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# Labor and Employment Seminar

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# Labor and Employment Legal Update

By: Randy Thompson, Brian Stair, and  
Brittany Falkowski

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## Obesity as a Disability Under the ADA

- *Morris v. BNSF Railway Co.*, 2016 WL 1319407 (8th Cir. Apr. 5, 2016)
- **To qualify as a disability under the ADA, obesity must:**
  1. Be outside normal weight range
  - AND**
  2. Be caused by a physiological condition
- ADAAA did not affect this analysis.

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## Obesity as a Disability Under the ADA

- A regarded as disabled claim must be based on the individual's existing condition.
- It does *not* include the employer's future condition, or the perceived risk of a future condition.

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## Obesity as a Disability under the ADA

- NOTE: The facts of the *Morris* case were narrow.
  
- The plaintiff admitted, through expert medical testimony, he had no associated physical conditions, and he did not present evidence of any impaired major life activities.

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## Medical Information from Applicants

- *EEOC v. Grisham Farm Products, Inc.*, Case No. 6:16-cv-3105 (W.D. Mo. filed Mar. 22, 2016):
  - Employer required a 3-page health history from all job applicants.
  
  - EEOC alleges it violates the ADA and Genetic Information Nondiscrimination Act (GINA).

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## Website Accessibility

- For individuals with disabilities:
  - Titles II and III of the ADA apply to “places” of public accommodation
  - Is a website a “place” of public accommodation?
    - Conflicting laws exist

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## Website Accessibility

- If a website is a place of public accommodation, what obligations exist?
  - Make website substantially equally accessible/usable to those with disabilities
    - Motor skills-related disabilities
    - Blind
    - Deaf

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## Website Accessibility

- Defenses:
  - Substantial alteration in services being provided.
  - Unreasonably costly.
- DOJ has delayed issuance of guidelines until fiscal year 2018.

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## Birth Control Mandate

- *Zubik v. Burwell* (U.S. Supreme Court argued Mar. 23, 2015)
  - Sequel to 2014 *Hobby Lobby* decision
  - Issue: How to accommodate a substantial burden?
- Court requested post-argument briefing
- Potential compromise?

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**HUSCH BLACKWELL****NLRB – *D.R. Horton* Update**

- NLRB: collective action waivers in arbitration agreements violate substantive right.
- Rejected by 5th Circuit for second time in *Murphy Oil*
- Board ignoring Circuit Courts of Appeals
  - E.g., agreements unlawful despite opt-out
- Almost 30 pending appeals
  - Impending split?

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**HUSCH BLACKWELL****NLRB – Independent Contractors**

- *Intermodal Bridge Transport*
  - Regional Director filed complaint on April 18.
  - Issue: Is the misclassification of employees as independent contractors a violation of the NLRA?
  - Other allegations include threats, interrogations, etc.

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**HUSCH BLACKWELL****NLRB – Bargaining Unit Size**

- *Specialty Healthcare* (NLRB 2011)
  - Set heightened standard for employers challenging narrow bargaining units.
  - “Overwhelming community of interest.”
- *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016)
  - Upheld Board’s standard.
  - Joined 6th Circuit.

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**HUSCH BLACKWELL****OSHA – Final Rule on Silica Exposure**

- Significantly reduces the permissible exposure limit (PEL) for silica dust on job sites.
- Requires employers to plan, train, and monitor.
- Effective June 23, with staggered compliance deadlines.
- Industry challenges filed in Circuit Courts of Appeal.

