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Poison Pill: Dealing with a Problem Employee

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Employers' Most Unwanted List

1. The Harasser/Discriminator
2. The Clock Watcher
3. The Social Butterfly
4. The Bully
5. The Unwelcome Organizer
6. The Marijuana User ☺



1. The Harasser/Discriminator

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Public Enemy #1 – The Harasser

- Harassment and Discrimination are prohibited under:
 - Federal Law
 - State Law
 - Most Employers' Policies



The Law: What Is Unlawful Harassment/Discrimination?

- “**Unwelcome** or **unwanted** conduct related to a **protected characteristic** or of a **sexual nature.**”



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Types of Sexual Harassment

- Quid Pro Quo
- Hostile Work Environment



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Quid Pro Quo

- Requests for sexual favors are linked to a grant or denial of tangible job benefits:
 - Promotion
 - Favorable performance review
- Usually involves an express or implied threat that if the employee refuses the sexual advance, a tangible employment action will occur.

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Hostile Work Environment

- Tangible employment action not required
- Conduct creates a hostile or offensive working environment
- Conduct can be:
 - Visual
 - Physical
 - Verbal



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Impact of #MeToo

- Number of harassment charges filed with EEOC increased for first time in **10 years**
- Cause findings of harassment up nearly **25%** from year prior
- EEOC filed **50% more** sexual harassment lawsuits than year prior
- EEOC recovered **1.5 times more** in damages than year prior for harassment victims



Increase in Awareness & Claims



Other Claims

- Increased credibility of retaliation claims
- Shareholder derivative suits for boards' failure to address harassment
- More due diligence and specific representations in mergers/acquisitions

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Unintended Impacts

- 50% of male managers uncomfortable participating in “common” work related activities with female coworkers
- 1 in 6 male managers now hesitate to mentor a woman.
- 30% male managers uncomfortable working alone with woman.
- Senior male managers:
 - 3.5 times more hesitant to have work dinner with junior female coworker than junior male coworker
 - 5 times more hesitant to travel with junior female coworker

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All Reports Must Be Investigated

- Immediate, thorough, and objective investigation
- Identities kept confidential to the extent possible
- If improper conduct has occurred, effective remedial action taken:
 - Harasser disciplined (up to and including termination)
 - Steps taken to prevent further harassment
- Results of investigation communicated to complainant and others as appropriate

Employer Policies

- Implementing No-Harassment Policies
- Updating Existing Harassment Policies



Employer Policies, cont'd

Essential Elements:

- Protect all employees
- Cover conduct outside the workplace (e.g. social media, conferences, client meetings, work outings)
- Encourage reporting:
 1. Bystander intervention
 2. Several avenues
 3. No mandatory “tiered” reporting structures
- Cover customers, vendors, and third parties
- Communicate clearly and often

Then, TRAIN!

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Mentoring Relationships

Responding to Concerns:

- Increase opportunities for dialogue and communications
- Search for other opportunities or times for interactions that increase professional networking (e.g. breakfast, lunches, coffee)
- Expand relationship to include additional women (e.g. a mentoring circle)
- Some structure in mentor/mentee relationship is fine, such as setting a regular schedule/time to meet, but should be defined by the parties



