



**2018 HR Summit NYC  
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## **Old Problems, Fresh Faces and Emerging Trends: The Story of Human Resources for NY Healthcare Professionals in 2018**

*Presented by:*

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Jackson Lewis P.C. | Long Island

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## **Introductory Statement**

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# Sexual Harassment



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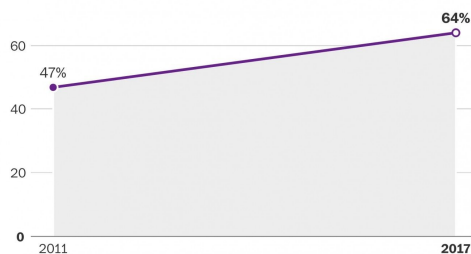


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# Sexual Harassment

## Sharp increase in Americans who say sexual harassment of women in the workplace is "serious problem"

Q: Do you think sexual harassment of women in the workplace is a problem in this country or not? If problem: Is that a serious problem, or not serious? (% saying "serious problem")



Source: Oct. 11-15 Post-ABC News poll with error margin of 3.5 points among U.S. adults.  
EMILY GUSKIN/WASHINGTON POST

## Over half of women cite unwanted sexual advances from a man, including 3 in 10 from a coworker

(AMONG WOMEN) Q: Have you ever received unwanted sexual advances from a man...



Source: Oct. 11-15 Post-ABC News poll with error margin of 4 points among national sample of 740 women.

EMILY GUSKIN/WASHINGTON POST

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# #MeToo

- A recent poll found that half of all American women—54%—have experienced “unwanted and inappropriate sexual advances” at some point in their lives.
- 30% of women have endured such behavior from male colleagues.
- 25% identified men with sway over their careers as the culprits.
- 33 million U.S. women have been sexually harassed—and 14 million sexually abused—in work-related episodes.
- 95%—report that male perpetrators of such abuse usually go unpunished.

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# TIME'S UP

- “Powered by women, TIME’S UP addresses the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential. We partner with leading advocates for equality and safety to improve laws, employment agreements, and corporate policies; help change the face of corporate boardrooms and the C-suite; and enable more women and men to access our legal system to hold wrongdoers accountable.”
- Time's Up includes a legal defense fund to help less privileged women protect themselves from sexual misconduct and any repercussions that may occur after they've reported it. It also will create legislation to penalize companies that tolerate harassment.

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# What Is Sexual Harassment?

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## Sexual Harassment

- Types (QPQ, HWE)?
- Who can be a harasser?
- Where can it take place?
- Liability?
- How can an employer protect itself?

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## Anti-Harassment Program

- Policy
- Dissemination of policy and procedures
- Training
- Complaint procedure in action

## Complaint / Investigation Procedures

- What must be investigated?
- When must investigation take place?
- What is the goal of an investigation?

## Investigation Guidelines

- Start broad, then narrow. Open-ended questions are best.
- Clarify as you go.
- Listen actively.
- Observe everything, including body language.

## Documentation

- Effective note taking includes:
  - Accurate records of information received from complaining employee, witnesses and alleged wrongdoer
  - Close to verbatim / use quotes
  - Identify those present, date, time, location
  - Record Qs & As
  - Review and affirm information
  - Statements are critical
- Effective note taking does **not** include:
  - Interpretations of the interviewer
  - Negative comments about the witness
  - Assumptions or guesses
  - Backdating
  - Conclusions

## Developing an Investigation Plan

- Take any necessary immediate action
  - Separate employees involved
- Review:
  - Applicable policies (harassment, work rules, progressive discipline)
  - Necessary personnel files
- Identify Investigator
  - Is he/she directly/indirectly involved?
  - Actually and perceived as being objective?
  - Effective witness in future proceedings?
  - Knowledgeable of company policies
- Determine who to interview and when
- Prepare/identify a list of questions to ask each interviewee
- Decide where to conduct interviews and make arrangements
- Determine if assistance from legal counsel is necessary

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## Conducting the Interviews

