

FHCA 2019 Annual Conference & Trade Show

CE Session #5 – Up a Creek Without a Paddle: Tough Employment Law Issues

Monday, August 5 – 8:00 to 9:30 a.m.

Windermere X – Legal/Regulatory/Survey

Upon completion of this presentation, the learner will be able to:

- Understand #MeToo in medicine and how to handle harassment complaints in an environment of heightened scrutiny
- Explain what accommodations, if any, Florida employers must make for prescription drugs and legalized marijuana in the workplace
- Describe proposed legislation that would require OSHA to mandate workplace violence prevention programs in health care and social service

Seminar Description:

This session will include a fast-paced overview of the hottest labor and employment law topics including government agency and Supreme Court updates. The speakers will discuss the practical impact of key issues such as the continued #MeToo movement, the proliferation of concerns about legalized marijuana and prescription drugs in the workplace and OSHA's increased focus on preventing workplace violence in the profession.

Presenter Bio(s):

Dee Anna Hays is a Shareholder in the Tampa office of Ogletree Deakins. She is Board Certified in labor and employment law by the Florida Bar. Dee Anna represents employers in litigation and in front of administrative agencies, such as the DOL, OSHA, EEOC and NLRB.

Phillip Russell is a Shareholder in the Tampa office of Ogletree Deakins. He is Board Certified in labor and employment law by the Florida Bar. Phillip represents employers in litigation and defends them in front of administrative agencies such as the DOL, OSHA, EEOC and NLRB.



***Up a Creek Without a Paddle:
Tough Employment Law Issues***

Presented by: Phillip B. Russell and Dee Anna D. Hays
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.



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Agenda

- #MeToo
- Workplace Violence
- Legalized Marijuana and Substance Abuse Policies
- Immunization/Vaccination and Related Accommodation Issues



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**#METOO – WHAT HAPPENS AROUND
THE CAMPFIRE DOESN'T ALWAYS STAY
AROUND THE CAMPFIRE**



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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.

EEOC 2018 Performance and Accountability Report, <https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>



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Federal Measures – 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.



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Federal Measures - Enacted

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.

Congressional 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.



Federal Measures – Proposed

H.R. 4495: Settlement Tax Deductions are Over for Predators (STOP Act) -- No deductions for judgments/settlements originating from claims of sexual abuse or harassment.

H.R. 4729: Ending Secrecy About Workplace Sexual Harassment Act -- Imposes additional EEO-1 disclosure requirements regarding sex discrimination and harassment settlements.

H.R. 4734/S. 2203: Ending Forced Arbitration of Sexual Harassment Act -- Amends Federal Arbitration Act to invalidate predispute agreements requiring arbitration of sexual harassment or sex discrimination claims under Title VII.



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State and Local Measures - Enacted

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

California		Arizona		Illinois
			Vermont	
	Delaware			Washington
Tennessee			Georgia	
		Maryland		New York



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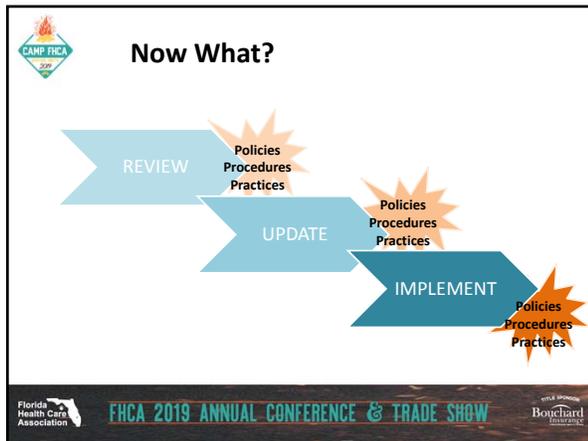


MEASURE	CA	DE	IL	GA	VT	TN	MD	AZ	NY	WA
No NDA, other agreement terms	X				X	X		X	X	X
Women on the Board	X									
No release of claims	X				X		X			X
Supervisor training	X	X							X	
Non supervisor training	X	X							X	
State anti-discrimination statute amended		X							X	
Public entities publish agreements, no use of public \$			X					X		
State gov't contractors have sex harassment policy			X							
Defamation statute adds harassment allegations as "privileged"				X						
Written policy required									X	X
No arbitration									X	
State agency to amend prevention/training programs									X	



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- ### Written Policies – What to Include
- Anti-harassment statement
 - Description & examples of prohibited conduct
 - 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
 - Harassment is a form of employee misconduct

- ### Written Policies, Continued
- Follow up with complainant
 - Anti-retaliation statement
 - Post in visible, central location
 - Include in all languages commonly used by employees
 - Review periodically
 - Given to new employees, redistributed periodically



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



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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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WORKPLACE VIOLENCE PREVENTION – POKING THE BEAR



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What Is Workplace Violence?



