



# Fall Labor & Employment Seminar

St. Louis, Missouri  
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## Labor and Employment Legal Update



### **Carrie Claiborne**

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Carrie focuses her law practice on employment and business litigation matters. She represents clients in a variety of employment-related issues, including litigation related to the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), Title VII and the Americans with Disabilities Act (ADA). She also assists clients with auditing and drafting employment handbooks, Occupational Safety and Health Administration (OSHA) compliance manuals and a variety of other human resources counseling services.

Before joining the firm, Carrie was a law clerk for a district judge in Denver, where she handled civil and domestic docket matters. She also worked in the Colorado Attorney General's Office. Carrie was a human resources representative at Boise State University before attending law school. There she reviewed and analyzed faculty, professional and classified employment contracts.



### **Randy Thompson**

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A member of Husch Blackwell's Technology, Manufacturing & Transportation team, Randy represents clients in the corrugated packaging, chemical manufacturing and healthcare industries, among others, in all matters relating to labor and employment law, from day-to-day counseling to class action litigation. He frequently represents employers in various litigation matters, including noncompetition, workers' compensation, harassment and discrimination. Randy has first-chaired multiple employment discrimination jury trials in federal and state court, including for Forest Pharmaceuticals and many Fortune 500 clients. Randy's practice includes traditional labor matters, such as collective bargaining, grievances, arbitrations and union campaigns. He also handles employment-related transactional matters, including reductions in force, mergers and acquisitions, and governmental compliance.



### **Bob Tomaso**

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Bob is a veteran labor and employment attorney, with a concentration in the healthcare field. As a member of the Healthcare, Life Sciences & Education industry team, he is increasingly being called upon for his experienced counsel to various healthcare employers regarding the rising tide of wage-based class and collective action lawsuits being filed across the country. Bob has served as first chair in numerous trials involving the Employee Retirement Income Security Act (ERISA) and employment discrimination in federal and state courts and has obtained summary judgment for defendants in more than 50 employment discrimination lawsuits. He has defended appeals of favorable employment decisions before the 7th, 8th and 10th U.S. Circuit Courts of Appeal, as well as the U.S. Supreme Court. In addition, Bob has represented management before the National Labor Relations Board (NLRB) and drafted and negotiated collective bargaining agreements. He regularly advises employers concerning regulatory issues, including wage and hour and plant-closing laws.

Bob is the Managing Partner of Husch Blackwell's St. Louis office, a member of the firm's Partner Board and a former member of the Executive Board. He also is an adjunct professor at Webster University, teaching "Legal Aspects of Human Resource Management" since 1997. He is a former Captain in the U.S. Army Reserves.

# Legal Update

Randy Thompson  
Bob Tomaso  
Carrie Claiborne

## New Illinois Laws

- Employee Sick Leave Act (Jan. 1, 2017)
  - If an employer provides sick days to employees, it must allow employees to use some of that time to care for a family member.
    - Child, spouse, domestic partner, sibling, parent, parent-in-law, grandchild, grandparent, step-parent.
  - Does not extend FMLA leave
  - May limit to ½ of the allotted sick days
  - Not required to be paid

## New Illinois Laws

- Chicago – Paid Sick Leave Ordinance (Jan. 1, 2017)
  - Employers with employees in the city of Chicago must provide *paid* sick leave.
  - Accrue at 1 hour for every 40 hours worked
  - May cap at 40 hours per 12 months
  - Carryover half unused (or up to 20 hours)
  - If FMLA – carryover additional 40 hours to use exclusively for FMLA.

## New Illinois Laws

- Child Bereavement Leave law (July 29, 2016)

Employers covered by FMLA, must provide:

  - 10 workdays, unpaid leave
  - Must use within 60 days of notice of death
  - For more than one child – 6 weeks leave
  - Does not reduce FMLA available

## New Illinois Laws

- Illinois Freedom to Work Act (Jan. 1, 2017)
  - Prohibits non-compete agreements with “low-wage” employees – *i.e.*, employees making: (1) minimum wage; or (2) no more than \$13 / per hour.
  - Begins Jan. 1, 2017; does not apply retroactively.

