

# Top Five HR and Compliance Tips for Preventing Your Greatest Strength—Your Workforce—from Becoming Your Greatest Vulnerability

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May 21, 2019



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# Preliminary

This presentation provides information of a general and educational nature and does not constitute legal advice regarding any specific situation or give rise to an attorney-client relationship. For legal guidance regarding any particular matter, please consult with an attorney.

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# Overview

## Why focus on HR and compliance issues?

- Time
- Money (especially for uninsured claims)
- Employee relations
- Public perception: brand, customers, and business partners

## Our session:

- 25 minutes for slides, plus 5 minutes for Q&A
- Provides awareness of key issues
- Not meant to be a deep dive

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***Tip 1:***  
**When hiring, know when and how to ask for information, including what not to ask.**

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# When hiring, know when and how to ask for information, including what not to ask.

Employers have long asked certain questions during the hiring process, often on application forms:

Pay history

Record of criminal convictions or even arrests

To a lesser extent, bankruptcies or other aspects of credit history

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# 1

## (continued)



Worker advocates have long argued that these types of questions perpetuate racial and gender-based discrimination.



As a result, a number of states and localities have enacted laws designed to exclude this type of information, or to minimize its impact, during the hiring process.

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## 1 (continued)

### *“Ban the Box” Laws*

- At least 10 states (e.g., California and Illinois) and at least 15 localities (e.g., D.C.) prohibit inquiries regarding convictions in job applications and bar “no conviction” ads.
- Questions normally permissible after a conditional job offer.
- Exceptions may apply (security, financial positions).

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## (continued)

### *Credit History Bans*

- Approximately 10 states (e.g., California and Illinois) and five localities (e.g., New York City and D.C.) bar any inquiry into credit history at all, unless an exception applies.
- Unlike criminal background check restrictions, credit history bans normally apply throughout the hiring process, rather than merely affecting the timing of when you can ask.

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# 1

## (continued)

### *Salary History Bans*

- Approximately 15 states (e.g., California and Massachusetts) and 12 localities (e.g., New York City) bar any inquiry into an applicant's salary (or pay) history.
- Rules vary regarding what happens if an employee volunteers pay history.
- Generally may ask about pay *expectations*, as well as forfeited deferred compensation and competing offers.

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## 1 (continued)

### *Don't Forget About the Fair Credit Reporting Act*

- May apply if you do any kind of background check, whether it involves criminal history, financial history, use of social media, or other information.
- When the law applies, you need to follow certain notice, consent, and other requirements.
- This is true not just for hiring, but at any time thereafter.

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***Tip 2:***  
**Be careful with non-competes,  
both when hiring and when trying  
to protect confidential business  
information.**

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## Be careful with non-competes, both when hiring and when trying to protect confidential business information.

It is unusual for hourly restaurant workers to be subject to non-compete agreements, but is more common for individuals with sensitive business information.



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# 2

## (continued)

When hiring employees, especially salaried or headquarters personnel, identify any contractual restrictions that may be in place from their current or former employer.

If the employee has a non-compete, tread carefully in order to avoid, or to reduce the risk of, litigation.



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# 2

## (continued)

Before you use agreements or other techniques to limit what your employees can do with regard to competitors, be aware of these considerations:

- Non-competes are enforceable in most states, if “reasonable.”
- A number of states already prohibit some or most non-competes.
- In 2019, legislatures in roughly 20 states have proposed or will propose further restrictions on non-competes.

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## 2 (continued)

Non-competes involving low-wage workers have come under scrutiny by state attorneys general in several states (as well as the District of Columbia):

- California
- Illinois
- Maryland
- Massachusetts
- Minnesota
- New Jersey
- New York
- Oregon
- Pennsylvania
- Rhode Island
- Washington

The focus of these cases has been on national fast food and retail companies.

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# 2

## (continued)

### *Steer Clear of “No Poach” Agreements*

Federal and state antitrust regulators regard it as a “red flag” for a business to do any of the following:

- Agree with another company to refuse to solicit or to hire that company’s employees;
- Agree with another company about employee benefits or compensation; or
- Discuss these topics with colleagues at other companies, including in social settings, or even to be present when others discuss these topics.

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# 2

## (continued)

### In 2018...

Washington's attorney general brought actions against franchise systems that include no-poach agreements in their contracts, resulting in agreements with more than 50 chains.

### In March 2019...

Several major restaurant chains entered into an agreement with the attorneys general of 13 states and the District of Columbia regarding these types of contractual provisions.

***Tip 3:***  
**Recognize the sea change that has occurred because of the #MeToo movement, and treat complaints accordingly.**

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# 3

## Recognize the sea change that has occurred because of the #MeToo movement, and treat complaints accordingly.

For the most part, the law of sexual harassment has not changed.

