

The logo for K&L GATES, featuring the text "K&L GATES" in white, uppercase letters on an orange rectangular background. The background of the slide is a blue bokeh pattern with light blue and white circular highlights.

K&L GATES

Emerging Issues in the Modern Workplace:

Sexual Harassment, Independent Contractors and Supply Chain Risk

Amy L. Groff
Maureen O'Dea Brill

OVERVIEW

- Sexual harassment
 - We'll focus on hostile work environment (more common and can position yourself to defend)
 - Best practices and practical tips
 - Reaction to attention on this issue (trends and laws)
- Independent contractors
 - Risks, benefits and misclassification issues
- Supply chain risk
 - Ways to mitigate risk and be proactive
 - Legal standards and trends



Sexual Harassment



Chilling Data

- Report by EEOC Select Task Force (2016)
 - **25% - 85%** of women reported workplace “sexual harassment”
 - Almost **60%** of women reported gender harassment (sexist or crude behavior)
 - Approximately **16%** of male federal employees reported unwanted sexual attention or sexual coercion
 - **Under-reporting: 70%** do not report

Hostile Work Environment

More common & harder to define than *quid pro quo*

A few points to remember:

- Can be conduct that is either extreme or frequent
 - Single, extreme incident can be enough, or
 - Repeated, less egregious conduct
- Intent of the offender is not relevant
 - “I was just joking” does not matter
- Not limited to men harassing women
 - Same sex; women harassing men

Potential Harassers (hostile work environment)

- Supervisor
- Co-worker
- Client
- Customer
- Vendor
- Contractors or employees of others on workplace premises

Broader than quid pro quo where harasser must be someone in a position of authority, like a supervisor.

Potential Victims

- All of your employees
- And in some states independent contractors, consultants, vendors, unpaid interns

Hostile Work Environment: Defense

- Employer can avoid liability for hostile work environment if it proves
 - It exercised reasonable care to **prevent** and promptly **correct** harassment, and
 - victim unreasonably failed to take advantage of preventive or corrective opportunities.
- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
- *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

Policy Essentials

- Written, easy to understand, and accessible
- Defines prohibited sexual harassment
- *Quid pro quo* and hostile work environment
 - Covers verbal, nonverbal gestures, physical, visual
- Provides examples
- States the complaint and investigation procedure
- Establishes an appropriate remedial action
- Prohibits retaliation

Best Practices

- Complaint procedure
 - Reporting by all – not just victims
 - Multiple options to whom reports can be directed
 - Allow for anonymous reporting (consider hotline)
 - Beware of zero tolerance / termination language that could discourage reporting of less egregious incidents

Best Practices

- Investigations
 - Appropriate steps to protect confidentiality
 - Don't guarantee or require confidentiality
 - Impartial, thorough, prompt
 - Reassure witnesses of no retaliation
 - Maintain documentation of investigation

- Exit interviews
 - Do them
 - Ask employees to be candid about reasons for leaving

Best Practices

- Mandatory training
 - Staff
 - Management (incl. what to do if they hear of incident)
 - Recent additional mandates (e.g., New York)
 - Important for *Faragher-Ellerth* defense

Training and policies alone are not enough.

Culture of respect, inclusion, diversity

(from the top down and throughout organization)

Sexual Harassment Backlash

- Male managers intentionally attempting to avoid being alone with women in the workplace or at work-related events.
- This strategy does not combat harassment and may lead to a discrimination claim.
 - Likely to deprive a female employee of mentoring and business opportunities that are provided to male counterparts.

Impact on Settlement Agreements and Confidentiality

- Recent laws and bills banning non-disclosure agreements in sexual harassment settlements
- Now no tax deduction for such settlement payments and attorney's fees if subject to NDA
26 U.S.C. §162(q)
- Chilling effect on settlement

Impact on Employment Agreements

- “Ending Forced Arbitration of Sexual Harassment Act” (S. 2203)
 - Introduced in Dec. 2017
 - Would require employees and employers to litigate sexual harassment claims → no mandatory arbitration clauses for those claims
 - But would not affect other arbitration-eligible claims

State Laws

- Unprecedented amount of sexual harassment legislation introduced in 2018
 - In first half of year, more than 30 states introduced 125 bills addressing sexual harassment.
- Legislative measures largely focus on:
 - requiring employers to adopt sexual harassment policies and training programs;
 - prohibiting mandatory arbitration of disputes and waivers of employees' rights; and
 - banning nondisclosure agreements in settlements.

