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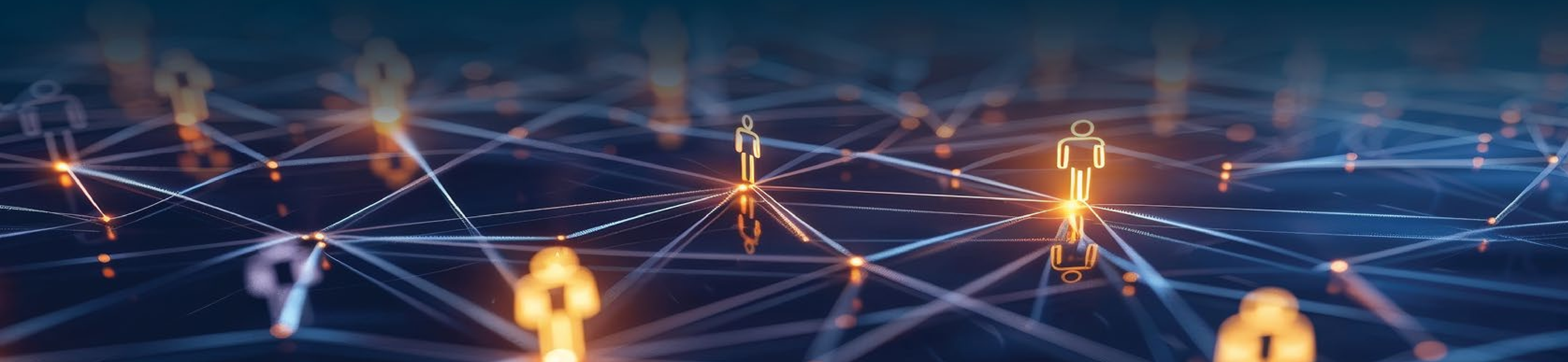
29th Annual Labor & Employment Conference

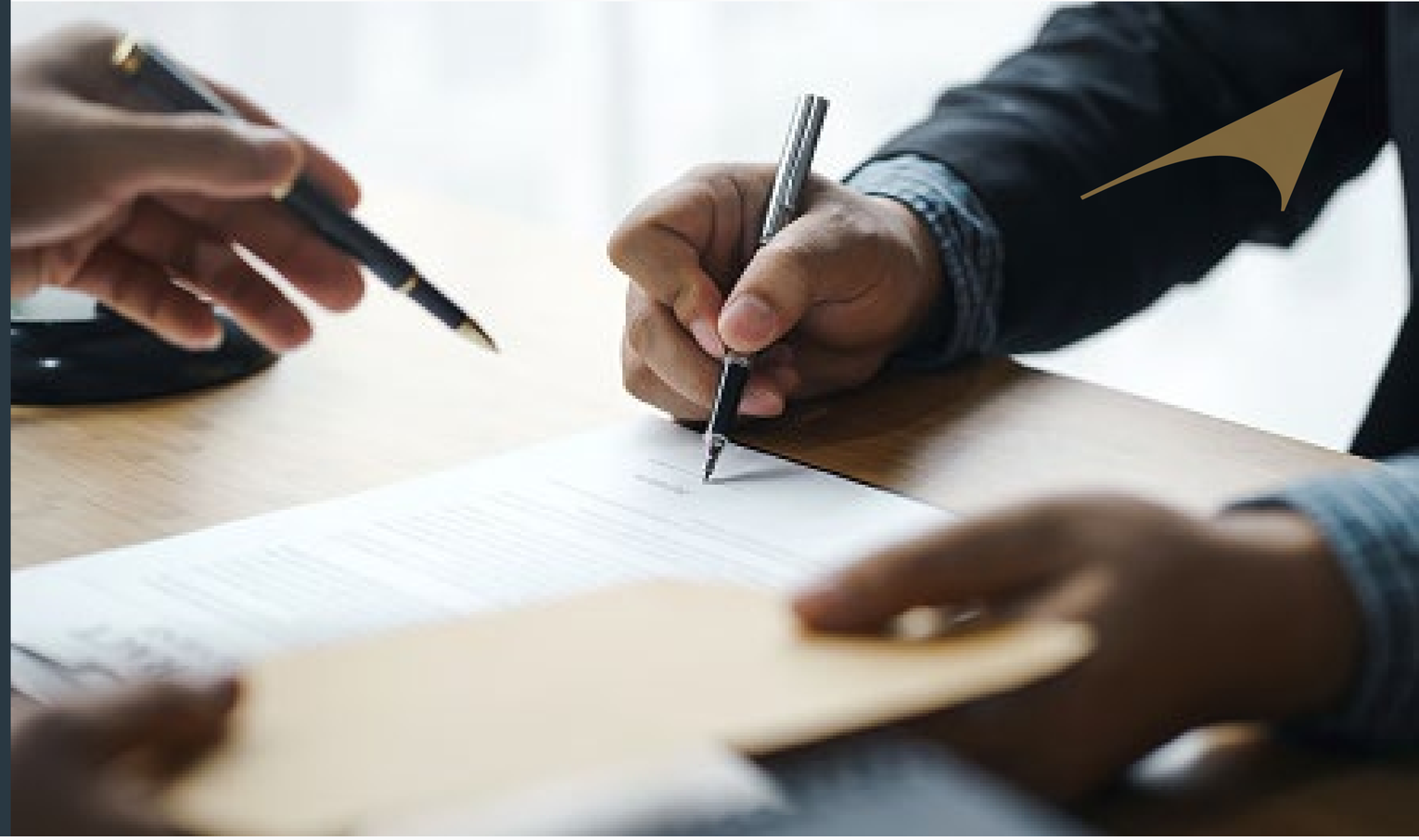
Tuesday, November 19, 2024



Handbook Essentials; Best Practices and Required Updates

29th Annual Labor and Employment Conference

November 19, 2024



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Agenda

- Introduction
- Required Policies
- Required Updates
- Optional Policies
- Common Mistakes
- Scenarios
- Best Practices & Key Takeaways
- Questions?

