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Employer Liability for Harassment by a 3rd Party

The US Court of Appeals for the Seventh Circuit recently confirmed that an employer can be liable under Title VII of the Civil Rights Act of 1964 for the harassment of an employee that was committed by a third party non-employee, even if the employer had no direct knowledge of the harassment, if it should have known and failed to act. In overturning a federal trial court, the Seventh Circuit ruled in Nischan v. Stratosphere Quality, LLC that the evidence supported the plaintiff's argument that her employer was on constructive notice of ongoing harassment by a client's employee because a Stratosphere supervisor witnessed the harassment and failed to report it, even though company policy required it.

The standard for establishing employer liability for harassment claims under Title VII differs depending on whether the perpetrator is a supervisor or coworker of the victim. Where the perpetrator is a supervisor and the harassment results in a tangible employment action, the employer is strictly liable for supervisor's actions. Where the perpetrator is a coworker, the employer can still be held liable if plaintiff can show that the employer was negligent in discovering or remedying harassment, i.e. that the employer knew or should have known of the harassment and failed to take remedial action. The facts in the Nischan case demonstrate that a company supervisor witnessed the harassment and provided console to the plaintiff. However, the supervisor failed to follow company policy and report the incidence. Hence the court ruled the company had constructive notice of the harassment. The appeals court made clear that an employer could be liable for harassment of an employee committed by a non- employee. In applying the co-worker theory, to prove negligence, an employee typically will be expected to make a concerted effort to inform his or her employer of harassing conduct. The court found the company liable because it knew or should have known of the harassing conduct yet failed to act, in other words had constructive notice of the harassment. The court found that the company's supervisor witnessing the sexual harassment coupled with the language in the company policy, requiring managerial and supervisory employees to report such conduct immediately, was sufficient to provide the company, Stratosphere, with constructive notice of the harassment.

This is a clear reminder that an employer can be liable for harassment committed by a third party non-employee, even if the victim does not complain directly, if the employer should have known about the harassment and failed to act. This case highlights the potential for third party harassment liability if employees with a responsibility to report it keep it to themselves, and why they need to be trained to take prompt action in bringing suspected harassment to management's attention whenever they observe it.

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Gender Identity Discrimination

Title VII prohibits an employer from discriminating against an individual on the basis of race, color, sex, national origin, or religion. Sex discrimination includes treating an applicant or employee unfavorably "because of" that person's sex. Even though Congress has resisted pressure thus far to amend Title VII to explicitly prohibit discrimination based on gender identity, federal courts have generally extended Title VII protection to cover some gender identity claims indirectly on the basis of "sexual stereotyping ", where an individual is perceived as not conforming to the gender stereotypes associated with his or her biological sex. In 2012, the EEOC ruled in Macy v. Holder, that discrimination based on a person's gender identity is a form of unlawful sex discrimination under Title VII. The EEOC has extended this position in private sector enforcement as well, with some courts accepting the interpretation and others rejecting it. In 2014, the U. S. Justice Department took a similar position that Title VII prohibits discrimination based on sexual orientation and gender identity. Also in 2014, President Obama issued a new Executive Order amending E.O. 11246 to expressly prohibit federal contractors from discriminating based on sexual orientation and gender identity.

On October 4, 2017 Attorney General Jeff Sessions issued a memo announcing the Department of Justice's new interpretation that Title VII does not prohibit discrimination based on gender identity, and officially withdrew the Obama Administration 2014 memo that concluded the opposite. The memo emphasizes that the new interpretation is a conclusion of law and is not a policy position. This new interpretation will have no practical impact on federal contractors that are prohibited from discriminating based on sexual orientation and gender identity by amended Executive Order 11246. For now, the Trump White House has publicly stated that these protections added to EO 11246 will remain intact and will be enforced. Also keep in mind, there are a growing number of state and local laws that expressly prohibit discrimination on the basis of gender identity.

New White Collar OT Rules

Last year the DOL proposed raising the minimum weekly salary amount (from $455 to $913 per week) used in part to determine whether an employee should be exempt from the FLSA's overtime requirement. This was an attempt to update salary tests from levels established in 1975. On August 31, 2017, the Final Rule was struck down permanently. The judge concluded that Obama's Labor Department exceeded its authority by raising the minimum salary so significantly that it became the determinative test for exempt status, diminishing the importance of the duties test.

On October 30, 2017, the DOL confirmed that it intends to "undertake new rulemaking with regard to overtime" by filing an appeal of the district court order holding the prior overtime rule invalid. While the Obama-era rule set the salary level for the white-collar exemptions at $47,476, the new salary level will be in the low $30,000 range.

What does this mean? While nothing has changed, we recommend that employers continue to review job descriptions to ensure that jobs meet one of more of the FLSA's "white collar" duties tests (Executive, Administration, Professional, Computer and Outside Sales).

In the meantime, we will await feedback from the DOL who is seeking information to determine whether there is a need for a new rulemaking. We'll keep you posted.

Pregnant Worker Accommodations

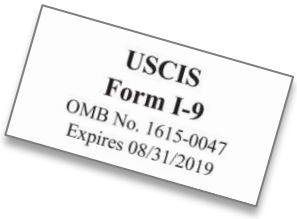
There are now 18 states (as well as the District of Columbia) that have laws in place requiring private sector employers to reasonably accommodate pregnant workers. Although current federal law prohibits pregnancy based discrimination and mandates workplace reasonable accommodations for pregnancy related disabilities, there is no requirement to provide an accommodation to a pregnant employee simply on the basis of her pregnancy. Each state has unique aspects to its law, so we encourage you to check the law of the relevant state if a compliance

Update on Salary History Prohibition States

There is a growing trend to ban employers from asking job candidates for past salary information. In an effort to fight wage discrimination and the gender pay gap, New York City, Philadelphia, San Francisco, Massachusetts, Delaware, Oregon and Puerto Rico have recently passed such rulings. Meanwhile, similar legislation has been proposed in California, New Jersey and Washington State, and in New York State, Pittsburgh and New Orleans, the public sector has been banned from making such inquiries of job candidates.

