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*Guiding Employers & Educators*



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# Hot Topics In Labor And Employment Law

**Nicole M. Vient**  
**May 11, 2016**



## Agenda

1. Legal Framework
2. Hot Topics
3. Action Items
4. Upcoming SHPC Seminars
5. Questions And Answers
6. Conclusion And Contact Information



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## I. The Legal Framework

- Level Playing Field
- Laws/Regulations
- Policies/Practices



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## Laws

- ADA
- Title VII
- ADEA
- FLSA
- USERRA
- FMLA



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## Policies And Practices

- Posters
- Policies
- Handbooks
- Training



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## II. Hot Topics

- A. Sick Leave
- B. Parental Leave
- C. Wage And Hour
- D. LGBTQA
- E. Accommodations
- F. NLRB



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## II. Hot Topics

- G. Bullying
- H. Whistleblower Protection
- I. BYOD
- J. Medical Marijuana
- K. E-Cigarettes



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## Hot Topics – Sick Leave Massachusetts Earned Sick Time Law

- All Employers Must Be Compliant As Of 1/1/16
- Sick Leave Law Applies To All Employers
  - Grants PAID Leave For Employers With 11 Or More Employees
- Employees Earn One Hour For Every 30 Hours Worked
  - Begin Earning Sick Time On First Day Of Work
  - May Begin Using Sick Time After 90 Days
  - Accrual Capped At 40 Hours
  - Time May Be Used Concurrently With Other Types Of Leave: FMLA, Parental Leave, Etc.
- Law Has Provisions Regarding: Employer Notification, Documentation, Rates Of Pay, Rollover, Break In Service, etc.



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## Case Study

Cyndi, who works 4 hours per day, 5 days per week, calls out sick 4 days in a row.

Can the employer require medical documentation for her absence? What if Cyndi fails to provide it?

What if Cyndi does not have health insurance and did not see a health care provider for her absence?

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## Hot Topics – Parental Leave Massachusetts Parental Leave

- Effective April 7, 2015
- Expands Scope Of Massachusetts Maternity Leave Act
  - Makes Previous "Maternity Law" Gender Neutral
  - Less Than Two Week's Notice Permissible If Delay Is For Reasons Beyond Employee's Control
  - Probationary Period Capped At Three Months
  - Leave Exceeding Eight Weeks Protected, Unless Written Notice Stating Otherwise
- Two Employees Working For Same Employer
  - Aggregate Of Eight Weeks Of Leave
- Ongoing Requirements (e.g., Posting Notice)
- Action Items:
  - Update Policies
  - Inform Managers



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## Hot Topics – Wage And Hour

- Minimum Wage
  - Federal - \$7.25/hr
  - Massachusetts - \$10.00/hr
  - \*Scheduled To Increase January 1, 2017



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## Hot Topics – Wage And Hour White Collar Exemptions

- DOL Proposed Regs. Would Expand Availability Of Overtime Pay
- New White Collar Threshold \$455-970/Week (\$23,660-\$50, 440)
- New Highly Compensated Employee Threshold \$100-122K/Year
- Levels To Be Adjusted Annually To Mirror Increases In National Average Salaries
- Final Regulations Expected In July 2016
- 60 Days To Implement



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## Hot Topics - Wage And Hour Proper Classification

- Employee
  - Exempt
  - Non-Exempt
- Contractor
- Temporary Employee
- Intern
- Volunteer
- Dangers of Misclassification



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## Hot Topics - LGBTQA LGBTQA Developments

- No Federal Statute Or Supreme Court Case Expressly Prohibits LGBTQA Discrimination In The Workplace
- EEOC Ruling: Title VII Extends To Claims Of Sexual Orientation And Gender Identity Discrimination
- Laws Vary Significantly From State-To-State
- Growing Movement To Protect Individuals Who Identify As LGBTQA
  - Federal And State Governments
  - Private Employers And Organizations



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## Hot Topics - LGBTQA Gender Identity And Sexual Orientation

