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# THE HOSPITALITY LAW CONFERENCE

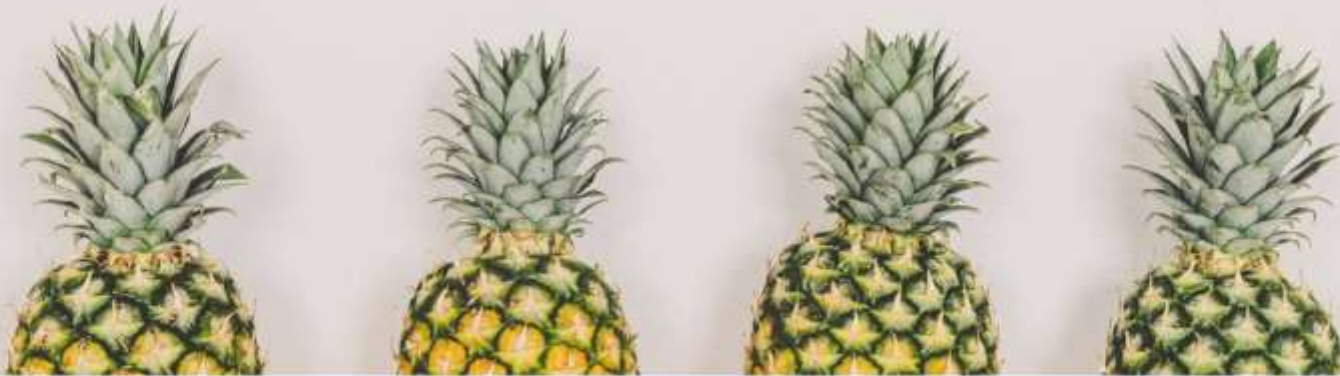
April 24 - 26, 2017 • Houston, Texas

# *Reefer Madness: The Impact on Employers*

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# Steve Roppolo

## Regional Managing Partner

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- Fisher Phillips, Houston, TX
- Nearly three decades representing hospitality employers in labor and employment matters

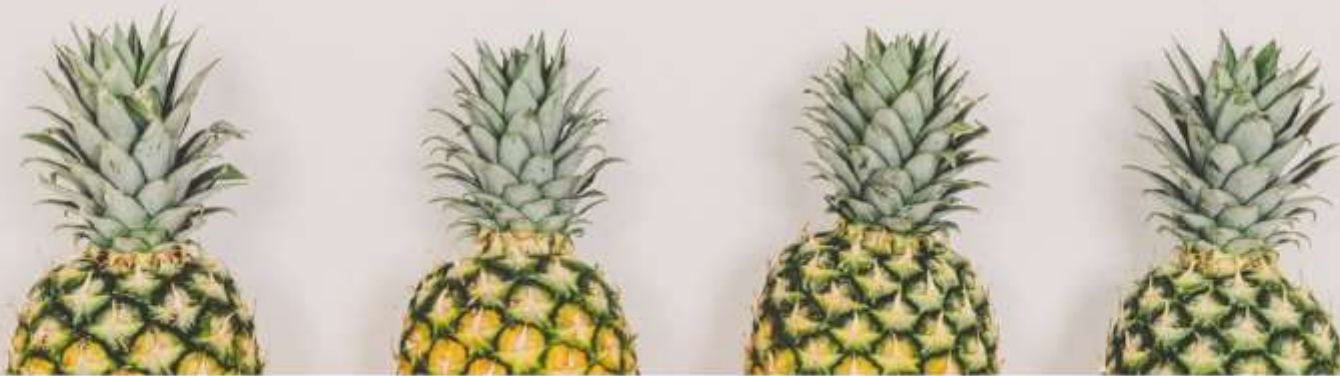


*Reefer Madness:  
The Impact on  
Employers*

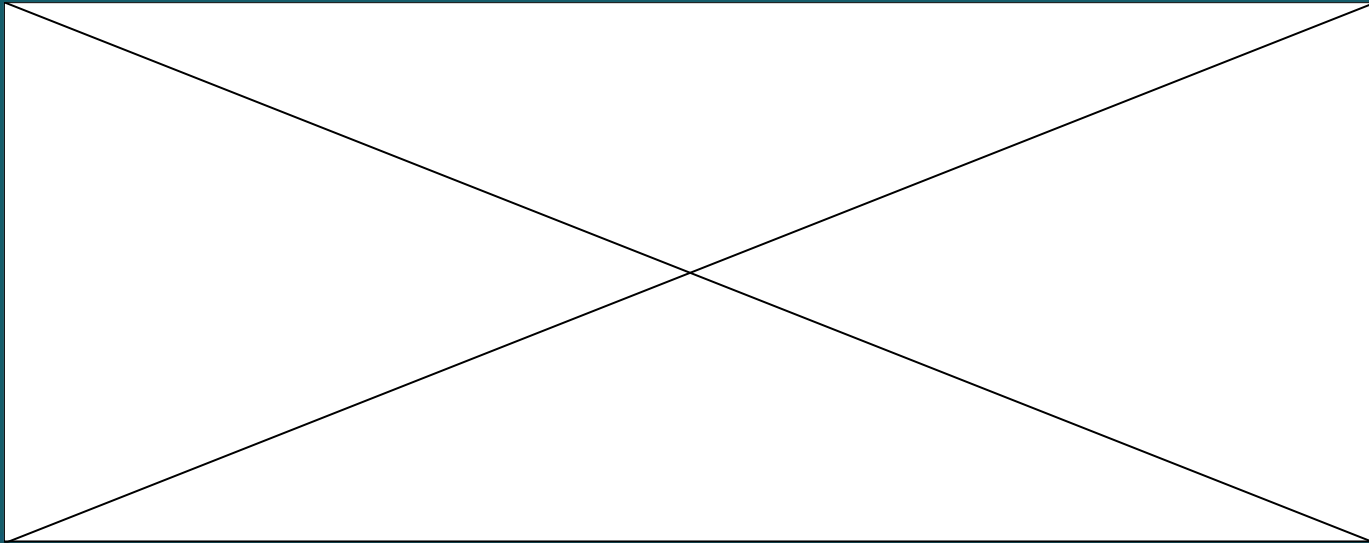
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# Did Our Grandparents Have it Right?



