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FLORIDA
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LEGISLATION

Preview of employment bills pending this legislative session

by Jeff Slanker
Sniffen & Spellman, P.A.

Each Florida legislative session sees a host of bills related to the workplace and how it is managed and governed. Some bills are ultimately passed, and some are not. The following preview covers some bills that would have an effect on Florida employers if passed. The session runs from the first Monday in March and continues for the following 60 consecutive days.

SB 474: discrimination in labor and employment

Senate Bill (SB) 474—which has been referred to the Commerce and Tourism, Judiciary, and Rules Committees—would create the Senator Helen Gordon Davis Fair Pay Protection Act. The statute prohibits an employer from using sex as the basis for providing less favorable employment opportunities, taking certain employment actions against employees, and engaging in disparate treatment in wages. The bill amends current Florida Statute 448.07 in some important and notable ways. Its prohibition on providing employees a "less favorable employment opportunity" based on sex includes:

- Assigning them to positions or career tracks in which the work performed requires less skill, effort, and responsibility than the work performed by the majority of individuals in the same occupation and labor market;
- Failing to provide them with information about promotions;
- Assigning them work less likely to lead to promotions or career advancement opportunities; or
- Limiting advancement opportunities based on sex.

That language is expansive and encompasses many adverse employment actions not otherwise actionable under current law. Further, although the statute creates a defense to claims, it requires that sex-based wage differentials be "job-related" and consistent with business necessity—a burden currently not borne by employers in equal pay litigation, which typically requires them to prove only that the differential wasn't for a discriminatory reason.

The statute creates a private claim for damages against employers and contains numerous other expansive provisions. They include a ban on an employer lowering a male's wages to comply with the statute, an antiretaliation provision, and prohibitions against seemingly innocuous and standard employer practices such as considering past pay history in setting a salary and even requesting wage and salary information from a prospective employee.

AGENCY ACTION

NLRB chair responds to lawmakers on joint-employer rule. National Labor Relations Board (NLRB) Chair John F. Ring in January responded to a letter from members of Congress urging the Board to withdraw its notice of proposed rulemaking aimed at setting a standard for what constitutes a joint-employer relationship. Representative Bobby Scott (D-Virginia), chair of the House Committee on Education and Labor, and Representative Rosa DeLauro (D-Connecticut), chair of one of the committee's subcommittees, had urged the NLRB to abide by the joint-employer standard set out in the *Browning-Ferris* decision, a more employee-friendly standard than the one in the proposed rule. But Ring countered that the *Browning-Ferris* decision "leaves much unresolved." He also cited the "lack of clarity" as a reason the NLRB initiated rulemaking to set a joint-employment standard. He noted in his January 17 letter to Scott and DeLauro the "significant interest" in a joint-employment standard as well as a "wide range of views," as evidenced by the more than 26,000 individual comments the Board has received with weeks still left in the comment period.

DOL provides compliance assistance on fall protection. The Occupational Safety and Health Administration (OSHA) announced in January that it has developed a collection of compliance assistance resources to address falls in the workplace, the leading cause of worker fatalities in the construction industry. OSHA's goal is to promote awareness about common fall hazards in construction, educate job creators and workers on fall prevention, and reduce the number of fall-related injuries and fatalities. The resources, which continue the goals of the U.S. Department of Labor's (DOL) Office of Compliance Initiatives, encourage and facilitate compliance evaluations.

