# Hot Labor and Employment Topics for 2014

## 30th Annual Employment Law Conference


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# I. AFFIRMATIVE ACTION

Federal Laws Requiring Affirmative Action

- Changes to both Disability and Veteran AAP Regulations
- Definition of disability changed to conform with the ADAAA
- Goals set for Disability, 7% and Veterans, 8% or percent calculated by employer
- Requires voluntary self identification of disability and veteran standards pre-offer, offer and current employees
- Job solicitations must contain EEO statement containing disability and "protected veteran" status" which must be posted see http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf)
- Electric posting requirement rules
- Specific language to incorporate requirements into a contract or subcontract

# I. AFFIRMATIVE ACTION

United States Supreme Court Addresses Michigan Voters

*SCHUETTE v. BAMN*, (April 14, 2014)

The Court upheld Michigan's constitutional prohibiting affirmative action state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions

# II. RETALIATION CASES

Burden of Proof

- 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

# RETALIATION CASE STUDY

Employee files an EEOC Charge against his employer. The parties agree to mediate. During the EEOC facilitated mediation, Employee is so offended by the offer to settle that he storms into the room occupied by the Employer representatives, and says “You can take your proposal and shove it where the sun doesn’t shine, and fire me and I’ll see you in court” and walks out of the mediation. Employer accepts the counter-proposal and fires Employee.

Can the Employer use the misconduct during he mediation as a basis for the termination?

A. No, because the Employee was engaged in protected activity

B. No, because the misconduct occurred outside of the workplace

C. Yes, because the Employee would have been fired for the same conduct at the workplace

D. Yes, because the Employee was on a last chance agreement

# AGE DISCRIMINATION CASES

- Mandatory Retirement Age?  Is this ok?
- *Sadie v City of Cleveland*, 718 F3d 596 (CA 6, 2013)

# AGE DISCRIMINATION CASE STUDY

Company is making business decisions regarding succession planning of its sales force. In doing so, Company identifies a 65 year old salesman who has been discussing retirement with his supervisor and, in the last week told his supervisor that he was purchasing a home in Florida and intended to relocate in the next 12 months. Supervisor shares this information with Company. Company decides to call Employee into a meeting to ask his intentions so that it could continue its succession planning strategies. During the meeting, Employee becomes offended and denies any intent to relocate to Florida. Employee immediately files a Charge of Discrimination with the EEOC.

# AGE DISCRIMINATION CASE STUDY CONT.

Was the Company's questioning a violation of the ADEA?

1. No, because Company had a good faith belief that Employee was preparing to retire
2. No, because it is not illegal to discuss succession planning in this context
3. Yes, Company should not have raised retirement with Employee and waited for Employee to retire
4. Yes, Company should have tape-recorded the conversation between Employee and Supervisor first as proof of Employee's intentions

# III. DISCRIMINATION – NURSING MOTHERS

*EEOC v Houston Funding II Ltd*, 717 F3d 425 (CA 5, 2013). Discharging a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII. "An adverse employment action motivated by these factors clearly imposes upon women a burden that male employees need not – indeed, could not – suffer."

REMINDER:

Nursing mothers (Patient Protection and Affordable Care Act, P.L. 111-148)

# III. DISCRIMINATION – SEXUAL ORIENTATION

- Sexual orientation is not a legally-protected classification under federal or Michigan law
- Twenty-one states have enacted statutes prohibiting discrimination based on sexual orientation. 15 states prohibit discrimination against transgender people
- Numerous municipalities, including Ann Arbor, Traverse City, Dearborn Heights, and Mt. Pleasant have enacted ordinances prohibiting discrimination based on sexual orientation
- Although not a protected class, gay, lesbian, and bisexual employees may bring sex discrimination claims on the basis of sexual harassment, sex discrimination such as discrimination based on an employee's non-conformance with sexual stereotypes

# III. DISCRIMINATION – SEXUAL ORIENTATION CONT.

The federal Defense of Marriage Act (DOMA) defined "marriage" and "spouse" as excluding same-sex partners for purposes of interpreting any federal law or regulation.

1. In *U.S. v. Windsor*, 133 S. Ct. 2675 (2014), the Supreme Court struck down the definition of "marriage" and "spouse" under DOMA, as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. *Windsor* does not require states to permit same-sex marriages or to recognize the marriages of same-sex spouses who were married in other states
2. Under *Windsor*, same-sex spouses who reside in states in which same-sex marriage is recognized by state law have the same rights as opposite-sex spouses (i.e. benefits)
3. New regulations DOMA & ERISA (see Clark Hill website for the April e-alert!)

# III. RELIGIOUS DISCRIMINATION CASES

- Several Courts of Appeals have issued conflicting opinions on whether a corporation can object to ACA's requirement that corporations provide the required contraceptive drugs/devices by citing the Religious Freedom Restoration Act (RFRA)
- Pending before the Supreme Court in *Hobby Lobby Inc. v Sebelius:*
  - 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?

# RELIGIOUS DISCRIMINATION CASE STUDY

Applicant, a Muslim woman, appears for her job interview at *Lord and Lady* a prestigious clothing store wearing a hijab. Applicant does not discuss the hijab and no questions are asked about her religious clothing or faith during the interview, in fact, her interviewer is also a Muslim woman and Applicant presumes there are no concerns regarding her religious clothing. Applicant is hired! She arrives on her first day of work wearing a hijab similar to that worn during her interview. Applicant is terminated for refusing to remove the hijab on the basis that wearing it is in violation of the store's dress code. Applicant files suit asserting that she should have been provided a religious accommodation for her clothing.

