Speaker 1 (00:00):

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Kelly Bunting (00:19):

Welcome to Asked & Answered, Greenberg Traurig's Labor & Employment podcast. I'm your host Kelly Bunting, and I'm the shareholder in GT's labor and employment practice. We hope to inform our audience about current hot button issues and employment law. Welcome back to the Asked & Answered Greenberg Traurig's L&E podcast. We continue our discussion with part two of the conversation.

Speaker 3 (00:43):

We are now going to segue into the new sex harassment law. And to do that, we'll start off with a little video clip. For those of you who don't recognize that clip, it is from the movie Horrible Bosses, and it is a clip about sexual harassment by the female boss against the male employee. So basically what happened is in this last legislative session, an amendment to the Texas labor code just slipped right in with little fanfare. And what that did was add a new chapter, C1 to the Texas labor code. There are three major changes that that chapter implemented. The first is a new definition of employer with respect only to sex harassment claims. That definition is this an employer, which is someone who can be liable for sex harassment under this statute, is any person who employs one or more employees or acts in the direct interest of the employer.

Speaker 3 (01:41):

Now, if you think about that under the statute itself, with respect to all the other types of protected claims, so religious discrimination, age discrimination, the threshold for employees is 15, but the legislature has decided that with respect to sex harassment, it's one or more. So that means that more employers can now be held liable for sex harassment. The second change is an expansion of the timeframe to file a charge under the state statute. It used to be 180 days. Again for sex harassment claims it's now been extended to 300 days, which means that employees have a longer period of time to file their claims. And also that's always problematic because if an employee waits till the last minute, you may have attrition and lose valuable witnesses or key players you might need to talk to about the facts of the case.

Speaker 3 (02:33):

Number three, it defines an unlawful employment practice. And that definition is if an employer, its agents, or supervisors knew, or should've known that conduct constituting sex harassment was occurring and failed to take immediate and appropriate corrective action. Now, if you noticed, I said agents and supervisors. That's right, under the new statute, supervisors and agents can be individually liable. This means that we in Texas are now more stringent than the federal standard, which doesn't provide for individual liability for people like supervisors. So what that means in full is that we now have a new scheme here that only applies to sex harassment and makes those claims a lot easier for employees to pursue. With respect to considerations, there are a lot of things to think about here. With respect to investigations, employers may want to consider providing disclaimers when they conduct investigations to let particularly supervisors know if those supervisors had any hand in or perhaps failed

to stop any kind of sexually harassing behavior to let them know that they may be subject to individual liability.

Speaker 3 (03:48):

With respect to training, you absolutely want to make sure it is a best practice already to go ahead and train your managers and your rank and file employees on sexual harassment and how to prevent it and how to report it. But now you need to make sure that your supervisors know that they could be subject to individual liability if they fail to act. And we see this a lot in our practice where supervisors say, oh, well, I just thought this person was kidding, or they didn't mean to harass someone. Well, that's not the standard. And your supervisors need to be trained and understand what that standard is so they can meet it. With respect to job descriptions, you may want to beef up your job descriptions and let anybody in a supervisory capacity know that they are now going to be responsible directly for seeing and handling sexual harassment claims, or at least making sure they know what they need to report.

Speaker 3 (04:43):

So they need to be able to issue spot is the best way to put that. And they need to understand that and their job description should reflect that that is an essential function of their job, is ensuring that they prevent that kind of behavior in the workplace. With respect to insurance coverage, it's probably a good idea for employers to contact their brokers and to make sure they know what their coverage is. Particularly if they have Employment Practices Liability Insurance, or EPLI policies. So for example, you may have a policy that covers the employer if they get sued for any kind of sexual harassment claims. But what about coverage for your supervisor who now gets sued as well? Even if there is coverage, does the policy allow for you to hire separate defense counsel, especially if you think that the supervisor failed to do something that he or she should have done such as notice that this behavior was going on and stop it.

Speaker 3 (05:38):

With respect to policy updates, this may be a forward facing policy to your employees, or it may be something like an operations policy internally for your management. But what you may want to think about is you may want to let your supervisors know what is expected of them if they see something that they're not sure if it constitutes sex harassment, if they have questions, you might even want a checklist. What do they need to be looking for? What is a red flag? When do they need to call HR? So you may want to update policies to let them know these things. And then finally, for some employers, they may want to implement arbitration agreements. And in that respect, instead of going to court, you've got an agreement whereby you and the employee agree to go to arbitration, which is a private proceeding to hash out whatever their claims are.

Speaker 3 (06:29):

Now, if you already have an arbitration policy, you want to make sure that in the definition of employer, where you say the employer and the employee agree to mutually arbitrate, you want to make sure that that definition is broad enough to include your supervisors, managers, and agents. So it's a good idea to dust off that arbitration agreement and take a look and make sure that it includes all of those people. Because if it doesn't, you could end up with a lawsuit where you are split, where you, the employer may be in arbitration, but the employee could be in court. And you may have people who have to be witnesses in both proceedings, and certainly you would not want there to be conflicting results in those two different proceedings.