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2. The Clock Watcher

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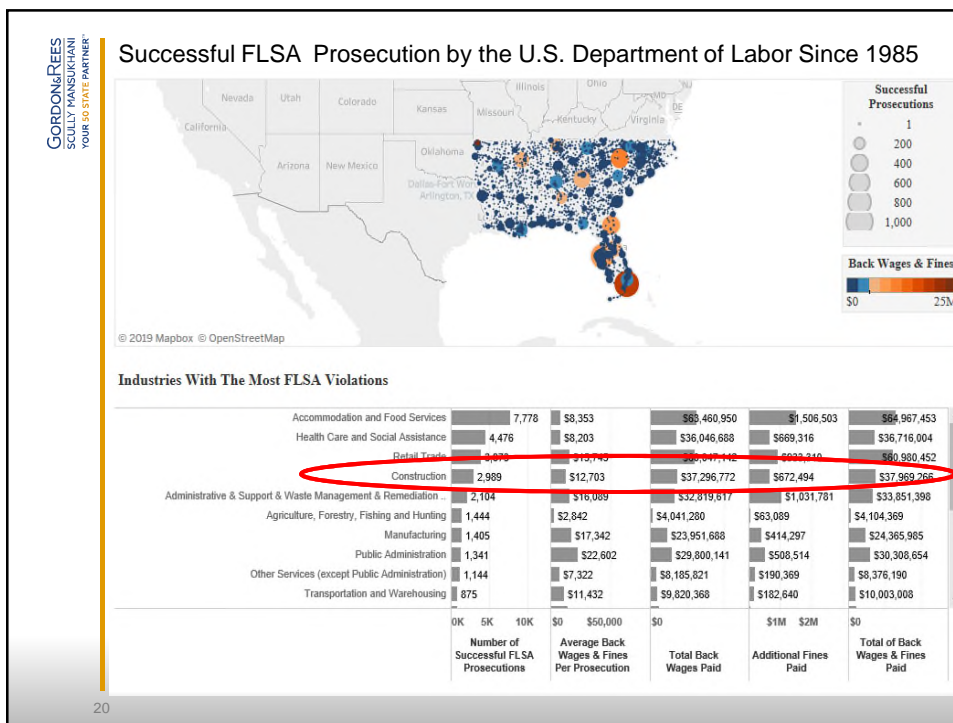
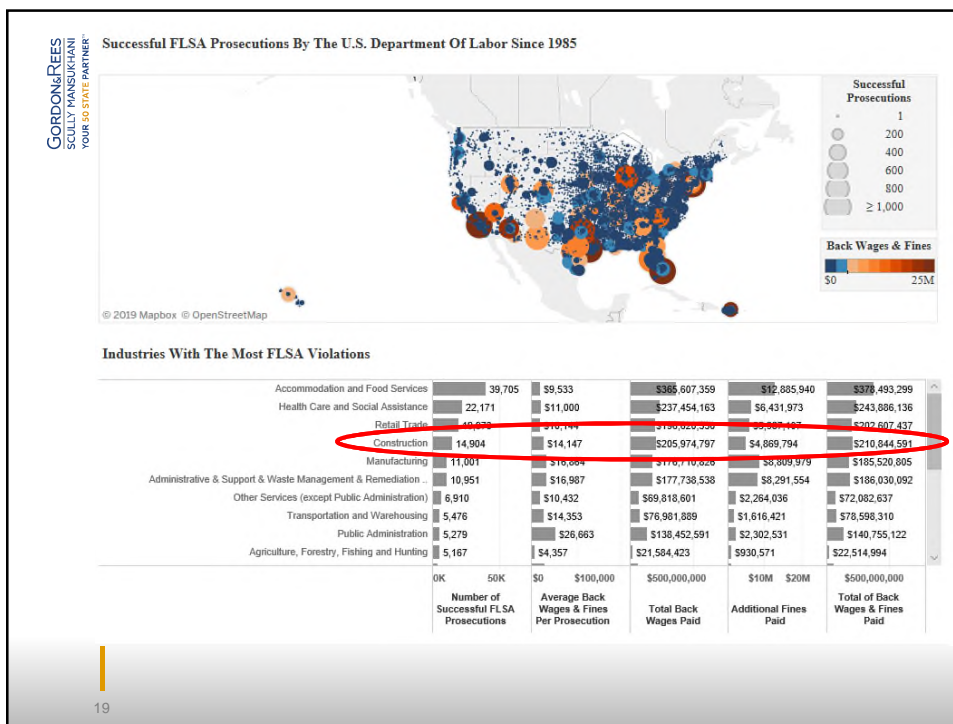
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The Clock Watcher

