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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





1. The Harasser/Discriminator

The Law: What Is Unlawful Harassment/Discrimination?

- Harassment is unwelcome conduct that is based on a protected characteristic..
- Harassment becomes unlawful when:
 - 1) enduring the offensive conduct becomes a condition of continued employment, or
 - 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- ***Anti-discrimination laws also prohibit harassment against individuals **in retaliation** for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

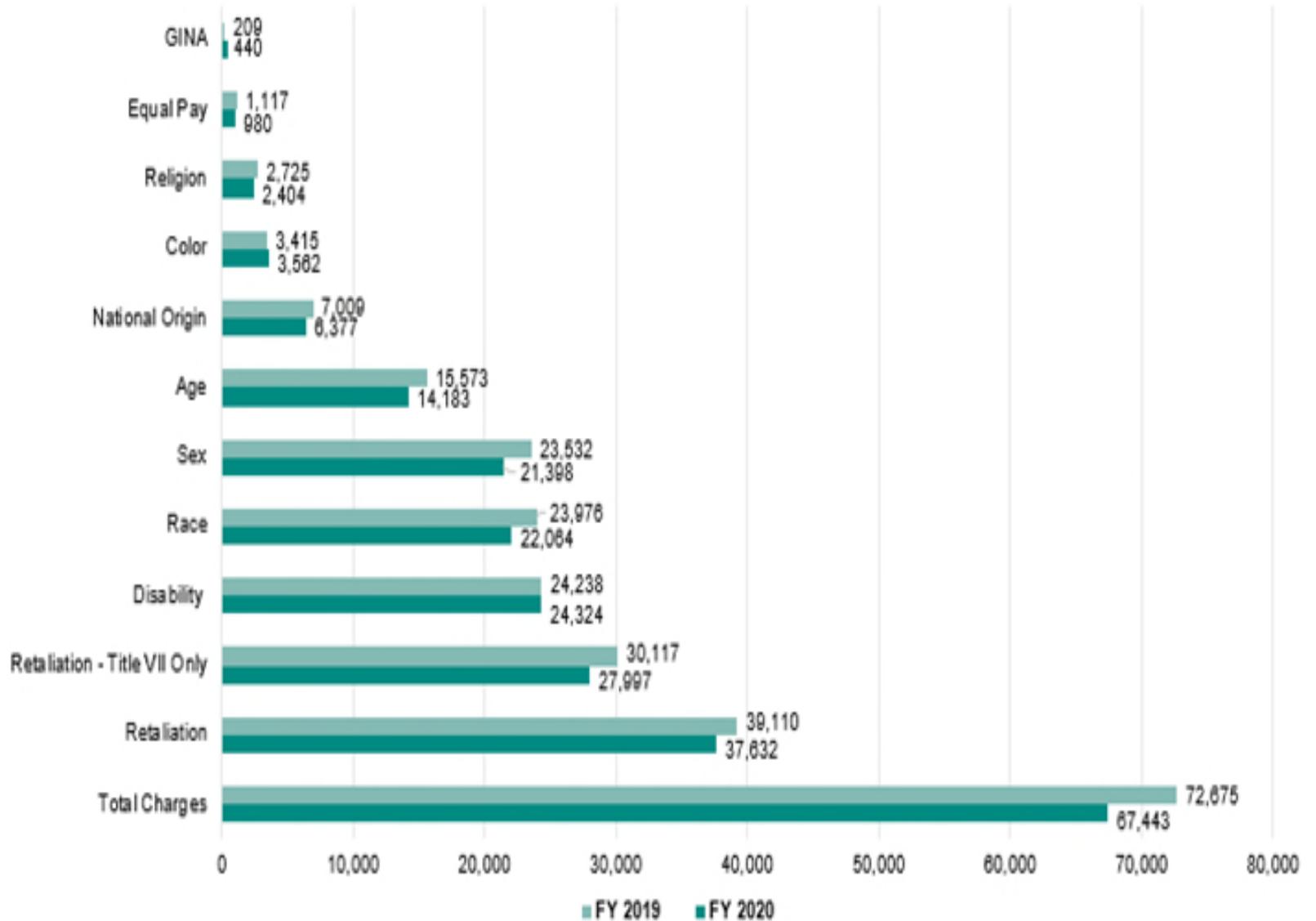
HARASSMENT/DISCRIMINATION

Laws prohibit discrimination and harassment based on a persons:

- Race/color
- Sex/Gender/Sexual Orientation—*Need to update policies based on June 2020 U.S. Supreme Court Ruling-* Employers subject to Title VII (most with at least 15 employees) may not take adverse employment action against an employee or a prospective employee based on their homosexuality or transgender status.
- National Origin
- Religion
- Disability
- Genetic Information
- Military Status

***Although the law does not prohibit harassment based on other reasons, employers often (and should) do so.*

Total EEOC Charges Filed: FY 2019 – FY 2020



TYPES OF SEXUAL HARASSMENT

- **Quid Pro Quo**
- Requests for sexual favors linked to grant or denial of *tangible job benefits:*
 - Promotion
 - Favorable performance review
- Involves an express or implied of a *tangible employment action* will occur.