EEOC and DOJ target harassment in state, local government. The Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice's (DOJ) Civil Rights Division signed a memorandum of understanding (MOU) in December to prevent and address workplace harassment in state and local government. The purpose of the agreement is to enhance the effectiveness of the nation's equal employment opportunity enforcement in the state and local government sector to ensure the efficient use of resources and a consistent enforcement strategy. The EEOC has ramped up its role as enforcer, educator, and leader on combating harassment in the workplace, and the MOU enhances those efforts. The EEOC and the DOJ share enforcement authority for employment discrimination claims involving state and local government employers under Title VII of the Civil Rights Act of 1964. ✤

SB 438: prohibited discrimination

SB 483—which has been referred to the Governmental Oversight and Accountability, Judiciary, and Rules Committees—expands current Florida law to prohibit discrimination based on sexual orientation and gender identity. Currently, under federal and state interpretations of employment discrimination law, sexual orientation and gender identity are not "protected classes." That means discrimination against employees because of their sexual orientation can't be the sole basis for a lawsuit. It can, however, overlap with adverse actions based on a failure to conform to stereotypical views of their sex.

Such sex-stereotyping claims have been recognized by federal courts interpreting federal employment discrimination law as it would be applied in Florida. Although many municipalities prohibit sexual orientation and gender identity discrimination, SB 483 would extend the prohibition to the entire state, leading to an influx of new, otherwise untenable lawsuits.

SB 692: employment practices

SB 692—which has been referred to the Commerce and Tourism Committee, the Appropriations Subcommittee on Agriculture, Environment, and General Government, and the Appropriations Committee—would create the Florida Family Leave Act (FFLA). The Act would require an employer to allow certain employees to take paid family leave to bond with a new child upon the child's birth, adoption, or foster-care placement.

Importantly, the Act greatly expands family leave obligations throughout the state. Currently, Florida has no paid or unpaid family leave statute of any kind. The statute requires employers with 15 or more employees to provide those who work at least 20 hours per week and have been employed for at least 18 months to take family leave for up to six months to bond with a minor child during the first six months after the child's birth or placement in connection with foster care or adoption. The leave would be without loss of pay or diminution of any employment privilege or benefit. The statute also prohibits an employer from taking an adverse employment action against an employee for exercising the rights.

Notably, the statute applies to employers with just 15 or more employees and to part-time employees. Currently, the federal Family and Medical Leave Act (FMLA) doesn't apply to private employers unless they have 50 or more employees within a 75-mile radius of the location where the person requesting leave works. Further, FMLA leave can be unpaid. The FFLA is a significant expansion of the obligations of all but the very smallest employers in Florida and permits employees to take off a significant amount of paid, job-protected time.

Takeaway for Florida employers

The bills introduced so far this session would have a significant effect on how Florida employers do business. Obviously, if they are passed into law, employers will face expanded liability and be required to provide new and costly benefits. Such laws also would greatly add to the morass of statutes and regulations

that dictate how Florida employers manage their workforces. You should follow these and other employment-related bills closely throughout this year's legislative session because they have the potential to change the labor landscape and employer-employee relations in the state.

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SEXUAL HARASSMENT

Quash workplace gossip about 'employee sleeping her way to the top' or pay the price

by Lisa Berg
Stearns Weaver Miller, P.A.

According to the U.S. 4th Circuit Court of Appeals, an employer can be held liable under Title VII of the Civil Rights Act of 1964 for discrimination "because of sex" when it subjects a female employee to false rumors her promotion was a result of sleeping with the boss. Although the court's novel decision isn't controlling in Florida (the 4th Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia), in the age of #MeToo, it will be interesting to see if federal courts in our state will adopt this reasoning.

Did you hear . . . ?

Evangeline Parker worked for Reema Consulting Services at a Virginia warehouse. During her employment, she was promoted six times, starting as a clerk and ultimately becoming the facility's assistant operations manager. Two weeks after her last promotion, male employees began spreading "an unfounded, sexually explicit rumor" that she obtained her promotion by having a sexual relationship with a high-ranking male manager. The rumor—started by a jealous male coworker who had begun his career at the same time but now found himself reporting to her—was disseminated further by the facility's highest-ranking manager. It wasn't true, yet it spread like wildfire.

