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How Changes at EEOC Could Benefit Employers

President Trump's appointment to the U.S. Equal Employment Opportunity Commission could signal a more cooperative attitude at the agency.

Now that the EEOC is likely to have a 3-2 Republican majority under nominee Janet Dhillon, its policies are expected to slant in a more pro-employer direction.

Control at the field office level, where much of the litigation against employers has originated, particularly litigation alleging systemic discrimination, is also likely to be more restrained. But that doesn't mean employers should let their guards down either. You'll still want to make sure you have a good employment practices liability insurance policy.

Obama Administration

Under the Obama administration, the EEOC often attempted "to engage in litigation tactics to force certain outcomes or to force

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This Just In

A bill introduced in the U.S. Congress would make it illegal for employers to enforce mandatory arbitration of sexual harassment claims in employment contracts.

According to Rep. Cheri Bustos (Dem.-Ill.), who introduced the bill, more than 60 million American workers are subject to arbitration in employment agreements.

Many companies rely on these clauses to keep disputes confidential and resolve them more quickly.

Ms. Bustos says she was prompted to introduce the legislation after hearing about women working at Kay Jewelers and Jared who were prevented by

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policies," said J. Randall Coffey, a partner with Fisher Phillips L.L.P. in Kansas City, Missouri, to *Business Insurance*.

Under the new administration the EEOC is not expected, for example, to try to push the boundaries of Title VII. In one such case involving a gay skydiver who said he was fired because of his sexual orientation, conflicting amicus briefs were filed with the appellate court. The EEOC contended that Title VII can be interpreted to apply to sexual discrimination, while the U.S. Department of Justice countered that Title VII does not address sexual orientation.

"The EEOC has been very aggressive in searching out cases on the cutting edge" of federal statutes, including those involving transgender issues, said Gerald L. Maatman Jr., a partner with Seyfarth Shaw L.L.P. in Chicago to *Business Insurance*. "I think when the Republican commissioners take their seats and have a majority, that sort of view of the EEOC will be pulled back," he said.

Sexual Harassment

One area where the agency is not expected to pull back, however, is with regard to sexual harassment. The recent revelations of sexual harassment and other sexual misbehavior by multiple media and political figures makes this issue "too much of a hot potato for them to cut back on that," according to Richard B. Cohen, a partner with FisherBroyles L.L.P. in New York.

People fundamentally agree that sexual harassment is noxious and should not be tolerated. Speakers attending the recent American Bar Association Labor and Employment Law Conference in Washington pointed out that there is still much harassment in the workplace that goes unreported. "Superstars" are often given a pass because of their power and influence. But tolerance for this behavior is fast disappearing. Given the current climate, suits alleging sexual harassment are likely on the rise.

A More Conciliatory, Cooperative EEOC?

Still, many employment law attorneys feel the tone of the EEOC will be more conciliatory and cooperative, seeking to help employers achieve compliance in a less adversarial and litigious environment. "We will see more outreach to employers for both training and education purposes, as well as trying to resolve the more complex charges before litigation," said Paul C. Evans, a partner with Morgan Lewis & Bockius L.L.P. in Philadelphia.

EEOC Chairperson Nominee Janet Dhillon herself has said that she thinks the commission should spend more time on conciliation to avoid litigation.

Beware of Activist States

While the EEOC's approach to litigation is expected to be less adventurous under the new administration, many experts feel that this may cause some states to become more active.

"HR professionals should never lose sight of the importance of annual compliance training and keep close tabs on statewide compliance regulations since there is enormous activity occurring at the state level," Barry Hartstein, co-chair of the EEO and diversity practice at Littler Mendelson law in Chicago recently told Human Resource Executive Online.

For the most part, clients who carry employment practices liability insurance have coverage that is designed to respond to these kinds of EEOC claims. But, experts warn, businesses that operate in states with more permissive legal environment should operate with greater scrutiny. Insurance companies will be following events closely, too.