Hostile Work Environment

- Tangible employment action *not required*
- Hostile or offensive working environment
- Conduct can be:
 - Visual
 - Physical
 - Verbal



Illegal Retaliation

- Definition – An Adverse employment action taken in response to engaging in a “protected activity”
- What is a protected activity?
 - Any participation in the reporting of illegal activity or the participation in the enforcement of any law
- What is not protected activity?
 - Simple workplace complaints
 - Routine work requests
 - “Free Speech”
 - Beware of clever lawyers!

Adverse Employment Actions

- Termination
- Demotion
- Discipline
- Decrease in salary
- Increased workload
- Failure to promote
- Refusal of overtime
- Diminished responsibilities
- Undeserved negative performance evaluation



These are probably not

- Late paycheck
- Isolated comments
- Mere ostracism
- Most other one-time events



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

Don't Go It Alone

- Report every instance of inappropriate conduct
- Make final decisions only in consultation with HR and/or Legal Department
- Send them home...
- When you're unsure about the response
- When there's a danger of further harm
- Who stays and who goes?

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!



2. The Clock Watcher

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



Wage and Hour Mistakes

These common issues pose a major risk to employers include:

- Misclassification of employees as exempt from overtime pay
- Misclassification of employees as independent contractors
- Timekeeping errors

Exempt vs. Non-Exempt Employees

- Employees classified as exempt from overtime pay bring these claims based on a 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?

FLSA : Final Rule on Classifying Workers Employee vs. Independent Contractor

The 2021 final rule adopts a modified version of the “economic reality” test to determine whether an individual should be classified as an independent contractor.

The two “core” factors entitled to greater weight are:

- 1) the nature and degree of the worker’s control over the work; and
 - 2) the worker’s potential for profit or loss.
- The three other factors would supplement the “core” factors as “guideposts”:
 - 1) the amount of skill required for the work;
 - 2) the degree of permanence of the working relationship between the worker and the potential employer; and
 - 3) whether the work is part of an integrated unit of production.⁸

EMPLOYEE vs. Independent Contractor

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

Timekeeping Do's

- **Use an accurate timekeeping system.**
- **Require employees to record all time worked.**

This includes using technology outside the office to respond to work email, access the company network, check phone messages, or perform other work tasks.

Make sure non-exempt employees know that they must report all time spent working, including time they spend checking work email outside of work hours. If employees can't use your regular timekeeping system to record after-hours work, instruct them on how to promptly and accurately report these hours.

- **Record training and travel time.**

Under the FLSA and many state laws, employers must pay employees not only for time actually spent working, but also for certain nonproductive time, such as time spent in training or traveling.

Timekeeping Do's cont'd

- **Consider rest breaks "work time."**

Under the FLSA, if you provide a rest break (any period lasting 20 minutes or less that the employee is allowed to spend away from work), it must be paid. Therefore, make sure employees do not punch out for breaks lasting 20 minutes or less. The duration of the break is generally the sole factor used when determining whether pay is required, not the reason for the break.

- **Require employees to verify hours worked.**

At the end of each pay period, require employees to review their time records and verify that they are accurate. This can help you make corrections before running payroll and document that the employee has confirmed the accuracy of their time records.

Timekeeping Don'ts

- **Withhold pay if employees fail to submit/sign timesheet.** If an employee fails to submit or sign a timesheet, ask the employee and their supervisor to immediately provide/confirm the hours worked and pay the employee accordingly.
- **Permit employees to work off-the-clock.** Employers can't ask or allow non-exempt employees to work "off-the-clock." Make sure you have a policy that expressly prohibits off-the-clock work and have controls in place to prevent it.
- **Withhold pay for 'unauthorized' work time.** Employers may have a policy that requires employees to get permission before working overtime (or before punching in early/punching out late). However, employers must pay non-exempt employees for all time worked, regardless of whether it was authorized in advance. If employees violate the policy, the employer may subject them to disciplinary action for failing to get approval in advance, but in no case may the employer withhold pay.

