



**Financial Executives International
Northeastern Wisconsin Chapter**

EMPLOYMENT LAW

2018 Developments and Insights for 2019

© 2018 Godfrey & Kahn, S.C.

This presentation may not be reproduced or broadcast without permission.

Hot Button Issues in 2018

- **Wage and hour liability**
- **Arbitration agreements**
 - **Class action waivers**
- **Sexual harassment**

WAGE AND HOUR LIABILITY

Big Verdicts and Settlements Continue

- FLSA cases up 456% since 1995.
- Significant driver: plaintiff's ability to recover attorney's fees.
 - *Castro v. Precision Demolition, LLC* (N.D. Texas)
 - Plaintiff's recovery = \$608.08 (x2)
 - Attorney's fees = \$141,236.50
- *Hines, et al. v. CBS Corp.* – \$9.98MM settlement.
- *Roseman, et al. v. Bloomberg* – \$54.5MM settlement.

Legal Framework

- Applicable Laws
 - Fair Labor Standards Act (FLSA)
 - State wage and hour laws

- General Requirements
 - Minimum wage for all *hours worked*.
 - 1.5x *regular rate* of pay for hours over 40 in workweek, unless qualify for exemption.

Exemptions

- “White Collar”
 - Must satisfy two part test:
 1. Salary basis test
 - Currently \$455/week (\$23,660/year)
 - NOTE: salary DOES NOT equal exempt
 2. Duties test (executive, administrative, professional)
- Commissioned sales employees
- Computer professionals

Common Wage/Hour Traps

1. Remote work.
2. Transition work.
3. Conflicts between state and federal law (e.g., travel time).

Remote Work

- The “technology trap.”
- *Allen v. City of Chicago*
 - Two part test:
 1. Did the employee perform compensable work?
 2. Did the employer have actual or constructive knowledge?
 - Work must be essential, not incidental.

Remote Work – Action Items

- Update policies:
 - Limitations on use of electronic devices outside regular schedule.
 - Require reporting of all hours worked.
 - Discipline, but pay.
- Train:
 - Periodic monitoring of e-mail and remote access use.
 - Train managers to recognize and address.
 - Impose controls (directive or system controls).

Transition Work

- Pre or post shift transition duties.
- Common claim in continuous shift operations.
- Example:
 - Employer pays to shift.
 - Employee clocks in 5 minutes early. During that time, he talks to employee he is relieving about project status and reviews work plans for day.
 - Employee stays 2 minutes after his shift to transition to employee relieving him.

Transition Work – Action Items

- Review and correct practices (careful roll-out and under privilege).
- Revise policies to: (1) prohibit working outside shift without authorization; and (2) report all work outside shift.
- Implement measures to monitor and correct work outside of shift.
 - Evaluate features of timekeeping system.

Conflicts – Travel Time

Federal

- If travel overnight away from home community, only paid where cuts across normal work hours.
- 29 CFR 785.39.

Wisconsin

- If travel overnight away from home community, all time spent traveling must be paid.
- DWD 272.12(2)(g)(6).

Small Mistake, Big Exposure

- 30 minutes/week unpaid time (all OT)
- 30 minutes/week @ \$22.50/hour (1.5x RR) X 156 weeks (3 year SOL) = \$1,755 per employee
- 250 employees X \$1,755 = \$438,750
- \$438,750 x 2 (liquidated damages) = \$877,500
- Plaintiff's attorney's fees = \$1.5MM+
- Your own attorney's fees = \$1.5MM+

ARBITRATION AGREEMENTS

Arbitration Agreements

Supreme Court resolves circuit split and rules arbitration agreements containing class action waivers enforceable in employment context.

Epic Systems Corporation v. Lewis

Arbitration Agreements

PROS

- Waiver of class and collective claims;
- Can deter employees and plaintiff's lawyers;
- Arbitration can be faster and less expensive (not always); and
- Can ease burden of electronic discovery.

CONS

- Duplicative arbitration;
- Varying quality of arbitrators;
- No summary judgment option or appeal rights;
- Agency charges remain;
- Negative PR; and
- Employee morale hit.

SEXUAL HARASSMENT

DOUBLE ISSUE

DECEMBER 18, 2017

Person of the Year TIME

THE
SILENCE
BREAKERS

THE VOICES
THAT LAUNCHED
A MOVEMENT



TIME'S == UP

The clock has run out on sexual assault, harassment and inequality in the workplace. It's time to do something about it.

What Hasn't Changed

- Applicable legal standard remains the same.
- Harassment = unwelcome speech or conduct based on *protected characteristic*.
 - Protected characteristics derived from federal, state, and local law.
- Two forms of harassment:
 - Quid Pro Quo.
 - Hostile Work Environment.

Quid Pro Quo

- Means “this for that.”
- Most often occurs in the sexual harassment context.
- Generally occurs in supervisor/subordinate relationships.
- Example: Offering a promotion if a subordinate submits to requests for sexual favors.

Hostile Work Environment

- Occurs when verbal or non-verbal conduct creates a work environment that is:
 - Unwelcome;
 - Severe or pervasive so as to affect the work environment;
 - Hostile, intimidating, or offensive to the recipient; and
 - That a “reasonable person” would find hostile, intimidating, or offensive.

What (Arguably) Has Changed?

- Heightened expectation for prompt and thorough investigation and remedial action;
- Heightened expectation to “walk the walk” through policies, training, and action (especially at senior management level);
- Focus on individual’s past conduct (even before you employed him/her);
- PR fallout (social media); and
- Weinstein tax.

Weinstein Tax

- Confidentiality clauses in settlement agreements generally enforceable.
 - Exceptions for disclosure in government investigation.
- Legal settlements historically tax deductible.
- Under new tax law, sexual harassment settlement (and attorney's fees) not deductible if agreement includes confidentiality.

Looking to 2019...

1. Pay equity

- Consider audit (under privilege)
- Run under privilege

2. Continued legislative activity at state/local level

- Sick and parental leave
- Salary history
- Arrest/conviction history
- Marijuana
- Sexual harassment settlements and training

Looking to 2019...

3. Status of Right to Work in Wisconsin?
4. Increased use of arbitration agreements in employment relationship.
5. Data Privacy.

QUESTIONS?

Thank You

GODFREY  KAHN^{S.C.}

WWW • GKLAW.COM

**OFFICES IN MILWAUKEE, MADISON, WAUKESHA, GREEN BAY AND APPLETON, WISCONSIN
AND WASHINGTON, D.C.**

The presentation and materials are intended to provide information on legal issues and should not be construed as legal advice. In addition, attendance at a Godfrey & Kahn, S.C. presentation does not create an attorney-client relationship. Please consult the speaker if you have any questions concerning the information discussed during this seminar.