HRHero.com
A division of BLR®

FLORIDA
EMPLOYMENT LAW LETTER

Part of your Florida Employment Law Service

Tom Harper, Managing Editor • Law Offices of Tom Harper
Lisa Berg, Andrew Rodman, Co-Editors • Stearns Weaver Miller, P.A.
Robert J. Sniffen, Jeff Slanker, Co-Editors • Sniffen & Spellman, P.A.

Vol. 29, No. 11
January 2018

What's Inside

What's Online

Podcast
Consider gamification for talent development
ow.ly/Lw4X30hyvw0

Strategy
Management mindset: 6 keys for greater staffing stability
ow.ly/Aqje30hyuBg

Sexual Harassment
Tips for repairing workplace after harassment investigation
bit.ly/2ByzLZZ

Find Attorneys
To find the ECN attorneys for all 50 states, visit
www.employerscounsel.net

ECN EMPLOYERS COUNSEL NETWORK
EMPLOYERSCOUNSEL.NET

LABOR LAW

A December to remember: NLRB delivers early holiday gifts to employers

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

President Donald Trump appointed two Republicans to the five-member National Labor Relations Board (NLRB) last year, giving his party a 3-2 majority for the first time in a decade. When Peter Robb assumed the reins as the new NLRB General Counsel, he issued a memorandum to the agency's regional offices laying out his agenda and outlining priorities on which types of charges should be submitted to his Division of Advice. Robb also signaled that he intended to assist the agency in overruling many precedents of the Obama-era Board.

The NLRB jumped on Robb's sleigh and delivered employers an early holiday gift. Notably, on December 14 and 15, 2017, the Board overturned three of the most controversial Obama-era decisions: (1) joint employer status (Browning Ferris overruled by Hy-Brand Industrial Contractors), (2) employer workplace rules and policies (Lutheran Heritage Village-Livonia overruled by The Boeing Company), and (3) microbargaining units (Specialty Healthcare overruled by PCC Structurals). Read on for details about these new decisions and their significance for employers.

NLRB issues new joint-employer test

The NLRB delivered its biggest gift when it reversed the standard it had set in a controversial 2015 case involving Browning-Ferris Industries, Inc., in which it held that joint employment could exist when companies have only "indirect or unexercised control" over the workers in question. The recent decision involved the termination of striking employees and the alleged joint-employer status of two construction companies. In reversing course, the Trump Board reinstated a previous test under which companies are "joint employers" only when the employer *actually exercises* direct control over another entity's employees (rather than merely having reserved the right to exercise control) and has done so "directly and immediately" in a manner that isn't limited and routine.

Employer takeaway. This decision has the greatest impact on employers that use staffing agencies, franchise models, and other contractual work relationships. They'll now face fewer labor risks (e.g., strikes and bargaining obligations) when engaging those kinds of third parties. *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017).

NLRB overturns standard for analyzing workplace policies

The next-biggest gift to employers, wrapped in a large red bow, came via the NLRB's decision in a case involving the Boeing Company's no-camera

AGENCY ACTION

EEOC cites progress in managing charge inventory. The Equal Employment Opportunity Commission (EEOC) released its annual Performance and Accountability Report on November 15, 2017, showing a decline in charge inventory as a highlight. During fiscal year 2017, which ended September 30, the agency reported it had resolved 99,109 charges and reduced the charge workload by 16.2 percent to 61,621, the lowest level of inventory in 10 years. Additionally, the EEOC handled over 540,000 calls to its toll-free number and more than 155,000 contacts about possible charge filings in field offices, resulting in 84,254 charges being filed. The 2017 report also notes that the agency secured approximately $484 million for victims of discrimination in the workplace.

New NLRB General Counsel sworn in. Peter B. Robb was sworn in as General Counsel of the National Labor Relations Board (NLRB) on November 17 for a four-year term. He was sworn in by the Senate on November 8. Robb replaced Richard F. Griffin Jr., who served in the post from November 3, 2013, to October 31, 2017. Before becoming the NLRB's General Counsel, Robb was a director at the New England law firm of Downs Rachlin Martin PLLC.

