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What's trending now in EPL?
How a look back can help you anticipate your future EPL risk

Sue first; ask questions later. That's the mindset of many employees in today's workforce.

Fueled by many factors, employee lawsuits can be devastating. Beyond damaging your business's reputation, an employment claim can lead to lower morale, diminished productivity and lost trust.

Speaking of lost, the cost of defending an employment-related claim can skyrocket as high as $300,000, and the timeline for resolving that claim can be as long as 24 months, according to Advisen. That's a lot of lost time and revenue. What can you do as employer to identify, avoid, and/or mitigate your exposure in the EPL arena? Looking back at the last 18-24 months of claim data can give us a chance to chart a new path forward that avoids some of the missteps of the years prior.

Sexual Harassment and Gender Discrimination Claims in the Wake of #MeToo & #TimesUp

Nearly one-third of 1,034 executives said they have changed their behaviors to a moderate, great or very great extent to avoid behavior that could be perceived as sexual harassment, according to new research the Society for Human Resource Management (SHRM) released today. About one-fourth of 1,022 managers said they have changed their behaviors.

Executives and managers are seeing the damage sexual harassment can create throughout an organization. Twenty-three percent attributed lowered morale and decreased engagement to sexual harassment, 18 percent said it affected productivity and 15 percent believed it created a hostile work environment. SHRM's findings are from data collected in January.

Organizations must be careful not to create a culture of 'guilty until proven innocent' but must also watch out for the unintended consequences that come from uncertainty related to sexual harassment. One troubling trend that has emerged is an uptick in executives going so far as to not invite female colleagues on trips, to evening networking events or into their inner circles to avoid any situation that could be perceived incorrectly, thus reducing the opportunity for women.

There have also been legal repercussions. The number of sex discrimination claims and sexual harassment complaints filed with the Equal Employment Opportunity Commission (EEOC) has risen. Among filings in fiscal year 2018, 41 included sexual harassment claims. In fiscal year 2017, sexual harassment claims accounted for 33 filings.

Wage/Hour Based Claims

Wage and hour disputes are cash cows for plaintiffs' attorneys because attorney fees are relatively easier to obtain even if the employer's mistakes are minor. It's akin to going 26 miles per hour in a 25 mile per hour zone and getting a speeding ticket. There is no 5 mile an hour generally accepted cushion. If you've made an error and a lawsuit is filed, the business is for damages and fees will be included. These cases tend to settle quickly because lengthy litigation can result in higher fees.

The dollar value of workplace class-action settlements skyrocketed in 2017, according to the annual Workplace Class Action Litigation Report by law firm Seyfarth Shaw. The top 10 employment-related settlements in 2017 totaled $2.72 billion—up from $1.75 billion in 2016, the report showed.

Looking forward to 2019

There is a visceral and palpable dynamic emerging in global workplaces: tension.

Tension between what is potentially knowable—and what is actually known. Tension between the present and the future state of work. Tension between what was, is, and what might become (and when). Tension between the nature, function, and limits of data and technology.

The present-future of work is being shaped daily, dynamically, and profoundly by a host of factors—led by the exponential proliferation of data, new technologies, and artificial intelligence ("AI")—whose impact cannot be understated. Modern employers have access to an unprecedented amount of data impacting their workforce, from data concerning the trends and patterns in employee behaviors and data concerning the people analytics used in hiring, compensation, and employee benefits, to data that analyzes the composition of the employee workforce itself.

There is also an equal, counterbalancing force at play—the increased demand for accountability, transparency, civility, and equity. We have already seen this force playing out in real time, most notably in the #MeToo, pay equity, and data privacy and security movements. We expect that these movements and trends will continue to gain traction and momentum in litigation, regulation, and international conversation into 2019 and beyond.
Glassdoor has been the subject of litigation in recent years. For those unfamiliar with the Glassdoor platform, it is the equivalent of "Yelp" for employers. Current and former employees, can anonymously praise, critique, and disclose information about the employer. You will find positive and negative reviews as well as anonymized salary range information for various titles within the company. Efforts to curtail employee speech have been frowned upon by the NLRB and the California Court of Appeal.

In its decision in *Glassdoor, Inc. vs. Superior Court of Santa Clara*, the Sixth District California Court of Appeal overturned a trial court ruling that would have required the identification of the author of an anonymous employee review of Machine Zone, Inc. (since rebranded MZ). MZ alleged that the post disclosed information in violation an employment non-disclosure agreement.

In doing so, the Court set legal precedent that greatly strengthens the ability of Glassdoor to protect and safeguard the identity of anonymous individuals who share free speech online and limit the ability of employers to silence criticism or discussions regarding compensation.