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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
- From the Bureau of Labor Statistics, Census of Fatal Injuries Summary, 2016:
<https://www.bls.gov/news.release/cfoi.nr0.htm>.



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Occupational Safety and Health Act of 1970

- To assure safe and healthful working conditions for working men and women; authorizing enforcement of the standards developed under the Act...
- **General Duty Clause:**

SEC. 5. DUTIES

(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.



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- 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
- OSHA: Most health care employers covered by the General Industry Standards found in 29 CFR § 1910
- There is no Federal OSHA Industry Standard addressing workplace violence...yet.



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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



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Federal Measures – Proposed, Continued

- The bill would require each workplace violence prevention plan to include:
 - designation of individual responsible for implementation
 - risk assessments and identification of potential workplace violence hazards (informed by specific past incidents)
 - annual evaluations
 - “[h]azard prevention, engineering controls, or work practice controls to correct, in a timely manner, hazards that the employer creates or controls applying industrial hygiene principles of the hierarchy of controls”



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Federal Measures – Proposed, Continued

- “[r]eporting, incident response, and post-incident investigation procedures”
- “[p]rocedures for emergency response, including procedures for threats of mass casualties and . . . incidents involving a firearm or a dangerous weapon”
- employee training
- “[p]rocedures for coordination of risk assessment efforts, [p]lan development, and implementation of the [p]lan with other employers”



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Secretary of Labor v. Integra Health Management, Inc., OSHRC No. 13-1124

- The case involves a General Duty Clause citation over the death of a health care service coordinator provider, whose employee checked in on a mentally-ill member with a criminal history that included acts of violence. OSHA cited Integra for exposing employees “to the hazard of being physically assaulted by members with a history of violent behavior.”
- The client had a criminal record (grand theft of a motor vehicle in 1981, battery in 1992, aggravated battery with a deadly weapon in 1990, and aggravated assault with a weapon in 1995).
- Stabbed the employee nine times.



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Legal Framework – Employer Liability

- OSHA – General Duty Clause
- Workers’ Compensation
- Tort
- State Law and Statutory Claims
- Disability discrimination claims



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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



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THE DOPE ON LEGALIZED MARIJUANA IN THE WORKPLACE – ONLY YOU CAN PREVENT FOREST FIRES



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- 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
- 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)





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Legalized Marijuana by the Numbers

The patchwork of marijuana-related laws across the United States has created compliance complications for multistate employers. This map highlights the states that allow medical and/or recreational marijuanas.

■ Recreational and Medical Marijuana
■ Medical Marijuana Only

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“This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. 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. This section does not create a cause of action against an employer for wrongful discharge or discrimination. Marijuana, as defined in this section, is not reimbursable under chapter 440.”

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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

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- **In states with anti-discrimination provisions**, merely possessing a medical marijuana card, or testing positive for marijuana on a random or pre-employment drug screen is generally not sufficient cause for automatic adverse action against employee
 - In most cases, employer must demonstrate that the employee used, possessed, or was impaired by the drug at work
 - Maine – protections may extend to recreational use
- So far, no laws prohibit enforcing workplace rules prohibiting using, possessing, or being under the influence of marijuana, alcohol, or other controlled substances **while at work**



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- 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



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- 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



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Plan ahead:

- 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
- Uniformly enforce drug testing policies to avoid discrimination claims
- Get qualified assistance as necessary



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MANDATORY IMMUNIZATION/ VACCINATION POLICIES – CABIN FEVER



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Mandatory Vaccinations?

- Federal law requirements
 - ADA exemption or accommodation process for disabilities
 - Title VII exemption process for religious objections
 - Employers must reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the business.
 - Obligation to bargain with the union, if applicable
 - Rapidly evolving area of the law
 - E.g., litigation testing limits of ADA and Title VII requirements
 - E.g., New HHS office for Conscience and Religious Freedom (<https://www.hhs.gov/conscience/index.html>)



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Voluntary Vaccinations?

- Reduces risk of ADA/Title VII claims
- Reduces risk of employee relations and negative media issues
- Caution: Having a voluntary program may be mandatory in some situations
 - OSHA Bloodborne Pathogens standard regarding HepB
 - State laws regarding healthcare or childcare workers
- Often the best approach for most employers



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Voluntary Vaccinations?

- Consider what vaccines
 - Seasonal Flu
 - Hepatitis for foodservice and hospitality (cafeterias)
 - HepB for jobs potentially exposed to blood or infectious materials
 - Others targeted to impending outbreaks or risks
- Incentivize to increase participation
 - Employer covers the costs
 - Convenient location and scheduling
 - Catered meals or entertainment
 - Financial incentives? Caution: ADA and Title VII



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QUESTIONS?



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