29th Annual

LABOR & EMPLOYMENT LAW SEMINAR

Presented by the Labor & Employment Law Group of McNees Wallace & Nurick LLC

Thursday, June 6, 2019

8:45 a.m. - 2:45 p.m.

HERSHEY LODGE
325 University Dr. • Hershey, PA 17033

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Credit information will be provided to all attendees, via email, the week of June 10th. Welcome and thank you for joining us today!

McNEES TRAINING ACADEMY

Customized Labor & Employment Law Training for Your Workforce

The McNees Labor and Employment Law Practice Group wants to help you build an efficient, effective training curriculum that is customized to suit the needs of your workforce. Let us work with you to craft a training program that will help ensure that your HR and management teams have the training they need to conduct business with the confidence that they are on solid legal footing.

You identify your priority training needs and your target audience, and we will tailor a training program just for you. Training topics cover the gamut from basic HR skill-building and general labor and employment law compliance, to narrowly focused, industry-specific topics. The length of your training program will vary based on your needs – from a 30-minute executive briefing to a full-day intensive workshop. Audiences may range from small groups to your entire salaried or hourly workforce, Board members, supervisory staff, and more. We can also design your training program to help you "train the trainer" – coaching your HR and management teams on how to effectively train hourly employees on selected legal issues – and extend the value of your tailor-made training program. All of our training programs are available on a fixed fee basis.

The training topics listed below provide just a sampling of the training programs that we can tailor to suit your Company's needs.

HUMAN RESOURCES BUILDING BLOCKS

- Identifying and Preventing Harassment and Discrimination in the Workplace (*module for hourly employees also available*)
- Employment Law 101
- Hiring 101: Interviews, I-9s and Background Checks
- Hiring 202: Offer Letters, Non-Competes and Employment Contracts
- Introduction to Wage and Hour Law
- FMLA/ADA 101: Employee Rights and their Limits
- FMLA/ADA 202: Effective Administration of Leave and Accommodation Programs
- Fundamentals of Effective Workplace Investigations
- OSHA Compliance for HR Managers

LABOR RELATIONS

- What Non-Union Employers Need to Know About the NLRA
- What Union Employers Need to Know About the NLRA
- Union Awareness: Best Practices and Policies
- The Nuts and Bolts of Union Representation Elections
- Managing a Unionized Workforce
- Best Practices for Grievance Administration and Labor Arbitration
- A Guide to Effective Labor Negotiations
- Work Stoppage Contingency Planning

EMPLOYEE BENEFITS

- What HR Needs to Know About Employee Benefits Law
- Complying with the Affordable Care Act (Health Care Reform)
- HIPAA Compliance for HR and Benefits Professionals
- Understanding Your Section 125 Plan
- Understanding Fiduciary Responsibility
- Employee Benefits Law Update

HUMAN RESOURCES MANAGEMENT AND LEGAL COMPLIANCE

- Wage and Hour Compliance Pitfalls
- Advanced FMLA/ADA: Effectively Addressing the Toughest Challenges
- Understanding Military Leave Laws and Other Leave Mandates
- Your HR Audit: Identifying and Addressing Common Compliance Issues
- A Roadmap for Use of Independent Contractors and Temporary Employees
- The Ten Most Important Policies in Your Handbook (and How to Enforce Them)
- How to Manage Toxic Employees
- I-9 (Employment Eligibility) Compliance
- Best Practices for Employee Discipline and Discharge
- Effective Management of Unemployment Compensation Claims
- Social Media and Electronic Resources in the Workplace
- Administering Your Affirmative Action Plan
- Administering Your Substance Abuse Testing Program
- Avoiding Whistleblower and Retaliation Claims
- Understanding Severance Agreements
- Non-Competes and Confidentiality Agreements: Their Value and Their Limitations

MANAGEMENT TRAINING ESSENTIALS

- Labor and Employment Law for Managers/Supervisors
- Labor and Employment Law Essentials for In-House Counsel
- Managing the Problem Employee: Documentation, Discipline and Discharge
- FMLA/ADA for Managers: Your Rights and Obligations as an Employer
- Your Role in a Government Inspection or Audit: Do's, Don'ts and What to Expect
- Anatomy of a Lawsuit: How Good Management Practices Make a Difference
- Industry-Specific Wage and Hour Compliance Issues
- Industry-Specific Labor and Employment Compliance Issues

SPECIALIZED TRAINING

- Employment Law Update (*topics tailored to your needs*)
- Understanding the Law and Limits of Employee Privacy
- Reductions in Force and Early Retirement Programs
- Tackling Equal Pay and Glass Ceiling Concerns
- Designing Your HR Record Retention Program
- Diversity in the Workplace
- Litigation Basics: Privilege, E-Discovery and Case Management
- Understanding DOT Testing and Fitness Regulations
- Construction Industry: Complying With Prevailing Wage Laws
- Construction Industry: Picketing, Reserve Gates and Protecting Your Machinery
- An Introduction to Employment Practices Liability Insurance
- Board Governance
- *Design Your Own Session*

How Can We Help You?

As you develop your training plan for the coming year, consider the McNees Training Academy as your partner. For more information please contact any of our Labor & Employment attorneys in the offices below.

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LABOR & EMPLOYMENT LAW ACRONYMS AND ABBREVIATIONS

Navigating the Alphabet Soup

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ACA	Affordable Care Act (see also PPACA)
ADA	Americans with Disabilities Act of 1990
ADAAA	ADA Amendments Act of 2008
ADEA	Age Discrimination in Employment Act of 1967
ALJ	Administrative Law Judge
CBA	Collective Bargaining Agreement
CFPB	Consumer Financial Protection Bureau
COBRA	Consolidated Omnibus Budget Reconciliation Act of 1985
DOL	Department of Labor
DOT	Department of Transportation
EAP	Employee Assistance Program
EBSA	Dept. of Labor's Employee Benefits Security Administration
EEOC	Equal Employment Opportunity Commission
EPA	Equal Pay Act
ERISA	Employee Retirement Income Security Act
ESI	Electronically Stored Information
FCRA	Fair Credit Reporting Act
FLSA	Fair Labor Standards Act of 1938
FMCS	Federal Mediation and Conciliation Service
FMLA	Family and Medical Leave Act of 1993
FTC	Federal Trade Commission
GINA	Genetic Information Nondiscrimination Act of 2008
HIPAA	Health Insurance Portability and Accountability Act
I-9	Employment Eligibility and Verification Form
ICE	Immigration and Customs Enforcement
LTD	Long Term Disability
MWA	Pennsylvania's Minimum Wage Act
NLRA	National Labor Relations Act of 1935
NLRB	National Labor Relations Board
OCRC	Ohio Civil Rights Commission
OFCCP	Office of Federal Contract Compliance Programs
OSHA	Occupational Safety and Health Administration
OWBPA	Older Workers Benefit Protection Act
PDA	Pregnancy Discrimination Act
PHRA	Pennsylvania Human Relations Act
PHRC	Pennsylvania Human Relations Commission
PPACA	Patient Protection and Affordable Care Act
SOX	Sarbanes-Oxley Act of 2002
STD	Short Term Disability
Title VII	Title VII of the Civil Rights Act of 1964
UC	Unemployment Compensation
ULP	Unfair Labor Practice
USCIS	U.S. Citizenship and Immigration Services
USERRA	Uniformed Services Employment and Reemployment Rights Act of 1994
WARN	Worker Adjustment and Retraining Notification Act
WC	Workers' Compensation
WHD	Department of Labor's Wage and Hour Division
WPCL	Pennsylvania's Wage Payment and Collection Law

HEALTHCARE-RELATED ACRONYMS AND ABBREVIATIONS

Navigating the Alphabet Soup

McNees

ACA	Affordable Care Act (see also PPACA)
FPL	Federal Poverty Level
FSA	Flexible Spending Account
FT	Full-Time
FTE	Full-Time Equivalent
HCE	Health Care Exchange
HHS	U.S. Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
HRA	Health Reimbursement Account
HSA	Health Savings Account
IMP	Initial Measurement Period
MEC	Minimum Essential Coverage
OOP	Out-Of-Pocket
PPACA	Patient Protection and Affordable Care Act
QHP	Qualified Health Plan
SMP	Standard Measurement Period

Labor & Employment Law Seminar Evaluation

June 6, 2019

EVALUATION FORM

Please complete and return to McNees staff or the registration desk (or email to kswaringen@mcneeslaw.com)

McNees would appreciate your input about this and future meetings. Please help us by completing the following information. Please rate each question below for the sessions you attended. If you are interested in signing up for the Labor & Employment Blog or any other McNees publications, please indicate your preference on the back.

OPENING SESSION - 8:45 – 10:00 AM

1. Speaker's Performance: Excellent Good Fair Poor
   Comments: _____
2. Speaker's Knowledge: Excellent Good Fair Poor
   Comments: _____
3. Was the program beneficial to you? Yes No
   Comments: _____
4. Was sufficient time provided for the presentation? Yes No
   Comments: _____

SESSION 1 - 10:15 – 11:15 AM *Circle your session - A B C*

1. Speaker's Performance: Excellent Good Fair Poor
   Comments: _____
2. Speaker's Knowledge: Excellent Good Fair Poor
   Comments: _____
3. Was the program beneficial to you? Yes No
   Comments: _____
4. Was sufficient time provided for the presentation? Yes No
   Comments: _____

SESSION 2 - 11:45 AM – 12:45 PM *Circle your session - A B C*

1. Speaker's Performance: Excellent Good Fair Poor
   Comments: _____
2. Speaker's Knowledge: Excellent Good Fair Poor
   Comments: _____
3. Was the program beneficial to you? Yes No
   Comments: _____
4. Was sufficient time provided for the presentation? Yes No
   Comments: _____

SESSION 3 - 1:45 – 2:45 PM *Circle your session - A B C*

1. Speaker's Performance: Excellent Good Fair Poor
   Comments: _____
2. Speaker's Knowledge: Excellent Good Fair Poor
   Comments: _____
3. Was the program beneficial to you? Yes No
   Comments: _____
4. Was sufficient time provided for the presentation? Yes No
   Comments: _____

OVERALL ASSESSMENT

1. Suggestions for future presentation topics: _____
2. If you can change or modify one aspect of the Annual Labor & Employment Seminar, what would that be?
   _____
   _____
   _____

McNees E-Newsletter Subscription

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Defining the Scope of Your HR Audit

To help us understand the desired scope of your upcoming Human Resources Audit, please check the topics that you would like the audit to cover – or that you would like to discuss as a potential audit topic.

GENERAL POLICIES AND PROCEDURES:

_____ Review of Employee Handbook and Related HR Policies/Procedures
_____ Review of Employee Benefit Plans and Related Documents (ERISA, COBRA, HIPAA, PPACA, Section 125, beneficiary designations, IRS determination letters, etc.)

HIRING:

_____ Review of Hiring Process (e.g. Application for Employment, Interview Questions, Job Advertisements, Job Postings, On-line Inquiries and Processes, Offer Letters, Reference Checking, Selection/Non-Selection Memos, Employment Agreements)
_____ Review of Supervisory and Employee Orientation and Training Programs
_____ Review of I-9 Compliance
_____ Review of E-Verify Compliance
_____ Review of Compliance with Fair Credit Reporting Act, Criminal History Information Act and Related Background Check Issues
_____ Review of Orientation Processes for Hourly and Salaried Employees (key policy discussion, sign-off, recertification)
_____ Review of Protections for Proprietary Information (use of and clearance from non-competes, non-disclosure/trade secret agreements)

HUMAN RESOURCES MANAGEMENT:

_____ Review of Corrective Action Procedures and Documents (corrective action procedures, action plans, documentation, follow-up, attorney-client privilege issues, record retention)
_____ Review of Performance Evaluation and Performance Management Processes (evaluation forms, disciplinary record forms)
_____ Internal Investigations (protocol, documentation, attorney-client privilege issues, record retention)
_____ Review of Internal/External Job Posting Processes (protocol, documentation, attorney-client privilege issues, record retention)
_____ Review of Job Descriptions (e.g. ADA essential function designations, support of exempt designations, format)
_____ Review of Human Resources Training Program (for HR Professionals)
_____ Review of HR Vendor Agreements

TERMINATION AND POST-EMPLOYMENT:

_____ Review of Reduction in Force Procedures and Related Documents
_____ Review of Termination Procedures and Documents (termination letter, disciplinary procedures, severance agreements, reference policy, attorney-client privilege issues, record retention)
_____ Review of Unemployment Compensation Control Procedures
_____ Review of post-termination communications protocol (internal/external communications, references, employee inquiries)
_____ Review of Protocol for Enforcing Post-Employment Covenants (enforcement of non-competes, non-disclosure/trade secret agreements)

FAIR EMPLOYMENT PRACTICES AND FMLA COMPLIANCE:

_____ Review of EEO and harassment policies and prevention efforts (policy review, employee education, investigation, documentation, follow-up, attorney-client privilege issues, record retention)
_____ Review of ADA Compliance Procedures and Practices (e.g. interactive process for accommodation, confidentiality, return from leave issues, ergonomics, etc.)
_____ Review of EEO-1 Reporting Compliance
_____ Review of Employee Demographics and Turnover for Potential EEO Compliance Concerns
_____ Review of OFCCP/Affirmative Action Plan Compliance
_____ Review of Equal Pay and Discriminatory Pay Practices Concerns
_____ FMLA Compliance (e.g. procedure for designation, policy, recordkeeping, reinstatement)

COMPENSATION:

_____ Review of Wage and Hour Practices
- _____ Exempt/Non-Exempt Determinations
- _____ Minimum Wage
- _____ Overtime Payment (e.g. bonus credit, multiple rate, comp time, carryover, etc.)
- _____ Hours Worked (start/stop, meals/breaks, on-duty vs. off-duty)
- _____ Child Labor
- _____ Authorization of Deductions
- _____ Final Pay Issues
- _____ Recordkeeping

_____ Review of Compensation Program (hourly, salaried, executive, job valuation, grades and steps)
_____ Review of Use of Independent Contractors, Temporary Employees and other Contingent Workers (e.g. independent contractor agreements, staffing services agreements, IRS/DOL compliance)
_____ Review of Employment Tax and Withholding Practices

POSTING AND RECORDKEEPING:

_____ Review of Required Employee Posting s
_____ Review of Personnel File Record Retention Practices (e.g. Wage/Hour Records, ADA compliance, Retention/ Destruction practices, HIPAA compliance, Personnel Files Act)
_____ Review of HR Records Retention Schedule
_____ Review of e-Discovery Protocol
_____ Review of Confidentiality Practices Relating to HR Records

SAFETY AND MEDICAL ISSUES:

_____ Review of OSHA Compliance
- _____ Recordkeeping
- _____ MSDS Program
- _____ Lockout/Tagout Program
- _____ Workplace Violence Prevention
- _____ First Responder Program
- _____ Bloodborne Pathogens Program
- _____ General Duty Clause Issues (Ergonomics and other known hazards)

_____ Review of Medical Emergency Protocol
_____ Review of Workers' Compensation Protocol (physician panel, notification process, documentation)
_____ Review of Drug Testing Policies and Related Documents and Protocol
_____ Review of Medical Privacy Practices (HIPAA, ADA, GINA, FMLA, HIV-related information)

LABOR RELATIONS:

_____ Review of Union Avoidance Plan
_____ Review of Collective Bargaining Agreements (issue spotting, suggestions for future negotiation)
_____ Review of Supervisory Status Among Current Employees

MANAGEMENT/SUPERVISORY TRAINING SESSIONS:

