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Briefly

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WHAT'S UP WITH TIME'S UP?

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"[T]he news has been dominated … by stories of unchecked sexual misconduct, much of it workplace related."

Someone is definitely training your employees about what harassment is and how to fight it. Make sure your own organizational message is clear, sincere, and backed up by appropriate action.

The EEOC recently released data for the fiscal year ending September 30, 2017 indicating an overall decrease in charges and a drop in sex discrimination and sex harassment charges as a percentage of overall filings. https://www.eeoc.gov//eeoc/statistics/enforcement/charges.cfm In Tennessee, sexual harassment filings actually increased by a total number of two. Mississippi saw a slight increase as well. In Georgia, the change was slightly more marked. There, 36 additional complaints were filed in the fiscal year which just ended as compared to the previous year.

What happened *after* September 30th, and what will it mean for employers? The Harvey Weinstein story broke on October 5th. Alyssa Milano's tweet reignited Tarana Burke's #MeToo hashtag on October 15th, and the news has been dominated ever since by stories of unchecked sexual misconduct, much of it workplace related.

Launched January 1, 2018 in the days leading up to the Golden Globe awards, the Time's Up initiative, a response to the #MeToo wave, declared war on sexual assault, harassment and inequality in the workplace. Hollywood scandals and arguments aside, it's a big mistake to discount the movement's potential impact. Time's Up dominated social media in early January and its website quickly morphed beyond a banner page, logo and manifesto. Visit the site at https://www.timesupnow.com

LEGAL FUND. 19,000 donors raised $20 million by February, much of it in $20-$100 increments. Several individuals, including Reese Witherspoon, Jennifer Aniston and Meryl Streep, donated $500,000 each. The National Women's Law Center (NWLC) will administer the fund, anticipated to facilitate charges or cases on behalf of low-wage earners or complex litigation. The legal initiative is spearheaded by attorneys Tina Tchen (former Chief of Staff to Michelle Obama) and Roberta Kaplan (whose clients include Edith Windsor, the plaintiff in the Supreme Court case invalidating the Defense of Marriage Act, Airbnb, and the Minnesota Vikings, to name a few), and is aided by top public relations professionals.

NETWORK OF LAWYERS. But that's not all. The NWLC is also the home to the Legal Network for Gender Equity, a national network of more than 300 attorneys who agree to provide at least one free consultation and to consider representing individuals who claim to have experienced sex discrimination. That initiative predated the Time's Up launch, but recent events substantially boosted its profile.

LITIGATION-ORIENTED EMPLOYEE RESOURCES. Consider just one of the "additional trusted resources" linked to the Time's Up page. Betterbrave.com is the brainchild of Tammy Cho, Grace Choi and Annie Shin, successful tech colleagues who just recently reached legal drinking age. Easy to navigate, attractively uncluttered in design, and packed with direct language tailored to specific situations, the site is a virtual instruction manual for individuals who believe they have been harassed, discriminated or retaliated against at work. Cho and her friends developed Betterbrave.com in the wake of Susan Fowler's stinging indictment of Uber and its HR Department's response to her complaints of sexual harassment. Cho makes no apology for the site's emphasis on "lawyering up." "We heard a lot of stories where HR mishandled the case."

LEGISLATIVE EFFORTS. Employers cannot assume that this issue is a "blue state" or "big city" phenomenon. Gretchen Carlson, whose $20 million settlement with 21st Century Fox brought Roger Ailes' tenure to an end, published "Be Fierce" on September 26th, 2017. That bestseller contains a detailed 12 step "how to" guide to stopping harassment, complete with *very specific* tips. She also lobbied for the introduction of the *Ending Forced Arbitration of Sexual Harassment Act of 2017 in December of 2017*, a bipartisan, bicameral bill introduced by Representative Cheri Bustos (D-IL) and Senator Kirsten Gillibrand (D-NY). Senators Lindsey Graham (R-SC), Lisa Murkowski (R-AK), Kamala Harris (D-CA), and U.S. Representatives Walter Jones (R-NC), Elise Stefanik (R-NY),

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and Pramila Jayapal (D-WA) are cosponsors. The bill has not yet made significant headway toward passage, but it bears watching.