## Federal Contractors – Paid Sick Leave

- Applies to any *new* contracts entered on or after Jan. 1, 2017.
- Highlights:
  - Accrues 1 hour per every 30 hours worked (or 56 hours in 12 months)
  - Employee’s own or family’s illnesses
  - PTO is sufficient
  - Exception for CBA’s until Jan. 1, 2020

## Federal Contractors – Paid Sick Leave

- Highlights, cont'd:
  - Applies to employees who work on or “in connection with” covered contracts
  - Carryover up to 56 hours
  - No requirement to cash out upon termination
  - Notify of balance each pay period or monthly

## U.S. Supreme Court

- *Green v. Brennan*, 136 S.Ct. 1769 (2016)
  - Vacated summary judgment for employer, where employee alleged constructive discharge based on race discrimination.
  - Court decided that the limitations period begins when the employee gives notice of his resignation (even if much later than the last alleged discriminatory act).

## Summary Judgment in 7<sup>th</sup> Circuit

- *Ortiz v. Werner Enterprises*, 2016 WL 4411434 (7th Cir., Aug. 19, 2016)
  - Problem: lower court separated direct evidence from indirect evidence and applied “convincing mosaic” standard.
  - Court: all evidence is evidence, and the same summary judgment standard applies.

## Americans with Disabilities Act (ADA)

- *Aliferis v. Generations Health Care Network at Oakton Pavilion, LLC*, 2016 WL 4987469 (N.D. Ill. Sept. 19, 2016)
  - Associational discrimination;
  - Employee alleged disability discrimination under the ADA when he was fired for missing work to drive his partner (an employee with breast cancer) to doctor’s appointments.

## Americans with Disabilities Act (ADA)

- *Erickson v. Dept. of Workforce Dev't.*, 2016 WL 5173414 (W.D. Wis. Sept. 21, 2016)
  - Hearing-impaired employee fired 6 weeks after accommodation implemented;
  - Employer may not consider pre-accommodation performance in termination decision.

## Fair Labor Standards Act (FLSA)

- Reminder - new overtime regulations effective December 1, 2016
  - Salary level: \$913 per week or \$47,476 per year.
  - Highly compensated: \$134,004
- 21 States and 55 (Texas) businesses have filed lawsuits challenging the final rule.
  - Unlikely to succeed or impact private employers.



## D.R. Horton Update

- In *D.R. Horton*, NLRB said that an arbitration clause prohibiting collective or class action violates NLRA;
- The circuit courts have now split.
- U.S. Supreme Court likely to get involved soon.

## D.R. Horton Update

- Two cases this year **AGREED** with NLRB:
  - *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) (May 26, 2016)
  - *Morris v. Ernst & Young, LLP*, 2016 WL 4433080 (9th Cir. Aug. 22, 2016)
- **8<sup>th</sup> Circuit** – enforced provision begrudgingly in *Patterson v. Raymour's Furniture Co.*, 2016 WL 4598542 (8th Cir. Sept. 2, 2016)

“If we were writing on a clean slate, we might well be persuaded . . . And hold that the EAP’s waiver of collective action is unenforceable.”

## EEOC – Statutory Right to Intervene

- *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016)
  - Employer’s arbitration agreement with employee did not prevent him from intervening in the EEOC’s ADA lawsuit against employer on his behalf.
  - While his own claim would be subject to arbitration, he had a statutory right to intervene in the EEOC lawsuit.

## EEOC – Guidance on Retaliation

- August 29, 2016 – EEOC published new guidance on retaliation claims (not updated since 1998).
- Highlights:
  - Participation in process is protected regardless of whether the EEO allegation is based on a reasonable, good faith belief that a violation occurred.
  - An employee’s opposition to discriminatory conduct is protected, even if courts disagree about whether that conduct is discriminatory.

