

# SECURE YOUR OWN MASK BEFORE ASSISTING OTHERS: FLYING THROUGH A YEAR OF REGULATORY AND LITIGATION-BASED THREATS TO EMPLOYERS (A/K/A THE YEAR IN REVIEW)

32<sup>nd</sup> Annual Labor & Employment Conference

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# YOU'VE HEARD THIS BEFORE, BUT...



# DEPARTMENT OF LABOR



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## PANIC IN PAYROLL

Paul will no longer be exempt once the new DOL regulations come into play. His employer still wants to pay him a weekly salary. He regularly works between 40 and 43 hours in a workweek, absent unusual and rare circumstances.

The hourly equivalent of Paul's current salary is \$16/hour. Accordingly, his employer sets his new weekly salary to be \$760  $[(\$16 \times 40) + (\$16 \times 1.5 \times 5)]$ . For any hours over 45 in a workweek, Paul receives an additional \$24/hour  $(1.5 \times 16)$ .

Will this method of payment be acceptable to the DOL?

- A. Yes
- B. No

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## PANIC IN PAYROLL (CONT.)

- Paul receives the same pay for his hours worked between 40 and 45 in a workweek, whether he works one overtime hour or five. The DOL would be unlikely to view any of Paul's salary to include the appropriate overtime premium.
- Under Section 7(f) of the FLSA an employer may pay a constant sum for varying amounts of overtime work ONLY if:
  1. The employee's duties "necessitate irregular hours of work"
  2. The employee is employed under an individual or union contract specifying a regular hourly rate (of at least the FLSA's minimum wage) for hours worked up to 40 in a workweek, plus 1.5 times that specified rate for hours worked over 40
  3. The contract provides for a weekly guarantee of straight-time and overtime pay, based upon that specified rate, for not more than 60 hours

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# PROPOSED REGULATIONS REGARDING EXEMPTIONS

The DOL is proposing to:

- Raise the minimum annual salary level required for “white-collar” exemptions to **approximately \$50,440 (or about \$970 per week)**, up from the current \$23,660 (\$455 per week) - an increase of 113%
  - Nondiscretionary bonus may be included
- Change highly-compensated employee exemption from \$100,000 to **\$122,148** annually
- Automatically “update” (*i.e.*, raise) the above salary levels every year
- Final Rule may modify the standard duties tests for “white-collar” exempt employees, including possible tighter limits upon the amount of “nonexempt work” that can be performed by an exempt employee

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## HE'S AN INDEPENDENT CONTRACTOR, I PROMISE

After completing the necessary training, George installed satellite dishes for Bam! Dish Company clients six days each week from 5:00 a.m. until midnight. George drove to and from installation jobs in his wife's van for which he held auto insurance. He used his own tools to complete the installations. Bam! supplied George with the dishes, transmitters, and modems, and reimbursed him for the cost of cement. George supplied all other materials needed for the installation. Bam! paid George \$200 for each installation. George did not enter into any contract with Bam! George was permitted to work other jobs. George was also permitted to decline jobs from Bam!; however, he never did. George worked for Bam! for 20 months and resigned. George claims that Bam! did not compensate him adequately as an employee under the FLSA by failing to pay him overtime. Would the DOL WHD classify George as an employee or an independent contractor?

- A. Employee
- B. Independent Contractor

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# EMPLOYEE VS. INDEPENDENT CONTRACTOR

- On July 15, 2015, at the request of interested employers, the Administrator of the Labor Department's Wage and Hour Division published a 15-page memorandum of guidance addressing the proper classification of workers. The memo can be found on the DOL's website: [www.dol.gov](http://www.dol.gov)
- The memorandum "clarified" that, under the Fair Labor Standards Act, (as interpreted by the DOL) the definition of employee is much broader than what some employers believe and what some court rulings have determined
  - Practical Implication: Implementation of the DOL's guidance will make it much more difficult for employers to classify workers as independent contractors

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## INDEPENDENT CONTRACTOR – COMMON SENSE RULES

- Am I paying a company? (Individual more likely to be an employee)
- Does the contractor choose the workers it sends? (If you're hiring a company, you're buying results, not particular workers)
- Does the person offer services to the public? (If person works only for you, more likely employee)
- Is the person working FOR (not in) the business? (Washing your windows vs. making/selling your widgets)
- Am I paying a monthly invoice amount? (Paying hourly / commission, more likely to be an employee)

If you answered “NO” to any of these questions, you're in the gray zone

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## JOINT EMPLOYER?

