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# General Counsel Employment Law Report

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# School's Out Forever, But ICE Still Making Noise for F-1 STEM OPT Students and Employers

As the summer winds down and recent graduates get into the swing of full-time employment, ICE has thrown companies that hire F-1 graduates another compliance loop. The agency has started to assert their authority to verify the information of F-1 graduates working in STEM fields at companies in the United States through site visits. Although ICE has had the authority to conduct site visits since the F-1 STEM OPT program was implemented in 2016, this administration has only now decided to aim these investigations at companies which employ high-skilled F-1 recent graduates. Site visits should not cause a panic for a prepared employer, but should be taken seriously, as the consequences of a bad site visit could mean immediate deportation and loss of employment status for a critical employee.

For a bit of background, F-1 students who graduated with a STEM major are eligible for an additional 24 months of OPT work authorization beyond the 12 months for which all F-1 graduates are eligible. Part of the process for an F-1 STEM graduate to obtain the additional time for work authorization is to file a training plan on Form I-983 with his/her university. The formal training plan must identify learning objectives and a plan for achieving those objectives, which are established by the direct manager in coordination with the F-1 STEM graduate. Both employer and F-1 graduate should understand the statements and information provided in the training plan, given that the Form I-983 may be requested by the government upon request and used to verify the connection between the F-1 graduate's employment and STEM degree during a site visit.

Employers should establish a clear policy and procedure on how to deal with a site visit. Typically, an officer will want to speak with the F-1 STEM employee and his/her direct supervisor, see the workspace where the employee sits, confirm details about the employee's employment such as title, and review the compensation files related to the STEM employee. Training the necessary stakeholders, including administrative professionals and the individual signing the training plan, on the internal policy is crucial to ensuring a smooth site visit.

We can help. Attorney Cassie Ramos leads our work authorization and immigration practice.

# What I Read on My Summer Vacation: Key NLRB Case

Employment Law does not take a vacation. In the dog days of summer, the National Labor Relations Board is issuing decisions (ever hear of the beach people?). In between novels and icy drinks, the *Cordua Restaurants* case commanded attention.

A refresher: even without a union at your workplace, the National Labor Relations Act applies and the NLRB enforces that Act. *Epic Systems Corp v. Lewis* was the 2018 seismic US Supreme Court case that allowed employers to utilize waivers barring class and collective actions in favor of individual arbitration. This took away a big gun in many instances–collective action against companies—and narrowed the "Section 7" rights under the NLRA.

Now that we are all up to speed let's get back to the decision at hand, *Cordua Restaurants, Inc.* In a case of first impression, the NLRB ruled that:

- Employers can threaten to discharge an employee for failing to sign a mandatory arbitration agreement, and
- Employers can require employees who opt in to collective actions under the Fair Labor Standards Act (FLSA) or state wage and hour laws to sign mandatory individual arbitration agreements.

What? How can that be? New Board, different Supreme Court. *Epic Systems* set the stage: an agreement allowing individual arbitration and not collective or class action does not violate Section 7 of the Act. Ergo, (thank you Sister Mary Perpetua for 8 years of Latin), requiring employees to sign an agreement as a condition of employment, and to opt out of collective action in favor of individual arbitration is not unlawful.

Can employers do anything they want now under *Epic Systems*? Not anything. Terminating or disciplining an employee for filing a class action or discussing wages and conditions of employment is still protected.

This case and *Epic Systems* give employers more tools to limit exposure. Contact us if you want to review your agreements. We can help.

# Remember #Metoo?

October 2017 marked the beginning of the #MeToo movement. Producer and film director Harvey Weinstein's sexual harassment of multiple women from A-list actresses to unknown hopefuls was exposed by the media. Then victims were asked via Twitter to respond #Metoo, and millions of #Metoo tweets later we are here. Almost two years in, states are continuing to enact laws that enhance enforcement of sexual harassment policies and encourage victims to come forward about the alleged abuse. From requiring more women on executive boards to eliminating non-disclosure agreements in settlement for sexual harassment cases, #MeToo has made an impact. On the flip side, the Harvard Business Review recently published a study indicating a #Metoo backlash, with consequences that hurt women.