- Best Practices
  - Include Sexual Orientation And Gender Identity In Anti-Discrimination And Anti-Harassment Policies
  - Update Policies Relating To Personnel Files, Facilities Accessibility, Dress Code And Any Other Gender-Exclusive
  - Consider Providing Leave On A Gender-Neutral Basis
  - Consider Offering Health Insurance Policies That Don't Exclude Coverage For Transition-Related Health Care
- Action Items:
  - Educate Managers And Supervisors
  - Prepare For Transition Plans



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## Hot Topics - Accommodations

- Religious
- Pregnancy
- ADA



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### Real World Scenario

The VP of Sales just called you to ask whether she is required to tolerate her assistant's persistent tardiness. After a few inquiries, you learn that her assistant has already provided a psychologist's note requesting "less stressful work duties." The assistant also made a specific request to (1) use accrued leave to arrive late to work and (2) have her job restructured so that she could have one or two "quiet days" per month for desk work without any "stressful public contact." What should you tell the VP?

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### Hot Topics - NLRB NLRB Report Highlights Pitfalls Of Common Handbook Policies

- NLRB General Counsel Issued A Report On March 18, 2015
  - Addresses Problematic Employee Handbook Provisions Which Could Have A Chilling Effect On Employees' Section 7 Activity
- Legal Background: What Is Concerted Activity?
- A Work Rule Violates NLRA If
  - The Rule Explicitly Restricts Protected Concerted Activities
  - Employees Would Reasonably Construe It As Prohibiting Protected Concerted Activity
  - Rule Was Promulgated In Response To Protected Concerted Activity
  - Rule Was Actually Applied To Restrict Section 7 Rights

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### Hot Topics - NLRB NLRB Report Highlights Pitfalls Of Common Handbook Policies (cont'd)

- Significant Policy Provisions Discussed
  - Overly Broad Confidentiality Provisions
  - Rules Requiring "Respectful" Behavior
  - Policies Limiting Communications With Third Parties
  - Conflict Of Interest Policies
  - Rules Forbidding Use Of Company Logos/Trademarks
  - Prohibitions On "Walking Off The Job"
  - Restrictions On Use Of Cameras And Recording Equipment
- Action Items:
  - Review Current Policies
  - Consider Revisions
  - Consult Counsel



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## Hot Topics - Social Media And The Workplace: Can They Really Say That?

- Several NLRB Decisions Favor Employees
- The NLRB Generally Allows:
  - Posts About Union Organizing
  - Posts About Wages, Hours, And Working Conditions
  - Posts That Criticize The Employer If Related To The Above
  - Posts That Are Not 100% Accurate, As Long As They Are Not Intentionally Or Maliciously False
  - Some Posts That Are Vulgar
    - Particularly If Employee Acted Impulsively
    - Particularly If Provoked
    - Particularly If Profanity Is Tolerated In Your Workplace



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## Hot Topics - Bullying

- No Specific Laws Against Bullying
- Laws Only Prohibit “Bullying” Directed At Members Of “Protected Classes”
- Issue Getting More Attention
- California Law
- Action Items:
  - Consider A Handbook Policy
  - Training
  - Open Door Policy



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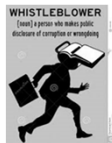
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## Hot Topics - Whistleblower Protection

- Recent Developments Highlight Importance For Employers To Be Proactive About Their Whistleblower Policies
- OSHA Claims Increase
- CT Supreme Court: Whistleblower Rights Broader Than First Amendment Rights
- False Claims Act Suits Continue To Be Lucrative
- 2016 – SEC Office Of Whistleblower “Top Priority” To Assess Company Confidentiality Agreements



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## OSHA Recommended Anti-Retaliation Practices

- April 21, 2015 OSHA Published Draft Document: "Best Practices For Protecting Whistleblowers And Preventing And Addressing Retaliation"
- Leadership Commitment
- "Speak-Up Culture"
- Independent Resolution Systems For Allegations Of Retaliation
- Specific Training
- Monitoring And Measurements That Do Not Suppress Reporting
- Independent Auditing Of Anti-Retaliation Program
- Action Items:
  - Review Policies
  - Manager Training



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## Hot Topics - BYOD Policies: BYOD Or Not BYOD? That Is The Question