## EEOC – Guidance on Retaliation, Cont'd

- Highlights:
  - Manner of opposition must be reasonable, even if broadly defined;
  - Opposition must be based on good faith belief the conduct was discriminatory;
  - Provides many examples (“materially adverse” employer action, protected opposition, etc...)
  - Applies to current employees, former employees, and applicants
- Condensed Q&A page:  
<https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm>

## EEOC – Equal Pay Enforcement

- EEOC to collect pay data
  - Sept. 29, 2016, New EEO-1 approved
  - Employers with 100+ employees (Fed. Contractors 50+ employees)
  - First submission due March 31, 2018
  - W-2 data, snapshot from one pay period between October 1 – December 31.

## OSHA – Injury Recordkeeping Rule

- OSHA amended its injury and illness reporting rule (29 CFR 1904.35), aka “Improve Tracking of Workplace Injuries and Illnesses rule.”
- Three modifications:
  1. Electronic reporting of Form 300A by July 1, 2017
  2. **Notify** employees by **Nov. 1, 2016** of right to report injuries/illnesses (must be reasonable) and without retaliation.
  3. OSHA discouraging post-accident drug testing without some suspicion that drugs could have contributed to accident.

## OSHA – Injury Recordkeeping Rule

Find a list of industries exempt from the record keeping requirement at this link:

<https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html>

## ACA Posting Requirements

- ACA Nondiscrimination POSTING requirements went into effect Sunday (October 16, 2016).
- Covered Entities: Any entity that operates a health program or activity that receives federal financial assistance.
- Section 1157 of the Affordable Care Act requires public posting of:
  - (1) notices describing nondiscrimination policies;
  - (2) taglines written in 15 most common non-English languages spoken in that State.

## ACA Posting Requirements

Find sample notices and taglines at the U.S. Dept. of Health & Human Services website:

<http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>

## Family and Medical Leave (FMLA)

- **de minimis contact** with an employee on FMLA leave does not interfere with FMLA rights . . . (*Massey-Diez v. Univ. of Iowa Comm.*, 826 F.3d 1149 (8th Cir. 2016)).
- . . . so long as the contact is **not (1) coercive; or (2) a condition of employment.** (*Tilley v. Kalamazoo County Road Comm.*, 2016 WL 3595715 (6th Cir. June 27, 2016)).
- Also, employers have **no obligation to notify** employee that her FMLA leave is about to expire. (*Boileau v. Capital Bank Fin. Corp.*, 646 Fed. App'x 436 (6th Cir. 2016)).

## Astounding Employment Cases Roundup

- **“Peel it, feel it, heal it, Onionhead.”**
  - Employees who rejected company’s implementation of “Onionhead” religion for conflict resolution were demoted and then fired.
  - Onionhead includes: using candles, reading spiritual texts, and telling colleagues “I love you” at work.
  - Court granted summary judgment for limited question of whether Onionhead was a religion. (Yes, it is)
  - *EEOC v. United Health Programs of America, Inc. et al.*, 14-CV-03673 (E.D.N.Y. Sept. 30 2016)

## Astounding Employment Cases Roundup

- Too cute? Too bad.
  - Wellness clinic owner fired instructor, who alleged it was because she was “too cute” and his wife was jealous.
  - Fired by email – “you are fired and no longer welcome in our office. If you call or try to come back, we will call the police.”
  - Court dismissed the claim as not sex discrimination, neither based on her appearance nor spousal jealousy.
  - *Edwards v. Nicolai et al.*, 2016 WL 2770273 (N.Y. Sup. May 11, 2016)

# Seeing the Big Picture When Handling Unemployment and Workers' Compensation Claims



## **Joe Glynias**

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Throughout his career, Joe has represented employers in all areas involving employer/employee relations, counseling clients on the Family and Medical Leave Act (FMLA), the Worker Adjustment and Retraining Notification Act (WARN) and discrimination laws. His strategic insights guide employers in Department of Labor actions, such as audits involving tipped food-service employees and laborers in the grain milling industry. In traditional labor cases, Joe regularly advises employers in grievance arbitrations and actions before the National Labor Relations Board (NLRB), most of which have come in the food-processing industry. He represents clients in noncompetition and nonsolicitation matters and related injunction litigation and has obtained favorable decisions before the Equal Employment Opportunity Commission (EEOC) and other federal and state administrative agencies nationwide.



