November 14, 2018

A ROUNDTABLE DISCUSSION: TOP CLIENT CONCERNS IN EMPLOYMENT LAW

Presented By:

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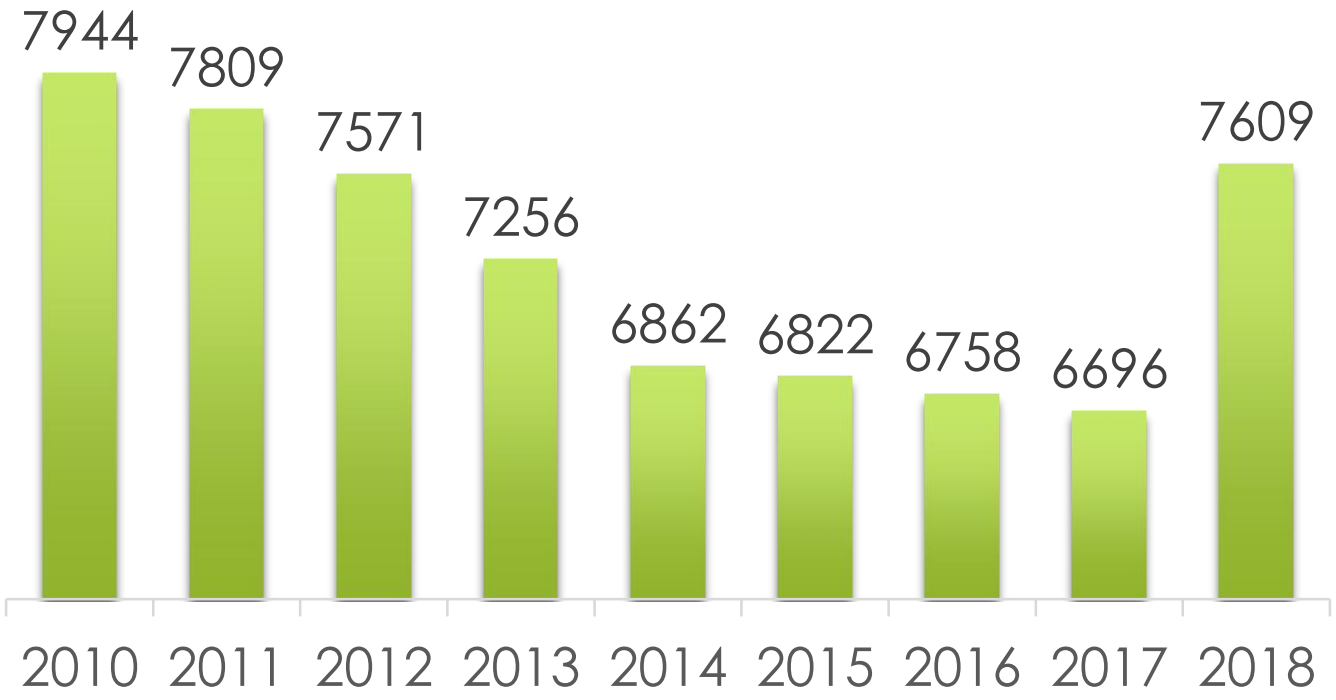
TOP CLIENT CONCERNS IN EMPLOYMENT LAW

#METOO

EEOC - Sexual Harassment Charges Filed



EEOC Task Force Study Take-Aways

1. Workplace harassment remains a consistent problem
2. Workplace harassment too often goes unreported
3. There are compelling business reasons to prevent/stop harassment.
4. It starts at the top – leadership and accountability are critical
5. Training must change
6. New and different approaches to training must be explored
7. It's on all of us to stop workplace harassment

Training Must Change

- Standard training **isn't effective**
  - Importance of live training
  - Use hypotheticals to make it interesting and relevant
  - Too focused on just avoiding legal liability
  - Goal should be harassment **prevention**
    - Create a culture of respect and equality
      - Add professionalism and workplace values and culture accountabilities to performance evaluation criteria
      - Ramp up diversity and inclusion efforts

Training Tips

- **EVERYONE** should receive training (separate trainings for separate groups):
  - Non-Management Employees
  - Managers/Supervisors
  - Compliance, Human Resources, Employee Relations, Legal
  - C-Suite/executive Leadership Teams
  - Board of Directors
- Tailor to industry and organization
- Qualified trainers
  - Remember trainer may be witness in litigation

Different Approaches To Training: Hypotheticals

Hypothetical Scenario [For Employees]

Shawn tells his co-worker Connie that she looks "really great" in her new dress - they're going to nail this presentation!

