

Anticipating Labor and Employment Issues for 2019

ACC South Central Texas
Wednesday, September 5, 2018

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Employers & Lawyers, Working Together

San Antonio Paid Sick Leave Ordinance

- Effective date, August 1, 2019 for Employers with more than five employees.
- Austin Paid Leave Ordinance stayed by Appellate Court on August 17, 2018.
- Legislative/Litigation Fix?

San Antonio Paid Sick Leave Ordinance (Cont.)

- Key actions to minimize impact.
 - Comply with notice provisions for handbook and pay stubs.
 - Ensure current PTO/sick leave policies fall into exceptions.
 - Evaluate carry-over provisions.
 - Familiarize/Train on Usage Rules.
 - No additional leave required if purpose is satisfied.

Federal Paid Leave Proposals

- “Workflex in the 21st Century” bill introduced by U.S. Representative Mimi Walters (R-CA).
- Would come under ERISA.
- Combination of guaranteed paid leave and work flexibility options.
- Would create paid leave policy uniformity and pre-empt local and state ordinance and laws.
- Would NOT replace Family and Medical Leave Act (FMLA).

Federal Paid Leave Proposals (Cont.)

■ Economic Security for New Parents Act

- Introduced by Sen. Marco Rubio/Rep. Ann Wagner
- Two months of pay at 300% of monthly anticipated benefit.
- Delay date of Social Security eligibility by 3-6 months.
- Administered by SSA

Private Leave Initiatives

- Microsoft
 - 8/31/2018 Wall Street Journal.
 - Require Vendors/Suppliers to provide 12 weeks of paid family leave to those with substantial assignments with Company.
 - 50+ employees.
 - Capped at \$1,000/wk.
- State of Louisiana – Declining bond bids based upon gun stance.

Epic / #MeToo / Arbitration Intersection

■ Epic Systems:

- Supreme Court decides circuit split regarding NLRB's determination that class action waivers in arbitration agreements violate the NLRA.
- Supreme Court reasons that congressional intent to protect scope of arbitration agreements and enforce within bounds of agreement and enforce as written.
- Clear impetus to use of arbitration agreements.

Epic / #MeToo / Arbitration Intersection (Cont.)

- #MeToo Impact on Arbitration Agreements:
 - Arbitration Agreements prevent transparency related to sex harassment and hostile environment claims.
 - Private party arbitration and mandatory arbitration hinders the transparency necessary to attack systemic hostile environment and sex harassment.

Epic / #MeToo / Arbitration Intersection (Cont.)

- U.S. Sen. Kristen Gillibrand (D-NY) introduced a bill titled “Ending Forced Arbitration of Sexual Harassment Act of 2017.”
- Applies only to cases involving sexual harassment or sex discrimination cases.
- Attorneys General from all 50 states sent a letter urging to bar arbitration in these types of cases.
- Future of arbitration clauses?

Epic / #MeToo / Arbitration Intersection (Cont.)

- If Sen. Gillibrand is successful, why not same rationale applied to include claimants of racial, ethnic, and religious discrimination?
- Private sector: Uber, Microsoft and other major companies are no longer enforcing arbitration clauses in cases involving sexual harassment and sex discrimination.

Epic / #MeToo / Arbitration Intersection (Cont.)

Employer options:

1. Stand with Arbitration Agreement.
2. Agree to not utilize arbitration agreements in some circumstances.
3. Impact on other arbitrable claims and overall enforceability of arbitration agreement.

What Does “Sex” Mean

- Split in circuits regarding whether the term “because of sex” in Title VII includes sexual orientation.
- 2nd and 7th Circuits specifically overturned prior decisions to find that a “because of sex” includes orientation.
- 11th Circuit recently upholds prior determinations that “because of sex” does not include sexual orientation.

What Does “Sex” Mean (Cont.)

- Employee in 11th Circuit case filed Petition for Writ of Certiorari in Supreme Court in May.
- Company in 2nd Circuit case sought review in Supreme Court in May.
- No ruling on Petitions for Writs of Certiorari.

What Does “Sex” Mean (Cont.)

■ Impact on Employers:

- Be prepared to revise handbooks and non-discrimination policies to the extent they do not already include sexual orientation as a protected category.
- Be prepared to conduct training.
- Regardless of Supreme Court decision, be prepared to respond to public comment related to anti-discrimination policies.

#MeToo/Confidentiality Agreements

- As part of #MeToo Movement, backlash against confidentiality/non-disclosure agreements because of impact on transparency.
- Non-Disclosure Agreement = Non-Deductibility
- Newly enacted Section 162(q) to the Internal Revenue Code provides that no deduction shall be allowed for:
 - Any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a non-disclosure agreement, or
 - Attorney's fees related to such settlement or payment.

Non-Disclosure and Non-Disparagement Provisions

- “Ending the Monopoly of Power Over Workplace Harassment Through Education and Reporting Act (EMPOWER)”.
- Introduced on June 5, 2018, by U.S. Senators Kamala Harris (CA-D) and Lisa Murkowski (R-AK)

Non-Disclosure and Non-Disparagement Provisions (Cont.)

- Prohibits non-disclosure (confidentiality) and non-disparagement clauses as a condition of employment.
- Covers workplace harassment, promotion, compensation, benefits or change in employment status or contractual relationship.
- Awards and settlement realized by claimants are not taxable.

Non-Disclosure and Non-Disparagement Provisions (Cont.)

- Prohibits employers tax deductions for expenses, attorneys' fees and settlement funds related to workplace harassment settlements.
- Public companies will have to report in their SEC filings number of settlements, judgments and amounts relating to workplace sexual harassment claims.

Non-Disclosure and Non-Disparagement Provisions (Cont.)

- NOTE: State Senator Jose Menendez (D-San Antonio) will propose during the 2019 Texas legislative session a bill “...that will prohibit nondisclosure or confidentiality agreements that keep employees from reporting harassment, abuse or other crimes.

Non-Disclosure and Non-Disparagement Provisions (Cont.)

- Impact on Employers.
 - Spread beyond harassment issues?
 - Impact settlement decisions?

Third Party Harassment Claims

- Federal and State Anti-Discrimination laws apply to third parties.
 - Provide safe environment to employees
- Increased focus by EEOC on third party harassment claims.
- Prevention

Department of Labor

- White collar regulations.
- Joint Employment regulations.

National Labor Relations Board

- Reappointment of Member Pearce.
- Revisiting *Purple Communications*.
- Joint Employment Review.

Third-Party Litigation Funding

- Increasing Scope and Breath
- Advertising in Texas Bar Journal
- Impact on settlement values and volume of litigation

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QUESTIONS

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