SV020 ALI-ABA 183

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Employment and Labor Law for Corporate Counsel and the General Practitioner: Evolving Law and Practical Compliance Procedures

***183** STATE AND LOCAL EMPLOYMENT LAW DEVELOPMENTS

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***185** This paper is a short summary of the topics highlighted during the Fifty State and Local Employment Fifty Law Developments presentation and the cases underlying the presentation. The topics include developments regarding violence in the workplace, highlights from California, worker classification, and several other topics.

Recent State Legislation Addressing Violence in the Workplace

On December 20, 2012, twenty children and six adults died as a result of gun violence at Sandy Hook Elementary School in Newtown, Connecticut. Since that time, gun violence has not relented in the United States. The United States has averaged over one mass shooting per month [FN2] and, by May 31, 2013, the number of people killed by guns in the United States since the Newtown shooting surpassed the number of American troops killed during the entire Iraq War.

While federal efforts to address gun violence have stalled in the United States Congress, there is a trend in some state legislatures to address violence in the workplace. These laws cover issues such as the use and possession of guns and other weapons at the workplace, stalking, harassment, and domestic violence. Employers also practice workplace violence prevention by establishing policies to identify potentially dangerous behaviors and response procedures to address violent incidents.

• *Protection for Victims of Domestic Violence*

Many states allow employees leave if they are the victim of domestic violence, sexual assault or stalking. [FN3] The number of leave days permitted varies under these statutes. Florida, for instance, allows three days of leave, while Hawaii allows five days. ***186** Other states, including Arizona, Pennsylvania and Vermont, have proposed similar laws that have yet to be approved. [FN4]

Proposed legislation in New Jersey would require employers to provide twenty days of leave time for victims of domestic violence. [FN5] The legislation is intended to allow victims time to obtain medical attention or counseling, pursue legal remedies, or relocate. The legislation would allow for legal actions against employers that do not comply. [FN6]

Similarly, proposed legislation in New York would allow victims of domestic violence in New York to take ninety days of unpaid leave to attain legal services, seek medical attention, engage in safety planning and seek services. [FN7] Another proposed bill would require employers in the state to make reasonable accommodations, including time off from work, for victims of domestic or sexual violence. [FN8] Notably, New York already has significant protections for victims of domestic violence in relation to employment discrimination. Since 2009, victims of domestic violence qualify as a protected class under the New York State **Human** Rights Law. [FN9] Accordingly, New York law prohibits discrimination or retaliation in the workplace based on an individual's status as a victim of domestic violence, sexual abuse, or stalking. This applies to discrimination with respect to hiring, firing, job advancement, requests for leave, or other terms, conditions and privileges

of employment.

Most states allow employers to obtain restraining orders on behalf of their employees in at least some situations of domestic violence. [FN10] The breadth and length of these orders vary by state. In Arizona, for instance, an employer is permitted to obtain a restraining order for an employee while the employee is on company property. [FN11] In ***187** Georgia, an employer may obtain a temporary restraining order effective for up to fifteen days against an individual who has committed or threatened to commit violence against an employee of that company. [FN12]

• *Bullies at the Workplace*

Many employers have implemented workplace codes of conduct meant to address bullying. Recent state court opinions demonstrate that courts refuse to tolerate the behavior of workplace bullies.

In *Berg v. TXJ Cos.*, No. CV 12-11-M-DLC, 2013 WL 3242472 (D. Mont. June 3, 2013), the United States District Court for the District of Montana granted summary judgment to T.J. Maxx on a state wrongful discharge claim. In Montana, it is unlawful to discharge an employee if "the discharge was not for good cause and the employee had completed the employer's probationary period of employment." [FN13] The plaintiff, a retail store manager, was fired after allegedly grabbing a subordinate's arm hard enough to leave a bruise, using profanity in front of employees and customers, and intimidating other employees. The employer, citing the company's code of conduct, which prohibits intimidation, violence, and offensive language, showed "good cause" for firing the manager. The court held that evidence of the code and the performance review were enough to show that the employee was fired for good cause.