- *Is Shawn's behavior inappropriate for the workplace?*

Different Approaches To Training: Hypotheticals

Hypothetical Scenario [For Employees]

Paulina, a female employee, likes to wear blouses with a plunging neckline, short tight skirts and high heels. When she walks down the hall in the office, her co-workers often stare at her; some with a knowing smile, others just shake their heads. Occasionally, one employee silently acts as if he is having a heart attack. Paulina has repeatedly told her co-workers that their conduct embarrasses her and has asked them to stop, but without much success. Some of her female co-workers have mentioned that she causes her problems by the way she dresses.

- *Have these employees engaged in harassment?*

Different Approaches To Training: Hypotheticals

Hypothetical Scenario [For Supervisors]`

Manuel, a department manager, has a giant poster of 2017 Sports Illustrated Swimsuit Edition cover on the back of his office door. The door is usually open so no one can see the picture. When the door is shut, the picture can be seen inside the office.

- *Which of the following apply?*
  - *If it is just this, then it is not "severe or pervasive," so it is permissible.*
  - *This might contribute to a hostile work environment.*
  - *His office is private, so it is fine.*
  - *None of the above.*

Discuss Other Types Of Harassment/Discrimination

Hypothetical Scenario [For Supervisors]

Tom, a manager, was at a local pub for dinner with his family last night where he saw several members of his team at the bar watching the football game. He went over and said hello, and noticed James leaning all over another employee, Jen. Both seemed buzzed. Later Tom saw James trying to kiss Jen at the bar, but she was backing away. Jen then left the bar with her friend.

Today, Jen tells Tom that she had fun at the bar last night but James made her feel very uncomfortable. Jen says she doesn't want to say anything to HR because she doesn't want James to get into trouble.

- *What is Tom's next best step?*
  - *Terminate James's employment immediately.*
  - *Nothing, the conduct happened away from work at a non-Company sponsored event.*
  - *Provide Jen with life advice about not putting herself in compromised positions.*
  - *Advise Jen that doing nothing is not an option and suggest they both go to HR to discuss.*

Discuss Other Types Of Harassment/Discrimination

Hypothetical Scenario [For Employees and Supervisors]

William keeps a large bible on his desk at work and always wears a large silver cross around his neck. At times William will use biblical quotations to support his comments and assertions that his observations are correct in conversations with his co-workers. Additionally, he usually tells people to have a "Blessed Day".

Joe, one of William's co-workers, has started referring to him as "Saint Willy". This has gotten a lot of laughs around the office. William has confronted Joe about this and asked him to stop. Joe's response was "can't you take a joke". Joe not only has not stopped referring to William as "Saint Willy", but he has encouraged others to do so.

- *Has Joe violated Company policy?*

Top Client Concerns In Employment Law

INVESTIGATIONS

Top 10 Tips For Investigations

1. Determine investigative strategy and work plan
2. Review and preserve documents
3. Consider confidentiality issues
4. Assess need for workforce protection
5. Identify investigation team
6. The Interviews (order, outline questions, location)
7. Maintain Objectivity
8. Create a Proper Record
9. Conclude Investigation (document findings, determine appropriate course of action)
10. Ensure against retaliation

Confidentiality of Investigations

Justin, a warehouse employee, was accused of making racially charged and discriminatory comments to a coworker during an argument at work.

During the store manager's investigation, he advised Justin not to discuss the incident with anyone else.

Justin was later terminated due to his behavior and he filed a charge at the NLRB. Neither Justin nor his union objected to the store manager's confidentiality instruction.

- **Was the store manager's instruction lawful?**

No

- The NLRB ruled that the manager's instruction violated the NLRB because it would "reasonably tend to chill employees" in their exercise of their right to discuss the terms and conditions of employment with others.
- As the NLRB ruled in Banner Health Systems (2015), confidentiality instructions are only appropriate where there is a particular and substantial need for confidentiality, such as a risk of evidence being destroyed or witnesses being coerced or colluded with.
- In this case, the employer provided no evidence to support such a need.
- There is some speculation that the Banner Health decision will be overturned by the new NLRB, since the board now has a Republican majority under the current presidential administration. Until that occurs, though, employers should be careful when conducting investigations.

