Hopefully, You Will Sleep Better at Night

By Sheryl J. Willert

A Little Advance Notice on Employment Issues That Will Be Faced by General Counsel in 2018

In the summer of 2017, ALM and a major American law firm launched what was described as the inaugural "General Counsel Up-At-Night" report. That report listed five major areas of concern for general counsel. The areas of focus for the general counsel who participated in the survey results included privacy and data security, risk and crisis management, regulations and enforcement, and litigation and intellectual property. The report contained some telling information about the employment related matters that might be areas of concern for general counsel in the coming year. The first of these significant factors is that, in the area of regulations, general counsel are extremely concerned about the existence of so many different regulatory schemes addressing the same subject matter in different jurisdictions. The second significant factor was that 59 percent of those surveyed were concerned about litigation in the employment arena. Because of these factors, it is important to alert general counsel about the issues that practitioners in employment related fields are seeing as areas of concern for general counsel and corporate America.

Many of the concerns that will be faced by general counsel around the country are foreshadowed, not only by actions of state

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and local governments, but also by what is in the news.

Sexual Harassment

Despite the fact that sexual harassment was defined in 1964 with the passage of the 1964 Civil Rights Act as something that was a violation of the rights of those who are subjected to differential treatment and/or a hostile working environment on the basis of their gender, claims of sexual harassment, sexual assault, and general sexual improprieties in the workplace continue as though the law has never existed.

Although not called "sexual harassment" or even recognized by many courts until *Vinson v. Meritor Savings Bank*, 477 US 57 (1986) and *Jensen v. Eveleth Taconite, Inc.*, 130 F.3d 1287 (8th Cir. 1997) (which was filed in 1988 and not settled until 1998), it was thought that the businesses and individuals within businesses had gotten a handle on what type of conduct was or was not permissible in the workplace.

According to the EEOC, claims of workplace harassment have risen over the last 20 years by 10 percent (https://hbr.org), with EEOC data through 2016 showing that the agency received 28,216 complaints of workplace sexual harassment and resolved 30,582 such claims. Although the agency found no reasonable cause for the vast majority of the claims, the agency nonetheless was able to secure monetary benefits totaling $125.5 million dollars for the complainants. http://legalnews.com. It should be noted, however, that the same EEOC study demonstrates that more than 50 percent of claims filed are dismissed with no reasonable cause findings.

Who are the people perpetrating these actions? In addition to people whose names will not be recognized, there is a host of individuals within the country who are not only well known within their industries, but also well known throughout the country and the world. Names such as Harvey Weinstein (the Weinstein Co.); Kevin Spacey (actor); Donald Trump (president of the United States); Bill Cosby ("America's Dad"); Bill O'Reilly (Fox News), Anthony Weiner (former U. S. Congressman); Roy Price (Amazon studio chief); Chris Savino (Nickelodeon); Rohit Varma (USC Medical School Dean); Antonio Reid (Epic Records); Eric Bolling (Fox News Specialist) and many, many others. *Beyond Harvey Weinstein: 33 other high-profile men accused of sexual harassment misconduct, related behavior.* http://www.latimes.com.

Why, at this point in American history, are allegations of harassment increasing as opposed to decreasing, despite the apparent increased awareness and understanding? According to some, the rise in such claims is the direct result of the rise in unemployment among married males. A study conducted by Dan Cassino, associate professor of political science at Fairleigh Dickinson University, supports this conclusion. Dan Cassino, *When Male Unemployment Rates Rise So Do Sexual Harassment Claims*, Harvard Business Review, https://hbr.org. Of course, this explanation does not, in any way, reflect why all of the people listed above, who presumably were not impacted by the phenomenon that was studied by Cassino, may have been involved in conduct that would give rise to allegations of sexual harassment. Consequently, there must be additional explanations that are more aligned with the thought process that sexual harassment and sexual misconduct, particularly of the nature described by many claimants, is more about power and the power that money may provide. It should be noted that according to the EEOC, men lodge fewer than 17 percent of claims of harassment. Regardless of the reasons for the rise in claims, there has been such a large increase in claims that it has sparked a movement known as the "Me Too" movement. In 2017, this movement has grown so rapidly and has sparked so much conversation that *Time Magazine* named the "Silence Breakers" as its 2017 Person of the Year. *See* Jill Disis, Time's Person of the Year 2017 is 'The Silence Breakers,' Dec. 6, 2017, *available at* http://money.cnn.com.