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Introduction

- Do I need a Handbook?
- There are several benefits to having a Handbook:
  - Sets out workplace expectations and consequences for misconduct.
  - Answers common workplace questions.
  - Minimizes risk of legal claims by encouraging resolution of workplace issues through internal complaint procedures.
  - Acknowledgments can assist in the defense of future claims.
  - Good onboarding practice for new employees.
- A Handbook is NOT a binding contract.

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Introduction

- Your handbook should:
  - Comply with applicable law;
  - Demonstrate your commitment to comply with the law; and
  - Accurately reflect your actual practices.

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Introduction

- Questions to ask yourself:
  - How large is the workforce?
  - Where are employees located?
  - What is the nature of your business?
  - Are employes unionized, nonunionized, or both?

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What policies are required by federal law?

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Required Policies/Notices – Federal Law

- Equal Employment Opportunity policy
- Anti-Harassment
- Anti-Retaliation
- Accommodation Policy (e.g., disability, pregnancy, and religious)
- Immigration Reform and Control Act Policy
- Explanation of Employee Classifications (e.g., full-time, part-time, exempt, non-exempt)
- Family and Medical Leave
- Other leaves (e.g., military leave, federal jury duty, etc.)

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What policies are required by New York law?

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Required Policies – New York Law

- Harassment and Discrimination Policy (including sexual harassment and complaint form)
- Airborne Infectious Disease Exposure Prevention Plan
- Expression of breast milk
- Electronic monitoring
- Work hours
- PTO/Vacation
- Holidays
- Whistleblower policy

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Required Leave Policies – New York

- Paid Sick Leave
- Paid Family Leave
- Voting Leave
- Military Leave
- Jury Duty
- Organ and Bone Marrow Leave
- Blood donation
- Volunteer Emergency Responders
- Crime Victims Leave

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Required Updates

- Perinatal Leave Policy
- Sexual Harassment Policy (given 2022 amendments)
    - Sexual harassment hotline number
    - Bystander intervention
    - Online harassment
- PUMP Act
- Artificial Intelligence (NYC)

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Optional, But Really Required Policies

- At-will provision.
- Confirmation of the employer's right to modify the handbook.
- Handbook acknowledgement form.

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Optional Policies

- Wage and Hour Practices
- Break Time and Meal Periods
- Attendance Policy
- Code of Conduct
- Corrective Action
- Employee Benefits
- Dress Code/Grooming Policy
- Confidential Information
- Solicitation and Distribution
- Bereavement Leave

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Optional Policies

- Background Check Policy
- Travel and Business Expense Reimbursement
- Performance Review
- Smoke-Free Workplace
- Nepotism Policy
- Romance in the Workplace
- Hybrid/Remote Work
- Violence In the Workplace
- Drug Testing
- Social Media Policy

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Optional Policies

- Employee Referral Policy
- Bonus Structure
- Tip Credit Notice
- Affinity Groups
- Bring Your Own Device Policy
- Media Relations Policy
- Outside Employment Policy
- Code of Ethics
- Tuition Reimbursement
- Health and Safety in the Workplace
- Reproductive Health Decision Making*

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Scenario #1 – ABC Corporation's Dress Code Policy

- ABC Corporation maintains a Dress Code Policy that provides the following:

  Our office maintains a business professional environment, but some clothing and grooming guidelines should be observed. Below are general guidelines outlining examples of acceptable and unacceptable workplace attire.

Acceptable:	Unacceptable:
Pant suits	Hijabs, bandanas, or scarves
Skirt suits	Shorts or short suits
Slacks	Jeans
Blouses	Tank tops or white tee shirts
Dress shoes or flats	Sneakers or open toed shoes (e.g., flip flops and sandals)

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Scenario #2 – Terminated Tammy

- Terminated Tammy is a receptionist at ABC Corporation's Buffalo, New York, location. She had been employed with the company for two years before she was terminated for screaming at a customer. ABC Corporation maintains a policy that provides,

  "Upon termination of employment for any reason, employees will be paid for up to 40 hours of accrued but unused PTO at the employee's final rate of pay."

- On Tammy's final day of employment, she accrued 56 hours of vacation time and 12 hours of paid sick leave.

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Common Mistakes

- Vacation/PTO policy that:
  - Is unclear regarding accruals and use.
  - Fails to address the payout of vacation/PTO at the end of the employment relationship.
  - Provides for permissible buyback creating unintended tax consequences.

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Common Mistakes

- Paid sick leave policy that doesn’t allow for carryover.
- Social media policy that broadly prohibits negative speech about the company.
- Overly rigid disciplinary procedures.
- Overly detailed employee benefit policies.

