
Texas Council
Risk Management Fund
LIABILITY WORKSHOP
Employment Law
January 26, 2018
The Westin Galleria Hotel
Houston, Texas

Texas Council Risk Management Fund

Employment Law

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AGENDA

7:00 a.m. Breakfast buffet in Plaza I next door to the Workshop

8:00 a.m. Introduction
George Patterson, Chief Executive Officer, Texana Center, and Chair, Risk Managers Advisory Committee, Texas Council Risk Management Fund

8:15 a.m. Legal Ruminations about Retaliation, Social Media, Discrimination and FLSA
Joel Geary, Shareholder, Vincent Serafino Geary Waddell Jenevein, P.C., Dallas

9:30 a.m. Sexual Harassment – Policy and Prevention
Pam Beach, General Counsel, Texas Council Risk Management Fund

Break – 10:15 a.m. to 10:30a.m.

10:30 a.m. Recent Trends and Cases in Discrimination Law
Tracy Graves Wolf, Partner, Vice Chair Employment and Labor Practice, Lewis Brisbois Bisgaard & Smith, L.L.P. Houston

11:30 a.m. Arbitration: Purpose and Process
Tracy Graves Wolf, Partner, Vice Chair Employment and Labor Practice, Lewis Brisbois Bisgaard & Smith, L.L.P. Houston

Luncheon – 12:15 a.m. to 1:00 p.m.

1:00 p.m. **ADA and FMLA Update**
Betty DeRieux, Partner, Capshaw DeRieux, Gladewater

Break – 2:00 to 2:15 p.m.

2:15 p.m. **What Makes Community Centers Different?**
Pam Beach, General Counsel, Texas Council Risk Management Fund

3:00 p.m. **Adjourn**

Safe Travels and Please Don't forget to do the evaluation and sign your continuing education sheets.

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Speaker Bios

Pamela L. Beach is an attorney in private practice in Houston. She provides legal services for the Texas Council Risk Management Fund. Her practice includes legal services for private providers of health care and assisting in cases involving psychiatric medical malpractice. Ms. Beach was previously general counsel for the MHMR Authority of Harris County and was an associate in a medical malpractice general defense firm. She is an experienced psychiatric nurse and has held administrative positions in mental health provider organizations. Ms. Beach is a frequent presenter on confidentiality and related topics at professional development workshops for health care professionals. Ms. Beach received her BSN from the University of Saint Thomas School of Nursing, Houston, Texas; her BA from the Plan II Liberal Arts Honors Program, The University of Texas at Austin; her MBA from the University of Saint Thomas, Cameron School of Business; and her JD from South Texas College of Law in Houston.

Elizabeth L. DeRieux is a partner in the law firm of Capshaw DeRieux, L.L.P., in Gladewater. Ms. DeRieux has a broad federal practice including commercial litigation, intellectual property, antitrust, and employment discrimination. She also represents several local government entities in a wide variety of non-litigation matters. Her background in appellate law informs all of her areas of practice with a focus on preservation of error in federal and state courts. Ms. DeRieux has also worked on post-conviction death penalty cases in federal courts. She is admitted to practice before the United States Court of Appeals, Fifth Circuit, as well as United States District Courts in Texas and Arkansas. Her prior professional experience includes associations with Brown McCarroll, L.L.P. and the Albritton Law Firm. She also has served as an Adjunct Professor of Criminal Justice at the University of Texas in Tyler. Ms. DeRieux received her BA degree from Lamar University and her JD from The University of Houston College of Law.

Joel Geary is a shareholder in the law firm Vincent Serafino Geary Waddell Jenevein, P.C., in Dallas. His practice areas include labor and employment law, professional liability, governmental liability, and other civil litigation issues. Over the course of his career, Mr. Geary has handled a diverse range of legal matters. He has represented clients in cases involving class action, commercial, and technology litigation. Mr. Geary also provides counseling to various types of firms on general commercial law, litigation risk management, and employment law issues. Mr. Geary has represented community centers in Texas in claims involving employment and governmental liability. He received his BA degree from the University of Tennessee and his JD from the University of Memphis.

Tracy Graves Wolf is a partner in the Dallas office of Lewis Brisbois and a vice-chair of the Employment & Labor Practice. She has extensive experience in employment law, commercial litigation, general liability, and intellectual property. She is board certified in Labor & Employment by the Texas Board of Legal Specialization.

Ms. Wolf has significant experience with the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), claims for discrimination under Title VII, and workers' compensation retaliation claims. She has also handled ERISA litigation ranging from COBRA litigation to fiduciary litigation and benefit discrimination litigation. Ms. Wolf has handled removals to Federal Court under ERISA and appeals in Federal Court of Appeals involving ERISA preemption. Additionally, she has extensive experience in dealing with the doctrine of qualified immunity. Ms. Wolf has handled appeals in front of the Federal Court of Appeals on issues ranging from qualified immunity to limitations and statutory construction with great success. In private practice, the clients she has represented have ranged from community college districts, school districts, and public utilities to private businesses. Ms. Wolf attended Baylor University School of Law, *Juris Doctor*, 1997 and Texas Christian University, Bachelor of Science in Political Science and Psychology, *cum laude*, 1992

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Some Thoughts on Employment Law

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The Claims We See Most Often

- Discrimination on the basis of a protected factor (race, gender, age, disability)
- Retaliation
  - Employee complains about perceived illegal discrimination (i.e., the above categories)
  - Whistleblower retaliation (employee reports illegal activity and adverse employment action follows)
- Fair Labor Standards Act
  - Improper Classification
  - Off-the-clock work

What follows: some ruminations on these and other topics I get asked about all the time....

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Rumination No. 1
Fair Labor Standards Act - Status of the "new" salary basis test

Background

- U.S. Department of Labor issued new rules concerning the salary basis test that were to go into effect on 12/1/16
  - **What is the salary basis test?**
    The executive, professional, and administrative ("EAP") exemptions from overtime requirements require, in addition to a demonstration that the employee performs certain duties, that the employee be paid a certain salary amount per week. If not paid this amount, employee was not exempt regardless whether they met the duties test.
    - Prior to 12/1/16: $455 a week ($23,660 annually)
    - Post 12/1/16: $913 a week ($47,476 annually)

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- The new rule was a priority of the Obama Administration
  - If implemented it would have moved many mid-level employees to non-exempt status; meaning they would have to be paid overtime for hours worked over 40
- Rule Enjoined in Texas – Several days before they were to go into effect, Judge Amos Mazzant (ironically, an Obama appointee) issued an injunction staying their implementation to give him time to evaluate their legality.
- Injunction Appealed – The DOL immediately appealed the injunction.
- Meanwhile . . in Washington – Somebody other than Hilary Clinton was elected
- Trump Administration revisits the rules – The Trump Administration signaled it would re-open comments on the rules and revisit whether the salary basis test should be adjusted.
- Meanwhile . . back in Texas – On 8/31/17, Judge Mazzant issued an order holding that the rules were invalid as a matter of law (DOL exceeded its authority). On 9/4/17, the Trump DOL indicated to court of appeals that it no longer desired to prosecute an appeal of the injunction.

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So, where are we now?

- DOL appealed Judge Mazzant's 8/31 decision invalidating the "new" rule but asked the Court of Appeals to stay the case "while the DOL undertakes further rulemaking to determine what the salary level should be." The case was subsequently stayed.
- Will a new salary level be implemented?
  - Maybe. Secretary of Labor Acosta has indicated that he *might* favor a hike to a range somewhere between $30,000-$35,000 (e.g., $33,000 = $635 a week).
  - Hard to know what will happen. Might be a year or more before we know.
- What should you do?
  - Just stay tuned.

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Rumination No. 2

Medical Inquiries and the Americans with Disabilities Act

Applicants

- Pre-Offer – Employer cannot make any disability-related inquiries or require a medical examination
- After a Conditional Job Offer (but before starting work) – Employer can make disability-related inquiries and conduct medical examinations as long as it does so for all entering employees in the same job category

Employees

- After Employment Begins – Employer can make disability-related inquiries and require medical examinations ***only*** if they are "job-related and consistent with business necessity"

Source: EEOC Enforcement Guidance – Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915.002 (7/27/00)

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What is a disability-related inquiry? (according to EEOC)

- Asking an employee whether she has (or ever had) a disability or how she became disabled or inquiring about the nature or severity of an employee's disability;
- Asking an employee to provide medical documentation regarding her disability;
- Asking an employee's co-worker, family member, doctor, or another person about an employee's disability
- Asking about an employee's prior workers' compensation history;
- Asking an employee whether he currently is taking any prescription drugs or medications, whether he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and
- Asking an employee a **broad** question about her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?)

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When is a disability-related inquiry or medical examination "job-related and consistent with business necessity"?

If employer has a "reasonable belief" based on objective evidence that (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat (to co-workers or customers) due to a medical condition.

- Also note: disability-related inquiries or medical tests are also authorized if necessary (1) in relation to a request for a reasonable accommodation under the ADA where the disability or need for accommodation is not known or obvious or (2) when the information is needed to determine whether to approve a request for Family & Medical Leave Act leave

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Example of an appropriate inquiry:

For the past two months, Sally, a case manager, had seen a third fewer clients than the average case manager in her unit. She has also made numerous mistakes in documenting her client interactions in client records. When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.

Based on Sally's explanation for her performance problems, the agency has a reasonable belief that her ability to perform the essential functions of her job will be impaired because of a medical condition. Sally's supervisor may make disability-related inquiries (e.g., ask her whether she is taking a new medication and how long the medication's side effects are expected to last), or the supervisor may ask Sally to provide documentation from her health care provider explaining the effects of the medication on Sally's ability to perform her job.

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Example of an inappropriate inquiry:

Six months ago, a supervisor heard a secretary tell her co-worker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, the secretary still comes to work every day and performs her duties in her normal efficient manner.

Supervisor becomes concerned she will start missing work and her performance will drop off and starts asking the secretary questions about her condition and asks her to get a medical release from her physician.

In this case, the employer does not have a reasonable belief, based on objective evidence, either that the secretary's ability to perform her essential functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.

But...if her performance starts to drop off, employer can start asking questions. Perhaps FMLA may become relevant or a reasonable accommodation becomes possible.

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Rumination No. 3
Workers' Compensation Questions

Are you curious about whether an applicant has made prior claims for workers' compensation at another employer? ***Maybe so . . . but do not ask them or try to figure it out.***

Why not?

- If they aren't hired, you've set yourself up for a workers' compensation retaliation claim. The Labor Code generally prohibits employers from taking an adverse employment action against a person because that person has previously filed a claim for workers' compensation. (but see next slide . . .)
- The more you learn about an applicant's workers' compensation history during the hiring process, the more you learn about their current/prior medical conditions and the easier you make it for them to succeed in a disability discrimination claim if they are not hired.

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Can I fire somebody because they have filed a workers' compensation claim?

- Ummm.....**NO!!**
  - ***But*** if you do – we will assert immunity (and will probably win). *Travis Central Appraisal Dist. v. Norman*, 342 S.W.3d 54 (Tex. 2011).
    - But I'd rather not have to go through the process (and neither would you). So, be nice!

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How long do I have to wait for someone to return from workers' compensation leave before I can terminate them?

- Are they concurrently on FMLA? If they qualify (e.g., a serious health condition, been there more than a year, and worked at least 1,200 hours in the past year, etc.), they should be.
  - Entitled to 12 weeks of unpaid leave (though they can choose to use available paid leave to run concurrent with FMLA) and, at the expiration of leave, must be returned to same or substantially equivalent position.

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- **What if they aren't ready to come back after 12 weeks (or don't qualify for FMLA). Can I immediately terminate?**
  - Tread carefully. The EEOC has taken the position that unpaid leave (over and above that provided by the FMLA) *might* be a "reasonable accommodation" that employer should extend to a person with a qualifying "disability" – though not all courts agree.
    - Fifth Circuit (covering Texas) – tends to view regular attendance as an essential function of most jobs
  - What you need to evaluate: (1) how much additional time off is needed; (2) how important is it that the position be immediately filled; (3) are there ways to "cover" for the position while the employee is out.
  - Fifth Circuit– Extended *indefinite* leave is *not* a required "reasonable accommodation."

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Rumination No. 4
Is working from home a "reasonable accommodation" under the ADA?

Credeur v. State of Louisiana, 2017 WL 2704015 (5th Cir. June 23, 2017)

- *Facts:* Credeur was an attorney working in the State's litigation division defending the State in lawsuits. She had a kidney transplant and was granted an accommodation to work at home for 6 months. She came back to work and, a couple of years later, experienced additional problems due to complications from the transplant. She took FMLA and when it expired, again requested a "work from home" accommodation. The State agreed -- but with the understood goal that she would eventually be reintegrated into the office environment. She was also required to keep the State updated on her medical improvement. After she had been working from home for some time, she provided reports from her physician's which seemed to contradict one another on how soon she could return to the office full time.

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Credeur Facts continued: The State ultimately decided that it would require Credeur to return to working full-time in an office environment (i.e., the "good times" were over). The considerable "strain" placed on supervisors and staff in trying to work with Credeur when she was never in the office was just too much. Under pressure, she subsequently returned but, a few months later, resigned and filed a lawsuit.

Lawsuit: Credeur claimed the State violated the ADA by refusing to continue to allow her to work from home. In other words, the State refused to provide her with the "reasonable accommodation" of being allowed to work from home.

