BUSINESS BRIEFS

Legal Developments Affecting Business

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#MeToo a Year Later: What Companies Should be Doing

By David M. Briggs

It is hard to believe that it has been a year since we first heard of #MeToo. In October 2017, a story came out detailing the egregious conduct of Harvey Weinstein. That story became the springboard to a broader movement demanding accountability from institutions throughout the country.

We cannot determine whether there has been an uptick in claims over the course of the past year because statistics from the Equal Employment Opportunity Commission or the Bureau of Labor and Industries are not available yet for this period following the beginning of the #MeToo movement. But, anecdotally, many law firms have seen an increase in the number of administrative claims and lawsuits filed.

Employers in every industry have stepped back to evaluate their policies and procedures. It is a good time to reflect on how employers can make their companies better and more compliant. We all also need to consider how to respond in case of allegations of harassment or discrimination.

Policies and Procedures

Every company with employees should have a policy about harassment and discrimination in the workplace. These policies should do more than just prohibit inappropriate conduct. You should provide specific examples of inappropriate conduct and a mechanism to allow employees to submit complaints. Most importantly, companies should designate where those complaints go.

Keep in mind that employers will typically be held liable for harassment or discrimination that they know or should have known about. That knowledge extends to all of a company's supervisors. So, if a supervisor knows about or participates in harassment of an employee, the company will face great risk of liability if something happens to the employee.

Train Your Employees and Managers

Companies need to set the tone and lay out expectations for all of their employees. In past harassment trainings, the education focused on what harassment and discrimination is and conduct that we look to model.

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Now, trainings for all staff should also include the creation of an open environment that encourages employees to step in on behalf of other employees. A focus should be on the culture that you want to establish.

In conjunction with that training, supervisors and managers need to be trained. These employees have unique abilities to create liability for your company. Under the law, the company is liable for harassment or discrimination that it knows or should have known about. The law also says that the company is considered to be aware of any harassment or discrimination about which any supervisor or manager knew or should have known. These employees must know when to report concerns to human resources or owners. Sitting on issues or "dealing" with them—without actually addressing them—can lead to substantially more liability. Supervisors and managers need to be trained on how to intake complaints and discover information as well as know where to report that information.

What to Do When a Complaint Comes In

Companies must be prepared in the event a complaint comes in. If the company receives a complaint that an employee is being harassed or discriminated against, you must take prompt action. That may mean suspending the alleged harasser or moving his/her individual shifts (but be very careful about changing anything for the alleged victim or any witness!).

Next, you will need to select an investigator. Here are a few questions that you should ask yourself when selecting an investigator:

- Do we have someone with sufficient experience to conduct the investigation?
- Do I need to get an outside investigator? If you do select an outside investigator, are you running that investigator through your attorney to preserve potential attorney/client privilege?
- Will it be a team of investigators or just one?
- How will the person record conversations (notes vs. audio/video recording)? Note: Know the laws related to recording conversations before you start!
- Will the person or group be neutral—and perceived by all parties as neutral?
- What will the investigator be in charge of? (i.e., just gathering facts; recommending disciplinary/remedial action if warranted; or asked to impose discipline/remedial action)

Next, the methodology of the investigation is important. Typically, the investigator will first speak to the one complaining about the conduct. Next the investigator would talk to any alleged victims, followed by the accused. The investigator will need to check in with witnesses, especially those recommended by the alleged victims and accused. At each step of the way, investigators need to remind parties of the fact that the company will not tolerate retaliation against people making complaints or participating in the investigation.

Determining when an investigation is complete can be a challenging decision. Will another witness just be cumulative? Or could it add new information for the investigators to consider?

Once complete, an investigation report should be drafted that describes the investigative process, a brief summary of statements from witnesses and conclusions of the investigation. From there, the company should take disciplinary action as appropriate. It may also decide to take more remedial action for certain groups/departments, such as harassment training, team building, or classes on effective communication.

