Welcome

Labor & Employment Seminar – October 2, 2013

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New Developments in Employment Arbitrations and Mediation Strategies

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The Federal Arbitration Act

- "A written provision in any…contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2

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Arbitration Clauses with Class Action Waiver Provisions

The Evolution of Supreme Court Analysis

- *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)
  - The question of whether a contract forbids class arbitration concerns what "kind of arbitration proceeding" the parties agreed to. "Arbitrators are well-situated to answer that question."
- *Stolt-Nielsen S.A. v. Animalfeeds International Corp.,* 130 S.Ct. 1758 (2010)
  - A class action lawsuit is not subject to arbitration unless the arbitration clause in the parties' agreement specifically includes class actions within its scope.

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Arbitration Clauses with Class Action Waiver Provisions

- *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011)
  - California's *Discover Bank* rule amounts to a prohibition on class action waivers.
  - Class arbitration is inconsistent with the FAA.
    - Switch from bilateral to class arbitration sacrifices the informality of arbitration ("makes the process slower, more costly, and more likely to generate procedural morass than final judgment").
    - Class arbitration requires procedural formality.
    - Class arbitration "greatly increases risks to defendants"—judicial review "focuses on misconduct rather than mistake."

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Arbitration Clauses with Class Action Waiver Provisions

Most Recent Supreme Court Decisions

- *Oxford Health Plans LLC v. Sutter,* 133 S.Ct. 2064 (2013)
  - Arbitration clause in the contract was silent on the topic of class and collective actions.
  - The arbitrator interpreted the parties' contract, finding it unambiguously "evinced an intention to allow class arbitration."
  - Supreme Court: Highly deferential standard of review applies to an arbitrator's interpretation of a contract.

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Arbitration Clauses with Class Action Waiver Provisions

- *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013)
  - Supreme Court stressed the FAA's overarching principle that arbitration is a contractual issue and courts cannot invalidate a contractual waiver of class arbitration unless another statute overrides that principle.
  - American Express' arbitration agreement with merchants contained a class arbitration waiver. Merchants brought an antitrust class action against American Express opposing American Express' motion to compel individual arbitration.
  - Supreme Court held that the class arbitration waiver could not be invalidated in spite of the high expense of proceeding individually with the merchants' antitrust claims against American Express.

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Drafting Arbitration Clauses

- Be aware of both federal and state law precedent (if any)
  - *Robinson v. Title Lenders*, 364 S.W.3d 505 (Mo. banc. 2012)
  - *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc. 2012)
  - *Owen v. Bristol Care, Inc.*, 2013 WL 57874 (8th Cir. Jan. 7, 2013)
- Discuss the pros and cons of arbitration and class actions with counsel
- Precisely craft arbitration clauses

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The Mediation Process

Factors in selecting a mediator

- Mediation (as opposed to adjudicative) skills
- Substantive knowledge of the law
- Facilitative versus evaluative
- Reputation for effectiveness and persistence
- Past? Location? Experience?

Pre-Mediation Conference or Teleconference with Mediator

- Request if not initiated
- Fees and expenses split unless otherwise agreed
- Style of mediation
- Meeting format, e.g. substantive joint session or separate caucuses
- Identify attendees and authority
- Time constraints of parties
  - Mediator practices and expectations
  - Opening statements
  - Video PowerPoint Presentations
- Pre-hearing submission

The Medication Process

- Pre-mediation submissions and preparation of mediator
  - Exchange or in camera?
  - Supplement?
  - Inclusion of key documents – highlight
- Ex parte/telephone call follow-up with mediator

Joint Opening Session Considerations

- What impact might information obtained in pre-mediation conference have on opening session?
- What are the risks/advantages of engaging in opening statements?
- What role should parties have in opening session?
- Handling questions from mediator or adverse party
- Benefits and risks of the emotions/conflict in opening session

Making Effective Use of the Mediator

- Taking the mediator into your confidence
- Whether to disclose final or best offer/demand
- Allowing direct access to your client
- Playing your cards one at a time
  - With opposing party
  - With the mediator