Please call us if you have questions about your employment liability insurance or if you would like to get a quote.

This Just In

arbitration clauses in their employment contracts from filing a lawsuit against executives at their employer who, Ms. Bustos says, "preyed" upon them.

Signet Jewelers, the parent company of Kay and Jared, said in a statement that the lawsuit Ms. Bustos referred to alleged "gender, pay and promotion discrimination" — not sexual harassment.

Nevertheless, the legislation addresses an issue that has dominated the news lately and has bi-partisan support.

"I'm asking the business community — for your own sake, if nothing else — help us lead America to a better business environment and a better business environment [means being] able to go to work without having to put up with a bunch of crap," said Senator Lindsey Graham (Rep. – S. Car.), a co-sponsor of Ms. Bustos's bill.

Section 7 and Social Media in the Workplace

Two restaurant employees complained about the company's accounting department on Facebook — and were fired. Two teen center employees took to Facebook after an office meeting and disparaged their supervisors' decisions — and were fired. James Damore used Google's employee message boards to criticize how his employer was implementing its diversity policy — and was fired.

Are employees always protected from actions by employers for things they say things about their employers on social media?

Sometimes they are, sometimes they're not. Let's look at these three cases more closely for some insights.

Three D L.L.C. (Triple Play) – Should employees be allowed to post comments where the general public can read them? Including obscenities?

Although Section 7 of the NRLA (National Labor Relations Act) specifically addresses an employee's rights to engage in activities related to collective bargaining pursuits, those protections can extend to using social media to complain about work environments (presumably to other employees, whether the public sees those posts or not). In the 2014 National Labor Relations Board case *Three D L.L.C. (Triple Play)*, employees used Facebook to discuss how they unexpectedly owed additional state income taxes because their employer made mistakes calculating the withholdings from their wages. When employees expressed their frustration, including using obscenities, on Facebook, they were fired.

The employees brought their case to NLRB, which found the employer's action to be unlawful.

The employers appealed the decision, but the appellate court upheld it, saying:

Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand. The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern-day social media use.

Two key takeaways here, according to Philip L. Gordon and Kwabena A. Appenteng of the employment law firm Littler Mendelson P.C., are :

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1. An employee's mere use of obscenities in a social media post that may be accessible by customers/clients is not enough, by itself, for the employee's communications to lose the protection of the Act.
2. Employers should consider consulting with counsel before firing an employee for disparaging or defamatory speech when that speech takes place in the course of a group discussion in social media about work.

Richmond District Neighborhood Center – Can employees just say anything they want about their employers on social media and get away with it?

In another 2014 NLRB case, *Richmond District Neighborhood Center,* employees at a teen center in San Francisco decided to complain about their supervisors and suggested how they would like to perform what the Board characterized as "insubordinate acts." They also used obscenities.

The employees had gone too far, said the Board. "We find the pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection and render [the employees] Callaghan and Moore unfit for further service."

Wasn't violating Google's corporate code of conduct sufficient grounds for firing James Damore?

We'll have to see about that. Mr. Damore was fired after publishing a memorandum questioning the effectiveness of Google's diversity methods because, he suggested, women may not have the same predisposition for understanding technology as men.

He has now filed an unfair labor practices charge against his former employer under Section 7 of the NLRA. As we've seen already, under Section 7 employees are entitled to complain about workplace policies to other employees. This is considered "concerted activity," and is protected by Section 7 "if it concerns employees' interests as employees." Pay attention to this one.

The reality is that social media is "how we communicate these days" Joane Wong, New York-based senior attorney with the NLRB, said to *Business Insurance* magazine. "We no longer just talk to our co-workers face to face or pick up the phone. Instead, we type out our concerns and press send, or we post something or press 'like.' Now we have people pressing buttons and everything's written out and is discoverable."

To protect your firm, consult your attorney about employment law matters and carry employment practices liability insurance. Give us a call if you'd like a quote.

