

WHAT'S NEW IN EMPLOYMENT LAW

Clifford L. Hammond

chammond@fosterswift.com

www.fosterswift.com/

General Workplace Fact

- The workplace is dramatically changing from both a demographic and technological perspective.
- We have a more diverse work force and a changing technological component of how work is done and the expectations of when it will be done.
- So we have to take that into consideration and be mindful of the different perspectives, backgrounds, and understandings of coworkers.
- So we have to be more cognizant that people may have different views.
- The access to the internet has made employees more aware of issues, but also in many situations, extremely wrong and vocal.

How Many New Laws Have Congress Passed on Employment Law?



- How busy has Congress been to place new and fun laws for us to navigate and comply with?

How Many New Laws Have Congress Passed on Employment Law?

■ **Actually, they haven't been too busy at all.**

...Surprised?

■ 2022, they passed the Pregnant Workers Fairness Act (“PWFA”)

■ It's an important law, but they left it to an agency to make the final rules.

How Many New Laws Have Congress Passed on Employment Law?



How Many New Laws Have Congress Passed on Employment Law?

- For the most part Agencies have made most of the laws we deal with.
- And every election we seem to get MAJOR CHANGES.
- BUT...

Don't Forget Our Friends in the Court



Power to Block Law

- Late last year several major changes were coming:
 - Exempt Status Salary Threshold;
 - Non-compete agreements
- But a court came in and issued a nationwide injunction.
- That is pretty powerful and there is potential legislation to stop it.

The Courts



- || Agencies no longer have the same deference.
- || Supreme Court has said, do your job courts, stop letting bureaucrats interpret the law. Your job is to interpret what Congress wrote.

The President and the EEOC

- || **157 Executive Orders**
- || **DEI**
- || **Affirmative Action**
- || **Discrimination**



BACKGROUND

What Does This Mean

- United States Supreme Court Justice Neil Gorsuch wrote a book last year called: *Over Ruled, The Human Toll of Too Much Law*.
- Justice Gorsuch recently stated:
- “I’ve been a judge now coming on 20 years, I’ve just seen so many cases come through my courtroom where ordinary Americans — decent, hardworking people who are trying to do their best — are just getting ... thwacked by laws unexpectedly.”

We Have Plenty of Laws Here Too

- Earned Sick Time Act
- <https://www.michigan.gov/leo/bureaus-agencies/ber/wage-and-hour/paid-medical-leave-act>



LAWS TO KNOW ABOUT

- Title VII of the Civil Rights Act of 1964;
 - Sex Discrimination
- Elliot Larsen Civil Rights Act;
- Bullard Plawecki Right to Know Law;
- PWFA;
- The Americans With Disability Act;

LAWS TO KNOW ABOUT

- The Family Medical Leave Act;
- The Michigan Persons with Disabilities Act;
- The Fair Labor Standards Act/IWOWA;
- ADA public accommodation/website/building;
- Immigration Reform and Control Act, (I-9);

AREAS OF LAW TO BE WORRIED ABOUT

- Religious Accommodation Changes;
- Reverse Discrimination;
- Retaliation;
- Exempt Status;
- Drug Testing and Marijuana Laws

AREAS OF LAW TO BE WORRIED ABOUT

II Independent Contractor v. Employee

- Battleground
- Changed standard under Biden
- Trump challenging rule, issued new guidance last month:
<https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf>
- BE CAREFUL, Michigan AG's office has a unit. Could be criminal?
- Unemployment audit. Back Taxes.
- Old days of just working it out over.
- It does NOT matter if the employee wants the arrangement.

AREAS OF LAW TO BE WORRIED ABOUT

- No one factor controls:
- 1) The extent to which the services rendered are an integral part of the principal's business.
- 2) The permanency of the relationship.
- 3) The amount of the alleged contractor's investment in facilities and equipment.
- 4) The nature and degree of control by the principal.
- 5) The alleged contractor's opportunities for profit and loss.
- 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- 7) The degree of independent business organization and operation.

AREAS OF LAW TO CONSIDER

- Employment Agreements;
- Separation agreements (what can you release);
- Layoffs;
- WARN;
- Unemployment;
- Bonuses/Commission!

Hot Topics

- Earlier we discussed that employees have more information and access through technology.
- But sometimes they still do not know what they are talking about.
- It can be dangerous for employers to retaliate just because an employee expresses their position.
- More importantly, a deliberate review of an employee's concern is the best approach.

Hot Topics

It is illegal to discriminate against an individual because of their race, color, religion, sex, physical or mental disability, national origin, height, weight, age, veteran status, genetic information, citizenship, family status, marital status, ancestry, culture, linguistic characteristics, or common characteristics common to a specific ethnic group.