Similarly, in *Carroll v. Lynch*, 698 F.3d 561 (7th Cir. 2012), the Seventh Circuit held that the Illinois Eavesdropping Act cannot help an employee who was fired for making an offensive call to her coworker's home. In that case, an employee called a coworker at night to berate him about his perceived invasion of her responsibilities and threatened to commit a criminal act. The call was recorded and the employee who had made the call was fired. Later, the former employee pursued an action against her former coworker and his wife under the Illinois Eavesdropping Act. [FN14] The Seventh Circuit dismissed the claim under a "fear of crime" exception to the law. [FN15]

***188** • *Allowing Guns at Workplace Parking Lots*

Recently, many state legislatures [FN16] have passed laws allowing employees to store guns in vehicles parked at an employer's parking lot. The legislation varies by state and generally attempts to balance the rights of armed employees and the rights of employers.

These laws are not, however, absolute in every state. Tennessee's Attorney General recently stated in a written opinion that an employer may abide by its own company policies on guns despite state legislation allowing weapons to be stored in cars on company parking lots. [FN17] The opinion clarifies that Tennessee gun laws do not alter an individual's employment-at-will status in the state. Accordingly, employees may be disciplined or dismissed in Tennessee for storing firearms in vehicles parked on their employer's property if doing so violates company policies.

Idaho's statute addressing the storage of weapons in vehicles on company property provides an employer immunity from litigation. The act states that "[n]o action shall lie or be maintained for civil damages . . . where the claim arises out of the policy of an employer to either specifically allow or not prohibit the lawful storage of firearms by employees in their personal motor vehicles on the employer's **business** premises." [FN18]

In the alternative, a recent Texas Attorney General Opinion provided that Texas employers may not impose handgun bans by posting a notice under the Texas Penal Code. [FN19] The opinion came to this conclusion despite the gun ban being mandated under a federally approved facility security plan.

Recent State Litigation on Corporate Diversity Initiatives

Several recent cases have arisen in the context of corporate diversity initiatives. On June 14, 2013, a former GlaxoSmithKline LLC sales manager filed a complaint against the company alleging that he was pushed out of his job for a less-qualified woman in order to satisfy a diversity initiative. [FN20] The plaintiff contends that GlaxoSmithKline LLC used the circumstances surrounding a training evaluation exam as a false pretense to terminate his employment. ***189** According to the plaintiff, the woman who replaced him had less experience and less training as a sales manager. [FN21]

In *Montgomery v. DePaul University*, 2012 WL 3903784 (N.D. Ill. Sept. 7, 2012), an African-American professor claimed that DePaul University discriminated against him when he was denied tenure. Dr. Montgomery alleged that the denial of tenure violated 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and that DePaul University retaliated against him for engaging in activity protected by those same acts. As part of his retaliation claim, Dr.

Montgomery asserted that the denial of tenure resulted in part due to his work "advocating for greater racial diversity at DePaul through his participation on the School's Diversity Committee and conversations with various DePaul officials." *Id.* at *9. The District Court for the Northern District of Illinois denied that contention. Noting initially that "Title VII explicitly provides that it does not require affirmative action to remedy the under-representation of a minority group," the court found that "[b]ecause Title VII does not make it an unlawful employment practice for an employer to fail to address racial imbalances with affirmative action, an employee who advocates diversity initiatives does not 'oppose . . . any practice made an unlawful employment practice by' Title VII." *Id.* at *9-10 The court noted further that DePaul University aided and encouraged Dr. Montgomery to work on its Diversity Committee and that the university itself initiated several university-wide diversity initiatives for which it has been recognized. *Id.* at *10.

California Laws and Regulations

California same sex marriages have resumed following the Supreme Court's ruling in *Hollingsworth v. Perry*, 570 U.S. ___ (2013). In that case, the Supreme Court held that the official sponsors of California Proposition 8, a ballot initiative from 2008, did not have Article III standing to appeal an adverse decision in the lower courts. In a related state court action, the California Supreme Court refused to halt same-sex marriages following the Supreme Court's ruling. *Hollingsworth, et al. v. O'Connell, et al.*, No. S211990 (Cal. 2013).

Pursuant to California Senate Bill 1193 and Civil Code Section 52.6, certain California **businesses** must post public notices addressing slavery and **human trafficking**. Affected **businesses** include night clubs, bars, the adult industry, bus stations, commercial service airports, privately owned and operating truck stops, emergency rooms, urgent care centers, farm labor contractors, and massage parlors. All affected **businesses** must post signs informing the public of hotline numbers to seek help or report unlawful **human trafficking**. The purported goal of the postings is to help the public understand and identify **human trafficking** and to prevent **businesses** from turning a blind eye to **human trafficking** and slavery.

