

The “Harvey” Effect: Navigating EPL Issues Post Weinstein

Quint Graham, Managing Director
Lori Wheeler, Managing Director

February 21, 2018



2017: Year in Review



HUNDREDS ALLEGE SEX HARASSMENT, DISCRIMINATION AT KAY AND JARED JEWELRY COMPANY

February 27, 2017

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Chef John Besh Steps Down Amid Sexual Harassment Scandal

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ROGER AILES SCANDAL: JULIE ROGINSKY HITS FOX NEWS WITH SEX HARASSMENT SUIT

April 4, 2017

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THE DAILY NEWS

no.203.078

October 2017

Ex-Gucci Employee Launches \$10M Sexual Harassment Suit

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CELEBRITY CHEF MARIO BATALI HIT WITH SECOND ROUND OF SEXUAL ASSAULT ACCUSATIONS

December 12, 2017

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THE SUN SHINE

NBC FIRES MATT LAUER AFTER SEXUAL MISCONDUCT ALLEGATION

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THE DAILY NEWS

Celeb Chef Todd English Accused of Sexual Harassment in Lawsuit

October 2017

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THE SUNSHINE NEWS

AFTER WEINSTEIN: 49 MEN ACCUSED OF SEXUAL MISCONDUCT AND THEIR FALL FROM POWER

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Female Congressional Candidate Ends Run After She Is Accused Of Sexual Harassment

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LensCrafters Settles Female-On-Male Sexual Harassment Case

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The “Harvey” Effect

In the 2000's, carriers became focused on retentions & class risk - *generally, the results were favorable*

1990's

2000's

2018

2010's

?

In the early years of EPL, underwriters were *required* to:

- Review employee handbooks confirming
 - At Will Statements
 - Anti discrimination
 - Anti harassment
 - Multiple avenues for employees to report concerns
- Understand training required by the insured
- Verify documentation exists that training was completed by employees
- Review claims history and look for patterns of behavior or problematic locations
- Confirm the insured will have a defensible position if a claim goes to court

In the 2010's, carriers proceeded to commoditize the purchase of EPL insurance. Underwriters were:

- Checking the box that insureds had certain policies but not reviewing those policies
 - Anti discrimination
 - Anti harassment
- Focused on the location and nature of operations

In the wake of the rampant sexual harassment allegations, we believe the market will move back to *requiring* underwriters to:

- Review of employee handbooks & HR manuals
- Understand what employee & manager training is required by the company
- Verify documentation exists that training was completed by employees
- Review claims history and look for patterns of behavior or problematic locations
- Confirm the insured will have a defensible position if a claim goes to court

What does the future hold:

- Has training effectively prevented harassing behavior?
- Can insurers continue to cover **INTENTIONAL** and **DELIBERATE** acts?
- Will EPL policies transition from paying legal bills and settlements to providing social and industrial psychologists or other resources to teach professional work environments?
- Will carriers
 - lower limits
 - raise deductibles
 - add sublimits for certain allegations
 - use retro inception

EEOC: Charges at National and Texas Levels

	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Total Charges	99,947	99,412	93,727	88,778	89,385	91,503
Texas	9,952	8,929	9,068	8,035	9,539	9,308

10.3% of
overall
charges

Note: the “Total Charges” figures do not reflect many CA allegations/claims as most are filed in State Court, which is a more favorable venue to employees.

Total Charges- TEXAS	FY 2014		FY 2015		FY 2016	
	US	TX	US	TX	US	TX
Race	9.4%	36.3%	10.8%	35.2%	10.0%	34.9%
Sex	9.9%	31.9%	11.0%	30.1%	10.3%	29.7%
National Origin	11.4%	13.6%	12.9%	15.3%	12.1%	12.8%
Religion	8.5%	3.7%	8.8%	3.3%	9.4%	3.8%
Color	12.0%	4.1%	15.5%	4.5%	13.0%	4.3%



