postings.
Legal Concerns

National Labor Relations Act Considerations - Surveillance

• Does unionized employer have right to surveil employees?
• Can employees use company-provided email to engage in union activities (e.g. to organize a union meeting)?
• Can employers unilaterally implement technology that monitors employee behavior then render disciplinary action based on the data it generates?
Legal Concerns

Recent NLRB Decisions

• 2015 Whole Foods Case
  • Employer had two rules prohibiting employees from secretly recording conversations without prior approval.
  • Intent was to “eliminate the chilling effect on the expression of views” that might occur when someone is being recorded.
  • Board held a reasonable employee might construe rule to prohibit section 7 activity.

• 2016 T Mobile Case
  • Employer had rule prohibiting employees from making communications in the workplace.
  • Similar ruling.

• Both pending appeal.
Legal Concerns

Recent NLRB Decisions (Continued)

• 2006 Rogers Electric Case
  • Board found that mere fact that an employer owns or leases an electronic device (e.g. – phone) does not mean observation of employee use doesn’t constitute surveillance or give the impression of surveillance if observation is out of the ordinary.
Legal Concerns

Fair Labor Standards Act (FLSA)

• Failure to understand the FLSA implications of business technology can quickly generate substantial wage liabilities for employers.

• Smartphones and other personal electronic devices are the primary risks.

• The U.S. Department of Labor has developed a smartphone app that enables employees to track their off-the-clock work for the very purpose of holding employers accountable for these extra work hours.
Legal Concerns

Workers’ Compensation (WC)

• If an employee engages in off-the-clock work by responding to customer calls and emails after hours, chances are that an injury he sustains at that time would be covered by workers’ compensation.

• The classic example here is the sales employee who takes a call from a prospective customer while driving.

• In many jurisdictions, if the sales employee wrecks his car while engaged in a work-related call, his injuries will be considered “work-related” and compensable under WC laws.

• Many employers prohibit use of cell phones while driving or require use of hands-free technology.
Thank you!