Holding: The State did not violate the ADA by refusing to allow her to work from home. Important aspects of its analysis:

- Employer is only required to provide an accommodation to someone who is "qualified" for the position;
- To be "qualified," the employee must be able to perform the "essential functions" of the position;

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- In making this determination, the Court must give the "greatest weight to the 'employer's judgment'" as to whether the employee can perform the essential functions;
- The general consensus in the Fifth Circuit is that "regular work-site attendance is an essential function of most jobs";
- "This is especially true when the position is interactive and involves a significant degree of teamwork."
- The State's prior practices and policies made it clear that its attorneys should work from the office most of the time
  - Her supervisors also testified that her job was "interactive and team-oriented"
  - The fact she had been allowed to work from home before did not matter; in the long run, the employer demonstrated that regular office attendance was essential

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Takeaways from this case:

- In most jobs (but not all), regular worksite attendance is an essential function
- Make this clear in your policies and job descriptions
  - General handbook/personnel policy stating regular attendance is required (e.g., M-F (9:00-6:00))
  - Emphasize interactive nature of position and ability to work in a team environment in job descriptions
- When a "work from home" R/A request is made, don't just deny it out of hand. Truly evaluate whether worksite attendance is an imperative – if it is (and you can demonstrate why), you are on safe ground in refusing the R/A
  - But sometimes a short stint working full-time at home to allow the employee to recover *might* be feasible for some jobs

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Rumination No. 5
Severance Agreements

What is a severance agreement?
A written contract between the employer and employee whereby the employee agrees to accept a payment in exchange for releasing the employer from any claims for employment law liability (e.g., discrimination).

- Becomes relevant when it is clear the relationship is broken, termination may be imminent, but there are concerns about facing a lawsuit over the termination (especially, when the facts indicate that lawsuit might potentially have merit)
- These are common in the world of private employers
- Not so common in the government world – but in my opinion, they should be considered an option in many circumstances

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Why consider?

- We know the employee is litigious and we have some potential "bad" facts
  - For example, X (an attractive young woman) has threatened to file complaints in the past over sexual harassment by co-workers. We know she currently has an "on and off again" romantic relationship with a supervisor. Her work performance drops off and we want to terminate on that basis (not because she was dating a supervisor). We believe the relationship with the supervisor was consensual, but we can't trust the supervisor to tell us the truth. For all we know, he coerced her into the relationship under threats of termination.
  - (regardless of the truth) We are virtually certain she will pursue a sexual harassment lawsuit if we terminate her
  - We know the lawsuit will drag on for years and cost us (i.e., the Fund) a $100,000 or more

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- We believe, however, that she will accept a reasonable severance payment (i.e., a fraction of the money, time, and energy a lawsuit will cost us) and agree to release us from any liability
- This is a good scenario for at least ***considering*** the ***possibility*** of using a severance agreement
  - We can fight it out in court (or in an arbitration) and we may win – but after much "water" (our time, energy, stress, etc.) and $$$ has passed under the bridge . . . and, then again, we might also lose.
- Severance agreement provides us 98% certainty that we are completely done with this person and we can move on
  - Note: The severance agreement won't prevent the EEOC from investigating a charge if one is filed – but employee can't sue us and collect damages
    - In my 20 years, I've never seen an employee pursue a charge after signing a severance agreement

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Important items to consider in drafting the agreement:

- If employee is 40 years old or older, to obtain a release of age discrimination claims, you must give the employee (1) 21 days to review the agreement and (2) seven days to revoke it once executed.
  - In this scenario, we don't make the payment until at least the 8th day after it has been signed
  - My experience tells me very few employees use 21 days to review and I have never had an employee actually revoke it once executed
- Release must be drafted broadly (include release of any claims associated with hiring, treatment during employment, and termination)
- No rehire clause and post-employment cooperation clause
- Confidentiality clause – we can include, but it won't be enforceable because you are a public entity

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Rumination No. 6

The FLSA and "Off-the-Clock" Work – when do I have to pay for it?

In general, the Fair Labor Standards Act requires employers to pay non-exempt employees at least minimum wage for each hour worked and time and half for each hour worked over 40 in any given work week.

- Employee regularly works overtime, doesn't obtain preapproval, and doesn't record her time on her time card. When she is later terminated for performance reasons she files an action under the FLSA claiming she worked many hours of overtime but was not paid for the work.
- Can she recover?
  - It depends.

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Case study: *Fairchild v. All American Check Cashing, Inc.*, 815 F.3d 959 (5th Cir. 2016)

Facts:

- Employer's written OT policy required employees to obtain prior approval from a manager before working OT.
  - Policy also required employees to accurately report their hours in designated time-keeping system.
- Employer paid employee for all OT that it authorized and that she recorded in time-keeping system
- Employee also worked additional OT that she did not report in time-keeping system and for which she was not paid
  - As proof of the OT, employee offered login/logout times and computer usage report from the employer's computer system to demonstrate she was working

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Holding: Employee could not recover.

- General rule: "An employer who is armed with knowledge that an employee is working overtime cannot stand idly by and allow an employee to perform OT work without proper compensation, even if the employee does not make a claim for OT compensation."
- But . . . an employee "cannot prevail on an FLSA overtime claim if that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the OT work."
- **The Key: If the employer can be demonstrated to have actual or constructive knowledge of the OT work, the employer is liable if it fails to pay for the OT.**

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- The court emphasized the following points:
  - The employee ignored the employer's policies and procedures – there was no evidence she sought preapproval for OT work and she admittedly failed to record the time as required by the employer's policies
  - The computer usage reports were insufficient to demonstrate the employer had constructive knowledge of her work
    - The court held that "mere access to this information was insufficient for imputing constructive knowledge"
      - Good holding: Employers often have potential access to electronic info that might reveal OT, but under this opinion, mere access is not enough
  - Importantly, there was no evidence that the employer ever required or encouraged the employee to submit falsified time reports by working "off the clock"

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So . . . when do you have "actual or constructive knowledge"?:

- Employer actually sees the work being performed. For example, supervisor knows employer was at the office working for 50 hours but approves a time card only demonstrating 40 hours.
- Employee complains about working long hours but not recording all the time (i.e., "I can't get this done in 40 hours but I'll get it done anyway.")
- Employer "audits" computer usage and sees conflicts between the time the employee was using the employer's computer system and the time they actually record on their time card.
- Employer's managers consistently tell employees NOT to work more than 40 hours but they KNOW it is extremely difficult to get the job done in 40 hours or less and ignore the "extra" work the employee is doing because the manager wants to demonstrate to managers above them that they are meeting budget and "holding the line" on OT.

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Some things I've learned handling OT cases:

- **It's a company "culture" issue that flows from the top down.** If the message from the top (CEO) is that OT "will not be tolerated," rest assured that the next level of managers, then the next, and so on will bend over backwards to force their employees to record no more than 40 hours. These managers don't want to lose their jobs and they will put considerable pressure on hourly employees to do everything possible to get the job done but to never record more than 40 hours.
- Financial budgets are a reality. But so are the OT laws. Expecting non-exempt employees to always get their work done in 40 hours or less is unrealistic and results in very expensive FLSA claims. Budget flexibility is important.
- The key is hiring good, self-aware managers and efficient hourly employees. If it appears, early on in their job, an hourly employee simply cannot get the work done in 40 hours (but everyone else seemingly can), they are an OT claim risk.
- If everybody seems to have a problem getting the job done in 40 hours, you simply are expecting too much out of the position.

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Social Media and Employee Discipline in the Governmental Employer Context

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- **Key Point: You are the government. The Constitution's First Amendment clause applies to your conduct.**
  - First Amendment: The government cannot "abridge" the "freedom of speech"
- "Speech" is not just the oral, spoken word – "speech" is also the written word; on paper or electronic (e.g., email, text messages, Facebook posting, Instagram, Twitter, and so on)
- Thus, the decision to terminate or discipline a gov't employee for something they post on Facebook or something they "tweet" that arguably relates to an issue of "public concern" has to be evaluated in the context of the First Amendment

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Case study: ***Graziosi v. City of Greenville*, 775 F.3d 731 (5th Cir. 2015)**

Facts:

- Sergeant in police dep't posted on Facebook statements (on the Mayor's official Facebook page) critical of the Police Chief after the Chief, for budget reasons, informed officers they would have to use personal vehicles to attend funeral of officer from another city killed in line of duty
- The posting generally criticized the fact that the Chief did not send an official representative of the department and said "Dear Mayor, can we please get a leader that understands that a department sends officers to the funeral of an officer killed in line of duty. Several of the sergeant's friends "liked" the posting. In response to some of her friend's comments, she continued to criticize the Chief by stating the department no longer had "leaders." As she posted, "If you don't want to lead, can you just get the hell out of the way."
- Initially, one fellow officer posted "Amen, sarge!" but then recanted his statement by posting that he supported the Chief.

Texas Council Risk Management Fund

Case study: ***Graziosi v. City of Greenville*, 775 F.3d 731 (5th Cir. 2015)**

Facts:

- City's investigation of the incident concluded the Sergeant violated official policies pertaining to supporting fellow employees, insubordination, discipline and accountability
- The sergeant (who had also recently been disciplined for another unrelated matter) was terminated
- Filed a lawsuit in federal court contending that she had been terminated for exercising her First Amendment right to speech

Texas Council Risk Management Fund

Case study: ***Graziosi v. City of Greenville*, 775 F.3d 731 (5th Cir. 2015)**

Holding:

- The sergeant's "speech" was not protected by the First Amendment and the termination did not violate the law
- Two-part test: (1) was the employee speaking as a citizen on a matter of public concern or as an employee pursuant to her official duties; and (2) if speaking as a citizen, did the government have an adequate justification for treating the employee differently from any other member of the public.
  - In relation to part (2), the court must strike a balance between "the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the city, as an employer, in promoting the efficiency of the public services it performs through its employees."

Texas Council Risk Management Fund

Case study: ***Graziosi v. City of Greenville*****, 775 F.3d 731 (5th Cir. 2015)**

Was the employee speaking as a citizen on a matter of public concern?

- She was clearly speaking as a citizen, not as an employee, because the "speech" at issue was not something ordinarily within the scope of her duties as a sergeant. In other words, she was not a public relations officer charged with making official statements on behalf of the department.
- Was she speaking on a matter of public concern? Court must analyze the content, form, and context of the "speech."
  - Content: The Court described her post as more of a "rant" than a post about any malfeasance, corruption, or breach of public trust (such as misuse of funds). Thus, the "content" element did not support protection of the "speech."
    - Note: Posts about misuse of funds will almost always be protected

Texas Council Risk Management Fund

Case study: ***Graziosi v. City of Greenville*****, 775 F.3d 731 (5th Cir. 2015)**

Was the employee speaking as a citizen on a matter of public concern?

- Form: The post was made on the Mayor's Facebook page where members of the community could lobby the Mayor to take particular action or apprise the community of events of interest. "Therefore, the form of the posts on a medium accessible by the community was primarily public." So, the form of the speech weighed in favor of protection. But . . .
- Context: Sergeant made the post almost immediately after returning to work form a suspension. She admitted she was angry with the Chief, that she was "hot-headed," and the posts were "inappropriately intense." Because the "speech" was made within the context of an existing dispute, the context weighed against providing protection to the "speech."

- In sum, weighing all three factors together, the court held the "speech" was not entitled to First Amendment protection.

Texas Council Risk Management Fund

Case study: ***Graziosi v. City of Greenville*****, 775 F.3d 731 (5th Cir. 2015)**

Though it could have stopped there, the Court went further and addressed . . .

Even if the "speech" were protected, did the City's interest in promoting efficient public services outweigh the Sergeant's interest in commenting on matters of public concern?

- In analyzing this issue, the Court examines "whether the statement impairs discipline by superiors or harmony among co-workers, [and] has a detrimental impact on closing working relationships for which personal loyalty and confidence are necessary."
- "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."
  - **Note:** Police and fire departments get significant special treatment in this regard because they operate as paramilitary organizations with strict hierarchies of command.

Texas Council Risk Management Fund

Case study: ***Graziosi v. City of Greenville*, 775 F.3d 731 (5th Cir. 2015)**

- The City contended that maintaining hierarchical discipline in a police department is important and that it was justified in dismissing the Sergeant to prevent insubordination in the department. The Court agreed.
- It noted that there was some evidence of actual disruption in that at least one officer had "liked" her post then later recanted. There was "buzz around the department" about her post and the Chief testified that the demeanor of some of this officers towards him changed.
- In any event, the City was not required to prove *actual disruption*; instead, it could justify the termination to prevent *future* disruption.
  - It is not necessary for "an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."
- Termination was appropriate.

Texas Council Risk Management Fund

Case study: ***Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017)**

Facts:

- Fire Department Battalion Chief was sitting in his office at work watching a gun control debate on TV when he posed the following to his personal Facebook page:
  - "My aide had an outstanding idea . . . Lets all kill someone with a liberal . . . Then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . It's almost poetic."
  - 20 minutes later, a county volunteer paramedic, posted a response:
    - "But . . . was it an 'assault liberal'? Gotta pick a fat one, those are the 'high capacity' ones. Oh . . . pick a black one, those are more 'scary." Sorry had to perfect on a cool idea!
    - 6 minutes later, the Battalion Chief "liked" the comment and replied, "Lmfao! Too cool..."

Texas Council Risk Management Fund

Case study: ***Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017)**

Facts:

- A couple of Department employees reported the posts to an Assistant Chief. The Assistant Chief told him to remove the posts as he felt they were inconsistent with the Department's social media policy for employees.
- A few hours later, the Battalion Chief removed the posts and posted the following:
  - "To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.
- . . . But he couldn't just let it drop . . .

Texas Council Risk Management Fund

Case study: ***Grutzmacher v. Howard County*****, 851 F.3d 332 (4th Cir. 2017)**
Facts:

- A friend replied to this post, "As long as it isn't about the [Department], shouldn't you be able to express your opinions?"
- The Battalion Chief replied:
  - Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Government recently published a Social media policy, which the Department then published on it's own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain . . . Sad day. To lose the First Amendment rights I fought to ensure, unlike the WIDE majority of the Government I serve.
- Three weeks later . . the Battalion Chief "liked" a friend's post of a picture of a person with her middle finger raised and the caption: "THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT IT'S MINE. I'LL POST WHATEVER THE **** I WANT."

