PRESENTATION

Labor and Employment Seminar

Putting Employment Laws to Work for You

May 21, 2015

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

Agenda

12:30 p.m.	Lunch
12:30 p.m. – 1:30 p.m.	**What to Expect When Your Employee is Expecting**
	Break
1:35 p.m. – 2:05 p.m.	**Non-Compete Agreements and Other Restrictive Covenants**
2:05 p.m. – 2:35 p.m.	**Significant Employment Decisions from the Last 12 Months**
	Break
2:50 p.m. – 3:50 p.m.	**An Employer's Guide to the Affordable Care Act**
	Break
4:00 p.m. – 5:00 p.m.	**Practical Tips for Avoiding Retaliation Claims**
5:00 p.m.	Wine Reception

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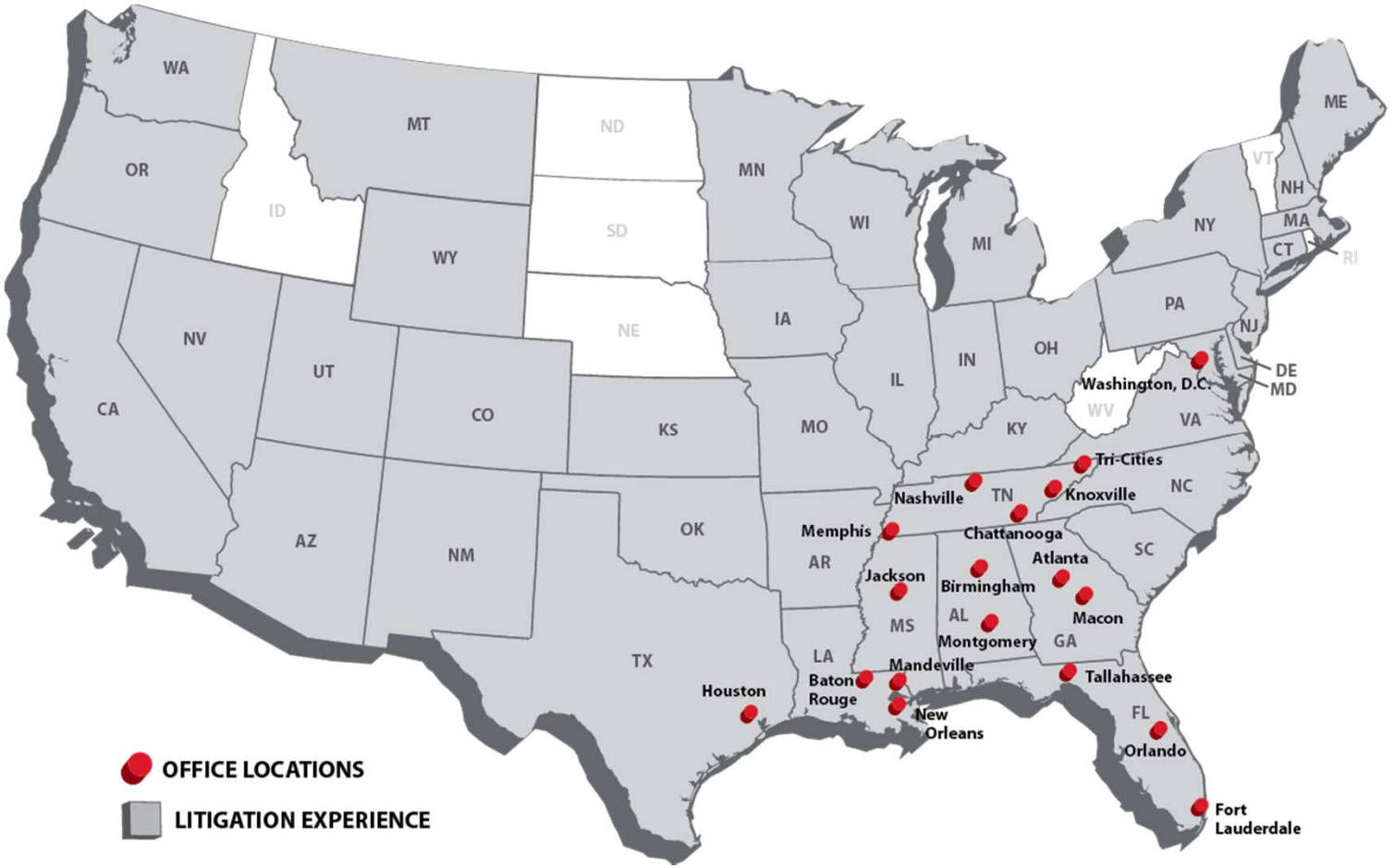
Baker Donelson L&E Litigation Experience



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Labor & Employment Team

Amelia W. Koch
Shareholder

Biography:
Mimi Koch, shareholder in the New Orleans office, practices in our Labor and Employment Department. She has substantial experience in all aspects of employment litigation and counseling, including the Fair Labor Standards Act, the Family Medical Leave Act, the American with Disabilities Act, Title VII, the Age Discrimination in Employment Act, covenants not to compete, personnel policies and manuals, state discrimination and wage statutes, and employment and severance agreements. She has defended FLSA collective actions and related class actions concerning state law wage claims and has also represented clients in wage matters before the United States Department of Labor.

Phyllis Cancienne
Shareholder

Biography:
Phyllis G. Cancienne, shareholder in the Baton Rouge office, concentrates her practice in the areas of labor and employment, and related class action litigation. She represents employers in all aspects of employment litigation before state and federal courts throughout the country, as well as governmental agencies including the EEOC and the Department of Labor. She has also handled numerous employment–related arbitrations and mediations. Ms. Cancienne has extensive experience drafting employee handbooks, employment contracts, confidentiality/trade secret agreements, and covenants not to compete, as well as rendering advice to employers on all federal and state employment laws, including Title VII, ADA, FMLA, GINA, ADEA, NLRA and the FLSA.

Steven F. Griffith Jr.
Shareholder

Biography:
Steven F. Griffith Jr., shareholder in the New Orleans office, practices in the area of business litigation and employment with a focus on clients in the construction, hospitality and maritime industries. He focuses on the unique wage and hour issues in these industries and defends nationwide collective actions brought under the Fair Labor Standards Act, as well as related class actions across the country. His practice also includes counseling clients about strategic initiatives to avoid litigation, as well as defending and pursuing complex antitrust, trade secret and unfair trade practice claims.

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Erin E. Pelleteri
Shareholder

Biography:
Erin E. Pelleteri is a shareholder in the New Orleans office. Ms. Pelleteri has helped defend nationwide collective actions brought under the Fair Labor Standards Act and related class actions, along with more traditional employment matters. She also has a broad range of litigation experience defending insurers in matters related to serious personal injury, medical malpractice property claims, commercial general liability and premises liability. In addition, Ms. Pelleteri handles bankruptcy and collection matters for her clients. Her bankruptcy experience has focused on assisting clients in the health care and hospitality industries with reorganizations under Chapter 11 of the U.S. Bankruptcy Code.

Kathlyn Perez
Shareholder

Biography:
Kathlyn Perez, shareholder in the New Orleans office, focuses her practice on employment law, commercial litigation and Louisiana property law. In the employment context, she represents clients before the EEOC and state and federal courts, defending them against charges of age, race, and sex discrimination, sexual harassment, wrongful termination and other related issues. She advises clients on many other employment-related matters, such as hiring, termination, wage and hours issues, and ADA and FMLA compliance. She also has experience conducting internal investigations into allegations of harassment, discrimination, retaliation and other wrongdoing for corporate and nonprofit clients, and works directly with clients to draft and revise employee handbooks and other policies to adhere to changing state and federal employment laws.

Andrea Powers
Of Counsel

Biography:
Andrea Bailey Powers has more than 20 years' experience as a dedicated ERISA/employee benefits attorney. She represents employers in all aspects of executive compensation and employee plans matters, including the design and administration of qualified retirement plans, health and welfare benefit plans, and non-qualified executive compensation plans. Because nearly every business is impacted by health care reform, Ms. Powers spends much of her time helping employers address compliance issues and business realignment in the wake of the Affordable Care Act. She is of counsel in the Birmingham office.

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Jennifer McNamara
Of Counsel

Biography:
Jennifer McNamara is of counsel in the New Orleans office and has over twenty years of experience defending employers and commercial defendants in complex litigation. In her employment practice, she defends and advises employers regarding complaints of discrimination, harassment, and retaliation under federal and state laws, violations of the Family Medical Leave Act, interpretation and application of the Fair Labor Standards Act, and other employment related issues. Moreover, Ms. McNamara's legal experience and organizational skills have helped her successfully handle and resolve class actions and multi-plaintiff litigation for her clients in both employment and commercial disputes. She also counsels employers regarding personnel policies, antitrust compliance, contract negotiation, and covenants not to compete, including training of senior management and employees in these areas. Ms. McNamara also has significant experience in business litigation, including intellectual property, contract disputes, oil and gas legacy litigation, and media law. With respect to her media law practice, in addition to advising news media regarding pre-broadcast issues, Ms. McNamara's experience includes having been engaged as an expert on First Amendment principles and defenses in defamation litigation brought in a foreign court.

Christopher Morris
Of Counsel

Biography:
Christopher Morris, of counsel in the Baton Rouge office, concentrates his practice in the areas of employment, ERISA, and related litigation. Mr. Morris represents employers in all aspects of employment law before state and federal courts, and state and federal agencies charged with enforcing employment laws. Mr. Morris also has experience drafting employee handbooks, confidentiality/trade secret agreements, covenants not to compete, and executive compensation agreements, as well as rendering counsel and advice to employers on all federal and state employment laws, including Title VII, ADA, FMLA, ADEA, and the FLSA. His experience also includes representation of employers and insurers in claims for benefits and class actions premised on alleged breaches of fiduciary duties under ERISA.

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Laura Carlisle
Associate

Biography:
Laura Carlisle is an associate in the Firm's New Orleans office and a member of the Advocacy Department and Business Litigation Practice Group. Ms. Carlisle focuses her practice on employment law and commercial litigation, but also has a broad range of experience assisting with construction defense, property law, medical malpractice defense, and oil and gas matters. In the employment context, she has assisted in defending clients with respect to state and federal wage claims, FLSA violations, discrimination and harassment allegations, retaliation, and other policy violations. She also has experience advising and defending clients with respect to other employment-related matters such as non-compete and confidentiality agreements, severance agreements, non-disparagement clauses, and wage and hour issues.

Sarah Casey
Associate

Biography:
Sarah Casey is an associate in the New Orleans office of Baker Donelson. She is a member of the Litigation Department and concentrates her practice in the areas of Labor and Employment, Oil and Gas, and general business litigation. Her labor and employment experience includes assisting corporate clients in responding to EEOC discrimination charges filed by employees, drafting and revising employee policies and procedures, and representing clients in a variety of litigation. Ms. Casey's oil and gas experience includes surface damage, mineral lease, and royalty disputes.

Matt Juneau
Associate

Biography:
Matt Juneau is an associate in the Advocacy Department. He focuses his practice on business litigation and corporate transactions. Mr. Juneau has assisted clients in a wide range of litigation matters, including contract and commercial disputes, property disputes, personal injury defense and
employment cases. Mr. Juneau has also assisted clients in corporate governance and related transactions, including bond financing and corporate acquisitions.

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Camalla Kimbrough
Associate

Biography:
Camalla Kimbrough is an associate in the Firm's New Orleans office and a member of the Advocacy Department. Ms. Kimbrough has helped to defend nationwide collective actions brought under the Fair Labor Standards Act and related class actions across the country. She has also assisted in defending clients against charges of race discrimination, sex discrimination, sexual harassment and retaliation. Ms. Kimbrough also represents financial institutions, defending mortgage servicing litigation and other mortgage-related matters, lender liability claims, wrongful foreclosures, and claims of unfair and deceptive trade practices.

Levy Leatherman
Associate

Biography:
Levy Leatherman is an associate in Baker Donelson's Baton Rouge office. Mr. Leatherman is a member of the Advocacy Department where he practices in civil litigation, employment and labor law, corporate litigation, and the defense of railroad and insurance claims. He has experience defending clients in Title VII, 42 U.S.C. § 1981, ADA, ADEA and FMLA suits, as well as in labor matters governed by collective bargaining agreements. Mr. Leatherman also has experience defending railroads under the recently enacted whistleblower retaliation provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, and he has obtained summary judgments before Department of Labor administrative law judges in FRSA actions. Additionally, Mr. Leatherman has defended railroads in suits brought under the Federal Employer's Liability Act in both state and federal courts.

Elizabeth Rutledge
Associate

Biography:
Elizabeth Rutledge is an associate in Baker Donelson's New Orleans office. As a member of the Advocacy Department, she assists clients in a variety of litigation matters, including labor and employment, oil and gas, and other business-related suits. She recently presented on "Defending against FDCPA claims." Elizabeth was previously a law clerk for East Tennessee Children's Hospital and student attorney for the University of Tennessee College of Law Legal Clinic.

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PRESENTATION

What to Expect When Your Employee is Expecting

Presented by:
Steven F. Griffith, Jr.
Sarah K. Casey
Jennifer B. McNamara

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History

Pregnancy Discrimination Act ("PDA") – enacted in 1978 to make clear that discrimination based on pregnancy, child birth, or related medical conditions is a form of sex discrimination prohibited by Title VII.

Prohibits discrimination on the basis of pregnancy, childbirth, or related medical condition AND mandates equal treatment.

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Peggy Young v. United Parcel Service (UPS)

Peggy Young worked as an air driver for UPS out of the Landover, Maryland facility.

In July 2006, Young requested a leave of absence to undergo a third round of in vitro fertilization.

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The Peggy Young Case (continued)

- She became pregnant and extended her leave.
- In September 2006, Young's midwife wrote a note limiting Young to lifting no more than 20 pounds.

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The Peggy Young Case (continued)

- In the fall of 2006 Young asked to return to work with her lifting limitation, which would require her to have light duty.

- UPS defined as an essential job function for drivers “the ability to lift, lower, push, pull…” packages weighing up to 70 pounds.

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The Peggy Young Case (continued)

- Pursuant to its collective bargaining agreement UPS only allowed light duty in the following circumstances:
  1. Employees with limitations arising from on the job injuries;
  2. Employees considered “disabled” under the ADA; and
  3. Employees who temporarily lost DOT certification.

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The Peggy Young Case (continued)

Thus, under the (bargained) policy, Young was ineligible for light duty work based on limitations arising from her pregnancy. She also could not perform the essential elements of her job.

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The Peggy Young Case (continued)

UPS left Young on unpaid leave until after the birth of her child, during which time her health insurance lapsed.

Young sued claiming that UPS's policy of providing light duty to some employees but not to pregnant employees violated the PDA's language to treat pregnant employees the same "as other persons not so affected but similar in their ability or inability to work."

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The Peggy Young Case (continued)

- The District Court denied Young's claims, and she appealed to the Court of Appeals for the Fourth Circuit.

- The Fourth Circuit Court of Appeals affirmed the decision of the district court in favor of UPS. (Jan. 2013)

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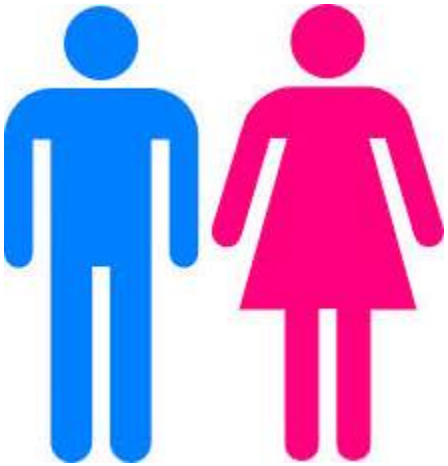
The Peggy Young Case (continued)

- **The 4th Circuit said:**
  1. UPS's policy was pregnancy neutral or "pregnancy-blind."
  2. Young argued that the PDA compels employers to treat pregnant employees more favorably than male and non-pregnant female employees with restrictions resulting from *non*-work-related injuries.



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The Peggy Young Case (continued)

However, on March 25, 2015, the U.S. Supreme Court overturned the Fourth Circuit's ruling and remanded the case, holding that the PDA "requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work . . . Ultimately, the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination."

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The Peggy Young Case (continued)

The Supreme Court did not, however, find that the PDA gave pregnant women an "unconditional most-favored-nation status." Nor did the Court adopt the EEOC guidance on the PDA.

Instead, the Court adopted the *McDonnell Douglas* burden-shifting framework: the plaintiff must show that she belongs to the protected class, she sought an accommodation, the employer did not accommodate her, and the employer did accommodate others similar in their ability or inability to work; the burden then shifts to the employer to state a legitimate, non-discriminatory reason; finally, it shifts back to plaintiff to show pretext.

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Why is the Peggy Young case important?

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The EEOC Has Taken an Interest in PDA Claims

In 1997, 3,900 EEOC Charges were filed alleging pregnancy discrimination.

In 2013, 5,342 EEOC Charges were filed.

With an increasing number of charges, on July 14, 2014, the EEOC issued guidance on the PDA.

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EEOC Guidance - Extent of PDA Coverage

Title VII as amended by the PDA, prohibits discrimination based on the following:

- Current Pregnancy
- Past Pregnancy
- Potential or Intended Pregnancy
- Medical Conditions Related to Pregnancy or Childbirth

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Supreme Court

Notice

Certain portions of this Enforcement Guidance are affected by the Supreme Court's decision issued on March 25, 2015 in *Young v. UPS*. The Commission is studying the decision and will make appropriate updates.

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Current Pregnancy

Discrimination occurs when an employer refuses to hire, fires, or takes any other adverse action against a woman because she is pregnant, without regard to her ability to perform the duties of the job.

Critical Inquiry – Employer's Knowledge of Pregnancy

No Liability When No Knowledge of Pregnancy

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Common Mistakes – Stereotypes & Assumptions

- Adverse treatment of pregnant women often arises from stereotypes and assumptions about their job capabilities and commitment to the job.

- **Examples:**
  1. Assuming that an employee cannot perform a particular job duty because she is pregnant
  2. Assuming that a woman will want to stop working after she has kids

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Recent Case - *EEOC v. CFS Health Management Inc.*

- Skin therapist told her boss she was pregnant two weeks after she began work at Shefa Wellness Center.
- Two days later, the owner removed her from the work schedule.
- When questioned, he said he felt deceived that she had not disclosed the pregnancy during her interview.
- She had no obligation to disclose her pregnancy if she was able to perform the job duties.

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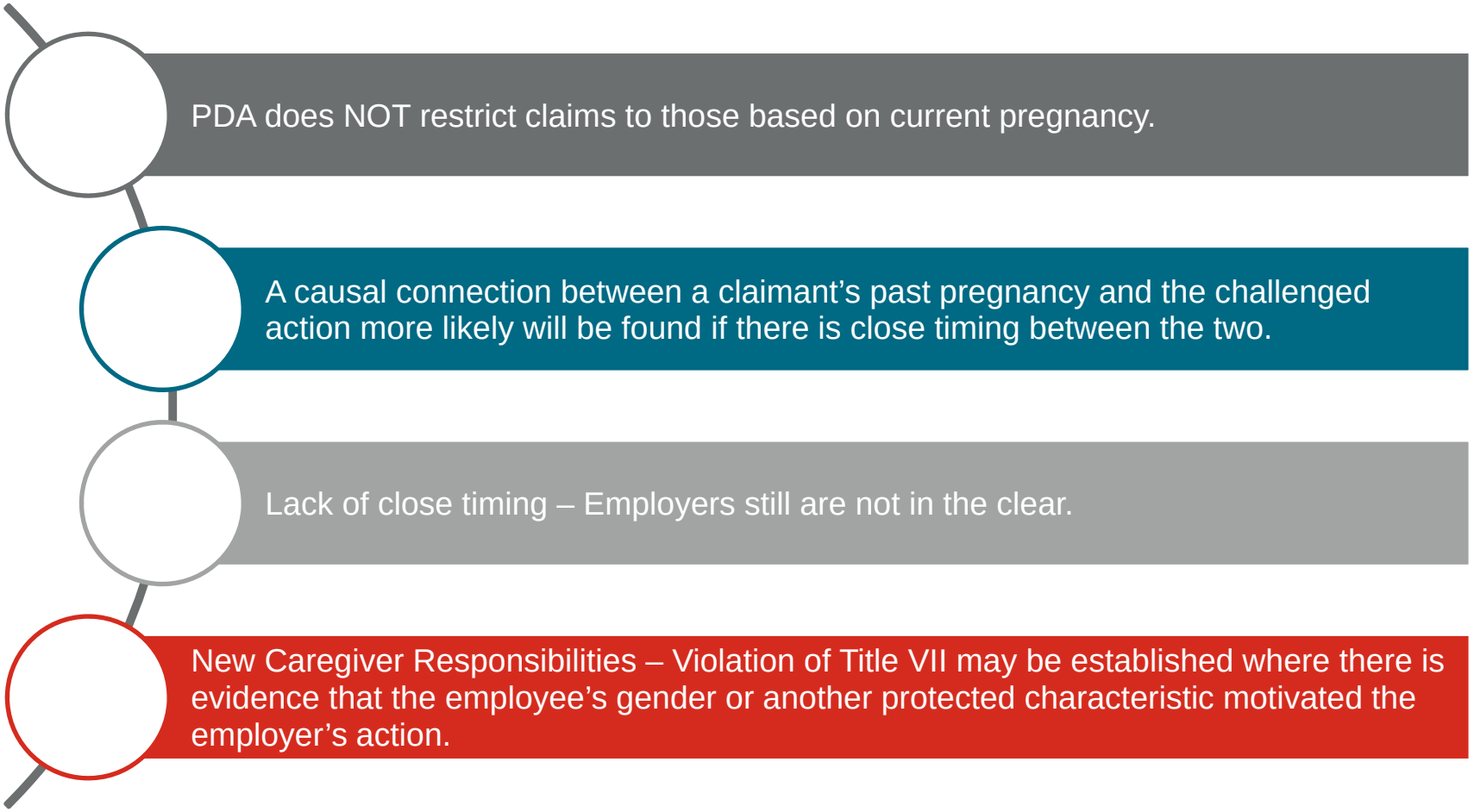
Past Pregnancy – “The Fourth Trimester”



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Potential or Intended Pregnancy

- SCOTUS has held Title VII "prohibits an employer from discriminating against a woman because of her capacity to become pregnant."
  1. Discrimination Based on Reproductive Risk – Battery Manufacturing Company
  2. Discrimination Based on Intention to Become Pregnant
  3. Discrimination Based on Infertility Treatment
  4. Discrimination Based on Use of Contraception

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Medical Condition Related to Pregnancy & Childbirth

- An Employer may not discriminate against a woman with a medical condition relating to pregnancy or childbirth and must treat her the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical condition.

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Breastfeeding

Lactation and breastfeeding are medical conditions related to pregnancy. Employers must give breastfeeding mothers the same freedom to address those needs as other employees have to address non-incapacitating medical conditions.

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Big Question: Who is Similarly Situated?

MEN AND NON-PREGNANT WOMEN – Title VII requires that individuals affected by pregnancy, childbirth, or related medical condition be treated the same for all employment related purposes as to other persons not so affected but similar in their ability or inability to work.

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Similar in Ability or Inability

Per the EEOC Guidance, an employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignment, leave, or fringe benefits.

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Cannot Distinguish Based on Cause of Inability

Thus, the EEOC contends, an employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job.)

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Disability Not Required

So, according to the EEOC, employers must accommodate pregnant employees with restrictions or requirements even if they are not disabled under the ADAAA.

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One Possible Solution for the Light Duty Dilemma (Offered Under the EEOC's Guidance)

If an employer's light duty policy places certain types of restrictions on the availability of light duty positions, such as limits on the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, as long as it also applies those same restrictions to other workers similar in their ability or inability to work.

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Disparate Impact

- A facially neutral policy is in violation of the statute if it has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical condition.

- Employer would need to show that the policy is job-related and consistent with business necessity.

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Best Practices

- Develop a strong policy
- Train managers and employees
- Respond to complaints efficiently and effectively
- Do Not Ask!
- Develop specific qualifications
- Do not assume or stereotype!
- Review light duty and leave policies
- Develop a process for evaluating reasonable accommodation requests

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What to Know About the FMLA When Your Employee is Expecting . . .

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The FMLA and DOL

The Federal Medical Leave Act

- Statute enacted in 1993
- Allows job-protected leave

The Department of Labor

- WHD enforces and administers FMLA
- Regulations, Rules, and Administrator Interpretations

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FMLA Basics: Covered Employers and Employees

- Covered Employers
  - Private employers: Employs 50 or more employees each day for 20 weeks in either the current or preceding year.
  - Public employers: Qualifies regardless of the number of employees.

- Covered Employees: Employee must:
  1. Have worked at least 12 months (need not be consecutive) for employer;
  2. Have worked at least 1250 hours during the 12 months before FMLA leave begins.
  3. Work at a site that employees at least 50 employees within a 75-mile radius

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Qualifying Circumstances

Eligible employees can take 12 workweeks of FMLA leave in a twelve month period:

1. To care for a **"son or daughter"** of the employee after **birth**;

2. To care for a **"son or daughter"** of the employee after placement for **adoption** or **foster care**;

3. Because of the **employee's own serious health condition** that renders employee unable to perform; or

4. To care for the **spouse**, or a **son, daughter**, or parent, of the employee, **if such spouse**, **son, daughter**, or parent has a **serious health condition**.