Speaker 3 (07:10):

Next, we're going to talk about the Texas Heartbeat law. And I'd like to preface this with this is not going to be a political or a religious discussion by any means. Instead, we're going to talk about the implications for employers with a law that was written with a specific purpose in mind by the legislature, but unfortunately was written in a way that has a lot of ambiguity that could lead to liability for employers. So I think most people are familiar by now with The Heartbeat Act. It creates a private cause of action against people who aid and abet abortions. And a person is defined not only as an individual, but it could be a corporation. It could be a partnership. So it is a very broad definition. The only kind of entity or person it doesn't include would be a state actor. So any individual who works for the state, they cannot bring an action, but basically everyone else can. So aiding and abetting an illegal abortion is what the crux of this statute is all about.

Speaker 3 (08:14):

That's what liability is founded on. And an abortion is illegal in Texas under the statute if it occurs after a fetal heartbeat is detected, which is generally around six weeks of gestation, but it could be a little earlier. Or if the doctor fails to test for a heartbeat, those are the two conditions. So aiding and abetting is where the liability is. So here is the language straight from the statute, and I won't read it all, but I will point out a few things that create the ambiguity we're going to talk about. The first is an employer, or excuse me, a person can be liable under the statute if they knowingly engage in or intend to engage in conduct that aids or abets the performance or inducement of an abortion, regardless of whether they knew, or even should've known that an abortion would be performed or induced in violation of the statute.

Speaker 3 (09:06):

So here's the ambiguity. If you break down what I just read, if you take the paragraph and cut it up, what you see is there is liability if the person knowingly engages in conduct, regardless of whether or not they knew. So there are two interpretations here and you all can decide which one you think is more realistic, but the legislature did not define which one is correct, or whether both are correct. So the first is someone could be liable if they knowingly assist with an abortion that later turns out to be illegal. So for example, if an employer knows that an employee's going to have an abortion and believes that it's at five weeks, so, okay, we don't think there's going to be a heartbeat. It should be fine. But it later turns out there was a fetal heartbeat at five weeks and that abortion was illegal. Is the employer liable for that or whoever the person is?

Speaker 3 (10:01):

So that's interpretation number one, knowing conduct by that person or that employer. Conduct number two, what if there is an employer who says, look employee, you seem really sad and upset. Why don't you use our EAP program, our employee assistance program. You might get some helpful information for whatever's bothering you. And it later turns out that that employee went and got an illegal abortion. Is that conduct that the employer knowingly engaged in, even though they had no idea that the employee was going to get an abortion, which one of those is correct? Does the employer, or the person need to know that the employee's going to get an abortion or do they not? Because the word knowingly looks like it applies to conduct, knowingly engages in conduct. So hence therein lies the ambiguity here.

Speaker 3 (10:54):

We don't know how broad this scope will be interpreted. No decisions yet. So it could be either or it could be both. All right. So for employers, what does this mean for you? There is potential liability here in several circumstances. So what if you grant a female employee time off and she uses that time to go get an abortion and that abortion is later determined to be in violation of the law. Are you the employer now liable because providing insurance coverage for an illegal abortion is a violation of the statute. So if you were to provide insurance or you were to provide leave, even if you knew, or you didn't know that the woman was going to have an abortion, are you now liable? What about your HR employees? What about the people who may have counseled the employee? What about your benefits employees who might have worked with the employee to provide some kind of leave? Are they now liable? We don't know, and these are all things that will need to be tested.

Speaker 3 (11:55):

So I went through this before. What if you have an EAP program and you know that a woman is pregnant and you know that she's struggling with this new pregnancy and you refer her to that program. And she later decides she's going to have an abortion. And that abortion turns out to be illegal. Are you the employer now liable? You have knowingly engaged in conduct that resulted in an unlawful abortion. So theoretically, and based on the plain language of this statute, you could be liable. And these are big issues. These are issues we don't think that the legislature thought through, but they have resulted based on the language that was chosen in the statute itself. So where are we now? The Department of Justice has now filed a petition with the Supreme court, asking that this law not be allowed to go or to continue into effect.

Speaker 3 (12:48):

And I, unfortunately, I haven't been able to look, but at 11 o'clock today, the state of Texas's briefing was due to the US Supreme court. And I will tell you that a number of entities and companies have intervened as friends of the court to give their opinions on whether or not this law should stand or not. But this, as we've heard about from Sherra and Jordan with the Supreme court is another issue that's being played out at that high level. And where it will land, we don't know, but we will certainly probably see results or at least a decision I'd say in the next few weeks, if not, maybe a month. And that's my prediction.

Kelly Bunting (13:31):

Thank you for listening and tune in to the next episode of Asked & Answer, Greenberg Traurig's Labor & Employment podcast.