PCBA Fall Seminar

2015 Employment Law Developments

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US Supreme Court Cases

- ***EEOC v. Abercrombie & Fitch*** (June 1, 2015)
  - A&F refused to hire applicant who wore religious headscarf because it conflicted with dress code
  - In a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need

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US Supreme Court Cases

- ***EEOC v. Abercrombie & Fitch*** (June 1, 2015)
  - It is not plaintiff's burden to raise a religious conflict/request accommodation
  - BOTTOM LINE: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions

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US Supreme Court Cases

- ***Young v. United Parcel Service, Inc.*** (March 25, 2015)
  - UPS routinely accommodated employees who needed light duty because of a disability under the ADA, an on-the-job injury, and even when they lose their commercial driver's license because of a D.U.I. conviction
  - UPS forced Young to take a leave of absence for the rest of her pregnancy instead of giving light duty

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US Supreme Court Cases

- ***Young v. United Parcel Service, Inc.*** (March 25, 2015)
  - HELD: Pregnancy Discrimination Act ("PDA") requires an employer to provide light duty to a worker if she needs it because of pregnancy, if the employer provides light duty to workers with similar limitations in ability to work when they arise out of disability or on-the-job injury

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EEOC Enforcement Guidance on Pregnancy (Updated)

- *Updated* June 25, 2015 to reflect changes after US Supreme Court decision in *Young v. United Parcel Serv., Inc.*
- Section I.B.1 (Disparate Treatment)
- Section I.C.1 (Light Duty)
- http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

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Iowa Case Law Developments

- ***Dindinger v. AllSteel, Inc.*** (3/6/15)
  - 2009 Equal Pay Act was unclear as to period of damages recovery
  - Law is not retroactive
  - Each unequal paycheck an employee receives is a separate discriminatory practice but limited recovery for unequal pay to within a 300-day period

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Iowa Case Law Developments

- ***Renneger v. Manley Toy Direct, LLC***

(August 5, 2015)

  - $11.88 million jury verdict to former customer service employee in sexual harassment case (3 other cases pending)
  - Vulgar and harassing remarks and gestures by supervisors/coworkers; supervisor grabbed head and forced to crotch
  - Jury found for employer on retaliation and sex discrimination claim

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NLRB Quickie Election Rules

- Representation Case Rule Implementation Effective April 14, 2015
- Reduces time between petition and election from 6 weeks to 2-3 weeks
- Representation hearings will take place within 8 days of the filing of the petition
- Issues such as employee eligibility to vote may be deferred until after election

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NLRB Quickie Election Rules

- Employers must give the Excelsior list to union (employee names, phone number, home address and email address) within 2 days after election notice (formerly 7)
- The current automatic stay of an election that issues when a party requests review of a pre-election hearing decision is eliminated

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NLRB Quickie Election Rules

- Employers must identify all issues in dispute in a position statement filed 7 days after notice of a pre-election hearing or waive them
- Issues such as employee eligibility to vote may be deferred until after the election is held

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NLRB Report of the General Counsel Concerning Employer Rules

- 3/18/15 General Counsel Memo GC 15-04
- Explains recent NLRB decisions finding employer work rules lawful vs. unlawful
- apps.nlrb.gov/link/document.aspx/09031d4581b37135

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NLRB GC Report Counsel Concerning Employer Rules

- Most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity
  - Example: Banning union solicitation
- Even if a rule does not explicitly prohibit Section 7 activity, it will still be found unlawful if:

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NLRB GC Report Concerning Employer Rules

1. Employees would reasonably construe the rule's language to prohibit Sec. 7 activity;
2. The rule was promulgated in response to union or other Section 7 activity; or
3. The rule was actually applied to restrict the exercise of Section 7 rights.

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NLRB GC Report Concerning Employer Rules

- **"Do not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses.'**
- Unlawful because restricts disclosure of employee information and therefore unlawfully overbroad

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NLRB GC Report Concerning Employer Rules

- "Sharing of [overheard conversations at the work site] with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information…. Do not discuss work matters in public places."
- "[I]f something is not public information, you must not share it."

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NLRB GC Report Concerning Employer Rules

- All were found facially unlawful, even though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications.

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NLRB GC Report Concerning Employer Rules

- No unauthorized disclosure of "business 'secrets' or other confidential information."
- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."
- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."

