Labor & Employment Annual Update

December 2, 2016

The Department of Labor's New Overtime Rule

Presented by:
Justin D. Flamm

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The Department of Labor's New Overtime Rule?

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DOL'S New Overtime Rule – Blocked

- Federal court in Texas issued a November 22 order blocking DOL's new overtime rule
- DOL cannot implement or enforce the rule "pending further order of this court"
- Injunction applies nationwide

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DOL'S May 2016 Overtime Rule

- DOL: "In 2014, President Obama directed the Secretary of Labor to update the overtime regulations to reflect the original intent of the Fair Labor Standards Act, and to simplify and modernize the rules…."

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Fair Labor Standards Act of 1938

- 19% unemployment rate in 1938

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DOL'S May 2016 Overtime Rule

- DOL: "(W)ill put more money in the pockets of middle class workers – or give them more free time"

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New Regulations

- Proposed rule published July 6, 2015
- 270,000 comments submitted
- Final rule published May 2016, scheduled to take effect yesterday

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New Regulations

- Estimated over 5 million currently exempt employees will be affected and will cost employers $2 billion in wages the first year alone

- DOL suggests salary increases will reduce litigation costs overall

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New Regulations

- Increase salary basis test from $455 per week ($23,660 annualized) to $913 per week ($47,476 annualized)
- Increase highly compensated employee's total compensation from $100,000 to $134,004
  - Up to 2/3 may include commissions, nondiscretionary bonuses, and other nondiscretionary deferred compensation

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New Regulations

- Automatic updates to salary and compensation levels every 3 years (starting January 1, 2020):
  - 40th percentile of full-time salaried workers in lowest census region (currently south)
  - 90th percentile nationwide for highly compensated employee exemption

Salary Basis Test

- Employee must be paid on a salaried basis
  - Predetermined amount of compensation each pay period on a weekly or less frequent basis
  - Compensation not subject to reductions for variations in the quality or quantity of the work performed.

DOL'S New Overtime Rule – Blocked

- Fair Labor Standards Act exempts "bona fide executive, administrative, or professional" (EAP) employees
- Statute gives DOL authority to "define and delimit" those terms

DOL'S New Overtime Rule – Blocked

- Statute is silent regarding salary requirements
- In 1940, DOL issued a regulation setting minimum salary level
- Seven updates to minimum salary levels in the decades that followed

DOL'S New Overtime Rule – Blocked

- November 22 Order of Judge Amos Mazzant (appointed by President Obama in 2014):
  - "Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level"
  - "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption"

DOL'S New Overtime Rule – Blocked

- Judge Mazzant's Order: The FLSA "does not grant [DOL] the authority to utilize a salary-level test or an automatic updating mechanism"
- DOL: "We are currently considering all of our legal options"

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Action Plan

- Identify exempt employees below $47,476
- Evaluate bonuses
- Review exempt job descriptions to ensure they accurately reflect duties
- Analyze options:
  - Increase salary
  - Manage hours
  - Fluctuating workweek

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Increase Salary

- Raise exempt employee's salary above new minimum salary level
- Review job descriptions to ensure they accurately reflect employee's duties
- Review actual duties to ensure they meet the exemption tests

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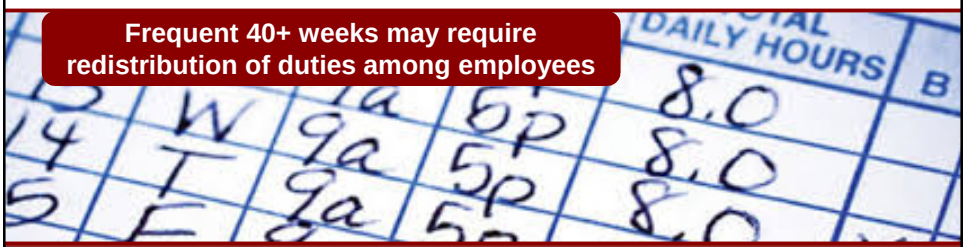
Manage Hours

- Reclassify employee as non-exempt
- Convert to hourly rate and pay overtime
- Measure hourly compensation against current or budgeted annual compensation
- Begin tracking hours to determine number of hours the employee is currently working

Frequent 40+ weeks may require redistribution of duties among employees



Manage Hours

- Consider re-designating the organization's workweek
  - Workweek is any "fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods"
  - Need not coincide with the calendar week but may begin on any day and at any hour

Manage Hours

- Employers may prohibit overtime
- If employees work unauthorized overtime:
  - Pay for the time
  - Discipline employee

Manage Hours

- Implement a timekeeping policy
- Educate managers
- Time is compensable if the employer, "through reasonable diligence," should have known
- "But reasonable diligence is not an expectation of omniscience."

Fluctuating Workweek (FWW)

- Hybrid model for nonexempt employees whose work hours fluctuate from week to week
- Established by federal regulation since 1968 (29 C.F.R. § 778.114)
- Employer pays a minimum weekly salary
- Employee tracks hours worked each week

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Fluctuating Workweek (FWW)

- Hourly rate changes each week
- The more hours the employee works, the lower the hourly rate becomes
- Overtime premium is 0.5 of that week's hourly rate, instead of the standard 1.5

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Fluctuating Workweek Requirements

- Weekly salary is a minimum, no matter how little the employee works
- "Clear mutual understanding" that the weekly salary compensates all hours worked each week
- Hourly rate for any given week cannot fall below minimum wage.
- Hours must have some fluctuation from week to week

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Fluctuating Workweek – Example

Assume:

- Employee is classified in June 2016 as exempt
- Annual salary is $35,000
- Employee works an average of 40 hours per week, which includes some weeks of 40+ hours

Fluctuating Workweek – Example

Hourly Model

- Convert employee to hourly rate: $16.83 per hour

  $35,000 ÷ 52 weeks = $673.08 per week
  $673.08 ÷ 40 hours = $16.83
  $16.83 × 1.5 = $25.24 overtime premium rate

- If an employee works 49 hours in a workweek, employer must pay $900.36

  $16.83 x 40 hours = $673.20
  $25.24 x 9 hours = $227.16

  $673.20 + 227.16 = $900.36

Fluctuating Workweek – Example

FWW Model

- Convert employee to weekly rate: $673.08 per week
- If employee works 49 hours in a workweek, employer must pay $734.91

$673.08 weekly rate
$673.08 ÷ 49 hours = $13.74 hourly rate that week
$13.74 × 0.5 overtime premium under FWW = $6.87
$6.87 × 9 overtime hours = $61.83

$673.08 + 61.83 = $734.91

- **FWW method saves employer $166.45 that week**

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Fluctuating Workweek – Downsides

- Payroll personnel or vendor must manage weekly calculations of that week's hourly rate
- Some states prohibit or limit its use (e.g. Alaska, California, Connecticut, Hawaii, New Hampshire, New Mexico, Pennsylvania)
- Payment of bonuses or other incentive compensation may create compliance risks based on DOL position

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"Everybody's getting together after work to do some more work—you in?"

