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The Law@Work

Winter 2018

Harassment

The #MeToo Movement – Timely Reminders for Employers

By Megan S. Glowacki and Lindsay Nichols

Although the #MeToo movement has brought to the forefront allegations of sexual harassment in the workplace, the issue is not limited to the bright lights of Hollywood or the newsroom. All employers, of any size and in any industry, must be aware of harassment in the workplace. The attention that the media has brought to workplace harassment may have several consequences. Employers may see an increase in the number of allegations of harassment, and perhaps a spike in jury awards where harassment liability is found. In addition, state and local governments may enact laws that impact employers who face harassment claims. This combination should encourage employers to act early to avoid harassment allegations.

Update Your Company's Anti-Harassment Policy

While most employers have an anti-harassment policy in place, it should be reviewed and updated at least annually. Even if there are no major changes to the law since the policy's last review, other important societal changes (for instance, the prevalence of social media use) may need to be addressed. Employees should be provided the policy and acknowledge its receipt in writing.

Conduct Training

A harassment policy that sits idly is of little value if employees are not aware of the policy and their obligations under it. All employees should be educated on the anti-harassment policy. In particular, supervisors should be well-versed on their responsibilities and potential liability for engaging in harassment or failing to report concerns of harassment. In some jurisdictions, training is mandatory. Due to the current environment, we suggest that now is a good time to review the

Harassment
The #MeToo Movement – Timely Reminders for Employers 1

National Labor Relations Board
What's New for Year Two: The NLRB Under President Trump 3

Employee Benefits
Tax-Reform Impacts on Employer Provided Fringe Benefits 5

Fair Labor Standards Act
DOL'S New Intern Test Takes Courts' More "Flexible" Approach 7

Recent News & Related Articles

- Fifth Circuit Vacates DOL Fiduciary Rule
- Biometric Data: Convenient or Cause for Concern?
- Employment Legislation Outlook
- Digital Workplace Discussions and Employer Liability
- #MeToo Movement Highlights Importance of Employer Response to Sexual Harassment
- DOL Sides with Circuit Courts, Adopts New Intern Test

For more information on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article, or contact Nancy M. Barnes, executive editor or Matthew R. Kissling, associate editor. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

company's policy, make any needed revisions and conduct anti-harassment training, which should be repeated every two years.

Review Reporting Structure and Be Prepared to Investigate

An employer's "reporting structure" is the internal mechanism that enables employees to report harassment. For example, some companies have anonymous hotlines, some require that incidents be reported to Human Resources and others direct employees to report up the chain of command. There are even phone apps that can be used to report harassment. The goal is to make it easy for employees to complain. And, when a report does come in, the designated individuals should be fully trained and prepared to respond promptly.

Watch for Legal Developments

Several states are contemplating legislation in the wake of recent sexual harassment headlines. New York, California, New Jersey, Pennsylvania, South Carolina and Washington are considering passing laws that limit the use of non-disclosure and mandatory arbitration clauses in employment contracts and settlement agreements. Proponents of such laws argue that the use of these types of clauses keeps bad behavior out of the public eye and doesn't effectuate widespread change. Opponents suggest that without private mediation, employers and employees will be forced to make very private subject matter public. We will monitor legal developments in this area and provide updates as they become available.

With any questions, please contact Megan Glowacki or Lindsay Nichols.

National Labor Relations Board

What's New for Year Two: The NLRB Under President Trump

By Eric S. Clark and Candice S. Thomas

President Trump nominated Marvin E. Kaplan and William J. Emanuel to fill the vacancies on the NLRB during the summer of 2017. These appointees were confirmed in August and September of 2017, respectively. These recent additions, in conjunction with Chairman Phillip Miscimarra, resulted in a Republican majority on the NLRB for the first time in nearly a decade. The Republican majority was short-lived, however, as Miscimarra's term expired on December 16, 2017. Still, the newly formed majority did not delay and reversed several Obama-era decisions during those three months. Now that Miscimarra's term has expired, and until a new nominee is confirmed, the NLRB is back to a 2-2 split of Republicans and Democrats going into President Trump's second year.

