2018 Labor and Employment Law - *Respect in the Workplace*

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PRESENTED BY:
LIZ BROWN
BRETT RAWITZ
JULIE TRESTER

Hot Topics We Will Cover

- Supreme Court Update - Arbitration Waivers
- Trump's Department of Labor Update
- Joint Employment
- Your Hiring Checklist
- The Changing Landscape of LGBTQIA Protections
- Paid Sick Leave
- Social Media Invasion & Other Common Pitfalls
- The #MeToo Movement

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Supreme Court Update

Will Arbitration Agreements Survive?

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Pending This Term

- ISSUE: Whether arbitration agreements that prevent employees from participating in class actions violate the National Labor Relations Act
- Circuit split:
  - NLRB, 6th, 7th, and 9th Circuits – YES
  - 2d, 5th, and 8th Circuits – NO
- Consolidated cases: 137 S. Ct. 809 (2017) (argued Oct. 2, 2017)
  - *Epic Systems Corp. v. Lewis* (7th Cir.)
  - *NLRB v. Murphy Oil USA* (5th Cir.)
  - *Ernst & Young LLP v. Morris* (9th Cir.)

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Department of Labor Update

The DOL Under Trump

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Joint Employment

HERE TO STAY?

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Why Does It Matter?

A joint employer may face the same liability and obligations as a traditional employer, including:

- Claims under state and federal employment laws
  - FLSA wage and hour claims
  - Claims for discrimination under Title VII, ADA, and ADEA
  - Union organizing campaigns or NLRB unfair labor practice charges
  - Remedies such as back pay, front pay, compensatory damages, and attorneys' fees and costs, as well as punitive and liquidated damages under certain circumstances
- Tax liability
- Workers' compensation and unemployment insurance
- Tort liability

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NLRB's Recently Vacated Decision

- On Feb. 26, 2018, the NLRB vacated the decision in *Hy-Brand Industrial Contractors, Ltd.,* restoring the prior joint-employer standard (the *Browning-Ferris* standard)
- Under the vacated decision, two or more entities would have been considered joint-employers under the NLRA if one entity had exercised control over essential employment terms of the other entity's employees and had done so directly and immediately in a manner not limited and routine
- The Board vacated *Hy-Brand* because the Inspector General found that NLRB Member Emanuel was ethically prohibited from participating in the case

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The *Browning-Ferris* Standard

- Employers are once again bound by the NLRB's *Browning-Ferris* decision
  - Organizations with **indirect control** over contractors, franchisees, or staffing agency workers can be considered joint employers
  - Before this decision, "direct and immediate" control was required for joint employment
- The pending challenge to *Browning-Ferris* will likely now proceed back to the U.S. Court of Appeals for the District of Columbia Circuit
- John Ring just confirmed to the open seat on the NLRB, replacing prior chair
- Options to revisit *Browning-Ferris* include *Orchids Paper Products* and *Preferred Building Services, Inc.*
- But the future of *Browning-Ferris*, for the time-being, depends on whether Member Emanuel is precluded from participating altogether in cases that challenge *Browning-Ferris's* joint employer analysis

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Potential Areas of Risk

Hiring
- Who selects candidates to be interviewed, and who conducts the interview?

Firing
- Who makes the termination decision?

Promulgating Work Rules
- Whose policies, such as an attendance policy or safety requirements, are applicable?

Performance/Discipline
- Who conducts performance reviews?
- Who determines promotions?
- Who disciplines?

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Potential Areas of Risk

Work Space and Equipment
- Whose premises is the work conducted on?
- Who provides the equipment?

Compensation
- Who determines wages and raises?

Work Hours
- Who determines the work hours?

Intention
- Are employees retained for an indefinite period of time?

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What Does This Mean For You?

Review all contracts with staffing agencies and other contractors to ensure that they do not wave a joint employment red flag
- Vest control in your vendors/contractors to the extent possible

Analyze the factual realities such as
- Length of the job commitment
- Extent of putative employer's control and supervision over the putative employee
- Scope of assignment (is the individual assigned solely to your workplace?)