Texas Council Risk Management Fund

Case study: ***Grutzmacher v. Howard County*****, 851 F.3d 332 (4th Cir. 2017)**

Facts:

- Battalion Chief gets terminated (big surprise).
  - Basis: (1) he approved (by liking) the earlier comment regarding "assault liberals," which had racial overtones and was insensitive and derogatory; (2) he failed to grasp the "impact and implications" of his comments on he leadership position within the Department (where he was responsible for enforcing Department policies); (3) he demonstrated "repeated insolence and insubordination" by his replacement post which "mocked" the Department and the County; and (4) interfered with Department operations and caused "disruption in the Department's chain-of-command and authority."
- He sued for a violation of his First Amendment rights (another big surprise).
- ***What do you think? Did he win or lose?***

Texas Council Risk Management Fund

Case study: ***Grutzmacher v. Howard County*****, 851 F.3d 332 (4th Cir. 2017)**

He lost.

Holding:

- The Court agreed that much of the content of the postings related to matters of public concern, e.g., the debate over gun control. Accordingly, most of the "speech" was protected by the First Amendment.
- BUT, he lost the balancing test (remember: even if the "speech" is protected, the court has to balance the employee's right to engage in the "speech" against the employer's right to an efficient workplace that is not unduly disrupted by the "speech")

Texas Council Risk Management Fund

Case study: ***Grutzmacher v. Howard County*****, 851 F.3d 332 (4th Cir. 2017)**

Holding:

- The Battalion Chief's Facebook activity led to dissension in the Department; another chief had to attempt to justify the Plaintiff's activity with other lower-level employees who felt like the Plaintiff's comments made it appear as if it was okay for "anybody to say or do anything against the [Social Media] policy."
- Several black employees complained about the Plaintiff's "like" of the comment that appeared to be derogatory towards blacks and one of them stated he did not work to work for the Battalion Chief anymore because he did not trust him
- The Facebook activity conflicted with Plaintiff's responsibilities as a battalion chief and Department leader because Plaintiff himself was, like other chiefs, responsible for enforcing Department social media policies – which he violated by casting dispersion on the Department
- His "speech" threatened community trust in the Department, which is vitally important to its function (e.g., it appeared to advocate violence to effect a political agenda and appeared to reflect racial bias)
- His "speech" – especially the "like" of the middle finger picture – expressly disrespected his supervisors undermining the department hierarchy (remember: fire departments are run like paramilitary organizations)

Texas Council Risk Management Fund

Case study: ***Grutzmacher v. Howard County*****, 851 F.3d 332 (4th Cir. 2017)**

Bottom Line:

This case demonstrates the fine-line between protected public speech and speech that can get you fired. It also demonstrates the extremely detailed analysis that must go into the decision-making process when you want to discipline someone for a social media communication. Even things such as "liking" a comment or photograph can become relevant to the legal discussion.

Be careful when you decide to discipline someone over a Facebook post or Tweet. Your immediate reaction should be to thoroughly evaluate, then deliberate, then act. The employers in both *Grazioso* and *Grutzmacher* spent considerable time evaluating before they acted and carefully justified their decision. This was good because the courts in both cases parsed the record with a fine-tooth comb and the outcomes were, by no means, a foregone conclusion. It took years of litigation in both cases to ultimately establish there was no First Amendment violation.

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The End

Questions?

PROCEDURE: SEXUAL HARASSMENT

PROCEDURE NUMBER: **20.018**

EFFECTIVE DATE: September 1, 1999

REVISION DATE: June 2006

REVIEWED DATE: November 2015

PRIMARY CONTACT: Director of Human Resources

PURPOSE:

To prohibit any form of sexual harassment.

PROCEDURE:

All Center employees are responsible for creating an atmosphere free of sexual harassment and/or a hostile environment. The Center prohibits any form of retaliation against any employee for filing a complaint under this policy or for participating in a complaint investigation.

The Equal Employment Opportunity Commission defines sexual harassment as follows: - "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submissions to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment,

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

This definition simply means "this for that" a supervisor threatens to fire or not promote an employee if he or she doesn't have sex with that supervisor. The following actions may fall into the three categories outlined in the above definition: comments, jokes, innuendoes, and other sexually- oriented statements, as well as the display or circulation of written materials or pictures derogatory to either gender.

Examples of inappropriate conduct of a hostile work environment of a sexual nature include sexually oriented jokes, sexually explicit e-mail, screen savers, posters, cartoons, and graffiti, and unwanted verbal and physical contact. The standard used by civil rights agencies and courts in determining whether a hostile work environment exists is whether a reasonable person, in the same or similar circumstance, would find the conduct offensive.

Managers should ensure that their employees do not feel uncomfortable because of behavior in the workplace, such as teasing, taunting, jokes, or inappropriate gestures.

All allegations of sexual harassment will be immediately reported to the Director of Human Resources who will immediately investigate the allegations or cause an investigation by someone more appropriate. Investigations will commence immediately upon a report of sexual harassment and be completed as soon as possible. A thorough investigation shall be done to assure all parties' rights are protected. Any disciplinary action taken will follow the employee disciplinary system utilized by the Center.

The Director of Human Resources will work with the supervisor to ensure that the employee who is making the allegation is protected from further harassment. The accused employee shall be moved to another work environment or placed on accrued leave, leave without pay, or reassigned within the center until the investigation is complete.

In the event the allegations are established to be true, the Administration will work closely with the employee to pursue any legal options that may be available or appropriate.

DEFINITIONS:

Center - Texana Center

Employee - An individual hired to perform the work of a classified position and paid a salary or wage for performing that work.

Sexual Harassment - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or, (3) such conduct has the purpose or effect of unreasonable interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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Sexual Harassment Training Doesn’t Work. But Some Things Do.

Traditional methods can backfire, but ideas like teaching bystanders to intervene and promoting more women have proved effective.

Image
CreditLorraine Sorlet

By Claire Cain Miller

Dec. 11, 2017

Many people are familiar with typical corporate training to prevent sexual harassment: clicking through a PowerPoint, checking a box that you read the employee handbook or attending a mandatory seminar at which someone lectures about harassment while attendees glance at their phones.

At best, research has found, that type of training succeeds in teaching people basic information, like the definition of harassment and how to report violations. At worst, it can make them uncomfortable, prompting defensive jokes, or reinforce gender stereotypes, potentially making harassment worse. Either way, it usually fails to address the root problem: preventing sexual harassment from happening in the first place.

That's because much of the training exists for a different reason altogether. Two 1998 Supreme Court cases determined that for a company to avoid liability in a sexual harassment case, it had to show that it had trained employees on its anti-harassment policies.

But while training protects companies from lawsuits, it can also backfire by reinforcing gender stereotypes, at least in the short term, according to research by Justine Tinkler, a sociologist at the University of Georgia. That's because it tends to portray men as

powerful and sexually insatiable and women as vulnerable. Her research has shown this effect no matter how minimal the training. “It puts women in a difficult position in terms of feeling confident and empowered in the workplace,” she said.

Other research found that training that described people in a legal context, as harassers or victims, led those being trained to reject it as a waste of time because they didn’t think the labels applied to them, known as an “identity threat reaction,” said Shannon Rawski, a professor of business at the University of Wisconsin, Oshkosh. Training was least effective with people who equated masculinity with power. “In other words, the men who were probably more likely to be harassers were the ones who were least likely to benefit,” said Eden King, a psychologist at Rice University.

Training is essential but not enough, researchers say. To actually prevent harassment, companies need to create a culture in which women are treated as equals and employees treat one another with respect.

“Organizations often implement training programs in order to reduce their likelihood of being named in harassment suits or to check a box for E.E.O.C. purposes,” Ms. King said, referring to the Equal Employment Opportunity Commission. “If we’re actually trying to change or reduce the likelihood of sexual harassment, that’s a different outcome altogether. That’s not a knowledge problem, that’s a behavior problem.”

Here are evidence-based ideas for how to create a workplace culture that rejects harassment. Researchers say they apply not just to men attacking women but to other types of harassment, too.

Empower the Bystander

This equips everyone in the workplace to stop harassment, instead of offering people two roles no one wants: harasser or victim, Ms. Rawski said. Bystander training is still rare in corporate America but has been effectively used on college campuses, in the military and by nonprofits.

One study found that soldiers who received the training were significantly more likely than those who did not to report having taken action when they saw assault or harassment. Another found that it changed college students’ attitudes regarding sexual violence and individuals’ ability to stop it, a change measurable both immediately after the training and a year later.

Image
CreditLorraine Sorlet

Trainers suggest choices for what to do as a bystander. Most don't advise confronting the harasser in the moment, because it can escalate and put the bystander in jeopardy. If comfortable doing so, they suggest, a bystander can say something like, "That joke wasn't funny."

Another option is to disrupt the situation, such as by loudly dropping a book or asking the victim to come to the conference room. (Charles Sonder, referred to as Snackman in a widely shared video, defused a fight on the subway by standing between the combatants, eating chips.)

Observers can talk to the harasser later, by asking questions but not lobbing accusations: "Were you aware of how you came off in that conversation?" Researchers also suggest talking openly about inappropriate behavior, like asking colleagues: "Did you notice that? Am I the only one who sees it this way?"

One crucial element, researchers say, is for bystanders to talk to targets of harassment. They often feel isolated, and observers might not know if they thought the interaction was consensual or amusing. Colleagues could say: "I noticed that happened. Are you O.K. with that?" If not, they could offer to accompany the victim to the human resources department.

"So many victims blame themselves, so a bystander saying, 'This isn't your fault, you didn't do anything wrong,' is really, really important," said Sharyn Potter, a sociologist at the University of New Hampshire who runs a research group there for sexual violence prevention.

Bystanders are unlikely to be present when the most egregious offenses happen, but harassers often test how far they can go by starting with inappropriate comments or touches, said Robert Eckstein, the lead trainer at the research group. A good workplace culture stops them before the offenses get worse.

“Bystander intervention is not about putting on your cape and saving the day,” he said. “It’s about having a conversation with a friend about the way they talk about women.”

Encourage Civility

One problem with traditional training, researchers say, is that it teaches people what not to do — but is silent on what they should do. Civility training aims to fill that gap.

Fran Sepler, who designed new training programs for the E.E.O.C., starts by asking participants to brainstorm a list of respectful behaviors. These often sound trivial, she said, but aren’t common enough, like praising work, refraining from interrupting and avoiding multitasking during conversations. A big one is spotlighting contributions by people who are marginalized. A person could say: “She just raised that same idea. Would she like to expand on it?”

Image

CreditLorraine Sorlet

Ms. Sepler gives people scripts for how to give and receive constructive feedback about rude behavior, so it can be dealt with in the moment. She teaches supervisors how to listen to complaints without being dismissive.

Train Seriously and Often

The most effective training, researchers say, is at least four hours, in person, interactive and tailored for the particular workplace — a restaurant’s training would differ from a law firm’s. It’s best if done by the employees’ supervisor or an external expert (not an H.R. official with no direct oversight).

It also seems to help if white men are involved in the training. A recent paper found that women and minorities are penalized in performance reviews for supporting diversity, while white men are taken more seriously when they do it. Another found a backlash against training when it was done by a woman but not a man.

Training shouldn’t be infrequent, and the topic should come up in conversations about other things, whether strategy or customer service, said KC Wagner, a harassment prevention trainer at Cornell’s ILR School.

“We’re talking about literally generations of people getting away with abusing power,” Mr. Eckstein said. “Thinking you can change that in a one-hour session is absurd. You’re not going to just order some bagels and hope it goes away.”

Promote More Women

Research has continually shown that companies with more women in management have less sexual harassment. It’s partly because harassment flourishes when men are in power and women aren’t, and men feel pressure to accept other men’s sexualized behavior.

It also helps to reduce gender inequality in other ways, research shows, like paying and promoting men and women equally, and including both sexes on teams.

Encourage Reporting

Most women don’t report harassment. Some don’t want to take the risk alone; fear retaliation; don’t know whom to report it to; or don’t think anything will be done. They may not want to end someone’s career — they just want to stop the behavior.

Image

CreditLorraine Sorlet

The E.E.O.C. has suggested a counterintuitive idea: Reward managers if harassment complaints increase, at least initially, in their departments — that means employees have faith in the system. It also recommended giving dozens of people in the organization responsibility for receiving reports, to increase the odds that victims can talk to someone they’re comfortable with.

Ian Ayres, a Yale professor of law and management, has written about using so-called information escrows for harassment reporting. Victims submit a time-stamped complaint against an abuser, and can request that it is reported only if another employee files a complaint against the same person.

Researchers also suggested proportional consequences: Harassers shouldn't be automatically fired; it should depend on the offense.

"If the penalty is someone's always going to get fired, lots of targets won't come forward," Ms. Rawski said. "But research suggests if you let the small things slide, it opens the door for more severe behaviors to enter the workplace."

Claire Cain Miller writes about gender, families and the future of work for The Upshot. She joined The Times in 2008, and previously covered the tech industry for Business Day. @clairecmFacebook

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The one best idea for ending sexual harassment

By Post Opinions Staff December 8, 2017

The past few months have seen a deluge of stories revealing that sexual harassment takes place everywhere, from Hollywood hotel rooms to factory floors. The stories shared by silence breakers have made it impossible to deny how prevalent sexual misconduct is, and how much damage it can do.

While the reckoning must continue, it's time to move the conversation forward. We need to start talking about the changes that will make sure fewer people are victimized in the future; that fewer employers will feel comfortable covering up for high-profile offenders; and that perpetrators will face swifter and more serious consequences.

