

# Hot Labor and Employment Topics for 2014

Delaware Valley Employment Conference

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## SUPREME COURT – HOT CASES

- First Amendment Challenge to the Affordable Health Care Act;
- Retaliation;
- “Supervisor” in harassment cases defined.



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## HOBBY LOBBY, INC. V. SEBELIUS

- Several Courts of Appeals have issued conflicting opinions on whether a corporation can object to ACA's requirement that the corporations provide the required contraceptive drugs/devices by citing the Religious Freedom Restoration Act (RFRA).
- At issue in the Supreme Court in ***Hobby Lobby***:
  - Whether the RFRA allows a for-profit corporation to deny coverage for contraceptives based on religious objections where its employees are otherwise entitled to such coverage under federal law, i.e., the ACA?

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## RETALIATION

- In **University of Texas Southwestern Medical Center v. Nassar**
  - A plaintiff claiming retaliation under Title VII must meet the stricter "but-for" causation standard to succeed.
  - The termination would not have occurred *but for* the employer's retaliatory action.
- Now, employees alleging retaliation have a higher causation standard than employees alleging status-based discrimination.
- Heightened standard increases likelihood of summary judgment.

## EMPLOYER LIABILITY FOR HARASSMENT

Employer's liability for workplace harassment generally depends on the status of the harasser and the type of harassment alleged.

Harasser's Relationship with Victim	Type of Harassment Alleged	Employer's Liability
Supervisor	Tangible Employment Action	Strict Liability
Supervisor	Hostile work environment, no tangible employment action	Vicarious liability unless (1) employer exercised reasonable care to prevent and correct harassment; and (2) victim unreasonably failed to take advantage of preventive or corrective opportunities.
Co-Worker	Hostile work environment	Liable if (1) knew or should have known of harassment; but (2) failed to take prompt action to correct harassment.

## EMPLOYER LIABILITY FOR HARASSMENT (CONT.)

- Previous Supreme Court cases did not define the term supervisor.
- In **Vance v. Ball State**, the Supreme Court rejected the EEOC's broad definition of "supervisor"
  - An employee is a "supervisor" for purposes of vicarious liability only when the employer has empowered that employee to take tangible employment action against the victim, i.e. ability to hire, fire, fail to promote or a decision causing a significant change in benefits.
- Employers should review and revise job descriptions and performance expectations for supervisor-level employees to clarify supervisory responsibilities.
- Employers must continue to guard against discriminatory, harassing behavior and promptly investigate any allegations of harassment, discrimination or retaliation to demonstrate reasonable care in addressing or correcting inappropriate conduct.

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## NLRB ELECTION RULES – SPEEDY VOTE RULE REVIVED

- Speedy Vote Rule revived
- Purpose is to cut the time it takes to hold a union representation election.
  - Limits pre-election hearings
  - Limits post-hearing briefs
  - Limits right to appeal Regional Director's decision to the full Board
  - Makes Board review of post election objections discretionary
  - Discontinues Board 25 day election rule.
- US DC Circuit has held that the Board that enacted new regulations did not have a quorum.
- New Board is appointed, it could vote on the rules.
- Department of Labor may issue new Persuader Rules which will limit the services an attorney may provide during an election campaign.



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## MICRO UNITS

- In *Park Manor*, the Board held that it would use a broad approach in non-acute care facilities to determine the proper bargaining unit.
- In *Specialty Health Care*, The Board rejected the *Park Manor* standard and adopted the "Community Of Interest" standard for determining the proper unit for bargaining. The Board certified a micro unit consisting of a small group of employees.
- Since *Specialty Heath Care*, the Board has permitted micro units in:
  - Construction Cases
  - Nuclear Power Plants

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## MEDICAL MARIJUANA: HYPOTHETICAL

A non-union worker in a Delaware-based manufacturing plant is undergoing treatment for cancer. The employee is a registered and qualifying medical marijuana patient. The employer has a Drug Free Workplace Policy which is enforced by random drug screenings, especially for workers who handle heavy equipment and machinery. Employees who fail drug tests are subjected to discipline, up to and including termination.

The employee reports to work as scheduled and performs his work in an acceptable manner. He does not use medicinal marijuana on the job nor does he report to work impaired. The employee does use medicinal marijuana when he is home in the evenings and also on the weekends. Employee's name comes up for a random drug screen and he tests positive for marijuana.