New disability regulations are also going into effect in California. This includes an expansive list of accommodations, including the regulations modifying duties, work practices, schedules, and policies; allowing for more frequent breaks; providing furniture; or modifying equipment or devices and lactation breaks. These regulations make a distinction between ***190** medical conditions that require employees to go on leave and nonmedical conditions that only require reasonable accommodations.

In May 2013, the California legislature proposed a new law that imposes an employer-employee relationship on a contracting entity under certain circumstances. [FN22] Pursuant to the proposed law, a contracting entity would be liable for damages caused by the contractor or the contractor's employees if the independent contractor wears a uniform similar to that of employees or drives a vehicle with the contracting entity's logo. Liability would extend to wage and hour violations, penalties, fines, and willful misconduct.

Worker Classification Laws

Many state authorities have launched high-profile initiatives to scrutinize and enhance enforcement of worker classification laws. These laws are designed to distinguish between company employees and independent contractors. Over twenty states have enacted or are considering such laws. Nevada recently considered suspending employers' **business** licenses for up to three years and fining employers up to $25,000 per offense for misclassifying workers as contractors. [FN23] Some states have created task forces that address employee misclassification. For instance, New Hampshire's Task Force on the Misclassification of NH Workers has a stated mission to "promot[e] a statewide community where all New Hampshire **businesses** are treated equally and expected to pay their fair share and New Hampshire workers are guaranteed appropriate pay and protections." [FN24]

The United States Department of Labor has similarly created a Misclassification Initiative designed to address these issues across the country. [FN25] As a joint initiative with the Internal Revenue Service, the Misclassification Initiative shares employment tax referrals with state and municipal taxing agencies under existing sharing agreements. Currently, fourteen states have signed memoranda of understanding with the Internal Revenue Service and the Department of Labor; the Department of Labor is also actively pursuing memoranda of understanding with additional states. The Misclassification Initiative works to apply financial pressure that will force additional state action.

In a related matter, a bill has been proposed in the New Jersey legislature that would establish a presumption that port and parcel delivery truck drivers are company employees and not independent contractors. [FN26] The Truck Operator Independent Contractor Act would establish this presumption unless companies can affirmatively prove that their drivers are independent contractors. Accordingly, trucking companies would be required to show that drivers are free ***191** from their control, services performed are outside the usual course of **business**, and the workers are "customarily engaged in an independently

established trade, occupation, profession or **business**." **Businesses** that misclassify truck drivers would be subject to criminal and administrative penalties. Further, drivers who believe they have been misclassified would be able to bring a cause of action for damages against a company. The Teamsters Union has lobbied heavily for this bill.

Mandatory Sick Leave Laws

On June 27, 2013, the New York City Council overrode Mayor Michael Bloomberg's veto of the New York City Earned Sick Time Act. [FN27] The act will accordingly take effect on April 1, 2014 for covered employers with at least twenty employees. The act will expand on October 1, 2015 to cover employers with at least fifteen workers. Pursuant to the act, employers must provide covered employees with one hour of sick leave for every thirty hours worked. Employees are permitted to use up to forty hours per calendar year. The act has broad coverage, including absences due to mental or physical illness, injury or health condition; medical diagnosis, care, or treatment of mental or physical illness, injury, or health condition; preventive medical care for an employee or family member; and closure of an employee's place of **business** or an employee's child's school or childcare provider due to a public health emergency.

This type of legislation appears to be growing across the country and similar legislation is likely to be enacted in other states and municipalities. New York joins Philadelphia, Portland, San Francisco, Seattle, Washington, D.C. and Connecticut as states/municipalities to pass mandatory sick leave laws.

Legislative Developments with Whistleblowers

National Security Agency whistleblower Edward Snowden has drawn a huge amount of attention in recent months. Snowden, a former employee of the well-known consulting firm Booz Allen Hamilton, was a contractor to the National Security Agency at the time he collected the relevant information.

Whistleblower cases are highly litigated in state courts. Two recent opinions serve as good examples. In *University of Houston v. Barth*, —— S.W.3d ——, 2013 WL 2660089 (Tex. June 14, 2013), the Texas Supreme Court determined when lower courts have jurisdiction to hear whistleblower cases. The court also addressed what entitles a plaintiff to protection under the Texas Whistleblower Act. The New Jersey Supreme Court also recently held that a jury was improperly instructed in the context of a New Jersey Conscientious Employee Protection Act claim. In *Longo v. Pleasure Productions, Inc.*, —— A.3d ——, 2013 WL 3811800 (N.J. July 24, 2013), the court determined that the jury was never told to consider whether upper management, by clear and convincing evidence, was actively involved in the relevant conduct and, accordingly, could not properly consider claims for punitive damages.

