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3 Compliance Cues NY Employers Can Take From Scary Films

By **Emily Wajert** (October 30, 2019, 6:00 PM EDT)

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With the Halloween season upon us, it's time to grab your pumpkin spice latte, break out your coziest flannel and put on your favorite horror movie. Whether you prefer terrifying murder rampages or supernatural mysteries, all scary flicks seem to have one thing in common: The main characters are always making bad decisions.

Murderer in the house? Great idea to run to the attic (instead of running outside). Running away from a zombie? A cemetery is definitely the safest place to go.

While watching some of my favorite Halloween films this month, I realized these movies often provide a step-by-step guide of how not to act in a frightening or challenging situation. To quote the classic horror film "Saw," I thought it might be fun to play a game and imagine what types of mistakes New York employers would likely make if trapped in our horror movie trope.

Employment lawyers beware — this may be even more frightening than any scary movie you have on your watchlist this fall.

1. Independent Contractor Discrimination Protections

"Terrible things Lawrence. You've done terrible things!" — "The Wolfman"

Trick or Treat Inc. recently hired Ted to join its independent contractor sales team. Ted, a werewolf (a protected class for purposes of this exercise), has come to human resources alleging he is being discriminated against because of his tendency to turn into a hairy canine every full moon.

Horror Movie Employer: Knowing that in a horror movie, characters often do exactly the opposite of what they should do, in our horror film, our employer would likely ignore Ted's issue — thinking, as an independent contractor, he is not protected against discrimination under the law.

I know you're likely screaming at your computer screen right now — "No, don't do it!" — as various jurisdictions do offer such protections to independent contractors.

Specifically, New York City employers should be aware that the city recently passed a law that expands protections under the New York City Human Rights Law to independent contractors and freelancers.

These protections include that it shall be unlawful for an employer, or an employee or agent thereof, to discriminate against an independent contractor or freelance worker because of the individual's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service, alienage or citizenship status, or other protected category.

The new law also clarifies how to determine whether a company has the requisite four or more employees for purposes of coverage under the NYCHRL, explaining the protections will apply to employers who employed at least four workers (including independent contractors, freelance workers and family members) at any time during the 12 months before the start of the discriminatory act. The new law goes into effect Jan. 11, 2020.

2. Requests for Accommodation

"It's Alive!" — "Frankenstein"

Frankenstein, an employee of Jekyll & Hyde Enterprises, has been suffering from migraines (likely due to his abnormal brain or faulty wiring during his creation). He has approached human resources seeking an accommodation.

Horror Movie Employer: Our New York City employer trapped in the horror film does not take Frankenstein's request seriously and begins to treat him differently, switching him out of the laboratory division and giving him easier tasks that are not as prestigious.

While this may seem like a no-brainer, employers should remember they must treat all accommodation requests seriously. New York City employers likely remember that this time last year, an amendment to the New York City Administrative Code went into effect requiring employers covered by the NYCHRL to engage in a good faith cooperative dialogue when evaluating employee requests for accommodations in the workplace. The law also requires employers then document the results of that dialogue in writing.

Following this trend, New York City recently codified additional protections for those seeking a reasonable accommodation. Effective Nov. 11, a request for a reasonable accommodation under the NYCHRL will be considered a protected activity for purposes of a retaliation claim, affirming 2016 enforcement guidance from the U.S. Equal Employment Opportunity Commission.

While some New York courts had previously recognized this guidance, others had rejected this theory of recovery. This amendment makes clear that such requests after the effective date are protected activity.

As always, employers should avoid any potentially retaliatory conduct when handling an accommodation request and be sure to engage in the cooperative dialogue process carefully.

3. Data Security

"I have crossed oceans of time to find you[r data]." — "Bram Stoker's Dracula"

The Bank of Transylvania is hiring Dracula as its new CEO. During the onboarding process, Dracula fills out a standard employment questionnaire — social security information, address, etc.— that will be housed in the bank's data systems.

Horror Movie Employer: In our horror movie setting, the Bank of Transylvania does nothing to protect Dracula's sensitive information. Much like many characters in classic horror films, the bank has no plan to address a frightening situation (a hacker, for example).

Our horror movie employer's behavior here should make New York employers' hair stand on edge because New York's new Stop Hacks and Improve Electronic Data Security, or SHIELD, Act requires covered entities to have reasonable safeguards in place to protect the security, confidentiality, and integrity of private information.

The law makes significant changes to prior New York data security laws and has practical implications that could affect out-of-state companies that collect, manage and store computerized data that includes the private information of New York residents.

The new act:

- Has an expansive reach — applying to "any person or business that owns or licenses computerized data which includes private information" of New York residents, regardless of corporate structure, revenues or location. Practically, this means many businesses outside of New York may be subject to these new cybersecurity and data privacy compliance obligations;

- Expands the data elements that may trigger data breach notification to include certain biometric information, usernames or email addresses, and account, credit card or debit card numbers, if circumstances would permit account access without a security code or other information;

- Broadens the definition of a breach to include unauthorized access (as opposed to simply unauthorized acquisition, the prior standard under the law); and

- Requires covered entities to adopt comprehensive data protection programs to safeguard private information.

While most provisions of the act went into effect Oct. 23, the act provides until March 21, 2020, for establishment of the required data protection program.

If all of that information didn't scare you, the SHIELD Act also increases the penalties for knowingly or recklessly violating the breach notification provisions of the act, allowing a court to "impose a civil penalty of the greater of five thousand dollars or up to twenty dollars per instance of failed notification," up to $250,000.

Dracula, an individual who can turn into a bat on a whim, is likely very sensitive about his biometric information being shared. While the act does not create a private right of action, our employer in our horror film scenario could face significant monetary penalties under this new law for failing to notify Dracula if a data breach were to occur.

Employers who maintain private information of New York residents should review and update data protection and breach notification policies and procedures to comply with the act's new requirements.

Conclusion

"They're Here!" — "Poltergeist"

Staying current with constant changes in the employment law landscape can be daunting, if not downright scary. Employers should continue to monitor changes in state and local laws to ensure they don't end up in a horror movie of their own.

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