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What You Should Know About Employment Law Right Now

June 22, 2022

Topics

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Changes to Texas Sexual Harassment Law

Updated Texas Sexual Harassment Statute

Effective September 1, 2021, Texas changed its sexual harassment statute as follows:

An employer commits an unlawful employment practice if *sexual harassment* of an employee occurs and *the employer or the employer's agents or supervisors*:

- know or should have known that the conduct constituting sexual harassment was occurring; and
- fail to take *immediate and appropriate* corrective action.

Key Changes

- Expands the definition of “employer.”
 - Sexual Harassment statute now applies to employers with one or more employees.
 - Individual liability for managers, supervisors, or other employees who act “directly in the interests of an employer in relation to an employee.”
- Extends statute of limitations from 180 days to 300 days.
 - Note: This just applies to sexual harassment claims

Key Changes

- Updates definition of sexual harassment.
- Sexual Harassment now defined as any sexual physical or verbal act that “has the purpose or effect of creating an *intimidating*, hostile or offensive working environment.”
- Heightened Standard for Employer response.
 - Previous standard required "prompt remedial action" in response to an employee complaint.
 - NOW: "**immediate and appropriate corrective action**" is required.

What Employers Should Do Now

- Review, update, or implement clear and effective anti-harassment policies that include a complaint procedure for reporting sexual harassment in the workplace.
- Ensure that a process is in place whereby sexual harassment complaints are seriously handled and immediately and thoroughly investigated and that corrective action is undertaken promptly, as necessary.

What Employers Should Do Now

- Document, maintain, and retain records relevant to complaints of sexual harassment, investigations of any alleged sexual harassment, and any remedial action taken.
- Conduct periodic anti-harassment training for employees at all levels, including management, and educate all employees about the prospect of individual liability for sexual harassment in the workplace and/or failure to take immediate and appropriate corrective action.

Latest from Department of Labor (DOL)

New Rule on Independent Contractors?

- On June 3, 2022, the DOL announced its plan to issue a new final rule regarding the employee-vs.-independent contractor analysis under the Fair Labor Standards Act (FLSA).
- The current Independent Contractor (IC) Final Rule, issued during the previous administration and set to go into effect in March 2021, initially was delayed and then ultimately was withdrawn by the DOL in May 2021.

DOL Now Seeking Liquidated Damages

- Under the prior administration, the DOL's policy was to not seek liquidated damages in connection with pre-litigation investigations and settlements of wage and hour claims.
- The DOL has recently rescinded this policy and is now seeking liquidated damages from employers in wage and hour investigations.

DOL Issues New Guidance on Retaliation

- In March 2022, the DOL issued a new field assistance bulletin entitled **Protecting Workers from Retaliation**, which addresses worker protections from retaliation under laws that the Wage & Hour Division enforces.

DOL and Retaliation

- According to the DOL, retaliation occurs when an employer, takes “adverse action” against an employee because he or she engaged in “protected activity.”
- The DOL defines an adverse action as “any action that could discourage an employee from making a complaint or expressing concern about a possible violation or engaging in protected activity.”

New Overtime Rule Coming?

- New overtime proposed regulations are expected to be released as soon as this summer
- It is expected that these regulations will recommend increasing the current exempt salary level of \$684 per week — \$35,368 per year — to a higher amount.
- These new regulations may also change [duties tests](#) making it more difficult to classify someone as exempt.

Latest from National Labor Relations Board (NLRB)

NLRB Issues Memo Regarding Rights of Immigrant Workers

- In May 2022, the General Counsel's office of the NLRB issued [Memorandum OM 22-09](#).
- The Memo reiterates the NLRB policy on workers' rights to access the NLRB collective bargaining and remedial procedures regardless of immigration status, without fear of reprisals from their employers or the federal government.

New Rule on Independent Contractors and Handbooks?

- The current board majority is reviewing the following issues that have a significant impact on the workplace:
 - Evaluating whether to change its approach to evaluating employer rules, policies and handbooks.
 - Considering whether to continue following the standard for determining whether workers are independent contractors or employees or whether to return to a 2014 Obama-era standard.

No More Deference for Employers on their Policies?

