

EMPLOYMENT LAW UPDATE

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ANNUAL MEETING
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NASHVILLE, TN
OMNI HOTEL

THE FUTURE STARTS NOW:
WHAT WE DO TODAY DEFINES WHO WE BECOME TOMORROW

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What's Happening and Where Your Focus Should Be in 2014 and Beyond . . .

- 1. Key Supreme Court Case Law Update**
- 2. Wage & Hour Trends**
- 3. Issues in Collective Bargaining**
- 4. Separation Agreements**
- 5. FMLA/ADA/Leaves of Absence**



What's Happening and Where Your Focus Should Be in 2014 and Beyond . . .

- 6. Bring Your Own Device (BYOD) Policies**
- 7. Workplace Romances**
- 8. Harassment Investigations**
- 9. Discipline for Legal Drug Use**
- 10. Other EEOC Initiatives**



Key Supreme Court Case Law Update

Lane v. Franks, ____ S. Ct. ____ (2014)

■ Facts

- Lane took over as executive director of youth program and discovered a politician working a no-show job.
- Lane fires politician
- Lane testified before grand jury
- Lane gets laid off



Key Supreme Court Case Law Update Lane v. Franks, ____ S. Ct. ____ (2014)

- **Issue: Was Lane's testimony protected by the First Amendment?**
 - Lane's truthful, sworn testimony, compelled by subpoena and outside the scope of his ordinary job duties is entitled to First Amendment protection
 - Anyone who testifies in court bears an obligation to tell the truth
 - Lane may proceed with First Amendment claim



Key Supreme Court Case Law Update

Harris v. Quinn, ____ S. Ct. ____ (2014)

■ Facts

- Personal Assistants employed by individuals for in-home care under Medicare/Medicaid.
- By operation of state law state is joint employer and PAs granted right to bargain
- PAs represented by SEIU and required to pay "Fair Share" fees even if not union members
- Fair Share fees approved by state law



Key Supreme Court Case Law Update **Harris v. Quinn, ____ S. Ct. ____ (2014)**

- **Issue: Was requirement to pay Fair Share fee compelled speech in violation of the First Amendment?**
 - Prior Supreme Court case law permitted collection of fees to avoid "free-riding"
 - However, free-riding concern not enough to overcome First Amendment objections
 - In this specific situation (PAs), First Amendment prohibits collection of fee from PAs who do not want to join or support the union.



Key Supreme Court Case Law Update

Vance v. Ball State Univ., 133 S. Ct. 2434 (2013)

■ Facts

- Vance worked in BSU's catering department, and was directed in daily work by Davis, Catering Specialist
- University acknowledged the job description indicated Catering Specialist was a "supervisor," but there was no evidence Davis engaged in formal supervisory actions, other than directing daily work



Who Is A Supervisor?

- **Prior Supreme Court Holding:**
 - An employer is liable for actions of its supervisors for sex-based and race-based workplace harassment
 - If the harasser was merely the victim's co-employee, the employer would not be liable, absent proof of negligence in the way the employer responded to the victim's complaint



Vance v. Ball State Univ.

- **Supreme Court Holding (5-4)**
 - A "supervisor" must have power to take "tangible employment actions" (like hiring, firing, failing to promote, etc.). An individual who merely directs the day-to-day activities of an employee is not a supervisor
- **Implications**
 - By adopting a narrow definition of "supervisor," Court makes it harder for employees to prove liability of employers for actions of individuals not meeting supervisory test
- **Take-Out?**
 - Take-Aways . . .



Key Supreme Court Case Law Update Univ. of Texas Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013)



■ Facts

- Nassar was a University faculty member and wrote a letter alleging discrimination and harassment based on race and religion
- After resigning, he claimed UT retaliated against him in violation of Title VII by preventing him from obtaining a position with a University-affiliated hospital
- Evidence showed the University had opposed Nassar's attempt to get a job both before and after he wrote letter alleging discrimination



Retaliation



■ Legal Context

- Retaliation cases have become single largest segment of employment law claims filed against employers
- Courts of Appeal divided over applicable standard of proof in Title VII retaliation cases
 - **"Mixed motive" test OR**
 - **"But for" cause**
- Employers prefer the "but for" standard as it imposes higher evidentiary burden and is harder for employees to meet



Univ. of Texas Southwestern Med. Ctr. v. Nassar



■ Supreme Court Holding (5-4)

- To prove a claim for unlawful retaliation under Title VII, an employee "must establish that his or her protected activity [in opposing discrimination] was a but-for cause of the alleged adverse action by the employer."
- Nassar lost because the University opposed his attempt to obtain the other job even before he wrote his letter complaining of discrimination.