Making Effective Use of the Mediator (cont'd)

- Asking for mediator's suggestions in negotiation strategy
- Discover underlying interest of adverse party
- Determine who the decision-maker(s) are in the other room
- Determine whether sufficient authority is really present in the other room or a phone call away
- Suggesting a reconvened joint session

Making Effective Use of the Mediator (cont'd)

- Requesting attorney-to-attorney sidebar
- Requesting parties sidebar without counsel
- Mediator involvement or absence from sidebars
- Consider party use of "what if" or "bracketing"
- When/whether to seek the mediator's private evaluation
- Entertaining or avoiding a mediator's "proposal"

Confirming an Agreement at Mediation in Writing

- What is the mediator's role?
- Use of template
- Use of term sheet
- Identifying principle terms
- Importance of signatures the "day of"
- Rules in other states (e.g. California)

Planned Early Dispute Resolution (PEDR Systems)

Adopted August 2013
By
ABA Dispute Resolution Section
Co-Sponsored by AAA, JAMS, CPR

Recommends procedures or systems to enable parties and their lawyers to resolve disputes as early as reasonably possible

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The Patient Protection and Affordable Care Act and Its Expected Impact on Businesses

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Employer Shared Responsibility

- Although the employer shared responsibility penalties have been delayed until 2015, employers should begin preparing for the enforcement of the employer mandate.

Employer Share Responsibility

- Which Employers Are Subject to Pay or Play Penalties?
  - At least 50 full-time employees and full-time equivalents
  - An employer's employees are determined on an aggregated employer basis, i.e., include employees of controlled group and affiliated service group members

Employer Shared Responsibility

Example:

Company A	Company B
35 employees	25 employees

If same 5 or fewer persons directly or indirectly own ≥ 80% of both companies, A and B are treated as one employer with ≥ 50 employees.

Employer Shared Responsibility

- Employer Penalty – No Coverage Offered
  - Minimum essential coverage (MEC) offered to < 95% of FT employees and children to age 26
  - No spousal requirement
  - At least one FT employee in subsidized coverage
  - Nondeductible penalty: $2,000 times total FT employees minus 30

Employer Shared Responsibility

- Employer Penalty – Coverage Offered but Not Affordable
  - 95% of full-time employees and children to age 26
  - MEC does not provide "minimum value" or is not "affordable"
  - At least one FT employee in subsidized coverage
  - Nondeductible penalty of $3,000 for each FT employee who receives subsidized coverage

Employer Shared Responsibility

- Affordable Coverage
  - Employee no more than 9.5% of household income
  - Proposed Regulations: **single coverage** only
  - Use lowest cost option that provides minimum value

Employer Shared Responsibility

Affordable Coverage

- How to measure income? Safe harbors:
  - W-2
  - Rate of pay at beginning of year
  - 100% of Federal poverty level ($11,170 for 2013)
  - Use different measures for different employee groups

Employer Shared Responsibility

- Minimum Value
  - Plan pays at least 60% of total expected costs
  - Employer contributions to HSAs and HRAs count towards minimum value

Employer Shared Responsibility

- Minimum Value cont'd
  - Wellness incentives
    - Generally do not count toward minimum value
    - Exception: incentives to prevent or reduce tobacco use count toward minimum value

Employer Shared Responsibility

- Minimum Essential Coverage
  - Future regulations
  - Does not include "excepted benefits" (such as accident or disability plans, specified illness plans, dental plans, vision plans, flexible spending accounts)

Employer Shared Responsibility

- Application of Pay or Play Mandate and Penalties in a Controlled Group
  - Penalties apply separately for each employer in the group
  - Example:
    - Company A covers its 35 FT employees
    - Company B provides no coverage for its 25 employees
    - Only Company B has penalty

Employer Shared Responsibility

- Application of Pay or Play Mandate and Penalties in a Controlled Group
  - Allocate 30 "free" employees pro rata based on the FT employees employed by each member.
  - Example:
    - Companies A and B have 60 combined FT employees
    - Company B is allocated 25/60 of the 30 free employees, or 12 employees
    - Company B pays the $2,000 penalty on 13 employees, i.e., $26,000.