- Trend May Be Turning Away From Bring Your Own Device Policies Because Of Perceived Risks
- Employers Should Weigh The Risks And Benefits Of BYOD Including:
  - Convenience To Employer And Employee
  - Security Concerns
  - Information Privacy Laws
- Employers Who Institute BYOD Should
  - Have Clear And Comprehensive Policy
  - Have The Capability To Remotely Wipe Company Data/Programs From Device

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## Hot Topics - Medical Marijuana

- 20 States And DC Have Legalized Medical Use Of Marijuana
  - AK, AZ, CA, CO, CT, DE, HI, IL, ME, MA, MI, MT, NH, NV, NJ, NM, OR, RI, VT, WA And DC
- In CT, ME And RI, Medical Marijuana Users Are Given Protected Status
  - Employment Discrimination Prohibited
- MA Law:
  - Legalized Use Of Marijuana By Patients With "Debilitating Medical Conditions"
    - E.g., Cancer, Glaucoma, HIV, AIDS, Hepatitis C, Etc.
  - Does Not Require "On-Site Medical Use Of Marijuana In Any Place Of Employment"
  - But Is Silent Regarding Off-Duty Use Of Marijuana
- Action Items:
  - Clearly Communicate Policy In Employment Application
  - Consider Adopting Drug Testing Policy
  - Enforce Drug Testing Policy Consistently



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## E-Cigarettes And The Workplace

- Law Has Been Slow To Catch Up To “Technology”
- It Was Not Until September 2015 That Massachusetts Prohibited Sale Of E-Cigarettes To Minors
- No Statewide Ban For Workplaces
- However 92 Massachusetts Cities And Towns Prohibit “Vaping” In Enclosed Workplaces
- Action Items:
  - Policy Should Be Written To Encompass E-Cigarettes
  - Communicate Policy
  - Enforce



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## III. Action Items

- Posters!
- Policies! (Handbooks!)
- Practices!



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## VI. Action Items: Employee Handbook Updates

- NLRB Policies: Confidentiality, Media, At-Will Language, Social Media, Rules On Respectful Behavior, etc.
- Update Wellness Program Policies
- Update Whistleblower And Anti-Retaliation Language
- Update FMLA Policy (Compliance Package)
- Electronic Communications (BYOD)
- Drug Testing Policies (Medical Marijuana And More)
- Update Policies Involving Same-Sex Marriage
- Update Discrimination And Harassment Policies
- Reasonable Accommodations
- Smoking
- Paid Sick Leave Law And Ordinances



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**Action Items:  
Management Training (Boot Camp)**

- Same-Sex Marriages And Recent Developments
- Prevention of Harassment, Discrimination (Including Associational) And Retaliation
- Criminal Background Check Screening Procedures
- Hiring Process (Ban The Box)
- Facebook And Social Media Firings
- BYOD Protocols And Cautions
- Conducting Internal Investigations
- Employee Handbook Updates



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**Action Items: The “To Do List”**

- Schedule Management Boot Camp
- Update Employee Handbook
- Criminal And Sex Offender Record Compliance Package
- Update FCRA Compliance Package
- Ban The Box: Update Employment Applications
- FMLA Compliance Package
- Wage & Hour Audit: Employee/Independent Contractor Classification (Federal And State Law Compliance); Equal Pay And Internship Analysis
- Municipal Law Compliance (Paid Sick Leave And More)
- Conduct I-9 Audit
- Confirm Federal Contractor Status/Compliance



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**IV. Upcoming Seminars  
Join Us!**

- Upcoming Seminars:
- The National Labor Relations Board Doesn't Like Your Handbook: Why It Matters And What You Should Do About It  
May 25, 2016, 8:30 AM at Schwartz Hannum PC
- Sex And Gender In The Workplace: Employee Rights And Employer Obligations  
June 9, 2016, 8:30 AM at Schwartz Hannum PC
- At The Intersection Of Work And Family: Successfully Navigating Flexibility  
June 16, 2016, 8:30 AM at Schwartz Hannum PC

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## V. Conclusions



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