Wrongful Termination in Violation of Public Policy

***192** In general, states deem that employment is at-will. Wrongful termination in violation of public policy is, however, a notable exception to this presumption. The policy seeks to prevent employers from terminating employees for taking an action required by law or refusing to commit an illegal act. Examples include terminating an employee for attending jury duty, refusing to exceed the maximum number of hours federal law permits to drive a tractor-trailer, or informing the authorities of abuse at a nursing home. By preventing termination under such circumstances, the exception serves to balance the interest of an employer, employee, and society. It is recognized in virtually all states by common law and/or statute.

Recently, in *Winston v. Countrywide Financial Corp.*, 2013 WL 603567 (Cal. App. Feb. 19, 2013), the California Court of Appeal addressed a wrongful termination claim. The plaintiff in that case claimed that his employer failed to offer him continued employment because he made a safety complaint and refused to mislead a rating agency. The court reversed a jury verdict in plaintiff's favor, noting that he had failed to demonstrate causation based on the protected activity.

Enforcement of Non-compete Agreements

Following the California Supreme Court's decision in *Edwards v. Arthur Andersen*, 189 P.3d 285 (Cal. 2008), non-compete clauses have become generally unenforceable in California. There are few exceptions to this rule, as the court apparently limited the acceptability of non-compete agreements to situations involving the sale or dissolution of corporations, partnerships, or limited liability corporations.

Other states have far more liberal interpretations of non-compete clauses, as evidenced by several recent cases. In *Nationsbuilders, Insurance Services, Inc. v. Houston International Insurance Group Ltd.*, 2013 WL 3423755 (Tex. App. July 3, 2013), the Court of Appeals of Texas held that an arbitrator, rather than the court, had the power to grant or deny a one-year extension to a non-compete agreement. In *Nitro-Lift Technology LLC v. Howard*, 568 U.S. ___, 133 S. Ct. 500 (2012), the United States Supreme Court vacated an Oklahoma Supreme Court ruling that two former workers' non-compete

agreements were void. The Court held that the validity of the agreements was to be determined by the arbitrator, not the Oklahoma court system. And in *Acordia of Ohio LLC v. Fishel*, 978 N.E.2d 823 (Ohio 2012), the Ohio Supreme Court addressed the impact of mergers on non-compete agreements. The court held that a merger amounts to the termination of employment and starts time running on a non-compete agreement's time limitations. The court noted, however, that if the employment agreement contained "successors and assigns" language, the non-compete agreement could survive.

Miscellaneous Developments

• *State Attorneys General Object to EEOC Guidance on Use of Criminal Convictions*

Recent guidance and case decisions from the United States Equal Employment Opportunity Commission held that employers may violate Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) by viewing an employees' criminal records. Republican attorneys general from Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah and West Virginia wrote a letter to the Equal Employment Opportunity ***193** Commission claiming that its guidance is overbroad. [FN28] This letter may represent a Republican push back to so-called "Ban the Box" laws, which seek to prevent employers from obtaining employees' criminal records.

• *Colorado Court of Appeals Rules on Marijuana Use in the Workplace*

In *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013), the Colorado Court of Appeals offered its first direct guidance on an employer's ability to enforce drug-free workplace policies following Colorado's legalization of recreational marijuana. The court held that an employee's termination after a positive test for marijuana was lawful because it violated the employer's drug-free work policies.

Conclusion:

While several states are pursuing new employment laws on a variety of issues. California appears to be leading the way on the volume of developments at the state level.

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[FN2]. *See Analysis of Recent Mass Shootings*, Mayors Against Illegal Guns (Aug. 9, 2013), http://libcloud.s3.amazonaws.com/9/56/4/1242/analysis-of-recent-mass-shootings.pdf.