- Have two company representatives conduct the interviews
- Explain the purpose of the interview
- Review the need for confidentiality
- Review retaliation protections
- Expectation of truth
- Document each interview and, if possible, have the interviewed person sign a statement
  - Get some kind of verification
- Don't forget to evaluate credibility
  - Separately record observations
  - Needed for analysis/conclusions

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## Evaluate the Evidence

- Consider policy
- Consider precedent
- Consider credibility of each party and witness
- Consider previous complaints
- Conclusiveness of findings
- Need for prompt corrective action

## Assist in Workplace Healing

- Treat all employees with respect and dignity
- Provide for an open, supportive environment that encourages communication
- Enforce all policies fairly and consistently
- Ensure all employees receive training and are held accountable
- Provide for zero tolerance of retaliation and/or intimidation
- FOLLOW-UP!



## 2017 – Major Developments

### LGBTQ & Title VII

- 5th Circuit
  - Sexual harassment can be motivated by the harasser's subjective perception that the victim failed to conform to gender stereotypes.
- 7th Circuit
  - Coverage under Title IX.
- There is an increase in claims asserting Title VII violations on the basis of gender identity.
- 2<sup>nd</sup> Circuit decision supports broad definition of gender.
- The EEOC mandated that employers allow transgender employees to use the bathroom that corresponds with their gender identity.

## LGBTQ & Title VII Continued

- 2014: Then Attorney General Holder announced that the DOJ would consider transgender individuals a protected class under Title VII.
- 2017: Current Attorney General Jeff Sessions informed U.S. Attorneys that Title VII does not protect transgender individuals from discrimination in the workplace.
  - This does not mean that it is now acceptable to discriminate against any class of employees or applicants.
  - There are still protections under state and local laws.

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## Parental Leave

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>● There is currently no federal law requiring paid paternity leave.</li> <li>● On average mothers receive approximately 8 weeks off following the birth of a child.</li> <li>● Fathers receive an average of 4 weeks off following the birth of a child.</li> <li>● Many major employers have implemented generous paternity leave policies.</li> </ul> | <p>Employers should:</p> <ul style="list-style-type: none"> <li>● Revisit policy to ensure compliance.</li> <li>● When possible, draft parental leave policies to allow equal leave to fathers and mothers.</li> <li>● Consult human resources and legal counsel when making decisions regarding granting or denying leave requests.</li> <li>● Cultivate a work environment where employees feel comfortable taking parental leave.</li> </ul> |
|--|---|

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## 2017: Agency Summary

### NLRB Joint Employment

#### OLD STANDARD

*Browning-Ferris*, 362 NLRB No. 186 (2015)

- The Board held that a joint employer need only possess indirect” or “potential” control over the contractors’ employees working conditions
- Significantly, the actual exercise of control was no longer required
- The standard enabled the NLRB to expand its regulatory reach and prosecute companies for labor violations committed by their contractors

#### NEW STANDARD

*Hy-Brand Industrial Contractors Ltd*, 365 NLRB No. 156 (December 14, 2017)

- Overruled *Browning-Ferris* and returned to the principles governing joint-employer status that existed prior to that decision
- A finding of joint-employer status now requires proof of exercise of actual control over essential employment terms
- The control must also be “direct and immediate,” and joint-employment status will no longer result from control that is “limited and routine”

# Employer Rules and Policies

## OLD STANDARD

*Lutheran Heritage Village-Lavonia*, 343 NLRB 646 (2004)

- The Board held that a workplace rule or policy violated the law if it could be “reasonably construed” by an employee as prohibiting the exercise of rights guaranteed by the NLRA
- Many seemingly innocuous workplace rules were found illegal even if they were never enforced.
  - For example – rules requiring employees to foster “harmonious interactions and relationships” or to maintain basic standards of civility in the workplace were found to be unlawful.