Here is a recap of the biggest decisions of the Trump NLRB so far:

***The Boeing Company*: Workplace Rules and Employee Handbook Policies**

In overturning the 2004 *Lutheran Heritage* standard, the Board established a new balancing test to determine whether workplace rules unlawfully interfere with employees' Section 7 rights. Now, when faced with a facially neutral rule or handbook provision, the Board will consider the nature and extent of a challenged rule's potential impact on employees' National Labor Relations Act rights and the employer's legitimate justifications associated with the rule. The Board provided three classifications of employee workplace rules:

- Lawful rules, which cannot be interpreted to interfere with workers' rights because business interests outweigh any interference.
- Rules requiring individualized scrutiny because they may be legal in some cases, depending on their application.
- Unlawful rules, which are always illegal because business interests do not outweigh any interference with employees' rights.

***Raytheon Network Centric Systems*: Past Practice Determines Unilateral Mid-Term "Changes"**

Reverting to its 1964 *Shell Oil* decision, the Board once again holds that a revision to the terms and conditions of employment is not a "change" if it is consistent with past practice. In the *Raytheon* case, the Board sided with an employer who adjusted its employee health care benefits without first bargaining with the union over the changes. The Board determined that because the unilateral modifications to the health care benefits were a continuation of the employer's past practice of making similar changes at the same time each year, the employer did not have to bargain with the union over the unilateral decision.

***PCC Structurals*: Micro-Unit Standard**

The Board also reversed its stance regarding "micro-units." The NLRB overturned its 2011 *Specialty Healthcare* decision and reinstituted the prior standard for unit scope. Under the previous standard, employers were required to show that the employees they wanted to include in a particular bargaining unit shared an "overwhelming community of interest" with the proposed unit. Now, the determination of a bargaining unit depends on whether the petitioned-for employees share a community of interest sufficiently distinct from excluded employees to justify their own unit.

The NLRB General Counsel's Office issued immediate guidance on *PCC Structurals*. Because of the "extraordinary" change in the law, Regional Directors have been granted discretion to entertain requests to revisit a unit determination as defined under a consent election agreement or a direction of election in a currently active case—whether the case is in pre-election or post-election status. Regional Directors are also authorized to delay pre-election hearings to resolve any "appropriate bargaining unit" issues.

***Hy-Brand Industrial Contractors:* Joint Employer Standard**

The expanded joint employer test temporarily came to a halt as the Board overturned the 2015 *Browning-Ferris* decision in December 2017. For a brief moment, the test for joint employer status returned to the pre-*Browning Ferris* standard and required proof that alleged joint employers had actually exercised joint control over essential employment terms—rather than merely having a "reserved" right to exercise control. However, on February 26, 2018, the Board unanimously vacated the *Hy-Brand* decision due to a finding in

an Inspector General report, which opined that Board Member Emanuel should have been disqualified from participating in the decision. For now, the *Browning-Ferris* test once again controls joint employer status.

New NLRB General Counsel Follows Suit of Fellow Trump Nominees

In addition to the confirmations of Marvin Kaplan and William Emanuel, President Trump's nominee for NLRB General Counsel, Peter Robb, was confirmed in November 2017, and he did not hesitate in taking action. On December 1, 2017, Robb issued a sweeping memorandum that rescinded several Obama-era memoranda related to employer rules, mandatory default language in board settlements, the extension of employee usage of a company's email to other electronic systems, and the legality of employer statements made to employees during organizing campaigns. He also mandated field offices to request advice on cases involving significant legal issues decided in the last eight years, including unlawful employer handbook rules, joint employer status, and unilateral changes consistent with past practice.

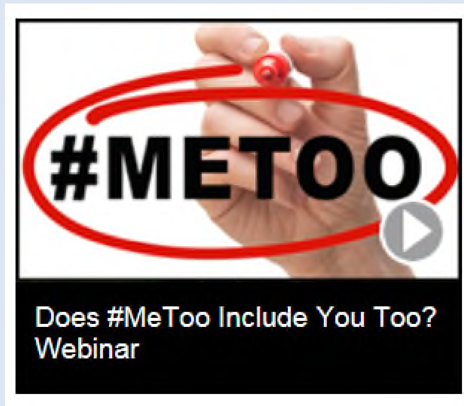
On the Horizon

The NLRB and the NLRB General Counsel have noted that they will also reconsider other Obama-era policies, including the legality of confidential severance agreements and the current "blocking charge" policy. Additionally, the NLRB has sought public input on its "quickie election" representation regulations which significantly reduced the time between filing a representation petition and the subsequent election from about six weeks to an average of 14 to 28 days.

Conclusion

Now that we have a better sense of what a Trump NLRB looks like, we anticipate a more employer-friendly approach to labor relations than we have seen in a while. As we move further into 2018, we expect to see this Board pick up steam and tackle more of the lingering issues that the General Counsel highlighted at the end of 2017.