[FN3]. *See* Cal. Lab. Code §§ 230 & 230.1 (2011); Colo. Rev. Stat. § 24-34-402.7 (2010); D.C. Code §§ 32-131.01 (2008), 32-131.02 (2009); Fla. Stat. § 741.313 (2008); Haw. Rev. Stat. § 378-72 (West 2003); 820 Ill. Comp. Stat. 180/1-180/45 (2009); K.S.A. §§ 44-1131 (West 2011) & 44-1132 (West 2006); 26 Me. Rev. Stat. § 850 (2001); N.M.S.A. § 50-4A-1-8 (West 2009); N.C. Gen. Stat. §§ 50B-5.5 & 95-270(a) (West 2004); Or. Rev. Stat. 659A.270 - 659A.285 (West 2011); R.C.W. 7.69.030 (West 2009).

[FN4]. *See* Ariz. H.B. 2640; Md. S.B. 698/H.B. 735; NJ. S2177/A2919; Pa. H.B. 1207; Vt. H. 208.

[FN5]. Under New Jersey law, "domestic violence" means the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor: (1) Homicide, N.J.S. 2C:11-1 et seq.; (2) Assault, N.J.S. 2C:12-1; (3) Terroristic Threats, N.J.S. 2C:12-3; (4) Kidnapping, N.J.S. 2C:13-1; (5) Criminal Restraint, N.J.S. 2C:13-2; (6) False Imprisonment, N.J.S. 2C:13-3; (7) Sexual Assault, N.J.S. 2C:14-2; (8) Criminal Sexual Contact, N.J.S. 2C:14-3; (9) Lewdness, N.J.S. 2C:14-4; (10) Criminal Mischief, N.J.S. 2C:17-3; (11) Burglary, N.J.S. 2C:18-2; (12) Criminal Trespass, N.J.S. 2C:18-3; (13) Harassment, N.J.S. 2C:33-4; and (14) Stalking P.L.1992, c. 209. (C. 2C:12-10).

[FN6]. New Jersey Security and Financial Empowerment Act, N.J. S.B. 2177 (2012-13).

[FN7]. An act to amend the labor law, in relation to the entitlement to unpaid leave of absence from employment for victims of domestic violence, N.Y. S.B. S2509 (2013).

[FN8]. N.Y. S.B. S03385 (2013).

[FN9]. **Human** Rights Law -- Unlawful discriminatory practices, N.Y. Exec. Law § 296 (2013).

[FN10]. *See, e.g.,* Ariz. Rev. Stat. § 12-1810 (LexisNexis 2007); Ark. Code Ann. § 11-5-115 (2008); Cal. Civ. Proc. Code § 527.8 (West 2007); Colo. Rev. Stat. § 13-14-102(4)(B) (2007); Ga. Code Ann. § 34-1-7 (2007); Ind. Code § 34-26-6 (2007); Nev. Rev. Stat. §§ 33.200-.360 (2007); N.C. Gen. Stat. § 95-261 (2007); R.I. Gen. Laws § 28-52-2 (2007); Tenn. Code Ann. § 20-14-101-109 (2011).

[FN11]. Injunction against workplace harassment; definitions, Ariz. Rev. Stat. Ann. § 12-1810 (2013).

[FN12]. Definitions; application for temporary restraining order and injunction; requirements; hearing; notice and service; notification of law enforcement agencies, Ga. Code Ann. § 34-1-7 (2013).

[FN13]. Elements of wrongful discharge - presumptive probationary period, Mont. Code Ann. § 39-2-904(1)(b) (2011).

[FN14]. *See* Elements of the offense; affirmative defense, 38 Ill. Comp. Stat. § 14-2 (2013).

[FN15]. This result may vary by state. For instance, the Florida Security of Communications Act, Fla. Stat. § 934.03 (2013), is strictly enforced. As the Florida District Court of Appeal noted in *O'Brien v. O'Brien*, 899 So. 2d 1133 (Fla. Dist. Ct. App. 2005), the act "connotes a policy decision by the Florida legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation. The purpose of the Act is to protect every person's right to privacy and to prevent the pernicious effect on all citizens who would otherwise feel insecure from intrusion into their private conversations and communications. The clear intent of the Legislature in enacting section 934.03 was to make it illegal for a person to intercept wire, oral, or electronic communications." *Id.* at 1135 (internal citations and quotations omitted).

[FN16]. Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Texas, Utah, and Wisconsin.

[FN17]. Office of the Attorney General of Tennessee, *Employee's Possession of Firearms and Firearm Ammunition on Employer Property*, Opinion No. 13-41, May 28, 2013.