## NEW STANDARD

*The Boeing Company*, 365 NLRB No. 154 (December 15, 2017)

- Overruled *Lutheran Heritage* and the Obama GC’s memorandum re prosecution for workplace rule violations
- The NLRB will now balance “the nature and extent of the potential impact” on NLRA rights against the “legitimate justifications associated with [a] rule.”
- Numerous rules that have been deemed unlawful on their face under the old test will be acceptable under the new test

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# Employer Rules and Policies Continued

- On December 1, 2017, the General Counsel of the NLRB published a memorandum rescinding several key Obama-era policy directives.
- Significantly, the memorandum advised that prosecuting employers for maintaining overboard workplace rules would no longer be an enforcement priority
- Examples of such overbroad workplace rules include:
  - *Do not discuss customer or employee information outside of work, including phone numbers and addresses*
  - *Be respectful to the Company, other employees, customers, partners, and competitors*
  - *No cameras are to be allowed in store or parking lot without prior approval from the corporate office.*

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## EEOC Addresses Harassment in the Workplace

- In 2017, the EEOC renewed its focus on harassment claims and called on employers and others to “reboot” harassment prevention.
- In October 2017, the EEOC launched two new anti-harassment training programs for employers: Leading for Respect (for supervisors) and Respect in the Workplace (for all employees).
  - Rather than concentrating on legal definitions and standards for liability, the new training programs focus on respect, and the types of behaviors that contribute to an inclusive workplace.
- On May 2, 2017, congressional Democrats reintroduced a bill, the Equality Act, which would prohibit employment discrimination on the basis of sexual orientation and gender identity.

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## 2016 v. 2017 Statistics

	FY 2016	FY 2017
Total Charges	91,503	84,254
Race	32,309	28,528
Sex	26,934	25,605
National Origin	9,840	8,299
Religion	3,825	3,436
Color	3,102	3,240
Retaliation (All Statutes)	42,018	41,097
Retaliation (Only Title VII)	33,082	32,023
Age	20,857	18,376
Disability	28,073	26,838
Equal Pay Act	1,075	996
GINA	238	206

## EEOC Trends

1. Total – 7,249 less charges filed in 2017 as compared to 2016
2. There is a decrease in charges filed for ALL classes from 2016 to 2017 EXCEPT “Color.”
3. Retaliation was the most frequently filed charge.
4. The EEOC filed 184 merit lawsuits alleging discrimination in fiscal year 2017, holding another 242 on its docket for 2018.
  1. The EEOC was successful in 90.8% of the suit outcomes in 2017.
  2. For comparison, in 2016, the EEOC only filed 86 merit lawsuits.

Agency Reduces Workload to  
Lowest Level in 10 Years



Obtains Nearly \$400 Million  
for Discrimination Victims

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## EEOC Task Force

- 2016: EEOC releases a 100+ page report on harassment in the workplace;
  - Bulk of recommendations focused on need for effective compliance training,
    - Calling for an increase in preventative efforts.
  - EEOC recommends live, in-person training.
- 2017: EEOC launches respect in the workplace training.



**SELECT TASK FORCE  
ON THE STUDY OF  
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## EEO-1 Pay Data Reporting

- Late 2016: The EEOC announced it would require employers to include compensation data on annual EEO-1 reports.
- The EEOC and OFFCP planned to use this data to identify companies with pay disparities to help close the “pay gap.”
- The EEOC then announced the pay data collection was too burdensome on employers and would be suspended indefinitely.
- Traditional EEO-1 reports for 2017 will be due by March 31, 2018.
- However, the EEOC continues to look for new ways to investigate pay discrimination.

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## DOL: Intern Test

- The DOL has implemented a new test to determine which party is the “primary beneficiary” of the relationship in question. Factors that are looked at include:
  1. The extent to which there is an expectation of compensation. Any promise of compensation suggests that the intern is an employee—and vice versa.
  2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment.
  3. The extent to which the internship is tied to the intern’s formal education program, for example, by the receipt of academic credit.

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## DOL: Intern Test

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

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## DOL: Overtime

- A Texas District Court issued a nationwide preliminary injunction enjoining the DOL from implementing and enforcing its final overtime rule.
- The rule, which was scheduled to take effect December 1, 2016, would have increased minimum salary levels required for an employee to achieve exempt status under the FLSA.
- On July 26, 2017, the DOL issued a request for information on the overtime rule, seeking public comment.
- On October 30, 2017, the DOL appealed the Texas District Court's summary judgment.
- On November 3, 2017, the DOL filed an unopposed motion to stay the appeal while it undertakes further rulemaking to determine what the salary level should be.

