Employment and Labor Law Institute

Friday, October 7, 2016

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

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Presenter Biographies

Employment and Labor Law Institute

Presenter Biographies

Jennifer Anderson's practice is focused on products liability, employment, class actions, mass torts, insurance, healthcare and commercial litigation. She regularly advises businesses and individuals on issues related to employment disputes, contracts, negotiations, medical malpractice, product safety, professional liability, and fair debt collection practices. She has appeared in state and federal courts, and regularly participates in arbitrations and facilitations.

George L. Bach practices in civil rights, employment and labor law, criminal defense and general civil litigation with the firm of Garcia Ives Nowara. During and after law school, Mr. Bach worked for attorney K. Lee Peifer litigating in civil rights, union-side labor law, and employee-side employment law. In 2005, he joined the American Civil Liberties Union of New Mexico as its first staff attorney, where he litigated a wide variety of civil rights cases in state and federal courts.

Phil Davis is a 1978 graduate of UNM Law School and a former law clerk to United States District Judge E.L. Mechem. He has been in private practice in Albuquerque since 1981, involving civil rights litigation, including police misconduct, employment, first amendment, whistle blower and discrimination cases, with a sub-focus in attorneys' fees litigation. Mr. Davis has tried, settled or is currently working on more than two hundred civil rights cases. He now serves regularly as well as a mediator and an arbitrator in a wide array of civil rights, personal injury and employment cases.

Brett Duke represents employees and persons wrongfully terminated and subjected to illegal employment practices such as hostile work environment, sexual harassment, discrimination, and retaliation, as well as persons who have been harmed by others. He has been named a Top 50 Employment Lawyer in the nation. To date, the largest judgment acquired by Brett on behalf of an employee wrongfully terminated is $1,959,019.02. He is a member of several bars and organizations and currently serves on the State Bar of New Mexico's Employment and Labor Law Section.

Barbara Evans is a partner with Atwood, Malone, Turner & Sabin, and has been with the firm since 2007. She is a litigator with her primary focus on employment law and governmental liability. In addition to litigating employment law and governmental liability disputes, Ms. Evans drafts employment agreements and policies for her clients. Prior to joining Atwood Malone, Ms. Evans served as a law clerk for, The Honorable K. Gary Sebelius, Magistrate Judge for Federal District Court for the District of Kansas, The Honorable Dale E. Saffels, District Court Judge for Federal District Court for the District of Kansas; and The Honorable Bobby R. Baldock, Court of Appeals Judge for the Tenth Circuit Court of Appeals.

John V. Jansonius is a partner at Jackson Walker L.L.P. in Dallas with 36 years experience in labor and employment law. He focuses his practice on labor relations and on the defense of employment discrimination claims, wrongful discharge claims, unfair labor practice claims, and denial of benefits claims. He has represented clients in numerous jury and nonjury trials in state and federal court, he has presented oral arguments to the U.S. Supreme Court and several federal courts of appeals, and he has handled representation and unfair labor practice cases before the National Labor Relations Board throughout the country.

Paula Maynes is an employment law litigator based in Santa Fe, New Mexico. She is a shareholder and Director of Miller Stratvert P.A., and serves on the firm's executive committee. Typical claims defended by Ms. Maynes include: charges of discrimination/retaliation filed with the Equal Employment Opportunity Commission, the New Mexico Human Rights Division of the Department of Workforce Solutions; claims filed in state court for violation of the New Mexico Whistleblower Protection Act; wrongful termination/retaliation; breach of an implied contract of employment; and employment-related torts, including negligent supervision and interference with prospective business relations. Ms. Maynes has litigated covenants not to compete and breach of confidentiality and proprietary information clauses in employment contracts.

Meghan Mead has extensive experience working with hospitals, physician groups, skilled nursing facilities, assisted living facilities, multi-level and continuing care retirement communities, hospices, and home health agencies. She has assisted clients with a variety of issues involving the Affordable Care Act, Medicare and Medicaid certification and enrollment, the purchase and sale of medical practices, concierge medicine, licensure, HIPAA compliance, drafting and updating compliance plans, STARK law, fraud and abuse, and state and federal regulatory compliance. Prior to joining Modrall Sperling, where she currently practices, Ms. Mead practiced for five years at a firm in San Francisco, where her focus was on healthcare, and senior care and housing.

Karen Molzen served as District Judge John Edwards Conway's first law clerk and returned as his career law clerk in 1991. During that time, she helped with the District of New Mexico's development of one of the first electronic filing systems in the nation ("A.C.E."), as well as serving on national automation committees and the federal Electronic Courtroom Project. On April 26, 1999, Molzen was sworn in as the first full-time female magistrate judge in the District. After 12 years in Las Cruces, she transferred to Albuquerque when she became Chief Magistrate Judge in 2011 and was reappointed to a third 8-year term in 2015. Judge Molzen has been an adjunct professor for the UNM School of Law since 2013, and she received the Federal Jurist of the Year Award from the N.M. Chapter of ABOTA in 2015.

Victor P. Montoya is a Principal and the Office Litigation Manager in the Albuquerque, New Mexico, office of Jackson Lewis P.C. He is a Certified Employment and Labor Law Specialist by the New Mexico State Bar's Board of Legal Specialization. Mr. Montoya's practice focuses on advising employers and representing them in litigation regarding federal and state laws related to employment, unemployment, wage, disability, and civil rights issues, including Title VII of the Civil Rights Act, the ADA, the ADEA, the FLSA, the FMLA, USERRA, the New Mexico Human Rights Act, and the New Mexico Minimum Wage Act. Mr. Montoya advises employers regarding employment practices and policies, handbooks, hiring, terminations, trade secrets, and employment contracts. Mr. Montoya also practices alternative dispute resolution and received his mediator certification from the University of New Mexico, School of Law in 1999.

Andrea K. Robeda is an Associate in the Albuquerque, New Mexico, office of Jackson Lewis P.C. Her practice focuses on the area of employment litigation, including representing employers against claims alleging discrimination, retaliation, and wrongful termination. While attending law school, Ms. Robeda was Lead Articles Editor of the New Mexico Law Review. Prior to joining Jackson Lewis, Ms. Robeda was an associate at a large New Mexico law firm practicing in the areas of employment and general commercial litigation.

Barbara G. Stephenson is a shareholder with Sheehan & Sheehan, P.A. Her practice focuses on representing employers in employment disputes and administrative charges before such agencies as the Equal Employment Opportunity Commission, the New Mexico Human Rights Bureau, and the Office of Federal Contract Compliance programs. Ms. Stephenson also consults with personnel managers on preventative personnel practices and procedures. She is a member of the Albuquerque and American (Section on Labor and Employment Law) bar associations, and the State Bar of New Mexico, and is a New Mexico Board-recognized specialist in labor and employment law.

LGBTQ Issues in the Workplace

LGBTQ Issues in the Workplace

Presented by:
Victor P. Montoya
Principal • Albuquerque Office Litigation Manager

jackson lewis

Let's Talk Facts

- Gallop Poll: An estimated 1 in 4 Americans is homosexual/gay.
- More accepted statistics suggest 3% to 6% of Americans are homosexual/gay.
- Gay marriage is now just "marriage."
- Estimated % of transgender individuals: .03% of U.S. population (about 97,000). [Williams Institute at UCLA]
- % of transgender individuals hiding their gender/transition to avoid discrimination: 71%. [National Center for Transgender Equality/National Gay/Lesbian Task Force]

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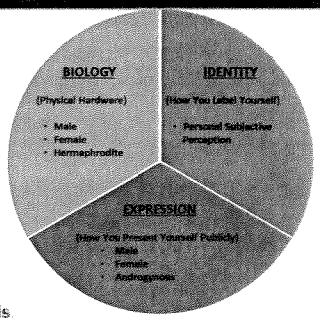
Traditional View: Pre-Evolving Workforce



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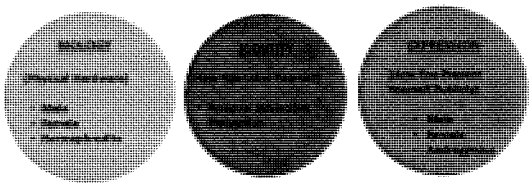
The Evolved Workforce

Cannot assume the 3 are in 1



What This All Means

- All three (biology, identity and expression) may or may not be in line with one another:
  - I am biologically male; I identify as male; I present as male.
- Your biological sex may not be in line with your gender identity or gender expression:
  - I am biologically male; I identify as female; I present as female.
- Your gender identity may not be in line with your gender expression:
  - I am biologically male; I identify as female; I present as male (but hope to transition to present as female).

Who Am I?

- **Biological sex:** Describes the organs and biology a person is born with (male, female, intersex).
- **Gender identity:** A person's innate, internal sense of his or her gender (subjective identity).
- **Gender expression:** The way in which a person presents his/her gender to the outside world (external expression).

Who Am I?

- **Cisgender:** An individual whose sex assignment at birth corresponds to their gender identity and expression.
- **Transgender:** An umbrella term. A "catch all" used to classify persons whose biological sex does not match their gender identity or expression.
- **Transsexual:** Someone who is making changes to their physical (body) for the purpose of having it match their gender identity.
- **Sexual orientation** is an individual's physical and/or emotional attraction to the same or opposite gender.

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Who Am I?

- **Transitioning:** A term used to describe the process or "transition" through which a person modifies their physical characteristic to bring them in line with their internal gender identity and external gender expression:
  - Taking of hormones;
  - Gender reassignment surgery;
  - Covering certain body parts;
  - Changing speech patterns;
  - Changing hair, wardrobe, makeup or other changes.

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Gender Conforming Surgery

- The term "gender re-assignment" surgery is a bit of a mischaracterization.
- The person is not re-assigning their gender by having surgery, the person is making their biology conform to the gender they have had since birth (gender identity).
- Better choice words:
  - Gender conforming surgery (the surgery is to "conform" the physical with the identity).

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Sexual Stereotyping Quiz

1. Would you rather bake or grill?
2. As a male, would you feel comfortable wearing a dress? As a female, would you feel comfortable wearing a suit and a tie?
3. How would you react if a male adult used the ladies restroom?
4. How should you respond if a transgender employee confided in you about their transition from F to M and asked you not to tell senior management or their staff?

What is Sexual Stereotyping?

- Whether or not individuals identify as male or female, gay, lesbian, bisexual, heterosexual or transgender, many people transcend traditional gender roles. For example:
  - A female with short hair is called "sir" in public;
  - A male with feminine characteristics receives curious glances or angry stares;
  - A gay teenager is reprimanded for "not acting like a man."
- All of these individuals face bias based on preconceived notions of gender—what it means to look and act like a man or a woman.

HETEROSEXISM

- Discrimination against people who are LGBTQ by individuals who are heterosexual
- An "ism," like sexism or racism, where one group is considered better than others.
- Pervades societal customs and institutions.
- Creates misinformation and misconceptions.

TRANSPHOBIA

- Fear, hatred or dislike of, or discrimination towards a transsexual or transgender person due to that person's expression of their internal gender identity.
- Negative valuing, stereotyping and discriminatory treatment of individuals based on gender identity.
- Employment and healthcare discrimination
- Issues for individuals transitioning gender on the job
- Lack of medical insurance coverage
- Lack of medical treatment

OFFENSIVE TERMS, PHRASES & COMMENTS

- Queer
- Fag, faggot, fruit
- Dyke, Lesbo, Lumberjack
- "That's so gay"
- Tranny, she-male, he-she, It, gender-bender
- Misgendering - Refusing to use the proper pronoun when addressing a transgender individual

Federal Law

- Federal statutes/regulations/orders:
  - Title VII of the Civil Rights Act of 1964
  - The Americans with Disability Act ("ADA")
  - OSHA Sanitation Standard
  - Executive Order 11246
  - Proposed statutes:
    - The Employment Non-Discrimination Act ("ENDA")
    - The Equality Act of 2015

Federal Law

- Federal statutes:
  - Federal law prohibits discrimination "because of ...sex." Title VII of the Civil Rights Act of 1964
  - Currently, no federal law that prohibits discrimination based on gender identity or expression.
  - However, Title VII has been used by some courts to extend protection under the umbrella of prohibition "because of ...sex."

Federal Law

- Courts have interpreted the prohibition against discrimination "because of sex" in the context of gender identity and expression cases by focusing on the issue of "sex stereotyping."
  - "You cannot discriminate against Tom because he does not "fit" the male stereotype."
- However, because gender identity and expression are not protected categories, the decisions deal with the issue in a somewhat roundabout manner.

Past Proposed Legislation

- The Employment Non-Discrimination Act ("ENDA"):
  - Prohibited sexual orientation discrimination and discrimination based on gender identity or expression.
  - Was first introduced in 1994 by Rep. Gerry Studds (D-Mass.) and Sen. Edward M. Kennedy (D-Mass.), failed each session of Congress since 1994.
  - Now dead.

New Legislative Initiative

- The Equality Act of 2015:
  - Bill in U.S. House of Representatives and Senate that if passed would amend Title VII of the Civil Rights Act of 1964 to include protections that ban discrimination on the basis of sexual orientation, gender identity, and sex in the areas of employment, housing, public accommodations, public education, federal funding, credit, and the jury system.

New Legislative Initiative

- The Equality Act of 2015: (Con't)
  - Received support from Apple, Inc., Dow Chemical Company, Human Rights Campaign, Levi Strauss & Co., American Airlines, Facebook, General Mills, Google, and Nike.
  - On November 10, 2015, President Barack Obama officially announced his support for the Equality Act.
  - Hillary Clinton and Bernie Sanders support the Equality Act.

The Americans with Disabilities Act

- The Americans with Disabilities Act ("ADA") excludes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" from coverage.
  - State and local laws prohibiting discrimination based on disability may provide a significant source of protection for transgender employees.
  - The term "disability" in anti-discrimination laws refers to a wide range of serious health conditions and is meant to protect individuals from discrimination based on stereotypes and ignorance about medical conditions and disability.

The Americans with Disabilities Act

- Medical complications from gender conforming surgery could give rise to ADA issues even if underlying gender identity issues are not protected.
- The LGBTG community and others find it inappropriate to link gender identity, expression and biological sex related issues along with pedophilia and exhibitionism.
- "Lumping" these issues along with pedophilia and exhibitionism is part of the traditional perspective. The law lags in some areas and the language will likely change moving forward.

Occupational Safety and Health Administration

- OSHA'S Sanitation Standard requires employers to provide employees with toilet facilities.
- OSHA Guidance:
  - All employees should be permitted to use the facilities that correspond with their gender identity.
  - Employers may also want to provide single occupancy gender neutral facilities.
  - Use of multiple-occupant, gender neutral restrooms with lockable single occupant stalls.

Federal Contractors

- Office of Contract Compliance Programs (OFCCP):
  - Requires federal contractors to comply with Executive Order 11246, as amended, which:
    - Prohibits discrimination based on sex and gender identity; and
    - Requires that transgender employees be allowed to use the restroom facilities consistent with their identity.

Equal Employment Opportunity Commission

- April 2015:
  - All employees MUST be permitted to use the facilities that correspond with their gender identity.
  - Failure to do so amounts to discrimination because of sex and violates Title VII.

FEDERAL CASE LAW

Price Waterhouse v Hopkins (1989) Gender Expression/Stereotype

- U.S. Supreme Court decision in *Price Waterhouse v. Hopkins* held that a woman who failed to conform to her employer's gender stereotypes regarding how women should look and act was protected from discrimination by Title VII.
- Hopkins (female accountant) advised by partners she could improve her partnership chances if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Price Waterhouse v Hopkins (1989)
Gender Expression/Stereotype

- Hopkins sued under Title VII for sex discrimination after she resigned following the firm's denial of partnership.
- Justice Brennan, writing for the plurality, held that "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."

Macy v. Holder (EEOC April 20, 2012)
Gender Expression and Gender Identity

- Job applicant Mia Macy applied for a job at the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATFE").
- When Macy applied for a job, she presented as male.
- Shortly thereafter, Macy informed ATFE that she was transitioning from male to female.
- ATFE informed Macy that another applicant had been hired because that applicant was farther along in the background check process.

Macy v. Holder (EEOC April 20, 2012)
Gender Expression and Gender Identity

- Macy filed a complaint against ATFE with the EEOC alleging that the reasons proffered for not hiring her were pretextual and that the true reason was because of her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."
- The EEOC reasoned that Macy could establish a viable sex discrimination claim on the ground that:
  - ATFE believed that biological men should present as men and wear male clothing; or,
  - ATFE was willing to hire a man, but not a woman.
- Either way, the EEOC concluded, transgender discrimination is discrimination "based on...sex" and violates Title VII.

Macy v. Holder (EEOC April 20, 2012)
Gender Expression and Gender Identity

- The EEOC issued a "Cause" finding.
- It was appealed to the Department of Justice
- The DOJ upheld the determination following an investigation.
- There was a settlement (terms not public).
- Three years later Macy still had no job.

EEOC v. Lakeland Eye Clinic (M.D. Fla. 2014)

- First time EEOC filed an alleged sex discrimination case under Title VII for transgender discrimination. The language remains "non conforming" "stereotypes" but having broader reach.
- Six months into his employment, Branson who had been hired to head a Hearing Clinic which the Eye Clinic opened up started wearing feminine attire to work, including makeup and women's tailored clothing.
- Co-workers noticed and snickered and rolled their eyes.
- Soon after, Lakeland Eye Clinic confronted Branson about her changing appearance. She explained that she was undergoing a transition from male to female.

EEOC v. Lakeland Eye Clinic (M.D. Fla. 2014)

- Following this meeting, Lakeland's managers and employees made derogatory comments about her appearance, and the ostracism intensified.
- The physicians stopped referring clients to Branson.
- Two months later, Lakeland discharged Branson, telling her that the position was being eliminated.
- Branson was replaced by a male employee.

EEOC v. Lakeland Eye Clinic (M.D. Fla. 2014)

- On April 9, 2015, the EEOC entered into a historic $150,000 settlement and consent decree with Lakeland Eye Clinic.
- Lakeland was required to implement a new gender discrimination policy.
- Lakeland was also required to provide training to management and employees regarding transgender/gender stereotype forms of discrimination.

EEOC v. RG & GR Harris Funeral Homes (E.D. Mich. 2015)

- Aimee Stephens was employed by Defendant since 2007.
- In July 2013, Stephens notified her employer and her co-workers that she was undergoing a gender transition from male to female and intended to dress in appropriate business attire as a woman and asked for their support. Two weeks later, Defendant fired Stephens, telling her that what she was "proposing to do was unacceptable."
- The employer moved to dismiss the EEOC's complaint, and the motion was denied.

Gender Reassignment Surgery
Goins v. West Group (Minn. 2000)

- In 1997, Goins, a MTF transgender employee, used an employee restroom designated for women. Two biological females complained to a supervisor.
- The HR Director deemed the two female employees' complaint to be a complaint of a "hostile work environment" and decided to enforce the policy of restroom usage according to biological gender.

Gender Reassignment Surgery (Cont.)
Goins v. West Group (Minn. 2000)

- The HR Director also decided to allow Goins the use of a single-occupancy restroom on a different floor or one in another building.
- Goins objected, proposing instead the complaining employees be educated regarding transgender individuals. Goins continued to use the restroom.
- In 1998, Goins resigned, claiming undue stress and hostility.

Gender Reassignment Surgery (Cont.)
Goins v. West Group (Minn. 2000)

- The court held that an employee born male who changed her legal name to that of a female and took female hormones to identify herself as a female, even though she elected not to undergo gender reassignment surgery, was protected under that state's anti-discrimination law protecting persons whose self-image or identity is not traditionally associated with his/her biological sex.

State Law

- 18 states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, **New Mexico**, Oregon, Rhode Island, Vermont and Washington) and the District of Columbia include gender identity and/or gender expression in their employment non-discrimination statutes.
- Courts and human rights agencies in Connecticut, Colorado, Hawaii, Massachusetts, New Hampshire and New York have ruled transgender employees are protected by their state anti-discrimination laws.

NEW MEXICO CASES

- *Griego v. Oliver*, 316 P.3d 865 (2013)
  - Discussed that in a case involving same-gender marriage, the equal protection challenge should not be analyzed as a case involving sex discrimination, but must be analyzed as a case involving discrimination based on a person's sexual orientation.
  - New Mexico Human Rights Act prohibits "sexual orientation" as a class of persons protected from discriminatory treatment.
  - Noted other New Mexico legislation which offers protection based on sexual orientation, as well as gender. *See* NMSA 1978, § 29-21-2 (2009) (prohibiting profiling by law enforcement officers on basis of sexual orientation as well as other characteristics); NMSA 1978, § 31-18B-2(D) (2007) (including sexual orientation as a protected status under the Hate Crimes Act, NMSA 1978, §§ 31-18B-1 to -5 (2003, as amended 2007)
  - HELD: Denying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution.