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Common Mistakes

- Harassment Policy:
  - Fails to comply with the updated model sexual harassment policy
  - Fails to include the required complaint form.

- Drug testing policy that does not account for the legalization of medical and adult-use cannabis and related protections under New York's Marihuana Regulation and Taxation Act ("MRTA").

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Common Mistakes

- Failure to include the State's standard Policy on the Rights of Employees to Express Breast Milk in the Workplace.
- No acknowledgement.
- No HERO Act policy.
- No electronic monitoring disclosure.

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Scenario #3 – Cathy's Complaint

- Cathy is looking to file an internal complaint of sexual harassment. Cathy is afraid to tell her manager and wants to file the complaint directly with HR and eventually the New York State Division of Human Rights. ABC Corporation's sexual harassment policy states:
    - "Preventing sexual harassment is everyone's responsibility. ABC Corporation cannot prevent or remedy sexual harassment unless it knows about it. Any employee, paid or unpaid intern, or nonemployee who has been subjected to behavior that may constitute sexual harassment is encouraged to report such behavior to a supervisor, manager, or the Human Resources department. Reports of sexual harassment may only be made in writing."
- The sexual harassment policy does not include any information on how to file complaints with state and federal agencies. Unable to find a complaint form, Cathy called HR to complain verbally.

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Key Takeaways & Best Practices

- Handbooks should be reviewed and updated annually to ensure changes with the law are included.
- Be mindful of federal, state, and local considerations.
- Ensure your handbook is:
  - Consistent,
  - Easy to read and understand, and
  - Reflective of your actual business practices.

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Key Takeaways & Best Practices

- Apply all policies uniformly.
- Consider your handbook a potential exhibit in employment related litigation.
- Ensure you have carveouts for unionized employees, if applicable.
- When in doubt, consult with your L&E attorney.

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Questions?

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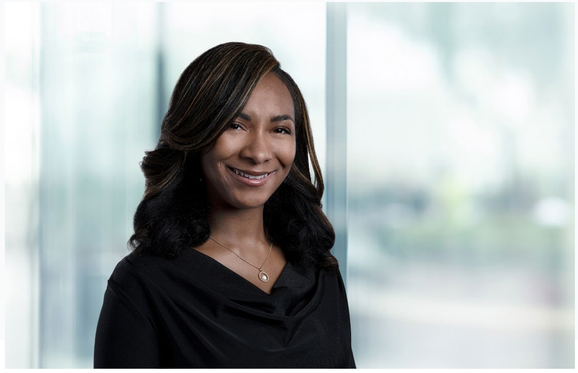

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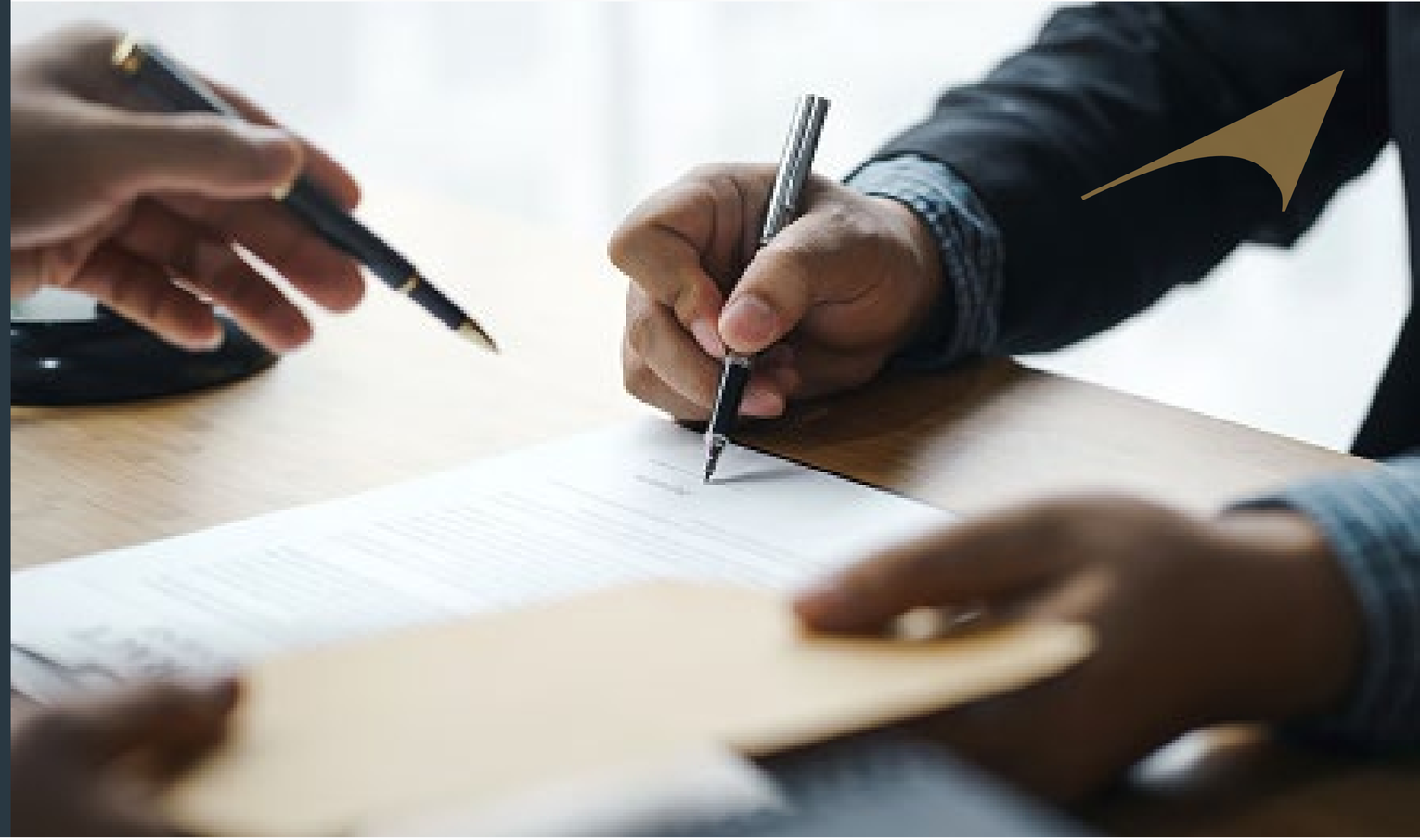
Reductions in Force and Separating Employment

