

LUNCH & LEARN

2019 EMPLOYMENT LAW UPDATE



*Presented by The HT Group
& Beckstead Terry, PLLC*

Agenda

- Austin's Paid Sick Leave Ordinance: Status
- Paid Sick Leave Throughout the U.S.
- Arbitration Update
- FCRA Disclosure Form Updates
- FLSA updates
- NLRB updates
- EEOC updates: "Me Too" Movement Year Two
- Texas Non-Compete Update
- Multi-State Employer Trends

Austin's Paid Sick Leave Ordinance Status

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Austin's Paid Sick Leave Ordinance Status

- October 1, 2018: Scheduled effective date of Ordinance
- August 2018: Third Court of Appeals issues temporary stay
- November 2018: Third Court of Appeals issues merits decision
- HELD: Texas Constitution prohibits local ordinances from containing “any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State”
- HELD: The Texas Minimum Wage Act (“TMWA”) prohibits local jurisdictions, like the City of Austin, from establishing or mandating a “wage.”
- HELD: Because it required covered employers to pay employees for hours they did not work, the Austin Ordinance established a wage. Thus, the Ordinance was preempted by the TMWA.

Austin's Paid Sick Leave Ordinance Status

- What about San Antonio's similar ordinance, scheduled to go into effect August 2019?
- House Bill 222 – if passed, would prohibit any Texas municipality from adopting or enforcing an ordinance, rule or regulation that requires to provide employees with paid sick leave



Paid Sick Leave Laws: A Nationwide Trend

- Arizona
- California + Several Cities Have Additional Requirements (Berkeley, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, & Santa Monica)
- Chicago & Cook County, Illinois (not statewide)
- Connecticut
- Maryland + Montgomery County and Prince George County
- Massachusetts
- Michigan
- Duluth and Minneapolis, Minnesota (not statewide)
- New Jersey (earlier local laws now preempted)
- New York City + Westchester County, NY
- Oregon
- Philadelphia, Pennsylvania (not statewide)
- Rhode Island
- Vermont
- Washington + City of SeaTac, Seattle, Spokane, & Tacoma
- Washington D.C.



Paid Sick Leave Laws: Tips

- Make sure existing policies for full-time employees comply
 - Watch carry-over and accruals
 - Watch if any mandatory language required
 - Doctor's note at 3 day mark?
- For part-time employees, consider taking highest accrual, highest carry-over, etc. and creating a policy for part-time employees that works for all locations
 - Accrual vs. front-loaded?
- Most require notices and some require handbook language: read the statutes and design your policies and handbooks accordingly

Arbitration Agreements and Class Action Waivers

- Pros and Cons of arbitration agreements
 - Pro: typically decreases settlement value of potential claim – no risk of runaway jury
 - Con: employer pays cost, limited appellate review
- U.S. Supreme Court held in *Epic Systems* that employers may utilize class action waivers in arbitration agreements
 - This is a powerful tool to help ward against the risk of class actions



FCRA Update

- Fair Credit Reporting Act = federal law that governs background checks
- New “A Summary of Your Rights Under the Fair Credit Reporting Act” released on September 12, 2018
 - Form added language regarding a consumer’s right to a security freeze
- **Make sure you are using this updated form when sending out the required FCRA notice**
 - At time of pre-adverse action notification
 - Before conducting an “investigative consumer report” (when background checking agency gathers information through interviews of applicant’s contacts)

Supreme Court FLSA Update: *Encino Motorcars, LLC v. Navarro*

- Supreme Court rejected long-standing lower court precedent that FLSA exemptions must be narrowly construed.
- “The narrow construction principle relies on the flawed premise that the FLSA “pursues” its remedial purpose “at all costs.”
- New standard: “fair reading.”
- Huge shift in how courts will now interpret overtime exemptions.



Changes Anticipated to Overtime

- 2016 regulations were enjoined
 - Highly compensated employee level (\$134k) not enjoined?
- In 2018, Trump Administration announced intention to issue a Notice of Proposed Rulemaking in January 2019 “to determine what the salary level” for various exemptions should be
- Government shutdown stalled efforts, don’t expect any new rules to be effective until 2020



New Overtime Rules?

