PORTER|HEDGES

Ethics Considerations for Corporate Counsel in the Face of Big Employment Law Changes in 2024

First Thursday CLE Program

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Introduction

- A national election year is always ripe for changes in employment guidelines and rules.
- 2024 will not disappoint in this regard as the various federal agencies have announced some monumental and sweeping changes for which corporate and in-house counsel need to be mindful in organizational planning for the new year.
- We will cover the various ethics responsibilities of corporate counsel in evaluating and applying the following upcoming changes for workplaces.
- We will review these through the ethical rules and guidelines that apply specifically to corporate and in-house counsel under the ABA Rules of Professional Conduct, the Oklahoma Rules of Professional Conduct and the Texas Disciplinary Rules of Professional Conduct.

Program Outline

Today we will discuss the ethical implications for corporate and in-house counsel regarding :

- **EEOC's proposed guidance to employers on anti-harassment policies, training and investigations**
- **Expanded employee rights and employer duties under the EEOC's Pregnant Workers Fairness Act (June 2023) and FLSA's PUMP Act (April 2023)**
- **DOL's proposed changes to federal wage overtime laws, highlighting the proposed increase to the minimum salary for overtime exemption**
- **OSHA's new enforcement policies and the deterrent effect such have had on voluntary settlements of citations**
- **NLRB's precedent-changing decisions and the rise in unfair labor practices charges for all employers**
- **DOJ's proposed rulemaking regarding ADA-compliant guidelines for workplace websites and apps**

Ethics Responsibilities Specific to Corporate and In-House Counsel

- **Five ethical issues for in-house counsel under the ABA Rules of Professional Conduct, the Oklahoma Rules of Professional Conduct and the Texas Disciplinary Rules of Professional Conduct:**
- **1. Who is the client? Though you interact daily with senior management and others, an in-house lawyer's client is the company and not any one individual. This can lead to some awkward moments, especially during internal investigations where you must make it clear to the individual that you represent the company not them, usually through an "Upjohn" warning. It's also easier to mix business and legal advice, jeopardizing the attorney-client privilege.**
- **2. Unauthorized practice of law. Working in-house means it's sometimes easier to forget to renew your law license, take required continuing legal education courses, or ensure that you have complied with the state licensing requirements (i.e., some just require a valid license from any state, others require some type of license from that state).**
- **3. Outsourcing legal work. Legal departments often hire non-law firms to provide services like document or due diligence review, contract preparation, and legal research. Under §§5.1 and 5.3, you are responsible for their work product and for ensuring they comply with the ethical rules.**

Ethics Responsibilities Specific to Corporate and In-House Counsel

- **Five ethical issues for in-house counsel under the ABA Rules of Professional Conduct, the Oklahoma Rules of Professional Conduct and the Texas Disciplinary Rules of Professional Conduct (continued):**

- **4. Duty of competence. In-house lawyers have a duty of competence under §1.1. For example, you must be technologically savvy, e.g., e-discovery or cyber-security and know when you must go to outside counsel to deal with a legal question. Further, malpractice claims against in-house lawyers are on the rise.**

- **5. Reporting misconduct. Rule 1.13(b) also causes tension as. In, under the right circumstances, you must report to a higher authority when the actions of officers or employees violate a legal obligation to the company, render the company responsible for violating a law, or are likely to result in substantial injury to the company.**

Ethics Responsibilities Specific to Corporate and In-House Counsel

- **Here are eight critical employment law issues for corporate and in-house counsel to focus on:**
  - **1. Training. Most companies have an online, live (or combination thereof) program to train employees on employment law issues, including sexual harassment, business ethics, and non-discrimination. A yearly review of your training program and materials to make sure they are relevant, effective, and updated to capture new issues is a must. You will likely need additional training for managers — which can substantially reduce risk in key areas — and such training should be part of any overall review process.**
  - **2. Employee classification. The process of properly classifying workers as "Exempt/Non-Exempt" under the Fair Labor Standards Act is crucial. Such classification tells you which employees must be paid overtime and which are exempt. Misclassification of hourly employees as "exempt" can set the company up for severe legal problems and potential big damages with respect to back wages and overtime.**

