EMPLOYMENT & HUMAN RESOURCES *newsletter*

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SEXUAL HARASSMENT AND HANDLING #METOO POSTS

Since the 2016 Presidential election, sexual harassment has been in the headlines across the United States on a routine basis. This is not because sexual harassment is a new occurrence in the workplace. Rather, employers should view the headlines as a reminder to review policies and procedures for addressing sexual harassment issues in their workforce.

Defining Sexual Harassment and Establishing a Policy

Sexual harassment is a form of sex discrimination prohibited by state and federal law. Advising employees of what constitutes sexual harassment, under the law, is an essential step to limiting employer liability. Federal and state law identifies the following behavior as sexual harassment: unwelcome sexual advances, requests for sexual favors, touching, jokes of a sexual nature, and derogatory comments. However, this is a non-exhaustive list.

Supervisory staff must be educated and able to identify behavior that

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is forbidden as unlawful sexual harassment and discrimination. First, the education is important given the ramifications the employer will face economically and, possibly, as vicariously liable for sexual harassment. Under federal law, an employer is automatically vicariously liable for sexual harassment committed by high ranking supervisors or in conjunction with an adverse employment action. In all other circumstances, the employer may be liable for the unlawful action if the employer was negligent.

An affirmative defense that may be raised by employers to avoid liability where the sexual harassment did not involve a tangible employment action was developed by the United States Supreme Court in the *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) decisions. To successfully plead the defense, an employer must demonstrate "that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior" and that the "employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." Ellerth, 524 U.S. at 765. Reasonable care may be demonstrated by having a well-established, communicated anti-harassment policy that (1) prohibits harassment; (2) defines what constitutes harassment; and (3) establishes clear reporting and investigation procedures.

Handling #MeToo Posts

The #MeToo hashtag has been utilized by individuals as a method to report sexual harassment and assault in the age of Twitter and other social media outlets. These reports should be classified as "semi-anonymous" because they are often made under pseudonyms, do not identify the perpetrator, and/or are not seen by most employers. And, it is the author's recommendation that supervisors and human resource professionals do not place themselves in a position to see such posts, namely: Do not "friend," "follow," or monitor employees on social media.

As discussed above, an employer's anti-harassment policy should establish the proper procedures for reporting harassment—not social media trends. An employee's failure to adequately report sexual harassment may be grounds for eliminating an employer's liability for the harassment. However, once an employer is placed on notice of possible harassment or discrimination, action must be taken by the employer to correct the unlawful behavior. A human resources director that connects with his employees on social media platforms will have a difficult time (1) denying he saw an employee's #MeToo post that appeared on the HR director's Facebook news feed; or (2) explaining why he did not investigate the harassment claim purportedly reported in the #MeToo post. Therefore, it is strongly recommended that supervisory staff avoid this unsolicited notification of "complaints" by not engaging with employees on social media. Otherwise, given the current trend of #MeToo postings, the #MeToo movement could lead to countless investigations when an actual report is not made.

Nonetheless, action should be taken when an employer sees a #MeToo post identifying alleged harassing or other discriminating behavior occurring in its workplace. Action taken should be consistent with the investigative process the employer would engage in had the complaint been raised in accordance with the anti-harassment policy. However, in situations where the employer cannot ascertain the identity of the poster or alleged victim, a general reminder of the employer's anti-harassment policy and reporting procedures should be disseminated to the workforce following notice of the post.

Investigation

Investigations should be conducted by an impartial party. For example, the supervisor accused of sexually harassing an employee should not conduct the investigation. Oftentimes, the investigator will be the employer's HR director. But, in those complicated cases and cases involving an allegation of a tangible employment action (e.g. quid pro quo harassment, demotion, or improper performance review) associated with the harassment, the employer should use legal counsel to conduct the investigation. Notably, the *Faragher/Ellerth* affirmative defense is not available in these latter, and it is imperative that the investigator clearly identify whether a tangible employment action is involved. These more complicated cases may also be more likely to turn into lawsuits. Further, establishing counsel as the impartial investigator at the outset will place you in the best position to timely and efficiently respond to any workplace grievance, EEOC charge, or lawsuit filed by the parties involved in the complaint. And, in the event that the employer mismanaged the investigation, allow the investigator to assist the HR director with establishing more effective procedures to properly address, investigate, and manage claims of sexual harassment and discrimination in the future.