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Brian focuses his practice on labor and employment matters. He has assisted with issues concerning Title VII, the National Labor Relations Act (NLRA), the Americans with Disabilities Act (ADA), the Occupational Safety and Health Act (OSHA), and other state and federal employment laws. He also has experience training HR professionals and managers on best practices for evaluating, disciplining and discharging employees in the workplace. Before joining the firm, Brian served as a law clerk to the Honorable E. Richard Webber of the U.S. District Court for the Eastern District of Missouri.



## **Mary Beth Hughes**

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A member of Husch Blackwell's Technology, Manufacturing & Transportation industry team, Mary Beth concentrates her practice in the area of workers' compensation. Her experience also includes general civil litigation.

Mary Beth works with clients in a broad range of industries to aggressively defend workers' compensation claims. Her experience includes representing employers and insurance carriers on large and small claims by performing case assessments, trying cases to administrative law judges, and preparing briefs for review before the Labor and Industry Review Commission, Circuit Court, Court of Appeals and Supreme Court. She counsels employers throughout the work-injury process on designing and executing creative strategies to prevent litigation and reduce costs, investigating injuries, making employment decisions and more. Mary Beth's experience also includes representing entities paying workers' compensation benefits in third-party Circuit Court and District Court matters, including preparing pleadings, making court appearances and participating in mediations.



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# Seeing the Big Picture When Handling Unemployment and Workers' Compensation Claims

Joe Glynias  
Mary Beth Hughes  
Brian Stair

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## **BIG IDEA**

What is said (or not said) in Unemployment  
and Workers' Compensation proceedings  
can impact other litigation

**BE CAREFUL AND STRATEGIC**



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## Bonus Discovery!

- Explore the extent of Employee's complaints, positions, arguments, etc.
- Helps evaluate likelihood of success in other forum
- Useful even without other pending claim
  - Anticipate potential claims (if contentious)
  - Determine likelihood of subsequent litigation



## Establish Winning Facts

- NOT just a conversation
  - Have a plan for what you want to get and how you will get it
- Particularly valuable with contradictory claims



## Avoid Harmful Statements/Positions

- Dangers
  - Jeopardizing defense(s) in other forum
  - Providing Employee with basis for new claim
- In written responses, at hearing, etc.
- Obvious threats
  - Hearing testimony turns toward irrelevant issues
    - (potential over-sharing by company witness)
  - OBJECT!
- Subtle threats



## Inconsistent Statements by Employee

- Nail down their version of events
  - Relevant to other proceeding?
  - Who said what?
  - Actions/inactions
  - Timeline
- Uses
  - Impeachment at subsequent deposition/trial
  - Reference in EEOC position statement



## Consistent Explanation of Termination

- Similarly, the Employee wants to “lock in” your testimony
  - Same uses/benefits (but in their favor)
  - Reduces likelihood of winning summary judgment
- Multiple avenues
  - Written responses to unemployment agency
  - Workers’ compensation discovery
    - (to the extent permitted by state)
  - Hearing testimony



## Lose, So You Can Win

- Establishing facts that hurt you in the short term
- But beneficial to a crucial or dispositive aspect of the other litigation
- Balancing desired outcomes
- Prior example – losing unemployment claim for sake of workers’ compensation victory