Airlines to pay $9.8 million to settle disability suit. The EEOC announced on November 20 that American Airlines and Envoy Air had agreed to pay $9.8 million in stock, which was worth over $14 million on the day of the settlement, to settle a nationwide class disability discrimination lawsuit. The EEOC's suit said the airlines unlawfully denied reasonable accommodations to hundreds of employees. The suit claimed the two airlines violated the Americans with Disabilities Act (ADA) by requiring their employees to have no restrictions before they could return to work following a medical leave. Under that policy, if an employee had restrictions, American and Envoy refused to allow him to return to work and failed to determine if there were reasonable accommodations that would allow him to return to work with restrictions.

OSHA issues rule setting crane operator compliance date. The Occupational Safety and Health Administration (OSHA) in November issued a final rule setting November 10, 2018, as the date for employers in the construction industry to comply with a requirement for crane operator certification. OSHA issued a final cranes and derricks rule in August 2010. After stakeholders expressed concerns regarding the rule's certification requirements, OSHA published a separate final rule in September 2014 extending by three years the crane operator certification and competency requirements. This one-year extension provides additional time for OSHA to complete a rulemaking to address stakeholder concerns. ✤

policy, which restricted employees from using camera-enabled devices such as cell phones on company property. The Board upheld Boeing's policy and overturned its landmark 2014 *Lutheran Heritage* standard for evaluating the legality of facially neutral workplace policies and rules. The previous standard found that employers violated the National Labor Relations Act (NLRA) by maintaining work rules that employees would reasonably construe to prohibit their Section 7 rights under the Act. The Board had used this "standard" to invalidate many handbook policies over the years, including rules limiting cameras and recording devices and addressing "civility," "respectful conduct," and "insubordination."

In place of that unworkable *Lutheran Heritage* test, the NLRB adopted a new test to strike the proper balance between asserted business justifications and the invasion of employee rights. When evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will now evaluate two things: (1) the nature and extent of the potential impact on NLRA rights and (2) legitimate justifications associated with the rule. The decision also established three categories for how the Board will analyze employer rules going forward.

"***Category 1*** will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." Examples of this include Boeing's no-camera rule as well as "civility" policies and "harmonious interactions and relationships" rules.

"***Category 2*** will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."

continued on pg. 4

ANDY'S IN-BOX

Does sexual harassment training work?

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

On December 11, 2017, the *New York Times* ran an article titled "Sexual Harassment Training Doesn't Work. But Some Things Do." The article describes sexual harassment training as an exercise that consists of "clicking through a PowerPoint, checking a box that you read the employee handbook, or attending a mandatory seminar at which someone lectures about harassment while attendees glance at their phones." According to the article, the type of training to which we're accustomed fails to achieve what *should* be the primary goal—preventing sexual harassment in the first place—because training is geared toward providing a defense to liability.

I don't agree that training "doesn't work." Training is an absolutely vital and necessary component of an antiharassment and antidiscrimination policy. Without training, employees may not know the company's stance on harassment and discrimination (hopefully, the company won't tolerate them) and may not know how to report harassment and discrimination (particularly if they have not read your employee handbook).

I do agree, however, that certain types of training are better than others. In my opinion, live, in-person training (where attendees are less easily distracted) is preferable to computer-based training (where employees may listen with half an ear or less). That said, I recognize that in-person training may not be practical or possible for all employers, particularly large employers or employers with multiple locations. I also agree that prevention, not liability avoidance, should be the primary goal of training. If you're successful at prevention, you've likely made significant progress toward reducing the risk of liability.

Training, however, is not enough to prevent harassment and discrimination. Prevention starts with culture, and establishing and maintaining proper culture starts at the top. Senior management must demonstrate, with words and actions, that equality is paramount and that harassing and discriminatory conduct will not be tolerated. It's about leading by example, which means refraining from sexual (or otherwise inappropriate) banter, jokes, comments, and touching. It's also about recognizing that conduct that may have been commonplace 30 years ago may not be acceptable today (and may not have been acceptable 30 years ago, either).

