Dangerous Curves – Current Employment Law Issues in the Construction Industry

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About the Firm

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.

The firm has more than 900 attorneys located in 54 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.
Agenda: Legal Update & Workplace Disruptors

- Workplace Violence
- Overtime and Other Pay Issues
- Joint Employment
- Legalized Marijuana
- Harassment – You Too
- **Bonus**: Top 10 Mistakes & Best Practices
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Workplace Violence
Staggering Statistics

- Effects between 1.5-2 million U.S. workers annually
- Homicide is the fourth leading cause of fatal occupational injuries in the workplace in the U.S.
- Murder is leading cause of death for women in the workplace
- Workplace incident costs an average of $800,000
To assure safe and healthful working conditions for working men and women; authorizing enforcement of the standards developed under the Act...

General Duty Clause:
What does the law require?

- Legislation in nine states (California, Connecticut, Illinois, Maine, Maryland, New York, New Jersey, Oregon, and Washington) mandates that certain types of healthcare facilities implement workplace violence prevention programs.
- There is no Federal OSHA Industry Standard addressing workplace violence...yet.
Federal Measures - Proposed

- House Resolution 1309, the Workplace Violence Prevention for Health Care and Social Service Workers Act, introduced by Rep. Joe Courtney (D-CT).
- Would force OSHA to issue an occupational safety and health standard that requires covered employers within the healthcare and social service industries to develop and implement comprehensive workplace violence prevention plans.
- Would give teeth to OSHA’s Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers.
Legal Framework – Employer Liability

- OSHA – General Duty Clause, Reporting and Recordkeeping
- Workers’ Compensation
- Tort
- State Law and Statutory Claims
- Disability discrimination claims
Who is vulnerable?

Workplace violence can strike anywhere, and no one is immune. Increased risk for:

- workers who exchange money with or deliver to the public;
- those who work alone or in small groups, during late night or early morning hours, in high-crime areas, or in community settings with extensive contact with the public.
What can you do to help?

- Provide safety education for employees so they know what conduct is not acceptable, and what to do if they witness or are subjected to workplace violence.
- Secure the workplace or jobsite. Where appropriate, install video surveillance, extra lighting, and alarm systems and minimize access by outsiders through identification badges, electronic keys, and guards.
- Equip field staff working alone or in small groups with cellular phones and require them to keep a contact person informed of their location throughout the shift.
- Instruct employees not to enter any location where they feel unsafe.
- Introduce a “buddy system” or provide an escort service or police assistance in potentially dangerous situations.
Best Practices

- Conduct background screening
- Craft a tough, consistently enforced anti-violence policy and train employees
- Establish a crisis management team
- Important to have written plan and escalation procedures, emergency action plan (EAP)
  - Involvement and partnership with local police departments (many have workplace violence units)
  - Do regular drills, include active shooter protocols
  - Use of technology for first alert system
What can you do after a violent incident?

- Encourage employees to report ALL incidents and threats of workplace violence or suspicious behavior.
- Provide prompt medical evaluation and treatment after the incident.
- Report violent incidents or threats to the local police promptly.
- Inform victims of their legal right to prosecute perpetrators.
- Offer stress debriefing sessions and posttraumatic counseling services to help workers recover from a violent incident; EAP.
- Investigate all violent incidents and threats, monitor trends in violent incidents by type or circumstance, and institute corrective actions.
- Evaluate whether there is an obligation to report to OSHA or log the incident.
Resources


- **Violence on the Job.** U.S. Department of Health and Human Services (DHHS), National Institute for Occupational Safety and Health (NIOSH) Publication No. 2004-100d, (2004). Provides streaming video resources that discusses practical measures for identifying risk factors for violence at work, and taking strategic action to keep employees safe. Based on extensive NIOSH research, supplemented with information from other authoritative sources. Transcript also available.

- **Stress... at Work.** U.S. Department of Health and Human Services (DHHS), National Institute for Occupational Safety and Health (NIOSH) Publication No. 99-101, (1999). Highlights knowledge about the causes of stress at work and outlines steps that can be taken to prevent job stress.