Legal Compliance and Strategies for Reducing Risk



November 19, 2024

Peter C. Godfrey, Esq.

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Agenda

- Planning for a Reduction in Force
- Constraints to Reductions in Force
- Selecting Positions for Elimination or Consolidation
- Severance Agreements and Releases
- Implementing and Communicating Reductions in Force
- Questions

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Planning for a Reduction in Force

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Planning for a Reduction in Force

Identifying Objectives

- What are the underlying financial, business or organizational goals?
  - Financial, e.g., reduce budget
  - Business, e.g., discontinue or relocate production
  - Organizational, e.g., streamline operations or leadership
- What is the timeline?

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Planning for a Reduction in Force

Considering Alternatives

- Hiring freezes or reducing hiring in affected positions
- Reducing wages or benefits
- Performance-based compensation plans so that wages automatically fall during periods of decline in performance and increase in times of success
- Transferring employees to other positions that need to be filled
- Temporary work hiatus, e.g., shutdown during holiday week
- Exit incentives

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Constraints to Reductions in Force

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Constraints to Reductions in Force

Contractual Considerations

- Consider expressed or implied contracts that may affect an at-will basis to terminate an employee.
  - Severance or notice provisions in contracts
  - Quasi-contractual obligations such as employee handbooks, policies, past practices, or other assurances made to employees*
  - Collective bargaining agreements
    - Seniority, bumping, and other rights impacting the selection process
    - Advance notice, meeting, or other procedural requirements before layoff
    - Contractual severance or other negotiated financial obligations

**See Murphy v Am. Home Products Corp.,* 58 N.Y.2d 293, 304 (Ct. App. 1983)

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Constraints to Reductions in Force

Benefit Plan Implications

- Defined benefit plan terminations may cause underfunding issues or possible reporting obligations to the PBGC.
- A RIF can also result in a partial plan termination where the group of employees terminated was an identifiable, separate group of employees. In the event of a partial termination, all accrued benefits of employees affected must become fully vested to the extent that the benefits are then funded.
- Multi-employer pension plan withdrawal liabilities may be triggered by a complete or partial withdrawal, without regard to the reason for the withdrawal. The amount of liability is the employer's proportionate share of the plan's unfunded liabilities.
- Under COBRA, employers must offer group health plan continuation coverage to all employees and their dependents who lose coverage due to a layoff or reduction in hours. Employees must receive a written COBRA election notice under federal law. States also have mini-COBRA laws as well, including New York State.

29 U.S.C. §§ 1161-1168

Constraints to Reductions in Force

Unions & Bargaining Obligations

- For union-represented employees, the National Labor Relations Act establishes the duty to bargain collectively with the union representing employees regarding the effects of a RIF, and depending upon the circumstances, about the decision to conduct a RIF.
- Effects bargaining must be conducted in a meaningful manner at a meaningful time. Best practice is to provide several weeks' notice when possible, especially in circumstances where significant reduction/loss of employment is expected. Negotiations with the union will focus on severance and post-employment benefits.
- Decisional bargaining may also be required for a RIF when the decision is based on economic reasons.

29 U.S.C. § 158(d); *First Nat. Maintenance Corp. v N.L.R.B.*, 452 US 666, 682 (1981)

Constraints to Reductions in Force

WARN Act

- Under the federal Worker Adjustment and Retraining Notification (WARN) Act, employers with 100 or more employees must give 60 days' notice prior to a mass layoff or plant closing.
- A mass layoff is (a) the greater of at least 50 employees or 1/3 total employees or (b) at least 500 active employees at a single site of employment during any 30-day period.
- A plant closing is a permanent or temporary shutdown, resulting in employment loss for at least 50 employees during a 30-day period of either a single site of employment or operating units within a single site of employment.
- The WARN Act has a 90-day aggregation rule, meaning employers must look ahead 90 days and look back 90 days from each employment loss. This requirement ensures that employers do not use repeated small layoffs to avoid the WARN Act's notice requirements.

29 U.S.C.A. § 2101; 20 C.F.R. § 639.3c

Constraints to Reductions in Force

WARN Act

- If the WARN Act is triggered, the employer must give 60 days' notice to (1) the union representative of each affected employee (if applicable), (2) each affected employee not represented by a union, (3) the state rapid response coordinators, and (4) the local government official where the RIF will occur. Notice requirements differ based on the recipient of the notice.
- Employers who violate the WARN Act are liable for back pay, lost benefits, civil penalties, and attorney fees.
- Certain states also have mini-WARN Acts that require additional notice requirements.
    - For example, in New York, employers with 50 or more employees must give 90 days' notice prior to a plant closing, mass layoff, reduction in work hours, or a relocation of substantially all facility operations.