We asked 16 leaders what one change they would implement to stop sexual harassment in their fields, and their answers have lessons for all of us. But these suggestions are just a starting point: We want to know what you think would be most effective at stopping sexual harassment. Share your ideas through the form at the bottom of this page. —Alyssa Rosenberg and Christine Emba

Airlines: Sara Nelson | Television: Gretchen Carlson | Parenting: Joanna Goddard | Corporations: Debra Katz | Firefighting: Kishia Clemencia | Finance: Sallie Krawcheck | Domestic work: Ai-jen Poo | Congress: Jackie Speier | Clergy: Bethany Mandel | Military: Monica Medina | Hospitals: Jean Ross | Universities: Nancy Chi Cantalupo | Newsrooms: Jill Abramson | Jewish communities: Danya Ruttenberg | Churches: Boz Tchividjian | National security: Rosa Brooks

IN THE AIR: Renounce a sexist past

Flight Attendants, about 80 percent women, are ongoing victims of sexual harassment and sexual assault. Not that long ago, the industry marketed the objectification of "stewardesses," a job only available to young, single, perfectly polished

women who until 1993 were required to step on a weight scale. Our union was formed to give women a voice and to beat back discrimination and misogyny faced on the job.

We defined our careers at the bargaining table, in the courts and on Capitol Hill. We taught the country to leave the word "stewardess" in the history books. But the industry never disavowed the marketing schemes featuring short skirts, hot pants and ads that had young women saying things like "I'm Cheryl, fly me."

Even today, we are called pet names, patted on the rear when a passenger wants our attention, cornered in the back galley and asked about our "hottest" layover, and subjected to incidents not fit for print. Like the rest of our society, flight attendants have never had reason to believe that reports of the sexual harassment we experience on the job would be taken seriously, rather than dismissed or retaliated against.

The most effective thing that could be done now is a series of public service announcements from airline chief executives. It would be powerful to hear these men clearly and forcefully denounce the past objectification of flight attendants, reinforce our safety role as aviation's first responders and pledge zero tolerance of sexual harassment and sexual assault at the airlines. They need to back up their words with action: A survey of our members last year showed the majority of flight attendants have no knowledge of written guidance or training on this issue available through their airline. Increased staffing and clear policies are needed.

Credibility from the industry on this issue isn't only about keeping only flight attendants safe. It is absurd to think that a group of people frequently harassed for decades can effectively become enforcers during emergencies without this level of clarity about the respect we deserve. Knowing that CEOs will back us up will also make it easier for flight attendants to intervene when passengers are sexually harassed or assaulted on planes. Flight attendants need to know the airlines will take this as seriously as any other safety duty we perform.

Sara Nelson is the international president of the Association of Flight Attendants-CWA.

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IN TELEVISION NEWS: Get rid of forced arbitration

Change the law. For a year I've worked with Congress to craft the Ending Forced Arbitration of Sexual Harassment Act, which gives victims the right to confront their harassers in court. A bipartisan group of senators and representatives is co-sponsoring this important legislation. It will make a huge difference in the lives of working women.

When my complaint against my former boss came out 17 months ago, I felt incredibly alone. I was wrong. Since I spoke up, thousands of women have courageously done the same. Every woman has a story, and we're at a tipping point where

real change is possible. It's an empowerment revolution! But forced arbitration means no matter how many women speak up, the system is rigged against victims from the get-go.

Today, more than 60 million Americans have arbitration clauses in their employment contracts, eliminating their Seventh Amendment right to a jury trial. Arbitration clauses can be required as a condition of employment — and they're a harasser's best friend. Forced arbitration keeps proceedings secret and allows predators to stay in their jobs, even as victims are pushed out or fired. Forced arbitration also silences other victims, who might have stepped forward if they'd known.

These clauses are unjust and un-American, and the Ending Forced Arbitration of Sexual Harassment Act restores victims' right to a jury trial. Under the act, victims can choose arbitration or court. This is the only way to ensure claims can be made public.

If we want to end workplace harassment, Congress must pass this law and get it to the president for signature. Sexual harassment is a bipartisan issue, because it impacts women from every walk of life. Trust me, harassers don't ask your party affiliation before they pounce. And that's why we should all care.

Gretchen Carlson, a former Fox News host, is author of " Be Fierce: Stop Harassment and Take Your Power Back ."

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AS A PARENT: Start teaching consent early

I always want to smother my children with kisses and hugs. But it's so important to teach consent from a young age. I tell my kids that they're the boss of their bodies — it's a clear, age-appropriate phrase (every kid understands the concept of boss!) and it makes them feel empowered. If my son doesn't want to kiss Grandma, I'll say, "You're the boss of your body, it's up to you." If they're playing with a friend who doesn't want a hug, I'll tell them, "She's the boss of her body, and you need to stop." I hope that by understanding consent at a young age, children will find it second nature to respect others' bodies and minds throughout their lives.

Joanna Goddard blogs at A Cup of Jo.

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AT PUBLIC COMPANIES: Require corporate reporting

Since October, when three decades of egregious sexual harassment by Hollywood producer Harvey Weinstein came to light, women have come forward in unprecedented numbers to expose sexual harassment and assault in their workplaces. Their graphic accounts have served as a powerful reminder that sexual harassment is not about sex. It is about abuse of power that doesn't end when the harassment does.

Instead, it continues when companies give male executives and star performers a pass for harassing women, and protect them by paying out confidential settlements, gagging the accusers and "managing" them out of their jobs. In publicly traded companies, at least, there's a good model for checking this behavior: Congress should apply the same standards for sexual misconduct that it does to violations of securities law.

After the Enron and WorldCom frauds devastated the retirement funds of numerous investors, Congress responded with the Sarbanes-Oxley Act of 2002, which has helped restore investor confidence through better corporate governance, stricter reporting and enhanced whistleblower protections for employees who report fraud. The law also requires corporate officers to sign certifications, under penalty of perjury, attesting to their companies' compliance with securities laws and maintenance of internal controls that work to identify violations.

Existing federal laws, including Title VII of the Civil Rights Act and the Congressional Accountability Act, must be amended to require companies to file similar disclosures of the number of sexual harassment claims settled, the amounts paid and the corrective actions taken in response. Legislators, too, should have to attest annually to their offices' compliance with sexual harassment laws and to disclose sexual harassment settlements (while shielding the identities of the victims). Changes like these could have uncovered the sexual harassment scandals at 21st Century Fox, which employed Roger Ailes and Bill O'Reilly, or the congressional practice of paying out confidential settlements with public money, much more quickly.

The current system permits settlements to go unreported and sexual harassment to be concealed. There is no accountability or transparency and therefore no deterrence — which is poor public policy. The challenges for women in the workplace will not end here, but these simple requirements could go a long way toward making clear whether a workplace is safe for women.

Debra S. Katz is a civil rights lawyer who specializes in the representation of employees in sexual harassment matters.

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IN THE FIREHOUSE: Recognize the message sent by vulgar language

In our agency, you have to lead by example. Discipline is important. When those in positions of authority are crude in conversation, it fosters an environment that makes it easy for misconduct to happen. Vulgarity in language, even if inappropriate touching never happens, trickles down throughout the organization. If people in a position to lead and make decisions constantly curse and joke about sex while playing down complaints about harassment, it sends the message that harassment is not a problem — and that everyone else should feel the same way. Loose conversation promotes a negative culture throughout the chain of command. It's hard to change people's morals or values individually, but the agency can set the precedent that that kind of language is not acceptable — from the top down.

The issue isn't isolated to the men on our job. Women can be just as vulgar — in part, because they think that joining in coarse conversation is what it takes to be equal to men or to gain their respect. But there will always be a group of men

who doubt women's ability, and that isn't the way to convince them. The way to gain respect is to know your job and perform it well consistently. Even if men don't want you around, nine times out of 10 they'll develop respect for you. Why? Because you're being true to yourself and because you're doing the work — maybe even better than they are. That's the way to get buy-in, not by trying to be cruder versions of men.

Kishia Clemencia is a captain with D.C. Fire and Emergency Medical Services.

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ON WALL STREET: Mandate diversity targets

Sexual harassment thrives in male-dominated environments such as Wall Street. Diversity groups can help; inclusivity training can help; mentoring programs can help. But the ultimate solution to harassment is shifting the power dynamic between men and women in a company, and this is most effectively accomplished by increasing gender diversity at the top.

The real question is how to get there. The financial services industry has been settling sexual harassment cases for decades. Individual firms have spent years and tens of millions of court-mandated dollars to improve gender diversity — and both have failed completely. There are no female chief executives on Wall Street; traders are 90 percent men and financial advisers are 86 percent men.

Thus, the solution is for the companies' boards of directors to mandate diversity targets: not as afterthoughts but as key business goals, just like they do with revenue targets, new-client goals and expense initiatives. In addition, these boards should commit to reviewing, and sharing publicly, gender pay comparisons for each level of the organizations. Managers should be compensated or penalized on each of these objectives, because if it's not measured and it's not part of compensation on Wall Street, it simply doesn't happen.

Are these "quotas"? It seems we're allergic to the term. But is it really too much to ask that an industry that brought the economy to its knees, was bailed out by our government and yet continues to exclude most of the population from its plum jobs get with the program ? If these companies become more inclusive of gender and other types of diversity, the research indicates that risk will be reduced and performance improved. And that is good for all of us.

Sallie Krawcheck is chief executive and co-founder of Ellevest, an investing and planning firm for women. She is former CEO of Smith Barney and Merrill Lynch Wealth Management.

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IN THE HOME: Protect workers in the gig economy

With sexual harassment and assault revealed to be prevalent in public workplaces, imagine what is happening to workers who labor behind closed doors in homes around the country.

Domestic workers — those who care for our children as nannies, clean our homes and support the elderly to live at home as they age — are some of the most at-risk and invisible workers in the nation. Not only is their workplace the private home, but also they have faced a long history of exclusion from basic protections afforded workers in other industries. We need to rewrite our harassment and discrimination policies to include all working people, regardless of field or employment classification.

Some of our most progressive labor protections exclude domestic workers, by design or default. During the negotiations surrounding the New Deal, Southern members of Congress, in exchange for their support, insisted on the exclusion of farm workers and domestic workers from labor protections afforded others. Title VII of the Civil Rights Act requires a threshold number of employees for workers to be protected from discrimination and sexual harassment. Because they typically work in settings with only one employee, the vast majority of domestic workers are excluded.

We live in an age in which work itself is changing. As more people work as freelancers, independent contractors or in temporary, part-time settings, they are failed by our inadequate legal protections against discrimination and harassment. How many female Uber drivers have faced harassment from male passengers at night? How many housecleaners, the original gig workers, have been manhandled by the "man of the house"? "Non-traditional" work is becoming the norm, and more women are falling through the cracks of our written rules of conduct.

The rules of the new economy are being written at this very moment. We have a unique opportunity to write them in a way that ensures the future of work is safe for women — and while we're at it, to address pay equity and value women's work equally. Thanks to the courage of women from Anita Hill to Rose McGowan and all who have shared their #MeToo stories, we're having a real conversation about working while female. It's time to ensure that the future of work for all women is safe and dignified.

Ai-jen Poo is the executive director of the National Domestic Workers Alliance and co-director of Caring Across Generations.

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IN CONGRESS: Fix a broken process

For too long, too many members of Congress have had an inflated sense of power, whereby they think they can do whatever they want to anyone and no one will hold them accountable. How else can you explain a congressman grinding against a staff member on the House floor, while sticking his tongue in her ear, without any consequence? If some

members are conducting themselves this way in the House chamber, I cannot imagine how they must act in private. And since I shared my own #MeTooCongress story, it's become clear that I am not alone.

That's why I introduced the bipartisan Member and Employee Training and Oversight on Congress Act, otherwise known as the Me Too Congress Act, which has more than 100 co-sponsors. I have heard from survivors that they have been personally, professionally and financially destroyed by the current opaque and abusive process. Meanwhile, taxpayers foot the bill for settlements and the harasser goes on his way, free to destroy more lives. This bill does three main things to rectify these wrongs.

To protect the vulnerable, this bill creates an in-house Victims' Counsel to represent and advise complainants, just as the House is represented by in-house counsel. The bill also ensures that employees who are not paid by Congress — that is, interns and fellows — receive the same protections as paid employees.

To level the playing field, the counseling and mediation stages will be voluntary, not required, and no confidentiality agreements will be required to start the complaint process. Legislative employees will also have the same whistleblower protections as those given to the rest of the federal government.

This bill will also increase transparency for cases that end in taxpayer-funded settlements. For those cases, the name of the employing office and the amount of the award or settlement will be published on Office of Compliance's public website. And members who have a substantiated finding against them will be personally responsible for reimbursing the treasury for settlement costs.

The #MeToo movement is about bringing to light a dark corner of our society, and I'm heartened by the outpouring of support from my colleagues on both sides of the aisle. I know Congress can be better than this, and the American people know Congress can be better than this. Now we must rise to their challenge.

Jackie Speier, a Democrat, represents California in the House.

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AT THE SYNAGOGUE: Spur action with lawsuits

In late 2014, the rabbi who oversaw my conversion to Orthodox Judaism, Barry Freundel of Georgetown, was infamously arrested on charges of voyeurism and eventually convicted of setting up secret cameras in the bathroom of the ritual bath. He was charged with 52 counts, but about 100 other victims' videos fell outside of the statute of limitations. Mine was one of these.

I decided not to join a class-action lawsuit against the synagogue, mikvah and rabbinic governing bodies such as the Rabbinical Council of America (RCA). Given how swiftly law enforcement was called, the synagogue and mikvah are, in my opinion, not liable for Freundel's actions.

That doesn't mean, however, that lawsuits aren't a valuable tool for putting fire under the pants of those in power to take abuse seriously.

