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How Changes at EEOC Could Benefit Employers

President Trump's appointment to the U.S. Equal Employment Opportunity Commission could signal a more cooperative attitude at the agency.

Now that the EEOC is likely to have a 3-2 Republican majority under nominee Janet Dhillon, its policies are expected to slant in a more pro-employer direction.

Control at the field office level, where much of the litigation against employers has originated, particularly litigation alleging systemic discrimination, is also likely to be more restrained. But that doesn't mean employers should let their guards down either. You'll still want to make sure you have a good employment practices liability insurance policy.



Obama Administration

Under the Obama administration, the EEOC often attempted "to engage in litigation tactics to force certain outcomes or to force policies," said J. Randall Coffey, a partner with Fisher Phillips L.L.P.

This Just In...

There's a disparity in how baby boomers learn and how younger generations including Generation X and millennials learn that affects safety in the workplace.

Christina Lincicome of SAIF Corporation, Oregon's state-chartered workers comp insurer, thinks "full classes on safety will become a rarer occurrence because younger generations don't necessarily learn best that way," she told *Business Insurance* magazine.

Lincicome points out that since "millennials are highly intuitive..., safety concerns should be relayed showing the best method quickly and decisively. For boomers, you want to include the entire method and build in time for questions."

Younger generations also want to know how changes are going to

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in Kansas City, Missouri, to *Business Insurance*.

Under the new administration the EEOC is not expected, for example, to try to push the boundaries of Title VII. In one such case involving a gay skydiver who said he was fired because of his sexual orientation, conflicting amicus briefs were filed with the appellate court. The EEOC contended that Title VII can be interpreted to apply to sexual discrimination, while the U.S. Department of Justice countered that Title VII does not address sexual orientation.

“The EEOC has been very aggressive in searching out cases on the cutting edge” of federal statutes, including those involving transgender issues, said Gerald L. Maatman Jr., a partner with Seyfarth Shaw L.L.P. in Chicago to *Business Insurance*. “I think when the Republican commissioners take their seats and have a majority, that sort of view of the EEOC will be pulled back,” he said.

Sexual Harassment

One area where the agency is not expected to pull back, however, is with regard to sexual harassment. The recent revelations of sexual harassment and other sexual misbehavior by multiple media and political figures makes this issue “too much of a hot potato for them to cut back on that,” according to Richard B. Cohen, a partner with FisherBroyles L.L.P. in New York.

People fundamentally agree that sexual harassment is noxious and should not be tolerated. Speakers attending the recent American Bar Association Labor and Employment

Law Conference in Washington pointed out that there is still much harassment in the workplace that goes unreported. “Superstars” are often given a pass because of their power and influence. But tolerance for this behavior is fast disappearing. Given the current climate, suits alleging sexual harassment are likely on the rise.

A More Conciliatory, Cooperative EEOC?

Still, many employment law attorneys feel the tone of the EEOC will be more conciliatory and cooperative, seeking to help employers achieve compliance in a less adversarial and litigious environment. “We will see more outreach to employers for both training and education purposes, as well as trying to resolve the more complex charges before litigation,” said Paul C. Evans, a partner with Morgan Lewis & Bockius L.L.P. in Philadelphia.

EEOC Chairperson Nominee Janet Dhillon herself has said that she thinks the commission should spend more time on conciliation to avoid litigation.

Beware of Activist States

While the EEOC’s approach to litigation is expected to be less expansive under the new administration, many experts feel that this may cause some states to become more active.

“HR professionals should never lose sight of the importance of annual compliance training and keep close tabs on statewide compliance regulations since there is enormous activity occurring at the state level,” Barry Hartstein, co-chair of the EEO and di-

impact the workplace. They need to know the why; they’re not satisfied just knowing what to do.

“Millennials bring intuitive problem-solving approaches while boomers carry the social and institutional knowledge. These two can create new approaches by leveraging the best in each other. Generation X is generally excellent at project management. They have been referred to as the latch-key generation and understand what it is like to work alone. They excel in productivity and creativity when you give them a charge, a deadline, and leave them alone,” said Ms. Lincome.

We saw a cartoon that put the generational disparity this way:

Boomer: Tell me quick, I only have five minutes.

