

# The Nordic Sessions: Avoiding Employment Law Landmines



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# American Employment Litigation Is Hot



Gone For LUNCH



got meal breaks?



# Overlapping American Employment Laws

- There are typically multiple sources of employment law at play even for the same employee.
  - Federal law (e.g., Title VII, the Fair Labor Standards Act)
  - State law (e.g., California Fair Employment and Housing Act; New York State Human Rights Law)
  - Municipal laws (e.g., sick leave laws; higher local minimum wage laws)
  - Decisional law interpreting the above
- Employees can join together in class, collective, and representative actions.

# 1. Underestimate #MeToo

# People Accused in Media Coverage

## Government and politics: 96

State and local government: 63



Federal government: 21



U.S. politics: 6



Judicial: 3



International government: 3



## Entertainment: 96



## Arts and music: 58

Popular music: 18



Classical music: 11



Photography: 11



Arts: 8



Theater: 4



Ballet: 6



# People Accused in Media Coverage

**Other industries: 179**

Media: 48



Education and research: 26



Finance: 25



Consumer goods: 23



Other: 15



Sports: 14



Technology: 7



Medical: 6



Philanthropy: 6



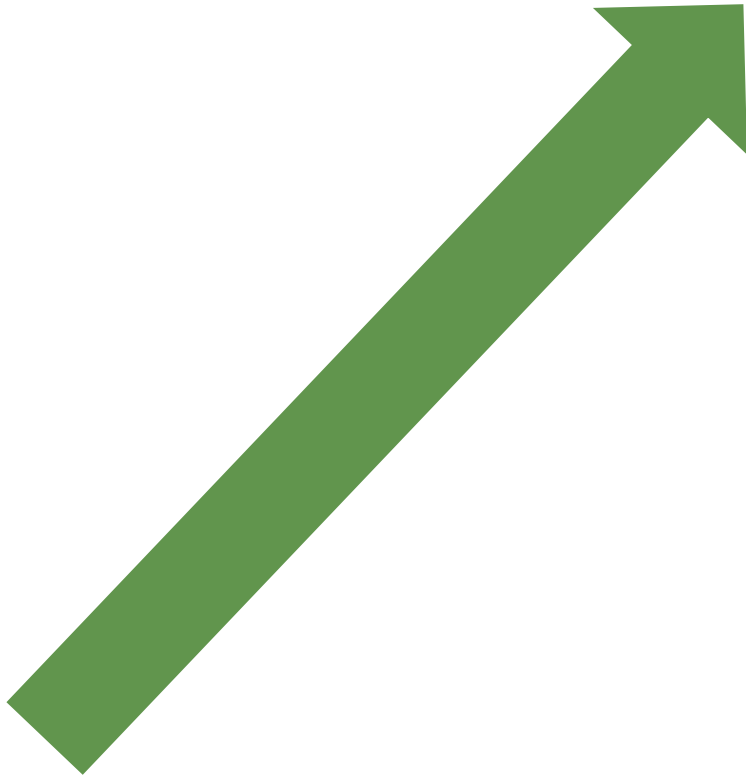
Publishing: 6



Policy: 3



# #MeToo Impact on EEOC Enforcement In FY 2018



- **50%** increase in lawsuits challenging sexual harassment filed by EEOC
- **12%** increase in charges alleging sexual harassment filed with the EEOC
- **1200** charges resulted in reasonable cause findings
- **\$70 million** recovered for victims of sexual assault



# The Consequences Are Real

- *Zetwick v. County of Yolo* (Cal. 2017)
  - \$98,000 settlement for “unwanted hugging and kissing”
- *Toussaint v. Brigham & Women’s Hospital* (Mass. 2018)
  - \$25,000,000 verdict for retaliation in favor of female registered nurse
- *Taylor v. David* (Cal. 2019)
  - \$11,000,000 verdict in favor of sales executive for internet-based television provider
- *Meadowcroft v. Keyways Vineyard and Winery* (Cal. 2019)
  - \$11,000,000 verdict in favor of winery employees
- *Knox v. PPG Industries, Inc.* (Penn. 2018)
  - \$4,000,000 verdict in favor of research and development scientist