- Under the prior administration, the board issued a decision that afforded employers more deference for their handbook policies related to confidentiality, civility, and social media.
- The current board is considering returning to a prior standard that placed limits on employer handbook policies that could be "reasonably construed" by workers to limit their right to engage in protected concerted activity under the NLRA.

Return to Prior Independent Contractor Standard

- Prior standard set out in a 2019 decision considered a variety of factors, including the relationship the company and individual think they are creating and how much control the company has over the person's work.
- The 2014 test focused on whether a worker is economically dependent on a company.

Latest from Equal Employment Opportunity Commission (EEOC)

EEOC Issues New Guidance on Caregiver Discrimination

- On March 14, 2022, the EEOC released [new guidance](#) regarding caregiver discrimination and the COVID-19 pandemic.
- The EEOC's guidance reiterates that:
 - Employers cannot discriminate against an employee who is a caregiver based on an employee's sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age, disability, or genetic information.

EEOC Issues New Guidance on Caregiver Discrimination

Caregiver Discrimination and Harassment Based on Sex and Pregnancy

- The guidance cites the following examples of unlawful behavior:
 - denying male caregivers leave or a flexible work schedule to care for a family member with COVID-19;
 - refusing to hire pregnant applicants or taking adverse employment action against pregnant employees based on “assumptions that these individuals... should be primarily focused on ensuring safe and healthy pregnancies”;

EEOC Issues New Guidance on Caregiver Discrimination

Other Examples:

- harassment of pregnant co-workers for taking preventive measures against exposure to COVID-19;
- unilaterally reassigning work responsibilities based on the belief that female caregivers would not want to be away from their families if a family member is infected with or exposed to COVID-19; and
- disparaging comments made towards female employees for focusing on their careers rather than their families.

EEOC Issues New Guidance on Caregiver Discrimination

Associational Disability Discrimination

- The guidance cites the following examples of unlawful behavior:
 - refusing an employee's request for unpaid leave to care for a parent with "long COVID,";
 - declining an applicant because the applicant's spouse's disability increases the likelihood of her experiencing severe COVID-19 symptoms;

EEOC Issues New Guidance on Caregiver Discrimination

Other Examples of Associational Disability Discrimination

- refusing to promote an employee who is the primary caregiver of a child with a mental health disability that worsened during the pandemic based on the assumption that the employee will not be able to adequately perform their job duties due to their caregiver obligations; and
- mocking an employee for taking precautionary measures because they are caregivers for individuals at risk of severe COVID symptoms.

EEOC Issues New Guidance on AI

- On May 12, 2022, the EEOC issued its first guidance regarding employers' use of Artificial Intelligence ("AI").
- The EEOC's guidance outlines best practices and key considerations that help ensure that employment tools do not disadvantage applicants or employees with disabilities in violation of the Americans with Disabilities Act ("ADA").

EEOC Issues New Guidance on AI

- Employers will be held responsible for use of AI-driven decision-making tools to evaluate employees ***even if the AI tool was developed or administered by a third party vendor.***
- Guidance states that “employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer’s behalf.”

Common Ways AI may Violate ADA

- By relying on the software, the employer may fail to provide or recognize a need for a reasonable accommodation.
- The tool screens out an individual with a disability that is able to perform the essential functions of the job with or without an accommodation.
- The tool makes a disability-related inquiry or otherwise constitutes a medical examination.

Best Practices to Avoid Violations

Make Clear What Your Accommodations Process Is

- Employers should:
 - Make clear *in writing* that applicants and employees can request reasonable accommodations; and
 - Provide clear instructions on how they can do so.

Best Practices to Avoid Violations

Advise on Use of AI Assessments

- Employers need to inform all applicants and employees undergoing an assessment by AI information “*in plain language and in accessible formats*” the following:
 - the traits that the algorithm is designed to assess,
 - the method by which those traits are assessed, and
 - the variables or factors that may affect the rating.

Best Practices to Avoid Violations

Focus on Essential Functions

- Employers should ensure that the AI and algorithmic tools:
 - “only measure abilities or qualifications that are *necessary* for the job”.
 - even for people who are entitled to an on-the-job reasonable accommodation”
 - measure those necessary qualifications “directly, rather than by way of characteristics or scores that are correlated with those abilities or qualifications.”