Ethics Responsibilities Specific to Corporate and In-House Counsel

- **3. Employee agreements. In-house counsel should be responsible for drafting and maintaining employee agreements such as confidentiality, non-compete, non-solicitation, IP ownership, arbitration clauses, and so forth.**
- **4. Employee handbook. Most companies have an employee handbook containing key policies such as Code of Ethics and Business Conduct, Anti-Corruption, Anti-Trust, Insider Trading, Health and Safety, and Trade Compliance. Regular review of the employment law handbook's policies is important to ensuring the company stays on top of an ever-changing legal landscape.**
- **5. Independent contractors. It is important to ensure that independent contractors do not cross over and accidently become employees. In-house counsel should review all independent contractors each year to ensure they are not being treated like "employees" — for example, a contractor invited to employee meetings, given employee performance reviews, overly close supervision, and direction of the contractor's work — and therefore entitled to employee benefits.**

Ethics Responsibilities Specific to Corporate and In-House Counsel

- **6. Internal investigations policy. Internal investigations can often involve multiple staff groups such as the legal department, compliance office, HR, and internal audit. If so, the lines can become blurred and efforts duplicated, information lost, and bad decisions follow. To fix this, work together to prepare a plan that clearly sets out the roles and responsibilities of each group depending on the type of issue presented.**
- **7. Background checks. Given the potential legal exposure for making a "bad" hire, many companies perform criminal background checks on all potential employees and promotion candidates. This is an area where great care is needed as more cities and states have enacted (or are in the process of enacting) laws that change the rules on when employers can ask job applicants questions about things like prior arrests.**
- **8. Drug testing. As marijuana is legalized in more states — 15 for recreational use and growing — drug testing gets trickier. You do not need to let people who are "high" come to work but you must make accommodations to protect registered uses of medical marijuana from discrimination. In-house counsel should be paying close attention to this ever-changing area of the law.**


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EEOC's Proposed Guidance to Employers on Anti-Harassment Policies, Training and Investigations

- **On September 29, 2023, the EEOC unveiled proposed guidance, "Enforcement Guidance on Harassment in the Workplace," outlining the agency's stance on what constitutes an effective anti-harassment policy (notably including potential unlawful harassment based on sexual orientation and gender identity), complaint process, and anti-harassment training, as well as common pitfalls.**
- **According to the EEOC, despite federal laws prohibiting harassment, it continues to be an issue in U.S. workplaces as more than one third of charges filed with the agency from the beginning of fiscal year (FY) 2018 through FY 2022 included an allegation of unlawful harassment.**
- **The 145-page guidance proposal (including 350 footnotes containing significant, more recent case law citations).**
- **The EEOC's proposed guidance specifies what features or content the EEOC believes an anti-harassment policy and complaint process should contain to be effective.**
- **The proposed guidance identifies what effective harassment training should minimally contain.**
- **The EEOC's comment period closed on the proposed guidance on Nov. 1, 2023.**
- **The final guidance and rule changes are expected to be released in early 2024.**


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- **According to the EEOC's proposed guidance, effective anti-harassment policies would minimally contain several features, including the following:**
  1. **A definition of what conduct is prohibited**
  2. **A requirement that supervisors report harassment of which they are aware**
  3. **Offering multiple reporting avenues available during the employees' working times and other times (e.g., weekends and evening hours)**
  4. **Clearly identifying accessible points of contact to report harassment with contact information**
  5. **An explanation of the complaint process, including the ability to bypass a supervisor (especially one alleged to have engaged in harassment), anti-retaliation and confidentiality protections, as well as any alternative dispute resolution process available**
- **In addition, the EEOC states an effective policy would not only be disseminated widely, but also be comprehensible to employees and "implemented effectively."**


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EEOC's Proposed Guidance to Employers on Anti-Harassment Policies, Training and Investigations

The proposed guidance states that effective policies are understandable to employees who speak other languages, have limited literacy skills, or have other barriers to comprehension. For example, according to the proposed guidance, a workplace that employs teenagers should have policies and processes that an average teenager can understand.