But wait... there's more



July 2017

THE DAILY NEWS

Chipotle Is Being Sued by Its Shareholders — Again

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February 01, 2016

OLIVE GARDEN HAS UNLIMITED BREADSTICKS — ALSO LOTS OF LABOR ISSUES, ILLNESS OUTBREAKS, AND AN ICKY SEXUAL HARASSMENT POLICY

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FedEx to settle second drivers lawsuit in 20 states for \$240 million

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The FedEx driver who sued... and won

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ABM ENTERS INTO AGREEMENT TO SETTLE CLASS ACTION LAWSUIT

February 7, 2017

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WAL-MART SETTLES LAWSUIT BY WASH. WORKERS FOR \$35M

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VICTORIA'S SECRET WILL PAY \$12 MILLION TO RETAIL WORKERS WHO WERE SUBJECTED TO UNFAIR 'ON-CALL' SHIFTS

June 13, 2017

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THE DAILY NEWS

September 2

TGI FRIDAY'S AGREES TO SETTLE WAGE SUIT FOR MORE THAN \$19M

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THE SUN SHINE

RADIO SHACK SETTLES MANAGER OT SUITS WITH \$41M CLAIM

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Wage & Hour Claims Broken Down

- W 30% - Services
- W 23% - Retail & Wholesale
- W 13% - Transportation & Real Estate
- W 9% Mining & Construction
- W 9% - Manufacturing

Top 10 states for claims:

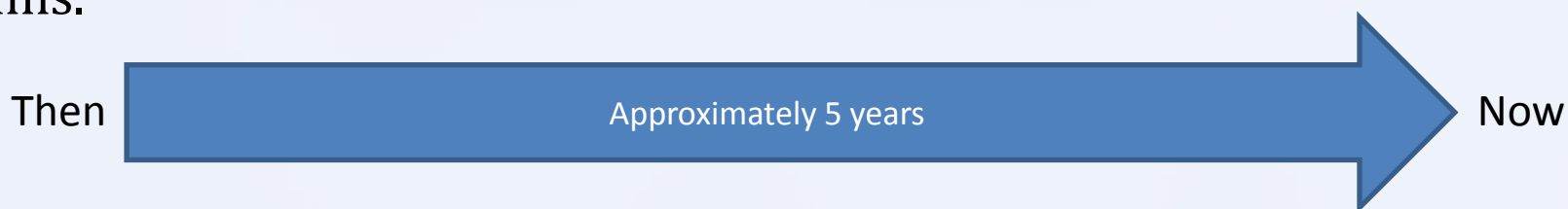
- W California
- W Florida
- W Mississippi
- W Louisiana
- W West Virginia
- W Texas
- W Nevada
- W New York
- W Arkansas
- W Hawaii

The top 10 cases in 2017 were valued at almost \$600 million

- W FedEx \$227MM
- W American Commercial Security \$110MM
- W The City of Dallas \$61.7MM
- W Lyft \$27MM
- W US Security Associates \$21MM
- W Carlson Restaurants \$19.1MM
- W JP Morgan \$16.7MM
- W PNC Bank \$16MM
- W Duane Reade \$13.5MM
- W Wells Fargo \$13MM

Wage & Hour

Wage and Hour filings have increased by over 450% in the last 15 years and are now outpacing Employment Practice Liability (EPL) claims.



Originally, only stand alone coverage was available:

- W Mass employers (10K employees +)
- W Bermuda was the only market
- W Defense costs only
- W Deductibles starting around \$1M

Now, the market has expanded and coverage is available:

- W Midsize employers (500 employees +)
- W AIG (US), Beazley (Lloyd's), and Markel/XL/Aspen/Awac/Argo (Bermuda) are the markets
- W Defense costs only or defense costs and indemnity available
- W Deductibles starting around \$500K
- W *\$250K (max) defense only sublimit may be available on standard EPL policies (normally for < 250 employees)*