It is also not lawful to discriminate against employees because they have filed a complaint alleging they were discriminated against or participated in an investigation or proceeding regarding such.

Hot Topics

But, the Supreme Court has stated:

Title VII is not “a general civility code for the American workplace.”

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

Harassment

■ Harassment comes from the French word “Harasser” – which literally means to “sic a dog on someone” without provocation.



Harassment

- **Before, During or After Work**
- **Breaks**
- **Lunch hour**
- **Work-related events outside of office, (i.e. happy hours, work conferences, dinners, holiday, parties, picnics)**
- **Social Media**
- **3rd Parties**

Harassment

■ Two forms

- Quid pro quo (Latin for “this for that” or “something for something”)
- Hostile Work Environment

Quid Pro Quo

- Example of Quid pro Quo—
 - Mary Smith receives smaller pay increase based on performance than other employees with similar performance, because she refused to go out with her supervisor.

Hostile Work Environment

- Less obvious than blatant sexual harassment could be situations where behavior of a sexual nature creates an offending, intimidating, or hostile work environment for another employee.
 - Pornography
 - Vulgar Language
 - Sexual Touching
 - Degrading Comments
 - Embarrassing Questions
 - Sexual Jokes
 - Sexual Propositions
 - Group of employees talking about each other's sex lives in the presence of another person who feels very uncomfortable about such discussion

Hostile Work Environment

- Types of harassment that are unacceptable include not only sexual harassment, but harassment based on:
- Race
- Religion
- National Origin
- Age
- Disability
- Sex (includes sexual identity and sexual orientation)
- Pregnancy
- Marital Status
- Physical Appearance (height, weight, etc.)
- And other protected classifications

Sexual Harassment

- It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Harassment **does not have to be of a sexual nature**, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.
- Both victim and the harasser can be either a **woman or a man**, and the victim and harasser can be the same sex.

Hostile Work Environment

- But...employers are **not required to wait until a hostile or improper action reaches an illegal level to take action.**
- Employees have the right and are encouraged to bring their concerns about the work place to Human Resources immediately so the issue can be evaluated and prompt measures can be taken.
- Creating and ensuring a healthy and safe work environment is just good business.
- Employees are encouraged to bring any concerns to Human Resources promptly so they can be investigated.

Sexual Harassment

- Although generally the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a customer.

Hostile Work Environment

- In addition to speech and conduct, a hostile work environment can be created by suggestive items displayed in the workplace that interfere with job performance or that create an abusive or hostile work environment
 - Example: Jane has a 9" x 12" calendar of nude males on her cubicle wall visible to passersby.

Who Can Be Involved In Sexual Harassment

- Those who commit – employees at all levels, customers, members of the same sex.
- Those who are targeted – victims, bystanders and, in some cases, witnesses who are affected by the harassment.

Why it's Important

- No one wants to work in an environment where they feel harassed and uncomfortable.
- Respectful behavior facilitates more productive employees.
- Disrespectful, harassing behavior can cost the perpetrator their job.
- Compliance with Title VII of the Civil Rights Act prohibits sex discrimination (including gender identity, change of sex and/or transgender status) as well as Michigan's anti-discrimination statute.
- Compliance with similar Michigan civil rights laws and fair employment laws.

Harassment

- Harassment is unwelcome conduct that is based on a protected class.
- Harassment should not require an employee to:
 - 1) endure the offensive conduct becomes a condition of continued employment, or
 - 2) rise to conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Harassment

- Anti-discrimination policies prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Responses to Claims

- However, the Employer must take “reasonable care to prevent” sexual harassment.
- "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." In many instances, an employer takes steps reasonably calculated to end harassment when it disciplines the perpetrator – but they must be **prompt.**
- But, if the steps taken by the employer do not result in an end to the harassment, the employer's actions may not be reasonably calculated to end the harassing behavior.

See: *Sotoj v. Nashville Aquarium, Inc.*, 2016 U.S. Dist. LEXIS 86102 (6th Cir. 2016)

Questions?

Clifford L. Hammond

313 South Washington Square
Lansing, Michigan 48933

28411 Northwestern Highway, Suite 500
Southfield, MI 48034

248-538-6324/ 517-371-8100

chammond@fosterswift.com



Presentation Terms of Use

Foster Swift Collins & Smith, PC presentations are intended for our clients and friends. This presentation highlights specific areas of the law. This communication is not legal advice. The information provided is current as of the date of the presentation. Those viewing the presentation should consult an attorney to determine how the information applies to any specific situation.

Copyright © 2025 Foster Swift Collins & Smith, PC