An effective complaint process that the EEOC believes should be included in the anti-harassment policy would generally provide for the following:

1. **Prompt and effective investigations and corrective action**
2. **Adequate confidentiality protections**
3. **Adequate anti-retaliation protections**

The proposed guidance cautions against employer-created obstacles to filing complaints, such as undue expense to the employee, inaccessible points of contact, or burdensome requirements.

Expanded Employee Rights and Employer Duties Under the EEOC's Pregnant Workers Fairness Act (June 2023) and FLSA's PUMP Act (April 2023)

- **Two new federal laws expand the scope of existing protections for pregnant employees and nursing workers. Employers should carefully review existing accommodation and lactation policies and practices to ensure they are compliant with the new laws.**
- **The Pregnant Workers Fairness Act (PWFA) and the PUMP for Nursing Mothers Act (PUMP Act).**
- **While these new laws do not replace the Americans with Disabilities Act, Title VII, the Family and Medical Leave Act, and state and local laws that may provide protections for pregnant and lactating employees, these new federal requirements apply to employers throughout the country and have an expanded coverage of qualifying employees with pregnancy and childbirth related limitations.**

EEOC's Pregnant Workers Fairness Act

- The PWFA requires private and public sector employers with at least 15 employees to provide reasonable accommodations to an employee's known limitations related to pregnancy, childbirth, or related medical conditions, unless it will cause an undue hardship.
- The PWFA requires employers to engage in an interactive process with employees to evaluate reasonable accommodations.
- The law prohibits employers from:
  - Denying a job or other employment opportunities to a qualified applicant or employee based on their need for a reasonable accommodation;
  - Requiring an employee to take leave if another reasonable accommodation can be provided that would allow the employee to continue working;
  - Retaliating against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
  - Interfering with any individual's rights under the PWFA.

FLSA's PUMP Act

- The PUMP Act amends the Fair Labor Standards Act (FLSA), and requires employers to provide:
  - 1. reasonable break time for employees to express breast milk for one year after a child's birth; and
  - 2. a place, other than a bathroom, that is shielded from view and free from intrusion in which the employee can express breast milk.
- An employer may not deny a covered employee a needed break to pump. The law does not specify a minimum frequency or duration of breaks, as this will likely vary depending on the needs of the employee and applicable state and local requirements.
- While the Affordable Care Act of 2010 (ACA) amended the FLSA to provide these rights to non-exempt employees, the PUMP Act extends coverage to all employees, unless specifically excluded.
- The PUMP Act does not provide a right to a paid break; however, the law makes clear that time spent expressing breast milk is considered "hours worked" if the employee is not relieved of all duties during the entirety of the break.

DOL's Proposed Changes to Federal Wage Overtime Laws, Highlighting the Proposed Increase to the Minimum Salary for Overtime Exemption

- The DOL announced a proposed rule raising the overtime exemption salary threshold for white collar workers.
- The proposed rule addresses the overtime exemption for executive, administrative and professional employees.
- Currently, such workers must earn at least $35,568 annually to qualify for the exemption. The proposed rule would raise the threshold to $55,068.
- The highly compensated employee (HCE) exemption also is being increased under the proposed rule from its current level of $107,432 to $147,414 per year.
- The rule would also include automatic updates, bumping up the threshold with inflation every three years.

DOL's Proposed Changes to Federal Wage Overtime Laws, Highlighting the Proposed Increase to the Minimum Salary for Overtime Exemption

The DOL has used a three-part test for this exemption. An employee must

1) perform exempt duties,

2) be paid a fixed salary and

3) be paid a high enough salary.