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Drug Tests, Medical Marijuana, Misbehaving and Careless Employees: The Impact These Can Have on Your Workers' Compensation Costs

Presented by:
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and
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Drug Testing in Workers' Compensation Context: Using a positive drug test to defend against the allowance of a workers' compensation claim

- An employee is not entitled to receive workers' compensation benefits if the injury or occupational disease is caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician
- The intoxication must be the proximate cause of the injury
  - Ohio Revised Code Section 4123.54(A)(2)

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Drug Testing in Workers' Compensation Context: To determine if an employee is intoxicated

- The drug test must be a qualifying chemical test within 8 hours of the injury for potential alcohol intoxication. For amphetamine, cannabinoids, cocaine, opiates or phencyclidine, the drug test must be a qualifying chemical test administered within 32 hours of an injury or a gas chromatography mass spectrometry test.
  - Ohio Revised Code Section 4123.54(B)(1)(a-d)
- Exceeding the levels set forth in the statute, there is a rebuttable presumption the employee is intoxicated.
- If the employee refuses to take a qualifying drug test, there is a rebuttable presumption of intoxication
  - Ohio Revised Code Section 4123.54(B)(2)

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Drug Testing in Workers' Compensation Context

- Laboratories certified by the U.S. Department of Health and Human Services that meet or exceed the standards of that department must be used for drug testing
  - Ohio Revised Code Section 4123.54(E)
- The employer must post written notice to employees that the results of a positive test or an employee's refusal to take a drug test may affect the employee's eligibility for workers' compensation or benefits
  - Oho Revised Code Section 4123.54(F)

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Whether to Test

- A chemical test is a qualifying test if:
  - Administered after the injury; and
  - Employer has a reasonable suspicion employee may be intoxicated; or
  - Test administered at request of a police officer; or
  - At the request of a licensed physician not in the employ of the employer

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Whether to Test

- Reasonable suspicion must be from objective facts and reasonable inferences drawn from these facts in light of experience and training
  - This includes:
    - Observable phenomenon such as direct observation of use, possession or distribution of the controlled substance
    - Physical symptoms of being under the controlled substance such as slurred speech, dilated pupils, odor of alcohol, "dynamic mood swings", change in affect
    - Pattern of abnormal conduct, erratic or aberrant behavior
      - For example: frequent absence, excessive tardiness, recurrent accidents not attributable to other factors
    - Employee being subject of a criminal investigation
    - Reliable and credible report of use

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Remember

- Nothing in the Ohio Workers' Compensation Act prevents the employer from drug testing employees randomly or after any industrial accident
- To be used as a defense to a workers' compensation claim, the test must be based on reasonable suspicion as set forth in the statute
  - Ohio Revised Code Section 4123.54(D)

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Remember

- Termination of employment for positive drug test may be used to prevent payment of temporary total benefits where there is written notice that a positive drug test will result in termination of employment
  - See *Louisiana-Pacific Corp. v. Indus. Comm.,* 72 Ohio St.3d 401, 650 N.E.2d 469, 1995-Ohio-153

Remember

- In Kentucky, voluntary intoxication through any substance bars workers' compensation benefits
  - Ky Rev. Stat. § 342.610(3)
- The intoxication must be shown to have a causal connection to the injury
- The employer must plead and prove the intoxication and its causal relationship to the injury

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Drug Tests, Medical Marijuana, Misbehaving and Careless Employees: The Impact These Can Have on Your Workers' Compensation Costs

Presented by:
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and
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Ohio Medical Marijuana Law

- HB 523 effective September 8, 2016
- Legalizes medical marijuana in Ohio for certain medical conditions including pain that is either chronic and severe or intractable as well as PTSD and traumatic brain injuries

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Ohio Medical Marijuana Law

- Only legal forms of marijuana will be oils, edibles, patches, plant material and tincture
- Vaporization is permitted
- Cannot be smoked
- Growth is prohibited

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Ohio Medical Marijuana Law

- Ohio Department of Commerce is charged with regulating the licensure of medical marijuana cultivated and processed
- Ohio Board of Pharmacy will license retail dispensaries and register patients
- State Medical Board of Ohio regulates physician requirements and procedures, including:
  - Applying for and maintaining certificates to recommend medical marijuana
  - Maintaining the list of conditions for which medical marijuana can be recommended

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Impact on BWC & Employers

- No impact on Drug Free Safety Program
- No requirement that BWC pay for patient access to marijuana
- The law expressly states that an employee under the influence of marijuana is not covered by workers' compensation

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Impact on BWC & Employers

- The law does not require an employer to accommodate an employee's use of medical marijuana
- The law does not prohibit an employer from refusing to hire, discharge, or taking adverse employment actions because of a persons' use of medical marijuana
- The law specifies that marijuana is covered under "rebuttable presumption", even if the marijuana use is recommended by a physician

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Impact on BWC & Employers

- The law does not address reimbursement for medical marijuana by BWC for injured workers
- BWC relying upon existing OAC regulations concerning medication:
  - OAC limits reimbursement by BWC to only those drugs approved by FDA
  - BWC funded prescriptions must be dispensed by a registered pharmacist from enrolled provider
  - BWC only reimburses for drugs on its pharmaceutical formulary

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2016's Ten Most Surprising Decisions of the National Labor Relations Board and Department of Labor

Presented by:
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Trustees of Columbia University in the City of New York

364 NLRB No. 90 (August 23, 2016)

- Student teaching and research assistants are "employees" and can unionize
- NLRB overrules its own *Brown University* decision

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Dalton Schools, Inc.

