Insight
EMPLOYMENT AND LABOR LAW
KIENBAUM OPPERWALL HARDY & PELTON, P.L.C.
ATTORNEYS AND COUNSELORS
WINTER 2018

EEOC Task Force Report

New Initiatives For Workplace Harassment Prevention

With the explosive press coverage of high-profile sexual harassers, employers should brace for a flood of new claims and an activist EEOC that will scrutinize sex-based charges with new vigor. Even though there is a well developed body of federal law that sets forth a rigorous legal standard for unlawful sexual harassment, obtaining summary dismissals of such claims will become more difficult and juries, at least in the near future, could be quite punitive if an employer is found to have "looked the other way" when obvious problems of sexual or gender abuse are occurring in the workplace. The steep costs businesses already incur as a result of workplace harassment – legal expenses, adverse publicity, declining workforce morale, decreased productivity, employee turnover, compromised recruitment, etc. – will only worsen in today's climate.

The sensational and deeply troubling nature of the stories concerning high visibility figures in Hollywood and the political, media, and entertainment arenas have created an unfortunate perception that corporate America has been neglecting its responsibility to address the moral and legal problem of sexual abuse in the workplace. While that is true within some pockets of corporate America, it is not the case everywhere – at least not in the heartland of America where many employers have worked diligently for decades to eradicate sexual harassment in their workplaces. And many corporations have made significant progress in their concentrated efforts to curtail this type of conduct. With that said, problems remain and employers need to be vigilant if they are to make further headway toward eradicating this problem. Employers also need to critically re-examine which of their prior prevention efforts have been successful, which have not (and why), and be willing to change course if past history and recent research suggest a different approach would be more effective.

Recognizing the need for a fresh look at the broad issue of harassment (not limited to sex-based claims), the EEOC authorized a Select Task Force to solicit the contributions and insights of "sociologists, industrial-organization psychologists, investigators, trainers,

Inside This Edition

- New Tax Law Discourages Non-Disclosure of Sexual Harassment Settlements 2
- EEOC's 2017 Statistics 4
- Two Conflicted Issues Resolved For Employers 5
- Will Mandatory Arbitration Of Sexual Harassment Claims Be Outlawed? 5
- Federal Appeals Courts Rule For LGBT Protections Under Title VII 6
- Don't Forget The Plant Closing Act 7
- Impact On Employers Of Legalizing Marijuana . 9
- Anti-Poaching Agreements May Be Criminally Prosecuted 11
- U.S. Department Of Labor Keeps Rolling Back Obama-Era Regulations 12
- Is Smaller, Gentler OFCCP On Horizon? 13
- Arbitration Rollout Must Say That Continued Employment Accepts Arbitration 14
- NLRB In Hiatus 15

New Initiatives For Workplace Harassment Prevention *from page 1*

lawyers, employees, advocates, and anyone else who had something useful to convey to us." The 16-member task force spent from April 2015 to June 2016 in search of answers to the following question:

"With legal liability long-ago established, with reputational harm from harassment well-known, with an entire cottage industry of workplace compliance and training adopted and encouraged for 30 years, why does so much harassment persist and take place in many of our workplaces? And, most important of all, what can be done to prevent it? After 30 years, is there something we've been missing?"

The Report of the Co-Chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace, which reflects the input of a wide range of stakeholders (*e.g.*, the EEOC, the employer community, the civil rights community, other governmental agencies, and academic researchers), offers many observations and recommendations to employers about how they can improve their prevention efforts. A number of those ideas are discussed in this article, along with additional observations on new approaches to this persistent and seemingly unsolvable problem.

The Task Force report emphasizes a fundamental principle that should guide a business's prevention efforts: Creating a workplace culture that values civility and respect among employees, at all levels, and will do more to cultivate a harassment-free workplace than simply taking a compliance approach by educating employees as to what conduct is unlawful, or warning them of negative consequences if they engage in politically incorrect behaviors. If employees understand that a premium is placed on civility, and that being rude and mean-spirited toward one's fellow employee will not be tolerated, troubling conduct that commonly develops into harassing behavior is far less likely to occur.

While not a new insight, the Task Force report reinforces the point that harassment prevention efforts will be more successful if the employer's workforce believes that the highest level of management is sincerely committed to ensuring a workplace devoted to civil treat-

Tax Law Discourages Non-Disclosure of Sexual Harassment Settlements

The new Tax Cuts and Jobs Act, enacted on December 22, 2017, amends the tax code regarding deductibility of business expenses in a manner intended to limit the use of non-disclosure agreements in settlements of sexual harassment claims. The tax code now provides that no deduction is allowed for any settlement payment or attorney fees "related to sexual harassment or sexual abuse if such settlement or payment is subject to a non-disclosure agreement." This will be a significant financial disincentive for some employers.

The change leaves many unanswered questions including: how it will apply to cases with multiple claims including sexual harassment; or to settlements where there are no sexual harassment allegations but a broad general release is used covering all claims including sexual harassment; or to payments under separation agreements where there have been no allegations of sexual harassment. If a case includes sexual harassment and other claims, it would seem prudent to allocate the settlement dollars (and attorney fees) among the claims, so some portion would be deductible.

It is also unclear whether a sexual harassment claimant will still be allowed a miscellaneous deduction for the claimant's own attorney fees.

Guidance from the IRS will hopefully be forthcoming to answer these questions.

Sonja L. Lengnick

New Initiatives For Workplace Harassment Prevention *from page 2*

ment and free of harassment. This requires that upper level management be visible and vocal in defining what conduct is, and is not, acceptable; commit the financial resources and time to training and enforcement; empower and reward those whose job it is to ensure compliance; and then hold them responsible if they fail to do their job. Anti-harassment policies must also be regularly communicated and consistently adhered to. For the process to have integrity, employees must believe that the anti-harassment policy is more than words on the page.