# Or Maybe Our Parents?





# Eighties, Anyone?



# Twenty-First Century Madness

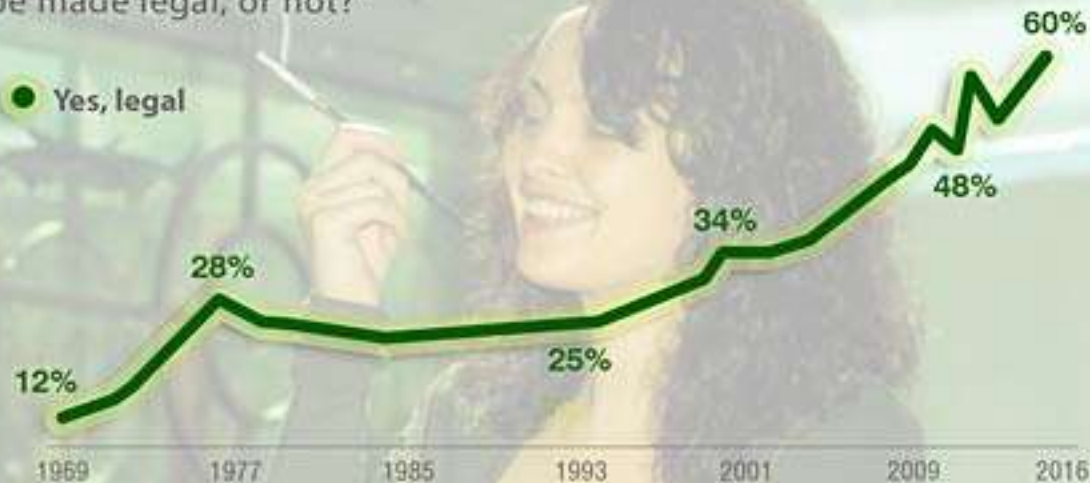




## GALLUP POLL: Americans' Views on Legalizing Marijuana

"Do you think the use of marijuana should be made legal, or not?"

● Yes, legal

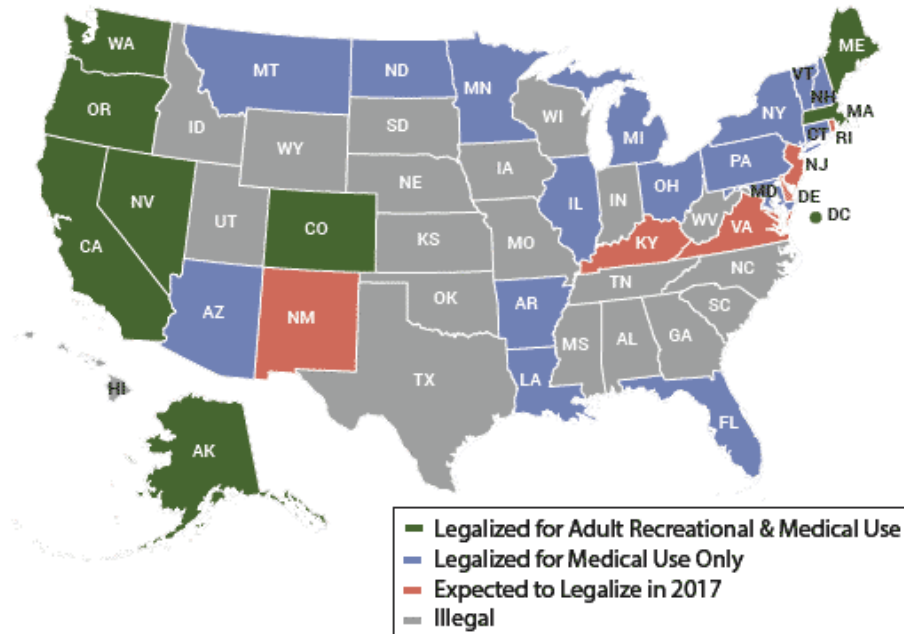


NORML



## States That Have Legalized Marijuana

After Nov. 8, these states now allow some form of legalized marijuana.