_____ Performance Management and Discipline
_____ Drug and Alcohol Testing Issues
_____ FMLA / ADA / Work-Related Injuries
_____ Discriminatory Harassment
_____ Diversity in the Workplace
_____ Workplace Violence
_____ Electronic Resources and Social Media Policies
_____ Interviewing / Hiring
_____ Confidentiality and Medical Records
_____ Litigation Basics: e-Discovery, Privilege, Litigation Holds and More
_____ Wage and Hour Issues for Supervisors and Managers
_____ Employment Law for Managers
_____ Employee Benefits Law for Managers
_____ Preventing Harassment in the Workplace
_____ Understanding Your Role in ADA/FMLA Compliance
_____ A Manager's Guide to Wage and Hour Compliance
_____ Conducting Effective Workplace Investigations
_____ A Manager's Survival Guide to Employment Laws
_____ Do's and Don'ts in Interviewing and Hiring
_____ Performance and Disciplinary Documentation
_____ HR's Guide to I-9 Compliance
_____ Managing a Unionized Workforce
_____ Avoiding Union Activity
_____ Protecting Your Company's Confidential Information
_____ Handling Employee Medical Records (HIPAA, ADA, FMLA)
_____ Do's and Don'ts for Administering Your Drug and Alcohol Testing Program
_____ Preventing and Responding to Violence in the Workplace
_____ Litigation Basics: Privilege, Litigation Holds and E-Discovery
_____ Employment Law Refresher
_____ Workplace Privacy
_____ Independent Contractor Designation
_____ Avoiding Retaliation and Whistleblower Claims
_____ Employee Benefits Law Update
_____ Managing in the Electronic Age
_____ Other (Please explain):_____

McNees
Labor & Employment Law Seminar

DOL AND NLRB UPDATE AND PREDICTIONS

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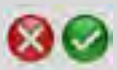
1

CIVICS POLL

- The next Presidential election will be held:
  - A. In a mere 17 months
  - B. In 2022
  - C. Seemingly nightly on various cable news networks
  - D. I don't know, I've given up following national politics on the advice of my doctor



2

DOL AND NLRB IN 2019 AND BEYOND

- With change in administrations in the White House (from one political party to the other) come changes in the positions held by federal agencies on certain key issues
- Key question – how much can be changed (and how many changes can survive legal challenges) before the next change in administrations occurs?
  - Regulatory process takes time
  - 2020 – Presidential election year
    - **The race is on ...**

3

OVERTIME EXEMPTION REGULATIONS – FLSA

- Background
  - May 18, 2016 – DOL issued final regulations updating the FLSA's "white collar" overtime exemptions
    - **More than doubled minimum salary requirement, with automatic updates every three years**
    - **Effective date – December 1, 2016**
  - November 22, 2016 – Federal Judge in Texas issued nationwide injunction blocking new regulations from taking effect
    - **Trump DOL did not pursue appeal to overturn injunction**

4

OVERTIME EXEMPTION REGULATIONS – FLSA

- March 7, 2019 – DOL issues proposed rule updating FLSA's "white collar" overtime exemptions
  - Would replace blocked 2016 Obama-era DOL rule
- Would increase minimum salary requirement from $455 per week ($23,660 annually) to $679 per week ($35,308 annually)
- Additional increases every four years, but only after opportunity for public comment
- Highly compensated employee exemption – would increase minimum annual salary requirement from $100,000 to $147,414

5

OVERTIME EXEMPTION REGULATIONS – FLSA

- Employers could count certain nondiscretionary bonuses and incentive comp for up to 10% of minimum salary requirement
- No proposed changes to the exemptions' duties tests
- DOL estimates changes will make more than a million currently exempt workers OT eligible
- 60-day public comment period after proposed rule was published in Federal Register
  - Public comment period closed in May 2019
  - DOL estimates that final rule will take effect in January 2020

6

DOL AND NLRB UPDATE AND PREDICTIONS

PREDICTION – PROPOSED FLSA REGULATIONS

- The 2019 proposed FLSA Overtime Exemption Regulations:
  A. Will be finalized and take effect in 2020 and survive any legal challenges, becoming the law of the land
  B. Will be finalized and take effect in 2020, but be blocked by an injunction, just like the 2016 regulations
  C. Will be issued as a non-legally binding Tweet
  D. Will never be issued in final rule form

7

DOL AND NLRB UPDATE AND PREDICTIONS

OVERTIME EXEMPTION REGULATIONS – PENNSYLVANIA MINIMUM WAGE ACT

- PMWA – our mini-FLSA in Pennsylvania
- Covers all Pennsylvania employers
- Requirements are similar, but not identical, to FLSA
  - When requirements differ, employers must comply with whichever requirement is more favorable for the employee

8

DOL AND NLRB UPDATE AND PREDICTIONS

OVERTIME EXEMPTION REGULATIONS – PENNSYLVANIA MINIMUM WAGE ACT

- June 2018 – PA Department of Labor & Industry issued proposed rulemaking that included big increases to the minimum salary requirements and changes to the duties tests
  - $610 per week ($31,720 annually) effective on the date the final rule is published
  - $766 per week ($39,832 annually) effective one year later
  - $921 per week ($47,892 annually) effective one year later
  - Other proposed changes also do not align requirements with FLSA

9

OVERTIME EXEMPTION REGULATIONS – PENNSYLVANIA MINIMUM WAGE ACT

- August 2018 – public comment period on proposed regs closed
- September 2018 – PA's Independent Regulatory Review Commission published critical comments and questions regarding the proposed regulations
- Now – we wait for L&I to issue final regulations
  - With Governor Wolf's reelection in November 2018, making final regulations much more likely

10

MINIMUM WAGE INCREASE?

- Current rate – $7.25/hour (under FLSA and PMWA)
- FLSA – change would require amendment through legislative action
  - Not likely in current environment
- Pennsylvania law – where change is more likely
  - 29 states and DC currently have minimum wage rate higher than federal rate
    - **Includes all New England and Mid-Atlantic states other than NH, PA, VA, and NC**

11

MINIMUM WAGE INCREASE?

- Push to raise the Pennsylvania minimum wage rate
  - Governor Wolf wants $15/hour
  - GOP leadership in General Assembly – willing to consider increase, but not $15/hour
  - Likelihood of actual increase taking effect – highest in many years

12

DOL AND NLRB UPDATE AND PREDICTIONS

RETURN OF DOL OPINION LETTERS

- DOL's Wage and Hour Division resumed issuing Opinion Letters in 2018
  - Obama DOL ceased publishing opinion letters in 2010
  - Give official agency opinion on how law applies to specific factual circumstances

13

DOL AND NLRB UPDATE AND PREDICTIONS

RETURN OF DOL OPINION LETTERS

- Can address FLSA or FMLA issues
- DOL issued 29 FLSA Opinion Letters and 2 FMLA Opinion Letters in 2018
- Do not have the binding effect of regulations
- Helpful by making clear position of DOL on certain issues and giving employers ability to make "good faith" defense to claims for liquidated damages

14

DOL AND NLRB UPDATE AND PREDICTIONS

HIGHLIGHTS OF RECENT DOL OPINION LETTERS

- August 2018 – compensability of employee time spent on wellness activities like biometric screenings, gym classes, attendance at benefits, fairs, etc.
- March 2019 – compensability of employee time spent on employer-sponsored volunteering activities
- April 2019 – whether service providers for a "virtual marketplace company" in gig economy can qualify as independent contractors (i.e., not employees)

15

DOL AND NLRB UPDATE AND PREDICTIONS

NLRB'S INDEPENDENT CONTRACTOR TEST – REINSTATED

- Issue – NLRB's employee/independent contractor standard
- *SuperShuttle DFW, Inc.* – decided January 25, 2019
  - Board rejected 2014 Obama-era NLRB decision
  - Reinstated common-law factors that had been followed for decades prior
- Big impact on entities that engage independent contractors and other non-employees to perform services
  - Harder to unionize under reinstated standard

16

DOL AND NLRB UPDATE AND PREDICTIONS

NLRB'S CONCERTED ACTIVITY TEST – REINSTATED

- Section 7 of NLRA protects "concerted activities" taken for the purpose of mutual aid or protection
  - Individual gripes or complaints – not protected
- Issue – what is "concerted activity" for purposes of Section 7 protections?

17

DOL AND NLRB UPDATE AND PREDICTIONS

NLRB'S CONCERTED ACTIVITY TEST – REINSTATED

- Pre-Obama NLRB standard – *Myers Industries*
  - Three types of concerted activity
    - **Group action or action on behalf of others**
    - **Action preparing for group action**
    - **Bringing a group complaint to management**
- 2011 – Obama-era NLRB modified third prong to hold that even an individual complaint made in a group setting was "concerted activity"

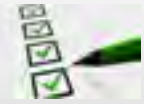
18

NLRB'S CONCERTED ACTIVITY TEST – REINSTATED

- *Alstate Maintenance LLC* – decided January 11, 2019
  - Reversed Obama-era NLRB precedent and reinstated *Myers Industries* standard
  - Returned to more stringent test where only those complaints that seek to initiate group action or truly involve group complaints will be protected
- Takeaway
  - Always consider Section 7 protections when taking adverse action against "complaining" employees

19

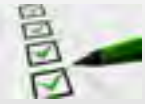
OTHER NLRB DEVELOPMENTS



- Joint employment standard
  - December 2017 – Board overturned 2015 *Browning-Ferris* decision in *Hy-Brand-Industrial Contractors*
    - Returned to prior standard that required proof of alleged joint employer's actual exercise of control over essential employment terms
  - February 2018 – Board vacated *Hy-Brand* after Ethics Official found that one of participating Members should have been disqualified

20

OTHER NLRB DEVELOPMENTS



- Joint employment standard
  - September 2018 – Board announced intent to propose regulation to address joint employment standard
    - **Proposed rule – joint employer only if it "possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine"**
    - **Indirect influence and contractual reservations of authority – no longer sufficient**

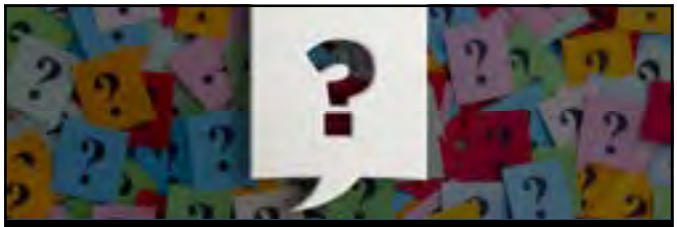
21

DOL AND NLRB UPDATE AND PREDICTIONS

OTHER NLRB DEVELOPMENTS

- "Quickie" election rules
  - December 2017 – Board published a Request for Information related to 2014 quickie election rules
  - No further action by Board to date
- Employee use of employer's e-mail to unionize
  - August 2018 – Board invited briefs on whether 2014 *Purple Communications* decision should be modified or overruled

22



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EEOC UPDATE AND #METOO: WHAT'S NEXT?

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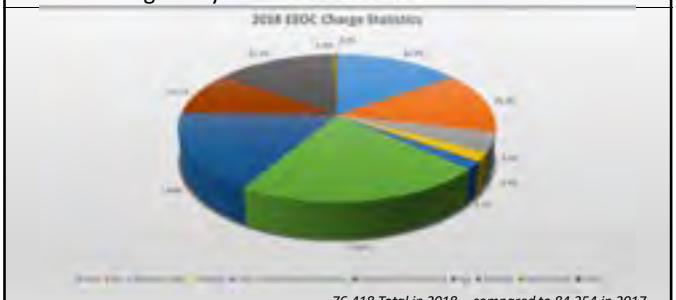
24

EEOC Charges - By the Numbers



76,418 Total in 2018 – compared to 84,254 in 2017

25

EEOC & #MeToo

EEOC and Sexual Harassment - 2018

- Sexual harassment charges filed with the EEOC increased by more than 12% over the previous year.
- Reasonable cause determinations increased from 970 to 1,200, an increase of over 23%.
- Sexual harassment lawsuits filed by EEOC attorneys increased by 50%.

26

EEOC - Recovery

- EEOC recovered more than $500 million for workplace discrimination claims
- Of that $500 million, almost $70 million in damages for sexual harassment

27

EEOC Charges - PA

EEOC Charges in Pennsylvania: 2017 v. 2018

	2017	2018
TOTAL CHARGES	**4,516**	**4,463**
% of US total charges	5.4%	5.8%
Race	**1,195**	**1,179**
% of US race charges	4.2%	4.8%
% of total state charges	26.5%	26.4%
Sex	**1,293**	**1,381**
% of US sex charges	5.0%	5.6%
% of total state charges	28.6%	30.9%
National Origin	**328**	**327**
% of US National Origin charges	4.0%	4.6%
% of total state charges	7.3%	7.3%

	2017	2018
Religion	**181**	**168**
% of US religion charges	5.3%	5.9%
% of total state charges	4.0%	3.8%
Color	**110**	**204**
% of US religion charges	3.4%	6.4%
% of total state charges	2.4%	4.6%
Retaliation (all)	**2,133**	**2,452**
% of US religion charges	4.5%	6.2%
% of total state charges	47.2%	54.9%
Retaliation (Title VII)	**1,428**	**1,640**
% of US religion charges	4.5%	5.4%
% of total state charges	31.6%	36.7%

28

EEOC Charges - By the Numbers

EEOC Charges in Pennsylvania: 2017 v. 2018

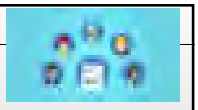
- While the total charges in PA are down, the charges alleging sex harassment are up.
- Title VII Retaliation increased.
- EPA increased.

https://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm#centercol

	2017	2018
Age	**1118**	**1014**
% of US age charges	6.1%	6.0%
% of total state charges	24.8%	22.7%
Disability	**1647**	**1665**
% of US age charges	6.1%	6.8%
% of total state charges	36.5%	37.3%
Equal Pay Act	**59**	**65**
% of US age charges	5.9%	6.1%
% of total state charges	1.3%	1.5%
GINA	**8**	**5**
% of US age charges	3.9%	2.3%
% of total state charges	0.2%	0.1%

29

EEO -1

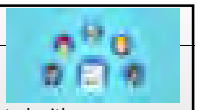


Component 2

- EEOC previously established new EEO-1
- Pay data collection was suspended by OMB 2017
- Component 2 includes pay data:
  - Wage information
  - Hours worked
- Reported for all employees by:
  - Race
  - Ethnicity
  - Sex

30

EEO-1 Pay Data

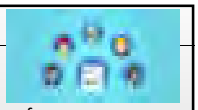


Why collect pay data?

- Persistent pay gaps exist in the U.S. workforce correlated with sex, race, and ethnicity;
- Workplace discrimination important contributing factor to these pay disparities;

31

EEO-1 Pay Data

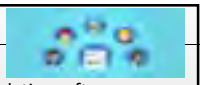


Why collect pay data?

- Improve EEOC's ability to effectively assess allegations of pay discrimination and focus investigations; and
- Encourage employers to voluntarily address unjustified pay disparities.

32

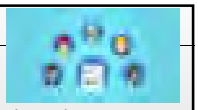
Pay Data – How Can It Hurt You?



- EEOC staff analyzes data using desktop EEO-1 analytics software to focus the early stages of its investigations:
  - Assess pay disparities based on sex, ethnicity, or race.
  - Analyze employer's EEO-1 data and conduct statistical analysis of pay and hours-worked data in Title VII and Equal Pay Act investigations.

33

What Else?



- EEOC also uses data to develop studies of the private sector workforce;
- EEOC may provide data to researchers who request data for academic studies, subject to Title VII confidentiality and data security requirements.

34

Pay Data Deadlines

If the requirements fit, you must submit.