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## 2018: Game Changing Shifts

### The Labor Secretary

● Alexander Acosta is expected to be a traditional, business oriented Secretary throughout his term.

- Previous Dean of Florida International University Law School;
- Former member of the NLRB;
- Son of Cuban immigrants, is be the first Hispanic American on Trump's cabinet;
- Wrote 125 decisions while at the NLRB;
- Understands Board practice and procedure;
- Good reputation at the agency level.



## Equal Employment Opportunity Commission

- President Trump appointed Victoria Lipnic as Acting Chair of the EEOC.
- During her time at the EEOC, Lipnic has joined in bipartisan initiatives of the agency.
  - She has co-chaired the EEOC's Select Task Force on Harassment in the Workplace in 2015-2016.
- She also voted to approve the EEOC's 2012 Guidance on the Use of Arrest and Conviction Records in Making Employment Decisions.
- Lipnic has opposed the EEOC's proposed change to EEO-1 reporting to include collecting pay data from employees.



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## National Labor Relations Board

- New General Counsel: Peter Robb
- Phillip Miscimarra's departure in December 2017 as Chairman of the NLRB left the Board with two Democrats and two Republicans, an even split that likely means months will pass before more changes will be coming from the NLRB.
- While Miscimarra will not be a participant in the Trump Board's efforts to roll back additional Obama Board labor-friendly rulings, he leaves behind dissenting opinions that his replacement and Members William Emanuel and Marvin Kaplan likely will follow as they travel down an employer-friendly road.



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## New Supreme Court Justice

- On April 10, 2017, Neil Gorsuch was sworn in to the Supreme Court to succeed the late Justice Antonin Scalia, who passed away in February 2016.
- President Trump may have an opportunity to fill another Supreme Court seat in the next four years with Justice Ginsburg at age 83, Justice Kennedy at age 80, and Justice Breyer at age 78.
- Justice Gorsuch has stated that courts “are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.”\*



\* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016)

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## Looking Ahead: What to Expect

## What's on the Horizon for SCOTUS?

- Epic Systems Corp. v. Lewis*, No. 16-285; *National Labor Relations Board v. Murphy Oil USA*, No. 16-307; *Ernst & Young LLP v. Morris*, No. 16-300 (consolidated)**
- In 2018, SCOTUS will decide whether arbitration agreements with individual employees that bar pursuing work-related claims on a collective or class basis in any forum are prohibited because they limit employees' right under the National Labor Relations Act (NLRA) to engage in protected concerted activities.
- The U.S. Courts of Appeals are split over the issue.
- Three circuits (Second, Fifth, and Eighth) conclude that such waivers do not violate the NLRA,
- Three circuits (Sixth, Seventh, and Ninth) agree with the NLRB that they violate the NLRA.
- Reportedly, more than half of nonunion private sector employers have mandatory employment arbitration agreements that cover more than 60 million workers.

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## Paid Leave Hits New York



Applying For Paid Family Leave

To Use Paid Family Leave To:

Bond with a newborn, a newly adopted or fostered child	Care for a family member with a serious health condition	Assist family members due to another family member's active military duty or impending active duty abroad
<b>Complete Form PFL-1</b> <ul style="list-style-type: none"> <li>Complete PFL-1, Part A.</li> <li>Provide PFL-1 to employer.</li> <li>Employer completes PFL-1, Part B and returns to you within 3 days.</li> </ul>	<b>Complete Form PFL-1</b> <ul style="list-style-type: none"> <li>Complete PFL-1, Part A.</li> <li>Provide PFL-1 to employer.</li> <li>Employer completes PFL-1, Part B and returns to you within 3 days.</li> </ul>	<b>Complete Form PFL-1</b> <ul style="list-style-type: none"> <li>Complete PFL-1, Part A.</li> <li>Provide PFL-1 to employer.</li> <li>Employer completes PFL-1, Part B and returns to you within 3 days.</li> </ul>
<b>Complete Form PFL-2</b> <ul style="list-style-type: none"> <li>Complete PFL-2 and collect supporting documentation.</li> </ul>	<b>Complete Form PFL-3</b> <ul style="list-style-type: none"> <li>Care recipient completes PFL-3 and provides to health care provider.</li> <li>Care recipient's health care provider keeps PFL-3.</li> </ul>	<b>Complete Form PFL-5</b> <ul style="list-style-type: none"> <li>Complete PFL-5 and collect supporting documentation.</li> </ul>
<b>Send forms and documents</b> <ul style="list-style-type: none"> <li>Send completed forms and supporting documentation to insurance carrier.</li> <li>Insurance carrier accepts or denies claim within 18 days.</li> </ul>	<b>Complete Form PFL-4</b> <ul style="list-style-type: none"> <li>Complete "Employer" information at the top of PFL-4.</li> <li>Provide PFL-4 to care recipient's health care provider.</li> <li>Care recipient's health care provider completes PFL-4 and returns to you.</li> </ul>	<b>Send forms and documents</b> <ul style="list-style-type: none"> <li>Send completed forms and supporting documentation to insurance carrier.</li> <li>Insurance carrier accepts or denies claim within 18 days.</li> </ul>
	<b>Send forms and documents</b> <ul style="list-style-type: none"> <li>Send completed forms and supporting documentation to insurance carrier.</li> <li>Insurance carrier accepts or denies claim within 18 days.</li> </ul>	

### Effective Dates Phased In:

- January 1, 2018:**
  - 8 weeks paid at 50% of the employee's average weekly wage or 50% of the state average weekly wage, whichever is less;
- January 1, 2019:**
  - 10 weeks paid at 55% of the employee's average weekly wage or 55% of the state average weekly wage, whichever is less;
- January 1, 2020:**
  - 10 weeks paid at 60% of the employee's average weekly wage or 60% of the state average weekly wage, whichever is less; and
- January 1, 2021:**
  - 12 weeks paid at 67% of the employee's average weekly wage or 67% of the state average weekly wage, whichever is less.

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## Employee Eligibility

- Employee who works more than 20 hours per week and must work 26 consecutive work weeks (175 days worked for employee who works fewer than 20 hours per week) preceding the first full day leave is required.
  - This includes employees who are not scheduled to work every week in the 26 week period, provided that such a schedule is the usual employment practice for the employer.

## Reasons For Leave

- **Care for Family Member:** When paid leave is necessary to provide care, including physical or psychological care, to their family members due to a family member's serious health condition;
- **Bond with Child:** To bond with their newborn children during the first year of the child's life, or, in the case of adoption or foster care placement, for the first year after the placement of a child with the employee; and
- **Military Qualifying Event:** For any qualifying reason as provided for under the federal Family and Medical Leave Act arising from the employees' spouse, domestic partner, child, or parent being on active military duty, or, alternatively, being notified of an impending call or order to active military duty.

## Employer General Notice Requirements

- **Handbook Policies:**
  - PFL guidance must be included in a handbook or other written guidance regarding employment policies.
- **Workplace Postings:**
  - Employers must display/post a typewritten or printed notice concerning PFL.
  - The posting must be displayed in plain view where employees and/or applicants can readily see it.
- **Accessibility:**
  - If employees do not read and write in English, the notice must also be in a language in which the employees can read and write.
  - Employers must follow laws for sensory-impaired individuals.

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## Employee Notice Requirements

- Advance Notice: Similar to FMLA (Foreseeable vs. Unforeseeable).
- Content of Notice:
  - To request paid family leave, employees will generally be required to complete a Request for Paid Family Leave or PFL-1 form that the state has made available.
  - Employers and carriers can use alternative forms as long as they contain all the required information contained in the PFL-1 form.
- Certifications:
  - Bonding Certification: PFL-2 Form plus documentation
  - Health Care Provider Certification: PFL-4 Form plus Personal Health Information (PHI) Release (PFL-3 Form)
  - Military Qualifying Event: PFL-5 Form plus documentation.