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## WHAT CAN THE EMPLOYER DO WITH REFERENCE TO THIS EMPLOYEE?

- A. The employer can and should terminate the employee. Marijuana is illegal under federal law and accordingly the employer is not obligated to offer accommodation under the ADA;
- B. The employer can terminate the employee because he has violated the employer's drug policy.
- C. The employer cannot terminate the employee because medical marijuana is legal in Delaware.
- D. While the employee is not covered under the ADA, the employee maintains a protected status in the State of Delaware and may be entitled to accommodations.

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## MEDICAL MARIJUANA

- New Jersey and Delaware have medical marijuana laws which exempt a “qualifying patient” and “primary caregiver” from criminal prosecution under state law when engaging in the “medical use of marijuana.”
- While there is a pending Bill to legalize medical marijuana in Pennsylvania, the Governor has stated he will veto the Bill.
- Almost half the states in the US have now passed laws legalizing the controlled distribution of medical marijuana.
- Colorado and Washington recently legalized “recreational” use of marijuana.

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## MEDICAL MARIJUANA: NO DUTY TO ACCOMMODATE UNDER ADA

- The ADA does not require an accommodation for “illegal drug use.”
- As the ADA is a federal statute, “illegal drug use” is defined by federal rather than state law.
- Marijuana is a Schedule I controlled substance under the Federal Controlled Substance Act -- any use is illegal under federal law.
- Accordingly, the ADA does not require accommodation for marijuana use
  - Under the ADA employers can discipline employees who test positive for marijuana, even if they hold a legal prescription for medical marijuana.

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## MEDICAL MARIJUANA: STATE PROTECTIONS FOR EMPLOYEES?

- Most states with medical marijuana laws do not provide any employment protections.
- Supreme Courts in at least 4 states, including California, Oregon, Washington and Montana, have upheld employer decisions to discharge employees for violating drug policies, despite the fact that the employees were medical marijuana patients.
- A few states have medical marijuana laws which provide some protection for employees who use marijuana.
  - In Connecticut, Maine, Rhode Island and Illinois, medical marijuana patients have protected status.
- Delaware and Arizona have adopted more explicit statutory language that bars employers from discriminating against registered and qualifying patients who have failed drug tests for marijuana.
- Employers in Delaware and Arizona do have defenses where the employee either used, possessed or was impaired by marijuana while on the job.

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## MEDICAL MARIJUANA: HYPOTHETICAL (ANOTHER ISSUE FOR EMPLOYERS - IMPAIRMENT)

A non-union factory worker in a Delaware-based manufacturing plant is also undergoing treatment for cancer. The employee is a registered and qualifying medical marijuana patient. The employer's Drug Free Workplace Policy is enforced by random drug screenings, especially for factory workers who handle heavy equipment and machinery. Employees who fail drug tests are subjected to discipline, up to and including termination.

The employee reports to work as scheduled and performs his work in an acceptable manner. He does not use medicinal marijuana on the job nor does he report to work impaired. The employee does use medicinal marijuana when he is home in the evenings and also on the weekends. Employee's name comes up for a random drug screen and he tests positive for marijuana.

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## WEEKEND USER – DOES YOUR ANSWER CHANGE?

- A. The positive test is proof of impairment and the employee should be terminated.
- B. Regardless whether the employee was impaired, he tested positive for marijuana and should be terminated.
- C. The employee maintains a protected status in Delaware and cannot be terminated.
- D. The employer needs to follow up and determine whether the employee was impaired on the job.

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## SEXUAL ORIENTATION DISCRIMINATION - HYPOTHETICAL

William works as a machine operator for ABCO at the Company's plant in Clarkhill, Pennsylvania. William is openly homosexual, and wears a gay pride rainbow sticker on his hard hat. He files his nails while on breaks, and speaks in a soft, effeminate voice. He does not, however, openly talk about gay rights at work. He is in a long term relationship and has never made overtures toward a co-worker.

William applies for a vacant, supervisory position, but the position is awarded to Joe, a big and tough, masculine worker who has worked for ABCO for fewer years than William and who is not as strong of a performer. When William asks his boss why he did not get the promotion, he is told that management was concerned that William was not tough enough to supervise a group of predominately male employees.

William complains to Human Resources about the fact that he did not receive the promotion. He expresses his belief that despite the fact that he was more qualified for the job, he was not considered because of his sexual orientation. Clarkhill, Pennsylvania does not have a statute prohibiting sexual orientation discrimination.