New Mexico Cases

- *Elaine Photography, LLC v. Willock, 309 P.3d 53 (2013)*
  - HELD: Elaine Photography's refusal to serve Vanessa Willock violated the New Mexico Human Rights Act, which prohibits a public accommodation from refusing to offer its services to a person based on that person's sexual orientation. Enforcing the New Mexico Human Rights Act against Elaine Photography does not violate the Free Speech or the Free Exercise clause of the First Amendment or the New Mexico Religious Freedom Restoration Act.

Best Practices

- Rely on existing procedures re: Title VII/modify.
- Develop a strong EEO policy to include gender identity and gender expression.
- Train managers/employees on the policy and procedures.
- Have a clear complaint or concern procedure.
- Consistently and fairly enforce the policy and procedures.
- Review recruitment, hiring, and promotion protocols.
- Maintain open communications.
- Be proactive/address complaints early on.
- Ensure employees who voice concerns are not subject to retaliation.

Gender Transition Plan

Plan should include/address:

- Timeline;
- Dress code;
- Company resources;
- I.D./name changes;
- Security clearance issues;
- Medical coverage issues;
- Facilities usage;
- Appropriate norms of conduct;
- Sensitivity training;
- Complaint procedures;
- Plan modifications;
- Addressing religious objections.

The DO's and DON'Ts of Religious Accommodation in the Workplace

DO	DON'T
Adopt an inclusive diversity policy.	Leave anyone out.
Communicate and be flexible.	Deny accommodation before investigating whether it can be provided without undue hardship.
Regulate conduct, not beliefs.	Force employees to participate in religious activities or in LGBT issues.
Prevent religious harassment.	

Religious Objections/Accommodations Best Practices

- Inform and train supervisors on the proper responses to a religious accommodation request by an employee.
  - This should be handled by **HR ONLY**.
- Adopt a complaint and investigation procedure for religious based claims.
  - In writing and in your handbook.
- Engage in interactive process with employees.
  - The key is in the process and what you can show you did.

Peterson v. Hewlett-Packard – Religious Objections

- *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)
- Peterson was employed in the Boise, Idaho office of Hewlett-Packard (HP) for almost 21 years and his performance was satisfactory.
- HP began a diversity campaign, and displayed diversity posters.
  - The first series consisted of five posters, each showing a photograph of an HP employee above the caption "Black," "Blonde," "Old," "Gay," or "Hispanic."
  - Posters in the second series included photographs of the same five employees alongside a description of the featured employee's personal interests and the slogan "Diversity is our Strength."
- Peterson described himself as a "devout Christian," who believed that homosexuality violates the commandments he found in the Bible and that he has a religious obligation "to expose evil when confronted with sin."

Peterson v. Hewlett-Packard

- In his work cubicle, Peterson posted three Biblical scriptures in large font which are often cited to condemn homosexuality (Corinthians 10:12, Isaiah 3:9, and Leviticus 20:13).
- Peterson's direct supervisor removed the passages – determining they violated HP's policy prohibiting harassment.
- Peterson said, "the scriptural passages were intended to be hurtful. And the reason they were intended to be hurtful is you cannot have correction unless people are faced with truth."
- Peterson's position: Either HP could remove the "gay" poster, or it could allow Peterson to post the Bible verses.
- HP rejected these alternatives, and gave Peterson time off with pay to reconsider his position.
- On his return, Peterson reposted the scriptures, refused to remove them, and was terminated for insubordination. Peterson sued.

Peterson v. Hewlett-Packard – The Decision

- Hewlett-Packard won in the district court, and Peterson appealed.
- On appeal, the court upheld the decision in favor of HP.
  - Peterson offered no evidence that his termination was the result of disparate treatment based on his religion.
  - His termination resulted from his insubordination and because he generated a hostile and intolerant work environment.
  - Both of Peterson's suggested accommodations would have imposed an undue hardship on the company, inhibiting:
    - HP's ability to attract and retain a diverse workforce, including lesbian, gay, bisexual or transgender persons; and
    - HP's commercial success.

Peterson – Best Practices

- HP's managers evidenced best practices:
  - Asked about Peterson's specific objections.
  - Had conversations about Peterson's intent.
  - Attempted to reach a compromise accommodation.
  - Did not attempt to change his beliefs.
  - Gave Peterson a second chance.
- Intent can matter - court distinguished motivation:
  - Other employees and managers were allowed to send out communications promoting LGBT inclusion.

Gadling-Cole v. West Chester Univ. (E.D. Pa. Mar. 30, 2012)

- Charnetta Gadling-Cole was an adjunct professor at West Chester University in the social work department.
- All 5 other professors in the social work department advocated for the LGBTQ community.
- Gadling-Cole refused to support the LGBTQ community, claiming it conflicted with her Baptist religious beliefs.
- She claimed that, as a result, her colleagues refused to work with her, excluded her from meetings, criticized her, and voted against giving her a tenure-track position (awarding it instead to an allegedly-unqualified candidate).
- She complained to her supervisor; nothing changed.

Gadling-Cole v. West Chester Univ. (E.D. Pa. Mar. 30, 2012)

- Court held that a reasonable jury *could* find that Gadling-Cole was discriminated against on the basis of her religion.
- The university could be held vicariously liable for not taking action to rectify the religious harassment.

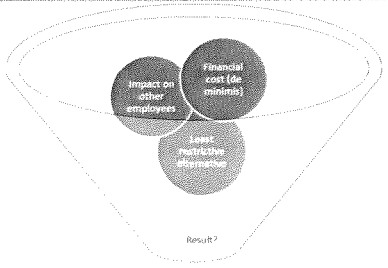
Steps to Accommodation

- Employee must come forward and advise the employer he/she has a bona fide religious belief that conflicts with a duty owed to the employer.
- Employer must engage in an interactive dialogue with the employee in an attempt to remove the conflict unless doing so would result in an undue hardship to the employer.

Steps to Accommodation

- Employer can only refuse to accommodate a religious employee when "each available alternative" has been explored and cannot be done.
- Employer need not provide the employee with the accommodation favored by the employee.
- However, an employer must offer the alternative that least disadvantages the employee in terms of his/her employment opportunities.

What constitutes an "Undue Hardship"



General Rules

- Treat everyone with respect; as you would want to be treated.
- Recognize we all have our differences, but at the end of the day, it's about running a company effectively.
- Appreciate that "different" does not need to be defined as "strange."
- Check prejudices at the door; no one has the right to belittle or degrade.
- Gestures and attitudes speak as loud as verbal communication; be mindful of the message you are sending.
- Individuals who have dealt with gender issues their whole life are not generally scared to speak about them, provided they are respected and it's safe to do so (be genuine and ask and discuss).
- No matter the religious objection, making someone feel isolated, badly, or disliked is not a viable workplace value.

TRANSGENDER BATHROOMS

- Status of Obama Administration's transgender bathroom directive
- Current legal challenges
- Best practices to address transgender bathroom issues

Questions?

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NOTES

State Law Update

NEW MEXICO EMPLOYMENT STATE LAW UPDATE

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State Bar of New Mexico
2016 Employment and Labor Law Institute
October 7, 2016
Albuquerque, New Mexico

The following are summaries of recent cases from the New Mexico Supreme Court and New Mexico Court of Appeals in New Mexico employment law.

A Reminder: *McDonnell Douglas* is a Framework - NOT a Required Method of Proof; Discrimination is Discrimination

Garcia v. Hatch Valley Pub. Schs., 2016-NMCA-034, cert. granted, No. S-1-SC-35641

The Appellate Court using the New Mexico *McDonnell Douglas* burden shifting framework of *Smith v. FDC* determined that a non-Hispanic does not need to meet a heightened standard to proceed with her claim for discrimination in violation of the New Mexico Human Rights Act (NMHRA"). "[W]e will analyze a reverse discrimination claim as we would any racial discrimination claim."

Plaintiff has a Hispanic surname by marriage, but she identifies herself as Caucasian and of German descent. Plaintiff was discriminated against based upon her status as a non-Hispanic. Defendant argued that non-Hispanic was was not a protected group under the NMHRA and then sought and received a summary judgment. Plaintiff appealed.

The Appellate Court presented a thorough analysis of national origin discrimination cases from the United States Supreme Court and other federal jurisdictions, noting that the classification of non-Hispanic has been widely accepted as a protected group involving national origin discrimination cases. The Appellate Court reviewed analysis of the federal jurisdiction treatment of cases of reverse discrimination noting varying standards and summarized "[g]enerally, federal circuits have approached the issue in one of two ways; either heightening the standard for reverse discrimination of plaintiffs by requiring evidence of discrimination at the outset, or not."

The Appellate Court considered the "Pros and Cons of a Heightened Standard" and summarized the positions. The proponents of the Heightened Standard contend that the primary purpose of Title VII is to assure opportunity to disadvantaged minority citizens. The opponents argue against the unconscionably high burden on majority plaintiffs, the difficulty of reconciling with United States Supreme Court precedent, and the potential pitfall of requiring courts to determine which groups are socially favored and which are socially disfavored, an unseemly task based on regional or local meaning.

The Appellate Court rejected the Heightened Standard after considering the "Pros and Cons of Abandoning the Heightened Standard" and then returned to the *McDonnell Douglas* framework of New Mexico law, again pointing out multiple times that the framework "is not a required method of proof; it is only a tool to focus the issues and to reach the ultimate issue of whether the employer's actions were motivated by impermissible discrimination." Id. ¶41. "The Court determined that the first prong of a prima facie case of discrimination could be satisfied upon a 'showing that the plaintiff is a member of the *protected group." Id.* ¶ 11 (emphasis added). It is worth noting that, in addition to recognizing the *McDonnell Douglas* framework as a tool rather than a mechanical formula, the Court chose the more neutral term 'protected group' in setting out the first requirement of a prima facie case of discrimination, and the Court relied on precedent

from federal circuits that take the more holistic and less rigid approach to analyzing reverse discrimination claims. Smith, 1990-NMSC-020, ¶¶ 9-11." Id. ¶42.

Two Retaliation Statutes Are Better (for Plaintiff) Than One

Herald v. Bd. of Regents of the Univ. of N.M., 2015-NMCA-104, *cert. denied*, No. 35,489

The Appellate Court found that Plaintiff was entitled to state claims under the NMHRA and the New Mexico Whistleblower Protection Act ("NMWPA").

Plaintiff sued for discrimination and retaliation for her termination from a residency program. Part of Plaintiff's claim included her allegation that her employer discharged her for a report she made, accusing her colleague of rape. Before trial, the district court dismissed her NMWPA claim. On appeal, the Appellate Court reversed the district court's dismissal of Plaintiff's NMWPA claim. The Appellate Court went through the differences between the two statutes and concluded that those differences do not render an irreconcilable conflict between the two statutes.

Common Law Retaliation is Alive and Well

Sherrill v. Farmers Insurance Exchange, 2016-NMCA-056

The Appellate Court bolstered and re-affirmed the tort of retaliatory discharge discussing the history of the legal theory and its necessary elements. "Under this cause of action, an employee must (1) identify a specific expression of public policy which the discharge violated; (2) demonstrate that he or she acted in furtherance of the clearly mandated public policy; and (3) show that he or she was terminated as a result of those acts."

Plaintiff worked as an adjustor for an insurance company. Plaintiff alleged that she expressed concerns about the insurance company's insurance practices and she was discharged in retaliation. She filed her retaliatory discharge claim (and some others) arguing that she was fired for her refusal to carry out unfair and illegal claims practices which violate New Mexico law and public policy.

The district court granted summary judgment in favor of the employer insurance company because it was unable to find a clear mandate of New Mexico public policy. Plaintiff appealed.

The Appellate Court discussed the public policy element as related to the legal theory, summarizing "when evaluating whether an expression of public policy constitutes a 'clear mandate of public policy' for purposes of a retaliatory discharge claim, we consider: (1) the specificity with which the employee has identified the policy; (2) whether the identified policy promotes the general good and reflects the principles and standards regarded by our Legislature and our courts as being of fundamental importance to the citizens of the state; and (3) whether the policy is well-recognized and clear in the sense that it provides specific guidance and is not overly vague or ambiguous." Id. ¶*18*.

The Appellate Court then found that the insurance code and the implied covenant of good faith and fair dealing embody clear mandates of public policy.

The State as an Employer is Usually Liable as an Employer

Ramirez v. CYFD, 2016-NMSC-016

The Supreme Court decided that the State as an employer is not immune from the Uniformed Services Employment and Reemployment Act of 1994 (USERRA).

Plaintiff was a New Mexico National Guard member and employed by the State. He was deployed. After he returned to work, he was terminated. A jury found that the State terminated him because of his military service. The Court of Appeals reversed concluding that the State was immune to Plaintiff's USERRA claim. The Supreme Court disagreed, finding that the Legislature specifically extended the rights, benefits and protections of USERRA and in doing so consented to suits brought against state employers who violate the protections of USERRA.

The Supreme Court also reiterated that the defense of state sovereign immunity should be adjudicated at the outset of litigation, instead of permitting the issue to be decided after the expense of trial.

Only the State Pays for NMWPA Violations

Flores v. Herrera, Aug. 18, 2016, No. S-1-SC-35286

The Supreme Court held that the NMWPA does not allow a state employee to assert a claim against a state officer in the officer's individual capacity. The NMWPA was enacted to promote transparent government and prohibit a public employer from taking retaliatory action against a public employee for whistleblowing.

Plaintiffs in separate actions brought claims against the Secretary of State for terminating their employment in violation of the NMWPA.

Workers' Compensation Coverage for Farm and Ranch Laborers

Rodriguez v. Brand West Dairy, 2016-NMSC-029

The Supreme Court held that the farm and ranch laborer exclusion contained in the New Mexico Workers' Compensation Act ("NMWCA") was unconstitutional.

Plaintiffs were farm and ranch laborers. The NMWCA did not require employers to provide workers' compensation coverage to farm and ranch laborers. The exclusion violated the right of the workers under the Equal Protection Clause of the New Mexico Constitution in light of the fact that other agricultural workers were not singled out for exclusion. The Supreme Court concluded that there is nothing to distinguish farm and ranch laborers from other agricultural

employees and that purported government interests such as cost savings, administrative convenience, and other justifications related to unique features of agribusiness bear no rational relationship to the Act's distinction between these groups. This is nothing more than arbitrary discrimination and, as such, it is forbidden by our Constitution.

Hospitals May Not Retaliate Against Participants in Peer Review

Yedidag v. Roswell, 2015-NMSC-012

The Supreme Court held that: (1) the Review Organization Immunity Act ("ROIA") creates a private cause of action for breaches of peer review confidentiality when such disclosures do not further any of the listed purposes of ROIA; (2) ROIA is the basis for an implied promise that physician-reviewers will not suffer adverse employment consequences from participation in peer reviews because contractual agreements incorporate mandatory state law; and (3) the evidence was sufficient for a jury determination of punitive damages because a jury could conclude that the hospital's actions were, at minimum, wanton.

Plaintiff participated in a peer review concerning a colleague's role in a patient's death. Information from the peer review leaked out and led to the termination of Plaintiff. The case hinged on the illegality of the employer hospital's actions regarding Plaintiff and the statutory protections he was entitled to as a peer reviewer. ROIA prohibits an employer from retaliating against a physician who participates in a peer review because the unlawful acquisition and utilization of peer review information is a factual prerequisite to such retaliation.

NOTES

Employers and HIPAA Compliance Issues

MODRALL SPERLING

Employers and HIPAA Compliance

Employment and Labor Law Institute, New Mexico State Bar

Meghan Mead

October 7, 2016

OVERVIEW

- How does HIPAA apply to Employers?
- Privacy Rules
- Security Rules
- Penalties and Audits

What is HIPAA?

- HIPAA is a federal law called the Health Insurance Portability and Accountability Act of 1996.
- HIPAA protects the privacy and security of Protected Health Information, known as "PHI."
- HIPAA applies to both Covered Entities and Business Associates.

Who Is a Covered Entity?

- Health care providers, such as doctors, hospitals, and skilled nursing providers.
- Health plans, including employer-sponsored health plans.

What is Protected Health Information (PHI)?

- Protected Health Information is information that:
  - Relates to a past, present, or future physical or mental condition of an individual, provision of healthcare to an individual, or payment for care provided to an individual.
  - Is transmitted or maintained in any form (electronic, paper, or oral representation).
  - Identifies, or could be used to identify, the individual.

What is not PHI?

- Financial information.
- Information received pursuant to a valid release.
- Employment-related information (FMLA, Worker's Compensation)
- Information not generated by Covered Entity.

Who Is a Business Associate?

- A person or entity that performs certain functions on behalf of a Covered Entity, but is not a member of the Covered Entity's workforce.
- Includes lawyers, accountants, consultants, IT support, and their subcontractors.

Why HIPAA is Important

- HIPAA imposes very specific requirements on covered entities.
- Employers that sponsor a health plan often don't realize their compliance obligations.

Protecting the Privacy and Security of PHI

Overview of Privacy and Security

- HIPAA requires covered entities to protect the privacy and security of PHI.
- Privacy means covered entities are limited in how they can use or disclose PHI.
- Security means they have to protect electronic PHI, as well as paper files containing PHI.

Business Associate Agreements

- Review who could come in contact with PHI.
- Even if you don't currently share PHI with them, is it possible they could ever see it?
- If so, you need a current business associate agreement with them.

Policies and Procedures

- Has the employer adopted policies and procedures? Are they current?
  - Lawyer can draft.
  - Purchase from company but review and revise.
- Confirm you are following your policies and procedures.

Privacy and Security Officer

- Appoint a Privacy Officer and Security Officer.
- Privacy Officer should have a clear understanding of HIPAA obligations, handle employee training, and document all HIPAA-related matters.
- Security Officer should have an understanding of computer systems and how to protect electronic PHI.

Notice of Privacy Practices

- Employers that sponsor a health plan must provide a notice of privacy practices (NPP) to plan participants.

Privacy: What are Your Obligations with PHI?

- Must not use or disclose PHI in violation of the law.
  - Treatment, payment, health care operations all ok.
  - Impermissible uses include: sharing PHI with co-workers who do not need to know about it, or gossiping about it with your family.

Privacy: Important!

- A health plan cannot disclose PHI to the plan sponsor (employer) for purposes of employment-related actions, or in connection with any other employee benefit plan of the plan sponsor.
- No using employee PHI to make employment-related decisions!
- Employer must report any inappropriate uses or disclosures to the group health plan.

Privacy: What are Your Obligations with PHI?

- Implement safeguards against improper use or disclosure.
  - Access to matters involving PHI should be restricted to only those who need access.
  - This meets the "minimum necessary" standard.

Privacy: When working with PHI, you must do the following:

- Look at or use PHI only if you need it to perform your job.
- Only share PHI with others when it is necessary for them to perform their jobs.
- If you are sharing PHI over the phone, know with whom you are speaking and whether that person has a right to know.

Privacy: When working with PHI, you must do the following:

- Talk to others about PHI only if it is necessary to perform your job, and do it discreetly.
- Refrain from discussing PHI in public areas, such as elevators and reception areas, unless doing so is necessary to perform your job.
- Do not leave files in plain sight of visitors or other employees who have no need to view PHI to do their jobs, including in common areas and conference rooms.

Privacy: When working with PHI, you must do the following:

- Employees should not download, copy, or remove any PHI, except as is necessary to perform their jobs.
- Upon termination of employment, or upon termination of authorization to access PHI, the employee must return to the employer all copies of PHI in his or her possession.
  - This includes hard copies and electronic media containing PHI!

Train your Workforce

- Conduct a training for all members of workforce.
- Can limit to those who work with PHI.
- Items to cover should include:
  - What is HIPAA?
  - How employees may and may not use PHI.
  - Security procedures (passwords, encryption, theft prevention).
  - What to do if an employee suspects a breach.
  - Who employees should contact with questions or concerns.

Training

- Need to have procedure for training new employees. Can be a video or one-on-one discussion.
- Document that training occurred for employees.

Security: Good Computing Practices

- Encrypt all computers but laptops should be high priority.
- Make sure you have a unique "Password" for log-in purposes.
- All passwords must be changed regularly or at least every 6 months.

Security: Good Computing Practices

- **Log-off** before leaving a workstation unattended
- Watch out for suspicious e-mails, including:
  - Any e-mail you receive with an Attachment;
  - Any e-mail from someone whose name you do not recognize; or
  - Phishing.

Security: Good Computing Practices

- Indications that your account has been tampered with include:
  - Your log-in states someone tried to log-in and you know it was not you;
  - Your account is locked when you try to open it;
  - Your password is not accepted;
  - You are missing data; or
  - Your computer settings have mysteriously changed.

  If you suspect someone has tampered with your account, call your IT department immediately.