Did the Orthodox world learn its lesson from Freundel? Soon after that arrest, the Orthodox community offered Rabbi Jonathan Rosenblatt of the Riverdale Jewish Center in New York a juicy buyout even after the New York Times reported that he took naked trips to the sauna with boys. (He was not accused of touching their genitals or any other criminal conduct.) After the story ran, the RCA's own Rabbi Yona Reiss appeared on a panel with Rosenblatt. The subject of their discussion? Responsibilities and boundaries. Talk about a mixed message.

There are several glaring similarities between the pre-scandal Catholic Church of the 1980s and the current Orthodox community. In his book on the clerical abuse crisis, "Mortal Sins," Michael D'Antonio wrote that before the scandals, "the Vatican was focused not on controlling abusive priests, but on disciplining theological liberals." Those who follow rabbinic politics know that one of the greatest concerns for those of the more right-wing RCA is reining in those among the more liberal Open Orthodox establishment.

Guila Benchimol, an academic expert on sexual abuse and victimization in the Jewish community, advises organizations on how to create protection policies to prevent abuse. She told me, "Jewish institutions who have been or are being sued, or anticipate a lawsuit from people who've been victimized by the institution's employee or volunteer, are often the first to ask for assistance with assessments, policy creation and training." That is, it's often a lawsuit that prompts institutions to take seriously their policies around sexual abuse. Which is why, as uncomfortable and socially damaging as it may be to file a suit, that may be the best way to prevent future abuses.

Bethany Mandel is a columnist at the Forward and a senior contributor at the Federalist.

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IN THE MILITARY: Give the inspector general broader authority

Despite the many actions taken to aid the victims of sexual assault in the military, there are still too few prosecutions and little real accountability. Though there's not an easy fix, there is an easy step forward: The secretary of defense could direct the inspector general to investigate and recommend the proper disposition of particularly difficult sexual assault cases or command failures to address pervasive and persistent sexual misconduct issues.

The Defense Department inspector general has the experience to take on this responsibility. To deal more effectively with the problem of retaliation against sexual assault victims, the inspector general's office is already charged with investigating all claims of professional retaliation related to sexual assault.

Getting the IG involved in retaliation complaints was the recommendation of a panel of judicial experts directed by Congress to come up with ways of dealing with this special category of whistleblower. As a result, the inspector general's office has a cadre of investigators and managers schooled in sexual assault response training and investigations.

Giving the inspector general broader authority would take the most challenging cases away from the military chain of command, give victims a way to have their cases investigated more thoroughly and give the department a way to deal with high-ranking offenders who may have undue influence over the chain of command.

Monica Medina is an adjunct professor in the School of Foreign Service at Georgetown University. She served as senior adviser to then-Defense Secretary Leon Panetta from 2012 to 2013.

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IN THE HOSPITAL: Organize with a union contract

While the public exposure of sexual misconduct has been most pronounced in media, politics and entertainment, what's less reported is its pervasive occurrence in predominantly female professions, especially those where women have less economic clout and face retaliation if they speak out.

Just ask nurses. About 90 percent of nurses are women. Moreover, many nurses work at odd hours, including nights and weekends, often in understaffed units, in isolation from colleagues who could be witnesses or backups.

To be able to safely advocate for themselves and their patients, and to be able to protest harassment and identify abusers, nurses need a protected and enforceable collective voice on the job.

That comes only through unionization with the legal force of contract law.

There are state and federal laws covering various forms of harassment and workplace safety. But without an enforceable mechanism that protects workers from retaliation for reporting dangerous workplace conditions, as in a union contract, those laws are repeatedly violated.

Nurses can be targeted not just by direct supervisors but also by doctors who are viewed as rainmakers by their hospital employers, who increasingly put their bottom lines ahead of the well-being of nurses and other staff. Management will commonly close ranks with the harasser — not with the target of the abuse.

Nurses who object to sexual misconduct can endure retribution, such as being reassigned to less desirable schedules or to clinical areas in which they have less expertise. Loss of livelihood is a particular threat to nurses who are their families' sole sources of income.

In union contracts, including many won by National Nurses United, nurses have won the power to report and hold management responsible for a safe workplace environment and to improve staffing to ensure patients have safe care.

For nurses, as for all women, the real potency of #MeToo is directly tied to the collective action for our empowerment. By uniting under that umbrella of workplace democracy, nurses and female workers can build the security, protection and freedom they need and deserve.

Jean Ross is a registered nurse and co-president of National Nurses United.

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ON CAMPUS: Don't backslide on Title IX

We will never solve the problem of sexual harassment and violence until we understand and address such conduct as the civil and human rights violation that it is. We must recognize that only in a society where women and gender minorities are truly equal will it be unacceptable to sexually abuse them. On college campuses, the best way to achieve that is to resist the backlash against Title IX and to continue its vigorous enforcement.

Since women first entered campuses for work, class and social activities — really, from the inception of higher education itself — sexual harassment and sexual violence have been a major issue for colleges and universities. Recent conversations about this reality have been painful, but they are also a reminder that the movement to end these problems has made extraordinary progress.

That's because women on campus have a unique tool available to them that is not necessarily accessible to other women coming forward to share their #MeToo stories: Title IX. This groundbreaking 1972 civil rights statute has been interpreted by the U.S. Supreme Court as incorporating sexual harassment and violence as unequal treatment. The statute provides education officials with many, many strategies for achieving the truly equal cultures and attitudes that will eliminate sexual abuse.

Under Title IX's banner, and with Vice President Biden's particular support, from 2011 to 2016, survivors and their allies pressured schools to facilitate victim reporting of abuse, to use equal procedures for investigating harassment complaints, to offer educational programs targeting cultures supportive of sexual harassment and violence, and to debunk canards such as the claim that most campus sexual harassment is protected free speech.

We now know that vigorously following Title IX presents not only the most effective way to address sexual abuse in education but also an example for preventing all such harassment. We shouldn't let the backlash to Title IX slow progress toward gender equality on campus, or short circuit this essential conversation in the wider world.

Nancy Chi Cantalupo is an assistant professor of law and author of "For the Title IX Civil Rights Movement: Congratulations & Cautions."

Correction: This item originally stated that the 1972 Title IX anti-discrimination statute "identifies sexual harassment and violence as unequal treatment." The statute does not cite sexual harassment and violence, but it has been interpreted to incorporate them.

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IN THE NEWSROOM: Women on the masthead

Put more women in charge.

This may sound self-serving coming from the first female executive editor of the New York Times. But having more newsrooms run by women would be a major stride in curbing sexual misconduct in news. I know from my experience leading several newsrooms that women are more likely to confide mistreatment to a female boss, and female bosses are unlikely to look the other way.

During my 40 years in journalism, I had a female boss only once, at the very beginning of my career. At Time magazine in the 1970s, my bureau chief, Sandra Burton, looked out for me in many ways. When I went out on assignments involving powerful or famous men, she warned me to be on guard against what was then called "lechery," before "sexual harassment" became a familiar term. She mostly laughed off the experiences she had had rising up the ladder in a male-dominated profession, but, looking back, there is nothing funny about them.

There are, of course, men who are terrific bosses and look out for the young women who work for them. When I was a young researcher at NBC News, my boss, Roy Wetzel, warned me away from a correspondent with a history of hitting on young women in the research pool. But in my experience, female bosses are more prone to take decisive action against harassers. At the Times and other places I worked in senior positions, there were situations where the men at higher levels wanted to look the other way in cases of sexual misconduct. I took it upon myself to confront the miscreants and to follow up with human resources.

By the end of my first year as executive editor of the Times, the newsroom masthead of the most senior editors was half women for the first time. But one of the most disheartening trends since I was fired in 2014 is seeing the number of top female editors stagnate. We're back where we were 10 years ago.

Empowering more women will help change the culture and the prevalence of sexual misconduct.

Jill Abramson teaches at Harvard University and is co-author of "Strange Justice: The Selling of Clarence Thomas."

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IN THE JEWISH COMMUNITY: Empower an independent reviewer

The Torah teaches us not to stand idly by the blood of our neighbors. If our concern is to care for victims of sexual misconduct and to prevent new victims, we must create and expand the systems and structures that allow us to do so.

I would like to see the development of a new, independent organization entrusted by every Jewish denomination and major organization with the authority to help the Jewish community do better around issues of sexual misconduct. If enough major players in the Jewish system agreed to entrust this body with authority, others would look to it as well.

I imagine that this body would serve several functions: It would run trainings on sexual ethics, power dynamics and bystander intervention that would be mandatory at every rabbinic seminary, for new employees at every Jewish organization and as a periodic professional development refresher. This training would be a semester- or year-long course and would force participants to confront their deep-seated issues in the same way that clinical pastoral education does.

Incidents of sexual misconduct would also be reported to this body. Today, it's not always clear to whom issues should be reported, and reporting can be particularly complex given the intricate tangle of relationships inside an organization. This third-party body would have clear procedures for reporting (including anonymous reporting), and every affiliated organization would agree to make information on reporting clearly available to constituents. This body would evaluate and investigate allegations fairly and, if warranted, bring recommendations for consequences, ranging from restorative justice to professional dismissal to involving legal authorities.

Lastly, this body would work with Jewish organizations to standardize and implement safe-conduct policies for working with congregants, campers, students and other constituents.

There are some organizations out there doing pieces of this work — Sacred Spaces most notably — that could be expanded to more comprehensively cover education and reporting as well as policy work. But as long as we leave it to each individual organization, denomination and community to fight sexual misconduct, we risk the work happening inconsistently and inexpertly, or allowing personal relationships, the impulse to protect "one of our own," or concerns about public relations to impact the process.

Danya Ruttenberg is rabbi-in-residence at Avodah and author of " Nurture the Wow: Finding Spirituality in the Frustration, Boredom, Tears, Poop, Desperation, Wonder, and Radical Amazement of Parenting ."

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AT CHURCH: Identify and destroy abuse

One of many critical steps that Christians must take to end the systemic abuses within our churches is to develop a safeguarding policy in every church and Christian organization.

Such a policy must identify the various types of abuse — such as sexual abuse and misconduct, child abuse, emotional abuse and spiritual abuse — and provide specific guidelines that minimize their occurrence.

In addition, every safeguarding policy must help create an environment that encourages abuse disclosures and provides a protocol for responding to them. That means defining response protocols to ensure that disclosures are addressed in a consistent manner regardless of the identity or influence of the alleged abuser.

Safeguarding policies would need not only to satisfy best-practices standards but also be developed by each individual church in collaboration with victim advocates and abuse prevention experts. Effective safeguards don't come from cutting and pasting policies from other churches or organizations.

Keep in mind, though, that the most thorough and well-written policy is powerless unless it becomes part of the very DNA of the church community. This begins by making sure that every member has a copy of the policy and fully understands it through ongoing education and training by church leadership, in partnership with abuse prevention experts. It is also critical for the safeguarding policy to be reviewed on a yearly basis, for the purpose of making continuous improvements that will best protect all members. The effective safeguarding of members won't become a central part of the church culture overnight. It will take time, a lot of hard work, and commitment from the entire church family. But it can be done: I've seen it!

One of the great challenges in confronting and addressing abuses within our churches is that abuse is not something that can be resolved exclusively through "policy" change. It requires a cultural transformation that can occur only when we see and understand these grave issues through the lens of Jesus.

Boz Tchividjian is executive director of Godly Response to Abuse in the Christian Environment (GRACE) and co-author of "The Child Safeguarding Policy Guide for Churches and Ministries ."

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NATIONAL SECURITY: It's not complicated — promote more women

It's simple. Hire and promote more women into leadership positions. Specifically, aim to fill at least 30 percent of policy and security leadership positions with women. Research suggests that 30 percent is the magic number, the tipping point at which women stop being a beleaguered minority — tokens, unable to change organizational culture — and serve as effective change agents.

It's time to stop making the old excuses, that "there just aren't enough qualified women" and so on. There are now hundreds — thousands — of highly qualified women in the foreign policy and national security worlds. There are female admirals and generals. There are women who have earned military awards for valor and whose sacrifices have been recognized with Purple Hearts. There are women who have served as ambassadors and assistant secretaries and senior White House officials; women with high-level intelligence experience, women who have run major think tanks and women who are top-notch scholars. If we had to stock the entire federal government with spectacularly accomplished women, we'd have plenty to choose from. Want a female secretary of defense? I can suggest half a dozen supremely qualified candidates. A female CIA director? Ditto. Female military service chiefs? There's an increasingly deep bench of women with stars on their shoulders.

When women reach critical mass in organizational leadership positions, things change. Women are less likely to create or tolerate a "locker room" atmosphere at work and more likely to notice and challenge sexism than male leaders. As a recent Harvard Business Review article noted, "Male-dominated management teams have been found to tolerate, sanction, or even expect sexualized treatment of workers." Conversely, organizations with plenty of women in leadership positions tend to be organizations in which sexual harassment is less likely to occur.

Increasing gender diversity has other important benefits, too. Companies with more women on their boards outperform those with few or no women, reaping substantially higher returns on sales, equity and invested capital. A McKinsey study found that gender-diverse organizations outperformed those with less gender diversity. (Ethnic diversity increased performance still more.)

It's not complicated. Want to reduce the incidence of sexual misconduct in foreign policy and national security workplaces, while simultaneously improving performance and the quality of decisions?

Just add women.

Rosa Brooks is author of " How Everything Became War and the Military Became Everything " and former counselor to the undersecretary of defense for policy.

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Let’s keep the conversation going. Submit your idea using the form below or by clicking here. [Update: You can read some of the best submissions here.]

