



We're Gonna Need A Bigger Handbook: Employment Law Developments

Lindsay Fiore, Partner

Robert Vaught, Partner

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Quarles & Brady LLP

Agenda

- Litigation Trends
- Arbitration Agreements
- The #MeToo Movement
- Arizona Fair Wages and Healthy Families Act

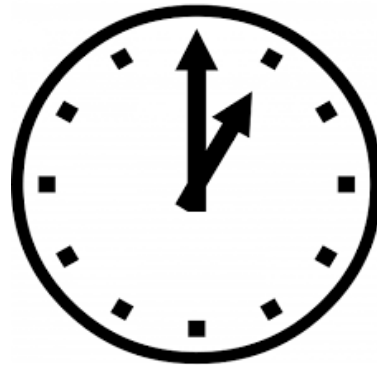


Litigation Trends

- The number of wage and hour lawsuits continues to rise.
 - March, 2017: 18,387 lawsuits filed in federal courts alleging labor law violations.
 - 9,041 alleged violations of the Fair Labor Standards Act.
 - More than any other category reported.
 - 2008: 6,786 Fair Labor Standards Act cases filed.
 - These numbers do not include claims filed in state court for violations of state wage and hour laws.

Litigation Trends

- Why are people suing?
 - Misclassifying "exempt" vs. "non-exempt" employees
 - Calculating overtime incorrectly
 - Uncompensated "off the clock" work



Litigation Trends

- EEOC Filings
 - FY 2017: 84,254 charges filed nationally
 - 25,605 alleged sex discrimination
 - 28,528 alleged race discrimination
 - 26,838 alleged disability discrimination
 - In Arizona: 1,988 charges filed in Arizona
 - 656 alleged sex discrimination (33%)
 - 437 alleged race discrimination (22%)
 - 696 alleged disability discrimination (35%)

Arbitration Agreements

- Use of mandatory, pre-dispute arbitration agreements has increased over several decades.
- 56% of private sector nonunion workers (60 million people) are currently subject to mandatory arbitration in employment contracts.
 - 25 million contain a class waiver.

Arbitration Agreements

- *In re D.R. Horton, Inc.* (2012):
 - NLRB ruled class action waivers in employment arbitration agreements were unenforceable under the NLRA.
- Second, Fifth, Eighth and Eleventh Circuits ruled class actions waivers are enforceable.
- Ninth, Sixth and Seventh circuits ruled class action waivers are not enforceable.

Arbitration Agreements

- *Epic Systems v. Lewis* (May 21, 2018):
 - Plaintiff filed collective and class action complaint.
 - Employer misclassified him and other similarly situated employees, depriving them of overtime wages.
 - Defendant moved to dismiss.
 - Plaintiff had an arbitration agreement requiring employees to bring wage payment claims in individual arbitration.
 - Trial court denied the motion, finding the class waiver unlawful under the National Labor Relations Act.
 - Seventh Circuit affirmed.

Arbitration Agreements

- Holding: Class waivers in employment arbitration agreements are enforceable.
 - The Federal Arbitration Act requires enforcement of arbitration agreements.
 - NLRA lacked a "clear congressional command" precluding the enforcement of class waivers in employment agreements.

Arbitration Agreements

- Potential benefits to arbitration:
 - Parties jointly select the arbitrator
 - Final decisions
 - Usually less expensive and quicker resolution
 - Less discovery
 - No "runaway" jury verdicts
 - Confidentiality

Arbitration Agreements

- Potential disadvantages:
 - Cost of separate arbitrations
 - Dispositive motions
 - "Split the baby"
 - Multiple individual claims
 - Limited rights to appeal



The #MeToo Movement

- What is the #MeToo movement?
 - Viral social media campaign to demonstrate the widespread prevalence of sexual assault and harassment
 - Followed public revelations of numerous sexual misconduct allegations against Harvey Weinstein
 - Since October 2017, the phrase has been posted online millions of times, usually accompanied by a personal story of sexual harassment or assault