- **This third prong is the "salary threshold" test. Its predominant rationale has been to serve as a proxy for an employee's status as a bona fide executive, administrator or professional. The idea is that an employee truly charged with those duties would likely have a salary commensurate with those duties.**

- **Practical Advice: The proposed change is a platform to review all exempt and non-exempt classifications to make sure that the duties and compensation fit both the FLSA definitions and the needs of the company. Like process in 2020, it is a means to make changes that need to be made without raising employee concerns about past compensation.**

OSHA's New Enforcement Policies have a Deterrent Effect on Voluntary Settlements of Citations

- OSHA has implemented several new enforcement policies over the past eighteen months.
- OSHA's new enforcement policies will likely make it more difficult for employers to accept citations in in settlement agreements.
- OSHA issued two significant enforcement policy changes:
  - 1) a memorandum to Area Offices regarding "instance-by-instance" violations and the discretion afforded Regional Administrators and Area Directors not to group violations of the same standard into a single citation; and
  - 2) a policy to expand situations in which an employer is placed into the Severe Violator Enforcement Program (SVEP). An employer placed in the SVEP risks losing substantial business.
- These policy changes make it increasingly difficult for employers to enter into settlement agreements in which violations are accepted.
- Accepting any serious violation can snowball into future willful or repeat violations, which may result in inclusion in the SVEP.
- Similarly, settling cases in which the employer faces multiple IBI or ungrouped violations will be challenging.

NLRB and OSHA Enter Into Memorandum of Understanding to Share Information and Make Referrals

- On October 31, 2023 the NLRB and OSHA announced a new agreement between the two federal agencies. The agreement was described as an effort to "strengthen the agencies' partnership and outline procedures for information-sharing, referrals, training and outreach that explain federal anti-retaliation protections."
- The first sentence of the memorandum of understanding between the two agencies cites the Occupational Safety and Health Act's anti-retaliation provision, Section 11(c), 29 U.S.C. § 660(c), as well as various statutory whistleblower provisions that OSHA is charged with enforcing.
- This agreement is an effort to increase awareness of the federal protections afforded to employees under whistleblower and anti-retaliation laws. The agencies even linked a handout that provides a direct link to OSHA's complaint web page.
- The memorandum of understanding will remain in effect for five years. Employers may be challenged by an increased number of whistleblower complaints during that time.

NLRB's Precedent-Changing Decisions and the Rise in Unfair Labor Practices Charges for all Employers

- During the first six months of Fiscal Year 2023 (October 1–March 31), unfair labor practice (ULP) charges filed across the NLRB's 48 field offices have increased 16%—from 8,275 to 9,592.
- In December, Congress gave the NLRB a $25 million increase for Fiscal Year 2023, ending a hiring freeze, preventing furloughs, and allowing the NLRB to backfill some critical staff vacancies.
- With the Board's precedent-turning decisions this calendar year, particularly in August 2023, employers may again begin to experience an uptick in ULP charges and election petitions.
- NLRB Precedent Setting Decisions in 2023:
  1. Protected Concerted Activity
  2. Work Rules and Handbook Policies
  3. Independent Contractor Standard
  4. Employee Discipline
  5. Remedies for Repeat Violators
  6. Severance Agreements
- Practical application: Counsel should review current policies and employee handbooks to make sure current with these changes.
- Management and HR Training on these topics.

DOJ's Proposed Rules Regarding ADA-Compliant Guidelines for Workplace Websites and Apps

- The DOJ issued a Notice of Proposed Rulemaking that would make the Web Content Accessibility Guidelines the standard for compliance for state and local governments covered by Title II of the Americans with Disabilities Act.
- The DOJ is proposing to make the Web Content Accessibility Guidelines the ADA Title II compliance standard for local and state governments.
- If finalized, the standard would apply to websites and mobile apps, and would give governments two to three years for compliance, based on population.
- The DOJ explicitly recognized the impossibility of designing and maintaining a website that conforms in all respects and at all times to the Web Content Accessibility Guidelines, but what measure of conformance would be adopted is unclear.
- Even though the proposed regulation would apply only to "public entities" covered by Title II of the ADA (namely, state and local governments), the NPRM represents the most significant indicator of what the DOJ will do when it comes to private-sector websites.

Thank you!

Questions to:

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