COMPLACENCY IS NOT AN OPTION. It's foolish to believe that the most serious forms of misconduct are historic artifacts or confined to the news, entertainment and restaurant industries. The EEOC announced a lawsuit in February against SMX, a light industrial staffing company. It alleges that a supervisor who was reported on multiple occasions called an employee "baby," told her she was "sexy," asked her for oral sex in exchange for overtime, and exposed his genitals ... and that he was not fired.

WHAT TO DO? Focus on what matters. There is no substitute for honest, direct communication. Listen up so your employees will speak up (before and hopefully instead of "lawyering up"). Ironically, some practical lessons may come from some of the farmworkers whose open letter of support to Hollywood insiders sparked the Time's Up launch itself.

The Coalition of Immokallee Farmworkers negotiated agreements with buyers that account for more than 90% of Florida's tomato industry production to protect workers against workplace sexual misconduct. Key features of the Fair Food Program code's implementation include a 24-hour hotline and multi-pronged worker training. Every new worker gets a take home pamphlet on their first day and watches a video before beginning work. After beginning work, each worker receives worker-to worker training in the field. Additionally, an outside firm conducts annual unannounced onsite audits of select sites, surveying at least 50% of workers, crew leaders and supervisors. Many more supervisors who have violated the policies have been disciplined rather than fired, but terminations do happen. Growers understand that continued access to key customers depends on their commitment to enforcement. This program is successful because it includes:

- Multiple training methodologies and consistent messaging, including in-person training with emphasis on shared responsibility for a safe, productive work environment;
- Multiple reporting mechanisms;
- Effective investigatory procedures and remedial actions, with financial incentives tied to key actors' roles; and
- Regular climate/cultural surveys.

PUTTING BEHAVIOR INTO PERSPECTIVE. Not all workplace conduct is the same. "Aristotle distinguished between mistakes and wickedness. So can we," says Kathleen Kelley Reardon, Professor Emerita, University of Southern California Marshall School of Business, who proposes the following *Male to Female Spectrum of Sexual Misconduct at Work* (January 22, 2018 Draft 2) as one tool employers could adapt for their own use:

- Non-offensive (Common remarks on such things as hair style and dress): "You look nice today," "I like your haircut," "Nice outfit," "That's a good color on you," "You look lovely."
- Awkward/Mildly Offensive (Comments involving or implying gender distinctions unfavorable to women): "You would say that as a woman," "I suppose it's a woman's prerogative to change her mind;" "We can't speak frankly around you women anymore."
- Offensive (Gender-insensitive or superior manner): Holding a woman's arm while talking to her; uninvited hugs; patronizing, dismissive or exclusionary behavior; making stereotypical jokes about women, blondes, brunettes, red-heads, etc.; implying or stating that women are distracted by family.
- Highly Offensive (Intentionally denigrating): Joking or implications about a woman's intellect or skills being limited due to her gender; labels like "ice queen" or "female mafia;" comments on physical attributes used to embarrass, insult or demean.
- Evident Sexual Misconduct (Usually crude or physically intrusive): Looking a woman up and down in a sexually suggestive manner; grabbing, unwelcome holding, touching or kissing; ignoring a woman's expressed disinterest in a personal or intimate relationship; crude jokes that demean women; describing women with such terms as "slut" or "frigid."
- Egregious Sexual Misconduct (Typically involves coercion, sexual abuse, or assault): Overt sexual behavior while a woman is present; pressing against a woman suggestively; threatening or implying career damage to a woman who refuses to engage in sex or sexual behavior; forcing or coercing a woman to have sex.

The spectrum framework has multiple potential applications. Trainers can point to specific problematic behaviors shy of outright assault that could lead to discipline. Employer representatives can utilize the framework to keep expectations about potential consequences for policy violations realistic for both the accuser and the accused. It could also help organizations identify where their real vulnerabilities lie. If a large factory's reported pattern of mildly offensive or gender insensitive remarks suddenly spikes into highly insensitive remarks or incidences of crude or physically intrusive behavior, there may still be a narrow window of opportunity to avert the kind of conflict that leads to litigation.

While the spectrum brings questions of severity into focus, what it does not do is bring insight into the *context* and *frequency* of individual behavior. Reardon herself acknowledges that the tool is only a conversation starter, not the last word, on workplace misconduct. Bill's single, intemperate, vulgar outburst at a coworker with whom he has a legitimate source of conflict is a different matter than John's habitual, widely broadcast, sneering references to "little girls" and "their feminine intuition." Those additional factors are critical in distinguishing between mistakes, wickedness, and the sometimes messy ground between.