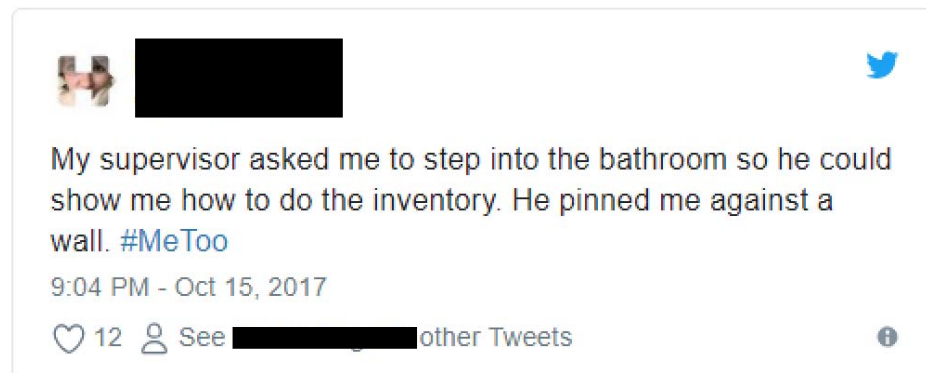
#MeToo and Workplace Sexual Harassment



The owner of the first company I worked for felt it was appropriate to rub my shoulders while I worked & called me baby. I was 17. #MeToo [twitter.com/womensmarch/st...](https://twitter.com/womensmarch/status/9111111111)
8:43 PM - Oct 15, 2017
542 likes 102 people are talking about this



At 16, my 36 year old co-worker told me he was gonna "spank me for being a naughty girl" I stayed silent because I was scared #MeToo [twitter.com/womensmarch/st...](https://twitter.com/womensmarch/status/9111111111)
8:56 PM - Oct 15, 2017
695 likes 103 people are talking about this



My supervisor asked me to step into the bathroom so he could show me how to do the inventory. He pinned me against a wall. #MeToo
9:04 PM - Oct 15, 2017
12 likes See [redacted] other Tweets

The #TimesUp Movement

- What is the #TimesUp movement?
 - A movement against sexual harassment founded by Hollywood celebrities in January of 2018
 - Founding initiatives include:
 - A legal defense fund to support lower-income women seeking justice for sexual harassment and assault in the workplace
 - Advocating legislation to punish companies that tolerate persistent sexual harassment
 - Encouraging gender parity in studios and talent agencies
 - #TimesUp has raised \$20 million for its legal defense fund and gathered over 200 volunteer lawyers

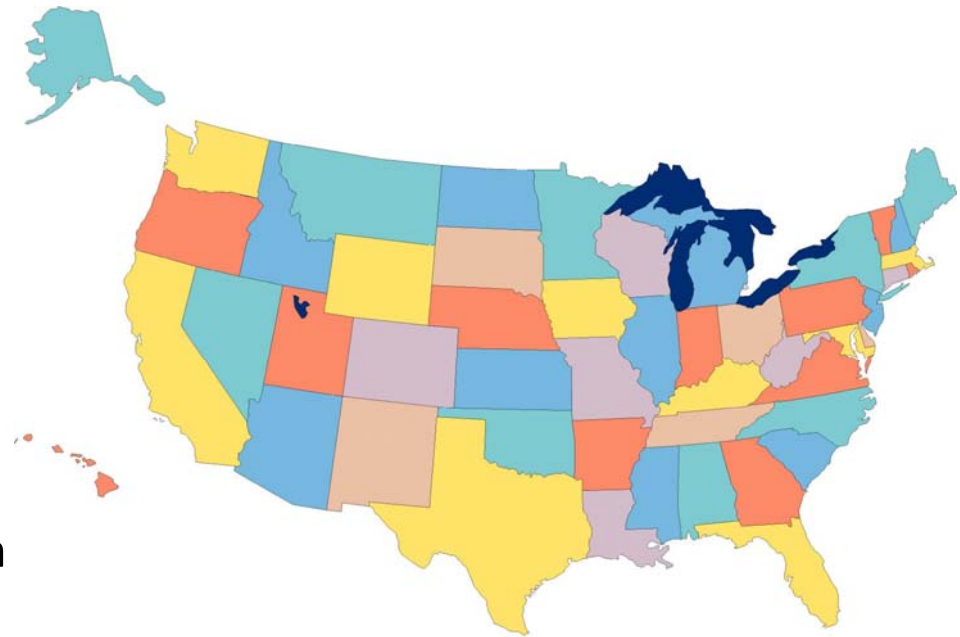


#MeToo and #TimesUp: Raising More than Awareness?