Equipment Breakdown Insurance Provides More than Just Insurance

If you've been in business a while, you might have heard the phrase "boiler and machinery insurance." Today it's called Equipment Breakdown insurance and these now cover much more than boilers and machinery, hence the name change. Read on to learn more about this valuable coverage.

Insurers introduced boiler and machinery coverage in the mid-1800s to cover valuable steam-powered machinery from explosion or breakdown, and to cover the equipment's owner from liability for resulting property damage or bodily injury. Today, few businesses use steam-powered machinery for business operations, but some still use steam-powered equipment for generating heat or power. Many states require these boilers to be inspected annually. If your boilers fall into this category, you may find equipment breakdown coverage a bargain, as coverage includes an inspection by the insurer along with protection from loss due to property damage or bodily injury. If you are relying solely on a governmental inspection for compliance, you may end up paying more and not have the insurance protection.

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To prevent business shutdowns or slowdowns, an organization might want to cover other kinds of valuable equipment from mechanical breakdown, too. Today's equipment breakdown insurance can cover these types of equipment, besides boilers:

1. Equipment designed to operate under internal pressure or vacuum
2. Equipment designed to generate, transmit or use energy
3. Communications equipment and computers
4. Equipment owned by a utility and used to provide service to an insured's location.

Don't think you need this coverage? Consider the following examples of claims from Hartford Steam Boiler, an insurer that specializes in boiler and machinery insurance and equipment breakdown insurance:

1. Owners of an office building had to spend nearly $1.6 million to restore power to tenants — including an accounting firm on tax-season deadlines—after electrical arcing destroyed three electrical panels, leaving the building without power.
2. A medical clinic had to discard more than $21,000 worth of drugs when they froze after a controller on its refrigerator malfunctioned.
3. A printer spent more than $136,000 to repair a high-speed press after a bolt came loose and jammed the cylinder and gears.

Insurers typically write equipment breakdown coverage under a stand-alone policy; however, some will include the coverage under highly protected risks (HPR) policies or in business package policies. Most policies provide seven typical coverages.

Equipment breakdown policies are designed to cover your equipment from mechanical failure only, so they typically exclude damage from earth movement, flood, nuclear hazard, windstorm or hail. They also exclude "causes of loss" typically covered by other property policies, such as aircraft, vehicles, freezing, lightning and vandalism. Many other exclusions apply; however, you can modify many of these by adding an endorsement to your policy.

Equipment breakdown coverage is highly specialized and should be handled by an experienced broker. For information on equipment breakdown coverage, please contact us.

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What's Covered in a Typical Equipment Breakdown Insurance Policy?

The typical equipment breakdown insurance policy includes the following coverages:

1. Damage to "covered property" at the location named in the policy
2. Expediting expenses, to cover the costs needed to get insured equipment operational as fast as possible, such as expedited shipping and making temporary repairs.
3. Business income and extra expense. Similar to coverage you should have under your property or business owners policy, many equipment breakdown policies will cover income lost due to the slowdown or stoppage caused by breakdown of the insured equipment. Extra expense coverage reimburses the insured for extra charges you incur to keep your business running while the equipment is not functioning, such as outsourcing or renting equipment. If your policy only lists extra expense coverage, it does not cover lost business income.
4. Utility interruption, which extends the policy's business income coverage to losses or spoilage caused by interruption of any utility service to the insured's premises, rather than just losses or spoilage caused by a breakdown of equipment at the insured premises.
5. Newly acquired premises, or premises unnamed in the policy, for the number of days shown in the policy's declaration page. The coverage only applies if equipment at the new location is of the same type covered by the policy.
6. Errors and omissions, which covers the insured for unintentional errors or omissions in describing or naming the insured property or location, and errors that cause cancellation of a covered premises.
7. Contingent business income and extra expense, which apply business income and extra expense coverage to breakdowns of equipment at a named "contingent location" not owned or operated by the insured. It can also include coverages to meet special needs, such as spoilage coverage, "brand and label" coverage, hazardous substance cleanup, and more.