

# Welcome

Labor & Employment Seminar  
October 12, 2011

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## **2011 Recent Developments in Employment Law**

Paul F. Pautler, Jr.  
Curtis R. Summers

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## MHRA Amendments

### Key Provisions

- Changed burden of persuasion from “contributing factor” to “motivating factor”
- Capped damages equivalent to federal law
- Excluded individuals from definition of employer
- Required “business judgment” instructions
- Directed Missouri courts to utilize summary judgment procedures of Missouri Rules to relieve crowded dockets

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## MHRA Amendments

### Whistleblower’s Protection Act

- Sole and exclusive remedy for retaliation claims based on claims or complaints under MHRA and/or for reporting unlawful acts or refusing to follow unlawful directions (public policy exception)
- Codify and limit existing common law exceptions
- Damages caps

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## MHRA Amendments

- Passed Missouri House and Senate in April 2011
- Governor Nixon Vetoed in May 2011
- What that means going forward

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## Hervey v. Missouri Department of Corrections

- Decided September 13, 2011 (Mo. Ct. App., W.D.)
- MHRA disability discrimination case
- Jackson County jury awarded over \$2.5 million in actual and punitive damages

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## Hervey, cont'd

- After post-trial motions, including front pay, attorneys' fees, and reduction of punitive damages award: \$1.5 million
- DOC appealed on several points, including:
  - Disability discrimination verdict director
  - "Disability" definition instruction
  - Punitive damages award

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## Hervey, cont'd

- Court of Appeals affirmed on all points
- Disability discrimination verdict director
  - Your verdict must be for the plaintiff if you believe that
    - Defendant discharged plaintiff; and
    - Disability was a contributing factor in such discharge; and
    - As a direct result of such conduct, Plaintiff sustained damage

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## Hervey, cont'd

- DOC: Error to omit status as “disabled” as element of verdict director
- Court: No error, but courts are “encouraged” to include the element when contested
- What is the implication for employers in MHRA disability discrimination cases?

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## Hervey, cont'd

### “Disability” definition instruction

- A disability is a physical or mental impairment which substantially limits one or more of a person’s major life activities, which with or without reasonable accommodation does not interfere with performing the job.

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## Hervey, cont'd

- DOC: Error to omit as element of definition the plaintiff's ability to perform essential functions of job
- Court: No error, the instruction quoted the MHRA definition and "job" is sufficiently broad to include plaintiff's ability to perform its "essential functions"
- Again, what are the implications in disability cases?

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## Hervey, cont'd

### Punitive damages award

- Mo. Rev. Stat. § 510.265 limits punitive damages and requires court to reduce award to within limits using "net amount of the judgment award to the plaintiff against the defendant"

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## Hervey, cont'd

- DOC: Error to include attorneys' fees in net amount of "judgment"
- Court: No error, attorneys' fees are recoverable under MHRA and including them "in calculating the final cap on the punitive damages award furthers this goal"

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## Leeper v. Scorpio Supply

- Bad facts make bad law
- Clear that MHRA provides for individual liability (individual as employer)
- Leeper: Vicarious individual (Briscoe) liability for sexual harassing conduct of supervisor

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## Leeper v. Scorpio Supply

- Interesting Points
  - No policies or training on sexual harassment
  - Briscoe did not know about harassing conduct until complaints made
  - Briscoe downplayed conduct, sought to blame plaintiffs, conducted inadequate investigation, did not discipline harasser
  - Seems to be basis for individual liability -- no need to find vicarious liability
- What this means going forward

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## AT&T Mobility v. Concepcion

- Decided April 17, 2011 (U.S.)
- Consumer arbitration agreement with cell phone customers included a class action waiver
- Class action waivers are permissible under the FAA and not unconscionable

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## AT&T Mobility, cont'd

- FAA preempts state unconscionability principles and class arbitration is contrary to FAA's purpose
- Potential impact on arbitration agreements and Dispute Resolution Programs in employment context

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## AT&T Mobility, cont'd

- Missouri courts have held that class action waivers invalidate arbitration provisions as unconscionable
  - Reasoning: class arbitration is necessary for small-dollar disputes
- Supreme Court expressly rejected that reasoning

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## AT&T Mobility, cont'd

- Nothing in the FAA “suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives”
- The decision could open the door for arbitration agreements with valid class action waivers

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## AT&T Mobility, cont'd

- But, the positive news could be short-lived
  - Arbitration Fairness Act was reintroduced in Congress days after the Supreme Court’s decision

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## Important NLRB Decisions

- Social Media
- Posting Requirements

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Questions?