Reporting procedures continue to be an area in which many employers fall short. The report emphasizes that employers should offer reporting procedures with "a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment." Employers need to communicate frequently with employees about how to register harassment complaints, and reassure them that anyone who is a victim of harassment and reports problems of inappropriate workplace conduct is protected from retaliation.

Since the old axiom "actions speak louder than words" is particularly apropos here, the Task Force appropriately reminds the employer community that management's credibility requires that it act promptly in response to complaints and with a "meaningful, appropriate and proportional" response. That, of course, means that the high ranking and highly valued employees are held to the same standards as the rank and file. It is also key that an employer not rush to judgment when a complaint is lodged (an adequate and fair investigation is always essential), or make an example out of wrongdoers by being too heavy-handed with discipline. Employees must have faith in the fairness and integrity of the system for the policy to be effective.

A significant focus of the Task Force report is on training – which clearly needs to be re-tooled since much of what has been done in the past has not worked. Ideally, training should be live (not online), interactive, and conducted by an experienced professional. Its effectiveness will be enhanced if it is customized for its audience (*i.e.*, a specific workplace and cohort of employees), and the report correctly notes that middle-managers and first-line supervisors, when trained correctly, "can be an employer's most valuable resource in preventing and stopping harassment." It also recommends new models for training, including "Bystander Intervention Training" (give co-workers tools to intervene when they witness harassment) and "Workplace Civility Training" (promoting respect and civility in the workplace for all employees irrespective of their protected characteristics).

The EEOC announced that it will launch two new training programs for employers: "Leading for Respect" (for supervisors) and "Respect in the Workplace" (for all employees). These programs address all forms of workplace harassment, not just sex-based. According to the EEOC, the "training program focuses on respect, acceptable workplace conduct, and the types of behaviors that contribute to a respectful and inclusive, and therefore ultimately more profitable, workplace. The program is customizable for different types of workplaces and includes a section for reviewing employers' own harassment prevention policies and procedures." The EEOC Training Institute will conduct the trainings. Information about the training program is available on the EEOC Training website.

Another suggestion of the Task Force report is that employers should focus extra attention on workplaces that are more at risk for harassment than others. Examples include: traditionally male-dominated workplaces where women are perceived as taking men's jobs or not conforming to workplace norms; workplaces with high value employees such as highly paid rainmakers who may conclude that their exalted status means the rules do not apply to them; workplaces with significant power disparities – *i.e.*, one small group has total control over the work life of a large segment of the employee population; workplaces where client satisfaction is paramount and employees feel compelled to tolerate customers' abu-

New Initiatives For Workplace Harassment Prevention *from page 3*

sive behaviors; isolated or decentralized workplaces where there is limited oversight by senior management or human resources, and employees have limited contact with corporate offices; and workplaces that tolerate alcohol consumption during working hours.

A closing suggestion, endorsed by the report, is for employers to conduct climate surveys and engage in periodic testing of their systems. Considering how the good faith efforts of many employers have missed the mark over the past several decades, this extra step makes infinite sense.

Elizabeth Hardy

EEOC's 2017 Statistics: Reduced Backlog, More Focus On Retaliation And Systemic Claims

In January 2018, the Equal Employment Opportunity Commission released its annual Performance and Accountability Report for fiscal year 2017, which highlighted its key accomplishments and identified the number and types of charges received by the EEOC.

In fiscal year 2017, the EEOC received 84,254 charges, which reflects a drop in filings from 2016 (91,503). Of particular significance is the number of retaliation claims: 41,097 of the 84,254 charges included retaliation claims. In addition, 28,528 charges included race discrimination claims; 26,838 charges included disability discrimination claims; 25,605 charges included sex discrimination claims; and 6,696 charges included sexual harassment claims.

Michigan accounted for 2,489 of those charges, and with few exceptions, its distribution of claims largely mirrored the national trends. The largest numbers of Michigan charges involved retaliation claims (986), followed by disability discrimination (831), race discrimination (779), and sex discrimination (664).

The EEOC touted several key achievements for fiscal year 2017, including obtaining substantial relief for alleged victims of discrimination while at the same time dramatically reducing its backlog of pending charges. The EEOC reduced its pending charges by 16.2%, which is its lowest pending inventory in over ten years. The EEOC resolved 99,109 charges in 2017, and secured approximately $484 million for alleged victims of discrimination. The EEOC filed 184 lawsuits in 2017, more than doubling the lawsuits from previous years (*e.g.,* 86 in 2016). Of those lawsuits, 124 were filed on behalf of individuals, 30 were brought on behalf of multiple aggrieved individuals, and 30 involved "systemic" claims (*i.e.*, alleging "pattern or practice, policy or class cases where the alleged discrimination has a broad impact on the industry, occupation or geographic area").

The EEOC acknowledged that addressing systemic discrimination in employment has long been an important part of its work, and in 2017 it sought to increase the number of systemic cases on its active litigation docket. The EEOC reported beating its goal with 24.8% of its 2017 cases (60 out of 242) involving systemic claims. The EEOC also resolved 329 systemic investigations, for which it obtained over $38.4 million in remedies; and 22 systemic lawsuits, four of which included at least 100 alleged victims of discrimination and two of which included over 1,000 alleged victims.

What trends can be predicted for 2018? Recent events and media coverage of high profile complainants and accused wrongdoers suggest that we may see a spike in sexual harassment and unequal pay claims in 2018. Employers should also be mindful of the EEOC's recent focus on retaliation and systemic charges – all of which underscores the importance of immediate and thorough investigations into employee complaints.