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## Employer Specific Notice Requirements

- Designation Notices Required
  - Necessary to run PFL concurrently with FMLA.
  - \*\*If an employer fails to provide this notice, the employer will be deemed to have permitted the eligible employee to receive family leave benefits without concurrently using the benefits available under FMLA.
- Must provide notice that medical certifications are required similar to federal FMLA.
- When the total hours taken for FMLA in less than full-day increments reaches the number of hours in an employee's usual workday, the employer may deduct one (1) day of PFL benefits from an employee's annual available PFL benefit.

## The NYS Minimum Wage for 2018

### As of December 31, 2017

- For Long Island (Nassau & Suffolk) and Westchester the minimum wage is now \$11.00/hour. It will rise to \$12.00/hour on 12/31/18.
- For NYC employers with 11 or more employees the minimum wage is now \$13.00/hour. It will rise to \$15.00/hour on 12/31/18.
- For NYC employers with 10 or less employees the minimum wage is now \$12.00/hour. It will rise to \$13.50/hour on 12/31/18.
- For the remainder of New York State the minimum wage is now \$10.40/hour. It will rise to \$11.10/hour on 12/31/18.

## The NYS Salary Basis Threshold for Exempt Status in 2018

### As of December 31, 2017

- For Long Island (Nassau & Suffolk) and Westchester the threshold is now \$825.00/week. It will rise to \$900.00/week on 12/31/18.
- For NYC employers with 11 or more employees the threshold is now \$975.00/week. It will rise to \$1,125.00/week on 12/31/18.
- For NYC employers with 10 or less employees the threshold is now \$900.00/week. It will rise to \$1,012.50/week on 12/31/18.
- For the remainder of New York State the threshold is now \$780.00/week. It will rise to \$832.00/week on 12/31/18.

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## Government Agencies in 2018

## EEOC

- Expect a shift from expanding the law to enforcing the law as it exists.
  - EEOC projects that nearly 87,000 employment discrimination charges will be filed against private sector employees in FY 2018.
- Continued targeting the release and arbitration agreements, employer vigilance on controlled substances, English only policies, and wellness programs.
- EEOC will likely also continue to pursue:
  - Hostile Work Environment;
  - Religious Accommodation;
  - ADA Accommodation (*especially* if no interactive process);
  - Pregnancy Discrimination and Accommodation;
  - LGBT Issues.

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## EEOC

- For the first time in a decade, the five-member EEOC will swing to a 3- 2 Republican majority in 2018.
- In 2018, EEOC is expected to publicly release new sexual harassment guidelines for the first time in more than 20 years. The new guidelines were approved by the EEOC in November 2017, but must be approved by the White House Office of Management and Budget before being released.

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## Pregnancy Accommodations

- Pregnancy discrimination is among the most common charges reported to the EEOC.
- Pregnancy discrimination is also a part of the EEOC's 2017-2021 strategic enforcement plan.
- Many states have expanded protections for pregnant employees.
- Employers must accommodate pregnant employees even if the employee is not considered disabled under the ADA:
  - Condition related to pregnancy: physical or mental condition intrinsic to pregnancy or childbirth;
- These states laws typically reference an interactive process that reflects that of the ADA.

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## Pregnancy Accommodations Continued

- Reasonable accommodations may include:
  - Permitting the employee to sit or stand while working;
  - Providing more frequent and/or longer breaks;
  - Providing assistance with manual labor;
  - Restructuring the employee's job duties (*i.e.*, "light duty" assignments);
  - Modifying the employee's work schedule; and
  - Allowing time off to recover from childbirth;

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## Employer Friendly NLRB

- The new Board will likely revisit numerous NLRB decisions from the Obama administration, such as:
  - Class actions waivers (an issue being decided by the Supreme Court);
  - Joint employers (standard just overturned);
  - Inclusion of temporary workers in bargaining units with an employer's regular workers;
  - Protected concerted activity in areas such as social media, confidentiality, and employer policies and handbooks;
  - Status of college/university adjunct faculty, graduate students, and student athletes.

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