George is employed by Bam! Dish Company. Bam! is an independent subcontractor to Big Dish Network. Bam! hired and pays George. Big Dish Network reserves the right to remove a dish installer (but not fire or discipline worker), sets the work schedule and order of work, and along with Bam!, monitors the work quality.

Who employs George?

- A. Bam! and Big Dish Network jointly employ George
- B. Only Bam! employs George
- C. Only Big Dish Network employs George

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# DOL ENFORCEMENT EFFORTS

- DOL seeks to find joint employment – making more employers liable
- On January 20, 2016, the WHD issued Administrator's Interpretation No. 2016-1 ("AI")
- The WHD intends to turn up the heat on companies by using a joint employment analysis that will result in holding as many entities as possible fully liable for wage-and-hour and other violations
  - The AI will result in finding a joint employer relationship between many supplier and user employers
  - Focus on the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries

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# WHAT THE AI MEANS

- Responsibilities of Joint Employers
  - Both employers responsible for FLSA compliance
  - Employee gets OT if works more than 40 hours total
  - FMLA: Staffing company responsible for implementing; client company must accept person back
- To Do
  - Read your contracts – are you indemnifying the other employer's errors?
  - Have the parties allocated risk between them?
  - Can you audit others' compliance?

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## OTHER DOL “INITIATIVES”

- Media campaigns (including blogging, press releases and social media)
- Push to raise minimum wage
- Push for paid sick leave (NPRM – “Establishing Paid Sick Leave for Federal Contractors” – Comments closed April 2016)
- OFCCP Rule implementing Executive Order 13672 (signed by President Obama in July 2014) prohibiting sexual orientation or gender identity discrimination by federal contractors or subs; took effect for contracts made or modified after April 8, 2015
- Fiduciary rule
- Employers to pay for kids’ diapers too?

# NATIONAL LABOR RELATIONS BOARD



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# NLRB – UPDATE – SPEEDY ELECTIONS

- Speedy Election Rule – Effective as of April 14, 2015
- Cuts the time it typically took to hold a union representation election from 38 days to between 15 and 25 days. This seriously hampers the employer’s ability to campaign against the union.
- Employers must be prepared for union organizational efforts
  - Train all supervisors and managers on the benefits of remaining union-free, warning signs of union organizational activity, and how supervisors and managers are to respond to potential activity
  - Develop a corporate strategy on how to remain union-free
  - Train all supervisors and managers on managing in a union-free environment, including fair application of policies, communication and issue resolution

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# NLRB – UPDATE – SPEEDY ELECTIONS

- More To-Do's
  - Review all policies and procedures to make sure they are compliant with the NLRB's new rulings on social media and courtesy policies
  - Communicate the company's union-free message to all employees
  - Proactively review your union free strategy and consult with a labor relations expert if necessary
  - **One thing is for certain:** waiting until the petition for election is filed will not provide your company sufficient time to prepare for an election

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# NLRB – UPDATE – GC MEMO EMPLOYEE HANDBOOKS

On March 18, 2015, NLRB General Counsel Richard Griffin, Jr. issued Memo GC 15-04, intending to bring some clarity to the NLRB's sweeping enforcement against employee handbook policies his office has deemed to be overly broad and infringing on workers' section 7 rights. GC Griffin identified eight categories of rules that have frequently come before the Board, and provides examples of lawful and unlawful wording

- Confidentiality Policies
- Employee-Management Conduct Policies
- Employee-Employee Conduct Policies
- Employee Interaction with Third-Party Policies
- Policies on the use of Company Logos, Copyrights and Trademarks
- Policies that Limit Photography and Recording
- Policies that Restrict Employees from Leaving Work
- Conflict of Interest Policies