364 NLRB No. 18 (June 1, 2016)

- Employees who have rightful access to their employer's email system in the course of their work may use the system for protected activity and do not lose that protection "merely for criticizing management in sharp and unequivocal terms"

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Retro Environmental/ Green JobWorks

374 NLRB No. 70 (August 16, 2016)

- When do two unrelated employers become one such that a Union can force recognition upon both?
  - R.E., a construction contractor had a contract for staffing with GJW Company for labor
  - GJW would remove one of its staff from R.E. if asked although this never occurred
  - GJW sets wages and benefits
  - R.E. supervises workers assigned to it
- NLRB: Joint employers even though no ongoing projects under *Browning Ferris* standard

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Miller & Anderson, Inc.

364 NLRB No. 39 (July 11, 2016)

- NLRB overturns its own prior precedent to hold that an appropriate unit can include "jointly employed" (temps) and "solely employed" (regular) employees of a single user employer
- Employer consent to such a combined unit is "no longer necessary"

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American Baptist Home of the West, d/b/a/ Piedmont Gardens

369 NLRB No. 13 (May 31, 2016)

- Employees of nursing home strike, and employer replaced them permanently, as the law allowed for 60+ years
- Held:
  - The hiring of permanent replacements for strikers is unlawful if "motivated by a purpose prohibited by the Act" and it is not necessary to show an illegal motive extrinsic to the strike
  - Replacing workers to punish strikers or to discourage future strikes is an "independent unlawful purpose"

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T-Mobile USA, Inc.

363 NLRB No. 171 (April 29, 2016)

- Unlawful to maintain or enforce a policy that requires employees to:
  - "maintain a positive work environment by communicating in a manner that is conducive to effective working relationships"
  - "refrain from making recordings in the workplace"

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#4 *Whole Foods Market, Inc.*

363 NLRB No. 87 (Dec. 24, 2015)

- Policy guides unqualifiedly prohibited "all workplace recording"
- Held:
  - Policy was overbroad because it could easily be construed by employees to prohibit activity protected by the Act
- Applies to both union and non-union settings

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#3 *AT&T*

Wis. Bell, Inc., 2016 NLRB LEXIS 506 (July 12, 2016)

- Facts:
  - At beginning of negotiations, employees begin wearing large buttons reading "WTF" with "where's the fairness" in smaller type below
  - Policy prohibited altering required apparel "in any way, which includes adding buttons, pins, stickers, etc."
- AT&T's Argument:
  - After charges filed, AT&T argued that customers would ascribe to the button the common meaning which is vulgar, profane and offensive

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AT&T

Wis. Bell, Inc., 2016 NLRB LEXIS 506 (July 12, 2016)

- Held:
  - Because "where's the fairness" appeared below, customers could view the button as signifying a labor dispute and could not be interpreted so as to offend customers
- Applies to both union and non-union settings

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Chipotle Mexican Grill

364 NLRB No. 72 (August 11, 2016)

- Unlawful Handbook Policy
  - "You may not make disparaging, false, misleading, harassing or discriminating statements about or relating to Chipotle, our employees, suppliers, customers, competition or investors"
  - "This code does not restrict any activity that is protected by the National Labor Relations Act"
- The rule is sufficiently "imprecise" such that it could encompass protected activity

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Capital Medical Center

364 NLRB No. 69 (August 12, 2016)

- Facts:
  - Acute Care hospital is bargaining with UFCW
  - Sixty employees begin informational picketing and hand billing on the sidewalk
  - No interference by hospital
  - Group of off duty employees moves into the lobby to picket
  - Employees told to picket outside or be disciplined
  - Cops called
  - No arrests or discipline

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Capital Medical Center

364 NLRB No. 69 (August 12, 2016)

- NLRB:
  - Even the threat of discipline violated the Act since patients were not actually blocked from entering
  - Violation unless "concrete evidence" that patients were disturbed or operations were disrupted or that disruption was certain and imminent based on objective evidence
  - "Speculation of possible harm" not enough
- Impact:
  - Expanded longstanding rule allowing solicitation and distribution (in non-work areas) to picketing
  - May apply in union and non-union settings

BONUS CASE

Cooper Tire & Rubber Co.

363 NLRB No. 194 (May 17, 2016)

- Facts:
  - Employer locks out employees during a labor dispute and hires temporary replacements
  - Locked out employee Runion shouts at van carrying replacement workers including African American workers
    - "Hey, did you bring enough KFC for everyone?"
    - "Hey, anybody smell that? I smell fried chicken and watermelon."
  - Cooper fires Runion, termination upheld by arbitrator
  - ALJ orders reinstatement, finding that arbitrator's decision is "clearly repugnant" to the NLRA

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BONUS CASE

Cooper Tire & Rubber Co.

363 NLRB No. 194 (May 17, 2016)

- Appeal to the 8th Circuit—NLRB argues:
  - Employer can terminate for picket line misconduct only if misconduct "would reasonably tend to coerce or intimidate employees in the exercise of their rights"
  - While "offensive to the dignity of African-American replacement workers," the remarks "were not so egregious as to cause him to forfeit the [NLRA's] protection"
  - Cooper faced no real jeopardy under Title VII had it failed to police such off-duty misconduct

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Advanced Immigration

Presented by:
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Overview

Non-immigrant (temporary) work visa categories to consider when the H-1B work visa cap has been met.

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What is the H-1B?

- Temporary work status
- Specialty occupations / professional level
- Labor Condition Application
- Six-year maximum stay (limited exceptions)

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The H-1B Cap

- Capped at 65,000 visas each fiscal year
- U.S. Master's degrees – additional 20,000 visas
- Cap exempt organizations

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Cap for FY 2017

- April 1 filing date, October 1 start date
- H-1B lottery
- Over 236,000 petitions received for FY 2017

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Employer's H-1B petition does not win the lottery.

What are the employer's options?

