LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN FALL 2017

LESSONS FROM HARVEY WEINSTEIN AND OTHER GENDER ISSUES AT WORK

Sexual harassment awareness began in 1991 with the Anita Hill/Clarence Thomas hearings. Hill accused the Supreme Court nominee and her former boss of harassment, and following extensive Congressional and public debate, Thomas was appointed to the Supreme Court. Fast forward more than 25 years to a new era and exploding social media - and not only has sexual harassment become the hot topic, but the **prevalence of sexual harassment, abuse and retaliation is astounding and the world is taking it seriously.** From the recent allegations against Weinstein and others in the entertainment world, to politicians, the financial industry and more, "me too" stories are being revealed, accusations are flying, denials and apologies being issued, lawsuits filed, secret settlements made, and harassers are losing their employment, businesses, families and reputations. Hopefully, the **days of companies protecting** their high revenue-producing executives, top salespeople and VIPs, and **victims afraid to complain** and jeopardize their career and reputation, **are over**.

Apart from the moral issues, **sexual harassment in the workplace is illegal**. Federal, state and local employment discrimination laws impose obligations on employers and employees to protect employees from sex discrimination and harassment and from retaliation for reporting it. But laws alone can't prevent misconduct at work; **clear zero tolerance, complaint and anti-retaliation policies and procedures** must be explained to employees and consistently enforced, managers and staff need to be **regularly trained**, and employers need to promptly resolve complaints and stop unlawful conduct.

Such risk management is more than common sense; by law, it can provide an employer with a legal **affirmative defense** to claims. Moreover, the practical benefits of proactive prevention to employers and employees are many, including better productivity, morale, and retention. Now is an ideal time for employers to review and update their anti-harassment policies and procedures.

Transgender as a Protected Category? Depends

Many federal appellate circuit courts maintain that **Title VII** of the Civil Rights Act of 1964 (the federal anti-discrimination statute) does **not cover transgender** status; the issue has not been decided by the Supreme Court. Last summer, the Justice Department agreed and officially rescinded the prior administration's formal memo protecting transgender. President Trump also abruptly announced in July that the government would no longer allow transgender people to serve in the **U.S. military, reinstating the ban** that the Pentagon lifted last year. But the policy will not become effective unless the White House sends rules and regulations to the Dept. of Defense.

Meanwhile, **Illinois** is one of a handful of states making it **expressly illegal to discriminate on the basis of "gender identity" in housing, employment and public accommodations**. Additionally, in a landmark ruling last April, the **7th Circuit** (covering Illinois, Indiana and

Wisconsin) became the first U.S. Court of Appeals to hold that Title VII's prohibition of **"sex" discrimination includes discrimination based on sexual orientation**, and suggested it would **extend to gender identity** as well.

In *Hively v. Ivy Tech Community College,* the Court found that the college's termination of Hively because she is gay was prohibited by the law. In its discussion of gender non-conformity cases, the Court anticipated the extension: "[t]he discriminatory behavior does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex." **Stay tuned** - other circuit courts may reconsider their precedent and the issue will inevitably reach the Supreme Court.

Illinois Fails to Ban Salary History Questions

In an effort to avoid the perpetuation of inequitable wages for women and minorities, many states now ban employers from asking applicants about salary history. But a similar bill proposed in Illinois will not become law. Gov. Rauner vetoed the bill earlier this year and last week the Senate failed to override the veto.

Pregnancy Accommodations

Even though **pregnancy alone (without complications) has not been considered a disability**, women are benefitting from legal developments **expanding rights and accommodations** for pregnancy and childbirth. The Supreme Court rendered an important decision in *Young v. UPS* (2015), ruling that employers must provide accommodations to pregnant employees that they provide for similarly situated employees who are not pregnant.

Young was a pregnant UPS driver whose doctor put her on weight-lifting restrictions. UPS policy provided **light-duty work** for drivers who were injured on the job and drivers who suffered from a disability under the American with Disabilities Act (ADA), but not for pregnant employees. The Court found the policy unlawful.

Relying on the UPS decision, in September the U.S. Court of Appeals for the 11th Circuit upheld a **breastfeeding employee's right to accommodations** in *Hicks v. City of Tuscaloosa.* Following maternity leave, police officer Hicks was advised by her doctor that wearing a bullet-proof vest could cause infection and prevent her from breastfeeding. She requested alternative duty that would not require her to wear a vest, and resigned when her employer refused.

In finding for Hicks, the court held that the federal Pregnancy Discrimination Act (PDA) bars discrimination not only on the basis of pregnancy, but also on the basis of **pregnancy-related physiological conditions** such as breastfeeding. The **key takeaway** is that even if an employee's pregnancy does not constitute a disability, she may be entitled to an accommodation under the PDA for her pregnancy or a related condition.