Shannon V. Loverich

Two Conflicted Issues Resolved For Employers

Just as we were preparing for publication, the U.S. Supreme Court issued two decisions (with no dissenters) that reversed decisions of the U.S. Court of Appeals for the Sixth Circuit and the Ninth Circuit. (Michigan is in the Sixth Circuit; the Ninth Circuit covers several western states including California.)

Yard-Man **Inference Is Now Really Dead.** In 2015, in a case entitled *M&G Polymers USA v. Tackett*, the Supreme Court instructed that lower courts were not to use retiree-favorable inferences when interpreting collectively bargained contract provisions governing retiree health insurance benefits. The Sixth Circuit had adopted such an inference in 1983 in *UAW v. Yard-Man Inc.* and applied it in many cases over the following 30 years to conclude that retiree health insurance benefits were "vested" and unalterable. But notwithstanding what many thought was a total rejection of the *Yard-Man* inference in *Tackett*, some Sixth Circuit judges continued to apply aspects of *Yard-Man* when interpreting labor contracts.

One of those post-*Tackett* cases was *CNH Industrial v. Reese*, in which the Sixth Circuit panel affirmed (by a 2-1 vote) a trial court decision that medical benefits were vested for the retirees' lifetimes, even though the collective bargaining agreement was silent on this point, and a clause limiting the duration of the contract supported the opposite conclusion. From that ruling, the *CNH Industrial* case proceeded to the U.S. Supreme Court, which in a short *per curiam* decision reversed the Sixth Circuit panel with an opinion that essentially said: We told you once in *Tackett* and now we're telling you again — the *Yard-Man* inference is really dead.

This ruling should help clear up ambiguities in the rules governing the vesting of collectively bargained retiree medical benefits, which have for decades perplexed and presented huge potential liabilities for employers doing business in the Sixth Circuit.

Dodd-Frank Whistleblower Protections Limited. In 2010, Congress enacted the Dodd-Frank Wall Street

Will Mandatory Arbitration of Sexual Harassment Claims Be Outlawed?

On February 13, 2018, the attorneys general of all 50 states, the District of Columbia, and the five U.S. territories sent a letter to Congress in support of ending the application of mandatory arbitration policies to claims of sexual harassment. A bipartisan bill with the same objective had been introduced in December by Senators Gillibrand (D-NY) and Graham (R-SC). Federal legislation is likely necessary to achieve the desired outcome because attempts by individual states to exempt a specific category of claims from mandatory arbitration could well be preempted by the Federal Arbitration Act.

While the state legal officers' letter arguably implies some reservations about the general concept of "mandatory" arbitration, it focuses on two reasons why such arbitration agreements are uniquely problematic for sexual harassment claims. First, many arbitrators lack the sensitivity and legal sophistication necessary to ensure that victims of alleged harassment "are accorded both procedural and substantive due process." Second, many arbitration agreements prohibit disclosure of both the existence and the outcome of arbitration proceedings, creating what the letter called a "veil of secrecy" and "culture of silence." That culture, the letter contends, is contrary to public policy because it prevents victims of harassment from learning of (and perhaps making evidentiary use of) the similar experiences of others, and makes victims feel isolated while allowing repeat offenders to remain in the workplace.

Noel D. Massie

Two Conflicted Issues Resolved For Employers *from page 5*

Reform and Consumer Protection Act that had several provisions addressing "whistleblower" protection. One provision defined a whistleblower as someone who provided information to the Securities and Exchange Commission in a particular manner that could lead to a monetary award following a successful SEC enforcement action. The Dodd-Frank Act also protected whistleblowers from "retaliation" for disclosing information in a manner that is required or protected under the Sarbanes-Oxley Act of 2002.

Several decisions of the U.S. Courts of Appeals took conflicting views of whether whistleblower protection covered only those who reported concerns to the SEC, or whether protection extended to a whistleblower who merely reported concerns within a corporation's internal hierarchy.

The U.S. Supreme Court has now resolved this conflict in *Somers v. Digital Realty Trust*. After carefully reviewing the provisions of the Dodd-Frank Act dealing with whistleblowers, the Supreme Court ruled that only complaints made to the SEC itself are protected by that Act's retaliation provision.

Although the Supreme Court's ruling limits protections of whistleblowers under the Dodd-Frank Act, employers should not assume that strictly internal whistleblowing would not be addressable under Sarbanes-Oxley or possibly state statutes or legal theories (such as alleged violation of "public policy") that might provide a wider form of whistleblower protection.

William B. Forrest III

Federal Appeals Courts Rule For LGBT Protections Under Title VII

Two recent rulings from the U.S. Courts of Appeals for the Second and Sixth Circuits have dramatically strengthened the trend in employment law that both sexual orientation and gender identity are protected classes under Title VII.

Second Circuit. The Second Circuit ruled on February 26, 2018, in *Zarda v. Altitude Express, Inc.*, that sexual orientation is a protected class. In two old Second Circuit decisions from 2000 and 2005, that court had held that sexual orientation discrimination was not a recoverable legal theory under Title VII. In the recent *Zarda* case, the same court convened a special *en banc* panel of all active judges and completely reversed course, holding that sexual orientation discrimination is inherently sex-based discrimination prohibited by Title VII. The court overturned its earlier rulings on the issue. The court based its new ruling on the "persuasive force" of new decisions and the "changing legal landscape."

Zarda was a gay man who worked as a sky-diving instructor. As part of his job, he had to be in close physical proximity with clients. His co-workers routinely referenced his sexual orientation and made jokes around clients, telling female clients not to be concerned since he was gay. A female client's boyfriend complained that Zarda had touched a client inappropriately, and Zarda was fired. Zarda brought suit in 2010 alleging the termination of his employment was due to his sexual orientation.