- Legislative Impact:
 - The Tax Act (effective December 22, 2017):
 - Ordinarily, employers may deduct ordinary and necessary business expenses, including settlement payments and legal defense fees.
 - The government will no longer permit employers to deduct any settlement related to sexual harassment or sexual abuse, or any related legal fees, if the settlement is subject to a nondisclosure agreement.
 - Congress has introduced legislation that would make it illegal for businesses to enforce arbitration agreements if employee allegations involve sexual harassment or gender discrimination.

#MeToo and #TimesUp: Raising More than Awareness?

- Legislative Impact, Cont.:
 - Many states are proposing legislation relating to workplace sexual harassment:
 - NY, NJ, and WA have passed bills that would limit the use of confidentiality agreements in sexual harassment cases.
 - PA, CA, NY, and SC have introduced similar legislation.
 - NY and SC have proposed bills which would prohibit mandatory arbitration of sexual harassment claims.



Produced by the Cartographic Research Lab
University of Alabama

#MeToo and #TimesUp: Raising More than Awareness?

- Claims by Victims
 - Employers are reporting an upsurge in internal complaints of sexual harassment in the wake of #MeToo and #TimesUp.
 - Sex discrimination claims made up the largest portion of EEOC claims filed in Arizona in 2017.
 - Successful claims can result in significant liability and reputational damage.



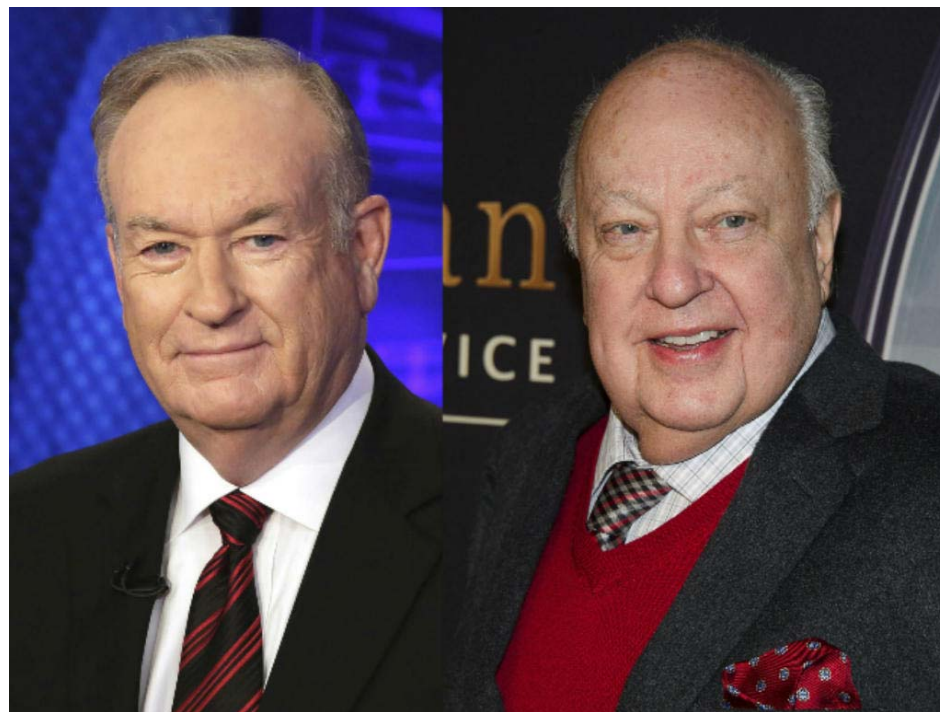
The High Cost of Sexual Harassment Claims

- 21st Century Fox and Bill O'Reilly

- In January of 2017, O'Reilly and Fox settled a claim of sexual harassment brought by a network analyst for \$32 million.
 - This was the sixth such settlement relating to O'Reilly.
- Despite its knowledge regarding this pattern of sex harassment allegations, 21st Century Fox extended O'Reilly's contract.
 - The settlements subsequently became public and numerous advertisers boycotted O'Reilly's show.
 - Ultimately resulted in O'Reilly's ouster.

- Fox News and Roger Ailes

- Former broadcaster Gretchen Carlson alleged that Ailes sexually harassed her. When Carlson refused to sleep with Ailes, her employment contract was not renewed.
- Carlson sued and ultimately received a \$20 million settlement.
- Ailes subsequently resigned, receiving a \$40 million severance.
- Additional lawsuits followed.