Costco Wholesale Corporation et al, Case 05-CA-169958 (Feb. 2, 2018)

Top Client concerns in employment law

PAY EQUITY

Setting Salaries Based on Prior Pay History

The employer has developed a salary schedule to determine the starting salaries of management-level employees:

- 12-level salary schedule
  - Each level contains progressive steps
    - New employees are placed on the step that corresponds with their most recent prior salary plus 5%

The employer has just hired a new female manager, but her prior salary level – even with the 5% adjustment – falls below the Level 1, Step 1 salary

- **Is it lawful for the employer to start the new female manager at the minimum salary level?**

It Depends on the Location

- The 9th Circuit Court of Appeals (covers AL, AZ, CA, HI, ID, MT, NV, OR, WA) held that prior salary alone, or in combination with other factors, cannot justify a wage differential between male and female employees under the Equal Pay Act (EPA).
- The employer argued that the wage differential resulted from the employee's prior wages and the pay scale was lawful under an exception in the EPA "a differential based on any other factor than sex."
- The court rejected this argument, stating "to accept the [employer's] argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed."
- The court also held that the "'any other factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."

Rizo v. Yovino, No. 16-154372 (Apr. 9, 2018)

Pay Equity Laws

Recently, several states have amended their Equal Pay Laws:

- Massachusetts
- California
- Maryland
- Nebraska
- Connecticut
- New York
- New Jersey
- Washington

Pay History Bans

- New Hampshire does not have a law against inquiring about an applicant's salary history as does Massachusetts and several other states but…
- The EEOC's position is that questions about an applicant's salary history may perpetuate compensation discrimination
  - It forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job
- And salary history alone cannot be used – by itself – to justify paying women less

Pay History Bans

- Louisville, KY – 5/17/18
- Massachusetts – 7/1/18
- San Francisco – 7/1/18
- Vermont – 7/1/18
- Westchester County – 7/9/18
- Kansas City, MI – 7/26/18
- Oregon – 10/6/17 (updates 1/1/19)
- Connecticut – 1/1/19
- Hawaii – 1/1/19
- New Orleans, LA – 1/25/17
- Puerto Rico – 3/8/17
- NYC – 10/31/17
- Delaware – 12/4/17
- Albany County- - 12/17/17
- California – 1/1/18
- New Jersey – 2/1/18
- Chicago, IL – 4/10/18
- Wisconsin- 4/18/18

TOP CLIENT CONCERNS IN EMPLOYMENT LAW

THE ADA

Reasonable Accommodations

The employee works as a receptionist at a hospital. Exposure to strong scents, including perfumes and cleaning products, causes an extreme exacerbation of her asthma.

The hospital has adopted a fragrance-free policy, has posted signs advising patrons that the area is fragrance-free, and has arranged for cleaning of the area to be done after the employee leaves for the day.

Despite the hospital's precautions, the employee is often exposed to patients wearing perfumes and suffers severe reactions. On more than one occasion, she has neglected to bring her inhaler to work, requiring her to receive treatment in the ER or be sent home, leaving the department understaffed.

- **Does the employer have any recourse?**

It Depends

- The employer is required to provide a reasonable accommodation unless it can prove an undue hardship
- The employer must weigh whether a reasonable accommodation can be provided in this situation.

Extended Leave as Reasonable Accommodation

The employee worked a very physically demanding job. He took 12 weeks of FMLA leave for back pain.

On his last day of leave, he underwent back surgery and requested an additional 2 to 3 months of leave for recovery.

The employer denied the request and terminated the employee's employment, inviting him to re-apply when medically cleared.

- **Was the employee's termination lawful?**

YES

- September 2017 – The Court held that the termination was lawful because "a long-term leave of absence cannot be a reasonable accommodation," because not working is not a means to perform the job's essential functions.
  - "Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."
  - According to the Court, a "reasonable accommodation is expressly limited to those measures that will enable an employee to work."
- April 2018 – the U.S. Supreme Court declined to review the ruling.

Severson v. Heartland Woodcraft, Inc. (7th Cir.)