Note: FMLA also provides for military family leave.

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Leave Related to Pregnancy: Expectant Mother's Own Health

Prenatal care

Pregnancy condition renders her unable to work

Her own serious health condition after birth of the child

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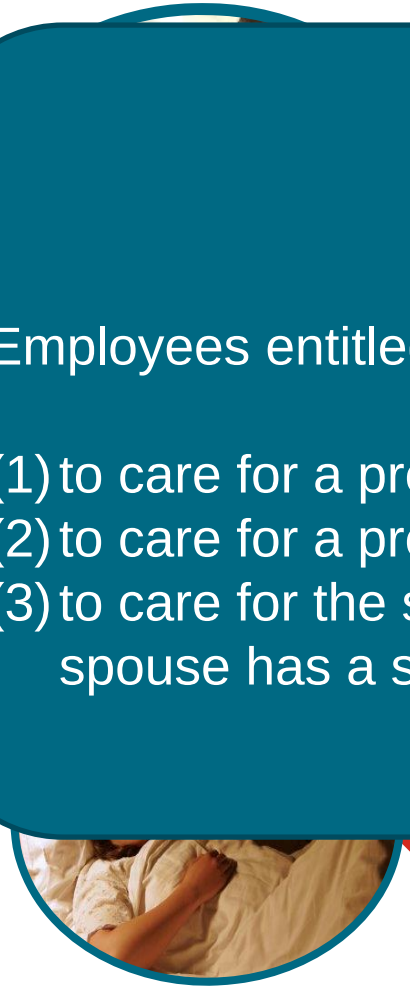
Leave Related to Pregnancy: Expectant Mother's Own Health

SPOUSES

Employees entitled to FMLA leave:

(1) to care for a pregnant spouse during her prenatal care
(2) to care for a pregnant spouse who is incapacitated
(3) to care for the spouse following the birth of the child if the spouse has a serious health condition



birth of the child

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DOL expands definition of “spouse”

DOL Final Rule — **Allows FMLA leave to care for a same-sex spouse**

- DOL issues final rule to take effect on March 27, 2015
- The definition of “spouse” is to be determined by the “state of celebration”

N.D. Tex. Enjoins Final Rule — **Texas, Arkansas, Louisiana, and Nebraska seek injunction**

- N.D. Tex., on March 26, 2015, grants the preliminary injunction
- DOL is barred from enforcing the Final Rule pending a final ruling on the merits

What Now? — **The preliminary injunction only effective in the 4 states**

- Will the DOL seek to enforce the Final Rule in states not covered by the injunction?
- The Supreme Court’s decision regarding same-sex marriage may render the preliminary injunction moot.

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Leave Related to Care for a “Son or Daughter”

After birth

After adoption

After placement for foster care

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Qualifying "Son or Daughter" (for leave other than military family leave)

Son or Daughter:

1. A biological child;
2. An adopted child;
3. A foster child;
4. A stepchild;
5. A legal ward; or
6. A child of an employee standing *in loco parentis*

The child must be under 18 OR, if over a18, incapable of self-care because of a mental or physical disability.

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DOL Administrative Interpretations: Expanding FMLA Eligibility in Cases of "Sons and Daughters

June 22, 2010 - Administrator's Interpretation No. 2010-3

DOL issued No.2010-3 to clarify the definition of "son or daughter" as it applies to an employee standing "***in loco parentis***" to a child.

January 14, 2013 - Administrator's Interpretation No. 2013-1

DOL issued No. 2013-1 to clarify the definition of "son or daughter" as it applies to an individual "**18 years of age or older and incapable of self-care because of a mental or physical disability**."

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DOL's Interpretation Expands Scope of Who Can Stand "*In Loco Parentis*"

The DOL clarified that that the phrase "*in loco parentis*" includes non-traditional families and includes ***any*** employee who has assumed parental care of a child

- An employee is not required to demonstrate that he provides both (i) day-to-day care and (ii) financial support to the child to stand *in loco parentis* to a child.

- The fact that a child has a biological parent living in the home or, in addition to the employee, has both a mother and a father does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child.

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The DOL's Conclusion:

- "[I]t is the Administrator's interpretation that either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child."

DOL's Conclusion Requires Two-Step Analysis:

- Does the employee provide either day-to-day care or financial support to the child; and
- Does the employee intend to assume a parent-like relationship with and responsibilities for the child.

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Query: How do you establish and accept "intent"?

The DOL says that employers do not have to accept an employee's "simple statement" that he stands in loco parentis where there is no legal or biological relationship.

The employer may request "reasonable documentation or statement of the family relationship."

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BUT WHAT ABOUT THE NORTHERN DISTRICT OF TEXAS DECISION ENJOINING THE DEFINITION OF SPOUSE TO INCLUDE SAME-SEX MARRIAGES?

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DOL Interpretation Expands Ability to take Leave to Care for Adult Children

***The law before interpretative guidance*:**

The FMLA allows employees to take up to 12 workweeks of leave to care for a son or daughter with a serious health condition.

However, once a son or daughter reaches 18, the scope of allowable leave narrows.

- FMLA leave available only if the son or daughter
  - has a disability as defined by the ADA;
  - incapable of self-care due to that disability;
  - has a serious health condition; and
  - the child is in need of care due to the serious health condition.

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- **DOL Has Clarified That the Age a Child Becomes Disabled Not Relevant:**

  - Previous DOL interpretations suggested that an adult child must have become disabled before the age of 18 in order for a parent to qualify for FMLA leave to care for a disabled child in adulthood.

  - Interpretation 2013-1 (January 14, 2013) clarifies that the age a child becomes disabled is not relevant to determining eligibility for FMLA leave to care for adult child.
    - In other words, the age at onset of the disability is immaterial so long as the adult child has a disability under the ADA.

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Expanded Definition of "Disability" Under the ADA, as Amended by the ADAAA, Applicable to FMLA

- Interpretation No. 2013-1 also confirms that the definition of "disability" under the ADA, as expanded in by the ADAAA in 2008, is applicable to determinations of disability under the FMLA.

- Thus, with respect to determining "disability," the DOL offered the following guidance:
  - Duration of the impairment does not matter.
  - Adult child must need assistance in three or more daily living activities.
  - "Serious health condition" and "needed to care for" still necessary.

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What to Expect When Your Employee is Expecting

I. *YOUNG V. UNITED PARCEL SERVICE, INC.*

Peggy Young was a driver for United Parcel Services (UPS), and UPS requires all drivers to be able to lift 70 pounds (and up to 150 pounds with assistance). Young became pregnant after suffering several miscarriages, and her doctor placed her on a 20-pound lifting restriction for the first 20 weeks of pregnancy and then a 10-pound restriction for the remainder of the pregnancy. Young sought an accommodation from UPS, which was denied. At that time, UPS only provided accommodations in three situations: 1) an employee had been injured on the job/workers' compensation; 2) an employee had a disability as defined under the Americans with Disabilities Act; or 3) an employee had temporarily lost his/her Department of Transportation certifications. Since Ms. Young did not meet one of these three conditions, UPS did not find it necessary to provide an accommodation, and UPS told Ms. Young that she could not work until the lifting restrictions had been lifted.

An aggrieved Ms. Young filed suit, alleging disparate treatment. UPS argued that "it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all 'other' relevant 'persons.'" That argument was successful with the District Court, and UPS successfully obtained summary judgment which was affirmed by the Fourth Circuit Court of Appeals. On March 25, 2015, the Supreme Court disagreed. The Court particularly focused on the second clause of the PDA, which provides that pregnant employees be treated "as other persons" not affected by pregnancy.

The Court held:

> In our view, the [Pregnancy Discrimination] Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. … Ultimately the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination.

The Court noted, however, that the PDA does not give pregnant employees "an unconditional most-favored-nation status." And the Court declined to significantly rely on the EEOC's July 2014 pregnancy guidance.

Instead, the Court crafted a standard under the *McDonnell Douglas* framework and held that to state a prima facie case of disparate treatment for failure to accommodate, the plaintiff must show that "she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" The burden then shifts to the employer to state a legitimate, non-discriminatory reason for the denial of the accommodation; however, "that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates." The burden then shifts back to the employee to show that the proffered reasons

are pretext, and the Court held that a plaintiff can create a genuine issue of fact as to pretext by showing that "the employer accommodates a larger percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." In the Court's opinion, Young had created a genuine issue of material fact, and the Court remanded her case for further development.

The Court declined to interpret the PDA as creating an obligation on the employer to accommodate a pregnant employee if it accommodates any employees. Instead, the Court posed the inquiry as "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"

In accordance with *Young*, now is a good time to review your company's policy and procedures for granting accommodations with that question in mind. If you find that you are accommodating a large number of employees and cannot articulate a reason for not accommodating pregnant employees, it is time to adjust your policies. Additionally, train your managers and supervisors to recognize a pregnancy-related accommodation request. And while the Supreme Court did not adopt the EEOC's guidance as law, we would encourage you to review the EEOC's guidance on the subject and to adopt the "Best Practices" to the extent that your company is able.

II. THE EEOC'S GUIDANCE

Below is a non-inclusive summary of the EEOC's enforcement guidance on pregnancy discrimination.

When Congress passed the PDA, it intended to prohibit discrimination based on "the whole range of matters concerning the childbearing process." The PDA prohibits discrimination based on:

- Current Pregnancy
- Past Pregnancy
- Potential or Intended Pregnancy
- Medical Conditions Related to Pregnancy or Childbirth

A. Knowledge

An employer must know about the pregnancy in order to commit pregnancy discrimination. It is not necessary that the employee formally inform the employer if the employer learns of the pregnancy through other means.

B. Stereotypes and Assumptions

Employment decisions based on stereotypes or assumptions can violate the PDA even when they are unconscious or believed to be in the employee's best interest.

Example: Maria tells her supervisor she is pregnant. She then is absent several days due to an illness unrelated to her pregnancy. Later, pregnancy complications keep her home two more days. Her employer fires her, stating that he needs someone without attendance problems. An investigation reveals that Maria attendance record is equal to, or better then, her non-pregnant co-workers.

Example: Darlene applies for a job at a campground when she is visibly pregnant. The interviewer tells her that July and August are the busiest months. She says that she is due in September and plans on working until then. The interviewer declines to hire her, stating that the campground cannot risk that she will decide to stop working earlier.

C. Past Pregnancy

An employer cannot discriminate against an employee for a past pregnancy.

Example: Theresa's employer fires her two weeks into her pregnancy-related medical leave, her employer discharges her for poor performance. Up until shortly after she informed him of her pregnancy, she had received nothing but good performance reviews.

A lengthy time difference between the pregnancy and the adverse action does not necessarily save the employer from a finding of discrimination.

D. Potential or Intended Pregnancy

The Supreme Court has held that employers are prohibited from discriminating against women because of their capacity to get pregnant.

In *Int'l Union, United Auto, Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187 (1991), the Supreme Court held that an employer's concern about risks to an employee's fertility will rarely, if ever, justify sex-specific restrictions. A battery-manufacturing company could not exclude all fertile women from jobs that exposed them to excessive lead levels.

Employers cannot discriminate based on a woman's intention to become pregnant

Example: Anne informs her boss that she is trying to get pregnant. He reacts with displeasure and demotes her two weeks later. Her performance evaluations prior to the demotion were outstanding.

Employers cannot discriminate on the basis of infertility treatment, e.g., penalizing a woman for taking time off to undergo IVF. Employers also cannot discriminate based on the use of contraceptives. If a health insurance plan covers preventive care for conditions other than pregnancy, it also must cover prescription contraceptives.

E. Medical Condition Related to Pregnancy

Employers cannot discriminate on the basis of a medical condition related to pregnancy or childbirth and must provide the same medical benefits for pregnancy-related medical conditions as it provides for other medical conditions.

Example: Sherry's employer provides 4 weeks of medical leave to employees who have worked less than a year. Sherry has worked 6 months when she takes leave due to a pregnancy-related condition. When she does not return after 4 weeks, she is discharged. If the employer applies its policy uniformly, it has not discriminated against Sherry.

Example: Michelle requests two months of leave due to pregnancy-related medical complications. Her employer denies the request because its policy providing paid medical leave requires employees to be employed for 90 days, and Michelle has only been employed 65 days. There is no evidence that non-pregnant employees are gated exceptions to this policy. There is no discrimination.

Lactation and breastfeeding are medical conditions related to pregnancy, and employers must give breastfeeding mothers the same freedom to address those needs as other employees have to address non-incapacitating medical conditions.

Breastfeeding mothers are also protected under other laws. The Patient Protection and Affordable Care Act requires employers to provide reasonable break time and a private place for hourly employees to express milk. Louisiana recently passed R.S. 17:81(W), which requires public schools to provide certain accommodations for employees to express breast milk.

Employers cannot discriminate against a woman for having an abortion, contemplating an abortion, or not having an abortion.

F. Similar Persons

Employers must treat women affected by pregnancy, childbirth, or a related medical condition the same as other employees similar in their ability or inability to work. The employer may not rely on a policy that makes distinctions based on the source of an employee's limitations.

An employer can require a pregnant employee to provide documentation for a requested accommodation if it requires that of all employees who request accommodations. Similarly, an employer can evaluate a pregnant employee's request for an accommodation in light of whether it would constitute an undue hardship.

G. Evidence of Discrimination

- An explicit policy that is facially discriminatory

- Close timing between the adverse action and the employer's knowledge of pregnancy

- More favorable treatment of non-pregnant employees of either sex

- Evidence casting doubt on the credibility of the employer's explanation of the adverse action

- Evidence that the employer violated or misapplied its own policy

H. Harassment

Pregnancy-based harassment is prohibited. As with other forms of harassment, if harassment is found to be causally linked to pregnancy or childbirth, it is a violation of Title VII.

I. Bona Fide Occupational Qualification (BFOQ) Defense

In extremely rare situations, employers may successfully argue that non-pregnancy is a BFOQ. The employer must show that pregnancy actually interferes with the employee's ability to perform the job. This must be based on objective, verifiable skills, not fears of danger, fears of tort liability, or assumptions and stereotypes.

J. Disparate Impact

A facially neutral policy can violate Title VII if it has a disproportionate adverse effect on women affected by pregnancy, childbirth, or a related medical condition and the employer cannot show that the policy is job related and consistent with business necessity.

Example: A company does not hire Carol because she cannot fulfill the 50 lb lifting requirement due to her pregnancy. The company must be able to prove that it treats all applicants the same in regard to the lifting requirement. In addition, if the evidence shows that the policy disproportionately affects pregnant women, the company must also prove that the requirement is job related and consistent with business necessity.

A 10-day ceiling on sick leave and a policy denying sick leave during the first year of employment have been found to disparately impact pregnant women.

K. Pregnancy-Related Comments

If there is evidence that pregnancy-related animus motivated an employer's decision to deny a pregnant employee's request for light duty, it is not necessary that the employee show that another employee was treated more favorably.

Example: Janice requests light duty. Her employer denies the request even though there are light duty positions available and states that having a pregnant worker in the workplace is just

too much of a liability. Janice does not need to produce evidence of a non-pregnant worker who was given a light duty position.

L. Leave

An employer cannot compel an employee to take leave because she is pregnant, as long as she is able to perform her job, even if the employer believes it is acting in the employee's best interest.

M. Americans with Disabilities Act as amended (ADAAA)

Employers can also be liable under the ADAAA if they discriminate against employees on the basis of a pregnancy-related disability.

Examples of reasonable accommodations to be granted to employees with pregnancy-related disabilities:

- Redistributing marginal job functions
- Modifying of workplace policies (e.g. allowing a water bottle on employee's desk)
- Purchasing or modifying equipment or devices
- Modifying work schedules
- Granting leave
- Light duty

N. Best Practices

- Develop, disseminate, and enforce a strong policy
- Train managers and employees
- Conduct employee surveys and review policies and practices
- Respond to complaints efficiently and effectively
- Protect applicants and employees from retaliation
- Do not ask applicants about pregnancy status or related issues
- Develop specific, job-related qualification standards for each position

- Make decisions without regard to assumptions and stereotypes
- Make sure employment decisions are well-documented
- Evaluate whether leave policy disparately impacts pregnant women
- Review light duty policies
- Have a process in place for expeditiously considering reasonable accommodation requests
- Train managers to recognize requests for reasonable accommodation

III. THE FMLA: LEAVE FOR PREGNANCY RELATED ISSUES AND TO CARE FOR CHILDREN

A. History of the FMLA and Introduction to Recent Amendments and Expansion under DOL Regulations

The FMLA was enacted by Congress over 20 years ago within the first couple of weeks of the first term of President Bill Clinton, who signed the bill into law on February 5, 1993. The FMLA did not go into effect for six months for most covered employees and a year later for unionized businesses, unless their existing labor agreement expired sooner.[1]

In the last few years, the FMLA has been amended on several occasions. Most recently, in 2009, President Barack Obama signed into law two sets of amendments: (i) the National Defense Authorization Act for Fiscal Year 2010, which expanded previous changes to the FMLA that created two types of leave applicable to military service, and (ii) the Airline Flight Crew Technical Corrections Act. The expansion of FMLA rights under these amendments are beyond the scope of this paper and not discussed herein, but a discussion of these changes regarding military family leave and special rules for airline flight crew employees can be found on the website of the Department of Labor ("DOL").[2]

More recently, through the issuance of two administrative interpretations in 2010 and 2013 regarding the FMLA's definition of "son or daughter," the DOL has expanded the ability of an eligible employee to take up to 12 workweeks of FMLA job-protected leave (i) to care for a son or daughter after birth of the son or daughter of the employee; (ii) to care for a son or

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[1] The FMLA became effective August 5, 1993, but as to groups of employees covered by a collective bargaining agreement on that date, the Act became effective on the earlier of the expiration of that agreement or February 5, 1994. 29 C.F.R. §§ 825.102, 825.700(c).

[2] The DOL delayed in issuing proposed regulations concerning these FMLA statutory amendments until February 15, 2012. Almost a year later, on February 6, 2013, the DOL finally issued its final regulations. The new regulations took effect on March 8, 2013 (the "Regulations"). While the bulk of the Regulations relate to the recent statutory amendments, the DOL has also made some other minor changes, primarily for classification purposes. The Regulations require employers to update their FMLA policy and forms. Additionally, the DOL issued a new FMLA poster that reflects many of the changes made by the new Regulations. Covered employers were required to have posted the new FMLA posted by the effective date of the Regulations, March 8, 2013.

daughter after placement of the son or daughter with the employee for adoption or foster care; and (iii) to care for a son or daughter with a serious health condition.[3]

First, on June 22, 2010, the DOL issued Administrator's Interpretation No. 2010-3 ("Interpretation 2010-3") to clarify "the definition of 'son or daughter' . . . as it applies to an employee standing '*in loco parentis*' to a child."[4] Second, on January 14, 2013, the DOL issued Administrator's Interpretation No. 2013-1 ("Interpretation. 2013-1") to clarify "the definition of 'son or daughter' . . . as it applies to an individual 18 years of age or older and incapable of self-care because of a mental or physical disability."[5]

After a brief review of the basics regarding FMLA coverage and eligibility, we will examine in more detail the availability of FMLA leave for pregnancy related issues and to care and bond with "sons and daughters" after birth or placement for adoption or fostering. We will also review how the DOL's recent definition of "sons and daughters" has expanded the circumstances under which eligible employees may take FMLA leave. We will also briefly review the requirements and issues that arise with respect to the taking of FMLA leave.

B. FMLA Basics: Covered Employers and Eligible Employees

1. *Covered Employers*

By its terms, the FMLA applies only to "covered employers." Thus, the first issue to examine when determining whether a particular entity is covered by the FMLA is whether that entity qualifies as an "employer." Under the FMLA, an employer is the legal entity that employs the employee, including any joint and integrated companies, any person acting in the interest of the employer in relation to an employee, and any successors in interest of the employing entity.[6] At a minimum, a FMLA employer must have some power to control the worker in question.

Once a given entity meets the test under the FMLA as an employer, the next inquiry is whether it is a "covered employer." Both private and public entities can qualify as covered employers. The FMLA defines covered employer as a private employer with 50 or more employees during 20 or more weeks in the current or previous calendar year. A covered employer also includes a public employer, regardless of the number of persons that it employs.[7] Examples of public employers covered by the FMLA include public agencies and public elementary and secondary schools, regardless of the number of people they employ.

As indicated above, for a private employer to be a covered employer under the FMLA, it must employ 50 employees each day for 20 weeks in either the current or preceding year.[8] All full-time, part-time, leased, and temporary employees on the payroll are counted toward the 50-employee threshold.[9] Employees on paid or unpaid leave are also counted, so long as the

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3 29 U.S.C. § 2612(a)(1)(A)-(C).
4 http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf.
5 http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm.
6 29 C.F.R. § 825.104(a).
7 29 U.S.C. § 2611(4); 29 C.F.R. § 825.104.
8 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104, 825.105(e).
9 29 C.F.R. § 825.105(b).

employer reasonably believes that the employees will return to work.[10] Employees employed outside of the United States, however, are not counted toward the 50-employee threshold.[11] In addition, employees who begin work after the first day of the workweek and employees who terminate their employment before the last day of the workweek are not counted as an FMLA employee for that week.[12] Once a private employer meets the 50 employees for 20 nonconsecutive weeks threshold, the employer remains covered until it has fallen below the threshold for both the current and preceding year.[13]

2. *Eligible Employees*

Determining whether the FMLA applies does not focus only on the status of the employer. Employees seeking to take FMLA leave must qualify as "eligible employees" under the statute. Under the FMLA, an "eligible employee" must (i) have worked for the employer for at least 12 months; (ii) have worked at least 1,250 hours during the year preceding the start of the leave; and (iii) be employed at a worksite where the employer employs at least 50 employees within a 75 mile radius.[14]

As for the 12-month employment requirement, the 12 months do not need to be consecutive, but an employee may not be eligible until his total length of employment meets or exceeds 12 months.[15] Periods of paid or unpaid leave may also count towards calculating the length of employment, if the employee has remained on the payroll of the employer.[16] When calculating the 12 month period of employment, 52 weeks is treated as equivalent to 12 months.[17]

Whether an employee has meet the requisite 1,250 hours of service during the previous 12 months is calculated by reference to the compensable hours rules of the Fair Labor Standards Act (the "FLSA").[18] Only actual hours of work will count toward the 1,250 hour requirement.[19] Paid time off for vacations, holidays, and sickness will not be counted.[20] Employees who are exempt from the FLSA for whom no time records are kept, and who have worked for the employer for 12 months will be presumed to have worked at least 1,250 hours in the previous 12 months unless the employer can clearly demonstrate that they did not meet the 1,250 hour requirement.[21]

The final requirement for an individual to qualify as an "eligible employee" turns on the number of employees employed by a covered employer. An employee can qualify as an eligible employee under the FMLA only where his employer employs at least 50 employees

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10 29 C.F.R. § 825.105(c).
11 29 C.F.R. § 825.105(b).
12 29 C.F.R. § 825.105(d).
13 29 C.F.R. § 825.105(f).
14 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110.
15 29 C.F.R. § 825.110(b).
16 29 C.F.R. § 825.110(b)(3).
17 29 C.F.R. § 825.110(b).
18 29 U.S.C. § 101, *et seq.*
19 29 U.S.C. § 207; 29 C.F.R. § 785.
20 *Sepe v. McDonnell Douglas Corp.*, 176 F.3d 1113 (8th Cir. 1999), cert. den., 528 U.S. 1062 (1999).
21 29 C.F.R. § 825.110(c)(4).

within 75 miles of the employee's work site.[22] Even public employers are not required to afford FMLA leave to employees who cannot meet the 50 employee requirement. The 75-mile radius is not determined "as the crow flies," but instead is based on miles traveled on public roads.[23] The 50 employee/75 mile component of the eligibility test is to be determined at the point in time the employee requests the leave.[24]

B. Qualifying Circumstances Related to Pregnancy and Caring for Children

Eligible employees may take FMLA leave:

(1) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter;

(2) Because of the placement of a son or daughter with the employee for adoption or foster care;

(3) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition; or

(4) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.[25]

1. *Leave Related to Pregnancy*

As noted, an eligible employee may take FMLA leave (i) because of the employee's own serious health condition or (ii) to care for a spouse with a serious health condition. A serious health condition is defined as "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."[26]

a. *Expectant Mothers*

Thus, an expectant mother may take FMLA leave *before the birth* of the child (i) for prenatal care or (ii) if her condition renders her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she doesn't receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. This would include, for example, an instance where a pregnant employee is unable to report to work due to severe morning sickness. After pregnancy, the mother is entitled to FMLA leave for her own serious health condition following the birth of the child.

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22 29 C.F.R. § 825.110(a)(3).

23 29 C.F.R. § 825.111(b).

24 29 C.F.R. § 825.110(e).