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# Social Media: The New Legal Landscape

Patrick Gavin  
Julianne P. Story

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## Background

- Facebook
  - 800 million active users
  - 50% log in on any given day
- LinkedIn
  - 100 million registered members
  - Diverse community in terms of age, gender, industry and geography

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## Pitfalls – NLRA Standards

- Concerted activity – “with or on the authority of other employees and not solely by and or on behalf of the employee” Meyers cases
- NOT Individual gripes

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## Pitfalls – NLRA Standards

- Protected activity –
  - Terms and conditions of employment
  - Protests of supervisory actions
  - Seek to involve other employees

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## Pitfalls – NLRA Standards

- No loss of protection – Atlantic Steel
  - Not “opprobrious”
  - Public outbursts against supervisor
  - Related to ongoing labor dispute
  - Disloyal, reckless or maliciously untrue
- Note: Calling supervisor “scumbag” is ok

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## Pitfalls – NLRA Violations

*Ortiz v. Hispanics United of Buffalo, Inc.*

- Employees posted comments on Facebook about work performance of co-worker
- Co-worker claimed “cyber bullying”
- Discharge of 5 employees violated NLRA
  - Swearing/sarcasm did not lose protection

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## Pitfalls – NLRA Violations

“Scumbag” supervisor comment

- Employee posted negative comment about supervisor on home computer after work
- Discharge for posting on Facebook violated Act
  - Name calling was not accompanied by threats

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## Pitfalls – NLRA Violations

*Becker v. BMW*

- Salesman posted photos and comments on Facebook page about using over-cooked hot dogs for promotional event
- Posts about hot dogs were protected concerted activity
- But discharge did not violate Act because he was discharged for photos of a car accident of a related dealer

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## Pitfalls – NLRA Violation

Too much tax withholding by “a\*\* hole”

- Bar employees posted complaints including expletives on Facebook regarding owing taxes
- Discharge and threat to sue violated NLRA
- Note: Usually bad idea to threaten suit without intending to sue

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## Pitfalls – NLRA – No Violation

Lee Enterprises (Arizona Daily Star)  
Writer’s Twitter posts were not protected concerted activity

- Writer’s duty included maintaining Twitter account
- Employee ignored warnings to stop

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## Pitfalls – NLRA – No Violation

Bad tips case

- Bartender's complaint to relative about tipping policy did not violate Act
- Bartender responded to inquiry from non-employee

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## Pitfalls – NLRA – No Violation

Posting on Senator's wall not violative of NLRA

- Employee posted complaints about fire department and emergency services
- No evidence she ever complained to her husband (who was a co-worker)

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## Pitfalls – NLRA – No Violation

Postings to friends not protected activity

- Employee posted about mental institution (“spooky residents”)
- “Friends” commented but were not employees

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## Pitfalls – NLRA – No Violation

Profane Facebook comments

- Comments about supervisor (“tyranny” and “super mega puta”)
- Were individual gripes, not concerted activity

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## Pitfalls – NLRA – Analytical Framework

- Location – work/outside
- Time – work/personal
- Equipment – company owned/personal
- Recipients – co-workers, supervisors, “friends”
- Subject matter - work conditions/personal gripes
- Complaint – individual/on behalf of others
- Loss of protection – malicious/annoying

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## Pitfalls – Background Checks

- 75% of hiring managers use social media to screen job applicants
- More than half claim they have not hired a candidate based on a social networking profile

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## Pitfalls – Background Checks

- Cannot “unring” the bell
- Questionable accuracy
- Risk of a discrimination claim by a disappointed applicant
- Disparate treatment or impact based on nature of search

## Pitfalls – Background Checks

- Fair Credit Reporting Act – applies when employer obtains a “consumer report” through a “consumer reporting agency”
- Invasion of privacy laws
  - Generally requires intentional intrusion upon the seclusion of another where intrusion would be “highly offensive to a reasonable person”
  - Person posting online may have difficulty showing a reasonable expectation of privacy unless deceit
- Lifestyle discrimination laws may provide protection for off-duty lawful conduct