## Which Approach to Take?

- Treat hearing as opportunity or threat?
  - Discovery vs. Defense
- Case-by-case determination
- Factors
  - How helpful is the information you want to establish?
    - (and how likely are you to establish it?)
  - Risk/impact of claimant's unflattering testimony
  - Preparedness of company witness(es)



## Attorney Involvement/Cooperation

- Coordination among outside counsel
  - Defense strategy, witness prep, etc.
- Benefits
  - Consistent positions/arguments across all forums
  - Protection from damaging testimony or result
  - Extra discovery
  - Set up for success in other forum



## Settlement Considerations

- Economic strain on Employee
  - Favorable result for Employee can fund their subsequent litigation
  - Impact on chances of early or cheap settlement
- Seek universal settlement
  - Avoid funding Employee's subsequent lawsuit
  - Valid releases for each claim/forum



## Knock! Knock! How to Answer When a Government Agency is at Your Door



### **Anthony Grice**

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Anthony has significant experience litigating single and multiple plaintiff discrimination and harassment cases in federal and state courts. He has obtained numerous summary judgment dismissals and successfully defended those dismissals before the United States Court of Appeals for the Seventh and Eighth Circuits, as well as the Court of Appeals for the state of Illinois. Anthony also conducts workplace investigations and has successfully represented employers before the Equal Employment Opportunity Commission (EEOC), the Missouri Commission on Human Rights (MCHR) and other federal and state administrative agencies. He has achieved favorable results for employers through alternative dispute resolution, including arbitrations and mediation. Anthony regularly advises employers regarding human resources issues, including Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA) compliance, employment agreements and restrictive covenants, personnel policies, discipline/discharge decisions, and severance agreements. He is a member of the firm's Cortex team and assists manufacturing and technology based startups with various employment related needs.



### **Brad Hiles**

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Serving businesses for 35 years, Brad has a national practice in the areas of OSHA/MSHA defense, labor and environmental law. He represents clients primarily in the manufacturing, energy/natural resource and food/agriculture sectors. Within these industries, he has developed a reputation for rapid, in-person responses to workplace fatalities or catastrophes during government investigations. He is commonly called upon to "triage" OSHA and MSHA citations within 24 hours to enable clients to formulate settlement strategies.



### **Terry Potter**

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A former field attorney with the National Labor Relations Board (NLRB), Terry views labor and employment cases from an insider's perspective. He represents employers in collective bargaining, arbitrations and union avoidance techniques in a myriad of factual settings before the NLRB, National Mediation Board (NMB) and various state public labor relations boards. Terry also advises employers in employment discrimination matters before the Equal Employment Opportunity Commission (EEOC), related state agencies and before state and federal courts. A member of the firm's Technology, Manufacturing & Transportation team, he represents employers regarding regulatory issues, wage and hour laws, restrictive covenant agreements, worker safety issues and public policy discharge matters. Courtroom experience is important for anyone in this area of the law and Terry has more than 30 years of such experience in a variety of state and federal courts across the country, including appellate courts. He is a charter member of the 8th Circuit Bar Association, and is often asked to speak on cutting edge legal issues.

# Knock! Knock! How to Answer when a Government Agency Is at Your Door

Brad Hiles  
Terry Potter  
Anthony Grice

## Department of Labor (DOL) Wage & Hour Division (WHD) Investigations

- Preparation Before a WHD Investigation
  - Develop and implement a comprehensive wage and hour program
  - Conduct internal or external wage and hour audits
  - Train staff
  - Establish response team and inspection protocols



## Department of Labor (DOL) Wage & Hour Division (WHD) Investigations

- Preliminary Inspection Issues & Opening Conference
  - Protect employer interests when the DOL arrives
  - Understand and enforce the DOL's opening conference obligations
  - Best practices during opening conference
    - Response team
    - Subpoenas
    - Interview and document production protocols

## Department of Labor (DOL) Wage & Hour Division (WHD) Investigations

- Document Production
  - Best practices
    - "Confidential and Proprietary" label
    - Question requests
    - Duplicates
    - Tracking
  - Avoid common mistakes
    - Do not generate documents during inspection
    - Do not give more than requested or leave documents in plain sight
    - Do not volunteer information

