PROGRAM MATERIALS
Program #2966
August 13, 2019

New Legislation and Litigation Impacting the Workplace - From Sick Leave and Wage and Hour to #MeToo and Disabilities in 2019 and Beyond

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

Introduction of Panel and Opening Comments

With the #MeToo environment creating hysteria in the boardroom and legislatures forcing businesses to provide for more time off, paid sick and family leave and additional disability provisions, the employment landscape is shifting rapidly. The recent court decisions concerning the ADA and Title III are leaving businesses coast to coast in the lurch attempting to make websites and premises ADA accessible often without the requisite guidelines and parameters. This presentation will discuss new legislation and loss controls as a result of #MeToo, increased employer responsibilities for paid time off and family leave and how to navigate the ADA and hot wage and hour issues. This presentation will provide a roadmap of the most precarious areas for employment law in 2019.

Reaction to the #MeToo Movement from the Board Room to the Legislature

The #MeToo monsoon has ended the careers of more than 250 prominent people in the US alone and led to significant rise in agency complaints and lawsuits. The EEOC reports that they estimate at least a twelve percent increase in sexual harassment complaints for 2018. Liability does not end at the Human Resources and management offices, corporate boards and the c-suite are also being caught up in the uptick. The increased scrutiny, societal change and outcry has led to new legislations which will put more requirements on employers for training, prevention and reporting sexual harassment in the workplace.

While only a handful of states (New York, California, Connecticut and Maine) require sexual harassment training, many more states are following suit. Immediate review of sexual harassment policies, complaint processes and training programs is essential. Given the very specific requirements of these new laws, employers should consult with counsel with experience with employment laws and policies to ensure that their policies and training programs are fully compliant.

A great example of the changes and new legal requirements is the new New York State and New York City Legislation. New York State and New York City have enacted new sweeping requirements for sexual harassment policies and training for private employers of all sizes. The October 9th deadline for all New York State employers to create, publish and implement sexual harassment policies is fast approaching. Even more burdensome for employers in New York State, is the October 2019 deadline for all employees to have completed sexual harassment training. The next phase of implementation for the New York City area begins on April 15, 2019. The New York City training mandate includes far more extensive training requirements that will force employers to invest in sexual harassment training beyond cursory videos or training materials.

While the legislation mandating that employers have a policy and institute training was passed on April 12,th the New York State Department of Labor only recently released its model sexual harassment policy and training program to clarify the requirements and guide employers on how to comply with the new laws. The supplemental model information includes a sample sexual harassment policy, a model complaint form, standards for the sexual harassment policy

and training, a model training program and a list of frequently asked questions about the new requirements.

New York State requires that your sexual harassment policy must, at a minimum, provide for the following:

- prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local law;
- include a complaint form;
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

The New York state training requirement must be completed by October 2019 and be performed annually. All new employees must complete the training within thirty (30) calendar days of their new hire date. Employees only working a single day within the calendar year are still required to receive the requisite training. Even part-time, temporary and transient workers must receive training.

The minimum requirements for annual training are as follows:

- be interactive;
- include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- include examples of conduct that would constitute unlawful sexual harassment ;
- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

Paid Leave – Sick and Family Leave – What the new legislation means?

Paid sick leave laws and regulations are increasing rapidly at the state and local level. Many of these new requirements include forty hours of paid sick leave per years and accrue at set minimum rate. The changing laws require that employers change their policies and handbooks to reflect the new regulations. Employers must be cautious making choices about how to give employees leave, whether it's up front, how it accrues. Then there are decisions as to whether to have separate paid time off (PTO) policies as a separate matter.

Sick leave goes beyond just time for illness and instead can be used for a variety of reasons depending upon the jurisdiction an employer is in. Often this includes time off for ill family members, childbirth and other issues. Employers are usually required to disclose to employees the array of reasons that they can use to obtain sick leave.

Another trend in this area of law is "fair scheduling laws." Oregon, New York City, Seattle and Philadelphia all have similar laws requiring "fair" notice as to their schedule for the week. Depending upon the jurisdiction there are different types of industries/employers covered by the laws. Often the business sectors include retail, food and hospitality establishments. Philadelphia's Fair Scheduling Laws go into effect as of January 1, 2020 and require Employers provide new hires with "written, good faith estimate: of their work schedule and additional compensation ("predictability pay") required when the schedule is changed.

In December 2018, the New York State Department of Labor proposed regulations requiring "call-in pay." New York City retail employers are already subject to the fair Workweek laws, which generally prohibit "on call" shifts.

Wage and Hour Hot Spots

Minimum wages are increasing and the threshold for the overtime exemption may increase, as well. The federal minimum wage is $7.25 as is the Pennsylvania minimum wage. Whereas the minimum wage in New Jersey is $8.85 as of January 1, 2019 but the Governor and legislature have agreed to a $15.00 per hour proposal. New York differs depending upon the geographic location – NYC $15.00, Long Island $11.80 and elsewhere in New York State $11.80.