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What should general counsels and corporate America do about this problem? In an age where most corporations have moved from human-based to tech-based training on issues of harassment, if the companies provide training at all, corporate America should give strong consideration to a return to training where people can ask questions, get answers, and hear stories relating to harassment in the workplace. However, prior to the institution of training, the company must have a strong, up-to-date policy regarding harassment; must be willing to enforce, in a meaningful way, policies prohibiting not only harassment, but also retaliation against anyone who reports such conduct; must promptly investigate claims of harassment and provide appropriate due process; and must instill a zero-tolerance ethic in the work place for such conduct. Failure on any of these fronts is simply an invitation to allow such conduct to start and/or continue.

Although undertaking such actions can never guarantee the complete elimination of harassment in the workplace, taking these actions can at least provide corporate America with a reasonable defense to such claims.

Gun Violence in the Workplace

Surveys demonstrate that many in corporate America who reside in the C-Suite do not believe that violence in the workplace is an issue. Consequently, few companies actually have plans that are known to their employees about how the company will go about

protecting them and about how they should protect themselves in the event that an active workplace shooting occurs. This is true despite the growing number of active workplace shooters who are showing up at the doors of American businesses and killing family members, co-workers, and strangers.

Why is this occurring? While there are many theories, including increasing radicalization of employees, cyber bullying, and anxiety associated with unemployment, there is no definitive answer as to the cause of the increase in workplace violence. Although the cause of such events is difficult to uncover, the response of corporate America to such activities should be the focus since employers have potential legal liability for failure to adhere to the requirements to provide a safe workplace. Many employers may be clinging to the concept that workplace violence is not foreseeable. However, given the increase in the number of such incidents, such an argument may not carry much weight with either a judge or a jury, unless the workplace shooter is a stranger to the business. Even then, a business may not be shielded from liability.

Why should employers be concerned? Although many of the incidents that have been described as mass shootings in America over the last five years have occurred in places such as music venues (Las Vegas, 2017), nightclubs (Orlando, 2017), public school buildings (Sandy Hook, 2012 and Marysville, WA, 2015); movie theaters (Aurora, CO, 2012) and churches (Charleston, SC, 2015), there is less attention paid by media and others to similar incidents that occur in the workplace, with the vast majority of workplace violence incidents actually occurring in the healthcare setting. *See* Violence in the Health Care Workplace: *Health care workers suffer more workplace injuries than any other profession, with about 654,000 harmed per year on the job.* (According to BLS, in 2015, there were 417 work place killings with 354 of them perpetrated by guns.)

Employers are required by the Occupational Safety & Health Act to provide a workplace that is free from recognizable hazards that are likely to cause death or serious injury. *See* General Duty Clause, Section 5(a)(1) of the Occupational Safety & Health Act. Case law across the country interpreting these provisions generally places responsibility on employers where the event is foreseeable. However, the simple issue of foreseeability, like many others, is likely to lead to litigation. Consequently, it is incumbent on employers to act before a need to defend against such litigation arises.

What should employers consider to protect their employees and themselves? In 2014, the FBI and the University of Texas released a study of active shooter incidents. *A Study of Active Shooter Incidents in the United States between 2000–2013*, Blair, J. Pete and Schwelt, Katherine, January 2014; https://www.fbi.gov. This study was the direct result of a significant increase in such activities during that period of time. Since 2013, the country has seen such an increase in active shooter activities that many employers have prudently implemented plans consistent with the recommendations of the Interagency Security Committee, which was convened as a result of two executive orders issued by President Obama in November 2015—Presidential Executive Orders 12977 and 13286. The recommendation of the committee provides a road map for businesses to follow. The Interagency Security Committee's Best Practices recommends establishing a plan that includes the following:

- conduct a security assessment
- preparedness
- communication
- incident plan (actions to be taken during an incident)
- training and exercises
- post incident recovery: enlisting employees and operations.

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The Interagency Security Committee also recommends that the active shooter plan be reviewed and revised every two years, based upon events that have occurred within the intervening time.

There are practical things that employers can do in order to prevent widespread injuries and deaths in the event of such an event. First, employers should appoint a committee that has the appropriate members. At a minimum, the committee should have a representative from its information technology department (IT); human resources department (HR); communications department, facilities department, and a contact within law enforcement.

Once established, the committee should review and select appropriate sources of information on active shooter activities from a wide variety of sources. The following resources may be of assistance in this endeavor:

- Active Shooter Resources.
  https://www.fbi.gov
- Active Shooter Preparedness.
  https://dhs.gov

Once those sources have been reviewed and studied, the information that is most valuable should be applied to your company's facilities to determine the best places for escape and hiding.