Employer Shared Responsibility

- Assessment of Payment
  - Section 1411 Certification to employer if any employee is in subsidized coverage.
  - When will IRS contact an employer? After the due date for employee Form 1040 and after employer deadline to report FT employees and coverage offered.
  - Employers can respond before penalty is assessed.
  - If IRS determines employer is liable, IRS will send notice and demand with instructions for payment.

Identifying Full-time Employees

- Full-time Employees
  - At least 30 hours per week (or 130 hours per month)
  - Expected FT employee must be offered not later than initial 3 months of employment; however, employer pay or play penalties will not apply until first day of the following month
  - Must be coordinated with 90 day waiting period rule
  - Calculation of hours: (1) Actual hours method; (2) 8 hours per day equivalency; or (2) 40 hours per week equivalency

Identifying Full-time Employees

- Employees with Variable Hours
  - Non FT employees: determine average hours over a "measurement period" from 3 to 12 months.
  - If ≥ 30 hours per week, employee is FT for a "stability period" of at least 6 months, regardless of actual hours worked in the stability period.
  - If < 30 per week, employee is not FT for the stability period, regardless of actual hours worked in the stability period.
  - Different measurement and stability periods may be used for reasonable categories of employees.

Identifying Full-time Employees

- Employees with Variable Hours

  Example:
  - Employer hires Cliff on August 15
  - Employer cannot reasonably determine if Cliff will average ≥ 30 hours/week at time of hire
  - Cliff can be excluded from coverage without penalty during his initial measurement period plus an administrative period (not exceeding 3 months)
  - Total exclusion period cannot exceed 13 months

Identifying Full-time Employees

- Seasonal Employees
  - Excluded from 50-employee count
  - Generally, treat same as variable hour employees
  - "Seasonal employee" to be defined in future regulations; good faith standard pending issuance of additional guidance.
  - Employers may assume that a new seasonal employee is not expected to be employed for the entire initial measurement period to determine average hours.
  - Generally excludes teachers

Action Steps for Employers

- Determine if the employer group is a "large employer".
- Determine methods to measure FT status for employees with variable hours.
- Begin tracking hours and maintain documentation.
- Identify FT employees of each employer in the group.

Action Steps for Employers

- Does each employer in the group offer MEC to at least 95% of its FT employees?
- If not, choose between extending coverage or paying the $2,000/FT employee penalty.
- Consider alternative corporate and/or workforce structures to minimize penalty if decision is made not to offer MEC to at least 95% of full-time employees.

Action Steps for Employers

- Determine whether coverage offered meets the minimum value test. The insurer (or TPA for a self-funded plan) should be able to provide this.
- Determine method for measuring affordability and whether coverage offered meets the affordability test.
- If tests are not satisfied, consider modifying plan design and/or employee cost-sharing structure.

Action Steps for Employers

- Determine the employees that may be eligible for subsidies (household income up to 400% of FPL: $44,680 for a single person and $92,200 for family of four for 2013).
- Compare:
  - Costs of plan design and/or cost-sharing changes (deductible), to
  - Paying the $3,000 unaffordable coverage penalty (nondeductible)
- During open enrollment, document offer of coverage to FT employees; require employees who do not enroll to sign waivers.
- Amend plan documents as necessary.

ACA Plan Design Requirements in 2014

- <u>Requirements for All Plans</u>
  - No more than a 90-day waiting period for participation (except for new employees who are not reasonably expected to be FT).
  - Dependent coverage must be offered to children up to age 26, regardless of other employer-provided coverage.
  - No annual dollar limits on essential benefits.
  - Pre-existing condition exclusions/limitations are prohibited for adults (eliminated for children in 2011 plan year).