- DOL has received thousands of comments on proposed changes
- Secretary of Labor Alexander Acosta publicly stated open to increasing minimum salary to \$33,000
- Irony: decision that enjoined 2016 rules held DOL didn't have regulatory power to set salary basis test. More challenges ahead?

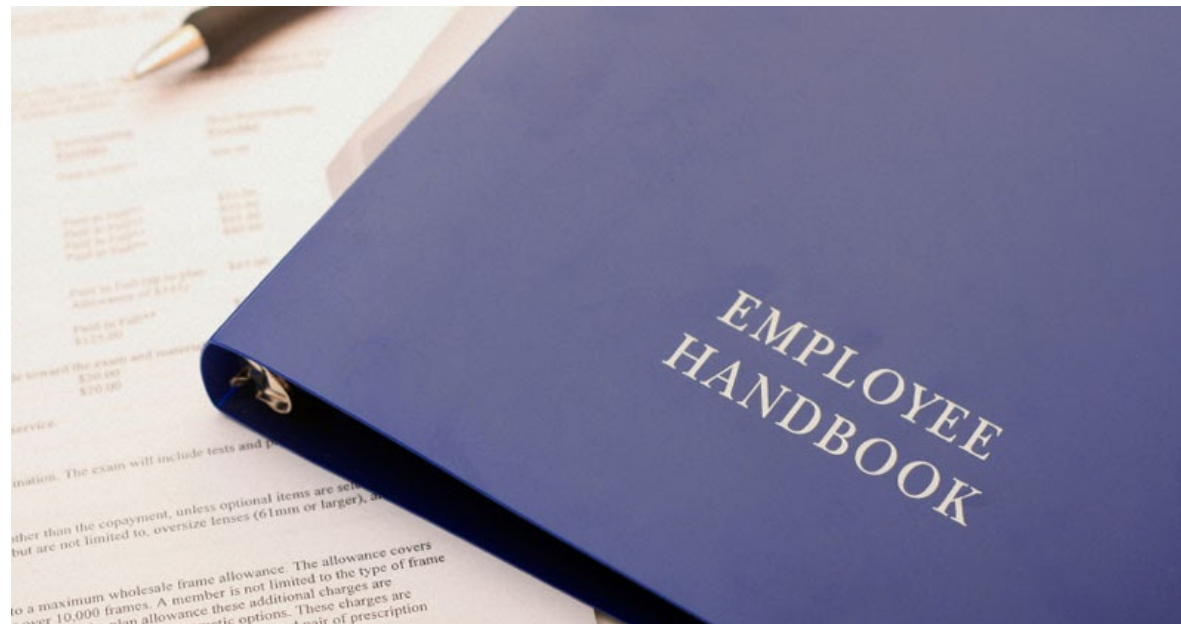


Latest DOL Opinion Letters

- Opinion Letter Process had ended under Obama administration.
- A number of new opinion letters issued in 2018, including:
 - Eliminating the 80/20 rule for tipped employees/"dual jobs"
 - Reissuing opinion letter regarding permissible deductions from exempt employee's salary
 - Voluntary participation in screenings and wellness activities not compensable time
 - Applying "retail or service establishment" to company that sells technology platform to other businesses to process credit cards

NLRB Update: Return to Reason

An employer rule will only violate the NLRA if it would be reasonably interpreted to interfere with workers' NLRA rights considering the balance between (A) the nature and extent of the rule's potential impact on protected rights and (B) the employer's legitimate justifications for the rule.



NLRB Update: Presumptively Lawful Policies

- Employees may not comment for or speak on behalf of the company without prior written approval
- Employees may not make negative or disparaging remarks about other employees
- Employees may not disclose the company's confidential, proprietary, or trade secret information
- Employees may not disclose information concerning the company's clients or customers
- Employees may not misrepresent the company's products, services, or employees
- Employees may not use the Company's logo, trademark, or graphics without prior written approval

NLRB Update:

But Still Beware of These Policies

- Blanket rules prohibiting employees from making disparaging or negative remarks about the company
- Blanket rules prohibiting employees from criticizing the employer
- Blanket rules prohibiting employees from making false or inaccurate statements
- Blanket rules providing that wages, benefits, or working conditions are confidential or preventing employees from discussing them
- Blanket rules prohibiting employees from joining outside organizations.