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# NLRB – UPDATE – GC MEMO EMPLOYEE HANDBOOKS

- Take-A-Ways
  - This Guidance affects not only union, but also non-union employers
  - Employers should compare their handbook policies to those addressed by the GC
  - If any policies appear to be unlawful or questionable, contact labor and employment counsel to address the deficiencies and to prepare workable policies that are likely to survive GC’s scrutiny

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# NLRB UPDATE – JOINT EMPLOYER & PERSUADER RULE

- Joint Employer – Definition is in flux. NLRB focused on changing employment landscape as reason to change the definition (staffing companies/temp agencies). Questions to ask when determining joint employer status include (1) whether both entities are employers within the meaning of common law and (2) whether they share or co-determine those matters governing the essential terms and conditions of employment. Factors to examine include whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary or whether it has reserved authority to do so. Joint employers are jointly and severally liable for employment issues including FLSA claims. McDonalds joint employer litigation underway now.
- Persuader Rule – Took effect April 25, 2016. Will be applicable to arrangements, agreements and payments made on or after July 1, 2016. Will require public disclosures of any consultants that employers hire to thwart union organizing. The rule will require them to report when they “plan, direct or coordinate managers to persuade workers; provide persuader materials to employers to disseminate to workers; conduct union avoidance seminars; and develop or implement personnel policies or actions to persuade workers” on union organizing. The rule won’t require employers/consultants to disclose the content of the advice offered.

# EQUAL EMPLOYMENT OPPORTUNITY COMMISSION & TITLE VII



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**“IT”**

Victor was born a woman, but transitioned to male before being hired by a grocery store. Several months after being hired, Victor claimed he was harassed on a daily basis by his grocery store coworkers. He claims they repeatedly referred to him as “she,” or even worse, “it.” He says he complained to management, but that management refused to address his complaints.

Victor filed a lawsuit against the grocery store for sex discrimination under Title VII arguing that (1) the grocery store discriminated against him because of his transgender status and (2) because he failed to act and/or identify with his gender (a/k/a sex stereotyping).

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## “IT” (CONT.)

If the grocery store asks, will the Court dismiss Victor’s claims?

- A. Dismiss both claims
- B. Dismiss only the transgender claim
- C. Dismiss only the sex stereotyping claim
- D. Dismiss neither claim