Employers will want to be diligent about interviewing out-of-state candidates in the event they are in a city/state that has a salary history ban. Anyone involved in the hiring process should be apprised of this change. The best advice is to simply remove salary questions from the interview process to ensure compliance. It is presumed that more states and cities will be joining this movement in the months ahead.

Is HR using the Updated Version of Form I-9



Form I-9, Employment Eligibility Verification, was updated by the USCIS earlier this year. Starting September 18, 2017, employers must use the revised form with a revision date of 07/17/17. Employers must continue following existing storage and retention rules for any previously completed Form I-9.

What was changed:

- USCIS changed the name of the Office of Special Counsel for Immigration-Related Unfair Employment Practices to its new name, Immigrant and Employee Rights Section.
- USCIS removed "the end of" from the phrase "the first day of employment."
- Consular Report of Birth Abroad (Form FS-240) was added to List C.
- The various types of certifications of report of birth issued by the Department of State were combined (Form FS-545, Form DS-1350, and Form FS-240) for easier reporting.
- All List C documents were renumbered excepting the Social Security card

Because the Administration is focusing on immigration worksite compliance, we strongly urge employers to review current compliance practices and procedures to ensure that all requirements are being met.

2017 EEO-1 REMINDER

The 2017 EEO-1 will continue to collect race, ethnicity and gender data by job category and will not include the collection of pay and hours worked data. Reports must be submitted and certified by March 31, 2018. The employment data used for the 2017 EEO-1 report should be selected from a payroll period in October, November or December, the fourth quarter of calendar year 2017.

The Essential Functions in Job Descriptions

There are practical compliance issues that can arise in the drafting, reviewing and updating of job descriptions. In relationship to the Americans with Disabilities (ADA), specifically with respect to establishing "essential" job functions, job descriptions can be very important. A written job description, while not required, is evidence of the job's essential functions under the ADA. It can help an employer defend its position in a situation where the company is accused of failing to make a reasonable accommodation to an employee with an ADA-covered disability. The ADA requires an employer to make reasonable accommodation for the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless the employer can show that making the accommodation would impose an undue hardship on its business. Under the ADA, an individual with a disability is qualified only if he or she can perform the "essential functions" of the job with or without reasonable accommodation. As a result, an employer is never required to eliminate, reassign, or significantly alter an essential job function as a reasonable accommodation.

The ADA does not dictate what functions are essential to particular jobs. Instead, they define "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or applies for". There are a number of reasons why a job function may be considered "essential":

- The function may be essential because the reason the position exists is to perform that function;
- The function may be essential because of the limited number of employees available among whom the performance of the job function can be distributed; and/or
- The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

The EEOC's regulations also suggest types of evidence that an employer can use to demonstrate that a particular function is essential:

- The employer's judgement as to which functions are essential
- Written job descriptions prepared before advertising or interviewing applicants for the job
- The amount of time spent on the job performing the function
- The consequences of not requiring the incumbent to perform the function
- The terms of a collective bargaining agreement
- The work experience of past incumbents in the job
- The current work experience of incumbents in similar jobs

Here are some practical tips for reviewing and updating job descriptions to facilitate ADA compliance

- Draft job descriptions with ADA compliance in mind; show evidence of essential job functions
- Ensure job descriptions are up-to-date and accurate
- Include all essential job functions
- It is not necessary to label function as essential
- Include the actual duties of the specific positions
- Focus on the intended result instead of "the way we've always done it"
- Include other essentials in addition to specific job duties

Wrapping up 2017 – Checklist

While it has been a comparatively quiet year in terms of new compliance regulations, existing federal contractor regulations remain strictly in force. It's never too early to start preparing for your 2018 affirmative action plan. Here are some items you should begin focusing on:

1. **Workforce Snapshot –** Ensure that all employee data is current and accurate; i.e., job titles, salaries, supervisors, etc.
2. **Employment Activity –** Check that all employment activity records are accurate (new hires, applicants, promotions, job changes, terminations). If possible, close out requisitions for the year to accurately capture 2017's recruitment activity.
3. **Outreach & Recruitment –** Has all outreach to disabled, minorities and protected veterans been recorded? Review steps going forward in 2018 for improvement. Ensure that jobs are being posted to the appropriate State or local job services.
4. **Review of Physical and Mental Qualifications –** Is a schedule in place to review qualifications to ensure that Individuals with Disabilities are not unnecessarily screened out.
5. **Invitation to Self-Identify as Disabled –** When was the last time your organization invited current employees to self-identify as disabled? Does this need to be planned for 2018?
6. **Management Training –** Has all management been trained on appropriate and legal recruiting methods?
7. **HR Policies & Procedures –** Review existing policies and procedures to ensure that they still apply or comply with current laws and regulations.
8. **Posters –** Ensure that all mandated EEO posters are posted.
9. **Recordkeeping –** Review and ensure that the following records are accessible and current:
   a. Job descriptions
   b. Job postings and advertisements
   c. Hire and offer logs
   d. Applicant flow logs
   e. Reasons for non-selection
   f. Applications and resumes
   g. Interview notes
   h. Tests and test results
   i. Written employment policies and procedures