State Laws

- Sexual harassment policies
 - Required by California, Maine, Massachusetts, New York, Rhode Island, and Vermont
 - Social media use
- Sexual harassment training
 - Required by California, Connecticut, Maine, and New York
 - Legislation requiring training was introduced this year in Delaware, Pennsylvania, Rhode Island, and Virginia

State Laws (cont'd)

- Mandatory arbitration and Waiver of rights
 - Predispute employment agreements requiring arbitration of sexual harassment claims are prohibited or restricted in New York, Maryland, Vermont and Washington
- Nondisclosure Agreements
 - Conflicting arguments for and against NDAs
 - Arizona, Louisiana, New York, and Vermont have laws restricting the use of, or permitting a limited breach of, confidentiality provisions in sexual harassment settlements. No state totally prohibited the use of NDAs
 - Legislation prohibiting the NDAs in settlement agreements was introduced this year in California, Florida, Kansas, Indiana, Missouri, New Jersey, Pennsylvania, and Virginia



Independent Contractors



INDEPENDENT CONTRACTORS

- More workers want to work independently – not be tied to one employer
- Value flexibility
- BLS survey released in June 2018 showed 10.6 million independent contractors
- On-demand or gig work increasing and blurring the lines between employees and contractors

INDEPENDENT CONTRACTOR RELATIONSHIPS

- Individual workers
- Individual workers incorporated as businesses
- Third party staffing agencies
 - Joint employer risk
 - Apportion liability
- Small businesses that look like independent contractors

PERCEIVED BENEFITS OF INDEPENDENT CONTRACTOR RELATIONSHIPS

- Minimum wage/overtime
- Fringe benefits
- Recordkeeping/reporting
- Taxes
- Workers' compensation
- Collective bargaining
- OSHA
- Civil rights laws
- Flexibility

MISCLASSIFICATION ATTACKS (EXAMPLES)

- Taxes (IRS)
- Workers' compensation (state agencies)
- Civil rights (EEOC, private plaintiffs)
- Wage and hour (DOL, private plaintiffs)
- Fringe benefits (government agencies, private plaintiffs)

DIFFERENT TESTS

- Similar factors
 - Control
 - Economic dependence
 - Relationship between the parties (contract)
- Different emphasis
- Inconsistent results

EXAMPLE: Fair Labor Standards Act (FLSA) ECONOMIC REALITIES TEST

Factors:

- Is the work an integral part of the employer's business?
- Does the worker's managerial skill affect his or her opportunity for profit or loss?
- What is the worker's investment?

ECONOMIC REALITIES TEST (Cont'd)

- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the employer permanent or indefinite?
- What is the nature and degree of the employer's control?

“A score of 5-3 decides a baseball game, but this regulation does not work that way.” *Reyes v. Remington* (7th Cir. 2007).

IMPLICATIONS & OPTIONS

Four Key Topics:

- Does your company really need or want ICs?
- If so, what intake processes should your company put in place to increase the likelihood that new ICs will be held to be valid IC relationships?
- If so, what steps should your company take to evaluate and (if necessary) strengthen the validity of ongoing IC relationships?
- If not, how can your company move away from current IC relationships while minimizing the likelihood of litigation?

DOES YOUR COMPANY REALLY NEED OR WANT INDEPENDENT CONTRACTORS?

Understand what you want to accomplish

- Save money
- Avoid obligations and employee headaches
- Avoid peripheral issues so you can focus on your own core business

DOES YOUR COMPANY REALLY NEED OR WANT INDEPENDENT CONTRACTORS?

Understand what you are giving up

- You cannot control how ICs do the work
- You cannot limit ICs from doing the same work for others
- You cannot present ICs as representatives of your company
- You cannot integrate ICs into your operations
- You are not protected from negligence claims by the workers' compensation bar

DOES YOUR COMPANY REALLY NEED OR WANT INDEPENDENT CONTRACTORS?

Understand the risks of misclassification

- FLSA – Unpaid minimum wages and overtime, liquidated damages, and attorneys' fees
- Claims for insurance, leave, retirement, and other benefits
- Unpaid federal and state taxes
- Penalties under new IC misclassification statutes

DOES YOUR COMPANY REALLY NEED OR WANT INDEPENDENT CONTRACTORS?

Balance the benefits and risks thoughtfully!

WHAT INTAKE PROCESSES SHOULD YOUR COMPANY PUT IN PLACE?

- Require that ICs have a valid business license
- Require that ICs engage in business with others
- Check to make sure that ICs have a history of paying federal and state taxes
- Check to see if ICs have employees, so that work can be delegated
- Check to see if ICs have a separate place of business and their own equipment
- Check to see if ICs have separate business accounts

WHAT STEPS SHOULD YOUR COMPANY TAKE TO STRENGTHEN ONGOING IC RELATIONSHIPS?

- Review your IC arrangements and adjust when possible
- Review how ICs are paid – by the project is good and hourly is bad
- Avoid expense reimbursement and employee-like benefits
- Minimize interim control and focus on the end product
- Let the ICs manage their employees

WHAT STEPS SHOULD YOUR COMPANY TAKE TO STRENGTHEN ONGOING IC RELATIONSHIPS?