Medical Marijuana

- The US Attorney General is enforcing federal laws that prohibit all use of marijuana
- 28 states have legalized medical marijuana use and 8 have passed laws legalizing recreational marijuana
- Employers need to review their drug policies and address the quickly changing landscape of medical marijuana in the workplace – especially relating to pre-employment drug testing
- One judge in Connecticut found that federal law does not preempt Connecticut law – accordingly an employee could bring a cause of action under Connecticut's medical marijuana law for firing or refusing to hire a user of medical marijuana, even where the individual has failed a drug test.
- Do employers have to provide reasonable accommodations?
- Several states prohibit employers from taking action based solely on a failed drug test in non-safety sensitive positions when employees hold valid medical marijuana cards.
- No state laws currently require employers to permit drug use in the workplace or to tolerate employees who report to work under the influence.

Employment Arbitration Agreements

The Supreme Court has agreed to decide whether class action waivers in employment arbitration agreements violate the National Labor Relations Act (NLRA)

Arbitration agreements that require employees to pursue claims in arbitration have long been in use. However, the NLRB has taken the position that employers violate the NLRA when they make such waivers in arbitration agreements a condition of employment

Circuits upholding Class Action Waivers:

- Second Circuit
 - Sutherland v Ernst & Young (2013)- class action waiver is not rendered invalid just because plaintiff's claim is not economically worth pursuing individually.
 - Patterson v. Raymours Furniture (2016)- FLSA claim. Followed Sutherland but noted that if it was writing on clean slate, may have decided otherwise.
- Fifth Circuit
 - Murphy Oil v. NLRB- Murphy Oil did not engage in unfair labor practice when it requires employees to sign arbitration agreements waiving access to class action litigation. Use of class action procedures is not a substantive right under the NLRA.
- Eighth Circuit
 - Cellular Sales of Missouri v. NLRB (2016)- did not violate the NLRA with its agreement requiring employees to waive the right to class relief.

Circuits holding that class action waivers are unlawful because they violate the NLRA:

- NLRB
- Sixth Circuit
 - NLRB v. Alternative Entertainment Inc. (May 26-2017). Class action waivers violate employees' right under the NLRA to engage in concerted activity. Invalidating these provisions falls within the savings clause of the FAA, because any contract—not just an arbitration clause—that restricts concerted activity is unenforceable.
- Seventh Circuit
 - Lewis v. Epic Systems Corp.- held in 2016 that an arbitration agreement precluding collective arbitration or collective action violates Section 7 of NLRA and is unenforceable under the FAA.
- Ninth Circuit
 - Morris v. Ernst & Young- also in 2016, agreed w Epic and held that despite the FAA, under Section 7, employees have substantive rights to pursue collective relief that cannot be waived in an arbitration agreement. The arbitration agreement was illegal under the NLRA and therefore no conflict between NLRA and FAA.

Equal Pay

In 2016, the EEO-1 form was revised to require compensation data by gender, race, ethnicity, and pay bands. This data was purported to be a way for the EEOC to combat pay discrimination on the theory the information would enable the EEOC to identify employers who might be discriminating against minorities and/or females. The EEOC planned to publish aggregated EEO-1 data and industry reports on a periodic basis, providing private employers the data to conduct voluntary self-assessments of their pay practices, remedy pay disparities and comply with state and federal equal pay laws.

HAVE EMPLOYERS WON THE BATTLE BUT LOST THE WAR?

- Ⓢ Sparked judicial activism
- Ⓢ Efforts underway to strengthen state and local pay discrimination laws
- Ⓢ Localized pay data laws would be a huge headache for multi-state employers
- Ⓢ Business will have to comply with different standards across different states/cities

Ban the Box

- W Banning employers from asking about salary history
 - W California's law was effective in January of 2018
 - W Delaware, Massachusetts, New York, Oregon have law
 - W New York City, Philadelphia and San Francisco have enacted restrictions on asking about salary

How does this impact a national company which uses one application nationwide?????