29 U.S.C.A. § 2102; 20 C.F.R. § 639.5; N.Y. Labor Law §§ 860-860-i

Constraints to Reductions in Force

Discrimination Claims

- Discrimination claims are possible if a layoff would adversely affect any member of a protected class, typically through disparate impact or disparate treatment.
- Disparate impact claims arise when a seemingly neutral layoff policy disproportionately affects a protected group. This occurs as unintentional, systemic discrimination.
- Disparate treatment arises when a more qualified member of a protected class is laid off and a less qualified employee is retained. This occurs as intentional discrimination.

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42 U.S.C.A. § 2000e-2

Selecting Positions for Elimination or Consolidation

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Selecting Positions for Elimination or Consolidation

Decide Selection Strategy

A. Determine decisional units

B. Appoint decision-makers and identify selection criteria

C. Conduct risk assessment and refine as necessary

Selecting Positions for Elimination or Consolidation

What is a “Decisional Unit”

- Required as part of the release and waiver process under the Age Discrimination in Employment Act (“ADEA”) regulations, but relevant to all RIFs.
- The “Decisional Unit” refers to the portion of the employer’s organizational structure from which the employer decides the employees who would be offered consideration for the signing of a waiver and those who would not be offered consideration for signing the waiver.
- Reflects the process by which the employer picks certain employees for the program and rules out others from the program.

29 C.F.R. § 1625.22

Selecting Positions for Elimination or Consolidation

Decisional Unit Examples

- A particular facility;
- A particular department at a facility;
- A particular division with incumbents at multiple facilities;
- All incumbents supporting a particular line of business;
- A particular job category (e.g. all accountants, all HR).
- A decisional unit may cut across multiple geographic locations.
- Note: a “decisional unit” may be entirely distinct from the WARN Act “single site of employment”

29 C.F.R. § 1625.22

Selecting Positions for Elimination or Consolidation

Decisionmakers and Criteria

- Where it becomes necessary to select among employees for inclusion in a RIF, more objective criteria presents less risk. For example, job classification, tenure, and objective performance metrics are generally objective and present less risk.

- Where subjective criteria are applied, it is important to document the factors and process. By way of example:

  - Consider creating a RIF Selection Committee that consists of a diverse group of individuals to create the criteria for layoff decisions and who will be affected.

  - Consider creating layoff evaluation forms to force-rank employees in terms of relevant factors, e.g., qualifications, skills, knowledge, and ability to perform remaining work.

Selecting Positions for Elimination or Consolidation

Decisionmakers and Criteria

- Regardless of the factors, selection criteria should be applied consistently across the decisional unit.
- Ensure that the selection criteria is consistent with the stated RIF goals originally discussed. Documentation is extremely important throughout the RIF process.
- All layoff decisions should be documented in preparation for potential litigation, including the economic reasons for the layoff, documenting the selection process, and explaining the non-discriminatory reasons justifying the termination decisions.
- Consider attorney-client privilege and attorney work product.

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Selecting Positions for Elimination or Consolidation

Risks Assessing Selection Methodology

- Disparate treatment claims:
  - Less favorable treatment relative to other, similarly-situated employees *because of* membership in a protected class
  - **Intentional** discrimination
  - "Reverse discrimination" is also unlawful

- Disparate (adverse) impact claims:
  - Neutral selection criteria, policy, or practice has a disproportionately harmful effect on a protected class (usually shown by statistical comparison)
  - **Unintentional** and/or systemic discrimination
  - *Yes, discriminatory employment practices can exist even in the absence of discriminatory intent*

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Selecting Positions for Elimination or Consolidation

Conducting a Disparate Impact Analysis

The "4/5" or "80%" Rule

- A "rule of thumb"
- Uniform Guidelines for Employee Selection Procedures (EEOC, OFCCP)
- Compares the selection rate of one group with the selection rate of another group via a ratio and considers any value (or "impact ratio") less than 80% as ***evidence*** of potential discrimination
- Used to identify selections that should be examined more closely

29 C.F.R. § 1607.4

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Selecting Positions for Elimination or Consolidation

Conducting a Disparate Impact Analysis

- Calculate the rate of selection for each group (divide the number of individuals selected from the group by the number of incumbents)
  - 5 out of 100 men are selected for termination
    - 5% selection rate
  - 25 out of 50 of women are selected for termination
    - 50% selection rate
- Calculate the “impact ratio” for each group
  - .05/.50 = 10%
  - Women survived the RIF at only 10% of the rate that men did, which is evidence of an adverse impact against women

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Selecting Positions for Elimination or Consolidation

What to do about Disparate Impact

- Consider the strength and evidence of the legitimate non-discriminatory business decisions for the selection criteria and outcomes.
- Consider alternative criteria if needed.
- Consider adjustments to prevent discrimination against protected groups if needed. However, avoid engaging in intentional discrimination to remedy unintentional disparate impact.
- A statistically significant disparate impact does not automatically establish liability. As with disparate treatment claims, employers that rebut a *prima facie* case of disparate impact discrimination. For example, an employer may rely upon the business necessity of the decision. *See e.g.*, Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999).