# Harassment Avoidance Training



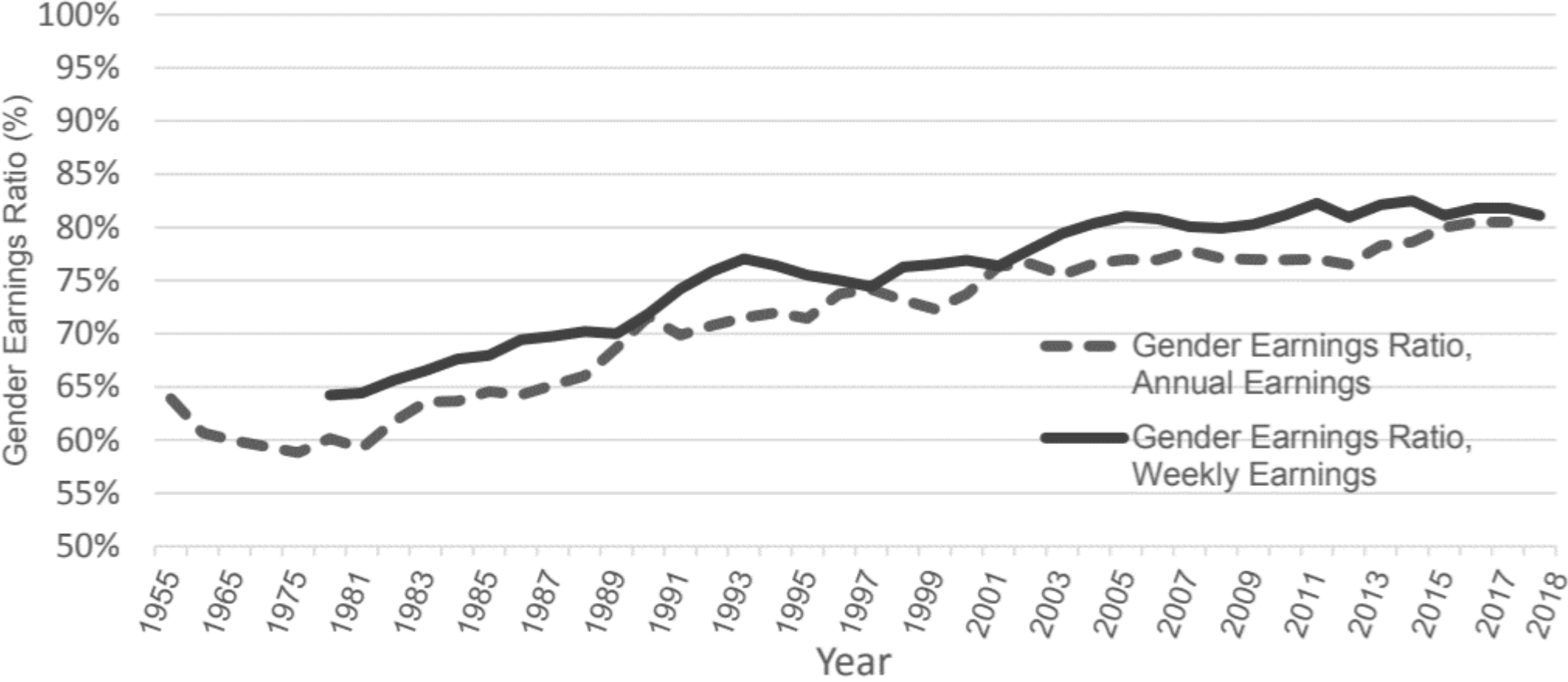
*“I came of age in the ‘60s and ‘70s, when all the rules about behavior and workplaces were different. That was the culture then. I have since learned it’s not an excuse, in the office – or out of it. To anyone.”*

– Harvey Weinstein

- Training is not required by federal law, but the U.S. Supreme Court has stated that for a company to reduce liability for harassment claims it must train employees and supervisors, require employees to report incidents of harassment, thoroughly investigate all reports, and take corrective action when necessary.
- Training is required in California, Connecticut, Maine and New York.
- Other states strongly recommend training.

## 2. Ignore Pay Equity

# Gender Earnings Ratio is Stagnant



# Federal Equal Pay Act

- Employers must not pay unequal wages to men and women who perform jobs that require:
  1. Substantially equal skill, effort and responsibility, and that are
  2. Performed under similar working conditions,
  3. Within the same establishment.
- There are four exceptions:
  1. Seniority system
  2. Merit system
  3. System that measures earnings by quantity or quality
  4. Differential based on any other factor other than sex

# Equal Pay Act – Important Things To Know

- Job duties and content, not job titles, determines whether jobs are substantially equal
- Possession of a skill not needed to meet the requirements of the job should not be considered
- Equal wages must be paid in the same form
- Cannot use prior salary to justify pay disparity under the Equal Pay Act
  - *Rizo v. Yovino*, No. 16-15372 (9th Cir. Apr. 9, 2018) (en banc) (vacated) – Math consultant sued Fresno County because it had a policy to take prior salary into consideration as a “factor other than sex” when determining what to pay employees