After making these determinations, the company should engage in table top exercises in order to ensure that all relevant constituencies are prepared. This should include training human resources personnel, managers, and supervisors to be on the lookout for potential warning signs in employees, including changes in personal circumstances such as divorce, financial problems, reports of restraining orders, or evidence of substance abuse. Remain vigilant about sudden changes in moods or personality that may be precursors to violent activity. In addition to training on recognition, there should also be training on methods of de-escalation.

In addition to training management and supervisory staff, all staff should be well versed in the simple things that may avert

an attack by an active shooter. Perpetrators are often deterred by the simple fear of being detected. In other words, look people in the eye and speak to them in order to let them know that they have been seen. Observe demeanor—does the individual appear nervous or suspicious? If anything suspicious occurs, or even if the employees' instincts suggest that the person does not belong and may do something wrong, report any incidents to appropriate personnel immediately.

Most importantly, everyone should be trained in the concepts of avoid, deny, and defend. In simple terms, this phrase means that everyone should be taught appropriate methods of escaping, hiding and barricading, and as a last resort, physical self-defense. Much of this information can be found in a video developed by the ALERRT Center at Texas State University. Avoid | Deny | Defend™ - **It Matters.** http://www.avoiddenydefend.org.

Ban on Salary History Inquiries

There have been a number of states and municipalities that have banned inquiries from employers about an applicant's prior compensation history. As of the date of this article, there are nine states and municipalities that have enacted such laws. In December 2017, Delaware will become the first state to prohibit employers from asking candidates about their prior salary history. Delaware will be followed by California (January 2018); Massachusetts (July 2018) and Oregon (January 2019). In addition, effective October 31, 2017, New York City prohibited all public and private sector employers from inquiring about pay history. Philadelphia actually attempted to be the trend-setter among municipalities, but that effort was thwarted by an injunction, which as of this writing was still in effect. New Orleans and Pittsburgh have imposed limitations on inquiring on employment pay history, but only for municipal employees. Prior to the change in administrations, the Paycheck Fairness Act also contained similar language. Although this legislation has not come out of Congress, the failure to pass this legislation is considered to be the genesis of many of these state and municipal laws.

What is this legislation about? Plain and simple, it is an effort to decrease gender inequities in compensation for men and women because women are believed to earn somewhere between 83 and 90 percent of what is generally paid to men holding the same or similar positions. Most of the statutes and ordinances prohibit the use of salary as a screening tool and also prohibit requiring an applicant to disclose prior compensation history.

In an effort to assist in rectifying the problem associated with inequity related to immutable characteristics such as gender, race and other factors, general counsel and CEOs should give consideration to retention of consultants who can provide an annual or bi-annual basis market survey that gives parameters for compensation.

Why should these things keep corporate counsel and management up at night? The things that the legislation is attempting to address are truly issues that must be addressed in private industry, and this is particularly true as women begin to represent a larger and larger percentage of the work force. However, in many circumstances, regulations of this nature will be viewed both by employees and managers as yet another ground for companies to be on the other end of protracted litigation, which, as is well known, means that the company's profit centers will have to support the expenditure of dollars simply to defend hiring practices.

Not only is there the potential for litigation, but many general counsel have seen firsthand the nightmare that can occur because there are different regulatory requirements in different locations. Some of those include requirements for different application forms, preparing different interview question templates, and, more importantly, changing the specific mind sets of all of those who are hiring authorities. Such a transition may well be difficult for local management who are accustomed to making decisions in a different way—including making inquiries about compensation in an effort to hire the best talent, while at the same time saving significant money for the company.

In an effort to assist in rectifying the problem associated with inequity related to immutable characteristics such as gender, race and other factors, general counsel and CEOs should give consideration to retention of consultants who can provide an annual or bi-annual basis market survey that gives parameters for compensation. If the expense of such market surveys is too high, it is incumbent on the corporation to train someone to perform this type of analysis or to participate in surveys where they can receive the data that will help in the company's ability to establish market factors as the primary basis for salary determinations. Once this data is collected, it is best to establish ranges for positions that provide legitimacy to the numbers and decisions.

In addition to market survey information, it is equally important for corporations to document salary decisions, which should reflect factors other than those immutable characteristics that formed the basis of the actual salary decisions. Examples of appropriate factors to distinguish one person's salary from another's that would also be considered bona fide reasons to distinguish one candidate from another include seniority systems, measuring quantity or quality of production, workplace locations, training, education, and experience.

Regardless of whether you are in a state or municipality where such laws have been enacted, this is definitely an area to watch.

