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Hospitality Labor Trends, Compliance, and Best Practices

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Mismatched Employee Documentation

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Mismatched Employee Documentation

- ◆ Social Security Mismatch Letters
 - Since March, more than 570,000 employers were sent "No-Match" letters by the Social Security Administration.
 - "No-Match" letters told employers that the names of their employees do not match their Social Security numbers.
- ◆ The reasons for the mismatch range from administrative errors by SSA staff, typos by the employer or the employee, unreported name changes, or even identity theft or a fraudulent social security card.
- ◆ Industries most affected: hospitality, construction, and agriculture

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How to respond to "No-Match Letters"

- ◆ If you received a "No-Match" letter from the Social Security Administration, you must:
 - Register with SSA's Business Services Online to obtain the list of employee names and recorded information from the database.
 - Compare the no-match letter information with your own employment records.
 - Follow up with the employee in writing, but you cannot use the receipt of the no-match letter to retaliate or otherwise subject the employee to heightened scrutiny or any other adverse action.
 - You should document all of your efforts to obtain the correct information from the employee in the event that are unable to provide a valid SSN.
 - Follow all instructions in the letter.

4

Sexual Harassment in the Workplace

5

The Impact of #MeToo and the Speak Out Evolution

- #MeToo, #TimesUp, and Harvey Weinstein:
- ◆ \$44 million to settle all claims
 - ◆ Criminal trial for rape set to begin in September
 - ◆ Over 80 women have accused him of sexual harassment or other wrongdoings
 - ◆ Last month, #TimesUp, the legal defense fund which was created during the aftermath of the Harvey Weinstein allegations, has filed 25 claims against McDonald's, alleging sexual harassment, gender-based discrimination, and retaliation

6

A Snapshot of the EEOC in FY 2018

- ◆ Individual EEOC charges filed were down approximately 9% in FY 2018 than in FY 2017
 - Individual charges filed: 76,418
 - Retaliation was the top claim in both FY 2017 and FY 2018: alleged in 51.6% of all individual charges (also top claim in FY 2017)
- ◆ However, sexual harassment claims increased 13.6% from FY 2017
 - The amount of monetary benefits awarded through the EEOC also increased from FY 2017 to FY 2018

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New York State and New York City Human Rights Laws

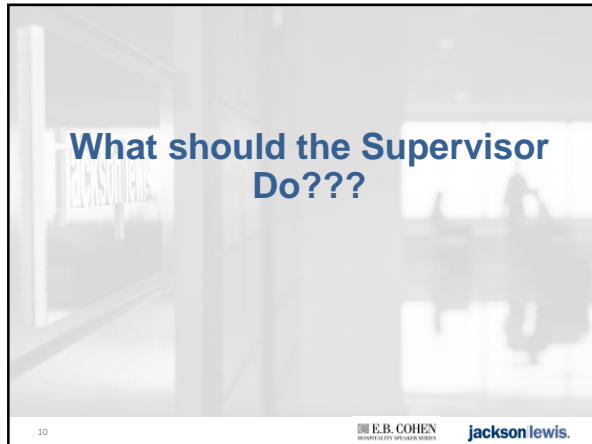
- ❖ City and State laws define sexual harassment as including harassment based on sex, gender identity/gender expression, sexual orientation, perceived gender, transgender status, and on the basis of pregnancy, childbirth, breast feeding or related medical conditions.
- ❖ City and State regulations define sexual harassment as unwelcome verbal or physical behavior based on a person's gender, including unwanted touching, offensive and suggestive gestures or comments, and request for sexual favors.

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Two Types of Sexual Harassment

Quid Pro Quo <ul style="list-style-type: none">◆ Applies to sexual harassment only◆ Some term or aspect of employment is conditioned on submission to a sexual advance or sexual conduct <p>IT'S ABOUT POWER!</p>	Hostile Work Environment <ul style="list-style-type: none">◆ Applies to all forms of harassment◆ Involves unwelcome conduct based on one or more protected characteristics◆ Under federal and state law, conduct must be so "severe or pervasive" that it alters the terms and conditions of employment<ul style="list-style-type: none">• Local laws can vary standards
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What should the Supervisor Do???