- **Preventing Homicide in the Workplace.** U.S. Department of Health and Human Services (DHHS), National Institute for Occupational Safety and Health (NIOSH) Publication No. 93-109, (May 1995). Helps employers and employees to identify high-risk occupations and workplaces, informs employers and employees about their risks, encourages employers and employees to evaluate risk factors in their workplaces and implement protective measures, and encourages researchers to gather more detailed information about occupational homicide and to develop and evaluate protective measures.

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Overtime and Other Pay Issues
DOL UPDATE

- The New Overtime Rule
- Other Key DOL Initiatives
  - Regular Rate Determination
  - Joint Employer Proposal
  - Modifications to Fluctuating Workweek Regulations
  - Reforms to Tip Regulations (Tip Credit/Pool and 80/20 Rule) (Not a priority for construction)
New Overtime Rule: Final Part 541 Regs

- Rescinds Enjoined 2016 Final Rule
- Effective January 1, 2020
Overtime Issues for Contractors

- Exemptions

- 1. Duties
  - Executive
  - Administrative
  - Professional
  - Outside Sales
  - Difficult Positions: Estimators, Project Engineers, Dispatchers

- 2. Salary Basis
  - New Minimum is $35,568 annually; $684 weekly
Nondiscretionary Payment -- Standard Salary Level

- 10% of Minimum Standard Salary Level May Be Nondiscretionary Bonus, Incentive, and Commission Payments
- Nondiscretionary Payments Must Be Paid Annually or More Frequently
- “Catch up” Payment to Meet 10% Allowed
  - Must be made by next pay period after end of year
Highly Compensated Employee (HCE)

- **$107,432** Total Annual Compensation (from $100,000)
  - Based upon annualized value of the 80th percentile of weekly earnings of full-time salaried employees nationally

- Includes Provision for Annual “Catch Up” Payment at the End of the Year or within One Month of Year’s End

- Must Include Standard Salary Level of $684 Per Week
New Overtime Rule Also

- Reaffirmed Commitment to Update Standard Salary Level and Total Annual Compensation More Regularly
- Regular Updates Through Notice-and-Comment Procedure
  - Allows flexibility and consideration of economic and other factors, and not timeframes, to drive updates
  - Consistent with FLSA requirement to define and delimit exemptions “from time to time”
The Final Rule Does Not:

- Change any Duties Tests
- Inflate salary or compensation forward to 2020
- Include Provision that Automatically Would Increase the Standard Salary Level on a Periodic Basis
- Allow Nondiscretionary Bonus or Incentive Payments to Meet Minimum **Standard Salary Level** For Highly Compensated Employee’s Total Annual Compensation
Actions for Employers to Take Now

- Evaluate Jobs Impacted by Standard Salary Level Test of $684 per week
  - Consider whether exempt positions below $35,568 will receive a salary increase or will be reclassified
  - Consider pay and rate for jobs to be reclassified
    - Devise communication plan for affected employees
    - Train affected employees (and managers) on timekeeping and other policies
  - Ensure exempt employees satisfy applicable duties tests
Overtime Issues for Non-exempt Employees

- Commuting
- Travel
- Lunch Breaks
- Other Breaks
- Prove it!
Who Cares?
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Joint Employment
On January 12, 2020, the Department of Labor’s Wage and Hour Division released the final changes to its joint-employer regulation under the Fair Labor Standards Act (FLSA).
The Four-Factor Test

Examines whether the putative joint employer:

1. hires or fires the employee;
2. supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
3. determines the employee’s rate and method of payment; and
4. maintains the employee’s employment records.
Certain Business Practices Do Not Trigger Joint-Employer Liability

- operating as a franchisor or entering into a brand and supply agreement;
- contracts requiring compliance with specific legal obligations or certain standards to protect the health or safety of employees or the public (e.g., requiring compliance with the FLSA, the adoption of sexual harassment and workplace safety policies and protocols, etc.)
- Contracts requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation;
- Providing sample employee handbooks or other forms; allowing “store within a store” arrangements; offering an association health or retirement plan; or jointly participating in an apprenticeship program with the employer.
2020 could be the year of the joint-employer regulation...