## Tips to Minimize Risk

- Create formal policies/procedures regarding acquisition and use of online information
- Develop criteria for disqualifying applicants and apply criteria uniformly
- Train employees who conduct online searches
- Require non-decision maker to conduct the search/review and filter out irrelevant or protected information
- Do not use deceptive means to obtain information

## Tips to Minimize Risk

- Do not rely only on the internet – supplement online information with reference checks and/or subsequent interviews
- Consider conducting an online search only after making a conditional offer of employment
- Consider obtaining written consent from each applicant before reviewing his or her social networking page
- Maintain accurate records of online searches/information reviewed to rebut allegations of improper conduct/discrimination

## Pitfalls – Restrictive Covenants

- Activity on social media sites can run afoul of restrictive covenants
  - *Sasqua Group, Inc. v. Courtney*
  - *Teksystems v. Bolton*

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## Tips to Minimize Risk

- Draft restrictive covenants to encompass electronic communications, including social media
- Take steps to maintain the confidentiality of information sought to be protected
- Monitor the social networking sites of current and former employees
- Implement and enforce a blogging and social networking policy

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## Pitfalls – Discrimination and Harassment

- Employer's duty to maintain harmonious work environment
- Off-duty conduct impacting the workplace/in violation of policy
  - *Blakey v. Continental Airlines, Inc.*
  - In re: Martin House
  - Missouri's ban on teacher-student "friendships"

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## The Policy

### NLRA:

- Do not generally prohibit employees from posting photos of themselves which depict the company
- Do not generally prohibit employees from making disparaging comments about company, co-workers and competitors
- Do not generally prohibit "rude" or "inappropriate" behavior/discussion

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## The Policy

- NLRA: Employer violates NLRA if work rule would “reasonably tend to chill employees’ exercise of their rights”
- Two-Part Test: (1) expressly restricts; or (2) if not express, then if:
  - Reasonably construed as prohibiting activity
  - Promulgated in response to activity
  - Applied to restrict activity

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## The Policy

- Frame in terms of guidelines, not absolutes
- Alert employees to potential individual liability for unlawful statements
- Remind employees not to disclose company’s confidential information
- Remind employees that only authorized personnel may speak for the company
- Remind employees that only authorized employees may start a social media site on behalf of the company

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## The Policy

- Caution employees that activities outside of work that negatively impact the workplace may be grounds for discipline
- Remind employees that the internet is a public space
- Remind employees that nothing in the policy is intended to interfere with the NLRA

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Questions?

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# Break

Please be back at 10:15 a.m.

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## **An Ounce of Prevention:** Guidance on Conducting Effective and Defensible Internal Investigations

Amy Fowler  
Christi Hilker Vaglio

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## The Benefits of a Prompt and Thorough Investigation

- Timely resolution of employee complaints prevents:
  - Morale problems
  - Disruption to the business that can result from unaddressed problems in the workplace
  - Conveys the important message that the employer will not tolerate misconduct and will take effective steps to correct problems
- Such action can also provide a defense to liability in some instances

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## Negligence Theory: Investigation is a Defense

- *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998)
- *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998)
- Hostile environment sexual harassment
- Supervisor is harasser
- No tangible employment action has been taken
- Employer may raise an affirmative defense to liability if:
  - Employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior
  - Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise
- Prevention and correction include:
  - Undertaking a prompt investigation of complaints when they arise
  - Acting on the results of that investigation to eliminate the existing problem and future problems

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## Cat's Paw Theory: Don't Let the Monkey Get the Best of You

- *Vincent Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011)
- Employer may be liable for the discriminatory animus of a lower level supervisor even if the lower level supervisor was not the ultimate decision maker
- HR (decision maker) did not conduct independent investigation into legitimacy of the underlying corrective actions issued by supervisor before making termination decision
- Plaintiff subsequently complained the corrective actions, and therefore his termination, were the result of the supervisor's discriminatory animus against the military
- Still no investigation
- Court: When the supervisor (i.e., monkey) performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse action and if the act is a proximate cause of the ultimate employment action, then the employer is liable under discrimination laws
- Applies even if the ultimate decision maker (i.e., cat) lacks discriminatory intent

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## Third-Party Retaliation: Don't Let the Fiancé Get the Best of You Either!