Analyze the economic realities such as
- Method and form of payment and benefits
- Who furnishes the work space and equipment
- Who sets work hours

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Your Hiring Checklist

THE EXPANDING LIST OF "DO NOT ASK" QUESTIONS

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Ban the Box

- What is Ban the Box?
  - "Ban the Box" policies generally prohibit an employer from asking about criminal conviction history on a job application and requires it to delay the background check inquiry until later in the hiring process
- A total of 31 states have adopted some form of ban the box policies for government employers. Eleven of those states have extended those policies to private employers.
  - States that ban the box for private employers: California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont & Washington
- Nationwide, over 150 cities and counties have also "banned the box"

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Prior Salary History

- Beware the proliferation of state and local laws and ordinances prohibiting employers from asking for salary history at various stages of the hiring process
- The Ninth Circuit recently decided in *Rizo v. Yovino* that pay discrepancy based on prior salary history violates the Equal Pay Act of 1963.
- On the federal level, H.R. 6030, Pay Equity for All Act of 2016 would amend the FLSA to make it an unlawful practice for an employer to:
  - Screen prospective employees based on their previous wages or salary histories;
  - Seek information about the prior wages or salary history of any prospective employee from any current or former employer of such employee; or
  - Discharge or retaliate against any current or prospective employee because the employee opposed any act or practice made unlawful by the Act
  - It is currently under review, but is seen as unpopular with the current Administration and Congress, and will likely be thrown out

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State/Local Pay Equity Initiatives

Current States & Cities That Enacted Salary History Laws:

States	Cities/Counties
California	Albany County (NY)
Delaware	Chicago (IL)
Massachusetts	New Orleans (LA)
New Jersey	New York City (NY)
New York	Philadelphia* (PA)
Oregon	Pittsburg (PA)
Puerto Rico	San Francisco (CA)
	Westchester County (NY)

Pay Equity Proposals:

States	States
Alabama	Mississippi
Arizona	Nebraska
Hawaii	Rhode Island
Indiana	South Carolina
Illinois	Tennessee
Missouri	Washington

Philadelphia:
Following ruling on April 30, 2018, employers may now inquire about prospective employees' wage histories. However, employers are prohibited from relying on wage histories when making wage determinations.

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What Does This Mean For You?

- Know the law in your jurisdiction
- Exercise caution and check with counsel before conducting background checks
- Advise recruiters and interviewers of topics not to broach
- Convey to every candidate that you are an equal opportunity employer and will hire those that are capable of performing the essential duties of the job with reasonable accommodation

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LGBTQIA Issues

THE CHANGING LANDSCAPE OF EMPLOYMENT PROTECTIONS

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EEOC Guidance on Title VII

- Title VII makes it an unlawful employment practice to discriminate based upon race, color, religion, sex or national origin
- EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation
  - *What You Should Know About EEOC and Enforcement Protections for LGBT Workers*, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm
- In 2015, EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation and/or gender identity/transgender status (28% increase from 2014)

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States Prohibiting Discrimination On The Basis Of Sexual Orientation and/or Gender Identity

Employment non-discrimination law covers sexual orientation and gender identity (20 states + D.C.)

Employment non-discrimination law covers only sexual orientation (2 states: WI & NH)

No employment non-discrimination law covering sexual orientation or gender identity (28 states)

State has law preventing passage or enforcement of local non-discrimination laws (3 states)

Source: http://www.lgbtmap.org/equality-maps/non_discrimination_laws

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Circuit Split on Title VII Coverage

Circuit split regarding whether sexual orientation is covered under Title VII's sex discrimination prohibition

YES:

- Seventh Circuit: *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (Apr. 4, 2017)
- Second Circuit: *Zarda et al. v. Altitude Express d/b/a Skydive Long Island*, 2017 U.S. App. LEXIS 13127 (Feb. 26, 2018)

NO:

- Eleventh Circuit: *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (Mar. 10, 2017), *cert. den.* (Dec. 11, 2017)

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Transgender Discrimination

- Equal Protection Clause of the U.S. Constitution
  - *Whitaker v. Kenosha Unified School District* (7th Cir. 2017) (Holding discrimination against transgendered students likely constitutes sex discrimination under the Equal Protection Clause of the U.S. Constitution)
  - *Dodds v. U.S. Dept. of Education* (6th Cir. 2016) (Holding discrimination against transgendered students likely constitutes sex discrimination under the Equal Protection Clause of the U.S. Constitution)
  - *Glenn v. Brumby* (11th Cir. 2011) (Holding discrimination against transgender individuals is discrimination based on gender behavioral norms and is unconstitutional)
- Title VII
  - *EEOC v. E.G. & G.R. Harris Funeral Homes* (6th Cir. 2018) (Holding that termination of an employee on the basis of transitioning or transgender status violates Title VII)
  - *Roberts v. Clark City School Dist.* (D. Nev. 2016) (Title VII found to cover transgender school police officer who was precluded from using either the men's or women's bathroom at work)

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What Does This Mean For You?