- The National Labor Relations Board (NLRB) is expected to finalize its joint-employer regulation soon.
- The Equal Employment Opportunity Commission (EEOC) is expected to issue a joint-employer proposal of its own.
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The Dope on Legalized Marijuana
Marijuana Regulation & the Workplace

- **Federal prohibition (1937 to present)**
  - Controlled Substances Act (1970)

- **Medical use (1996 to present)**
  - Some states allow employers to enforce drug-free workplace policies
  - Some states have anti-discrimination provisions
  - Individuals who suffer from a “debilitating medical condition” are authorized to use medical marijuana upon the receipt of a “registry identification card”
  - A “debilitating medical condition” can meet the definition of a disability under applicable state and/or federal law

- **Recreational use (2012 to present)**
  - A growing number of states permit recreational use
  - One in four Americans lives in a state where use is legal without a doctor letter

- **The Food and Drug Administration approved the first cannabis-derived drug in June 2018** (Epidiolex; treats childhood epilepsy using CBD)
Federal Drug Free Workplace Act of 1988

- USDOL ended the Drug Free Workplace Act of 1988 in 2010, at least in its general application to all manners of private and public practice.

- There is no requirement for most private employers to have a drug-free workplace policy of any kind.

- Today, federal drug and alcohol testing policies are applicable to federal contractors including safety and security industries and positions.
Marijuana Laws

* This map reflects state and local marijuana laws only and not laws permitting cannabidiol or other low-THC products. The sale, possession, and use of marijuana remains illegal under applicable federal law.

Recreational and Medical Marijuana
Medical Marijuana Only
No Law

Updated 1-2020
This map is intended as a visual aid and should not be relied upon or construed as a substitute for legal advice.
Medical Marijuana and Job Protections

States That Prohibit Discrimination Against Employees Based on Their Status as Medical Marijuana Cardholders or Based on Detectable Levels of Marijuana in Their System

- Arizona
- Arkansas
- Connecticut
- Delaware
- Illinois
- Maine
- Massachusetts
- Minnesota
- Nevada
- New York
- Oklahoma
- Pennsylvania
- Rhode Island
- West Virginia
Different rules for different stages of employment relationship: pre-offer; post-offer, pre-employment; active employee: reasonable suspicion, random, or post-accident testing

- Questions about legal drug use/current medications are impermissible at the pre-offer stage

Generally, employers may not ask about employee’s use of prescription drugs

Must be able to demonstrate job-related and consistent with business necessity
Remember, the FMLA and ADA are federal laws and marijuana is still illegal under federal law.

Under the ADA, employers are generally required to engage in an interactive process with individuals with qualifying disabilities and, absent undue hardship, provide reasonable accommodations.

Modified work schedule/leave of absence is the most typical accommodation for drug and alcohol abuse.

- Rehabilitation
- Support group meetings
What about Florida law?

- No obligation for employers to accommodate marijuana use in the workplace or during work time:
  - “Medical use” does not include use or administration of marijuana “[i]n a qualified patient’s place of employment, except when permitted by his or her employer.” §381.986(1)(j)(5)(c), Fla. Stat.
  - “This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy.” §381.986(15)(a), Fla. Stat.
  - This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana. §381.986(15)(b), Fla. Stat.
  - This section does not create a cause of action against an employer for wrongful discharge or discrimination...” §381.986(15)(c), Fla. Stat.
What about Florida law?

- Clever plaintiff’s attorney might try to challenge lawful off-duty use of medical marijuana as not being “in the workplace.”
- This statute does not have a private right of action, so any such claim would have to come under the state disability discrimination statute.
- No court decisions yet.
Florida State Senator Lori Berman and State Representative Tina Polksy have filed SB 962 and HB 595, which would provide job protections for medical marijuana users.

Fortunately, employers would not be required to extend protections to positions with “safety-sensitive job duties,” which include “tasks or duties of a job which the employer reasonably believes could affect the safety and health of the employee performing the tasks or duties or other persons.”

It will be important to monitor these companion bills during the 2020 Legislative Session.
What Should Employers Do Now?