Class Actions and Class Action Waivers

Class action lawsuits against employers continue to proliferate across the country. While the vast majority of these actions are based on issues related to the failure of employers to pay appropriate wages, in-

cluding misclassifying employees as independent contractors or failing to provide appropriate meal breaks and rest breaks, employers are facing class actions in other areas as well. Most notable in 2017, class actions that were filed, settled, or dismissed by courts alleged violations of the Fair Credit Reporting Act against companies like Starbucks, TransUnion, Shamrock Foods, Uber, and PepsiCo; actions alleging gender discrimination against companies like Google and Forest Laboratories; allegations of race discrimination against companies like Fox News and Wells Fargo; actions alleging unpaid internships against companies like Kenneth Cole; allegations that uniforms were causing illness against American Airlines; claims against Roundy's (Mariano's grocery chain) and Intercontinental Hotels Kimpton alleging violations of the biometric information statutes in Illinois, and even actions alleging failure to reimburse expenses appropriately against companies like Pizza Hut.

On Monday, October 2, 2017, the United States Supreme Court heard argument in the consolidated cases of *Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris, and NLRB v. Murphy Oil USA, Inc.*, 137 S.Ct. 809 (Mem). In this case, the Court is being asked to decide whether the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.* takes precedence over the provisions of the National Labor Relations Act 29 U.S.C. §§151, *et seq.,* which provides that employees have the right to engage in concerted action controls on the issue of resolving employment related disputes.

Conventional wisdom in the industry is that the ability to avoid public litigation is beneficial to corporations because it has the potential to reduce the number of class claims and "me too" claims, as well as ensuring that there is a lower cost involved in the resolution of disputes. Regardless of whether these thoughts are correct, the decision of the Court will implicate an estimated 25 million contracts around the country. If your company has elected to invoke arbitration as a means of dispute resolution, this decision is one to watch.

A Special Shout Out for ADEA Claims

Another issue that is looming and on which general counsel should focus is the split in the circuits about how to evaluate age claims. In *O'Connor v. Consolidated Coin Caters Corp.*, 517 U.S. 308 (1996), the U. S. Supreme Court determined that, in Age Discrimination in Employment Act (ADEA) cases, the relevant question is not whether the person who was treated more favorably was also over the age of 40, but whether someone was treated differently because of his/her age. With this as a backdrop, the 3rd Circuit in *Karlo v. Pittsburgh Glass Works LLC*, 849 F.3d 61 (3d Cir. 2017), determined that an individual who is within the protected class can pursue claims resulting from disparate treatment even though the person who was treated more favorably was within the protected class. The net effect of this decision is to permit claims to proceed where the employee claiming harm is 60 years old and the more favorably treated employee is 50 years old. This decision created a split in the circuits. See, *Lowe v. Commack Union Free School District,* 886 F. 2d 1364 (2nd Cir. 1989), *Smith v. Tennessee Valley Authority* 924 F.2d 1059 (6th Cir. 1991) and *EEOC v McDonnell Douglas Corp.,* 191 F 3d 948 (8th Cir. 1999). *See also Katz v. Regents of the Univ. of Calif.*, 229 F.3d 831, 835–36 (9th Cir. 2000) (in which the court noted the issue but failed to apply the standard that was adopted by the 3rd Circuit).

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The net impact of this decision is to put employers on notice that there is some potential in the future that, in layoffs and other circumstances where individuals over the age of 40 are impacted, it will be necessary not only to determine whether there is an adverse impact on individuals over the age of 40 as compared to those who are younger, but also to compare those within different subsets of the protected group.

This decision is also a reminder to employers that, with an aging population that is remaining in the workforce for longer periods of time, the ADEA provides that those protected by the statute can bring collective actions against employers if they are able to meet the necessary criteria.

Joint Employer Relationships

Despite the fact that the Trump administration has backed away from the joint employer rules that were promulgated by the National Labor Relations Board in 2015 in the Brown and Ferris decision *Browning–Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350,International Brotherhood of Teamsters, Petitioner,* 2015 NLRB LEXIS 672; 204 L.R.R.M. 1154; 2014-15 NLRB Dec. (CCH) P16,006; 362 NLRB No. 186 *("Browning–Ferris")*, which broadened the scope of joint employment liability, the issue has not been resolved because the concept can and often does arise in the context of state-based employment litigation as opposed to claims arising before the NLRB. The *Browning–Ferris* guidelines changed the landscape so that an entity could be considered a joint employer if a) under a contractual provision, the entity provided that it might at some point have an opportunity to control the business, or b) if the entity, through a third party, actually exercised control over employees of another business. The NLRB stated:

> We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Reserved authority to

control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. Nor will we require that, to be relevant to the joint employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.