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# LGBT DISCRIMINATION

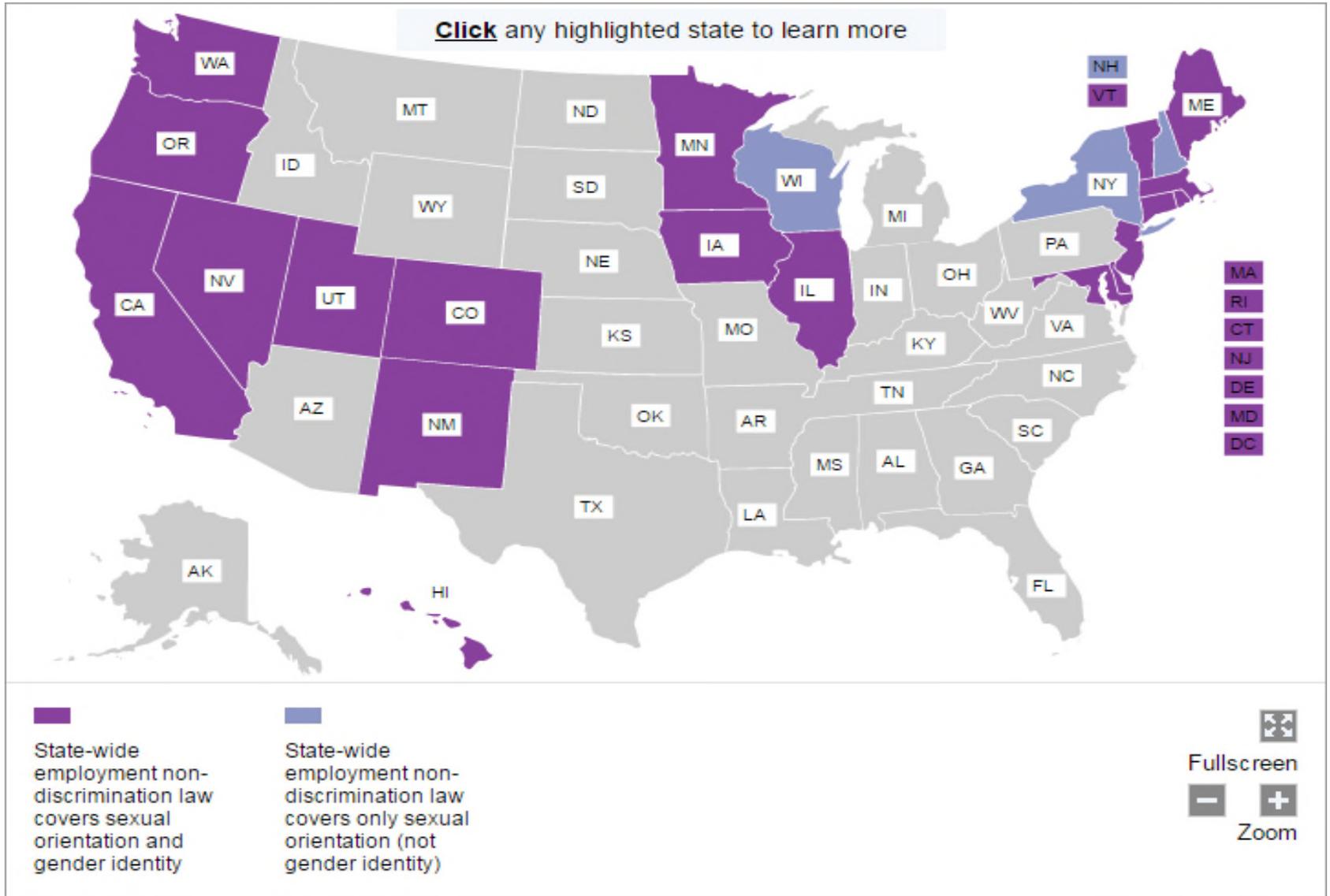
- No federal statute explicitly protects LGBTQ persons from workplace discrimination
- Title VII prohibits discrimination because of an individual's sex
  - *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (“sex” within the context of Title VII encompasses both the biological differences between men and women as well as a person’s failure to conform to stereotypical gender norms)
  - *Christiansen v. Omnicom Group, Inc.*, 2016 U.S. Dist. LEXIS 29972 (E.D.N.Y. 2016) (sexual orientation is not a protected class under Title VII)
  - *United States v. Southeastern Okla. State Univ.*, 99 Empl. Prac. Dec. (CCH) P45,354, 2015 U.S. Dist. LEXIS 89547 (W.D. Okla. July 10, 2015) (Court found the alleged discrimination occurred allegedly because of the plaintiff’s presented gender, and she falls within a protected class)

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## LGBT DISCRIMINATION (CONT.)

- EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation
  - *Macy v. Holder*, Appeal No. 0120120821 (EEOC Apr. 20, 2012) (“discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex, and . . . violates Title VII”)
  - *Baldwin v. Dep't of Transportation*, Appeal No. 0120133080 (EEOC July 15, 2015) (Discrimination against an individual because of that person's sexual orientation is sex discrimination under Title VII)