Meanwhile, many states including **Illinois have pregnancy accommodation laws**, which has resulted in reduced employee turnover, absenteeism and pregnancy discrimination claims, and increased employee morale and productivity. The 2015 Illinois Pregnancy Accommodations Act

requires **employers with 1 or more employee** to accommodate employees affected by pregnancy, childbirth or common related conditions. The law further requires the employer to **reinstate the employee to her original or an equivalent job** with equivalent pay and benefits following leave, absent proof of an undue hardship on the employer's business.

Equal Parental Leave for Dads

The Equal Employment Opportunity Commission has sued Estée Lauder Companies, Inc., based on a paid parental leave program that provides **male employees who are new fathers less parental leave benefits** than it gives female employees who are new mothers. In addition to paid leave reasonably provided to new mothers to recover from childbirth, Estée Lauder provides new mothers an additional 6 - but new fathers only 2 - weeks of paid parental leave for child bonding.

Extended Leave May Not Be a Reasonable Accommodation

The 7th Circuit has been busy this fall examining whether a lengthy leave of absence is a reasonable accommodation under disability law. Per the ADA, a **reasonable accommodation is one that allows the disabled employee to perform the essential functions** of the employment position. If it does not, then the employee is not a **"qualified individual"** entitled to the law's protection.

In recent cases, *Severson v. Heartland Woodcraft* and *Golden v. Indianapolis Housing Agency,* the court found that a several-month medical leave **does not permit the employee to perform the essential functions** of his job and removes him employee from ADA protection. The court explained that unlike a request for a 1 or 2-week extension following a 12-week FMLA leave, the law does not warrant a long extension. But it was noted that **intermittent time off or a short leave of absence** may be appropriate, as part-time or modified work schedules are listed accommodations under ADA regulations.

The 11th Circuit recently rendered similar rulings, and if other circuits follow suit, employers may no longer have a legal obligation to provide lengthy (non-FMLA) leaves of absence, or to justify the denial based on business needs. Nevertheless, employers should **approach long-term leave and extension requests carefully as there are conflicting decisions from other circuits and the EEOC which the Supreme Court has not yet resolved.** Remember the importance of **requesting updated medical information from employees nearing the end** of FMLA or other medical leave periods.

Update on Paid Sick Leave (Local and Nationwide)

On July 1, employers in Chicago and many Cook County towns became subject to the new Chicago and Cook County Paid Sick Leave (PSL) laws, allowing most employees to accrue 1 hour of paid sick leave for every 40 hours worked, up to 40 hours of PSL a year. While many companies already had paid sick day or PTO policies, the laws impose **new restrictions** not found in prior policies:

- They apply to **employers with 1 or more** employee.
- They apply to most **part-time and temporary** employees.
- Employees can **carry over** up to 20 hours a year, and more if covered by FMLA.
- Employers can't require a **doctor's note** unless employee has **missed 3 consecutive days.**

- Leave is allowed for employee's or family member's illness or injury, or if they are a victim of domestic or sexual abuse or stalking.

PSL laws are becoming the norm in many states, including California, Massachusetts, Minnesota, and New York, and many cities such as NYC, Seattle, and Philadelphia. Supporters emphasize that employees should **not have to choose between going to work ill**, or with an ill child at home, or taking an **unpaid day off, which many can't afford**. PSL helps employers and employees, leading to a healthier workplace, fewer absences, and better morale and productivity.

The laws are not without controversy. **Most of the 132 Cook County municipalities** used home rule status to **opt out** of Cook's PSL law. Opponents maintain that only the state has authority to regulate PSL, **local businesses can't afford** it, and it will cause employers to lay off employees, raise prices or shut down. Some towns are still discussing opting out, and some who opted out continue to vet strong opinions from community proponents and opponents.

Since many employers operate both in Chicago and in Cook County opt-in towns, and many have employees in multiple locations, determining and navigating applicable rules will continue to confuse employers. Hopefully, the nuances and unanswered questions will be resolved through court/agency interpretation or legislative clarification. Meanwhile, employers should **do their best to comply retroactive to July 1, 2017 and to start a new accrual year on January 1**. Compliance includes **posting the model notice, training managers, accruing past and future PSL, and reviewing, updating and communicating PSL and related policies, including PTO/sick days, attendance, FMLA, and leave of absence**.

At this time of Thanksgiving and the holidays, I want to express my gratitude for my clients, referral sources, colleagues, and friends. I wish you amicable, peaceful relationships and resolution of conflict, and I hope that employers and employees find multiple ways to show mutual appreciation for one another.

Announcements

- ✓ *I am a proud recipient of the **Superlawyers Illinois award for 2017** (2nd consecutive year) and awards for **Top 100 Lawyers and Top 50 Women Lawyers.***
- ✓ *I work with **both employers and employees** on workplace matters, compliance, contracts, training, and dispute resolution.*
- ✓ ***Career Resource Center is here for you!** Please help us spread the word about the wonderful career transition services offered by CRC, a nonprofit celebrating almost 30 years of success. We are here for newly RIF'd employees, graduates, individuals returning to the workforce, those seeking a change of employment or career, and employees who need a boost in their career transition search. Stop by for a tour, try out a workshop, or join for a year. Volunteers and donors always welcome too! **careerresourcecenter.org***