Parker soon faced "open resentment and disrespect" from many of her coworkers, and her male supervisor blamed her for "bringing the situation to the workplace" and told her he couldn't recommend her for promotion because of the rumor. A few days later, he again blamed her and stated he should have fired her when she began "huffing and puffing about the BS rumor." He then lost his temper and began screaming at her. One month after complaining to HR, Parker was fired. She sued her employer, alleging several claims, including sexual harassment and retaliation under Title VII.

The district court granted the company's request to dismiss Parker's suit, finding her sexual harassment claim was based on conduct rather than gender and wasn't severe or pervasive enough to alter her employment conditions. She appealed to the 4th Circuit.

Double standard

On appeal, the 4th Circuit reversed the lower court, describing the rumor as follows:

> Parker, a female subordinate, had sex with her male superior . . ., implying [she] used her womanhood, rather than her merit, to obtain . . . a promotion. She plausibly invokes a deeply rooted perception—one that unfortunately still persists—that generally women, not men, use sex to achieve success. And with this double standard, women, but not men, are susceptible to being labeled as "sluts" or worse, prostitutes selling their bodies for gain.

The appeals court said distinguishing between harassment based on gender versus harassment based on conduct is "not meaningful" when the conduct (spreading a rumor about a woman having sex to get a promotion) is actually related to gender. It concluded Parker sufficiently alleged the harassment was severe or pervasive based on her allegations that it persisted continuously for two months. *Parker v. Reema Consulting Servs.*, 2019 U.S. App. LEXIS 3965 (4th Cir., Feb. 8, 2019).

Employer takeaway

Workplace rumors about women "sleeping their way to the top" can create disruption, damage morale, and destroy careers if not properly handled. As the *Parker* decision demonstrates, such rumors also implicate gender stereotypes and can support a harassment claim if the employer endorses the rumors or fails to take adequate steps to stop them. In this case, top management publicly discussed the rumors, which added fuel to the fire. Management also failed to promptly investigate the rumors when first circulated by the jealous coworker,

which could have prevented the situation from escalating and avoided liability altogether. Making sure you have well-drafted policies and conduct management training on how to treat employees and respond to complaints can be critical in minimizing inappropriate workplace conduct and potential discrimination claims.

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ARBITRATION

Appeals court upholds arbitrator's award to reinstate fired Gainesville bus driver

by Tom Harper
The Law and Mediation Offices of G. Thomas Harper LLC

In a decision conflicting with three other Florida appellate courts, the 1st District Court of Appeals (DCA) in Tallahassee has ruled an appeals court does have jurisdiction to review a trial court order vacating (tossing out) an arbitrator's award and ordering the case to be heard again by a different arbitrator. The 1st DCA's ruling acknowledges that taking jurisdiction conflicts with decisions by Florida's 3rd, 4th, and 5th DCAs.

14-year driver

Desiree Heyliger worked for more than 14 years as a bus driver for Gainesville Regional Transit System (RTS). She was fired after two separate confrontations during which she touched passengers, just 48 hours apart. Both incidents were captured on video, and the recordings were critical in the findings and award made by Atlanta arbitrator Joe M. Harris.

Bus drivers with Gainesville RTS are represented by the Amalgamated Transit Union, Local 1579. The contract between RTS and the union states employees can be terminated only for "just cause." Every employee terminated can file a grievance, which—if not resolved—may be heard by an impartial arbitrator selected by both sides. Harris' name was on a panel provided to the parties by the Federal Mediation and Conciliation Service.

No drink cups on my bus!

The first incident at issue occurred in the predawn hours on October 14, 2015, and involved a passenger named Gloria who boarded Heyliger's bus with an open drink cup. Heyliger politely told Gloria she couldn't bring an open drink on the bus. Gloria ignored the instructions, sat down, and drank from her cup.

For a second time and more forcefully, Heyliger told Gloria she couldn't have an open drink on the bus. Gloria stood up, walked to the front, and "slammed" her cup into the trash can. Heyliger asked for her bus pass, and Gloria sat down behind her. When she found her bus pass, she dangled it near Heyliger's face while the bus was moving. Heyliger pushed Gloria's arm and hand out of her face.

