

## CUT AND PASTE POST FEBRUARY, 2018

### 2017 Workplace Discrimination Stats

On January 25, 2018, the U.S. Equal Employment Opportunity Commission (EEOC) released its [2017 data](#) on enforcement and litigation detailing the top 10 most frequently filed charges for the fiscal year. According to the numbers, over 84,000 workplace discrimination charges were filed with the agency during fiscal year 2017, and nearly \$4 million was secured for victims. This includes victims in the private sector and workers subject to discrimination in state and local government workplaces.

Here is the list of most frequently filed workplace allegation claims:

- Workplace retaliation claims: 48.8% of all charges filed (this is the 7<sup>th</sup> year in a row this has been #1);
- Discrimination based on race: 33.9%;
- Discrimination based on disability: 31.9%;
- Discrimination based on sex: 30.4 %. (The agency received 6,696 sexual harassment charges and obtained \$46.3 million in monetary benefits for victims of sexual harassment.)

These stats, and the #MeToo! Movement, show how important it is that your workplace discrimination policies and procedures are in compliance with all applicable federal and state discrimination laws.

### Wage and Hour Division Revises Unpaid Internship Test

On January 5, the U.S. Department of Labor's Wage and Hour Division (WHD) released a [Field Assistance Bulletin](#) establishing that the primary beneficiary test, rather than the six-point test, will determine whether interns at for-profit employers are employees under the federal Fair Labor Standards Act (FLSA).

The primary beneficiary test requires an examination of the economic reality of the intern-employer relationship to determine which party is the primary beneficiary of the relationship. The following seven factors are part of this test:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

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6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job after the internship.

According to the WHD, under the primary beneficiary test, no one factor is dispositive and every factor is not required to be fulfilled to conclude that the intern is not an employee. *The primary beneficiary test is a distinct shift in WHD policy: since April, 2010, every intern and trainee was considered an employee entitled to minimum wage unless his or her job satisfied each part of a six part test.*

### **Increased Penalties for Violations of Federal Law and OSHA Rules**

On January 2, 2018, the U.S. Department of Labor (DOL) announced in the [Federal Register](#) that penalties for violations of the following federal laws have increased for 2018:

- Black Lung Benefits Act.
- Contract Work Hours and Safety Standards Act.
- Employee Polygraph Protection Act.
- Employee Retirement Income Security Act.
- Fair Labor Standards Act (child labor and home worker).
- Family and Medical Leave Act.
- Immigration and Nationality Act.
- Longshore and Harbor Workers' Compensation Act.
- Migrant and Seasonal Agricultural Worker Protection Act.
- Occupational Safety and Health Act.
- Walsh-Healey Public Contracts Act.



These increases are as a result of the Inflation Adjustment Act, which requires the DOL to annually adjust its civil money penalty levels for inflation by no later than January 15. The new rates were effective January 2, 2018.

In the same *Federal Register*, the U.S. Department of Labor announced that Occupational Safety and Health Administration (OSHA) penalties will increase for 2018 as follows:

- Other-than-Serious: \$12,934
- Serious: \$12,934
- Repeated: \$129,336
- Willful: \$129,336
- Posting Requirement Violation: \$12,934
- Failure to Abate: \$12,934

These increases apply to states with federal OSHA programs; rates for states with OSHA-approved State Plans will increase to these amounts as well; State Plans are required to increase their penalties in alignment with OSHA's to maintain at least as effective penalty levels.

These new penalty increases are also effective as of January 2, 2018 and apply to any citations issued on or after that date.