Conduct an Annual Risk Assessment

- Conduct an annual risk assessment of your system to identify vulnerabilities.
- HHS provides guidance.
- Work with your IT department to complete this.

Security: Good Computing Practices

Security for USB Memory Sticks and Storage Devices:

- Do not store e-PHI on memory sticks.
- If you must store it, encrypt it.
- Wipe the e-PHI when no longer needed.
- Protect the devices from loss, theft and damage.

Security: Good Computing Practices

- Never store PHI on unencrypted electronics.
- Try to avoid storing PHI on smartphones.
- If you must store it, encrypt it.
- Back-up original files.
- Synchronize with computers as often as practical.
- Wipe PHI files from all portable media when no longer needed.
- Protect your device from loss or theft.

Faxing

- Always include a cover sheet containing a Confidentiality Statement with the faxed information.
- If information is inadvertently faxed to the wrong party, the Privacy Officer should be notified.

E-Mailing

- When e-mailing PHI, triple check to make sure you have the correct address for the recipient.
- Avoid e-mail chains that contain PHI.
- Consider implementing an encryption program for e-mails containing PHI.

Disposing of PHI

- Do not just throw out paper files at home or the office; make sure they are destroyed such as by shredding or pulping!
- If you are disposing of, recycling, or giving away electronic media, make sure you take it to IT to be wiped clean.
- This should be done with any device used to access client confidential information, not just PHI.

What Do You Do If You Suspect a Breach?

An impermissible use or disclosure of PHI is *presumed* to be a breach.

Examples of Unauthorized Uses and Disclosures

- Fax or e-mail sent to the wrong number/person. **Triple check the fax number or e-mail address when sending PHI!**
- Posting PHI on social media websites or emailing/telling coworkers about it.
- Intentionally accessing PHI that is not job-related.
- Sending or using more PHI than is necessary.
- Disposing of PHI incorrectly, such as by throwing it in your trash.
  - All paper records of PHI should be shredded or destroyed.
  - All electronic media should be returned to IT for disposal.
- Theft or loss of laptop, phone, or other device that contains PHI.
- If any of the above occur, notify IT and your supervisor and/or the Privacy Officer **immediately**!

What if there is a breach of confidentiality?

- Possible breaches of the policies and procedures or the confidentiality of PHI must be reported to the Privacy Officer.
- The Privacy Officer will investigate and attempt to mitigate the harmful effects of any breach.
- The Privacy Officer must report a breach to the individual, HHS, and, if the breach is large enough, the media.

Disciplinary Actions

- Internal Disciplinary Action
  - Individuals who breach the policies must be subject to appropriate discipline.
- Civil Penalties and Criminal Penalties
  - Covered entities, business associates, and individuals who violate these standards can be subject to civil and criminal liability. Fines in the millions and jail time!

Audits

- HIPAA audits are underway for both covered entities and business associates.
  - Both desk audits and onsite audits.
- Also, DOL health plan audits.
  - Will want to see if employers are complying with HIPAA.

NOTES

Expanding Reach: NLRB Affects

KEEPING UP WITH THE TIMES OR REWRITING HISTORY: THE PACE AND SCOPE OF CHANGE UNDER THE NATIONAL LABOR RELATIONS ACT

New Mexico Bar Association

2016 Employment and Labor Law Institute

October 7, 2016

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TABLE OF CONTENTS

Mark Gaston Pearce was named Chairman of the National Labor Relations Board ("NLRB" or the "Board") by President Obama on August 27, 2011. In the five (5) years of his tenure as Chairman, the Board has been on a mission to expand influence of the National Labor Relations Act ("NLRA" or the "Act") for ease of organizing, to restrict employment practices potentially affecting employee exercise of statutory rights, and to broaden the definitions of employee covered by the Act. At the same time, the NLRB has encountered precedent setting court challenges to its authority and its decisions. This paper highlights several developments in NLRB rulemaking, NLRB decisions, and federal court litigation under the NLRA over the past five years.

I. THE EFFECT OF *NOEL CANNING* AND OTHER NLRB UPDATES

A. Impact of *Noel Canning* – Invalid Recess Appointments.

The NLRB has recovered from the Supreme Court's decision in *Noel Canning*.[1] In *Noel Canning*, the Supreme Court held that President Obama's recess appointments of three Board members in January 2012 were invalid because Congress was not in recess as meant in the Constitution at the time of the appointments.[2] The decision affected all Board decisions issued between January 2012 and August 2013.

Approximately 700 cases were decided by the recess-appointed Board, including ninety-eight (98) cases that were pending in federal court. The Board, after acquiring a properly appointed quorum, ratified or issued new decisions in most cases decided by the recess-appointed Board. Specifically, for those cases decided by the recess-appointed Board that were pending in federal court, the Board either modified or set aside the orders in cases in which a record had not been filed. In all other cases, the Board requested that the courts vacate and remand the cases back to the Board for reconsideration.

In addition to Board decisions, *Noel Canning* also affected administrative actions taken by the Board between January 2012 and August 2013. On July 18, 2014, the Board ratified all administrative, personnel, and procurement matters taken by the Board between January 4, 2012 and August 5, 2013[3]. This action removed any doubt about administrative appointments made during the 20 month period when the Board did not have a valid quorum.

B. Current Board Members.

The Board currently has three (3) members. The terms of two (2) members expired in 2015 and 2016 and there has been no movement on filling those seats on the Board. The NLRB has always been politically charged, and that has never been more so than now. The current members are: Chairman Mark Gaston Pearce and Members Lauren McFerran and Philip Miscimarra.

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[1] 134 S. Ct. 2550 (2014).

[2] *Id.* at 2578.

[3] *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/news-outreach/news-story/nlrb-officials-ratify-agency-actions-taken-during-period-when-supreme-court (last visited Sept. 27, 2016).

Ms. McFerran is the most recently appointed Board member, as she replaced Nancy Schiffer whose Board term expired on December 16, 2014. Harry Johnson's and Kent Hirozawa's terms ended in 2015 and 2016, respectively. Miscimarra is the lone Republican on the Board. He is a former management side labor lawyer in private practice and he has been a frequent and forceful dissenter in numerous Board decisions over the past few years. Though President Obama appointed replacements for both, the Senate has yet to confirm either appointment.

II. "QUICKIE ELECTION" RULES AND "PERSUADER" REPORTING RULE.

On April 14, 2015, the Board adopted expedited election rules, amending its long time set of rules and regulations governing representation-case procedures. The Board's new rules substantially reduce the time between the filing of a petition for representation and an actual election. The new rules are meant to avoid delays in the election process by focusing only on major questions concerning representation raised by the parties before conducting elections, rather than litigating all disputes up front. The rules also meant to ease the filing process for petitioners. Although the final rules do not set a hard deadline, or even a target timeline, for the amount of time between filing of an election petition and an election, the Board's goal is to conduct elections "as soon as practicable." Historically, the petition to election period typically ran 38-42 days. Since the new rules took effect in April 2015, that span has decreased to approximately three (3) weeks to twenty-eight (28) days.

A. Legal Challenges to New Election Rules.

Several business organizations raised legal challenges to the new rules before their implementation. Cases were filed in the Western District of Texas and in the District for the District of Columbia. Members of Congress also attempted to challenge the implementation of the rules.[4]

Both of the federal court challenges were dismissed by summary judgment. *See Associated Builders & Contractors of Texas, Inc. v. NLRB,* No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of United States of Am. v. Nat'l Labor Relations Bd.*, 118 F.Supp.3d 171 (D.D.C. July 29, 2015). On appeal, the Fifth Circuit affirmed the district court's decision in *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016). Absent consideration by the Supreme Court, or legislative action, it appears that the Board's new election rules are here to stay.

B. Summary of the New Election Rules.

Hearings and Review of Regional Director Rulings

Under the new rules, pre-election hearings will generally be held eight (8) days after a hearing notice is served, making the scheduling of pre-election hearings uniform across all

[4] House and Senate Republicans submitted a joint resolution to President Obama that would have blocked the new election rules; however, on March 31, 2015, President Obama vetoed the measure. *See Obama Vetoes Congressional Resolution, Backs NLRB Adoption of 'Overdue Reforms'*, BLOOMBERG BNA, http://www.bna.com/obama-vetoes-congressional-n17179924833/ (last visited Sept. 27, 2016).

NLRB regions. Additionally, issues litigated during pre-election hearings are limited to those issues necessary to determine whether an election may be held. Regional Directors have discretion to decide whether or not to resolve most questions of voter eligibility and bargaining unit inclusion before an election. Further, post-hearing briefs will no longer be automatically accepted after a hearing, as the new rules grant the Regional Director discretion to accept post-hearing briefs.

In a change to the procedures governing parties' request for Board review, parties are no longer required to submit requests to the Board to review Regional Directors' representation-case rulings before an election is held. Now, parties may request Board review of a Regional Director's rulings only *after* an election. This change essentially eliminates the mandatory twenty-five (25) day waiting period before an election that provides the Board time to consider requests for review of Regional Director rulings. As to hearings on election challenges, the new rules specify that post-election hearings on challenges or objections will be held twenty-one (21) days after the tally of ballots, or as soon as practicable.

Position Statements

In most cases, the new rules provide that one (1) business day before a pre-election hearing, the non-petitioning party must submit a position statement identifying all issues it may have with the petition, including issues related to the appropriateness of the bargaining unit or the date, time, and place of the proposed election.[5] Employers may not be able to litigate issues that are not raised in their position statement in the pre-election hearing.[6] Additionally, an employer's position statement must specifically identify the names, job classifications, shifts, and work locations of all employees it believes should be included in the petitioned-for unit.

In its discretion, the Board may request a written position statement from the petitioning party (generally, the union requesting an election). More commonly, however, the petitioner's position will be requested orally at hearing. Given that issue preclusion applies to both parties, the petitioner should be prepared to make all of its arguments at the time of the hearing, whether through writing or orally.

List of Eligible Voters

Within two (2) days after issuance of a Direction of Election or an Election Agreement, employers must produce a list of eligible voters, including the employees' names, home addresses, telephone numbers (if available), email addresses (if available), job classifications, shifts, and work locations. This is the so-called *Excelsior* list, which has been a representation case requirement for decades. The new *Excelsior* list requires more information than before, however, and must be provided much earlier in the process than before.

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[5] The filing and service of position statements must be completed before noon the day before the pre-election hearing.

[6] The expedited election rules will apply to all representation case elections, including decertification and unit clarification proceedings. Thus, in all cases, these rules of preclusion will relate to the non-petitioning party, which could be the employer or the labor union.

Electronic Filing

The new rules allow for electronic filing of documents by all parties. Additionally, NLRB offices may transmit notices and documents electronically. When a document is filed with the Board, it must be served on other parties in the same format in which the filing was made. However, if a document is electronically filed, it does not necessarily have to be served by electronic mail. Instead, the filing party must ensure that the document gets into the other parties' hands simultaneously with the filing, so a facsimile or hand delivery of service would be sufficient.

C. Effect of the Expedited Election Rules to Date

April 14, 2016 marked the one-year anniversary of the expedited election rules. Board data reviewing the effects of the changes to the Board's election rules since their implementation (between April 14, 2015 and April 14, 2016) tell a story of expectation and surprise. Overall, the data shows that the median time for election proceedings has shortened significantly, but the number of union wins has remained almost identical when compared to the previous year.[7]

According to a Board report, there were 2,674 election petitions filed between April 14, 2015 and April 14, 2016. This is a four percent (4%) decrease from the number of petitions filed during the same period one year earlier. Expectations at least in the business community were that the number of union organizing campaigns would increase significantly.

As expected, the new rules have substantially reduced the length of delays between the filing of election petitions and the election itself. As April 14, 2016, the median days between petition filing and election were twenty-four (24), which is nearly a thirty-seven percent (37%) reduction from the previous year. For those elections governed by a direction of election, rather than an election agreement, the median number of days between filing and election dropped from 64 to 34. Unions won 65% of the elections held since the implementation of the new elections rules, a one percent *decrease* from the number of union wins during the same period one year earlier.

D. The "Persuader Activity Rule"

The Labor Management Reporting and Disclosure Act ("LMRDA") requires employers and legal consultants to report any arrangement to persuade employees directly or indirectly regarding their right to organize or bargain collectively, which is referred to as "persuader activity." Failure of an employer to comply with this requirement could mean jail time and a substantial fine. However, the LMRDA excludes arrangements between employers and attorneys or consultants who merely provide advice, as long as counsel or consultant has no direct contact with the employees and the employer may choose to accept or reject its counsel's recommendations.

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[7] *Annual Review of Revised R-Case Rules*, NAT'L LABOR RELATIONS BD. (April 20, 2016). The report and data are available online at https://www.nlrb.gov/news-outreach/news-story/three-quarter-review-revised-r-case-rules (last visited Sept. 21, 2016).

1. Background to the New Persuader Rule.

In July 2011, the Department of Labor ("DOL") proposed an expanded "Persuader Rule," for federal reporting by employers, their attorneys and labor consultants. Amid controversy, the DOL repeatedly postponed its target date to finalize and publish the rule. However, the DOL published the final rule this year. On April 25, 2016, the DOL's rules relating to employers' disclosure of resources used to counter organizing drives briefly took effect.

2. Obligations Imposed By the 2016 Persuader Rule.

The 2016 Persuader Rule significantly narrows the scope of the advice and counsel exception by requiring labor relations consultants, including attorneys, to file public reports if the consultants' activities fall within the following categories:

i. A consultant engaged in *direct* contact or communication with any employee, with an objective to persuade such employee; or

ii. A consultant who has no direct contact with employees, but undertakes one or more of the following activities with the goal of persuading employees:

- **Planning, Directing, or Coordinating Supervisors or Managers**. This includes both formal meetings and other less structured interactions with employees.

- **The Provision of Persuader Materials.** This includes providing materials or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees. However, a consultant's revision of employer-created materials, including edits, additions, and translations, if an "object" of the revisions is to ensure legality as opposed to persuasion, does not trigger reporting.

- **Conducting a Seminar for Supervisors or Other Employer Representatives.** Seminar agreements must be reported when the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer's supervisors or other representatives. A consultant who merely solicits business by recommending that the employer hire the contractor to engage in persuasive activities does not trigger reporting. Employers are not required to file a report for attendance at a multiple-employer union avoidance seminar.

- **Developing or Implementing Personnel Policies or Actions.** According to the DOL, reporting is only required if the consultant develops or implements personnel policies, practices, or actions for the employer with the objective to, directly or indirectly, persuade employees (*e.g.*, the identification of specific employees for disciplinary action, or reward, or other targeting, based on their involvement with a union representation

campaign or perceived support for the union, or implementation of personnel policies or practices during a union organizing campaign).

3. Legal Challenges to the 2016 Persuader Rule.

The Persuader Rule has been challenged in court by several business and professional organizations. Most notably, in *National Federation of Independent Business et al. v. Perez*,[8] the U.S. District Court for the Northern District of Texas has issued a nationwide preliminary injunction against application of the Persuader Rule.[9] As a result, the DOL has suspended use of the new reporting forms and requirements until further notice.[10]

Approximately one (1) week earlier, a District Court in Minnesota denied a temporary injunction to the Persuader Rule. The federal court in Minnesota expressed strong misgivings, however, about the legality of the new rule.[11] A third challenge is pending in the Eastern District Court of Arkansas. However, since a nationwide preliminary injunction has already been issued in the Northern District of Texas, the court there is not pressed to rule on an injunction.[12]

III. NLRB GENERAL COUNSEL INITIATIVES

Since being appointed as NLRB General Counsel on November 4, 2013, Richard Griffin has actively promoted change to certain long-standing Board law and policy. Two memoranda issued by the General Counsel in 2014 outline Mr. Griffin's initiatives and policy objectives for his four (4) year term.[13] Some of the issues of interest to the General Counsel concern section 7 Rights and Employer Email Systems, the application of *Weingarten* rights in non-union settings, and Section 10(j) remedies.

1. Employers' Email Systems.

The General Counsel successfully petitioned the Board to reconsider its decision in *Register Guard*, 351 N.L.R.B. 1110 (2007), which held that employees do not have a right to use their employer's email system for union organizing or other protected activity under the Act because an employer's email system is property of the employer. *See* Section V(A), *infra*, for a more detailed discussion of this issue.

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[8] Case No. 5:16-cv-00066-C (N.D. Tex. Jun. 27, 2016).

[9] *See Nat'l Fed'n. of Indep. Bus. v. Perez*, No. 5:16-cv-00066, 2016 WL 3766121, at *46 (N.D. Tex. Jun. 27, 2016).

[10] Office of Labor-Management Standards (OLMS), UNITED STATES DEPARTMENT OF LABOR, https://www.dol.gov/olms/regs/compliance/ecr.htm (last visited September 25, 2016).

[11] *See Labnet Inc. v. United States Dept. of Labor*, No. 16-cv-0844, 2016 WL 3512143, at *13 (D. Minn. Jun. 22, 2016).

[12] *Associated Builders and Contractors of Arkansas, et al. v. Perez, et al.*, No. 4:16-cv-00169 (E.D. Ark.).

[13] *Mandatory Submissions to Advice*, Office of the General Counsel, Memorandum GC 14-01 (Feb. 25, 2014); *Affirmation of the 10(j) Program*, Office of the General Counsel, Memorandum GC 14-03 (Apr. 30, 2014).

2. *Weingarten* and Non-union Settings.

General Counsel Griffin is questioning *IBM Corp.*, 341 N.L.R.B. 1288 (2004), which held that *Weingarten* rights do not extend to non-union employees. *Weingarten*[14] holds that, when an employer conducts an investigation or interview of a union represented employee that could result in disciplinary action and the employee requests a representative, the employer may not hold the meeting/interview without the union representative present. The General Counsel has instructed Regional Directors to forward all relevant cases to the Division of Advice before processing.[15]

3. Section 10(j) Remedies.[16]

Section 10(j) of the Act authorizes NLRB Regional Directors to seek injunctive relief in federal court against alleged unfair labor practices. The General Counsel has endorsed initiatives to seek section 10(j) injunctions to pressure agreement to first time labor contracts and in cases involving unlawful discharges of employees alleged to be victims of serious unfair labor practices resulting from union organizing. Additionally, the General Counsel intends to seek section 10(j) relief in successor employer refusal-to-hire or refusal-to-bargain cases.[17]

4. The General Counsel's 2015 Memoranda.

In 2015, among other memoranda, the General Counsel issued memos discussing employer work rules, immigration, and guidance on the application of the Board's new arbitral deferral policy.[18] GC 15-04 is a comprehensive outline of the General Counsel's view concerning the legality of employer policies concerning employee activity and behavior. General Counsel Griffin's Memorandum takes a broad view about potential impact of workplace policies that may interfere with employee exercise of rights under the Act. This subject is discussed in more detail in section V *infra*.

In Memorandum GC 15-02, the General Counsel addressed the new standard for deferral to contractual grievance procedures in cases alleging violation of section 8(a)(1) and 8(a)(3) of the NLRA. The new standard was established in *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 (2014). In *Babcock* the Board overturned over thirty (30) years of precedent with regard to the Board's standard for deferring to arbitral decisions in cases alleging violations of section 8(a)(1) and 8(a)(3) of the NLRA. The Board's 2015 standard, often referred to as the "*Olin* standard", provided that deferral is appropriate in unfair labor practice cases where the contractual issue was factually parallel to the unfair labor practice issue, the arbitrator was

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[14] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[15] *Mandatory Submissions to Advice*, Office of the General Counsel, Memorandum GC 14-01 (Feb. 25, 2014).

[16] *Affirmation of the 10(j) Program*, Office of the General Counsel, Memorandum GC 14-03 (Apr. 30, 2014).

