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**August 25-28, 2019**  
GAYLORD PALMS & CONVENTION CENTER  
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**What's Hot - Exploring Current  
Issues in the Modern Workplace**

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### #MeToo

- Many high profile companies are in the news for sexual harassment claims.
- Importance of enforcing anti-harassment and anti-retaliation policies.
- What should you be doing?



## Dramatic Increase in Anti-Harassment Litigation

- EEOC filed 66 harassment lawsuits (41 sexual) in 2018—50% increase over 2017.
- Harassment charges filed at EEOC increased by 12% over 2017.
- Hits on sex harassment page of EEOC website more than doubled in 2018.

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## “Hostile Working Environment Harassment”

- Offensive, intimidating, or hostile behavior related to any of the protected characteristics
- Unreasonably interferes with work performance
- Objectively offensive behavior (to a reasonable person) that subjectively offends the victim (offensive to that specific employee)



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- Verbal comments (racial slurs, inappropriate names (honey, sweetie, doll, Cuban, gramps), off-color jokes, talking about sexual topics, swear words, telling people to learn to speak English, etc.)
- Physical actions (hugs, massages, touching, leaning in too close)
- Visual (inappropriate screen savers, calendars, photos, emojis, emails)

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### What Would You Do?

- You are having lunch with Sally when she mentions that her new coworker makes her a little uncomfortable. “He always seems to be staring at me, making excuses to give me hugs or rub my shoulders, and keeps making awkward jokes about how lucky my husband is! I always just laugh it off, but I wish he would cut it out. Don’t say anything though, ok? I don’t want things to get weird.”



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## Today's Reality

- Just because conduct does not rise to the legal level of “harassment,” “discrimination,” or “retaliation” does not mean the Companies should not discipline an employee for unprofessional conduct
- Many employers no longer tolerate unprofessional behavior even by top producers or top managers.

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## Gender Identity Discrimination

- EEOC and several federal courts take the position that discrimination against a *transgender* or *transitioning* individual is discrimination on the basis of sex
- The United States Supreme Court has agreed to hear cases on the issue of whether discrimination based upon sexual orientation or gender identity is gender discrimination
- For now, the best practice is that employers must accommodate a transgender employee

- Consider revising your policies.
- Confidentiality and privacy are key.
- During the hiring process, hiring managers and supervisors should be sensitive to the possibility that applicants have transitioned.
  - The name and gender on the application may correspond with the person's current usage; however, background or suitability checks may disclose a previous name that indicates a gender different from the one the applicant is currently presenting.
  - In such cases, hiring managers should respectfully ask whether the applicant was previously known by a different name, and confirm with the applicant the name and gender that should be used throughout the hiring process.

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- Do not ask employees to provide medical or legal documentation of their gender identity.
- Dress and appearance.
  - The Company is encouraged to evaluate, and consider eliminating, gender-specific dress and appearance rules.
  - Once an employee has informed management that he or she is transitioning, agency dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender.
  - Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.

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- Names and pronouns. Intentionally using the wrong pronoun can and has led to liability.
  - Managers, supervisors, and coworkers should use the name and pronouns appropriate to the gender the employee is now presenting at work.
  - Further, managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee.
  - Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers is contrary to the goal of treating transitioning employees with dignity and respect, and creates an unwelcoming work environment. Intentionally using the wrong pronoun can and has led to liability.



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- Workplace assignments and duties.
  - In some workplaces, specific assignments or duties are differentiated by gender.
  - For a transitioning employee, once he or she has begun working full-time in the gender that reflects his or her gender identity, employers should treat the employee as that gender for purposes of all job assignments and duties.
  - Transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to be eligible for gender-specific assignments or duties.
  - Under no circumstances may an agency require an employee to accept a gender-specific assignment or duty contrary to the gender the employee otherwise works as.

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- Recordkeeping.
  - Records in the employee's personnel file should reflect the employee's new gender identity
- Sick and medical leave.
  - Employees receiving treatment as part of their transition may use sick leave under applicable regulations.
  - Employees who are eligible under the Family Medical Leave Act may also be entitled to take medical leave for transition-related needs of themselves or their families.

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- Restroom takeaways.
  - Check for local laws and regulations.
  - OSHA requires employers to provide “meaningful” access to workplace restrooms, including for transgender employees.
  - It is recommended allowing transitioning employee to use the restroom they identify with.
  - Do not require transgender employees to use certain restrooms. You can suggest other, more private facilities if available.

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### Florida Amendment

- November 2016 - Constitutional Amendment 2 passed (with 71% of the vote):
  - Created a constitutional right to use medical marijuana for individuals with certain “debilitating medical conditions.”
  - Cancer, epilepsy, glaucoma, the human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, and multiple sclerosis; and a catch-all category for other conditions “of the same kind or class as or comparable” to those enumerated....”

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### Florida Law

- June 2017, Governor signed law that states:
 

“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.**”
- What does this mean for employers?



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### Must You? Can You? Should You?