Don't touch me!

In a second incident just two days later, a "bulky, stocky" man stepped on the bus and said to Heyliger in an unfriendly tone, "Well, it took you long enough." The man kept moving toward the driver and, according to the video, appeared to reach behind her back. She immediately pushed the man's arm out of the way and said, "Don't touch me!" After the incident, RTS fired her, and she filed a grievance that went to arbitration.

Although Heyliger had three previous disciplinary instances, only one had been significant—a five-day suspension five years before her discharge. The arbitrator listened to the testimony about the reasons for the discharge and concluded RTS hadn't even considered her prior discipline in deciding to fire her.

RTS relied on two employee rules to justify Heyliger's firing—Rules 17 and 19. Rule 17 forbids "fighting, provoking or instigating a fight." Rule 19 prohibits "immoral, unlawful or improper conduct or indecency, whether on or off the job, which would tend to affect the employee's relationship to his/her job, fellow workers, reputations, or goodwill in the community." After hearing the witnesses and viewing the videos several times, Harris didn't believe her conduct violated either rule. He ordered her reinstated with full back pay and benefits since her termination date—a complete victory for the union.

The rest of the story

The case is significant because of what happened *after* the arbitration. RTS filed suit against the union in state court in Gainesville, seeking to vacate the arbitration award. It cited Florida Statute Sections 682.13(1)(b)(1) and (d), which provide a court must vacate an arbitrator's award if there was evident partiality by the arbitrator or he exceeded his powers. In a rare order, Circuit Judge Donna Keim agreed with RTS and ordered a new arbitration hearing. The judge reviewed the transcript and evidence and found the arbitrator had displayed evident impartiality through his words and actions.

According to the judge, the arbitrator "demonstrated bias as evidenced by his description of the passengers involved in these two incidents and his description of the two incidents which can clearly not be gleaned from the record or the video of these incidents." Bias in Heyliger's favor was also demonstrated in the arbitrator's description of a previous incident in which she was disciplined for improper behavior on the job.

The court found the arbitrator had exceeded his powers, and his award didn't draw its essence from the collective bargaining agreement and therefore must be vacated (thrown out) under Florida law.

'It ain't over 'til it's over'

The union fought back, asking the appeals court to review the circuit judge's order. Three other Florida appeals courts have ruled appellate courts *do not have jurisdiction* to review this type of order. But the 1st DCA in Tallahassee found it did have jurisdiction, granted the union's request, and quashed the trial court's order.

Since the 1st DCA decided it *did have jurisdiction* to hear the matter, the court acknowledged its ruling was contrary to rulings by three other Florida appellate courts. Thus, it certified a conflict with the other courts so the Florida Supreme Court may decide whether appellate courts have jurisdiction over a petition seeking to review a trial court's order vacating an arbitration award and ordering new arbitration.

The appeals court found the circuit court had used an "outrageous findings" standard that has been used in some federal cases. In other words, the arbitrator's findings were "outrageous." But the appeals court found that standard has not been adopted in Florida as a distinct reason for vacating an arbitration award. It found that even though "the trial court disagreed with the arbitrator's characterization of the evidence, the remarks did not demonstrate partiality toward a particular party. Accordingly, the trial court did not employ the correct legal standard and thus departed from the essential requirements of law."

In a complete reversal of the circuit court's view, the appeals court found the arbitrator had correctly quoted both work rules and concluded Heyliger had acted in defense of herself and the other passengers while operating the bus. It stated, "The arbitration award was clearly within the scope of the arbitrator's authority, and the trial court's order constituted an impermissible review of the arbitrator's factual findings and application of the law." *Amalgamated Transit Union, Local 1570 v. City of Gainesville,* Case No. 1D17-4382 (Fla. 1st DCA, February 15, 2019).

