

TENNESSEE LEGAL & LEGISLATIVE UPDATE
 A 2018 survival kit for HR professionals and managers

Presentation for American Staffing Association
 Jeff Weintraub
 Fisher & Phillips LLP
 Phone: (901) 526-0431
 jweintraub@fisherphillips.com



Fisher Phillips
 www.fisherphillips.com

Best Lawyers
LAW FIRM OF THE YEAR
 USNews
 2018

Atlanta | Baltimore | Boston | Chicago | Cincinnati | Cleveland | Dallas | Denver | Detroit | Fort Worth | Houston | Indianapolis | Jacksonville | Kansas City | Los Angeles | Louisville | Miami | Minneapolis | New York | New York City | Philadelphia | Phoenix | Pittsburgh | Portland | Raleigh | San Diego | San Francisco | Seattle | St. Louis | Tampa | Washington, DC

Sexual Harassment in the Workplace

The #MeToo Movement!



Preventing Sexual Harassment in the Workplace





• SAG-AFTRA (the actors' union) and several major television networks have agreed to eliminate the infamous "casting couch"!

• The agreement will reduce auditions and meetings held in private homes and hotel rooms.





VIDEO VIGNETTE

The Complaint

HOW WOULD THIS LOOK IN COURT?



VIDEO VIGNETTE

Confronting the Accused Harasser

HOW WOULD THIS LOOK IN COURT?



Sexual Discrimination

- Title VII bars workplace discrimination based on gender
- Stereotypes



Sexual Discrimination

- Stereotypes



Local News...



Jury Awards over \$1.5 Million in EEOC Sexual Harassment and Retaliation Case Against Mid-American Specialties



EEOC AND FEDERAL COURTS BREAKS NEW GROUND IN DISCRIMINATION & HARASSMENT LAW: SEXUAL ORIENTATION

"To boldly go where no one has gone before"
-Star Trek



Introduction to Sexual-Orientation Gender Discrimination

- **Title VII**
 - It is impermissible under Title VII to refuse to hire an individual woman or man or discriminate against or harass an employee because of sex (biological).



Harassment Based on Failure to Conform

- Gender discrimination includes discrimination because of stereotypical assumptions about members of the protected class.



Until 2017, no federal courts of appeals had ever found sexual preference to be a protected category under Title VII. Now, three courts of appeals have done so, and another has held that transgender is a protected category under Title VII!



Sexual-Orientation Harassment

Various legislatures boldly go....



Sexual-Orientation Harassment

Jenner



The Labor Board & Social Media

**THE STAFFING INDUSTRY:
Joint Employers, Union Organizing, and The Labor
Board's Views on Social Media & Concerted Activity**



The Labor Board & Social Media

THE STAFFING INDUSTRY:
Joint employers may be liable for the other employer's Labor Act unfair labor practices.



Labor Board Decisions Impacting the Staffing Industry

Browning-Ferris Decision (2015)

As of 2015, direct, immediate control over the employees was no longer required to establish "joint employer" status, so BFI and a staffing company were deemed joint employers.



Labor Board Decisions Impacting the Staffing Industry

Retro Environmental, Inc./Green JobWorks, LLC (August 2016)

NLRB decided that a construction company and its temporary staffing agency were joint employers, even though the companies had no future projects together.



Labor Board Decisions Impacting the Staffing Industry

Miller & Anderson Decision (2016)

As of 2016, where the host employer had regular employees and a staffing agency was supplying temps, NLRB decided to no longer require the consent of both employers for union organizing, so a union election could be held among a single bargaining unit made up of the employees and the temps.



Labor Board Decisions Impacting the Staffing Industry

– In the staffing industry, the most impacted were:

- Employers that subcontracted labor through outside vendors
- Other businesses that secured workers from third-party staffing agencies
- Entities that have utilized vendor-provided workers, believing the relationship insulated them against liability and exposure



Labor Board Decisions Impacting the Staffing Industry

Joint Employer in the past determined by:

Facts showing the right to control, hiring, firing, directing workers as to the manner in which they perform their jobs, etc.



Labor Board Decisions Impacting the Staffing Industry

NLRB rejected 30 years of precedent and held it would no longer require joint employer to **exercise** authority to control terms and conditions, only that it has **potential** power to **indirectly** control them (even if unexercised).



Labor Board Decisions Impacting the Staffing Industry

Staffing Industry Ramifications:

1. Joint responsibility for unfair labor practice charges
2. Increased risk of being embroiled in misclassification and tax issues governed by a host of additional laws and regulations
3. Risk of union organizing of host employer where substantial number of temps



Labor Board Decisions Impacting the Staffing Industry

In December 2017, the NLRB in Hy-Brand overturned BFI and returned to the Board's old standard of **"direct control"**!

Then ethical questions resulted in the Board's vacating its Hy-Brand decision.

On June 5, 2018, the Board's Chairman announced his intent to engage in rulemaking regarding joint employment.



Labor Board Decisions Impacting the Staffing Industry

So, what the heck is the standard now?.....



Concerted Activity

Employers cannot prohibit employees from engaging in protected concerted activity.



Non-Union Workplaces

§ 7 – “Employees shall have the right...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”



NLRB Protections

- If employees are discussing terms and/or conditions of employment, e.g., wages, discipline may be inappropriate in certain circumstances, as the employees may be engaging in protected activity.



Protected Concerted Activities

- Sharing information about wages
- Complaining about policies or managers
- Displaying union-related insignias/ logos
- Expressing union support
- Attempting to organize a union
- Otherwise discussing employment terms



Rampant Compliance Issues

- The Board's previous General Counsel expressed concerns over ambiguous, all-encompassing policies that, while drafted with the lawful intention of preventing disparagement of company or protecting trade secret or confidential information, could be interpreted as prohibiting employees from engaging in concerted activity.



Board Weighs In On Facebook "Likes"

- Previous Board decided that clicking a Facebook "Like" button can constitute concerted activity.



New Guidance on Concerted Activity

New June 6 NLRB General Counsel Guidance on concerted activity, providing examples of rules that the board will presume **lawful**, including **general civility rules** banning offensive language and rude or socially unacceptable behavior, as well as **"no photography" rules and insubordination restrictions** that don't infringe on workers' rights to engage in concerted activity. The memo notes that a ban on **mobile phones** in the workplace may not pass muster under the Labor Act.



Bits & Pieces

- 1. Affordable Care Act
- 2. Tennessee requires some employers to check criminal conviction records.