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**HUSCH BLACKWELL****DOL – New “Persuader” Rule**

- Expands disclosure requirements for union avoidance consulting
- Disclosure now triggered prior to direct contact with employees
- Legal challenges filed
- Congressional effort to block the rule

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**HUSCH BLACKWELL****DOL – FMLA Update**

- New FMLA notice poster issued in April.
  - Easier to read
  - February 2013 version still fulfills posting requirement
- Updated FMLA compliance guide for **employers**
  - Application, eligibility, and procedural guidance
  - Responsibilities of employer and employee

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**HUSCH BLACKWELL****Defend Trade Secrets Act (DTSA)**

- Passed by Senate in March
- Overwhelmingly passed by House last week (410-2)
- President Obama expected to sign
- Federalizes trade secrets law
  - Allows civil lawsuits for trade secrets theft

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**HUSCH BLACKWELL****Illinois Legislative Update**

- Equal Pay Act
  - Extends application of prior law to all employers
- Veterans Preference in Private Employment Act
  - Allows hiring preference for veterans
  - Must publicly post policy



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**HUSCH BLACKWELL****Ban the Box - Missouri**

- Executive Order 16-04:
  - Applies to state agencies, departments, boards, and commissions
  - Full compliance required by July 10, 2016
- Proposed Legislation:
  - E.g., House Bill 1864



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**HUSCH BLACKWELL****Paid Family Leave Laws**

- California – recently expanded
  - Will provide higher percentage of normal wages.
  - San Francisco measure provides full pay.
- New York
  - 2018: eligible for 8 weeks.
  - 2021: 12 weeks.
- Missouri – proposed legislation

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## Equal Pay Issues (Gender)

- U.S. Women's Soccer Team
  - EEOC charge
  - Bonuses, appearance fees, per diems, etc.
- Missouri
  - Proposed legislation



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# EEOC Update

By: Joe Guffey, Sonni Nolan, and  
Carrie Claiborne

**HUSCH BLACKWELL****2015 Statistics**

- Slight increase in discrimination charges filed
- \$525 million secured for discrimination charges
  - \$356.6 million – conciliation/mediation
  - \$65.3 million – litigation
  - \$105.7 million – federal employees
- EEOC filed 142 lawsuits (37% ADA)

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**HUSCH BLACKWELL****2015 Statistics**

- 268 systemic investigations (20 or more individuals)
  - \$33.5 million obtained in systemic investigations
  - 26 cases resolved in litigation
  - 99 reasonable cause findings (36%)
- 42 of 142 lawsuits involved “multiple victims”

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**HUSCH BLACKWELL*****Mach Mining v. EEOC***

- Supreme Court case that addressed what steps the EEOC must take before filing suit.
  1. Courts have authority to review; and
  2. The EEOC satisfies its duty by informing the employer of the specific allegation and giving the employer an opportunity to remedy the practice.

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**HUSCH BLACKWELL*****Since Mach Mining***

- *EEOC v. Jetstream Ground Services* (D. Colo. 2015)
  - Did the EEOC make good faith attempt to conciliate? (settlement fund, reinstatement)
  - Court said it had no authority to “police the details” of the offers.

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## Since *Mach Mining* – Scope of EEOC Investigations

- *EEOC v. McLane Company, Inc.* (9th Cir. 2015)
  - Required to give EEOC “pedigree information” for nationwide class, based on one sex discrimination charge.
- *EEOC v. Union Pacific Railroad Co.* (E.D. Wis. 2015)
  - 2 charges with lawsuits filed led to EEOC’s own pursuit of nationwide investigation.

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## Hot Litigation Topics for EEOC

- LGBT Issues
- Pregnancy Discrimination
- Religious Accommodations
- ADA Violations

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## **LGBT Issues**

### **Status of the Law**

- Title VII
  - No explicit protection for sexual orientation or gender identity.
- Federal Case Law
  - Generally (without consensus) favors protection of both categories.

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## **LGBT Issues**

### **EEOC Position**

- Three transgender cases filed in 2014 - 2015
- Administrative Actions
  - Failure to promote
  - Single-use restroom not sufficient

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**HUSCH BLACKWELL****Pregnancy Bias**

- Updated Guidelines in June 2015 (after *Young v. UPS*).
- 13 EEOC-filed lawsuits in 2015 involving pregnancy discrimination.
- Basis for broad subpoenas.