25 29 U.S.C. § 2612(a)(1). As previously noted, the FMLA has specific provisions for military family leave. An eligible employee may take military family leave (1) because of a qualifying reason arising out of the covered active duty status of a military member who is the employee's spouse, son, daughter, or parent ("qualifying exigency leave") or (2) To care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember ("military caregiver leave"). 29 C.F.R. § 825.112. The main differences between the two types of military family leave is that military caregiver leave is the only type of FMLA leave that extends beyond 12 weeks (up to 26 weeks) and qualifying exigency leave covers non-medical conditions and needs arising out of a family member's call to active duty.

26 29 U.S.C. § 2611(11).

b. *Spouses*

A spouse is entitled to FMLA leave if needed (i) to care for a pregnant spouse who is incapacitated; (ii) to care for a pregnant spouse during her prenatal care, or (iii) to care for the spouse following the birth of a child if the spouse has a serious health condition.

Although the DOL has issued a rule that would allow an employee to take FMLA leave for a same-sex spouse *regardless* of whether the employee lives in a state that recognizes their marital status, that rule hit a bump on the road on March 26, 2015 when the United States District Court for the Northern District of Texas preliminarily enjoined application of the final rule in *Texas v. United States of America*, No. 7:15-cv-00056 (N.D. Texas 2015).[27]

On February 25, 2015, the DOL issued a final rule, which was to take effect on March 27, 2015, providing that the definition of "spouse" under the FMLA was to be determined by the state in which a marriage is entered, the "state of celebration."[28] The DOL stated that the "place of celebration" rule "allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live."[29] The DOL also noted that as of February 13, 2015, 32 states and the District of Columbia extend the rights to marry to both same-sex and opposite-sex partners.[30]

But before the final rule took effect, the states of Texas, Arkansas, Louisiana, and Nebraska sought a preliminary injunction to enjoin the DOL's changed definition of "spouse" under the FMLA. The Northern District of Texas found that the DOL's rule might not survive a challenge based on the Federal Full Faith and Credit Statute, which says no state is required to abide by any federal action that would force a state to recognize a relationship between two people of the same sex as a marriage. In issuing its order, the court barred the DOL from enforcing the rule pending a final ruling on the merits of the Texas Attorney General's claim.

It is important to note, however, that the preliminary injunction issued by the Northern District of Texas is only effective in those four states. Thus, whether the DOL will enforce the new rule in states not covered by the court's injunction is an open question.

Moreover, the United States Supreme Court's decision regarding the same-sex marriage cases currently before it may render the preliminary injunction moot since many commentators believe the Supreme Court will decide that the 14th Amendment requires states to license a marriage between two people of the same sex.

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[27] In 2013, the Supreme Court struck down Section 3 of the Defense of Marriage Act in *United States v. Windsor*. Soon after the DOL changed their definition of spouse under the FMLA, which allowed eligible employees to care for their same-sex spouse under the FMLA – if the employee resided in a state that recognizes same-sex marriage. Because the DOL rule was limited only to states that recognized same-sex marriage, states such as Texas were exempt from the FMLA rule change. In the Final Rule, however, that was halted by the court injunction, the DOL proposed to remove that geographic limitation by replacing the phrase "state of residence" to "state of celebration", thus forcing all states to allow FMLA leave to married same-sex workers.

[28] A copy of the DOL's final rule can be found at 80 Fed. Reg. 9989 (Feb. 25, 2015) and http://www.gpo.gov/fdsys/pkg/FR-2015-02-25/pdf/2015-03569.pdf.

[29] 80 Fed. Reg. 9989, 9991.

[30] 80 Fed. Reg. 9989, 9991-92.

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Although the DOL has issued a rule that would allow an employee to take FMLA leave for a same-sex spouse *regardless* of whether the employee lives in a state that recognizes their marital status, that rule hit a bump on the road on March 26, 2015 when the United States District Court for the Northern District of Texas preliminarily enjoined application of the final rule in *Texas v. United States of America*, No. 7:15-cv-00056 (N.D. Texas 2015).[27]

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[29] 80 Fed. Reg. 9989, 9991.

[30] 80 Fed. Reg. 9989, 9991-92.

2. ***Leave to Care for a Child: The DOL Expands the Definition of "Sons and Daughters"***

Under the FMLA, an eligible employee may take up to 12 workweeks of job-protected leave (i) to care for a son or daughter after birth of the son or daughter of the employee; (ii) to care for a son or daughter after placement of the son or daughter with the employee for adoption or foster care; and (iii) to care for a son or daughter with a serious health condition. [31]

While the FMLA may refer to a "son" or "daughter," two DOL administrative interpretations regarding the FMLA's definition of "son or daughter" have expanded the scope of FMLA with respect to the ability of an eligible employee to take up to 12 workweeks of job-protected leave to care for a child.

On June 22, 2010, the DOL issued Administrator's Interpretation No. 2010-3 ("Interpretation 2010-3") to clarify "the definition of 'son or daughter' . . . as it applies to an employee standing '*in loco parentis*' to a child."[32]

And on January 14, 2013, the DOL issued Administrator's Interpretation No. 2013-1 ("Interpretation. 2013-1") to clarify "the definition of 'son or daughter' . . . as it applies to an individual 18 years of age or older and incapable of self-care because of a mental or physical disability."[33]

The effect of these two interpretations has been to expand the circumstances under which eligible employees may take FMLA leave.

a. *DOL Expands Scope of Who Can Stand "*In Loco Parentis*" Under the FMLA*

In Interpretation No. 2010-3,[34] the DOL extended FMLA leave rights to any employee who has assumed responsibility for the parental care of a child, clarifying that the phrase "*in loco parentis*" includes non-traditional families. In a press release, the DOL hailed the "clarification" as "a victory for many non-traditional families, including families in the lesbian-gay-bisexual-transgender community, who often in the past have been denied leave to care for their loved ones."[35] The DOL made two determinations that impact all employers, particularly those with employees in states that have not recognized same-sex marriage.

First, the DOL noted that the FMLA regulations define *in loco parentis* as including those with day-to-day responsibilities to care for and financially support a child. (citing 29 C.F.R. § 825.122(c)(3)) The DOL then noted that employees who have no biological or legal relationship with a child may nonetheless stand *in loco parentis* to the child and be entitled to FMLA leave. Despite the fact that regulation 29 C.F.R. § 825.122(c)(3) uses the conjunctive with respect to requiring financial support and day-to-day care in order to be found to stand *in*

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31 29 U.S.C. § 2612(a)(1)(A)-(C).

32 http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf.

33 http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm.

34 http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf.

35 http://www.dol.gov/opa/media/press/whd/whd20100877.htm.

loco parentis to the child and be entitled to FMLA leave, the DOL issued its interpretation that the regulations do not require an employee to demonstrate that he provides both day-to-day care as well as financial support to the child to stand *in loco paren*tis to a child.

Second, the DOL stated that the fact that a child has a biological parent living in the home or has both a mother and a father does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child for the purpose of taking FMLA leave. The DOL further stated "[n]either the statute nor the regulations restrict the number of parents a child may have under the FMLA."

Interpretation No. 2010-3 concludes with the statement that "it is the Administrator's interpretation that either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child." (emphasis added). Under this conclusion, a two-step analysis is required to determine who qualifies as "*in loco parentis*" for FMLA purposes:

(1) Does the employee provide either day-to-day care or financial support to the child; and

(2) Does the employee intend to assume the parent-like relationship with and responsibilities for the child.

Although Interpretation No. 2010-3 was intended to recognize the changing nature of family structures and preserve the spirit and intent of the FMLA, there is the potential for both confusion and abuse. The DOL has recognized this fact and advises that an employer does not have to accept an employee's simple statement that he stands *in loco parentis* where there is no legal or biological relationship. The employer may request reasonable documentation or statement of the family relationship.

In other words, the employer's right to documentation of family relationship is the same for an individual who asserts an *in loco parentis* relationship as it is for a biological, adoptive, foster, or step-parent. An employee should (and may be required) to provide sufficient information to make the employer aware of the *in loco parentis* relationship.[36]

It should also be noted that the Northern District of Texas decision to preliminarily enjoin the DOL's final rule that would allow an employee to take FMLA leave for a same-sex spouse, regardless of whether the employee lives in a state that recognizes their marital status does not impact whether a person who will co-parent a same-sex partner's biological child may take leave for the birth of the child and for bonding.

As previously discussed, in June 2010, the DOL recognized that eligible employees may take leave to care for the child of the employee's same-sex partner (married or unmarried) or unmarried opposite-sex partner, provided that the employee meets the *in loco* parentis requirement of providing day-to-day care or financial support for the child. Thus, whether or not the DOL's definition of "spouse" is recognized as expanded as being determined by the state in

[36] 29 CFR § 825.122.

which a marriage is entered, the "state of celebration" has no impact on the standards for determining the existence of an *in loco parentis* relationship.

b. *Expanded Ability to Care for Adult Children Under the FMLA*

On January 14, 2013, the DOL issued Interpretation 2013-1[37] to clarify its position on the ability of employees to take leave under the FMLA to care for an adult child who has a disabling medical condition.

The FMLA allows employees to take up to 12 workweeks of leave to care for a son or daughter with a serious health condition.[38] However, the scope of allowable leave narrows once an employee's son or daughter reaches 18 years old. At that point, a parent is entitled to take FMLA leave only if:

(1) the adult child has a disability as defined by the ADA;

(2) the child is incapable of self-care due to that disability;

(3) the child has a serious health condition; and

(4) the child is in need of care due to the serious health condition.[39]

It is only when all four requirements are met that an eligible employee is entitled to FMLA leave to care for an adult child.

Before Interpretation No. 2013-1, there was some question as to whether the adult child's disability must have developed before age 18. Previous DOL interpretations suggested that an adult child must have become disabled before the age of eighteen in order for a parent to qualify for FMLA leave to care for the disabled child in adulthood.

The DOL's new interpretation clarifies that the age a child becomes disabled is not relevant to determining a parent's entitlement to FMLA leave. According to Interpretation No. 2013-1, the age of onset of the disability is immaterial so long as the adult child at issue has a disability under the ADA.

Additionally, Interpretation No. 2013-1 confirms that because the FMLA's definition of "son or daughter" looks to the definition of "disability" under the Americans with Disabilities Act, that definition, as expanded by the Americans Disabilities Act Amendments Act of 2008 ("ADAAA") will be applicable to determinations of disability under the FMLA. As a result:

- ***Duration of the impairment doesn't matter***: Citing the broad definition of disability under the ADA, Interpretation No. 2013-1 restates that there is no minimum duration required for an impairment to a disability. The effects of the impairment lasting or expected to last fewer than six months can still be substantially limiting within the meaning of the ADA.

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37 http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm.

38 29 U.S.C. § 2612(a)(1).

39 *Id.*; *see also* 29 C.F.R. § 825.122(c)(1) and (2) and Interpretation No. 2013-1.

- ***Needed assistance in three or more daily living activities*:** Not only must the adult child suffer from a disability, but the adult child must require "active assistance or supervision to provide daily self-care in *three or more* of the 'activities of daily living' or 'instrumental activities of daily living'" because of his or her disability. These include: grooming and hygiene, bathing, dressing and eating and also include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence using telephones and directories, using a post office, etc.

- "***Serious health condition" and "needed to care for" still necessary***. The adult son or daughter's condition necessitating FMLA leave must also still qualify as a serious health condition for which the employee/parent is needed to care" as defined by the FMLA.

To assist in understanding Interpretation No. 2013-1's position with respect to taking FMLA leave to care for adult children, the DOL provides two examples:

- **Example 1** ***(Shattered Pelvis)*:** An employee's 37-year old daughter suffers a shattered pelvis in a car accident which substantially limits her in a number of major life activities (i.e., walking standing, sitting, etc.). As a result of this injury, the daughter is hospitalized for two weeks and under the ongoing care of a health care provider. Although she is expected to recover, she will be substantially limited in walking for six months. If she needs assistance in three or more activities of daily living such as bathing, dressing, and maintaining a residence, she will qualify as an adult "daughter" under the FMLA as she is incapable of self-care because of a disability. The daughter's shattered pelvis would also be a serious health condition under the FMLA and her parent would be entitled to take FMLA-protected leave to provide care for her immediately and throughout the time that she continues to be incapable of self-care because of the disability.

- **Example 2** ***(Diabetes)*:** An employee's 25-year old son has diabetes but lives independently and does not need assistance with any daily activities. Although the young man's diabetes qualifies as a disability under the ADA because it substantially limits a major life activity (i.e., endocrine function), he will not be considered an adult "son" for purposes of the FMLA because he is capable of providing daily self-care without assistance or supervision. Therefore, if the son is admitted to a hospital overnight for observation due to a skiing accident that does not render him disabled, his parent will not be entitled to take FMLA leave to care for him because he is over the age of 18 and not incapable of self-care due to a mental or physical disability. If the son later becomes unable to walk and is also unable to care for his own hygiene, dress himself, and bathe due to complications of his diabetes, he will be considered an adult "son" as he is incapable of self-care due to a disability. The son's diabetes will be both a disability under the ADA and a chronic serious health condition under the FMLA because his condition requires continuing treatment by a doctor (e.g., regular kidney dialysis appointments). If his parent is needed to care for him, his parent may therefore take FMLA-protected leave to do so.

In Interpretation No. 2013-1, the DOL expressly recognized that the broad definition of disability under the ADAAA will "increase the number of adult children with disabilities for whom parents may take FMLA protective leave." The DOL's clarification reflects the impact of the ADAAA's expansion of the definition of "disability" on the FMLA and will enable more parents to take FMLA-protected leave to care for their adult sons and daughters with disabilities.

C. Taking FMLA Leave

Once an employee has established eligibility for FMLA leave and qualifying circumstances, the employee is entitled to take leave under the FMLA. An employee need not use any specific language to request FMLA leave. The employee must only provide the employer with sufficient information to determine that the leave is protected by the FMLA.[40] When the need for FMLA leave is foreseeable for the birth or placement of a child for adoption or foster care, or for planned medical treatment for a serious health condition of the employee or a close family member, an employee must give 30-days advance notice to the employer of the need to take leave.[41] When it is not possible to provide this advance notice, or when the need for the leave is not foreseeable, notice must be given "as soon as practicable under the facts and circumstances of the particular case," which typically must occur within the time set by the employer's customary notice policies.[42] For a serious health condition of an employee or her family member, an employer may require the employee to provide medical certification within a period set by the employer. That period can be as short as 15 calendar days after the employer's request for certification. Where an employee seeks an extension of an FMLA leave and requires additional certification, the employer must again allow 15 days.

An employee may take 12 workweeks of leave during any 12 month period under the FMLA.[43] The employer, meanwhile, is permitted to choose a consistent and uniform method for determining the 12 month period in which employees may take their leave. The employer may use a fixed year method, measuring the 12 months from a specific date, or a rolling method, measuring the 12 month period either forward or backward from when leave commences.[44] If the employer does not select a method, the method that results in the most favorable for the employee will be deemed to apply.[45] Employers are prohibited from taking any action that discourages or interferes with an employee's right to take FMLA leave.[46]

The FMLA also allows an employee to take intermittent leave, taken in separate blocks of time, or to work a reduced leave schedule, which decreases the employee's work schedule for a limited period of time.[47] The FMLA places no limit on the amount of time taken as intermittent leave, and an employer may only limit a leave increment to the shortest period of time the employer uses to account for use of other forms of leave, provided that it is not greater

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40 29 C.F.R. § 825.303(b).
41 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a).
42 29 U.S.C. § 2612(e)(2)(B); 29 C.F.R. § 825.303(a).
43 29 U.S.C. § 2612(a)(1).
44 29 C.F.R. § 825.200(b).
45 29 C.F.R. § 825.200(e).
46 29 C.F.R. § 825.220.
47 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202.

than one hour and that the employee is not charged with more leave than actually used.[48] Even if the employee takes intermittent leave, the FMLA still provides 12 full workweeks of leave. The amount of time actually taken counts against the FMLA entitlement.[49]

FMLA leave is generally unpaid.[50] Where issues of organized labor are not present, both the employee and employer have the option to require the substitution of any accrued paid leave for any part of the 12 week period.[51] Where the employee taking the FMLA leave is represented by a labor union, however, an employer can require the contemporaneous use of paid leave only where that has been the traditional practice.

During the employee's FMLA leave, the employer must maintain the employee's health benefits under any group health plan as if the leave had not been taken.[52] The employer's obligation to maintain health benefits for an employee on FMLA leave ceases when the employment relationship would have ended, even if the employee had not taken leave.[53]

Upon return from a FMLA leave, the employer must return the employee to the same position he held at the beginning of the leave or to "an equivalent position with equivalent benefits, pay, and other terms and conditions of employment."[54] An employer may have a uniformly applied policy requiring all employees who take leave under the FMLA to present a fitness-for-duty report, which contains medical evidence establishing that the employee is capable of returning to work in light of the condition for which the employee took FMLA leave.[55]

It is important to note that spouses (who have the same covered employer and also are eligible for FMLA leave may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition.

This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as spouses are employed by the "same employer.' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave.

Where the spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the

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48 29 U.S.C. § 825.205(a)(1).
49 29 C.F.R. § 825.205(b)(l).
50 29 U.S.C. § 2612(c); 29 C.F.R. § 825.207(c).
51 29 U.S.C. § 2612(d)(2).
52 29 U.S.C. § 2614(c); 29 C.F.R. § 825.209(a).
53 29 C.F.R. § 825.209(f).
54 29 U.S.C. § 2614(a)(1).
55 29 U.S.C. § 2614(a)(4); 29 C.F.R § 825.312.

spouses would each be entitled to the difference between the amount he has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his own serious health condition or to care for a child with a serious health condition. State laws, however, may expand upon leave available to the employees.

PRESENTATION

Jumping Ship or Walking The Plank? Drafting and Enforcing Non-Compete Agreements and Other Restrictive Covenants

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BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

Basics of Non-Competes in Louisiana

"Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void." La. R.S. 23:921(A).

BUT….

There are always exceptions.

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Rules for Enforceable Non-Competes

Per the plain language of La. R.S. 23:921(C):

1. A person may agree with his or her employer
2. To refrain from carrying on "business similar to that of [his or her] employer"
3. Within specific parishes, municipalities, or parts thereof
4. For a period not to exceed 2 years.

Simple enough, right?

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The Agreement

The statute does not prescribe any particular form for the agreement.

Typically, a non-compete agreement will be included in a broader employment agreement.

Where an employer chooses not enter into an employment agreement, a standalone non-compete agreement is also acceptable.

Best to have the employee sign the non-compete at the beginning of employment to avoid questions regarding proper consideration. Louisiana courts have held agreements valid where the only consideration to an employee in exchange for the non-compete is continued employment.

There is no one-size fits all solution for the written agreement. Whether included in an employment agreement or not, each agreement should be individually tailored.

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The Business

An employee can only agree to not compete with the legitimate business interests of his or her employer – in other words, refrain from carrying on "business similar to that of [his or her] employer."

An employer cannot have an employee refrain from all work.

Do you have to describe the type of business or work in the agreement?

Best practices?

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The Location

Section 921 requires that a non-compete agreement specifically identify the parishes, municipalities, or parts thereof where it will apply.

The failure to include geographic boundaries will render the non-compete unenforceable.

Location is often a hotly-contested issue in non-compete cases.

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The Time

The statute strictly limits the non-compete period to no more than 2 years.

No exceptions.

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Overbroad Agreements

Common issues with non-compete agreements:

- Too many parishes listed – employer doesn't actually do business in all locations
- Non-compete period of more than 24 months
- "Business" is defined in an overbroad manner

Can a court reform an overbroad agreement?

What can be reformed?

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Specific Issues

Physician Non-Compete Agreements

- Can a physician be prohibited from practicing for a competing provider?

- No public policy implicated by a physician non-compete issue is let to legislature to resolve.

Regional Urology, L.L.C. v. Price, 966 So.2d 1087 (La. App. 2 Cir. 2007)

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Specific Issues

Physician Non-Compete Agreements

What if a physician describes his practice differently than the business listed in the non-compete?

Cardiovascular Institute of the South v. Abel, No. 2014-1268 (La. App. 1 Cir. 3/9/15)

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Practical Approaches and Considerations

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How Far Do We Go to Enforce the Restrictions?

Considerations:

- Cost/time
- Enforceability
  - What restriction has been violated?
  - How do we/can we prove it?
- What will we ultimately obtain?
  - Money judgment?
  - Injunction?
  - Restrictions on competitor?

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What Do You Do Now?

Determine the Scope of Conversion:

- Review work email
- Phone logs/recordings
- Interview Co-workers/managers
- IT level analysis (can recover “deleted” items)
- You need to know what was taken so that you can recover it

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What Do You Do Now?

Lawsuit:

Potential Federal Court Venue

- Diversity
- Computer Fraud & Abuse Act

Request Temporary Restraining Order/Preliminary Injunction

- Judges typically very responsive
- Telephonic hearing
- Put former employee/new employer on heels from initiation of suit

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What Do You Do Now?

Lawsuit (cont.):

Direct route to monetary payment, injunction, other judgment

- Judgment/injunction by court order
- Consent relief via settlement

Additional relief available

- Seize computers/hard-drives

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What Do You Do Now?

Settlement:

1. Parties go separate ways with certain specific caveats
2. Return/destruction of converted materials
3. Unauthorized competition by employee ceases
4. Negotiate collection of attorney's fees
5. Consent Judgment – potential contempt of court for violation

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Pointers

- Ensure you have in place robust policies regarding use and access of Employer email, telephone, and other data systems
  - Cordon off access depending on position/job duties
- Ensure those policies provide for monitoring and inspection of employee activities/access with respect to those systems
  - If an issue arises – inspect!
- Adopt and maintain measures that actively ensure presentation and protection of confidential materials
  - This is an element of a claim for violation of the Louisiana Uniform Trade Secrets Act
  - Password protect sensitive information, limit and monitor access to that information

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Pointers (cont.)

- Do not generally distribute or make available to all or substantially all employees information you will later seek to protect
  - Do not distribute hard copies of sensitive information
- Even if your Company does not have a separate non-disclosure, non-competition agreement, ensure that all employees acknowledge the Company's data use, access, and confidentiality policies
- if you do adopt a stand alone non-disclosure and/or non-competition agreement, include a liquidated damages provision in the event of a breach by an employee (assuming enforceable in your state)
  - Permits threat of monetary award in cease and desist letter
- Unless you intend your stand alone agreement to be an employment contract, do not prepare it as one
  - In Louisiana, no additional consideration is required
  - At-will employment relationship can be maintained despite non-disclosure/non-competition agreement

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The End

Questions?

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PRESENTATION

MATERIAL HANDOUT

Jumping Ship or Walking The Plank? Drafting and Enforcing Non-Compete Agreements and Other Restrictive Covenants

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Exceptions to Prohibition on Non-Competes

Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment . . . La. R.S. 23:921(C)

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The Location

A particular parish may be off limits to the employee only if the "employer carries on a like business therein." In view of the statutory history of the Statute and the nature of commercial business activity that generally does not abruptly end at the parish line of the principal location of a business, the lack of an actual business facility in Morehouse in this case is not the only measure for the geographic test of the Statute. Its language of "carrying on" "business" allows for the employer to demonstrate significant business activity which might be competitively impacted in a parish outside of the location where the employee worked. The customer "territory" concept is therefore still a business interest of the employer recognized under the Statute.

West Carroll Health System v. Tilmon, 92 So.3d 1131 (La. App. 2 Cir. 2012)

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The Location

We find there is no significant difference between "parish or parishes" as used in the statute and "county or counties," for both refer to the same type of geographic subdivision of a state. What is important is that the geographic limitation be express and clearly discernable. The agreement here satisfied that requirement by specifically listing the counties in Mississippi and Alabama to which the agreement applies. For this reason the geographic limitation is enforceable.

Hose Specialty & Supply Management v. Guccione, 865 So.2d 183 (La. App. 5 Cir. 2006).

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Sample Provisions – Spot the Problem

In exchange for continued employment with the Company, Employee agrees that during her employment with Company and for a period of twenty-four (24) months after her separation from Company, she will not engage in the business of selling widgets for any other person or entity. If Employee is terminated for Cause, she acknowledges and agrees that this period will be extended to thirty-six (36) months.

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Sample Provisions – Spot the Problem

In exchange for continued employment with the Company, Employee agrees that during her employment with Company and for a period of twenty-four (24) months after her separation from Company, she will not engage in the business of selling widgets for any other person or entity within a 100-mile radius of Company's headquarters.

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Sample Provisions – Spot the Problem

Employee agrees that during her employment with Company and for a period of twenty-four (24) months after her separation from Company, she will not compete with the Company within the parishes specified in Exhibit A.

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Specific Issues

Physician Non-Compete Agreements

Can a physician be prohibited from practicing for a competing provider?

Lastly, Dr. Price argues that we should nullify the noncompetition and non-solicitation agreement between the Members of Regional Urology for being against public policy. This we decline to do. The considerations raised by Dr. Price are compelling, particularly concerning the freedom patients should have to obtain treatment from a physician of their own choosing. However, these considerations were apparent when Dr. Price and the other physicians of Regional Urology signed the Amendment and put their own material concerns above that of patient choice. We find nothing in Louisiana's public policy that would require us to nullify the agreement at issue. The policy concerns raised by Dr. Price are, as observed by the trial court, a matter for the legislature to address.