Takeaway

The standard to change an arbitrator's award in Florida is very high. Since the 1st DCA certified a conflict with other Florida appellate courts, this case would normally be appealed, and the Florida Supreme Court would decide whether appellate courts have jurisdiction to review court orders affirming or vacating arbitration awards. The city of Gainesville, however, has decided to reinstate Heyliger, and if the parties can agree on her damages and any other terms of her reinstatement, there will be no appeal to the to the Florida Supreme Court to determine whether the 1st DCA's ruling was correct.

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SETTLEMENTS OF NOTE

$4.9 million settlement announced against city of Jacksonville

by Tom Harper
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The Equal Employment Opportunity Commission (EEOC) has announced it has resolved its race discrimination lawsuit against the Jacksonville Association of Fire Fighters, Local 122, IAFF. This suit was a companion case to a lawsuit filed by the U.S. Department of Justice (DOJ) against the city of Jacksonville alleging the city's promotional practices for various positions in the Fire and Rescue Department violated the prohibition against race discrimination in Title VII. The consent decree entered between the parties resolves the DOJ's and the EEOC's claims as well as claims filed against the city and/or union by private individuals. The city agreed to develop a new promotional examination for the selection of certain positions in the department. In addition, it will offer up to 40 settlement promotion positions for qualified African Americans and will establish a $4.9 million settlement fund for eligible promotion candidates.

Restaurant settles sexual harassment suit with EEOC

The EEOC has announced a settlement in its suit against Christini's Ristorante Italiano, an Italian restaurant located in Orlando's Restaurant Row. According to the agency, Christini's has agreed to pay $80,000 and furnish other relief to settle a sexual harassment and retaliation lawsuit. The agency claimed the owner of the restaurant "created and encouraged a work environment in which unwelcome, sexually charged comments and conduct were permissible and commonplace, and which allowed for the repeated propositioning of a female bartender." The suit alleged the female bartender was asked

to go on dates, described to restaurant patrons as single and available to date, subjected to sexual innuendo, and told to dress "sexy" and "date-ready." She alleged that when she complained about the treatment, she was fired.

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ELECTRONIC WORKPLACE

A treatment plan for negative online employee reviews

The Wall Street Journal recently reported on its discovery that, after analyzing millions of online reviews of various companies by their current and former employees, it appeared that more than 400 employers might be gaming the system. Each of the companies experienced unusually large single-month increases in the number of reviews posted by their employees to the jobs website Glassdoor. The surges tended to be disproportionately positive not only for the months in which they occurred but also by comparison to the surrounding months. The clear implication was that someone in a position of authority at the companies had spearheaded a campaign to get employees to post positive reviews to the site in an effort to counteract the overwhelmingly negative ones already posted.

It's a problematic response to an admittedly frustrating situation. Because employees can post reviews to Glassdoor (and similar websites) anonymously, they may not feel constrained by truth, fairness, loyalty, or even the ordinary fear of reprisal that can motivate most employees to hold their tongues. Yet in a tight labor market, you can't really afford to just ignore negative reviews and hope for the best.

An ounce of prevention . . .

The first step in combating negative online reviews from employees is to prevent them from happening in the first place. It goes without saying that having an organization that values, respects, and fairly compensates employees will go a long way toward minimizing negative employee reviews. No matter how hard you try, however, some employees simply won't be satisfied, and there's no way to completely prevent them from badmouthing you online. But you can develop policies that attempt to minimize negative reviews and the damage they may cause.

First, you will need a strong social media policy. Work with your attorney to develop or refine your policy to make sure it addresses employee reviews of the company (or similar commentary) within appropriate legal boundaries. That could include, for example, prohibiting employees from posting lies about your company or any of its leaders and staff or from disclosing confidential information. It should not include a blanket prohibition on negative commentary or disclosures of salary or benefits information. Either of those types of provisions may be considered interference with an employee's right to engage in concerted activity under the National Labor Relations Act (NLRA).