We are still awaiting the "salary threshold test" to determine exempt workers. The current minimum salary for exempt employees is $23,660. However, there was a proposal sent on January 10, 2019 to the Office of Information and Regulation for a minimum of $30,000 the threshold.

ADA Accessibility – Websites are the New ADA Frontier

The American with Disabilities Act (ADA) requires that individuals with a disability be provided with access to a place of public accommodation. The law was originally brought concerned physical access to a place of public accommodation. While many such lawsuits are still being filed, there has been a surge in lawsuits concerning web site and application ("app") accessibility.

Presenter to read NY Code

This code is required for all attorneys wishing to receive CLE credit in the state of NY

Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!

The practice of filing claims against businesses for violation of the ADA has been widely reported. It has even been the subject of investigative reports. The frequency with which such actions can be brought by one Plaintiff is alarming, so too are the costs to businesses. All signs point to a continued increase in the filing of such lawsuits.

Plaintiffs have filed 4965 ADA Title III lawsuits in federal court in the first six months of 2018. Compare that to the fact that there were 7,663 filings for **all of 2017**.

California led the way in having the most lawsuits filed. In the first three months of this year, 2155 lawsuits were filed in California with New York (1026) and Florida (882) in second and third place respectively. Perhaps, the fact that these states have a large tourist and hospitality industry contributes to the numbers.

When it comes to lawsuits regarding website accessibility, the results are even more alarming. In the first six months of 2018, there were more website accessibility lawsuits filed in federal court than in all of 2017. In the first six months of this year, it is reported that there were 1053 web site accessibility filed. Whereas in 2017, there were 814 such lawsuits filed for the entire year. There is no indication that the filings will decrease. New York leads the way in the number of website accessibility lawsuits filed in federal court.

The lawsuits seek primarily injunctive relief. The demand is that the alleged discriminatory conduct ceases and thus allows people with disability access to the goods and services. There are no monetary damages available in Title III cases, but Plaintiffs do seek an award of attorney's fees and costs. The lawsuits will also contain allegations of violations of local anti-discrimination laws.

Given the costs associated with such lawsuits to businesses and the fact that there is no indication that the filings will decrease, businesses may be wise to invest now in preventing such lawsuits, and if sued, learning of ways to defend against these allegations.

The American with Disabilities Act of 1990 (ADA), 42 U.S. Code § 12101.

The ADA is the first comprehensive civil rights law that prohibits discrimination in employment, public services, public accommodations and telecommunications of individuals with disabilities. Title III of the ADA provides that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases, (or leases to), or operates a place of public accommodation."

The ADA lists twelve categories of private entities that would qualify as a place of "public accommodation". Such places include hotels, restaurants, bars, movie theatres, grocery stores, clothing stores, shopping centers and other sales or rental establishments. There is however a split in the circuits as to whether the place of public accommodation must be or have a connection with physical space. And, these days, the dispute amongst the courts is whether the term "public accommodation" refers to an actual physical stricture or encompasses "electronic space".

Discrimination prohibited by the ADA includes, amongst other things, a failure to make a reasonable modifications in policies, practices or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to the individuals with disabilities, unless the entity can demonstrate that the making of such modifications would fundamentally alter the nature of such goods, services, facilities,, privileges, advantages, or accommodations. If the entity does not take such steps, it must demonstrate that taking such steps would result in an undue burden or fundamentally alter the nature of goods and services provided.

In 2009, the Americans with Disabilities Amendment Act became effective and significant changes were made to the definition of "disabilities". To further clarify (and actually broaden) the amendment, in 2016, the Attorney General signed the ADA Amendments Final Rule. The Rule requires that the term "disability" be interpreted broadly". Major life activities now include the operation of major bodily functions, such as neurological, nervous of digestive systems. Given that there was uncertainty as to the meaning of physical or mental impairments, examples were included such as attention deficit disorder and dyslexia.

To whom does the ADA APPLY?

For the purposes of this presentation, we will focus on Title III of the ADA. This title is for nondiscrimination on the basis of disability in places of public accommodation and in commercial facilities. Title III applies to businesses that provide services to the public and also to non-profits (private businesses that are open to the public, such as restaurants, hotels, movie theaters, museums, and doctor's offices.) Title I and II apply to employers of 15 or more and to providing of government services to person with disabilities respectively.

Website Accessibility

In 2010, the United States Department of Justice ("DOJ") issued a Notice of Proposed Rule Making wherein it took the position that websites are places of public accommodation under Title III. Perhaps foreshadowing what was to come, in 2014, the DOJ reached a settlement with an online grocery retailer. Even though the retailer's website had no nexus to physical premises, the retailer was required under a settlement agreement to make its web site and apps accessible to individuals with disabilities. (www.ada.gov/peapd_sa.htm)

Thereafter in 2015, the DOJ issued a statement that the ADA's expansive nondiscrimination mandate reaches goods and services that are provided by places of public accommodations that have internet websites. However, the DOJ did not provide guidance as to how a website could comply with the ADA.