- *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011)
- Eric Thompson and Miriam Regalado both employees of NAS
- Regalado files charge of sex discrimination with EEOC
- Three weeks later - Thompson fired
- E.D. Ky. and 6<sup>th</sup> Circuit - No retaliation claim when no separate protected activity
- Unlawful retaliation - A reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired
- Open question - How close must the relationship be?
- Close family member v. "mere acquaintance"
- Be mindful of family members and close relationships when making employment decisions
- Be mindful of timing

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## What Triggers an Employer to Conduct an Investigation?

- Based on personal experience, informal knowledge or suspicion
- The law does not require an employee to make a formal written complaint or request a private meeting to discuss their complaints
- Specific concern or general unfair treatment
- Investigate promptly and thoroughly any and all alleged misconduct reported by an employee
- Regardless of the form of the complaint

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## Practical Strategies for Conducting the Investigation\*

### Pre-Investigation (things to consider)

- Identify potential witnesses
- Review available personnel or other records
- Other documented reports of related activity?
- Review personnel files of the complainant and employee who is the subject of the complaint
- Other prior and/or similar complaints and previous outcomes
- Any other potential motivations for the complaint?
- Keep an open mind
- Necessary to temporarily transfer, or place the employee who is subject of the complaint on administrative leave?
- Prepare chronology based on the information provided by the complainant and any relevant documents
- Consult relevant policies and any union or arbitration agreements for specific procedures or possible restrictions on the investigation procedures
- If questions arise, consider consulting with an attorney

\* Not every complaint will call for every step. You must evaluate the information needed to bring, prompt, effective resolution to the particular concern at issue.

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## Practical Strategies for Conducting the Investigation

### Interview Complaining Party

- Promptly schedule initial interview with the complainant
- Convey impartiality in the investigation
- Attempt to obtain facts of the complaint
- Gather any relevant information the complainant may possess
- Ask for identification of witnesses complainant thinks may have relevant information
- Take notes and retain those notes for later use
  - Decide whether legal counsel will be involved and if notes are taken at legal counsel's discretion for the purpose of obtaining legal advice
- Review information obtained from complainant to ensure complete and accurate understanding
- Explain complete confidentiality cannot be guaranteed but disclosure will be limited to the extent necessary to achieve an effective resolution
- Remind the complainant that company policy prohibits retaliation
- Clearly tell the complainant that if he/she believes he/she has experienced retaliation, he/she should immediately notify his/her supervisor and/or the investigator
- Tell the complainant the investigator will get back to him/her at the end of the investigation; in the interim, invite the complainant to contact the investigator if he/she has any questions about the status of the investigation

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## Practical Strategies for Conducting the Investigation

### Interview the Subject of the Complaint

- Convey impartiality in the investigation
- Gather any relevant information the subject of the complaint may possess
- Ask for identification of additional relevant witnesses
- Take notes and retain those notes for later referral in a separate investigative file
- Remind the individual who is subject of the complaint that company policy prohibits retaliation
- Retaliation reminder is particularly important where the accused employee is in a position to influence decisions regarding the complainant's employment

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## Practical Strategies for Conducting the Investigation

### Interview Other Relevant Witnesses

- Such witnesses may include:
  - Employees in a position to have observed the alleged misconduct
  - Employees identified by either the complainant or the subject of the investigation
- Information gathered in the investigation will be kept confidential to the extent possible
- Do not promise complete confidentiality
- Take notes and retain those notes for later referral as part of the investigative file
- Remind each witness interviewed that company policy prohibits retaliation

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## Practical Strategies for Conducting the Investigation

### Interview Management Personnel

- Interview any involved management personnel
- Gather relevant documentation
- Any essential background information on relevant procedures
- Background information regarding the individuals involved in the complaint
- Inform the interviewee that information gathered through the investigation will be kept confidential to the extent possible but do not promise confidentiality
- Take notes and retain those notes for later referral as part of the investigative file
- Remind each manager interviewed that company policy prohibits retaliation

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## Practical Strategies for Conducting the Investigation