## **Department of Labor (DOL) Wage & Hour Division (WHD) Investigations**

- On-Site Inspection Activities
  - Understand investigator's activity during audit
  - Employer participation in audit
- Employee Interviews
  - Understand investigator's role in employee interview process
  - Understand company's role in employee interview process
  - Prepare all employees scheduled for interviews
  - Provide additional preparation for managers

## **Department of Labor (DOL) Wage & Hour Division (WHD) Investigations**

- Closing Conference
  - Reviews, follow-up interviews, research, calculations
  - Communication of findings & rights
  - Best practices
- Back Wage Findings
- Post-Audit Options
  - Pay
  - Informal settlement conference
  - Formal settlement
  - Trial

## **EEOC Systemic Investigations & Subpoena Enforcement Actions**

- Recent Focus on Systemic Investigations
- Lessons Learned from Recent Subpoena Enforcement Actions
  - Timeliness of challenge to subpoena
  - Relevance
  - Time frame covered by subpoena
  - Undue burden

## **EEOC Systemic Investigations & Subpoena Enforcement Actions**

- Broad Based Investigations
  - Requests for computerized personnel data
  - Requests for information involving personnel decisions unrelated to underlying charge
  - Requests for information involving broad geographic data
  - Authority to investigate even absent charging party
  - Subpoenas to third parties

## EEOC Systemic Investigations & Subpoena Enforcement Actions

- Successful Challenges to EEOC Subpoenas
  - Limit scope of subpoenas
  - Limits to investigative authority
    - Untimely expansion of investigation
    - Rejection of request for information from successor employer
    - Improper fishing expedition
    - Limit geographic scope
    - Limit efforts to expand investigation beyond classification referenced in charge
    - Improper purpose
- Privacy considerations

## EEOC Systemic Investigations & Subpoena Enforcement Actions

- What to Expect During an On-Site Visit
  - Touring
  - Probing the company's story
  - Questions about employment law knowledge and training
  - Selective note taking
- Best practices
  - View each communication as an exhibit
  - Keep the ball in the EEOC's court
  - Question everything
  - Re-emphasize your good points

## Why Does OSHA Inspect?

- Your company reported a fatality, hospitalization, amputation or eye injury
- Anonymous complaint filed with OSHA
- Random "Program" Inspections
- Other Reasons
  - Very high injury/illness rate
  - National or Regional Emphasis Program

## Pre-Planning for an On-Site Inspection

- Adopt an Inspection Warrant Policy?
- Assign a closed-mouth person (and a substitute) to accompany the inspector. (They are trained to be nice and, sometimes, chatty).
- Decide if trade secrets or proprietary processes should be protected.
- Have a camera (with video) in the ready.

## When OSHA Is At The Door

- Ask for credentials.
- Put the Inspector in a Conference Room.
- Assemble your team.
- During the opening conference, ask the reason for the inspection – “What do you want to see?”
- Notify the inspector of trade secrets and proprietary processes.

## Inside the facility. . .

- Anything the inspector observes is subject to a Citation, even if not part of the planned inspection.
- Chart a course that matches the inspector’s area of interest (while avoiding as many other areas as possible).
- The inspector may interview employees, but not if it interferes with present work.
- Take duplicate photographs.
- Do not admit a violation or attempt to explain it.

## **Inside the facility. . .**

- Correct alleged violations before the inspector leaves (if possible).
- Never leave the inspector alone (one exception).
- If there are multiple inspectors, ensure each is accompanied.
- Chat only about the weather (if not relevant to your operations) or, better yet, don't talk much at all--Don't lie!

## **Witness Interviews**

- Prepare supervisors and managers for interviews.
- Always have a witness/helper during interviews of supervisors and managers.
- Prepare hourly employees for interviews (when possible).