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TRUMP DEPARTMENT OF LABOR MAKES UNPAID INTERNSHIPS LEGAL AGAIN

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The Trump administration continues to undo regulatory changes of the Obama administration. This time the change involves unpaid internships.

The Fair Labor Standards Act of 1938 ("FLSA") emplaced broad requirements on the employer-employee relationship, including that employees be paid. It's important to remember that an employee can't waive her rights under FLSA—even if she agrees to work without pay, that doesn't make it legal. Unpaid interns have always occupied an uncertain spot on the very edge of the definition of "employee."

Historically, case law interpreting FLSA, and determining if an intern may work without pay has looked back to a 1947 case involving a railroad training aspiring brakemen. The courts looked at the totality of the circumstances as guided by four factors:

1) whether the trainees displaced paid employees;
2) whether the trainees' work was of any immediate advantage to the employer;
3) whether there was expectation of compensation, to include a job at the end of the course; and
4) whether the training was similar to what a vocational school might offer.

These four factors were examined to determine the ultimate test—who was the primary beneficiary of the program. If it was the employer, then the worker is an employee and must be paid. If it was the worker, then the worker need not be paid.

Unpaid internships received a lot of attention following the economic collapse of 2008, with anecdotes of companies pushing the envelope to make the most of dwindling budgets, and would-be employees desperate to take any opportunity to enter or re-enter the workforce. In 2010 the Obama Deportment of Labor ("DOL") adopted a six factor test to determine if a worker is an employee subject to FLSA versus an intern not covered by FLSA. Not only were there six factors, but all six had to be satisfied in order for a worker to be an intern. To qualify, the internship had to be:

1) training similar to educational environment;
2) purely for the benefit of the intern;
3) under close supervision and without displacing regular employees;
4) of no immediate advantage to the employer;
5) with no entitlement to job at end of the internship; and
6) understood by both employer and employee to be without compensation.

While this list might look similar to the brakemen standard, the fact that all six criteria had to be satisfied made it very difficult for any program to qualify as a legal unpaid internship.

The Obama DOL guidance did not fare well in court with four separate U.S. Appeals Court Circuits rejecting it, the last being in December of 2017. The most decisive blow was the 2015 case of *Glatt v. Fox Searchlight Pictures*. Therein, the court affirmed the primary benefit test of the 1947 brakemen case. But the Court didn't stop there. It laid out seven factors to be used in determining the primary benefit:

1) mutual understanding of no compensation;
2) training similar to educational environment;
3) training tied to the worker's formal education;
4) a schedule which accommodates the worker's academic calendar;
5) a schedule limited to the benefits of the program. This means that the program should not continue beyond the amount of time necessary to confer benefit to the worker (editor's note: I wish this had applied to law school!);
6) the work should complement rather than displace paid employees; and
7) no entitlement to a job at end of the program.

Most importantly, the court restated that this is not a checklist—not all of the criteria need be satisfied. These factors are simply examined to determine who is the primary beneficiary, the worker or the company.

Now, we might have expected the Trump DOL to look back over history and conclude that you just aren't a major player in this game if you don't come up with your own original multi-factor list. Instead, in what must be (according to one's political leanings) either extreme laziness or brilliant simplicity, they announced that going forward their test would be the Glatt test. In fact, their January 5, 2018 guidance recites the Glatt test verbatim and restates that these are simply subfactors to the ultimate primary beneficiary test.

While this style of rulemaking will do very little for the billable hours of attorneys, it would be a welcome change to employers weary of tinkering with their employment policies to apply new and untested standards.

INTELLECTUAL PROPERTY

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In today's society, where value is placed on creativity and invention, employers need to be extra vigilant to protect the work of their employees, including the intellectual property ("IP") created by their employees. IP, creations of the mind, are generally categorized into three groups of protection: patents for inventions, trademarks for easily recognized marks, and copyrights for written works. Often after an employee leaves a company, the question arises of ownership of the rights to the IP the employee developed while employed.

Some works created by an employee "within the scope of his or her employment," such as copyrighted works, are "works for hire" and constitute "works for hire" and are automatically property of the employer. 17 U.S.C. Section 101, *et seq.* Copyright protection, however, does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, which are more likely to be protected by patents.