### Gather Documentary Evidence

- Gather and review any and all relevant documentary evidence
- Such documents should be retained as part of the investigative file
- Relevant documents may include but certainly are not limited to:
  - Personnel records
  - Policies and procedures
  - Payroll records
  - Time records
  - Calendars
  - E-mails
  - Text messages

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## Practical Strategies for Conducting the Investigation

### Make a Determination

- Gather and review all relevant documentary evidence
- Complete witness interviews
- Resolve any credibility issues
- Then make a determination as to whether any violation of company policies and procedures and/or the law has occurred
- If it is determined that a violation has occurred, then determine what remedial or disciplinary action will be issued up to and including termination of employment
- Consider company policy as well as past practice in similar situations

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## Practical Strategies for Conducting the Investigation

### Inconclusive Evidence

- Direct contradictions between the parties
- Lack of documentary or eye-witness corroboration
- If no determination can be made because of the evidence is inconclusive, then remind the subject of the complaint of company policies and procedures and inform him/her that the employer will continue to monitor the situation to prevent any improper behavior
- Where the investigation was inconclusive, a simple reminder of relevant policy may be sufficient to address the situation

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## Practical Strategies for Conducting the Investigation

### Communicate with the Complaining Party and Alleged Violator

- Complainant and the subject of the complaint should be informed of the completion of the investigation
- Where misconduct and/or a violation of policy is found, the subject of the complaint should be disciplined based on his/her conduct
- Because discipline is a confidential personnel matter, the specifics of the discipline should not be revealed to the complainant
- Should be explained to the complainant that his/her complaint has been investigated and remedial action has been taken to prevent recurrence
- Inform both the complainant and the subject of the complaint that if they have any new information regarding the alleged improper behavior, or if the improper conduct continues or is repeated, they should report such information immediately

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## Privilege Considerations

- Investigations conducted by attorneys can be protected from disclosure in later litigation by either the attorney-client privilege or the work product doctrine
- Attorney-client privilege and work product protection may be waived by placing privileged matters "at issue"
- Courts have observed that an employer's affirmative reliance upon the adequacy of an internal investigation as a defense to discrimination claims can result in such waiver

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## Common Issues/Questions: An employee requests that a co-worker attend an investigation interview

Absent a collective bargaining agreement allowing a co-worker to attend the interview, a private employer is not required to accommodate this request. However, the employer must not retaliate for the employee's request

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## An employee requests that his/her attorney attend the investigation interview

Absent a custodial interrogation by law enforcement, a private employer does not need to allow an employee's attorney to attend the interview. An investigation may be found to be "custodial interrogation" where there is a clear connection between the police and the internal investigation, the completion of the interview is at the instigation of the police, there is close supervision of the interview by the police, or the interview is taken on behalf of the police to further a police objective. In the event of any of these situations, the right to have an attorney present may be triggered.

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## An employee refuses to cooperate in the investigation

From time to time, an employee will refuse to cooperate in the investigation. When this happens, the investigator should inquire as to the reason, emphasize the non-retaliation policy and explain the importance of a full investigation. If the employee persists in the refusal, the investigator should document the attempted interview and refusal.

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## An employer wants to search an employee's office for evidence of misconduct

With some important limitations, employers may search an employee's office. Private employers should be cognizant of possible exposure to claims for invasion of privacy. If the employer has informed employees their offices may be searched and no other office practice would suggest an expectation of privacy, risk of liability would be minimal. However, employers should limit any search to employer-owned items. Depending on the circumstances, and the employer's policies, searching a briefcase, backpack, or other personal items may not be reasonable.

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## An employer wants to monitor employee's computer usage and e-mails as part of its investigation

- An employer may monitor an employee's internet usage and stored emails if the employer owns the computer and the employee has been notified that computer use and/or stored emails may be monitored
- Best practice provides an employer should obtain consent, either express or implied, through notification to employees that e-mails may be monitored. A signed annual acknowledgment and/or daily banner reminder at sign on would make this possibility clear to employees. An employer who provides an e-mail system for its employees may monitor e-mails without violating the applicable Stored Communications Act. If e-mails are transmitted through a third-party service provider, an employer may access e-mails with employee consent.

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Questions?