■ **Take Aways...**

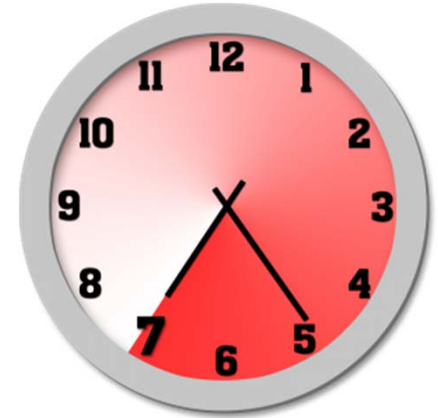


Wage & Hour Trends

- **Number of Fair Labor Standards Act (FLSA) cases filed in FY 2013 rose for fifth straight year**
 - More than 6x as many lawsuits filed vs. 1990
 - FY 2014 will likely break the record again
- **Median settlement numbers continue to increase in terms of total numbers and on a per plaintiff basis**



Presidential Memorandum



- **March 13, 2014: Updating and Modernizing Overtime Regulations**
 - Per the President, regulations regarding exemptions from FLSA's overtime requirement have not kept up with our modern economy
 - Expect changes making more workers eligible for overtime pay under federal law
 - **Increase in threshold amount for salaried employees**
- **Executive Order regarding minimum wage**
 - States and local municipalities following suit





Wage Payment Issues

- **Bulletin 2013-10 from the federal Consumer Financial Protection Bureau:**
 - Payroll card accounts fall within the Electronic Fund Transfer Act and its implementing Regulation E
 - Regulation E may be enforced against financial institutions and employers
 - Regulation E prohibits employers from mandating that employees receive wages only on a payroll card of the employer's choosing
 - What should employers do?



Ensuring Wage and Hour Compliance

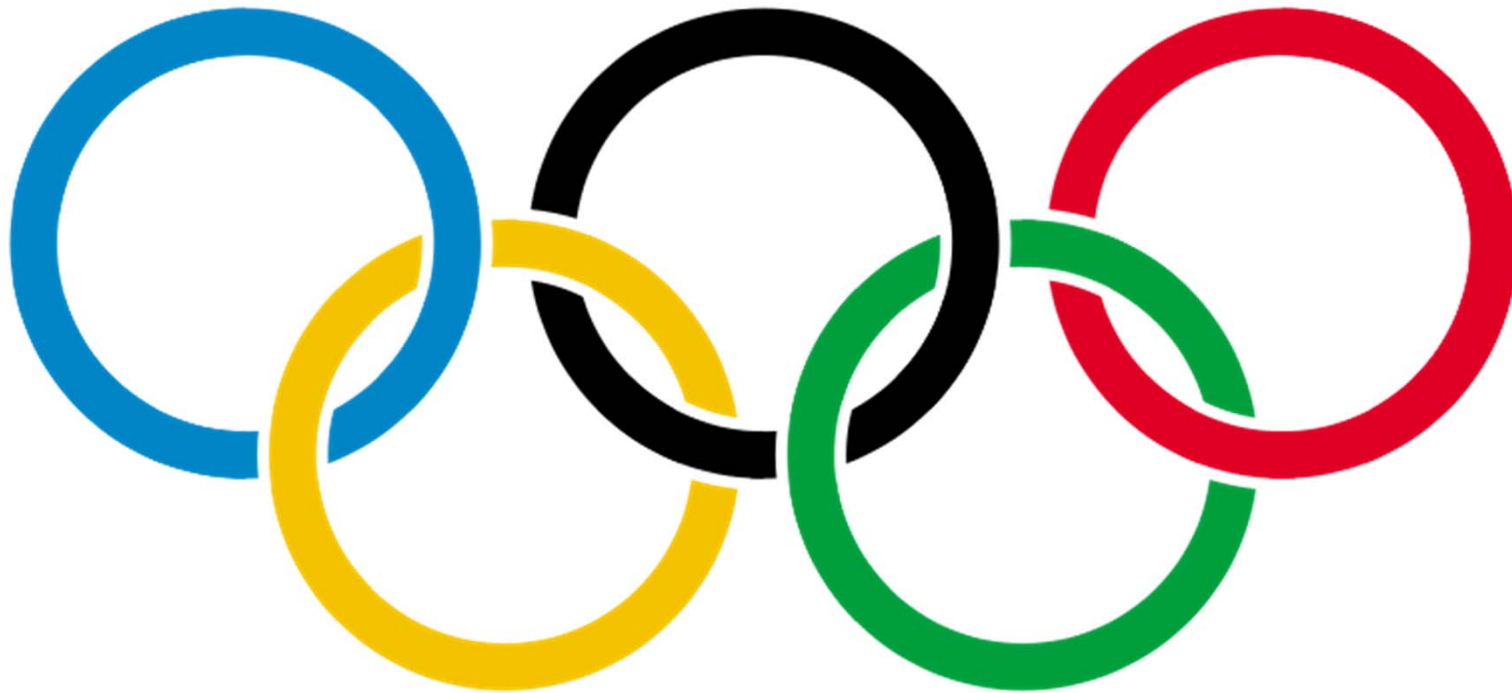
- **Conduct comprehensive formal wage and hour audit to review all facets of potential risk**
 - Classification of exempt employees
 - Classification of independent contractors
 - Compensation of non-exempt employees
 - Wage payment issues
 - Recordkeeping and postings
 - State law nuances