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Optional Practical Training (F-1)

- Relate to course of study
- Pre-completion vs. post-completion OPT
- 24-month STEM extension – new Rules/Form I-983

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NAFTA Professionals (TN)

- Requirements
  - Citizen of Canada or Mexico
  - Specified list of occupations
  - U.S. position requires a professional
  - Job with U.S. employer
  - Qualifications to practice the professions

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Business Visitors

- Visa Waiver Program vs. B-1
- Business activities
- B-1 in lieu of H-1

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Treaty Traders (E-1)

- Requirements
  - Nationals of treaty countries
  - Substantial trade
  - Principal trade
- Employees
  - Same nationality
  - Executive or supervisory duties, or special qualifications

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Treaty Investor (E-2)

- Requirements
  - Nationals of treaty countries
  - Substantial investment
  - Develop and direct the enterprise
- Employees
  - Same nationality
  - Executive or supervisory duties, or special qualifications

Australian Specialty Occupation Professionals (E-3)

- Requirements
  - Australian nationals
  - Offer of employment
  - Qualifying credentials
  - Specialty occupation
- Cap of 10,500 Visas Annually

Intracompany Transferees (L-1)

- U.S. employer requirements
  - Have a qualifying relationship with a foreign company
  - Do business in U.S. and at least one other country
- Employee requirements
  - Work for a qualifying organization in an executive, managerial, or specialized knowledge position for one continuous year within the past three years preceding U.S. admission
  - Fill an executive, managerial or specialized knowledge position in the U.S.

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Extraordinary Ability (O-1)

- Sciences, education, business, and athletics
  - Sustained national or international acclaim
  - Working in the U.S. in area of extraordinary ability
- Arts
  - Distinction
- Types of evidence
  - Awards
  - High remuneration
  - Comparable evidence

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Best Practice

- Plan Now for FY2018 (4/1/2017) H-1B Needs
  - ID qualified foreign candidates & positions
  - Assess candidates' current status expiration
  - Pre-filing/clearance required by DOL
  - Finalize decision on H-1B filings by early January

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The Interplay of the ADA and FMLA

How Much Leave is Too Much?

Presented by:
Evan T. Priestle

FMLA Leave Entitlement

- 12 weeks/year for eligible employees
  - Birth
  - Adoption
  - Serious Health Condition
  - Military Family
- May be taken
  - All at once
  - In chunks
  - Intermittently

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FMLA Leave Entitlement

- Practice Pointer
  - Employer decision to grant "FMLA leave" for non-FMLA eligible reason DOES NOT count against an employee's 12 weeks/year annual entitlement

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Recent FMLA Cases of Note

- Use the "rolling" 12-month method to calculate FMLA leave.
- In *Caggiano v. Illinois Dept. of Corrections*, 2016 WL 362383 (N.D. Ill. Jan. 29, 2016), the department of corrections maintained an FMLA policy, but it failed to inform employees how the 12-month FMLA period was defined.
  - If an employer fails to identify which method it is using to calculate an employee's FMLA leave, the 12-month option that provides the most beneficial outcome to the employee is used.
  - Had the department of corrections used the "rolling" 12-month method, the employee would have exhausted his leave.
- If you change methods, make sure to give your employees 60 days' notice prior to making the switch.

Failure to Advise That FMLA Leave May Be Denied for Failing to Turn in a Certification

- *Wallace v. Fed Ex. Corp.*, 764 F.3d 571 (6th Cir. 2014)
  - Fed Ex offered Wallace FMLA leave and verbally asked her to complete FMLA form
  - Wallace failed to return form and was terminated for two consecutive days' absence after form was due
  - Fed Ex failed to notify Wallace of the consequences of failing to return the form

- *Wallace v. Fed Ex. Corp.*, 764 F.3d 571 (6th Cir. 2014)
  - Fed Ex violated 29 CFR 825.305(d) for failure to notify about the consequences of failing to return the form – Wallace testified she would have returned the certification had she known
  - 825.305(d) – "At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification."

What is Sufficient "Notice" Under the FMLA?

- *Festerman v. Wayne County*, 611 F. App'x 310 (6th Cir. 2015)
  - Standard is whether the employee has given the employer enough information for the employer to reasonably conclude that an FMLA-qualifying event has occurred.
  - Calling in "sick" is not sufficient. Neither is a doctor's note which fails to provide specifics about an employee's need for leave or needed treatment.

What is Sufficient "Notice" Under the FMLA?

- *Festerman v. Wayne County*, 611 F. App'x 310 (6th Cir. 2015)
  - However, a doctor's note that simply states an employee's need for leave combined with other knowledge regarding an employee's health condition can be sufficient notice.
  - In essence, employers are held to a "totality of the circumstances" standard when determining whether they had sufficient notice of an FMLA condition.

Can Individuals Be Liable for FMLA Violations?

- *Graziadio v. Culinary Institute of America*, 817 F.3d 415 (2d Cir. 2016)
  - The Second Circuit reversed the trial court, finding there to be sufficient evidence from which a jury could conclude that an HR manager was an "employer" in economic reality and under the FMLA.
  - "An employer includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees." 29 C.F.R. § 825.104(d).

Can Individuals Be Liable for FMLA Violations?

- The Court examined four factors:
  - (1) Power to hire and fire employees
  - (2) Level of supervision and control over employee schedules and conditions of employment
  - (3) Control over determining employee's rate of pay
  - (4) Control over employee's records
- Court found there was enough evidence to submit the issue to a jury because the HR manager (a) reviewed the employee's FMLA paperwork, (b) determined its adequacy, (c) controlled the employee's ability to return to work, and (d) sent the employee nearly every communication regarding her leave and employment.

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Leave As A Reasonable Accommodation Under the ADA

Basic Principle – Employees Are Entitled To "Reasonable" Accommodation Unless It Results In An "Undue" Hardship

- There are no hard and fast rules about what is "reasonable" or "undue"

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How do we decide when a leave request is reasonable?

- **Threshold Question:** Would additional leave help the employee be able to return to work in the near future?
- Certain and Brief Leave is Almost Always Reasonable and Not Undue
- The More Uncertain Length Of The Leave, The More Unreasonable It May Become
- Indefinite Leave is Not Reasonable

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How do we decide when a leave request would be an undue hardship?

- Best evidence is actual experience
- A few factors to consider:
  - Losses in productivity
  - Lower quality or less accountability for quality
  - Lost sales
  - Delayed projects
  - Increased burden on co-workers or management

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EEOC Strongly Dislikes Hard And Fast Rules About Duration Of Leave Policies - It Claims They Violate The ADA

- One of EEOC's six national priorities identified by EEOC's Strategic Enforcement Plan

Simply Satisfying the FMLA 12 Week/Year Rule May Not Satisfy Leave as a Reasonable Accommodation Under The ADA

- EEOC settled with Interstate Distributor for $4.85 million who had such a policy
- EEOC settled with Princeton Healthcare for $1.35 million who had such a policy

Length of Leave Must Be Tailored To Each Individual

- In May 2016, Lowe's settled a disability discrimination suit brought by the EEOC for $8.6 million.
- Lowe's had been using a 180-day (and then a 240-day) maximum leave policy.