[17] *Id.*

[18] *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements to Section 8(a)(1) and (3) cases*, Office of the General Counsel, Memorandum GC 15-02 (Feb. 10, 2015); *Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Procedures*, Office of the General Counsel, Memorandum GC 15-03 (Feb. 27, 2015); *Report of the General Counsel Concerning Employer Rules*, Office of the General Counsel, Memorandum GC 15-04 (Mar. 18, 2015).

generally presented with the relevant facts of the unfair labor practice, and the award was not clearly repugnant to the NLRA.[19]

The Board's new standard is articulated as follows: If the arbitration procedures appear to have been fair and regular, and if the parties agreed to be bound, the Board will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue—which may be effectuated through a collective bargaining agreement or the explicit authorization of the parties; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.[20] The burden of proving that deferral is appropriate is with the proponent of the deferral.[21]

GC 15-02 advises Regional Offices to apply the previous *Olin* standard in cases in which the arbitration hearing occurred on or before December 15, 2014. The more restrictive *Babcock* standard is to be applied when the collective-bargaining agreement under which the grievance arose was executed after December 15, 2014.[22] Additionally, the Memorandum provides that in cases in which the "collective-bargaining agreement, was executed on or before December 15, 2014, and the arbitration hearing occurred after December 15, 2014" the applicable standard will depend on evidence that the arbitrator was explicitly authorized to decide the statutory issue.[23] If the arbitrator was authorized to decide the unfair labor practice claim, the *Babcock* standard will apply. However, if the arbitrator was not explicitly authorized to decide the statutory issue, the *Olin* standard would apply.[24]

Immigration Status in ULP Cases

In Memorandum GC 15-03, General Counsel Griffin discussed procedures for addressing immigration status issues arising during unfair labor practice proceedings. Under the new procedures, Regional Office staff members are required to immediately contact the Division of Operations-Management as soon as they become aware of immigration status issues in a case.[25] The Office of Operations-Management will then provide technical assistance, determine whether interagency engagement could assist with the enforcement of the Act, explore remedial options with Regional Office staff, and coordinate the agency's response to the issues presented.[26] The Memorandum makes clear that immigration status of anyone involved in a case before the agency should not be an issue during the investigation stage.[27]

When considering remedial options for undocumented charging parties, the Memorandum provides that the Office of Operations-Management will consider alternate remedies to backpay and reinstatement, such as consequential damages, reimbursement of

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[19] *Olin Corp.*, 268 NLRB 573, 573-74 (1984).
[20] *Id.* at *5.
[21] *Id.* at *2.
[22] Memorandum GC 15-02 at *9.
[23] *Id.*
[24] *Id.*
[25] Memorandum GC 15-03 at *1.
[26] *Id.*
[27] *Id.* at *2.

organizing or bargaining expenses, or publication of a notice in newspapers or other public forums.[28] The Memorandum notes that the Board may seek formal settlement agreements in cases in which back pay or reinstatement remedies are not available due to a complainant's immigration status. That resolution tactic would strengthen the Board's bond to enforce settlement agreements in cases in which pecuniary relief is limited on unavailable by creating the prospect of a contempt order.[29]

Unilateral Withdrawal of Union Recognition

Most recently, General Counsel Griffin issued Memorandum GC 16-03. This Memorandum outlines the procedures for NLRB regions should follow after deciding to issue a complaint alleging that an employer violated section 8(a)(5) by unlawfully withdrawing recognition from an incumbent union. This recommendation marks a major departure from long-standing precedent.

Under *Levitz Furniture Co. of the Pacific*[30] employers are permitted to unilaterally withdraw recognition from an incumbent union based on objective evidence that the union lost majority support. General Counsel Griffin believes that the *Levitz* framework is problematic because it does not establish a definitive test for assessment of lost majority support for the incumbent union. The General Counsel has instructed Regions to request that the Board adopt a rule that, "absent an agreement between the parties, an employer may lawfully withdraw recognition from a section 9(a) representative based only on the results of an RM or RD election."[31]

IV. THE JOINT EMPLOYER DOCTRINE.

Businesses large and small have always relied to some degree on other companies to provide labor. Sub-contractors, staffing services, entities in a supply chain, and joint-venturers are typical examples. With the ever increasing complexity of the economy and pace of change employers must adapt to, there has been a steady increase in reliance on third parties to provide labor and on flexible relationships with individuals providing services to American businesses. Growth of the contingent workforce is perceived as a threat by the federal government, which favors standard employment relationships as a more certain means of assuring legal compliance and revenue generation for the Treasury. The NLRB has been at the forefront of the federal government's effort to stretch the reach of federal labor and employment law to contingent workers and third party supply of workers.

A. *Browning-Ferris Industries of California.*

In August 2015, the Board issued a long awaited decision in *Browning-Ferris Industries of California,*[32] in which the Board changed the analysis and standard by which it is determined whether two legally separate entities are joint employers of an individual or group of workers.

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[28] *Id.* at *3.
[29] *Id.* at *3-4.
[30] 333 NLRB 717, 717 (2001).
[31] *Id.* at *1.
[32] 362 NLRB No. 186 (2015).

The NLRB long held that legally separate entities are joint employers only when they actually shared control or co-determined essential terms and conditions of employment. In *BFI*, the Board abandoned the actual control standard in favor of a potential to control standard.

Browning-Ferris Industries ("BFI") operated a recycling business in northern California and Leadpoint, a subcontractor, provided staff to Browning-Ferris to sort recyclable items from waste and to clean the facility.[33] The contract between Leadpoint and BFI provided that Leadpoint was the sole employer of its personnel and responsible for recruiting, hiring, setting wages and benefits, and discipline and discharge.[34]

The Teamsters sought to represent a unit of employees consisting of sorters, housekeepers, and screen cleaners at the BFI recycling facility.[35] This proposed unit included both BFI employees and Leadpoint employees.[36] The Teamsters took the position that Browning and Leadpoint are joint employers.[37] The Regional Director for Region 32 in Oakland, California found otherwise. Applying the Board's well-established joint employer standard, BFI did not exert sufficient control over Leadpoint's workers to make BFI a joint employer with another business.[38] The Regional Director concluded that the evidence showed only indirect or routine control by BFI over Leadpoint personnel.[39]

The Teamsters appealed to the Board, which took the unusual step of inviting the parties and the public to submit briefs addressing the issue of whether the Board should adopt a new standard for determining joint employer status. NLRB General Counsel Richard Griffin urged the Board to adopt a less stringent standard for determining joint employers in an amicus brief submitted to the Board.[40] General Counsel Griffin further urged the Board to replace the current joint employer standard with a standard that would find an entity to be a joint employer with another business "if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where 'industrial realities' otherwise made it essential to meaningful bargaining."[41]

On August 27, 2015, the Board held that it would find a business to be a joint employer when a business has the *ability* to directly or indirectly control any terms or conditions of employment for employees of a legally separate business entity or person.[42] The Board stated that to determine whether a putative joint employer meets the standard, the initial inquiry is whether a common-law employment relationship exists with the employees in question.[43] If a common-law employment relationship is present, the inquiry then turns to "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of

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[33] *Id.* at *2-3.
[34] *Id.* at *3.
[35] *Id.* at *1.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] General Counsel Amicus Br., Jun. 26, 2014, *available* at http:///www.nlrb.gov/case/32-RC-109684?page=1.
[41] *Id.* at 2.
[42] 362 NLRB No. 186, at *15 (2015).
[43] *Id.* at *2.

employment to permit meaningful collective bargaining."[44] The Board recognized that the new standard will require a fact-based inquiry considering, among other things, the direct or indirect right to hire, terminate, discipline, supervise and direct employees.[45]

Members Miscimarra and Johnson dissented arguing that the Board's new approach will cause far more harm than good. The dissenters explored the practical consequences of the majority's holding in the context of various business relationships.[46] The dissenters concluded that, under the majority's decision, joint employer status will be found to exist in more cases than not and that the change in law will foster instability in the bargaining context due to the consideration of multiple conflicting interests among employers.[47] The *Browning-Ferris* decision has been appealed to the U.S. Court of Appeals for the District of Columbia.[48] The court will likely issue a decision in the first half of 2017.

B. ***CNN America, Inc.***

Foreshadowing *Browning-Ferris*, the Board previously explored the contours of the joint employer relationship in *CNN America, Inc.*[49] There, the Board held that CNN and Team Video Services ("TVS")—a former subcontractor of CNN—were joint employers.[50] The dispute stemmed from CNN's decision to cancel a subcontract agreement with TVS.[51] TVS employees operated the electric equipment in CNN's Washington D.C. and New York studios and were also unionized.[52] CNN did not bargain with the union that represented TVS employees regarding the decision to terminate the contract or about the effects of that decision, it refused to recognize or bargain with the union, and it hired all of the non-unionized employees for in-house positions.[53]

The Board majority held that CNN violated the Act by failing to bargain with the union regarding the termination of the TVS contract because CNN was a joint employer.[54] In *CNN*, the Board announced that joint employer status would be found when entities "share or codetermine those matters governing the essential terms and conditions of employment" with the putative employer "meaningfully affect[ing]...matters relating to the employment relationship 'such as hiring, firing, discipline, supervision and direction'".[55] Applying the pre-BFI factors to the CNN case, the Board found that CNN was a joint employer because CNN controlled the hiring and work hours of TVS employees, controlled the assignment of work for TVS employees, and directed and supervised the work performed by TVS employees.[56]

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[44] *Id.*
[45] *Id.* at *15.
[46] *Id.* at *38-43.
[47] *Id.* 23-24.
[48] *NLRB v. Browning-Ferris Indus.*, Nos. 16-1064, 16-1063, 16-1028.
[49] 361 NLRB No. 47 (2014).
[50] *Id.* at *1.
[51] *Id.*
[52] *Id.* at *2.
[53] *Id.* at *1.
[54] *Id.*
[55] *Id.* at *3 (quoting *Laerco Transportation*, 269 NLRB 324, 325 (1984)).
[56] *Id.* at *3-7.

The majority then extended this analysis finding "additional factors" supporting their finding, including that (1) CNN provided TVS with floor space in CNN building; (2) CNN provided TVS employees with CNN e-mail accounts; (3) CNN supplied all the equipment used by TVS employees; (4) TVS employees performed work that was at the core of CNN's business and worked exclusively for CNN; and (5) CNN granted TVS employees security clearances and required them to wear CNN security badges, thus holding TVS employees out as their own employees.[57] CNN, as a joint-employer with TVS of the bargaining-unit employees, therefore violated section 8(a)(1), (3), and (5) of the Act by failing to bargain over the decision to terminate the TVS contract, the effects of its cancellation, and the subsequent lay-off of TVS employees.[58]

Additionally, the Board majority held that CNN's conduct following termination of the TVS contract violated the Act since CNN was a successor to the CNN-TVS joint-employment relationship. Finding that "on the day following the termination of the [TVS contract], CNN continued the same business operations with employees who performed the same work, at the same locations, and using the same equipment as TVS technicians." Thus, CNN was obligated to bargain with the union that represented TVS employees about changes in terms and conditions of employment.[59]

Member Miscimarra dissented, asserting that CNN was not a joint-employer of the TVS employees. CNN did not have any "role in hiring, firing, disciplining, discharging, promoting, or evaluating employees" and CNN "did not actively co-determine the TVS technicians' other terms and conditions of employment."[60] Member Miscimarra also rejected the majority's use of the "additional factors" in joint-employer analysis.[61] Finally, Member Miscimarra, while agreeing that CNN was a successor to the TVS contract, disagreed that CNN had an obligation to bargain over the terms and conditions of employment.[62] As a successor, CNN could in the dissent's view unilaterally set initial terms and conditions.

C. ***Retro Environmental, Inc.***

In *Retro Environmental, Inc.*,[63] the Board shed some additional light on the new "joint employer standard" articulated in *BFI*. *Retro* involved a staffing agency that provided temporary workers to a construction company.[64] A union sought to represent laborers supplied by the temporary staffing company, along with laborers directly employed by the construction company.[65]

The Regional Director found a "colorable claim for joint employment," but dismissed the union's petition. The Regional Director was persuaded by the fact that the temporary staffing

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[57] *Id.* at *8.
[58] *Id.* at *32.
[59] *Id.* at *26.
[60] *Id.* at *36.
[61] *Id.*
[62] *Id.*
[63] 364 NLRB No. 70 (Aug. 16, 2016).
[64] 364 NLRB at 1*.
[65] *Id.*

agency and the construction company contractually set a specific termination date.[66] The Board disagreed with the Regional Director about the significance of a set end date and analyzed whether or not a joint employer relationship was present.[67]

As expected, the Board determined that there was a joint employer relationship between the temporary staffing agency and the construction company.[68] The temporary staffing agency recruited employees, prescreened them, performed drug tests and background checks, provided essential training, and verified that employee's possessed required certifications.[69] The construction company's contract with the temporary staffing company provided that the temporary staffing agency would perform all of the specified duties. Additionally, the construction company retained the right to request a replacement if it was unsatisfied with an assigned employee and was primarily responsible for determining the number of workers supplied, hours and scheduling, and supervised laborers on the job.[70]

In response to the dissent's claim that the majority should not determine that parties are joint employers when their relationship in the future is speculative, the majority identified three factors that will influence its consideration of a joint employer relationship: (1) the user employer retains the right to dictate the number of laborers supplied by the temporary staffing agency; (2) the user employer continues to impose conditions on the staffing agency to ensure that laborers are properly trained and qualified to perform the job; and (3) the user employer retains the right to request that the temporary staffing agency replace a supplied laborer if it is unsatisfied with the laborers work.[71] While set expiration dates remain useful in defending against joint employer claims, *Retro Environmental* illustrates that lack of control over temporary workers supplied by a staffing service remains critical to defeating joint employer status under the *BFI* standard.

D. Mixed Bargaining Units: *Miller & Anderson, Inc.*

On the heels of its new joint employer standard outlined in *BFI*, the Board invited briefs discussing bargaining units that combine individuals singularly employed by a company with individuals jointly employed by a user employer and a supplier employer. Specifically, should employer consent be required for such bargaining units? The Board previously considered this issue in two well known cases.

In 2000, in *M.B. Sturgis, Inc.*,[72] the Board held that the Act permits employees who work for one employer to be included in units with employees jointly employed by a user employer and a supplier employer without consent of the user or supplier employers. Four years later, the Board overturned *M.B. Sturgis*. In *Oakwood Care Center*,[73] the Board flip-flopped and held that bargaining units with employees who are solely employed by a user employer and employees

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[66] Id. at *2.
[67] *Id.* at 3.
[68] *Id.* at *4.
[69] *Id.* at *3.
[70] *Id.*
[71] *Id.* at fn. 7.
[72] 331 NLRB 1298 (2000).
[73] 3434 NLRB 659 (2004).

who are jointly employed by the same user employer and a supplier employer equate to a multi-employer bargaining unit that is only appropriate with employer consent.

Three months ago, after considering the briefs and its precedent, the Board overruled *Oakwood* and reverted to *M.B. Sturgis*. In *Miller & Anderson, Inc.*,[74] the Board held that employer consent is not required for bargaining units that combine jointly employed and solely employed employees of a user employer if there is a sufficient community of interest between the employees.[75] The Board majority reasoned that return to the *Sturgis* rule is consistent with the broad statutory purpose and provisions of the Act favoring collective bargaining.[76]

Specifically, the majority in *Miller & Anderson* explained that, in its view, the bargaining unit was not a true multi-employer bargaining unit. Rather, all bargaining unit members worked for the user employer, either jointly or solely.[77] Requiring consent from both the user and supplier employer, the Board said, is too limiting to employees' right to organize.[78] Echoing its concern in recent years with the changing nature of the American workforce, the majority pointed out that contingent workers are often spread out among different user employers and that the *Oakwood* rule interfered with their opportunity to organize.[79]

V. EXPANSION OF EMPLOYEE RIGHTS TO ENGAGE IN CONCERTED ACTIVITY RELATED TO WAGES, HOURS, TERMS AND CONDITIONS OF EMPLOYMENT.

Section 7 of the NLRA gives employees a right to engage in concerted activity for purposes of wages, hours, terms and conditions of employment. Application of this near eighty (80) year old law to the 21st Century workplace has been a major subject of controversy or progress, depending on one's point of view, during the terms of Chairman Pearce and General Counsel Griffin. There is no denial, however, that decisions by the NLRB in the last five (5) years have significantly impacted union and non-union employers alike in development and enforcement of workplace rules and policies.

A. Social Media and Electronic Communications.

One of the most commented about decisions by the NLRB under Chairman Pearce concerns employee use of an employer email system for Section 7 activities. That case is *Purple Communications, Inc.*[80] Seven (7) years earlier, in *Register Guard*,[81] the Board held that employees do not have a right to use an employer's email system for Section 7 purposes because the email system was the property of the employer. In *Purple Communications*, the Board flip-flopped again and reversed an ALJ's decision.[82] The Board held that Purple Communications'

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[74] 364 NLRB No. 39 (July 11, 2016).
[75] 364 NLRB at pg. 2.
[76] *Id.* at 6-7.
[77] *Id.* at 7.
[78] *Id.*
[79] *Id.* at 9.
[80] 361 NLRB No. 126 (2014).
[81] 351 NLRB 1110 (2007).
[82] 361 NLRB No. 126, at *3.

electronic communication policy violated Section 8(a)(1) of the Act and said that employees have a "statutory right to use their employer's email systems for Section 7 purposes."[83]

In its December 2014 decision, the Board in *Purple Communications* created a new framework for determining when employees have a right to use their employer's email system for section 7 activities. The Board explained that there is a presumption that any employee who has access to an employer's email system cannot be prohibited from using the employer email system for Section 7 purposes, absent special circumstances.[84] Though the Board did not explicitly define special circumstances, it noted that special circumstances are to be determined by the nature of the employer's business.[85]

Additionally, the Board clarified in *Purple Communications* that its holding is limited to email systems only and that the presumption of permitted use is limited to non-working time.[86] The Board specified that its holding does not prevent employers from monitoring their email systems for productivity purposes or for other reasons that could give rise to employer liability, as long as the employer "does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activities."[87]

The majority set forth three specific grounds on which employers may limit or ban employee use of e-mail for Section 7 activities. Specifically:

- The access rule "applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access";[88]

- "[A]n employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline",[89] although the Board explained that "[b]ecause limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, we anticipate that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees";[90] and

- "Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline."[91]

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[83] *Id.* at *1.
[84] *Id.*
[85] *Id.* at *13.
[86] *Id.*
[87] *Id.* at *15.
[88] 361 NLRB No. 126 at *1.
[89] *Id.*
[90] *Id.* at *14.
[91] *Id.* at * 1.

The Board remanded *Purple Communications* back to the ALJ for reconsideration in light of its decision.

On March 16, 2015, the ALJ issued a supplemental decision applying the Board's holding to the facts presented in the case.[92] The ALJ held that Purple Communication's Electronic Communication Policy violated section 8(a)(1) of the Act because the policy was broad enough to prohibit the use of the company's email system for section 7 activities during nonworking times.[93] Purple Communications declined to argue that its policy is lawful under the NLRA due to the "special circumstances" defense articulated by the Board.[94] In the original hearing, Purple Communications employees testified that the purpose of electronic communications policy was to prevent "computer viruses, the transmission of inappropriate information, and the release of confidential information."[95] The ALJ noted that Purple Communications' proffered reasons for the policy were not sufficient to sustain the "special circumstances" defense.[96]

B. EMPLOYER WORK AND CONDUCT POLICIES.

As discussed in section III above, on March 18, 2015, the NLRB General Counsel issued a memorandum discussing his perspective about the legality of certain employer work rule cases.[97] The Board too has taken a particular interest in employer work rules under Chairman Pearce, creating a vast body of law on the issue. The core precedent underlying General Counsel Griffin's memorandum and most of the NLRB's recent work rule decisions is *Lutheran Heritage Village – Livonia*.[98] There, the Board ruled in 2004 that employers violate section 8(a)(1) of the Act by maintaining a work rule that: (1) employees would reasonably construe to prohibit section 7 activity; (2) the employer promulgated in response to union or other section 7 activity; or (3) the employer applied to retract the exercise of section 7 rights.[99] The central subject of focus in cases over the past five (5) years is the phrase "would reasonably construe" in the first prong of *Lutheran Heritage* analysis.[100]

1. Confidentiality Policies.

Confidentiality rules and conduct rules have been of particular interest to the Board. In the area of confidentiality rules, the General Counsel explained that rules limiting disclosure of employee information concerning wages, benefits, and other terms and conditions are facially

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[92] *Purple Communications, Inc.*, Case 21-CA-095151 (NLRB Div. of Judges, Mar. 16, 2015).
[93] *Id.* at *4
[94] *Id.*
[95] *Id.* at *4.
[96] *Id.* at n.8. The parties have filed cross exceptions to the ALJ's March 16, 2015 decision. All briefing was completed by July 7, 2015, and a Board decision on the cross-exceptions is expected soon.
[97] *Report of the General Counsel Concerning Employer Rules*, Office of the General Counsel, Memorandum GC 15-04 (Mar. 18, 2015).
[98] 342 NLRB 646 (2004).
[99] *Report of the General Counsel Concerning Employer Rules*, Office of the General Counsel, Memorandum GC 15-04, at *2 (Mar. 18, 2015).
[100] *Id.*

unlawful under *Lutheran Heritage*.[101] Examples of unlawful confidentiality rules examined by the General Counsel include:

- "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."[102]

- "Do not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses.'"[103]

- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information...Do not discuss work matters in public places."[104]

The General Counsel's memorandum examined the characteristics of lawful confidentiality rules and explained that confidentiality rules that: (1) do not reference information regarding employees or employee terms and conditions of employment; (2) do not define "confidential" in an overbroad manner; and (3) do not otherwise contain language that would be reasonably construed to prohibit Section 7 communications are generally lawful rules.[105] Notable examples of lawful confidentiality rules included:

- "Misuse or unauthorized disclosures of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."[106]

- "Do not disclose confidential data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."[107]

Employer confidentiality policies in the context of internal investigations were addressed in *Banner Health Sys.*[108] There, the Board examined whether an employer violated section 8(a)(1) of the Act by encouraging employees not to discuss a workplace investigation.[109] The Board first examined its test articulated in *Hyundai Amer. Shipping Agency.*[110] Under *Hyundai*, an employer may only request investigation confidentiality on a case-by-case basis. The employer must determine if confidentiality is necessary based on objectively reasonable grounds

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[101] *Id.* at * 4-5.
[102] *Id.*
[103] *Id.* at *4.
[104] *Id.* at *5.
[105] *Id.* at *6.
[106] *Id.*
[107] *Id.*
[108] 362 NLRB No. 137 (2015).
[109] *Id.* at *9.
[110] 357 NLRB No. 80 (2011).

for believing that the integrity of an investigation would be compromised without confidentiality.[111]

Based on the *Hyundai* test, the Board determined that Banner Health's policy was unlawful.[112] Even though Banner Health did not apply its confidentiality policy to all investigations, the Board viewed the policy as a "blanket" policy. As found by the Board, Banner Health did not examine the particular facts of the investigation before instituting a confidentiality mandate.[113]

In *Boeing Co.*[114] the company provided employees involved in work-related investigations with a confidentiality notice advising them not to discuss the details of internal investigations with other employees.[115] The Board affirmed the ALJ's ruling that the policy violated section 8(a)(1) of the Act, in spite of the employer's argument that the policy was lawful based on legitimate business justifications—including protecting witnesses, victims, or employees, and preventing the spread of unfound rumors.[116] The Board rejected the employer's justifications as too general.[117] Instead, ruled the Board, confidentiality policies related to investigations must be weighed against the competing interest of protecting employees' section 7 rights. Confidentiality policies related to internal investigations must be tailored to the unique circumstances of an investigation, explained the majority, such as concerns of witness intimidation or harassment, destruction of evidence, or other misconduct that tends to compromise the integrity of the investigation.[118]

In an attempt to satisfy the Board's expanded application of section 7, Boeing had amended its confidentiality notice to state that it was *recommended* that employees refrain from discussing investigations with other employees, as opposed to *directing* employees to keep investigations confidential.[119] The Board agreed with the ALJ's finding, however, that the revised policy was also unlawful.[120] The ALJ and the Board determined that the revised policy would still inhibit protected activity, particularly in light of the fact that it was clear that the employer desired confidentiality, the employer routinely asked employees to sign confidentiality notices, and Boeing did not provide assurance that employees were free to disregard the recommendation contained in the revised policy.[121]

2. Civility and Behavior Codes and Policies.

On the subject of employee conduct rules, the General Counsel Memorandum 15-04 and recent Board decisions focus on: (1) whether or not the rule could be construed to ban protected criticism or protests regarding supervisors or management; (2) whether or not the rule could be

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[111] *Id.*
[112] *Id.* at *10.
[113] *Id.* at 6.
[114] 362 NLRB No. 195 (2015).
[115] *Id.* at *2.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at *3.
[120] *Id.*
[121] *Id.*

understood to ban conduct that would be reasonably understood as including protected concerted activity; and (3) whether or not the rule would reasonably be construed to refrain criticism of the employer in public.[122] Conduct rules may lawfully require employees to be respectful of customers, competitors, and others because employers have a legitimate interest in having employees act professional and courteous when conducting business.[123] Examples of conduct rules considered unlawful by the General Counsel include:

- "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."[124]

- "[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."[125]

3. Business Relationships and Employment At-Will

In its continued scrutiny of handbooks and work rules, the NLRB this year has concluded that two common provisions in a non-compete agreements violate section 8(a)(1) of the Act. In *Minteq Int'l, Inc.*,[126] the Board examined an "interference with relationships" rule and an "at-will employment" provision contained in a non-compete agreement all employees were required to sign. The "interference with relationships" rule prohibited employees from intentionally soliciting or encouraging any present or former customer to terminate or alter its relationship with the employer in an adverse manner.[127] The General Counsel argued that the rule would be read by employees to prohibit lawful Section 7 conduct such as "asking customers to boycott the [employer's] products in support of a labor dispute."[128] The Board agreed.

The Board majority reasoned that employees' ability to communicate with customers about the terms and conditions of employment for their mutual aid and protection is a right protected by Section 7 of the Act.[129] Thus, according to the majority, the rule restricted employees' ability to use channels outside of their immediate employment relationship to improve the terms and conditions of their employment.[130] Also, the Board noted, the policy could interfere with employees' right to ask customers to boycott the employer's products or services and other forms of appeal to the employer's customers.[131]

The non-compete in *Minteq* also included an "at-will employment" provision. The rule stated that the "[e]mployee acknowledges that [the agreement] does not affect the Employee's status as an employee-at-will and that no additional right is provided...which changes such

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[122] *Id.* at *7-8.
[123] *Id.* at *7.
[124] *Id.* at *8.
[125] *Id.*
[126] 364 NLRB No. 63 (July 29, 2016).
[127] *Id.* at 6-7.
[128] *Id.* at 7.
[129] *Id.*
[130] *Id.*
[131] *Id.*

status."[132] Minteq's collective bargaining agreement, by contrast, provided that after six (6) months employees could be discharged or disciplined only for cause.[133] In light of the just cause provision, the Board ruled that the "at-will employment" rule violated the Act. The Board reasoned that the rule purported to give at-will employment status to all employees, in spite of the parties' agreement in the CBA.[134] Further, the Board reasoned that the conflicting provisions would likely discourage employees from engaging in section 7 activity such as utilizing the contractual grievance and arbitration processes to challenge disciplinary action they believe were not for just cause.[135]

One of the most recent and arguable cases concerning codes of conduct is *William Beaumont Hospital*.[136] This case arose in the tragic context of a baby's death while in hospital care. Lack of staff cooperation with each other was questioned as a factor in the events resulting in the baby's loss of life.

The hospital's Code of Conduct for Surgical Services and Perianesthesia prohibited employee conduct "inappropriate or detrimental in patient care."[137] Other provisions in the hospital's Code of Conduct prohibited "behavior that is ... counter to promoting teamwork," and "negative or disparaging comments about the ... professional capabilities of an employee or physician to employees, physicians, patients or visitors."[138] A Board majority found these hospital policies unlawful.

Relying *on Lutheran Heritage* the Board majority reasoned that employees would reasonably construe the hospital's conduct policy as barring protected activity under section of the Act. Member Miscimarra filed a fiery dissent. Going beyond the point that the policy was intended to facilitate effective patient care and a healthy work environment, Member Miscimarra called for the reversal of the "would reasonably construe" standard articulated in *Lutheran Heritage*. The Board's application of that case in Member Miscimarra's assessment creates an incentive for employers to dispense with sensible workplace policies and manage employee relations on a purely situational basis.[139]

Member Miscimarra reasserted his call for a reassessment of *Lutheran Heritage*, or more accurately Chairman Pearce's interpretation, in *Schwan's Home Services, Inc.*[140] Schwan maintained three facially neutral conduct policies that the Board ruled interfered with employee's section 7 rights. Specifically, Schwan prohibited employees from (1) sharing information concerning customers, vendors, or employees,[141] (2) disseminating information containing the company's name without approval,[142] and (3) engaging in any conduct that could be detrimental

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[132] *Id.* at 7.
[133] *Id.*
[134] *Id.*
[135] Id.
[136] 363 NLRB No. 162 (April 13, 2016).
[137] *Id.* at *1-2.
[138] *Id.*
[139] *Id.* at *9-10.
[140] 364 NLRB No. 20 (2016).
[141] *Id.* at *1.
[142] *Id.*

to the best interest of the company or its employees.[143] The Board determined that all three policies were broad enough to restrict section 7 activities.[144] Member Miscimarra filed an in-depth dissent reasserting his view that the Board should overrule its "reasonably construe" standard, articulated in *Lutheran Heritage*, because the application of the standard failed to properly balance an employer's legitimate business justification for promulgating work rules against its potential adverse impact on employee's Section 7 rights.[145]

4. Videotaping and Recording in the Workplace.

Section 8(a)(1) of the Act has long been understood to prohibit employer surveillance of employee union and other protected activity. The flip-side, employee recording of workplace events and conditions, has been less certain as a legal right. This is yet another subject of attention in recent NLRB decisions.

In *Whole Foods Market Grp., Inc.*,[146] the Board ruled it unlawful for an employer to maintain a policy that prohibits employees from recording in the workplace without prior management approval.[147] Whole Foods maintained a policy that prohibited employees from recording company meetings and conversations with others without prior approval.[148] An ALJ ruled that the no-recording policy did not violate section 8(a)(1) of the Act because the policy did not explicitly prohibit employees from engaging in protected concerted activity and, in the ALJ's view, making recordings in the workplace was not a protected right.[149] The Board disagreed. The majority reasoned that recording conversations may sometimes be necessary to protect rights under the Act and cannot be completely prohibited.[150] Whole Food's no recording policy applied in all workplace settings, regardless of whether the recording involved protected activity, and in the majority's view that went too far.[151]

As to states that prohibit nonconsensual recording, the majority acknowledged that surreptitious recording may violate state law. Still, the majority stuck to its view that the Whole Foods' policy was unlawful because it was not limited to stores in states where nonconsensual recordings are prohibited by law.[152] Finally, the Board distinguished its decision in *Flagstaff Med. Ctr., Inc.*,[153] in which it held that an employer policy that prohibited the use of cameras for recording images in a hospital setting did not violate the Act.[154] The Board reasoned that *Flagstaff* was distinguishable because it involved a concern for the disclosure of confidential patient information.[155] Appeal of this decision is in the Second Circuit.[156]

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[143] *Id.*
[144] *Id.* at 7.
[145] *Id.* at *18 – 20.
[146] 363 NLRB No. 87 (Dec. 24, 2015)
[147] *Id.* at *1.
[148] *Id.*
[149] *Id.* at *2.
[150] *Id.* at *4.
[151] *Id.* at *4.
[152] *Id.* at fn. 13.
[153] 357 NLRB No. 65 (2011).
[154] *Id.* at *4.
[155] *Id.* at *5.

VI. NON-SOLICITATION POLICIES.

The Eighth Circuit recently overturned a Board decision that elevated employee rights to organize for mutual aid under the Act over an employer's right to discipline its employees for violating company policy. In *Conagra Foods, Inc.*,[157] the Board considered the definition of "solicitation" in the workplace. Conagra maintained a non-solicitation policy and also posted a letter that "reminded" employees that union discussions on the production floor were prohibited by the company's non-solicitation policy.[158]

The United Food and Commercial Workers began an organizing campaign at Conagra's plant in Troy, Ohio.[159] Janette Haines worked at the facility and was a supporter of the union.[160] Haines spoke with two employees, Schipper and Courtaway, in the restroom during a break about signing union authorization cards and both employees indicated that they would.[161]

A few days later, Haines passed Schipper and Courtaway on the production floor and told them that she placed authorization cards in their lockers.[162] Courtaway was cleaning at the time and stopped cleaning momentarily when Haines spoke to her.[163] Schipper was waiting for her shift to begin.[164] Courtaway reported the conversation and Haines was given a verbal warning for violating the Company's non-solicitation policy.[165] Haines filed an unfair labor practice charge and an ALJ determined that Conagra violated section 8(a)(3) and 8(a)(1) of the Act by disciplining Haines.[166]

The Board affirmed the ALJ's decision and held that Haines' behavior could not lawfully be a subject of discipline because her actions did not amount to solicitation.[167] Solicitation usually means asking someone to sign an authorization card, according to the Board, not the simple mention of a union authorization card.[168] The Board explained that Haines' statement that she placed the authorization cards in the employee's mailboxes was not a solicitation because it did not call for a response of any kind and did not pose a significant disruption to the production floor as the message was conveyed in a few seconds.[169] The Board went on to hold that the Company letter that "reminded" employees about the non-solicitation policy was unlawful because it could be viewed as barring all discussions during working times.[170]

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[156] *Whole Foods Market Group, Inc. v. National Labor Relations Board*, Nos. 16-0002, 16-0346.
[157] 361 NLRB No. 113 (2014).
[158] *Id.* at *3.
[159] *Id.* at *1.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at *2.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* at *3.

On February 19, 2016, the Eighth Circuit reversed the NLRB's decision in part, holding that Conagra lawfully disciplined Haines under its non-solicitation policy.[171] Examining the issue whether Haines was "soliciting" union support during work time, the court stated that, contrary to the Board's conclusions, it is not necessary to request a signature for an action to constitute solicitation.[172] The court also disagreed with the Board's reliance on the brief duration of the encounter between Haines and her coworkers: "an employer may censure *any* discussion—about unions, the weather or anything else—that is sufficiently disruptive. But when that discussion solicits union support it may be subject to a blanket prohibition by an employer during working time."[173] Following this reasoning, the Eighth Circuit held that Haines's brief mention of union cards was part of a prolonged, continuing effort to solicit union support, so by her statement she violated the company's non-solicitation policy.[174]

The Eighth Circuit did, however, affirm the Board's conclusion that Conagra violated the Act by posting a letter reminding employees about the non-solicitation policy, as that could chill employees in the exercise of their section 7 rights.[175]

VII. EXPANSION OF REMEDIES UNDER THE NLRA.

In unfair labor practice cases involving loss or denial of employment, remedies under the NLRA have been limited relative to remedies in common aw and other statutory causes of action. Remedies awarded by the Board are typically backpay, reinstatement, and notice posting. Under Chairman Pearce, the Board has looked for broader remedial power.

A. Back Pay and Interim Earnings

On January 20, 2016, the Tenth Circuit issued a decision in *NLRB v. Cmty. Health Servs., Inc. (Mimbres).* In its 2-1 decision, the court enforced a Board order that declined to deduct employees' provable interim earnings from other employment when calculating their back pay in a reduction of hours case. *Mimbres* is an important clarification about the interplay of the duty to mitigate damages and policy concerning deduction of interim earnings from backpay.

In the underlying Board proceedings, United Steelworkers of America, District 12 filed ULP charges against Mimbres Memorial Hospital and Nursing Home challenging the hospital's 1999 decision to reduce the hours of its full-time, respiratory department employees.[176] The Board held that the hospital violated Sections 8(a)(1) and (5) of the Act and ordered a make whole remedy for any loss of earnings or benefits for effected employees. The Tenth Circuit enforced that order in whole.[177]

In its January 20, 2016 decision, the Tenth Circuit explained that employees who are not terminated but "suffer other labor injuries" have no duty to seek secondary employment to

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[171] *Conagra Foods, Inc. v. NLRB*, No. 14-3771, 2016 WL 682979 (8th Cir. Feb. 19, 2016).
[172] *Id.* at *6.
[173] *Id.* at *7.
[174] *Id.* at *9.
[175] *Id.* at *10.
[176] *Id.* at *1.
[177] *Id.*

mitigate their damages pending a decision on their claims.[178] Nonetheless, some employees will be forced to seek secondary employment while awaiting the outcome of their ULP claims. Concluding that the Board had properly interpreted *Ogle*, and that its policy justifications were reasonable, the Tenth Circuit affirmed and enforced the Board's order.[179]

B. Search-For-Work and Interim Employment Expenses.

King Soopers, Inc.,[180] like *Browning-Ferris Industries*, is an example of the current NLRB's willingness to signal change in precedent by inviting public comment before a decision. In *King Soopers*, the Board considered whether to revise treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees. Early this year, the Board invited the public to submit briefs discussing that issue.

Under the Board's traditional approach, search-for-work and interim employment expenses incurred by a wrongfully terminated employee were treated as offsets of an employee's interim earnings.[181] In some instances, wrongfully terminated employees' recoverable search-for-work and interim employment expenses were capped at the amount of the employee's interim earnings.[182] The General Counsel argued existing law required victims of discrimination to bear the burden of the expenses caused by an employer's unlawful conduct.[183]

The Board sided with the General Counsel and held that search-for-work and interim employment expenses should be treated separately from interim earnings.[184] Search-for-work and interim employment expenses are no different than medical expenses or retirement fund contributions, as explained by the majority, which the Board treats as separate elements of back pay for victims of discrimination.[185] Additionally, the Board reasoned that its new rule would avoid potential tax problems for employees, as search-for-work and interim employment expenses will no longer be mixed with wages as taxable income. Finally, the Board held that it would apply this new rule retroactively.[186]

C. More Stringent Remedies for Repeat Violators

Under the authority of Section 10(c)[187] of the NLRA, the Board ordered rarely used remedies in *HTH Corporation*.[188] HTH had a long history of litigation with the Board resulting from HTH's numerous violations the NLRA over a ten (10) year period.[189] Examples of HTH's violations included unlawfully granting promotions and wage increases during the period before an election, unlawfully withdrawing recognition from the selected union, and unilaterally

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[178] *Id.* at *4.
[179] *Id.* at 3-9.
[180] 364 NLRB No. 93 (2016).
[181] *Id.* at *5.
[182] *Id.*
[183] *Id.* at *1.
[184] *Id.* at *6.
[185] *Id.*
[186] *Id.* at *8.
[187] 29 U.S.C. §160(c).
[188] 361 NLRB No. 65 (2014).
[189] *Id.* at 2.

changing terms and conditions of employment.[190] To remedy HTH's previous unfair labor practices, the Board sought issuance of section 10(j) injunctions.[191]

Following an administrative trial, the ALJ issued a cease-and-desist order and a notice posting requirement.[192] The Board affirmed the ALJ's remedies, but determined that additional non-standard remedies were warranted due to HTH's continued violations.[193] The additional remedies included monetary damages, which included an award of attorneys' fees, litigation costs, and other related costs, to the General Counsel and to the Union.[194] Additionally, the Board expanded the ALJ's notice *reading* requirement by ordering the attendance of HTH supervisors at a reading of the notice and ordering the publication of the notice in a generally circulated publication.[195]

In a dissent, Member Johnson argued that the grant of litigation costs was beyond the scope of the remedies authorized by the NLRA.[196] The majority relied on case law in which litigation expenses had been awarded in cases involving bad faith in the conduct of the litigation.[197] Having found that HTH demonstrated bad faith in the litigation by failing to remedy earlier unfair labor practices, the Board majority determined that an award of litigation costs was appropriate.[198]

Perhaps foreshadowing future awards, the Board discussed in dicta the possibility of awarding front pay to an employee who was twice unlawfully terminated for engaging in protected activity.[199] The Board ultimately decided against awarding front pay in this case because neither the union nor GC had requested it.[200] Nonetheless, the Board strongly suggested that it would award such a remedy in a future case, stating that "the Supreme Court's decision in *Pollard v. E.I. du Pont de Nemours & Co.*,[201] provides strong support for concluding that an award of front pay reasonably serves a make-whole purpose that falls squarely within the Board's remedial authority."[202]

VIII. *WEINGARTEN* RIGHTS

In *NLRB v. Weingarten*[203], the U.S. Supreme Court held that employees represented by a union have the right to have a representative present during an employer inquiry that may reasonably result in discipline.[204] The Board has continuously explored the contours of

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[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.* at *3.
[194] *Id.*
[195] *Id.*
[196] *Id.* at *26.
[197] *Id.* at *3.
[198] *Id.* at *4.
[199] *Id.* at *10.
[200] *Id.* at *11.
[201] 532 U.S. 843 (2001).
[202] *Id.*
[203] 420 U.S. 251 (1975).
[204] *Id.*

employee *Weingarten* rights both within and outside of the unionized setting. In *Asset Protection & Security Service, L.P.*,[205] the Board considered whether a union represented employee is entitled to a *witness* other than a union representative present in an investigatory interview could reasonably lead to disciplinary action.[206]

The General Counsel argued that Asset violated Mr. Dawson's Section 8(a)(1) rights by refusing to allow him to have a witness during the interview and by discharging Mr. Dawson because of conduct during the interview.[207] The ALJ found, and the Board agreed, that *Weingarten* entitled represented employees to have an agent of the "labor organization which serves as the exclusive representative of the employees" present during disciplinary meetings or interviews, but did not entitle represented employees to have another employee present during a disciplinary meeting or interview to serve solely as a witness.[208] Accordingly, since Mr. Dawson declared that he would represent himself at the beginning of the interview, he was not entitled to witness under *Weingarten*. The General Counsel further argued that the union representative Asset offered to make available was not an adequate representative for Mr. Dawson during the interview because he was on a union election slate that had run against Mr. Dawson.[209] However, the ALJ determined that there was no evidence of a conflict of interest or adverse interest on the part of the union. Campaign literature lacking indication of personal or derogatory animus was insufficient to show bias or inability to fairly represent the employee.[210]

Last year, the NLRB's Office of General Counsel issued an Advice Memorandum exploring the boundaries of *Weingarten* rights in the context of a vehicle search.[211] The matter involved Southwestern Bell Telephone Company and a small bag of marijuana found underneath empty chairs where an employee and a co-worker were sitting.[212] The employer conducted an investigation and interviewed the employees.[213] During the interview, one of the employees requested a union representative and the employer granted the employee's request.[214] Following the interview, the employer searched the company vehicle assigned to the employee.[215] Southwestern Bell did not notify the employee about the search.[216] During the search, the employer found a CD case with music and pornographic DVDs.[217]

Following the vehicle search, the employer again interviewed the employee with a union representative present.[218] The employee admitted that the CD case belonged to her, but denied knowing that there were pornographic materials in the case.[219] Ultimately, Southwestern Bell

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[205] 362 NLRB No. 72 (2015).
[206] *Id.* at *1.
[207] Id.
[208] *Id.* at * 6.
[209] *Id.* at *5.
[210] *Id.* at 5.
[211] *Southwestern Bell Tel. Co.*, Case 14-CA-141000 (Feb. 6, 2015).
[212] *Id.* at 1.
[213] Id.
[214] *Id.*
[215] *Id.* at *2.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*

determined that there was not enough evidence to discipline the employee for illegal drug possession, but did issue the employee a written reminder, the first step in the employer's progressive disciplinary procedure, for possession of the pornographic materials.[220]

On advice review, the Office of the General Counsel concluded that the employer's search of the company vehicle did not invoke the employee's *Weingarten* rights because the search did not amount to an investigatory interview.[221] The Office of the General Counsel reasoned that the vehicle search at issue did not involve any interactions with the employee, so the search was not a continuation of the prior investigatory interview during which the employee requested union representation.[222] Additionally, the Office of General Counsel noted that during the search, the employer did not engage in a confrontation with the employee and did not ask the employee any questions, either explicitly or implicitly.[223]

IX. OTHER SIGNIFICANT RECENT CASES.

A. Definition of "Supervisor."

Supervisors do not have the right to organize and are not protected under the NLRA. Section 2(11) of the Act defines "supervisor" as:

> any individual having authority ... to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such action ... requires the use of independent judgment.