The legal effect of the movement and laws varies from state to state and even by municipality. Here is a brief overview:

As usual, California has forged the way in enacting legislation that would require all public companies to have at least one woman on an executive board. The idea is a well-rounded executive team would prevent and address sexual harassment and discrimination issues. (Or– hey women, you did not make the mess but you can clean it up?) As is often the case, California may set the tone for other states to follow suit. Further, California has changed its defamation law so that victims will be more willing to speak out. It also allows companies to warn other employers if an employee had harassment issues without fear of a defamation law suit.

Thirteen states have passed laws prohibiting employers from requiring a victim of sexual harassment to sign a non-disclosure agreement as a condition of employment or settlement. This allows employees to discuss the abuse and warn others of poor behavior by a person or the company. NDAs have been a powerful tool to protect abusers for decades and we expect to see more states limit their use.

States have extended sexual harassment protections to interns, independent contractors, or graduate students. At least 10 states have increased the requirements in sexual harassment training. California requires managers to receive at least 2 hours of training and staff to receive 1 hour, for employers with 50 or more employees. As a practical matter, Weinstein committed acts of abuse in California, which at the time had the strictest sexual harassment laws in the country. Whether tightening the laws and requiring more training will reduce sexual harassment is still an open question.

NAVEX global report stated that sexual harassment complaints rose up to 18% after #MeToo began. That is not a huge increase considering the tremendous publicity of the celebrity perpetrators and the lessening of the stigma by #Metoo. Statistics also indicate that many employees believe there has been little change to the workplace: at least 57% of workers report it's stayed the same and gender discrimination went up.

Does #Metoo matter? Yes, and not only for legal reasons. Having a workplace where all employees comport themselves well improves morale, production and recruitment. Start with creating a thorough, compliant sexual harassment and discrimination policy. Then provide training to employees about what sexual harassment is, how to recognize it, when and who should report it, and any other remedies available to victims. It is crucial to create a safe and equitable work environment for all employees. One size does not fit all: each workplace has its own characteristics and environment. Training works best when it is tailored to its intended audience.

We at Foley and Foley can assist you not just in times of crisis, when a sexual harassment claim has happened. We can work with you to create clear policies, procedures, and training programs that prevent sexual harassment and discrimination. We can help.

# We Need to Talk About Workplace Violence

McDonald's has just announced a comprehensive program to address workplace bullying, violence and harassment. In June, a disgruntled employee killed 12 people at a workplace in Virginia. The Department of Labor (DOL) reports that every year over 2 million people are victims of workplace violence, not including over 1000 fatalities.

*What should employers do?* Workplace violence is a complicated, pervasive issue which requires careful thought and action.

## Legal Responsibility:

- While there is no specific federal law on workplace violence, the "general duty" clause under OSHA mandates a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."
- A few states have enacted workplace specific laws addressing the healthcare field (OR and CA).
- Employers have common law general premises liability and perhaps negligent hiring in certain cases.
- Even without specific laws, employers want to protect their brand and their biggest asset—employees.

## Prevention:

- Evaluate: Threats at your workplace. Valuable assets? Irate or troubled clients or patients?
- Security: What level of security is needed? What is the standard for your industry?
- Plan: what is the plan to report and communicate actual or potential threats? Do you have a strong violence prevention policy?
- Training: At a minimum, all employees must be educated about the plan and policy.

## Policy:

- A strong workplace violence policy can help create a safer environment. The DOL recommends a zero tolerance policy for any type of violence. A well written policy will:
    - Clearly identify prohibited behaviors
    - Ban guns and any weapons from the workplace
    - Determine discipline for employees engaged in any violent or harassing acts
    - Inform employees about the channels of communication
    - Summarize the employer's investigation procedures
    - Protect employees who report threats or violence

## Training:

- The best plans and policy cannot have any impact without training.
    - In-house training on company policy and procedures a must
    - Bystander training to diffuse potentially violent incidents beneficial
    - Manager training to identify threats and behavior leading to violence
    - Active shooter training particularly if your workplace is vulnerable to violent threats or behavior.

We can help: policy drafting, handbook updates, training, advising. Contact us

# General Counsel's Office Hours

## Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.