Reminder: Section 7 rights apply to non-managerial employees only.

NLRB Update: Joint Employer Test

- September 2018, NLRB proposed regulation that would clarify separate employers only considered “joint employers” if two employers actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment
- Regulation clarifies that indirect influence and contractual reservations of authority won’t establish joint-employer relationship
- **Still important to make sure whenever utilizing a staffing company that you contract with established and reputable companies**

#MeToo Movement Year Two

Increasingly visible in media and popular culture because of the #MeToo movement



Alyssa Milano
@Alyssa_Milano

Follow

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

4:21 PM - 15 Oct 2017

Impact of #MeToo for Employers

- Greater employee awareness of workplace harassment
- Greater expectations of management
- More complaints of harassment; speak-up culture
- Higher likelihood of other employees joining complaints
- Less tolerance for rehabilitating (habitual) offenders
- Instant credibility before judges/juries
- Threats of large-scale negative publicity

Hallmarks of Effective Anti-Harassment Policy

- Write the policy in a way that will be understood by all employees. Avoid legalese.
- The policy should cover all forms of harassment, not just sex harassment. Provide examples, including examples of how third parties (vendors) can harass.
- Policy should not focus on “legal” definitions – misconduct punishable even when doesn’t = “legal” harassment.
- Describe the complaint process, including the individuals who can receive harassment claims. Ensure at least one person is outside the employee's chain of command.
- Assure the confidentiality of individuals bringing claims of harassment to the extent possible.
- Consider including anti-bullying prohibitions.

Hallmarks of Effective Anti-Harassment Policy

- Remind complainants, witnesses, and others who provide information concerning claims protected from retaliation.
- Describe steps in investigation process, including that it will be prompt, thorough, and impartial.
- Assure immediate and appropriate corrective action, including discipline or removal of employees and managers.
- Remind all employees of duty to report.
- Implement it in a manner which ensures its effective dissemination to all employees. The policy needs to be posted in conspicuous locations throughout the facility and incorporated into employee handbook.
- Consider employee hotline
 - Pros/cons of anonymous reporting

Hallmarks of Effective Anti-Harassment Policy

- Reminder: some states have special requirements/language that must be included in policies
 - New York
 - California
 - Delaware
 - More jurisdictions to come?

Why Implement Anti-Harassment Training?

- Policy + Training Supports Important Affirmative Defense in Harassment Cases
- Employers can avoid liability for “hostile environment” harassment if can show: (1) employer “exercised reasonable care to prevent and correct promptly any harassing behavior”; and (2) employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.
- Having an effective anti-harassment policy, coupled with anti-harassment training, can provide employers that affirmative defense and avoid liability in certain harassment lawsuits!

Hallmarks of Effective Anti-Harassment Training

- The basics (from the EEOC's own guidance):
 - Types of conduct that would violate the anti-harassment policy
 - Workplace-relevant scenarios
 - Seriousness of the policy and violations of the policy
 - Describe complaint process and investigation process
 - Reminder about no retaliation
 - Specific training for managers and supervisors
- Some states have specific training requirements:
 - California
 - New York and New York City
 - Connecticut
 - Maine
 - More to come