The 2015 decision is currently on appeal before the D. C. Circuit Court. However, no opinion has been issued to date.

Regardless of the outcome of the appeal and regardless of the roll back of the rule by the NLRB, the issue of joint employment should continue to be on the radar of any business that uses leased employees, subcontracts work to others, or even permits employees of other businesses to come on their premises to perform work. Why? Because the controlling law on many cases where joint employer relationships are asserted is not the law of the NLRB, but is instead the law of the individual federal circuits and states where the work in question was performed.

Many of the federal circuits and many states have adopted the standards for joint employers adopted by the federal court in *Bonnette v. California Health and Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir. 1983). The *Bonnette* court held that there were four main factors that should be considered in making a determination of a joint employment relationship. Those factors were a) the power to hire/fire, b) supervision and control over employee work schedules or conditions of employment; 3) rates and methods of pay; and 4) maintenance of personnel records. Several other jurisdictions besides the 9th Circuit have adopted the *Bonnette* test. Those include the 5th Circuit and the 7th Circuit. Since the decision in 1983, the 9th Circuit modified the *Bonnette* factors and expanded them from four factors to eight. The 9th Circuit modification expanded the list of considerations to include: a) was the work to be performed a specialty job on the production line; b) whether the responsibility for contracts pass from one contractor to another without material change; c) whether the employer's premises and equipment are used to perform the work; d) did the employee have a business organization that could shift as a unit from one worksite to another; e) whether the employee had the opportunity to experience profit or loss depending on the employee's managerial skill; f) the duration or permanence of the relationship; and g) whether the work performed by the employee was an integral part of the employer's business.

Regardless of the outcome of the appeal and regardless of the roll back of the rule by the NLRB, the issue of joint employment should continue to be on the radar of any business that uses leased employees, subcontracts work to others, or even permits employees of other businesses to come on their premises to perform work.

Other circuits have adopted a version of the economic realities test. Those circuits include the 2nd Circuit, the 3rd Circuit, the 4th Circuit, the 10th Circuit, and the 11th Circuit. Each of these circuits has a specific variation on the economic realities test. Two circuits, the 6th and 8th Circuits have no specific tests.

In light of the potential liability that continues for employers under theories of joint employment, employers should take appropriate actions to minimize and distance themselves from relationships that evidence control over employees of contractors or temporary employment services. This, of course, is significantly more difficult than it sounds. Many businesses wish to ensure that there is compliance with state and federal laws, which not only requires compliance with the law, but actually provides that they are at liberty to audit such contracts. This type of "indirect control" is one of the factors upon which the 2015 NLRB latched in order to relax the standards to facilitate accountability on some party, regardless of their actual ability to control, to facilitate recovery for workers who have been wronged by someone. Contracting companies should also avoid the temptation to set schedules, instruct contractors on how to perform their jobs, assist in responding to allegations that a subcontractor has violated the law, or otherwise insert themselves into the business.

Similarly, employers who seek to assist contractors and franchisees in order to ensure that they are in compliance with laws, *e.g.*, providing training, agreeing to review paperwork, etc., can create the same form of liability for themselves. As a practical matter, businesses should require that businesses certify to them that they are cognizant of and will comply with the law without any aid or benefit from the contracting company.

Finally, companies should be clear that efforts to seek indemnification from another party, if you are determined to be a joint employer will, more likely than not, be an unenforceable term of an agreement. The law in almost every, if not all, jurisdictions, prohibits indemnification for violation of FLSA as a violation of public policy. *See, e.g., LeCompte v. Chrysler Credit Corp.*, 780 F. 2d 1260 (5th Cir. 1986), *Lyle v. Food Lion Inc.*, 954 F. 2d 984 (4th Cir. 1992), *Martin v. Gingerbread House, Inc.*, 977 F. 2d 1405 (10th Cir. 1992), *Eckerd Corporation v. J & S, Inc.*, 647 F. Supp.2d 388 (2009), and *Herman v. RSR Sec Servs.*, 172 F. 3d 132 (2d Cir. 1999). Since it is not unusual for states to look to the federal law for interpretation of their statutory wage schemes, these cases can provide guidance.

Conclusion

Although the issues discussed above may not be at the top of the list, hopefully addressing these issues proactively can eliminate the potential sleepless nights and headaches that general counsel will inevitably face during this calendar year and beyond.