As a result, employers are faced with real time questions from potential and current employees regarding compensation gaps, policy application and implementation, and the work environment generally.

Invasion of Employee Privacy

Whether it's done from a computer or through the lens of a security camera, many employees are monitored at work. While employers have rights in the workplace, so do their employees. Legal experts predict that privacy will soon replace wrongful termination as the biggest hot-button issue in the workplace, according to a recent article in the Insurance Journal.

According to industry experts, these are the most common situations that spawn workplace privacy lawsuits:

- ✓ An example would be failing to mention a drug-screening policy to a candidate and then firing him or her for failing a random drug test.
- ✓ Secret Monitoring. Installing hidden cameras in a place of business can be unethical and illegal.
- ✓ Personal Life Monitoring. In most cases, an employee's life outside the office, assuming he or she isn't breaking the law, is off limits to an employer.
- ✓ Accessing Social Media Accounts. Today, social media has become a valuable tool for mining information about prospective employees. In fact, according to a 2016 survey, 60 percent of companies now check job applicants' social media profiles before hiring them. While perusing a candidate's LinkedIn page isn't illegal, demanding access to a person's social media accounts is.

An exception to the above may be triggered by a so-called morality clause. Employee handbooks or contracts that contain morality clauses may provide the segue for the employer to discipline or terminate any employee when his or her social media conduct reflects poorly upon the company's reputation, status, or brand. But, be careful and be specific about what you are attempting to curtail or what constitutes a violation. The case law supports enforcement of such a clause if it is specific, limited, and does not infringe on an employee's civil rights such as the right to free speech or the right to religious freedom

Is disclosure and consent enough?

As with most things legal, it depends. Employers should exercise care in connection with workplace monitoring, such as video surveillance, e-mail monitoring, and listening to employee telephone conversations. The California courts have indicated that where employers have legitimate business purposes for such monitoring, it is the best practice to disclose the monitoring to employees in a handbook, memo, sign or by other means.

Most states impose limits on conducting background checks, such as credit- or criminal-history reports. In addition to being aware of federal rules on conducting background investigations, employers must also be aware of their responsibilities under State law.

Employee privacy rights are also implicated when businesses test for drugs, particularly when they have random drug testing programs. Given the overarching privacy rights, employers should limit random drug testing to special circumstances, such as for safety-sensitive roles or when state or federal law may require such testing.

The federal Fair Credit Reporting Act (FCRA) sets national standards for employment screening. Two common tools employers use to screen candidates are credit reports and criminal background reports. However, a candidate must provide written consent before an employer can request these documents. Businesses that attempt to secure this information without a candidate's consent are inviting a potentially damaging lawsuit

Compliance Tips

When dealing with the maze of privacy issues that come up in the employment setting, it is a good idea to consult local counsel. The biggest issue for employers to be aware of is that any time they are dealing with an employee's private information, notice and consent are likely required.

Think of it like the Golden Rule. Do unto others records as you would want done to/with yours.

Pregnancy Discrimination

According to the Insurance Journal, the Pregnancy Discrimination Act requires employers to allow pregnant employees to work at their jobs as long as they can perform their duties. Additionally, an employer cannot hold pregnancy against a candidate who's applying for an available position.

Genetic Discrimination

GINA, the Genetic Information Nondiscrimination Act, prohibits employers from using genetic information as a factor in employment-related decisions. What's more, under GINA, employers cannot request family medical history or any other kind of genetic information from job applicants, according to a recent article in the Insurance Journal.

Unpaid Internships

Employee or intern? It's a question the U.S. Department of Labor can help you answer. Interns, unlike employees on a payroll, are not subject to the Fair Labor Standards Act. To protect themselves, businesses should know what defines an internship. For the six key criteria, visit the Department of Labor's Test for Unpaid Interns.

What to do going forward?

Whether employers have bulked up their anti-harassment training and discipline processes depends on who you ask. More attention has been paid to the quality of the training, with an emphasis on role-playing scenarios and different types of training for managers compared to nonmanagers. Training also has been mandated in some locales.

Effective Oct. 9, 2018, all employers in New York City must provide sexual-harassment prevention training to all workers. These employers also must adopt a written sexual-harassment prevention policy and distribute it to employees. California statutes likewise require both sexual harassment and gender sensitivity training in hourly increments for all managers.

Employers need to embrace day-to-day changes, too. Cultivate respectful cultures and take swift action to thwart inappropriate behavior, including cutting back on alcohol at company parties and patrolling party venues for suspicious activity.

A wholesale audit or review of internal policies, training requirements, and payroll are critical to risk avoidance in 2019.