- March 4, 2019 – federal court ruled pay data provisions be "immediately reinstated."
- Begin collecting EEO-1 Component 2 data for calendar years 2017 and 2018
- Analyze results, identify disparities, address gaps
- Submit by September 30, 2019

35

EEOC – Focus on Title VII

"Because of …Sex" = Sexual Orientation and Gender Identity

- Does Title VII's prohibition on discrimination "because of …sex" encompass sexual orientation?
- Does it mean gender identity and include transgender status?
- Survey says…

36

EEOC – Focus ADEA

ADEA's prohibition on Disparate Impact Include Private Sector Applicants?

- Circuits split
- EEOC scrutinizing ads/hiring process:
  - 3 to 7 years of experience (no more than 7)
  - 3 to 7 years of experience

37

EEOC's Primary Foucs

#MeToo movement has made an impact in the way that the EEOC, and employers across the country, are handling workplace sexual harassment.

- EEOC's October 2018 public hearing, several key issues:
- Need for employers to continue presenting effective workforce harassment training; and
- Recommendation that companies conduct "a workplace culture assessment"
  - Set of group expectations, behavioral norms, and social customs that governs what goes on and how it is interpreted.

38

EEOC Focus

YouTube and Newsflash

- 2019 EEOC Budget report - EEOC utilize YouTube Channel to provide educational videos and a new "Newsflash" series.
- EEOC plans to increase outreach by 20% in 2019 overall – outreach efforts focused on antiharassment.

39

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#MeToo: What's Next

What America Thinks of the #MeToo Movement

- More than 70% of the public say workplace sexual harassment is at least a "somewhat" serious problem.
- 44% hold a favorable view of the #MeToo movement.
- 28% say the movement has gone too far.
- 28% say it is about right.
- 17% say it hasn't gone far enough.

Huffingtonpost.com "HuffPost/YouGov Survey" dated August 22, 2018

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41

#MeToo: What's Next

What Juries Think About The #MeToo Movement

- 80% of jurors surveyed agreed that the #MeToo movement has helped show that sexual harassment is much more widespread in the workplace than previously thought.
- 80% of jurors polled believe that the #MeToo movement demonstrates too many managers failed to adequately address issues of sexual harassment in the workplace.

Sound Jury Consulting.com "Litigating sexual harassment claims in the era of #MeToo", The Sound Jury Library, May 31, 2018

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42

#MeToo: What's Next

What Juries Think About The #MeToo Movement

- 86% agree #MeToo movement puts all employers on notice that they need to change the way they respond to claims of sexual harassment in the workplace.
- 64% believe #MeToo movement made it more likely they would find in favor of a plaintiff in a lawsuit involving claims of sexual harassment.
- Nearly 2/3 jurors would tend to support plaintiff's claims before hearing anything else about the actual case.

Sound Jury Consulting.com "Litigating sexual harassment claims in the era of #MeToo", The Sound Jury Library, May 31, 2018

43

#MeToo: What's Next

What Juries Think About The #MeToo Movement

It's not all bad news for employers:

- 66% believe #MeToo movement made it easier for employees to make false claims of sexual harassment in the workplace.
- 61% believe there are more false claims of sexual harassment in the workplace today than ever before.
- 55% said they would have difficulty trusting someone who waited for years before claiming to be a victim of sexual harassment in the workplace.

Sound Jury Consulting.com "Litigating sexual harassment claims in the era of #MeToo", The Sound Jury Library, May 31, 2018

44

#TimesUp – Impact on Court's View

Minarsky v. Susquehanna County, 895 F.3d 303 (3d Cir. July 3, 2018)

- So Long Summary Judgment?
- Hostile Work Environment Claim
- Employer won on Summary Judgment with Farragher/Ellerth defense:

The employer must show "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

45

#TimesUp

Minarsky v. Susquehanna County

- Employee worked alone Fridays for years with a serial harasser.
- Only complained to harasser after enduring unwanted advances from him for a long period.
- After her conversation with a co-worker about harassment was overheard, employer fired harasser.

46

#TimesUp

Minarsky v. Susquehanna County

Takeaways –

- Affirmative defense can fail even if employee waits 4 years to complain.
- Consider what employer does as well as what was specifically done to individual employee/plaintiff.
- Don't over-value defenses/documentation.

47

#TimesUp – Impact on Court's View

Can false rumors that a female employee slept with her male boss to obtain promotions create liability under Title VII for discrimination "because of sex?"

48

#TimesUp

- Previously, federal courts typically held that gossip and rumors do not give rise to Title VII liability.

Parker v. Reema Consulting Services, Inc., 2019 WL 490652

49

#TimesUp

Rumors and Gossip in the Workplace Create Employer Liability for Harassment

- Instead of quashing the rumors, supervisors helped spread them.
- After employee complained to HR, hostility escalated – ostracized, nasty co-workers, false complaint against her.
- Given 2 written warnings and fired in same meeting.

50

#TimesUp

Rumors and Gossip in the Workplace Create Employer Liability for Harassment

- Spreading rumors was offensive and violated plaintiff's dignity; rumors were not based on gender.
- Rumors based on false statement about plaintiff's conduct.
- Rumors existed for only two months.

51

#TimesUp

Rumors and Gossip in the Workplace Create Employer Liability for Harassment

- Did not create a hostile work environment.
- Complaint was not protected activity – rumors were not based on gender.
- Retaliation claim dismissed.

52

#TimesUp

Rumors and Gossip in the Workplace Create Employer Liability for Harassment

- District Court failed to take into account "the sex-based" nature of the rumors and its effects.
- Harassment sufficiently severe or pervasive as it persisted continuously for 2 months.
- Reinstated retaliation claim. Complaint was protected.

53

#TimesUp

Rumors and Gossip in the Workplace Create Employer Liability for Harassment

"Because traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society and these stereotypes may cause superiors and coworkers to treat women in the workplace differently than men, it is plausibly alleged that Parker suffered harassment because she was a woman."

Parker v. Reema Consulting Services, Inc., 2019 WL 490652

54

Take Aways

- Don't ignore rumors or gossip – especially if they may be based on a protected classification.
- Train supervisors to bring such rumors to HR for evaluation and, if necessary, investigation and appropriate action.
- Conduct annual sexual harassment training for all employees.
- Consider revising current policies to address concept of rumors/gossip in workplace.

55

#TimesUp, Other Advancements in the Wake of #MeToo Movement

- Many employers are dropping mandatory arbitration agreements for all employees.
- Challenges or carveouts to allow employees to discuss allegations covered by non-disparagement clauses.
- Impact on confidentiality agreements.

56

#TimesUp, Other Advancements in the Wake of #MeToo Movement

- #MeToo harassment policy:
  - Netflix reportedly told employees on film crews in England they should not look at co-workers for more than five seconds.
  - Issued "guidelines" such as avoid unnecessary touching, lingering hugs or asking for personal phone numbers or contact information.

57

BE HEARD in the Workplace Act

- "Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination."
- Eliminates Title VII's minimum # of employees.

58

BE HEARD in the Workplace Act

- Mandatory Policies and Training
- Amends Title VII to prohibit employment discrimination against LGBTQ individuals
- Erases caps on compensatory and punitive damages in harassment suits against employers.

59

BE HEARD in the Workplace Act

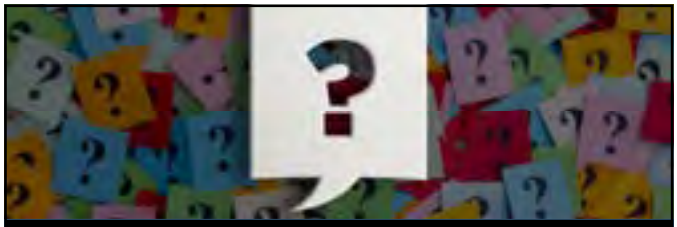
- So long Severe or Pervasive Standard.
- Prohibits pre-dispute arbitration clauses.
- Prohibits blanket non-disclosure agreements.

60

Looking forward

- Inclusion
- Awareness
- Commitment to safety and equity in the workplace

61



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SUPREME COURT UPDATE AND PREDICTIONS

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63

SUPREME COURT UPDATE

Lamps Plus, Inc. v. Varela, No. 17-988 (Apr. 24, 2019)

- Frank Varela filed a class action in federal court against his employer, Lamps Plus, for releasing his personal information in response to a phishing scam
- Lamps Plus moved to compel Verla to arbitrate as an individual under the terms of his employment contract
- District Court held that Verela had to arbitrate his claim but also held that class arbitration was appropriate
- 9th Circuit upheld District Court, determining that the employment contract was ambiguous and did not prohibit class arbitration

64

SUPREME COURT UPDATE

Lamps Plus, Inc. v. Varela, No. 17-988 (Apr. 24, 2019)

Issue before the Supreme Court: Can courts infer from an ambiguous employment arbitration agreement that the parties have consented to class-wide arbitration?

1. Of course, as long as class arbitration can be reasonably inferred from the contract.
2. No way. Class arbitration is so different from bilateral arbitration that it must be expressly authorized by the contract.
3. It depends on whether state law allows for a court to interpret the contract to include an agreement for class arbitration.
4. What the heck is class arbitration?

65

SUPREME COURT UPDATE

Mt. Lemmon Fire Dist. v. Guido, 2018 WL 5794639 (Nov. 6, 2018)

- John Guido and Dennis Rankin were terminated by Mt. Lemmon Fire District, a political subdivision of Arizona
- Guido and Rankin were the oldest two employees at the time of discharge
- Filed ADEA claims against Mt. Lemmon
- ADEA defines "employer" as: a person engaged in an industry affecting commerce who has twenty or more employees… The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State.
- Mt. Lemmon employed fewer than 20 workers at all relevant times

66

SUPREME COURT UPDATE

Mt. Lemmon Fire Dist. v. Guido, 2018 WL 5794639 (Nov. 6, 2018)

Issue before the Supreme Court: Whether the ADEA's 20 employee threshold applies to political subdivisions?

1. Yes. Employers with fewer than 20 employees are never covered by the ADEA.
2. Yes. Subjecting small municipal employers to the ADEA would create an undue burden on tax payers.
3. No. The ADEA's definition of employer treats political subdivisions differently than private sector entities.
4. It depends on whether state laws already prohibit political subdivisions from discriminating on the basis of age.

67

SUPREME COURT UPDATE

Janus v. AFSCME Council 31, 585 U.S. ___ (June 27, 2018)

- Mark Janus worked as a child support specialist employed by the state of Illinois
- AFSCME is the labor union which represented Illinois public sector employees
- Janus was required to pay a "fair share fee" to AFSCME even though he was not a member of the union
- Janus sued, arguing that fair share fees violate the First Amendment
- U.S. District Court and Seventh Circuit dismissed Janus' case on the basis of Abood v. City of Detroit
- In Abood, the Supreme Court held that public sector employees can be required to pay unions cost of contract administration even if the employees are not union members

68

SUPREME COURT UPDATE

Janus v. AFSCME Council 31, 585 U.S. ___ (June 27, 2018)

Issue before the Supreme Court: Does requiring public sector employees to pay fair share fees violate the First Amendment?

1. No. The Supreme Court already ruled that fair share fees are constitutional.
2. No. Fair share fees are not "speech" under the First Amendment.
3. Yes. Public sector employees who aren't union members cannot be forced to financially support a union.
4. Yes. I am a faithful reader of the Pennsylvania Labor & Employment Blog and know the answer.

69

SUPREME COURT – LOOKING AHEAD

Altitude Express, Inc. v. Zarda, 17-1623

- Donald Zarda was employed as a skydiving instructor by Altitude Express
- Prior to a tandem skydive with a female customer, Zarda told her that he is gay to make her feel more comfortable
- The customer's boyfriend told Altitude Express that Zarda was gay
- Altitude Express terminated Zarda for the comment
- Zarda sued under Title VII, alleging that he would not have been terminated if he had told the customer he was heterosexual
- U.S. District Court dismissed the case
- U.S. Court of Appeals for the Second Circuit reversed

70

SUPREME COURT – LOOKING AHEAD

Bostock v. Clayton County, Georgia, 17-1618

- Gerald Bostock was employed by Clayton County as a child welfare services coordinator
- Bostock joined a gay softball league and suggested it as a place to seek out volunteers for the child welfare program
- Shortly afterwards, the County audited the program and terminated Bostock for mismanaging program funds
- Bostock sued under Title VII, alleging that the audit was pretext for sexual orientation discrimination
- U.S. District Court dismissed the case
- U.S. Court of Appeals for the Eleventh Circuit affirmed

71

SUPREME COURT – LOOKING AHEAD

EEOC v. RG & GR Harris Funeral Homes, 18-107

- Aimee Stephens worked as a funeral director and informed her employer that she is a transgender woman and planned to transition from male to female
- Two weeks later, Stephens was terminated
- The employer expressly terminated Stephens for her planned transition
- Stephens sued under Title VII, alleging that she was discriminated against on the basis of her gender identity
- The U.S. District Court dismissed the case
- The U.S. Court of Appeals for the Sixth Circuit reversed

72

SUPREME COURT – LOOKING AHEAD

Sexual Orientation and Gender Identity Under Title VII

- EEOC's position is that both are protected under Title VII
- Trump Administration's position is that neither are protected under Title VII
- Federal Circuit Courts are split
- 14 states expressly consider sexual orientation and gender identity protected traits under state law
- PHRC's position is that both are protected traits under the PA Human Relations Act

73

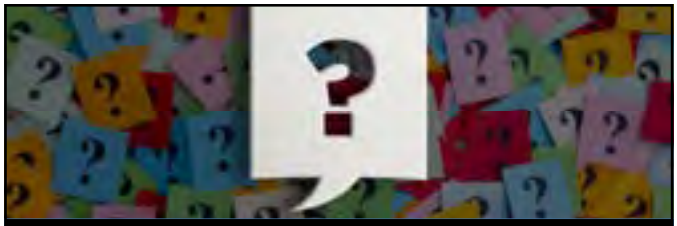
SUPREME COURT – LOOKING AHEAD

Zarda, Bostock, & Harris

Issue before the Supreme Court: Whether sexual orientation and/or gender identity are protected characteristics under Title VII?

1. Both sexual orientation and gender identity are protected under Title VII.
2. Only sexual orientation is protected under Title VII.
3. Only gender identity is protected under Title VII.
4. Neither sexual orientation nor gender identity are protected under Title VII.

74



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H.R. 101: PERSONNEL FILES, PERFORMANCE DOCUMENTATION AND TELECOMMUTING

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76

H.R. 101: PERSONNEL FILES

The Pennsylvania Personnel Files Law, 43 P.S. 1321-1324, requires an employer to permit an employee to inspect his or her own personnel file "used to determine his or her own qualifications for employment, promotion, additional compensation, termination or disciplinary action."

77

H.R. 101: PERSONNEL FILE

Who is an employee?

- "Any person currently employed, laid off with reemployment rights or on leave of absence."
- It does not include applicants for employment or "any other person."
- What about former employees?

78

H.R. 101: PERSONNEL FILES

In 2017, the Pennsylvania Supreme Court in Thomas Jefferson University Hospital v. Pennsylvania Department of Labor & Industry, 162 A.3d 384, found that a recently terminated employee was not within the definition of "employee" for purposes of the law because they were not "currently employed", and had no recall or reemployment rights.

79

H.R. 101: PERSONNEL FILES

Under the Law, a personnel file is defined as:

- Any application for employment;
- Wage or salary information;
- Notices of commendations;
- Warnings or disciplines;
- Authorizations for deductions or withholding of pay;
- Fringe benefit information;
- Leave records;
- Employment history with the employer (including salary information);
- Job title and dates of changes;
- Retirement record;
- Attendance records;
- Performance evaluations.