Timekeeping Don'ts cont'd

- **Make automatic deductions for meal periods.** It's a best practice to require employees to clock out and back in for their meal periods. Time records should accurately reflect that the employee took a meal period, how long the meal period lasted, and the actual hours worked.
- **Forget to address interrupted meal periods.** Under the FLSA, for a meal period to be unpaid, it must generally be at least 30 minutes without interruption and the employee must be fully relieved of all duties for the purpose of eating regular meals (some states have additional requirements). Instruct employees to report interrupted lunch breaks so that they can be paid for the time.
- **Neglect recordkeeping responsibilities.** The FLSA requires employers to keep time cards and other records on which wage calculations are based for at least two years. Employers must also keep payroll records, including hours worked each day and total hours worked each workweek, for at least three years. Records required for federal tax purposes must be kept for at least four years. Check your state law for any additional recordkeeping requirements.

Many employees may be misclassified!

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

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-



3. The Social Butterfly

Social Media: Employer Rights

- Employers generally have the right to monitor their employees use of Internet (including visiting social networking sites, checking email, and instant messaging) on computers owned by the employer, during employees on-duty hours.
 - Federal laws prohibit employers from discriminating against prospective or a current employee based on information on the employee's social networking site or personal blog that relates to their protected characteristic
 - Federal law does not prohibit an employer from viewing a prospective employees social networking site or personal blog as a method of performing background checks

Do private-sector employees have free speech rights to make inflammatory posts or comments?

- *No.* Employees often believe that their statements are protected under the First Amendment. The First Amendment specifically prevents the *federal government* from interfering with freedom of speech, but it does not guarantee that right in private settings, including private workplaces.

Can employers discharge employees for off-duty conduct on social media or in person?

It depends. Currently, California, Colorado, Louisiana, New York, and North Dakota ban employers from firing or retaliating against employees for off-duty lawful activity, including speech. However, this would not protect online speech that attacks immutable characteristics protected by law (age, race, sex, religion, etc.)

Employers can create legal, reputational, and cultural risks by ignoring off-duty conduct, particularly if the conduct constitutes harassment based on a protected class.

Can employers discharge employees who make offensive political posts or engage in protests?

It depends. Many states protect political activity and prohibit retaliation by an employer. New Mexico protects employees' political opinions, while other states protect party membership or for engaging in election-related speech and political activities.

Employers may want to consider all state authority that might impact employee conduct related to an employee's political statements (online or in-person) prior to taking action.

Can employees post social media complaints about their jobs?

Yes. The National Labor Relations Act (NLRA) and similar state laws protect employees' rights to communicate with one other about their employment. More specifically, employees have the right to engage in "protected activity" regarding their workplaces—sharing grievances and organizing online in protected activity.

Beyond NLRA protections, other federal employment laws protect employees from retaliation for claiming that their rights have been violated.

What other steps can employers take?