TENNESSEE WORKERS' COMPENSATION UPDATE

Fredrick R. Baker

"Since their creation in 2014, the Court of Workers' Compensation Claims and the Workers' Compensation Appeals Board have been busy."

The Tennessee Workers' Compensation Law underwent sweeping changes in 2014, including a new formula for permanent disability, a new administrative court system, and a new causation standard. Since then, the Tennessee legislature, the Tennessee Bureau of Workers' Compensation, and the new administrative court system have been busy fleshing out the new system. Indeed, 2017 brought several critical changes to the Tennessee Workers' Compensation Law.

I. 2017 LEGISLATIVE CHANGES BY TENNESSEE GENERAL ASSEMBLY

We will begin our review of the 2017 revisions by focusing on the actions of the Tennessee General Assembly.

With regard to medical panels, the basic rule is that employers must provide to the injured worker a panel of three or more independent physicians, surgeons, chiropractors, or specialty practice groups, if available in the employee's community, from which the employee may choose the authorized treating physician. The 2017 changes impact situations in which there are not three or more independent physicians, surgeons, chiropractors or specialty practice groups available in the employee's community. In such circumstances, medical panels must now contain three or more independent providers or specialty practice groups not associated in practice together within a 125 mile radius of the employee's community. In this context, the phrase "not associated in practice together" means that at least one provider or specialty practice group is not associated in practice with another provider or specialty practice that is on the panel. Essentially, where there are not three or more options in the local community, and an employer is expanding beyond the usual range of the community, only two of the providers can be associated in practice. At least one of the options on the panel must be independent of the other two. This will be particularly important for employers located in rural areas where the choices for medical providers is limited. This change was effective May 18, 2017.

Another important legislative change is the creation of a vocational rehabilitation program within the Tennessee Bureau of Workers' Compensation. Specifically, the "Second Injury Fund" has been renamed the "Subsequent Injury and Vocational Recovery Fund." The Fund now has a new responsibility to determine the appropriateness of applications for vocational recovery assistance and to pay out such benefits. Vocational recovery assistance may include vocational assessments, employment training, job analysis, vocational testing, GED classes and testing, and education through a public Tennessee community college, university, or college of applied technology, including books and materials. Assistance is capped at $5,000.00 per employee per fiscal year and must not exceed the total sum of $20,000.00 per employee who participates in this program for all years. The total aggregate amount to be paid from the Subsequent Injury and Vocational Recovery Fund is limited to a total of $500,000.00 in any calendar year. This new vocational recovery assistance is applicable only to injuries occurring on or after July 1, 2018, and a sunset provision prohibits it from applying to injuries on or after June 30, 2021.

The Tennessee legislature also made a small but important change for death benefits. Under prior law, recoverable burial expenses were capped at $7,500.00. Under the new law, the cap has now been increased to $10,000.00 – an adjustment to reflect the ever-increasing costs for funerals. This change was effective May 18, 2017.

The recent legislative changes further alter the utilization review system. Employers are now restricted from sending certain medical recommendations to utilization review in the early days of a workers' compensation claim. For instance, utilization review may not be used for diagnostic procedures ordered in accordance with the Medical Treatment Guidelines by the authorized treating physician within the first 30 days after the date of injury. Likewise, utilization review may not be used for diagnostic studies recommended by the treating physician when the initial treatment regimen is nonsurgical, no diagnostic testing has been completed, and the employee has not returned to work. The clear intent of these two provisions is to prevent medical treatment at the outset of the claim from being hindered by what the legislature views as unnecessary disputes over medical necessity. This change was effective May 18, 2017.

II. NEW REGULATIONS ENACTED BY TENNESSEE BUREAU OF WORKERS' COMPENSATION

In 2017, the Bureau of Workers' Compensation was quite active updating several sets of workers' compensation regulations.

