

2019 Employment Law: What to Expect & What to Do

By John Vering

1. **Expect more sexual harassment claims** and more guidance from the EEOC on sexual harassment and recommended best policies. In 2018, the EEOC received a record high 13,055 sexual harassment charges and filed 50 percent more lawsuits alleging sexual harassment than it did in the prior year. In light of the #MeToo movement, expect that your employees could be more willing to make sexual and other harassment claims than they have in the past. **What to do**: Ensure that your policies against sexual and other harassment and discrimination and your anti-retaliation policies are up-to-date and ensure that your personnel receive required and appropriate training regarding those policies. Be aware of state law requirements. For example, New York, Delaware and California now have mandatory sexual harassment training requirements. New York requires special policies and training for employees working in New York, even if an out of state employer has only one employee working in New York. If you need help with updating your policies or training, let us know.
2. Missouri employers can expect some relief from **discrimination claims** now that the Missouri Human Rights Act has been amended to bring its requirements more in line with federal law in terms of burden of proof, limits on damages and restrictions on suing supervisors and managers individually. We now have one Missouri Appeals Court ruling indicating that this new law only applies to claims of alleged discrimination when the alleged discriminatory acts occurred on or after August 28, 2017, the effective date of these amendments. We expect future court cases interpreting and clarifying these amendments. However, although Missouri law has changed, employers need to continue to be diligent in enforcing their anti-discrimination, anti-harassment and anti-retaliation policies. Recent cases have allowed large attorneys' fees awards even where damages were modest including a recent plaintiff attorneys' fees award of $226,562 where actual damages were only $6,000. In another recent case, the jury rejected most of plaintiff's claims and awarded only $524 in actual damages, awarded $75,000 in punitive damages (the employee sought $1,000,000 in punitive damages), and the court allowed $346,500 in plaintiff's attorneys' fees. **What to do**: Train employees on your policies prohibiting discrimination and retaliation, and promptly investigate and address claims of discrimination and retaliation.
3. Most Missouri employers need to pay non-exempt employees a minimum wage of at least $8.60 per hour. Tipped employees in Missouri must be paid half of the minimum wage rate (i.e., $4.30 per hour) and their wages plus tips must total at least $8.60 per hour. Kansas and federal minimum wage remains at $7.25 per hour. Tipped employees in Kansas must be paid a minimum cash wage of at least $2.13 per hour, and their wages plus tips must total at least $7.25 per hour.
4. **Expect** the National Labor Relations Board and the Department of Labor (DOL) to issue **new standards narrowing the Obama administration's broad interpretation of who are joint employers.** For example, when is an employee of an independent contractor/subcontractor considered jointly employed by both the independent contractor and the company that subcontracts the work to the independent contractor under federal wage and hour laws? These

expected regulations would likely impact the issue of joint employment in the context of union negotiations and in the context of franchisor/franchisee employment lawsuits. **Expect DOL to update overtime regulations to increase the salary level required to be exempt** from the current threshold of $23,660 per year to some higher number but far less than the $47,476 proposed by the DOL under President Obama. **What to do:** Wait for new regulations and be prepared to react when they become final.

5. The U.S. Supreme Court may decide under the **Equal Pay Act** whether an employer can lawfully pay a woman less than a man for the same job based on salary history if the man is earning more at his former employer. There is also a case brought by the U.S. Dept. of Labor against Google alleging gender inequality in pay. **What to do**: To be safe, attempt to pay men and women doing the same job the same pay unless you can justify the difference based on a reasonable factor other than sex such as seniority, merit, or the quality or quantity of the employee's work.
6. The U.S. Supreme Court may decide whether **sexual orientation and gender identity** bias is covered by Title VII, the principal federal law prohibiting discrimination based on sex and prohibiting sexual harassment because there is a split of authority on this issue in lower federal courts. Neither Missouri nor Kansas state laws prohibit discrimination based on sexual orientation, but some cities in both states have ordinances that prohibit discrimination based on sexual orientation and/or gender identity, including but not limited to Kansas City, St. Louis and Columbia, Missouri and Lawrence, Manhattan, Roeland Park, Merriam, Mission, Prairie Village, and Wyandotte County Kansas. Moreover, Missouri employers should note that there is a recent Missouri Court of Appeals ruling that permitted an employee to proceed with litigation under the Missouri Human Rights Act on a claim that he was discriminated against because of unlawful sexual stereotyping because his behavior and appearance contradicted the stereotypes of maleness held by his employer and managers. **What to do**: Do not discriminate based on sexual orientation or gender identity. It is legally risky and a bad business practice.
7. **Expect more class action wage and hour lawsuits**. **What to do**: Continue to be vigilant in making sure that employees are not working off the clock and that overtime is paid for hours worked over 40 hours in a week – except for employees who meet all the tests for being exempt from overtime under applicable federal and state wage and hour laws. Also, take action to guard against potential claims by non-exempt employees that they are working after hours without pay reviewing and/or responding to emails or talking to customers or co-workers.
8. With the passage of Missouri Amendment 2, employers should **expect** that in late 2019 or early 2020 they will be seeing **some applicants and employees using medical marijuana** after the Missouri Department of Health develops regulations to implement the law. **What to do**: Consider having your employee handbook and drug testing policies reviewed and updated to take into account the new amendment and consider how best to deal with potential requests from applicants and employees who are likely to claim that you should reasonably accommodate their medical use of marijuana under federal and state disability laws and train management employees to recognize marijuana impairment.
9. **Expect possible claims of failure to preserve emails and documents** in connection with employment claims. We have observed a trend in recent years of employee plaintiff's lawyers asserting that employers failed to adequately preserve evidence (e.g., documents, emails and text messages) relating to employment claims and that such failures should result in sanctions and monetary penalties against the employer up to and including entering a judgment in favor of the employee, even on a weak case. **What to do**: Have your document retention policy reviewed by counsel. Work with counsel to set up a procedure to require that a litigation hold letter be sent when you reasonably expect litigation so that potential evidence (which may be quite helpful in defending the case) is not inadvertently lost or destroyed. Remember that a duty to preserve evidence can arise before a lawsuit is filed and lawsuits can sometimes drag on for years, and personnel and computer system changes can make preserving all relevant evidence a challenge. Our attorneys have considerable experience dealing with issues of evidence preservation.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the author John Vering, any other shareholders in the Employment Law Group at the firm including Rachel Baker, John Neyens, Brenda Hamilton, Shannon Johnson, or Mark Opara or your regular contact at Seigfreid Bingham at 816-421-4460.