Sources: Money Morning Staff Research



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2017 Texas Cannabis Legislation

[Home](#) > [Legislation/Policy](#) > [Republican legislators sign on to medical marijuana bill in Texas](#)

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# Republican Legislators Sign On To Medical Marijuana Bill In Texas

 [Stephen Carter](#) | [April 4, 2017](#) | [0](#)



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## New policy to decriminalize marijuana in Harris County will save time, money, DA's office says

by Brian Rogers Updated 10:05 pm, Thursday, February 16, 2017

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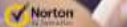
Photo: Michael Crago, Houston Chronicle

IMAGE 1 OF 17

Marijuana reform activist from the Houston NORMAL group, Carlos Cobillo, center, takes a picture of Harris County district attorney Kim Ogg, left, after she announced a new policy to decriminalize low-level possession of marijuana Thursday, Feb. 16, 2017 in Houston. The new policy means that most misdemeanor offenders with less than four ounces of marijuana will not be arrested, ticketed or required to appear in court if they agree to take a four-hour drug education class.

A CRACKED DEVICE IS NOTHING COMPARED TO A HACKED DEVICE.

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Windows Taskbar: 3:10 PM 2/16/2017



Wonkblog

# Sessions on enforcing federal marijuana laws: 'It won't be an easy decision'

By Christopher Ingraham January 10



The image shows a screenshot of a web browser displaying a news article. The browser's address bar shows a URL starting with 'http://www.wonkblog.com'. The article is titled 'Sessions on enforcing federal marijuana laws: 'It won't be an easy decision'' and is attributed to Christopher Ingraham, dated January 10. There are two images: one of a man speaking at a podium and another of a man in a blue jacket in a snowy landscape with the 'Cabela's' logo.



# So What is an Employer to Do?

1. Marijuana is still federally an illegal drug
2. Employers can still enforce drug policies and drug test employees
3. So far, courts have not treated marijuana the same as traditional prescription drugs
4. So far, employers do not need to accommodate marijuana.





# The Courts. . . .

- *Several courts have all held employers may prohibit marijuana use in their workforces:*
  - 2008, California – state law only protects individuals from criminal prosecution; employer free to refuse to hire
  - 2010, Oregon - no employer should be forced to accommodate marijuana
  - 2011, Washington - employees terminated for medical marijuana use – even offsite – have no basis to sue their employers.



# The Courts. . . .

- *Several courts have all held employers may prohibit marijuana use in their workforces:*
  - 2012, Montana - medical marijuana users and providers have no special right to their employment despite state law.
  - 2015, Colorado - employers are still free to prohibit use and can still discipline and terminate for positive test
  - January 2016, New Mexico - state law does not require employers to accommodate medical marijuana use.



# But Be Careful. . . .

- The District of Columbia passed the Prohibition of Pre-Employment Marijuana Testing Act of 2015, which prohibits employers from testing employees for marijuana use until after a conditional offer for employment has been made.



# And Practically Speaking

- Will a “zero tolerance” policy on marijuana reduce my pool of qualified candidates to an unacceptable level?
- Will failing to test for marijuana increase workplace injuries or absenteeism?
- Will treating marijuana differently than other illegal drugs create problems in my workplace?



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# THE HOSPITALITY LAW CONFERENCE

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# An Update on Discrimination, Harassment and Retaliation Case Law and Agency Matters and Practical Implications for Hospitality Employers

2017 HOSPITALITY  
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# Robert T. Bernstein, *Partner* Laner Muchin, Ltd.

- Laner Muchin, Ltd. is based in Chicago, Illinois and has 45 attorneys representing employers throughout the United States in all aspects of their labor and employment, employment litigation, employee benefits and immigration matters.
- My practice has been concentrated in defending employers in employment disputes throughout the country, counseling employers on their day-to-day labor and employment issues, drafting employment agreements and employee handbooks and conducting management training, as well as handling collective bargaining negotiations and arbitrations on behalf of employers.
- Advisory Council member for the Illinois Restaurant Association and an active member of the Illinois Hotel and Lodging Association.

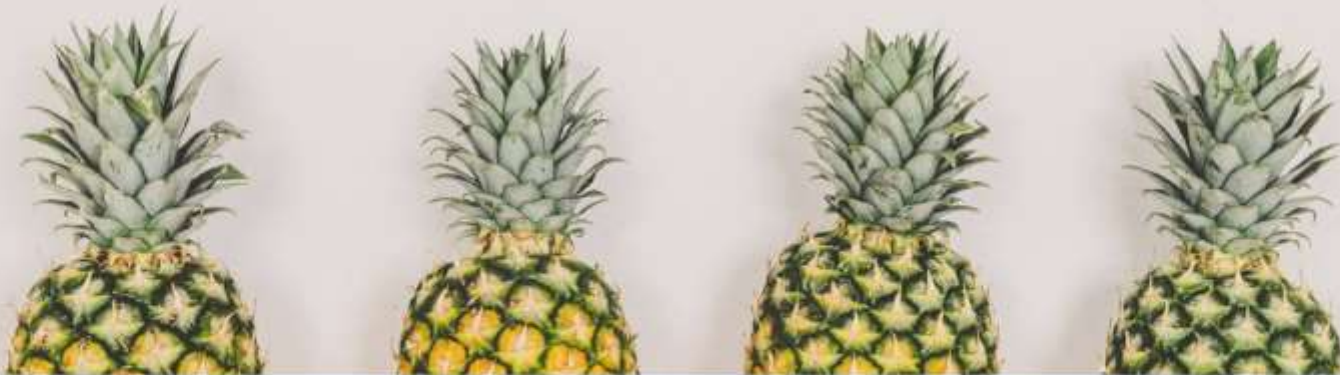


# An Update on Discrimination, Harassment and Retaliation Case Law and Agency Matters and Practical Implications for Hospitality Employers