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**HUSCH BLACKWELL****Religious Accommodations**

- *EEOC v. Abercrombie & Fitch Co.* (U.S. Supreme Court 2015):
  - Does Title VII require employers to make accommodations where employer does not have knowledge of need for accommodation?

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## Religious Accommodations

- *EEOC v. Abercrombie & Fitch Co.* (U.S. Supreme Court 2015):
  - Answer: Yes.
  
  - Enough that a “motivating factor” for not hiring was desire to avoid making an accommodation based on employer’s belief scarf was for religious reasons.

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## Religious Accommodations

### Two EEOC cases after *Abercrombie*:

1. *EEOC v. Mims Distributing* (E.D.N.C. 2015)
  - Rastafarian; employer told him he could have the job if he cut his hair. Informed employer he could not cut it for religious reasons.
  - Settled for \$50,000.

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## Religious Accommodations

### 2. *EEOC v. Star Transport, Inc.* (C.D. Cal. 2015)

- Muslim truck drivers fired for refusing to transport alcohol, which violated their religious beliefs.
- Jury awarded two truck drivers \$240,000 (\$20,000 each in compensatory damages and \$100,000 each in punitives) (Oct. 19, 2015).

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## Disability Discrimination

- Most litigated category –
  - 53 out of 142 lawsuits filed in 2015 (37%)
- Proposed regulations
  - ADA and the Affordable Care Act
  - Wellness Programs (proposed rule published Apr. 20, 2015)

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## Disability Discrimination

- **Litigation involving inflexible leave plans:**
  - *EEOC v. AutoZone, Inc.* (N.D. Ill. 2014)
    - Nationwide pattern-or-practice lawsuit
  - *EEOC v. United Parcel Service* (N.D. Ill. amended 2015)
    - Same.
  - *EEOC v. Pactiv LLC* (N.D. Ill. 2015)
    - Settled for \$1.7 million.
    - Employer was not allowing leave, intermittent leave, or extensions of leave as a reasonable accommodation.

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## Noteworthy Changes

- Position Statements
- Equal Pay
- Social Media Policies
- Retaliation

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## Position Statements

- Electronic Filing
- Charging Party's Access
- Confidentiality of Exhibits & Documents
- *Farrow* reminder and update

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## Equal Pay Enforcement

- EEO-1 – proposed changes
  - Employers with 100 or more employees.
  - Consider internal audit.
  - September 2017

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## **Social Media Policies**

- EEOC piggy-backing off of NLRB ruling regarding “likes” on Facebook (2015 Ruling)
- Cautious when restricting employees’ use of social media

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## **Retaliation**

- EEOC’s proposed new guidance on retaliation (January 2016)
- Broadens definition for what constitutes protected activity (first proposed change in 20 years)

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# Keeping the Law in View when Interviewing

By: Brad Hiles, Anthony Grice, and  
Kayt Kopen

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## Statutory Protections from Discrimination

- Race
- Color
- Religion
- Gender
- Age
- National origin
- Disability
- Pregnancy
- Genetic information
- Military service
- Sexual orientation

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## The “Right” Questions

- Questions that relate to the requirements of the job
- Elicit information regarding the qualifications you seek
- Job-hopping
- Reasons for leaving prior employment
- Restrictions from current or prior employer

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## The “Wrong” Questions

- Marital status
- Child care
- Military obligations
- Religious activities
- Age
- Non-job-related questions regarding health and work injuries

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## **Scenario 1: Sexual Harassment**

- Employer asks applicant about reason for leaving prior employment.
- Applicant reveals that s/he was sexually harassed.

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## **Scenario 2: Religious Accommodations**

- Job in question involves working on Saturdays.
- Applicant observes the Jewish Sabbath.

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**HUSCH BLACKWELL****Scenario 2: Religious Accommodations**

- Job in question involves working on Saturdays.
- Applicant observes the Jewish Sabbath.

OR

- Applicant is wearing a peaked turban.
- Job in question requires hard hats.



