Sexual Harassment: A Refresher Course

In light of recent publicity about allegations and, in some cases admissions, of sexual harassment by high profile individuals including actors, producers, television stars, judges, and politicians, we thought a brief refresher about sexual harassment law would be useful.

First, Title VII, the federal law under which many harassment claims are brought, covers employers with 15 or more employees, but smaller employers are not immune. Some state anti-discrimination laws cover smaller employers and depending on the harassing behavior, an employee may have a state claim for assault, battery, false imprisonment or other similar claims. In addition, employers may be liable for hiring or retaining employees that they know, or should know, might engage in such conduct if indeed the employees harm an individual.

Focusing on Title VII, which is also the law after which many state statutes are patterned, there are two types of claims. Quid pro quo harassment occurs when employment decisions are based on the employee’s submission to, or rejection of, sexually harassing conduct, or when submission is implicitly or explicitly tied to employment conditions. Hostile environment harassment occurs when unwelcome conduct that is severe or pervasive and based on gender, creates an abusive work environment that alters conditions of employment. These distinctions are mostly important in determining the employer’s liability.

To violate Title VII, the harassment must be based on gender. It need not be sexual, although it often is. It can involve employees of the same sex or those of the opposite sex. Harassment can be verbal, physical, or both. Hostile environment harassment must be severe or pervasive. It need not be both. Some courts have found a single egregious incident to qualify. It also must be unwelcome to the person being harassed.

Employers are liable for quid pro quo harassment committed by supervisors. For hostile environment harassment by supervisors, employers may escape liability if they have taken reasonable steps to prevent and correct harassment (typically adoption of an effective harassment policy) and the employee unreasonably failed to take advantage of the opportunity provided by the employer to avoid harm. For harassment by coworkers, employers are liable if they knew or should have known of the harassment and failed to take reasonable steps to prevent and correct it. These defenses highlight the importance of an effective policy, as well as effective anti-harassment training. Attorneys and consultants will provide advice on the proper policies, assist with investigations, and provide training.

Retaliation for reporting harassment is also unlawful under Title VII so long as the employee reasonably believed the conduct reported was in violation of the law.

Unions may play an important role in protecting employees from harassment but face particular challenges when the alleged harasser is also a member of the bargaining unit. Unions must represent both employees fairly. The situation is analogous to others in which the rights of collective bargaining unit members conflict. Unions should investigate and be careful not to rely on stereotypes, or irrelevant factors such as union membership or activity, or gender to decide which employee to support.
As evidenced by recent publicity, employers should not assume that sexual harassment is not occurring or that valued employees would not engage in such behavior. Employers should not ignore warning signs or evidence of sexual harassment. Messages from the top of the organization that harassment will be not tolerated set the proper tone for the organization. No business wants to be the next Weinstein.

For the EEOC guidance on sexual harassment see here.

On a related note, the recently passed tax bill contains a provision limiting the tax deduction for payments related to sexual harassment settlements containing confidentiality provisions. The theory is that this limitation will discourage settlements of cases that allow harassers to continue to prey on others because the settlement is confidential. Critics contend that it will make settlements more difficult and reduce the amount of money available to those who suffer from harassment. In an ironic twist, the language of the bill, in the eyes of many tax experts requires employees who are harassed to pay taxes on the amount of money paid to their lawyers as part of the settlement, money they don’t keep. This is an unintended consequence that may further impede settlements of these cases. Employers and employees contemplating settlement of cases would be well-advised to get tax advice.

For more on the tax provision, see here.

**NLRB – Trump Style**

The Trump Board moved quickly to overturn Obama Board decisions, with a rash of decisions in December 2017, just before Chair Miscimarra left the Board. These decisions came much more quickly than has occurred with previous administration changes and without requests for amicus briefing or oral argument, a practice often used when the Board is considering overturning precedent, moving in a different direction, or dealing with a novel issue. Several of these decisions are discussed below. For a union perspective on the cases, see here and for an employer perspective see here.

In addition, the new General Counsel has advised the Regional Offices that they must seek advice from headquarters before issuing complaints in cases raising issues on which the Obama Board reversed prior precedent. Requiring the Regions to seek advice in certain cases is common, but what is unusual is to impose the requirement based solely on the prior Board’s reversals of precedent. The memo gives a strong indication that the General Counsel will seek reversals or modifications of these decisions. The General Counsel has also raised eyebrows by floating a proposal to limit the authority of the agency’s Regional Directors, for the first time in the agency’s eighty plus years.

To read about the General Counsel’s actions, see here, here and here.

In another action, the NLRB has requested comments regarding the 2014 election rules that sped up the election process and provided more information about employees to unions organizing the workforce in order to increase access. Not surprisingly, the agency is considering whether to retain, modify or eliminate the rule. Here is the link for comments.

Finally, with respect to the *Hy-Brand* case discussed below, which was a significant reversal of prior precedent, the NLRB on February 26 vacated the decision because the agency’s inspector general determined that one of the majority Board members should have recused himself from participating in the decision. We have left our analysis of the case intact because we expect that either in the rehearing of *Hy-Brand* or in another case, a similar decision will be issued. Nevertheless, as of now until another decision is issued, *Browning-Ferris* is the law.
To read more about the NLRB Inspector General’s determination see here.