Conclusion

In the end, the #MeToo movement has been a wakeup call for many employers. Having good policies and procedures in place now can ensure a healthy and safe working environment while saving the company from long and expensive litigation later.

Should you have questions or want to talk about your policies or procedures or schedule a training with your staff, contact David Briggs at (503) 399-1070 or dbriggs@sglaw.com.

SDC Modifications on the Rise

By Margaret Y. Gander-Vo

In 1989, the Oregon State legislature passed ORS 223.297–223.314, which regulates and standardizes the ability of local jurisdictions to charge developers a one-time fee on new development and certain types of redevelopment to pay for a portion of existing or planned infrastructure necessary to meet the needs of the development. These charges, known as System Development Charges ("***SDCs***") are one mechanism local governments use to finance infrastructure growth through areas of new development. As development expands into new areas, many jurisdictions are opting to update their SDC schedules to help offset the costs of the increased infrastructure needs. Typically, SDCs are charged under the following scenarios:

- Change in use or occupancy
- An increase in the number of plumbing fixture units
- Addition of accessory dwelling units
- Increase in the size of the water meter
- Increase in impervious area
- New connections to sewer/stormwater
- Increase in volume to existing connections
- Increase in square footage of residential/ commercial occupancy

Under the statutory scheme, local governments can use SDCs for improvements to water supply treatment and distribution; waste water collection, transmission, treatment, and disposal; drainage and flood control; transportation; and parks and recreation. The fees may be assessed as a reimbursement of unused infrastructure capacity or as an improvement fee for proposed infrastructure under the local government's Capital Improvement Plan ("***CIP***"). However, the fees cannot include an improvement fee where sufficient capacity in the system exists at the time of the development application. Additionally, SDC revenue may be levied and used for capital costs but may not be used for ongoing maintenance or projects designed to fix existing deficiencies or replace existing capacity.

Local governments establish their SDCs by either ordinance or resolution, and adopt a methodology that sets forth the mechanism for calculating the SDC, provides a credit system for any qualified capital improvements financed by a developer, and establishes a mechanism for reviewing any challenged expenditure of SDC revenue. This methodology must be adopted via a public process allowing for involvement from stakeholders in the community.

Prior to the imposition of the ordinance or resolution, the local government must have a CIP in place that outlines the local government's long-term plan for the completion of CIP. In conjunction with the CIP, the local government must also have a public facilities plan, or a plan that is comparable in nature, that lists the infrastructure improvements that will be funded with the improvement fee portion of the SDC. Within these plans the local government must provide an estimate of the cost and timing for each of the listed improvements. These plans may be modified by the local government from time to time and create the ability for developers and local jurisdictions to forecast the improvements associated with the development of any given property.

The statutory scheme does not prescribe a specific mechanism for the calculation of SDC rates, but over time there has been significant standardization of the methodologies across jurisdictions. An example of one of the more standardized methodologies is that used for the calculation of transportation system improvements. Transportation SDCs are typically determined on a standard trip-generation count based on the type of dwelling, business, or facility being developed. The standard trip-generation count is then used to calculate a maximum charge, a percentage of which is charged to the developer.

Historically, the imposition of SDCs for the development of parks had been most commonly found under SDC ordinances at the county level. However, over the past several years an increasing number of cities are adopting and assessing SDCs for the development of park infrastructure and other less common SDCs. Along with this subtle expansion of categories, many local jurisdictions are in the process of updating their SDC methodologies to adjust for a variety of factors, including increased population and

growth estimates and changes in traffic forecasting, which lead to an increased need for capacity in those jurisdictions. The process for increasing SDCs is public in nature, often requiring the creation of a committee tasked with evaluating the needs of the community against the existing fees and adjusting fees as necessary. Ordinarily, committee members will meet with builders and other stakeholders in the community during this stage of the process in order to refine earlier fee estimates. After this period of evaluation, the committee tasked with the evaluation and revision of the SDC methodology for the jurisdiction will hold a public hearing allowing the public to question or challenge the methodology and provide feedback to the jurisdiction. After the public hearing the committee may revise the methodology to account for feedback from the community prior to a final vote by the local decision maker. The entire process takes a minimum of 90-days.