ACA Plan Design Requirements in 2014

- Cafeteria Plan Elections
  - Availability of coverage through an exchange is not a change of status event that permits change of cafeteria plan elections.
- Key ACA Provisions Deferred Pending Guidance
  - Nondiscrimination rules for nongrandfathered insured health plans
  - Automatic enrollment (with opt-out opportunity)

ACA Notice and Reporting Requirements

- Notice of grandfathered plan status (if applicable)
- W-2 reporting of value of coverage, (began with W-2 issued in January 2013 for 2012 coverage)
- Summary of Benefits and Coverage (SBC) (began with enrollment periods for 2013 plan year)
- 60-day advance notice of any benefit changes

ACA Notice and Reporting Requirements

- Employers must provide notice of coverage available through exchanges by October 1, 2013 (no penalty for non-compliance).
- New employees must receive a copy of the notice within 14 days of their date of hire.
- Insurers and plans report annual enrollment count to HHS for transitional reinsurance fee by November 15, 2014, 2015 and 2016.
- Employers report health coverage offered and workforce information to IRS beginning in 2015 for 2014 coverage.

New ACA Fees

- Comparative Effectiveness Research Fee (PCORI)
  - Payable for each plan year or policy year ending after October 1, 2012 and before October 1, 2019; for calendar year plans first payment due July 31, 2013
  - Payable by health insurance issuers and plan sponsors of self-insured health plans, including retiree-only plans
  - Annual fee: $2 times the average number of covered lives ($1 for plan/policy years ending before October 1, 2013)
  - Fees are treated as excise taxes, and will be reported annually and paid on IRS Form 720
  - DOL: fees cannot be paid from plan assets

New ACA Fees

– Transitional Reinsurance Fee
  - Payable for three calendar years beginning in 2014.
  - Collected annually by HHS and used for reinsurance for issuers covering high risk individuals in the individual market
  - Fee is assessed against health insurance issuers and self-insured plans providing major medical coverage
  - Applies per capita basis for all covered lives
  - 2014 proposed fee is $5.25 per month per covered person ($63 per year); states may require more from insured plans
  - DOL: fees may be paid from plan assets

Missouri and Kansas

- Insurance exchanges in Missouri and Kansas will be operated by the federal government.
- Employers are required to provide a notice of exchange availability to all employees by October 1, 2013.
- New employees must receive a copy of the notice within 14 days of their date of hire.
- The enrollment period for the exchanges opens October 1, 2013 and extends through March 31, 2014.

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Reasonable Accommodation: 10 Key Steps in the Interactive Process

Americans with Disabilities Amendment Act (ADAAA)

Julianne Story
Curtis Summers
October 2, 2013

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ADAAA: The Background

- 26,000 Charges in FY2012
- 2013 EEOC Enforcement Initiative
  - Focus on vulnerable workers
  - Temporary conditions (pregnancy*)
  - No fault attendance policies
- Two components of Employer's obligation
  - Non-Discrimination
  - Reasonable Accommodation

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10 Key Steps in the Interactive Process

- 29 C.F.R. § 1630.2(o)(3):

  To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

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10 Key Steps in the Interactive Process

- Dual Goals for the Employer in the Interactive Process:
  - Reach an appropriate reasonable accommodation for your disabled employee.
  - Position your company to effectively defend against claims of diability discrimination.

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1. Maintain (Accurate) Job Descriptions

- Ensure each job description accurately identifies the position's "essential functions."
  - *Kallail v. Alliant Energy Corp.* (8th Cir. 2012)
    - Rotating shift can be an essential function.
- Job descriptions often trump a specific employee's experience.
  - *Knutson v. Schwan's Home Service, Inc.*, (8th Cir. 2013)
    - "Knutson's specific personal experience is of no consequence in the essential functions equation. Instead, it is the written job description, the employer's judgment, and the experience and expectations of all Managers generally that establish the essential functions of the job."
- Regularly review and update job descriptions.