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What to do if you receive an EEO complaint

- ◆ Thank the person for coming to you, and discuss the limited confidentiality
- ◆ Reiterate the employer's commitment to foster a workplace free of harassment and how serious the employer takes the issue
- ◆ Listen – be sensitive, **but impartial** (avoid reactions)
- ◆ **Document the conversation**
- ◆ Tell the complainant to notify you immediately if the conduct continues, reoccurs, worsens, etc.
- ◆ Assure the complainant that they will not be retaliated against and that there will be a prompt and thorough investigation
- ◆ Immediately report to HR and take steps to have another manager or HR representative with you during the conversation

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LGBTQ Protection

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LGBTQ Protection

<p>New York State Human Rights Law</p> <ul style="list-style-type: none"> ◆ SONDA: prohibits discrimination on the basis of actual or perceived sexual orientation <ul style="list-style-type: none"> • Defines sexual orientation as "heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived" ◆ GENDA: prohibits discrimination based on gender identity and expression 	<p>New York City Human Rights Law</p> <ul style="list-style-type: none"> ◆ NYCHRL has expressly prohibited discrimination based on sexual orientation and gender identity or expression ◆ It is unlawful to refuse to hire, fire, harass, or otherwise discriminate against someone because they are LGBT ◆ Ostensibly neutral policies that have a disparate impact based on gender identity, gender expression or sexual orientation are also unlawful
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New York City Anti-Discrimination Laws

- ◆ Under the NYCHRL, employers **must**:
 - Allow employees to use the bathroom/single sex facility consistent with their gender identity
 - Allow employees to use their preferred name and pronouns
- ◆ Under the NYCHRL, employers **may not**:
 - Discriminate based on failure to conform to sex-stereotypes
 - Require employees to follow gender based dress-codes/grooming standards
 - Offer different benefits because of gender

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Understanding the Impacts of Structural and Individual Bias on LGBTQ People

- ◆ **46%** of LGBTQ workers say they are closeted at work
- ◆ **53%** of LGBTQ workers report hearing jokes about lesbian or gay people at least once in a while
- ◆ The top reason LGBTQ workers don't report negative comments they hear about LGBTQ people to a supervisor or human resources
 - They don't think anything will be done about it and they don't want to hurt their relationships with coworkers

See [HRC Survey: A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide \(June 2018\)](#)

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Consider Implementing a Gender Transition Plan

The transition plan should address the following issues:

- Timeline
- Dress code
- Company resources
- Identification changes
- Security clearance issues
- Facilities usage
- Appropriate norms of conduct
- Sensitivity Training
- Complaint Procedures
- Plan Modifications

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Investigating LGBTQ Discrimination

- ◆ Consider who is the best person to conduct this sensitive investigation
- ◆ Revise interview questions to reflect gender neutral questions and assumptions concerning the use of preferred personal pronouns
- ◆ Be sensitive to assumptions about the interviewee's gender identity or sexual orientation and asking accusatory questions based on the investigator's biases and assumptions
- ◆ Unless granted permission by the LGBT complainant, accused or witness, maintain strict confidentiality of the person's sexuality or gender identity. Do not assume that this information is widely known.
- ◆ Consider the perspective of the "reasonable person" who is lesbian, gay, bisexual, transgender or gender non-binary
- ◆ Be familiar with current local and state sexual orientation and gender identity/expression employment laws

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EPLI Employment Practices Liability Insurance

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EPLI Defined and Types of Covered Allegations

- ◆ Harassment
- ◆ Discrimination
- ◆ Wrongful termination
- ◆ Employment related misrepresentation, libel, slander, etc.
- ◆ Failure to promote
- ◆ Deprivation of career opportunity
- ◆ Wrongful discipline
- ◆ Vicarious liability for intentional acts
- ◆ Punitive damages
- ◆ Coercion or humiliation in relation to: race, marital status, gender, physical and mental impairments, pregnancy, sexual orientation and other protected classes established by law

