Hot Topics in Employment Law

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Hot Topics in Employment Law

There is no shortage of employment law issues that could be qualify as hot employment law topics. With the changes in Washington and the nonstop 24-hour news cycle, employment law issues continue to be frontline news. Below are some of the current topics, but it is by no means an exclusive list:

1. **Sexual Harassment and the “Me Too” Response. Is this a Tipping Point?**

   Not since 1991, when Anita Hill testified before Congress, has sexual harassment taken such a front seat in the media and at the workplace. Notwithstanding the absence of any meaningful substantive changes in the law, employers are now again searching for new ways to defend, investigate and prevent these claims. Companies continue to issue statements of zero tolerance and undergo intensified efforts to do training, but the power imbalance and inability to train hormones out of the workplace continues to be an uphill battle.

   It is apparent that an anti-harassment policy is not enough; rather companies need to fix the corporate culture. Policies and training to prevent sexual harassment become somewhat irrelevant if they are not backed up by the corporate culture. In the absence of true “buy-in” from management and the C-suite, the company policies become ineffective or worse. To be effective, there has to be complete and total buy-in at all levels so that potential offenders have a true reason to fear real consequences. To fully change the culture, companies need to train all employees and executives, not just managers – as many companies do.

   Policies are important if drafted correctly, but they will not work if they focus solely on illegal actions. Instead, employers should give specific examples of behavior that will not be tolerated, even if such actions are not “illegal.”
Companies should consider including examples such as inappropriate remarks about an employee's appearance or provocative jokes/comments will not be tolerated. It is critical that workplace comments and conduct be nipped in the bud before they escalate – something that is easier said than done.

Though seemingly obvious, many policies don’t provide multiple options for reporting harassment or discrimination. Although that sounds simplistic, policies are repeatedly designed in such a way that employees are often required to first report the matter to their immediate supervisor. Companies should consider having an outside entity provide a hotline that can pass along instances to be investigated. And of course all policies need to unequivocally reassure employees that no retaliation will result if an employee brings forward a claim.

a. Human Resources Alone Cannot Stop Sexual Harassment.

In a perfect world, someone who experiences harassment at work would head directly to Human Resources, where a sensitive, well-trained professional could conduct an immediate and impartial investigation that would be followed by appropriate action to address any prohibited conduct from continuing. However, numerous high-profile sexual harassment cases reveal that Human Resources are frequently not equipped to handle serious workplace harassment claims. Some of that inability stems from the second-class citizenship that Human Resources experiences from senior management. And sometimes it relates to skills and talents of the Human Resources managers. Employees often look at Human Resources as a tool of management, not as an advocate of employees.

Gender also plays a role as it relates to the dynamics within a company when it comes to sexual harassment. Nearly three-quarters of HR managers are women according to Bureau of Labor statistics, which can lead to harassment claims being met with skepticism by a leadership that is dominated by men.
b. **EEOC Guidance Update.**

The EEOC has indicated that the Commission has unanimously approved new Guidelines as of November 7, 2017. After that Guidance moves through the Office of Management and Budget for approval, it will become public. Attached is the latest statement from the EEOC on its website identifying promising practices for preventing harassment. It contains four points:

1. Leadership and accountability;
2. A comprehensive and effective harassment policy;
3. An effective and accessible harassment complaint system; and;
4. Effective harassment training.

2. **Developments regarding Sexual Orientation Discrimination.**

Title VII explicitly prohibits discrimination based on an employee or applicant’s race, color, national origin, religion and most critically in this arena - sex. Sexual orientation is not expressly included as a Title VII protected class and the case law thus far has been focused on whether sexual orientation discrimination is encompassed by Title VII prohibition of sex discrimination. The Equal Employment Opportunity Commission has expressed its position that Title VII does provide such protection.

Prior to 2017, the Circuits that addressed this question have held that sexual orientation was not enforceable under Title VII. However, within a span of just a few weeks in March and April 2017, cases decided by the Second, Seventh and Eleventh Circuits, respectively, have paved the pathway for this issue to finally be resolved by the Supreme Court.
Perhaps the most significant decision came from the Seventh Circuit in *Hively v. Ivy Tech, Cmty, Coll.* of Indiana, 853 F.3d 339 (7th Cir. 2017). Creating a Circuit split, the en banc decision held that discrimination based on sexual orientation is unlawful sex discrimination in violation of Title VII. The Court emphasized that it was not considering whether to “amend” Title VII to add sexual orientation as a protected class, but whether the existing protection against discrimination based on sex also encompassed sexual orientation. Judge Posner, in a concurring opinion, indicated that while Title VII sex discrimination would not reasonably have been understood to encompass sexual orientation upon its passage in 1964, the majority’s decision was a permissible exercise in “judicial interpretative updating” to ensure that the statute reflected intervening developments in social attitudes.

The Second and Eleventh Circuits also considered the Title VII sexual orientation question. A critical difference between those cases and the Seventh Circuit case, however, was that the Second and Eleventh Circuit cases were decided by three judge panels. Therefore, those courts were bound by Circuit precedent. Whereas the Seventh Circuit, sitting en banc, had the discretion to reexamine its prior holdings. *Christiansen v. Omnicom Grp. Inc.*, 852 F.3d 195 (2nd Cir. 2017); *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) pet. for cert docketed by __________ U.S._________ (Sept. 11, 2017).

So, changes continue. If the Supreme Court accepts certiorari in the *Evans* or another case, then this issue may finally be resolved – at least in the courts.