Please contact Candice Thomas or Eric Clark with any questions.



Detailed allegations of sexual harassment and abuse have featured prominently in the news of late, and the use of #MeToo on social media has highlighted the prevalence of these issues in organizations of all sizes and industries. Even companies with strong anti-harassment and anti-discrimination policies may still be exposed to claims and liability.

In late February and early March, Thompson Hine presented a series of robust seminars on preventing and responding to sexual harassment and discrimination in the workplace. Topics included additional steps that companies can take to help prevent sexual harassment and discrimination from occurring and how to respond if allegations arise.

Visit YouTube to watch the webinar we recorded on February 27, 2018.

Employee Benefits

Tax-Reform Impacts on Employer Provided Fringe Benefits

By Mark G. Kroboth and David W. Uhlendorff

In an effort to stimulate economic growth, the Tax Cuts and Jobs Act (Act) cut corporate tax rates from 35 to 21 percent, effective for tax years beginning after December 31, 2017. However, in order to avoid further increasing the federal deficit, the Act includes several revenue-raising measures aimed at countering the loss of corporate tax revenue. While it had long been speculated in the employee benefits arena that such revenue-raising measures would come in the form of retirement plan reform, namely the loss of traditional pre-tax deferrals in favor of Roth contributions, 401(k) plans came away intact. Instead, employer provided fringe benefits ultimately proved to be targets for change.

Transportation Fringe Benefits

Under previous tax law, employers could provide "qualified transportation fringe" benefits tax-free to employees and deduct the expense of doing so. Common examples of "qualified transportation fringes" include qualified parking, transit passes, commuter highway vehicle transportation and qualified bicycle commuting reimbursement. Under the Act, tax-free qualified bicycle commuting reimbursements are suspended until 2026, and while employers can continue to provide the remaining qualified transportation fringe benefits tax-free under Section 132(f) of the Internal Revenue Code, the expense of providing these benefits to employees is no longer deductible by an employer after 2017. Therefore, in 2018, while employers can continue to provide employees with qualified parking and transit benefits of up to $260 per month tax-free, employers cannot take a deduction for these expenses. However, if an employer chooses to include a qualified transportation fringe benefit in an employee's income, the employer may deduct the expense of providing the benefit.

Moving Expenses

Prior to enactment of the Act, an individual who incurred moving expenses in connection with beginning employment at a new place of business at least 50 miles away from his or her former residence could claim a deduction for such

expenses or be reimbursed for such expenses by his or her employer on a tax-free basis. Under the Act, neither a deduction nor reimbursement on a tax-free basis is available for moving expenses incurred after December 31, 2017 and before January 1, 2026. However, a deduction is still available for active duty military members whose moves are a result of military orders.

Entertainment Expenses

Under previous tax law, employers were permitted to deduct 50 percent of certain entertainment, amusement and recreation expenses, provided that they were directly related to the employer's trade or business activity. Under the Act, no deduction is permitted for entertainment-related expenses regardless of any nexus with the employer's trade or business. This exclusion extends to amounts paid for membership or dues for clubs organized for business, pleasure, recreation or other social purpose.

Employer Credit for Paid Family and Medical Leave

While many of the Act's fringe benefit changes are revenue-raising measures, the Employer Credit for Paid Family and Medical Leave provides a tax credit for certain qualifying employers. In 1993, Congress passed the Family Medical Leave Act which allows eligible employees to take up to 12 weeks of leave during any 12-month period. However, there is no requirement that the employee be paid during the approved absence. The Employer Credit for Paid Family and Medical Leave provides a tax credit to employers in order to incentivize certain paid leave programs.

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In order to qualify for the credit, an employer must have a written policy which provides at least two weeks of annual paid family and medical leave to full-time employees. The policy must also include a pro rata amount of paid leave for part-time employees. The amount paid during the leave must be no less than 50 percent of the employee's compensation. If the policy provides paid leave equal to 50 percent of an employee's compensation, the employer will receive a 12.5 percent credit. The tax credit amount increases by 0.25 percent for each 1 percent of compensation paid while on family medical leave in excess of 50 percent, with a maximum credit of 25 percent if an employee is paid 100 percent of compensation while on leave. The maximum amount of leave eligible for the credit is 12 weeks per employee per calendar year.