29 U.S.C. § 152(11). Recent decisions by the Board have applied a narrow interpretation to the definition of supervisor.

A case in point this year is *G4S Government Solutions, Inc.*[224] *G4S* involved supervisory status of "protective force lieutenants" at a nuclear power plant. The lieutenants oversaw security officers responsible for preventing sabotage or terrorist attacks at the power plant and in transport of nuclear material. Security at the 310 square mile site followed a military style chain of command and the record established that the lieutenants routinely gave on-the-spot corrections to subordinate security officers and were responsible for administering security orders, post orders, work procedures, and tactical directions. Nonetheless, the Board majority concluded that the lieutenants are not supervisors because they are not "accountable" for subordinate employees' actions.[225]

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[220] *Id.*
[221] *Id.*
[222] *Id.* at *4.
[223] *Id.*
[224] 363 NLRB No. 113 (Feb. 16, 2016).
[225] *Id.*, at *1-2.

Accountability as an element of proving "responsibility to direct" other employees was first articulated in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). The Board in *Oakwood* explained that "accountability" means "that some adverse consequence may befall" the responsible employee for other employees' conduct or job performance in order to qualify as a supervisor.[226] *G4S* and other recent decisions have seized on this language to reject supervisory status of individuals who by normal appearance are overseeing the work of other employees.[227]

B. Managements Rights Clauses.

The Board recently added to its long line of cases interpreting management-rights clauses. In *Graymont PA. Inc.*,[228] the Board held that a union did not "clearly and unmistakably" waive its right to bargain over changes to the employer's work rules, absenteeism policy, and progressive discipline schedule, in spite of a broad management-rights clause that clearly encompassed the aforementioned policies.[229] The management rights clause at issue stated that the employer:

> "retain[ed] the sole and exclusive rights to manage; to direct its employees...to evaluate performance...to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards for performance for employees."[230]

In *Graymont,* the employer announced changes to its work rules, absenteeism policy, and progressive discipline schedule.[231] After the announcement, the union informed the employer that it wished to discuss the changes.[232] The parties met, but the employer informed the union that it had no plans to bargain over the policy changes because the union waived its right to do so according to the management-rights clause in the governing collective bargaining agreement.[233] The union disagreed with the employer's position and filed a charge against the employer alleging failure to bargain in violation of Section 8(a)(5) and 8(a)(1).

Affirming the administrative law judge's finding that the employer unlawfully unilaterally instituted the policy changes, the Board explained that in order to waive a union's right to bargain over a mandatory subject of bargaining, there must be a "clear and unmistakable waiver." That is a well-known standard.[234] The Board further reasoned, however, that the management-rights clause at issue did not specifically reference work rules, absenteeism, or progressive discipline, so the employer could not rely on the clause as a "clear and unmistakable

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[226] *Id.* at *691-692.
[227] *See Buchanan Marine*, 363 NLRB No. 58 (Dec. 15, 2015) (tug boat captains not supervisors); *Veolia Transportation*, 363 NLRB No. 98 (Jan. 20, 2016) (road supervisors in public bus system not "supervisors" under the Act).
[228] 364 NLRB No. 37 (2016).
[229] *Id.* at *4.
[230] *Id.* at *1.
[231] *Id.*
[232] *Id.*
[233] *Id.* at *2.
[234] *Id.*

waiver."[235] Additionally, the Board found that there was no evidence that the parties discussed the subjects during contract negotiations.[236]

The implications of *Graymont* are significant. Many employers include similarly broad management-rights clauses in CBAs in order to cover unanticipated circumstances which may require unilateral action. However, it is clear from *Graymont* that there must be a high level of specificity in a management-rights clause in order for a union to clearly waive its right to bargain over certain terms and conditions of employment.

C. ***Successorship.***

In the oft-cited *Spruce Up* case,[237] the Board held that a buyer of a business that included union employees did not have a duty to bargain with the union prior to setting initial terms and conditions of employment if the buyer announces new terms prior to or simultaneously with the offer to the previous work force to accept employment with the buyer. An exception applies to "perfectly clear" successors. In *Nexeco Solutions, LLC*,[238] the Board found that buyer Nexeco was a "perfectly clear" successor to the seller's union employees thereby preventing Nexeco from setting initial terms and conditions of employment unilaterally.

Nexeco entered into a purchase agreement with the seller that provided Nexeco would make at-will employment offers to the seller's employees before the closing date and that Nexeco would provide certain benefits to the transferred employees within eighteen (18) months of the sale.[239] After closing, the seller communicated details of the sale to employees, specifically advising that the employees would transfer to the new business. Nexeco did not make any such communication or assurance.[240]

Approximately three (3) months after the sale, Nexeco sent a letter to the employees stating that Nexeco did not agree to assume any of the seller's CBA provisions. Nexeco set out additional terms of employment contingent upon the employees accepting Nexeco's offer of employment.[241] This, in the NLRB's view, was too little too late.

The Board held that the purchase agreement and the seller's communications to the employees shortly after the sale established that Nexeco was a "perfectly clear" successor. Thus, Nexeco was obligated to bargain with the union *before* establishing or altering initial terms and conditions of employment.[242] The Board reasoned that it was clear from the purchase agreement and the seller's communication with the employees that Nexeco planned to retain the seller's employees.[243]

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[235] *Id.* at *3.
[236] *Id.*
[237] 209 NLRB 194 (1974).
[238] 364 NLRB No. 44 (2016).
[239] *Id.* at *2.
[240] *Id.*
[241] *Id.* at *4.
[242] *Id.* at *16.
[243] *Id.* at *12.

D. Union Information Requests.

For the past generation, witness statements obtained by employers when conducting workplace investigations could be kept confidential by the employer. That has changed. In *American Baptist Homes of the West*,[244] the Board overruled the bright-line rule under *Anheuser-Busch, Inc.*,[245] which distinguished witness statements from other information that must be disclosed to a union under a company's duty to bargain. The Board had previously reached the same conclusion in 2012,[246] but that decision was set aside following *Noel Canning*.[247]

In *Anheuser-Busch*, the Board held that the general duty to furnish information to a union "does not encompass the duty to furnish witness statements themselves."[248] In *American Baptist Homes*, the union alleged that the employer violated Sections 8(a)(5) and (1) of the Act by failing to provide names, job titles, and written statements of three individuals who claimed that they had witnessed an employee engaging in misconduct that had resulted in that employee's termination.[249] The ALJ found violations for failing to provide the requested names and job titles, but found that the written statements were exempt from disclosure under *Anheuser-Busch*.[250]

The Board agreed with the ALJ's findings relating to witness names and job titles, but held that the duty to furnish information also attached to witness statements provided during the employer's investigation. The Board majority stated: "we find that the rationale of *Anheuser-Busch* is flawed. In our view, national labor policy will best be served by overruling that decision and, instead, evaluating the confidentiality of witness statements under the balancing test set forth in *Detroit Edison* [440 U.S. 301 (1979)]."[251]

In reaching this conclusion, the Board explained that Section 8(a)(5) imposes on the employer the "general obligation" to furnish the union with relevant information necessary to the union's performance of its duties as collective bargaining representative of employees. That includes information needed for the union to determine whether to arbitrate a grievance.[252] The Board first asks whether the requested information is of probable or potential relevance. Then, if a party asserts that relevant information is confidential, the Board applies the *Detroit Edison* test, which "balances the union's need for the relevant information against any 'legitimate and substantial confidentiality interests established by the employer.'"[253]

Despite overturning *Anheuser-Busch*, the Board still applied its bright-line rule to the facts of American Baptist Homes in order to avoid "manifest injustice," based on an understandable expectation of confidentiality.[254] The new rule regarding witness statements will

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[244] 362 NLRB No. 139 (2015).
[245] 237 NLRB 982 (1978).
[246] 359 NLRB No. 46 (Dec. 15, 2012).
[247] Discussed in Section I, *supra*.
[248] 237 NLRB at 984-985.
[249] 362 NLRB No. 139 at *1.
[250] *Id.*
[251] *Id.* at *3.
[252] *Id.*
[253] *Id.*
[254] *Id.* at *7-8.

only be applied prospectively.[255] Members Miscimarra and Johnson each wrote a separate dissent, essentially asserting that the Board's decision will damage the integrity of workplace investigations. The Board minority has been consistent in opposing reversal of precedent throughout Chairman Pearce's terms.

E. ***Dues Checkoff After Contract Expiration.***

Lincoln Lutheran of Racine,[256] represents another reversal of longstanding NLRB precedent. There, the Board considered whether an employer's obligation to check off union dues continues after the expiration of a collective bargaining agreement that establishes such an arrangement. For over forty (40) years, the Board relied on *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), in which the Board held that dues checkoff provisions could be terminated by employers upon the expiration of a collective bargaining agreement. The Board actually overturned the *Bethlehem Steel* holding in *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012); however, at the time of the *WKYC* ruling, the Board consisted of two members who were later deemed to be invalidly appointed under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

It did not take long for the Board to revisit the issue in *Lincoln* in which it held that an employer's obligation to checkoff union dues continued after the expiration of a collective bargaining agreement that establishes the arrangement. The Board reasoned that dues checkoff is a mandatory subject of bargaining because it is a matter related to the wages, hours, and other terms and conditions of employment within the meaning of the NLRA. Accordingly, the Board reasoned that its established rule against unilateral changes regarding terms and conditions of employment precluded any other finding. The Board noted that there are a handful of provisions that govern terms and conditions of employment, such as arbitration clauses, no-strike clauses, and management rights provisions, that generally do not survive the expiration of a collective bargaining agreement. However, the Board distinguished dues checkoff provisions because, in the Board's view, they do not involve the surrender of any statutory or non-statutory rights. The Board noted that the new rule only applied prospectively and also noted that employers may bargain over the right to cease honoring a dues checkoff provision after the expiration of a collective bargaining agreement as long as any such waiver is clear and unmistakable.

X. CLASS ACTION WAIVERS.

Presently and for the past three years, the issue litigated most frequently and aggressively by the NLRB in the federal circuit courts involves employee waivers of class and collective action litigation. This issue, which appears destined for the Supreme Court, first took prominence with the Board's decision in *D.R. Horton*, Inc. 357 NLRB No. 184 (2012). In that case, the Board majority held that a home builder violated section 8(a)(1) of the Act by requiring employees, as a condition of employment, to sign an agreement barring them from filing class or collective actions regarding wages, hours, or working conditions. Rather, they would have to pursue any claims against the company on an individual basis. In the view of the Board majority, class or collective action litigation concerning employment is inherently concerted activity protected by Section 7 of the Act.

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[255] *Id.*

[256] 362 NLRB No. 188 (2015).

The Fifth Circuit disagreed with the Board. In *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the circuit court reversed the NLRB and criticized its reasoning. Nothing in the NLRA expressly recognizes or authorizes employees to pursue class or collective actions, and creating such a right would be counter to purposes of the Federal Arbitration Act, 9 U.S.C. §§ 1-16. In a strong rebuke of the NLRB, the Fifth Circuit reaffirmed its holding in *D.R. Horton* in *Murphy Oil U.S.A. v. NLRB*, No. 14-60800 (5th Cir., Oct. 26, 2015).

On September 9 of this year, the NLRB filed a petition for writ of certiorari asking the Supreme Court to decide whether section 7 of the Act forecloses employers from requiring class and collective waivers as a condition of employment. *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (U.S. Supreme Court, Sept. 9, 2016). The NLRB has pointed to the following split on this issue in the federal circuit courts:

Class and Collective Actions Waivable:

D.R. Horton v. NLRB, 737 F.3d 344 (5th Cir. 2012)

Owens v. Bristol Care, Inc., 702 F.2d 1050 (8th Cir. 2013)

Sutherland v. Ernst & Young, LLP, 726 F.3d 290 (2d Cir. 2013)

Walthour v. Chipio Windshield Repair LLC, 745 F.3d 1326 (11th Cir. 2014)

Class and Collective Actions Not Waivable:

Morris v. Ernst & Young, No. 13-16599 (9th Cir. Aug. 22, 2016)

Lewis v. Epic Sys. Corp., No. 15-cv-82-bbc (7th Cir. May 26, 2016).

XI. GRADUATE STUDENTS AS EMPLOYEES.

In *The Trustees of Columbia University*[257], the Board ruled that student assistants at Columbia University are employees with a right to unionize.[258] This recent ruling overruled the Board's decision in *Brown University*[259], in which the Board ruled that graduated students were not employees within the meaning of the Act. The broad decision is not limited to union organizing, but brings many areas of higher education administration under purview of the Act, such as handbooks, discipline, and work rules. The ramifications of this recent decision are significant for higher education and private universities both from a labor law perspective and from the perspective of relationships among students, faculty, and administration.

[257] 364 NLRB No. 90 (2016).
[258] 342 NLRB 483 (2004).
[259] 342 NLRB 483 (2004).

NOTES

Mental Health Issues in the Workplace

NOTES

Whistleblower Protection Act Update

THE NEW MEXICO WHISTLEBLOWER PROTECTION ACT
NMSA § 10-16C-1, *et seq*

Barbara Evans and Benjamin Petty

INTRODUCTION

This paper addresses the scope of the recently passed New Mexico Whistleblower Protection Act, and ongoing litigation based on the incomplete definitional section of the Act. This paper focuses on recent caselaw resolving some of the initial confusion over the terms in the Act, and discusses those issues yet to be resolved.

DISCUSSION

1. The New Mexico Whistleblower Protection Act.

A. Background

- New Mexico Whistleblower Protection Act § 10-16C-1, *et seq.*

The NM Whistleblower Protection Act (WPA) was signed into law March 1, 2010.

- The New Mexico WPA is a retroactive statute, allowing civil actions for damages resulting from retaliation occurring on or after July 1, 2008.

- The NM Whistleblower Protection Act (WPA) prohibits public employers from retaliating against a public employee because that employee:

  - Communicates to the public employer or third party information about action/failure to act that the public employee believes in "good faith" constitutes an "unlawful or improper act";

  - Provides information to, or testifies before, a public body as part of an investigation, hearing or inquiry into an "unlawful or improper act;" or

  - Objects to or refuses to participate in an activity, policy or practice that constitutes an "unlawful or improper act."

Statute of Limitations

- Plaintiffs must file a complaint within two years from the date on which the retaliatory action occurred. NMSA § 10-16C-6.

Posting requirement

- Public employers must post a notice that sets forth the provisions of the New Mexico Whistleblower Protection Act. NMSA § 10-16C-5.

B. Definitions in the New Mexico WPA

- The WPA does provide definitions for some of the language used in the Act.
  - "Public employer" is defined as "any department, agency, office, institution, board, commission, committee, branch or district of state government; any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived; any entity or instrumentality of the state specifically provided for by law; and every office or officer of any" of the entities listed above.
  - "Retaliatory action" is defined as "any discriminatory or adverse employment action against a public employee in the terms or conditions of public employment."
  - "Unlawful or improper act" is defined as "a practice, procedure, action or failure to act on the part of a public employer that: violates a federal law, a federal regulation, a state law, a state administrative rule or a law of any political subdivision of the state; constitutes malfeasance in public office; or constitutes gross mismanagement, a waste of funds, an abuse of authority of a substantial and specific danger to the public."
  - "Good faith" means that "a reasonable basis exists in fact as evidenced by the facts available to the public employee."
- Terms that are ***not*** defined by the New Mexico WPA
  - Even though the New Mexico WPA provides some definitions, many of the terms in the statute are still open to interpretation by the courts:
  - For example, who is an "officer" of an agency of state government or political subdivision for purposes of qualifying as a public employer
  - What constitutes a communication to a public employer or third party?
  - What is meant by "discrimination" against public employee that constitutes retaliation?
    - Other terms not defined in the New Mexico WPA include: "gross mismanagement;" "waste of funds;" "abuse of authority;" and

"substantial and specific danger to public."

**Undefined Terms = Litigation

**Jury Instructions?

- Should definitions for "gross mismanagement" or "abuse of authority" based on federal law be included in jury instructions?

- *DeSantis v. Napolitano*, 716 F. Supp. 2d 1100, 1107-08 (D.N.M. 2010) (interpreting the federal Whistleblower Protection Act (5 U.S.C. §2302(b)) and concluding that "[t]o show gross mismanagement, the employee must show a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. It must be more than de minimis wrongdoing or negligence. An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons... The burden for showing gross mismanagement or waste of funds is onerous.") (internal quotations and citations omitted).

- Should additional interpretive information from other jurisdictions be included in jury instructions? For example:

  To establish a claim under the WPA, Plaintiff has the burden of proving that his "whistleblowing" was of the sort "that benefits the public by exposing unlawful and improper actions by government employees", rather than "communications regarding personal personnel grievances that primarily benefit the individual employee." Personal disagreements with legitimate managerial decisions do not demonstrate abuse of authority or any other kind of activity that could be considered a whistleblowing disclosure. Statements of facts publicly known already, or made in connection with normal or official employment duties, are not to be considered a communication protected under the WPA. Furthermore, communications that merely exhibit differences of opinion or dissatisfaction with discretionary management decisions are not "protected activity" for purposes of the WPA.

- *Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (reports that are nothing more than carrying out normal job duties are not covered by the whistleblower act.); *Laberge v. Dep't of the Navy*, 91 M.S.P.R. 585 (M.S.P.B. 2002) (disclosures made to command regarding environmental issues were not protected since they were part of employee's normal duties as an environmental engineer); *see also, Garcetti v. Ceballos*, 547 U.S. 410, 440 (2006) (noting, in the context of a

First Amendment retaliation claim that, "Federal employees have been held to have no protection from disclosures made to immediate supervisors, or for statements of facts publicly known already. Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties."). *Martin v. Weyerhauser Co.*, 312 Fed. Appx. 142 (10th Cir. 2009) (concluding that to succeed on an Oklahoma whistleblower claim, a plaintiff must express more than mere "dissatisfaction" with a defendant's practices and must show something "fraudulent, criminal or illegal").

C. New Mexico WPA Affirmative Defenses

- The New Mexico WPA provides that "[i]t shall be an affirmative defense to a civil action brought pursuant to this section that the action taken by a public employer against a public employee was due to the employee's misconduct, the employee's poor job performance, a reduction in work force or other legitimate business purpose unrelated to conduct prohibited pursuant to the Whistleblower Protection Act and that retaliatory action was not a motivating factor. NMSA 1978, § 10-16C-4(B).

- The Statute does not expressly include an affirmative defense that "disclosure" or "report" was made in ordinary course of the employee's job or that it was within the employee's job duties to report such conduct.