The *Times* article lays out a handful of other ways to prevent harassment:

- **Bystander training.** Train "bystanders" who witness harassment to intervene when the harassment is observed ("Hey, that joke was inappropriate."). Bystanders should also be trained to address the issue privately with the perpetrator ("You're aware that the joke you told Jane was inappropriate, right?") or with the victim ("I heard what John said. Are you OK with that?").
- **Civility training.** During training, instead of focusing solely on what employees *can't* do ("don't touch" and "don't tell dirty jokes"), also focus on what employees *should* do—such as praise colleagues' work and recognize colleagues' contributions.
- **Consider frequency.** As stated in the *Times* article, "Thinking you can change [the abuse of power] in a one-hour session is absurd. You're not going to just order some bagels and hope it goes away." In other words, one-time training during onboarding may not be enough. What is enough depends on your culture and work environment. There is not a one-size-fits-all approach.
- **Promote equality through promotion.** Look around you. Do you have women and minorities in management positions? Send the desired message through your actions and personnel decisions.

Every company has (or should have) the same goals—to eliminate harassment and discrimination and to create an environment where all individuals feel welcome. How you achieve those goals is up for debate, and what works for one company may not work for your company. There are several successful recipes for success. Consult with your employment attorney to discuss the best recipe for success in your organization.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like him to address, e-mail arodman@stearnsweaver.com or call 305-789-3255. Your

identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

continued from pg. 2

"***Category 3*** will includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." An example would be a rule that prohibits employees from discussing wages or benefits with one another.

Employer takeaway. This decision certainly warrants celebrations in 2018 as it signals that the Board is likely to apply a more balanced approach when assessing work rules. It doesn't mean, however, that employers can adopt work rules without any justification. Neutral work rules can still be found to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Therefore, prudent employers should consult with legal counsel when assessing work rules to ensure they either fall into Category 1 or are legally defensible under Category 2. *The Boeing Company,* 365 NLRB No. 154 (2017).

NLRB eliminates 'micro-unit' standard

Finally, the Republican majority overturned the NLRB's 2011 *Specialty Healthcare* standard, which had allowed "micro-units" of workers to unionize, and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. The traditional standard, which the Board had used throughout most of its history, permits the agency to evaluate the interests of all employees—both within and outside the petitioned-for unit, without regard to whether the groups share an "overwhelming" community of interest.

Employer takeaway. In returning to its previous approach, the NLRB has made it more difficult for unions to attempt to organize by eliminating their ability to conduct "micro-unit" organizing. Unions can no longer cherry-pick smaller bargaining units in which they find employee support. *PCC Structurals,* 365 NLRB No. 160 (2017).

Let it snow, let it snow, let it snow

It appears the Republican-majority NLRB was in a rush to decide this flurry of cases before Board Chairman Philip Miscimarra's term expired on December 16, 2017. Now, the Board is locked in a 2-2 split until Miscimarra's replacement is confirmed. It remains to be seen whether the decisions will survive federal court challenges. In the interim, employers should consult with experienced labor counsel to help navigate this rapidly changing legal landscape.

You may contact the author at lberg@stearnsweaver.com. ✤

MINIMUM WAGE

Can local governments set higher minimum wage than the state? FL appeals court says no

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

Throughout the country, much has been made of varied initiatives to increase the minimum wage from its current level under federal law to higher levels. Many commentators frequently propose $15 an hour as the new minimum wage, and some municipalities throughout the country have enacted local ordinances to push their minimum wage higher than the federal minimum wage.

The city of Miami Beach was one such city. In 2016, it enacted an ordinance raising the minimum wage for many of its employees higher than the state and federal minimum wages. The city was sued for enacting the ordinance, and the trial court struck down the law. The Florida 3rd District Court of Appeals upheld the decision of the trial court.