Intermittent Leave: Not Just An FMLA Issue

- EEOC settled with Pactiv, LLC for $1.7 million in part because Pactiv failed to consider intermittent leave as a possible accommodation for employees with disabilities.

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Lesson:

The Hallmark of the ADA is Engaging in the "Interactive Process"

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Question:

What Is The Cost In Terms Of Dollars And Flexibility Of Allowing An Employee To Remain On Leave?

Versus

What Is The Cost In Terms Of Dollars And Flexibility Of Discharging An Employee While On Leave?

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OSHA Update

Presented by:
Conor H. Meeks

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OSHA Penalties Increased 78%

- Bipartisan Budget Act of 2015 (November 2015): Congress ordered federal agencies to adjust civil penalties for inflation by August 1, 2016
  - One-time catch up adjustment, plus
  - Annual inflation adjustments
- OSHA's prior penalties in place since 1990
- OSHA issues maximum catch up adjustment:
  - Serious/Failure to Abate : $7,000 → $12,471
  - Willful/Repeat : $70,000 → $124,709

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OSHA Penalties Increased 78%

- Announced June 30, 2016
- Applicable to citations issued on or after August 2, 2016, for violations that occurred after November 2, 2015

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More Changes to the Injury and Illness Recordkeeping and Reporting Rule

- January 2015 – new reporting requirements for fatalities, hospitalizations, amputations, eye loss
- May 11, 2016 – OSHA announces Final Rule to Improve Tracking of Workplace Injuries and Illnesses:
  - Electronic submission and public disclosure of injury and illness data
  - New anti-retaliation protections to prohibit policies that discourage workers from reporting an injury or illness

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Electronic Submission and Public Disclosure of Injury and Illness Data

- Purpose – improve worker safety by better informing workers, employers, and the public about hazards in the workplace
  - "Behavioral economics tells us that making injury information publicly available will 'nudge' employers to focus on safety."
- Electronic submission requirements effective January 1, 2017
- Data will be submitted via secure website (TBD), expected to go live February 2017

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Electronic Submission Criteria

- Based on size of each establishment, not the company as a whole
- 250+ Employees – submit annually data from Forms 300 (Injury/Illness Log), 300A (Summary), and 301 (Incident Reports)
- 20-249 Employees for establishments in certain high risk industries – submit annually data from Form 300A
- Less than 20 Employees – no e-submission required (unless specifically requested by OSHA)

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Electronic Submission Timeline

Submission Year	250+ Employees	20-249 Employees	Submission Deadline
2017 (2016 data)	300A	300A	July 1, 2017
2018 (2017 data)	300, 300A, 301	300A	July 1, 2018
2019 and beyond	300, 300A, 301	300A	March 2 each year

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Anti-Retaliation Provisions

- 3 new provisions in recordkeeping rule to improve accuracy and completeness of injury and illness data:
  1. Must specifically inform employees of their *right* to report work-related injuries and illnesses without fear of retaliation
  2. Reporting procedure must be reasonable, cannot deter or discourage reporting
  3. Employers cannot retaliate or discriminate against employees for reporting work-related injuries or illnesses

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Anti-Retaliation Provisions

- Effective August 10, 2016
- July 8 – Lawsuit challenging anti-retaliation provisions
- July 12 – Emergency motion for preliminary injunction
- July 13 – OSHA delayed enforcement to November 1, "to allow time for additional outreach to the regulated community"
- October 18 – OSHA delayed enforcement to December 1, at the Court's request to allow additional briefing in the lawsuit
- October 19 – OSHA released enforcement guidance as promised in July, interpreting anti-retaliation provisions

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Enforcement Guidance: Reporting Procedures

- Time to report – reasonable to require employees to report injury/illness as soon as practicable after becoming aware
- Method of reporting – must not be unduly burdensome under the circumstances

Enforcement Guidance: Anti-Retaliation

- Key to reasonable policy – adverse action cannot be taken *because* the employee reports an injury/illness, must be related to legitimate business interest
- To issue a citation, OSHA must be able to show:
  1. Employee reported work-related injury/illness
  2. Adverse action taken against employee
  3. BECAUSE the employee reported the injury/illness
     - Fact-specific inquiry, OSHA must be able to show pretext or lack of legitimate business reason

Enforcement Guidance: Discipline Policies

- Discipline for violation of legitimate safety rules OK, as long as consistent whether or not there is a reported injury
  - Disciplining only violators who report injury is evidence of retaliation, rule violation not the real motivation if uninjured violators go undisciplined or receive lighter penalties
- Discipline for violation of reporting procedure OK, as long as procedure is reasonable, deviation was not excusable, and discipline is not excessive

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Enforcement Guidance: Drug and Alcohol Testing Policies

- OSHA only concerned with employers' voluntary post-accident drug and alcohol testing policies
  - No impact on pre-employment or random testing
  - No impact on post-accident testing done pursuant to federal or state law (Department of Transportation or state workers' compensation drug free workplace policies)
- Post-accident drug testing policy cannot deter or discourage reasonable employees from reporting injuries

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Enforcement Guidance: Drug and Alcohol Testing Policies

- Must have objectively reasonable basis to administer post-accident drug test.
- OSHA will consider various factors:
  - Reasonable belief drug use by the reporting employee could have contributed to the injury/illness (and results could provide insight into the cause)
  - Whether other employees involved in the incident were also tested (versus only the reporting employee)
  - Whether employer has heightened interest in determining if drug use contributed to the incident based on hazardous nature of the work
  - Whether test is capable of measuring impairment
    - for alcohol testing only at this time, since other drug tests largely incapable of measuring impairment

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Enforcement Guidance: Drug and Alcohol Testing Policies

- Automatic, mandatory testing following any injury, regardless of the circumstances of the injury or whether or not the victim contributed to the cause, is not objectively reasonable
- Unless done pursuant to federal or state law
  - DOT requirements
  - State workers' compensation drug free workplace program (including private carrier plans that mirror state law)
  - BUT NOT COLLECTIVE BARGAINING AGREEMENTS

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Enforcement Guidance: Safety Incentive Programs