80

H.R. 101: PERSONNEL FILES

A personnel file does not include:

- Records relating to the investigation of a possible criminal offense;
- Letters of reference;
- Documents developed or prepared for use in civil, criminal or grievance procedures;
- Medical records;
- Materials used by the employer to plan for future operations; or
- Information available to the employee under the Fair Credit Reporting Act.

81

H.R. 101: PERSONNEL FILES

Confidentiality Obligations Under the ADA

- Information obtained under the ADA "shall be maintained on separate forms and in separate medical files and be treated as a confidential medical record…"
- The only exceptions to confidentiality are that:
  - Supervisors and managers can be informed about necessary work restrictions on work or duties and necessary accommodations;
  - First aid and safety personnel can be informed if the disability might require medical treatment; and
  - Government officials investigating compliance can be provided relevant information.

82

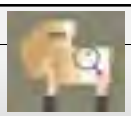
H.R. 101: PERSONNEL FILES

Confidentiality Obligations Under GINA

- As with information under the ADA, information obtained under GINA must be maintained as a confidential medical record, although it can be maintained in the same file as the ADA records.
- If you receive this information orally, it need not be reduced to writing, but it can't be disclosed except as it would be permitted for written records.

83

H.R. 101: PERSONNEL FILES



Employees who wish to view their personnel file:

- May view it themselves or designate an agent to review the file;
- Can only do so during the regular business hours of the office which maintains the files;
- Do not have the right to view the file during their working time;
- May be required to submit a written request for access, and may be required to identify the purpose for which the inspection is requested or the particular parts of the record the employee wants to review.

84

H.R. 101: PERSONNEL FILES

Does the Employer have to:

- Permit the employee to remove the file, or any portion thereof?
- Copy the file?
- Permit the employee to take notes on the file?
- Protect the file from loss, damage, or alteration?
- Allow the employee to view it in a room by him/herself?
- Provide unlimited time to review the file?
- Allow the employee to inspect their file, daily, weekly, monthly or yearly?

85

H.R. 101: PERFORMANCE MANAGEMENT

Do laws require HR documentation?

Most documentation is not required by law, but rather is a best practice in the event that you're ever required to defend your HR decision.

86

H.R. 101: PERFORMANCE MANAGEMENT

A Few Words About How to Document Effectively….

- If it's worth remembering, it's worth writing down.
- Ask the right questions and document the essentials: Who, What, When, Where, Why, Witness
- Take prompt, objective notes:
  - Performance problems
  - Discipline
  - Complaints or reports of harassment or discrimination
  - Only include FACTS, not opinions or emotions

87

H.R. 101: PERFORMANCE MANAGEMENT

Performance Management, Discipline & Discharge

- Handled improperly, discipline and discharge are fertile ground for litigation.
- Good and consistent documentation, proper timing and effective communication are key.

88

H.R. 101: PERFORMANCE MANAGEMENT

Best Practices: Performance Management

- Managing employee performance and discipline appropriately will help avoid claims of discrimination.
- Advance notice of expectations and deficiencies prior to discharge:
  - Be candid
  - Avoid surprises
  - PIP process when appropriate
- "Differentiation" between stars and underperformers.

89

H.R. 101: PERFORMANCE MANAGEMENT

Performance Evaluations Must be Done CONSISTENTLY!

90

H.R. 101: PERFORMANCE MANAGEMENT

Best Practices: Preparing Performance Evaluations

- Review appropriate records for the evaluation period
  - Employee notice reports
  - Emails
  - Manager's notebook
- Outline projects/jobs completed
  - Consider what role the employee played in the project/job
  - Consider importance of his/her contributions
- Consider employee's progress as compared to similarly situated employees

91

H.R. 101: PERFORMANCE MANAGEMENT

Best Practices: Preparing Performance Evaluations

- Should be thorough and honest.
  - Don't sugar coat – if there's a problem, document it.
  - They should recognize positive achievements as well as identifying areas of improvement.
  - Remember, you're going to have to live with the inaccurate/incomplete/vague appraisal if poor performance continues and you try to take action…only to be challenged.

92

H.R. 101: PERFORMANCE MANAGEMENT

Best Practices: Preparing Performance Evaluations

- Measure performance according to objective criteria.
- Employees should be given an opportunity to review the evaluation.

93

Best Practices: Performance Discipline

- Is discipline consistent with the employer's handling of prior circumstances involving performance of other employees?
  - Performance improvement plan?
  - Progressive discipline?

94

Best Practices: Performance Discipline

- Does adequate documentation exist?
  - Look at the last performance review and other counseling/communications
    - Is documentation timely and factual?
    - Is it objective or subjective?
    - Does it include opinions?
    - Does the documentation exist from counseling through more severe discipline?

95

Best Practices: Employee Misconduct Discipline

- Is there a policy or rule in place?
- Has the infraction been established or admitted?
  - If not, has the employer conducted a thorough investigation?
  - Is there a good faith belief that the interaction occurred based on the investigation?
- Is the rule/standard clear and is it known to the employee?
  - If not, is the standard of conduct obvious (e.g., no fighting)?

96

Best Practices: Employee Misconduct Discipline

- Is the disciplinary action to be taken consistent with the action taken in response to prior incidents of a similar nature?
  - If not, is there a clear explanation for the deviation from past practice?
- Has the employee had the opportunity to provide an explanation?
  - Can you show why that explanation is not sufficient?

97

Best Practices: Disciplinary Actions

- Approach disciplinary actions with the assumption that they will be appealed or disputed.
  - Investigate
  - Document, document, document
  - Dot every "i" and cross every "t"
- Enforce all applicable policies (i.e., attendance, performance, conduct).
- Be sure that all materials are forwarded to HR for inclusion in the employee's personnel file!

98

Termination: Considerations

- Is the termination decision consistent with the law?
  - Discrimination/retaliation
  - Union activity
  - Wage payment
  - Safety complaint
  - Jury duty
  - Military leave
  - Whistleblower
  - Leaves of absence/accommodation
  - Public policy

99

H.R. 101: PERFORMANCE MANAGEMENT

Termination: Considerations

- Consider legal risks
  - Protected traits cannot be a factor
  - No retaliation
  - ADA issues

100

H.R. 101: TELECOMMUTING

Considerations When Considering Telecommuting

- Company Property
- Security of Information
- Workers' Compensation
- Wage and Hour

101

H.R. 101: TELECOMMUTING

Considerations: **Company Property**

1. Are telecommuting employees using company computers or their own computers?
2. Do they have a company-issued smartphone or tablet?
3. What happens if these devices and equipment are lost or stolen?
4. What about damaged equipment?
   - Who is responsible for replacing a company computer that the family dog destroyed?

102

H.R. 101: TELECOMMUTING

Considerations: **Security**

1. Is your telecommuting employee taking home sensitive documents or electronic data?
2. How secure is their home office?
3. Are they working from a wireless Internet connection that can be accessed by others?

103

H.R. 101: TELECOMMUTING

Considerations: **Workers' Compensation**

- "…the Workmen's Compensation Act is remedial in nature and intended to benefit the worker, and, therefore, the Act must be liberally construed to effectuate its humanitarian objectives…"
- An employee who is injured during the course and scope of his/her employment is entitled to compensation, regardless of fault.
- In exchange, employer cannot be sued by employee for work related injuries.

104

H.R. 101: TELECOMMUTING

Considerations: **Workers' Compensation**

1. What happens if your telecommuting employee slips and injures herself on related papers?

2. How about if she develops a fatal blood clot while working at home?
3. What if she trips over her family dog and injures herself?
4. Worse yet, what if your employee is assaulted by a third-party while working at home?

105

H.R. 101: TELECOMMUTING

Considerations: **Workers' Compensation**

- The term "injury arising in the course of his employment" does include "…all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere...." 77 P.S. § 411(1)

106

H.R. 101: TELECOMMUTING

Considerations: **Wage and Hour**

1. Challenges in complying with hourly recordkeeping regulations.
2. Fair Labor Standards Act (FLSA) requires employers to pay and to keep accurate records on hours worked.
   - This applies "to work performed away from the premises or the job site, or even at home" and requires employers to count the time as hours worked "[i]f the employer knows or has reason to believe that the work is being performed." (29 C.F.R §785.12)

107

H.R. 101: TELECOMMUTING

Considerations: **Wage and Hour**

1. FLSA rules on overtime, waiting time, on-call time, and rest and meal breaks apply to telecommuters as much as they do to employees in the workplace.
2. Employers with non-exempt telecommuting employees must be especially careful to track employees' working hours—to avoid the risk of costly collective actions.

108

H.R. 101: TELECOMMUTING

Pros of Telecommuting (for Employers):

- Improves employee satisfaction
- Reduces attrition
- Reduces unscheduled absences
- Increases productivity
- Can save money
- Expands talent pool
- Increases employee empowerment

109

H.R. 101: TELECOMMUTING

Pros of Telecommuting (for Employees):

- Saves money
- Reduces stress, illness and injury
- Can increase leisure time
- Increases productivity
- Increases employee loyalty

110

H.R. 101: TELECOMMUTING

Cons of Telecommuting (for employers):

- Management mistrust
- Lack of employee engagement
- Co-worker jealousy
- Initial costs
- IT infrastructure changes
- Lack of collaboration
- Zoning issues

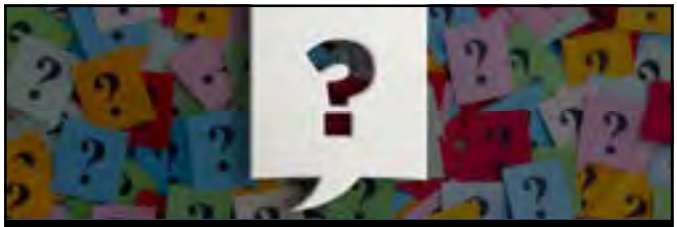
111

H.R. 101: TELECOMMUTING

Takeaways in Telecommuting:

1. Consider all factors and implications
2. Helpful to require a written agreement or written terms of employment that outline the telecommuting arrangement
3. Address important items such as preapproval for overtime, timekeeping requirements, and the other important topics

112



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113

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EMPLOYEE BENEFITS IN 2019: TOP COMPLIANCE TRAPS (AND HOW TO AVOID THEM)
June 6, 2019

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114

UNDERSTANDING FIDUCIARY RESPONSIBILITY – OVERVIEW

- **What is a fiduciary?**
- **Standards of conduct and discharge of duties**
- **Fiduciary liability**
- **Fiduciary protection**

115

WHAT IS A FIDUCIARY?

- **Any person**
- **Any discretionary authority**
  - Plan management/administration
  - Disposition of plan assets
- **Investment advice**
- **Remedial purpose of ERISA**

116

WHAT IS A FIDUCIARY?

- **Generally a "functional" test**
- **Belief, knowledge and often consent are <u>not</u> required**
  - Investment manager exception
- **Unwitting violations are possible!**

117

FIDUCIARY DUTIES

- **Exclusive Benefit**
  - Also known as the "duty of loyalty"
  - Acting with a "single eye"
- **Prudence**
  - Care, skill and diligence
  - Good faith is irrelevant – a "pure heart and an empty head"
- **Standard for Discharge and Fiduciary Responsibilities**
  - Good faith is meaningless!
  - "Should have known" is the standard.

118

FIDUCIARY DUTIES

- **Three Keys to Success**
  - Education
  - Procedures and documentation
  - Communication
- **Fiduciary Protection**
  - Exculpation
  - Delegation
  - Indemnification
  - Insurance

119

5500 FILING REQUIREMENTS

- **Pension Plan Requirements**
  - General Rule
  - Exceptions
- **Welfare Plan Requirements**
  - "Funded" Plans
  - Unfunded Plans
    - Who must be counted as a participant?
- **Audit Requirements**
  - Pension Plans
    - General Rule
    - 80-120 Rule
  - Welfare Plans – Only if funded

120

FILING DEADLINES

- General Rule – Last day of the 7th month following the last day of the plan year
- Tax Return Extension
- Form 5558
- No extension beyond 9-1/2 months
- All filings must be done electronically via EFAST 2.

121

ITEMS THAT MIGHT TRIGGER AN AUDIT

- Original Effective Date Precedes Any Prior Filings
- Incomplete Character Codes
- EIN/Plan Number
- Beginning of Year And Prior End-of-Year Asset Figures
- Participant Counts

122

DELINQUENT FILER PROGRAM

- Possible Significant IRS and DOL Penalties
- DFP fees are almost always significantly less.
  - Small Plan
    - $10 per day up to $750
    - $1,500 maximum for multiple years
  - Large Plan
    - $10 per day up to $2,000
    - $4,000 maximum for multiple years
- Coordination With IRS
- How far back must we go?
  - Administrative Issues
  - "Three-year" Rule of Thumb

123

MISSING PARTICIPANTS

- **Fiduciary Duty Issue Under ERISA and a Potential Qualification Issue Under The Code**
- **Enforcement Initiative Centered in The DOL Philadelphia Regional Office**
- **Missing Participants and Missing or Unknown Beneficiaries**
- **Ongoing Plan v. Terminating Plan**

124

MISSING PARTICIPANTS

- **DOL Guidance – FAB 2014-01**
- **Required Search Steps**
  - Certified Mail
  - Check Related Plan and Employer Records
  - Check With Designated Beneficiary
  - Use Free Electronic Search Tools
- **Additional Search Steps – Fiduciary duties of loyalty and prudence require a determination based upon the size of the benefit and the cost of the search.**
  - Internet Search Tools
  - Commercial Locator Services
  - Credit Reporting Agencies
  - Investigative Databases

125

MISSING PARTICIPANTS

- **IRS Guidance**
  - IRS letter forwarding program has been discontinued.
- **References to locating missing participants in the EPCRS are not as extensive as DOL – therefore, DOL procedures are the best practice.**
- **Deceased Participants**
  - Missing Beneficiary – Same as missing participant
  - No designated beneficiary or deceased beneficiary
    - Fiduciary obligation to make a good faith effort
    - How far must you go in this process?

126

MISSING PARTICIPANTS

- **Disposition of Assets – Terminating Plan**
  - Defined Benefit – PBGC program is available.
  - Defined Contribution – PBGC program is also available.
  - IRA Rollover?
- **Disposition of Assets – Ongoing Plan**
  - PBGC Program unavailable
  - Keep it in the plan – Cost
  - IRA Rollover
  - Forfeiture – Possible eventual restoration
  - Escheat – Conflicting guidance

127

401(K) ADMINISTRATION PROBLEMS

- **Plan Document Errors**
- **ADP/ACP Test**
- **Matching Formula Applied Incorrectly**
- **Improper Use of the Forfeiture Account**
- **Plan Force-Out Provisions**
- **Failure to Follow Plan Terms**
- **Participation Errors**
- **Hardship and Loan Failures**

128

PLAN DOCUMENT ERRORS

- **You missed the deadline to amend your written plan document for tax law changes.**
- **Revenue Procedure 2019-19**
  - Self-correction allowed if done before the last day of the second plan year following the plan year for which the failure occurred.
    - **For plans acquired in mergers, the correction must occur prior to the last day of the first plan year that begins after the merger.**

129

ADP/ACP TEST

- The plan document provides the testing method (current year/prior year).
- Are all employees eligible to participate being included?
- Are HCE's properly classified?
- Are you a member of a controlled group?
- Are the early participation rules being applied?

130

MATCHING FORMULA APPLIED INCORRECTLY

- Is the matching formula being applied consistent with the plan documents?
- Do the contributions exceed the 401(a)(17) limit?
- Does the plan allow for a "true-up"?