Regional Urology, L.L.C. v. Price, 966 So.2d 1087 (La. App. 2 Cir. 2007)

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Specific Issues

Physician Non-Compete Agreements

The non-compete agreement requires Dr. Abel “not to carry on or engage in the business of the practice of medicine in the sub-specialty of cardiology” in the Parish of St. Mary, where the Prevention Plus clinic is located, for a period of two years following his departure from CIS. While Dr. Abel's practice at Prevention Plus may not have been identical to his practice at CIS, we find the practice conforms to the language of La. R.S. 23:921(C) in that it is “a business similar to that of the employer.” Whether Dr. Abel chooses to call his practice “internal medicine,” “preventative medicine,” or “wellness,” the district court's ruling was clear enough to restrict Dr. Abel from performing services and procedures one would receive at CIS.

Cardiovascular Institute of the South v. Abel, No. 2014-1268 (La. App. 1 Cir. 3/9/15)

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Enforcement

Any agreement covered by Subsection B, C, E, F, G, J, K, or L of this Section shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived. In addition, upon proof of the obligor's failure to perform, and without the necessity of proving irreparable injury, a court of competent jurisdiction shall order injunctive relief enforcing the terms of the agreement. Any agreement covered by Subsection J, K, or L of this Section shall be null and void if it is determined that members of the agreement were engaged in ultra vires acts. Nothing in Subsection J, K, or L of this Section shall prohibit the transfer, sale, or purchase of stock or interest in publicly traded entities.

La. R.S. 23:921(H).

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Hypothetical

I. Steeling, has just resigned as an employee for your organization. Rumors have it that Mr. Steeling has gone to work for your competitor, Your Ideas Utilized, Inc. Your IT department discovers that, immediately before he left, Mr. Steeling sent numerous emails from his company email account to personal email accounts belonging to himself and his spouse. Attached to those emails were proprietary company documents. While he was employed with your organization, Mr. Steeling executed an iron-clad Non-Competition and Non-Disclosure Agreement that you obtained from Baker Donelson. In addition, Mr. Steeling acknowledged your company policies regarding confidentiality and proper use of company email systems.

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PRESENTATION

The Year in Review:

Significant Employment Decisions from the Last Twelve Months

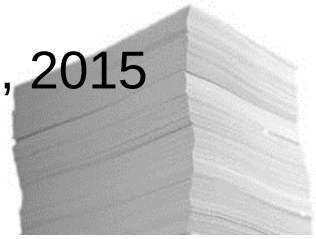
Presented By:

Erin Pelleteri

Matt Juneau

and Laura Carlisle

May 21, 2015



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A Busy Year

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Wage and Hour Litigation

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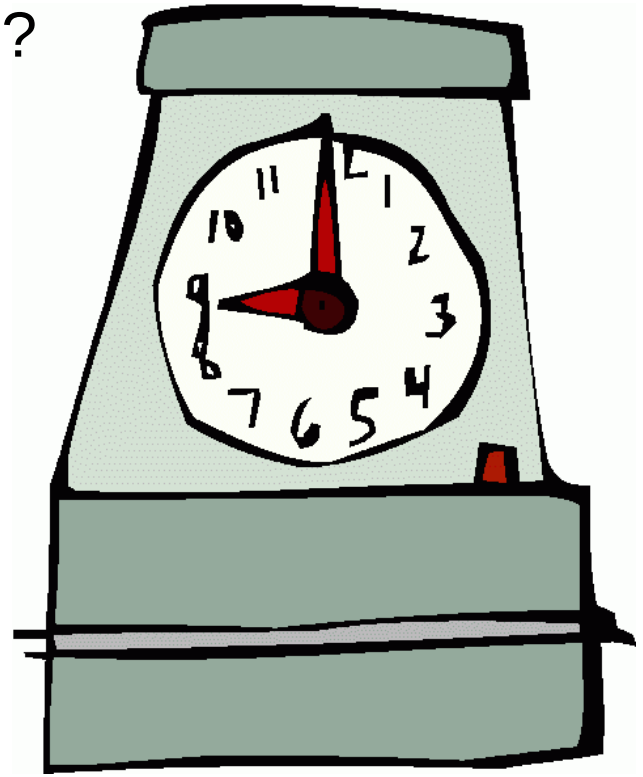
Notable Cases and Trends

- In the Courts: What constitutes compensable work-related activities?
- Minimum wage for federal contractors
- FLSA Exemptions



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Title VII

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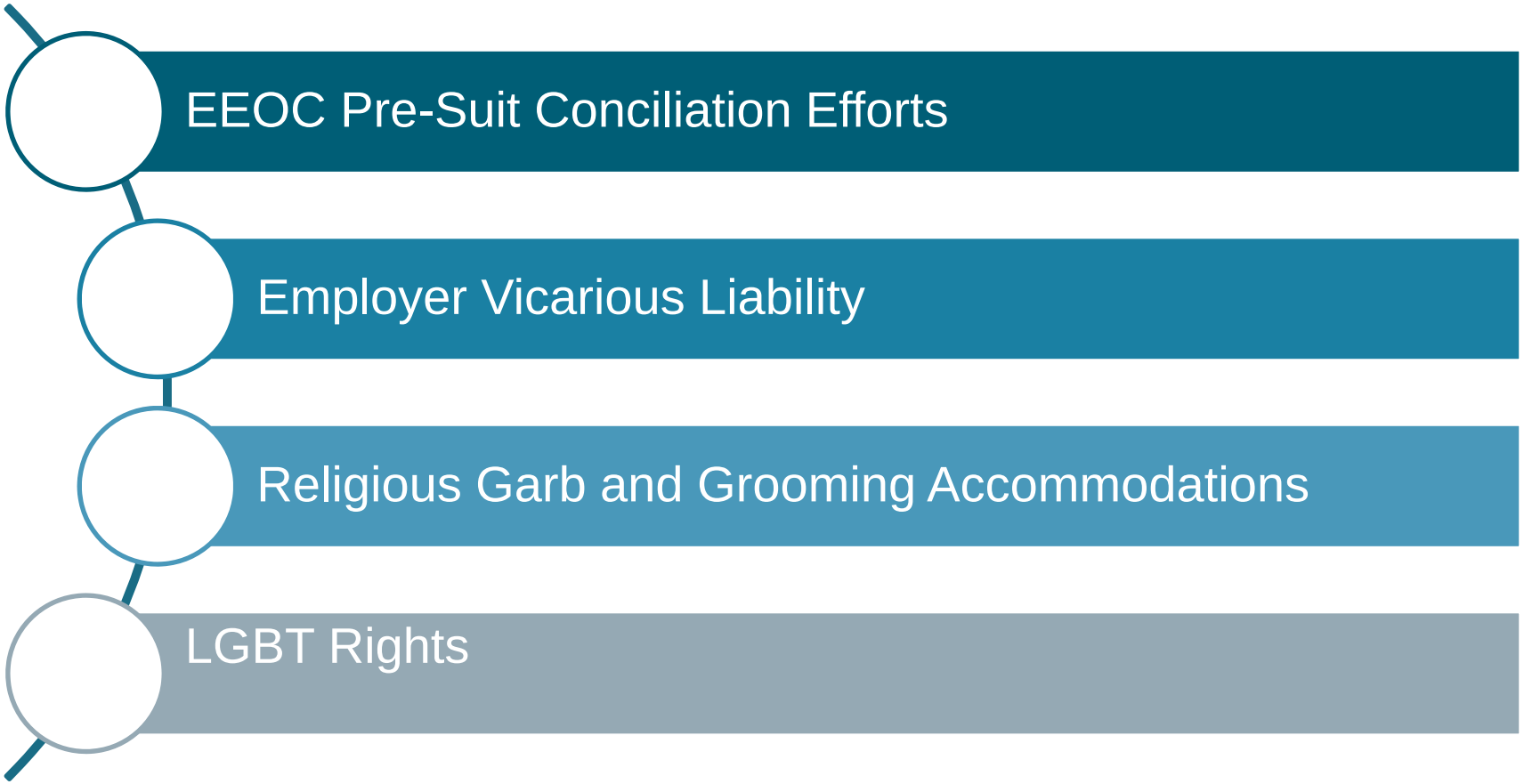
Hot Topics



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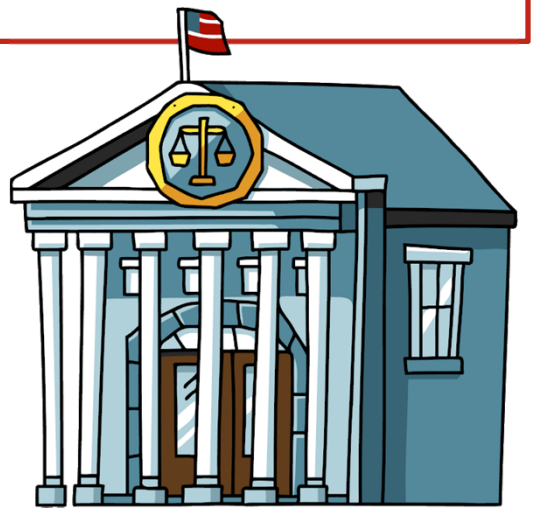
From the High Court

- *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).
- *Vance v. Ball State University*, 133 S. Ct. 2434 (2014).



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Notable Trends

- Religious Garb and Grooming Accommodations
- LGBT Rights

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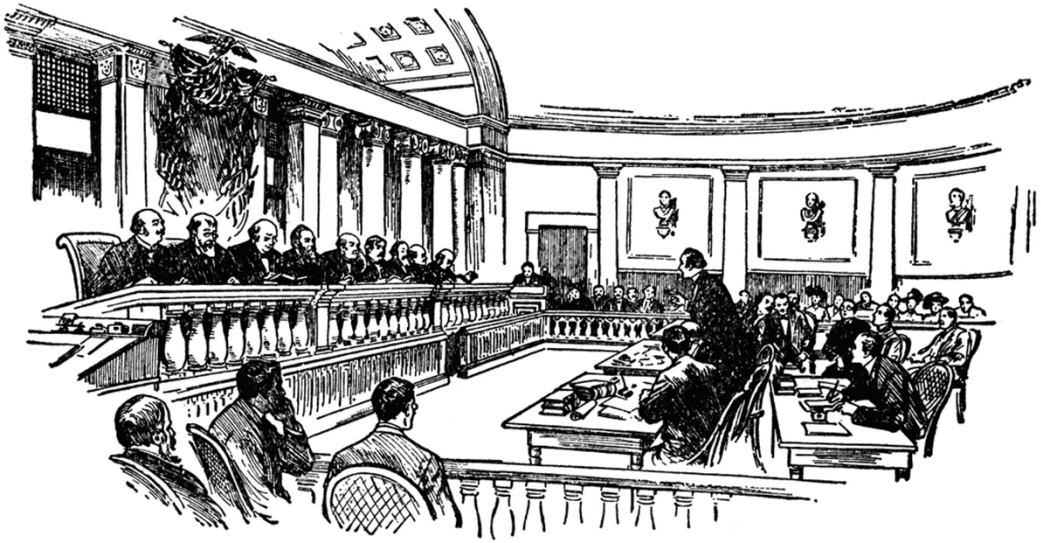
Religious Objections to the ACA



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Notable Cases

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

Wheaton College v. Burwell, 134 S. Ct. 2806 (2014).

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Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604 (2013).

Tibble et al. v. Edison International et al., No. 13-550, U.S. Supreme Court (Argued February 24, 2015 – Decided May 18, 2015).

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ADA Accommodations

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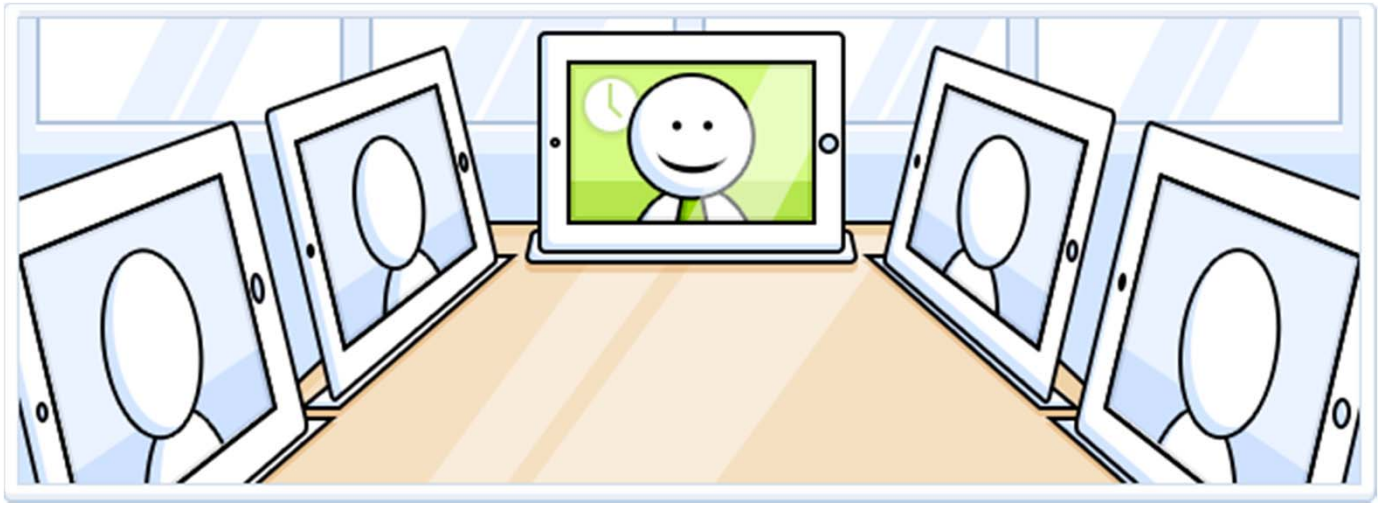
Something to Watch

EEOC v. Ford Motor Company, No. 5:11-cv-013742 (6th Cir. April 10, 2015).



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THE YEAR IN REVIEW: SIGNIFICANT EMPLOYMENT DECISIONS FROM THE LAST TWELVE MONTHS

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The current administration has been active in its efforts to impact workplace policies. For instance, in the 2014 State of the Union Address, President Obama called on Congress to raise the national minimum wage from $7.25 to $10.10 an hour and to pass legislation that ensured equal pay for men and women. Given the 2010 elections, however, it is highly unlikely that any such legislation will be passed during this administration. While only Congress can raise the minimum wage or pass legislation to extend Title VII's protections, there are other measures that enable the president to impact the workplace, such as Executive Orders or administrative regulations.

Notably, in 2014, President Obama signed an Executive Order to raise the minimum wage for those individuals working on new federal service contracts. As of January 1, 2015, federal contractors will be required to pay their employees $10.10 per hour – above the $7.25 minimum wage. This regulation will directly impact 200,000 low wage workers, and is anticipated to indirectly impact those workers who already earn more than the federal minimum wage but less than $10.10 per hour. Additional orders and memoranda issued by this administration have required federal contractors be transparent in their pay practices, provide compensation data based on gender and race, prohibit them from requiring their employees to arbitrate certain employment claims, and disclose prior employment claims.

This administration has also made overhauling the Fair Labor Standards Act ("FLSA") exemptions a priority. The FLSA requires that all non-exempt employees be paid an overtime rate for hours worked over 40 in a workweek. The Secretary of Labor determines who is exempt from this requirement based on service as a bona fide administrative, professional, outside sales, or computer employee. On May 5, 2015, U.S. Secretary of Labor Tom Perez confirmed that proposed new definitions for these exemptions had been submitted to the Office of Management and Budget ("OMB") to seek its approval for the release of the proposed definitions for public comment. OMB is normally expected to complete its assessment within 90 days, and, if approved, then the Department of Labor will release the assessment for public comment with little delay. This comment period is unlikely to be shorter than 60 days, and it may be longer.

It is anticipated that the proposed regulations will significantly increase the salary threshold required to render an employer exempt from overtime pay requirements, and may even bring the salary threshold to somewhere between $42,000 and $52,000 per year. In addition, it is anticipated that the new regulations will create a "bright-line" test regarding which "duties" an overtime-exempt employee may undertake. Whatever the changes, there is little question that they will have tremendous impact on employers and workers alike. Employers should

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proactively review how they currently classify employees and develop contingency plans in order to ensure compliance if and when the new regulations become effective.

Given these initiatives, it appears that the litigation related to wage and hour issues will continue to rise, but potentially not at the rate observed over the past decade. Commentators have attributed aggressive efforts by employers to improve payroll practices, monitor management, and increase awareness regarding proper classifications to the modest increase in FLSA litigation over the past year. However, there were a couple of FLSA suits of note decided this past year.

***Integrity Staffing Solutions, Inc. v. Busk, et al.*, 135 S. Ct. 513 (2014).** In 1947, Congress found that the Fair Labor Standards Act had been interpreted judicially in such a way so as to bring about the "financial ruin of many employers" as "employees would receive windfall payments . . . for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay." 29 U.S.C. §§ 251(a)-(b).

In response to this "emergency," Congress enacted the Portal-to-Portal Act, which exempted employers from liability for future claims based on two categories of work-related activities: (1) walking, riding, or traveling to or from the place of performance of the principal activity; or (2) activities which are preliminary to or postliminary to said principal activity or activities. In *Integrity Staffing Solutions, Inc.*, the Court clarified when an activity should be considered integral and indispensable to the principal activities that an employee is employed to perform – and thus compensable under the FLSA. The appropriate test is whether the activity is an intrinsic element of the principal activities and one with which the employee cannot dispense if he is to perform his principal activities.

Factual Background:

Integrity Staffing required its employees, warehouse workers who received inventory and packaged it for shipment, to undergo an antitheft security screening before leaving the warehouse each day. During this screening, employees removed items such as wallets, keys, and belts from their persons and passed through metal detectors. The employees alleged they are entitled to compensation under the FLSA for the time spent waiting to undergo and actually undergoing the security screenings, as the screenings were conducted "to prevent employee theft" and thus occurred "solely for the benefit of the employers and their customers." They also alleged the time could have been reduced to a *de minimus* amount by adding more security screeners or by staggering through the checkpoint more quickly.

Procedural History:

The District Court dismissed the Complaint for failure to state a claim, holding that the time spent waiting for and undergoing the security screenings was not compensable under the FLSA. The Ninth Circuit reversed, holding that postshift activities that would ordinarily be classified as noncompensable postliminary activities are compensable as integral and indispensable to an employee's principal activities if those postshift activities are necessary to the principal work performed and done for the benefit of the employer. The Court of Appeals concluded that the screenings met those criteria and were thus compensable. The Supreme Court, in an unanimous decision, reversed.

How the High Court Got There:

After reviewing the history of the Portal-to-Portal Act, the Court determined that the issue in this case is the exemption for the "activities which are preliminary or postliminary to said principal activity or activities." The Court reasoned that an activity is integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. For example, the Court had previously held compensable the amount of time meatpacker employees spent sharpening their knives because dull knives slow down production, lead to waste, and otherwise impact the performance of the principal activities. The Court also relied on an Opinion Letter issued by the Department of Labor in 1951, where the DOL found noncompensable preshift and post-shift security searches of employees.

Based on the foregoing, the Court held that the test is not whether an employer required a certain activity, but instead the integral and indispensable test is tied to the productive work that the employee is employed to perform. According, as the security screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment and Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work, they were not "integral and indispensable" to the employees' duties as warehouse workers.

With regard to the employees' argument that the amount spent at the screenings could have been reduced, the Court simply stated that "these arguments are properly presented to the employers at the bargaining table . . . not to a court in an FLSA claim."

What Does This Case Mean for Employers?

While the Court's decision should be viewed as a positive for any company that requires its employees to undergo uncompensated security screenings, employers must still be mindful that an activity which is "integral and indispensable to the principal duties of employment" is compensable. As such, it is advisable for employers to:

1. Review screening processes and policies to ensure they are comparable to the screenings considered in *Integrity Staffing*. If your screenings are for a different purpose, or employees are required to perform tasks related to the screening, this time may be considered compensable.

2. Engage legal counsel if you are considering altering your prior practice of paying for such screenings. There are a host of issues that may arise from altering the terms of employment.

3. Ensure that the screening procedures your company utilizes are consistently and fairly applied to all employees.

4. Evaluate the circumstances of the process to confirm whether reasonable accommodations may be required for your employees.

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***Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, (2014).** Generally, employees must be paid for time spent donning and doffing protective gear at the work site to the extent that it is required by law or the employer. But, in 1949, Congress passed Section 203(o) of the FLSA, which permits – in a unionized setting – time spent "changing clothes" to be excluded from compensable time by either a collective bargaining agreement or by a custom or practice of non-compensation for that activity. However, courts had not been consistent in defining what items constituted "clothes" for purposes of Section 203(o).

In *Sandifer*, the Court considered the definitions of "clothes" proposed by the employer and employees and rejected both. The Court adopted a middle ground approach, holding that "clothes" means "items that are both designed and used to cover the body and are commonly regarded as articles of dress." This definition "leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices," but "does not exclude all objects that could conceivably be characterized as equipment." The Court further held that, if the vast majority of time is spent donning "clothes," the whole period is covered by Section 203(o).

Factual Background:

Former and current employees of U.S. Steel filed a collective action seeking recovery for pre- and post-shift time spent donning and doffing flame-retardant jackets and pants, hoods, hard hats, gloves, steel-toed boots, safety googles, and ear-plugs. The collective bargaining agreement ("CBA"), which had been in place since 1947 and prior to the enactment of Section 203(o), provided that U.S. Steel would not compensate its employees for "preparatory and closing activities."

Procedural History:

The District Court granted summary judgment in favor of U.S. Steel based on its determination that the items were "clothes" and, therefore, not compensable under the CBA. The District Court further held that, even if the items were not "clothes," the time spent donning and doffing these items was *de minimis* and thus not compensable under the FLSA.

On appeal, the Seventh Circuit affirmed the District Court's ruling, including its *de minimis* finding. This ruling, however, conflicted with Ninth Circuit authority in a meatpacking case holding that "special protective gear is different in kind from typical clothing" and is not "clothes" under Section 203(o). The Fourth, Sixth, Tenth, and Eleventh Circuits had adopted a definition of clothes that included anything one "wears," including "accessories" such as ear plugs and safety glasses. The Court rejected the definition of "clothes" proposed both by the employees and the employer in favor of a middle ground approach in which "clothes" were defined as "items that are both designed and used to cover the body and are commonly regarded as articles of dress."

How the High Court Got There:

The Court began with the fundamentals of statutory construction by looking to the common meaning of the term "clothes." The Court reasoned that this definition "leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices" (such as a wristwatch), but "does not exclude all objects that could conceivably be characterized as equipment." The Court rejected the broader view of certain circuits that "clothes" meant anything worn on the body, including tools and accessories, and specifically singled out necklaces, knapsacks, knife holders, and tools as not falling within the definition. Further, in considering the meaning of "changing" clothes, the Court dismissed the employees' argument that donning protective gear is not covered by section 203(o) and held that "changing clothes" includes not only putting on substitute clothing but also "altering dress."

Applying these principles to the items at issue, the Court defined the following items as "clothes": (1) flame-retardant jackets; (2) flame-retardant pants; (3) flame-retardant hoods; (4) a hard hat ("simply a type of hat"); (5) snoods (the industrial equivalent to a skier's "balaclava"); (6) wristlets ("essentially detached shirt-sleeves"); (7) work gloves; (8) leggings ("much like traditional legwarmers, but with straps"); and (9) metatarsal boots. The Court found that these items qualified as "clothes" because they were "both designed and used to cover the body and commonly regarded as articles of dress." On the other hand, the Court concluded that safety glasses, ear plugs and a respirator are not "clothes" under Section 203(o).

The Court rejected application of the *de minimis* doctrine to the donning and doffing of these items on the basis that the statute deals with "trifles," and "there is no more reason to *disregard* the minute or so necessary to put on glasses, earplugs, and respirators, than there is to *regard* the minute or so necessary to put on a snood." However, the Court recognized that the congressional intent behind Section 203(o) was not to require courts to be time-study professionals, and, as such, held that "if the vast majority of the time is spent donning and doffing clothes," the entire period qualifies. On the other hand, if the vast majority of time in question is spent putting on equipment or other non-clothes items, then the entire period is not or spent putting on and taking off equipment or other nonclothes items, the entire period is not covered by Section 203(o).

What Does This Case Mean for Employers?

The Court's decision certainly represents a victory for any unionized employer that has negotiated or established a practice of not compensating employees for "donning" and "doffing" time. Further, while the Court's decision is helpful in that it provides clarity on the definition of clothes for a number of items, it will still be left to the lower courts to apply the *Sandifer* analysis to items that fall somewhere in between. In the event that an item takes little time to put on or take off, this is unlikely to be of much concern. However, where these in-between items take significant time to put on, employers should strongly consider becoming the time-study professionals or risk letting courts do so.

TITLE VII

Over the past three years, the Equal Employment Opportunity Commission ("EEOC") has shown commitment to its focus on "reducing and deterring discriminatory practices in the workplace." The EEOC filed 133 merits lawsuits in 2014, and secured $22.5 million in monetary relief for charging parties through litigation. It also completed 260 systemic investigations, and recovered approximately $13 million in monetary relief.

Notably, in 2014, the EEOC issued guidance on pregnancy discrimination, religious dress and grooming in the workplace, and filed the first two lawsuits in its history challenging gender discrimination. Based on this activity, it is anticipated that employers will face heightened scrutiny in the areas of religious discrimination and accommodation practices, accommodation of pregnant employees, and the treatment of lesbian, gay, bisexual and transgender individuals under Title VII.