- Safety incentive programs are OK (including cash prizes), *unless* the act of reporting an injury/illness likely to result in loss of benefit
  - Incentive conditioned on injury rates (based on reported injuries) without consideration of the circumstances surrounding an injury likely to discourage employees from reporting
- OSHA wants to see benefits conditioned on compliance with legitimate safety rules, or participation in safety-related activities

2016 Top Ten Cited Standards

	HAZARD	REGULATION	TOTAL CITATIONS*
1	Fall Protection	29 C.F.R. § 1926.501	6,929 (+208 from 2015)
2	Hazard Communication	29 C.F.R. § 1910.1200	5,677 (+485 from 2015)
3	Scaffolding	29 C.F.R. § 1926.451	3,906 (-389 from 2015)
4	Respiratory Protection	29 C.F.R. § 1910.134	3,585 (+280 from 2015)
5	Lockout/Tagout	29 C.F.R. § 1910.147	3,414 (+412 from 2015)
6	Powered Industrial Trucks	29 C.F.R. § 1910.178	2,860 (+100 from 2015)
7	Ladders	29 C.F.R. § 1926.1053	2,639 (+150 from 2015)
8	Machine Guarding	29 C.F.R. § 1910.212	2,451 (+156 from 2015)
9	Electrical—Wiring Methods	29 C.F.R. § 1910.305	1,940 (-464 (from 2015)
10	Electrical—General Requirements	29 C.F.R. § 1910.303	1,704 (-269 from 2015)

*Because inspectors have six months to issue citations, adjusted numbers may issue later in the calendar year.

Recent Enforcement Cases

- Ashley Furniture - $1.75 million settlement involving multiple willful and repeat machine guarding violations
- Sunfield Inc. (OH car parts company) - $3.42 million penalty involving machine guarding and LOTO violations, as well as failure to train temporary workers

Recent Enforcement Cases

- USPS - $44,000 penalty involving improper use of a relocatable power tap (RPT) (a.k.a. power strip) and damaged extension cord, and hazard communication and asbestos violations

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Sexual Harassment in the Workplace: Minimize Your Legal Risk and Transform Your Culture

Presented by:
Sarah Clay Leyshock

EEOC's Select Task Force on the Study of Harassment in the Workplace

- June 2016: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic
  - One-year study by panel of experts on how to prevent sexual harassment
  - 30 years after U.S. Supreme Court recognized hostile work environment sexual harassment violates Title VII in *Meritor Savings Bank v. Vinson* (1986)
  - Sexual harassment remains a persistent problem that usually goes unreported

June 2016 Report of Co-Chairs of Task Force on the Study of Harassment in the Workplace

- Recommendations to prevent harassing behaviors even before they are actionable
  - Leadership and accountability
  - Approach reporting and training procedures differently
- "[T]ransform the problem…from being about targets, harassers and legal compliance, into one in which co-workers, supervisors, clients, and customer all have roles to play…"
- Recommendations for all stakeholders, including EEOC
  - Not the law, but will influence what is expected of employers

Reaction vs. Prevention

- The business case for prevention
  - Legal costs
  - Mental, physical and economic harm to individuals
  - Decreased productivity, increased turnover, reputational harm
- Reaction – a legal issue
  - *Ellerth*/*Faragher* Affirmative Defense: Employer may avoid liability if:
    1. Employer exercised reasonable care to prevent and promptly correct any harassing behavior; and
    2. Employee unreasonably failed to take advantage of corrective opportunities provided by employer or to avoid harm otherwise
- Focus on prevention, not just reaction
  - Sexual harassment policy and investigation is not enough

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"Reaction" Can Be Ineffective and Costly

***Smith v. Rock-Tenn Services, Inc.* (6th Cir. 2016)**

- **The Conduct:** Male coworker touched male plaintiff's backside on 4 occasions
- **The Policy:** Victim directed to speak directly to harasser before reporting to management
- **Employer's Response:** Supervisor meeting, delayed investigation, back to work with alleged harasser, ultimately investigation resulted in 2-day suspension for alleged harasser

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"Reaction" Can Be Ineffective and Costly

- **Plaintiff's Reaction:** work suffered, anxiety attack, sick leave to get counseling
- **Jury Verdict and Judgment:** $300,000 awarded to plaintiff
- **Judgment Upheld on Appeal:** Employer failed to take prompt and appropriate corrective action when it was notified of the incidents:
  - No action for ten days
  - Failed to separate plaintiff and the alleged harasser
  - Did not produce a written report as stated in policy
  - Failed to consider alleged harasser's former misconduct
  - *Investigation was not adequate, thorough or timely*

Roadmap to Prevention

- You may already be…
  - Designing effective anti-harassment policies
  - Developing effective training curricula
  - Implementing complaint, reporting and investigation procedures
- But are you also…
  - Creating an organizational culture that does not tolerate harassment?
  - Holding employees accountable?
  - Assessing and responding to workplace risk factors?

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016)

What Should an Anti-Harassment Policy Include?

- Clear articulation of prohibited conduct, including examples
- Clear complaint process including multiple avenues to present the complaint
- Assurances that:
  - Employees who report will be protected against retaliation
  - Confidentiality maintained to the extent possible
  - Investigation process that is prompt, thorough, and impartial
  - Immediate corrective action where a complaint is substantiated
- Keep harassment in mind when drafting social media policies
- "Zero tolerance" may deter reporting out of fear of disproportionate discipline

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016)

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How Should Reporting Systems Work?

- Multiple avenues: Email and phone; manager and HR; multi-lingual complaint hotline, etc.
- Investigators are well-trained, objective, and neutral
- Timely responses and investigations
- Document all steps taken from the first point of contact, prepare a written report using guidelines to weigh credibility, and communicate findings to all relevant parties
- Supportive culture: Employees who receive complaints must take all complaints seriously; watch for and prevent retaliation
- Discipline is prompt and proportionate
- Fairness to all contributes to faith in the system; bad experiences deter future reporting

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016)

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When is Anti-harassment Training Effective?

- Do not limit to legal definition of harassment
- Focus on explaining what conduct is inappropriate
- Explain consequences (i.e. corrective action based on severity of conduct)
- Use examples and scenarios tailored to specific realities of worksite, organization and industry
- Consider conducting trainings in different languages, for different learning styles or levels of education
- Focus on reporting rights and responsibilities
- Provide training on a regular basis for all employees

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016)

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Where Does the Right Culture Come From?