# STATE LAWS

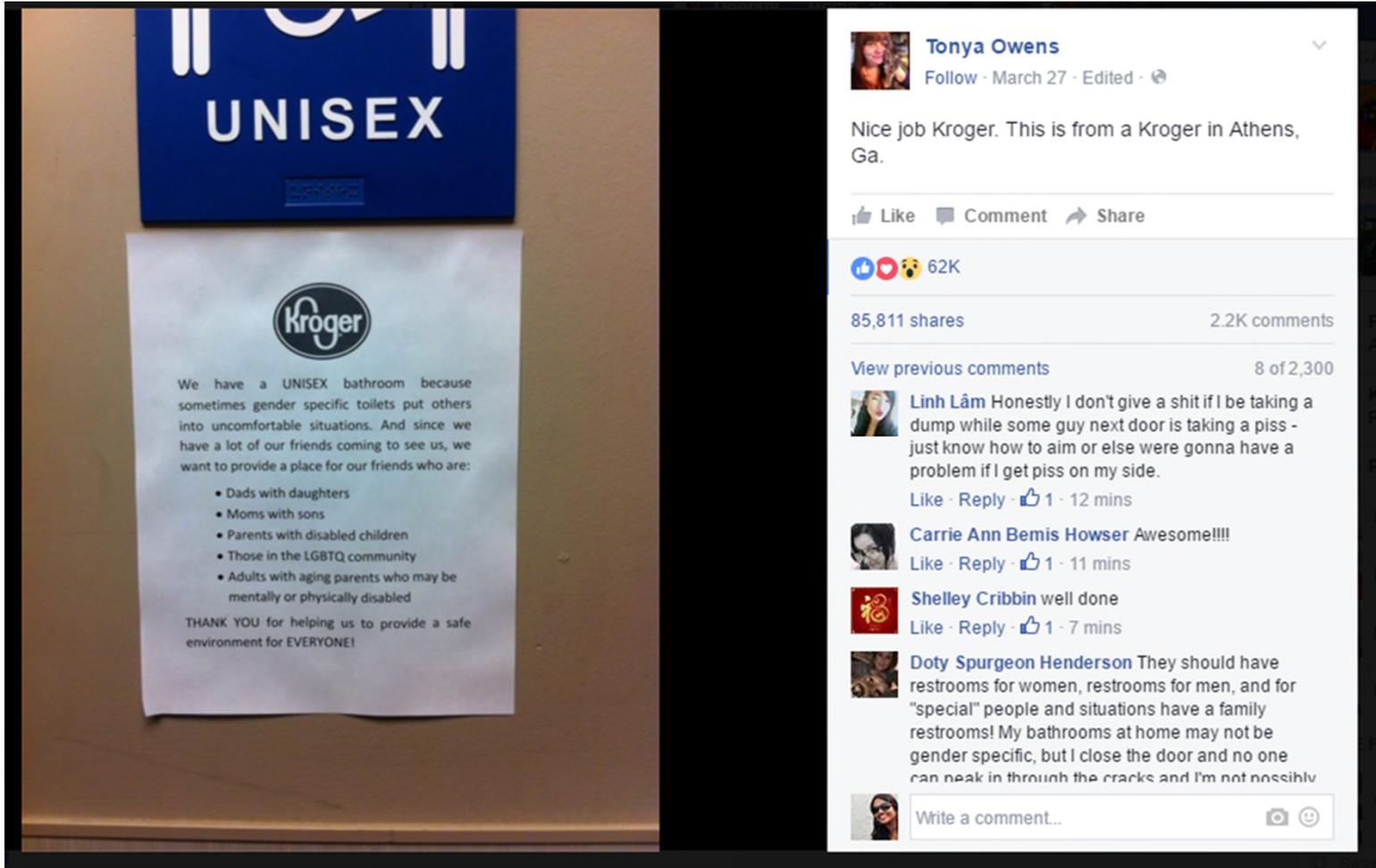


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# DUTY TO ACCOMMODATE



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## DUTY TO ACCOMMODATE (CONT.)

- On June 9, 2015, OSHA (which is part of the DOL) issued A Guide to Restroom Access for Transgender Workers
- Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity
- As a best practice, some employers may choose to offer (but should not require) use of
  - Single-occupant gender-neutral facilities, and/or
  - Multiple occupant gender-neutral restroom facilities with lockable single occupant stalls
- As a best practice, employers should not ask employees to present medical or legal documentation of their gender identity

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## THE NEEDY SUPERVISOR

Harry is Sally's supervisor at Hurry Up Foundation. Sally is a development officer. Part of her job is to meet with possible sponsors for Hurry Up's events. She drives a lot. Harry is constantly texting Sally while she is driving. If Sally doesn't respond immediately, Harry sends Sally an email to reprimand her, copying the Director of Development. Hurry Up Foundation is smart and has a no texting and driving policy. Sally files a Complaint with OSHA.