- Do not let ICs manage your employees
- Avoid at-will arrangements – the contract should be for a set term or by the project
- Consider whether to require mandatory arbitration
- Obtain an end product for a defined amount

HOW CAN YOUR COMPANY MOVE AWAY FROM IC ARRANGEMENTS?

- Evaluate and identify appropriate timing
- Find a viable explanation for change
- Try to change more than just the IC arrangements
- Do not simply convert ICs to employees
- Work on messaging, and communicate clearly and consistently



Global Supply Chain Risk



DEFINING THE PROBLEM

- 24.9 million victims of human trafficking or forced labor (\$150B/year enterprise)
- More modern slaves today than at any point in history
- Many working within supply chains of corporations (16 million)
- Complex, hidden, and deceitful abuses
- Often occur before employment begins
 - Labor recruitment
 - Contract abuse
 - Document confiscation
 - Debt bondage

DEFINING THE PROBLEM (Cont'd)

Biggest Risk Trends:

- Industries that rely on low-skilled or unskilled labor -- dirty, dangerous or difficult jobs, undervalued by society and low paying
- Industries where fierce competition leads to constant downward price pressure
- Industries of a seasonal nature where turnaround time for production is short or where there is an urgency to hire employees

DEFINING THE PROBLEM (Cont'd)

Examples of Industries Most at Risk:

- Agriculture
- Manufacturing
- Extractives (Mining)
- Fish/seafood
- Construction

RISKS TO YOUR CORPORATION

- Regulatory risks
- Litigation
- Supply disruption
- Adverse publicity
- Reputation damage for company and its brands
- Loss of engagement/confidence from:
 - Investors
 - Consumers
 - Employees/candidates



LAWS AND TRENDS

- Existing Legislation:
 - United Kingdom Modern Slavery Act
 - California Transparency in Supply Chains Act
 - France Duty of Vigilance Law

 - U.S. Tariff Act / Trade Facilitation and Trade Enforcement Act
 - FLSA Hot Goods Provision

LAWS AND TRENDS

- Proposed Legislation:
 - Australia
 - Hong Kong
 - Proposed amendments to strengthen UK MSA
 - Netherlands (child labor diligence)
 - Switzerland (constitutional amendment)

GLOBAL SUPPLY CHAIN RISK: WHAT CAN I DO?

- Identify Risk
 - Risk assessment can help to avoid unpleasant surprises
 - Examine processes (internal & external)
 - Supply chain mapping
 - Training of key personnel to recognize and report “red flags”
 - Engage stakeholders throughout supply chain
- Manage Risk

IDENTIFYING SUPPLY CHAIN RISK

▪ Risk Assessment – Factors To Consider

- **Geographic Risk**: Where are my suppliers located? Where are the raw materials sourced? Where are my products manufactured or assembled? How do those locations rank on human rights indexes? Corruption? Poverty? Legal/regulatory framework? Conflict?
- **Industry Risk**: Has my industry or my supplier's industry proven susceptible supply chain risk associated with human-trafficking, forced labor, or human rights violations? Unskilled or temporary labor? Migrant workers? Recruiting practices?
- **Transaction Risk**: What is the volume of business with suppliers located in high-risk regions and/or industries?
- **Third-Party Risk**: How well do you actually know your suppliers? What is your supplier's reputation for business ethics, integrity? Have they been censured, investigated? Any allegations or reports?

IDENTIFYING SUPPLY CHAIN RISK

- Recognize “red flags” associated with human rights issues in the supply chain:
 - Poor reputation for business ethics & integrity
 - Business conducted in countries with a significant reputation of corruption or human rights abuses
 - Refusal to sign agreement with compliance provisions, to sign compliance certification, and/or to complete due diligence questionnaires
 - Lack of transparency regarding labor and employment conditions
 - Reliance on migrant or transient workforce
 - Conditions of employment that may prevent a worker from leaving, especially where workers are recruited by brokers or agents
 - Workplace practices such as passport retention, “runaway insurance” deposits, and placement/recruitment fees from workers
 - Below-market rates within the industry and/or region – a deal too good to be true

MANAGING SUPPLY CHAIN RISK

- Code of Conduct (internal & external)
- Compliance Certificates
- Contract Provisions
- Risk-based due diligence & monitoring
- Grievance reporting
- Response program – remediation



Questions?



Amy L. Groff

Harrisburg

+1.717.231.5876

amy.groff@klgates.com

Maureen O'Dea Brill

Harrisburg

+1.717.231.5832

maureen.odeabrill@klgates.com

Check out the K&L Gates HUB, www.klgateshub.com, for industry-based content, articles and on-demand CLE.

K&L GATES