*****Religious Dress and Grooming Accommodations*****

As discussed above, in March 2014, the EEOC issued guidance related to religious dress and grooming in the workplace. The guide does not create any new obligations on employers, but was intended to provide clarity to the employer. As the cases below illustrate, however, clarity may still be required.

***EEOC v. Abercrombie & Fitch Stores*, 731 F.3d 1106 (10th Cir. 2013), *cert granted*, (Oct. 2, 2014**). Plaintiff, a Muslim woman, applied for a sales associate position with Abercrombie Kids. Plaintiff was familiar with the type of clothing that Abercrombie sold and understood she would be required to wear similar clothing if she became an employee. During the interview, Plaintiff wore an Abercrombie-esque shift, jeans, and her headscarf/hijab. The interviewer informed Plaintiff that she would be required to wear clothing similar to that sold by Abercrombie and no heavy makeup or nail polish, as Abercrombie relies on its "Look Policy" as being critical to the health and vitality of its "preppy" and "casual" brand. During the interview, Plaintiff did not inform the interviewer that she was Muslim, that she wore the headscarf for religious reasons, and would need an accommodation to address the conflict between her religious practice and the "Look Policy." While the interviewer apparently assumed Plaintiff was Muslim, she did not know of the requirements regarding the hijab. Abercrombie did not extend an offer of employment to Plaintiff, and she later learned from an Abercrombie employee that she was not hired because of her hijab.

The EEOC filed suit against Abercrombie for religious discrimination and failure to accommodate Plaintiff's religious beliefs in violation of Title VII. The District Court granted summary judgment to the EEOC in favor of Plaintiff and denied Abercrombie's summary judgment. The Tenth Circuit reversed, and ordered the District Court to vacate its judgment an enter judgment in favor of Abercrombie.

In its decision, the Tenth Circuit noted that the EEOC bore the burden of proving that Plaintiff had a *bona fide* religious belief that conflicted with the employer's requirements, that she

informed her prospective employer of the conflicting belief, and that she was not hired because of the conflict. The Court reasoned that the EEOC had not met its burden of establishing notice as it had not shown that Plaintiff informed the interviewer of her religious belief that conflicted with the "Look Policy." This decision places the burden on applicants or employees to initially inform employers of the religious nature of their conflict and the need for an accommodation to implicate the accommodation dialogue.

The Supreme Court heard oral arguments on February 25, 2015, but no decision has been rendered yet. From the oral arguments, however, many of the justices seemed skeptical of Abercrombie's argument that only actual knowledge from the applicant of the religious belief was adequate to put the employer on notice of the duty to accommodate. The justices also seemed interested in the opportunity to clarify precisely what level of notice – short of actual knowledge from the applicant – would be adequate. Regardless of the decision, clarification from the Court as to what notice triggers the duty to explore religious accommodation will be welcome guidance.

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***EEOC & Umme-Hani Khan v. Abercrombie & Fitch Stores*, 966 F.Supp.2d 949 (N.D. Cal. Sep. 2013).** Plaintiff, a Muslim woman, was working at Hollister (an Abercrombie brand) as an "impact associate." At the time that she was hired, Plaintiff wore a hijab, and believed that Islam required her to wear a hijab when in public or in the presence of men who are not immediate family members. When she was hired, Plaintiff acknowledged the "Look Policy," and agreed to abide by it. As part of her duties, Plaintiff worked primarily in the stockroom, but was requested to wear the hijab in Hollister colors, which she agreed to do. However, after approximately four months, management informed Plaintiff that she would be removed from the work schedule unless she removed her hijab at work. Plaintiff refused, and was thereafter terminated for refusing to comply with the "Look Policy."

The EEOC filed suit against Abercrombie alleging discrimination on the basis of religion in violation of Title VII. The parties filed cross-motions for summary judgment. It was undisputed that Plaintiff established a *prima facie* case, but Abercrombie argued it could not accommodate Plaintiff's religious beliefs without undue hardship. The District Court found that Abercrombie's sole support for its defenses was the opinion testimony of its own employees that deviation from the "Look Policy" negatively affected its brand and that was insufficient:

> Abercrombie must provide more than generalized subjective beliefs or assumptions that deviations from the Look Policy negatively affect the sales or the brand. The evidence presented does not raise a triable issue that a hardship, much less an undue hardship, would have resulted from allowing Khan to wear her hijab, particularly where she had already been wearing the hijab on the job for four months without any complaints, disruption, or a noticeable effect on sales.

Based on this hodling, to establish undue hardship, the employer must show more than

subjective belief regarding the impact of its dress code and grooming policies. In some cases, an employer may have to show economic harm connected to the employee's non-compliance with dress policies.

What Do These Cases Mean For Employers?

1. Employers are not required to make an accommodation for religious beliefs if the employee does not seek such an accommodation.

2. Employers may not rely on discriminatory customer or co-worker preferences or the need to protect the business's "image" to deny an accommodation to an employee.

3. Employers must make accommodations even when the religious beliefs an employee adheres to are new and had not previously been discussed.

4. Employers must make accommodations for employees even when the employee only observes a religious dress or grooming practice during certain times of the year.

5. These protections do not only apply to adherents of traditional religions, but also to newer or less well-known religions.

*****LGBT Rights*****

Though efforts to pass the Employment Non-Discrimination Act ("ENDA") have failed, as of December 2014, 35 states and the District of Columbia have full marriage equality, and 18 states have state-wide laws prohibiting discrimination in employment on the basis of sexual orientation and gender identity. In December 2014, the Department of Justice issued a memorandum holding that Title VII's prohibition on discrimination on the basis of sex also protects workers who are discriminated against based on their gender identity.

In 2013, the EEOC processed 147 charges alleging sex discrimination based on gender identity/transgender status; it processed 202 such charges in 2014, and has already processed 112 such charges in 2015. The EEOC has also made clear that advancing workplace rights for LGBT individuals is a priority, and two recent suits evidence this commitment.

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710 (E.D. Mich.).** Plaintiff worked as a funeral director/embalmer and informed her employer that she would be undergoing a transition from male to female, and intended to dress in female business attire. Two weeks later, her employer fired her and allegedly told her that her proposal was unacceptable. The EEOC filed suit on the basis of sex discrimination under all three possible theories: (1) the employer acted because the plaintiff is transgender; (2) the employer acted because of the plaintiff's transition from male to female; or (3) the employer acted because

plaintiff did not confirm to the employer's sex-based stereotypes. The employer filed a motion to dismiss on the grounds that gender identity disorder is not covered by Title VII, that the EEOC lacks the authority to prosecute gender identity claims, and that the claim does not constitute sex-stereotyping.

While the District Court agreed with the employer that transgender status is not a protected class under Title VII, it denied the Motion to Dismiss based on its finding that the Plaintiff had stated a valid claim for sex-stereotyping. Discovery is ongoing.

EEOC v. Lakeland Eye Clinic, **No. 14-2421 (M.D. Fla.).** Plaintiff was hired at an eye clinic, he presented as a male and successfully performed the duties of his work. However, when he began to wear feminine clothes, his employer confronted him and learned that Plaintiff was undergoing a gender transition. Plaintiff alleges that, after this conversation, the other managers and employees made derogatory comments and stopped referring patients to his division. Subsequently, the employer fired Plaintiff on the purported basis that it was closing the division and not hiring a replacement. Thereafter, Plaintiff learned that the division had not closed and the employer had hired a replacement – a male who conformed with traditional gender norms. The EEOC again filed suit on the basis of sex discrimination under all three possible theories: (1) the employer acted because the plaintiff is transgender; (2) the employer acted because of the plaintiff's transition from male to female; or (3) the employer acted because plaintiff did not confirm to the employer's sex-based stereotypes.

What Do These Cases Mean for Employers?

Regardless of the outcomes of these lawsuits, given the rapidly changing law at both the state and federal levels, employers are advised to review and compare EEOC guidance against their internal policies, practices, and procedures regarding transgender and gender nonconforming employees. The EEOC recommends the following measures:

1. Revising dress codes and policies to ensure gender neutrality allowing all employees the opportunity to dress in conformity with their gender identity and expression.

2. Ensuring full access to sanitary facilities consistent with employee gender identity.

3. Using appropriate names and pronouns consistent with employee's gender identity.

4. Treating transition issues sensitively and confidentially.

*****Other Notable Decisions*****

Mach Mining, LLC v. EEOC, **135 S.Ct. 1645 (2015).** Title VII makes clear that if the EEOC finds discrimination, it is supposed to "endeavor to eliminate [the] alleged unlawful

employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). If those conciliation efforts fail, however, the EEOC may then bring a federal lawsuit known as an enforcement action. However, Title VII is silent as to whether an employer (or any other party) may seek judicial review of whether the EEOC satisfied its statutory obligations in pursuing these informal methods of resolution.

In *Mach Mining*, the Supreme Court answered two questions: (1) what does the EEOC have to do to satisfy its duty to conciliate; and (2) can an employer challenge the EEOC's conciliation efforts (or lack thereof) in court? In its ruling, the Supreme Court unanimously held that courts have the authority to review whether the EEOC has satisfied its pre-suit obligation to attempt conciliation, but those duties do not extend beyond a "relatively barebones review."

Factual Background:

The case arose from a charge of discrimination from a woman who claimed that Mach Mining rejected her multiple applications for coal mining jobs because of her gender. After investigating the charge, the EEOC determined that reasonable cause existed to believe that Mach Mining had discriminated against a class of female applicants. The agency notified Mach Mining of its determination and intention to begin informal conciliation. Though the parties discussed possible resolution, they did not reach an agreement, and the EEOC notified the defendant that it had determined conciliation had failed and further efforts would be futile. It then filed suit.

Procedural Background:

Mach Mining asserted an affirmative defense in the district court based on the EEOC's failure to conciliate in good faith. The EEOC later moved for summary judgment on the limited issue of whether, as a matter of law, an alleged failure to conciliate is judicially reviewable as an affirmative defense to alleged discrimination. The District Court denied the motion, but certified for interlocutory appeal the question of whether and to what extent conciliation is judicially reviewable through an implied affirmative defense. Breaking rank with the other federal circuits, the Seventh Circuit ruled that it is not subject to judicial review. The Seventh Circuit was unapologetic as to the effect of its ruling:

> Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate. Because the courts of appeals already stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split.

Ruling that "alleged failures by the EEOC in the conciliation process simply do not support an affirmative defense for employers," the Seventh Circuit rejected the notion that the EEOC's conciliation efforts are subject to any kind of substantive judicial review; for the court, it was sufficient that the EEOC "pled on the face of the complaint that is complied with all procedures required under Title VII and the relevant documents are facially sufficient." In other words, so long as the EEOC pleads that it attempted conciliation, and its complaint appears in order, there

is nothing more for the courts to consider. The Supreme Court reversed, finding that Congress intended courts to have the authority to review the EEOC's conciliation efforts. Further, while rejecting Mach Mining's request for a "deep dive" into the conciliation process, it held that the two letters issued by the EEOC were insufficient to satisfy the conciliation obligation.

How the High Court Got There:

The Court held that, to engage in conciliation, the EEOC "must tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." The Court noted the EEOC's conciliation "attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever 'informal' means of 'conference, conciliation, and persuasion' it deem appropriate." Accordingly, the EEOC is not required to entertain a certain number of counteroffers or set a particular duration for the conciliation process, but simply has to notify the employer of the claim and provide an opportunity to discuss a possible resolution. The EEOC makes the determination when to end conciliation efforts and commence litigation.

As such, the Court held that a court's authority to review conciliation is extremely limited: "the point of judicial review is instead to verify the EEOC's say-so – that is, to determine that the EEOC actually, and not just purportedly, tried to conciliate a discrimination charge." Judicial review is limited to a determination as to whether the EEOC informed the employer about the specific allegation (which the Court noted is typically satisfied in the EEOC's "for cause" determination letter) and whether the EEOC engaged the employer in "some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice."

Importantly, the Supreme Court noted that a sworn affidavit from the EEOC that it has met the above obligations will usually be sufficient. If an employer can provide credible evidence to the contrary, the court may "conduct the fact finding necessary to decide that limited dispute" and order the EEOC to go back to the drawing board to attempt to obtain the employer's "voluntary compliance."

What Does This Case Mean for Employers?

While the Court has recognized a limited judicial review, the EEOC still holds the cards when it comes to conciliation after a "for cause" determination. Even after a limited judicial review, the only relief will be additional conciliation with the EEOC (instead of a case dismissal as urged by many employers). As such, it is imperative that employers try and avoid a "for cause" determination, and we suggest employers do the following to accomplish just that:

1. Adopt, implement and post anti-discrimination and retaliation policies, which include multiple mechanisms for reporting.

2. Train all supervisors on their responsibilities for abiding by, and enforcing,

those policies.

3. Train all employees on the policies and the mechanisms for reporting.

4. Investigate and take prompt remedial action upon receiving a report of discrimination, harassment or retaliation.

5. Treat all charges of discrimination as if a "for cause" determination will be issued.

6. If, in the unfortunate event the EEOC issues a "for cause" determination, document the EEOC's efforts (or lack thereof) to conciliate, but know that a court's review of their efforts will be extremely limited.

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***Vance v. Ball State University*, 133 St. Ct. 2434 (2014).** Liability under Title VII may be either direct or vicarious. In terms of vicarious liability, courts have traditionally held that an employer can be vicariously liable for Title VII actions or violations involving "supervisors." But, there has long been disagreement over who is a "supervisor" for purposes of Title VII vicarious liability. In *Vance*, the Court finally provided clarification, ruling that an employee is deemed a supervisor for vicarious liability purposes only if she is permitted to take tangible employment actions against the victim. "Tangible" here is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Factual Background:

Maetta Vance, an African-American, started working as an employee at Ball State University ("BSU") in 1989. In 2007, she was promoted to a full-time position as a catering assistant. While at BSU, Vance worked with Saundra Davis, a white woman and a catering specialist. Vance alleged to BSU and the EEOC that Davis slammed pots and pans in Vance's presence, gave her weird looks, and blocked her path on the elevator – and that these actions resulted in racial harassment and discrimination against her.

Procedural History:

Vance filed suit in the District Court for the Southern District of Indiana, alleging a racially hostile work environment in violation of Title VII and that Davis was her supervisor. The District Court granted summary judgment in favor of BSU. First, the district found that BSU was not vicariously liable because Davis could not hire, fire, demote, promote, transfer, or discipline Vance and, therefore, was not a "supervisor" for purposes of vicarious liability. Second, the court found that BSU was not liable under a negligence theory because it responded reasonably to incidents of which it was aware. The Seventh Circuit affirmed, and Vance appealed.

Held:

An employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. On the specific facts of the case, the Court found that Davis was only a co-worker who allegedly harassed Vance, not a supervisor for purposes of vicarious liability under Title VII.

How the High Court Got There:

The Court used this case as an opportunity to resolve a split between the federal courts of appeal on the question of what makes an employee a "supervisor" for purposes of imputing Title VII liability to the employer. On the one hand, the First, Seventh, and Eighth Circuits followed a narrow interpretation, defining "supervisor" as an employee who can take tangible employment action against – or hire, fire, demote, promote, transfer, or discipline – the plaintiff. The Second, Fourth, and Ninth Circuits, along with the EEOC, adopted a broader definition, including in the definition of supervisor any employee who supervises the daily work activities of the plaintiff or could take a tangible employment action.

As the Court noted in *Vance*, the term supervisor is not defined by statute; nor had the Court directly addressed it in its key historical cases regarding vicarious liability. But, the Court was persuaded that dicta from its prior cases led to "the strong implication…is that the authority to take tangible employment actions is the defining characteristic of a supervisor." The Court further supported its analysis by reasoning that the employer's grant of authority to a supervisor to take a tangible employment action (and thus cause economic injury) justifies imparting vicarious liability to the employer. In addition, the Court was persuaded by the advantages of what it saw as a bright-line rule amenable to easy application – as opposed to a rule that invites fact-specific inquiries.

What Does This Case Mean for Employers?

The Court's decision in *Vance* certainly provides a clearer demarcation between employees who are merely co-workers for purposes of vicarious liability and those who constitute supervisors capable of shifting liability to the employer for their actions. The decision is further favorable to employers insofar as it limits the definition of supervisors to those employees have the power to take tangible employment actions against the plaintiff or victim. As a result of the decision, employers should certainly revisit their job descriptions to make sure that supervisory positions clearly track the language used in *Vance* so that supervisor status can be readily determined. In addition, employers should revisit their anti-harassment training efforts to ensure that supervisors have been properly identified for training and can be readily identified in the future.

THE AFFORDABLE CARE ACT AND RELIGIOUS FREEDOM RESTORATION ACT

Burwell v. Hobby Lobby Stores, Inc., **134 S. Ct. 2751 (2014).** In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA"), which requires strict scrutiny review when a

neutral law of general applicability "substantially burden[s] a person's exercise of religion." The statute was amended in 2000 to extend the "exercise of religion" to include any exercise of religion "whether or not compelled by, or central to, a system of religious belief," which is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." The Supreme Court has consistently upheld the constitutionality of the RFRA as applied to federal statutes.

The landmark and highly controversial decision of *Burwell v. Hobby Lobby Stores, Inc*., addressed the question of whether the RFRA and the Free Exercise Clause of the United States Constitution shield employers from the requirement under the recently-passed Patient Protection and Affordable Care Act ("ACA") that employers provide contraceptives as part of employer-sponsored health plans. According to the Supreme Court, the RFRA exempts closely held, for profit companies from laws, including the ACA, to which their owners religiously object, provided there is a less restrictive means of furthering the law's interest.

Factual Background:

The Green family, owners and operators of two closely held businesses, Hobby Lobby Stores, Inc. and Mardel Christian and Educational Supply, a Christian bookstore chain, sued Department of Health and Human Services Secretary Kaltheen Sebelius and challenged the ACA's requirement that corporations pay for insurance coverage for contraception and abortion-inducing drugs. Specifically, the Greens argued that the ACA's mandate to provide certain emergency contraceptives and intrauterine devices (IUDs) to employees violated the employer's religions freedoms.

Procedural History:

Hobby Lobby filed suit in the Unites States District Court for the Western District of Oklahoma in September 2012. The District Court denied Hobby Lobby's request for a preliminary injunction, and the company appealed. In March 2013, the Court of Appeals for the Tenth Circuit granted a hearing of the case and, in June, ruled that Hobby Lobby is a "person" with religious freedom, ordered the government to stop enforcement of the contraception rule on Hobby Lobby, and sent the case back to the district court, which granted a preliminary injunction in July 2013.

In September, the government appealed to the Supreme Court. At the time, two other federal appeals courts had ruled against the contraception coverage rule, while another two had upheld it. The Supreme Court ultimately did not reach the constitutional challenge, but ruled that, pursuant to the RFRA, closely held, for-profit companies are allowed to be exempt from laws, including the ACA, to which their owners religiously object, provided there is a less restrictive means of furthering the law's interest.

How the High Court Got There:

The Court first examined the applicability of the RFRA to regulations governing the activities of

a for–profit corporation. Concluding that "person" as used in RFRA includes both natural persons and corporations, the Court rejected the argument that "person" does not extend to for-profit corporations. The Court further held that for-profit corporations can exercise religion.

Relying on the RFRA, the Court next found that the regulations of the Department of Health and Human Services pursuant to the ACA substantially burdened the exercise of religion because the company's owners were forced to choose between following the regulations, and in their view violating their religious beliefs by facilitating abortions, or paying a hefty fine of as much as $1.3 million per day. While the Court assumed that the regulations served a compelling government interest, it found that the contraceptive mandate was not the least restrictive means of achieving the compelling government interest, as there are other ways the government could ensure women cost-free access to contraceptives. In this regard, the Court observed that a less restrictive option would be for the federal government itself to simply assume the cost of the contraceptives. Moreover, the Court observed that the Department of Health and Human Services already had in place an accommodation for nonprofit organizations with religious objections, under which the nonprofit could certify its opposition and the insurance issuer or third-party administrator would then have to exclude the contraceptive from the group health coverage and provide separate payments for contraceptive services without imposing any cost-sharing on the certifying nonprofit, the group health plan, or plan participants or beneficiaries. While the Court did not determine that that approach satisfied RFRA, it found that it would not violate the plaintiff employers' religious beliefs and would serve the Government's interest equally well. Responding to the argument that its decision would open the floodgates to religious objections to many medical procedures and drugs, including blood transfusions and vaccinations, the majority limited the decision to the contraceptive mandate, and further emphasized that the decision did not stand for the broad proposition that any insurance-coverage mandate is invalidated if it conflicts with the employer's religious beliefs. The Court also emphasized that objections to taxes would not come within the holding because there is no less restrictive alternative to "the categorical requirement to pay taxes." As noted above, finding that the contraceptive mandate as applied to closely held corporations violates RPRA, the Court did not reach Hobby Lobby's constitutional claim.

What Does This Case Mean for Employers?

While the majority stated the *Hobby Lobby* decision has narrow application, we likely will not know the full reach of the decision for some time. The decision could have a widespread impact to the extent it can be read to allow corporations – not just individuals and churches – to claim religious exemptions from federal laws. In the meantime, the *Hobby Lobby* decision would appear to allow closely held corporations to opt out of any federal statute or mandate, except tax laws, incompatible with its religious beliefs, so long as they can show sincere religious beliefs opposed to the law at issue and that there is a less restrictive means of furthering the law's interest. But, to be clear, a public company, certainly a big public company, likely would not be able to articulate or pull off a sincere religious objection of this kind, as the bigger a company gets, the less likely it is that all of the people who have an ownership or management interest in it are of the same religion and share the same objections. In other words, the logic of the decision is largely limited to family-owned companies or perhaps companies owned by a small group of like-minded religious people who say their religion is very important to the way they operate

their businesses.

*****

***Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).** Only three days after its decision in *Hobby Lobby*, the Supreme Court took at least an initial step further in beginning to consider whether the requirement of having non-profit entities assert their religious objections and complete the Department of Health and Human Services' ESBA Form 700, which in turn triggers the requirement that others be required to provide contraceptive coverage, also violates the RFRA. The initial and only scrimmage in the case to date involves Wheaton's request for emergency injunctive relief.

Factual Background:

The Department of Health and Human requires non-profits seeking an exemption from the ACA's contraceptive mandate to complete ESBA Form 700, which in turn triggers contraceptive coverage from another sources such as an insurer or third-party administrator. Wheaton College, a small Christian college located in Illinois, sought declaratory and injunctive relief against the Department of Health and Human Services and its requirement that non-profits like Wheaton complete EBSA Form 700 in order to receive the religious nonprofit exemption from the contraception coverage mandate. The College argued that requiring it to complete the form would impermissibly burden its free exercise of religion in violation of the RFRA because it would trigger the requirement that others be required to provide the coverage and, therefore, make the College complicit in the provision of contraceptives.

Procedural History:

Wheaton filed suit against the Department in the United States District Court for the Northern District Court of Illinois and sought preliminary injunctive relief. The district court as well as the Seventh Circuit denied a preliminary injunction, and Wheaton College appealed to the United States Supreme Court.

Held:

To obtain an injunction pending appeal, Wheaton was not required to follow notice procedures for a nonprofit organization's claim for religious accommodation where the College objected to such procedures on religious grounds. Relying on the *Hobby Lobby* decision, the Court issued an interim rule of sorts providing for preliminary injunctive relief enjoining a private college, during the pendency of appeal, from having to submit EBSA Form 700 where the college submitted a written assertion that it was a nonprofit organization holding itself out as religious and asserted its religious objections.

How the High Court Got There:

Limiting its decisions solely to the question of preliminary injunction relief, and expressly disclaiming any ruling on the merits of the case, the Court found that an employer's written assertion of its religious identify and objections – as opposed to completion and submission of

Form 700 – was good enough under the ACA during the pendency of an appeal and did not affect the ability of applicants and employees to obtain, without cost, the full range of FDA approved contraceptives. In that regard, the Court observed that nothing prevents the government from taking the employer's written assertion and facilitating the provision of full contraceptive coverage under the ACA.

Dissenting, Justices Sotomayor, Ginsburg, and Kagan contended that completing the form did not burden the college's free exercise of religion because it is federal law rather than completion of the form that triggers the alternative coverage. The dissent further argued that, even if completion of the form burdened the exercise of religion, such a burden is the least restrictive means of advancing the Government's compelling interest in public health and women's well-being. In addition, beyond the merits, the dissent contended that the case did not warrant emergency injunctive relief.

What Does This Case Mean for Employers?

While the *Wheaton* majority expressly disclaimed any decision on the merits and stated that its decision "should not be construed as an expression of the Court's views on the merits," the dissent correctly noted that an emergency injunction is typically not issued unless, among other things, the legal rights at issue are "indisputably clear" and the movant has a likelihood of success on the merits. As such, the Supreme Court in the near future will likely have to resolve a question it failed to reach in *Hobby Lobby* – that is, whether the accommodation provided to non-profits with religious objections itself survives a challenge under the RFRA.