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# Notable Discrimination Case Law

- Sex Discrimination: Hively v. Ivy Tech Community College of Indiana, 7th Cir. 2017). Part-time adjunct professor brought action against community college, alleging she was denied full-time employment and promotions based on sexual orientation in violation of Title VII. The 7th Circuit Court of Appeals held that a person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes. Compare the *Hively* matter with the *Evans v. Georgia Regional Hospital* case (11th Cir. 2017); *Evans* held that discrimination based on sexual orientation was not actionable under Title VII.)



# Notable Discrimination Case Law (cont'd)

- Wrongful Termination Under the NLRA: *NLRB v. Pier Sixty, LLC*, 2017 BL 131230 (2nd Cir. No. 15-1841-ag-2017). After engaging in a vulgarity-laced Facebook post about a supervisor, the catering worker, Herman Perez, was terminated. Specifically, Perez became upset when the assistant banquet manager chided employees in a “raised, harsh tone” about talking among themselves as guests arrived at a catered event. Perez then stepped outside and used his mobile phone to post a message on Facebook that “Bob is such a nasty mxxx fxxx don’t know how to talk to people!!!!!! Fxxx his mother and entire fxxx family!!!! What a Loser!!!! Vote Yes for the Union!!!!!!” The posting – two days before employees voted for union representation – was visible to Perez’s Facebook friends and anyone else who visited his Facebook page. The NLRB found that Perez was illegally fired for a Facebook posting that was “distasteful” but legally protected. The 2nd Circuit Court of Appeals agreed with the NLRB, holding that Pier Sixty failed to show Perez’s online conduct was egregious enough to forfeit the protection of the National Labor Relations Act.



# Notable Discrimination Case Law (cont'd)

- Disability Discrimination: *Elmessaoudi v. Mark 2 Restaurant, LLC*, 2016 WL 4992582 (S.D. N.Y. 2016). Former food runner at the Mark, a restaurant owned and operated by Mark 2 Restaurant LLC in NYC, sued his employer for, among other things, disability discrimination for refusing to offer him a work schedule that would permit him to attend his therapy sessions. The employer did change the plaintiff's work schedule to allow him to report later to attend his therapy sessions. In granting summary judgment for the employer on the disability claim, the Court determined that if the plaintiff found the accommodation inadequate, the evidence showed that he never brought the alleged inadequacy to the employer's attention at the time.



# Notable Discrimination Case Law (cont'd)

- National Origin Discrimination (and Retaliation): *Mondal et al. v. DHG Management Co. LLC*, Case No. 1:15-cv-09607 (S.D. N.Y. 2015). In April 2017, the last of three workers at a bar in a boutique hotel in Midtown Manhattan who alleged that they were discriminated against because of their Bangladeshi origin – being called “Taliban,” “Bengali mafia” and other slurs – has settled suit with the hotel owner. The three men alleged that after working at the hotel’s bar for several years, discriminatory behavior against them because of their Bangladeshi origin began in 2013 and intensified in 2014. The workers included several examples of discriminatory behavior in their complaint, such as a co-worker writing on an order slip for one of the plaintiffs that he needed a coffee “black like you,” and another co-worker saying to one of the plaintiffs, “Hey Taliban the food is ready.” The three workers further alleged that after they complained to their supervisors and union representatives about the behavior, the discriminatory actions continued, their work status was threatened and their work assignments were changed in retaliation for their complaints.





# Notable Harassment Case Law

- *Andrade v. Arby's Restaurant Group Inc., Altamira Corp. And Pedro Moto*, 2016 WL 7211144 (N.D. Cal. 2016). Miriam Andrade started as a sandwich preparer and was subsequently promoted to cashier and then to shift lead, the position she held at the time of her termination. Andrade sued the Company, alleging, among other things, sexual harassment under the California Fair Employment and Housing Act (“FEHA”). She alleged her supervisor subjected her to sexual harassment by asking her out on dates, making comments about her body, sending personal text messages and trying to touch her and that despite telling the supervisor to stop asking her out and texting her, he persisted. Andrade also alleged that the Supervisor engaged in physical conduct toward her. Andrade reported the conduct of her supervisor to her Shift Supervisor. Subsequently, after Andrade participated in sending a notice to the Company that the employees intended to unionize and complaining of the “abusive work environment” caused by another manager’s physical abuse of employees in the workplace, she was confronted by this manager and then terminated shortly thereafter. The Court determined that Andrade sufficiently alleged elements of quid pro quo sexual harassment under FEHA. Under California law, where a supervisor is the harasser, the employer is strictly liable.