To avoid ambiguity and potential litigation, employers who are looking for a better way to protect their investment should request an employee sign an agreement, prior to starting employment, assigning to the employer all of an employee's rights to IP developed while employed by the employer. Agreements assigning an employee's rights to his or her inventions to an employer are subject to state contract law. Contracts must be supported by consideration to be valid. This means, the employer needs to give something to the employee for signing the assignment. Case law is limited as to what is considered "adequate" consideration for an IP assignment. It is likely that if a court were to look at this issue, the court would determine "adequate" consideration for the assignment is similar to adequate consideration for a non-compete agreement. This means a bonus, promotion in job title, or raise is needed for an employee who is already employed. For a new employee, signing the assignment prior to or on the first date of employment is adequate consideration.

The specific provisions to include in an agreement to assign IP can be detailed and vary depending on the industry. However, one constant throughout all the agreements is that Minnesota law requires the disclosure of the following notice in any agreement requiring an employee to assign his rights to an invention to his employer:

[This] agreement does not apply to an invention for which no equipment, supplies, facility or trade secret information of the employer was used and which was developed entirely on the employee's own time, and (1) which does not relate (a) directly to the business of the employer or (b) to the employer's actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by the employee for the employer.

Minn. Stat. § 181.78, subd. 3. As a precaution, the agreement should also contain a provision requiring continued cooperation by the employee following termination for future patent or IP disputes associated with the invention and a third party raised by the employer.

All employers should assess the value of IP in their business and, if necessary, take steps to protect the employer's assets and investment in those assets.

THE "SHOCKING" DECISION IN SEVERSON VS. HEARTLAND WOODCRAFT, INC.

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Perhaps the most significant employment decision of 2017 came out of the Seventh Circuit Court of Appeals, a federal court governing Wisconsin and Illinois, among other states. In the case the Court decided that an employer does not violate the Americans with Disabilities Act (ADA) by failing to provide an employee with a reasonable accommodation of three-month leave of absence after his Family Medical Leave Act (FMLA) leave expired.

The case, *Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476 (7th Cir. 2017), has been described as "shocking," and caused a stir both among employment attorneys and at the Equal Employment Opportunity Commission ("EEOC"). By way of background, to be protected under the ADA, an employee must be a "qualified individual with a disability." A "qualified individual" is an employee who, with or without a reasonable accommodation, can perform the essential functions of the job. Over the years, the question has arisen: is a leave of absence a "reasonable accommodation" under the law, or a sign that the employee cannot, in fact, perform the functions of his or her job?

According to the EEOC, the answer was the former, and it consistently investigated employers who did not provide leave after FMLA or employer-offered leave had expired. Employers accused of violating the ADA in this manner have settled with the EEOC in the past, including settlements in the seven-figure range. The Chicago office of the EEOC, within the Seventh Circuit, was particularly known for leveraging heavy fines against employers it believed were violating the ADA by failing to provide additional leave to employees unable to work.

Heartland Woodcraft, however, did not settle. Its employee, Raymond Severson, worked for Heartland Woodcraft, as a fabricator of retail display fixtures from 2006 to 2013. The work was physically demanding, and in June of 2013 Severson took FMLA leave to deal with serious back pain. On the last day of his leave, he underwent back surgery. To recover, he needed another two or three months off of work. However, with his FMLA leave exhausted, Heartland Woodcraft terminated Severson's employment and offered him an opportunity to re-apply for his old position once he had recovered.