AMERICANS WITH DISABILITY ACT

***EEOC v. Ford Motor Company,* No. 11-013742 (April 10, 2015).** Jane Harris, an employee with irritable bowel syndrome, sought a job schedule of her choosing, to work from home on an as-needed basis, up to four days per week. Ford denied her request, deeming regular and predictable on-site attendance essential to Harris's highly interactive job. Harris, who had a history of documented poor performance, was terminated after she filed a charge of discrimination. The EEOC sued on her behalf under the ADA and retaliation. Ford filed a motion for summary judgment which the district court granted: "Working from home up to four days per week is not [a] reasonable" accommodation under the ADA and that the evidence did not cast doubt on Ford's stated reasons for terminating Harris's employment poor performance. The EEOC appealed, and a divided panel of the court reversed on both claims. Ford asked the full court to review the decision. The Sixth Circuit granted the request, and in an 8 to 5 decision, reinstated the holding of the district court.

In its decision, the Sixth Circuit reaffirmed the importance of a plaintiff being a qualified individual with a disability; reasonable accommodation; attendance being an essential job function; the lack of value of self-serving testimony of a plaintiff's affidavit for summary judgment purposes; and why telecommuting will not be a reasonable accommodation in many cases. The Sixth Circuit focused on the following facts:

- Plaintiff was not a "qualified individual" with a disability because her excessive

absences prevented her from performing the essential functions of a resale buyer.

- Regular and predictable on-site job attendance is an essential function of Plaintiff's resale-buyer job.

- An employee who does not come to work cannot perform any of his job functions, essential otherwise.

- Essential functions generally are those that the employer's judgment and written job description prior to litigation deem essential.

- Employees do not define the essential functions of their positions based solely on their personal viewpoint and experience.

- Even if Ford did not put sufficient effort into the interactive process of finding an accommodation, that failure is actionable only if it prevents identification of an appropriate accommodation for *a qualified individual*.

What Does This Case Mean for Employers?

The employer was successful in this case largely because of its well-documented efforts to find a reasonable accommodation for Plaintiff. Accordingly, this decision should not be read as a blank check employers to uniformly reject telecommuting requests as reasonable accommodations. Instead, an employer should still carefully analyze the employee's job to determine whether it, or another vacant job for which the employee is qualified, can be done on a telework basis. If not, the employer should consider whether other reasonable accommodations will permit the employee to successfully perform the essential functions of the job.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

***Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013).** ERISA and its regulations require plans to provide certain presuit procedures for reviewing claims after participants submit proof of loss (internal review). *See* 29 U.S.C. § 1133; 29 C.F.R. § 2560.503–1 (2012). The Courts of Appeals have uniformly required that participants exhaust internal review before bringing a claim for judicial review under § 502(a)(1)(B). *See LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 258–259, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008). A participant's cause of action under ERISA accordingly does not accrue until the plan issues a final denial.

ERISA § 502(a)(1)(B) does not specify a statute of limitations. Instead, in a case before the United States Supreme Court, the employer and employee agreed by contract to a 3–year limitations period. The contract specified that this period would begin to run at the time proof of loss is due. However, because proof of loss is due before a participant can exhaust internal review, the employee contended that the contractual limitations provision ran afoul of the general rule that statutes of limitations commence upon accrual of the cause of action.

The Court rejected that argument. It held that, absent a controlling statute to the contrary, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable.

How the High Court Got There:

As the Court noted, ERISA does not have a statute of limitations period for asserting claims to recover benefits under the terms of the Plan under section 502(a)(1)(B), although it does have a statute of limitation for claims of breach of fiduciary duty. The plan at issue in the case required participants to bring suit within three years of "proof of loss." Plaintiff argued that the contractual limitations period was unenforceable because the limitations period commenced before the plan's administrative process could be exhausted and thus before plaintiff could file suit.

The Court held that the contractual limitations period was enforceable. The Court relied on its precedent addressing contractual limitations provisions, particularly *Order of United Commercial Travelers of America* v. *Wolfe*, 331 U.S. 586 (1947), in which the Court held that parties can contractually agree to a limitations period shorter than a general statute of limitations if the shorter period is reasonable. The Court explained that the rule established in *Wolfe* permits parties to agree to not only the length of the period but also when it commences. The Court stated that "[t]he principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan." *Heimeshoff*, 134 S. Ct. at 611-12. Effect must be given to the Plan's limitation unless it is unreasonably short or a "controlling statute" prevents the provision from taking effect. Facially, the Plan's three-year limitations period was not unreasonably short. As applied, even though the long internal review process took longer than would be expected, it still left the participant almost one year to file suit. Turning to the controlling statute, the Court rejected the argument that the limitations provision would undermine ERISA's two-tiered remedial scheme of internal review process and judicial review. The Court also rejected an argument that the Court should look to state law to determine whether the limitations period should be tolled pending exhaustion of administrative remedies. The Court explained that when parties contractually adopt a limitations period there is no need to borrow either state statutes of limitation or state tolling rules.

What Does This Case Mean for Employers?

Employers can stipulate to applicable limitations periods in employment contracts for employees to assert claims to recover benefits under employee benefits plans so long as the stipulated period is reasonable. Importantly, based on the Court's opinion, such a contractually agreed upon limitations period is not rendered unreasonable if it expires before the employee's cause of action to recover benefits accrues. Thus, employers have been provided significant guidance as to what "reasonable" means in this context and can structure their employment agreements accordingly.

*****

***Tibble et al. v. Edison International et al.*, No. 13-550, U.S. Supreme Court (Argued February 24, 2015 – Decided May 18, 2015).** On May 18, 2015, the Supreme Court unanimously vacated a Ninth Circuit ruling that Edison International workers' Employee Retirement Income Security Act claims against the company over allegedly imprudent 401(k) plan investments were time-barred. The issue before the Court was whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U.S.C. § 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed. More simply put, the Court had to determine whether a claim under ERISA for breach of fiduciary duty related to an allegedly imprudent retirement investment that continued to cause losses can be pursued even if the investment was initially chosen outside of the applicable six-year limitations period. The Court held that the statute of limitations had not run and the claim could be pursued, concluding that plan fiduciaries have a continuing duty to monitor investments and that claims within that duty's statute of limitations are valid.

How the High Court Got There:

A contested Ninth Circuit ruling had determined that, with respect to a mutual fund initially chosen more than six years before Edison International's workers filed suit, the workers' fiduciary breach claims were time-barred under ERISA's six-year statute of limitations. However, in a unanimous opinion by Justice Breyer, Supreme Court said the appeals court erred by applying the statutory bar based solely on the initial selection of the mutual funds without considering the contours of the alleged breach of fiduciary duty:

> In short, under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones. A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely.

In this regard, the Supreme Court noted that an ERISA fiduciary's duty is derived from trust law.

> In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts. We are aware of no reason why the Ninth Circuit should not do so here.

However, the court kept its decision as narrow as possible. It offered no opinion on the scope of Edison's fiduciary duty, such as whether a review of the mutual funds is required, and, if so, just what kind of review is required:

> This Court expresses no view on the scope of respondents' fiduciary duty in this case, *e.g.*, whether a review of the contested mutual funds is required, and, if so, just what kind of review. A fiduciary must discharge his responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. §1104(a)(1). The case is remanded for the Ninth Circuit to consider petitioners' claims that respondents breached their duties within the relevant 6-year statutory period under §1113, recognizing the importance of analogous trust law.

What Does This Case Mean for Employers?

Employers essentially have perpetual exposure for these sorts of breach of fiduciary duty claims so long as employers have 401(k) plans. Based on the Court's opinion, to the extent that employers have a duty to monitor 401(k) plan investments to ensure that they are selecting the best possible ones for their employees, that duty is continuing. Importantly, the Court did not decide the scope an employer's duty in this regard.

*****Other Trends to Watch*****

Employer Duty to Monitor 401(k) Plan Investments

Clearly, the resolution of the merits of the *Tibble* case by the Ninth Circuit is something that employers are watching closely. Based on their briefing to the Supreme Court, it appears that the narrow dispute between the parties is whether the ongoing duty of prudence requires a periodic full review of the propriety of all assets in the portfolio (the position of the employees), or whether a more superficial periodic review is adequate until some "change" in the character of an asset occurs that warrants a "full due diligence process" (the position of the plan). A win for the employees would not only expose employers to copy-cat lawsuits, but it would also require employers to implement new internal policies and procedures aimed at complying with whatever scope of duty that the Ninth Circuit imposes.

PRESENTATION

An Employer's Guide to the Affordable Care Act

Labor & Employment Seminar
New Orleans, Louisiana

May 21, 2015

Presented by:

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BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

Select ACA Provisions Affecting Employers

2011 Plan Year	2011	2012	2013	2014	2018
Lifetime dollar limits on Essential Health Benefits (EHB) prohibited*	OTC medicines not reimbursable under Health FSAs, HSAs, or HRAs without prescriptions, except insulin	Employer distribution of SBCs to participants*	Notice to inform employees of coverage options on health exchanges	Individual mandate to purchase insurance or pay penalty	Excise tax on high-cost coverage
Preexisting condition exclusions prohibited for children under 19*	HSA Excise Tax increase	Medical Loss Ratio rebates (insured plans only)*	Limit of health Care FSA contributions to $2500 (indexed)	State Insurance exchanges	
Limits on annual dollar limits on EHB*		Employer reporting of health coverage on Form W-2 (due 1/31/13) (only for employers with ≥ 250 W-2s)	Medicare tax on high income (employers begin withholding on wages over $200,000)	Transitional reinsurance contributions (approx.. $44 per participant for 2015)	
Extension of adult child coverage to age 26*			Addition of women's preventive health requirements to no cost sharing and coverage for certain in-network preventive health services**	Preexisting condition exclusions prohibited*	
Enhanced appeals procedures**					
No cost sharing and coverage for certain in-network preventive health services**				Annual dollar limits on EHB prohibited*	
Nondiscrimination rules on fully-insured health plans** (DELAYED)				Limit of 90-day waiting period for coverage	
	*Denotes changes applicable to all group health plans ** Denotes changes NOT applicable to grandfathered health plans ***This requirement applies to "full time employees"(discussed below) Delayed to 2015 for employers with ≥ 100 FTEs; to 2016 for employers with ≥ 50 to 100 FTEs			Increased cap on rewards for participation in wellness program**	
				Limits on deductibles and out-of-pocket maximums**	
				Employer responsibility to provide affordable minimum essential health coverage****	

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Employer Shared Responsibility Payment (Commonly Called “Pay or Play” Penalty Tax)

- For plan years beginning on or after January 1, 2015*, employers with 100 or more employees are required to provide health insurance or pay penalty tax (1/1/16 for smaller employers):
  - If employer **doesn't offer health coverage** to at least 95% (70% for 2015) of FTEs enrolls in health coverage on an exchange and obtains a premium credit, employer must pay an annual penalty of $2,000 multiplied by all FTEs, disregarding the first 30
    - The penalty is payable on a monthly, pro-rata basis
  - If employer **does offer health coverage** but it is not "affordable" or is not of "minimum value" and a low income full-time employee enrolls in health coverage on the exchange and obtains a premium credit, employer must pay an annual penalty of $3,000 for each exchange enrolled FTE (Penalty capped at $2,000 multiplied by all FTEs, disregarding the first 30 (first 80 for 2015))

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Shared Responsibility Rules – Transition Rule

The transition rules allow a fiscal year plan to delay compliance until the first day of their 2015 plan year (e.g., July 1, 2015) if:

- as of any date between February 10, 2013 and February 9, 2014, at least 1/4 of ALL employees were covered under the plan; OR
- during the 2014 open enrollment period, coverage was offered to at least 1/3 of ALL employees; OR
- as of any date between February 10, 2013 and February 9, 2014, at least 1/3 of FTEs were covered under the plan; OR
- during the 2014 open enrollment period, coverage was offered to at least 1/2 or more of FTEs.

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Shared Responsibility – 50 Employee Requirement

- Count all employees regularly scheduled to work 30 or more hours per week as FTE
- Count part-time employees as partial FTE:

$$\frac{\text{actual hours worked per month}}{120}$$

- The sum of all FTEs equals your Total FTE. If your Total FTE calculations result in a decimal (i.e. 10.75), round down to the nearest whole number. Total FTE = 10.75 --> Total FTE = 10
- Special rule for seasonal employees:

  If average > 50 FTEs for 120 days or less per year, and the reason is because of the seasonal employees, employer will not be considered a large employer

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Shared Responsibility Rules (continued)
What Does It Mean to "Offer Coverage"?

- Employer that provides at least **95% (70% for 2015) of FTEs with health coverage**, or if greater, **coverage to all but five of its full-time employees,** is considered to offer health coverage for purposes of the pay or play penalty

- So, if an employer offers health coverage to 98% of its full-time employees:

  - Not subject to the $2,000 penalty

  - But is subject to the $3,000 penalty with respect to each low income FTE who isn't eligible for the employer's health plan and who enrolls in health coverage on the exchange and obtains a premium credit. (This is in addition to the penalty with respect to each low income FTE who is eligible for the employer's health plan but where the plan isn't "affordable" or not of "minimum value")

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Shared Responsibility Rules (continued)
Minimum Value Test

A plan will satisfy minimum value test if it covers 60% or more of the cost of covered benefits

Proposed regulations offer three methods of determining minimum value:

1. **Calculator Method** HHS and the IRS will, in the future, offer a calculator. The plan will enter information about the plan's cost-sharing to determine whether the minimum value test is satisfied

2. **Safe Harbor Checklists Method** The safe harbors will be published by HHS and the IRS in the form of checklists to determine whether a plan provides minimum value. Each checklist will describe cost-sharing attributes of a plan in four categories of benefits:
    - Physician and mid-level practitioner care
    - Hospital and emergency room services
    - Pharmacy benefits*; and*
    - Laboratory and imaging services

3. **Actuarial Certification Method** If the plan contains non-standard features that aren't suitable for the calculator or do not fit the safe harbor checklists, the plan's minimum value can be determined by an actuarial certification

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Shared Responsibility Rules (continued)
What Does It Mean to “Affordable"?

Health coverage must be "affordable" and of "minimum value" in order to avoid the $3,000 penalty. Coverage is deemed “affordable” if employee’s share of the monthly premium for employee-only coverage does not exceed 9.5% of one of the following safe harbors:

The 3 safe harbors for "affordability" test are:

1. Form W-2 wages (box 1 Form W-2 wages for the year divided by 12 (and pro-rated for partial years,
2. Rate of pay (employee’s monthly salary or, in the case of an hourly employee, the employee's hourly rate multiplied by 130), and
3. Federal poverty line for a single individual for the applicable calendar year, divided by 12. (In 2014, the FPL for a single individual is $11,670. Accordingly, using 2014 rates, the monthly premium under this safe harbor could not exceed $92.39 in 2015 ($11,670/12 x 9.5% = $92.39))

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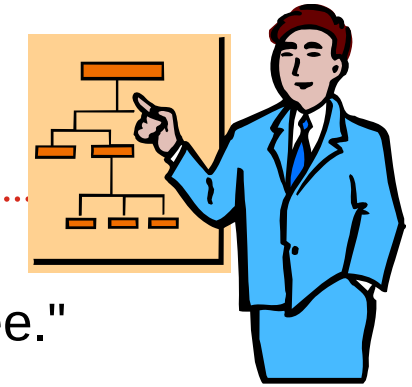
Shared Responsibility Rules (continued)
Who is the "Employer"?



- Apply common-law test to determine who is an "employee."

- All members of a "controlled group" under IRC § 414(b) or (c) are treated as a single employer.

  If a parent owns ≥ 80% of the equity in a subsidiary, or if the same 5 or fewer persons own ≥ 80% of the equity in another company or collectively own > 50% of both companies, the companies will be considered controlled groups and all employees must be combined together for purposes of calculating whether an employer is above or below the 50 FTE threshold.

- All members of an "affiliated service group" under IRC § 414(m) are treated as a single employer.

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Controlled Group Issues

- Determination of applicable large employer status: made on a controlled group basis;
- Assessment of the shared responsibility penalty: made on a member-by-member basis within the controlled group.

Each employer member can independently decide which measurement method to use to determine full-time employees, including using differing measurement and stability periods under the look-back measurement method.

CAVEAT: Nondiscrimination requirements under IRC § 105(h) for self-funded plans still apply. These rules may limit an employer's ability to offer coverage to some members of a controlled group, while not offering coverage to other members, unless done on a nondiscriminatory basis.

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Shared Responsibility Rules (continued)
Who is a Full-Time Employee (FTE)?

ACA defines FTE as an individual who works, on average, at least 30 hours per week. IRS guidance provides permissible safe harbor methods for applying rule:

- **New Hires.** Only count new hires as FTEs if employee is reasonably expected to work full-time as of date of hire
- **Variable Hour and Seasonal Employees.** Can generally exclude, unless the employee actually works, on average, at least 30 hours per week (130 hours/month) during a "measurement period" of between three and 12 months. If employee works the required number of hours during the measurement period, the worker must be treated as FTE during a subsequent "stability period" which must be a period of at least six months, and no shorter than the initial measurement period
- **On-Going Employees.** Can apply a measurement period/stability period test similar to above. An employee is treated as an ongoing employee (vs. a new hire) after the initial measurement period. If an on-going employee doesn't satisfy the "on average, at least 30 hours per week" test for a measurement period, employer will not be subject to penalty if it does not offer the employee health coverage for the subsequent stability period (which can't be longer than the measurement period). This is true regardless of the employee's actual hours of work during the stability period

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Shared Responsibility Rules (continued)
Measurement Periods/Administration Period/Enrollment

- Measurement Periods
  - Standard Measurement Period
    - Applies to all on-going employees classified as variable hour employees.
    - Set period of 3-12 months.
    - Calculate average hours worked during measurement period for all variable hour employees employed as of first day of measurement period.
  - Initial Measurement Period
    - Applies to variable hour (including seasonal) employees hired after start of standard measurement period.
    - Number of months in period is same as for standard measurement.
    - Initial measurement period calculated from employee's date of hire. If employee not an FTE after initial measurement period, calculate under standard measurement period thereafter.
- Administration Period
  - Period commences after end of measurement period and is used to conduct enrollment of eligible FTEs.
  - Period cannot exceed 90 days.
- Enrollment
  - FTEs must be eligible for coverage for period $\geq$ measurement period, but not less than 6 months.

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Shared Responsibility Rules (continued)
Summary of Tax

- $3,000, adjusted for inflation after 2014, multiplied by the number of FTEs who receive premium tax credits or cost-sharing assistance (this number is not reduced by 30)

- Penalty tax is capped at $2,000 multiplied by total number of FTEs, reduced by 30

- If an employee is offered affordable minimum essential coverage, employee generally ineligible for a premium tax credit and cost-sharing reductions for insurance purchased through an Exchange

- Employer reporting requirements (plan, type of coverage, number of full time employees)

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Transitional Reinsurance Program

- The Transitional Reinsurance Program provides for fees to be levied on employers and insurers that will be used to stabilize premiums in the individual market. The fee will be collected for 2014, 2015 and 2016.
- The program is funded through fees to be paid by employers (for self-insured plans administered by a TPA) and insurers (for insured plans).
- The fees for 2015 will be $3.66 a month(or $44 for the year) for each individual covered under a health care plan.
- The fee **may** be paid from plan assets.

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Restrictions on HRAs and Minimum Essential Benefits

Stand-alone HRAs will likely violate ACA requirements such as minimum essential benefits, preventive coverage and dollar limits. Thus, HRAs will need to be integrated with group health plans to comply with ACA. To satisfy ACA:

- The employer offers a group health plan that provides minimum value;
- The employee receiving the HRA is actually enrolled in the group health plan providing minimum value (regardless of whether the employer sponsors the plan); and
- The HRA is available only to employees who are actually enrolled in the non-HRA minimum value group coverage

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Minimum Essential Coverage – Reporting Obligation

Beginning in Q1 2016 for the 2015 plan year, employers* that sponsor self-insured health plans that provide “minimum essential coverage” will have to comply with reporting obligation under IRC § 6055. On Form 1095-B, employers must report:

1. Name of each individual enrolled;
2. Name and address of the primary insured or responsible individual who submits the application for coverage (such as a parent or spouse);
3. Taxpayer Identification Number for each covered individual;
4. Months of coverage for each covered individual;
5. Name, address and Employer Identification Number of the employer maintaining the plan; and
6. Whether coverage was enrolled through the Small Business Health Insurance Options Program (or "SHOP").

The form is due 3/31/16 if file electronically. *Applies only to employers with 50 or more FTEs.

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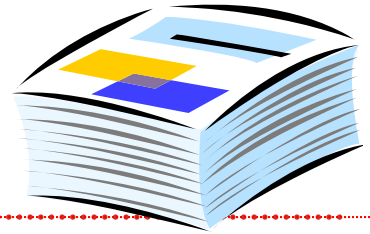
Large Employer – Reporting Obligation



Beginning for 2015 year, employers with 50 or more "FTEs" will have to comply with reporting obligation under IRC § 6056. On Forms 1094-C and 1095-C (or a substitute form if certain requirements are met), employers must report*:

1. Name, address and EIN of the employer;
2. Certification as to whether the employer offers its FTEs and their dependents the opportunity to enroll in minimum essential coverage under the employer's plan;
3. The number of FTEs for each month during the calendar year;
4. For each FTE, the months during the calendar year for which coverage under the plan was available;
5. For each FTE, the employee's share of the lowest cost monthly premium (self-only) for coverage, providing minimum value offered to that FTE under the employer's plan. This information must be provided for each calendar month; and
6. Name, address, and Taxpayer Identification Number of each FTE during the calendar year and the months, if any, during which that employee was covered under an eligible employer-sponsored plan.

*Simplified annual reporting for employees who received "qualifying offer" which is affordable coverage and available to spouse and dependents. Employer avoids having to provide information on a month-by-month basis.

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QUESTIONS?

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AN EMPLOYER'S GUIDE TO THE AFFORDABLE CARE ACT SHARED RESPONSIBILITY RULES

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Introduction

This outline sets forth a general discussion of the the Patient Protection and Affordable Care Act ("ACA") and the impact of the "shared responsibility" rules (also called the employer mandate provisions) on employers. Beginning with the 2015 plan year, these rules will apply to every "applicable large employer" with 100 or more full—time and full-time equivalent employees (2016 for those with 50 to 100). These provisions require such an employer to offer at least 95% (70% for 2015) of its "full-time employees" the opportunity to enroll in health coverage that is "affordable" and that provides "minimum value." An applicable large employer is an employer that employed, on average, at least 50 full-time employees, taking into account full-time and full-time equivalent employees ("FTEs"), during the preceding calendar year.

The "shared responsibility rules" under the ACA may impose one of two penalties. In general terms, the first penalty, which is equal to $2000 multiplied by **ALL** FTEs (excluding the first 30 FTEs), only applies if an employer does not offer enrollment in a health plan to at least 95% (70% for 2015) of its FTEs, without regard to how many FTEs actually enroll. If the employer does offer coverage to its FTEs, then this $2000 penalty does not apply. However, the employer can be subject to the second penalty. If the coverage offered is not both "affordable" and of "minimum value" for an FTE and that FTE enrolls in subsidized health coverage on an exchange, then the employer can be subject to a penalty tax of $3000 for that FTE.

Health coverage will generally be deemed "affordable" if the employee-only premium does not exceed 9.5% of the employee's Box 1 W-2 wages. The coverage will be considered to meet the minimum value test if it pays for at least sixty percent (60%) of the cost of benefits (which determination will likely require an actuarial certification). The pressing issue for most employers is how to determine who is -- and is not -- an FTE.

In the regulations issued under Section 4980H of the Internal Revenue Code of 1986, as amended (the "Code"), the IRS incorporated the guidance set forth in Notice 2012-58, which provided a safe harbor determination for who is an FTE. While there may be other methods of determining who is an FTE that comply with the ACA, a certain and conservative approach is to utilize the safe harbors. This outline addresses below the safe harbor rules used to determine who is an "FTE" and how employers may implement these rules.

Full-Time Employees v. Variable Hour Employees

A "full-time employee" is defined as an employee who is employed on **average** 30 or more hours per week. The employer must make a good faith determination of how many hours the employee is reasonably expected to work each week. For hourly employees, actual hours of service are counted. For employees not paid on an hourly basis, employers may use actual hours, days-worked equivalency or weeks-worked equivalency. The standard is hours worked or hours for which payment is due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.

If an employee is not classified as "full-time," then the employer can classify the employee as a "variable hour" employee. IRS guidance provides that:

> a new employee is a variable hour employee if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. A new employee who is expected to work initially at least 30 hours per week may be a variable hour employee if, based on the facts and circumstances at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of limited duration and it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week over the initial measurement period. As one example, a variable hour employee would include a retail worker hired at more than 30 hours per week for the holiday season who is reasonably expected to continue working after the holiday season but is not reasonably expected to work at least 30 hours per week for the portion of the initial measurement period remaining after the holiday season, so that it cannot be determined at the start date that the employee is reasonably expected to average at least 30 hours per week during the initial measurement period.

Note, however, that an employer cannot classify an employee as a variable hour employee merely because the employer has a high turnover rate and anticipates that the employee may not remain employed for a year or more.