If you are looking into the development or redevelopment of property within Oregon, SDCs may represent a significant cost for your development. Many jurisdictions list their SDC ordinances and rates on their website for review by the public. For more information, please contact a member of our Real Estate & Land Use group.

Oregon's Updated Advance Directive Law

By Erin N. Milos

Recent changes to Oregon's Advance Directive law (ORS 127.505 et seq.) may have you asking whether you need an Advance Directive, or if you will need to update your current one. The new law goes into effect on January 1, 2019. Below is some general information about the Advance Directive in Oregon and how the new law might affect you or your current Advance Directive.

In Oregon, an Advance Directive form is a document used to appoint health care representatives to make health care decisions during periods of incapacity. The Advance Directive is also used to express wishes regarding life-sustaining treatment, such as tube feeding and other forms of life support. Anyone with the ability to make health care decisions can complete an Advance Directive. Minor children, adults under the care of a guardian, and mentally incapacitated persons cannot execute a valid Advance Directive.

Sometimes an Advance Directive is associated with advanced age or illness. However, an up-to-date Advance Directive helps loved ones make health care decisions according to known wishes in the event of an unforeseen medical situation. An Advance Directive also helps ensure that end-of-life care will be guided by the appointed person.

Recent Changes to the Advance Directive Law

The updated Advance Directive law adopts a new statutory form that is more functional and intuitive than the form currently in use. It also provides a new additional form that is limited to the appointment of health care representatives and omits end-of-life wishes. The new law also establishes an Advance Directive Adoption Committee ("***Committee***") to review and update the Advance Directive form on an ongoing basis, with changes subject to the approval of the legislature and Governor. The Committee will be made up of thirteen individuals with various areas of expertise, including, among others, the Long-Term Care Ombudsman or his or her designee, medical professionals, lawyers, and representatives for persons with disabilities, consumers of health care services, and the long-term health care community.

The modified Advance Directive form will be used beginning January 1, 2019, but sunsets January 1, 2022. Here are some key differences between the current statutory Advance Directive form and the new updated statutory Advance Directive form:

> *Current Advance Directive Form*. The current Advance Directive includes a section appointing health care representatives and a section giving instructions to appointed health care representatives regarding life-sustaining treatment such as tube feeding and other life support measures. The current Advance Directive requires the signature of two witnesses. Appointed health care representatives must also sign to accept

appointment. The current Advance Directive will continue to be used until the new law takes effect on January 1, 2019.

New Advance Directive Form. The new Advance Directive will use simpler, more intuitive language and organization than the current form. The new Advance Directive law provides for two forms: one form used only to appoint health care representatives, and a second form used to both appoint health care representatives *and* give specific instructions regarding end-of-life decisions. The new law also allows the option of having two witnesses or a single notary sign the Advance Directive. In the new form, the witnesses or the notary must accept the appointment in order for the appointment to be effective.

The instructions in the new form have been reorganized and slightly reworded, replacing a full page of introductory instructions appearing as the first page in the current form. The new form states that any prior Advance Directive will be revoked upon signing a new Advance Directive, and the new form may be revoked in any manner the signer wishes. The new form also includes a section indicating whether the instructions must be followed or are to be considered as mere guidelines.

The Bottom Line

The modified Advance Directive form will provide clearer instructions and the flexibility of using either two witnesses or a notary to witness execution of the document, making the new form more user-friendly. Importantly, the new law does not render your current Advance Directive invalid, even after the law takes effect. You do not need to execute a new Advance Directive unless your wishes have changed. When the time comes to update your Advance Directive, you may notice the new form looks different. However, it still accomplishes the same objectives of appointing health care representatives and expressing wishes regarding end-of-life decisions, just as the old form did.

For any questions about this article, you may contact any of the attorneys in the Saalfeld Griggs PC Estate Planning practice group, who would be happy to assist you.