# Notable Harassment Case Law (cont'd)

- *Rosh v. The Gold Standard Café at Penn, Inc., et al.*, 2016 WL 7375014 (E.D. Penn. 2016). Unmy Rosh was a prep cook at Gold Standard Café. She reported to co-owners that she had been subjected to sexual assault and sexual harassment on multiple occasions by two co-workers. Although the co-owners told Rosh that they would talk to the two co-workers, the two co-workers continued to sexually harass Rosh. Despite further written and verbal complaints to the co-owners, the harassment persisted. After Rosh complained a final time, she alleges that one of the co-owners stopped speaking to her, reduced her work hours and told her to stop the harassment on her own. Rosh subsequently resigned her employment and sued the Company for sexual harassment, retaliation and constructive discharge. The Court determined that Rosh alleged sufficient facts that would lead to liability for the Gold Standard Café. The Court noted that Rosh notified the co-owners of the ongoing sexual harassment on at least four occasions, yet the co-owners' actions were not reasonably calculated to prevent further harassment. The Court also held that Rosh sufficiently pled facts to support constructive discharge and retaliation claims.



# Notable Retaliation Case Law

- *Meneske v. Harrah's Chester Casino & Racetrack*, 649 F. App'x 142 (3d Cir. 2016). Meneske worked at Harrah's as a beverage server. She is Turkish and Muslim. After she was terminated in July 2011 for making a threat to a co-worker, she sued the Company, alleging, among other things, that it unlawfully retaliated against her for complaining about harassment in violation of Title VII. The 3rd Circuit Court of Appeals affirmed summary judgment in favor of Harrah's. In doing so, it agreed with the district court that Meneske could not demonstrate a causal link between her complaints and termination – the time period between Meneske's most recent complaint (March or April 2011) and her termination (July 2011) did not, on its own, raise an inference of causation.



# Notable Retaliation Case Law (cont'd)

- *D'Aquin v. Giovani*, 2017 WL 319013 (E.D. La. 2017). D'Aquin filed a *pro se* lawsuit alleging that while he worked as a volunteer at the Ozanam Inn, an unidentified defendant or defendants sexually harassed and possibly sexually assaulted him. He further alleged that after he complained about the behavior of the defendants, another unidentified defendant retaliated against him by demoting him and eventually making him leave the Inn. The Court determined that although D'Aquin's complaint alleged actionable conduct under Title VII, he failed to establish that any of the defendant's were his "employer" under Title VII. Although D'Aquin stated that he "worked as a volunteer" at the Inn, the complaint did not allege that any of the defendants employed him and D'Aquin did not allege any facts suggesting a plausible employment relationship.



# Notable Agency Settlements

- Age Discrimination: *EEOC v. Texas Roadhouse*, Civil Action No. 1:11-cv-11232-DJC (D. Mass 2017). EEOC had filed lawsuit alleging that Texas Roadhouse had engaged in a nationwide pattern or practice of age discrimination in hiring hourly front-of-the-house employees. Case was scheduled for retrial in May, 2017 after it had previously resulted in a hung jury after nearly a four-week trial earlier this year. Case settled for \$12 million pursuant to a 3.5 year consent decree, which included the Company agreeing to change its hiring and recruiting practices.
- Disability Discrimination: *EEOC v. Diallo's Entertainment, Inc., d/b/a Diallo's of Houston*, Case No. 4:16-cv-02909 (S.D. Tex. Jan. 2017). EEOC sued Diallo's under the ADA, alleging that it forced an employee to provide medical documentation to prove she was not HIV-positive, and then fired her when she failed to provide such documentation. Default judgment was entered against Diallo's for \$139,366. The EEOC in its press release stated that "it is a violation of federal law to make a disability-related inquiry unrelated to an employee's job requirements or to any legitimate business necessity."



# Notable Agency Settlements (cont'd)

- Disability Discrimination: *EEOC v. OHM Concessions Group, LLC, d/b/a Dunkin Donuts*, Civil Action No. 1:15-cv-01946 (D. Md. 2015). This suit brought by the EEOC involved a former regional manager who was diagnosed with breast cancer and requested unpaid leave for surgery, chemotherapy and radiation treatment. She alleged that the Company refused to provide a reasonable accommodation and instead abruptly terminated her. Case settled for \$151,000 among other non-economic relief. The EEOC in its press release stated “Providing a leave of absence for an employee who needs medical treatment related to a disability is not only the decent thing to do – it is required by federal law unless the employer can show it would impose an undue hardship.”





# Notable Agency Settlements (cont'd)

- Pregnancy Discrimination: *EEOC v. D&S Shipley Donuts, d/b/a Shipley's Donuts*, Case No. 4:14-cv-03712 (S.D. Tex. 2015). The EEOC sued Shipley's, alleging that it forced an employee to take unpaid leave after Shipley's owner/general manager received information that the employee may be pregnant. According to the EEOC, Shipley's would not allow the employee to continue working unless she provided a doctor's release indicating that her pregnancy was not "high risk". The lawsuit further alleged that when the employee failed to provide such a release, and after she and her mother complained that Shipley's could not require her to do so, she was fired. The case settled for \$45,000 and significant non-monetary relief. In its press release, the EEOC stated that "The Supreme Court decided many years ago that a pregnant employee is solely responsible for making decisions that affect her ability to continue her job, and any duties associated with her job. An employer that imposes its own personal beliefs and concerns about an employee's pregnancy on her violates federal law and invites legal action."