RECENT TRENDS and CASES IN DISCRIMINATION LAW

Prepared by: William S. Helfand with caveats by Tracy Graves Wolf
Presented by: Tracy Graves Wolf

Lewis Brisbois Bisgaard & Smith, LLP

Status Discrimination Claims

- Gender
  - Pregnancy
  - Transgender
- Race
- National Origin
- Religion
- Age – Age Discrimination in Employment Act (ADEA)
- Disability – Americans with Disabilities Act (ADA)
- Retaliation
- Hostile Work Environment

Two Tests for Discrimination

- Disparate *treatment* – more common of the two. Test of intent to discriminate based upon protected status. Intent to discriminate is an element of claim.
- Disparate *impact* – discriminatory effect of facially neutral policy. No intent need be shown.
  - The Supreme Court re-affirmed availability of a disparate impact theory available under ADEA in 2005 in Smith v. City of Jackson, 544 U.S. 288 (2005).

Disparate Treatment Case

- *Prima facie* case
  - Employee member of protected class
  - Qualified for position
  - Denied opportunity to do work (or get benefit) which was given to someone outside protected class)
- Employer must articulate legitimate, non-discriminatory reason for challenged decision.

Proof of Legitimate, Non-Discriminatory, Reason

- Follow established guidelines in a **uniform** manner – Most important factors:
  - Identify controlling guidelines before making decision
  - Don't base decision on factors which may be argued as a basis of disguising a discriminatory event
    - Don't discuss these factors in decision making discussions or in communicating decision

Proof of Legitimate, Non-Discriminatory, Reason

- Documentation – Second most important consideration in executing employment decision
  - Contemporaneous and detailed
  - Includes specific dates, times, descriptions and witnesses
- Obtain witness statement, in their own hand, if at all possible
- Related to statute, regulation and/or policy related to decision

Sexual Harassment in the Workplace

- Harvey Weinstein, *Miramax*
- Ray Price, *Amazon*
- Roger Ailes, *Fox*
- Travis Kalanick, *Uber*

Sexual Harassment in the Workplace

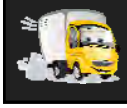
- Not just a Hollywood issue
- This is happening in Silicon Valley
- Now, we are seeing it in other industries
  - Restaurants (John Besh group)
  - Kay Jewelers
  - Amazon

Beyond Sexual Harassment

- *B.C. v. Steak N Shake Operations, Inc.* 512 S.W.3d 276 (Tex 2017).
  - When the gravamen of the claim is sexual assault, TCHRA is not the exclusive remedy.
- *Berghorn v. Tex. Workforce Commission*, 2017 U.S. Dist. LEXIS 188702 (N.D.Tex. 2017)
  - Texas District Court held that Title VII protection did not extend to a plaintiff's claim of sexual orientation discrimination
- *Hirely v. Ivy Tech Cnty. Coll. of Ind.*, 853 F.3d 339, 340, 41 (7th Cir. 2017)
  - Recognized gender stereotyping as a type of discrimination covered by Title VII, and gave Plaintiff leave to amend his pleadings to allege a gender stereotyping claim.

Same Sex Sexual Harassment

- *Chin v. Crete Carrier Corp.*, 2017 U.S. Dist. (LEXIS 126606 (N.D. Tex.2017)
  - Male on male; newly employed truck driver trained by employee who made sexual advances over 6 day period
  - Employee quit before being disciplined
  - Not severe or pervasive enough to alter a term, condition or privilege of employment



Title VII Anti-Retaliation Claims

- Title VII anti-retaliation provision forbids employer actions that "discriminate against" an employee (or job applicant) because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing."
- Supreme Court ruling in *Burlington Northern v. White*, 548 U.S. 53 (2006), expanded anti-retaliation claims to include even those actions taken by an employer in retaliation against an employee or applicant outside the workplace

Discrimination vs. Retaliation

- Discrimination claim requires evidence of adverse action affecting hiring, discharge, compensation, terms, conditions, or privileges of employment, employment opportunities, or status as an employee.
  - Ultimate employment actions
- Retaliation claims require only evidence of any action that would be "materially adverse to a reasonable employee or applicant."
  - Plaintiff must show only that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination."

Anti-Retaliation Claims

- Title VII's anti-retaliation provision forbids employer actions that "discriminate against" an employee (or job applicant) because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing."
  - All civil right statutes prohibit retaliation
  - Practice Tip: Social media searches
  - Potential concerns in this area
- Retaliation actions exceed all other discrimination claims reported to EEOC
  - Now almost 50% of all complaints

Discrimination vs. Retaliation

- Discrimination claim requires evidence of **adverse action** affecting hiring, discharge, compensation, terms, conditions, or privileges of employment, employment opportunities, or status as an employee.
  - Ultimate employment actions
- Retaliation claims require only evidence of any action that would be "materially adverse to a reasonable employee or applicant."
  - Claimant must show only that the challenged action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Common Claims

- **Retaliation**
- **ADEA**
- **Sexual Harassment**
  - Same sex claims are more prevalent
- **Title VII (other)**
- **ADA** (Personally, I am seeing less of these types of claims.)

Dealing with the EEOC/TWC

- Most offices are overwhelmed with complaints
  - I recently handled two matters in Houston that remained in the investigation phase for two years
  - San Antonio moving a little faster
- In 2017, examiners were trying to mediate cases
- Examiners dismissed with no cause finding
- Most claims dismissed with no cause finding

Dealing with the EEOC/TWC (continued)

- EEOC is in charge of the process
- EEOC has regulatory, *investigative*, authority.
  - No enforcement authority against units of state agencies
- EEOC findings likely not admissible
- EEOC seeks judicial enforcement where investigation is resisted

Dealing with the EEOC/TWC (continued)

- Interplay between TWC unemployment compensation determination and claims of discrimination
  - Always respond to unemployment compensation claims
    - Point out and document "misconduct related to the work" where it exists
      - Likely to be considered by EEOC/TWC
      - Statements likely admissible if suit filed

Dealing with the EEOC/TWC (continued)

- **Mediation**
  - Pre-investigative deferral
  - Non-binding
  - Less likely to include EEOC demands
  - Personally, I view mediation at its worse; as free discovery.
- **Conciliation**
  - EEOC required to offer if it makes a "cause" finding
  - Not binding but consequences for failure
  - EEOC demands will likely be significant

Trends for 2018

- EEOC pushing for mediation and early resolution
- Sexual harassment claims
  - The environment is the same
- Interesting uses of Title VII

Questions?

ARBITRATION: PURPOSE & PROCESS

Prepared by

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FOR STARTERS

"As a litigant, I should dread a lawsuit above all else, other than sickness and death."

- Judge Learned Hand, 1921

WHY ARBITRATE?

HERE'S WHY…

- Address venue concerns
- Control costs
- Expedite final disposition

just to name a few reasons

ARBITRATOR'S FINDINGS

Not Appealable*

*with limited exceptions

DISCOVERY

- Can limit
- Can control terms/type

CLASS ACTION & COLLECTIVE ACTION

Waivers in Arbitration Agreements

SPECIFIC DETAILS OF ARBITRATION AGREEMENTS

QUESTIONS

ADA, FMLA and Workers' Compensation Issues

Presented to
Texas Council Risk Management Fund

By
Elizabeth DeRieux

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AMERICANS WITH DISABILITIES ACT

DEFINITION OF "DISABILITY"

The basic 3-part definition of "disability":

1. A physical or mental impairment that substantially limits a major life activity;
2. A record of such an impairment;
3. Being regarded as having such an impairment.

CANNOT CONSIDER MITIGATING MEASURES

- Determination of whether an impairment substantially limits a major life activity must be made **without regard** to the ameliorative effects of mitigating measures such as:
  - Medication, medical supplies, equipment or appliances, low-vision devices (which **do not include eyeglasses or contact lenses**), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
  - Use of assistive technology;
  - Reasonable accommodations or auxiliary aids or services; or
  - Learned behavioral or adaptive neurological modifications.
  - Surgical interventions that do not permanently eliminate an impairment
- For example, a diabetic who uses insulin may nevertheless be deemed disabled even if the insulin controls the sugar imbalance.

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STILL DISABILITY IF EPISODIC OR IN REMISSION

- "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
- Episodic impairments include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, schizophrenia.
- Cancer in remission but possibility it could return in substantially limiting form is a disability under ADA
- If reasonable accommodation owed, consider not only current effects of impairment, but also what effects would be if the impairment were in active state.

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MAJOR DEPRESSION, BIPOLAR DISORDER, POST TRAUMATIC STRESS DISORDER, OBSESSIVE COMPULSIVE DISORDER

- "…which substantially limit major life activities including functions of the brain, thinking, concentrating, interacting with others, sleeping or caring for oneself"
- Accommodating disabilities that manifest in behavior issues will be challenging
- Coworkers required to accept abuse or bad behavior?
  - Prior cases suggested workplace misconduct even if disability related were adequate grounds for termination
  - Should still be able to terminate for abusive behavior

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DEFINITION OF "REGARDED AS"

- If an employer makes an employment decision (e.g., hiring, demotion, promotion, termination) based on an individual's actual or perceived impairment (that is not transitory and minor), employer has regarded individual as having a disability and must defend its actions.
- An employee need not demonstrate that impairment is "substantially limiting" to be regarded as having a disability. Employer does have to believe that the impairment substantially limits a major life activity to regard an employee as disabled under the ADA.
- Accommodations are not required if an individual is merely "regarded as" having a disability.

NOT A DISABILITY

- Temporary non chronic impairments of short duration with little or no residual effects
  - Common cold
  - Seasonal or common influenza
  - A sprained joint
  - Minor or non chronic gastro-intestinal disorders
  - A broken bone "that is expected to heal completely"
  - Appendicitis and seasonal allergies that do not substantially limit a major life activity
- Longer term impairments that do not substantially limit a major life activity

INTERACTIVE PROCESS

Four steps:

1. Analyze particular job involved and determine its purpose and essential functions;
2. Consult to ascertain precise job related limitations and how limitations can be overcome with accommodations.
3. In consultation, identify potential accommodations and assess effectiveness in enabling individual to perform essential functions of the position.
4. Consider preferences of employee to be accommodated in selecting and implementing accommodations that are most appropriate for both employee and employer.

CONSULTATION REQUIRED

- Specifically discuss with employee each job function in question.
- Fair to consider the safety of the employee and others in the equation.
- Don't make assumptions: "Employee takes prescription pain medication, therefore cannot safely drive."

Cannon v. Jacobs Field Svcs, N.A. Inc., (5th Cir. 2016.)

REASONABLE ACCOMMODATIONS

- Employer obligated to provide a reasonable accommodation that is effective to remove the workplace barrier.

REASONABLE ACCOMMODATIONS

- An accommodation is effective if it will provide an individual who has a disability with an equal employment opportunity to participate in the application process, attain the same level of performance as co-workers in the same position, and enjoy the "benefits and privileges" of employment available to all employees.

REASONABLE ACCOMMODATIONS

- Reasonable accommodations relating to the "benefits and privileges" of employment are those accommodations needed to give the individual "equal access to the information communicated in the workplace, the opportunity to participate in employer-sponsored events . . . and the opportunity for professional advancement."

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FOCUS ON ACCOMMODATION STEP

- Cases of discrimination based on the ADA will focus on whether employer complied with its obligations under the ADA, *i.e.* whether there was discrimination, as opposed to whether employee is disabled.
- ADA claims are defended like many other types of discrimination claims: by showing that the employer has a legitimate, non-discriminatory reason for its decision.

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STEPS TO TAKE

- Review employment policies.
- Review job descriptions.
- Keep records of accommodation requests made and accommodations denied or provided, along with some evidentiary back-up for the decisions made.
- Limit amounts and types of discretionary leaves.

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Job Descriptions

- Court dismissed ADA case brought by a customer service employee with depression and anxiety who had attendance problems.
- Takeaway: If attendance is an essential function of a job, *i.e.*, you need employees to be physically present at work, say that in the job description. This is no longer a given.
- *Williams v. AT&T Mobility Services* (6th Cir.)

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ATTENDANCE

- If an employee has unused personal leave, it is hard to defend adverse employment action based on excessive absences.
- Best practice: Contemporaneous documentation and discussion of attendance issues; avoid adverse employment action based on tardiness or absences that were not documented and discussed at the time they happened.

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Document, Document, Document

- In addition to documenting accommodation process, document reasons for any employment actions, including termination.
- *Heinsohn v. Carabin & Shaw, P.C.,* (5th Cir. 2016)

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OTHER STEPS TO TAKE

- Remember that the ADA itself provides a non-exhaustive list of accommodations, including:
  - acquiring certain equipment; adjusting exams, training materials, or policies; providing qualified interpreters; reallocating nonessential job functions; permitting part-time or modified work schedules; and reassigning employees to vacant, equivalent positions.

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Consider Regulations Implementing Title II of the ADA

* Service animals
* Wheelchairs and power-driven mobility devises
* Physical barriers/restrooms
* Effective communication

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Web Content Accessibility Guidelines (WCAG) 2.1

- Purpose – to provide individuals with disabilities access to information and communication technology
- WCAG 2.1 are Guidelines – not firm legal rules
- Helpful in gauging reasonableness of requested accommodation
- Watch for developments of regulations in late January 2018.

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MEDICAL DOCUMENTATION

- Employee requested accommodations and provided 6-year-old doctor note that mentioned ADHD.
- Employer requested more recent medical information; one month later employer followed up; three months later employer again requested doctor note; employee then provided a medical history from his doctor.
- Employer decided it was insufficient but did not communicate the insufficiency to the employee. The employer granted some of the employee's accommodation requests over the next two years; employee was given negative performance evaluations.
- **Held**: Employer did not grant accommodations in a timely fashion and employee's insufficient medical documentation was no excuse.

Gilreath v. Cumberland County Board of Education

MEDICAL DOCUMENTATION

May an employer consult with the employee's doctor about medical documentation?