## The Anonymous Complaint Process

- Anyone can call OSHA to complain about safety at our facilities (employees, ex-employees, customers, neighbors).
- Most complaints result in a letter from OSHA
  - The complaint is presented, with an opportunity to respond within 7 to 10 days.
  - Responses terminate the inquiry 90% of the time.
  - Failure to respond results in an inspection 90% of the time.

## Responding to Anonymous Complaints

- Avoiding complaints in the first instance:
  - Many anonymous complaints are from employees who believe they are being ignored.
  - Investigate every complaint and respond to the complaining employee.
- Reply on time.
- Admitting noncompliance normally will not result in a Citation if a plan for compliance is submitted.
- Never volunteer information to OSHA about the suspected complainant.



## Perspective of Agency

- NATIONAL LABOR RELATIONS BOARD
  - What's missing?

## Initial Contact

- Charge with cover letter
  - Investigator's Contact Information
  - Commerce Form
  - Notice of Appearance Form
  - Request for Statement of Position

## Next Steps

- Contact Legal Counsel – NOA
- Unrepresented – No Attorney/Client Protection
- Skip Counsel

## Be Careful

- “Require” Affidavits
- Not Required
- Why NLRB Desire?

## Better Response

- Statement of Position Best
- Credibility Issues – Hearing

## How to Get the Facts

- No Discovery in NLRB Proceedings
- Investigation Replaces Discovery
- Ask, Ask, Ask

## How to Get the Facts cont'd

- Investigation Subpoenas
- Rare

## Settlement/Hearing Process

- Merit Found – Proposed Settlement Agreement
- Complaint – Hearing – ALJ
  - Location
  - Rules
  - ALJ issues – Recommended Order
  - Appeal – NLRB
  - Appeal – Court of Appeals

## Appeal Process

- No Merit Found
  - CP Appeals
  - Office of Appeals
  - Uphold or Remand

## Tips and Tricks for Engaging in Delicate Conversations with Employees



### **Brittany Falkowski**

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Brittany focuses her practice on Labor & Employment matters. She has defended employers in numerous discrimination cases in state and federal court with favorable results. In addition, she has represented employers in proceedings before the Equal Employment Opportunity Commission, the Missouri Commission on Human Rights and the Missouri Division of Employment Security. She regularly counsels employers on human resources issues, including personnel policies, wage and hour issues, plant closing laws, employee handbooks, Occupational Safety and Health Administration (OSHA) compliance issues and severance agreements. Brittany also has assisted in the defense of unfair labor practice charges before the National Labor Relations Board and workplace investigations by OSHA.



### **Kate Leveque**

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A member of the firm's Healthcare, Life Sciences & Education industry team, Kate focuses her practice on Labor & Employment matters. She has obtained favorable resolutions in employment-related litigation filed in numerous state and federal courts and administrative agencies. Kate's litigation experience includes defending wage and hour class and collective actions as well as single plaintiff employment claims involving Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA) and other state and federal employment laws. In addition, Kate regularly advises employers about personnel decisions, wage and hour matters, internal complaints, investigations, personnel policies, employment contracts, severance agreements and leave and accommodation issues.

Kate is a member of the firm's Hiring Committee and Chair of the Recruiting Committee in the St. Louis office.



### **Scott Meyers**

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Scott focuses his practice on labor and employment matters. He has assisted with issues concerning the Fair Labor Standards Act (FLSA), Title VII, the Family and Medical Leave Act (FMLA) and other state and federal employment laws. After working with the firm as a summer associate in 2014, Scott joined Husch Blackwell as an associate in 2015. While pursuing his law degree, he worked as an intern for the United States Attorney's Office for the Eastern District of Missouri and as a judicial extern for the Honorable E. Richard Webber of the United States District Court for the Eastern District of Missouri.

