

THE CHALLENGING CLIMB
TO REACH NEW HEIGHTS

Addressing #MeToo, Pay Equity, and Other Employment Risks – Money and Time Well Spent

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Sexual Harassment Claims Continue Unabated

- More than 525 prominent people across industries have been publicly accused of sexual harassment (*Bloomberg*, October 4, 2018)
 - List includes seven Congressmen, two sitting federal courts of appeals judges, and scores of elected state politicians
- Number of lawsuits filed by EEOC alleging sexual harassment increased by more than 50% over 2017
- Wave of shareholder derivative/securities class actions alleging directors turned blind eye to sexual misconduct and wasted corporate assets (Wynn Resorts, Twenty-First Century Fox)



A Renewed Focus on Transparency Is Driving Change

- State legislation limiting use of NDAs and mandatory arbitration of sexual harassment claims (NY, WA, MD, NJ)
- State mandated disclosure of sexual harassment claims to state civil rights commission (MD)
- Some employers have committed voluntarily to disclose:
 - Number of sexual harassment complaints
 - Substantiation percentages
 - Claims resulting in discharge



Changing Cultures and Instilling Confidence

- Tapping into and understanding the employee experience
- Instilling confidence in reporting channels
- Strategies to overcome fear of retaliation
- Training “Upstanders”



Navigating the Government Harasser

- Liability for third party harassment
- Available strategies to end the harassment



Anticipating the Next Frontier of Claims and Risk

- Fearful of accusations, men are disengaging from women
- Claims by the accused (“scapegoat” litigation)
- Rise in disparate treatment and pay equity claims



The Legal and Social Landscape

- #MeToo and #TimesUp movements have focused attention on pay equity issues
- Substantial attention to the “wage gap” from legislatures, media and shareholders
- OFCCP enforcement on the rise
- Pay transparency coupled with pay equity



Pay Transparency

- EEO-1 pay data now due September 30th
- State pay disclosure laws
- International pay disclosure laws
- Employee, shareholder, public pressure to disclose



State Laws are Expanding the Risk

- Expand comparators from same job to “substantially similar” or “comparable” work
- Limit defenses to pay discrepancies
- Must account for entire pay difference
- Cannot rely on prior salary



Proactive Steps to Ensure Pay Equity

- Conduct privileged analyses of pay
- Establish a pay equity program
 - Develop and document compensation philosophy
 - Define “Comparable” Jobs
- Assess pay upon hire – key driver of pay differences
- Normalize pay following acquisitions



Citizenship and Hiring Requirements

- Citizenship inquiries are generally prohibited by the Immigration and National Act (INA)
- Inquiries regarding work authorization and employment eligibility are permitted
 - However, I-9 and E-Verify procedures must be strictly followed
- Exceptions to prohibition available where
 - Citizenship requirement is imposed by law, regulation, executive order or government contract
 - Important to confirm that there is actually a “requirement”
 - Be mindful of undocumented requests or stated preferences



Citizenship and Hiring Requirements

- Employees who are not U.S. citizens, U.S. nationals, lawful permanent residents, asylees, or refugees may not access ITAR covered technology without obtaining authorization from government.
 - However, ITAR does not limit the categories of work-authorized, non-U.S. citizens an employer may hire.
 - Carefully crafted and limited inquiry regarding citizenship status for applicants whose jobs require them to access covered technology is *likely* permissible.
 - Overbroad inquiries or exclusion of applicants (or employees) may lead to discrimination claims.



Department of Labor Developments

New Proposed Rules

- Overtime Rule (Issued March 2019)
 - Increase Salary Level Requirement - \$35,308
 - Increase “Highly Compensated Employees” Salary - \$147,414
 - No changes to the job duties test
 - No automatic adjustment of salary level
- “Regular Rate” Rule (Issued March 2019)
 - Clarifies which types of compensation are excluded from the regular rate used to calculate overtime



Department of Labor Update

Proposed Rules

- Joint Employer Rule (Issued April 2019)
 - Four-factor test examines whether potential employer actually exercises authority to:
 - hire or fire the employee
 - supervise and control the employee's work schedules or conditions of employment
 - determine the employee's rate and method of payment
 - maintain the employee's employment records
 - Proposed rule will narrow the types of business arrangements in which a joint employer relationship can be found



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