

Fitness Industry Workplace Law Update – Winter 2018

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Welcome to our premiere issue! Our goal is to keep fitness industry clients and contacts informed about employment and labor law issues that may affect your organizations. We hope you find this newsletter valuable and invite you to share it with interested colleagues and contacts.

In this issue, we provide a brief summary of hot topics in employment law — including reviewing 2017, what we expect in 2018, and how these issues may affect the fitness industry.

Harassment – The Speak Out Evolution

Sexual harassment claims are grabbing headlines at a pace and intensity like never before. No company is immune from potential exposure. All employers, regardless of industry, size, or geography, must be prepared for the next phase of the “[speak out evolution](#).” This is especially true in the fitness industry. In addition to the high-profile nature of these issues, 2017 saw the Equal Employment Opportunity Commission’s [Proposed Enforcement Guidance on Unlawful Harassment](#). The Guidance sets out to define what constitutes harassment, examine when a basis for employer liability exists if harassment is proven, and offer suggestions for preventive practices. Jackson Lewis [submitted comments](#) seeking clarity for employers and suggesting changes. Harassment issues will continue to be brought to the forefront in 2018.

Marijuana – States Reduce Legal Restrictions, But Uncertainty Remains at Federal Level

Twenty-nine states, the District of Columbia, Guam, and Puerto Rico now allow for comprehensive public medical marijuana and cannabis programs. Eight states also have passed adult-use legalization legislation. This growing trend affects fitness organizations operating in these states to the extent that the [state law prohibits discrimination](#) against employees based on employees’ status as a medical marijuana cardholder and/or requires employers to [engage in the interactive process](#) concerning accommodating medical marijuana use. Fitness industry employers who conduct drug testing for employees also should be mindful of changing state laws and adjust their policies and practices accordingly.

The fact that marijuana remains illegal under federal law further complicates these issues. The [only court to have weighed in to date](#), however, concluded that not only does Connecticut’s medical marijuana statute allow employees to sue for discrimination based on their qualifying patient status, but also that employers regulated by federal law are not exempt from those discrimination prohibitions.

Transgender/Sexual Orientation – A Legal Landscape in Flux

Legislation and lawsuits involving transgender and sexual orientation issues also continue to draw attention and create controversy. In 2017, the Trump Administration [took the position](#) that Title VII of the Civil Rights Act does not protect against discrimination based on gender identity. It has not made its position clear on whether Title VII prohibits sexual orientation discrimination.

On the other hand, transgender protections were expanded in some states, including [California](#). Even the courts are struggling to come to a consensus on these issues. The [U.S. Court of Appeals for the Seventh Circuit](#) concluded that Title VII protects against sexual orientation discrimination, while the Second and Eleventh Circuits reached the opposite conclusion. This year, [a decision from the U.S. Supreme Court](#) is expected in a case addressing discrimination against sexual orientation based on a public accommodation law. This case could also shed light as to how the Supreme Court will view transgender issues in the public accommodation context and sexual orientation discrimination in the employment context.

As employers, fitness organizations should ensure their equal employment opportunity (EEO) and

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harassment policies and training cover sexual orientation and transgender discrimination. Organizations in the industry should also pay careful attention when drafting policies and considering accommodations for transgender individuals in public restrooms or locker rooms.

Data Security – Ransomware, Phishing, Biometrics, IoT, Data Breach, Oh My!

Fitness industry organizations, like almost all organizations, maintain vast amounts of data about employees, customers, and clients. Every organization is at risk for a cyber incident. A 250-percent increase in [ransomware](#) attacks in 2017 resulted in damages estimated to top \$5 billion. These attacks target your electronic systems, lock you out, and demand a ransom in order to decrypt your data. While the ransom cost alone may be in the thousands of dollars, the potential unauthorized access or acquisition of employee, customer, and client personal information (*i.e.*, a data breach) could subject your organization to additional significant costs and fees.

The threat of phishing attacks was unrelenting in 2017. Spearfishing emails regularly target human resource and payroll personnel seeking employee tax information ([particularly Forms W-2 in January and February](#)) as these individuals are apt to respond to requests from management for that information. Of course, the emails are not from management, but are artfully disguised as such. Successful attacks can result in a breach that may require notification, credit monitoring, and additional remediation steps.

The [trend for greater immersion of biometrics and other technologies](#) into business operations continues with no shortage of related legal issues. Over the last few years, for example, the collection and use of [biometric data](#) (*e.g.*, fingerprints, hand scans, and so on), often in connection with timekeeping systems, have produced many class action lawsuits. While biometrics may be a preferred method of validation, legal compliance should be addressed prior to implementation.

No longer is GPS the only option for tracking or monitoring employees, facilities, equipment, and data. “Internet of Things” (IoT) technology (*i.e.*, the growing network of internet-enabled devices that communicate with one another), including wearables, automated assistants, and video and audio surveillance, allows organizations to significantly enhance their monitoring capabilities. These technologies likely improve efficiency, productivity, and safety, as well as help ensure compliance with policies, protect employer-owned property, and provide better customer and client service. Such connectivity also raises significant privacy and data security concerns. [Our article on the top 10 data privacy topics for 2018](#) discusses these issues, and some of the anticipated changes and advancements to expect this year.

Sick Leave Laws

In 2017, we saw several states (*e.g.*, [Arizona](#), [Rhode Island](#), and [Washington](#)) and local municipalities (*e.g.*, [Minneapolis and St. Paul](#), [Cook County](#), and [New York City](#)) enact laws expanding the circumstances under which employers are required to provide their employees time off (often with pay). By way of example, in New York City, absences from work are allowed when the employee or a covered family member of the employee is the victim of family offense matters, sexual offenses, stalking, or human trafficking. As these laws continue to be amended or expanded, employers (especially those with locations in multiple cities or states) should carefully review local statutes or ordinances. Employers need to confirm their sick leave policies and practices are compliant with all applicable legal requirements. New laws or amendments to existing laws to expand employer responsibilities with respect to sick leave are expected in 2018.

Wage & Hour – Localizing Minimum Wage

Minimum wage increases at the state and local level continue to trend. The start of 2018 saw increases in 18 states and 19 cities and counties. Many states and [cities](#) also passed legislation in 2017 setting significant increases that phase in over several years. Employer challenges to such increases were unsuccessful in 2017 at both the [state](#) and [local](#) level. Employers in the fitness world should continue to stay tuned for changes and (particularly for those with a national presence) ensure appropriate processes are in place to account for changes already [set for 2018 and the coming years](#).

Fitness industry employers also should consider the ripple effect of minimum wage changes and should evaluate policies and procedures accordingly. This includes accounting for any increases to non-traditional pay structures (*e.g.*, commission and piece rate) to ensure non-exempt employees are still paid the minimum wage.

We will continue to report on issues that affect organizations in the fitness industry. Please contact your Jackson Lewis attorney to discuss these developments and your specific organizational needs.

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