- Employers should respect the gender identity of others
  - Do not challenge an individual's identification as a man or woman
  - Treat the individual according to the gender that the individual presents at that time
- Permit transitioning employees to use restrooms of their choice or provide a unisex restroom
  - Consult counsel
  - Work with transitioning employees on using proper pronouns, etc.
- Encourage employees to report any issues to HR
- Be aware of your state and local laws

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Paid Sick Leave

IT'S CONTAGIOUS!

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Coming Soon to a Jurisdiction Near You?

States with (Statewide) Paid Sick Leave: Arizona, California, Connecticut, Massachusetts, Oregon, Rhode Island, Vermont, Washington, Washington D.C.

States with Paid Family Leave: California, New Jersey, Rhode Island, New York, Washington (eff. 2020), Washington D.C. (eff. 2020)

Cities with Paid Sick Leave:

- Chicago, IL & Cook County, IL
- Austin, TX (eff. Oct. 1, 2018)
- Minneapolis & St. Paul, MN
- 13 Cities in New Jersey
- New York City, NY
- Los Angeles, Oakland, San Diego, San Francisco, Santa Monica, Emeryville, & Berkeley, CA
- Seattle, Spokane, & Tacoma, WA
- Montgomery County, MD
- Philadelphia, PA

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The Laws Typically Address…

1) **Who is a covered employer**
   - ➢ Some laws mandate PSL only for employers of a certain size or delineate leave provisions based on the size of the employer
2) **Who is a covered employee**
   - ➢ Some laws require employees to work a certain number of hours or for a minimum time period before becoming eligible for PSL
3) **Leave accrual and usage**
   - ➢ PSL laws generally specify how much and when leave is accrued, and when employees can begin using accrued leave
4) **Carryover of unused sick leave**
   - ➢ Many laws require employers to carryover accrued unused sick leave, often with an annual cap
5) **Qualifying use of leave**
   - ➢ Most PSL laws allow leave to be used for more than an employee's own illness, such as for preventive medical care or medical care for a family member
6) **Payout on employment termination**
   - ➢ Current laws generally do not require an employer to pay out unused sick leave at the time of termination
7) **Anti-retaliation provisions**
   - ➢ Most laws expressly prohibit retaliation for taking leave

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Chicago Paid Sick Leave Ordinance

- Who is a Covered Employer?
  - Any individual or entity with one covered employee who is subject to licensing requirements in the city and has a business facility here
  - Employers must provide workers the right to accrue and use up to 5 paid sick days (or 40 hours) per year, earned at a minimum rate of one hour for every 40 hours worked
- Who is a Covered Employee?
  - Any employee who works within Chicago's city limits and works 80 or more hours within a 120-day period
  - The ordinance does not apply to employees working in the construction industry who are covered by a collective bargaining agreement
- What is Proper Use of Paid Sick Time?
  - Sick leave may be used by employees to care for themselves or their families when they are sick, to receive medical care, and if the employee or family member is the victim of domestic violence or sexual abuse

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Paid Sick Leave - Federal Contractors

- Executive Order 13706 issued on Labor Day 2015
  - Final regulations issued on September 30, 2016
  - Same coverage as E.O. 13658 (minimum wage)
- Seven days (56 hours) of paid sick leave to employees who work on or in connection with covered contracts
- New or replacement deferral contracts awarded on or after January 1, 2017
- Carryover allowed, but no pay out at termination

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What Does This Mean For You?

- Know the law
  - Complex legal landscape
  - Compliance challenges
- Analyze and revise your leave policies
  - Include a general disclaimer that the policies are not intended to conflict with any federal or state law
  - Consider how to implement if you operate in multiple jurisdictions

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In 280 Characters or Less

SOCIAL MEDIA & OTHER COMMON PITFALLS

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Traditional Employment Issues Now Arise in New Social Media Context

Have your employment and handbook policies kept up with the times?