HOWEVER…

- According to the EEOC Enforcement Guidance:
  - "Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation"
  - "However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave"
    - BUT NOTE: "an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return"

TOP CLIENT CONCERNS IN EMPLOYMENT LAW

SERVICE ANIMALS

Emotional Support Animals

Martina has requested permission to have her emotional support dog at work to help with her anxiety symptoms. The employer is concerned that if it agrees to the accommodation, other employees are going to want to do the same. To make matters more difficult, the employer is aware that one of Martina's co-workers is afraid of dogs.

- **Must the employer allow Martina to bring her dog to work?**

Maybe

- The employer must engage in an interactive process to determine whether this request can be accommodated without causing an undue hardship.
- This request, like all requests for reasonable accommodations, should be analyzed on a case-by-case basis:
  - Is the workplace environment appropriate for the animal, e.g., a sterile laboratory, a restaurant, a hazardous worksite?
  - What services is the animal trained to provide and how would the animal assist the employee in performing the essential functions of their job?
  - What if other employees are allergic to pet dander, afraid of the animal, etc.? The employer may have to set boundaries and make sure that other workers' contact with the dog is limited.
  - What other related accommodations may the employee require, e.g., additional breaks for walking the dog, etc.

TOP CLIENT CONCERNS IN EMPLOYMENT LAW

FITNESS FOR DUTY

Second Opinions Under the FMLA

Omar has been out of work for 12 weeks on FMLA leave. He has received a certificate from his doctor stating that he may return to work full-duty without restrictions. The employer has concerns regarding the doctor's certification and Omar's ability to perform all of his job duties upon his return.

- **Can the employer require Omar to undergo a fitness-for-duty exam by the employer's own physician?**

No

- When an employee takes leave under the Family and Medical Leave Act, the employee is entitled to be restored to employment upon certification from the employee's health care provider that the employee is able to resume work. The employer is not permitted to seek a second opinion regarding the employee's fitness for work prior to restoring the employee to employment. The implementing regulations expressly state that "[n]o second or third opinions on a fitness-for-duty certification may be required."
  29 C.F.R. § 825.312(b)

Second Opinions

Ginger took FMLA leave for pneumonia. When the employer requested a certification form from Ginger's medical care provider confirming her ability to return to work, the doctor stated, "since last seen it is apparent she is having delusions and will need to be cleared by a psychiatrist before returning to any and all employment." Several weeks later, the psychiatrist cleared Ginger to return to work full-duty. The employer is very troubled and insists that it needs a second opinion because the employee "is truly crazy."

- **Is there anything the employer can do?**

No

- 29 CFR § 825.312(b) states "No second or third opinions on a fitness-for-duty certification may be required."
- If the employee has timely produced the documentation required by FMLA then the employee has the right to return to work under the FMLA.
- The analysis then turns to whether the employer has grounds under the ADA to require a medical examination upon the employee's return to work.
- The issue is whether the employer has a reasonable belief, based on objective evidence, that the employee's ability to perform essential job functions will be impaired by the medical condition; or the employee will pose a direct threat due to the medical condition.
- In this instance, it is unlikely the employer has enough to meet that standard until they further observe the employee. The doctor said the employee needed to be cleared by a psychiatrist and she was.

Inquiries Under the ADA

Carol informed her employer 10 months ago that she was experiencing some major heart issues, but that she was postponing surgery due to the associated risks. Over the past 2 months, there has a been a significant decline in Carol's health affecting her ability to perform the essential functions of her job.

- **Can Carol's employer require her to provide documentation that she can perform her job duties?**
- **What kind of information, if any, can the employer require from Carol regarding her health situation?**

LIKELY YES…

- **ANSWER:** Under the ADA, if the employer feels confident that Carol's declining performance is a direct result of her health condition, then it would likely be reasonable to request a fitness for duty examination in order for a doctor to ascertain if the employee can perform the essential functions of the position.
- **ANSWER:** There is likely sufficient evidence of performance problems coupled with a reasonable belief that the performance problems are caused by the employee's health issue to request that the employee undergo a fitness for duty examination. The exam, however, should be limited to the employee's ability to perform the essential job functions and not seek additional information about her health condition.