The trial court dismissed his claims and he appealed to the Second Circuit. The three-judge panel upheld the rejection of his legal theory, but only because it was bound to do so under the court's prior precedents. The court then convened *en banc* to revisit its prior rulings on the issue in light of new developments.

In its *en banc* decision, the Second Circuit joined several of its sister Circuits, and the EEOC, finding that "an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation." According to the court: "[A] woman who is subject to adverse employment action because she is attracted to women would have been treated differently if she had been a

Federal Appeals Courts Rule For LGBT Protections Under Title VII *from page 6*

man who was attracted to women." Therefore, the court concluded, "sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination."

Sixth Circuit. On March 7, 2018, a three-judge panel of the Sixth Circuit held that gender identity is a protected class under Title VII. In *Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit panel found that a transgender woman could maintain a lawsuit for sex discrimination. Stephens had been a funeral director who was "assigned male at birth" and gave her employer notice that she planned on presenting as and transitioning to a woman. The owner of the funeral home testified that he fired Stephens because she was no longer going to present as a man and "wanted to dress as a woman."

The court reasoned that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" and violates Title VII. According to the court, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." This is because "[g]ender is not being treated as 'irrelevant to employment decisions' if an employee's attempt to change his or her sex leads to an adverse employment decision." The court concluded that "[t]here is no way to disaggregate discrimination on the basis of gender non-conformity, and we see no reason to try."

The Sixth Circuit additionally found that the funeral home could not raise a freedom of religion defense to a Title VII transgender sex discrimination case. The owner of the funeral home testified that he sincerely believed the Bible teaches that a person's sex is an immutable God-given gift, and that he would be violating God's commands if he were to permit one of the funeral home's directors to deny their sex while acting as a representative of the organization. The court rejected this defense, holding that complying with Title VII is not a substantial burden on religious beliefs, and that the eradication of discrimination is a compelling government interest that outweighs whatever burden exists. The court affirmed the principle that transgender individuals are protected by federal sex discrimination laws and that religious beliefs did not give the employer the right to discriminate against them.

This Sixth Circuit decision is binding on Michigan employers.

The U.S. Supreme Court may at some point choose to offer its opinion on one or more of these issues, thereby expanding these protections to the entire country. But until it does so, employers should be aware that the trend in this area of the law is to find that sexual orientation discrimination and gender identity discrimination are subsets of sex discrimination prohibited by Title VII (and similar laws in some states). Employers should review their anti-discrimination and anti-harassment policies for compliance with legal developments in states where they have employees, and seek counsel when situations like these arise in their workforce.

Ryan D. Bohannon

Don't Forget About The Plant Closing Act

Economic times are good by most measures, including historic low unemployment levels. But employers should not lose sight of the federal Worker Adjustment and Retraining Notification Act, sometimes referred to as the WARN Act or the Plant Closing Act. In 2017, federal appellate courts issued several important decisions interpreting WARN Act obligations.

WARN requires employers under certain circumstances to provide 60 days' advance written notice to employees who will suffer an employment loss as a result of a covered plant closing or mass layoff. A plant closing of 50 or more employees or a mass layoff involving 50 or more employees and at least one-third

Don't Forget About The Plant Closing Act *from page 7*

of the employees at a single site of employment triggers WARN obligations. Penalties for failing to provide proper notice to the employees, their union representatives, and the state and local units of government include back pay and benefits for the period of the violation. There are narrow exceptions to the notice requirement for faltering companies actively seeking capital, where the employer can establish a reasonable belief that advance notice would preclude its ability to obtain such capital or business, and when unforeseeable business circumstances occur.

Purchase of a Business. Under the statute, WARN notice obligations fall on the seller of an ongoing business up to the date of the sale and on the purchaser of the business after the date of the sale. In *Day v. Celadon Trucking Services, Inc.*, the parties to the sale of a business attempted to contractually provide that the seller was responsible for WARN notices resulting from the sale of the business. Two commercial trucking companies entered into an asset purchase agreement that required the purchaser to deliver to the seller a list of the seller's employees to whom the purchaser intended to offer employment. However, for a period of 14 days immediately following the closing of the sale, the seller agreed to employ all employees not being offered employment by the purchaser, and the seller would be responsible for sending them any required WARN notices. Despite the contractual obligation on the seller to provide WARN notices to those non-hired employees, the U.S. Court of Appeals for the Eighth Circuit found that the transaction had all the traditional earmarks of a sale of an ongoing business (not just assets) and that under the statute the purchaser had obligations to provide WARN notices to employees who were not hired by the purchaser after the date of the sale.

Single or Joint Employer. The U.S. Court of Appeals for the Sixth Circuit, in *McKinney v. Carlton Manor Nursing & Rehabilitation Center, Inc.*, addressed the question whether a management consulting firm was a single or joint employer under the WARN Act. Carlton Manor was under regulatory oversight by the Ohio Department of Health, which provided deadlines to resolve certain deficiencies. Carlton hired a consulting firm to assist in resolving these deficiencies. Carlton's plan was ultimately rejected by the Ohio Department of Health, and the nursing home soon thereafter closed. Carlton Manor gave notice to its employees of the closure of the business, but not the full 60 days required by WARN. The employees sued Carlton Manor and the consulting firm and obtained a default judgment against Carlton Manor. But Carlton Manor had no assets, so the aggrieved employees attempted to hold the consulting firm responsible for the WARN violation. The Sixth Circuit rejected the employees' argument that the consulting firm was liable either as a "single employer" or a "separate but joint employer" with Carlton Manor. The court held that none of the factors that make two entities a "single employer" – common ownership, sharing of directors and officers, the same personnel policies, or that the employees of the two businesses were all on the same payroll – were present. The WARN regulations provide factors for determining "joint employer" status, but these factors — that the consulting firm hired and fired Carlton's employees or otherwise controlled their terms of employment — were also not present.