- Yes—with the employee's consent.
- EEOC Enforcement Guidance recommends that the employer should consult with employee's doctor if the medical documentation provided by the employee is insufficient. Employee may be responsible for the breakdown in the interactive process where the employee refuses to allow the employer to speak with her doctor.

MEDICAL DOCUMENTATION

May an employer require an employee to go to a health care professional of the employer's choice when the employee's medical documentation is insufficient? Yes

- EEOC Enforcement Guidance states that any medical examination by the employer's health care professional must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.
- Employer must pay all costs associated with the visit(s).

ATTENDANCE

Look at treatment of non-disabled employees

- Flight attendant unable to work up to half of each month due to arthritis, but able to perform job when she worked. Five other flight attendants also exceeded absences set out in policies and were not disciplined. Employer lost.

Carmona v. Southwest Airlines Co., 604 F. 3d 848 (5th Cir. 2010).

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MISCONDUCT

- Employer may enforce a consistently-applied conduct standard, even if misconduct is caused by disability, such as mental illness.

Newberry v. East Texas State University, 161 F. 3d 276 (5th Cir. 1998).

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DRUG USE & TESTING

- Current use of illegal drugs not protected, but rehabilitated drug users are protected.
- 42 U.S.C. 12114(b), 12210(b)
- No Bright Line: How far back can employer look to determine "current" drug use is a fact question.
- Can test for drugs; can enforce policy against hiring or rehiring someone who failed a drug test.

Lopez v. Pacific Maritime Association, 657 F.3d 762 (9th Cir. 2011).

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Texas Commission on Human Rights Act (TCHRA)

- Substantial overlap with ADA, as well as prohibiting other discriminatory employment practices.
- Applies to all governmental entities, regardless of number of employees
- Texas Labor Code, Sec. 21.001–21.556
- Compliance training programs available

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FAMILY MEDICAL LEAVE ACT

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Employee Eligibility

- Employed by covered employer
- Worked at least 12 months
- Have at least 1,250 hours of service during the 12 months before leave begins
- Employed at a work site with 50 employees within 75 miles

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Qualifying Leave Reasons

Eligible employees may take FMLA leave:

- For the birth or placement of a child for adoption or foster care, within one year of birth or placement.
- To care for a spouse, child, or parent with a serious health condition
- For their own serious health condition
- Because of a qualifying reason arising out of the covered active duty status of a military member who is the employee's spouse, child, or parent **(qualifying exigency leave)**
- To care for a covered servicemember with a serious injury or illness when the employee is the spouse, child, parent, or next of kin of the covered servicemember **(military caregiver leave) (26 workweeks of leave).**

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Qualifying Family Members

- **Parent** – A biological, adoptive, step or foster father or mother, or someone who stood in loco parentis to the employee when the employee was a son or daughter. Parent for FMLA purposes does not include in-laws.
- **Spouse** – A legally married husband or wife, including common law marriage and same-sex marriage.
- **Son or Daughter** – For leave other than military family leave, a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under 18 years of age, or 18 or older and incapable of self-care because of a mental or physical disability.

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Qualifying Leave Reasons – For the Birth or Placement of a Child

- Both the mother and father are entitled to FMLA leave for the birth or placement of the child and/or to be with the healthy child after the birth or placement (bonding time)
- Employees may take FMLA leave before the actual birth, placement or adoption
- Leave must be completed by the end of the 12-month period beginning on the date of the birth or placement

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BREAK TIME FOR NURSING MOTHERS

- Employers must provide reasonable break time for an employee to express breast milk for her nursing child for one year after the birth of the child.
- Break allowed each time employee has need to express milk.
- Employers required to provide a place, other than a bathroom, that is shielded from view and free from intrusion by coworkers and the public where employee can express milk.

Qualifying Leave Reasons – Serious Health Condition

- Illness, injury, impairment or physical or mental condition involving:
  - Inpatient Care, or Continuing Treatment by a Health Care Provider

Serious Health Condition – Inpatient Care

- An overnight stay in a hospital, hospice, or residential medical facility
- Includes any related incapacity or subsequent treatment

Serious Health Condition – Continuing Treatment

Continuing Treatment by a Health Care Provider

- Incapacity Plus Treatment
- Pregnancy, including prenatal medical care
- Chronic Conditions
- Permanent/Long-term Conditions
- Absence to Receive Multiple Treatments

Continuing Treatment by a Health Care Provider

Incapacity Plus Treatment

- Incapacity of more than three consecutive, full calendar days that involves either:
  - Treatment two times by HCP (first in-person visit within seven days, both visits within 30 days of first day of incapacity)
  - Treatment one time by HCP (in-person visit within seven days of first day of incapacity), followed by a regimen of continuing treatment (e.g., prescription medication)

Continuing Treatment by a Health Care Provider

Chronic Conditions

- Any period of incapacity or treatment due to a chronic serious health condition, which is defined as a condition that:
  - requires periodic visits (twice per year) to a health care provider for treatment
  - continues over an extended period of time
  - may cause episodic rather than continuing periods of incapacity

Continuing Treatment by a Health Care Provider

Chronic Conditions

- Any period of incapacity or treatment due to a chronic serious health condition, which is defined as a condition that:
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  - continues over an extended period of time
  - may cause episodic rather than continuing periods of incapacity

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Continuing Treatment by a Health Care Provider

Permanent/Long-Term Conditions

- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective

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Continuing Treatment by a Health Care Provider

Absence to Receive Multiple Treatments

- For restorative surgery after an accident or other injury, or
- For conditions that, if left untreated, would likely result in incapacity of more than three consecutive, full calendar days

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Amount of Leave

- Employee's workweek is basis for entitlement
- Eligible employees may take up to **12 work weeks*** of FMLA leave:
  - for the birth or placement of a child for adoption or foster care;
  - to care for a spouse, son, daughter, or parent with a serious health condition; and
  - for the employee's own serious health condition.

Amount of Leave – Intermittent Leave

- Employee is entitled to take intermittent or reduced schedule leave for:
  - Employee's or qualifying family member's serious health condition when the leave is medically necessary
  - Covered servicemember's serious injury or illness when the leave is medically necessary
  - A qualifying exigency arising out of a military member's covered active duty status
- Leave to bond with a child after the birth or placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent or reduced schedule leave

Amount of Leave – Intermittent Leave

- In calculating the amount of leave, employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour.
- Shortest increment may vary during different times of day or shift.
- Required overtime not worked may count against an employee's FMLA entitlement.

12-Month Period

Method determined by employer

- Calendar year
- Any fixed 12-month leave year
- A 12-month period measured forward
- A rolling 12-month period measured backward

Substitution of Paid Leave

- "Substitution" means paid leave provided by the employer runs concurrently with unpaid FMLA leave and normal terms and conditions of paid leave policy apply
- Employees may choose, or employers may require, the substitution of accrued paid leave for unpaid FMLA leave
- Employee remains entitled to unpaid FMLA if procedural requirements for employer's paid leave are not met

Employer Responsibilities

- Provide notice
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- Maintain records

Employer Responsibilities – Provide General Notice

- Employers must inform employees of FMLA:
  - Post a General Notice, and
  - Provide General Notice in employee handbook or, if no handbook, distribute to new employees upon hire
- Electronic posting and distribution permitted
- Languages other than English required where significant portion of workforce not literate in English
- Potential fine for willful posting violation

Employer Responsibilities – Provide Notice of Eligibility

- Within five business days of leave request (or knowledge that leave may be FMLA-qualifying).
- Eligibility determined on first instance of leave for qualifying reason in applicable 12-month leave year.
- New notice for subsequent qualifying reason if eligibility status changes.
- Provide a reason if employee is not eligible.
- May be oral or in writing (optional WH-381).

Employer Responsibilities – Provide Notice of Eligibility

- Within five business days of leave request (or knowledge that leave may be FMLA-qualifying).
- Eligibility determined on first instance of leave for qualifying reason in applicable 12-month leave year.
- New notice for subsequent qualifying reason if eligibility status changes.
- Provide a reason if employee is not eligible.
- May be oral or in writing (optional WH-381).

Employer Responsibilities – Provide Notice of Rights and Responsibilities

- Provided when eligibility notice required
- Must be in writing (optional WH-381)
- Notice must include:
  - Statement that leave may be counted as FMLA
  - Applicable 12-month period for entitlement
  - Certification requirements
  - Substitution requirements
  - Arrangements for premium payments (and potential employee liability)
  - Status as "key" employee
  - Job restoration and maintenance of benefits rights

Employer Responsibilities – Provide Notice of Designation

- Within five business days of having enough information to determine leave is FMLA-qualifying
- Once for each FMLA-qualifying reason per applicable 12-month period (additional notice if any changes in notice information)
- Include designation determination; substitution of paid leave; fitness for duty requirements
- Must be in writing (optional WH-382)
- If leave is determined not to be FMLA-qualifying, notice may be a simple written statement

Employer Responsibilities – Provide Notice of Designation

- Employer must notify employee of the amount of leave counted against entitlement, if known; may be payroll notation.
- If amount of leave is unknown (e.g., unforeseeable leave), employer must inform employee of amount of leave designated upon request (no more often than 30 days).
- Retroactive designation permitted provided that failure to timely designate does not cause harm to employee.

Employer Responsibilities – Maintain Group Health Plan Benefits

- Group health plan benefits must be maintained throughout the leave period
- Same terms and conditions as if employee were continuously employed

Employer Responsibilities – Maintain Group Health Plan Benefits

- Employee must pay his/her share of the premium.
- Even if employee chooses not to retain coverage during leave, employer obligated to restore same coverage upon reinstatement.
- In some circumstances, employee may be required to repay the employer's share of the premium if the employee does not return to work after leave.

Employer Responsibilities – Job Restoration

- Same or equivalent job
  - equivalent pay
  - equivalent benefits
  - equivalent terms and conditions
- Employee has no greater right to reinstatement than had the employee continued to work
- Bonuses predicated on specified goal may be denied if goal not met
- Key employee exception

Prohibited Employment Actions

Employers cannot:

- Interfere with, restrain or deny employees' FMLA rights.
- discriminate or retaliate against an employee for having exercised FMLA rights.
- Discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA.
- Use the taking of FMLA leave as a negative factor in employment actions.

Employer Responsibilities – Maintain Records

- Basic payroll information
- Dates FMLA leave is taken
- Hours of leave if leave is taken in less than one full day
- Copies of leave notices
- Documents describing benefits/policies
- Premium payments
- Records of disputes

Employee Responsibilities

- Provide sufficient and timely notice of the need for leave
- If requested by the employer:
  - Provide certification to support the need for leave
  - Provide periodic status reports
  - Provide fitness-for-duty certification

Employee Responsibilities – Notice Requirements

- Provide sufficient information to make employer aware of need for FMLA-qualifying leave
- Specifically reference the qualifying reason or the need for FMLA leave for subsequent requests for same reason
- Consult with employer regarding scheduling of planned medical treatment
- Comply with employer's usual and customary procedural requirements for requesting leave absent unusual circumstances

Employee Responsibilities – Notice Requirements

Timing of Employee notice of need for leave:

- Foreseeable Leave - 30 days notice, or as soon as practicable
- Unforeseeable Leave - as soon as practicable

Employee Responsibilities – Provide Certification

- Medical Certification for serious health condition (optional WH-380-E and 380-F)
  - Submit within fifteen calendar days
  - Employer must identify any deficiency in writing and provide seven days to cure
  - Annual certification may be required
  - Employee responsible for any cost

Employee Responsibilities – Provide Certification

- Employer (**not** employee's direct supervisor) may contact health care provider to:
  - **Authenticate:** Verify that the information was completed and/or authorized by the health care provider; no additional information may be requested
  - **Clarify:** Understand handwriting or meaning of a response; no additional information may be requested beyond what is required by the certification form
- Second and third opinions (at employer's cost)
  - If employer questions the validity of the complete certification, the employer may require a second opinion
  - If the first and second opinions differ, employer may require a third opinion that is final and binding

Employee Responsibilities – Provide Certification

- Recertification
  - No more often than every 30 days and with an absence
    - If the minimum duration on the certification is greater than 30 days, the employer must wait until the minimum duration expires
    - In all cases, may request every six months with an absence
  - More frequently than every 30 days if:
    - the employee requests an extension of leave, or
    - circumstances of the certification change **significantly**, or
    - employer receives information that casts doubt on the reason for leave
- Consequences of failing to provide certification
  - Employer may deny FMLA until certification is received

Employee Responsibilities – Provide Periodic Status Reports

- Employee must respond to employer's request for information about status and intent to return to work

Employee Responsibilities – Fitness-for-Duty Certification

- For an employee's own serious health condition, employers may require certification that the employee is able to resume work
  - Employer must have a uniformly-applied policy or practice of requiring fitness-for-duty certification for all similarly-situated employees
- If state or local law or collective bargaining agreement is in place, it governs the return to work
- Not permitted for intermittent or reduced schedule leave unless reasonable safety concerns exist
- Authentication and clarification
- Employee responsible for any cost

Qualifying Exigency Leave

Eligible employees may take up to **12 workweeks*** of FMLA leave because of a qualifying reason that arises out of the fact that the employee's spouse, son, daughter, or parent is on, or has been notified of an impending call, to "covered active duty"

- For qualifying exigency leave, son or daughter refers to a son or daughter of any age
- Leave for this reason counts against an employee's normal FMLA entitlement for other leave reasons within the 12-month leave year

Qualifying Exigency Leave – Covered Active Duty

- **Regular Armed Forces**:
  - duty during deployment of the member with the Armed Forces to a foreign country
- **Reserve components** of the Armed Forces (members of the National Guard and Reserves):
  - **duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation**

Qualifying Exigencies

- Short-notice deployment (up to seven days)
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Non-medical counseling
- Care of the military member's parent
- Rest and recuperation (up to fifteen days)
- Post-deployment activities (90-day period)
- Additional activities by agreement

Employee Responsibilities – Provide Certification

- An employer may require an appropriate certification with:
  - a copy of the military member's active duty orders
  - a qualifying exigency certification (optional Form WH-384)
  - Statement of facts
  - Dates of leave
  - Frequency and duration of intermittent leave
  - Contact information for any third party meeting
- The employer may verify meetings with a third party and may contact DOD to verify the military member's covered active duty status

Military Caregiver Leave

Eligible employees may take up to **26 workweeks*** of FMLA leave in a "single 12-month period" to care for a "covered service member" with a "serious injury or illness" if the employee is the covered service member's spouse, parent, son, daughter, or next of kin

- For military caregiver leave, son or daughter refers to a son or daughter of any age
- All FMLA leave is limited to a combined total of 26 workweeks during the "single 12-month period"; no more than 12 workweeks can be taken for other leave reasons

Qualifying Family Relationships Under Military Caregiver Leave

You are the Servicemember's…

Covered Servicemember: Spouse, Parent, Son or Daughter, Next of Kin

In this order:

1. One blood relative in writing, if none…
2. All blood relatives with legal custody, if none…
3. All brothers and sisters, if none…
4. All grandparents, if none…
5. All aunts and uncles, if none…
6. All first cousins.