For instance, the regulations governing utilization review were amended in January 2017. For the most part, the time requirements of a utilization review have remained unchanged. An employer shall submit a case for utilization review within three business days of the notification of recommended treatment. Once sent, the utilization review

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organization must render a determination about medical necessity within seven business days of receipt. However, a regulatory change for 2017 provides that a utilization review decision to deny a recommended treatment shall remain effective only for a period of six months from the date of the decision without further action by the employer. Thus, any requests that come from the treating physician with regard to the same type of treatment remain prohibited under that initial utilization review denial for a period of six months. However, there can be circumstances in which the treating physician documents some material change that supports a new review or other pertinent information that was not used by the utilization review organization in making its initial determination. The new regulations also clarify that treatment recommendations shall not be denied if they follow the Bureau's adopted Medical Treatment Guidelines.

Another important set of regulatory changes from June 2017 involved the implementation of new procedures for penalty assessments and contested hearings. The new regulations clarify that a Bureau employee may accept information concerning possible non-compliance or a possible rule violation from another Bureau employee, from within the Bureau, from within the Department of Labor, from other governmental agencies, through an investigation or inspection, from governmental records, or from any lawful source. Unsurprisingly, this represents a great expansion of the possible sources where a penalty referral can originate. The new regulations also outline a comprehensive and detailed procedure for the initiation, investigation, hearing, and appeal of penalty assessments. While an in-depth discussion of these new procedures is not appropriate for this article, a definite conclusion may be drawn from the fact that the Bureau has invested so much time and energy in building this procedural structure – namely, that employers and carriers should brace up for the ramped up assessment of penalties in 2018 and beyond.

III. NEW CASES FROM THE ADMINISTRATIVE COURT SYSTEM

Our third source of updates for the Tennessee Workers' Compensation Law is the administrative court system. Since their creation in 2014, the Court of Workers' Compensation Claims and the Workers' Compensation Appeals Board have been busy.

One place where the courts have been focusing their attention is penalties. For instance, in *Berdnik v. Fairfield Glade Community Club*, the Workers' Compensation Appeals Board referred the employer to the Penalty Program for determination of whether a penalty was appropriate for the failure to provide a medical panel. Likewise, in *Johnson v. Stanley Convergent Security Systems*, a single Appeals Board judge in a concurring opinion referred the employer to the Penalty Program for investigation of Employer's actions in failing to provide Employee a panel of physicians. Interestingly, in both cases, the employers were referred to the Penalty Program despite prevailing on the issue of whether substantive workers' compensation benefits were owed. Again, this sends a clear message to employers that in 2018 the Bureau may heighten its enforcement efforts for the many potential penalties that exist under the Tennessee Workers' Compensation Law.

The Appeals Board also addressed an interesting application of the Recreational Activity defense. In *Pope v. Nebco of Cleveland Inc*., a car salesman injured his knee participating in a "mud run," which was a recreational charity event sponsored in part by his employer, a car dealership. The employee argued that his participation was "impliedly required" by the employer, due to pressure from a co-worker and general manager. The Appeals Board rejected this argument, reasoning that although the employee may have felt peer pressure to participate, such pressure does not by itself amount to an express or implied requirement to participate. The employee also argued that participation in the event was during working hours and part of his work duties. The Appeals Board also disagreed with this argument. While the mud run did occur during normal working hours, the employee was not paid for his time away from the dealership, he was not required to sell any cars while there, and he was not required to wear any clothing to identify him as an employee of the dealership. Based on these facts, the injury was found to be not compensable.

IV. CONCLUSION

While 2017 did not bring any radical changes for Tennessee Workers' Compensation Law, we did see several important additions and clarifications to the sweeping 2014 changes that are still in the process of unfolding. Stay tuned for more changes in 2018 as the system continues to evolve.

NOTICE OF DEADLINE FOR NEW IRS WITHHOLDING TABLES

Employers have until February 15, 2018, to begin using the new 2018 Withholding Tables, which reflect changes made by the tax reform legislation enacted in December. The IRS released the new tables on Jan. 11, 2018, per Notice 1036, which can be viewed at https://www.irs.gov/pub/irs-pdf/n1036.pdf. Employers should continue using the 2017 Withholding Tables until implementing the 2018 tables. For more information, please see the IRS' ***Guidance on Withholding Rules*** (Notice 2018-14), found at https://www.irs.gov/pub/irs-drop/n-18-14.pdf, and ***Employer's Tax Guide For Use in 2018*** (Publication 15), at https://www.irs.gov/pub/irs-pdf/p15.pdf.