You may also want to spend some time developing written procedures for detecting and responding to negative online reviews when they occur. Such procedures would need to address things like:

- Who is responsible for monitoring job boards for negative reviews?
- What type of inquiry will be made into the validity of negative reviews, and by whom?
- Who decides how (and whether) to respond?
- Who actually develops a response and posts it?
- Should it be posted under the name of an individual employee (such as the director of HR or another member of management) or the company's name?

Do no harm

Manipulating your online reviews by asking employees to counteract them with their own, presumably positive, reviews is not the answer. Even if employees sincerely mean all the nice things they say, the fact that you encouraged (or required) them to post reviews casts doubt on their validity. Worse yet, if word gets out, the practice could result in you looking even worse to prospective employees than when all you had were a few negative reviews.

It would also be a mistake to attempt to identify the authors of the negative reviews (assuming they don't violate your properly drafted policies addressing online behavior). If you want the information so you can discipline an employee for violating company policy, you must be very certain you aren't targeting her for conduct that's protected by the NLRA. Even if you just want to have a conversation with the employee or ask her to consider revising or deleting the review, your actions could easily come across as retaliatory.

In short, it's better not to know who posted the reviews. You can't be accused of retaliating against an employee for posting legally protected comments online if you don't know who made them.

Surgical strike

Assuming you decide to respond to negative online reviews, the issue becomes what your response should look like. Here are some simple recommendations:

(1) The response should be posted to the website in question by someone in a position of leadership at your organization.

(2) It should start by thanking the employee for the feedback.

(3) It should not be a "stock" denial or some other standardized response.

(4) To the extent you dispute any aspect of the review, you may want to explain your side, but be careful. A

simple acknowledgment of the employee's complaints and a description of any action you may be taking to resolve them would be less likely to evoke a backlash.

(5) It should describe any corrective action you may have taken to address any legitimate complaints expressed in the review.

If all else fails, remember that a narrowly targeted response that says too little is better than a more comprehensive one that gets you into trouble by saying too much. ✤

OCCUPATIONAL SAFETY

OSHA reverses course on electronic reporting requirements

In what has become a familiar refrain for anyone paying attention, the Trump administration has once again pulled back employment-related regulations that had been established or expanded during the Obama administration. This time, the regulations at issue required establishments that are subject to the Occupational Safety and Health Administration's (OSHA) record-keeping requirements to submit information about work-related injuries and illnesses to OSHA electronically. To understand the significance of the change, a quick review of the nature and history of the agency's reporting requirements may be helpful.

Some background

Most employers have long been required to (1) report work-related deaths and certain injuries and illnesses to OSHA within 24 hours and (2) maintain certain records of less serious workplace injuries on-site and produce them for the agency upon request. The new regulations affect the latter but not the former.

The records of workplace injuries and illnesses that covered establishments must maintain include:

- An annual log of all work-related injuries and illnesses (OSHA Form 300);
- An annual summary of work-related injuries and illnesses (OSHA Form 300A); and
- Incident reports for specific work-related injuries and illnesses (OSHA Form 301).

Both the log (Form 300) and the incident reports (Form 301) must be completed promptly after a recordable work-related injury or illness occurs. Covered establishments must post the 300A in a common area for viewing from February 1 to April 30 each year.

Before 2016, employers were not required to file any of the forms with OSHA. Instead, the agency obtained detailed information about work-related injuries during investigations of specific workplace accidents or during general worksite inspections. The 2016 regulations attempted to change that by requiring certain establishments to provide the forms to OSHA each year. Establishments with 250 or more employees were required to submit all three forms to the agency. Those with 20 to 249 employees were required to submit only the 300A, and only if they were in certain industries. The only method of submission

WORKPLACE TRENDS

Report notes big rise in diversity of Fortune 500 boards. A multiyear study of Fortune 500 companies has found big gains in diversity on company boards. The study, titled "Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards," from the Alliance for Board Diversity, in collaboration with Deloitte, says that the number of Fortune 500 companies with better than 40% diversity has more than doubled from 69 to 145 since 2012. Representation of women and minorities on Fortune 500 boards reached an all-time high at 34%, compared to 30.8% in 2016. Total minority representation increased to 16.1% from 12.8% in 2010, the first year Fortune 500 data was captured. The report's findings point to the increase being driven by Fortune 100 companies, which have 25% women and 38.6% women and minorities. Fortune 500 companies lag behind, with 22.5% women and 34% women and minorities.