- Leadership + accountability = culture
- Leadership must exhibit a commitment to a diverse, inclusive, and respectful workplace
- Accountability systems to enforce expectations
- Holistic, universal commitment to values; not compliance
- Harassment is fostered where management:
  - Does not model appropriate behavior,
  - Tolerates harassing conduct by others, or
  - Fails to support anti-harassment policies with appropriate resources

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016)

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When is Accountability Achieved?

- **Individual Accountability:** individual engaging in harassing behavior must be issued proportionate discipline
- **Bystander Accountability:** witnesses voice disapproval, intervene and report harassing behavior
- **Supervisor Accountability:** mid-level managers and front line supervisors must monitor and stop harassing behavior
- **Investigator Accountability:** investigations must be commenced and concluded promptly, fair and thorough, result in appropriate corrective action
- **Employer Accountability:** Reporting systems must be effective and fair
- **Use Metrics and Evaluations:** Accountability is function of formal and informal rewards

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June, 2016)

What are Risk Factors for Harassment?

- Homogenous Workforces
- Where Some Workers Do Not Conform to Workplace Norms
- Cultural and Language Differences in the Workplace
- Current Events/Social Discourse Outside the Workplace
- Many Young Workers
- "High Value" Employees
- Significant Power Disparities
- Reliance on Customer Service or Client Satisfaction
- Workplaces Where Work is Monotonous or Consists of Low-Intensity Tasks
- Cultures that Tolerate or Encourage Alcohol Consumption
- Decentralized Workplaces

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016)

Prevention Efforts Enhance Reaction

***Stancombe v. New Process Steel LP* (11th Cir. 2016)**

- Male plaintiff alleged that male coworker hugged him and touched his buttocks
  - Plaintiff reported the incident to his supervisor who reported to manager
  - Plaintiff was taken seriously, moved to a different department and shift, alleged harasser was directed to have no contact
  - Employer initiated investigation
- After another incident, plaintiff quit
  - Employer investigated both incidents, substantiating only that the alleged harasser placed his arm around plaintiff's shoulder
  - Suspended for three days for inappropriate physical contact

Prevention Efforts Enhance Reaction

***Stancombe v. New Process Steel LP* (11th Cir. 2016)**

- Summary judgment granted to employer
- Even if incidents constituted sexual harassment, employer would not be liable because employer took "reasonable care to prevent harassment by promulgating an anti-harassment policy" and taking actions "reasonably likely to prevent the misconduct from recurring"
  - Immediately and adequately investigating all incidents
  - Asking plaintiff to speak with an HR representative
  - Separating plaintiff and alleged harasser during investigation
  - Suspending alleged harasser for inappropriate contact, even when it determined that the contact was not of sexual nature or illegal

Preventing Harassment—What Can Employers Do?

- Identify risk factors and take proactive steps to address them
- Conduct a climate survey of employees to determine whether they feel that harassment exists and is tolerated in the workplace
- Visibly promote an inclusive workplace
- Clearly articulate behaviors that will not be tolerated
- Encourage employees to attain and maintain appropriate work culture
- Conduct effective trainings on anti-harassment policies and procedures
- Commit adequate money and time to prevention and investigation

EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016)

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2016

The Year in Review

Presented by:

Doreen Canton

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Sexual Orientation Discrimination

The Writing is on the Wall—Is That Enough?

- The EEOC has said that firing someone based on sexual orientation is sex discrimination.

  Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015)

- The 7th Circuit may soon agree.

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Sexual Orientation Discrimination

The Writing is on the Wall—Is That Enough?

- July 28, 2016:
  The 7th Circuit held that sexual orientation is beyond the scope of Title VII.
  - The 7th Circuit noted that the writing may be on the wall, "[b]ut writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent." *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016)
- By October 11, 2016:
  The 7th Circuit set aside its own ruling, agreeing to rehear the case en banc.

Matthew Bultman, *Full 7th Circ. To Hear Sexual Orientation Bias Row*, Law360 (October 11, 2016)

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Sex Discrimination

- Title IX
  - Women's basketball coach awarded $3.36 Million in California sex discrimination and retaliation suit.
  - The former coach's termination followed her protests that men's athletics were treated more favorably than women's.

Suevon Lee, Ex-SDSU Coach Who Fought Title IX Inequality Nets $3.3M Win, Law360 (10/03/2016)

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Sex Discrimination *(continued)*

- Rescinding Employment Offer
  - After receiving an offer of employment, new hire disclosed pregnancy.
  - Employer responded, stating "we appreciate you telling us beforehand," and rescinding her offer.
  - EEOC filed suit in July, 2016.

Maureen Minehan, Employer in Hot Water After Rescinding Offer to Pregnant Employee, Thomson Reuters Employment Alert, vol. 33, issue 18 (September 2, 2016)

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Religious Discrimination

- "Onionhead" is a Religion
  - EEOC action claimed that employer imposed upon its employees "Onionhead" or "Harnessing Happiness."
    - The Onionhead program, developed and implemented by the aunt of the CEO, involved "discussions about God, spirituality, demons, Satan, divine destinies, the 'Source,' purity, blessings, and miracles."
  - The employer argued that the program was a "a multi-purpose conflict resolution tool," while employees believed it to be a religion, claiming that they were terminated for rejecting Onionhead beliefs or for maintaining their own religious beliefs.
  - The court determined that Onionhead is a religion for the purposes of Title VII.

EEOC v. United Health Programs of Am., Inc., No. 14-CV-3673 (KAM)(JO), 2016 U.S. Dist. LEXIS 136625 (E.D.N.Y. Sep. 30, 2016)

Religious Discrimination

- Flu Shot Exemption: **Religious Accommodation**
  - Philadelphia Hospital sued by EEOC after firing 6 employees who refused a mandatory flu shot, seeking a religious exemption.
  - Fired despite policy that provided religious or medical exemptions, and allowed face masks as an accommodation.

Dan Packel, EEOC Says Hospital Denied Religious Vaccine Exemptions, Law360 (September 23, 2016).