Is Hurry Up Foundation in trouble?

- A. No, its no texting and driving policy is OSHA compliant
- B. No, Harry did not know Sally was driving
- C. Yes, Harry made Sally's texting and driving a practical requirement of her job

# DISTRACTED DRIVING ON COMPANY BUSINESS

- The DOL through OSHA is partnering with the Department of Transportation to combat distracted driving
- OSHA's focus on texting while driving
  - OSHA calls upon employers to prohibit any work policy or practice that requires or encourages workers to text while driving
- Employers who require their employees to text while driving—or who organize work so that doing so is a practical necessity even if not a formal requirement—violate the Occupational Safety and Health Act



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# DISTRACTED DRIVING ON COMPANY BUSINESS: EMPLOYER BEST PRACTICES

- Employers should
  - Work with their trusted insurance broker to design risk reduction efforts that put safety first and help identify any loopholes in policies and coverage
  - Draft a clear, comprehensive and enforceable traffic safety policy that does not violate varying state laws, and communicate the policy to all employees
  - Require hands free calls and/or that the driver pull over before taking a company or employment related call

# SUPREME COURT, 2015-16



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# DO WE REALLY NEED TO KEEP ACCURATE PAY RECORDS???

PIGS 'R US meat processing plant hires “kill, cut, and retrim” pork workers. The workers are required to wear personal protective equipment (“PPE”). PIGS 'R US deemed the time to put on and take off the PPE not compensable. They paid employees a separate amount for that time. The employees filed a collective action claiming they weren't paid enough money under the state and federal wage and hour laws. During the trial, the PIGS 'R US said the employees “statistical sampling evidence,” a few iPhone videos recording the time certain employees spent to put on and take off the PPE, was not fair, not accurate.

Should a court ban the evidence?

- A. Yes, the evidence was unfair to PIGS 'R US
- B. No, PIGS 'R US did not keep accurate records

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# **CAN SELF-FUNDED EMPLOYER-SPONSORED MEDICAL PLANS STILL GET THEIR MONEY BACK UNDER ERISA? (SUBROGATION AND REIMBURSEMENT RIGHTS)**

- When an ERISA-plan participant
- Wholly dissipates a third-party settlement
- On non-traceable items

Can the plan fiduciary bring suit?

A. Yes

B. No

# WHAT ELSE?



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# MICHIGAN SUPREME COURT

- Can non-disclosure or non-compete be enforced where plaintiff terminated the business relationship within two weeks after the agreements were signed?
- *Innovation Ventures v. Liquid Mfg.*, No. 315519, 2014 Mich. App. LEXIS 2058 (Mich. Ct. App. Oct. 23, 2014), appeal granted, 498 Mich. 859 (July 1, 2015)
- Oral argument held, March 9, 2016



# STATE AND LOCAL “LAWMAKERS” HAVE BEEN BUSY TOO !

- In 2015 alone:
  - 10 states (and various additional municipalities) enacted minimum wage increases
  - 11 states enacted Veterans Hiring Preferences
  - Five states (and several municipalities) enacted additional Equal Pay Act protections
  - Three states (and several municipalities) enacted or amended Paid Sick Leave requirements



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## STATE AND LOCAL “LAWMAKERS” HAVE BEEN BUSY TOO ! (CONT.)

- Six more states limited employer access to social media
- Three states enacted “Intern” protections from harassment/discrimination
- Five states enacted Pregnancy Accommodation requirements
- Five states legalized Medical Marijuana usage
- Two states (and several cities) enacted new limitations on criminal history information during hiring
- Two states enacted protections for Domestic Violence/Stalking victims
- Two states enacted parental leave/familial status protections

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# QUESTIONS?



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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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