# California Fair Pay Act

- Further expanded California Fair Pay Act by prohibiting pay discrimination based on race, ethnicity, or salary history (as opposed to just gender)
- Replacement of the “equal work” standard with the “substantially similar” standard
- Deletion of the “same establishment” requirement
- Tightening of the “bona fide” factor standard for affirmative defense
- Three year record keeping
- Must provide applicants with a pay scale upon “reasonable request”

# California's Salary History Ban

- Cannot seek applicant's salary history information personally or through an agent before a job offer has been made
  - This includes information about the value of an applicant's benefits, such as equity, health insurance, or other monetary benefits
- What if the applicant voluntarily discloses his/her salary history information before the job has been offered?



# New York Achieve Pay Equity Law

- Equal work and similar working conditions
- Comparators must be in the same geographic region, no larger than the same county
- Burden on the employer to prove the reasons for any pay differences
- Employer must explain entire wage differential

# New Jersey's Diana B. Allen Equal Pay Act

- Effective July 1, 2018
- Additional protected characteristics include race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, and disability.
- “substantially similar” standard

# Massachusetts Equal Pay Act

- Took effect July 1, 2018
- Redefines “comparable work”
- “Self-evaluation” defense
- New affirmative defenses for employers
- Restricts employers’ ability to require an employee to refrain from discussing pay and from requiring wage information

# Maryland Equal Pay for Equal Work Act

- Adds gender identity to protected class
- Work of “comparable character” instead of equal
- Applies to all workplaces in the same county
- Limits “other than sex” affirmative defense to bona fide factors
- Anti-retaliation against employees for wage inquiries
- Equal Pay Commission Establishment Act also signed – creates Equal Pay Commission in Maryland

# Steps for Companies to Consider

- Designate individuals who will be responsible for monitoring pay practices and reviewing compliance with federal, state and local law
- Make sure that job descriptions contain specific details that reflect legitimate reasons for any pay differential
- Analyze personnel decisions that influence compensation
- Define compensable factors
- Group jobs into grades or bands
- Evaluate all forms of compensation (starting salary, benefits, bonuses, shift differentials, separation pay, overtime)
- Make sure you have justification not based on sex to support any differential.

# Steps for Companies to Consider

- Document bases for pay determinations
- Provide timely and effective performance evaluations
- Maintain information on prior “unit” performance reflected in raise pools. The size of raise pools can explain differences in pay.
- Review and update training for recruiters, compensation committees and employees making compensation decisions
- Ensure applications in certain states do not require prior wages or salary history
- Ensure no prohibition on discussion of wages in company documents
- Consider whether to conduct a pay equity study (within the confines of privilege)

# 3. Classify All Employees as Exempt



# Misclassification

- “It is easier to pay everyone a salary, rather than dealing with meal and rest breaks, overtime, time records and such.” – CEO #1
- “My employees like the fact that they always make the same amount of money each pay period, and it won’t be a problem.” – CEO #2
- **Reality check:**
  - With few exceptions, to be exempt an employee must:
    - (a) be paid at least \$23,600 per year or \$455 per week (for now), and
    - (b) be paid on a salary basis, and also
    - (c) perform exempt job duties.
  - These requirements are outlined in the FLSA Regulations. Most employees must meet all three "tests" to be exempt.

# Salary Level Test/Salary Basis Test

- Salary Level Test
  - Employees who are paid less than \$23,600 per year (\$455 per week) are nonexempt.
  - DOL proposed rule would increase the minimum to \$35,308 annually (\$679 per week).
- Salary Basis Test
  - Guaranteed minimum amount of money employee can count on receiving for any work week s/he performs any work.
  - Salary basis is not affected by whether pay is expressed in hourly or salaried terms

# The Duties Tests

- FLSA exemptions are limited to employees who perform relatively high-level work.
  - Job titles or position descriptions are of limited usefulness in the determination.
  - Actual job tasks must be evaluated along with how the particular job tasks “fit” into the employer’s overall operations.
- Three typical categories of exempt job duties:
  - Executive
  - Professional
  - Administrative

# The Executive Exemption

- Job duties are exempt executive job duties if the employee
  - Regularly supervises two or more other employees, and also
  - Has management as the primary duty of the position, and also,
  - Has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

# The Professional Exemption

- “Learned Professionals”
  - Predominantly intellectual work that requires specialized education and involves the exercise of discretion and judgment
    - Must have education beyond high school, and usually beyond college, in fields that are distinguished from (more "academic" than) the mechanical arts or skilled trades
- “Creative Professionals”
  - Work requires invention, imagination, originality or talent; who contribute a unique interpretation or analysis