TOP CLIENT CONCERNS IN EMPLOYMENT LAW

EMPLOYEE HANDBOOKS

Codes Of Conduct

The Code of Conduct in the employer's handbook contains prohibitions against :

- "insubordination and non-cooperation"
- "rude, discourteous or unbusinesslike behavior"
- "disparaging or offensive language"
- "creating a disturbance on company premises"
  - **Are these rules lawful under the NLRA?**

National Labor Relations Act (NLRA)

- Section 7: **"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."**
- Section 8(a)(1): of the NLRA makes it an unfair labor practice for an employer **"to interfere with, restrain, or coerce employees in the exercise of the rights"** guaranteed in Section 7 of the Act.
- Even if it's not an explicit restriction, there will still be a Section 8(a)(1) violation if:
  - Employees would reasonably construe the rule to restrict Section 7 rights (perception)
  - The rule was promulgated in response to union activity (improper motivation)
  - The rule has been applied to restrict Section 7 activity (application)

YES

- According to the NLRB's June 6, 2018 Memorandum "Handbook Rules Post-Boeing", rules governing employee behavior such as insubordination or non-cooperation are now considered lawful.
- The Memorandum further clarifies its December 14, 2017 decision in The Boeing Co. in which it set a new standard governing the validity of employer rules, policies and handbook provisions.
- The Board will now consider whether a facially neutral rule, when reasonably interpreted, would interfere with employee rights under the NLRA. It will no longer find rules unlawful merely because they could be interpreted to chill employee rights.

TOP CLIENT CONCERNS IN EMPLOYMENT LAW

SOCIAL MEDIA USE

JUSTIFIED?

In response to North Carolina's transgender bathroom bill, ESPN analyst/former All-Star pitcher Curt Schilling reposted a Facebook meme which showed a man dressed in a blonde wig and women's clothing with the message

> **"LET HIM IN! TO THE RESTROOM WITH YOUR DAUGHTER OR ELSE YOU'RE A NARROW MINDED, JUDGMENTAL, UNLOVING, RACIST BIGOT WHO NEEDS TO DIE!!!"**

Schilling commented, "**a man is a man no matter what they call themselves. I don't care what they are, who they sleep with, men's room was designed for the penis, women's not so much. Now you need laws telling us differently? Pathetic."**

ESPN terminated Schilling, stating "ESPN is an inclusive company. Curt Schilling has been advised that his conduct was unacceptable and his employment with ESPN has been terminated."

- **Do you think Curt Schilling's termination was justified?**

TAKEAWAYS

- Because ESPN is a private employer, it was within its rights to terminate Schilling for the offensive Facebook post.

Off-duty Social Media Use

Lydia has been vocally critical of 5 of her co-workers. Marianna, one of those employees, sent a message from her personal computer at home to the other 4 employees:

> **"Lydia...feels that we don't help our clients enough....I about had it! My fellow coworkers how do u feel?"**

Her co-workers, while off-duty, posted messages on Marianna's Facebook page. Lydia also responded on the same Facebook page, demanding that the four **"stop with ur lies about me."**

Lydia complained to her supervisor that the postings violated the Employer's "zero tolerance" policy against "bullying and harassment."

The Employer investigated and, agreeing with Lydia that its policy had been violated, fired the 5 co-workers.

- **Were the terminations of Lydia's coworkers lawful?**

No

- The NLRB found the firings unlawful as it found that the employees' Facebook postings were considered to be protected concerted activity.
- The employer was ordered to offer reinstatement, and pay for loss of earnings and benefits.

Hispanics United of Buffalo (HUB) v. Ortiz

TOP CLIENT CONCERNS IN EMPLOYMENT LAW

EXEMPT V. NON-EXEMPT

Exempt or Non-Exempt Position?

Executive Assistant to Executive VP:

- Maintains a high degree of confidentiality in all aspects of member and staff information.
- Utilizing a database management application, processes daily, weekly and monthly reports for distribution to and retrieval by staff.
- Composes routine and advanced correspondence for review and signature.
- Schedules travel arrangements, conference, seminar and webinar attendance when applicable.
- Assists in the preparation, compilation and distribution of the budget in conjunction with the Strategic Plan.
- Assists Executive Vice President with planning, preparation and execution of annual Strategic Planning Conference and other events as they occur.