131

IMPROPER USE OF THE FORFEITURE ACCOUNT

- Plans may allow forfeitures to reduce future employer contributions, pay plan expenses, or be allocated as an additional contribution to eligible participants, among others.
- The plan may state the order in which the funds may be used.
- The allocation of forfeited amounts must occur annually.
- The forfeiture account may not accumulate and remain unallocated in the plan from year to year.

132

PLAN FORCE-OUT PROVISIONS

- Plans often include provisions which allow the employer to force former employees with small balances to move their money out of the plan.
- Failure to track the small balance accounts could be costly to the plan sponsor by increasing annual fees, causing the number of participants to go over thresholds, and increasing the cost of required communications.

133

FAILURE TO FOLLOW PLAN TERMS

- The plan document describes exactly how the plan should operate and actual operation must conform to the terms of the plan document.
- The SPD is not the plan; the plan document controls if there is a conflict.

134

PARTICIPATION ERRORS

- The exclusion of certain employees despite the plan stating all employees are eligible.
- Misclassification of independent contractors.
- Errors in counting hours or missing initial eligibility dates.
- Misjudging the relationship between service requirements and entry dates.

135

HARDSHIP AND LOAN FAILURES

- **Hardship**
  - Plan does not allow for hardships, but permitted in practice
  - Substantiation fails to meet requirements for amount distributed
  - Failure to suspend deferrals
- **Loans**
  - Plan does not allow for loans, but permitted in practice
  - Substantiation for principal residence loan fails to meet requirements
  - Failure to default loans

136

REVENUE PROCEDURE 2019-19
SELF-CORRECTION WITH RESPECT TO PLAN LOANS

- **Providing participants new options to cure defaults on loan payments;**
- **Correcting failures occurring when the plan allowed participants to have multiple loans even though it was not permitted under the plan;**
- **Correcting a failure occurring when the plan provided a loan to a participant when the plan does not permit loans; and**
- **Correcting failures occurring when the plan failed to obtain a required spousal consent.**

137

REVENUE PROCEDURE 2019-19
SELF-CORRECTING OPERATIONAL ERRORS

- **Plan sponsors may also self-correct certain plan operational errors, such as administering a plan differently than the plan documents provide and failing to timely adopt a discretionary amendment, by:**
  - Retroactively amending the plan to confirm to the plan's operation if:
    - **The corrective amendment results in an increase of the participant's benefit, right or feature;**
    - **The increase in benefit, right or feature is provided to all employees eligible to participate in the plan; and**
    - **The increase in benefit, right or feature was permitted under the IRC.**

138

TIPS TO AVOID COMMON MISTAKES

- Perform annual reviews of the plan's operations.
- If the plan document is amended, check the definitions against the old plan document, noting any differences.
- If the plan document is amended, communicate those changes to everyone involved in the plan's operations.
- Make sure to properly train the person in charge of payroll to understand the plan document.
- Use a calendar tickler to remind you when amendments must be completed.
- If possible, simplify the plan's definition of compensation and use the same definition for multiple purposes.
- Develop a communication mechanism to make all relevant parties aware of changes on a timely and accurate basis.

139

CLEARLY DEFINING "COMPENSATION"

- How is "compensation" defined for plan purposes? The definition in the plan document is key!
- How does the definition of compensation affect compliance testing and contributions?
- What time period is used for the definition of compensation?
- An IRS audit will look at the provisions of the plan as defined in the plan document and confirm compliant operation.

140

CLEARLY DEFINING "COMPENSATION"

141

WHEN YOU NEED A SECTION 125 PLAN

- **Cafeteria plans, which are governed by Section 125 of the Internal Revenue Code, are also known as:**
  - Section 125 plans, after the Code provision that allows cafeteria plan participants to exclude the cash option from gross income.
  - Flexible spending plans.
  - Premium conversion plans.
- **Cafeteria plans allow employers to offer their employees the choice of taxable or nontaxable benefits.**

Issue #1: Not having a Plan document

Issue #2: Having a Plan document not in compliance with proposed regs

Issue #3: 'Mistake of fact' changes in elections

142

EMPLOYEE BENEFITS UPDATE

ACA ENFORCEMENT

"Employer Mandate" Enforcement Intensifying

- October 2018: IRS begins sending 226J letters for 2016 tax year
- Only 30 days to respond
- $4.5B in penalties assessed for 2015 tax year
- Enforcement seems to be intensifying
- Common Compliance Problems:
  - Failure to check MEC Coverage Box on 1095-C
  - Code errors on 1095-C
  - Necessity of supporting documentation
  - Late filing of 1094/1095 (penalty of up to $540 per return for 2018 tax year)

143

EMPLOYEE BENEFITS UPDATE

ACA ENFORCEMENT

Section 1557 and Gender Transition Surgery

- ACA Section 1557: Covered Plans may not discriminate on the basis of "sex"
- Obama-era regulations appeared to interpret this requirement to require gender transition surgery
- Franciscan Alliance v. Burwell (N.D. Texas 2016) enjoins parts of regulation (gender transition and abortion)
- Trump Administration promises to modify regulations
- Boyden v. Conlin (W. Wis. 2018): Two transgender individuals sue State of Wisconsin's health plan due to exclusion of coverage for gender transition surgery – State seeks to dismiss based on Franciscan Alliance case
- Court: Refuses to dismiss case since claim is based on text of Affordable Care Act and not the regulations
- Similar prior court decisions in California and Minnesota

144

EMPLOYEE BENEFITS UPDATE

ACA ENFORCEMENT

The Risks of ACA Avoidance Measures

Marin v. Dave & Busters (S.D.N.Y. 2018)

- Class action – 1200 employees participating
- Allegation that systematic reduction of employee hours to avoid ACA pay or play mandate = violation of ERISA Section 510
- December 2018: Settlement approved for $7.4M (not a judicial determination)
- ERISA Section 510 Statute of Limitations = Likely 2 years in PA

145

EMPLOYEE BENEFITS UPDATE

Mental Health Parity Enforcement

Increased Compliance Enforcement Efforts

- April 23, 2018: DOL Issues Compliance Guidance for Employers
  - Self-Compliance Tool for Plans
  - Fact Sheet on MHPAEA Enforcement
- HHS enforces against governmental plans; DOL against private sector
- Nonquantitative Treatment Limits in the spotlight
- April 1, 2018: HHS MHPAEA Enforcement Report:
  - Excluding methadone as treatment for addiction, but allowing for pain management
  - Requiring certification of necessity for additional visits sooner for mental health/substance claims
  - Consecutive day limit on mental health/substance treatment not applicable to other claims

146

EMPLOYEE BENEFITS UPDATE

Mental Health Parity Enforcement

Wilderness Therapy Litigation

- Camps/Expeditions/Therapy Programs (cost up to $3000 enrollment and $500+/day)
- Multidisciplinary staff (psychiatrist/psychologist/counselor/teacher/guide)
- Demand is increasing
- Parity in coverage – and in exclusion
- Plan verbiage crucial
- Cases allowing claims to proceed: MO, WA, MA, UT
- Cases rejecting claims: IL, OH, FL, CA, MA, UT

147

EMPLOYEE BENEFITS UPDATE

HIPAA and Employee Privacy

Increased Enforcement & Higher Penalties

- May 2018 – IBM Prohibits Employees from Using Removable Storage (USB sticks, SD cards and other portable hard drives). Mandates use of the Cloud (IBM's Sync and Share Service)
- June 2018 – Texas health provider issued $4.3M penalty – prompted by theft of unencrypted laptop and loss of two unencrypted USB drives
  - The entity recognized need to encrypt in 2006, but had not yet completed process
- September 2018 – Hospitals penalized $1M for inviting documentary camera crews on-site to film patients without authorizations
- October 2018 – HHS Increases CPI-Based Civil Money Penalties Effective 10/11/18 (minimum $114 to maximum $1.7M)
- April 30, 2019 – HHS announces reduction in civil money penalty schedule (willful neglect = $50,000 per violation; $1.5M/year maximum)

148

EMPLOYEE BENEFITS UPDATE

HIPAA and Employee Privacy

HHS Issues Record HIPAA Penalty

- 10/15/18 HHS settles with Anthem, Inc. for $16M
- Cyberattacks resulted in theft of PHI for 79M individuals
- Investigation prompted by "advanced persistent threat attack"
- "Spear Phishing" emails sent to subsidiary
- Finding of insufficient:
  - Risk analysis
  - Procedures to review system activity
  - Procedures to identify threat signals in advance
  - Policies and procedures to restrict access to ePHI

149

EMPLOYEE BENEFITS UPDATE

HIPAA and Employee Privacy

Dittman v. UPMC (Pa. 2018)

- UPMC sued by employees after data breach affecting 62,000 employees leads to fraudulent tax returns filed in their names
- Plaintiffs assert they were required to provide info as term of employment
- Data includes: SSN, DOB, tax information, bank account numbers and addresses
- Claim: Employers owe employees a duty of reasonable care in protecting confidential electronic information

150

EMPLOYEE BENEFITS UPDATE

HIPAA and Employee Privacy

Dittman v. UPMC (Pa. 2018) – cont'd

- PA Supreme Court Holding:
  - Economic Loss Doctrine: Historically, negligence claims exclusively seeking economic damages are barred
  - Employers with **internet-accessible computer systems** owe a duty of reasonable care to protect employee information on their system; and
  - Economic loss doctrine does not bar claims solely for damages due to breach of this duty (but may apply if contract were breached)
- Practical implications?
- HIPAA Privacy/Security for an Employee's Non-Health Information?
- Security and Breach Notification Requirements?

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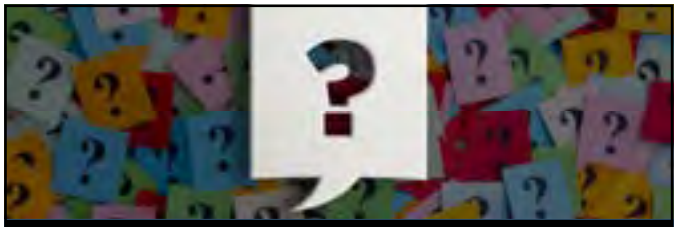

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152

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PA MEDICAL MARIJUANA

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153

MEDICAL MARIJUANA- THE FEDERAL LANDSCAPE

Marijuana - Status Across the U.S.

- Legal for recreational use – **10 states plus DC**
- Legal for medical use – **33 states plus DC**
- Low THC/High CBD laws – **14 states**
- Federal Law
  - Controlled Substances Act (CSA) – Schedule I drug
  - DOJ Memo
  - Rohrabacher-Farr/Blumenauer amendment (**Sept. 30, 2019**)
  - **Farm Bill – legalization of hemp**

154

MEDICAL MARIJUANA

POLL – Have you amended your drug testing policy to include provisions relating to medical marijuana?

A. No, that's why I am here.

B. Wait, I'm supposed to have a drug testing policy?

C. Of course. I am a frequent reader of Denise's blog posts and McNees has reviewed my policy.

D. Yes, but I want to be sure no further updates are needed.

155

MEDICAL MARIJUANA- THE FEDERAL LANDSCAPE

Drug Free Workplace Act of 1988

- Applies to Federal contractors and grantees
- Requires covered organizations to provide a "drug-free workplace" by:
  - Publishing a policy statement
  - Establishing an awareness program
  - Notifying employees of their obligations
  - Notifying the granting agency of any violations
  - Imposing penalties
- Standard – "good faith effort to maintain a drug-free workplace."
- Penalties for lack of compliance – payments and/or grant may be suspended/terminated

156

MEDICAL MARIJUANA- THE FEDERAL LANDSCAPE

Drug Testing Under Federal Regulations

- DOT's "Medical Marijuana Notice" October 2017
  - *"MROs will not verify a drug test as negative based upon information that a physician recommended that the employee use medical marijuana."*
- A positive test is a positive test.
- The test result may include external note re: alleged medical use

157

MEDICAL MARIJUANA- PENNSYLVANIA LAW

Pennsylvania Medical Marijuana Act (April 17, 2016)

- "Notwithstanding any provision of law to the contrary, use or possession of medical marijuana **as set forth in this act** is lawful in this Commonwealth."
- Patients wishing to use medical marijuana must obtain a "certification" from a registered physician
- The patient must suffer from one of the enumerated serious health conditions
- Once certified, the patient obtains the medical marijuana from a licensed dispensary (pharmacist, CRNP, PA, MD or DO)

158

MEDICAL MARIJUANA- PENNSYLVANIA LAW

What medical conditions will qualify?

- Cancer
- HIV/AIDS
- ALS
- Parkinson's Disease
- Multiple Sclerosis
- Spinal Cord Nerve Injuries
- Epilepsy
- Inflammatory Bowel Disease
- Neuropathies
- Huntington's Disease

- Crohn's Disease
- Post Traumatic Stress Disorder
- Intractable Seizures
- Glaucoma
- Sickle Cell Anemia
- Chronic or Intractable Pain
- Autism
- Opioid Use Disorders
- Dyskinetic and spastic movement disorders
- Neurodegenerative diseases
- Terminal Illness

159

MEDICAL MARIJUANA- PENNSYLVANIA LAW

Pennsylvania Medical Marijuana Act (April 17, 2016)

How is Medical Marijuana Dispensed?

- Pills
- Oils
- Topical Forms (gel, cream, ointment)
- Vaporization
- Tinctures
- Liquid
- Dry Leaf or Plant ("flower")

*****NOTE – smoking is NOT permitted; NO sale of edibles**

160

MEDICAL MARIJUANA- PENNSYLVANIA LAW

Pennsylvania Medical Marijuana Act (April 17, 2016)

- By the numbers . . .
  - 4.5 billion – dollars spent in medical marijuana sales nationwide
  - 2.1 million – people in the U.S. using medical marijuana
  - 116 thousand – patients and caregivers certified in Pennsylvania
  - 62 – pages of the pdf listing the physicians approved to issue certifications (nearly 1,000 physicians)
  - 49 – number of dispensaries in Pennsylvania

161

MEDICAL MARIJUANA- PENNSYLVANIA LAW

Pennsylvania Medical Marijuana Act (April 17, 2016)

Employment Provisions:

- Anti-Discrimination Provision- *no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against any employee regarding compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.*
- Accommodation for use is not required – *nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment.*
- Disciplining medical marijuana users is permitted – *this act shall in no way limit an employers ability to discipline an employee for being under the influence of medical marijuana in the workplace.*

162

MEDICAL MARIJUANA- PENNSYLVANIA LAW

Pennsylvania Medical Marijuana Act (April 17, 2016)

Safety Sensitive Exception – while "under the influence"

- May not perform work at heights or in confined spaces
- May not operate high voltage electricity or public utility
- May not operate or be in control of chemicals that require a permit
- May be prohibited from performing tasks the employer deems life threatening to any employees of the employer
- May be prohibited from performing any duty that could result in a public health or safety risk

Federal Law Exception – employers do not have to "commit an act that would put the employer or any person acting on its behalf in violation of federal law."

- Example – DOT certified drivers may be restricted from driving if using medical marijuana
- Query – impact of Drug Free Workplace Act????

163

MEDICAL MARIJUANA

POLL – Do you employ individuals in safety sensitive positions?

A. No.

B. Maybe. Is making coffee for an office of cranky people considered safety sensitive?

C. Yes.

D. Yes, and the positions are labeled as such on the job description.

164

MEDICAL MARIJUANA- CASE LAW

Pennsylvania Cases?

- *Palmiter v. Commonwealth Health Systems*, Docket No. 19-CV-1315 (Lackawanna Cty. 2019)
  - Medical marijuana user alleges that she was denied employment because she could not pass a drug test.
  - Complaint alleges a violation of the PA Medical Marijuana Act – specifically the anti-discrimination language in section 2103.
  - Status – Employer filed Preliminary Objections arguing no private right of action provided for or implied by MMA.