The High Cost of Sexual Harassment Claims

- Beyond Hollywood and Media Outlets:
 - \$41.3 million award to retail chain employee who made numerous complaints that a manager was harassing her, which the employer largely ignored until the manager sexually assaulted the employee.
 - \$7.65 million award to a teenager working at Chipotle; alleged her 26 year-old manager made comments about her breasts, touched her breasts, and ultimately sexually assaulted her.
 - \$6.5 million award in punitive damages against founder of Bikram Yoga following trial on claims of sexual harassment and sexual assault.
 - \$1.75 million jury verdict for dental assistant where manager made sexual comments, grabbed her breasts and buttocks, and denied her a raise unless she agreed to go to Las Vegas with him.
 - Economic damages were only \$16,000.



#MeToo and #TimesUp: Raising More than Awareness?

- Suits Alleging Inadequate Investigations
 - *Phramus, Inc. v. Metropolitan Opera Ass'n* (2018)
 - Top company officials were notified of complaints against the plaintiff on numerous occasions.
 - Once notified by the police of sexual misconduct allegations, the employer launched its own investigation, ultimately firing the plaintiff in the midst of a social media scandal.
 - The plaintiff filed suit alleging defamation and breach of contract, argued he did not have reasonable opportunity to respond to allegations.
 - Seeking \$5.8 million in damages.



#MeToo and #TimesUp: Raising More than Awareness?

- Suits Alleging Inadequate Investigations, Cont.
 - *TS Media Inc. v. Public Broadcasting Service* (2018)
 - PBS investigated complaints of workplace misconduct against one of its talk show hosts.
 - PBS did not inform the host of the names of his accusers or the specific allegations against him; at close of investigation, PBS fired him.
 - The host then filed suit against PBS alleging that the employer's investigation was "biased," "in violation of norms and procedures for conducting workplace investigations," and a pretext for race discrimination.



In the Midst of It All, What's an Employer to Do?

- Create and Demonstrate an Inclusive Atmosphere
 - Acknowledge the #MeToo and #TimesUp movements and your company's commitment toward combatting sexism, harassment, and other inappropriate behaviors in the workplace.
 - Be aware of the risk factors for harassment and take steps to minimize them.
 - Encourage employees to come forward if they witness or are subject to harassment.
 - And provide the resources for them to do so.
 - Demand professionalism at every level.
 - Ensure that your managers are modeling good behavior and calling out bad behavior.



In the Midst of It All, What's an Employer to Do?

- Thoroughly Review and Revise Your Applicable Policies
 - Anti-Harassment Policy Musts:
 - Definition of sexual harassment
 - Examples of prohibited conduct
 - Defined reporting procedure
 - Statement against retaliation



In the Midst of It All, What's an Employer to Do?

- Train, Train, and Train Some More:
 - Where feasible, training should occur annually.
 - Train your managers and your non-managers.
 - All employees should be equipped to spot and appropriately respond to sexual harassment.
 - Managers are on the front lines and often are the most likely recipients of complaints.
 - Reconsider the traditional approach.
 - In-person, rather than electronic/video-based.
 - Not just compliance, but culture.
 - Make your (up-to-date) training materials accessible.
 - Consider bringing in the experts.



In the Midst of It All, What's an Employer to Do?

- Investigate Complaints Swiftly and Thoroughly.
 - Investigate every complaint.
 - Beware of the chronic complainer – eventually they'll get it right!
 - Investigate promptly and thoroughly.
 - Practice good documentation.
 - For the love of your lawyers, remember that your documents may become exhibits.
 - Contemporaneous, factual, detailed.
 - Practice good communication.
 - Don't overpromise confidentiality.
 - Communicate a conclusion, not necessarily the details.



Arizona Fair Wages and Healthy Families Act

- Approved by Arizona voters in November, 2016.
- Raises Arizona's minimum wage incrementally over the next several years.
- Requires employers to provide employees with paid sick time off.
- Paid sick time provisions became effective July 1, 2017.
- Final administrative regulations October, 2017.

