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<td>Wage-Hour 30</td>
</tr>
<tr>
<td>45</td>
<td>Everything Else 20</td>
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So,
Let’s Talk
About Money
and Things
Let’s Talk
• Litigation Avoidance

• Best Practices to Come to an Early Resolution

• Best Practices to Avoid Costly Litigation Once in Litigation
About Money
Clients
Courts
Compliance
And Things
EEOC

Alphabet Soup (Charges)

ADA Title I & Title III and Websites

Litigation

Mediation

Arbitration
2018 EPL Market Trends

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SEXUAL HARASSMENT
The #MeToo Movement
&
The Weinstein Effect
The Weinstein Effect – Increase in Sexual Harassment Claims?

FREQUENCY

• The average number of visits to the EEOC sexual harassment website doubled in October, up to an average of 2,156 per day.

• The EEOC has received hundreds of inquiries about the new workplace anti-harassment training program.

• There has been a fivefold increase in the number of calls coming into the National Women's Law Center, which provides information about harassment and how to file an EEOC charge.

SEVERITY


• Punitive damages = $11.7

Risk factors leading to harassment:

- Homogenous workforces
- Workplaces where some workers do not conform to workplace norms
- Cultural and language differences in the workplace
- Coarse social discourse outside the workplace
- Workforces with many young workers
- Workplaces with “high value” employees
Risk Factors leading to Harassment (continued):

- Workplaces that include employees with significant power disparities
- Workplaces where employee compensation is directly tied to customer service or client satisfaction
- Workplaces where work is monotonous
- Isolated workplaces
- Workplace cultures that tolerate or encourage alcohol consumption
- Decentralized workplaces
Preventing Harassment in the Workplace

– Leadership

  • Establish a sense of urgency about preventing harassment.
  • Establish effective policies and procedures and conduct effective training.
  • Invest money and time in preventing harassment.

– Accountability

  • Harassers are held responsible for their actions.
  • Managers and supervisors are responsible for monitoring and stopping harassment.
  • Incentivizing and rewarding responsiveness to anti-harassment efforts.
The Weinstein Effect: Underwriting Impacts

• How do you underwrite culture?
  – Leadership and Accountability
  – Policies and Procedures
• Price Increases
• Stricter Scrutiny
• Increase in First Time Buyers/Returning Purchasers
• Higher Limits
• Training and Value-Added Services
THIRD PARTY DISCRIMINATION CLAIMS
Third Party Discrimination: Website Accessibility Claims

- Title III of the *Americans with Disabilities Act (ADA)* requires public accommodations, such as stores or banks, to make physical locations accessible to customers with disabilities.

- Increase in lawsuits filed against various companies, including allegations that websites and electronic self-service devices are inaccessible to individuals with disabilities, in violation of Title III of the ADA.
  - 2015-2016: 319 accessibility lawsuits were filed.
  - 2017: 814 federal lawsuits regarding inaccessible websites were filed, including a number of class actions. *

• Types of Businesses
  – Retail
  – Restaurants
  – Community Banks

• Jurisdictions*
  – New York: 335
  – Florida: 325
  – Pennsylvania: 58
  – California
    • 9 federal suits
    • 115 state law suits

Third-Party Discrimination
Website Accessibility Claims

• Legal Issue: Whether a website is a “public accommodation,” subject to the ADA’s Title III accessibility requirements.

• Series of Inconsistent Decisions by Courts:
  – 3rd, 6th, and 9th Circuits (which includes California): Websites not connected to an actual physical location are not places of “public accommodation” and, therefore, are not subject to the ADA.
  – 1st, 2nd, and 7th Circuits: No requirement that a website have a nexus with a physical location.

• U.S. Department of Justice (DOJ) previously stated that websites should be considered public accommodation and proposed Web Content Accessibility Guidelines (WCAG) 2.0 as the industry standard, but has delayed issuing website accessibility regulations.