An employee will qualify for paid family leave if he or she has been employed by the employer for at least one year and his or her compensation in the prior year did not exceed 60 percent of the compensation threshold for highly compensated employees. For the 2018 tax year, employees who have been employed for at least one year and who had total compensation of $72,000 or less in 2017 would be eligible employees.

However, there are further limitations to the credit. If an employee is required to be paid for his or her leave due to state or local laws, the credit is not available. Additionally, leave which is paid due to vacation, personal leave or sick leave is not eligible for the credit. Finally, the credit is only applicable for the 2018 and 2019 tax years.

Plan administrators should work with counsel to evaluate employer fringe benefit and paid family leave programs to ensure they are structured to comply with the Act and align with the employer's talent attraction and retention goals.

Please contact Mark Kroboth or David Uhlendorff with any questions.

Employee Benefits Roundtable Series

Dayton

Multiple Dates
8:30 – 10:30 a.m.

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Tuesday, October 16 – *What's New for 2019?*

Please visit ThompsonHine.com/events for more information.

Fair Labor Standards Act

DOL'S New Intern Test Takes Courts' More "Flexible" Approach

By Lindsay Nichols

Most of us have been involved with an internship program at one time or another—either in our workplace or through our own participation—but this year, employers will want to pay special attention to internship programs, as the U.S. Department of Labor (DOL) has issued new guidance about intern classification. On Friday, January 5, 2018—right in time for hiring season for summer internship programs—the DOL announced that it will conform to the string of federal court rulings that rejected the DOL's six-part intern test in favor of a primary beneficiary test.

Why This Matters

Employee misclassification (for example, classifying non-exempt employees as exempt employees or classifying employees as unpaid interns) can open an employer up to liability for unpaid wages and overtime claims as well as issues related to eligibility for benefits. For interns, this typically comes up in the unpaid internship context, where an unpaid intern alleges that during the course of an internship, he or she was actually functioning as an employee of the company, and thus, was eligible for at least minimum wage and, if applicable, overtime compensation. In recent years, unpaid intern lawsuits have plagued the high fashion and media industries, among others. Abiding by the intern tests used by courts and the DOL can help prevent liabilities for employers.

Out With the Old: The Six-Factor Test

In 2010, the DOL issued guidance as to whether unpaid interns are employees under the Fair Labor Standards Act (FLSA). Under the 2010 guidance, an intern is an employee unless ***all*** of the following factors are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In With the New: "Primary Beneficiary" Test

Several Courts of Appeals have considered the six-factor test too rigid and some (including the Second Circuit in the notable *Glatt v. Fox Searchlight Pictures Inc.* case) have adopted a new test, called the primary beneficiary test, that turns on which party (the intern or the employer) derives the primary benefit from the relationship. This test has three key features: (1) the test contains a focus on what the interns receive in exchange for their work; (2) the test allows for flexibility in examining the economic reality between the parties; and (3) the test acknowledges the difference between intern-employer relationships (typically containing some sort of educational or vocational benefit) and employee-employer relationships. The primary beneficiary test includes seven factors for courts to weigh and balance:

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1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Although several federal appellate courts have adopted the primary beneficiary test in lieu of the six-factor test, it appears the most recent court to do so, the Ninth Circuit in *Benjamin v. B & H Educ., Inc.*, No. 15-17147, 2017 U.S. App. LEXIS 25672 (9th Cir. 2017), may have been the tipping point for the DOL to change its position. That case involved whether cosmetology and hair design students in certain California and Nevada schools were also employees of those schools within the meaning of the FLSA. To date, the DOL has made an announcement on its website and issued Fact Sheet #71.

More to Come

The DOL's brief January 5th announcement promised additional information will be forthcoming: the Wage and Hour Division will update its enforcement policies to align with recent case law, eliminate confusion, and provide DOL investigators with increased flexibility to analyze internships on a case-by-case basis.

What This Means for Employers

The six-factor test required all six factors to be met (or the intern was an employee), while the primary beneficiary test asks courts to rely heavily on individualized facts and to weigh a number of factors to make the same determination. The primary beneficiary test has been considered by both courts and the DOL to offer increased flexibility to evaluate internships on a case-by-case basis. On the one hand, this suggests that the DOL is more committed to carefully considering individual internship programs—and to arriving at the correct result—than to broadly enforcing policies across varied industries and entities. However, on the other hand, the new test may not offer the same level of clarity and may introduce more of a "gray area" into the intern vs. employee analysis. Employers planning to design internship programs or hire interns may want to consult counsel to assist with navigating this development.

Please contact Lindsay Nichols with any questions.

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