3. **EEOC’s Energized Enforcement and the ADA.**

September, 2017 the Equal Employment Opportunity Commission (“EEOC”) filed 86 new lawsuits against employers. This is the largest number of lawsuits filed by the EEOC in a single month in the past six years, and represents 45% of the
lawsuits the EEOC filed during all of fiscal year 2017.\textsuperscript{1} Thirty-six (36) of these lawsuits include claims of disability discrimination, with at least 10 targeting leave and other policies that are alleged to have been inflexibly applied, and others challenging pre or post-offer medical inquiry examinations that the EEOC believes improperly screened out disabled workers. There were 17 lawsuits targeting alleged sexually hostile workplaces and another 5 took aim at workplaces where African American employees alleged to have been subjected to a racist work environment.\textsuperscript{2}

Is Additional Time Off A Reasonable Accommodation?

In a recent Seventh Circuit decision, the United States Court of Appeals rejected a multi-month leave of absence request as not being a reasonable accommodation. \textit{Severson v. Heartland Woodcraft, Inc.}, 872 F3rd 476 (7th Cir. 2017); \textit{See also, Delgado and Echevarria v. AstraZeneca Pharm. LP}, 856 F3rd 119 (1st Cir. 2017) (affirming summary judgment to dismiss plaintiff's claim for disability discrimination because plaintiff's request for an additional 12 months of medical leave after she exhausted her FMLA entitlement was not a reasonable accommodation under the ADA). In \textit{Severson}, because of the physical nature of the employee’s work, the employee suffered back pain for which he took a 12-week leave of absence under the FMLA. On the last day of his leave of absence, the employee had back surgery and required an additional two to three months away from work to recover from surgery. The employee requested that his employer continue his medical leave of absence. The employer declined this request because the employee had already depleted his FMLA entitlement. Subsequently the employer terminated the employee's employment. The

\textsuperscript{1} The EEOC, like all federal agencies, operates on a fiscal year that ends September 30. It is common that during the month of September for the EEOC makes a concerted effort to address its docket by dismissing pending charges and filing lawsuits so that its annual reports to Congress will show progress on reducing the backlog of charges, and demonstrating its enforcement of EEO laws.

\textsuperscript{2} Notably, of the 86 lawsuits, only 26 were brought on behalf of multiple workers with the vast majority (70%) being brought on behalf of an individual employee who is alleged to have been the victim of discrimination, harassment and/or retaliation. This runs somewhat counter to the EEOC’s strategic plan to pursue claims that seek to remedy discrimination for a broad class of individuals and to eliminate systemic discrimination. This robust approach to litigation may, in part, be a reaction to announced intentions to reduce funding for the EEOC and its counterpart the OFCCP.
employee sued the employer for violating the ADA by failing to provide a reasonable accommodation of three months leave of absence. This case presented the court with the question of whether a three-month medical leave of absence was a reasonable accommodation.

The Seventh Circuit in denying the multi-month leave of absence as a reasonable accommodation differentiated between the purpose of the FMLA medical leave entitlement statute and the ADA common anti-discrimination statute. The Seventh Circuit ruled that recognizing a multi-month leave as a reasonable accommodation impermissibly commingles the statutes’ purposes. As defined by the ADA, a reasonable accommodation allows an employee to perform the essential functions of the job. Stated differently, the accommodation allows the employee to work. Therefore, if an employee is on a multi-month leave that employee is not working – and thus is not a reasonable accommodation.

It remains unclear as to what impact the Seventh Circuit decision will have beyond the scope of that Circuit. The EEOC continues to maintain that a reasonable accommodation can include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. Moreover, the EEOC’s recent court filings underscore that the Agency plans to continue to challenge employers as they struggle to implement the ADA when considering and designing accommodations. The ongoing tension that businesses face when an employee is out of work for his/her own medical condition under the FMLA, but is still unable to return after 12 weeks and needs more time off presents a reoccurring dilemma. The vexing question of “how much time is reasonable” has no clear answers because it is always highly fact specific.

4. **Obama’s Administration Overtime Rule**

Once the topic of many seminars and training in 2016, the overtime rule and adjustments to the salary threshold for exempt status has become somewhat of a
footnote. However, the stage is now set for the Department of Labor to issue a proposed rule in 2018. In late October 2017, the Department of Justice, on the behalf of the Department of Labor, filed a notice of appeal to a district court’s opinion that the FLSA overtime rule was invalid. The DOL intends to ask the Fifth Circuit to “hold the appeal” in abeyance while the Department of Labor undertakes further rulemaking to determine what the salary levels should be. This move by the Department of Labor paves the way for it to maintain its authority to establish overtime regulations and at the same time allows them the opportunity to review the more than 140,000 public comments recently submitted. If the DOL’s motion is granted and a new overtime is eventually published, they Department is likely to then ask the Court to declare the litigation moot.

The overtime rule which was blocked before it went into effect doubled the annual salary threshold level – to more than $47,000 – under which employees qualify for overtime wages for all work beyond 40 hours in a week. There is wide belief that the Labor Secretary, Alexander Acosta, acknowledges that the current threshold of $24,000 is too low and it is anticipated that the updated rule will have a salary range between $30,000 to $35,000.

The Supreme Court Hearing Oral Argument on Class Action Waivers
At oral argument in a case that will decide the validity of collective and class action waivers in arbitration agreements, the Justices of the Supreme Court appeared divided. The consolidated oral argument in the trio of cases in the U.S. Court of Appeals from the Fifth, Seventh and Ninth Circuits focus on the intersection of the National Labor Relationship Act (“NLRA”) and the Federal Arbitration Act (“FAA”). It is expected that the Court will issue at least two opinions and that the release will be sometime in January or February 2018.