Don't Forget About The Plant Closing Act *from page 8*

WARN Claims in Bankruptcy. The U.S. Supreme Court in *Czyzewski v. Jevic Holding Corp.* recently reversed lower court findings that the Bankruptcy Court's conclusion that WARN plaintiffs could not recover was improper under the Bankruptcy Code's distribution scheme. Under a complicated set of facts, the Bankruptcy Court and U.S. Court of Appeals for the Third Circuit had held that WARN creditors (*i.e.*, former employees), despite having a clear priority under the bankruptcy rules, did not have this priority under the circumstances and that unsecured creditors having a lower priority would be allowed to recover. The Supreme Court's decision makes very clear that distressed employers subject to WARN litigation who are in bankruptcy may not pay the claims of general unsecured creditors absent the consent of the higher-priority WARN creditors.

Unforeseen Business Circumstances. In *Varela v. AE Liquidation, Inc.*, the U.S. Court of Appeals for the Third Circuit joined five other Circuits, including the Sixth Circuit, in determining that the unforeseen business circumstances exception excuses WARN notice where an event outside the employer's control that would normally trigger notice requirements is "possible but not probable to occur." In *Varela*, the employer received assurances that operating funds from a Russian bank would be available. Employees were temporarily furloughed as the employer awaited the funding, but WARN notice was not given because the employer expected to retain the employees. The Russian funding deal ultimately fell through, and employees were only then notified that their layoffs would be permanent. The court held that "the WARN Act is triggered when a mass layoff becomes probable — that is, when the objective facts reflect that the layoff was more likely than not." The court determined that this standard strikes a balance between the protections for employees under WARN without imposing a burden on struggling employers to notify employees of every possible layoff scenario. Based on this "probable" standard, the Third Circuit held that the employer had met its burden of demonstrating that the funding failure was not "probable" prior to the employer's decision to lay off the employees. Be aware, however, that even where the unforeseen business circumstances exception applies, WARN notice still must be given as soon as possible.

Eric J. Pelton

The Impact on Employers of Legalizing Marijuana

Michigan voters will likely have the opportunity to vote to legalize recreational use of marijuana on the statewide ballot in November 2018. If passed, the Michigan Regulation and Taxation of Marihuana Act would allow adults 21 years of age and older to possess up to 2.5 ounces (71 grams) of marijuana and grow up to twelve marijuana plants in their residence for recreational use. Michigan could become the tenth state, in addition to Washington D.C., to legalize the recreational use of marijuana. Pressure for states to legalize marijuana for recreational use comes with popular support for the drug reaching new highs in 2017, with more than 64% of Americans favoring legalization. One poll in Michigan shows that 56.6% of 600 voters surveyed support the proposal while 36.7% oppose it.

Even if the Michigan proposal to legalize marijuana passed, it would remain designated as a Schedule I substance and its possession criminalized under the federal Controlled Substances Act. Despite current laws prohibiting possession of marijuana, its use in Michigan has been steadily increasing since Michigan voters approved the use of medical marijuana in 2008. The number of people with medical marijuana cards has increased 76% since 2012 with "severe and chronic pain" being the most common reason for obtaining a card. In 2014-2015, 15% of Michiganders used marijuana at least once in the prior year, making Michigan

Impact On Employers Of Legalizing Marijuana *from page 9*

the thirteenth highest ranking state for marijuana use. Legalization of recreational marijuana would make use more widespread.

With a greater percentage of the population using marijuana and legalization of recreational marijuana on the horizon, employers are faced with genuine challenges to maintain productivity, ensure workplace safety, and adequately fill positions with quality employees while still protecting employees' rights.

Employers who wish to maintain a drug free workplace will be able to continue to do so under the proposal. They will not have any obligation to accommodate the use of marijuana in the workplace or on their property. Furthermore, employers will not be prohibited from "disciplining an employee for violation of a workplace drug policy or for working while under the influence of mari[j]uana [or] from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of mari[j]uana."

A workplace drug policy can take many forms, including a zero tolerance policy. Employers who receive federal grants or are federal contractors are covered by the Drug Free Workplace Act, which requires them to maintain a drug free workplace, but does not require alcohol or drug testing. Even employers that are not required to comply with the Drug Free Workplace Act can take solace in the fact that marijuana is illegal under federal law, especially considering Attorney General Jeff Sessions' January 4, 2018 memorandum to end the Obama Department of Justice's guidance on the prosecution of marijuana possession cases – known as the Cole Memo – that had allowed medical and recreational use of marijuana to spread at an unprecedented rate.

Even though Michigan does not have any limits on private workplace drug testing, prudent employers should consistently apply a policy to avoid claims of disparate treatment toward protected groups. Employers who choose to have a drug policy prohibiting only the use of marijuana in the workplace and being under the influence of marijuana at work, may have difficulty proving that an employee's impaired performance is because of marijuana. The cannabinoid most widely tested is carboxy THC, an inactive metabolite that only indicates prior marijuana use. Testing for THC, tetrahydrocannabinol, the psychoactive ingredient in marijuana is a better indicator of recent use, but that requires a blood test. However, THC is not the same as alcohol, as it is metabolized differently, meaning that the amount of time it stays in a person's body is greatly influenced by factors such as gender, body fat percentage, frequency of use, method of ingestion and type of cannabis product consumed. Studies show that a heavy marijuana user could have even more than a 5-nanogram level of blood THC (the legal threshold in Colorado for driving under the influence of marijuana) for several days after last use. On the other hand, people who did not regularly use marijuana could ingest marijuana and have no evidence of it in their blood.