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Selecting Positions for Elimination or Consolidation

Conducting a High-Risk Term Analysis

- Conduct ***attorney-client privileged*** risk evaluations regarding any particular high-risk selections, e.g.:
  - Employees currently on job protected leave, e.g., FMLA, parental leave, military leave.
  - Employees who have recently engaged in protected activity, e.g., made internal complaints, opposed allegedly unlawful activity, participated in an internal investigation, or made complaints to a government agency.
  - Employees whose pension or retiree health benefits are about to vest.
- To defend against any potential litigation, an employer must show that the employee would have been selected for the RIF regardless of the employee's protected leave or engaging in a protected activity.

See, e.g., 29 C.F.R. § 825.216; 20 C.F.R. § 1002.139(a)

Severance Agreements and Releases

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Severance Agreements & Releases

General Releases

- If severance is offered in exchange for a release, there must be consideration for the agreement, meaning that the employer must provide additional compensation to employees for signing, and not compensation that is already guaranteed.

- In order for a general release to be enforceable, it should at least satisfy the following:
  - Written in language that is understandable to the employee;
  - Specifically refer to rights or claims being released;
  - Should not attempt to waive future claims;
  - Consideration for the execution of the release which is beyond that which the individual is already entitled to receive;
  - Advise the employee to review with legal counsel before executing the agreement; and
  - Reasonable time within which to consider the agreement prior to execution and give the employee some period of time within which to revoke the agreement after execution.
  - Adhere to unique state law requirements
  - Avoid interference with whistleblower rights and administrative investigations.

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Severance Agreements & Releases

ADEA Releases

- The Older Worker's Benefit Protection Act (OWBPA) amendments to the ADEA sets forth requirements for employers who ask employees aged 40 or older to sign a release. In addition to factors applicable to all releases, the OWBPA requires the following:
  - Waiver of a right to sue for age discrimination must be part of a written agreement between the individual and the employer and that the agreement be written in plain English;
  - The waiver must fully refer to rights or claims arising under the ADEA;
  - Cannot waive rights or claims which may arise from incidents that occur after the waiver is executed;
  - The employee must receive consideration for execution of the waiver (beyond that which the individual is already entitled to receive);
  - The employee must be advised in writing to seek legal counsel before executing the agreement;
  - The employer must provide the employee with a 21 (45 if group) day waiting period within which to consider the agreement prior to execution; and
  - The employee must be given 7 days within which to revoke or repudiate the agreement subsequent to execution.

29 C.F.R. § 1625.22

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Implementing and Communicating Reductions in Force

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Implementing and Communicating Reductions in Force

Communicating to Employees

- Employers should establish an overall communication strategy for explaining the RIF to employees, customers, suppliers, and the general public.
- Prior to the layoff, some employers may wish to let employees know that a layoff is happening and to explain the reasons why, so there is some warning and explanation to those who are laid off, rather than a sudden termination.
- Plan differences for announcing the RIF to employees physically present and employees who work remotely.
- HR and managers must be trained and prepared to deliver the news to affected employees. Any severance pay and benefits being offered should be explained during the termination meetings.
- Develop a procedure to safeguard and return company property, such as providing prepaid boxes to affected employees to send equipment back to the company in.

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Implementing and Communicating Reductions in Force

Administering the RIF

- Certain states require a written notice of termination be provided to employees.
  - For example, in New York, employers are required to provide written notice to any employee terminated from employment with "the exact date of such termination as well as the exact date of the cancellation of employee benefits connected with such termination." This written notice must be provided within five working days after the employment relationship has ended.
- Final pay requirements are also state specific.
  - For example, in New York, an employer must pay all unpaid wages no later than the regular payday for the period when the employee separated. In addition, payment for unused leave time such as vacation pay depends upon the terms of the employer's applicable policy in New York State.

N.Y. Labor Law §§ 195(5)-(6); N.Y. Dep't of Labor *Wages & Hours FAQ*

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Implementing and Communicating Reductions in Force

Administering the RIF

- Review what benefit plans each affected employee currently has and be prepared to discuss and answer questions around termination of those benefit plans. Notify the administrator of the benefit plans of the terminations so that required COBRA letters can be sent out.
- Prepare any severance pay and release letters for employees. Prepare to discuss the parameters of the letter with departing employees.
- Provide affected employees with contact information for the state unemployment agency and consider employee assistance programs.

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Implementing and Communicating Reductions in Force

Addressing Concerns After the RIF

- Discuss with managers how to properly discuss the reason for the RIF to remaining employees.
- Meet with the remaining employees to explain why the RIF was necessary, that no further reductions are planned at this time, that this will allow the company to continue to run, etc.
- Prepare for a drop in productivity and discuss ways to reassure and rally the remaining workforce.
- Prepare messaging for the general public and the media.

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Questions?