# Notable Agency Settlements (cont'd)

- Sexual Harassment: *EEOC v. R.V. Associates Ltd. d/b/a Windsor Inn*, Case No. 1:16-cv-00197-RDB (D. Md. 2016). The EEOC filed suit, alleging that the restaurant owner sexually assaulted a female employee and that when others also harassed the employee, the Restaurant failed to stop the harassment. The female employee was forced to quit due to the intolerable abuse. The EEOC also alleged that the owner engaged in unwelcome sexual touching of other female employees and made sexually offensive comments, including requests for sexual favors, to female employees. The EEOC further alleged that the Restaurant suspended and later refused to increase the work hours of a female employee in retaliation for her rejection of the owner's sexual advances and filing of a charge of discrimination. The Restaurant settled the sexual harassment and retaliation case with the EEOC for \$200,000 and a variety of other non-economic relief.



# Practical Pointers

- Make sure your employment-related policies and job descriptions are legally compliant and drafted in a practical and effective way.
- Make sure your supervisors and managers are trained on your company's policies and that they understand the company's expectations and their obligations.
- Conduct prompt and thorough investigations before taking disciplinary or termination measures.
- Make sure that potentially sensitive discipline or termination decisions are vetted through Human Resources, in-house counsel and/or outside counsel.
- Prepare effective documentation memorializing the company's decisions.
- The manner in which employment actions are communicated to employees is very important in protecting the company.



# ANY QUESTIONS?

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# Gender Identity Issues in the Workplace: Best Practices

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# Tom Posey

## Partner

- 
- Faegre Baker Daniels
  - Regularly counsels clients and gives presentations to businesses and trade groups on a variety of labor relations and union avoidance issues, employment discrimination law, workplace harassment, litigation practice and avoidance, and other human resources and personnel-related topics.





# Gender Identity Issues in the Workplace: Best Practices

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# What is Gender Identity?

- ▶ A person's perception of having a particular gender, which may or may not correspond with their birth sex.

Oxford Dictionary definition

- ▶ One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves.

Human Rights Campaign – Sexual Orientation and Gender Identity Definitions

# Other Important Terms

## ▶ Gender expression

- ▶ External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

## ▶ Transgender

- ▶ An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. **Being transgender does not imply any specific sexual orientation.** Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.

Human Rights Campaign – Sexual Orientation and Gender Identity Definitions

# Other Important Terms

## ▶ Gender transition

- ▶ The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

## ▶ Gender dysphoria

- ▶ Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify.

## WORKPLACE ISSUES

- ▶ **Transitioning employees**
- ▶ **Restroom protocols**
- ▶ **Dress codes**
- ▶ **Name identification**
- ▶ **Discrimination / harassment**
- ▶ **Model Policies and Best Practices**

### Examples of unlawful harassment:

- ▶ **Intentionally and persistently failing to use name and gender pronoun that correspond to EE's self-identification**
- ▶ **Denying equal access to a common restroom corresponding to EE's gender identity**

# OSHA – GUIDE TO RESTROOM ACCESS

- ▶ **Impacting a large employee population**
  - ▶ Williams Institute (UCLA) – 700,000 transgender adults in the U.S.
- ▶ **Access as a safety and health issue**
  - ▶ Prompt access without unreasonable restrictions
- ▶ **Model Practices / Best Policies**
  - ▶ Use facility corresponding to self-identification
  - ▶ Single occupancy, unisex facilities
  - ▶ Multiple occupancy, unisex, locking stalls



# State Restroom Access Laws

## ▶ Colorado

- ▶ Use facility “appropriate to their gender identity”
- ▶ Without being harassed or questioned

## ▶ Delaware

- ▶ Gender identity non-discrimination law
- ▶ Cannot compel EE to use a specific restroom unless all other workers *of the same gender identity* are also compelled to use it

# State Restroom Access Laws

- ▶ **District of Columbia**
  - ▶ **Single-stall restroom must have gender-neutral signage**
- ▶ **Iowa, Vermont, Washington**
  - ▶ **Use facility corresponding to self-identification**

# Workplace Transition Plans - Getting Started

- **Initial employee meeting**
  - What do EE and management expect through the transition process.
- **Initial management meeting**
  - Management meets with supervisor to educate about process and review company policy and procedures.
- **Joint meeting with employee and supervisor**
  - Discuss transition plan and address any questions or concerns.

# Workplace Transition Plans - Getting Started

- **Informing co-workers**
  - Provide basic info about EE's plans
  - Discuss policies
  - Expected behavior
  - Addressing individual concerns
  - Create atmosphere where EEs feel more comfortable asking questions

Transgender Workplace Diversity  
Jilian T. Weiss, J.D, Ph.D

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# Spotting & Handling Workplace Violence

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# Gina Cadogan

- Faegre Baker Daniels – Of Counsel
- Gina represents public and private companies in all aspects of labor and employment litigation and training.
- For 17 years, Gina has successfully represented clients in discrimination, harassment and retaliation cases, as well as labor matters, including violations of the Family Medical Leave Act and the overtime laws under the Fair Labor Standards Act.





# Spotting & Handling Workplace Violence



# Workplace Violence

- OSHA defines **Workplace Violence** as an assault, intimidating act, or threatening conduct which occurs in or is related to the workplace.
  - Physical harm
  - Verbal threats to inflict bodily harm
  - Vague or covert threats
  - Attempts to cause physical harm
  - Bringing weapons into the workplace
  - Stalking



# OSHA Requirement

- General Duty Clause – Employers are required to provide a safe and healthful work environment.
- OSHA has recognized that workplace violence is an **occupational** hazard in some industries and environments.
- Employers may be found in violation of the general duty clause if they fail to reduce or eliminate **recognized workplace violence hazards** that cause or are likely to cause death or serious physical harm to employees when there is a feasible method to abate the hazard.