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**HUSCH BLACKWELL****Religious Accommodations**

- A reasonable religious accommodation is any adjustment to the work environment that will allow employees to practice their religion, including:
  - Modifications to uniform policy
  - Scheduling adjustments
  - Job reassignments

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**HUSCH BLACKWELL****Scenario 3: Military Status**

- Applicant is a member of the armed forces but not currently on active duty.
- Employer wonders whether applicant may be recalled to active duty.

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**HUSCH BLACKWELL****Uniformed Services Employment and Reemployment Rights Act (USERRA)**

- Purposes of the Act
  - Encourage non-career service in the uniformed services
  - Minimize disruption to those performing military service and employers
  - Prohibit discrimination based on military service
- Employee rights
  - Right to leave
  - Right to re-employment
  - Right to nondiscrimination

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**HUSCH BLACKWELL****Office of Federal Contract Compliance Programs (OFCCP)**

- Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)
  - Protected Veterans
    - Disabled
    - Active duty wartime or campaign badge
    - Recently separated
    - Armed forces service medal
  - Nondiscrimination and affirmative action

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**HUSCH BLACKWELL****Scenario 4: Disability**

- Applicant has an obvious disability.
- Employer is concerned that applicant's disability may impact applicant's ability to perform the job duties.

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**HUSCH BLACKWELL****Scenario 4: Disability**

- Applicant has an obvious disability.
- Employer is concerned that applicant's disability may impact applicant's ability to perform the job duties.

OR

- Applicant has a nonobvious disability that s/he mentions during an interview.

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**HUSCH BLACKWELL****Disability-Related Questions**

- Do not ask:
  - Have you ever filed for workers' compensation?
  - Do you have any medical conditions?
- You can ask:
  - Will you be able to meet attendance requirements?
  - Will you need an accommodation to complete the hiring process?
  - Can you, with or without an accommodation, perform all of the job functions of this job?

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## **Asking If an Employee Will Need Reasonable Accommodation**

- You can ask this if:
  - Obvious disability
  - Voluntary disclosure of nonobvious disability
  - Voluntary disclosure of need for accommodation

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## **Scenario 5: Criminal Histories**

- Employer finds out through social media that applicant has a criminal record.

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**HUSCH BLACKWELL****Criminal Histories**

- At what point you may ask about criminal history
  - Illinois
  - Chicago, IL
  - Columbia, MO
- Potential limits
  - How far back in time
  - Certain types of crimes
  - Juvenile convictions
  - Arrests that have not yet resulted in convictions
  - Sealed or expunged records
- Procedures relating to background checks

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**HUSCH BLACKWELL****Criminal Histories: Taking Adverse Action**

- Relationship between crimes and nature of relevant position
  - Job related and consistent with business necessity
- Length of time that has passed following most recent conviction
- Nature of specific offenses
- Nature of sentencing
- Number of convictions
- Age of applicant at time of most recent conviction
- Evidence of rehabilitation
- Extent to which applicant has been open, honest, and cooperative

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**HUSCH BLACKWELL****Scenario 6: Restrictive Covenants**

- Employer wants to know whether applicant may be subject to a restrictive covenant.

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**HUSCH BLACKWELL****Restrictive Covenants**

- Types:
  - Customer non-solicitation
  - Employee non-solicitation
  - Non-competition
  - Confidentiality/non-disclosure
- Protectable interests:
  - Customer relationships
  - Confidential information
  - Customer lists
  - Pricing information
  - Marketing strategies
- Reasonable scope

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# Adapting to Changes in the FLSA White Collar Exemptions

By: Joe Glynias, Scott Meyers, and  
A.J. Weissler

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## FLSA Proposed Rule Change

- Process
  - **Step 1:** DOL provides notice of Proposed Rule.
  - **Step 2:** Comments submitted to DOL until September 2015.
  - **Step 3:** DOL reviews submitted comments.
  - **Step 4:** Final Rule submitted to White House Office of Management and Budget (“OMB”).
  - **Step 5:** Final Rule is issued and effective date is set.
  - **Step 6:** Final Rule takes effect on the effective date.