**Trashing Browning-Ferris**

In December 2017, NLRB announced a decision in the *Hy-Brand Industrial Contractors* dispute, which reversed the previous *Browning-Ferris* decision regarding joint employer status. Chairman Miscimarra wrote a dissenting opinion in that previous case, and in his role as Chairman, he vigorously discredits the analysis and outcomes of it. Under *Browning-Ferris*, if the possibility of joint control over an employee existed, joint employment existed, and both employers were obligated to participate in labor negotiations. In *Hy-Brand*, Miscimarra returns to the pre-*Browning-Ferris* standard that requires actual joint control by employers in order for them to be considered joint employers for purposes of labor negotiations.

The original reasoning behind *Browning-Ferris* was to ensure that there were no parties missing from negotiations if their presence was required to resolve employment related issues. Calling *Browning-Ferris* “a distortion of common law” and “ill-advised as a matter of policy,” Miscimarra asserts that joint employment henceforth will require “that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having “reserved” the right to exercise control), the control must be “direct and immediate” (rather than indirect), and joint-employer status will not result from control that is ‘limited and routine.’”

The change will have significant implications for labor negotiations involving sub-contractors and franchisees and make organizing these employees more difficult. This does not preclude a finding of joint employment where two employers assert managerial control over workers’ jobs, but will excuse hands-off customer/employer and franchisor companies from those negotiations.

This decision may influence joint employer determinations under other statutes as well.

For more information see here. For a pro-worker analysis, see here and for a pro-business analysis, see here.

**Making Organizing Harder**

In *PCC Structural*, the Board reversed its *Specialty Healthcare* decision, another target of employer criticism of the Obama Board. *Specialty Healthcare* required employers seeking to add employees to the union’s petitioned-for unit to show that they had an overwhelming community of interest with employees in the unit sought. The standard established in *PCC Structural* asks whether the employees in the unit requested in the petition have a community of interest “sufficiently distinct” from other employees of the employer to justify a separate unit.

This decision will limit the ability of smaller groups of employees that desire union representation to organize when others that may have some common terms and conditions of employment do not share their interest in unionization.

For the case, see here.
The Legality of Handbook Rules - The Boeing Company

Employee handbooks contain a wide range of rules that an employer expects its employees to observe. Among these may be some rules that interfere with the right of employees to share information that may lead to collective bargaining or other collective action. Free exchange of information fuels employee’s awareness of inequities in their treatment or salaries. Recordings of employers, prohibited by Boeing’s handbook rules, can also substantiate a claim of inappropriate behavior by an employer, or of substandard work conditions. The Lutheran Heritage decision protected employees from workplace rules that they could “reasonably construe” as infringing their right to engage in collective activities.

In December, prior to the departure of Chairman Miscimarra, the new Republican majority on the NLRB overturned Lutheran Heritage in a decision that split along party lines. Claiming that the Lutheran Heritage standard “has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules,” the Board instead has adopted a standard that takes employers’ interests into account. The new standard requires that the potential impact on NLRA rights is to be balanced against an employer’s claim that a work rule has a legitimate justification. The Board also upheld Boeing’s no camera rule and indicated that going forward, certain rules like those banning recording and requiring civility will be lawful, while other rules will require individualized determinations as to their legality. Still others, such as rules that expressly limit NLRA-protected activity, are deemed unlawful.

The dissent claimed the “new standard is essentially a how-to manual for employers intent on stifling protected concerted activity before it begins.” The NLRA is legislation designed to protect the rights of workers to collectively bargain, despite having dramatically less power than employers. The new rule is presented as striking a balance that is more sensitive to the needs of employers. It remains to be seen how the circuit courts will interpret this new standard.

For employers, this makes writing and enforcing handbook rules much easier. For employees, this reduces the protection available for collective activity and discussion.

For more information including a link to the decision, see here.

Update on Sexual Orientation Discrimination

In previous newsletters, we have discussed the growing protection for employees subjected to sexual orientation discrimination. On February 26, the Second Circuit, covering New York, Connecticut and Vermont, decided in Zarda v. Altitude Express that Title VII’s prohibition on sex discrimination incorporates a ban on discrimination based on sexual orientation. The decision was made by all of the judges on the court, who decided to hear the case after a three-judge panel of the court ruled to the contrary based on the court’s prior decisions. The full court decision was split, but a majority of the judges ruled for the employee. In this case, the EEOC supported the employee while the Justice Department supported the employer, as we reported in the September 2017 newsletter. The Second Circuit thus joins the Seventh Circuit in finding sexual orientation discrimination barred by Title VII. The Eleventh Circuit ruled the other way and in December 2017, the Supreme Court declined to hear an appeal from the Eleventh Circuit case. It is likely that this question will be decided by the Supreme Court, but the timing of that is uncertain.

For the decision, see here.