The ordinance

The city's ordinance, which was titled "City Minimum Living Wage," raised the minimum wage in Miami Beach above the rate set by the Florida Minimum Wage Act and the federal Fair Labor Standards Act (FLSA). The Florida Legislature had previously enacted a statute that established that the federal minimum wage was the Florida minimum wage and that local governments could not set a different minimum wage.

In 2004, Florida voters amended the Florida Constitution to establish a higher minimum wage in Florida than the minimum wage set by federal law. The amendment stated:

> This Amendment provides for payment of a minimum wage and shall not be construed to preempt or otherwise limit the authority of the state legislature or any other public body to adopt or enforce any other law, regulation,

requirement, policy or standard that provides for payment of higher or supplemental wages or benefits, or that extends such protections to employers or employees not covered by this amendment.

Miami Beach passed its ordinance mandating a higher minimum wage, interpreting the constitutional amendment to permit it to set a different minimum wage than the one established by state statute. The city was sued over the ordinance, the trial court invalidated the ordinance, and the city appealed.

Ordinance's invalidity upheld

The appellate court held that the city's argument that the constitutional amendment invalidated the state statute prohibiting local governments from setting a different minimum wage was not dictated by the plain language of the statute and upheld the trial court's decision invalidating the wage ordinance. The appellate court noted that the amendment to the Florida Constitution expressly provided that it did not preempt the authority of the state legislature from preempting municipal powers as it did in the minimum wage legislation.

The court indicated that based on the plain language of the constitutional amendment, the city was entitled to enact its minimum wage ordinance under the constitution, but the legislature was entitled to exercise its power to preempt local governments' ability to enact minimum wage ordinances. Accordingly, the appellate court upheld the decision of the trial court to strike down the city's minimum wage ordinance. *The City of Miami Beach, Florida v. Florida Retail Federation, Inc., et al.*, Case No. 3D17-705 (Fla. 3d DCA, 2017).

Takeaways

If your business is in a locale where a local governmental entity has enacted an ordinance that sets the minimum wage higher than the state statute's minimum wage, the local ordinance may well be subject to legal attack under the same theories propounded in this case. Time will tell whether this legal reasoning will prevail since other challenges to local minimum wage ordinances may eventually lead to a conflict.

WORKPLACE TRENDS

Survey finds most applicants don't negotiate job offers. A survey from CareerBuilder finds that 56% of workers don't negotiate for better pay when they are offered a job. Those who don't attempt to negotiate say they don't feel comfortable asking for more money (51%), they are afraid the employer will decide not to hire them (47%), or they don't want to appear greedy (36%). The survey also shows that the majority of employers expect a counteroffer. Fifty-three percent of employers said they are willing to negotiate salaries on initial job offers for entry-level workers, and 52% say when they first extend a job offer to an employee, they typically offer a lower salary than they're willing to pay so there is room to negotiate.

Employees' caregiving roles subject of study. A new study from Merrill Lynch, conducted in partnership with Age Wave, finds that the 40 million family caregivers in the U.S. spend $190 billion per year on their adult care recipients. The study also found that 84% of employers say caregiving will become an increasingly important issue in the next five years, but just 18% strongly agree that their workplace is currently "caregiving-friendly." "Meaningful, well-designed employer benefits can make a crucial difference in helping caregivers navigate the high stress of caring for a loved one, and help them balance these responsibilities with the rest of their working and financial lives," Kevin Crain, head of Workplace Financial Solutions for Bank of America Merrill Lynch, said in response to the findings. "Just as child care has been an issue in the past that led to revolutionizing HR benefits, the aging of the population means we need to consider how caregiving is becoming an increasingly important issue for employers and employees."