- Over 50% of all employment claims have a wage and hour component
- 20% of employers reported an increase in wage and hour multi-plaintiff litigation
- 40% of employers reported that the greatest increase in multi-plaintiff litigation was in wage and hour actions
- 43% of employers reported that wage and hour claims were the employers' largest monetary exposure
- In 2017, employers were hit with 8,261 FLSA lawsuits — This is up by more than 417 percent since 1997










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Misclassification of Employees

- Employees classified as exempt from overtime pay bring these claims based on theory that they are misclassified – i.e., they perform duties that do not meet the criteria for exemption
- What is “work”?
 - Working through lunch?
 - Starting up/shutting down a computer?
 - Use of PDAs?
 - “On-call” time?
 - Donning and doffing?
 - Going through mandatory bag check protocols?

EMPLOYEE vs. Independent Contractor	
Paid hourly or by salary 	Paid upon completion of project 
Uses employer's materials, tools and equipment 	Provides own materials
Typically works for one employer 	Works for multiple clients
Continuing relationship (at will or a defined term) 	Temporary relationship (until project complete)
Employer decides manner and means of performing 	Contractor decides manner and means of performing
Employer determines work performed 	Contractor and client agree to project scope

JOINT EMPLOYER LIABILITY

- Under the FLSA, all “joint employers” are responsible, both individually and jointly, for compliance with the rules and regulations.
- “Indirect control” over the terms and conditions of employment = joint employer
- The definition of “joint employers” is very broad under the FLSA.

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Many employees may be misclassified!

New rule affords opportunity to reclassify and correct any issues.

Risks of misclassification –

- 2 years of wages under FLSA-overtime, payroll, FICA, unemployment insurance and worker’s compensation premiums
- Treble Damage
- Attorney Fees
- Individual liability for decision-makers

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EPLI Implications

- Wage & Hour Claims Excluded under most EPLI policies
- Wage and Hour insurance typically covers defense cost only
 - must ask for endorsement
- Read your policy and watch out for:
 - Allocation provisions
 - Class action v. individual claims
 - Definitions in policy: Ex: “Insured” and “claim”
 - Intentional act exclusions
- Wage & Hour coverage – indemnity AND defense
 - Generally larger insureds
 - Blended or stand alone
 - Notably higher limits and retentions
- Director & Officers Individual Liability-

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3. The Social Butterfly

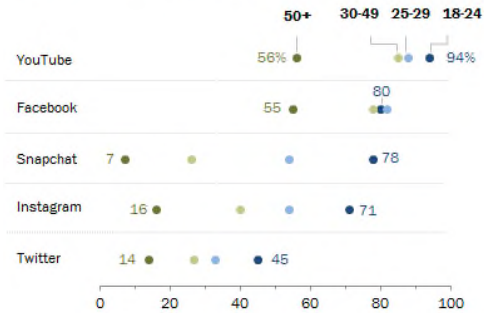
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Social Media by the Numbers

- 2,375 billion Facebook users
- 330 million Twitter users
- 1.9 billion YouTube users
- 1.6 billion WhatsApp users

Social platforms like Snapchat and Instagram are especially popular among those ages 18 to 24

% of U.S. adults in each age group who say they use ...