19

EPLI—Possible Add-Ons

- ◆ Third party liability
 - i.e. discrimination allegations from guest or based on website
- ◆ Wage & Hour Coverage
 - i.e. improper payment of overtime, spread of hours, 80/20, etc.
 - Usually limited to defense costs only
 - Usually a sublimit of \$100,000 or \$250,000 only
- ◆ Volunteers or trailers included as insured

20

EPLI Pitfalls & Solutions

- ◆ The coverage is Claims Made, and must therefore be in place prior to the alleged wrongdoing taking place. Claims occurring prior to a retro-active date are **NOT COVERED**. Consequently, restaurants should purchase EPLI prior to interviewing and hiring ANY employees including initial GMs.
- ◆ The coverage deductibles are negotiable. Costs below the deductible are **NOT COVERED**. Consider lower deductibles since the deductible also applies to the cost of legal defense.
- ◆ The settlements of Wage & Hour cases are typically **NOT COVERED**. However, coverage might apply to defense costs subject to a sublimit of insurance.

21

Claim Reporting and Notice Conditions

- The most common reason that EPLI insurance companies deny claims is due to late notice of a claim.
- Notice of a claim is typically required when an Insured has knowledge of a 'claim' as defined by the policy. The definition of 'claim' usually includes some written demand for money (could be an email) and/or written notice of a civil or administrative proceeding (could be an EEOC notice). An owner, operator or HR professional should obtain a copy of the notice provisions under their policy.
- Notice of a circumstance that might give rise to a claim (but not yet a 'claim' as defined by the policy) can typically be reported to an insurance company to preserve the matter under that policy term. Since such incidents would need to be reported upon application for renewal anyway, there is little downside to reporting a Notice of Circumstance.
- Notice to the insurance company should be done in accordance with policy terms. If a broker is handling this notice, an Insured should obtain an acknowledgement that the claim has been reported.

22

EPLI Claim Lifecycle

- Upon receipt of claim notice, insurance companies typically prepare a coverage letter and/or reservations of rights, if applicable
- Insured should have defense counsel appointed and approved by the insurance company
- It is advisable to "pre-approve" counsel with the insurance company at the time the insurance policy is placed. Panel rates and litigation guidelines apply, but most Employment and Labor attorneys would prefer to accommodate these items to maintain continuous client relationships.
- Panel counsel options
- Employment litigation follows. Once deductible is exhausted, an Insured typically allows insurance company to pay defense costs directly to law firm.



23

Workers' Compensation, Family and Medical Leave Act and New York Paid Family Leave

24



Workers' Compensation—Paid Family Leave (PFL)—Disability Benefit Law (BDL)—Family Medical Leave Act (FMLA) | Coordination Issues

- Understanding and coordinating benefits across multiple overlapping statutory legal regimes can be confusing
- Utilize a cohesive strategy to allow professional to work together. HR professionals working with insurance claim professionals and Employment counsel where necessary.
- WORKERS COMPENSATION: Employee workplace injuries
 - Medical expenses are fully covered but subject to the network of medical providers that accept workers' compensation
 - Lost time disability wage benefits are calculated as follows: 2/3 x average weekly wage x % of disability up to a maximum of \$934.11 per week for all accidents occurring between July 1, 2019-June 30, 2019
- DBL/PFL: Employee unable to work due not work related injury or disability including, among other things, pregnancy
 - Claim filing instructions and application of benefits can be complicated. The role of a claim professional at the insurance brokerage is a critical resource for administering such claims.
 - PLF and DBL benefits can typically apply in sequence once PFL is exhausted
- FMLA protects an employees position with an employer

25  

Workers' Compensation, FMLA, and PFL

- It is important for employers to know when an absence is covered by: workers' compensation, FMLA, and NY PFL/DBL
- Employers must also be aware of situations when some of these leaves can run concurrently, and when it cannot
 - There are some instances in which workers' comp and FMLA can run concurrently, and FMLA and PFL can run concurrently
- It is important to remember that Workers' Comp and PFL are wage replacement benefits, and FMLA is an unpaid leave