Surveys show that employers in states where recreational use of marijuana is legal are gradually removing marijuana from pre-employment drug screening panels. Given the more widespread use of marijuana, combined with the fact that THC metabolites can remain in a person's body for a month, pre-employment marijuana screens could result in a labor shortage in certain job classifications because a high percentage of candidates

Impact On Employers Of Legalizing Marijuana *from page 10*

will fail the test. When determining whether to prescreen for marijuana, employers should consider the nature of the job and whether it is dangerous, involves operating heavy machinery, or involves the safety or caretaking of others.

Employers should also consider how their policy would affect an employee who returns from FMLA leave to a zero tolerance workplace and has lawfully used medical marijuana as part of treatment for a serious medical condition while on leave. If such an employee tests positive for marijuana and is discharged pursuant to a zero tolerance policy, the employer could face a claim that the termination was in retaliation for the employee's use of FMLA. So long as marijuana is illegal under federal law, though, such a claim will probably not be successful.

The increased use of marijuana and the inevitability of the legalization of marijuana give rise to new questions for employers. While the science for determining marijuana intoxication and employment case law strive to catch up, employers must decide what policies are best for their unique workplaces to mitigate risks from workplace accidents, performance issues, labor shortages, and employment lawsuits.

Sarah L. Nirenberg

Anti-Poaching Agreements Between Employers May Be Criminally Prosecuted

On January 19, 2018, the Assistant Attorney General for the Antitrust Division of the Department of Justice, Makan Delrahim, announced that the Department of Justice "has a handful of criminal cases in the works," signaling that criminal charges are to be expected.

Anti-poaching agreements recently received attention as a result of the practice of certain Silicon Valley companies to agree among themselves not to poach the others' talent. Up to this point, the Department of Justice had enforced this type of conduct – which it had always viewed as a violation of the antitrust laws – through civil lawsuits seeking damages and injunctive relief to forbid the practice prospectively. This new announcement warns employers that this practice will now be met with criminal charges, and that in civil settlements in which the employers have not adhered to their agreements with the Department of Justice, criminal charges may be filed.

Assistant Attorney General Delrahim also referenced wage-fixing agreements as drawing criminal charges now. In such agreements two employers might seek to achieve the equivalent of a non-poaching agreement through wage and benefits parity, which discourages employees from switching employment.

This caution covers all entities that compete for employees, including non-profits, universities, and others who typically do not consider themselves impacted by the antitrust laws.

Thomas G. Kienbaum

U.S. Department of Labor Keeps Rolling Back Obama-Era Regulations

Since our last issue, the U.S. Department of Labor (DOL) under the Trump Administration has moved forward with several changes or proposed changes to interpretations of the Fair Labor Standards Act (FLSA).

Unpaid Interns. Likely the most significant recent development in the ever-evolving world of wage and

Rolling Back Obama-Era Regulations *from page 11*

hour law is a modification to the definition of interns at for-profit companies, a change which presumably will result in more individuals qualifying as genuine interns. In 2010 the DOL had issued a fact sheet setting forth six rigid requirements that must be met for an individual to be considered an intern rather than an employee. The test was very difficult to meet – some would say impossible – as the employer could not derive any immediate advantage from the activities of the intern. There was much ensuing litigation, including numerous class actions, regarding whether individuals were properly treated as unpaid interns, resulting in several U.S. Courts of Appeals ruling that the DOL's 2010 test was invalid.

In 2015, in *Glatt v. Fox Searchlight Pictures, Inc.*, the U.S. Court of Appeals for the Second Circuit rejected the DOL's rigid six-factor test in a case involving unpaid interns who worked on the film Black Swan and in Fox's corporate offices. The Second Circuit instructed that courts should look at the relationship as a whole and determine which party was the "primary beneficiary" of the relationship. It identified seven non-exclusive factors for courts to consider in this analysis. Notably, the court did not include the DOL's prior requirement that the employer derive no immediate advantage from the activities of the intern. Other courts followed the Second Circuit, most recently the Ninth Circuit in *Benjamin v. B & H Educ., Inc.* on December 19, 2017.

On January 5, 2018, citing *Glatt* and *Benjamin*, the DOL issued an updated "Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act," adopting the non-exclusive seven-factor "primary beneficiary" analysis set forth in *Glatt*, stating that no one factor is determinative. The seven factors are:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Although it should be easier for employers to engage interns under the new standard, employers still must be cautious in ensuring that this "primary beneficiary" test is met for all individuals classified as unpaid interns.

Tip-Pooling. The DOL also has issued a proposed rule to rescind a position it began taking in 2011 regarding tip-pooling. The FLSA permits employers to utilize tips received by employees as a credit against part of the employer's minimum wage obligations if certain conditions are met, including that employees retain all tips, with the qualifier that tips could be pooled among cus-

Rolling Back Obama-Era Regulations *from page 12*

tomarily and regularly tipped employees. In 2011, the DOL amended the FLSA regulations to state that the tip-pooling requirements apply to all employees receiving tips, even if the employer pays the employee at or above the minimum wage and does not take a tip credit.

Restaurants and other employers filed numerous lawsuits questioning the DOL's authority to apply the tip-pooling rules to employees who were not receiving a tip credit toward the minimum wage, resulting in a split among the federal appellate circuits on this issue. On December 4, 2017, the DOL issued a Notice of Proposed Rule Making that would rescind the challenged provision of the 2011 regulation requiring tip pool compliance for employees whose wages are not subject to a tip credit. Under the DOL's new proposal, tipped employees who are paid full minimum wage could be required to share their tips with back-of-the-house staff designated by the employer as a tip-pool participant. If adopted, this proposed change may help restaurants attract back-of-the-house staff, but it will not be popular with regularly tipped employees who are paid minimum wage.