Study points out challenges of remote work. Communicating and working from different locations via technology present significant challenges for remote workers, according to the authors of a new study of 1,153 employees. Fifty-two percent of respondents in the study by David Maxfield and Joseph Grenny, authors of *Crucial Conversations* and *Crucial Accountability,* feel their colleagues don't treat them equally. Sixty-seven percent of remote employees said they don't think their colleagues fight for their priorities, versus 59% of on-site employees. Forty-one percent of remote employees felt colleagues say bad things about them behind their backs, versus 31% of on-site employees. Sixty-four percent of remote employees felt that colleagues make changes to projects without warning them, versus 58% of on-site employees. Thirty-five percent of remote employees felt that colleagues lobby against them, versus 26% of on-site employees. ✤

UNION ACTIVITY

New report touts union benefits to communities. The American Federation of State, County and Municipal Employees, the American Federation of Teachers, the National Education Association, and the Service Employees International Union released a report in November 2017 examining how unions benefit communities. The report, *Strong Unions, Stronger Communities,* looks at case studies in which members of labor unions have worked to aid communities across the country. It cites union worker contributions to communities, such as helping hospitals and airports prepare to respond to the Ebola virus and helping high-school students pursue careers in nursing.

Union praises "Forces to Flyers" program. The president of the Air Line Pilots Association, Int'l (ALPA), has spoken out to commend the U.S. Department of Transportation's (DOT) "Forces to Flyers" initiative aimed at helping military veterans become civilian pilots. "Many of ALPA's members have proudly served our country in uniform, and the union stands ready to assist others in breaking down barriers that may impede them from pursuing carriers in aviation, all while maintaining the highest levels of safety," ALPA President Tim Canoll said. Currently, the industry has more qualified pilots than positions, Canoll said, but he noted the need to ensure an adequate future supply of qualified pilots "who earn good salaries, experience a healthy work/life balance, and can anticipate predictable career progression." He also noted that ALPA has invested member resources for more than 30 years "to mentor and inspire the next generation of pilots and to staunchly advocate for loan-guarantee programs and other incentives to make it more affordable to become an airline pilot."

Unions launch campaign to save TPS. Five labor unions, backed by the AFL-CIO, in November announced a campaign to save the Temporary Protected Status (TPS) designation, which allows certain immigrants to legally live and work in the United States. TPS designations to countries with humanitarian or environmental crises have been renewed annually but have lately come under fire from the Trump administration. UNITE HERE, the International Union of Painters and Allied Trades, the International Union of Bricklayers and Allied Craftworkers, the United Food and Commercial Workers International, and the Iron Workers have launched Working Families United, an immigrant worker advocacy coalition focused on extending TPS. The partner unions represent thousands of TPS union workers in hospitality, construction, and trades industries who would lose their legal worker status if TPS isn't renewed. Campaign leaders claim that termination of TPS also would eliminate a major source of tax revenue since TPS holders pay fees to have their immigration status renewed regularly. ✤

However, this decision is good news for employers facing an ordinance that establishes a minimum wage that is higher than the state's. Of course, consult an experienced labor and employment attorney before altering your wage and hour practices to ensure you are complying with the current local, state, and federal laws.

You may contact the author at jslanker@sniffenlaw.com or 850-205-1996. ✤

EMPLOYEE ILLNESS

Meeting (and exceeding) legal obligations to seriously ill employees

Few situations are more difficult for a caring employer than learning that an employee is facing a permanent disability or terminal illness. You've probably read plenty of articles about your obligations under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), but those laws cover only what an employer is legally required to do. Responsible HR professionals strive to go above and beyond to help struggling employees receive the full advantage of the benefits they offer.

Benefits during extended medical leave

One common scenario is when an employee has a disabling condition that prevents her from returning to work at the end of FMLA leave (or who isn't eligible for FMLA leave). The Equal Employment Opportunity Commission (EEOC) and many courts have taken the position that employers are required to offer disabled employees additional leave as a reasonable accommodation under the ADA if it would enable them to return to work. But what if an employee's doctors have no idea how long she will be off work? Or what if her diagnosis is terminal?