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NLRB GC Report Concerning Employer Rules

All were found lawful because:

- They do not reference information regarding employees or employee terms and conditions of employment
- Although they use the general term "confidential," they do not define it in an overbroad manner
- They do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications

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NLRB Joint Employer Standard

- ***McDonald's USA, LLC***
- GC issued 13 complaints in December 2014 and 6 in February 2015, naming McDonald's as a "joint employer" of the employees at its franchisees
- Allegation: McDonald's and its franchisees violated employee rights by "making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment during the past two years."

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NLRB Joint Employer Standard

- ***McDonald's USA, LLC***
- GC determined McDonald's, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of the NLRB
- Hearings started in March and are ongoing

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NLRB Joint Employer Standard

- ***Browning-Ferris Industries***, 362 NLRB No. 186 (August 27, 2015)
- The NLRB stated the purpose of the decision was to put the NLRB joint employer standard on a stronger analytical framework and to best serve the Federal policy of "encouraging the practice and procedure of collective bargaining."
- NLRB claimed it was "reaffirming" its previous standard. Critics disagree.

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NLRB Joint Employer Standard

NLRB finds joint employment status when:

- They are both employers within the meaning of the common law; and
- They share or codetermine those matters governing the essential terms and conditions of employment.

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NLRB Joint Employer Standard

- Prior standard required a joint employer to not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority
- *Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry….*

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EEOC Rulemaking

April 20, 2015: EEOC issued Notice of Proposed Rulemaking on Employer Wellness Programs

- EEOC previously had not said whether employers may offer incentives to employees to participate in such programs or whether offering incentives would make participation involuntary
- Comment period closed in June 2015 (313 public comments)

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EEOC Rulemaking

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- HIPAA, as amended by ACA, allows wellness programs to offer rewards to participating employees who achieve certain health outcomes or penalties if participating employees fail to achieve health outcomes

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EEOC Rulemaking

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- NPRM clarifies that ADA allows employers to offer incentives up to 30% the cost of employee-only coverage to employees who participate in a wellness program and/or for achieving health outcomes

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EEOC Rulemaking

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- Describes what is and is not a wellness program
- Defines voluntary health program
- Explains how ADA rules requiring employers to keep medical information confidential apply to medical information obtained as part of voluntary employee health programs

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EEOC Transgender Suit

9/17/15 EEOC joins Mississippi lawsuit

- First Tower Loan fired a manager-trainee allegedly because he is transgender, and/or because he did not conform to the employer's gender-based expectations, preferences or stereotypes
- DL listed “F” as gender; presents male
- Employer asked him to sign statement, fired after he refused

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EEOC Transgender Suit

I understand that my preference to act and dress as a male, despite having been born a female, is not something that will be in compliance with First Tower Loan's personnel policies. I have been advised as to the proper dress for females and also have been provided a copy of the female dress code. I also understand that when meetings occur that require out of town travel and an overnight room is required, I will be in [sic] assigned to a room with a female.

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DOL/OSHA

Guide to Restroom Access for Transgender Workers (6/1/15)

- OSHA regulations require employers to allow employees prompt access to sanitary facilities
- Best practice: allow employee to determine most appropriate restroom for him/herself
- No segregated facility for transgendered

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DOL/OSHA

Guide to Restroom Access for Transgender Workers (6/1/15)

- Single-occupancy unisex restroom
- Multi-occupant, unisex restroom with lockable single occupant stalls
- Do not ask for medical/legal documentation of gender

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Iowa Civil Rights Commission

Sexual Orientation & Gender Identity

- Iowa Civil Rights Act requires employers to allow employees access to restrooms in accordance with gender identity
- https://icrc.iowa.gov/sites/default/files/publications/2012/SOGIEmpl.pdf

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DOL Regulations

July 6, 2015 NPRM regarding OT Regs

- Current regs set AEP exemption salary threshhold at $23,660
- Proposed overtime threshold $50,440 for 2016 with formula to automatically adjust
- Current HCE level $100,000
- Proposed HCE level $122,148, with formula to automatically adjust

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DOL Regulations

July 6, 2015 NPRM regarding OT Regs

- Estimated 5 million more employees will be overtime-eligible
- NPRM also discusses current duties test and solicited suggestions for additional occupation examples and comments on current requirements
- Comments solicited through 9/4/15
- Expected to be implemented in 2016

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DOL Wage and Hour Division

Final Rule effective March 27, 2015 to Amend FMLA definition of spouse to comply with *Windsor* decision

- Change from a "state of residence" rule to "place of celebration"
- Definition of spouse expressly includes same-sex marriages and common law marriages