White Collar Exemptions. The DOL is planning to issue a new regulation regarding the white collar exemptions to replace the enjoined Obama-era revamp. The Obama administration's overtime regulation, which was set to go into effect on December 1, 2016, would have raised the minimum salary necessary for an employee to be exempt to $913 per week. This would have doubled the prior minimum required salary, but it would have made no changes to the duties tests, which left many employers guessing about an employee's correct classification. That regulation was enjoined by a Texas federal court in November 2016, shortly before it was to go into effect, and the court later ruled it invalid. That ruling is on appeal, but the DOL has requested the appeal be placed on hold while it re-evaluates the regulation.

As we reported in our last issue, Summer 2017, the DOL issued a Request For Information (RFI) regarding a new proposed regulation, inviting responses to eleven questions. In its Fall 2017 regulatory agenda, the DOL stated that it expects to issue a Notice of Proposed Rulemaking on this topic in October 2018, giving it a year after the responses to the RFI were due to formulate a new proposed regulation. It is likely any new regulation that results from that process would not be effective for quite some time, possibly not until 2020.

Sonja L. Lengnick

Is Smaller, Gentler OFCCP On Horizon?

The Office of Federal Contract Compliance Programs (OFCCP) under the leadership of recently appointed Director Ondray Harris appears headed toward both downsizing and a major attitude adjustment. Evidence of both can be found in the OFCCP's input to the fiscal year 2019 budget proposed by the Trump Administration, and a series of OFCCP-hosted stakeholder meetings in January 2018.

According to the proposed FY 2019 budget for the U.S. Department of Labor (DOL), which houses OFCCP, the OFCCP's estimated obligations for FY 2019 total $9.1 million, down 12.3% from current spending levels. This translates to a 14.2% reduction in headcount, to an historic low of 450 employees — in contrast to the recent high of 788 employees in FY 2010. Some of the forecasted reduction has already come from two rounds of buyout offers during the final months of 2017 plus attrition and an ongoing unofficial hiring freeze.

Both the FY 2019 budget proposal and the recent stakeholder meetings signal a welcome shift in agency attitude. The January 2018 stakeholder meetings, led by OFCCP Director Harris, Senior Advisor Craig Leen, and Director of Policy Debra Carr, invited a number of federal contractors, representatives of civil rights groups, and representatives of several membership organizations

Is Smaller, Gentler OFCCP On Horizon? *from page 13*

to three separate sessions. In meeting with federal contractors, Director Harris shared his goals for a new and improved OFCCP. The agency's primary goal is to focus on developing apprenticeship programs as a means to fill a defined skills gap nationwide and to develop better parity in the workforce. Other primary goals include incentivizing employers to voluntarily comply with agency regulations; increasing outreach for individuals with disabilities; and increasing agency transparency through compliance assistance. The OFCCP recognizes that 98% of contractors undergoing audits are found to be in full compliance, and so the agency going forward is planning an "innocent until proven guilty" approach rather than the opposite—a refreshing change!

The FY 2019 budget proposal identifies technical assistance for federal contractors as one of two main priorities. Along with increased emphasis on systemic discrimination (the other budget priority), OFCCP plans to implement technical assistance through several initiatives which include improving training for compliance officers; developing regional contractor training programs; reconstituting Reagan-era recognition programs; and reorganizing (and probably closing) many of OFCCP's district and area offices. It is anticipated that several "skilled regional centers," staffed by experienced and specialized compliance officers, will more efficiently replace many of the 50-plus local offices.

Harris quietly started his role as OFCCP's new Director on December 10, 2017, squelching speculation the OFCCP would be merged into the EEOC. Harris had joined the DOL in June 2017 as a senior advisor. He is a former management-side employment and labor lawyer in private practice, and also a former Department of Justice appointee, all of which should position him well for leading change at OFCCP.

Seemingly in keeping with its kinder and gentler approach, OFCCP mailed its Corporate Scheduling Announcement Letters to contractors on February 1, 2018, using the following guidelines:

- Setting no more than ten establishments of a single contractor on the audit scheduling list and no more than four establishments per contractor in the same district;
- Intending to set no establishment on the audit scheduling list that had closed an audit within the last five years.

Unfortunately, some anomalies in these self-imposed caps appear to have slipped through. OFCCP began sending the actual audit scheduling letters on a rolling basis beginning March 9 and continuing through September 30, 2018 or longer.

Julia Turner Baumhart

Arbitration Rollout Must Say That Continued Employment Accepts Arbitration

A recent decision from the U.S. District Court in Michigan clarifies that an employer may treat an arbitration policy it has unilaterally announced as contractually binding *only* if the policy expressly informs recipients that continuing employment will signify acceptance of arbitration.

In *Cerjanec v. FCA US, LLC* (2017), current and former employees of Fiat Chrysler Automobiles (FCA) alleged that FCA's revamped employee evaluation policy had a disparate impact on employees aged 55 and older. Three of the four named plaintiffs had worked for Chrysler, FCA's predecessor, over 20 years earlier, when the company had implemented an Employment Dispute Resolution Process (EDRP) requiring non-union employees to arbitrate most employment-related disputes. Employees were notified of the EDRP by a mailed letter and information brochure, the contents of which turned out to be pivotal.

Acceptance Of Arbitration *from page 14*

Arbitration is, of course, a matter of contract. A party cannot be required to submit to arbitration any dispute which it has not agreed to submit. When a dispute over arbitrability is brought to court, the court must decide whether a valid agreement to arbitrate exists between the parties and whether the matter at issue falls within its scope.