While the law generally allows you to terminate employees in those situations, employers often prefer to grant them an extended medical leave so they can maintain their group health coverage and other benefits. This is an admirable sentiment, but it's not without risks. Many insurance policies require employees to maintain a certain number of work hours or be "actively at work" to remain eligible for benefits. Plus, while coverage is guaranteed for the duration of FMLA leave, there is no similar protection for a non-FMLA medical leave.

By allowing an ineligible employee to keep her benefits, you run the risk of the insurance companies denying her claims. Because you never terminated the employee, you probably didn't offer her COBRA, either, and the time to do that may have passed. She could end up with huge medical bills and no way to get coverage, and you could be liable under COBRA or for a breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA).

To prevent this, fully insured employers should find out how long their carriers allow employees to retain their benefits while on medical leave. Some group health carriers, for example,

allow up to a year as long as you have a written policy to support the practice. If your carrier has a shorter time frame, you may need to terminate the employee so she can elect COBRA in a timely manner. Be sure to consider how termination will affect the employee's eligibility for other benefits (more on this below), and contact your attorney before making a final decision.

If you're self-insured, you can generally choose how long employees stay on your plan, as long as you include the information in your plan document, summary plan description, and stop-loss contract.

Beware these tricky benefits traps

While medical coverage is considered the flagship of any employee benefits program, your other benefits can be just as critical. Here's a quick rundown of some things to look out for with other benefits:

- **STD.** Make sure the employee files for short-term disability (STD) benefits in a timely manner. Before letting employees supplement STD payments with other forms of paid leave, verify that the STD policy allows it.
- **LTD.** Long-term disability (LTD) benefits are typically available only to current employees (including those on FMLA leave and/or STD). Help employees file a claim before separation from employment if they qualify. In addition, make sure the LTD carrier has current salary information on file, preferably before the claim is submitted. That may determine the amount and duration of benefits available to permanently disabled employees.
- **Ancillary benefits.** Remind employees of any other coverage they may have, such as accident coverage, critical illness, and employee assistance programs. These are easily overlooked.
- **Life insurance conversion.** Make sure employees know about their conversion rights under your group and/or voluntary life policies. This is especially crucial for terminally ill employees. If the carrier doesn't provide a notice of conversion rights, add it to your offboarding package or checklist.
- **COBRA and state laws.** Provide notice to your COBRA administrator within 30 days after the employee's last day of work (or leave, if applicable). If you self-administer COBRA, issue an election notice to the employee within 44 days. If you're exempt from COBRA, check to see if there is a state continuation requirement that applies to you.

Final thoughts

Employers need a plan and process for helping employees in their time of need. That starts with a thorough understanding of the benefits you offer, the eligibility and notice requirements for each type of benefit, any applicable deadlines, and other intricacies of your specific policies. By preparing now, you can prevent mistakes and oversights and hopefully ease a difficult situation for your employees and their loved ones. ✤

NONDISCLOSURE AGREEMENTS

Revisiting employment agreements in the age of Weinstein

With all the recent sexual harassment and assault scandals in Hollywood, Washington, high-profile boardrooms, and even public television and radio, many are asking how these things could have been going on in secret for all these years. The answer, in many cases, is that the employer had some sort of contractual agreement with the alleged victims that basically guaranteed their silence.

For example, nondisclosure agreements (NDAs)—and similar nondisparagement clauses—can appear in many types of employee-employer agreements. Some—such as employment contracts and noncompete/confidentiality agreements—are entered into before the employee is even a twinkle in the harasser's eye. Employment contracts can also contain mandatory arbitration clauses, which limit an employee's ability to sue for workplace violations.

Agreements executed as part of a settlement of harassment or other workplace complaints also frequently include a nondisclosure component and/or a waiver of civil claims.

Why reconsider these agreements now?

It appears many of the women (and some men) who have come forward recently with stories of harassment and abuse at the hands of powerful men are doing so in breach of an NDA. For example, it's been reported that accusers of both Harvey Weinstein and Representative John Conyers breached decades-old NDAs to bring sexual misconduct to light. Several other women who worked for Weinstein initially demurred when contacted by reporters, citing general NDAs they signed

TRAINING CALENDAR

Call customer service at 800-274-6774 or visit us at the websites listed below.