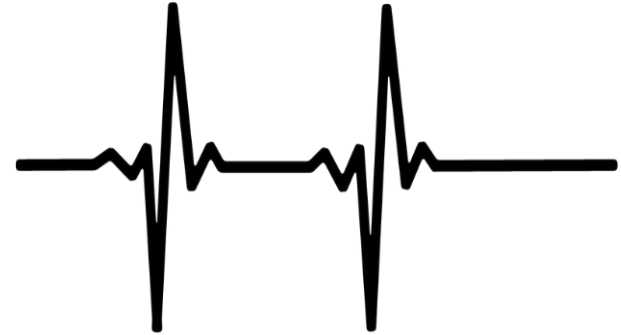
Beckstead's Rules on Effective Training

- Supported at the highest level -- have leadership participate and be interactive during the training.
- Train supervisors to report claims of harassment or discrimination (even if not labeled as such) to HR
- Don't just train at hire – conduct training every few years for everyone.
- In-person, interactive training trumps online training.
- Don't include insulting examples.
- Do provide real life examples of inclusive behavior.
- Focus on golden rule and kindness.
- Do provide strategies on what to do/how to handle when situations arise in workplace
 - Bystander intervention training
 - Civility training
 - Problem solving and conflict resolution

Reminders About Conducting Investigations

- When complaint comes to HR, investigate promptly and neutrally
 - Ensure individual accused has chance to tell his/her side of story, as well as complainant
 - Interview relevant witnesses & review documents
- Prepare investigation report with findings and conclusions
 - Make conclusions regarding violation of Company policy, not violations of law
- Inform complainant and accused of findings

Regular Pulse Checks



- Consider use of
 - Culture surveys
 - 360 reviews
- HR should be visible and accessible – open door
- Conduct at least annual review of complaints/concerns to identify and proactively address trends
- Consider “Speak-up” campaigns

Texas Non-Compete Update

- General rule: narrowly-tailored non-compete and non-solicitation provisions are enforceable in Texas if supported by adequate consideration.
- Application of Anti-SLAPP law created new risks on employer plaintiffs seeking to enforce non-competes or seeking damages for misappropriation of trade secrets.
- *Elite Auto Body v. Autocraft Bodywerks, Inc.* and numerous other cases since have applied anti-SLAPP to these lawsuits.
- Result: Employers must be much more careful before bringing non-compete lawsuit or face potential of paying attorneys' fees at a motion to dismiss stage.

Multi-State Employers Trends

- Paid Sick Leave laws
- Harassment policies and trainings
- Ban the Box
 - Criminal background inquiries
 - Notification requirements
- Minimum Wage Increases
- Salary History Ban
 - CA, NY, MA, CT, Hawaii
 - Have to provide pay scale upon request in CA
- Non-compete and non-solicitation law changes
 - MA, NV, CA
 - Update proprietary rights agreements

Questions?



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Amy Beckstead is a partner at Beckstead Terry PLLC. In her practice, Amy assists employers in complying with the multitude of federal and state employment laws and is licensed in both Texas and California. She has guided employers through complicated employment matters, including reclassification of exempt employees to nonexempt positions, Department of Labor investigations and audits, and EEOC on-site investigations. Amy also is a litigator, defending employers in wage and hour class actions, wrongful termination, employment discrimination, retaliation, harassment and other employment-related lawsuits and arbitrations. Prior to forming her own law firm, Amy's past professional experience includes an equity partnership at DLA Piper, one of the world's largest law firms.

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J.D. University of Kansas (graduated at top of the class of 2001), Order of the Coif

Bar Admissions and Affiliations:

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hire performance, powered by you

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The HT Group is a collection of passionate, dedicated staffing and recruiting professionals whose main goal is to improve lives by connecting individuals with quality career opportunities. Our team is made up of dedicated experts who are ardent and deeply committed to the work that we do for employers and job-seekers alike. Our relationships run deep, our sense of urgency matches your own, and we don't rest until the job is done right and done well.

Our founders, Mark Turpin and Jim Gilliam are lifelong friends and decided to create The HT Group after growing frustrated with the level of service at other staffing companies. They saw the need for quality candidates, thorough vetting processes, strong client relationships, and a better experience from start to finish for both clients and candidates. The HT Group was born of the idea that things could not only be better but could go above and beyond anything that currently existed in the market. Today, The HT Group has grown from one office to three divisions and four offices located in North and South Austin and Beaumont, Texas.

The HT Group is widely considered to be one of the best staffing and recruiting agencies. Our award-winning staffing services have been recognized locally and nationally.

THANK YOU!

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