Landmines in Nonprofit Executive Compensation—Avoiding Excise Taxes, the Old and the New

By Eric Robertson

Both closely held for-profit corporations and nonprofit organizations have long been restricted in how much they may compensate their key employees. In both situations, the compensation paid to key employees must be "reasonable." With for-profit corporations, this rule is in place to ensure that amounts deducted by the corporation as "wages" paid to shareholders are not in actuality non-deductible dividends. With nonprofit organizations, this rule is in place to ensure that the money coming into the organization is being used in ways that further the mission for which the organization was granted tax-exempt status. When reasonable compensation rules applicable to for-profit corporations are not followed, the consequence is loss of deductions. When reasonable compensation rules applicable to nonprofits are not followed, the consequence can be significant excise taxes and even loss of tax-exempt status. The passage of the Tax Cuts and Jobs Act (the "***Act***") brings the issue of nonprofit executive compensation back into the forefront because the Act included two new excise taxes specific to nonprofit organizations.

Payment of Excess Compensation to a Nonprofit's Key Employee

Many nonprofit organizations have the difficult task of attracting and retaining top talent in key positions. Nonprofit organizations must fend off other nonprofits and for-profit organizations from poaching their key employees. The Internal Revenue Code (the "***Code***") requires that a nonprofit pay its key employees no more than "reasonable compensation." A key employee is generally one who can exercise substantial influence over the organization, such as an officer or director or the family member of an officer or director. The Code does not provide a definition or formula for determining what exactly "reasonable compensation" is. Rather, the Code's regulations and the courts have stated that compensation will be deemed "reasonable" if the amount paid would ordinarily be paid for

comparable services by a comparable enterprise (whether nonprofit or for-profit) under comparable circumstances. If compensation is deemed excessive, the key employee can be hit with a 25% excise tax on amounts deemed in excess of "reasonable." If the excess amount is not repaid to the organization in a timely manner, then the excise tax increases to 200% of the excess amount. In some situations, those individuals who approved the excess compensation (such as the organization's trustees, directors and/or officers) may also be hit with an excise tax, albeit at a lower rate. As indicated above, in particularly egregious situations the nonprofit organization may also lose its tax-exempt status.

When Compensation Paid to "Covered Employees" Exceeds One Million Dollars

Even if a public for-profit corporation's compensation paid to an executive is reasonable, the corporation may not be able to take the full amount of compensation paid as a deduction. The IRS limits deductions to business expense salaries that did not exceed $1 million for "Covered Employees," which is generally defined as the corporations' five highest paid officers. Because nonprofit organizations are not publicly held and do not claim deductions, this $1 million limitation was not applicable to such organizations.

Prior to the Act, bonuses, stock options and other "performance-based" pay were excluded when calculating the salaries of Covered Employees. As a result, many publicly-held corporations structured the compensation packages of Covered Employees through incentives, rather than a high base salary. Under the Act, the exclusion of performance-based pay from the $1 million limitation is eliminated for publicly-held companies.

Additionally, a new version of the $1 million limitation on compensation paid to Covered Employees was extended to nonprofit organizations. Since nonprofit organizations are not subject to income tax, the mechanism to provide the limitation is an excise tax of 21% on compensation that exceeds $1 million, which is imposed to the nonprofit organization. This excise tax is independent of the unreasonable compensation limits, meaning that a nonprofit could pay all of its executives "reasonable compensation" and still trigger this new excise tax. When calculating a Covered Employee's compensation for purposes determining whether it exceeds $1 million, the IRS includes: (1) the employee's total wages (with some exceptions for certain Roth contributions); and (2) any amounts that are considered vested deferred compensation (i.e., amounts not subject to a "substantial risk of forfeiture"). Notably excluded when determining an employee's compensation are amounts paid to licensed medical professionals including surgeons, doctors, nurses, or veterinarians. However, only amounts paid in relation to the medical professional's services are excluded. Any other amounts paid to the medical professional would be included.