WEBINARS & AUDIO SEMINARS
Visit http://store.HRHero.com/events/audio-conferences-webinars for upcoming seminars and registration.

2-7 Pay Grades and Job Value: How to Tackle Compensation Questions for Best Results

2-7 Online Job Applications that Rock: Getting Top Talent to Click Submit

2-8 Behavior-Based Safety-Developing a Safety Culture That Addresses Human Factors that Contribute to Accidents

2-8 New Payroll Tax Requirements for 2018: How to Update Your Payroll System to Comply with New Tax Regulations

2-9 Civility at Work: How to Build a Culture of Respect, Legally and Effectively, Both In Person and Online

2-13 Hone Those Job Posts! How to Attract the Right Talent with All-Star Descriptions about the Positions and Your Employment Brand

2-14 HR's Role in Meeting Ever-Changing Business Needs: How to Align Processes with New Initiatives Launched in Today's VUCA World

2-15 Temporary Worker Safety-Essential Strategies for Host Employers and Staffing Agencies

2-15 Leave & Benefits: What You Must Provide, Who Pays, and What Happens If an Employee Doesn't Return to Work

2-20 Free LinkedIn Recruiting Tools: Use Ideal Search Strings, Calendar & Text Expander Tools, and More to Yield Qualified Interviews

2-21 Employee Training: How to Handle Interactions Between Co-Workers and Solve Interpersonal Conflict

2-22 Light-Duty and Return-to-Work Programs: Successful Strategies to Get and Keep Injured Employees Back to Work Safely

when they first started working for the company. Gretchen Carlson of Fox News was reportedly also bound by a mandatory arbitration clause in her employment contract.

Which leads one to ask: With the apparent cultural shift toward holding harassers more accountable for their actions, are strict NDAs and mandatory arbitration clauses still a good idea? The answer will likely vary based on the employer and the circumstances.

In general, we suggest that employers that use these types of restrictions reevaluate their desirability in light of the current climate. What is it you are trying to accomplish with an NDA or mandated arbitration? When and for what purposes do you (or should you) use one? Exactly what information and/or legal avenues are you trying to restrict? Who are you trying to protect, and what are you trying to protect them from? Are there disclosures you want to specifically prohibit (such as to the press) or allow (such as to the police)?

Bottom line

Using employment contracts and other binding agreements to restrict employees' future legal rights was tricky even before the recent flood of harassment revelations. The practice is coming under even more scrutiny now. While the law may not have changed yet, the climate has. Plus, some lawmakers are already looking into restricting or eliminating the use of nondisclosure agreements and arbitration clauses in harassment situations.

We recommend taking action now to make sure your standard employment agreements will stand up to the heightened levels of scrutiny—not only in court but in the court of public opinion. Your attorney can help you craft a set of documents that extends the proper degree of protection to the employees involved as well as the employer.

Also keep in mind that even the best documents won't fit every situation. Loop your counsel in any time an employee complains about serious harassment or misconduct. They can help you navigate the sensitive situation, evaluate the complaint, negotiate a potential settlement, and make sure your settlement documents provide the appropriate protections for the employer and the employees on both sides of the complaint. ✤

FLORIDA EMPLOYMENT LAW LETTER (ISSN 1041-3537) is published monthly for $447 per year plus sales tax by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to G. Thomas Harper at The Law and Mediation Offices of G. Thomas Harper, LLC, 1912 Hamilton Street, Suite 205, Post Office Box 2757, Jacksonville, FL 32203-2757, 904-396-3000. Go to www.EmploymentLawFlorida.com for more information.

FLORIDA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Florida employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The Florida Bar does designate attorneys as board certified in labor and employment law.

For questions concerning your subscription or Corporate Multi-User Accounts, contact your customer service representative at 800-274-6774 or custserv@blr.com.

HRhero® a division of BLR BLR®