Old water cooler chatter → Facebook/Twitter posts

- Defamation and workplace torts
- Harassment
- Privacy torts
- Union organizing
- FMLA/ADA
- Religious accommodation
- GINA

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The NLRB and Protected Concerted Activity

NLRB continues to look at common handbook provisions and workplace policies addressing confidentiality

- Don't make your social media policy too broad or include language that tends to chill employees in the exercise of their legal rights
- Don't make policy that lacks definitions or guidance as to what is covered under the policy such that it could be interpreted to prohibit protected concerted activity

Do consider putting in "catch-all" language

- "Nothing in the policy is intended to chill employee rights under the law"
- "Any conflict between language and the current state of relevant law will be decided in favor of the law"

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Peter Robb's GC 18-02 Memorandum

- Rescinds prior administration's GC Memoranda, including
  - GC 15-04 (Concerning Employer Rules)
  - GC 17-01 (General Counsel's Report on the Statutory Rights of University Faculty And Students in the Unfair Labor Practice Context)
  - GC 16-03 (Seeking Board Reconsideration of the Levitz Framework)
  - GC 13-02 (Inclusion of Front Pay in Board Settlements)
  - GC 12-01 (Guideline Memorandum Concerning Collyer Deferral)
  - GC 11-04 (Default Language)
  - OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes)
- Instructs Regional Directors on which types of charges should be submitted to his office for advice including:
  - Common employer handbook rules found unlawful
  - Concerted activity for mutual aid and protection where only one employee has an immediate stake
  - Purple Communications- cases where employees are found to have presumptive right to use employer's email to engage in Sect 7 activities
  - Conflicts with other statutory requirements
  - Joint Employment

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State Laws on Employer Access to Social Media

Twenty-six states (including Illinois) have passed laws prohibiting employers from seeking information about employees' and prospective employees' personal social media accounts

Examples of prohibited conduct include:

- Requesting or requiring that an employee or applicant disclose any user name, password, or other means to access a personal account
- Discharging, disciplining, or otherwise penalizing (or threatening to do so) an employee for refusing to disclose the specified information
- Requiring an employee or applicant to "friend" another employee, supervisor or administrator to the account's contact list

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What Does This Mean For You?

- Limit access to devices for non-exempt employees
- Prohibit remote access during non-working hours
- Require and implement time recording system for remote access
- Train supervisors
- Audit remote access logs and usage
- Carefully draft policies
- Enforce policy violations
- Know the laws of your state

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The #MeToo Movement

TIME'S UP & WHAT THAT MEANS

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TIME'S UP

What the Movement Has Done

- Exposed sexual harassment in society as a whole, particularly in the workplace
- Removed the stigma or fear those experiencing workplace sexual harassment may feel
- Emboldened those who experience workplace harassment to come forward, sometimes banding together in order to prevent being ignored

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EEOC's Response to the #MeToo Movement

- In FY 2017 there were 84,254 charges of discrimination (all types) filed by plaintiffs with the EEOC
  - Down from 91,503 filed in FY 2016
  - 48.8% of charges alleged retaliation
  - 6,696 of the charges alleged sexual harassment, down slightly from 6,758 in FY 2016
- The real impact of the movement is yet to be seen—the EEOC fiscal year ended in July, before #MeToo or the *Weinstein Effect*
- The EEOC recently opened a new online portal for employees to file charges of harassment and other kinds of discrimination online
- The EEOC has also launched a new training program on Respectful Workplace
- In the recently signed spending bill, Congress added a $16M budget increase for the EEOC to fight workplace sexual harassment and discrimination

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Legislative Responses To #MeToo

- Federal: Recent tax legislation prohibits companies from deducting settlement payments to employees for sexual harassment claims (as well as attorneys' fees and costs) if the agreement includes a confidentiality provision
- New York, South Carolina: Legislation barring mandatory arbitration in the harassment context
- California, New Jersey, New York, Pennsylvania, Washington: Legislation barring confidentiality provisions in sexual harassment settlement agreements or limiting the extent to which such provisions can be enforced
- California: Legislation designed to extend the window of time for filing harassment claims under the Fair Employment and Housing Act from one to three years
- California: Legislation requiring certain business to maintain records regarding sexual harassment for 10 years from the date the complaint was filed

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How Can You Prepare?

- Evaluate your policies
- Evaluate your training programs
- Evaluate your complaint response procedures
- Create an action plan
- Don't avoid the problem

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A Holistic Sexual Harassment Prevention Effort

- Leadership
- Resources
- Understand the Nature of the Problem (Data Collection)
- Education/Training
- Effective Policy
- Prompt and Equitable Investigation
- Creativity
- Sustainability

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Create a Culture of Responsibility and Accountability

- Response
- Resolution
- Prevention

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Contact Information

Brett Rawitz
Associate General Counsel
US Foods, Inc.

Julie Trester
Cozen O'Connor
123 N. Wacker Dr., Ste. 1800
Chicago, IL 60606
(312) 474-7876
jtrester@cozen.com
www.cozen.com

Liz Brown
Senior Counsel
Groupon, Inc.

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