Banning employers from asking about criminal history

- W Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, D.C., Connecticut, Vermont have law
- W Austin, Baltimore, Buffalo, Chicago, Newark, Philadelphia, San Francisco, Seattle, Los Angeles have restrictions

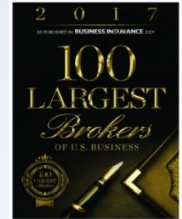
WHEN can an inquiry into criminal history be made...after the initial interview, after a conditional offer, after written conditional offer? General consensus is to postpone the inquiry until later in the hiring process.



Questions?

An Award Winning Broker

- W Best Practices Agency per Independent Insurance Agents & Brokers of America
- W 100 Largest U.S. Brokers by Business Insurance
- W Top 100 P/C Agency per Insurance Journal
- W Wortham voted Best Place to Work by Houston Business Journal
- W Wortham's Houston office has been voted Top Workplace 6th year in a row
- W Multiple "Power Broker" award winners according to Risk & Insurance magazine
- W Multiple Young Guns recognized by Insurance Business





Appendix

EPL: The Headlines

Sexual Harassment:

- W <https://www.usatoday.com/story/tech/news/2017/06/21/uber-ceo-traivs-kalanick-resigns-report/103060200/>
- W <https://www.theguardian.com/technology/2017/oct/13/amazon-suspends-studio-chief-roy-price-amid-weinstein-scandal>
- W https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html?utm_term=.ec31850bc014
- W <http://wwd.com/business-news/legal/ex-gucci-store-employee-launches-10-million-sexual-harassment-suit-11020658/>
- W <https://www.nbcnews.com/news/us-news/roger-ailles-scandal-embattled-fox-news-hit-another-sex-harassment-n742066>
- W <https://www.nytimes.com/2017/10/23/us/john-besh-sexual-harassment.html>
- W <https://ny.eater.com/2017/10/4/16418564/todd-english-sexual-harassment-lawsuit-plaza-hotel-nyc>
- W <http://www.nydailynews.com/entertainment/mario-batali-hit-sexual-assault-accusations-article-1.3694154>
- W <http://radiotvtalk.blog.ajc.com/2017/11/29/nbc-fires-matt-lauer-after-sexual-misconduct-allegation/>
- W https://www.huffingtonpost.com/2011/06/20/lenscrafters-settles-fema_n_880709.html
- W <https://www.npr.org/sections/thetwo-way/2017/12/15/571262099/female-congressional-candidate-ends-run-after-she-is-accused-of-sexual-harassmen>
- W <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>
- W https://www.salon.com/2016/02/01/olive_garden_has_unlimited_breadsticks_also_lots_of_labor_issues_illness_outbreaks_and_an_icky_sexual_harassment_policy/

... and More Headlines

Wage & Hour:

- Ⓜ <http://money.cnn.com/2016/08/29/news/economy/chipotle-lawsuit-nearly-10000-workers/index.html>
- Ⓜ <http://investor.abm.com/releasedetail.cfm?releaseid=1010716>
- Ⓜ https://www.salon.com/2016/02/01/olive_garden_has_unlimited_breadsticks_also_lots_of_labor_issues_illness_outbreaks_and_an_icky_sexual_harassment_policy/
- Ⓜ <https://www.bna.com/olive-garden-waitress-n57982083031/>
- Ⓜ <https://www.reuters.com/article/us-fedex-settlement/fedex-to-settle-driver-lawsuits-in-20-states-for-240-million-idUSKCN0Z229Q>
- Ⓜ <http://money.cnn.com/2014/11/20/news/companies/fedex-driver-lawsuit/index.html>
- Ⓜ <http://abcnews.go.com/Business/story?id=8147775>
- Ⓜ <https://www.law360.com/articles/833915/radioshack-settles-manager-ot-suits-with-41m-claim>
- Ⓜ <https://fashionista.com/2017/06/victorias-secret-lawsuit-employee-settlement>
- Ⓜ <https://nypost.com/2017/09/21/tgi-fridays-agrees-to-settle-wage-suit-for-more-than-19m/>