- Have a zero-tolerance policy with respect to marijuana use?
- Accommodate onsite recreational marijuana use? Offsite?
- Accommodate onsite medical marijuana use? Offsite?
- Discipline employees for onsite recreational marijuana use? Offsite?
- Discipline employees for onsite medical marijuana use? Offsite?

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### Best Practices

- Include information addressing how you treat marijuana use as part of an updated, comprehensive substance abuse and testing policy
- Consider whether use poses a threat to workplace safety and identify areas/positions of high risk
- Notify applicants and current employees of the policy
- Tailor policies to adhere to differing state requirements if applicable
- Ensure managers are aware of policies
- Maintain uniformity in policy enforcement and discipline

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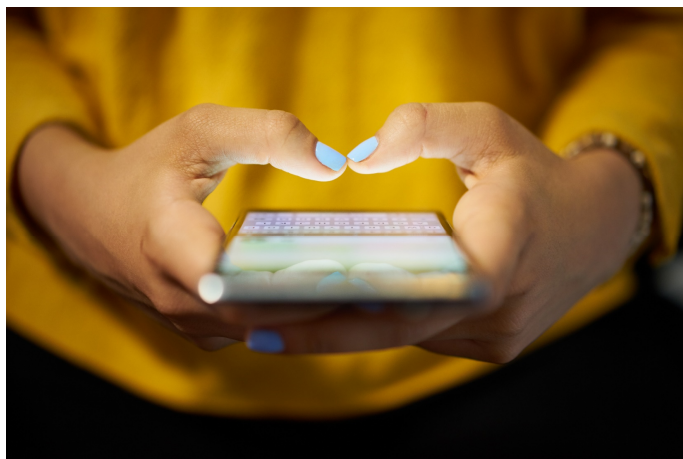
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## What Would You Do?

- You are excited to be hiring Joe, who seems perfect for the position you've had trouble filling. However, you are stunned when he fails his drug test after testing positive for marijuana. "Its fine" he tells you. "I have a medical marijuana card. I need it to help me sleep. I know my rights and I know I'm allowed to use marijuana. When do I start at work?"

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## What Would You Do?

- Jane is an entry level hourly associate. When she was hired, she was told her hours would be 9:00-5:00, Monday-Friday.
- Jane's boss, Susan, is a very busy executive who is often out of the office and much of her work is handled via email.
- Sometimes Jane emails herself projects so she can work on the project at home.
- Jane has access to her emails on her personal cell phone. She checks her emails all the time, at the gym at home, and even while driving.

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## Not All Employees Should Have Remote Access

- Identify what positions currently have remote access.
- Determine what positions should have remote access.
- Put policies in place to clearly delineate what positions may have remote access.



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## Mobile Devices While Driving

- Off-duty police officer was texting and crashed into another vehicle, killing the passenger.
- Beverage company has a policy requiring drivers to use a hands-free device when using a cell phone while driving. Driver was using a headset, in accordance with company policy, and struck a woman.
- Salesman killed a motorcyclist while using his own cell phone, driving his own car. The accident occurred on a Saturday. The salesman was talking with a client at the time.

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## Warn Employees About Dangers

- Policy prohibiting texting/emailing when driving.
- Conduct training on the dangers of texting/emailing while driving.
- Consider apps for drive-mode.
- Out of office reply, disable incoming/outgoing calls while driving.
- Do not, under any circumstances, encourage cell phone use while driving.

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## OSHA General Duty

- OSHA Website, July 2017:
  - **An employer that has experienced acts of workplace violence**, or becomes aware of **threats, intimidation**, or other indicators showing that the **potential for violence** in the workplace exists, would be on notice of the risk of workplace violence and **should implement a workplace violence prevention program** combined with engineering controls, administrative controls, and training.
- According to this, virtually every employer should have a workplace violence prevention program.

## Liability Scenarios

- Employee harms Employee
  - Workers' comp generally limits employer's liability
- Third party harms Employee
  - Workers' comp generally limits employer's liability
  - Employer may be liable under OSHA general duty clause
  - May be liable under common law theories
- Employee harms third party
  - Employer may be liable under common law theories

1. Communication with your employees:
  - Does everyone know where the exits are? Where AEDs are kept?
  - What would your employees do if they noticed someone acting strangely?



## Work Place Safety

### 2. Security:

- Installing security cameras.
- Background checks for employees AND volunteers, especially those working with children.

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## Work Place Safety

### 3. Have a plan in place:

- Who would call 911?
- Who would assist those with special needs?
- Who might realistically engage a physical threat?
- Consider investing in a third party security assessment.

### 4. Have a “Worst Case Scenario Committee”

- This can go beyond violence – think fires, hurricanes, or other unexpected events.

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## Work Place Safety

6. Have safety drills so people know what to do
7. Conduct training:
  - CPR
  - Stop the bleed
  - Bystander Training
8. Have First Aid – including AEDs available

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## Work Place Safety

9. Strictly follow your own safety guidelines:
  - who drops off deposits?
  - who is responsible for locking up?
10. Have methods of communication in place:
  - Walkee Talkees, iPhone apps.

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