The DOJ was then to provide guidance and regulations in this regard in 2016. The, the DOJ then stated that guidance would be forthcoming in 2018. As of the submission of this paper, no guidance has been forthcoming.

Conflicts in the Law

The lack of guidance has left the matter up to the interpretation by the Courts as to whether a website and business is ADA compliant and even whether the ADA applies to the website. Courts disagree as to whether a website can be a place of public accommodation when it does not have a physical, bricks and mortar business. For example, a court found that the streaming website for Netflix was a place of public accommodation even though it did not actually have a physical premises business. *National Association of the Deaf v. Netflix,* 869 F. Supp.2d. 196 (Mass). By contrast, a Court in the Norther District of California found that Netflix and Ebay's website were not a place of "public accommodation" under Title III of the ADA because they had no nexus to a physical place of business. *Cullen v. Netflix,* 2103 U.S. Dist. Lexis 4246 (N.D. Cal 2012) *Earll v. Ebay, Inc*. 599. Fed. Appx 695 (N.D. Cal. 2012)

It is apparent however, that the trend is to find that a website—regardless of whether it has a nexus to physical premises--will be found to be a place of public accommodation. As Target found out, the main goal of the ADA is to provide individuals with disabilities with the ability to have access to goods and services and enjoy them. *National Federation of the Blind v. Target*, 452 F. Supp. 2d. 949 (N.D. Cal. 2006). Indeed, as stated by the Court in the Massachusetts Netflix case, we live in a society where business is conducted primarily on line. Therefore, this Court found it would be irrational to find that a website is not a place of public accommodation.

Targets of the Plaintiff's Bar

Many law firms that used to focus on whether a physical premises was in compliance with the ADA now focus on website accessibility. An alarming number of lawsuits are being filed alleging that the website and/or app is not in compliance with the ADA. In particular, Plaintiffs allege that the web site has a barrier which denies a person with disability access.

Law firms will surf the internet looking for websites with errors that could be perceived as a barrier. The size of the business is of no moment. Many law firms are already equipped with a repeat Plaintiff which they use on all their cases and aggressive demand letters. This one Plaintiff could potentially file hundreds of lawsuits, each one of them claiming that the website had barriers which denied them access.

Most often, the Plaintiff's attorney will want the Defendant to retain Plaintiff's expert to bring the website into compliance. Plaintiffs will also demand payment of the expert's fees plus attorney's fees and costs. The Defendant also bears the burden of then bringing the website into compliance.

Even if a business were to defend a claim and was successful, the costs of litigation may be more than the costs of compliance.

Best Practices for Web Site Accessibility

A website can never be fully "compliant". The rules guidelines are constantly changing. The goal, however, is to have a website that can be used by persons with various sight (color

blindness for example), hearing, and mobility disabilities. In order for these individuals to have access to all of the content on the website, they will need screen readers and other technology that provides assistance.

As stated above, the DOJ has not yet issued any guidance and there are no regulations. However, Courts and the DOJ have reviewed the Web Content Accessibility Guidelines (WCAG) 2.0 Level AA as the standard for ADA Compliance.

In 1994, Tim Bernes-Lee founded the World Wide Web Consortium. He has also been credited as being one of the founders of the internet. In 1999, along with the Web Accessibility Initiative, the Web Content Accessibility Guidelines were created. Those standards were updated in 2008 which have become the standard ISO international standard for the web. (WCAG 2.0)

Any business would do well to check with the designer of their web site to ensure that it meets WCAG 2.0 Level AA guidelines. Also make sure to review whether the web designer provides indemnification in case of a lawsuit. It would also be beneficial to review other websites that they designed.

These guidelines are based on four principles, POUR. Accessible Websites are Perceivable, Operable, Understandable and Robust. A website is perceivable, for example, if it provides text alternatives for non-text content so it may convert into other forms such as large print or speech. It includes captions, live audio or prerecorded video content. Make the web page easier for users to see and hear the content.

A website is operable if it provides time for the viewer to read the content by making the time limits adjustable. Users should also be able to pause, stop, or hide scrolling or blinking information. The design should also not cause seizures.

The text and content should be understandable. The text should be readable and understandable.

The web page should also be robust. In other words, in can be interpreted reliably by assistive technologies.

There are different level of compliance and other factors that should be considered. This description is not mean to be exhaustive but illustrative. Care should be taken to retain a web design expert who is familiar with the WCAG guidelines.

Also businesses should review the expertise of the website designer. Are they aware of WCAG? Also, chances are if you designed the website yourself, barriers exist. If compliance with WCAG cannot be made, then the business should try and consider providing the equivalent services such as by way of a toll free number with live agents.