D. Remedies

- NMSA 1978 § 10-16C-4(A) provides that a public employer who violates the WPA *shall be* liable for the following:

  - Actual damages;

  - Two times the amount of back pay with interest;

    **Mandatory?

  - Reinstatement with the same seniority status that the employee would have had but for the violation;

    **Mandatory?

  - Litigation costs and reasonable attorney fees of the employee.

  - Note: the remedies provided for in § 10-16C-4(A) are not exclusive and "shall be in addition to any other remedies provided for in any other law or

available under common law." *See* NMSA § 10-16C-4(C)

> **This appears to be an invitation to bring claims under other statutes (e.g.) New Mexico Human Rights Act) and/or to incorporate remedies available in common law causes of action.

2. Interpretive Case Law and Recent Developments

Generally, the WPA functions to protect public employees from government retaliation when that employee discloses, or refuses to participate in, the employer's unlawful or improper actions. The underlying policy for the WPA "reflects a remedial purpose." *Flores v. Herrera*, 2015-NMCA-072, ¶ 14, *cert granted*, 2015-NMCERT-6 (No. 35,286, June 19, 2005) *(reversed on other grounds)* (quoting *Lohman v. Daimler–Chrysler Corp.*, 2007–NMCA–100, ¶ 31, 142 N.M. 437). Accordingly, courts construe the WPA "liberally to facilitate and accomplish its purposes and intent." *Id.*

Pleading a WPA claim requires the Plaintiff to shoulder the burden of proof for three general elements. Proof of all three elements will establish a prima facie case. Both "[t]he [New Mexico] WPA and the federal WPA require the same elements." *Walton v. New Mexico State Land Office*, 113 F. Supp. 3d 1178, 1199 (D.N.M. 2015). Namely, that "(i) the employee engaged in a protected disclosure [or action]; (ii) the employer took an adverse employment action against the employee; and (iii) a causal connection exists between the protected disclosure and the adverse action." *Id.*

Moreover, causal connection requires the plaintiff to show that the protected act was a *contributing factor* in the employer's retaliation. *Id.* And "[i]f there is no evidence of knowledge, there can be no causal connection." *Id.* at 1202. The plaintiff must "present some evidence to create an inference" that the employer knew of the plaintiff's whistleblowing act. *Id.*

New Mexico does not have much caselaw interpreting the WPA. Consequently, the many of the cases that do interpret the statute rely in part on federal caselaw interpreting the federal WPA, which is substantially similar.

> When New Mexico cases do not directly answer the question presented, we look for guidance in analogous law in other states or the federal system." *CIT Grp./Equip. Fin., Inc. v. Horizon Potash Corp.*, 1994–NMCA–116, ¶ 6, 118 N.M. 665, 884 P.2d 821. The WPA was modeled after its federal counterpart. *See* 5 U.S.C. § 2302(b)(8) (2013) (prohibited personnel practices). Accordingly, cases interpreting the federal whistleblower law have persuasive value in considering the legislative intent behind the WPA. *See Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 2002–NMSC–004, ¶ 8, 131 N.M. 607, 41 P.3d 333 (recognizing that, when New Mexico statutes are similar to their federal counterparts, appellate courts may rely on federal jurisprudence in construing legislative intent).

Wills v. Bd. of Regents of Univ. of New Mexico, 2015-NMCA-105, ¶ 19, *cert. denied sub nom. Wills v. Bd. of Regents*, 2015-NMCERT-009.

The addition of federal caselaw to the interpretation of the New Mexico WPA broadens the liberal approach that courts take when interpreting claims brought under the act. Notably, the definition of *improper* becomes especially loose. Even if a public employer's conduct was lawful, it can still be improper if the plaintiff believed in good faith that the employer's conduct was improper and took a whistleblowing step to confront it. *See Walton v. New Mexico State Land Office*, 113 F. Supp. 3d 1178, 1201 (D.N.M. 2015).

Another distinction in the interpretation of the WPA provided by federal law is the emphasis on whistleblowing acts that reveal issues of public concern.

> Like the WPA, the federal whistleblower protection law does not explicitly limit whistleblower protection to communications that benefit the public or pertain to matters of public concern . . . . [But] federal courts interpreting the federal whistleblower protection law have distinguished "whistleblowing" that benefits the public by exposing unlawful and improper actions by government employees from communications regarding personal personnel grievances that primarily benefit the individual employee.[1]

Wills v. Bd. of Regents of Univ. of New Mexico, 2015-NMCA-105, ¶¶ 19–20, *cert. denied sub nom. Wills v. Bd. of Regents*, 2015-NMCERT-009 (citation moved to footnote). As a result, purely personal grievances are probably not covered by the WPA.[2]

A. Recent Cases

***Flores v. Herrera*, 2016 WL 4409940 (NMSC August 18, 2016)**

The Supreme Court answered this question: Does the WPA allow a state employee to assert a claim against a state officer in the officer's individual capacity? The answer is "no". The WPA creates an official-capacity suit only against state officers.

--Compare 42 U.S.C. § 1983, which creates liability in a "person". *Loya*

[1] *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1368 (Fed.Cir.2012) (stating that the federal whistleblower protection law "makes clear that whistleblowing provides an important public benefit"); *Winfield v. Dep't of Veterans Affairs*, 348 Fed.Appx. 577, 580 (Fed.Cir.2009) (per curiam) ("Whistleblower protection does not extend to an employee's personal grievances about his job."); *Riley v. Dep't of Homeland Sec.*, 315 Fed.Appx. 267, 270 (Fed.Cir.2009) (stating that "personal disagreements with legitimate managerial decisions" do not demonstrate abuse of authority or "any other kind of activity that could be considered a whistleblowing disclosure"); *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed.Cir.1998) (stating that the federal whistleblower protection laws are "designed to protect employees who risk their own personal job security for the benefit of the public").

[2] *Wills v. Bd. of Regents of Univ. of New Mexico* references the following case because it lists aspects of the legislative intent supporting the federal WPA. "*Montgomery v. E. Corr. Inst.*, 377 Md. 615, 835 A.2d 169, 180 (2003) (discussing the legislative intent of the federal whistleblower protection laws and stating that the term "whistleblowing," which generally evokes the type of public disclosure that "serve[s] the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary government expenditures[,]" does not include an individual's communications regarding a supervisor's maltreatment of him personally (emphasis, internal quotation marks, and citation omitted))."

v. Gutierrez, 2015–NMSC–017, ¶ 45, 350 P.3d 1155.

--"Where, as in the WPA, the Legislature consents to suit by creating a claim that may be asserted against either state entities or the officers of those entities, we find no reason to interpret the statute as implicitly authorizing personal-capacity officer suits."

--Section 10–16C–2(C)(4)'s inclusion of the term "officer" has operative effect even though it does not permit a personal-capacity officer suit. In cases where a plaintiff elects not to name a state entity as a defendant, the statutory term "officer" in Section 10–16C–2(C)(4) works to create vicarious liability in a state entity for retaliatory actions taken by officers of that state entity.

--Practical result: If a state officer who is named as a defendant in a WPA suit dies or leaves office pending the final resolution of the plaintiff's action, the defendant's departure from public office would merely result in an automatic substitution of his or her successor in office, and the plaintiff's suit would proceed against the current officer. *See* NMRA 1-025(D)(1).

***Herald v. Bd. of Regents of the Univ. of N.M.*, 2015-NMCA-104, 357 P.3d 438.**

The issue was whether a doctor's termination from a residency program was driven by discrimination and retaliation. The district court dismissed WPA claim on basis that HRA was the exclusive remedy for the retaliation claim. HRA claim went to trial and the jury found no retaliation under the WPA.

--Court of Appeals reversed dismissal of WPA claim, primarily based on language in WPA that says it remedies "shall be in addition to any other remedies provided for in any other law" (and the lack of exclusivity language in HRA).

--Court of Appeals remanded to the district court for further proceedings based on the WPA claim, ruling against defendant's claim that a jury finding of "no retaliation" under the HRA precluded a retaliation finding under the WPA. The court held that the jury's determination of no retaliation under the HRA did not preclude a determination that Defendant retaliated against Plaintiff in violation of the WPA.

***Walton v. N.M. State Land Office*, 113 F.Supp.3d 1178 (D.N.M. 2014)**

Judge Browning looked to Tenth Circuit case law interpreting the federal WPA for instruction on interpreting the NMWPA, specifically as to causation.

--To establish a causal connection, an employee must show that a protected disclosure was a "contributing factor" in the unfavorable personnel decision. (citing *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1129 (10th Cir. 2013).

--Plaintiff cannot make the required showing when the decision maker was unaware of the protected disclosure.

***Wills v. Bd. of Regents of the Univ. of N.M.*, 2015-NMCA-105.**

-The WPA was modeled after its federal counterpart. See 5 U.S.C. § 2302(b)(8) (2013) (prohibited personnel practices). Accordingly, cases interpreting the federal whistleblower law have persuasive value in considering the legislative intent behind the WPA.

-- Neither the NMWPA nor the federal whistleblower protection act explicitly limit whistleblower protection to communications that benefit the public or pertain to matters of public concern. Nevertheless, federal courts interpreting the federal whistleblower protection law have distinguished "whistleblowing" that benefits the public by exposing unlawful and improper actions by government employees from communications regarding personal personnel grievances that primarily benefit the individual employee.

- *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1368 (Fed.Cir.2012) (stating that the federal whistleblower protection law "makes clear that whistleblowing provides an important public benefit");
- *Winfield v. Dep't of Veterans Affairs*, 348 Fed.Appx. 577, 580 (Fed.Cir.2009) (per curiam) ("Whistleblower protection does not extend to an employee's personal grievances about his job.");
- *Riley v. Dep't of Homeland Sec.*, 315 Fed.Appx. 267, 270 (Fed.Cir.2009) (stating that "personal disagreements with legitimate managerial decisions" do not demonstrate abuse of authority or "any other kind of activity that could be considered a whistleblowing disclosure");
- *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed.Cir.1998) (stating that the federal whistleblower protection laws are "designed to protect employees who risk their own personal job security for the benefit of the public").

--Thus, Plaintiff's complaint to employer about his pay and ultimate termination were not considered protected disclosures under the WPA.

***Arrellano v. New Mexico Dept. of Health*, 2015 WL 1164426, at *4 (N.M. Ct. App. Feb. 9, 2015), *cert. denied sub nom. Arellano v. NM Dept of Health*, 2015-NMCERT-004, 348 P.3d 694.**

The Court agreed with the notion that that a determination that an employer has "good cause" to terminate an employee does not as a matter of law constitute

issue preclusion of a WPA claim that the primary basis of the termination was in reality retaliatory. This is because even if an employer has "good cause" to terminate an employee, it is possible that a WPA claim exists on the basis that the primary reason for the firing was nonetheless retaliatory. This argument was a non-starter for the Plaintiff because her asserted protected activity under the WPA (reporting a co-worker for abuse) was found to be falsified.

B. Additional Westlaw Headnotes to the WPA

- Construction And Application
    - Because the Whistleblower Protection Act reflects a remedial purpose, the Court of Appeals construes its provisions liberally to facilitate and accomplish its purposes and intent. *Flores v. Herrera*, 2015, 352 P.3d 695, **certiorari granted, certiorari granted** 367 P.3d 852.
    - Program manager for Metropolitan Court of Bernalillo County was not a "public officer," as necessary to qualify as a "public employer" under state Whistleblower Protection Act, though program manager was the head of a department or office within judicial branch of state government and had supervisory duties over probation officers; job description stated that program manager was to work "[u]nder administrative direction[,]" position was not specifically created by statute, and there was no evidence that supreme power or freedom from external control had been vested in program manager. *Janet v. Marshall*, 2012, 296 P.3d 1253, certiorari granted 300 P.3d 1181, certiorari dismissed 302 P.3d 1163.
    - Employee of Metropolitan Court of Bernalillo County who oversaw the Background Investigations Division and was the liaison between the court and the county's Metropolitan Detention Center was not a "public officer," as necessary to qualify as a "public employer" under state Whistleblower Protection Act; although employee was the head of a department or office within judicial branch of state government and had supervisory duties, employee's job description required that he work "[u]nder administrative direction[,]" his position was not specifically created by statute, and there was no evidence that supreme power or freedom from external control had been vested in him. *Janet v. Marshall*, 2012, 296 P.3d 1253, certiorari granted 300 P.3d 1181, certiorari dismissed 302 P.3d 1163.
    - Jury finding that state medical school's board of regents did not unlawfully retaliate against resident physician under state Human Rights Act (HRA) did not necessarily resolve resident physician's claim for retaliation under the Whistleblower Protection Act (WPA) and, thus, resident physician was entitled to trial on such issue following appellate court's reversal of dismissal of WPA claims, where resident physician's claims under HRA and WPA were premised on distinct theories of what caused board's retaliation against her, in that HRA claims involved hostile work environment on the basis of sex, while WPA claim was premised on retaliation due to report of alleged rape to residency administrators.

Herald v. Board of Regents of University of New Mexico, 2015, 357 P.3d 438, certiorari denied, certiorari denied 369 P.3d 370.

- State Human Rights Act (HRA) and Whistleblower Protection Act (WPA) were not in irreconcilable conflict, so as to deprive former resident physician of ability to raise retaliation claim against state medical school's board of regents under WPA, in addition to HRA, premised on assertion that her termination from residency program was based on reporting of alleged rape by fellow resident, despite fact that, unlike WPA, HRA provided administrative process which generally required exhaustion as prerequisite to suit, and acts had different statutes of limitations and differed in recovery available; WPA contained provision expressly indicating that its remedies were in addition to any provided by law, and HRA had procedure by which a claimant could proceed to court on order of non-determination. *Herald v. Board of Regents of University of New Mexico*, 2015, 357 P.3d 438, certiorari denied, certiorari denied 369 P.3d 370.

- Sufficiency Of Evidence Of Retaliatory Discharge
  - New Mexico Environmental Department did not violate New Mexico Whistleblower Protection Act (NMWPA) when it fired employee who had reported alleged irregularities in the way office staff manager conducted his duties including giving special privileges to certain contractors regulated by department in exchange for cash, absent sufficient evidence of any reason other than nonretaliatory justifications provided in employee's dismissal letter. *Lobato v. New Mexico Environment Dept.*, 2013, 733 F.3d 1283.
  - Probationary employee of New Mexico Environmental Department, who was of Mexican ancestry, failed to show that employer's proffered legitimate, nondiscriminatory reason for terminating him was pretextual, even if employee was dismissed without prior discipline; employee could not point to any written policy that said department mandated progressive discipline with probationary employees, could not rely on department's treatment of other probationary employees to establish general practice that they were entitled to progressive discipline, and deposition testimony fell short of showing that department had unwritten policy of requiring progressive discipline with probationary employees, counter to its written policy which stated that probationary employees were employed at will and could be fired for any lawful reason. *Lobato v. New Mexico Environment Dept.*, 2013, 733 F.3d 1283.
  - Filing by state university health sciences center employee of his initial breach of contract complaint against employer did not constitute a communication to both employer and a third party via the public record that employer was abusing its authority by withholding employee's contractually agreed upon pay, as required to fall under the protections of the Whistleblower Protection Act (WPA); no authority supported employee's proposition that, by communicating about his dispute with employer over whether employer was required to pay him according to the terms of his expired employment contract, he engaged in an activity that was protected by the WPA. *Wills v. Board of Regents of University of New Mexico*, 2015, 357 P.3d 453, certiorari denied, certiorari denied 369 P.3d 371.

- Elements Of Proof
    - Employee of state university health sciences center failed to allege that because he communicated with employer or a third party about employer's abuse of authority, employer retaliated against him, as required to state a claim for retaliation under the Whistleblower Protection Act (WPA). *Wills v. Board of Regents of University of New Mexico*, 2015, 357 P.3d 453, certiorari denied, certiorari denied 369 P.3d 371.
- Construction With Other Laws
    - State Human Rights Act (HRA) and Whistleblower Protection Act (WPA) were not in irreconcilable conflict, so as to deprive former resident physician of ability to raise retaliation claim against state medical school's board of regents under WPA, in addition to HRA, premised on assertion that her termination from residency program was based on reporting of alleged rape by fellow resident, despite fact that, unlike WPA, HRA provided administrative process which generally required exhaustion as prerequisite to suit, and acts had different statutes of limitations and differed in recovery available; WPA contained provision expressly indicating that its remedies were in addition to any provided by law, and HRA had procedure by which a claimant could proceed to court on order of non-determination. *Herald v. Board of Regents of University of New Mexico*, 2015, 357 P.3d 438, certiorari denied, certiorari denied 369 P.3d 370.

NOTES

How to Prepare an Employment Case for Federal Mediation

EMPLOYMENT LAW SECTION: Annual Employment Law CLE

State Bar Center, October 7, 2016
Paula G. Maynes
Miller Stratvert, P.A.
200 W. DeVargas St., Suite 9
Santa Fe, NM 87501

PREPARING FOR A FEDERAL SETTLEMENT CONFERENCE IN AN EMPLOYMENT CASE:

Drafting the Position Statement: Defense perspective

The aim of the Position Statement is not to persuade the Magistrate Judge that your case is better or that you should or will win. It's to give the Magistrate Judge hard facts and numbers so that she can better assist you in trying to resolve the entire case, and sometimes other things as well. The Magistrate Judges have done this before; they know the legal elements of employment claims.

BEFORE YOU START:

- Review the case file for "forgotten facts"
- Reread the complaint --list the claims
- Skim written discovery responses
- Review any expert reports or key medical/psych records
- Review any economist's evaluation of lost pay/damages
- [Review the motion for summary judgment to list "undisputed material facts"]

MAKE A LIST OF DAMAGES/FEES CLAIMED:

- Back pay –
  - Date of termination, but did the ee also receive severance?
  - Other employment earnings?
  - Unemployment compensation [not always permitted to offset]
  - Mitigation efforts?
- Front pay –
  - Plaintiff's age
  - Skill set, education/license, prior job experience
- Benefits –
  - Retirement, 401k contributions, Profit-sharing, bonus plan
  - Health insurance --- COBRA election?
  - Paid leave/sabbatical programs
  - Tuition reimbursement and education leave
- Emotional distress
  - Garden variety

- Psychologically fragile plaintiff
- Money spent on treatment/therapy

Punitive damages –

- Willful conduct? Gross negligence?
- Has foundational requirement been met?
- Liquidated damages: doubling the back pay?

- Plaintiff's attorney's fees/costs –
  - Hourly rate?
  - Number of attorneys/paralegals deployed by the Plaintiff
  - Costs incurred. Experts? Depositions? Travel?
  - How much more through trial?

- ADD UP EACH ELEMENT OF CLAIMED DAMAGES IN A COLUMN ON ONE PAGE: Total exposure

Is there an applicable Cap on damages?

- Defense attorney's fees/costs
  - How much have you billed on the case.
  - How much in fees/costs do you anticipate through trial:
  - How much in fees/costs do you anticipate if Defendant has to appeal?

- ADD UP YOUR DEFENSE COSTS AS OF THE DATE OF THE MEDIATION—AND FOR THE FUTURE THROUGH TRIAL: THEN AN APPEAL

These are the numbers that you should have available for the Magistrate Judge in summary form. See, FORM.

THE REAL CLAIMS

List the most viable legal claims brought, those most likely to go forward after motions.

DEFENDANT'S BAD FACTS

List the bad facts against the employer. Even if disputed, what are the worst things that will be said about the employer – even if mistakes.

ADVERSE INFERENCES/BAD CONDUCT IN LITIGATION/SPOLIATION?

Has the Court made negative findings against the Employer in this suit? What money impact will follow from those negative findings?

OUTCOME TIPPING FACTS

List the facts that are CRITICAL:

"He said/She said" -- how will the jury resolve this? Percentage likelihood for defendant.

"My supervisor was unduly critical of me in my evaluation"---- how will the jury resolve this? Percentage likelihood for defendant.

"The Company does not advance women candidates, favors men." How will the jury resolve this? Percentage likelihood for defendant.

CLIENT/CASE WEAKNESSES

Provide a very candid assessment of the challenges your case faces. These may include how the client/supervisor will present as a witness, weaknesses in legal theory, and the like

HISTORY OF OFFERS MADE

Dates of the offers [at what stage of litigation]

Amounts offered:

DEFENDANT'S TOLERANCE FOR RISK

Bet the Company?

Insurance?

Insurance limits, then broke?

IMPONDERABLES

Report to the Magistrate Judge privately and not in writing.

May go back to "preparing your client's expectations for the conference."