What has changed is the public perception of these issues:

Revelation of high-profile instances of alleged harassers who settled several matters confidentially over an extended period of time.

Criticism that confidentiality of investigations, arbitration, and settlement allowed individuals to continue to engage in their alleged behavior.

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# 3

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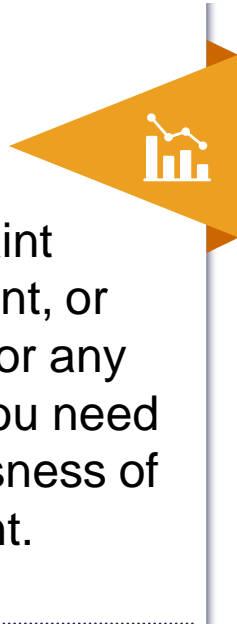
### *The New Reality*

- Settlement value of claims has increased.
- Plaintiffs' counsel are emboldened.
- Significant use of, and impact from, social media and other publicity efforts.
- Legislative efforts to prevent confidential settlements and to ban mandatory arbitration.

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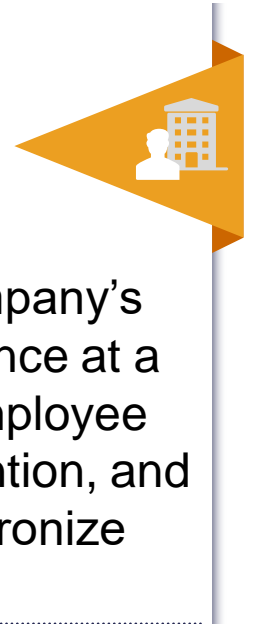
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## (continued)



Today, whether a complaint alleges sexual harassment, or race-based misconduct, or any other hot-button issue, you need to treat it with the seriousness of a brand-threatening event.

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Allegations involving a senior executive can threaten a company's survival, but even an occurrence at a local restaurant can affect employee morale, recruitment and retention, and the public's willingness to patronize that site.

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# 3 (continued)

***Think about these matters from the standpoint of not only what the law requires, but what a jury or a potential customer would expect a responsible business to do.***

Some states ban non-disclosure agreements relating to sexual harassment or assault (e.g., Tennessee, Vermont, and Washington), with some states such as California and New Jersey banning non-disclosure agreements more broadly.

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# 3

## (continued)

New York now requires employers to have a sexual harassment policy that, among other things:



- Prohibits sexual harassment;
- Provides examples of prohibited conduct;
- References federal and state law and available remedies;
- Notes that there may be applicable local laws;
- Contains a complaint form and investigation process;
- States that harassers and supervisors who knowingly allow it to continue will be punished; and
- Prohibits retaliation.

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# 3

## (continued)

New York also requires sexual harassment training, which must:



- Be completed for all current employees by **Oct. 9, 2019**;
- Be interactive;
- Include an explanation of sexual harassment consistent with guidance issued by the state Department of Labor;
- Include examples;
- Include information concerning federal and state provisions and remedies;
- Address available complaint adjudication forums; and
- Cover supervisor conduct and additional responsibilities.

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***Tip 4:***  
**The interplay between workplace law and substance use and abuse has become much more complicated in recent years.**

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## The interplay between workplace law and substance use and abuse has become much more complicated in recent years.

Public sentiment regarding marijuana use has shifted considerably in the past 10 to 15 years:

- At least 33 states and D.C. legalize medical marijuana use.
- At least 11 states (including Arizona, Illinois, and Pennsylvania) prohibit discrimination against users of medical marijuana.
- At least 10 states and D.C. permit recreational marijuana use.

Marijuana use remains illegal under federal law.



## 4 (continued)

### *The Opioid Crisis*

- Opioids are now the most commonly abused illegal drug in the United States.
- 2/3 of individuals misusing opioids report being employed.
- Nearly 1/3 of employers report impaired job performance due to prescription painkillers.
- Opioids cause an estimated 15,000 deaths a year in the United States.

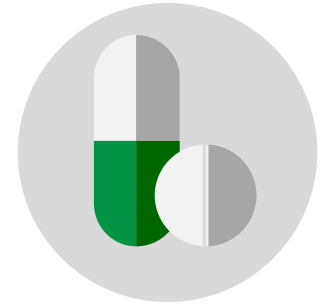
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# 4

## (continued)

Substance abuse cuts across numerous legal areas, including:

- ▶ Americans with Disabilities Act
- ▶ Family and Medical Leave Act
- ▶ HIPAA
- ▶ Ambiguity regarding whether and when employers may discipline employees for marijuana use when state law legalizes use in whole or in part, including conflicting court rulings concerning federal preemption



# 4

## (continued)

Today, restaurants face substance abuse issues in a variety of ways:

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- Employees who may be impaired while on the job;
- Attendance and performance issues related to an employee's potential substance abuse;
- Employees who need time off to care for addicted family members; or
- Employees who need time off to attend a substance abuse treatment program.