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2. Meet with the Employee

- Demonstrates your willingness to participate in the interactive process to the employee and to a court.
- Schedule a meeting promptly.
- You are not required to allow attendance of a third party (but you can).
  - *See Ammons v. Aramark Uniform Servs., Inc.* (7th Cir. 2004).
- Document scheduling attempts and the meeting.

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3. Understand the Employee's Perspective

- Inquire as to the employee's needs and ask about desired accommodation.
- Provides a starting point for the interactive process.
- Use the employee's job description.
  - Discuss the job duties for which accommodation is needed.
- Note: If the employee cannot or does not provide a specific request, it does not relieve you of your duty to identify and implement a reasonable accommodation.

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4. Take Time to Consider

- There is no need to respond to a request at the exact moment it is made.
  - A hasty "yes" can lead to an unnecessarily broad accommodation and a difficult precedent for future employee requests.
  - A hasty "no" can lead to litigation or the loss of a good employee.
- Document discussions of the requested accommodation that take place internally. *
  - Creates a record of good faith consideration of the request.

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5. Consider Alternatives

- Never just reject a requested accommodation.
- "An employer is not obligated to provide an employee the accommodation he or she requests or prefers, the employer need only provide some reasonable accommodation."
  - *Gile v. United Airlines* (7th Cir. 1996)
- Once an employer offers a reasonable accommodation, the "failure to engage in the interactive process by itself does not give rise to relief."
  - *Bellino v. Peters* (7th Cir. 2008)

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6. Confirm Medical Information

- Ask for clarification as to the extent of the medical restrictions and the duration of those restrictions.
- Clarify any "return to work" notes by asking what restrictions, if any, the employee will have upon return.
- An employee's failure to provide adequate medical documentation can be fatal to their ADA claim.
  - *Jackson v. City of Chicago* (7th Cir. 2005).
  - *Matthews v. Bank of America*, (E.D. Mo. 2011).

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7. Explain Your Decision(s)

- Explain decision to deny an accommodation or to offer an alternative.
  - *Murray v. AT&T Mobility LLC* (7th Cir. 2010)
    - "In any case, we think that AT&T did engage in the interactive process. It considered her request, explained its reasoning for not being able to accommodate it, and reminded her of another accommodation it was already making. This was sufficient."
- Shows the employer is not simply rejecting the request and helps frame future interactions to work toward a compromise.
- Avoids the appearance of post hoc rationalization that can arise when the rationale behind a decision is not explained until a charge or lawsuit is filed.

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8. Close the Loop

- Summarize the interactive process and the result reached (even if not "final").
- Instruct the employee how to communicate any additional questions or concerns.
- Allow the employee an opportunity to correct any misunderstandings or to provide missing information.
- Minimizes an employee's ability to argue over the process later.
- Emphasize retaliation prohibition.

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9. Schedule a Follow-up

- Calendar a follow-up with the employee and the employee's supervisor(s) to:
  - Help ensure the supervisor is properly implementing the accommodation.
  - Allow you to confirm whether the accommodation is effective and whether it is still needed.
- *Cloe v. City of Indianapolis* (7th Cir. Apr. 9, 2013)
  - "The City had no way of knowing that its other seemingly reasonable accommodations – a different lot, visitor parking, street parking – would be insufficient. And, more importantly, once the City found out that its proposed accommodations were insufficient, it acted with reasonable speed to come up with new ones."

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10. Avoid "Absolutes" in Your Leave Policies

- The ADA can require employers to deviate from their disability-neutral policies in order to provide a reasonable accommodation.
- Therefore, it is best to avoid "absolute" statements in your leave policies when possible. For example:
  - All employees who are on unpaid leave for one year will have their employment terminated.
  - All employees will be terminated once they qualify for long-term disability.

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10. Avoid "Absolutes" in Your Leave Policies (cont'd)

- Prevent the policy from being an excuse for not requesting additional leave.
  - "I would have requested more leave, but the policy says . . . ."
- Consider using language that establishes a presumption that employees will be terminated after a certain amount of leave, but leaves room for accommodation.
- Include reasonable accommodation language in the leave policy.