- Review / consider drug testing policy (generally no “one size fits all” policy for nationwide compliance)
- Implement supervisor and employee training
- Provide employee education and offer employee assistance
- No state currently restricts employer prohibition on recreational use, but beware of “lawful off-duty conduct” litigation
- Uniformly enforce drug testing policies to avoid discrimination claims
- Get qualified assistance as necessary
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Harassment & #MeToo Issues
#metoo: Litigation Update

- Sexual harassment charges increased in 2018 by more than 12% over prior year.
- Sexual harassment lawsuits filed by the EEOC’s attorneys increased by 50% over prior year.
- Monetary awards in sexual harassment cases increased by more than 22% over prior year.
- The total amount of money awarded to employees in sexual harassment cases settled or conciliated at the EEOC stage was $70 million.

Federal Law – No Change

Title VII of the Civil Rights Act of 1964

- Continues to prevent discrimination on the basis of sex.
- Harassment is a form of discrimination.
- Prevents quid pro quo harassment and hostile work environment based on sex.
- Limited defenses when a supervisor is harasser.
Tax Cuts and Jobs Act of 2017: Effective 1/1/2018
Section 162(q): prohibits employers from deducting costs/fees for sexual assault and harassment complaint settlements subject to non-disclosure agreements.

Cngrssnl. Accountability of 1995 Reform Act: Signed 12/21/18
Amends the 1995 Act and revises dispute resolution procedures for certain claims by government employees who claim that their offices have violated their right to be free from sexual harassment. Members of Congress must reimburse treasury for damages.
State and Local Measures - Enacted

Ten states enacted legislation addressing at least one aspect of sexual harassment in the workplace in 2018

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## State and Local Measures - Enacted

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Now What?

- REVIEW
  - Policies
  - Procedures
  - Practices

- UPDATE
  - Policies
  - Procedures
  - Practices

- IMPLEMENT
  - Policies
  - Procedures
  - Practices
Written Policies – What to Include

- Anti-harassment statement
- Description & examples of prohibited conduct
- Information about statutory provisions and remedies, local laws, as required
- Clear reporting mechanism
- Complaint form
- Description of investigation process: prompt, thorough, and impartial (sample checklist included in materials)
  - Confidential to fullest extent possible
  - Employees encouraged to cooperate in an investigation
  - Employer will take prompt, remedial action if needed
- Anti-retaliation statement
- Harassment is a form of employee misconduct
Written Policies, Continued

- Posted in visible, central location
- Include in all languages commonly used by employees
- Reviewed periodically
- Given to new employees, redistributed periodically
- Provide contact information for state/local agencies – only if required by state law
Training – Best Practices

- Conducted by qualified trainers
- Supervisors and non-supervisors alike
- Interactive (in-person or online) and easy to understand
- Regularly scheduled at least every two years
- Employees sign-off on attendance
- Evaluated by participants
Audit Template Agreements

- Employment Agreements
- Arbitration Agreements
- Settlement Agreements
- Confidentiality Agreements

Consider whether your various agreements include legal/appropriate provisions based on federal NDA law and applicable state law.
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Top 10 Mistakes & How to Avoid Them
Top 10 Employers Mistakes

1. Failure to be aware of relevant employment laws.
2. Poor hiring practices.
3. Failure to be brutally honest when evaluating employees.
5. Poor timekeeping practices and/or records.
6. Not fully addressing harassment or discrimination complaints.
7. Failure to be aware of retaliation claims.
8. Failure to accommodate.
10. Unintentional modification of at-will employment.
Best Practices

Before any disciplinary act or termination, be able to say:

“We are disciplining/discharging _______ because ______. This is important to the company because _____.

This is fair to the employee because _____.”
Best Practices

- Give discipline in person, in private.
  - Have witness present.
  - Have employee sign receipt.
  - Keep meeting short.
  - Don’t argue.
  - Be hopeful.
Best Practices

- Update the employee handbook every year!
- First line of defense in litigation
- Laws are constantly changing
- One size fits all approach will not work
- Consider adding an addendum for every state to comply with state and local laws
Key Handbook Updates for 2020

- Civility rules
- Confidentiality rules
- Investigation rules
- Leave policies
- Equal employment opportunity/discrimination policies
- Drug testing
Questions ?
Thank you!

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