# Tips and Tricks for Engaging in Delicate Conversations with Employees

Kate Leveque  
Brittany Falkowski  
Scott Meyers

## Before the Conversation

- Don't Avoid the Conversation
- Do Your Homework
  - Get the facts
  - Determine if investigation is needed
  - Review your policies
  - Consider legal implications
  - Plan what to say

## Before the Conversation

- Find The Right Setting
  - Set up meeting according to customary practice
  - Time of day when it is not obvious
  - Closed office or conference room

## During the Conversation

- Consider having a witness
  - Know the *Weingarten* Rule
    - Union employees may have a representative at the meeting if he or she reasonably believes the meeting may lead to corrective action



## During the Conversation

- Know How To Begin
  - Be direct and upfront
  - Take a proper tone
- Manage Emotions
  - Be positive
  - Be truthful
  - Know how and when to end the conversation

## After the Conversation

- Maintain Confidentiality
- Determine what follow-up, if any, is necessary
  - E.g., Engage in the interactive process, close the loop with the complainant

## After the Conversation

- DOCUMENT, DOCUMENT, DOCUMENT
  - Create a record of the conversation and outcomes
  - Make copies to place in files
- Be Consistent
  - Promotes fairness
  - Helps to avoid claims of discrimination

## Romantic Relationships

- Patrick is a partner at his accounting firm. Anna is an associate in his division. Patrick and Anna are on a team that frequently travels together to perform audits for clients. Patrick and Anna start dating secretly, but are not very good at hiding their romance. Others on the team quickly find out. To complicate matters, Patrick is going through a messy divorce.

## Romantic Relationships

- Concerns:
  - Sexual harassment
  - Perceived or real favoritism
  - Retaliation
  - Subpoena related to divorce
- Tips:
  - Review policies (e.g., anti-fraternization and anti-nepotism)
  - Consider a love contract
  - Negotiate a protective order for subpoenaed documents

## Off the Clock

- Alan and Beau are co-workers and friends. After a long week, the two decide to go to a bar for happy hour. After a few too many, they get into an argument, and Alan punches Beau. Alan is arrested and charged with assault. Beau plans to get an order of protection against Alan. Alan is a top performer, and the business does not want to fire him.

## Off the Clock

- Concerns:
  - Hostile work environment
  - Lawful off-duty conduct laws
  - Abiding by the order of protection
- Tips:
  - Investigate immediately
  - Follow-up frequently

## Something Smells

## Something Smells

- Concern:
  - May relate to a medical condition
- Tips:
  - Consider engaging in the interactive process
  - Be careful not to accidentally create a “perceived as” claim
  - Know when to end the conversation

## Talking Politics

- Ken Bone is an undecided voter. Monday morning after the last Presidential Debate, Ken wore an “I’m With Her ... because she supports paid maternity leave” pin on his red sweater while passing out flyers that say, “Remember: Republicans support paid maternity leave too!”

## Talking Politics

- Concerns:
  - First Amendment
  - NLRA Section 7 rights protect concerted activity
- Tip:
  - Ask questions to uncover whether Ken has engaged in concerted, protected activity
- Remember:
  - Employees are entitled to leave for voting

## You're Wearing...That?

- ABC Company has a business casual dress code. Paul frequently leaves a few too many shirt buttons undone, revealing his chest and cross necklace. A customer complains to Paul's supervisor, Jenny.

## You're Wearing...That?

- Concerns:
  - Sexual harassment
  - Neutral dress code
  - Religious garb
- Tips:
  - Consider the most appropriate person to deliver the message
  - Take a proper tone
  - Handle the issue directly

## Friendly Fire

- The CFO of a small company suspects embezzlement by the CEO. When confronted, the CEO requests to resign in lieu of discharge and signs a severance agreement with mutual confidentiality and non-disparagement provisions. The CFO needs to inform the employees of the CEO's departure.

## Friendly Fire

- Concerns:
  - Defamation
  - Breach of contract
- Tips:
  - Focus on the future
  - Keep it simple
  - Maintain confidentiality