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# 4 (continued)

## *Key Considerations*

- ADA restrictions on asking medical questions or requiring a medical exam.
- The ADA permits testing for current illegal drug use, but be careful where state law legalizes marijuana, and remember that opioids may have both legal and illegal uses.
- It is difficult for medical testing to differentiate between current marijuana impairment and past consumption.

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# 4

## (continued)



If you are in a state that allows medical or recreational marijuana use, seek guidance before disciplining an employee for off-duty, off-premises marijuana use.

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Some states limit pre-employment drug testing, allowing the testing only after a conditional offer of employment.

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If you test for drugs, allow an applicant or employee an opportunity to explain any prescriptions.

# 4

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If an employee makes for an accommodation—including a leave of absence, to deal with substance abuse issues, or any other type of accommodation, whether or not related to substance abuse—be sure to engage in an appropriate interactive process.

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The same is true if you have notice of the need for an accommodation even without a request.

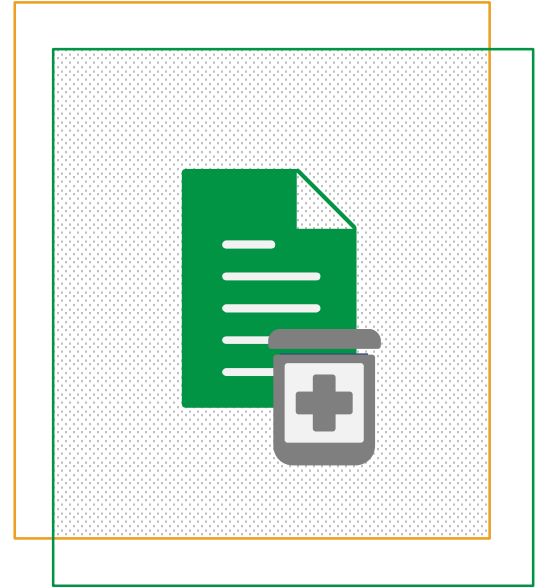
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In some states, including California and New York, failure to engage in an interactive process may itself violate the law.



# 4 (continued)

You need a well-designed and consistently applied policy addressing substance abuse, as well as the protocol for handling requests for accommodation.



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***Tip 5:***  
**Be prepared for the increased  
minimum salary for overtime  
exempt status.**

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## Be prepared for the increased minimum salary for overtime exempt status.

On March 22, 2019, the U.S. Department of Labor published a Notice of Proposed Rulemaking that proposes the following:

Raising the minimum salary for the executive, administrative, and professional exemptions under the FLSA from \$455 per week (\$23,660 per year) to \$679 per week (\$35,308 per year);

Allowing certain bonuses and other incentive compensation to satisfy up to 10% of that amount; and

Increasing the threshold for the highly compensated exemption from \$100,000 to \$147,414 per year.

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# 5 (continued)

Public comments on the proposal are due on or before May 21, 2019, unless DOL extends the deadline.

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For most restaurants, this change may affect restaurant managers and assistant managers, as well as certain administrative or other office employees.

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We anticipate that a Final Rule consistent with the proposal will go into effect in early to mid-2020.



# 5 (continued)



We do not expect that the courts will block this increase the way that the courts stopped a significantly larger increase in 2016.

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Therefore, if you have managers or other exempt employees earning less than \$35,308 per year in salary, you will need to prepare for this change by either:

- Converting these employees to non-exempt **or**
- Modifying their pay in order to meet the new standards.

# Thank you!

## Takeaway 1

Have policies in place to deal with these issues **before** problems arise.

## Takeaway 2

Consider not asking about pay or credit history at all, and not using non-competes for employees working in restaurants.

## Takeaway 3

Investigate all allegations of sexual or other harassment or discrimination promptly and thoroughly.

A nighttime photograph of a modern building with a rooftop lounge area. The building's windows are illuminated from within, and the lounge area is decorated with blue lighting and potted plants.

# Join us!

## Restaurant Law Center Third Annual Legal

Westin Galleria, Dallas, TX  
October 23-25, 2019

For more information about the event,  
please visit [RestaurantLawCenter.org](http://RestaurantLawCenter.org) or  
call 202-973-5370.

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