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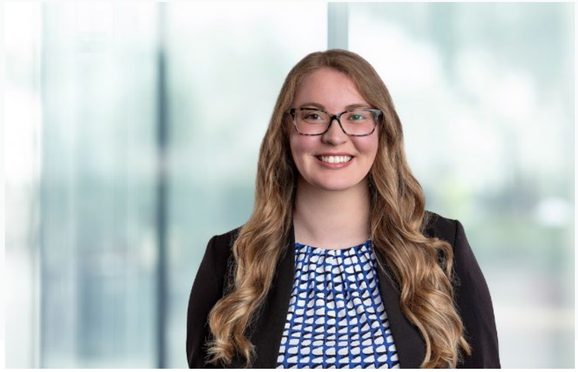

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Addressing Political Ideology and Religious Expression in the Workplace

29th Annual Labor and Employment Conference

November 19, 2024

Meghan M. DiPasquale, Esq.
Madeline G. Cook, Esq.
Ryan A. Hughes, Associate Pending Admission

Agenda

- Political Speech in the Workplace
  - Statutory Protections
    - New York Labor Law § 201-d
    - National Labor Relations Act
    - Considerations of Title VII and NYS HRL
- Religious Expression in the Workplace
  - Statutory Protections
    - Title VII and NYS HRL
- Employer Best Practices

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Political Speech in the Workplace

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Do Employees Have a Right to Free Speech at Work?

- Private employees do not have an unfettered free speech right.
  - First Amendment does not apply to the private workplace.
- The First Amendment does apply to public employees, but public employees may still be disciplined for speech that:
  - Relates to their official job responsibilities; or
  - Speech that could threaten to interfere with the operations of the workplace.
    - For example, a teacher's complaint regarding student discipline could serve as grounds for their termination.

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Protections for Public Employees

- Public Employees receive free speech protection through the First Amendment.
- Speech on a matter of public concern, such as political, social, economic, or other community-related concerns, is protected.
- This same speech may not be protected if it relates to the public employee's official job duties.
- Any disruptive speech is not protected
  - Employers will consider the following in determining whether speech is disruptive:
    - Time, place, and manner of speech.
    - Impact on the work environment.
    - Impediment on employee performance.

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Protections for Private Employees

- Both New York Labor Law (NYLL) and the National Labor Relations Act (NLRA) protect certain employee conduct.
- Title VII and the New York Human Rights Law protects employees from discrimination, harassment, and retaliation.
  - But not based on political speech or affiliation.
- These protections can create tension with employee speech.

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New York Labor Law

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New York Labor Law § 201-d

- Prohibits discrimination based on “political activities,” “recreational activities,” and “legal use of consumable products” outside of work.
  - Political activities include “(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group.”
  - Recreational activities include “any lawful, leisure-time activity, for which the employee receives no compensation, and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading, and the viewing of television, movies, and similar material.”

Scope of NYLL § 201-d

- Protections are narrower than what would be covered by the First Amendment.
  - E.g., Picketing and protesting has been found to not be protected recreational activities.
    - *Kolb v. Camilleri*, 2008 WL 3049855 (W.D.N.Y. Aug. 1, 2008) (picketing not protected).
    - *Greco v. City of New York*, 2023 WL 5024720 (E.D.N.Y. Aug. 8, 2023) (participation in January 6th riots not protected).

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Conflict of Interest Defense

- Employee conduct will not be protected if it “creates a material conflict of interest related to the employer’s trade secrets, proprietary information, or other proprietary or business interest.”
- Legislative history offers some support for idea that law’s intent was to ensure employers do not tell employees how to think on their own time.
- Presumption against not interfering with an employer’s right to terminate an at-will employee versus principle that antidiscrimination statutes, remedial in nature, should be liberally construed.

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Captive Audience Meetings

- As of September 2023, § 201-d also bars captive audience meetings.
- Employers may no longer require employees to:
  - (i) Attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or
  - (ii) Listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

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Political Matter v. Political Activity

- "Political matters" definition differs slightly from the statute's "political activities" definition.
  - Political Matters include "matters relating to elections for political office, political parties, legislation, regulation, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization."

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National Labor Relations Act

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NLRA Protections

- The NLRA provides employees with the right to engage in protected, concerted activity ("Section 7 Rights").
  - "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment[.]"

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NLRA Protections

- The NLRA does not explicitly protect "political speech," but political speech will be protected if it is both:
  - (1) Concerted (i.e., a group or individual expressing concerns on behalf of similarly situated employees; and
  - (2) Related to work.
- Whether an individual's actions are "concerted" depends on the totality of the circumstances. Miller Plastic Products, Inc., 372 NLRB No. 134 (Aug. 25, 2023).

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“Concerted Speech” in Action

***Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023).**

- Tesla employees wore union t-shirts to work. Tesla threatened to send the employees home for violating the company’s uniform policy.
  - Tesla’s policy required employees to wear specific uniforms “to minimize damage to vehicles throughout the production process.”
- NLRB initially ruled that Tesla infringed on employees’ rights and stated “when an employer interferes *in any way* with its employees’ right to display union insignia, the employer must prove special circumstances that justify its interference.”

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“Concerted Speech” in Action

***Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023).**

- On appeal, the Fifth Circuit vacated the NLRB’s decision, stating “it was beyond the scope of the NLRA for the NLRB to declare all uniforms and dress codes presumptively unlawful[.]”
- Fifth Circuit upheld Tesla’s uniform policy because it advanced a legitimate employer interest in a non-discriminatory manner while still allowing employees to exercise their Section 7 right to display insignia in other ways.

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“Concerted Speech” in Action

***Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023).**

- Court drew distinction between attire and insignia:
  - Footnote 16: “[E]mployees could stencil union designs onto their Team Wear or could put as large a sticker, and as many stickers, on the shirts as they wanted. In other words, whatever insignia employees wanted to add to their Team Wear attire, they could; they just had to wear Team Wear.”