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**The New ADA  
Regulations:  
Are You in Compliance?**

Kimberly Jones

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## ADAAA

- Statutory Amendments effective January 1, 2009
- EEOC's New Regulations effective May 24, 2011

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## Operating Principle

“The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.”

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# ADAAA

## Changes in the Law

- Major life activity
- Substantially limits
- Mitigating measures
- Episodic/in remission
- Regarded as

## Major Life Activity (Statute)

ADAAA: Definition of MLA broadened to include:

- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working (when employee cannot perform his/her job, even when he/she can perform a broad range of other jobs); and
- Operation of major bodily functions, e.g., respiratory, circulatory, endocrine and reproductive functions

## Major Life Activities (Regulations)

- Major Life Activities
  - Add sitting, reaching and interacting with others
- Major Bodily Functions
  - Add special sense organs and skin, genitourinary, bladder, cardiovascular, hemic and musculoskeletal

## Substantially Limits (Statute)

- Rejects Toyota definition of “prevents or severely restricts”
- Rejects EEOC definition of “significantly restricts” and directs EEOC to revise its regulations
- States disability is to be construed “in favor of broad coverage... to the maximum extent permitted by the terms of ADAAA”

## Substantially Limits (Regulations)

- Term to be construed broadly in favor of expansive coverage
- Key factors in rules of construction
  - Comparison with “most people”
  - Should not require extensive analysis
  - Made without regard to mitigating measures
  - Impairment that is episodic or in remission is a disability

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## Mitigating Measures

- Cannot consider (except corrective lenses)
- Mitigating measures are now defined

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## Other Provisions

- Non-ameliorative effects of mitigation such as negative side effects of treatment should be considered
- Prohibitions against discrimination in regard to leaves of absence, sick leave or any other leave

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## Episodic/In Remission

A covered disability if the impairment, *when active*, would substantially limit a MLA

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## Per Se Disabilities (Regulations)

- Deafness
- Blindness
- Intellectual disability
- Missing limbs
- Mobility impairments
- Autism
- Cancer\*
- Cerebral palsy
- Diabetes\*
- HIV infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive order\*
- Bipolar disorder\*
- PTSD
- Obsessive compulsive disorder
- Schizophrenia

## Regarded As Disability

- An actual physical or mental impairment (regardless of whether impairment limits or is perceived to limit a MLA); and
- Not “transitory and minor”  
 (“transitory” – impairment with actual or expected duration of 6 months or less)
- EEOC encourages claimants to rely on “regarded as” prong in asserting a claim

## Impact on Employers

- Increase in charges filed
- Burden clearly on employer to prove compliance and accommodation
- FMLA/ADAAA combination lawsuits

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## What Should HR Do?

- Review job descriptions
- Re-evaluate internal leave policies
  - Look for (and eliminate) blanket leave policies
  - If CBA, look at seniority policies and blanket leave policies

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## EEOC has launched an attack on perceived inflexible leave policies

- *EEOC v. Supervalu, Inc.* (N.D. ILL.) (consent decree entered January 5, 2011)
- *EEOC v. Sears Roebuck & Co.* (N.D. ILL.) (consent decree entered September 29, 2009)

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## What Should HR Do?

- Establish a protocol for evaluating ADAAA issues once FMLA expires
- Supervisory training
  - Issue spotting
  - Need for HR involvement from outset
  - Importance of interactive dialogue

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## Interactive Dialogue

- An increasingly important step in the analysis
- Document efforts
- Obtaining input from employee's physician vs. FCE
- Role of legal counsel

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Questions?

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“Stump” Your L&E Lawyer  
Questions for the Panel?

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Thank You for Coming

For those attending the  
optional OFCCP program  
please be back at 12:15 p.m.

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# OFCCP Gears Up: Are You Ready?