Collective Bargaining Considerations

- **Clarify leave of absence provisions**
 - Statutory minimum
 - When do benefits cease?
 - Leave payouts
- **Wage trends**
 - Anybody not take a zero?
- **Pension and OPEB relief**
 - Grandfathering
- **Interest arbitration**
 - Evidence of ability to pay





Severance Agreements

- **EEOC Strategic Enforcement Plan FY 2013-2016** talks about renewed focus on:
 - "Overly broad waivers" and
 - "Settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination"



Severance Agreements

- **February 2014: EEOC sues CVS Pharmacy, challenges form severance agreement**
 - Five page, single-spaced document contained:
 - **Non-disparagement provision**
 - **Confidential information provision**
 - **General release that included release of "any claim of unlawful discrimination of any kind"**
 - **General covenant not to sue**



Severance Agreements

- **CVS Agreement contained following**
 - "Nothing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation."



Severance Agreements

- **EEOC's response**
 - General disclaimer language is not enough to cure other alleged defects
 - Stay tuned for court decisions
- **Where do we go from here?**
 - Review form agreements
 - Where on the spectrum do you want to fall?
 - **Broader agreements v. increased EEOC scrutiny**



Severance Agreements

■ General principles

- Shorter, simpler agreements usually better
- Emphasize employee's right to file administrative charges and participate in investigations by government agencies
- Qualify blanket non-disparagement and confidential information provisions



Severance Agreements

Medicare, Medicaid & SCHIP Extension Act

- **Special reporting rules apply when entering into settlements of employment-related claims (including severance agreements) for**
 - Medicare-eligible employees
 - Individuals enrolled in Medicaid
- **Additional language for severance agreements required**



The Intersection Of ADA, FMLA & Workers' Compensation

- **A Common Scenario**
 - Employee begins protected leave
 - **FMLA**
 - **Workers' Compensation**
 - **Paid leave**
 - Employee unable to return when leave expires/eligibility ends



Americans with Disabilities Act (ADA)

- **Interactive Process**
 - Examine job to determine essential duties
 - Request information about limitations
 - **Identify barriers**
 - Determine accommodations that would be most effective
 - Consider employee's requests
 - **Discuss alternatives if requests are burdensome**



What Is Required When An Employee Needs Additional Time Off Beyond FMLA?