165

MEDICAL MARIJUANA

POLL – Will the PA Courts Find that the MMA Created a Cause of Action?

A. No. Please let the answer be no!

B. It depends on what the Judge has in his vape pen.

C. Probably, but this job has made me eternally pessimistic.

D. Yes, PA will follow the recent trends in New England, Delaware and Arizona.

166

MEDICAL MARIJUANA- LESSONS FROM OTHER STATES

Barbuto v. Advantage Sales and Marketing (Supreme Ct. Mass, July 2017)

- Medical marijuana user may assert state law discrimination claim
- Accommodation requested by employee – waiver of policy barring anyone from employment who tests positive for marijuana – is facially reasonable
- What might be unreasonable?
  - Use of medical marijuana poses an "unacceptably significant safety risk."
  - Continued employment of user would violate "employer's contractual or statutory obligation and thereby jeopardize its ability to perform its business."

167

MEDICAL MARIJUANA- LESSONS FROM OTHER STATES

Callaghan v. Darlington Fabrics (RI Superior Ct., May 2017); *Noffsinger v. SSC Niantic Operating Co.* (Dist. Conn., Aug. 2017 & Sept. 2018)

- Medical marijuana act, by virtue of non-discrimination clause, contains an implied right of action for employee
- Employer's enforcement of a neutral drug testing policy to deny employment to medical marijuana user violated anti-discrimination provision of state law
- Distinguished older decisions out of California, Colorado, Montana, Oregon and Washington, which held that the CSA preempts state law

168

MEDICAL MARIJUANA- LESSONS FROM OTHER STATES

Carlson v. Charter Communs., LLC (Dist. Mont. 2017)

- Post accident test- employee hit a telephone pole while driving a company vehicle; tested positive for THC; terminated
- Montana MMA- "nothing in this part may be construed to require an employer to accommodate the use of marijuana by a registered cardholder"
- Employee's wrongful discharge claim failed; accommodation requested was per se unreasonable pursuant to the statute.

169

MEDICAL MARIJUANA- LESSONS FROM OTHER STATES

Lambdin v. Marriott Resorts Hospitality Corp. (Dist. Hawaii 2017)

- Employer's policy- testing required following an on-the-job accident; providing a sample found to contain evidence of drug use will result in disciplinary action; the use of marijuana violates federal law even if the employee has a prescription
- Employee suffered a panic attack at work; transported to the hospital and drug tested; positive for marijuana
- *Note*- employee had only applied for certification under state law
- Employee's claims dismissed

170

MEDICAL MARIJUANA- LESSONS FROM OTHER STATES

Cotto v. Ardagh Glass Packing (Dist. NJ 2018)

- Post accident test
- Claims under NJ Compassionate Use Act and disability discrimination
- "Nothing in either statute requires an employer to waive a drug test as a condition of employment for a federally prohibited substance"

NOTE – *NJ MMA does not contain an anti-discrimination provision*

Wild v. Carriage Funeral Holdings (Superior Ct. NJ 2019)

- Post MVA – clear plaintiff was not under the influence; no blood test required by hospital; employer required the test anyway
- Claim for disability discrimination under NJ law
- "Just because the legislature declared that nothing in the CUA shall be construed to require an employer to accommodate the medical use of marijuana in any workplace, does not mean that the LAD may not impose such an obligation."

171

MEDICAL MARIJUANA- LESSONS FROM OTHER STATES

Chance v. Heinz (DE Super. 2018)

- Post accident testing; employee terminated in accordance with company policy
- No allegation that the company believed the employee was impaired at the time of the accident
- Claim for discrimination under anti-discrimination clause contained in DMMA
- Employer argued no private right of action and federal preemption
- "CSA does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters."
- Upheld private right of action
  - "absent a finding of an implied right of action, anti-discrimination section would be devoid of any purpose within the broader context of the statute."

172

MEDICAL MARIJUANA- LESSONS FROM OTHER STATES

Whitmire v. Wal-Mart Stores, Inc. (Dist. AZ 2019)

- Post injury test; due to the high levels of marijuana metabolites (more than 1000 ng/ml), employee must have been impaired (according to Wal-Mart)
- Claims for discrimination in violation of the AMMA and the Arizona Civil Rights Act (state law disability discrimination)
- Court found an implied private cause of action in the AMMA
- AMMA provides: "patient shall not be considered to be under the influence solely because of the presence of metabolites that appear in insufficient concentration to cause impairment."
- Court – proving impairment based on a drug test is a scientific matter; employer offered no evidence that it observed impairment or believed the employee was impaired

173

MEDICAL MARIJUANA- NEW OSHA REGULATIONS

- Requires employers to establish "reasonable procedures" for employees to report illnesses and injuries promptly and accurately 29 C.F.R. § 1904.35(b)

174

MEDICAL MARIJUANA- NEW OSHA REGULATIONS

- Procedure is not reasonable if it would deter a reasonable employee from accurately reporting a workplace injury or illness.
- OSHA = Blanket policies that require post-accident drug and alcohol testing in all cases will discourage reporting.

175

MEDICAL MARIJUANA- NEW OSHA REGULATIONS

- Effect = Can no longer require automatic post-accident drug and alcohol testing in policy
- BUT, may require post-accident testing if:
  - "reasonable possibility" drug or alcohol use caused or contributed to reported injury or illness.

176

MEDICAL MARIJUANA- RECOGNIZING IMPAIRMENT

Signs of Use

- Bloodshot/Red Eyes
- Smell – Distinct
  - **Burnt Rope**
  - **Skunky**
- Lethargic
- Paranoia
- Change in usual mood/demeanor

177

MEDICAL MARIJUANA- RECOGNIZING IMPAIRMENT

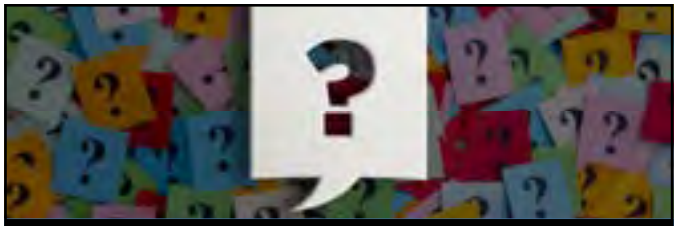
Subtle Clues in the Eyes

178

MEDICAL MARIJUANA- WHAT DO WE DO NOW?

- Review and update your policy (consider whether new policies should be created).
- Review and update job descriptions (safety sensitive positions should be clearly identified).
- Begin thinking about the interactive process; what possible accommodations would be an undue hardship for your company?
- Provide training on reasonable suspicion and how to properly document signs of impairment and handle reasonable suspicion testing.
- Take the pulse of your company – where are you most at risk?

179



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HR 201: ADA/FMLA SELECTED ISSUES

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181

- **Lightning Round: Quick Refresher Course On Key FMLA And ADA Obligations**
- **Mental Health Illness And The ADA/FMLA**
- **Substance Abuse And The ADA/FMLA**
- **Pros And Cons Of Using Third Party Administrators To Manage Leaves Of Absence (And More)**

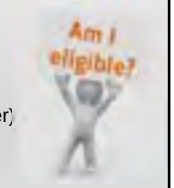
182

- **FMLA Overview**
  - Covers employers with 50 employees
  - Affords eligible employees unpaid, job protected leave of absence – with benefits – for certain qualifying events
    - 12 weeks of leave in 12-month period
    - Up to 26 weeks for military caregiver leave
  - Maintenance of health benefits and of benefits available to employees who take other types of leave
  - Reinstatement rights
  - Prohibits retaliation

183

HR 201: ADA/FMLA SELECTED ISSUES

- **FMLA Employee Eligibility**
  - 1 year of service; AND
  - 1,250 hours worked in the preceding 12 months; AND
  - Qualifying event; AND
    - Birth or placement for adoption of a child
    - Serious health condition of employee or his/her immediate family member
    - Military leave provisions (exigency, caregiver)
  - 50 employees within a 75-mile radius



184

HR 201: ADA/FMLA SELECTED ISSUES

- **FMLA "Serious Health Condition"**
  - An illness, injury or impairment or physical or mental condition that:
    - Involves inpatient care (overnight); or
    - Involves "continuing treatment by a health care provider" – *i.e.*:
      - Incapacity of 3 or more days + treatment 2 or more times in 30 days; or
      - One treatment + ongoing regimen
    - Involves incapacity due to chronic condition, long-term conditions for which treatment may not be effective, or conditions requiring multiple treatments but no immediate incapacity

185

HR 201: ADA/FMLA SELECTED ISSUES

- **FMLA Procedural Requirements – Notice, Certification, Designation, Etc.**
  - FMLA has time-sensitive, content-specific procedural requirements triggered when an employer knows – or reasonably should know – of an employee's need for potentially FMLA-qualifying leave
    - Ensure key employees know these requirements and are trained to recognize them!

186

HR 201: ADA/FMLA SELECTED ISSUES

- **Which Of The Following Is A Legitimate Reason To Delay FMLA Designation?**
  - A. Employer prefers to allow employees to exhaust their accrued paid leave (*e.g.*, PTO or sick leave) prior to clocking their FMLA entitlement so that the employee has as much available time off as possible.
  - B. Employee plans to take FMLA bonding leave after the birth of her child and does not wish to use any of her 12 week entitlement prior to that qualifying event, so she declines FMLA certification when the employer offers it for her absences to care for her hospitalized spouse.
  - C. Employee suffers a work-related injury and is provided light duty in the form of a 2-day/week reduced schedule. Because it's covered by Workers' Compensation, the employer does not designate the reduced schedule as FMLA leave time and counting against the employee's 12-week entitlement.
  - D. None of the above.

187

HR 201: ADA/FMLA SELECTED ISSUES

- **ADA Overview**
  - Applies to employers with 15 or more employees
    - Pennsylvania Human Relations Act applies to employers with 4 or more employees
  - Requires reasonable accommodation for qualified applicants and employees with a "disability" unless undue hardship would result
  - Prohibits discrimination against applicants and employees because of a physical or mental disability
  - Prohibits retaliation

188

HR 201: ADA/FMLA SELECTED ISSUES

- **ADA Interactive Process**
  - Discussing with employee limitations, accommodation need
  - Considering need for accommodation, requested accommodation(s) and effective alternatives
  - Requesting additional information from employee's health care provider
  - Evaluating undue hardship
  - Documenting

189

HR 201: ADA/FMLA SELECTED ISSUES

- **Intersection Of FMLA and ADA**
  - When do they intersect?
    - Non-eligibility of employee for FMLA
    - Exhaustion of FMLA leave
  - How should the employer handle this interaction?
    - Communication is key (think the ADA's interactive process)

190

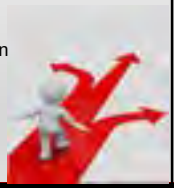
HR 201: ADA/FMLA SELECTED ISSUES

- **Scenario:**
  - Joy works as one of four stock room attendants for Small Co. Her duties include tracking inventory and reordering supplies, and delivering materials to the floor and stocking shelves
  - Joy suffered a back injury in a car accident (non-work related):
    - Out on FMLA leave since March 1
    - Will exhaust 12 weeks of FMLA leave on May 24
  - HR has yet to hear any word from Joy since leave started, BUT has heard from one of Joy's co-workers that she had complications and may be required to undergo more surgery

191

HR 201: ADA/FMLA SELECTED ISSUES

- **What Should HR Do?**
  - A. Have Joy's supervisor call Joy's doctor for a status update.
  - B. Restructure department and create new stock room position with no delivering and shelving duties so as to enable Joy to sit all day doing inventory management.
  - C. Advertise open stock room attendant position and begin preparing Joy's termination so Small Co. can pull the trigger when she does not return on May 24.
  - D. None of the above.



192

HR 201: ADA/FMLA SELECTED ISSUES

- **The Age-Old Question When Leave Is A Reasonable Accommodation… How Much Leave Is Required?**
  - No bright-line rule; fact-specific inquiry – considers:
    - Size and financial resources of employer
    - Position held by employee requesting leave
    - Leave already taken
    - Additional leave requested
    - Medical opinions on ability to return to work

193

HR 201: ADA/FMLA SELECTED ISSUES

- **Leaves Of Varying Durations Have Been Deemed Reasonable, But Indefinite Leaves Have Not…**
  - *Nunes v. Wal-Mart* (9th Cir. 1999):
    - **10-month leave** (after 2-month leave earlier in year) may be a reasonable accommodation
  - *Garcia-Ayala v. Lederle Parenterals* (1st Cir. 2000):
    - **Additional 2 months leave after 15 months** reasonable
  - *Walton v. Mental Health Ass'n of SE Pa.* (3rd Cir. 1999):
    - Continuing leave beyond initial **9 weeks** would have imposed undue burden
  - *Henry v. United Bank* (1st Cir. 2012):
    - "Open-ended or indefinite leave extension does not constitute a reasonable accommodation"

194

HR 201: ADA/FMLA SELECTED ISSUES

- **What About ADA Leave After Exhaustion Of FMLA? Scenario:**
  - Pat suffers from chronic back pain that limits the ability to walk, bend, lift, sit and stand. Pat requests – and receives – continuous FMLA leave for this condition. On the last day of the 12-week FMLA leave, Pat has surgery and requests an additional 2 to 3 months of leave. XYZ Corp denies Pat's request and discharges Pat with an invitation to reapply if/when Pat is medically cleared to return to work. Pat sues XYZ under the ADA for failure to provide leave as an accommodation for three additional months after Pat's FMLA exhaustion. Who wins here? Is Pat's multi-month leave of absence a reasonable accommodation under the ADA?

195

HR 201: ADA/FMLA SELECTED ISSUES

- **Remember: Neither FMLA Nor ADA Accommodation Leave Is A Get-Out-Of-Jail-Free Card**
  - Compliance with uniformly enforced leave-related policies and procedures (*e.g.*, call off policies/procedures)
  - No moonlighting/outside employment
  - Payment of health care premiums
  - No absolute right to reinstatement to original position under ADA (big distinction from FMLA)

196

HR 201: ADA/FMLA SELECTED ISSUES

- **Addiction And The ADA/FMLA:**
  - Illegal drug use has been increasing in the United States
  - Among construction and mining industries, 15% of employees have substance abuse disorder
  - In the service industry, prescription drug abuse rates are highest
  - What are an employer's obligations under the FMLA and ADA when drug addiction issues arise? (And when are they triggered?)

197

HR 201: ADA/FMLA SELECTED ISSUES

- **Treatment That Qualifies As An FMLA Serious Health Condition:**
  - In-patient treatment requiring overnight stay in hospital
  - Treatment by healthcare provider followed by an ongoing regimen of treatment and/or prescription medication
  - Overnight stay at medical rehabilitation or addiction treatment facility

198

HR 201: ADA/FMLA SELECTED ISSUES

- **Scenario:**
  - John enrolls in an alcohol rehabilitation treatment program. His employer, Big Co., approved a six week FMLA leave so he could attend in-patient treatment. Three weeks into treatment, the provider lets John leave the facility for three days, after which he was to return for completion of in-patient care. Big Co. learns from another employee that John was out of treatment for three days. Big Co. wants to discipline him for not reporting to work when he was not in the rehabilitation program. What should Big Co. do?