Deena Jenab  
Molly Kurt

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## Summary of New and Upcoming Changes

- Scheduling letter
  - September 29, 2011 revisions: 30 more days to comment
- Compensation data collection tool
  - OFCCP is in “listening” mode
- ACE – Directive No. 295
  - “Management” becomes “Enforcement”
- Jurisdiction over healthcare
  - Cases pending and proposed legislation

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## Summary of New and Upcoming Changes

- Veterans regulations
  - April 26, 2011 publication; OFCCP considering how to finalize
  - Personnel practices and benchmarks
- Disabilities regulations
  - Target was August 2011 - silence
- Construction regulations
  - Target is November 2011
- Sex discrimination regulations
  - Target is February 2012

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## Updating Your Toolbox

- Are your E.O. 13496 posters up?
- Are you incorporating the EEO clause in contracts and purchase orders?
- Are you engaging in enhanced recruiting/outreach of the disabled & veterans?
- Have you looked at compensation lately?
- Are your leave policies up-to-date?
- Six-month check of AAP data?
- Record keeping:
  - Advertisements & listings
  - Accommodations made
  - Outreach activities

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# Employee Selection Procedures and The Uniform Guidelines

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## Legal Framework

- Uniform Guidelines on Employee Selection Procedures (1978)
- Uniform Guidelines Q & A (1979)
- Title VII
- Executive Order 11246

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## Who Enforces UGESP?

- EEOC
- OFCCP

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## What is a "selection procedure"?

- The Uniform Guidelines on Employee Selection Procedures apply to all selection procedures used to make employment decisions, including interviews, physical ability tests, pencil and paper tests, cognitive ability tests, and evaluations of performance
- The guidelines incorporate a single set of principles to provide a framework for determining the proper use of tests and other selection procedures

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## What is excluded?

- Recruitment practices
- Seniority system governed by NLRA

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## What is “validation” and when is it required?

- Validation is a procedure by which a selection procedure’s effectiveness is determined
- Validation required when test has discriminatory effect
  - Plaintiff can establish a *prima facie* case
- Validation demonstrates that the test is job related and consistent with business necessity

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## What is “validation” and when is it required

- In other words, validation measures the correlation between the selection method and job performance
- On the other hand, a discriminatory test may be used if it is sufficiently related to job performance
- “Bottom line” defense: Rejected by U.S. Supreme Court in *Connecticut v. Teal*
  - Employers should be prepared to defend each component of hiring process

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## How to Validate

- **Content validation** tests skills, abilities and knowledge in relation to the specific duties of the job
- **Construct validation** is established when the test is shown to measure a trait required for successful performance on the job (e.g. intelligence, judgment)
- **Criterion validation** compares test results with actual success on the job

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## Who Conducts A Validation Study?

- Expert/PhD-level Industrial or Organizational Psychologist
  - Either the test vendor, or independent consultant
- Typically, most employers do not have properly trained personnel to conduct a validation study

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## Can't We Just Accept the Test Vendor's Published Evidence of Validation?

- Generally, no!
- In most cases, "onsite validation" is the necessary final step
- Transportation validation is allowed by section 1607.6(A) of the UGESP
  - Test users may accept criterion validation studies that other users or test publishers have conducted, if:
    - Evidence clearly shows test is valid
    - Incumbents in users' job and incumbents in the job for which the validation study was conducted perform substantially the same major work behaviors
    - The studies include a study of test fairness for each race, sex and ethnic group in the user's labor market for the jobs in question

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## Pitfalls

- Do-it-yourself validation studies, either overall or transportation
- Relying on vendor's materials accompanying a commercial testing product without "onsite validation"/transportation study
- Validating the test itself but not the cutoff score
- Not updating validation studies that are several years old
- Not considering less discriminatory alternatives than testing
- Accepting vendor's claim that tests meet American Psychological Association's Division 14 "Principles for The Validation and Use of Personnel Selection Procedures" (4<sup>th</sup> Ed. 2003) and hoping it will satisfy OFCCP
- Not examining use of tests and validation until OFCCP audit is looming and hiring adverse impact is discovered

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## OFCCP's Outlook on Testing

- Everything is a test
- Inherently biased against testing
- Proceed with caution!

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## Action Plan

- Be proactive! Examine selection processes for use of tests, particularly cognitive ability tests and physical ability tests before OFCCP audit is underway
- Consider using test results as a factor among many and not an absolute threshold. No cutoff score.
- If physical/cognitive tests are in use, investigate:
  - Does test have adverse impact on protected class?
  - Was “onsite validation” performed?
  - Was cutoff score validated?

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## Resources

- Uniform Guidelines on Employee Selection Procedures (UGESP)
- Q & A on Uniform Guidelines
- [www.uniformguidelines.com](http://www.uniformguidelines.com)

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Questions?

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