26  



Concurrent Leaves

Workers' Comp and FMLA

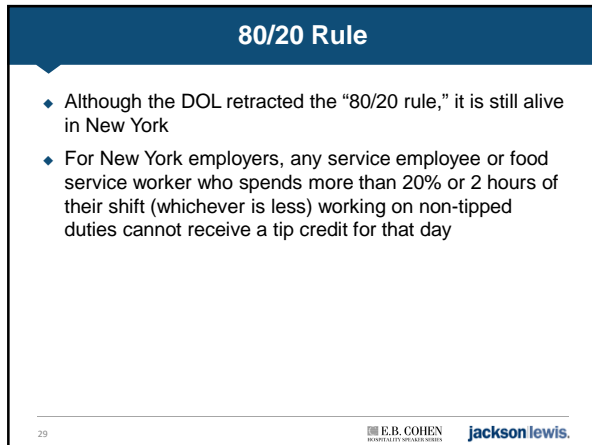
- If an employee's absence is due to an on-the-job injury or illness that also qualifies as a "serious health condition," Workers' Comp leave and FMLA can run concurrently, and you should provide employees with notice of this.
- Failure to designate leave as FMLA that runs concurrently with workers' comp leave can lead to the employee being entitled to FMLA leave once workers' comp absence has ended

FMLA and PFL

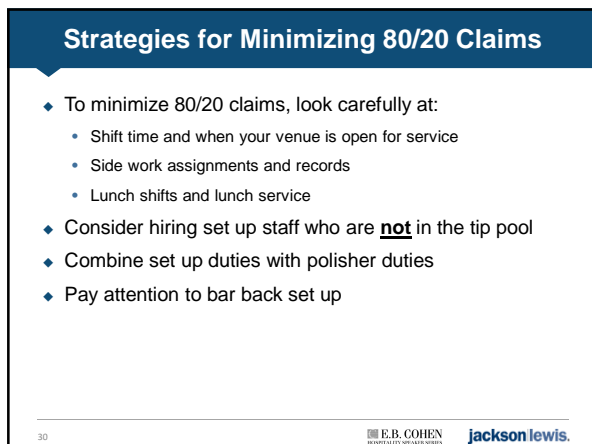
- There are instances in which FMLA and PFL will run concurrently—leave to bond with a newborn, to care for a family member with a serious health condition, or assisting family when a service member is deployed abroad
- FMLA and PFL **cannot** run concurrently if it is for the employee's own serious health condition, since that is not covered by PFL
- Failure to designate concurrent leave can lead to the employee being entitled to FMLA or PFL once the other leave has ended

27  





- ◆ Although the DOL retracted the "80/20 rule," it is still alive in New York
- ◆ For New York employers, any service employee or food service worker who spends more than 20% or 2 hours of their shift (whichever is less) working on non-tipped duties cannot receive a tip credit for that day



- ◆ To minimize 80/20 claims, look carefully at:
 - Shift time and when your venue is open for service
 - Side work assignments and records
 - Lunch shifts and lunch service
- ◆ Consider hiring set up staff who are **not** in the tip pool
- ◆ Combine set up duties with polisher duties
- ◆ Pay attention to bar back set up



Lactation Rooms



- ◆ As of March 18, 2019, New York City employers with at least **four** workers must provide lactation rooms for employees and maintain a written policy for distribution to employees upon hire
- ◆ Lactation room is defined as:
 - a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water.
- ◆ Employers with at least four workers must provide lactation rooms "in reasonable proximity to [an employee needing to express breast milk's] work area" and a refrigerator close to that employee's work area.

What to do if you cannot provide the lactation room:

- ◆ An employer must provide a lactation room unless it can show that doing so would pose an undue hardship to the employer.
 - Must engage in cooperative dialogue!
- ◆ It is the employer's responsibility to prove that providing a lactation room or certain requirements of a lactation room poses an undue hardship.
- ◆ Inconvenience is not an undue hardship.
- ◆ Other options include:
 - Portable lactation spaces
 - Using employer vehicles (e.g., the cab of a large agriculture or construction vehicle), along with shades or other privacy measures the employer can offer;
 - Pop-up tents
 - Other mobile enclosed spaces that would allow mobile employees to pump in privacy
 - Temporarily assigning changing rooms, manager offices, or conference rooms to serve as pumping spaces;
 - Setting up a stall in an employee locker room

Questions?

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Thank You



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