[FN18]. Immunity of employers allowing employee firearm storage, 3 Idaho Code Ann. § 5-341 (2013).

[FN19]. Greg Abbott, Attorney General of Texas, *Authority of an employer to ban the transport and storage of handguns by concealed handgun license holders in locked private vehicles on employee parking lots (RQ-I061-GA)*, Opinion No. GA-0972, Nov. 5, 2012.

[FN20]. *Cappellino v. GlaxoSmithKline LLC*, No. L-001643 (N.J. Super. Ct.).

[FN21]. *See* Joshua Alston, *GSK Sales Director Claims He Was Fired For Being A Man*, Law360 (July 3, 2013), *available at* http:// www.law360.com/articles/455138/gsk-sales-director-claims-he-was-fired-for-being-a-man (last visited Aug. 9, 2013).

[FN22]. Agency: ostensible: nongovernmental entities, Cal. S.B. 556 (2013).

[FN23]. Nev. S.B. 95 (2013); Nev. S.B. 96 (2013).

[FN24]. *Task Force on the Misclassification of NH Workers*, http:// www.nh.gov/nhworkers/ (last visited Aug. 9, 2013).

[FN25]. United States Department of Labor, *Employee Misclassification as Independent Contractors*, http://www.dol.gov/whd/workers/misclassification/ (last visited Aug. 9, 2013).

[FN26]. The Truck Operator Independent Contractor Act, N.J. A.B. A1578 (2013).

[FN27]. New York City Earned Sick Time Act, New York City Council Act 0097-2010, Version: A (2010).

[FN28]. *See A communication from the States of Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah, and West Virginia regarding the U.S. Equal Employment Opportunity Commission's position on bright-line criminal background screens in hiring*, July 24, 2013, *available at* http:// www.wvago.gov/pdf/2013-7-24,%20EEOC%20(bw).pdf (last visited Aug. 9, 2013).

***194** Morgan Lewis

State & Local Developments

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TABLE
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State & Local Developments

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***195 • In December 2012, 20 children and 6 adults were murdered by gun violence at Sandy Hook Elementary School in Newtown, CT**

- The U.S. averages over one mass shooting per month
- As of May 31, the number of people killed by guns since Newtown surpassed the number of American troops killed during the entire Iraq War

• **State Legislative Trend: move toward providing additional protection to employee victims of violence**

- Proposed legislation in New Jersey:
  - New Jersey employers would require 20 days of leave time for domestic violence victims to obtain medical attention or counseling, pursue legal remedies, or relocate
- Proposed legislation in New York:
  - Victims of domestic violence would see their jobs protected for up to 90 days with unpaid leave to obtain certain services

• **Several states allow employees leave for domestic violence, sexual assault or stalking:**

- California, Colorado, District of Columbia, Florida, Hawaii, Illinois, Kansas, Maine, New Mexico, North Carolina, Oregon and Washington
- **States vary on the number of days of leave**
- **Most states allow employers to obtain restraining orders on behalf of their employees in at least some situations of domestic violence**
- Arizona
- Georgia

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***196 Courts Don't Like Workplace Bullies**

• Berg v. TXJ Cos., June 3, 2013: Montana court granted summary judgment to T.J. Maxx on state wrongful discharge claim. The court found good cause for the discharge where the plaintiff, a retail store manager, was fired after allegedly grabbing a subordinate's arm hard enough to leave a bruise, using profanity in front of employees and customers, and intimidating other employees.

• Carroll v. Lynch, (7th Cir. 2012): Seventh Circuit recently held that the Illinois Eavesdropping Act cannot help an employee who was fired for making an offensive call to her coworker's home at night to berate him about his perceived invasion of her responsibilities and threaten to hurt him. (The call was recorded, and the employee was fired. Later, the employee pursued action against the employer and the coworker and his wife under the Illinois Eavesdropping Act for recording the call.) The court of appeals affirmed the court below, dismissing the claim.