Non-Exempt

- The primary duties of this position are administrative support, which is generally non exempt work.
- While executive assistant positions can be classified as exempt, this is only correct in very rare situations when the employee is really performing substantive as opposed to more administrative work, which is generally not the case in the consistent, ongoing manner required for the exemption.
- Secretarial and administrative duties generally do not constitute exempt work.

TOP CLIENT CONCERNS IN EMPLOYMENT LAW

MEDICAL MARIJUANA

Off-Duty Use of Medical Marijuana

The employee applied for and was conditionally offered employment with the company subject to passing a pre-employment drug screen.

The employee disclosed that she took a form of synthetic marijuana at bedtime for sleep, for which she had a medical marijuana certificate through the state of Connecticut.

The drug screen came back positive for cannabis and the employer rescinded the employment offer.

- **Was the rescission of the job offer lawful?**

No

- The federal court in Connecticut held that federal law does not preempt the Connecticut medical marijuana statute's prohibition on employers' firing or refusing to hire qualified medical marijuana patients, even if they test positive on an employment-related drug test.
- The Court further held that there is an implied right of action under the state medical marijuana law, and that employers who are federal contractors or are otherwise regulated by federal law are not exempt from the state law's discrimination prohibition.

Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Health & Rehab. Ctr., (D. Conn. Aug. 8, 2017)

About Debra Weiss Ford

- Licensed in New Hampshire, Massachusetts and Maine
- AV (Preeminent) Martindale-Hubbell Peer Review Rating, the highest rating in legal ability and ethical standards
- "Top Rated Lawyer" by American Lawyer Media and Martindale-Hubbell
- Best Lawyers in America (Labor & Employment Law), Management Lawyer of the Year
- Business New Hampshire Magazine, Best Labor and Employment attorney in New Hampshire
- Listed in Top New Hampshire Lawyers in Labor and Employment, New Hampshire Magazine
- Elected as a Fellow to the College of Labor and Employment Lawyers
- Listed in New England Super Lawyers (Top 100 attorneys in New England)
- Listed in New England Super Lawyers (Top 50 Women in New England, Employment & Labor)
- Listed in Chambers USA as one of the top Lawyers in Labor and Employment

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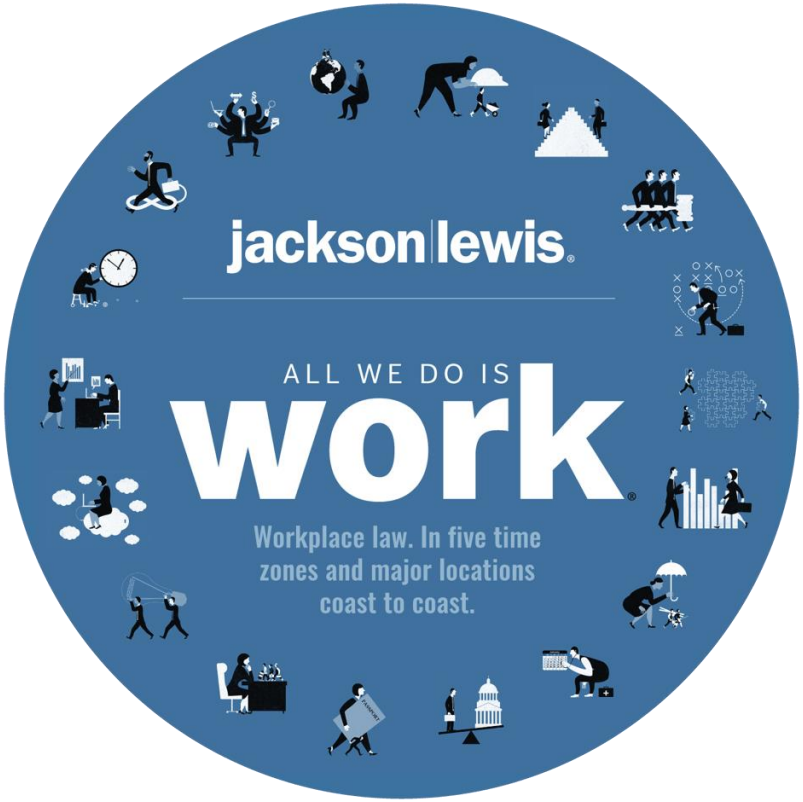

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