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Questions?

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Litigation Update:

Are Courts Helping, Hurting, Or Standing By?

By: Jeffrey D. Hanslick & Benjamin A. McMillen

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FLSA Update: Event Triggering Compensation

- FLSA's continuous workday rule requires employers to pay for all time from the first "principal activity" to the last.
- 29 U.S.C. § 203(o) excludes changing clothes and washing from the coverage of the FLSA if they are not compensated by agreement in a CBA or a practice under a CBA.
- Adair v. ConAgra Foods, Inc., 2013 WL 4608803 (8th Cir. Aug. 30, 2013)
  - An activity excluded by §203(o) is not a "principal activity" and does not start the continuous workday, i.e., an employer does not have to pay for activities like walking or drinking coffee that occur after changing clothes and washing but before the next activity that is "work" under the FLSA.
  - "Principal activity" defined.

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FLSA Update: Unpaid Interns

- Glatt v. Fox Searchlight Pictures, Inc., 2013 WL 2495140 (S.D.N.Y. June 11, 2013)
  - Interns working on the set of the film Black Swan sued Fox Searchlight Pictures for unpaid wages.
  - There are several competing tests: the "economic realities" test, the "primary benefit" test, and the DOL's six-factor test.
  - Using the DOL's test, the Court held that the interns were entitled to payment.
  - Neither the Eighth nor Tenth Circuit has weighed in.

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Title VII Update:

- Employers win in June:
  - University of Texas Southwestern Medical Center v. Nassar (June 24, 2013)
  - Vance v. Ball State University (June 24, 2013)

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Title VII Update: *Retaliation Claims Require a Higher Burden of Proof*

- The previous "motivating factor" standard
- *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (June 24, 2013).
  - Court holds Title VII retaliation claims require proof that the desire to retaliate was the "but-for" cause of the challenged employment action.
- Why *Nassar* matters to employers and employees.

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Title VII Update: Clarified Definition of "Supervisor"

- Vance v. Ball State University, 133 S. Ct. 2434 (June 24, 2013).
  - "We hold that an employer may be vicariously liable for an employee's unlawful harassment *only when the employer has empowered that employee to take tangible employment actions against the victim*, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."
- Why *Vance* matters to employers and employees
  - The court rejected the more open-ended approach advocated by the EEOC's Enforcement Guidance, which ties supervisor status to the ability to exercise significant direction over another's daily work.

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Missouri Law Update: MHRA Procedures

- Farrow v. St. Francis Medical Center, et. al, 2013 WL 4520993 (Aug. 27, 2013)
  - Employees may proceed with MHRA claims asserted in an untimely filed Charge of Discrimination unless the employer objects to the untimeliness of the Charge through the MCHR's judicial review process within 30 days of the notice of the right to sue being issued.
  - Asserting the defense in court through an affirmative defense or dispositive motion is not enough.
- Employers' options

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Missouri Law Update: Worker's Compensation

- Templemire v. W & M Welding, Inc., 2012 WL 6681950 (Mo. Ct. Ap. 2012)
  - The Court of Appeals upheld the "exclusive causation" standard for workers' compensation retaliation claims.
  - The Court rejected the lesser "contributing factor" standard based on controlling Missouri Supreme Court precedent, but noted the Supreme Court's recent indication that it is inclined to change the standard to "contributing factor" in a future case like this one.
- The case was argued before the Missouri Supreme Court on September 11, 2013.

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Kansas Law Update: Modification of the Kansas Workers Compensation Act

- Notice: SB 187 reduces the time for an injured worker to give notice of accident or repetitive trauma
- Selection of Administrative Law Judges and Board Members: The new law expands the selection process for ALJ's and Board members.
- Evaluating Permanent Impairment: Since 1996, Kansas impairment ratings have been on the AMA Guides to the Evaluation of Impairment, 4th edition. SB 187 dictates that for injuries occurring on and after January 1, 2015, the AMA Guides, 6th edition, shall be used.