• Compare with Florida Eavesdropping Act - very stringently enforced

State Legislation: Allowing Guns at Work & Impact on Employers

Recent trend: allowing employees to bring guns to employers' premises
- State legislation is a patchwork of the balance between the rights of armed employees and employers
- A few states err for employer protection: immunity for the employer on gun-related incidents, allowing the employer to create policies to refuse guns on its premises
  - May 2013, Tennessee Attorney General Opinion allows employers to abide by their own company policies on guns even in light of parking lot allowance
  - Opinion clarifies that TN gun law does not alter employment at will
  - Employees may be disciplined or dismissed for storing firearms in vehicles parked on their employer's property in violation of the company policies, despite a new state law
- Some states protect employees who bring guns
  - Many states have passed laws that prohibit employers from banning guns and ammunition in their employees' vehicles on company parking lots: Arizona, Georgia, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Utah, and Wisconsin

TABLE

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***197 State & Local Developments**

Parking Lot Laws: Employees Can Bring Guns to Employer Premises
- States that passed laws allowing employees to store guns in their vehicles at work

Alabama	Georgia	Kentucky[a1]
Alaska[a1]	Idaho[a1]	Louisana
Arizona	Indiana[a1]	Maine[a1]
Florida[a1]	Kansas[a1]	Minnesota

STATE & LOCAL DEVELOPMENTS

Mississippi

Missouri[a1]

Nebraska[a1]

North Dakota[a1]

Oklahoma[a1]

Texas

Utah

Wisconsin[a1]

FNa1. States have a broad policy of allowing guns in a secured area - beyond just the parking lot

- **Recent State Litigation on Corporate Diversity Initiatives**
  - Cappellino v. GlaxoSmithKline LLC (June 2013) (NJ state court)
    - Former sales manager filed a complaint alleging that he was pushed out of his job for a less-qualified woman in order to fulfill a diversity initiative. The plaintiff argued that the woman who replaced him has less experience and less training as a sales manager.
  - Montgomery v. DePaul University (Sept. 2012) (N.D. Ill.)
    - Work on diversity committee is not a shield

TABLE

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***198 California Laws & Regulations in Effect: 2013**

• California same-sex marriages resume after Supreme Court Prop. 8 Ruling
  • Hollinesworth v. Perry: Supreme Court held that the official sponsors of California Proposition 8, a 2008 ballot initiative, did not have Article III standing to appeal an adverse decision when public officials refused to do so
  • Some challenges after Hollinesworth v. Perry dismissed by California Supreme Court
• Certain California **businesses** must post public notice on slavery and **human trafficking**
  • Night clubs, bars, the adult industry, bus stations, commercial service airports, privately owned and operating truck stops, emergency rooms, urgent care centers, farm labor contractors, massage parlors: All must post sign informing the public of hotline numbers to seek help or report unlawful **human trafficking**
  • Goals of the posting is to help the public understand and identify **human trafficking** and to prevent **businesses** from turning a blind eye to **human trafficking** and slavery
• New Disability Regulations
  • Expansive list of accommodations: modification of duties, work practices, schedules, and policies; allowing more frequent breaks; providing furniture; or modifying equipment or devices and lactation breaks
  • Regulations make a distinction between medical conditions, which require an employee to go out on leave, and nonmedical conditions, which only require a reasonable accommodation

State Legislation: Newly Proposed California Misclassification Law, SB 556

• In May 2013, the California legislature proposed a new law that imposes an employer-employee relationship on a contracting entity and independent contractor if:
  • Independent contractor wears a uniform similar to that of employees
  • Independent contractor drives a vehicle with the contracting entity's logo
• Law imposes liability on any contracting entity for the damages caused by the contractor or contractor's employees, including wage-and-hour violations, penalties, fines, and willful misconduct

***199 State & Local Developments**

• State authorities have launched high-profile initiatives to scrutinize and enhance enforcement of worker classification (employees vs. independent contractors)
  • 20+ states have enacted or are considering laws and/or have task forces
    • New Hampshire task force for reclassification
    • Nevada considered fining employers up to $25,000 per offense for misclassifying workers as contractors and suspension of their **business** licenses for up to 3 years.
• IRS/DOL joint initiative to improve classification compliance; share DOL employment tax referrals with state and municipal taxing agencies under existing sharing agreements
• Financial pressure will force more state action
• Currently, 15 states have signed memoranda of understanding with IRS and DOL regarding employee misclassification

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***200 State Legislation: Newly Proposed NJ Law, Truck Operator Independent Contractor Act, A1578**

- Establishes a presumption that port and parcel delivery truck drivers are employees unless companies can prove otherwise
  - Motor carriers have burden to rebut the presumption
  - Must show freedom from employer control in performing services outside the usual course of **business**
  - Workers "customarily engaged in an independently established trade, occupation, profession or **business**"
  - Criminal and administrative penalties for misclassification of truckers
- Allows drivers who think they've been misclassified to sue for damages
- Teamsters lobby hard for this bill