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“Speech Related to Work” in Action

***Home Depot USA, Inc*. NLRB Case 18-CA-273796 (2024).**

- Home Depot violated the NLRA when it terminated an employee for refusing to remove “BLM” from his apron.
- Context matters:
  - (1) The employee and several of his coworkers had complained to management about another coworker’s racially discriminatory conduct;
  - (2) A Black History Month display in the workplace was vandalized on two occasions;
  - (3) The employee and several of his coworkers all began displaying “BLM” on their aprons when they were raising concerns about racist behaviors in the workplace;
  - (4) Home Depot allowed other employees to wear other types of pins, such as Pride pins.

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“Speech Related to Work” in Action

***Home Depot USA, Inc*. NLRB Case 18-CA-273796 (2024).**

- Even though the employee did not have any specific discussions with his fellow employees about the BLM insignia, the NLRB still deemed it to be a “logical outgrowth” of the employees’ complaints.
- Thus, the employees’ display of the lettering was:
  - Concerted; and
  - Related to work.
- NLRB ordered Home Depot to reinstate the terminated employee with back pay.

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Employee Political Speech on Social Media & Employer Liability

Okonowsky v. Garland, 104 F.4th 1166 (9th Cir. 2024).

- Supervisor encouraged other employees to view his Instagram account, which was riddled with overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes, some of which contained vague references to female co-workers.
- The Ninth Circuit noted that other employees could view, like, comment on, and otherwise interact with the offensive posts.
- Instagram posts and other speech on social media can create the grounds for hostile workplace claims under Title VII.
- Employers can be liable for discriminatory or harassing speech, regardless of where the speech originates or transpires, as long as the effects of that speech are felt in the workplace.

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Religious Expression in the Workplace

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Religious Expression in the Workplace

- Title VII and New York State Human Rights Law:
  - Protect employees from religious discrimination, harassment, and retaliation; and
  - Create an obligation for employers to accommodate employees' expression of sincerely held religious beliefs in the workplace or otherwise unless such accommodation will cause the employer an undue hardship.

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Religious Accommodations

Groff v. DeJoy, 600 U.S. 447 (2023).

- An Evangelical Christian United States Postal Service employee requested that the USPS not require him to work Sundays after it had recently started offering Sunday deliveries.
- The employee sued USPS for failing to accommodate his sincerely held religious belief.
- The Supreme Court found USPS to be in violation of Title VII, and redefined the threshold for an employer's obligation to offer accommodation to be limited in instances where the employer would face "undue hardship."
  - "Undue hardship" was defined by the Court to mean that the accommodation would cause "substantial increased costs in relation to the conduct of [an employer's] particular business."

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Religious Harassment under Title VII

- Religious harassment in violation of Title VII occurs when employees are:
  - Required or coerced to abandon, alter, or adopt a religious practice as a condition of employment (this type of "quid pro quo" harassment may also give rise to a disparate treatment or denial of accommodation claim in some circumstances); or
  - Subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer liable.

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EEOC Guidance on Religious Discrimination & Harassment

- While Title VII requires employers to accommodate an employee's expression of a sincerely held religious belief, such as proselytization, an employer does not have to accommodate such expression if it amounts to workplace harassment.
- Some employees may perceive proselytizing or other religious expression as unwelcome based on their own religious beliefs and observances.
- In an increasingly divided society, employers must balance an employee’s right to express their religious beliefs against an employee’s right to be free from harassment.

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EEOC Guidance on Religious Discrimination & Harassment

- An employer can reduce the chance that employees will engage in conduct that rises to the level of unlawful harassment by implementing an anti-harassment policy and an effective procedure for reporting, investigating, and correcting harassing conduct.
- Employers may reduce their chances of litigation if they quickly respond to complaints of religious harassment and address employee concerns to ensure the behavior does not become severe and pervasive.

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Religious Harassment under the New York State Human Rights Law

- Offers substantially similar protections against religious harassment and discrimination as Title VII.
- However, after an amendment to the NYSHRL in 2019, a lower standard of proof is required for harassment and discrimination claims brought under the NYSHRL as for those brought under Title VII.
- An individual bringing a harassment claim under the NYSHRL based on any protected class, including religion, must prove that the conduct alleged rises above "petty slights or trivial inconveniences."
- The New York State Division of Human Rights (NYSDHR) administers and enforces the NYSHRL.

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Employer Best Practices

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Employer Best Practices

- Review and revise your employee handbook.
  - Refine or remove any limits on “political discussions.”
  - Ensure that any provisions on social media, computer use, and solicitation and distribution conform to NLRA standards.
  - Update and strengthen discrimination and non-harassment policies.
- Carefully consider whether any discipline or termination might give rise to a claim under NYLL Section 201-d or the NLRA (and, for public sector employers, a claim of retaliation for speech protected by the First Amendment).

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Employer Best Practices

- When incidents arise related to employee political or religious speech, focus on less content and more conduct.
  - Does the employee's behavior implicate your nondiscrimination and non-harassment policies?
  - Has the employee violated other lawful workplace rules?
- Train supervisors on employees' rights to engage on protected activity under Section 201-d and the NLRA.
- Consider offering civility or ethics training to clearly convey company policies and expectations.
- If you believe union organizing is occurring, contact counsel as soon as possible.

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Questions?

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