This guidance also set forth rules for determining who is a "seasonal" employee:

> The Affordable Care Act addresses the meaning of seasonal worker in the context of whether an employer meets the definition of an applicable large employer. Specifically, § 4980H(c)(2)(B) generally provides that if an employer's workforce exceeds 50 full-time employees for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal employees, the employer would not be an applicable large employer. Furthermore, § 4980H(c)(2)(B)(ii) provides that, for this purpose, seasonal worker means a worker who performs labor or services on a seasonal basis, as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1) and retail workers employed exclusively during holiday seasons. The statute does not address how the term "seasonal employee" might be defined for purposes other than the determination of applicable large

> employer status, such as the determination of whether a new employee of an applicable large employer is reasonably expected to work full time for purposes of determining the amount of any assessable payment under § 4980H. Through at least 2014, employers are permitted to use a reasonable, good faith interpretation of the term "seasonal employee" for purposes of this notice.(s)

Note that the 120 day rule articulated above is SOLELY for purposes of determining whether an employer is a larger employer or not.

Employers are required to track full-time status on a month-by-month basis. This is done through a "look-back/stability period" approach. This approach allows that full-time status may be determined over a measurement period of between 3 to 12 months. An employer may select the measurement period and calculate the average hours worked for each employee during that period. The measurement period is followed by an administrative period (not to exceed 90 days) during which employees are informed of their eligibility to enroll in the plan. Once enrollment is effective there is a stability period of the same duration as the measurement period, but not less than six months, during which the employee may remain covered under the plan regardless of hours worked, so long as still employed. (If an employer uses a 4-month measurement period, then it must use a 6-month stability period).

Ongoing Employees, New Hires and Rehires

The next step -- after selecting the measurement/stability period and administration period is to determine the categories of employees that must be tracked.

Ongoing employees:

- Full-time employees (working at least 30 hours per week) will be treated as full-time for the subsequent stability period.

  Part-time employees will be treated as "variable-hour" ongoing employees. Employers may treat these employees as full-time and offer coverage (or have coverage offered by staffing company); or it may use its chosen measurement period to determine which variable-hour ongoing employees must be treated as full-time. Each ongoing employee not deemed full-time will be subject to annual "standard measurement period". Employers can choose period of 3-12 months. Each year, the part-time employee's hours will be tracked for the measurement period and if they equal or exceed 30 per week, the employee will be deemed an FTE and must be eligible for enrollment in the next plan year.

  NOTE: The regulations permit an initial measurement period of 3-12 months that begins on any date between the start date and the first of the month following the start date. Thus, instead of possibly having to calculate FTE status each calendar day of the year, employers could run the measurement period from the 1st day of the month following date of hire so that all initial measurement periods are done on the last day of the month.

New Hires :

- New employees hired as full-time: Expectation of working on average 30 hours per week or more; no measurement required; employer must offer coverage within three calendar months of date of hire.

- Newly hired variable-hour employees: Employees who, when hired, are not reasonably expected to work a full-time schedule must be tracked during the applicable measurement period. Any such employee who actually works on average more than 30 hours per week must be offered coverage for the next stability period. These new-hires will have an "initial measurement period" not to exceed 12 months and calculated from the date of hire (1st hour of service). If the new hire does not average 30 or more hours during the initial measurement period, then the employer will continue to treat as a variable hour employee and include in the standard measurement period. If, however, the new hire is deemed to be an FTE at end of initial measurement period, then new hire must be allowed to enroll in the plan with coverage beginning no later than 13 months from date of hire.

  For this reason, employers may want to use an initial measurement period of 10 months + partial month with a 60 day + partial month administrative period with enrollment effective as of 1st day of month following 60-day administrative period. As an example, a variable hour employee hired July 20, 2014 is deemed to be an FTE on May 31, 2015 (10 months later) and will be eligible to enroll in plan as of August 1, 2015 (13th month following date of hire).

- Employment status changes: If a new employee (variable-hour) has a change in employment status during an initial measurement period, such employee will be treated as a full-time employee on the earlier of (i) the first day of the fourth month following the change in status, or (ii) if the employee averages more than 30 hours of service per week during the initial measurement period, the first day of the first month following the initial measurement period.

- Rehires: An employer may treat a rehired employee or an employee resuming service as a new employee rather than a continuing employee after a break in service in two situations:

  - The first situation is when the employee had no hours of service for at least 13 weeks (previously, 26 weeks under the proposed regulations).

  - Second, under the "rule of parity," an employer may treat a rehired employee who has had a break of at least four weeks as a new employee if the employee’s break in service with no credited hours of service is longer than the employee’s period of service immediately preceding the break in service.

Below is an illustration of the timeline using a 12-month measurement period for ongoing variable hour employees:

Standard Measurement Period and Administrative Period for On-Going Employees

Measurement Period (12 months)	1/1/2014 - 12/31/2014	Admin Period (90 days)	1/1/2015 - 3/31/2015	Enrollment 4/1/2015

Below is an illustration of the timeline for a newly hired variable hour employee:

Initial Measurement Period and Administrative Period for New Hires - 12-month measurement period

2/1/15 (Date of hire)	Measurement Period	2/1/2015 -1/31/2016 (12 months)	Admin Period (up to 30 days)	Enrollment 3/1/16

Initial Measurement Period and Administrative Period for New Hires - 10-month measurement period

2/5/15 (Date of hire)	Measurement Period	3/1/2015 -12/31/2015 (10 months)	Admin Period (60 days + partial)	Enrollment 3/1/16

Both of the above initial measurement periods result in the same enrollment date. However, the second method simplifies calculations as it allows for enrollment on the 1st day of the month.

Measurement Periods

Generally, the measurement and stability periods used by an employer must apply uniformly to all employees. However, employers may use different measurement periods and stability periods for the following categories of employees: (i) each group of collectively bargained employees covered by a collective bargaining agreement; (ii) collectively bargained employees and non-collectively bargained employees; (iii) salaried employees and hourly employees; and (iv) employees located in different states. We would need additional facts to offer additional recommendations as to whether specific issues with each might warrant discussion.

Application of Rules to an Employer's Workforce

Because the ACA defines a "full-time" employee as an employee who is employed on average at least 30 hours per week, it is important to consider whether there are any employees classified as "part-time" who will actually be deemed full-time under the ACA because of the number of hours they average each week. As discussed above, if an employer chooses to utilize the Safe Harbor to ensure that it is in compliance with the ACA, then it will choose an "initial measurement period" of between 3 and 12 months to assess whether the employees who have been classified as "part-time" averaged working 30 or more hours per week. If a part-time employee averages 30 or more hours per week during the "standard measurement period" then the employee must be given the opportunity to enroll in the health plan effective as of the first day of the plan year.

ACA Shared Responsibility Reporting Obligations

Because the IRS needs data to verify subsidy eligibility and to enforce the individual and employer mandates, the ACA added new Code Sections 6055 and 6056, requiring insurers and large employers to report that data to the IRS and to beneficiaries. The IRS published final rules in March 2014 and released early draft Forms in August. The final Forms for (voluntary) 2014 reporting were published February 9, 2015. Mandated reporting begins in early 2016, for 2015 coverage months.

Employers that are subject to the ACA employer "shared responsibility" mandate will use the new forms to report health coverage offered under employer-sponsored plans in accordance with Section 6056 of the Internal Revenue Code of 1986, as amended (the "Code"). The forms that impact OGB are:

- Form 1095-C (Employer-Provided Health Insurance Offer and Coverage); and
- Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns)

Form 1095-C (Employer-Provided Health Insurance Offer and Coverage)

Form 1095-C requires that the following information be provided to the IRS and to employees on an employee-by-employee basis:

- Employer and employee data (e.g., name, tax identification number);
- For each month of the year during which the employee is employed, an indication as to whether coverage was offered to the employee and his/her spouse and/or dependents; whether the employee coverage provided "minimum value," or if transition relief applies; the monthly employee cost for the least expensive self-only coverage option offered by the employer (unless certain exceptions apply); and a notation regarding the status of the coverage for purposes of the penalties under Code section 4980H.
- Sponsors of self-insured health plans must also list the employee and each covered spouse/dependent, his or her social security number (or, if not available, his or her date of birth) and notation as to which months in the year the individual had coverage for at least one day. This information must be reported for any employee who enrolled in coverage, regardless of whether the employee was full-time.

In general, each employer in a controlled group ("ALE group") is responsible for separately preparing/issuing/filing the foregoing for its employees. It is permissible, though, to use a third-party agent for this purpose.

Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns)

This Form serves as the transmittal form for Forms 1095-C. An employer may file multiple Forms 1094-C (with different Forms 1095-C), but if the employer does so, it must designate one

of them as the employer's "authoritative" transmittal. Form 1094-C includes, among other information, the following:

- A notation as to whether the employer provided minimum essential coverage to 95% of its full-time employees and their dependents for the whole year or for certain calendar months (or is entitled to transition relief);

- The employer's total employee count and total full-time employee count (excluding employees in a limited non-assessment period) for each month of the prior calendar year;

- An indication as to whether the employer is part of an aggregated ALE group, and if so, a list of the name and employer identification number (EIN) of all (or the 30 largest, if more than 30) other members of the ALE group for the year; and

- An indication as to whether the employer is using one of the alternative reporting methods or eligible for certain transition relief (described below).

Each employer in the ALE group is required to report separately. A governmental employer, however, may designate another entity that is part of the same governmental unit to file on its behalf.

Filing/Furnishing Requirements

A Form 1095-C must be provided to each "full-time" employee (i.e., an employee who averaged 30 hours per week), and any other employee who had employer coverage during the year. The deadline for providing this statement to employees and filing with the IRS is the same as required for the Form W-2, as it must be provided to individuals no later than January 31 of the year following the year to which the return relates.

A Form 1094-C must be attached to any Form 1095-C filed by an employer. Forms 1094-C and 1095-C must be filed with the IRS no later than March 31 of the following year if filed electronically or February 28 if filed on paper. (Note that an employer must file electronically if it has 250 or more Forms 1095-C.)

PRESENTATION

Navigating Anti-Retaliation Statutes and Practical Tips for Avoiding Retaliation Claims

Kathlyn Perez Bethune, Camalla Kimbrough, and Elizabeth Rutledge

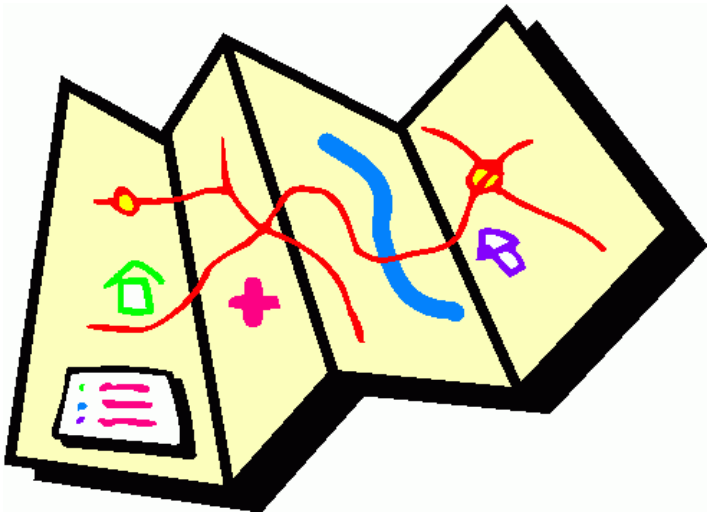
May 21, 2015

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

Overview

- Retaliation claims – background and logistics
- Identify specific sources of retaliation risks, specifically the laws that prohibit retaliation and protect employees
- Practical tips for avoiding retaliation claims



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Retaliation Claims – Background and Logistics

- Basic Definitions- Implied Malice?
  - Webster's defines retaliate as follows: "to repay (as an injury) in kind; to return like for like; ***to get revenge***."
  - WordNet defines it as "take revenge for a ***perceived wrong***."

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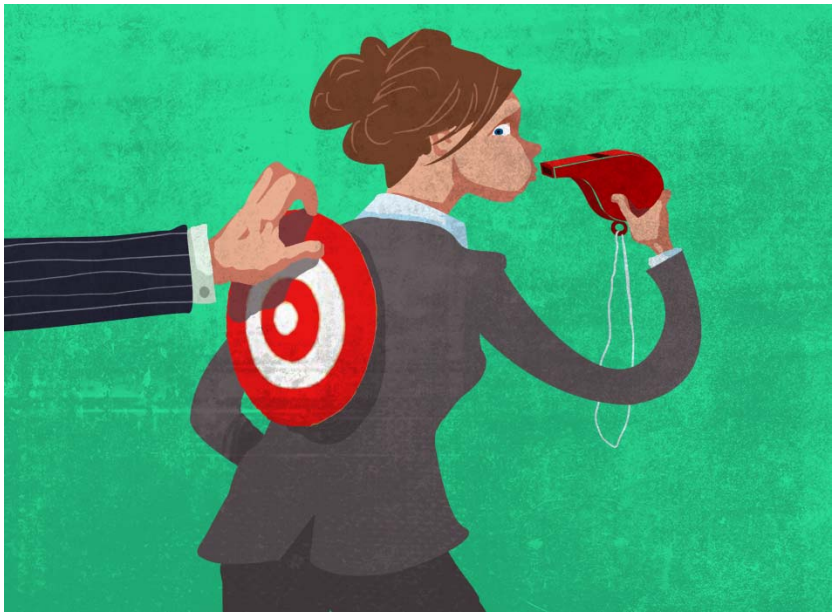
Retaliation Claims – Background and Logistics

- The underlying purpose of whistleblower protection laws is to allow employees to stop, report, or testify about employer actions that are illegal or violate specific public policies



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Retaliation Claims – Background and Logistics

- Retaliation claims now outnumber all other types of charges filed with the EEOC

- **37,955** retaliation claims were filed with the EEOC in 2014, totaling **42.8%** of the charges filed in 2014

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Retaliation Claims – Background and Logistics

- Generally, retaliation occurs when an employer takes an
  - **Adverse action** against a
  - **Covered individual** because he or she engaged in a
  - **Protected activity**

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Sources of Retaliation Risks: Common Laws Prohibiting Retaliation

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Louisiana's Whistleblower Statute, La. R.S. 23:967

- An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
  - (a) Discloses or threatens to disclose a workplace act or practice that is in violation of **state law**;
  - (b) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of **state law**; and/or
  - (c) Objects to or refuses to participate in an employment act or practice that is in violation of **state law**.

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Louisiana's Whistleblower Statute

- Employee must:
  - Prove that employer committed an **actual** violation of LA law.
  - **First** advise his employer of an illegal practice and **then** disclose or threaten to disclose the practice, provide information or testify before a public body, or object or refuse to participate in the illegal practice.
  - Act in **good faith**.

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Title VII

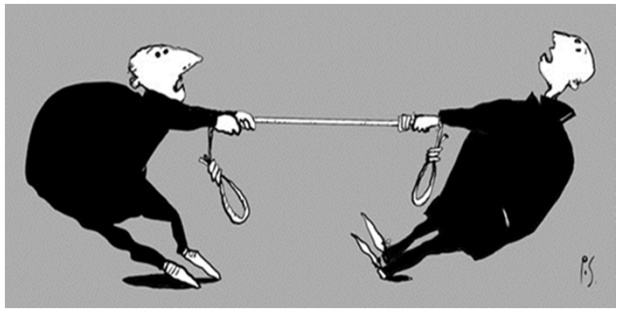
- Prohibits discrimination based on:
  - National Origin
  - Race
  - Sex
    - Including same-sex discrimination, *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444 (5th Cir. 2013)
  - Religion
  - Color

Title VII – Covered Individuals

- Individuals who have:
  - Opposed unlawful practices
  - Participated in proceedings
  - A close association with someone who has engaged in protected activity

Title VII – Protected Activity

- Protected activity includes:
  - Opposition
  - Participation



Title VII – Adverse Actions

- Termination
- Refusal to hire
- Denial of promotion
- Demotion
- Threats
- Unjustified negative evaluations
- What else?

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Title VII – Adverse Action

- Challenged action must be "materially adverse:" **sufficient to dissuade reasonable employee/ applicant in complainant's situation from making or supporting a complaint.** *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

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Title VII – Adverse Action

- In *Stewart v. Mississippi Transportation Commission*, 586 F.3d 321, 331-32 (5th Cir. 2009), plaintiff complained that the following retaliatory actions were taken against her:
  - personal items were taken from her desk;
  - the locks on her office had been changed, and she was not allowed to close her office door;
  - and she was chastised by superiors and ostracized by co-workers.
- Held: each of these complaints "do not rise to the level of material adversity but instead fall into the category of 'petty slights, minor annoyances, and simple lack of good manners' that the Supreme Court has recognized are not actionable retaliatory conduct." *Id.* at 332.

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Title VII – Adverse Action

- Also found insufficient:
  - Unpleasant work meetings;
  - Verbal reprimands;
  - Improper work requests; and
  - Unfair treatment.
- *King v. Louisiana*, 294 Fed. Appx. 77, 85, 2008 WL 4326493, at *6 (5th Cir. Sept. 23, 2008).

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Title VII – Adverse Actions

- Papering the file: Adverse action? YES

Kim v. Nash Finch Co., 123 F.3d 1046, 1066 (8th Cir. 1997):

- Prior to the plaintiff's complaint, he "had received high performance evaluations and had had no disciplinary problems."
- After his complaint, "he began to receive markedly lower performance evaluations;"
- Plaintiff "produced evidence that refuted the negative reports in his personnel file, including evidence that *Nash Finch* had 'papered' his personnel file with negative reports."

- Papering the file: Adverse action? NO

Babin v. National Vision, 2012 WL 6177134 (5th Cir. 2012):

- Plaintiff had many performance write ups pre- and post- protected activity. *She* claimed she was terminated because of reporting race discrimination.
- Court holds, "However, she never provides any evidence that the documents contain false characterizations of her on-the-job performance, and her conclusory assertions are not enough to survive summary judgment."

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Title VII- Adverse Action

- Also includes an employer's post-employment actions. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)
  - Negative references
  - Disclosure of a former employee's prior complaints about discrimination
  - Denial of or delays in post-employment benefits
  - Spreading negative rumors about former employee
  - and more!

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Title VII – Adverse Actions

- "[T]he mere fact that some adverse action is taken after an employee engages in some protected activity will not always be enough for a prima facie case . . . . Title VII's protection against retaliation does not permit EEOC complainants to disregard work rules or job requirements."

- *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002).

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Title VII - Cat's Paw Theory of Retaliation

- "[T]here can be situations in which the forbidden motive of a subordinate employee can be imputed to the employer because, under the circumstances of the case, the employer simply acted as the **'cat's paw'** of the subordinate."

- *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997)

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Title VII – Cat's Paw Theory of Retaliation

- Typically, "statements by non decision makers, or statements by decision makers unrelated to the decisional process itself [do not] suffice to satisfy the Plaintiff's burden." *Price Waterhouse v. Hopkins*, 490 U.S. 227, 277 (1989) (O'Connor, J., concurring).
- Statements of non decision makers become relevant, however, when the ultimate decision maker's action is merely a "rubber stamp" for the subordinate's recommendation. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir. 2001). Thus, "[i]f the employee can demonstrate that others had influence or leverage over the official decisionmaker . . . it is proper to impute their discriminatory attitudes to the formal decisionmaker." *Id.* at 226.
- *Rios v. Rossotti*, 252 F.3d 375, 382 (5th Cir. 2001).

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Age Discrimination in Employment Act (ADEA)

- Protects individuals who are 40 years of age or older from employment discrimination based on age
- Covered individuals and protected activity – same as Title VII

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ADEA – Adverse Actions

- Same as Title VII
- Also includes:
  - Reassignment, even if salary and benefits remain the same. *Tadlock v. Powell*, 291 F.3d 541 (8th Cir. 2002)
  - Harassment, if it creates a hostile working environment. *See Boise v. Boufford*, 121 F. App'x 890, 893 (2d Cir. 2005)

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Americans with Disabilities Act (ADA)

- Prohibits discrimination based on disability
- Actual/perceived disability

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ADA – Covered Individuals

- Individuals with a disability, and
  - An individual is considered to have a disability if he/she:
    - Has a physical or mental impairment that substantially limits one or more major life activities;
    - Has a record of such impairment; or
    - Is regarded as having such impairment.
- Individuals that are qualified
  - A qualified individual with a disability is a person who:
    - Meets essential eligibility requirements, and
    - Can perform essential function with or without reasonable accommodation.

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ADA- Protected Activity

- Opposition and participation
- Requesting reasonable accommodation based on disability
- Anti-retaliation provision prohibits interference, coercion, and/or intimidation

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ADA- Adverse Actions?

- Terminating a epileptic new hire for marijuana use?
  - *EEOC v. The Pines of Clarkston, Inc.*, 13-14076, E.D. Mich. 2015)
- Terminating an employee after she requests an accommodation due to her social anxiety disorder?
  - *Jacobs v. N.C. Administrative Office of the Courts*, 13-2212 (4th Cir. 2015)
- Reassigning a pregnant employee to a different position with same salary, benefits, and working condition?
  - *Spees v. James Marine, Inc., et. al.*, 617 F.3d 380 (6th Cir. 2010)

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Fair Labor Standards Act (FLSA)

- Prescribes standards for wages and overtime pay

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FLSA – Covered Individuals and Protected Activity

- Same as Title VII
- Protected activity includes both oral, "informal" complaints as well as written complaints.
  - *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011)

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FLSA – Adverse Actions

- Making an "oral" complaint is not always legally protected:
  - *Montgomery v. Havner*, 700 F.3d 1146 (8th Cir. 2012) – employee's telephone call to her supervisor inquiring why she was docked ten minutes from her time card did not constitute sufficiently–detailed complaint so that supervisor should have reasonably understood that employee was alleging an FLSA violation, thereby precluding employee's FLSA retaliation claim stemming from her subsequent termination.

- Using information obtained from an employee's protected activity for purposes of initiating an adverse action may be actionable:
  - *Leonard Avila v. Los Angeles Police Department*, 758 F.3d 1096 (9th Cir. 2014) - finding that a police officer's termination following testimony in an FLSA lawsuit constituted unlawful retaliation.

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Family and Medical Leave Act (FMLA)

- Provides certain employees with up to 12 weeks of unpaid, job-protected leave per year, and requires that their group health benefits be maintained during the year

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FMLA – Covered Individuals

- Must work for a covered employer;
- Must have worked for employer for at least 12 months;
- Must have worked for at least 1,250 over the 12 months immediately prior to leave; and
- Must work at a location where the employer has at least 50 employees within 75 miles

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FMLA –Protected Activity

- Participation and opposition
- Exercising or attempting to exercise any right under the FMLA

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FMLA – Adverse Actions

- *Millea v. Metro-N. R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) – finding that a letter of reprimand can constitute a "materially adverse action."

- *Jaszczyszyn v. Advantage Health Physician Network*, 504 F. App'x 440 (6th Cir. 2012) – company did not retaliate against employee who had taken intermittent leave under the FMLA when it fired her for fraud following an investigation.

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And the list goes on…

- False Claims Act
- Sarbanes-Oxley
- Occupational Health and Safety Act
- Seaman's Protection Act

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And on…

- Workers' compensation
- Jury duty
- State law discrimination statutes

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Practical Tips for Avoiding Retaliation Claims

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Practical Tips for Avoiding Retaliation Claims

- Document all violations of policy;
- Document any investigation you do of injury/complaint;
- Document any light duty or alternative duty offered (comp), or action taken against the offender, or accommodation to remedy the complaint (discrimination or harassment);
- Emphasize to all involved that retaliation is prohibited.

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Practical Tips for Avoiding Retaliation Claims

- Use progressive discipline
  - Warning
  - Final warning
  - Termination

- Think long and hard before discharging an employee with a recent workers' compensation injury/protected activity (consider their written write up history)
- Be sure warnings and discharge are for objective reason and related to company policies (*e.g.*, not attitude but insubordination; not poor job performance but failure to perform specific tasks or meet certain criteria)
- Be as specific and objective as possible.

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Practical Tips for Avoiding Retaliation Claims

- Apply your policies consistently
- Monitor injured or complaining workers' reviews and attendance
- Ensure personnel decisions are well understood
- Document appropriately
- Separate the offender from the complaining employee
- Use a neutral decision maker
- Keep investigations as private as possible. A decision-maker that does not know of protected activity cannot retaliate.

Practical Tips for Avoiding Retaliation Claims

- Make sure reviews are accurate
- Like warnings they should be based on primarily objective criteria
- If reviews are substantially lower after injury/protective activity, the reasons should be evident from the review
- Discharging an employee for poor job performance who has good reviews is asking for trouble
- HR Director should ensure that lower-level managers are not giving unfair reviews to injured employees, or those engaging in protected activity.
- Remember that close family members can be protected

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Practical Tips for Avoiding Retaliation Claims

- Have employee sign he or she received the warning or have a witness confirm the employee refused to sign;
- Provide opportunity for them to tell their side;
- If you have a good reason to discharge an employee, be sure the employee knows it;
- Conduct an Exit Interview that offers employee opportunity to reveal any problems or issues during their employment
- Do not make comments about the claim
  - "I see someone is trying to win the lottery"
  - "You're not hurt that bad"
  - "Joe's claim cost us our bonus checks"

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Practical Tips for Avoiding Retaliation Claims

- Understand that post-termination actions can form the basis for a retaliation claim
- Provide only basic information when giving a reference (*e.g.*, name, position, dates of employment, job duties, and supervisors)
- Do not criticize former employees when speaking with prospective employers
- Do not disclose lawsuits, charges, or complaints filed by former employee.
- Be careful when denying or challenging former employee's claim to unemployment or other post-employment benefits.