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## IS ABCO AT RISK OF LIABILITY EXPOSURE IF WILLIAM BRINGS A CLAIM?

- A. While the supervisor's actions are unfortunate, there is no potential legal liability, because sexual orientation is not a protected status Title VII or state law.
- B. The supervisor's actions are illegal because sexual orientation is a protected classification.
- C. Although sexual orientation discrimination is not illegal, the Company is potentially liable to William for sex discrimination under a theory of sex stereotyping.

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## SEXUAL ORIENTATION DISCRIMINATION – KEY POINTS

- Sexual orientation is not a legally-protected classification under federal law
  - Lawmakers tried to introduce Employment Non-Discrimination Act (ENDA), most recently during the second half of 2013.
- Sexual orientation is not a legally-protected classification under Pennsylvania law.
- Twenty-one states, including New Jersey and Delaware, have statutes prohibiting discrimination based upon sexual orientation.
  - Discrimination based upon sexual identity is also unlawful in New Jersey and Delaware.
- Numerous municipalities, including Philadelphia and Pittsburgh, have enacted ordinances prohibiting discrimination based upon sexual orientation.
- Even in jurisdictions that do not have legislation that prohibits discrimination based upon sexual orientation, employers may be liable on a theory of "sex stereotyping/gender nonconformity."
- Employers should consider prohibitions on sexual orientation discrimination in their Policies.

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## TRANSGENDER DISCRIMINATION

- 15 States, including New Jersey and Delaware, and the District of Columbia prohibit discrimination against transgender people.
- If ENDA is signed into law, it will protect gay, lesbian, bisexual and transgender people.
- The EEOC recently found that discrimination against a transgender individual because transgender discrimination is based upon sex and a violation of Title VII.
- Employers should set a tone of tolerance, sensitivity and mutual respect when dealing with transgender issues.
- Employers who face transgender issues (i.e. bathroom designations) in the workplace should consult with counsel, their staff and the transgender employee to create an atmosphere that is acceptable for all.

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## INCREASED WAGE AND HOUR ENFORCEMENT - HYPOTHETICAL

Because of increased labor costs, ABCO's management has asked you to create a new policy that restricts the amount of overtime that employees can work. Which statement should not be included in ABCO's new policy?

- A. Employees must obtain approval before working overtime each week.
- B. Employees may not work away from the office without prior approval. Employees will not be paid for work away from the office without advance approval.
- C. Employees may take up to two breaks per day, for no more than 15 minutes each. These breaks will be unpaid.
- D. All of these statements should be included in the policy.
- E. None of these statements should be included in the policy.



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## INCREASED WAGE AND HOUR ENFORCEMENT

- Employers must pay non-exempt employees for all hours worked, even “unauthorized” overtime.
- Employers should define standards about when and under what conditions work is permitted away from the workplace.
  - For example, are employees permitted to remotely access the computer system? Are employees permitted to check e-mails at night?
- Employers should ensure that non-exempt employees accurately and completely record all hours worked.
- Generally, Pennsylvania employers are not required to provide meal or rest breaks to employees.
  - If rest periods are provided, any break of less than 20 minutes must be paid.
- Employers are required to provide non-exempt nursing mothers with reasonable breaks to express breast milk for nursing child for one year after the child’s birth.

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## INCREASED WAGE AND HOUR ENFORCEMENT - HYPOTHETICAL

Because of all of the problems that ABCO has had with hiring employees, ABCO decides that it is going to hire independent contractors instead of employees. These contractors sign independent contractor agreements, use their own tools in ABCO’s facility, are paid a flat fee each day worked (5 days for 11 hours each day) and report to ABCO’s manufacturing supervisor. They are not contracted for a set term.

About six months after the contractors are hired, you receive a call from the Department of Labor, advising that they will be conducting an audit of ABCO’s Philadelphia facility. You are instructed to have all payroll information as well as all information, documents and data concerning independent contractors ready when the DOL arrives (in one week).

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## WILL THE DOL FIND ABCO IN COMPLIANCE WITH WAGE AND HOUR LAWS WITH RESPECT TO ITS INDEPENDENT CONTRACTORS?