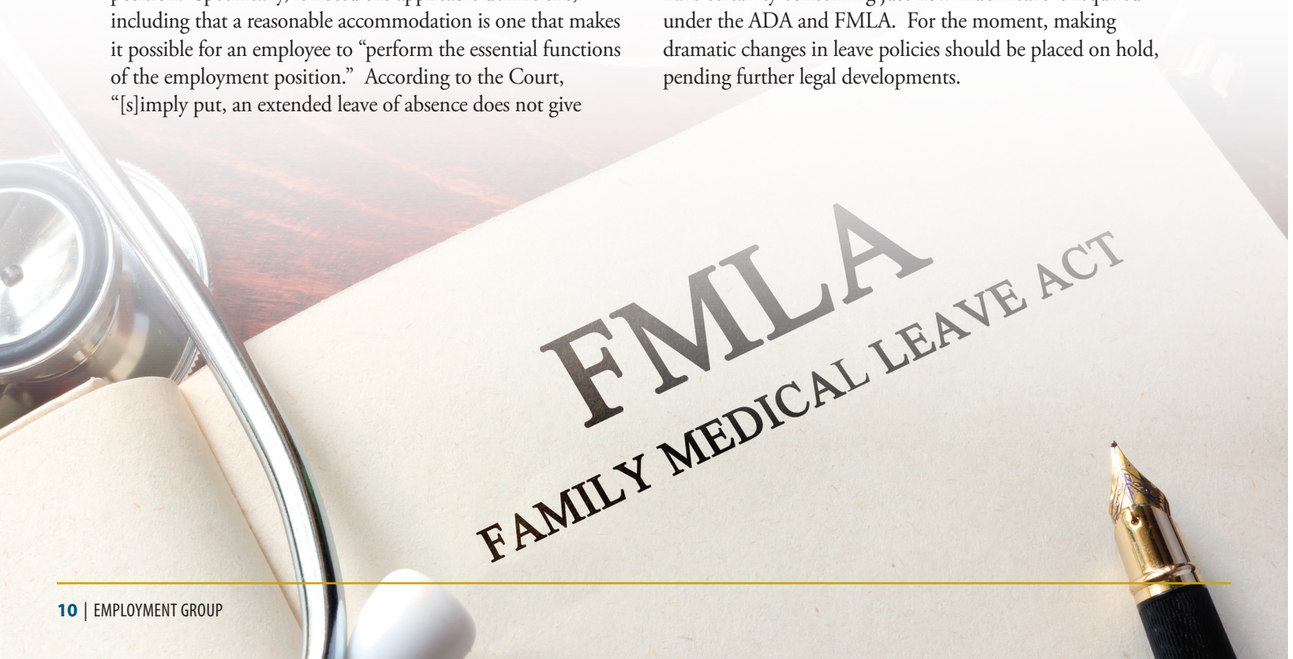
Rather than re-apply, Severson sued. The EEOC supported Severson on appeal, and argued that long-term medical leave should qualify as a reasonable accommodation when the leave is of a definite, time-limited duration, requested in advance, and the employee is likely to enable to perform the essential functions of the job when he or she returns.

The Court rejected the arguments by both Severson and the EEOC, and took special care in rejecting the EEOC's position. Specifically, it noted the applicable definitions, including that a reasonable accommodation is one that makes it possible for an employee to "perform the essential functions of the employment position." According to the Court, "[s]imply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."

It further stated that long-term leave is the province of a more-specific set of statutes, the FMLA. It provides up to 12 weeks of leave, recognizing that employees will "sometimes be unable to perform their job duties due to a serious health condition. In contrast, 'the ADA applies only to those who can do the job.'" According to the Court, should the EEOC's argument be accepted, it would transform the ADA into a medical-leave statute with an open-ended extension of the leave currently offered. For the Court, that conclusion was "untenable."

While this conclusion likely appears to be entirely logical, it must be again emphasized that the EEOC has taken the opposite position historically, and investigated employers under its own interpretation. Moreover, that interpretation had received support in a separate circuit, the Tenth Circuit, which sets up a "Circuit Split" on the question. Such splits often lead to a decision from the United States Supreme Court, and indeed a petition for review by the high Court has been filed by Severson and the EEOC.

Thus, for now this story is not yet over, and this legal issue is not finally resolved. However, employers now have a "shocking" decision from a powerful Court in their corner. Further, while hazarding guesses about Supreme Court decisions can be a fool's errand, the makeup of the current Court suggests that if the petition for review is granted, Heartland Woodcraft would have a very strong chance at having the decision upheld. Hopefully employers will soon have certainty concerning just how much leave is required under the ADA and FMLA. For the moment, making dramatic changes in leave policies should be placed on hold, pending further legal developments.



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Employment and Labor Law Conference

Thursday, February 22, 2018

Owatonna Country Club
1991 Lemond Road
Owatonna, MN 55060

11:30 – Buffet Luncheon

Noon – 3:30

Topics to include:

- **Politics in the Workplace**
- **Wage and hour audits**
- **2018 Sexual Harassment – Protocols of Prevention – Protection from "Me Too."**
- **Case Law Update – current issues hitting the courts**

Registration

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$50.00 includes, lunch, break, seminar and access to materials
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