• DOJ has placed the issue on the “inactive’ list.
Third-Party Discrimination Website Accessibility Claims

• *Gil v. Winn Dixie Stores, Inc.*, Civil Action No. 16-23020-Civ-Scola, United States District Court, S.D. Florida, June 12, 2017

• Ruling: Winn Dixie violated Title III of the ADA because the plaintiff, who was blind, was unable to use the grocer’s website to download coupons, order prescriptions and find store locations.

• $250,000 to make the website accessible was not an “undue burden.”

• The court referenced WCAG 2.0 AA as the standard for website accessibility.
IMMIGRATION COVERAGE
Immigration Coverage

- **Federal Immigration and Naturalization Act**, 8 U.S.C. Section 1101, et seq. (FINA): Employers must obtain Form I-9, which verifies both an employee’s identity and employment authorization.

- Employers who have knowingly hired or continued to employ unauthorized workers are subject to:
  - Criminal prosecution
  - Fines: $375-$16,000 per violation depending on the number of violations and the employer’s history of previous violations
  - Disbarment: The employer will be prevented from participating in future federal contracts and from receiving other government benefits.
• U.S. Immigrations and Custom Enforcement (ICE) was instructed to increase worksite enforcement activities 4 to 5 times over current levels during 2018.

I-9 Worksite Audits:

• The likelihood of increased enforcement activity and awareness of the issue has led to increase in requests for coverage.

• Coverage Options
  – Defense Costs coverage subject to sublimit ($25,000 to $250,000)
  – Additional Sublimit coverage for insurable fines or penalties
  – Coverage may be restricted by industry or by state.

www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces
EMPLOYEE PRIVACY
Employee Privacy and Cyber-Related Exposures

Employee Records include:

- Job applications
- Résumé/C.V.
- Personal Information (Social Security numbers, Emergency contacts, Family Information)
- Handbook and Policy Acknowledgments
- Performance Reviews
- Compensation History
- Employment History
- Attendance Records
- PTO Records
- Benefit Records
- Disciplinary Records
- Medical Records
- I-9 Form
- Payroll Data
- Time Records
Employee Privacy and Cyber-Related Exposures

• **RISK**
  – Data Breach
    • Negligent: Lost laptop or cellphone
    • Malicious: Hacking/Social Engineering/Phishing/Malware

• **LEGAL OBLIGATION**
  – State laws obliging entities subjected to a data breach to notify employees affected by disclosure of employee records (employment, personal, financial, medical)

• **AGGRIEVED VICTIMS**
Employee Privacy and Cyber-Related Exposures

• COVERAGE OPTIONS
  – CYBER
    – EMPLOYEE PRIVACY EXPENSE REIMBURSEMENT
      • First Party Coverage
      • Reimburse Expenses incurred by Insured in responding to a data breach
    – EMPLOYEE PRIVACY DEFENSE COSTS
      • Defense costs for claims by employees arising from a data breach
      • Exposures
        – Failure to notify affected employees
        – Failure to maintain adequate safeguards
SOCIAL MEDIA
Social Media Impact on EPL Coverage

• FORM OVER SUBSTANCE
  – Does the means by which the wrongful employment practice occurs matter?

• COURSE AND SCOPE OF EMPLOYMENT
  – Is the employer liable for conduct that occurred outside of the worksite?
  – Does an employee’s Facebook post from a home computer that contains offensive language about a co-worker constitute conduct within the course and scope of the employee’s duties?
  – Should an EPL policy extend coverage for this conduct?
Social Media Impact on EPL Coverage

Best Practices for Employers:

• Notify employees that internet use will be monitored and that there is no expectation of privacy.
• Implement a social media policy and train employees on a cyclical basis.
• Designate an individual to be responsible for implementing and administering these policies, and monitoring compliance.
• Implement a procedure to report policy violations.
• Prohibit the use of social media networking during working time.
ADDITIONAL SERVICES
Proactive Employers

• Purchase Employment Practices Liability (EPL) insurance

• Use the risk control resources that are included with the purchase of EPL insurance

• Provide training and ongoing education to their workforce