Paid Sick Time - Overview

- **Paid Sick Time**: Requires all private employers to provide all employees with paid sick time off of work for certain medical and other reasons at the same rate of pay otherwise received.
- **Accrual**: 1 hour of sick time for every 30 hours worked.
- **Caps**: Employers with 15 or more employees may cap the amount of paid sick time an employee may accrue or use at 40 hours per year.
- **Carry Over**: Capped at 40 hours per year. Or, pay out at end of the year, and replenish for immediate use at the beginning of the next year.
- **Qualified Uses**: Mental or physical illness, injury or health condition; need to seek diagnosis, care or treatment; domestic violence, abuse, sexual violence, stalking; public health emergency.
- **Documentation**: Reasonable documentation can be required after 3 or more consecutive workdays.
- **Notice**: Notice of law and notice of sick time accrued, used and paid.

Updates

Guidance re Coverage:

- AIC will not include an employer's non-Arizona employees in the employer's total employee count for earned paid sick time purposes.
- AIC does not intend to enforce the Act against an Arizona employer's out-of-state employees.



Updates

Guidance re Existing Policies:

- If employers already have a paid time off policy, they do not need to offer additional paid sick time.
- If employees exhaust paid time off for reasons other than those allowed under the paid sick time law, the employer is not required to provide additional paid time off for sick time purposes.
- Policy must meet minimum requirements:
 - Made available to be used for the same purpose and under the same conditions.

Updates

Guidance re Designating Time:

- The AIC will not pursue enforcement when an employer designates an employee's time off from work as earned paid sick time, provided that the employer has a good faith belief that the absence meets the requirements of earned paid sick time usage.
- If an employer who has, in good faith, designated leave time as earned paid sick time learns that it did so in error, it must take prompt action to correct.

Updates



Guidance re Recordkeeping:

- Employers must keep the following records:
 - The amount of earned paid sick time available.
 - The amount of earned paid sick time taken.
 - The amount of pay the employee has received as earned paid sick time.
 - The employee's earned paid sick time balance (including carryover).

Updates

Miscellaneous

- If a current PTO policy meets or exceeds the requirements of the Act, an employer cannot count time that was accrued or used before July 1, 2017.
- When leave is not foreseeable, and leave is not requested in accord with employer's written policy, AIC will not enforce against an employer who does not designate as paid sick time, if:
 - The employer provided a copy of the written policy;
 - The policy does not discriminate against employees using earned paid sick time; and
 - The employee does not have a "reasonable justification" for failing to follow the policy.
- An employee's family member, medical provider, friend, or "other person" can submit a request for earned paid sick time on an employee's behalf "in appropriate circumstances".
- You may deny perfect attendance bonuses for those using paid sick time, provided that employees who have used other leave types are similarly disqualified.

Pitfalls and Penalties

- If an employer takes an adverse action against an employee within 90 days of the employee asserting a right under the Act, retaliation against the employee will be presumed.
- This presumption can only be overcome if the employer shows by "clear and convincing evidence" that the action taken against the employee was for a permissible reason.

Pitfalls and Penalties

- An employer who fails to pay earned paid sick time must pay the employee wages owed, with interest, and an additional amount equal to twice the underpaid wages.
- Civil penalty of \$250 for the first violation.
- \$1,000 for each "subsequent or willful" violation.
- If the employer does not maintain required records, it will be presumed that the employer did not pay required sick time.

Tips for Employers

- Update policies concerning paid time off, sick days, leaves of absences and attendance.
 - If employers will require employees to follow special procedures for requesting sick time off, such requirements must be specifically detailed in a workplace policy and distributed to all employees.
- Post required notices.
- Have tracking mechanism in place to track and report employees' sick leave bank.

Tips for Employers

- Train, train and train some more.
 - Requests: Orally, in writing, by electronic means.
 - Only when not foreseeable, you can require notice per policy, but only if policy has been distributed.
 - Family members can request.
 - Uses: Not just for sick time. Includes public health emergencies and domestic violence, sexual violence or stalking.
 - Documentation: Only for three or more consecutive work days.
 - Medical leave: Something signed by a health care professional indicating earned paid sick time is needed.
 - Everything else: An employee's own written statement.

Questions?

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Quarles & Brady LLP

THANK YOU



Lindsay Fiore
Partner
(602) 229-5717
lindsay.fiore@quarles.com



Robert Vaught
Partner
(602) 229-5716
robert.vaught@quarles.com