Best Practices to Avoid Violations

Ensure Your Vendors are in Compliance

- Confirm that the AI tool does not ask job applicants or employees questions that:
 - are likely to elicit information about a disability or
 - seek information about an individual's physical or mental impairments or health
- These inquiries can be made if they are related to a request for reasonable accommodation.

EEOC Enforcement Efforts on AI

- On May 5, 2022 — just one week before releasing its guidance — the EEOC filed a complaint in the Eastern District of New York alleging that iTutorGroup, Inc., a software company providing online English-language tutoring to adults and children in China, violated the ADEA.
- The complaint alleges that a class of plaintiffs were denied employment as tutors because of their age.

COVID-19 and Beyond

Vaccine Mandate Status

- In light of Supreme Court ruling, OSHA withdrew Emergency Temporary Standard regarding vaccines (ETS) **effective January 26, 2022.**
- **BUT**, the ETS also acts as a proposal for a permanent standard, which is separate from the litigation and requires the agency to undergo a formal rulemaking process with a notice-and-comment period.

What's Next for OSHA and Vaccines

- OSHA continues to strongly encourage the vaccination of workers against the continuing dangers posed by COVID-19 in the workplace.
- OSHA will continue to inspect employer worksites for COVID-19 safety under the agency's current standards including general duty clause.

What's Next for OSHA and Vaccines

OSHA continues to recommend that Employers:

- Provide paid time off for vaccination;
- Ensure rooms are properly ventilated;
- Set rules for masking, physically distancing, and practicing good hygiene; and
- Have protocols in place for employees to follow if they test positive for COVID-19.

Long COVID and ADA

- In July 2021, President Biden announced that “long COVID” may be considered a disability under the ADA.
- In December 2021, the EEOC issued guidance clarifying when COVID-19 may be considered a disability under ADA.
 - In the EEOC's guidance, it's noted that certain conditions can be caused or worsened by COVID-19 resulting in impairments that are themselves disabilities under the ADA.
 - However, if COVID-19 results in mild symptoms that resolve in a few weeks, then will not have an ADA disability that could make someone eligible to receive a reasonable accommodation.

Long COVID and ADA

- Applicants or employees with disabilities are not automatically entitled to reasonable accommodations under the ADA.
 - They are entitled to a reasonable accommodation when their disability requires it, and the accommodation is not an undue hardship for the employer.
 - But, employers can choose to do more than the ADA requires.

Long COVID and ADA

- Don't rely on myths, fears, or stereotypes about a condition and prevent an employee's return to work once the employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others.
- Taking actions based on assumptions may lead to a disability discrimination claim.

COVID-19 and FMLA

- Employees with COVID-19 may qualify for FMLA if their symptoms meet the definition of a “serious health condition.”
- Serious Health Condition requires:
 - More than three calendar days of incapacity plus two treatments by a healthcare provider.
 - More than three calendar days of incapacity plus one treatment by a healthcare provider plus continuing treatment under the supervision of a healthcare provider.

Takeaways

Takeaways

- Update sexual harassment policies to address the new law.
- Train employees and managers so that they can identify and respond to sexual harassment complaints immediately.
- Be on the lookout for changes to DOL regulations and conduct audits of exempt employees to ensure that they are properly classified as exempt.

Takeaways

- Review current policies regarding maintaining order and professionalism in the workplace to ensure that they are not overbroad.
- Given new AI guidance, evaluate your current and contemplated AI tools for potential risk including consulting with vendors and reviewing your accommodations processes for both applicants and employees.

Takeaways

- Continue to evaluate COVID protocols to make sure they are in line with current CDC and OSHA standards.
- Be on the lookout for employees with Long COVID symptoms including:
 - Following existing reasonable accommodation and FMLA policies with employees who are COVID-19 long haulers.
 - Make sure to engage the ADA interactive process with the individual when determining whether reasonable accommodation is possible.
 - Inform employees who are FMLA-eligible that their conditions might qualify for FMLA leave.

Thank you

Questions?

About Today's Speaker



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Laura Alaniz counsels clients on compliance issues relating to employment law and prevention of claims including issues related to hiring and terminating employees, leaves of absence, layoffs, unemployment compensation, employment handbooks and policies, and conducting employee and management training.

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