- Employers **cannot** take the position that they are only required to provide FMLA leave
- The accommodation obligation may require LOA in excess of what FMLA requires
 - Without pay, without benefits?
- **Even after a generous LOA is exhausted, there is no black letter rule as to accommodation obligations**
 - EEOC takes a hard line against "inflexible leave" policies – e.g., "Employees who are unable to return to work after 26 weeks of leave will be terminated."
 - Cannot require full / 100% release to return to work



As FMLA Exhaustion Date Approaches



- **Reach out to Employee**
 - Confirm return-to-work date following exhaustion of FMLA leave
 - Remind employee of need for fitness-for-duty certification (if applicable)
- Advise employee to call HR if circumstances have changed and employee is unable to return to work or will require accommodation



The ADA: Extended Leaves of Absence

- **Generally EEOC and courts have taken the position that unpaid leave is a form of reasonable accommodation**
- **Leave may be a reasonable accommodation when:**
 - Employee expects to return to work after treatment for a disability
 - Recovering from an illness
 - Taking other action in connection with a disability (e.g. training a service horse)
- **When can you say “no” to a request for leave under the ADA?**



What is BYOD?

■ Bring Your Own Device

- Employees utilizing their own Smartphones, tablets, and computers to perform work functions
- Accessing e-mail, documents, confidential information from personal property
- 2012 Cisco Poll: about 90% of workers have used own devices in work-related capacity (whether endorsed by employer or not)
 - **Only about 30% of employers had BYOD policies**



BYOD Pros

- **Happy employees!**
 - PEW Research Poll
 - **56% of Americans own smartphones (70% of college grads)**
 - 28% Android, 25% iPhone, 4% Blackberry
 - **24% own e-readers**
 - **35% own tablet computers**
- **Accessing work product on-the-go can lead to increased productivity**
- **Decreased expenses (maybe)**
- **Convenient for employer and employee**



BYOD Cons

- Lack of employer control
- Ownership issues (device v. data)
- Unintended overtime (blurring of work/personal time)
 - According to September Pew Research poll, 44% of device owners slept with phone next to bed so they didn't miss calls, text messages, or other updates
- Security concerns
 - Loss/theft of data
 - Per a recent study, in 2011, one American lost or misplaced their mobile phone every 3.5 seconds
 - Portability of confidential or proprietary information
- Practical concerns

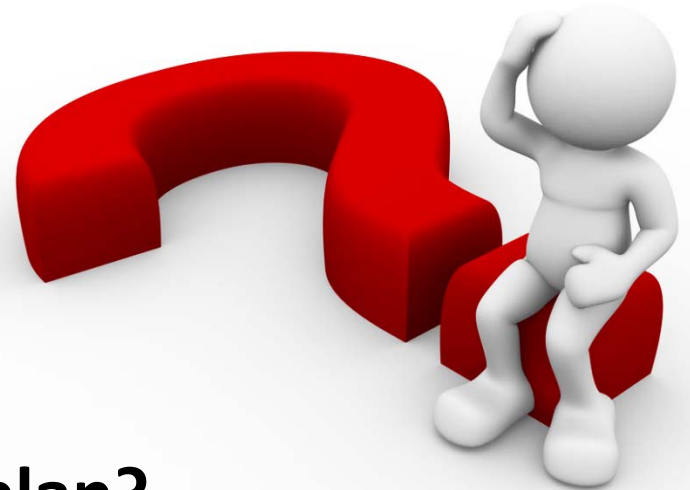


Why Is It Important To Have A BYOD Policy?

- **Mitigate potential security risks and legal liability**
 - Establish baseline security policies
 - Manage password controls
 - Manage installation of applications/ programs
 - Remotely wipe devices
- **Make employees aware of expectations**
- **Balance need to monitor employee usage with employee privacy concerns**



Questions to Ask When Developing Policy



- Who will be **eligible**?
- Who will **pay** for the device?
- Who will pay for **data/voice plan**?
- Will we **reimburse the employee**?
- How will we address **security** concerns?
- What about **practical** concerns?
- What do we do when an employee **quits** or is **fired**?



MORE Questions

- What level of **privacy** can employees expect?
- What are **permitted** and **prohibited** uses of the device?
- Which **platforms** and **software** will we support?
- What happens if an employee **misuses** the device?
- How do we prevent **unauthorized overtime**?