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Coming up in 2014…

- UNITE HERE Local 355 v. Mulhall
- Sandifer v. United States Steel Corp.

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What's New at the EEOC:
Enforcement Trends and Developments

Anne Gusewelle, Senior Trial Attorney, EEOC
Paul F. Pautler, Jr.

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TOPICS

- Elephant in the Room: Government Shutdown
- EEOC Strategic Enforcement Plan (2013 – 2016)
- Recent Cases of Note

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GOVERNMENT SHUTDOWN

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EEOC STRATEGIC ENFORCEMENT PLAN -PRIORITIES

- Eliminating Barriers in Recruitment and Hiring
- Protecting Immigrants, Migrants and Other Vulnerable Workers
- Addressing Emerging and Developing Issues
- Enforcing Equal Pay Laws
- Preserving Access to the Legal System
- Preventing Harassment Through Systemic Enforcement and Targeted Outreach

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RECENT CASES

- Background checks
- $4.7 Million assessed against EEOC
- EEOC Solicitation of Plaintiffs

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THANK YOU

Optional Bonus Session is Next:
Making Sense of OFCCP's New Rules for Veterans and the Disabled

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What's New at OFCCP:
New Rules for Veterans and the Disabled Are a Game-Changer for Federal Contractors

Molly Kurt
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Agenda

- Review jurisdiction of OFCCP
- Overview of New Rules
- Disability Inquiries Now Required
- Gloves off for audit practices by OFCCP
- Action Plan

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Overview of OFCCP Jurisdiction

- EO 11246: minorities and females
- Rehabilitation Act, Section 503: individuals with disabilities
- Vietnam Era Veterans Readjustment Assistance Act (VEVRAA): veterans and special disabled veterans

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Overview of OFCCP Jurisdiction, cont'd.

- EO 11246 minorities and females:
  $50,000 contract or subcontract and 50 employees
  "paperwork" threshold
- Rehabilitation Act, Section 503:
  $50,000 contract/subcontract and 50 employees
- VEVRAA: **$100,000 contract/subcontract**

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Overview of New Rules

VEVRAA	Rehabilitation Act , Section 503
Requires a "benchmark" of 8% veterans	Requires a placement goal of 7% IWD
Alternate benchmark available using 5-factor analysis	N/A
Benchmark measures entire workforce across all establishments	Goals measured by job groups, in most cases
Pre-offer self-identification as "protected veteran"	Pre-offer self-identification as IWD
Post-offer self-identification in specific veteran categories still required	Post-offer self-identification still required
	All employees must be invited to self-identify as IWD every 5 years
Applicant/hire disparity analysis	Applicant/hire disparity analysis

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Overview of New Rules, cont'd.

VEVRAA	Rehabilitation Act , Section 503
Posting of openings with state job service now required in specific format	N/A
Job advertisement tagline: EOE M/F/D/V	Job advertisement tagline : EOE M/F/D/V
Three year record retention period	Three year record retention period

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Mandated Forms

- VEVRAA-required posting with state job service: specific language require
- Notice to covered subcontractors: incorporation by reference must be in bold type
- Voluntary Self-ID for "protected veterans" pre-offer
- Voluntary Self-ID for IWD pre-offer

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Mandated Forms, cont'd.

- Voluntary Self-ID for veterans (in specific categories) and IWD post-offer
- Voluntary Self-ID for IWD to current employees once every 5 years

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OFCCP Audit Practices

- OFCCP can now obtain post-scheduling letter data, putting to rest *Frito Lay*
- OFCCP now gets to decide how contractor data is provided (in what format)
- OFCCP has broad authority to obtain records offsite

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Action Plan

- Update review of government contractor status.
- Determine when new rules apply: March 24, 2014. AAPs that pre-date effective date may delay implementation of section C obligations.
- Plan to modify HRIS systems to capture new data.
- Collect new forms and be prepared to implement.

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Thank You

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