# Written Policy



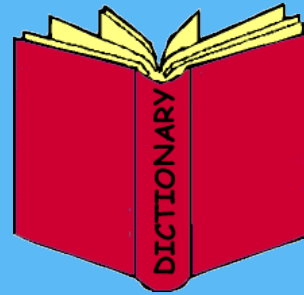
Create an anti-violence program that includes:

- Includes an anti-violence statement that covers all workers, patients, clients, visitors, contractors, and anyone else who may come in contact with company personnel and provides specific information regarding the consequences of non-compliance.
- Identifies potential outcomes taken if the policy is violated, including discipline or termination of employees when appropriate. Enforce policy consistently!
- Encourages prompt reporting of all violent incidents and recordkeeping of incidents to assess risk and to measure progress.

# Define Workplace Violence

Clearly define what will be considered violence or bullying in the workplace:

- Screaming?
- Freezing someone out?
- Insults and practical jokes?
- Threats of physical violence?
- Physical or mental intimidation?
- Sabotaging someone's work?
- Spreading rumors or gossip?
- Repeated communications via text messages, phone calls, Facebook messages, etc.?



# Employee Surveys

- Survey employees before and after making job or worksite changes, or installing security measures or new systems to determine their effectiveness.
- Survey employees periodically to learn if they experience hostile or threatening situations.
- Survey employees to evaluate effectiveness of program and opportunities for improvement.



# Complaint Procedures

- Require employees to report all acts or threats of violence to a supervisor or manager promptly.
- Define the ways in which an employee can raise a complaint, including who they can complain to and what responsibilities that person will have when a complaint is received.
- Include an anti-retaliation provision and make sure that employees know that they will not be retaliated against for bringing a complaint of violence or bullying to management's attention or for participating in an investigation.





# Investigation Procedures

- Investigate all complaints of violence in the workplace and develop a plan of action once findings are issued.
- Define the investigation procedures:
  - Who will be responsible for investigating a complaint?
  - Will the supervisor be responsible or Administrator?
  - When will claims be investigated?
  - How will the results of the investigation be communicated?



# Response Procedures

- **Create Response Team** that would be responsible for immediate care of victims, reestablishment of work areas and processes after incident and providing debriefing sessions with victims and coworkers.
- **Create Crisis Management Team** that would be responsible for investigating complaints of violent conduct or threats of violent conduct and providing support to supervisors in managing difficult employees.

# Employee Training

- Conduct mandatory and annual training for employees to learn:
  - How to recognize the earliest stages of a possible assault.
  - How to avoid or mitigate potential violent encounters, including how to protect oneself.
  - How to seek refuge and/or assistance if violence appears imminent.
  - How to report and document incidents of violence or aggressive behavior.
  - How to locate and operate safety devices.



# Spotting Warning Signs

- Noticeable changes in behavior
- Withdrawn
- Threatening emails, texts or behavior
- Aggressive with co-workers or supervisors
- Changes in productivity, professionalism and punctuality
- Noticeable changes in appearance and hygiene
- Pending or Anticipated Performance Improvement Plan
- Family disruptions
- Death of a loved one
- Financial problems
- Loss of family member's job
- Gambling issues
- Romantic problems
- Displaying a gun in the workplace



# Respond-Disruptive Behavior



# Step #1

- Investigate disruptive behavior
  - Engage supervisor or workplace violence team
  - Determine a safe place to speak with employee
  - Speak calmly and respectfully with employee
  - Speak calmly and respectfully with alleged victim
  - Ask open-ended questions
  - State the anti-violence policy
  - Encourage contacting EAP

## Step #2

- Allow employee to stop disruptive behavior
  - State the Zero Tolerance Policy on Workplace Violence
  - Offer a time off
  - Offer EAP or anger management assistance
  - Obtain employee's agreement to stop disruptive behavior
  - Warn employee about consequences of further disruptive behavior
  - Ask employee to report any behavior they feel is disruptive
  - Create a timeline for company to check up on employee's progress
  - Alert company security or law enforcement if you think employee will erupt

## Step #3

Employee continues or increases disruptive behavior

- Document
- Suspend or terminate employee
- Inform about decision
- Alert security or police if volatile





# Respond-Direct Threats of Violence

- Reasonable belief of “direct threat”?
  - Duration
  - Nature and severity
  - Likelihood of potential harm to health and safety
  - Imminence
- Can employee perform essential job functions with or without a reasonable accommodation?
  - Interactive process with employee
  - Mental health evaluation may be necessary
  - Determine if a reasonable accommodation is feasible
- Document the “direct threat”
- Document discussion with the victim of the direct threat
- Reiterate Zero Tolerance Policy against Workplace Violence
- Determine whether to terminate or offer anger management
- Notify security or law enforcement

# Respond-Actual Violence/Bullying

- Apply Zero Tolerance Policy
  - State the Policy
  - Terminate; especially if physically violent
  - Determine when to advise employee of termination
  - Equally discipline or counsel the employees involved
  - Consistently apply discipline for similar situations
- Document the Violence
  - Written documentation
  - Photographs
  - Determine whether there is evidence to secure (emails, video, audio, weapons, etc.)