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Covered Servicemember

A **covered servicemember** may be:

- a current member of the Armed Forces;

  OR

- a veteran of the Armed Forces.

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Covered Current Servicemember

A **current member of the Armed Forces**, including a member of the National Guard or Reserves:

- undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness

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Current Servicemember – Serious Injury or Illness

A serious injury or illness is one that:

- was incurred by a servicemember in the line of duty on active duty; or
- existed before the servicemember's active duty and that was aggravated by service in the line of duty on active duty;

and

- may cause the servicemember to be medically unfit to perform the duties of his or her office, grade, rank, or rating

Employee Responsibilities – Certification for a Current Servicemember

- An employer may require that leave to care for a covered service member be supported by a certification completed by an authorized health care provider (optional WH-385), or an Invitational Travel Order (ITO) or Invitational Travel Authorization (ITA)
- Authentication and clarification
- Limited second and third opinions

Covered Servicemember – Veteran

A **veteran of the Armed Forces** is a covered service member if he or she:

- is undergoing medical treatment, recuperation, or therapy for a serious injury or illness; and
- was discharged under conditions other than dishonorable within the five-year period before the employee first takes military caregiver leave*

* Special rules may apply if the service member was discharged before March 8, 2013

Veteran Serious Injury or Illness

An injury or illness that was incurred or aggravated by service in the line of duty on active duty in the Armed Forces, that manifested before or after the servicemember became a veteran, and that is either:

1) a continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces; *or*

Veteran Serious Injury or Illness

(continued)

2) a condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater (the rating may be based on multiple conditions); *or*
3) a condition that substantially impairs the veteran's ability to work because of a disability related to military service, or would do so absent treatment; *or*
4) an injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers

Employee Responsibilities – Certification for a Veteran

- An employer may require that leave to care for a veteran be supported by a certification completed by an authorized health care provider (optional WH-385-V)
- Authentication and clarification
- Limited second and third opinions

Employee Responsibilities – Certification for a Veteran

- An employee may submit a copy of a VASRD rating determination or enrollment documentation from the VA Program of Comprehensive Assistance for Family Caregivers to support the veteran's serious injury or illness.
- Additional information may be needed to establish the other requirements for a complete certification such as:
  - confirmation of family relationship;
  - documentation of discharge date

Military Caregiver Leave – Application of Leave

- "Single 12-month period"
- Per covered service member, per injury
- Limitations on leave
  - 26 workweeks for all qualifying reasons
  - Designation of caregiver leave
  - Spouses working for same employer

FMLA Enforcement Mechanisms

- To enforce FMLA rights, employees may:
  - File a complaint with Wage and Hour Division
  - File a private lawsuit (Section 107(a))
- Action must be taken within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful

SAME SEX MARRIAGES

- *Obergefell v. Hodges*, decided June 26, 2015 held that the U.S. Constitution guarantees same-sex couples the freedom to marry.
- FMLA rights must be afforded to eligible employees in a same-sex marriage, regardless of where the marriage was performed or where the employee resides.

MEDICAL CERTIFICATION

- When an Employer requests medical certification, it must advise the employee of the consequences of failure to provide certification.
- Employee may be fired for failure to provide certification within 15 days, if notice was adequate. However, best practice includes a reminder and a grace period if necessary.

29 C.F.R. 825.305(d) and W*allace v. Fedex Corp*., 764 F. 3d 571 (6th Cir. 2014).

FITNESS FOR DUTY/RIGHT TO RETURN TO WORK

If an employer requires clarification of a fitness-for-duty certification, the employer may contact the employee's doctor, if employer has employee's permission to do so. However, employer may not delay the employee's return to work while contact with the health care provider is made.

Section 825.312(b)

FMLA Compliance Assistance Materials

Title I of the FMLA, as amended (29 U.S.C. 2601—2654)
The Regulations (29 C.F.R. Part 825)
The Employee's Guide to the FMLA
The Employee's Guide to Military Family Leave under the FMLA
FMLA Forms
FMLA Fact Sheets
FMLA Poster (WH-1420)
FMLA Frequently Asked Questions
https://www.dol.gov/whd/fmla/

WORKERS' COMPENSATION

Workers' Compensation

Under workers' compensation law, an injury or illness is covered, without regard to fault, if it was sustained in the course and scope of employment, *i.e.*, while furthering or carrying on the employer's business; this includes injuries sustained during work-related travel.

Workers' Compensation

Injuries are not covered if they were the result of the employee's horseplay, willful criminal acts or self-injury, intoxication from drugs or alcohol, voluntary participation in an off-duty recreational activity, a third party's criminal act if directed against the employee for a personal reason unrelated to the work, or acts of God.

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Workers' Compensation

Injured workers must file injury reports within thirty days of the injury, must appeal the first impairment rating within 90 days of its issuance, and must file the formal paperwork for the workers' compensation claim within one year of the injury.

If the work-related nature of the injury or illness was not immediately apparent, those deadlines run from the date on which the employee should have known the problem was work-related.

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Workers' Compensation

Three main types of benefits:

* medical benefits
* income benefits
* death benefits

Each type is statutorily defined and limited.

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Workers' Compensation

The law places a heavy emphasis on return-to-work programs.

Studies show that recovery is faster if an employee has some kind of useful work to do.

Workers' Compensation

An employee's refusal of suitable light-duty work can stop the payment of workers' compensation benefits.

Workers' Compensation

A job injury can involve other laws such as FMLA and ADA

Whatever law provides the greatest protection should be applied if there are conflicts.

Workers' Compensation

Chapter 451 of the workers' compensation law prohibits discrimination or retaliatory action against employees who have filed workers' compensation claims or are in the process of doing so.

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Workers' Compensation

Stray remarks can be harmful to a company's legal position in a Chapter 451 lawsuit.

Train employees not to talk about a claim in terms of it being a problem, since negative remarks may be evidence against employer on a retaliation claim.

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Workers' Compensation

Design your paid leave policies to avoid "benefits stacking", *i.e.*, the combining of workers' compensation and leave-related benefits in such a way that the employee ends up getting more than 100% of his or her regular wage each week.

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Workers' Compensation

Employees on workers' compensation do not have to be allowed to continue accruing leave or other benefits, but should be treated at least as favorably as other absent employees in that regard.

Workers' Compensation

Loss of health insurance benefits while on workers' compensation leave is a COBRA-qualifying event.

Workers' Compensation

If a workers' compensation claimant files an unemployment claim, he or she will be disqualified from unemployment benefits unless the workers' compensation benefits are for "permanent, partial disability."

The claimant's medical ability to work would be in question and should be raised by the employer as an issue in its response to the unemployment claim.

FINAL THOUGHTS: CONSTRUCTIVE DISCHARGE

- Constructive discharge or dismissal: instead of firing employee, employer wrongfully makes working conditions so intolerable that employee is forced to resign.
- Hard for plaintiff to prove, but remains a viable legal theory.
- Document any complaints about working conditions and your responses, including investigations.
- *Microsoft v. Mercieca,* (Tex.App., 2016)

FINAL THOUGHTS: RETALIATION

- Taking adverse employment action because a person reported or provided testimony about a violation of law may result in liability, based on a theory called "protected oppositional conduct."
- The witness must have reasonably believed that the situation they were providing information about constituted a violation of law.

EEOC v. Rite Way Svcs, Inc., (5th Cir. 2016).

FINAL THOUGHTS: BE CONSISTENT

- Maintain central repository/HR person with information on all employment actions.
- Look backward and forward: Have we fired employees on first offense in the past? Are we willing to do that every time in the future?
- Strive for consistency between programs and supervisors.
- Document, document, document.
- *Wheat v. Florida Parish Juvenile Comm.,* (5th Cir. 2016).

Thank you!

What's Different About Being Governmental?

Pamela L. Beach
Attorney at Law
Texas Council Risk Management Fund

Centers are Governmental

Health and Safety Code 534.001 states:

(c) A community center is:

(1) an agency of the state, a governmental unit, and a unit of local government, as defined and specified by Chapters 101 and 102, Civil Practice and Remedies Code;

(2) a local government, as defined by Section 791.003, Government Code;

(3) a local government for the purposes of Chapter 2259, Government Code; and

(4) a political subdivision for the purposes of Chapter 172, Local Government Code.

The Tort Claims Act

The Texas Tort Claims Act provides immunity from suit unless immunity is expressly waived. In addition, there is a cap on damages.

Civil Practice and Remedies Code 101 et seq.

The Pay Day Act

Governmental entities are exempt from the provisions of the Pay Day Act.

Labor Code 61.003

The EEOC

The EEOC can't sue you because governmental entities are exempt. Only the Department of Justice can sue you. Answer the charges politely but briefly ALWAYS stating that the center is a governmental entity.

See MOU

The NLRA

Centers are exempt from the National Labor Relations Act. We have had complaints filed, but they are easily dismissed. In addition, state law prohibits governmental entities from collectively bargaining with unions.

29 U.S. Code § 152

Texas Gov't Code 617.002

The FLSA

- There are special provisions in the FLSA that allow governmental entities to deduct from exempt employee's pay for parts of days.
- 29 CFR 541.710

OSHA

We are exempt from OSHA requirements. Occasionally we get a complaint but we have a form letter prepared for a response.

29 CFR 1975.5

Open Meetings
Open Records

Centers are required to comply with the provisions of the Public Information Act and the Open Meetings Act. The Attorney General's office has training on both.

Texas Gov't Code 551 and 552

Drug testing

There is an Texas Attorney General opinion that says random drug testing of governmental employees in Texas is unconstitutional.

Privacy Issues

See Joel Geary's presentation on privacy.

Gratuitous payment

The Texas Constitutional prohibits gratuitous payments to employees. Gratuitous payments can include severance payments and bonuses unless they are structured correctly.

Guns

As a governmental entity, we may prohibit our employees from carrying guns, but we cannot prohibit clients or visitors to our property from legally carrying weapons.

Government Code Sec. 411.203

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§541.710 Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of §541.602 shall not be disqualified from exemption under §§541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

(1) Permission for its use has not been sought or has been sought and denied;

(2) Accrued leave has been exhausted; or

(3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Texas Council Risk Management Fund

Employment Law

Participant Evaluation

Thank you for attending the liability workshop. Your evaluation is important to us. Your ideas and suggestions help us plan and improve future learning programs. Please take a few moments to share your thoughts on this seminar.

A. OVERALL RATING Please complete by rating from 1 to 5 in the space provided. (1 is the lowest; 5 is the highest score)

1. ____ Overall, how satisfied were you with the **course materials and delivery skills** that were used? (List one of the following choices.)

   1 = dissatisfied 2 = somewhat dissatisfied 3 = OK
   4 = somewhat satisfied 5 = satisfied

2. ____ How satisfied were you with the overall **quality and value** of this learning experience? (List one of the following choices.)

   1 = dissatisfied 2 = somewhat dissatisfied 3 = OK
   4 = somewhat satisfied 5 = satisfied

3. ____ How useful was the **content** of the workshop for you? (List one of the following choices.)

   1 = irrelevant: material not applicable, 2 = insignificant: I'm unlikely to use the material, 3 = somewhat useful: I may use the material, 4 = useful: I'll use the material, 5 = significant learning: I'll definitely use the material.

B. GENERAL QUESTIONS

1. What parts of this seminar were most relevant or helpful to you in your responsibilities?

2. What changes would improve this session's usefulness or effectiveness?

3. What other subjects would you like to see included in future seminars?

C. RATING SCALE OF TOPICS Please complete by rating from 1 to 5 in the space provided. (1 is the lowest; 5 is the highest score)

How useful was the **content** of each topic for you? (List one of the following choices) Your comments are also welcome.

1 = irrelevant: material not applicable. 2 = insignificant: I'm unlikely to use the material. 3 = somewhat useful, I may use the material 4 = useful, I'll use the material 5 = significant learning: I'll definitely use the material.

1. _____ **Recent Trends and Cases in Discrimination Law**

2. _____ **Arbitration: Purpose and Process**

3. _____ **Legal Ruminations about Retaliation, Social Media, Discrimination and FLSA**

4._____ **Sexual Harassment – Policy and Prevention**

5. _____ **ADA and FMLA Update**

6._____ **What Makes Community Centers Different?**

D. GENERAL COMMENTS AND SUGGESTIONS FOR NEW TOPICS:

Please leave this form on your desk or give it to Alicia on your way out. Safe Travels home.