# The Administrative Exemption

- Administrative job duties:
  - Office or nonmanual work which is
  - directly related to management or general business operations of the employer or the employer's customers, and
  - a primary component of which involves the exercise of independent judgment and discretion about matters of significance
- Employees whose main job is to "keep the business running"
- Typically involves the exercise of discretion and judgment, with the authority to make independent decisions on matters which affect the business as a whole or a significant part of it

# Other Exemptions

- Computer Professional
- Outside Sales
- Commissioned Inside Sales Employee



# 4. Make Everyone an Independent Contractor

# The ABC Test

- Many states use the ABC test to determine whether a worker is an employee or an independent contractor
- Presumed to be an employee unless the hiring entity establishes:
  - A. Worker free from control and direction
  - B. Work is outside the usual course of hiring entity's business
  - C. Worker customarily engaged in independently established business
- California, Connecticut, Massachusetts, New Jersey, and other states use the ABC test or some variation

# Consequences of Misclassification

- Liability for employment taxes and penalties
- Liability to employee who was misclassified
- Administrative agencies and the IRS closely scrutinize independent contractor relationships
- Challenges can arise in many forms, including:
  - Filings for unemployment benefits
  - Claims for unpaid wages
  - Claims for workers' compensation
  - Charges of employment discrimination
  - Investigations by the IRS and Employment Development Department (EDD) to audit wage payments, workers' compensation coverage and Unemployment Insurance Fund contributions

# 5. Let Employees Take Unpaid Sick Leave

# Paid Sick Leave - State and Local Trends

- 11 states and D.C. require paid sick leave
  - Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont, and Washington.
- Cities have their own requirements:
  - Los Angeles, San Francisco, Seattle, New York City, San Diego, Oakland, Tacoma, Philadelphia, Santa Monica, Minneapolis, Chicago, Austin, San Antonio, Duluth, Dallas, and others.
- State and municipal laws are often inconsistent.
- Employers should perform multijurisdictional audits to ensure compliance.

# 6. Automatically Terminate Employees on or After Protected Leave

# Bright Line Rules Lead to Trouble

- **Examples of When Employees Can't Be Fired:**
  - On FMLA leave (whether they can do the essential functions of their job or not), OR
  - They are able to do the essential functions of the job with reasonable accommodations, but the employer hasn't provided accommodations (whether the employee is on FMLA leave or not).
- **Examples of When Employees *May* Be Legally Fired:**
  - They stop communicating after taking their 12 annual weeks of FMLA.
  - They didn't declare they were taking FMLA leave and they violated their sick leave policy or used up their sick time.
  - They are not able to do the essential functions of the job, even with reasonable accommodations.
  - They are able to do the essential functions of the job with accommodations, but they don't return to work after the employer has provided the appropriate accommodations.



# 7. Require California Employees to Sign Noncompete Agreements

# Noncompete Agreements

- California prohibits all noncompete agreements except in very limited circumstances.
- California permits some types of nonsolicitation agreements – for now.
- Employees may not use a former employer's trade secrets to compete against the former employer.
- Other states have similar prohibitions.

# Proactive Steps to Reduce Risks



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# Proactive Steps to Reduce Risks

- Regularly provide management and supervisory trainings on employment laws and harassment/discrimination avoidance
- Review your handbooks to make sure you are in compliance with the law
- Audit the exempt classifications of your workforce periodically to ensure that employees are properly classified
- Determine whether a worker is an employee or independent contractor using the "ABC" test
- Audit payroll practices periodically to ensure that you are tracking time and paying correctly
- Ensure that record-keeping policies are intact so that you maintain the appropriate documents, either on paper or electronically, to substantiate classification and payroll practices
- Make sure the required posters and notices are prominently placed and/or distributed
- Consult employment counsel before making wide-scale changes to any overtime classification, payroll practice, or employment policy

# Avoiding Employment Landmines in M&A Transactions



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# Employment Issues in M&A Transactions

- Deal structure
  - Asset deal
  - Stock deal / merger
- Due diligence
  - Get educated about the target company's employment base
  - Identify areas of potential risk
  - Identify hurdles for integration – combining different workforces/cultures, retention
  - Understand the additional complexity of US benefits plans
- Consideration in transaction documents
  - Promises regarding continuation of employment
  - Allocation of liability – breach of warranties, pre-closing liabilities, “transaction expenses”

**THANK YOU!**

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