Millennial: Tell me quick. I only have a few seconds, send me a message on my iPhone.

versity practice at Littler Mendelson P.C. in Chicago recently told Human Resource Executive Online.

For the most part, clients who carry employment practices liability insurance have coverage that is designed to respond to these kinds of EEOC claims. But, experts warn, businesses that operate in states with a more permissive legal environment should operate with greater scrutiny. Insurance companies will be following events closely, too.

Please call us if you have questions about your employment liability insurance or if you would like to get a quote. ■

How Technology Is Helping to Reduce Fraud

Fraud in all U.S. lines of insurance is responsible for approximately \$80 billion per year in losses. Several billion dollars of that is workers comp fraud. In the past few years, however, some of those losses have been reduced thanks to technology.

Video and Video Surveillance:

Though the use of drones with cameras on board for investigating fraud is rapidly growing, particularly on stakeouts (see below), claims investigators use video in other ways, as this excerpt from a post on the www.trustify.info blog demonstrates:

“You wouldn’t mind if I... you know... videotaped us working out, would you?” I said to Lifter guy. “Just to look at my form and stuff?”

“No problem. You gonna put it on YouTube or something?” Lifter Guy responded.

“Yeah,” I smirked and smiled, “something like that.”

Little did Lifter Guy know that I was a Private Investigator (P.I.) working undercover to videotape him powerlifting while cheating the workers’ compensation system.

People like attention, so it’s not hard to get their permission to film them even in situations where they should be more cautious. A more common use of video is as a surveillance tool.

Nearly one in four business owners now uses video cameras to monitor employees. A recent YouTube video shows actual foot-



age of a Fort Lauderdale woman who hit herself on the head with a sprinkler head after it fell onto her desk. She is startled at first, then quickly picks the sprinkler head up, leans back in her chair and smacks her head with it. She has been convicted of workers comp fraud. https://www.youtube.com/watch?v=A4N4X_9URKk

Video surveillance can also be helpful in identifying fraud in other ways. For example, parking lot cameras could show how a worker limped from their car and into the build-

ing shortly before reporting that the injury to their leg just occurred on the job.

Prescription Monitoring Database: Almost every state uses a prescription drug monitoring program to control substance abuse. These databases track drug use by patients as well as the dispensing of drugs by prescribers, making it easier to detect patterns of excessive or fraudulent use of opioids and other controlled substances.

Social Media: A workers comp recipient was on leave because of a work-related in-

jury. However, he “could not resist playing a contact sport on a local semi-professional sports team,” according to *Risk Management Magazine*. Social media and internet searches revealed the worker was listed on the team roster and having a great season

“Head and shoulders above anything else from falsifying an accident or exaggerating an injury, the biggest trend is how social-media monitoring is being used as an investigative tool to understand and predict future activities of these presumably injured people.” Steve Cassell, Lake Mary, Florida-based president and CEO of Command Investigations L.L.C. told *Business Insurance* magazine. “People brag; it never stops.”

Keep in mind you can’t trick people into giving you access to their social accounts, but if access to their accounts is available to the public, information obtained from them can be used to substantiate allegations of fraud.

Drones: Private investigator Mike Stanfield of Apex Investigation Group used to stake out a suspected fraudster for weeks. Now he uses technology. He recently sent a remote camera drone to make short flights near the house of someone suspected of faking a back injury. Stanfield discovered that the supposedly disabled man was “tossing

around 200 pound rocks re-landscaping his property.”

“If you are on any property that does not have a privacy fence around it, you are fair game for the drone camera,” according to Stanfield.

Internet of Things: As we interact more and more with apps and appliances these days, we leave behind time stamped data records of our whereabouts, actions and even our conversations. That information is now being used in investigations. In Arkansas, a court order was issued to Amazon demanding Echo recordings of a suspect in a murder investigation. In Ohio prosecutors will use data from a fraud suspect’s pacemaker to attempt to prove he lied in statements to investigators about how he escaped the fire in his home.

Consumer and privacy groups are concerned about how “Big Data” is becoming increasingly intrusive. The courts and legislators are currently trying to strike a balance between privacy and the proper use of data.