- Provide prompt medical evaluation and treatment
- Report violent incidents to local police immediately
- Follow company protocols for dealing with the media
- Inform victims of their legal right to prosecute perpetrators
- Request the employee immediately notify company about unusual acts, such as employee or family members being followed or receiving threats on social media



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A pineapple with its green crown sits in a field of green grass. The background is a clear blue sky with some light, wispy clouds. The entire scene is framed by a white horizontal band in the middle, which contains the conference title and dates.

# THE HOSPITALITY LAW CONFERENCE

April 24 - 26, 2017 • Houston, Texas

# SUCCESSOR LIABILITY: Even if you didn't own it then, you might be liable

2017 HOSPITALITY  
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APRIL 24 - 26



# Jennifer Arledge

- Wilson Elser – Partner, Las Vegas
- Jennifer practices in the areas of product liability, pharmaceuticals, medical devices, general liability in the hospitality arena and construction defect, primarily representing architects and engineers. Jennifer also handles toxic tort and bankruptcy matters. Most of her cases are complex and include serious injury or death as well as substantial monetary damages.



Jennifer Willis Arledge, Esq.

Wilson Elser Moskowitz  
Edelman & Dicker, LLP

## **SUCCESSOR LIABILITY:**

**Even if you didn't own it  
then, you might be liable**

April 25, 2017



# SUCCESSOR LIABILITY

## GENERAL RULE

- Company that acquires all of seller's assets is not liable for seller's liabilities

## GENERAL EXCEPTIONS

- Buyer expressly or implicitly agrees to assume some or all of debts of seller
- *de facto* merger
  - same management, personnel, location & business obligations, continuity of shareholders, seller dissolves soon after sale
- Buyer is “merely a continuation” of seller
  - continued use of seller's name, location, employees
- Fraud intended to evade liability for debts
  - assets were purchased for inadequate consideration

# PRE-PURCHASE PROTECTIONS

- Ascertain potential liability
- Have clear purchase agreement
  - express provision liabilities not assumed
- Have insurance
  - seller to maintain insurance coverage as part of the deal
- Avoid “red flags”
  - Don't have: continuity of ownership, management, personnel, etc.

# POST-PURCHASE ACTIONS

## REVIEW THE DUE DILIGENCE

What problems have existed?

- people falling at pool
- reports of illness from specific food product
- Las Vegas “Death Ray”



# SOLVE THE PROBLEMS

- Slippery pool deck
  - check surface for compliance with building codes and other standards
  - is a protective coating appropriate?
  - what was the maintenance schedule of seller?
- Food illness
  - identify root cause
  - distributor
  - preparation
  - temperature issue

# SOLVE THE PROBLEMS



# POST-PURCHASE ACTIONS

## UNDERSTAND SELLER'S POLICIES AND PROCEDURES

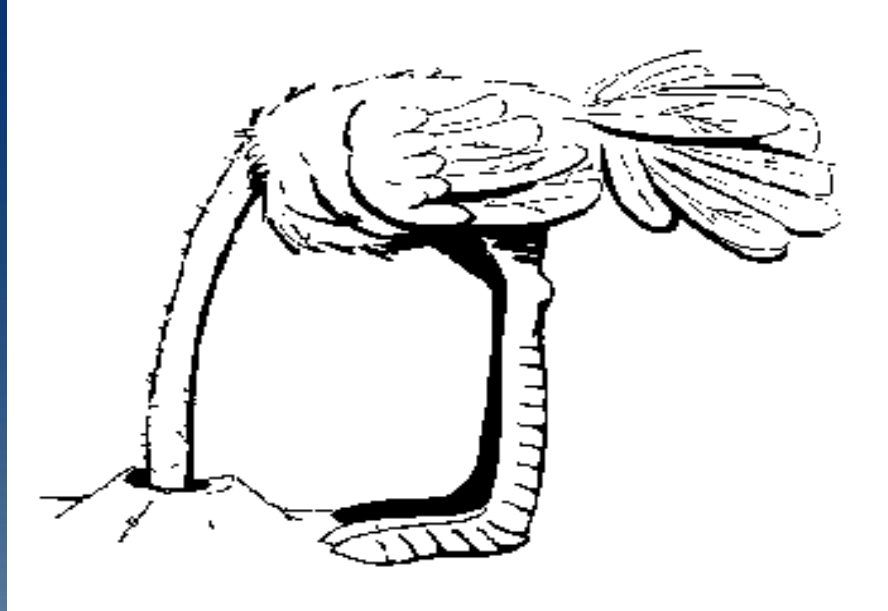
- Was maintenance kept up?
- Should seller's procedures be kept or modified?
- Review seller's claims history/risk management assessments (again)

# POST-PURCHASE ACTIONS

## EMPLOY GOOD RECORD-KEEPING

- Inventory and index seller's records
- Establish written document retention policy
  - identify Custodian of Records
  - follow the policy

# DON'T BURY YOUR HEAD IN THE SAND





# BE PROACTIVE IN IDENTIFYING AND SOLVING PROBLEMS

- INVESTIGATE
- TAKE ACTION



**DOCUMENT THE PROBLEMS AND  
THE STEPS TAKEN TO CORRECT**