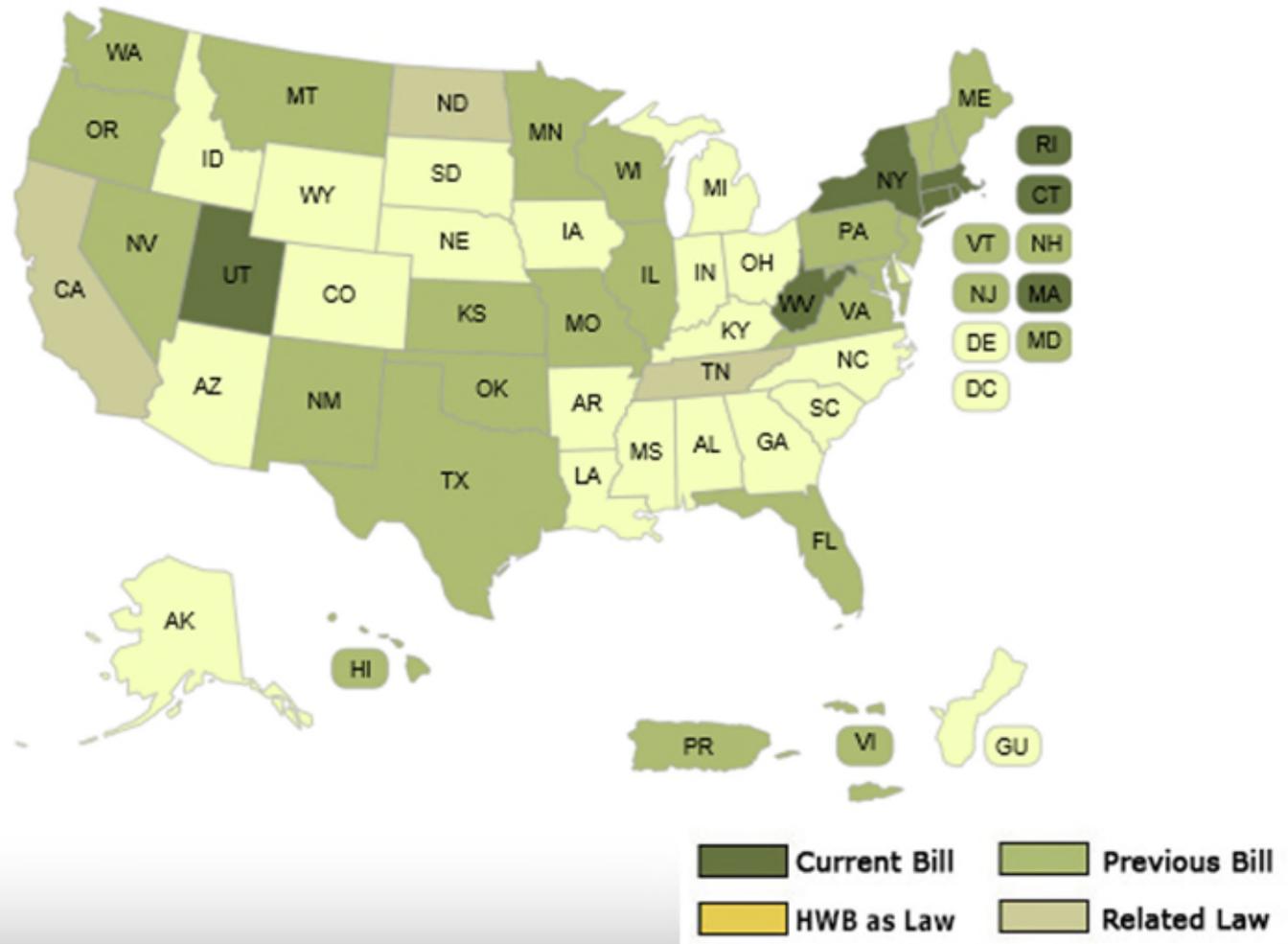
- Reiterate the company's core values so employees know which behaviors violate organizational principles. Remind employees of the avenues to report inappropriate conduct if they experience or learn of it.
- Companies can enact policies, procedures, and training requirements to ensure that their actions going forward are consistent with the values they have expressed in recent statements.
- Implement or review and update social media policies to make clear that off-duty conduct that violates a company policy or harms the company's reputation may still trigger consequences at work, including termination of employment.
- Promptly investigate any reports of potentially problematic social media posts or other conduct.



4. The Bully

Healthy Workplace Bill

32 Legislatures [30 States, 2 Territories] have introduced the HWB



Puerto Rico enacts First Workplace Bullying law in the U.S.

- Puerto Rico became the first U.S. Territory to pass a bill similar to the Healthy Workplace bill.

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



5. The Unwelcome Organizer

What is Union Salting—Is it legal?

- The National Labor Relations Act (NLRA), Section 7, is one of the most powerful laws passed in employment history. It is used by unions as a tool for organizing because it gives employees the “...right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities...”
- Salting is when a union organizer acquires a job at a specific workplace with the intent of organizing other employees.

Tips for Avoiding Salting

- **Show no animus towards unions.**
 - First and foremost, if an overt salt applies for a job position and they are remotely qualified, you should interview him. Ask basic questions about employment history, skill level, desire salary, etc... Do not speak negatively about unions.
- **Keep accurate records of ALL interviews.**
 - The point is critical. It is important to keep records of all interviews not just interviews of overt salts because you need to be able to show uniform application of the interview process.
- **Follow up with references.**
- **Institute a dishonesty policy.**

Non-Solicitation Policies

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

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

- Pre-election hearings will be scheduled 14 business days from the date of the petition.
- Regional Directors may postpone hearings upon a showing of good cause.
- Employers will have eight business days to file the Statement of Position. Petitioning parties (typically unions) will be required to respond to the Statement of Position within three business days
- Employers may now litigate bargaining unit composition issues prior to the election.
- Parties again have the right to file post-hearing briefs following pre-election hearings.
- Absent agreement by the parties, a Regional Director may not direct an election before the 20th business day following a direction of election.

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