Local Developments

- **Mandatory Sick Leave Laws**
  - As of June 27, 2013, New York City Council overrode Mayor Michael Bloomberg's veto of the New York City Earned Sick Time Act
  - The act will take effect on April 1, 2014 for covered employers with at least 20 employees "within the city of New York." The coverage of the act will expand on October 1, 2015 to include employers with at least 15 employees
    - Broad coverage: covers absences due to the employee's own mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; preventive medical care for an employee or family member; closure of an employee's place of **business** or an employee's child's school or childcare provider due to a public health emergency
  - Philadelphia, PA; Portland, OR; San Francisco, CA; Seattle, WA; Washington, D.C.; and Connecticut now require paid sick leave for employees
  - Appears to be growing trend - will likely see more states and municipalities enact these laws

***201 State Legislative Developments with Whistleblowers**

- **National Security Agency ("NSA") whistleblower Edward Snowden has drawn a lot of media attention regarding whistleblowers**
- Snowden was a Booz Allen Hamilton employee. Booz Allen Hamilton was an independent contractor to the NSA, the federal agency that was collecting the leaked security information
- **Whistleblower laws highly litigated in state courts:**
- Texas Supreme Court
  - University of Houston v. Barth, June 2013, Texas court outlines when lower court has jurisdiction and what entitles plaintiff to protection under whistleblower act
- New Jersey Supreme Court holds behavior of upper management may be considered in whistleblower cases
  - In Doreen Longo v. Pleasure Productions, Inc., July 2013, the high court held that the jury at the trial level was given flawed instructions because it was never told to consider whether upper management, by clear and convincing evidence, was actively involved in the egregious conduct or was willfully indifferent to it before it could consider any punitive damages against the employer.

TABLE
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State & Local Developments

- **Wrongful Termination in Violation of Public Policy - Review**
  - Exception to the "employment-at-will" doctrine
  - Prevents employers from terminating employees for doing something required by law or refusing to do something illegal

Examples:

1) Terminating an employee for attending jury duty
2) Terminating an employee for refusing to exceed the maximum number of hours federal law permits him or her to

drive a tractor-trailer truck
3) Terminating an employee for informing the authorities of abuse at a nursing home
• Purpose is to balance the interests of the employer, the employee, and society
• Recognized in virtually all states by common law and/or statute
Winston v. Countrywide (California):
Employees must show causation based on protected activity.

***202 • Noncompete Enforcement**

• Nationsbuilders Ins. Servs. Inc. v. Hous. Int'l Ins. Grp. Ltd.
• Texas appeals court held that arbitrator, rather than the court, had the power to grant a one-year extension of a noncompete.
• Nitro-Lift Tech. LLC v. Howard
• U.S. Supreme Court vacates Oklahoma Supreme Court ruling that two former workers' noncompete agreements were void. The Court held that the validity of the agreements was for the arbitrator, not Oklahoma courts, to decide.
• Acordia of Ohio LLC v. Fishel
• Ohio Supreme Court rules on the impact of mergers in noncompete agreements. The court held that when a company that is a party to a noncompete agreement merges with another company, the merger amounts to a termination of employment that starts the time running on the agreement's time limitations unless the employment agreement contains "successors' and assigns"DDDDD' language.
• California Noncompete Clauses - Still Generally Unenforceable
• Following the California Supreme Court's Edwards v. Arthur Andersen decision, noncompete clauses are generally unenforceable in employment agreements in California.
• Few exceptions: noncompetition agreements in the sale or dissolution of corporations, partnerships, and limited liability corporations

• Miscellaneous Developments

• Nine state attorneys general object to EEOC lawsuits and guidance on use of criminal convictions
• EEOC recent guidance and case decisions held that employers may violate Title VII by improperly using criminal records.
• Republican attorneys general of West Virginia, Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, and Utah wrote letters to EEOC claiming that guidance is overbroad
• Possible Republican pushback to "Ban the Box" laws
• Colorado Court of Appeals rules on marijuana use in the workplace
• The decision offers the first direct guidance on employers' ability to enforce drug-free workplace policies following Colorado's legalization of recreational marijuana by constitutional amendment in November 2012
• Holds that an employee's termination after a positive test was lawful, because it violated employer's drug-free work policies

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***203 Thank you**

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