199

HR 201: ADA/FMLA SELECTED ISSUES

- **Addiction And The ADA:**
  - "Qualified individuals" under ADA include those:
    - Who have been successfully rehabilitated and who are no longer engaged in the illegal use of drugs
    - Who are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs; and
    - Who are regarded, erroneously, as illegally using drugs
  - Former casual drug users and current illegal drug users are not protected
  - Alcoholism is a disability within the meaning of ADA

200

HR 201: ADA/FMLA SELECTED ISSUES

- **Accommodations Under The ADA For Addiction-related Disability:**
  - Leave of absence to attend treatment
  - Alternative work schedule
  - Permission for employee to take anti-addiction medication in workplace
  - Stress-reducing accommodations to reduce potential of relapse

201

HR 201: ADA/FMLA SELECTED ISSUES

- **Scenario:**
  - Maria comes to work for ABC Corp. with bloodshot eyes and is slurring her speech. She's having difficulty staying awake, complains of nausea, and has very small pupils. Suspecting that she might be under the influence of a controlled substance, ABC's HR sends her for a drug test. Immediately prior to the test, Maria tells ABC that she used heroin last night, enrolled in a rehab program, and is no longer a heroin user. Maria's drug test confirms that she was under the influence of heroin. ABC terminates her consistent with its zero tolerance drug policy. Maria sues ABC for disability discrimination. Will she win?

202

HR 201: ADA/FMLA SELECTED ISSUES

- **Mental Health Conditions And The FMLA:**
  - FMLA covers both physical and mental serious health conditions
  - A mental illness can be a serious health condition if it meets regulatory definition
    - Medical certifications are crucial (including recertification)
    - Carefully scrutinize certifications, seek clarification when necessary
  - Employees may be entitled to take block or intermittent leave to care for their own or a covered family member's mental health condition

203

HR 201: ADA/FMLA SELECTED ISSUES

- **Mental Health Conditions And The ADA:**
  - Mental impairments under ADA include psychological or emotional disorders
    - Major depression, bipolar disorder, schizophrenia, PTSD, etc.
  - Effects of medication irrelevant to whether condition qualifies as disability
  - Condition does not need to be permanent or severe to qualify as "substantial limitation" of major life activity

204

HR 201: ADA/FMLA SELECTED ISSUES

- **Scenario:**
  - Al is a custodian for LargeCo. Each month, LargeCo.'s custodial staff rotates to work in different buildings. Al has an autism spectrum disorder that makes it extremely difficult for him to adjust to changes in his daily routine. He asks for an accommodation – specifically, he asks to be able to leave work when changes in his building assignments cause his condition to flare up so that he can relax at home. What should LargeCo. do?

205

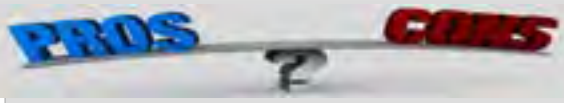
HR 201: ADA/FMLA SELECTED ISSUES

- **Using Third Party Administrators (TPAs):**
  - Employers commonly report difficulties managing FMLA in-house
  - Employers use TPAs to administer and manage certain processes, including FMLA (and sometimes ADA, COBRA...)
  - Use of TPAs to manage FMLA process is increasing
    - Approximately 35% of employers with 50 or more employees
    - Approximately 45% of employers with 1,000 or more employees
  - But there are pros/cons and pitfalls to watch out for...

206

HR 201: ADA/FMLA SELECTED ISSUES

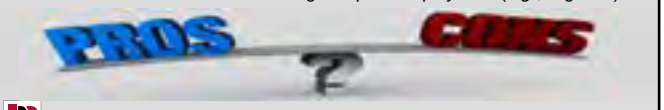
- **Pros Of Using A TPA To Administer FMLA:**
  - Reduces administrative burden on employer
  - Narrowly-focused
  - Familiarity with FMLA regulations and administration
  - Promotes increased compliance (or is intended to)



207

HR 201: ADA/FMLA SELECTED ISSUES

- **Cons Of Using A TPA To Administer FMLA:**
  - Adds "middleman" to process
  - Employer forfeits control (may not be involved in granting/denying leave)
  - TPA may not consider ADA or other obligations
  - Employer still legally liable for TPA's actions
  - Access to information during and post-employment (*e.g.*, litigation)



208

HR 201: ADA/FMLA SELECTED ISSUES

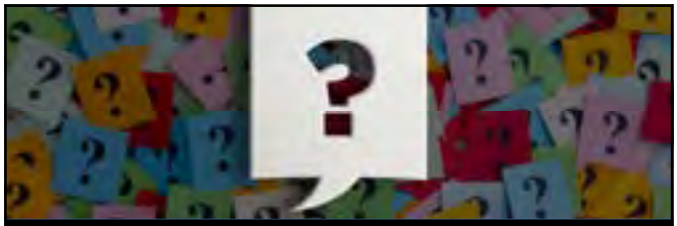
- **Scenario:**
  - Terry, an FMLA-eligible employee of GrandCo, had a flare up of multiple sclerosis. Terry submits an FMLA certification for a six week block leave to Triad, GrandCo's TPA. Three weeks into Terry's leave, his condition improves and he provides GrandCo's HR manager with a fitness for duty certification for his immediate return to work. HR tells Terry not to return until Triad verifies the certification. Three weeks pass and Triad does not respond to the certification. After four weeks Triad clears Terry to return. Terry sues GrandCo for FMLA interference. Can he prevail?

209

HR 201: ADA/FMLA SELECTED ISSUES

- **Best Practices When Using A TPA To Administer FMLA (Among Other Things):**
  - Maintain a partnership
    - Be sure TPA knows your policies/procedures and understands your company culture
  - Maintain consistency in leave administration protocol
  - Communicate, communicate, communicate – with the TPA and your employee
  - Vet the TPA's policies/practices (and audit them periodically)
  - Scrutinize the TPA contract and demand indemnification

210



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211

CRISIS PREPAREDNESS & ACTIVE SHOOTER TRAINING

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212

The Plan is Only a Plan 'Til the First Shot is Fired

- In the event of a crisis situation, whether manmade or natural disaster you should have a plan for reaction.
- Remember that in a crisis you will be shocked and dismayed.
- Having a plan will help to reinforce expected reaction.
- It takes practice to create muscle memory.

213

Crisis Reaction

- Earthquakes, fires, tornadoes and even large-scale manmade attacks are all within the range of possibility.
- Simple steps like keeping accurate lists of employees in attendance and maintaining accurate cell phone lists can help to ensure staff is accounted for in the event of a disaster.
- Be sure to designate a company rally point a safe distance from your building where employees are to congregate. (Not for active shooter scenarios).
- Once you have accounted for all employees, be sure to prepare an appropriate statement for the press.

214

Crisis Preparedness

- If employees have been injured, killed or are just unaccounted for, call emergency services to report to family members, etc.
- Each business should have an emergency response team with at least two people designated for each task.
- Practice your plan. FEMA provides a 12 page booklet that discusses steps for preparedness. Read it. . . before the disaster.
- In a true disaster, people will want to get home. Post possible risks to inform employees of hazards.

215

Active Shooters

- 500 Workplace homicides in 2016.
- This was an 84% increase from 2015.
- Shootings accounted for 80% of homicides at 384.
- There are a number of risk factors that should be carefully considered in an attempt to avoid workplace shootings.
- Nordstrom 2014- disgruntled ex-boyfriend shoots store employee at work.

216

The Warning Signs

- RISK FACTORS:
  - Domestic Discord
  - Threats from Customers
  - History of Interpersonal Conflict
  - History of Unwelcome Sexual Advances
  - History of Threats of Physical Assault
  - Recent Discipline or Furlough
  - Perception that Furlough is Impending
  - Recent Stressful Personal Incidents
  - Interest in Violent Incidents
  - Holding a Grudge
  - Extreme Opinions or Attitudes
  - A Sense of Persecution
  - A Fascination with Weapons

217

The Warning Signs

- **OBSERVABLE BEHAVIORS**:
  - Rapid Speech
  - Blaming Others or Constant Excuses
  - Offensive or Abusive Language
  - Defensive Reactions to Criticism
  - Paranoia
  - Pounding, Banging or Slamming
  - Bullying Other Employees
  - Demonstrating a Sense of Entitlement
  - Threats
    - **Overt**
    - **Veiled**

218

External Threats

- **How to Respond to Threats from the Public?**
  - Active Shooter – 3 Steps
    1. **RUN**
    2. **HIDE**
    3. **FIGHT**

219

External Threats

- **RUN**
  - Have escape route and plan in mind
  - Evacuate, regardless of what others are doing
  - Leave your stuff
  - Keep hands visible
  - Call 911 when safe

220

External Threats

- **HIDE (Only if Run is not possible)**
  - Out of view
  - Cover
  - Lock door
  - Blockade with furniture
  - Silence your phone
  - Quiet
  - Call 911 if possible

221

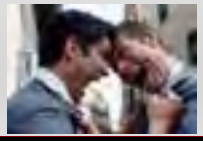
External Threats

- **FIGHT (Last Resort)**
  - Be as Aggressive as Possible
  - Use Improvised Weapons
  - Throw Objects
  - Yell
  - Commit and Win

222

External Threats

- **How to Respond to Threats from the Public?**
  - Verbal Threats
    - Deescalate
    - Separate
    - Contact Law Enforcement (if appropriate)
    - No Trespass/No Contact Letter (if known)



223

External Threats

- **How to Respond to Threats from the Public?**
  - Physical Assault
    - Call 911
    - Avoid Putting Yourself in Danger
    - Lock Doors if He/She Leaves
    - No Trespass/No Contact Letter (if known)

224

Workplace Bullies

- **What is Bullying?**
  - A blustering browbeating person; especially: one habitually cruel to others who are weaker
- **Potential Concerns**
  - Discrimination/harassment claims
  - Workplace violence
  - Drain on morale
  - Turnover, low productivity
  - Impact on bottom line

225

Bullying Statistics

- **35% of workers feel bullied at work**
  - Up from 27% in 2011
- **16% suffered health problems as a result**
- **17% quit their jobs to escape the bullying**
- **Most complaints are about being bullied by a supervisor or coworker**
  - Also against customers

Source: CareerBuilder.com survey

226

Workplace Bullies

THE MEAN GIRLS

- **Bullying is psychological violence often misclassified as "Personality Clashes"**
  - Women= 58% of the perpetrator pool
- **Most bullying is same-sex**
  - Half of all reported bullying is woman-on-woman
  - "Status-Blind Harassment"
- **Three times more prevalent than sexual harassment**

227

Conduct of Workplace Bullies

- **Non-Verbal Conduct**
- **Verbal Abuse**
  - Shouting, swearing, name-calling
  - Malicious gossip, rumors, lies
- **Use of Technology**
  - Bullying via social media accounted for approximately 1 in 5 incidents*

*Source: www.InsuranceJournal.com

228

Workplace Violence

- **Definition:**
  - Incidents that Arise Out of or Occur During the Course of Work
  - Based on Time, Location, Employee Involvement and Relationship to Work
  - Broad Definition

229

Workplace Violence

- **Broad Definition of Violence:**
  - Physical Violence
  - Threats
    - **In person, Over the Phone, by E-mail**
  - Use of Weapon or Hazardous Device
  - Destruction of Property
  - Domestic Violence in the Workplace

230

#1 Policy

- **Violence and Bullying Strictly Prohibited**
  - Fighting and Similar Unprofessional Behavior
- **Do Not Put Yourself in Danger**
- **All Reports Will Be Taken Seriously**
  - Encourage Employees to Make Reports ASAP
- **Prompt Investigation of Incidents**
- **Appropriate Action**
- **Referral to Law Enforcement if Appropriate**

231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232


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LABOR LAW 201
A UNION ORGANIZING CAMPAIGN IN REAL TIME
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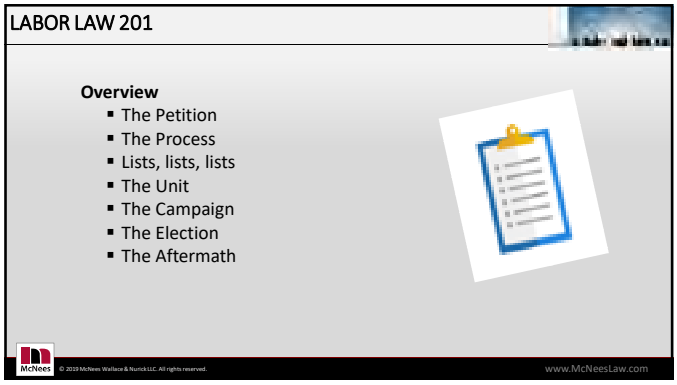
233


LABOR LAW 201
Overview
The Petition
The Process
Lists, lists, lists
The Unit
The Campaign
The Election
The Aftermath
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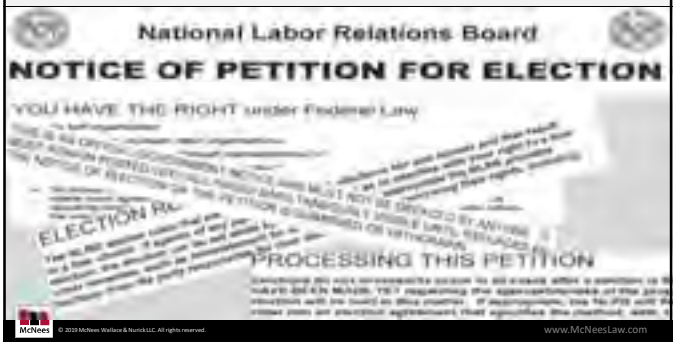
LABOR LAW 201

235

Petition Posted by Employer on May 31, 2018



236

LABOR LAW 201

The first thing you should do when you receive a petition is?

a) Curl up in the fetal position and start crying
b) Call your attorney
c) Go on Indeed and find a new job
d) Read it

237

LABOR LAW 201

The Petition – who, what, when, where, why, how?

- How did you receive it?
- Was it filed with the Board?
- When was it filed?
- Who filed it?
- Did they get the name of the employer and employer contact correct?
- What is the scope of the unit?
- When is the hearing scheduled?

238

LABOR LAW 201

The Petition – the first 12 hours

- Calendar key dates
- Schedule call with counsel and local managers
  - Contact with NLRB Investigator
  - Gather employee list for card check?
  - Payroll date?
  - What is our position on unit description?

239

LABOR LAW 201

The Petition – the first 12 hours

- Schedule call with counsel and local managers
  - What is the scope of the unit?
    - Any early eligibility issues?

240

LABOR LAW 201

The Petition – the first 12 hours

- What has been going on with activity?
  - **Take a close look at new hires – salting?**
  - **Early warning signs?**
- Position statement or stipulated election agreement?
- Key details for an election?

241

LABOR LAW 201

The Petition – the first 48 hours

- Posting of Petition
  - Within 2 business days after service, employer must post the Notice of Petition for Election in conspicuous places;
  - Employer must also distribute it electronically if the employer communicates with its employees electronically;
  - Petition must remain posted until dismissed or withdrawn, or replaced by the Notice of Election;
  - Employer's failure to properly post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

242

LABOR LAW 201

The Petition – the first week

- Statement of Position
- NLRB jurisdictional questions and other information that will facilitate entry into election agreements or streamline the pre-election hearing if necessary
- Employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit
- Employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit, and must further indicate those individuals must be excluded from the proposed unit.
  - These lists must be alphabetized (overall or by department).

243

LABOR LAW 201

The Petition – the first week

- **Election Agreement**
- Elections can occur either by agreement of the parties or by direction of the regional director or the Board.
- Three types of agreements are available:
  1) A Consent Election Agreement
  2) A Stipulated Election Agreement
  3) A Full Consent Agreement
- If there's an election agreement, hearing is cancelled.