- A. Yes, because the independent contractors signed independent contractor agreements and do not receive W-2s, the DOL will find that ABCO is in compliance with wage and hour laws and move on to its next investigation.
- B. No. The DOL will find that the independent contractors are actually employees, but will just ask ABCO to change the workers' status going forward. The DOL will not assess any penalties or monetary damages.
- C. No. The DOL will find that ABCO retained control over the independent contractors and that they were in fact employees. The DOL will assess back wages for the workers for overtime hours worked. In addition, the DOL will look at whether the workers have been denied family and medical leave, unemployment compensation insurance and similar benefits that are offered to employees.

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## INCREASED WAGE AND HOUR ENFORCEMENT

FY 2014 budget for wage and Hour Division (WHD) of Department of Labor includes:

- \$16 million funding increase for WHD
- \$14 million to combat misclassification of workers as independent contractors
- \$3.4 million to support greater enforcement of FLSA and FMLA
- \$5.8 million for new integrated information technology system
- Addition of 63 full time employees for a total of 1,867 full time employees

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## INCREASED WAGE AND HOUR ENFORCEMENT

- Targeted investigations, as opposed to complaint-based investigations to ensure compliance.
- Use of penalties, sanctions and other compliance mechanisms to deter violations.
- Focus in industries in which subcontracting, independent contractors and contingent workforces are prevalent.
- Continue to coordinate federal and state efforts to address violations arising from misclassification.
- Use of new technology will allow improved efficiency and ability to develop profiles of violators.

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## PROACTIVELY ADDRESSING WAGE AND HOUR ISSUES



- Regularly review pay practices including classification of employees and independent contractors.
- Regularly review exemptions under FLSA, to determine whether employees are performing exempt job duties and being paid on a salary basis.
- Educate management and supervisors regarding employer/independent contractor classification and treatment, and FLSA and FMLA obligations.
- Educate field management about their role in the investigative process, if the DOL conducts an audit.

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## EEOC STRATEGIC ENFORCEMENT PLAN

- Six national priorities as its focus:
  - Elimination of hiring and recruitment barriers
  - The protection of immigrants, migrant workers and other vulnerable employees
  - Addressing workplace discrimination issues arising from the ADA Amendments Act, coverage under Title VII's sex discrimination provisions for LGBT individuals and accommodations for pregnancy
  - Enforcement of equal pay laws,
  - Maintaining workers' access to the legal system
  - Prevention of harassment through "systemic enforcement and targeted outreach"

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## EEOC GUIDANCE REGARDING EMPLOYERS' USE OF CRIMINAL BACKGROUND INFORMATION

Burden on the employer to show that the past criminal conduct in question poses an unacceptable risk for the particular position at issue. Failure to make that showing may result in Title VII liability.

Protected persons who are denied employment because of a criminal background may have viable Title VII claims where:

- Denial of employment was based solely on an arrest
- Employer used a blanket exclusion that screened out all persons who have ever been convicted of a crime
- The exclusion did not take into account the nature of the crime, the amount of time elapsed since it occurred, and the nature of the job
- The employer did not provide an opportunity for the excluded person to explain a criminal
- The employer has a reputation for excluding persons with criminal backgrounds
- The employer has expressed stereotypical views concerning the criminality of certain racial or ethnic groups

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## EFFECT OF THE GUIDANCE

- Not binding law
- More expansive than what is required under current law
- The standard that the EEOC will use when evaluating discrimination complaints based on the use of criminal history information in employment decisions
- Courts may use it in their analysis of these issues.
- Employers need to act prudently when deciding what course to follow.

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## CREDIT CHECKS IN HIRING

- Recent dismissal of *EEOC v. Kaplan* case
- EEOC alleged use of credit checks as a hiring tool can have a disparate impact on black and Latino job applicants
- EEOC could not support theory:
  - Expert's "race rating" system was scientifically unsound
- EEOC runs credit checks on own applicants(!)
- Decision impacts EEOC's ability to sustain future claims

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## BEST PRACTICES FOR EMPLOYERS

- Steps employers can take when considering credit, arrest and conviction records in making employment decisions:
- Develop written policy and procedures for individualized screening and review of applicants and employees;
  - Avoid blanket and discretionless policies
- Limit inquiries regarding credit and criminal records to those that are "job related for the position in question and consistent with business necessity";
- Train managers, hiring officials, and decision makers regarding implementation of the policies and procedures; and
- Keep information regarding applicant and employee criminal records confidential.

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## THANK YOU



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

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