SETTLEMENT WORKSHEET

Damages claimed:

Back pay:

Salary/hourly rate for X hours per week: $_____

Length of time from termination x Salary $_____

<Other earnings after termination> $_____

<Unemployment compensation> $_____

<Disability benefits>

TOTAL LOST PAY $_____

Ongoing loss differential by week $_____

Front pay:

One or two years of future salary and benefits $_____

Benefits:

401k contribution [439 plans?] or other

Retirement plan $_____

Health insurance; employer-paid $_____

Premia and richness of plan benefits $_____
<Available on the insurance exchanges>

Paid leave $_____

Tuition assistance/education leave $_____

Emotional distress $_____

Specials? $_____

Punitive Damages/Liquidated Damages $_____

TOTAL DAMAGES EXPOSURE $_____

PLAINTIFF'S ATTORNEYS FEES, IF RECOVERABLE

Hourly rate: _____

Number of hours: _____

Costs: _____

TOTAL to date $_____

Fees through trial $_____

Costs thru trial $_____

DEFENSE COSTS/FEES to date	$_____
Through Trial	$_____

EMPLOYMENT LAW SECTION: Annual Employment Law CLE

State Bar Center, October 7, 2016
Barbara G. Stephenson
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MANAGING YOUR CLIENT'S EXPECTATIONS BEFORE AND AFTER A FEDERAL SETTLEMENT CONFERENCE IN AN EMPLOYMENT CASE

Managing the Client: Defense Perspective

I. Before a Conference Determine a Client's Level of Experience with the Process

A. A smaller business client may not have been through a federal settlement conference before.

B. A client may not even have been through mediation or some other form of alternate dispute resolution.

C. A larger business client may have experience with litigation but still may not understand the federal settlement conference process.

D. The process should be explained, including the fact that the Magistrate Judge cannot require either party to settle.

E. If there is an EPLI carrier, however, a client should understand that the carrier may impose a settlement.

F. The Magistrate Judge's role in facilitating a resolution should be explained.

G. A client should understand that there is no charge to them for service of the Magistrate Judge, unlike private mediation.

H. A client should be instructed on the steps of a settlement conference and the physical layout of the ADR rooms should be explained.

I. A client should be instructed as to Magistrate Judge's likely strategy in a settlement conference, that is, to put pressure on both sides.

J. A client should have reviewed and agreed to the contents of settlement position statement and should understand that the statement is a confidential communication to the Magistrate Judge which should have a candid acknowledgement of risks and bad facts.

II. Before a Settlement Conference Hold a Preparation Meeting Close to the Event

A. At a preparation meeting, counsel should gain insight into a client's tolerance of risk.

B. Counsel should discuss with a client and agree to settlement ranges and an opening offer at a settlement conference.

C. A client should fully understand what remains to be done in the litigation if a settlement conference is not successful and the projected costs of these steps.

D. If there is an EPLI carrier, a client should fully understand the limits of coverage and the role of an adjuster at a settlement conference.

E. A client should be instructed on the various strategic options which might arise during a settlement conference such as the use of a "mediator's number" and/or the use of brackets.

F. Counsel and a client should review what prior demands, offers and counter-offers have been received from the other side or made on behalf of the client.

G. A client should be instructed to be available for possibly the full day including over the noon hour and even into the evening.

H. A client should be instructed on appropriate dress and decorum before the Magistrate Judge.

I. A client should be instructed on court security, limitations on cell phones, and the like.

III. Instruct a Client About Events During a Settlement Conference

A. A client should understand that there likely are no joint opening statements and no "face-to-face" with the other side. Rather, the parties will remain separated during the process and the Magistrate Judge will go back and forth between the parties' rooms using "shuttle diplomacy."

B. The Magistrate Judge likely will emphasize what some call the "7 C's of Settlement Advantages" for a client:

- Control over the outcome
- Containment of costs
- Certainty of outcome
- Confidentiality
- Creativity in fashioning resolutions
- Continuing the relationship ("buying peace")
- Closure[1]

C. A client should realize that the Magistrate Judge will convey to the other side only information agreed to by the client, but will not disclose candid discussions with the Magistrate Judge of risks and bad facts.

D. If a settlement is reached, the Magistrate Judge may request a joint closing conference, but a "group hug" is not a mandatory part of this process.

IV. Instruct a Client About Post-Settlement Conference Events

A. Some form of written agreement likely will have been prepared by the Magistrate Judge at the end of the settlement conference. The client should understand that a more-detailed settlement agreement will be needed and the client should review and approve this document.

B. The client should understand there may be post-settlement sticking points such as the payment of taxes or the timing of settlement payments, although ideally these were covered during the settlement conference.

C. The client should realize the potential for "settlers' remorse" from the other side and the consequences of such a development.

D. The client should be instructed to make certain that all settlement terms are completed including making full payment of any settlement sum, providing such things as a neutral letter of reference, not opposing an unemployment compensation benefits if that was a settlement term, sealing a personnel file or redacting portions of such a file, and making certain that a Form 1099 is provided if required.

E. The client should be made aware of post-settlement risks such as defamation of the other side by a manager or company representative. Such actions will be not covered by an already-executed settlement agreement and may give rise to another claim.

---

[1] Credited to Retired Federal Magistrate Judge Steven Pepe, Eastern District of Michigan.

NOTES

High Times: Drugs in the Workplace

jackson lewis.

Drug Testing & Substance Abuse Management

HIGH TIMES: Drugs in the Workplace

Presented by:
Andrea K. Robledo
Jackson Lewis P.C. | New Mexico
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Agenda

- Marijuana in the workplace
- Prescription medications in the workplace
- Workplace drug and alcohol policies



 2

MARIJUANA IN THE WORKPLACE

States with Medical Marijuana Laws

- 27 states including DC now have medical marijuana laws: AK, AZ, CA, CO, CT, DE, DC, GA, HI, IL, ME, MA, MD, MI, MN, MT, NV, NH, NJ, NM, NY, OR, PA, RI, VA, VT and WA.

 4

States with Recreational Marijuana Laws

- 5 states including DC now have recreational marijuana laws: AK, CO, DC, OR and WA.
  - AK, CO and DC laws permit employers to have policies prohibiting marijuana use.
  - OR laws permit federal contractors to prohibit marijuana use.
  - WA law is silent with respect to employment.

 5

More States Are Now On The Marijuana Train

- Over <u>50</u> marijuana ballot initiatives in 2016 (many already failed):
  - Certified/Confirmed for the 2016 ballot : FL (medical) and NV (recreational)
  - Signatures needed: AZ, CA, ME, MA, MI, MO & MT (all recreational)

 6

Federal Government's Current Position on Marijuana

- Congress' FY 2016 Budget (once again) provides that the DOJ may not use federal funds to prevent certain states from implementing their own medical marijuana laws.
- In March 2015 a U.S. Senate bill was introduced (CARERS Act) seeking to amend the CSA and downgrade marijuana from a Schedule I drug, to a Schedule II drug.
  - Schedule II drug: has a high potential for abuse, but it has a currently accepted medical use in treatment in the U.S. or a currently accepted medical use with severe restrictions.
  - In addition, the bill proposes: allowing interstate transport of medical marijuana; allowing veterans to obtain medical marijuana from the V.A.; and relaxing financial restrictions on banks and credit unions who seek to do business with marijuana growers and dispensaries.
- April 4, 2016 DEA letter states it is reviewing FDA reclassification recommendation and "hopes" to issue a determination in the 1st half of 2016.

 7

Potential Risk Under State Laws

- State courts do not feel bound to follow federal courts or federal law. This is particularly true now that the DOJ will not opposed state medical and recreational marijuana laws.
  - New Mexico court required reimbursement of medical marijuana expenses, noting that the federal government has changed its position on marijuana.
    - *Vialpando v. Ben's Auto. Servs.*, 2014.

8

New Mexico Court Holds Employers Need Not Accommodate Medical Marijuana Use

- *Garcia v. Tractor Supply Company* (D.N.M. Jan. 7, 2016)
  - New Mexico federal court dismissed the lawsuit of an employee who was fired after testing positive for marijuana, even though he used medical marijuana in accordance with state law.
  - Court held that employers in New Mexico are under no duty to accommodate the use of medical marijuana by employees.

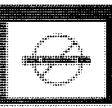
9

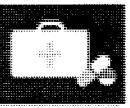
Medical Marijuana: Employer Risk Differs by State

- States with medical marijuana laws where employers have prevailed in litigation with employees using medical marijuana: CA, CO, MI, MT OR and WA.
- States with medical marijuana laws that say employers need not accommodate marijuana use at work: AK, HI, MA, NH, NJ, RI and VT.
- States with medical marijuana laws that do not address employment issues at all: DC, MD and NM.
- States with medical marijuana laws which define employers' responsibilities regarding employee-medical marijuana users (anti-discrimination provisions): AZ, CT, DE, IL, ME, MN, NV, NY and RI.

 10

Lifestyle Discrimination





- Most states have "lifestyle discrimination" laws to protect the right of employees to participate in legal activities outside the workplace.
- Of the various state lifestyle discrimination laws:
  - Some prohibit discrimination based on any lawful off duty activity (CO, CA, ND) or any lawful recreational activity (NY);
  - Some prohibit discrimination based on the use of lawful consumable products (NY, IL, MN, MO, MT, NV, NC, TN, WI);
  - Some specifically prohibit discrimination based on the use of tobacco products (29 states and the District of Columbia).

11

Employees Regulated by Federal Agencies

- Safety standards imposed by federal agencies, such as the Federal Mine Safety and Health Administration and the Department of Transportation, **do not** provide for the use of medical or recreational marijuana by regulated employees.
- The Department of Transportation has issued a statement that "the Department of Transportation's Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result... **It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana.**"
- What does this mean for employers?
  - Here, you should follow the federal safety requirements.

 12

Balancing State and Federal Laws

- Employers in states that have legalized medical marijuana will need to balance a number of competing interests:
  - Complying with federal law, versus
  - Complying with state law.

and

  - The employer's right and duty to establish and maintain a safe and productive workforce, versus
  - The employer's obligation to accommodate, when reasonable, employees with disabilities that may require provide for the use of medical marijuana.

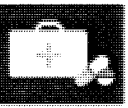
13

The Americans with Disabilities Act and Medical Marijuana

- The federal Controlled Substances Act states that marijuana is illegal and has "no accepted medical use."
  - Accordingly, it cannot be considered a reasonable accommodation for a disability.
- The Americans with Disabilities Act expressly excepts illegal drug use from coverage – employers do not need to accommodate illegal drug use. Therefore, terminating an employee for medical marijuana use will not implicate federal anti-discrimination law.

14

Potential Risk Under State Laws



- So far, no court has concluded that any state law requires employers to accommodate medical marijuana use.
- However, the cases litigated so far involved medical marijuana statutes without an anti-discrimination provision.
- We do not yet know how the anti-discrimination provisions of the newer medical marijuana laws will be interpreted. Even in these states, however, there is a strong argument that federal law pre-empts state law.

15

Potential Risk Under State Laws: Recent Court Cases

- Despite the strong federal pre-emption argument, however, there may be risk in state courts (and administrative agencies), given that state courts and agencies do not always feel bound to follow federal courts or federal law.
  - New Mexico court required reimbursement of medical marijuana expenses (in a workers' compensation case), noting that the federal government has changed its position on marijuana.

    Vialpando v. Ben's Auto Servs., 2014 N.M. App. LEXIS 50 (N.M. Ct. App. May 19, 2014)

16

Managing The Risk

- In the states with anti-discrimination provisions, when analyzing accommodation requests, consider:
  - Is the job "safety-sensitive"? If yes, the applicant/employee may pose a "direct threat" to the health and safety of himself/herself and/or others.
  - Can the applicant/employee really perform the essential functions of the job with or without a reasonable accommodation? (Consider nature of employee's illness; when and how frequently must he/she use medical marijuana).
  - What is your tolerance for risk?
  - How important is it to have one nationwide policy with regard to marijuana use?

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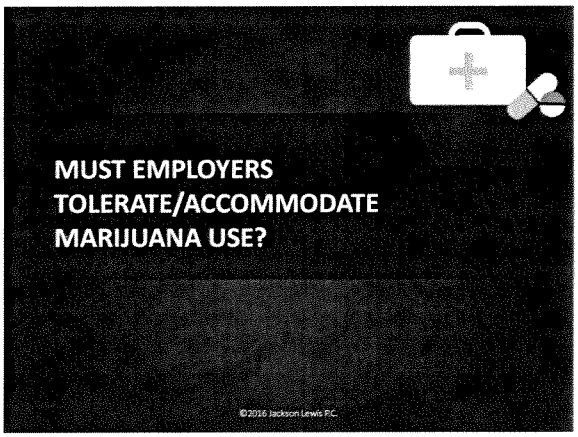

Must Employers Tolerate/Accommodate Marijuana Use?

- Alaska, Colorado, Oregon and Washington have legalized marijuana for medical and recreational use.
- In addition, Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island and Vermont have passed laws which permit the use of medical marijuana.
- The highlighted states above also require some form of job accommodation or non-discrimination by the employer where the employee lawfully uses medical marijuana.

 19

Must Employers Tolerate/Accommodate Marijuana Use?

- A New Mexico court holds that employers need not accommodate medical marijuana use.
  - ***Donna Smith v. Presbyterian Healthcare Services* (ABQ. District Court. 2015)**
    - 2nd Judicial District Judge Nan Nash, upheld the firing of a physician's assistant by Presbyterian Healthcare Services because the woman, a registered medical marijuana patient, tested positive for marijuana while on the job.
    - Nash granted a summary judgment in favor of Presbyterian. She agreed with defense attorney Robert Conklin's argument that Presbyterian is a federal contractor that accepts Medicare and Medicaid reimbursements and must comply with the Federal Drug-Free Workplace Act of 1988.
    - Consequently, Presbyterian must provide drug-free workplaces as a condition of receiving contracts, grants or other money from federal agencies and departments.

 20

Employer's Right to Enforce a Drug Free Workplace

- Employers may find themselves uncertain about the legality of their own policies regarding drug use in the workplace.
- New Mexico employers, in particular, may be faced with making sure their policies comply with three drastically different marijuana use and possession laws:
  - State
  - Federal
  - Local

21

Employer's Right to Enforce a Drug Free Workplace

- Employers can be sure of one thing...They can prohibit the use of intoxicating substances during work hours and are not restricted from disciplining an employee for being under the influence of intoxicating substances during work hours.
  - *Kosmicki v. Burlington Northern & Santa Fe RY.* Co., 545 F.3d 649, 650 (8th Cir. 2008); 42 U.S.C. §12114(c)(3)
- Employers may require employees to conform with requirements of Drug Free Workplace Act [41 U.S.C. §§ 8101-8106]; 21 U.S.C. § 812(c)(c)(17).

22

Employer's Right to Enforce a Drug Free Workplace

- New Mexico's Compassionate Use Act does not refer to employment
  - Prohibits the government from taking adverse action against medical marijuana users and their caretakers.
- The act does not specifically prohibit employment discrimination based on an individual's status of a medical marijuana card.
  - Could be argued that if NM legislature had intended to provide protection to medical marijuana users in the employment context, it would have designed its law with this prohibition.
  - Public employers should be aware, however, that the wording of New Mexico's statute leaves the door open for plaintiffs to argue that the Act regulates public employment.
    - N.M.S.A. § 26-2B-4 "A qualified patient shall not be subject to....penalty in any manner for the possession of or the medical use of cannabis.."

23

PRESCRIPTION MEDICATIONS

Inquiring about Prescription Use as a Business Necessity

- *Kirkish v. Mesa Imports, Inc.* (9th Cir. 2011)
  - Employer did not violate the ADA by inquiring about prescription use even though the plaintiff was never involved in any accidents.
  - Employer knew that the employee was taking pain meds and employer had a business necessity in asking about side effects since driving was part of Kirkish's job duties.

25

ADA and Accommodation

- *Hill v. Kansas City Area Transp. Authority* (8th Cir. 1999)
  - Hill fell asleep two times while driving a bus and was terminated. Claimed employer violated the ADA by terminating her and not accommodating her.
  - Hill claimed that she fell asleep because of a combination of meds to treat hypertension and pain.
  - Employer did not violate ADA –employee did not ask for accommodation until after violating a workplace rule. She ignored the potential side effects until her work performance warranted discharge.

26

Termination For Conduct Caused By Side Effects of Prescription Medication Was Not Disability Discrimination

- *Caporicci v. Chipotle Mexican Grill, Inc.*, Case No. 8-14-cv-2131-T-36EAJ (M.D. Fla. May 27, 2016)
  - Caporicci showed up to work in what appeared to be an inebriated state.
  - She was fired for violating Chipotle's Drug and Alcohol Policy.
  - Caporicci asserted disability discrimination claims under federal and state law, as well as FMLA interference and retaliation claims.
  - The Court noted that courts are split on the question of whether a termination based on conduct related to, or caused by, a disability constitutes unlawful discrimination.
  - The Court followed the majority position and held that Caporicci's termination was not discrimination based on her disability, but rather, it was the result of her employer's application of a neutral policy which prohibited employees from reporting to work under the influence of drugs or alcohol.

27

Prescription Medications: EEOC Litigation

- **The EEOC is actively pursuing cases where employers reject applicants or fire employees due to the use of prescription medications.**
- 11/3/15: EEOC commenced lawsuit alleging disability discrimination because employer refused to hire an applicant who is a recovering addict that uses methadone.
- 4/22/15: EEOC settled a disability discrimination suit alleging that the Company required all employees to disclose the use of prescription medications and over-the-counter drugs to management. Company paid $59,000 to one former employee who took prescription medications and was fired.
- 3/17/15: EEOC settled disability discrimination suit alleging that job applicant was rejected after testing positive for prescription medication used for seizure disorder.

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Prescription Medications: EEOC Litigation

- *EEOC v. Dura Automotive Systems* (Tenn. 9/5/12) -- $750,000 settlement after employer tested all employees for 12 substances, including prescription medications, and made it a condition of employment for employees to cease using certain medications.
  - Dura Automotive also was sued separately by six former employees for the same reason. After an $870,000 jury verdict against it, Dura appealed. In August 2014, the 6th Cir. Court of Appeals vacated the jury verdict and remanded for a new trial, finding that the question of whether Dura's prescription drug testing program qualifies as a "medical examination" depends on the specific facts of the case, which must be determined by a jury. Case settled June 2015.
- 1/23/12: EEOC settled disability discrimination suit alleging that job applicant was rejected after testing positive for methadone.

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WHAT HAPPENS IF AN EMPLOYEE CANNOT PERFORM THE JOB SAFELY WHILE USING PRESCRIPTION MEDICATION?

PRESCRIPTION MEDICATION: SAFETY CONSIDERATIONS

- Must make an individualized assessment as to whether the employee's prescription drug use actually affects his/her ability to safely perform the job.
  - Cannot just "speculate" about "possible safety concerns." *EEOC v. Hussey Copper Ltd.* (W.D. Pa. Mar. 10, 2010).
  - Determination must be based on "the best available objective evidence."
- Must engage in interactive process to determine whether a reasonable accommodation exists that would allow the employee to perform his/her job duties in a safe manner, such as:
  - Reassignment to vacant position;
  - Leave of absence (beyond FMLA);
  - Modification of equipment or devices;
  - Job restructure.

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PRESCRIPTION MEDICATION: SAFETY CONSIDERATIONS

- The success of most disability discrimination cases will depend upon:
  - The employer's interactive process and
  - The attempts at reasonable accommodation.

32

WORKPLACE DRUG AND ALCOHOL POLICIES

Clarity is Key!

- Lack of clarity in employer's drug testing policy results in remand to trial court in unemployment compensation case:
  - ***Austal USA, LLC v. Ala. Dep't of Lab.* (Ala. Civ. App. Mar. 18,2016)**
  - Employee selected for a random drug test pursuant to company's, "Drug and Alcohol Zero Tolerance Policy." The initial test came out positive for amphetamines and methamphetamines. The company offered second test and the employee refused and was terminated.
  - Employee applied for unemployment and the DOL initially approved. On appeal, the company argued that the record was clear that the employee failed to cooperate with second drug test and was aware that it would result in termination.
  - Because of this, the trial court erred by granting the DOL's motion for summary judgement.

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Austal USA, LLC v. Ala. Dep't of Lab. (Ala. Civ. App. Mar. 18,2016) continued...

- Court of Civil Appeals remanded for further litigation regarding the procedure to be followed for the second test.
- Despite testimony from a manager who states that second tests are administered pursuant to DOT regulations, the employer's Policy "[was] completely devoid of an established procedure for the physical administration of a drug test."
  - Specifically, the policy did not mention that employees would be required to submit to a second test after the initial on-site positive test result
  - The policy further did not clarify whether the second test was performed on the original specimen or on a new specimen
- The lack of clarity required remand to the trial court to determine whether the refused test complied with DOT standards or was "otherwise reliable."

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Clarity: Bottom Line

- Employers should have clear, detailed drug and alcohol testing policies, including a description of the testing methods to be followed.
- When a testing policy is silent or vague on a particular issue, a court is likely to refer the issue to the finder of fact.

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Questions?

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NOTES