244

LABOR LAW 201

The Hearing – the first week

- Questions of representation?
  - Questions regarding eligibility to vote or inclusion in the unit are ordinarily not litigated before election
    - Consider impact or campaign
- Issues litigated
  - Jurisdiction
  - Unit appropriateness
  - Expanding and contracting unit issues
  - Eligibility formulas
- If you failed to raise it in your position statement, will be precluded from litigating issue at hearing

245

LABOR LAW 201

Lists, lists, lists

- Upon receipt of Regional Director decision or after reaching an election agreement, employer must provide a second employee list of eligible voters
  - Provided to NLRB and Union
    - **Full names, work locations, shifts, job classifications and contact information (home address, available personal email addresses, and available home and cell numbers)**
      - Alphabetized in a word file
- Must be ***received*** by the NLRB within two business days of the approval of the election agreement or direction of election
- Note objections
- Special rules for construction industry

246

LABOR LAW 201

The Unit

- Recall that most unit and voter issues are not resolved prior to the election, but still something that must be considered at the outset
- The term "employee" shall include any employee, but shall not include any individual having the status of an **independent contractor**, or any individual employed as a **supervisor**.
- Bargaining unit members share a community of interest

247

LABOR LAW 201

The Unit

- The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a mere routine or clerical nature, but requires the use of independent judgment.

248

LABOR LAW 201

The Unit - Public Employee Relations Act (PERA)

- Public employee means any individual employed by a public employer, but does not include **management level employees** or **confidential employees**.
- Management level employee means any individual who is involved directly in the determination of policy or who responsibly directs the implementation of policy and shall include all employees above the first level of supervision.
- Employees with the authority to perform one or more supervisory functions must also be excluded from the bargaining unit under PERA.

249

LABOR LAW 201

The Unit – Our Petition

- Assistant plant manager and lead workers?
  - Hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action
  - Use of independent judgment and not routine
    - According to SCOTUS: judgment that possesses a sufficient degree of independence

250

LABOR LAW 201

The Unit – Our Petition

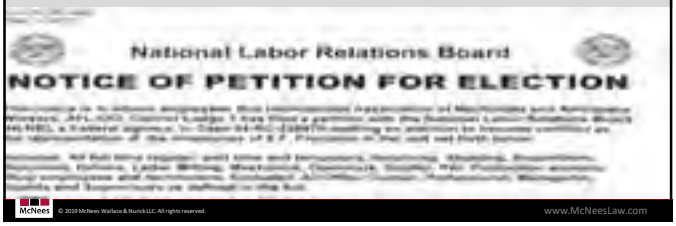
- To assign?
  - The NLRB concluded that the term "assign" should be construed to refer to the act of designating an employee to a place (such as a location or department), appointing an employee to a time, or giving significant overall duties or tasks to an employee
- To "responsibly to direct" to apply to individuals who not only oversee the work being performed, but are held responsible if the work is done poorly or not at all
  - Some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly

251

LABOR LAW 201

The Unit – Our petition

- Why does this matter?
  - Campaign
  - Post-campaign


National Labor Relations Board

NOTICE OF PETITION FOR ELECTION

252

LABOR LAW 201

The Unit – Community of Interest

- The community-of-interest test requires "the Board in each case to determine whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised."

253

LABOR LAW 201

The Campaign

National Labor Relations Act (NLRA)

- Employees have the right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities ...."

254

LABOR LAW 201

National Labor Relations Act (NLRA)

- "Unfair labor practice" to interfere with an employee's rights
- "Unfair labor practice" to discriminate against an employee with the purpose of encouraging or discouraging union membership
- Unlawful to interfere with or chill exercise of protected activity

255

LABOR LAW 201

National Labor Relations Act (NLRA)

- It is not an "unfair labor practice" for an employer to "express its views, argument, or opinion …."
- It is lawful for an employer to oppose unionization and to express their views to employees!

256

LABOR LAW 201

Public Employee Relations Act (PERA)

- It shall be lawful for public employees to organize, form, join unions, and to engage in lawful concerted activity for the purposes of collective bargaining or other mutual aid and protection
- Employees have the right to refrain from such activity
- Similar list of unfair labor practices

257

LABOR LAW 201

The Campaign

- Combination of written communications and group discussions with employees regarding the costs and benefits of unionization
  - Written communications
  - Group discussions
  - 24 hour speech

258

LABOR LAW 201

The Campaign

- What is your message?
- What was union's message during early part of campaign?
  - Wages or benefits?
  - Pension benefits?
  - Problem supervisor?
  - Safety issues?
  - Skeletons in Union's closet?
  - True costs of unionization?

259

LABOR LAW 201

The Campaign

- What will you discuss?
  - Election details
  - Dues
  - Union constitution and bylaws
  - Union misdeeds
  - What does bargaining mean?

260

LABOR LAW 201

The Election

- Election typically scheduled no earlier than 10 days after voter eligibility list is due
  - Must post notice of election
  - Will include date, time and location
  - In person or mail ballot
  - Union needs 50% plus one of those casting votes in the unit
    - What about challenged ballots?

261

LABOR LAW 201

The Election

- If union prevails, duty to bargain collectively in good faith
- If union loses, union may not try again for 12 months
  - Union win rate has been around 70 percent for the past several years.

262

WHAT ACTUALLY HAPPENS IF UNION WINS THE ELECTION?

- Nothing, at first.
  - No "automatic" changes just because union wins.
- Union is certified by NLRB, if no "objections" filed.
- Arrangements for first several meetings must be made.
- Neither party is required by law to agree to the other party's proposals.
- Negotiations can take months to conclude (or may not ever conclude).

263

WHAT ACTUALLY HAPPENS IF UNION WINS THE ELECTION?

- Once negotiations begin, bargaining is a "two way street." Union can ask for "more," Company can propose "less." Everything is negotiable!
- Possible outcomes of negotiations: Two out of three outcomes not good for employees.
- Union's only real weapon is to strike.
  - Everyone loses

264

LABOR LAW 201

The Aftermath

- Serious unfair labor practices committed by employer can result in "bargaining order" (where majority of employees signed union authorization cards and NLRB concludes that fair election is "impossible")
- Conduct of supervisors and managers imputed onto employer
  - Supervisor and manager training
- What about conduct of union during campaign?

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265

LABOR & EMPLOYMENT LAW UPDATE

Was this session helpful?

a) Yes, now I know to look for a new job when a petition shows up
b) Not really, but the banter among the panel members was funny
c) Not really, but Santucci is a snappy dresser
d) Yes, thank you!

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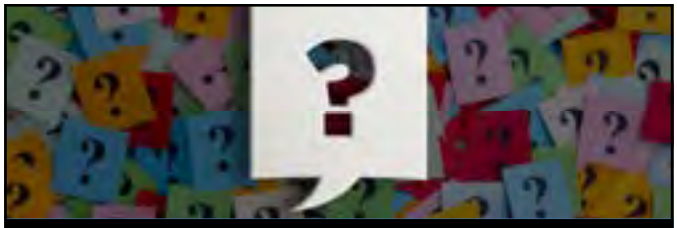
266



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268

BACKGROUND AND INTRODUCTIONS

- **The caption:**
  - Ms. Fancy-Pants v. Please Just Do Your Job, LLC (PJDYJ) & We Staff Problems for You, Inc. (WSPFY)
- **Ms. Fancy-Pants: Plaintiff**
  - Temporary staffing agency employee assigned to PJDYJ by WSPFY
- **We Staff Problems for You, Inc.: Defendant**
  - Temporary staffing agency
- **Please Just Do Your Job, LLC: Defendant**
  - Client of temporary staffing agency

269

BACKGROUND AND INTRODUCTIONS

- Temporary employees or non-employees are workers who are not treated as employees of the entities for whom they provide services
- Often provided by temp agencies pursuant to a contract, whereby the temp agency supplies and pays wages to the temp workers for a fee
- Provide many advantages, including flexibility and ready source of labor
- Can range from hourly unskilled workers to high-level managers/executives provided on a temporary basis

270

JOINT EMPLOYER RELATIONSHIP GENERALLY

- **While there are advantages, approach is not risk free; various employment laws allow for joint employer status**
  - Two or more entities can be deemed the employer of a single employee
  - Complex legal analysis to determine employment relationship
  - Test under various laws is different

271

JOINT EMPLOYER RELATIONSHIP GENERALLY

- **Joint Employer status may exist under a number of employment laws:**
  - Title VII of the Civil Rights Act
  - State anti-discrimination laws
  - Fair Labor Standards Act
  - National Labor Relations Act
  - Migrant and Seasonal Agricultural Worker Protection Act
  - Internal Revenue Code
  - Unemployment Compensation Act
  - Workers Compensation Law

272

THE CASE OF MS. FANCY-PANTS

- Ms. Fancy-Pants v. Please Just Do Your Job & We Staff Problems for You, Inc.

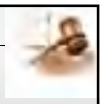
273

JURY INSTRUCTIONS – TITLE VII JOINT EMPLOYER

- Relevant factors in joint employer analysis include:
  - Skill required
  - Source of tools/instrumentalities
  - Location of work
  - Duration of relationship
  - Ability to assign additional projects
  - Extent of worker's discretion over when/how long to work
  - Whether work is part of employer's regular business
  - Whether worker is in business for himself/herself
  - Tax treatment, employee benefits, etc.

274

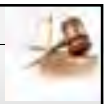
JURY INSTRUCTIONS – HARASSMENT CLAIM



- **Employer(s) liable if:**
  - Plaintiff was subjected to inappropriate conduct by Supervisor Willie and HR Representative Sally
  - Willie and Sally's conduct was not welcomed by Plaintiff
  - Willie and Sally's conduct was motivated by the fact that Plaintiff is female
  - The conduct was so severe or pervasive that a reasonable person in Plaintiff's position would find Plaintiff's work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable female.
  - Plaintiff believed her work environment to be hostile or abusive as a result of the conduct.

275

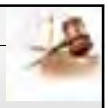
JURY INSTRUCTIONS – HARASSMENT CLAIM



- **Employer(s) not liable if:**
  - Employer(s) took all steps to prevent and promptly correct inappropriate conduct
    - **Policy in place**
    - **Reporting procedure**
    - **Training provided**
    - **Investigated complaints**
    - **Took prompt remedial action designed to bring about an end to any discriminatory harassment**

276

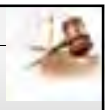
JURY INSTRUCTIONS – RETALIATION



- **To prevail on this claim, Plaintiff must prove all of the following by a preponderance of the evidence:**
  - First: Plaintiff complained of alleged discrimination or harassment based on sex.
  - Second: Plaintiff was subjected to a materially adverse action at the time, or after, the protected conduct took place.
    - **To answer this question you have to determine whether she suffered an adverse action when her assignment to PJDYJ ended and whether her employment with WSPFY was a result of constructive discharge**

277

JURY INSTRUCTIONS – RETALIATION CONT…



- **To prevail on this claim, Plaintiff must prove all of the following by a preponderance of the evidence:**
  - Third: There was a causal connection between the alleged complaint of discrimination or harassment and the termination of Plaintiff's assignment to PJDYJ and the termination of her employment with WSPFY.

278

JURY INSTRUCTIONS – FLSA JOINT EMPLOYER STATUS

- **When determining whether joint employment relationship exists under the FLSA, courts should consider:**
  - Alleged employer's authority to hire and fire the employees
  - Alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment
  - Alleged employer's involvement in day-to-day employee supervision, including employee discipline
  - Alleged employer's actual control of employee records, such as payroll, insurance, or taxes

279

JURY INSTRUCTIONS – FLSA RETALIATION

- **To prevail on this claim, Plaintiff must prove all of the following by a preponderance of the evidence:**
  - Plaintiff made a good faith complaint of violation of Fair Labor Standards Act
  - Plaintiff was subjected to a materially adverse action at the time, or after, the protected conduct took place.
    - **To answer this question you have to determine whether she suffered an adverse action when her assignment to PJDYJ ended and whether her employment with WSPFY was a result of constructive discharge**
  - There was a causal connection between the alleged complaint of discrimination or harassment and the termination of Plaintiff's assignment to PJDYJ and the termination of her employment with WSPFY.

280

JURY DELIBERATIONS – LET'S TAKE A POLL

Both PJDYJ and WSPFY were the joint employers of Ms. Fancy-Pants for the Purposes of her Title VII claim?

- **Yes**
- **No**
- **IDK**
- **Sorry, I left to end the assignments of all of our temps.**

281

JURY DELIBERATIONS – LET'S TAKE A POLL

Plaintiff subject to unlawful discriminatory harassment?

- **Yes**
- **No**
- **IDK**
- **Based on what I heard in other sessions, yes, we need to assume that all of our employees are being harassed all of the time. #helpme**

282

JURY DELIBERATIONS – LET'S TAKE A POLL

Both PJDYJ and WSPFY are able to make out an affirmative defense to the harassment claim?

- Yes
- No
- IDK
- What's an affirmative defense?

283

JURY DELIBERATIONS – LET'S TAKE A POLL

Plaintiff subject to retaliation?

- Yes
- No
- IDK
- The retaliation one is always the one that gets you, so yes!

284

JURY DELIBERATIONS – LET'S TAKE A POLL

Were both PJDYJ and WSPFY the joint employers of Ms. Fancy-Pants for purposes of her FLSA retaliation claim?

- Yes
- No
- IDK
- Stop, I am curled up in a ball under the table sobbing.

285

JURY DELIBERATIONS – LET'S TAKE A POLL

Was Plaintiff subject to FLSA retaliation?

- Yes
- No
- IDK
- The retaliation one is always the one that gets you, so yes!

286

JURY VERDICT

- Jury finds that Ms. Fancy-Pants is the employee of both PJDYJ and WSPFY
- Jury finds that both PJDYJ and WSPFY established affirmative defense to harassment claim
- Jury finds no retaliation because all temps treated the same

287

JURY VERDICT

- Jury finds both PJDYJ and WSPFY both employers for FLSA claim
- Jury finds no FLSA retaliation because PJDYJ would have ended assignment anyway; WSPFY offered her another position

288

WHAT WENT WRONG?

- **Job posting on Craig's List**
- **Poor orientation onsite**
- **Level of control**
  - Policies and procedures
  - Supervisor on site is PJDYJ supervisor
  - Supplied all tools and equipment
- **Supervisor did not initially handle complaint well**
- **Unclear which policy applied to temporary employees**
- **Supervisor wanted to cut corners and sent temps back and used another agency**

289

WHAT WENT RIGHT?

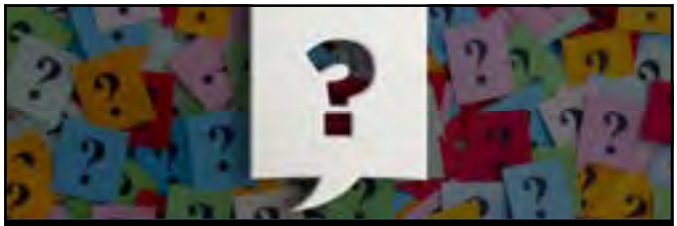
- **Written agreement between the parties**
  - No employment relationship
  - Coordination on legal claims
- **PJDYJ did not simply cut the temps loose**
  - Coordinated with WSPFY to investigate claims
  - Followed through on investigation and corrective action; including documenting outcome and close out memo to employee
- **Coordination on termination of assignments**
  - Consistent employment practices for temps
  - HR as gatekeeper on documenting decision-making

290

REMINDERS

- **Issue is not limited to discrimination and harassment claims**
  - Risk exists under many employment laws
- **Different employment laws have different tests, but "right to control" is key factor in almost every employment relationship test**
- **Do not assume and fall into the trap**
  - Taking shortcut to get rid of the problem temp worker can create liability and headaches later

291



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292