Workplace Romances

- Jack – Public Works Manager
- Jill - Summer Intern

Jack: "Looks like we'll have an opening right around the time you graduate from college. If you play your cards right this summer, I might be able to put in a good word for you with the Council/Board

Would you like to get a drink after work to talk about how you might fit in around here?"



Workplace Romances

Jack and Jill fall in love



Jill gets promoted after a year



Workplace Romances

- Tom doesn't get promoted
- Joe doesn't get promoted
- Sam doesn't get promoted
- Mike doesn't get promoted
- Tom, Joe, Sam and Mike have more experience . . .



Workplace Romances

- Jack and Jill are affectionate at work
- Really affectionate



Workplace Romances

- Then, Jill meets someone her own age at a happy hour



- Jill breaks up with Jack
- Jack continues to send her flowers and tries to win her back



Workplace Romances

- Jill gets engaged to her new beau
- Jill gets her first poor performance evaluation
- Jill gets demoted
- Jill gets fired
- And files a lawsuit



Harassment Investigations

- **Employer affirmative defense to liability**
- **Be proactive**
 - Policy and training critical
- **Employees at all levels of the organization are responsible for their behavior**
 - Supervisors play a key role
- **Any harassing behavior should be promptly reported**
- **Investigation is critical**
- **No retaliation**



Investigation Preparation

- **Decide who will conduct**

- Human Resources? Outside investigator? General Counsel? Outside counsel?
 - **Each has benefits and each has drawbacks**
 - **Two investigators?**
- Investigator must be impartial and familiar with policies
- Investigator should be a good communicator



Discipline for Legal Drug Use?

- **Marijuana legal in several states**
 - Medicinal – 22 states and D.C. (as of July 1)
 - **Pre-employment testing?**
 - **ADA accommodation?**
 - Recreational – 2 states
 - **Off –duty conduct?**
 - **Privacy?**
 - **Discipline?**



EEOC Strategic Enforcement Plan



- **Approved by Commission on December 17, 2012**
- **Guidance for employers on how EEOC will allocate resources over next several years**
- **Six areas of focus identified with emphasis on systemic claims**





Targeted Priorities

- **Eliminating barriers in recruitment and hiring**
 - Targeting screening tools (pre-employment tests, background tests, drug tests, etc.) that disproportionately impact racial, ethnic, religious groups, women, older workers, and disabled applicants
- **Emerging and developing issues**
 - ADAAA issues; pregnancy/child care discrimination; religious discrimination; sexual orientation discrimination





Targeted Priorities

- **Enforcing equal pay laws**
 - Focus on compensation systems and practices that discriminate based on gender
 - Strategies utilized include directed investigations and Commissioner charges
- **Preserving access to the legal system**
 - Eradicate overly broad waivers, settlement provisions which prohibit charge filing, retaliatory actions





Targeted Priorities

- Preventing harassment via systemic enforcement and targeted outreach
 - Emphasis on educating employers and systemic enforcement
- Protecting immigrant, migrant and other vulnerable workers
 - Focus on disparate pay, job segregation, harassment, human trafficking and other unlawful practices and policies



More From The EEOC

- **March 31, 2014 Press Release**

- EEOC sues Merry Maids franchise for pregnancy discrimination



- **Alleges employee was terminated because she "suffered from pregnancy-related health issues" which did not prevent her from working**
 - **Asserts violations under Title VII, as amended by the Pregnancy Discrimination Act and Americans with Disabilities Act**
- **"Pregnant women have the same right as other individuals to earn a living"**
 - **State and local laws require accommodation**



And One More From The EEOC



- **April 8, 2014 "Equal Pay Day"**
- **Women chasing men?**
 - According to EEOC, average woman has to work 15 months to match what male counterparts make in 12
 - Restated commitment to fully enforce Title VII and the Equal Pay Act to address unlawful exclusion of women in the workforce
 - Touted \$85 million recovered for victims of sex-based wage discrimination since 2010



This One Is *NOT* From The EEOC

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SHOULD EVER CHASE
IS HER BOURBON.

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