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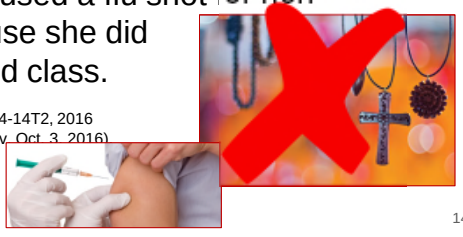
Religious Discrimination *(continued)*

- Flu Shot Exemption:
  Without Religious Reason
  - Hospital required flu shot with exemptions based on religious beliefs.
  - Hospital worker was not allowed to pursue religious bias claim when she refused a flu shot for non-religious reasons because she did not belong to a protected class.

Brown v. Our Lady of Lourdes Med. Ctr., No. A-4594-14T2, 2016 N.J. Super. Unpub. LEXIS 2177 (Super. Ct. App. Div. Oct. 3, 2016)



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Race Discrimination

- Dreadlocks Ban Permitted:
  - "[D]iscrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not."

EEOC v. Catastrophe Mgmt. Solutions, 26 Fla. L. Weekly Fed. C 782 (U.S. 11th Cir. 2016).

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Age Discrimination

- Photos of "Ideal" Employees Indicate Age Bias:
  - EEOC cites to photos of "ideal employees" sent to managers as indicating a preference for young, white female employees.
    - One human resources director reportedly stated to a former employee, "All you have to do is walk in the front door of one of our restaurants and see what people look like."

  - Unsuccessful job applications contained comments such as, "old."

Matthew Bultman, EEOC Raises 'Smoking Gun' In Texas Roadhouse Bias Row, Law360 (September 16, 2016).

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Age Discrimination *(continued)*

- 22.5% of EEOC charges in the last fiscal year were claims of age discrimination.
  - Claims resulted in $99.1 million in monetary benefits obtained by the EEOC for the claimants.

$99.1 Million

- Avoiding Age Discrimination:

  - Review how you've treated other—especially younger—employees for similar misconduct before disciplining or firing employees over age 40.
  - Train your supervisors to avoid age-related comments.
  - Focus on the employee's job performance over age.

Steven Gutierrez, Lessons in Proactively Avoiding Age Discrimination, Law360 (October 12, 2016).

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Disability Discrimination

- Diabetic Employee Allowed to Drink Orange Juice

  - Diabetic cashier drank an orange juice to offset symptoms of hypoglycemic episode, then paid for the drink after the emergency had passed.
  - Fired for violating store's "anti-grazing policy."
  - Awarded $277,565.
    - Employer failed to accommodate disability when it previously refused to let her keep juice nearby at the cash register and when it terminated her employment because of her disability.

Kevin McGowan, Fired Diabetic Dollar General Cashier, Wins $278K ADA Verdict, Bloomberg BNA (September 19, 2016).

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Disability Discrimination *(continued)*

- Obesity Not an Impairment
  - Employer rescinded conditional offer because of plaintiff's obesity.
  - Ninth Circuit determined that his obesity was not extreme enough to qualify as an impairment under Montana law.
    - Montana Supreme Court previously determined that obesity must be "severe" (body weight more than 100% over the norm) to qualify as an impairment.
    - At 220 pounds, plaintiff's weight determined to be within normal range, and therefore, was not an impairment.

Kelly Knaub, 9th Circ. Asked to Rehear Ruling Obesity is Not an 'Impairment', Law360 (September 23, 2016).

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Handling Workplace Disability Issues

- Tips for Supervisors:
  - ADA reasonable accommodation obligation requires preferential treatment.
  - Individual supervisors should not independently make the decisions regarding accommodation or determination of undue hardship—encourage supervisors to involve HR or the legal team as soon as possible in the process.
  - Expediting the interactive process will help defend against future discrimination claims—be quick, but effective.
  - Keep the employee's medical information private—don't seek it unless you need it.

Katarina E. Klenner, *NELI Offers Best Practices for Handling Workplace Disability Issues*, Law360 (September 29, 2016)

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SEC Enforces Whistleblower Case

- Section 21F of the Exchange Act prohibits retaliation against whistleblowers who report potential violations to the SEC or otherwise assist in an enforcement action.
- The SEC, though it did not allege a violation of securities laws, pursued the whistleblower retaliation claim, imposing a civil money penalty in the amount of $500,000.

In the Matter of International Game Technology, 2016 SEC LEXIS 3688

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Contractor Sick Leave

- The Department of Labor has issued its final rules implementing President Obama's Executive Order 13706 requiring federal contractors and subcontractors to provide certain employees with up to 7 days paid sick leave annually.
- The rules, among other things:
  - Require coverage for certain contracts awarded or renewed effective January 1, 2017.
  - Define eligible employees and contractors.
  - Define acceptable accrual methods for paid sick leave.
  - Require payment of unused sick leave upon termination.

Employee Recruiting Practices

- Potential Lawsuits stemming from employee recruiting practices:
  - Discrimination/Failure to Hire.
  - Negligent Hiring.
  - Breach of Implied Contract.
  - Invasion of Privacy.
  - Intentional/Negligent Infliction of Emotional Distress.

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Employee Recruiting Practices

(continued)

- Employer Tips:
  - Job postings should be concise and neutral when stating job requirements.
  - Consider linking your company website to the posting rather than describing the company in the posting.
  - Avoid screening applicants on social media if it is not relevant to the applicant's position.
  - Make sure hiring managers are trained and work with HR.

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EEOC on Retaliation

EEOC Enforcement Guidance on Retaliation and Related Issues (Aug. 29, 2016)**:**

- Employer Takeaways:
  - Both participation and opposition are considered protected activities.
  - The law protects more than just employees.
  - Complainants should still be expected to perform their jobs.
  - A combination of evidence can support retaliation claims.
  - Employers must prevent ADA interference as well.
  - Effective practices such as written policies, adequate training, and proactive follow-up and support can prevent claims.

Maureen Minehan, Six Important Takeaways from New EEOC Retaliation Charge Guidance

Workplace Investigations

- Second Circuit held that "Cat's Paw" theory of employer liability applies to Title VII claims.

  - Second Circuit extended Cat's Paw liability to include situations in which the decisionmaking process is influenced by a coworker with discriminatory animus.
  - An employer is liable under Title VII when, "through its own negligence, the employer gives effect to the retaliatory intent of one of its—even low-level—employees."

Patrick Dorrian, *Watch Out for Witness Bias in Workplace Investigations*, Bloomberg BNA (September 1, 2016).

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EEOC Priorities

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