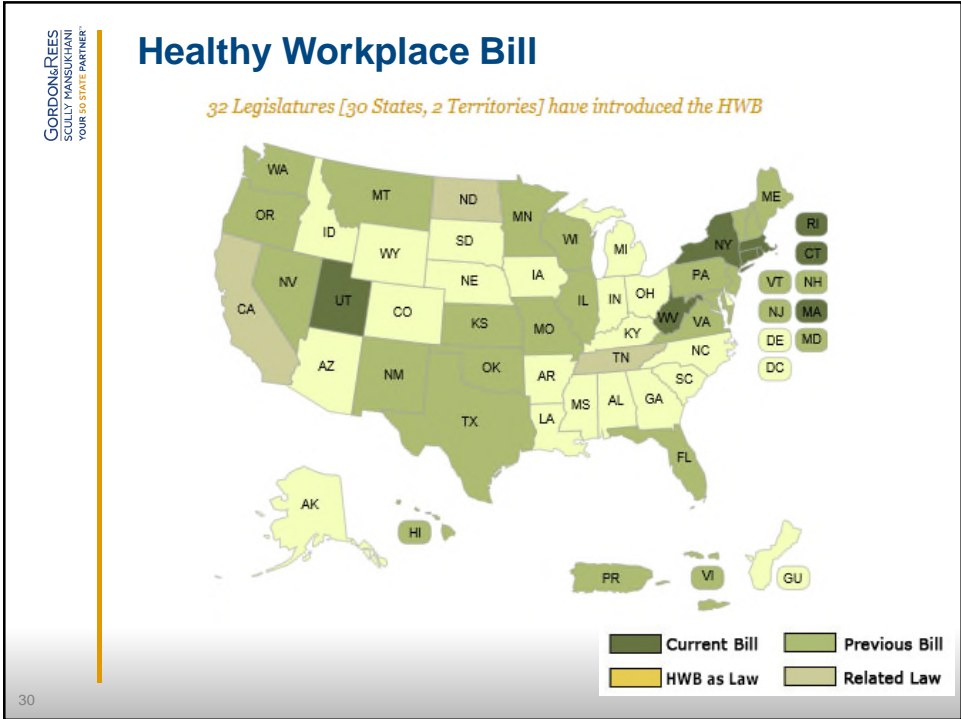
Source: Survey conducted Jan. 3-10, 2018.
"Social Media Use in 2018"

PEW RESEARCH CENTER

Social Media's Impact on Your Business

- Discovery of personal information
- Employee online conduct = Company liability
- Data breaches
- Background checks
- Internet usage policies
- Workplace harassment
- Disclosure of trade secrets and proprietary information
- Wage & Hour claims
- EPLI coverage
- NLRB's impacts:
 - Social media policies should be narrowly tailored

3. The Bully



Best Practices for Employers

- Don't ignore bullying
- Have a workplace policy with a reporting system
- Encourage your employees to treat each other in a respectful and professional manner
- Educate everyone about what is considered bullying and where they can go for help
- Treat all bullying complaints seriously by conducting a thorough investigation

4. The Unwelcome Organizer

Non-Solicitation Policies

- Limitation by employment status
- Limitation by type of solicitation
- Limitation by working hours
- Limitation by site of work

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Email Policies

- Employers may deny company email access to employees for all purposes
- Employer who grants access to the company email system cannot prohibit employees from using the email system to communicate with other employees about workplace issues during non-working time
- Under “special circumstances”, only an employer may justify non-work time email use in order to maintain production or discipline (rare)
- Employer may review employee emails on its system for “legitimate business reasons” only

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TIPS

- **T**hreaten
 - Reduction of employee benefits
 - Termination
- **I**nterrogate
 - Signing a union card
 - Supporting organizing activity
 - How they intend to vote
 - What they think about union representation
- **P**romise
 - Wage or benefit increases
 - Promotions
- **S**py
 - Applies to working and non-working hours and on and off work premises

Election Timeline

- Day 1 – Petition Filed
- Day 8 – Statement of Position Due
 - Within 7 days of the NLRB serving the Notice of Hearing to the employer
- Day 9 – Hearing Normally Held
 - 8 Days from Service of Notice of Hearing
- Decision and Direction Issued and Notices of Election Served



AUTHORIZATION FOR REPRESENTATION

I hereby authorize Teamsters Union Local No. 315, I.B.T., under the National Labor Relation Act, I, to be my exclusive collective bargaining representative in negotiations for better wages and working conditions.

Name _____ Date Hired _____
 Address _____ Phone _____ Telephone _____
 City _____ State _____ Zip _____

Name of Company _____
 Kind of Work _____ Dept. _____ Salary _____
 Date _____ Your Signature _____

This card is strictly confidential. Please remove tape and seal.

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