# RELIGIOUS DISCRIMINATION CASE STUDY

Is Applicant successful on her claim?

1. Yes, *Lord and Lady* had constructive notice of Applicant's religious beliefs and observations as she had worn a hijab during the interview
2. Yes, *Lord and Lady* was familiar with the practice of wearing the hijab as the interviewer herself was of the same religion
3. No, Applicant never informed *Lord and Lady* prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs
4. No, Applicant failed to request an accommodation prior to arriving for her first day of work

# IV. NLRB SOCIAL MEDIA RULES

- Impacts unionized and non-unionized employers and governs private sector employment
- Scrutinizes “overbroad” employer policies that may adversely impact an employee’s right to engage in “protected concerted activity” for the purpose of “mutual aid or protection” or discussing working conditions
- Any policy that has a tendency to chill protected activity may be struck down as overly broad
- Policy must have a narrow focus and clearly set forth prohibited conduct

# IV. NLRB ACTIVITY CONT.

On February 5, 2014, the Board announced that it would re-issue its proposed election rule amendments.

The amendments would:

- "Allow for electronic filing and transmission of election petitions and other documents;
- Include telephone numbers and email addresses in voter lists to enable parties to the election to be able to communicate with voters using modern technology; and
- Consolidate all election-related appeals to the Board into a single post-election appeals process"

# IV. NLRB ACTIVITY CONT.

Election rules – 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
- Department of Labor may issue a new definition for Persuader which will limit the services an attorney and consultants may provide during an election campaign

Micro units

- *Park Manor* and *Specialty Health Care*






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# V. INCREASED WAGE AND HOUR ENFORCEMENT

- Increased budget
- 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

# WAGE AND HOUR ENFORCEMENT CASE STUDY

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 Phoenix 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).

# WAGE AND HOUR ENFORCEMENT CASE STUDY

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

D. Unknown because the DOL will make an independent finding with respect to the particular job duties and level of control exercised by ABCO with respect to each individual

# VI. EEOC STRATEGIC ENFORCEMENT PLAN

Six national priorities as its focus:

1. Recent dismissal of *EEOC v. Kaplan* case
2. The protection of immigrants, migrant workers and other vulnerable employees and the elimination of hiring and recruitment barriers
3. 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
4. Enforcement of equal pay laws
5. Maintaining workers' access to the legal system
6. Prevention of harassment through "systemic enforcement and targeted outreach"

# VI. EEOC STRATEGIC ENFORCEMENT PLAN CONT.

**Criminal Background Checks**

Employers must be mindful of the EEOC Enforcement Guidance on the consideration of arrest and conviction records

- Use of criminal record information may have disparate impact based on race or national origin
- When using criminal record information to disqualify applicants or employees, employer must be able to prove that the use of the information is job-related and consistent with business necessity
- "Ban-the-Box" Legislation
- Individualized assessment of criminal record information
- Michigan Law - MCL 37.2205a
- Employers should not solicit misdemeanor arrest information that did not result in a conviction

# VII. FMLA REVISIONS

1. New Regulations effective as of March 8, 2014
2. New FMLA poster MUST be displayed and can be obtained from the DOL website
3. Retains the “physical impossibility” rule, which provides that when it is physically impossible for an employee to begin or end work midway through his or her shift, the entire period that the employee is absent may be counted as FMLA
4. DOL is taking the position that legally married same-sex couples are eligible for FMLA leave benefits. Under the revised regulations, married gay and lesbian couples’ eligibility for FMLA benefits will depend on their state of residence. The regulation will apply to all private and public employers and workers, including state and federal agencies

# VII. FMLA REVISIONS CONT.

5. Clarifying language was added that employers must track FMLA leave using the smallest increment of time used for other forms of leave (subject to a one hour maximum)

6. The recordkeeping requirements were updated to confirm an employer's obligation to comply with the confidentiality requirements of GINA

7. Extending qualifying exigency leave to eligible employees who are family members of members of the Regular Armed Forces and adding the requirement for all military members to be deployed to a foreign country in order to be on "covered active duty" under the FMLA

# VII. FMLA REVISIONS CONT.

8. The definition of a “serious injury or illness” for a current service member is expanded to include injuries or illnesses that existed before the beginning of the member’s active duty and were aggravated by service in the line of duty on active duty in the Armed Forces

9. Increases the amount of time an employee may take for qualifying exigency leave related to the military member’s “rest and recuperation” from 5 to 15 days

10. Creates an additional qualifying exigency leave category for “parental care leave” to provide care necessitated by the covered active duty of the military member for the military member’s parent who is incapable of self-care

# VIII. ADA – TELECOMMUTING AS AN ACCOMMODATION

*EEOC v Ford Motor Company* (6th Circuit April 22, 2014)

Analyzing telecommuting abilities in today's world and reasoning that the law must respond to the advance in technology in the employment context as it has in other areas of modern life, and recognizes that the "workplace" is anywhere that an employee can perform her job duties

**Held, while face-to-face interaction may be an essential function in some positions (where client interaction is required for example), the facts as scrutinized in this case found she could perform her essential job functions at her home and that such an accommodation was not an undue burden. Summary Disposition Reversed – Case Proceeds to Trial**

# IX. MISCELLANEOUS MATTERS…

Supervisor Liability

- 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.
- Michigan's Whistleblower's Act
  - *Wurtz v Beecher Metropolitan District.* (Michigan Supreme Court, April 28, 2014)

# QUESTIONS?

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# THANK YOU!

**Note: 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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