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Questions? Discussion?

- Other examples?
- Other best practices?

- ***Remember***: An employee's underlying claim may be without merit, but how the company handles it can put it at real risk for allegations of retaliation.

Navigating Anti-Retaliation Statutes and Practical Tips for Avoiding Retaliation Claims

I. Introduction:

It is common knowledge that an employer may not retaliate against an individual for engaging in certain "protected activities," including opposing discrimination and harassment. Nonetheless, there has been a steady rise in the number of retaliation claims filed with the Equal Employment Opportunity Commission over the last several years due to legislative and case law developments that have broadened the scope of persons protected against retaliation, lowered the burden for establishing unlawful retaliation, and expanded the damages available to successful claimants. Accordingly, employers must be especially careful when dealing with complaints of discrimination and harassment in order to avoid running afoul of the various state and federal anti-retaliation laws. This paper will explain when retaliation occurs, identify common laws prohibiting retaliation, and provide best practices for avoiding retaliation claims.

II. When Does Retaliation Occur?

Generally, retaliation occurs when an employer takes an **adverse employment action** against a **covered individual** because he or she engaged in **protected activity**.

1. **Adverse employment actions** are actions taken to keep someone from opposing an unlawful practice, or from participating in a proceeding pertaining to the unlawful practice. Examples include, but are not limited to, termination, refusal to hire, denial of promotion, and unjustified negative evaluations.

2. **Covered individuals** include those who have opposed unlawful practices or have participated in proceedings related to unlawful practices. Covered individuals also include those with a close association with someone who has engaged in protected activity (*e.g.*, spouses).

3. **Protected activity** includes opposing a practice believed to be unlawful (*e.g.*, complaining and/or threating to file a charge/lawsuit), as well as participating in a discrimination proceeding (*e.g.* filing a complaint, cooperating with an investigation, and/or serving as a witness in an investigation).

III. A Non-Exhaustive List of Laws Prohibiting Retaliation:

1. Louisiana's Whistleblower Statute prohibits an employer from retaliating against an employee who, in good faith, and after advising the employer of an actual violation of Louisiana law: (a) discloses or threatens to disclose a workplace act or practice that violates Louisiana law; (b) testifies regarding any violation of Louisiana law; and/or (c) objects or refuses to participate in an act or practice that violates Louisiana law.

2. **Title VII** forbids employment discrimination based on race, color, religion, sex, or national origin. Covered individuals under Title VII's anti-retaliation provisions include former employees.

3. The **Age Discrimination in Employment Act** protects individuals who are 40 years of age or older from employment discrimination based on age.

4. The **Americans with Disabilities Act** ("ADA") prohibits discrimination against qualified individuals with disabilities. In addition to opposition and participation conduct, requesting a reasonable accommodation based on disability constitutes protected activity under the ADA. The ADA further protects individuals from coercion, intimidation, threats, harassment, or interference in the exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

5. The **Fair Labor Standards Act** prescribes standards for wages and overtime pay.

6. The **Family and Medical Leave Act** ("FMLA") provides certain employees with up to 12 weeks of unpaid, job-protected leave per year, and requires that their group health benefits be maintained during the year. In addition to opposition and participation conduct, exercising or attempting to exercise any right under the FMLA constitutes protected activity.

7. The **False Claims Act** protects employees, contractors, or agents who come forward with evidence of fraud against the federal government.

8. The **Sarbanes-Oxley Act** protects employees and subcontractors of publicly-traded companies for providing information about, or participating in investigations relating to, what they believe to be violations of securities laws on the part of their employers.

9. The **Occupational Health and Safety Act** protects employees who engage in protected activity related to workplace safety or health, environmental laws, motor vehicle safety laws, and securities laws, among others.

10. The **Seaman's Protection Act** provides that a person may not discharge or in any manner discriminate against a seamen because the seamen in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seamen believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.

11. **Louisiana's Workers' Compensation Statue** prohibits an employer from refusing to hire or discharging anyone for filing a claim for workers' compensation benefits.

IV. Best Practices for Avoiding Retaliation Claims:

1. Document all violations of policy.

2. Document any investigation you do of injury/complaint.

3. Document any light duty or alternative duty offered, or action taken against the offender, or accommodation to remedy the complaint.

4. Emphasize to all involved that retaliation is prohibited.

5. Use progressive discipline (warning, final warning, then termination).

6. Think long and hard before discharging an employee with a recent workers' compensation injury/protected activity (consider his or her written write up history).

7. Be sure warnings and discharge are for objective reason and related to company policies (*e.g.*, not attitude but insubordination; not poor job performance but failure to perform specific tasks or meet certain criteria).

8. Be as specific and objective as possible.

9. Apply your policies consistently.

10. Monitor injured or complaining workers' reviews and attendance.

11. Ensure personnel decisions are well understood.

12. Document appropriately.

13. Separate the offender from the complaining employee.

14. Use a neutral decision maker.

15. Keep investigations as private as possible. A decision-maker that does not know of protected activity cannot retaliate.

16. Make sure reviews are accurate.

17. Like warnings, reviews should be based on primarily objective criteria.

18. If reviews are substantially lower after injury/protective activity, the reasons should be evident from the review.

19. Discharging an employee for poor job performance who has good reviews is asking for trouble.

20. HR Director should ensure that lower-level managers are not giving unfair reviews to injured employees, or those engaging in protected activity.

21. Remember that close family members can be protected.

22. Have employee sign that he or she received the warning or have a witness confirm the employee refused to sign.

23. Provide opportunity for employee to tell his or her side;

24. If you have a good reason to discharge an employee, be sure the employee knows it.

25. Conduct an Exit Interview that offers employee opportunity to reveal any problems or issues during his or her employment.

26. Do not make comments about the claim.

27. Understand that post-termination actions can form the basis for a retaliation claim.

28. Provide only basic information when giving a reference (*e.g.*, name, position, dates of employment, job duties, and supervisors).

29. Do not criticize former employees when speaking with prospective employers.

30. Do not disclose lawsuits, charges, or complaints filed by former employee.

31. Be careful when denying or challenging former employee's claim to unemployment or other post-employment benefits.

Firm Profile

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Firm Facts

- Ranked 30th on FORTUNE magazine's "**100 Best Companies to Work For**" list in 2015.
- Named as **68th largest law firm** by *National Law Journal* in 2014.
- Represent **over half of the FORTUNE 100** and **more than a quarter** of the FORTUNE 1000 companies.
- Represent emerging companies in **every state in the Southeast**.
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- We have **251 attorneys recognized** by *The Best Lawyers in America*® – more than any firm headquartered in our footprint.
- *Chambers USA* lists 81 of our attorneys as leaders across 24 practices.
- 24 practice areas are also recognized by *Chambers USA* as leading practices in individual states.
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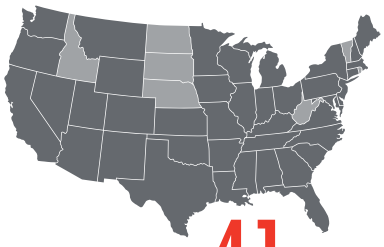

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EXPAND YOUR EXPECTATIONS℠

LOUISIANA

At-Will Employment

The employer/employee relationship is governed by the at-will employment doctrine. La. Civil Code art. 2747. This means that either party may terminate the relationship at any time, with or without cause, and with or without notice. However, absent a disclaimer to the contrary, the terms and conditions of an employer's Employment Manual or Handbook may narrow and restrict the employment at-will doctrine.

Right to Work Laws

The State of Louisiana is a right to work state. It is the "public policy of Louisiana that all persons shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities." La. Rev. Stat. § 23:981. No person can be required, as a condition of employment, to become or remain a member of any labor organization, to refrain from becoming a member of any labor organization, or to pay charges of any kind to a labor organization. La. Rev. Stat. § 23:823.

Immigration Verification

All private contractors who want to do business with a state or local public entity must use E-Verify and, prior to bidding or contracting with a public entity, verify in a sworn affidavit that it: (1) participates in E-Verify, (2) will continue to participate in E-Verify throughout the period of the contract, and (3) will require all subcontractors to submit sworn affidavit evidencing (1) and (2). La. Rev. Stat. § 38:2212.10.

As of August 15, 2011, all Louisiana employers must use E-Verify or retain picture identification of employees using one of the listed documents in Louisiana Revised Statute Section 23:995 to avoid penalties. Section 23:995 penalizes an employer who employs, hires, recruits, or refers for employment any person without employment eligibility in the United States. E-Verify is strongly recommended because only the use of E-Verify creates a rebuttal presumption of good faith compliance with the law. If an employer fails to comply with 23:995, it may face cancellation of public contracts, ineligibility for future public contracts for a period of up to three years, increasing monetary fines, and an eventual loss of licensure.

Drug Testing

The State of Louisiana provides guidelines regarding the drug testing of employees in the workplace. La. Rev. Stat. §§ 49:1001, et seq. The statutory scheme adopts by reference the federal guidelines for the drug testing of federal employees. In general, the confidentiality of drug testing information must be maintained except for administrative, disciplinary, or civil litigation proceedings where such information is relevant. La. Rev. Stat. § 49:1012. Employees are entitled to access to all drug testing records, if the result is positive, within seven business days of a written request. La. Rev. Stat. § 49:1011. Employers cannot require an employee to pay the cost of a drug test. La. Rev. Stat. § 23:897. And finally, and perhaps most importantly, an employer will not be held liable for defamation, libel, slander, or damage to reputation or privacy of an employee when the employer's testing policy/procedures are in accordance with the law. La. Rev. Stat. § 49:1012. Denial of Workers' Compensation Benefits and Unemployment Benefits can result if the employee fails or otherwise refuses to submit to a drug test. *See* La. Rev. Stat. §§ 23:1081, 23:1601 (10).

It should also be noted that there are additional specific requirements pertaining to the obtaining of a sample, chain of custody, and lab certifications. Employers should cautiously approach drug testing as it can present substantial hurdles.

Jury Duty Leave

The State of Louisiana requires an employer to provide to its employees a paid leave of absence, without loss of sick, emergency, or personal leave or any other benefit) of "up to one day" for jury duty; otherwise, leave for jury duty may be without pay. Also, an employer shall not discharge an employee on account of his or her being called to serve on any jury. La. Rev. Stat. § 23:965.

Voting Leave

The State of Louisiana does not require an employer to offer to its employees time off to vote.

Parental Leave

For those employers who employ more than twenty-five employees, the State of Louisiana requires that a female employee receive at least six weeks of disability leave on account of a normal pregnancy, childbirth, or related medical condition. La. Rev. Stat. § 23:341. Employees returning from maternity leave are to be placed in the same or comparable position, consistent with staffing and business requirements.

Other Leave

The State of Louisiana does not require employers to offer to employees paid vacation or sick leave. The Louisiana School and Day Care Conference and Activities Leave Act provides that an employer may grant an employee up to 16 hours of leave per year to "attend, observe, or participate in conferences or classroom activities related to the employee's dependent children at the child's school or day care center, if the conferences or classroom activities cannot reasonably be scheduled during the non-work hours of the employee." La. Rev. Stat. § 23:1015.2. The employee seeking such leave must give reasonable notice of the leave. The employer is not required to pay the employee for such leave, but an employee "shall be permitted" to substitute accrued vacation time or other appropriate paid leave for any leave taken pursuant to this Section. Id. at § 23:1015.2(B). There is also law governing leave time for First Responders. La. Rev. Stat. §§ 23:1017.1 et. seq.

Smoking Laws

Employers are not permitted to terminate, or otherwise take adverse action against, an employee because the employee is a smoker or non-smoker. However, an employer is free to formulate and adopt a policy regulating the use of tobacco in the workplace. La. Rev. Stat. § 23:966.

Break Time to Express Milk

The State of Louisiana has no law regulating the expression of breast milk in the workplace. The Legislature of Louisiana has found that breast milk provides better nutrition and more immunity to disease, is easier for babies to digest, and may raise a baby's intelligence quotient and declared that the promotion of family values and infant health demands an end to the "vicious cycle of embarrassment and ignorance that constricts women and men alike on the subject of breastfeeding." La. Rev. Stat. 51:2247.1(1)(2)-(3). Consequently, a mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present. La. Rev. Stat. § 51:2247.1.

Meal Breaks

The State of Louisiana has no law regulating meal breaks or rest periods-other than for minors. No minor shall work for any five-hour period without at least a thirty minute break for meals. La. Rev. Stat. § 23:213. This break shall not be included as part of the working hours of the day.

Minimum Wage

The State of Louisiana has no minimum wage law. Employers are therefore subject to federal minimum wage law. Notably, local governmental units are specifically forbidden in Louisiana from enacting laws requiring employers to pay a higher minimum wage than federal law requires. La. Rev. Stat. § 23:642.

Final Payments

Following separation, an employee must be paid all wages due and owing on the next scheduled payday, or no later than fifteen days following the discharge, whichever occurs first. La. Rev. Stat. § 23:631.

Unemployment Insurance

Unemployment insurance benefits provide income to individuals who have lost work through no fault of their own. The benefits are intended to partially offset the loss of wages while an unemployed worker searches for suitable work or until an employer can recall the employee to work. Nothing is deducted from the employee's wages to pay for this coverage, and an employer shall not discharge an employee for filing a claim for unemployment compensation benefits. La. Rev. Stat. § 23:1691.

Unemployment benefits are administered by the Louisiana Workforce Commission and additional information regarding the benefits may be accessed at http://www.laworks.net/UnemploymentInsurance/UI_MainMenu.asp.

Workers' Compensation

The Louisiana Workers' Compensation Law, La. Rev. Stat. § 23:1020.1, et seq., applies to every employer in Louisiana, subject to certain exemptions. Employees who suffer injuries and/or occupational diseases arising out of and in the course of their employment may be eligible to receive several types of benefits under the Law. The Law is administered by the Louisiana Workforce Commission and additional information regarding the Law may be accessed at http://www.laworks.net/WorkersComp/OWC_MainMenu.asp.

Under the Law, a workplace injury must be immediately reported to the employer; failing to timely report an injury may result in a denial of benefits. Finally, Louisiana prohibits the discharge of an employee for filing a workers' compensation claim. La. Rev. Stat. § 23:1691.

Gun Laws

No public or private employer shall be liable for damages resulting from or arising out of an occurrence involving a firearm transported or stored Section 32:292.1, other than for a violation of Subsection C of this Section. Under Subsection C, no public or private employer shall prohibit any person from transporting or storing a firearm. However, nothing prohibits an employer from adopting policies specifying that firearms stored in locked, privately-owned motor vehicles on property controlled by an employer or business entity be hidden from plain view or within a locked case or container within the vehicle. This section does not apply to any property where possessing a firearm is prohibited under state or federal law, any vehicle owned by the employer and used by the employee in the course of his employment, and any vehicle or property controlled by the employer if access is restricted by a fence, gate, security stations, signage, or other means of restriction, and if one of the following conditions applies: the employer or business entity provides facilities for the temporary storage of unloaded firearms or the employer or business entity provides an alternative parking area reasonably close to the main parking area in which employees and other persons may transport or store firearms in locked, privately-owned motor vehicles. La. Rev. Stat. 32:292.1.

Additional Laws & Regulations

Employment Discrimination Law. The Louisiana Employment Discrimination Law prohibits discrimination against applicants or employees in the terms or conditions of employment based on age (forty and older) (La. Rev. Stat. § 23:312), veterans for taking time away from work to attend medical appointments necessary to meet the requirements to receive his veterans benefits (La. Rev. Stat. § 23:331), disability (La. Rev. Stat. § 23:323), race, color, religion, sex, and national origin (La. Rev. Stat. § 23:332), sickle cell trait (La. Rev. Stat. § 23:352), protected genetic information (La. Rev. Stat. § 23:368), and pregnancy, childbirth, or related medical condition (La. Rev. Stat. § 23:342). Its provisions apply to all employers, with the exception of certain religious educational institutions, that employ twenty or more employees within the State of Louisiana (La. Rev. Stat. § 23:302). The provisions relating to pregnancy discrimination apply to employers with twenty-five or more employees in the State. Available remedies include unlimited compensatory damages, back pay, reinstatement or front pay, benefits, reasonable attorneys' fees, court costs, and a trial by jury. Punitive damages are not available. An employee is required to notify the employer in writing of his or her claim at least thirty days before filing suit in an attempt to amicably resolve the claim. La. Rev. Stat. § 23:303. An employee has one year to file suit; however, that time period is suspended for six months if the employee has filed a charge of discrimination with the Equal Employment Opportunity Commission or the Louisiana Commission on Human Rights. La. Rev. Stat. § 23:303.

Workplace Safety. The State of Louisiana requires every employer to furnish a "reasonably safe" work environment, including safety devices and anything reasonably necessary to protect the life, health, safety, and welfare of employees. La. Rev. Stat. § 23:13. Louisiana also provides specific regulations regarding (1) divers, tunnel, and caisson workers, La. Rev. Stat. §§ 23:481-88; (2) air circulation and fumes, La. Rev. Stat. § 23:511; and (3) persons who work in boilers, La. Rev. Stat. §§ 23:531-45.

Retaliation. The State of Louisiana further prohibits: (1) the discharge of an employee on account of his or her political opinions, political affiliations, running for political office, or voting actions for employers regularly employing twenty or more employees, La. Rev. Stat § 23:961-62; (2) the discharge of an employee who testifies or furnishes information during a labor investigation, La. Rev. Stat. § 23:964; (3) an employer from terminating an employee for disclosing or threatening to disclose an employment practice in violation of law, La. Rev. Stat. § 23:967; (4) the discharge of an employee because of a voluntary assignment or a single garnishment of earnings, La. Rev. Stat. § 23:731(C); (5) the discharge of an employee because that employee is a member of any armed service or National Guard, La. Rev. Stat. § 29:404; and (6) discharge of an employee based upon a request for, or the receipt of, genetic information regarding that employee, La. Rev. Stat. § 23:368.

Minimum Age. A "minor" is defined as any person under eighteen years of age. La. Civil Code art. 29. Minors under the age of fourteen years are prohibited from working in any occupation. La. Rev. Stat. § 23:162. Minors fifteen to sixteen years of age are prohibited from obtaining employment in certain occupations, depending upon the age of the minor and the occupation. La. Rev. Stat. §§ 23:161, 23:163. Minors fourteen and fifteen years of age may be employed only after school and during non-school days. La. Rev. Stat. § 23:166.

Reference Immunity. An employer who provides information that is not knowingly false or deliberately misleading in response to a request from a prospective employer or a current or former employee about the employee's job performance or reasons for separation shall be immune from civil liability. La. Rev. Stat. § 23:291.

Training Programs

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

LABOR & EMPLOYMENT

Baker Donelson customizes all in-house management training programs so that your management team will feel comfortable interacting with us and getting answers to their questions.

The key to effective management training on employment law issues is interaction. Baker Donelson customizes all in-house management training programs so that your management team will feel comfortable interacting with us and getting answers to their questions. We use a variety of techniques to make the training sessions educational and entertaining, including the following:

Customization

Programs are made industry, business and/or company specific, including use of your company's policies, forms, mission and values during training sessions.

Non-Lecture

Training sessions are open and interactive, with ample time for managers to ask questions and get answers.

No Legalese

We make employment laws understandable for the layperson and modify content based on the attendees' experience level.

Mock Trials

Managers get a real-world view of what it is like to be a witness or a juror in an employment law case.

Video Vignettes

We create videos using your management team or purchase videos as options for enhancing the learning experience.

Case Studies

Managers are challenged to apply what they have learned through real-world scenarios pertinent to your business.

Quizzes

We offer a variety of quiz formats to enhance your managers' ability to retain what they have learned.

Role-Playing

Managers practice investigation techniques, termination scenarios, performance evaluation meetings and counseling scenes with us and their peers, giving them an opportunity to hone their skills and be able to react quickly when difficult employment situations arise.

Employment Law Training Topics Include:

Mid-Level Managers And Front Line Supervisors

- Basics of Employment Discrimination and a Guide to Common Causes of Discrimination/Harassment Complaints
- Creating and Maintaining a Harassment-Free Work Environment
- When and How Managers Should Respond to Employee Complaints
- Compliance Guides on The Family and Medical Leave Act (FMLA) and The Americans With Disabilities Act (ADA)
- Religious and Disability Accommodations: When, Where and How
- Management's Guide to Legal and Ethical Decision-Making
- Dos and Don'ts for Protecting Privacy Rights in the Workplace
- Reduce Legal Risks: Basics of Progressive Discipline, Documentation and Termination
- Making the Employee Handbook Your Management Playbook
- Recruiting, Interviewing, Selecting and Hiring Employees and Conducting Evaluations
- Conducting Internal Investigations
- Negligent Supervision: Easy Guide to Reducing Legal Risks
- Wage and Hour Law for the Front Line Supervisor
- Mission Possible: Union Avoidance
- Unlawful Retaliation: Prevention is Worth a Pound of Cure
- Leadership Workshops on Diverse Workforces, Reducing Legal Risks, and Motivation

Human Resources Professionals

- Internal Investigations A to Z
- The Americans With Disabilities Act: Straight Answers to Tough Questions
- Coordinating the FMLA, ADA, and Workers' Compensation
- Maintaining a Union-Free Work Environment
- How to Conduct an Employment Practices Audit
- Lawfully Managing Attendance
- Personnel Document Retention: Best Practices for Reducing Legal Exposure
- Developing an Employee Handbook
- Affirmative Action Compliance
- Surviving an OFCCP Audit
- A Step-By-Step Guide for Responding to an EEOC Charge
- Negligent Hiring: Crafting Policies and Procedures to Reduce the Risk
- Conducting a Wage & Hour Audit
- Train the Trainer Sessions
- Employment Verification: Policies, I-9, E-Verify and No-Match
- Managing Visas and Status for Foreign Workers
- Implicit Bias: What is it? What Can You Do About It?

Executive Management

- Employment Law 101 for Executive Management
- Tone at the Top: Executive Management Commitment to a Harassment Free Workplace

To schedule your training program, please contact:

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About Labor & Employment

We're the Resource in Human Resources. Our labor and employment attorneys offer litigation defense services for administrative and court proceedings at the federal and state level, advice on pre-litigation strategies to reduce legal risks, policy analysis and drafting, compliance audits, management training and labor negotiation.

We Know People. We know our clients as people, not just clients. We form business partnerships so we can help clients strategize on the best approach for each situation, and are always looking at the big picture to ensure long-term success.

We Know Business and Industry. We work with clients across all types of businesses and industries, and we take pride in understanding exactly how they work and how our clients are positioned in the marketplace. These include local, regional and global companies in the health care, energy, food processing, entertainment, insurance, chemical manufacturing, construction, transportation and distribution industries.

We Know Our Alphabet. Our attorneys stay on top of the latest changes in laws and regulations from A to Z. We provide counseling and strategic advice on all employment-related laws and regulations, and when necessary, we defend our clients in district and federal courts across the country. Attorneys regularly appear before the EEOC, DOL and Occupational Safety and Health boards.

We Get Around. Our more than 70 labor and employment-focused attorneys are spread across the Firm's seven states and Washington, D.C. Attorneys are licensed in a total of 14 states and have handled matters in 40 states and the District of Columbia. Over the last three years, the team has tried more than 630 federal court cases, has appeared in the Third, Fourth, Fifth, Sixth, Eleventh and District of Columbia Courts of Appeal, and has appeared in 22 District Courts as well as the District of Columbia.

We Know Labor, Safety and Health. We help management deal with labor unions during the election phases of union campaigns, and we help with labor agreement negotiation. For clients who have unions already representing their workforce, we pursue management's interests in all phases of the grievance and arbitration process. Our health and safety lawyers offer regulatory monitoring, compliance oversight, training programs and internal auditing protocols, and represent clients before federal and state occupational safety and health regulators.

We Like to Help. Baker Donelson customizes all in-house management training programs so that clients' management teams will feel comfortable interacting with us and getting answers to their questions. We offer mock trials, case studies, role-playing, quizzes and video vignettes for human resources managers, mid-level managers and front line supervisors.

We Open Doors for Immigration. We offer a comprehensive and efficient approach to immigration, guiding clients through the entire range of immigration processes for foreign investors, executives, managers, professionals and other workers and their family members. Our experience and relationships help us cut through to practical solutions, using state-of-the-art systems to drive our best thinking through each step of every case.

We Play Well With Others. We want to be your go-to lawyers for every aspect of your company. No matter the legal issue, Baker Donelson's labor and employment attorneys can count on an integrated and experienced team of professionals to assist you in every other aspect of your legal business needs.

We're Good People. We are part of a Firm culture that promotes diversity, inclusion and a sincere appreciation for creative approaches to problem-solving. We are proud to have been listed among FORTUNE magazine's "100 Best Companies to Work For" for five consecutive years, something few other law firms have attained. Many of our offices consistently rank as a best place to work in their cities and states, as well. Our labor and employment attorneys are listed in *Chambers USA*, *Best Lawyers in America*© and *Super Lawyers*, alongside other state-specific accolades. The group also holds national Tier Two rankings in *U.S. News – Best Lawyers* in Employment Law and Labor Law.

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