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**HUSCH BLACKWELL****FLSA Proposed Rule Change**

- What is being changed?
  - Increase the minimum weekly salary required for an employee to be exempt from minimum wage and overtime.
    - Currently: **\$455 per week** (\$23,660 per year).
    - Proposed: **\$970 per week** (\$50,440 per year).
- No proposed change to the duties test for any exemption.

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**HUSCH BLACKWELL****FLSA Proposed Rule Change**

- Which employees will be affected?
  - Earn between \$455 and \$970 per week.
  - Already satisfy duties test for the **executive**, **administrative**, or **professional** exemptions.

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**HUSCH BLACKWELL****Public and Legislative Reaction**

- Over **250,000** comments submitted to DOL.
- The Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773)
  - Nullify the proposed rule.
  - Economic analysis on impact on small businesses.
  - Prohibit automatic increases in salary threshold.

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**HUSCH BLACKWELL****Where Are We Now?**

- **March 14, 2016:** DOL submitted final overtime rules to the OMB for review.
- Review normally takes **30 to 90 days**.
- Should expect new regulations to be effective by **June or July 2016**.
- Final regulations become effective **60 days after publication**.

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## Other Changes in the Landscape

- Increasing push for \$15 minimum wage.
  - New York by end of 2018.
  - California by 2022 or 2023.
  - Other municipalities are following suit.

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## What Should Employers Do?

- Prepare for changes to the salary threshold.
- Don't miss this opportunity to identify and resolve additional exemption/compensation concerns.

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## Preparing for the Salary Change

- Identify exempt employees in the affected salary band.
- Weigh alternatives for compliance:
  - Increase salary compensation to maintain exemption.
  - Convert to hourly model.
    - Structure pay rates and work schedules to minimize financial impact.

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## Preparing for the Salary Change

- **Example:** Salaried employee earning \$800 per week (\$41,600 per year) who works approximately 50 hours per week.
- Converted to an hourly rate of \$14.55 per hour and still working 50 hours, the employee earns \$800.25 per week ( $40 \times \$14.55 = \$582$ ) + ( $10 \times \$14.55 \times 1.5 = \$218.25$ ).

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## Preparing for the Salary Change

- Remember to consider the impact of:
  - Recording and managing hours worked.
    - Particularly controlling work away from jobsite.
  - Changes in benefit levels tied to classification.
  - Vacation and sick pay.

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## Seizing the Opportunity

- Misclassification of exempt employees is always a concern.
- Growing area of litigation.
- Generally focus on an employee's failure to meet the duties test for the **executive**, **administrative**, or **professional** exemptions.

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**HUSCH BLACKWELL****Seizing the Opportunity**

- Preventative action to identify and correct exemption concerns is the best way to avoid lawsuits.
- However, changes to duties and/or compensation can raise red flags regarding past compliance.

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**HUSCH BLACKWELL****Seizing the Opportunity**

- DOL's change to the salary threshold provides necessary cover to implement changes without raising alarms.
- Provides context for changes to employee duties and classification, even if those issues are not directly impacted by the change to the salary threshold.

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## Seizing the Opportunity

- We strongly recommend to use this time to audit all positions to determine whether they meet the duties tests of one or more exemptions.

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## Questions?

### Labor & Employment Legal Update



Randy  
Thompson



Brittany  
Falkowski



Brian  
Stair

### What's Happening at the EEOC?



Joe  
Guffey



Sonni  
Nolan



Carrie  
Claiborne

### Keeping the Law in View When Interviewing



Brad  
Hiles



Anthony  
Grice



Kayt  
Kopen

### Adapting to Changes in the FLSA White Collar Exemptions



Joe  
Glynias



A.J.  
Weissler



Scott  
Meyers