Excess "Parachute Payments"

The Act also limits income tax deductions and imposes an excise tax upon "excess parachute payments" made by public, for-profit and nonprofit organizations, respectively. However, unlike the $1 million limitation, the excise tax is imposed on the recipient of the payment rather than on the nonprofit organization. A "parachute payment" is compensation that is contingent on an employee's separation from employment with the employer. The Act defines an "excess parachute payment" as any parachute payment, the present value of which exceeds three times the executive's "base amount." The executive's "base amount" is generally the average compensation paid to the executive over the previous five years. Excluded from the definition of a parachute payment are payments made from qualified retirement plans, 403(b) plans, 457(b) plans, and payments to licensed medical professionals or to employees who are not considered "highly compensated employees" under Code section 414(q). In the event that an amount is deemed to be an excess parachute payment subject to the excise tax, that excess amount is disregarded when determining whether the nonprofit has paid Covered Employees compensation in excess of $1 million. In other words, the excess amount is not taxed twice (e.g., once as compensation in excess of $1 million and again as an excess parachute payment).

Conclusion

The takeaway from these new nonprofit laws is the same as the old: Nonprofit executive compensation must be closely monitored to avoid significant tax penalties. Finding the right balance between offering a competitive and attractive compensation package and offering unreasonable or excess compensation can be tricky. Our attorneys in the Employee Benefits and Executive Compensation Group would be happy to assist your organization in structuring new executive compensation packages or evaluating your current agreements.

Events and Announcements

Best Lawyers Announcement
Saalfeld Griggs is pleased to announce that seven of its lawyers have been recognized by *The Best Lawyers in America* in the upcoming 2019 Edition. We wish to congratulate the following lawyers from our team for inclusion in the 2019 Edition: Douglas Alexander, Randall Cook, Hunter Emerick, Shannon Martinez, Jeffrey Moore, Erich Paetsch, and Randall Sutton.

July 16 – HBA Golf Tournament
On July 16, our Construction Industry Group members sponsored and participated in the Home Builders Association of Marion and Polk Counties' annual Golf Tournament at the Salem Golf Club. It was a hot, but enjoyable day out on the course.

August 17 – Company Picnic
On August 17, the firm congregated for its yearly company picnic at the Log House Garden. Attorneys, staff, and their families brought a convivial attitude to the venue, and all enjoyed food, drink, and semi-competitive lawn games. With s'mores abound, bubbles in droves, and face paint ranging from Jurassic Park to strawberries, everyone took pleasure in the annual festivities.

August 28 – OBA Lender Liability Presentation
Attorneys Erich Paetsch and Shannon Martinez attended and presented at the Oregon Bankers Association's Lending Committee's August meeting. They presented on how best to avoid lender liability.

September 6 – SEDCOR Annual Awards Luncheon
On September 6, Saalfeld Griggs was a title sponsor for SEDCOR's Annual Awards Luncheon. The firm is thrilled to support the ongoing work of SEDCOR and pleased to have the opportunity to celebrate innovators in the Willamette Valley business community.

September 27 – Annual Celebrating Women in Business Event
Saalfeld Griggs Women's Industry Group applauded and engaged women in business at its 9th annual Celebrating Women in Business event. Over 100 women attended the evening, which was filled with networking, socializing, eating and drinking (some really good wine). The entire evening featured women owned businesses—the female members of Gail Gage Band performed during the networking portions of the evening; Just us Girls bartended; and the Whistler Sisters prepared small bites to complement our featured wine flight. After networking, the evening unfolded with a welcome from Shannon Martinez, a witty introduction of the female attorneys from Christine Moehl (which wove together the podcast 'My Favorite Murder' with a story about Mary Leonard, Oregon's notorious first female attorney), and a panel discussion with Isabelle Meunier, founder and winemaker of Lavinea, Mimi Casteel, founder and winemaker of Hope Well Wines, and Debbie Rios, owner and general manager of Santiam Wine & Bistro. The panelist shared their personal stories of success, philosophies about wine, and told us about being female entrepreneurs.

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