FCA argued in *Cerjanec* that employees who continued to work for Chrysler after receiving notice of the EDRP's implementation in 1995 had thereby entered into binding agreements to arbitrate. U.S. District Judge Laurie Michelson disagreed. She found that recent appellate court decisions that had so concluded had also made clear that "continued employment can manifest assent [only] when the employee knows that continued employment manifests assent."

Judge Michelson rejected FCA's argument that the EDRP brochure advising employees that "IT APPLIES TO YOU" and that the EDRP "will govern all future legal disputes between you and Chrysler" adequately put employees on notice that continued employment would constitute assent. In her view, an express statement was required that continued employment would constitute acceptance. Because FCA could not prove that, the court held that no valid agreement to arbitrate had been formed, and the employees' lawsuit was allowed to go forward.

The traditional foolproof way for an employer to be sure its arbitration policy will be enforceable is to obtain each employee's (or applicant's) signed acknowledgement — or an electronic equivalent — that the employee has received, reviewed, and understood the binding effect of the policy. If the size of the workforce or logistical issues make obtaining individual expressions of assent impracticable, the policy or an accompanying memo should contain a clear and preferably bolded notice that an employee's continuing employment will mean that he or she assents to having disputes resolved exclusively through arbitration.

Noel D. Massie

NLRB In Hiatus

As we sent this issue for publication, the National Labor Relations Board was again in an hiatus between being a 3-2 Republican majority "Trump Board" for a few weeks last December and going back to a 2-2 deadlocked Board after one of the Republican members (Phillip Miscimarra) reached the end of his term. A replacement Republican (John Ring) has been nominated but not yet confirmed by the Senate — which could happen at any time. During the Republican majority last December, several notable things happened:

1. The new Republican General Counsel (Peter Robb) issued a wide-ranging Memorandum to Regional Offices on December 1 identifying 15 broad categories of cases he would like to present to the Trump Board (when fully constituted) that would reverse decisions of the Obama Board — decisions that had changed or expanded rules in a fashion that favored unions and employees at the expense of employers. He also rescinded several of his predecessor's policy memoranda. With 15 broad categories to overturn, this could take some time.

2. On December 11, the Republican Board issued a decision in *UPMC* clarifying an administrative law judge's authority to accept a settlement of a case without the concurrence of the Regional Office or the charging party, so long as it met a "reasonableness" standard — something that should make employer-proposed settlements much easier.

3. On December 12, the Board issued a "Request For Information" seeking comment from the labor community on the 2014 "quickie election rule" — *i.e.*, whether it should be retained, modified, or rescinded.

4. On December 14 and 15, the Board issued four major substantive decisions, reversing Obama Board expansions — all on the eve of Miscimarra's departure:

- *The Boeing Company* reversed the standard for assessing whether facially neutral employer-promulgated work rules interfered with employees' Section 7 rights to engage in protected activity. General workplace civil-

NLRB In Hiatus *from page 15*

ity rules — which the Obama Board had made a habit of attacking — should be upheld under this standard.

- *PCC Structurals* overruled *Specialty Healthcare* (2011) which had made union organizing much simpler based on a new "micro-unit" concept. Returning to the prior test for appropriate units will make it harder for unions to carve out artificially small work groups.
- In *Raytheon Network Centric Systems*, the Board overruled *E.I. duPont deNemours* (2016) which had constricted an employer's right to make periodic changes (*e.g.,* annual adjustments to healthcare costs and benefits) without bargaining to agreement with a union representing affected employees.
- *Hy-Brand Industrial Contractors* reversed the Obama Board's dramatic and controversial expansion of the "joint employer" concept in *Browning-Ferris Industries* (2015), and restored the Board's decades-long adherence to a "direct and immediate control" test that looked at the *actual exercise of control* over the terms of a contractor's employees' employment. Under *Browning-Ferris*, the mere theoretical right of "indirect control" sufficed even though never exercised. The Obama General Counsel had proceeded after *Browning-Ferris* to prosecute McDonald's USA LLC along with its franchisees for unfair labor practices allegedly committed by the franchisees. Shortly after the *Hy-Brand* decision was released, the new General Counsel suspended the proceeding against McDonald's and its franchisees, and also requested that the U.S. Court of Appeals for the D.C. Circuit return the *Browning-Ferris* appeal to the Board for further review under the new *Hy-Brand* standard.

Then something remarkable happened. On February 9, 2018, the NLRB's Inspector General issued an ethics opinion that Board Member William Emanuel should not have participated in the *Hy-Brand* case because his former law firm had represented one of the employers in the *Browning-Ferris* case and the deliberations leading to the *Hy-Brand* decision were essentially a continuation of the *Browning-Ferris* case. Based on that opinion, on February 26 the Board disqualified Member Emanuel and declared the *Hy-Brand* decision null and void. That reinstated — at least for a time — the controversial *Browning-Ferris* "joint employer" test. The Board recently asked the D.C. Circuit to reinstate the appeal in the *Browning-Ferris* case. The McDonald's case has just settled. Who knows what will happen next.

Theodore R. Opperwall

KIENBAUM OPPERWALL
HARDY & PELTON, P.L.C.
ATTORNEYS AND COUNSELORS

Representing management nationally in all aspects of labor and employment law, including preventive counseling, employment litigation, non-compete and other business covenant claims, alternative dispute resolution, and traditional labor relations matters

280 North Old Woodward Avenue, Suite 400, Birmingham, Michigan 48009
Phone (248) 645-0000 • Fax (248) 645-1385
www.kohp.com

© 2018 Kienbaum Opperwall Hardy & Pelton, P.L.C. *Insight* is published periodically to offer timely perspectives on legal issues in the employment and labor field. The information contained in this newsletter is not legal advice. If you wish to discuss a matter that is similar in nature to a case or development covered in this newsletter, or if you wish to be added to our mailing list, please contact us at our Birmingham office.