Employer health, wellness offerings swaying job applicants. Research from OfficeTeam finds that 73% of professionals surveyed said a company's health and wellness offerings influence their decision to work there. Employees place the greatest weight on wellness incentives that reward healthy behavior (26%) and fitness facilities or programs (23%). The research notes that those are also the resources most commonly offered by organizations (43% and 41%, respectively). The report notes that 20% of companies don't have any health and wellness options.

Survey finds increasing automation not slowing demand for "human" skills. A new survey finds high demand for "uniquely human" skills, or soft skills, even as automation in the workplace increases. The survey of more than 650 employers and more than 1,500 current and former college students was conducted by Morning Consult on behalf of Cengage, an education and technology company serving the higher education market. The research finds the top skills employers are looking for in candidates include listening skills, attention to detail and attentiveness, effective communication, critical thinking, interpersonal skills, and active learning/learning new skills.

Most managers open to rehiring "boomerang" employees. A new survey from Accountemps finds that 94% of senior managers are open to rehiring "boomerang" employees, or workers who previously left the company on good terms. The research also shows that employees aren't as eager to rejoin their former employers, with just 52% of workers likely to apply for a position at a company they previously worked for. The reasons professionals cited for not wanting to return to past employers included dissatisfaction with management (22%), poor fit with organizational culture (17%), unfulfilling job duties (13%), and bridges burned by the company (11%). ✤

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4-24 Nix Incivility from Your Workplace: How to Build and Foster a Culture of Respect and Civility

4-25 HR Recordkeeping in California: Updates on Legal Guidelines on What to Keep, What to Destroy, and Why with Employee Records

anticipated by the regulations was electronic submission through OSHA's Injury Tracking Application, available on its website.

The new reporting requirements were originally scheduled to take effect January 1, 2017, but they have been delayed twice during the Trump administration. Currently, the deadline for submitting information about work-related injuries and illnesses that occurred in 2018 is March 2, 2019, although that could be extended.

What has changed

In new final regulations, issued in late January 2019, OSHA is reducing the reporting burden for covered establishments by:

- Eliminating the requirement for establishments with 250 or more employees to submit the 300 and 301 forms to OSHA, electronically or otherwise; and
- Maintaining the requirement for establishments with 20 or more employees to submit the annual 300A.

Establishments with between 20 and 249 employees are required to file the reports if they fall into one of the industries designated by the regulations. Again, the only method of submission is electronic.

The rationale provided for reducing the reporting requirement is that it is necessary to protect sensitive medical information, including descriptions of workers' injuries and the body parts affected, from public disclosure under the Freedom of Information Act (FOIA) or through the OSHA's online portal. The Obama administration's intent had been to publish on the agency's website deidentified injury information obtained from the Form 300 and Form 301, which was viewed by some as fodder for union organizing campaigns and class action lawsuits.

May the lawsuits commence

The reporting requirements were being challenged in court by proindustry groups before the latest revisions, and it isn't clear whether those challenges will go away in response to the changes. Some observers argue that the administration hasn't gone far enough in reducing the regulatory burden imposed on employers. Unions, on the other hand, argue that the Obama-era rules should be retained as an important step toward protecting worker safety.

While it's too early to tell, based on the challenges to other Trump administration regulations, unions or various blue states could challenge the new regulations for failure to follow proper rulemaking procedures. In any event, this is unlikely to be the final word on the matter, so stay tuned! ✤

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