We will undoubtedly keep seeing new technologies introduced to help reduce fraud. If you would like to discuss ways technology might help you reduce fraud and other types of losses at your firm, please contact us. ■

Section 7 and Social Media in the Workplace

Two restaurant employees complained about the company’s accounting department on Facebook — and were fired. Two teen center employees took to Facebook after an office meeting and disparaged their supervisors’ decisions — and were fired. James Damore used Google’s employee message boards to criticize how his employer was implementing its diversity policy — and was fired.

When are employees protected from actions by employers for things they say about their employers on social media?

Let’s look at these three cases more closely for some insights.

1. Three D L.L.C. (Triple Play) – Should employees be allowed to post comments where the general public can read them? Including obscenities?

Although Section 7 of the NLR Act (National Labor Relations Act) specifically addresses an employee’s rights to engage in activities related to unions and collective bargaining pursuits, those protections can extend to using social media to complain about work environments (presumably to other employees, whether the public sees those posts or not). In the 2014 National Labor Relations Board case *Three D L.L.C. (Triple Play)*, employees used Facebook to discuss how they unexpectedly owed additional state income taxes because their employer made mistakes calculating the withholdings from their wages. When employees expressed their frustration, including using obscenities, on Facebook, they were fired. The employees brought their case to NLRB, which found the employer’s action to be unlawful.

The employers appealed the decision, but the appellate court upheld it, saying:

Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand. The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern-day social media use.

Two key takeaways here, according to Philip L. Gordon and Kwabena A. Appenteng of the employment law firm Littler Mendelson P.C., are :

- a An employee's mere use of obscenities in a social media post that may be accessible by customers/clients is not enough, by itself, for the employee's communications to lose the protection of the Act.
- b Employers should consider consulting with counsel before firing an employee for disparaging or defamatory speech when that speech takes place in the course of a group discussion in social media about work.

2. Richmond District Neighborhood Center – Can employees just say anything they want about their employers on social media and get away with it?

In another 2014 NLRB case, *Richmond*



District Neighborhood Center, employees at a teen center in San Francisco decided to complain about their supervisors and suggested how they would like to perform what the Board characterized as “insubordinate acts.” They also used obscenities.

The employees had gone too far, said the Board. “We find the pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act’s protection and render [the employees] Callaghan and Moore unfit for further service.”

3. Wasn’t violating Google’s corporate code of conduct sufficient grounds for firing James Damore?

We’ll have to see about that. Mr. Damore was fired after publishing a memorandum questioning the effectiveness of Google’s diversity methods because, he suggested, women may not have the same predisposi-

tion for understanding technology as men.

He has now filed an unfair labor practices charge against his former employer under Section 7 of the NLRA. As we’ve seen already, under Section 7 employees are entitled to complain about workplace policies to other employees. This is considered “concerted activity,” and is protected by Section 7 “if it concerns employees’ interests as employees.” Pay attention to this one.

The reality is that social media is “how we communicate these days” Joane Wong, New York-based senior attorney with the NLRB, said to *Business Insurance* magazine. “We no longer just talk to our co-workers face to face or pick up the phone. Instead, we type out our concerns and press send, or we post something or press ‘like.’ Now we have people pressing buttons and everything’s written out and is discoverable.”

To protect your firm, consult your attorney about employment law matters and carry employment practices liability insurance. Give us a call if you’d like a quote. ■

Ways to Fill Winter Storm Insurance Gaps

Your firm's winter storm property insurance exposures may require more than a named perils insurance policy. You may want to consider upgrading your coverage to one of these types of property policies:

- ✱ A broad form property policy, which covers the basic named perils, and adds coverage for falling objects; weight of snow, ice or sleet; water damage (from certain causes) or collapse (from certain causes).
- ✱ An "all-risks" policy. This type of policy covers your business from property damage or loss due to all causes, unless specifically excluded by the policy. Typical exclusions include nuclear hazard, war and military action, earth movement, flood, wear and tear, and more.
- ✱ A business owner's policy (BOP). The standard BOP offers a package of coverages for the typical small to mid-sized business needs. These include property coverage, business income coverage, general liability coverage, and coverage for autos you borrow or rent for business purposes. ■



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